THE STRUCTURE OF APPROPRIATIONS LEGISLATION AND THE GOVERNOR'S ITEM VETO POWER: THE ARIZONA EXPERIENCE

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INTRODUCTION

Like many other states, Arizona imposes specific constitutional limitations on appropriations legislation.[1] These rules are designed to advance the substantive and procedural quality of budgetary lawmaking. Because they regulate the structure and content of appropriation bills, the rules also influence the scope and utility of the governor's "item veto" power over such measures.[2]

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1. ARIZ. CONST. art. IV, pt. 2, § 20, provides: "The general appropriation bill shall embrace nothing but appropriations for the different departments of the State, for State institutions, for public schools, and for interest on the public debt. All other appropriations shall be made by separate bills, each embracing but one subject." *Id.*

ARIZ. CONST. art. IV, pt. 2, § 13, a related provision applicable to all legislation, provides: "Every Act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such Act shall be void only as to so much thereof as shall not be embraced in the title." *Id.*

2. The item veto power is found in the third paragraph of ARIZ. CONST. art. V, pt. 2, § 7. That section provides:

> Every bill passed by the Legislature, before it becomes a law, shall be presented to the Governor. If he approve, he shall sign it, and it shall become a law as provided in this Constitution. But if he disapprove, he shall return it, with his objections, to the House in which it originated, which shall enter the objections at large on the journal. If after reconsideration it again passes both Houses by an aye and nay vote on roll call of two-thirds of the members elected to each House, it shall become a law as provided in this Constitution, notwithstanding the Governor's objections. This Section shall not apply to emergency measures as referred to in Section 1 of the Article or the Legislative Department.
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> If any bill be not returned within five days after it shall have been presented to the Governor (Sunday excepted) such bill shall become a law in like manner as if he had signed it, unless the Legislature by its final adjournment prevents its return, in which case it shall be filed with his objections in the office of the Secretary of State within ten days after such adjournment (Sundays excepted) or become a law as provided in this Constitution. After the final action by the Governor, or following the adoption of a bill notwithstanding his objection, it shall be filed with the Secretary of State.
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> If any bill presented to the Governor contains several items of appropriations of money, he may object to one or more of such items, while

The Arizona governor's item veto power has usually been construed in a manner that reflects the legislature's constitutional authority to control the appropriation process.[3] Recently, however, in *Rios v. Symington*,[4] the Arizona Supreme Court upheld novel applications of the item veto which appear to expand the governor's authority to determine the contents of the budget.

There has been little in-depth scholarly attention paid to the operation of the constitution's appropriation rules or to the item veto power.[5] Arizona courts have demonstrated some confusion as to their meaning and application. Yet the implications of the provisions for state legislative process, and for the balance of legislative and executive authority to direct state spending, are significant.

For these reasons,[6] a comprehensive study of the operation of these constitutional provisions and their relationship to one another is appropriate. This

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approving other portions of the bill. In such case he shall append to the bill at the time of signing it, a statement of the item or items which he declines to approve, together with his reasons therefor, and such item or items shall not take effect unless passed over the Governor's objections as in this section provided.

The veto power of the Governor shall not extend to any bill passed by the Legislature and referred to the people for adoption or rejection.

Id.

3. Regarding legislative authority, *see, e.g.*, ARIZ. CONST., art. IV, pt. 1, § 1 (lawmaking power rests exclusively in legislature); ARIZ. CONST. art. IV, pt. 2, § 20 (appropriations bills); ARIZ. CONST. art. IX, § 5 (power to contract debts); LeFebvre v. Callaghan, 33 Ariz. 197, 204, 263 P. 589, 591 (1928) ("Under our system of government, all power to appropriate money for public purposes or to incur any indebtedness therefor ... rests in the legislature."), *cited with approval in* Rios v. Symington, 172 Ariz. 3, 5, 833 P.2d 20, 22 (1992); *see also* Fairfield v. Foster, 25 Ariz. 146, 153–57, 214 P. 319, 322–23 (1923).

4. 172 Ariz. 3, 833 P.2d 20 (1992).

5. *See* John D. Leshy, *The Making of the Arizona Constitution*, 20 ARIZ. ST. L.J. 1, 72–73 (1988); JOHN D. LESHY, THE ARIZONA STATE CONSTITUTION 120–22, 131–34 (1993) (brief, clear discussions of both the constitution's appropriation rules and the item veto power); Donald W. Jansen, *Arizona's Constitutional Restraints on the Legislative Powers to Tax and Spend*, 20 ARIZ. ST. L.J. 181, 187–89 (1988) (very brief discussion of appropriations legislation); *see also* BRUCE BONNER MASON & HEINZ RUDOLF HINK, CONSTITUTIONAL GOVERNMENT IN ARIZONA 168–69 (7th ed. 1982) (suggesting that uncoordinated budgeting before 1967 made it difficult for governor to review budgets systematically and separate acceptable from objectionable items for veto, and apparently suggesting that use of item veto could be expected to increase after budget system changed in 1967; this, however, has not occurred); ROY D. MOREY, POLITICS AND LEGISLATION: THE OFFICE OF GOVERNOR IN ARIZONA 41–43 (1965) (characterizing item veto as "neglected tool of legislative influence"; asserting, with little support, that legislative budget-writing techniques have obstructed use; and noting correctly that it is "virtually impossible" to assess the effect of the *threat* of any veto); *see also* Roy D. Morey, *The Executive Veto in Arizona: Its Use and Limitations*, 19 W. POL. Q. 504 (1966) (same argument and information as MOREY, *supra*).

6. This study does not address the federal debate over the wisdom of adopting a Presidential item veto, although its exploration of one state's experience may help clarify the differences in rules and practices between the states and the federal government which render adaptation of the state experience to the federal context problematic. For commentary on the federal debate, see HOUSE COMM. ON RULES, 99TH CONG., 2D SESS., ITEM VETO: STATE EXPERIENCE AND ITS APPLICATION TO THE FEDERAL SITUATION (1986) [hereinafter 1986 RULES COMMITTEE REPORT]; Louis Fisher & Neal Devins, *How Successfully can the States' Item Veto be Transferred to the President?*, 75 GEO. L.J. 159 (1986); Calvin Bellamy, *Item Veto: Shield Against Deficits or Weapon of Presidential Power?*, 22 VAL. U. L. REV. 557 (1988); James Gosling, *Wisconsin Item-Veto Lessons*, 46 PUB. ADMIN. REV. 292 (1986).

Experience in the states does not demonstrate with clarity that the item veto has been of great significance in reducing legislative expenditures. *See, e.g.*, Fisher & Devins, *supra*, at 183 (arguing that the item veto may be used more as a partisan political tool, causing legislative/executive strife, than as a tool for fiscal control, and may even cause higher spending

article reviews and analyzes the Arizona experience. It focuses on legislative, gubernatorial, and judicial authority and practices, and explores applications of similar rules in other states for comparison and guidance.

Section I of the Article provides an overview of the constitutional provisions limiting legislative appropriations and defining the governor's item veto power. Section II reviews the central concept of "appropriation." It concludes that Arizona courts have sometimes misapplied the term, leading to the mischaracterization of legislative action and, in turn, to some confusion about the proper scope of the governor's item veto power. Clarification is offered.

Section III explores, in detail, the constitutional rules controlling the structure and content of appropriation bills. It concludes that the holdings of cases are not always consistent with articulated judicial doctrine, with legislative practices, or with the policies underlying the constitutional provisions, and recommends adjustments to reconcile these variances.

Section IV analyzes the purpose, nature and scope of the Arizona item veto power. It concludes that, in some circumstances, governors have misapplied and courts have misconstrued the power in a manner that potentially increases the governor's role in budget making beyond traditionally articulated rules and norms. Section V offers concluding remarks about each of these issues.

I. THE BASIC LIMITATIONS ON LEGISLATIVE APPROPRIATIONS AND GUBERNATORIAL ITEM VETOES

Constitutional provisions constraining legislative power in the appropriation process exist in many states.[7] Their adoption frequently accompanied creation of a gubernatorial item veto, a power currently held in some form by

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by the legislature in anticipation of the exercise of gubernatorial discipline through the item veto). Concern has been expressed that the real impact of a federal item veto would be more in policy than budgetary terms, in the form of a potentially great shift in power from the legislative branch to the executive. This trend has been suggested by the states' experience with gubernatorial exercises (and judicial review) of the item veto. *Id.* at 162, 196–97; Bellamy, *supra,* at 571; 1986 RULES COMMITTEE REPORT, at IV; Gosling, *supra,* at 297.

It has been emphasized that rules governing budgetmaking practices at the state level—like those explored in detail in this article—are so significantly different from Congressional practices that, absent important changes in the federal appropriations process, the item veto might not be readily adapted to the federal context. At the federal level, there are no constitutional rules about budgetmaking comparable to the restrictive state constitutional and statutory rules governing the structure and content of appropriation bills. *See generally* 1986 RULES COMMITTEE REPORT, at 52–55. Further, lump sum appropriating often characterizes federal budgets, with the details found in administration estimates and congressional committee reports not subject to individual veto. *Id.* at 56, 112. Various alternative techniques to the item veto have been described at the federal level, including reprogramming, apportionment, transfers and impoundment, *id.* at 119–40; *see also* Fisher & Devins, *supra,* at 162 (differences between federal and state appropriations processes).

7. The provisions include prohibitions against legislation in general appropriation measures; limitations of other appropriation bills to a single subject; limitations on state borrowing; balanced budget requirements; and prohibitions of private, special or local laws. Fisher & Devins, *supra* note 6, at 178, 180; 1986 RULES COMMITTEE REPORT, *supra* note 6, at 1. For reference to states' provisions on several of these subjects, see *infra* notes 69, 72 and accompanying text.

the governors of forty-three states.[8] Both kinds of provisions were enacted largely during 1861–1900, in a spirit of anti-legislative fervor as a response to the "Age of Spoils."[9]

Restrictions on the structure and content of budget legislation were designed to constrain legislative action *ab initio*. The item veto, by contrast, grounded in the belief that governors were better managers than legislatures, was designed to enable the *governor* to control budgetary excesses, including those arising from legislative corruption and bribery.[10] Further, many states required a balanced budget, in pursuit of which the item veto might be employed.[11]

Under Article IV, part 2, section 20 of the Arizona Constitution, there are two types of appropriation measures, "general" and "single-subject" bills.[12] "General" appropriation bills are annual measures that enact the state's budget, funding diverse state agencies and programs. These bills can contain no substantive legislation, for they are restricted to "appropriations."[13] Other appropriation bills may contain legislation, but only if they cover a single subject.[14]

Section 20, therefore, prohibits appropriation bills that would embrace *both* multiple subjects *and* legislation. This is designed to preclude appropriation-based "logrolling"—the adoption of legislation that lacks sufficient support on its own.[15] As "riders" on the coattails of needed appropriations, such legislation could be logrolled into passage by opportunistic, "false" legislative majorities.[16]

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8. *See* 1986 RULES COMMITTEE REPORT, *supra* note 6, at 4; *id.*, app. A, at 201–02. Almost all are limited to legislation appropriating money; in Washington the veto applies to any type of legislation. Bellamy, *supra* note 6, at 558. The six states lacking item veto provisions are Indiana, Maine, Nevada, New Hampshire, Rhode Island and Vermont. 1986 RULES COMMITTEE REPORT, *supra* note 6, at 47. North Carolina has no veto provision of any kind. *Id.* at 2. A "dizzying array" of variations on the item veto appeared in state constitutions after the first one was adopted by the Confederate States in 1861; most were in place by 1915. *Id.* at 4–6. Most states provide for override of an item veto by the same fraction required for a complete veto, generally two-thirds. *Id.* at 48.

For the text of all states' whole-veto and item-veto constitutional provisions, see *id.*, app. C–1, at 211–31. *See generally* Bellamy, *supra* note 6, at 558–62 (chart and brief narrative overview).

9. 1986 RULES COMMITTEE REPORT, *supra* note 6, at III–IV.

10. Fisher & Devins, *supra* note 6, at 178–79.

11. *Id.* An additional rationale for state item veto power was the need for gubernatorial flexibility over a budget cycle whose length often exceeded the term of the legislature. *Id.* at 180.

12. ARIZ. CONST. art. IV, pt. 2, § 20. For the text of § 20, see *supra* note 1.

13. ARIZ. CONST. art. IV, pt. 2, § 20.

14. *Id.*

15. "Logrolling" is "the combining of disparate minorities into a majority through a combination of unrelated legislative goals in a single bill." Litchfield Elementary Sch. Dist. No. 79 v. Babbitt, 125 Ariz. 215, 223–24, 608 P.2d 792, 800–01 (Ct. App. 1980); *see also* BLACK'S LAW DICTIONARY 942 (6th ed. 1990) (defining logrolling as "A legislative practice of embracing in one bill several distinct matters, none of which, perhaps, could singly obtain the assent of the legislature, and then procuring its passage by a combination of the minorities in favor of each of the measures into a majority that will adopt them all.").

16. Logrolling, of course, can also occur with multi-subject legislation that is *non*–appropriative in nature. Hence the Arizona Constitution imposes a one-subject requirement that applies to non-appropriative legislation as well. *See* ARIZ. CONST. art. IV, pt. 2, § 13. For the text of § 13, see *supra* note 1 ("*Every Act* shall embrace but one subject and matters properly connected therewith ...." (emphasis added)).

Section 20 has a fiscal impact as well as an anti-legislative one. Appropriations in the general appropriation bill are limited to the *subjects* set forth in section 20. In any other appropriation bill the legislature may appropriate on only *one* subject. These topical restrictions help to reduce "pork barrel" practices—the legislature's inclusion in budgets of appropriations made more for political gain or patronage than for overall public benefit.[17]

The section 20 restrictions on appropriation bills are complemented by the Arizona governor's item veto power. Article V, part 2, section 7 of the Constitution authorizes the governor to object to one or more "items of appropriations of money" in any bill containing several such items.[18] The purpose of the item veto is to enable the governor to constrain expenditures,[19] especially where caused by legislative "pork barrelling." The authority to strike out individual appropriations enables the governor to avoid having to choose between blanket approval and rejection of complex appropriation bills containing particular items he finds objectionable.[20]

The Arizona Supreme Court has historically limited the scope of the governor's item veto authority, by construing strictly the constitutional phrase "items of appropriation" that defines matter properly subject to veto. The governor can only veto *appropriative* provisions, not other language. Moreover, the permissible reach of a veto is no more and no less than complete "items" as structured by the legislature. This approach tends to minimize the governor's alteration of legislative intent through creative partial deletions of language, letters or numbers. Other states apply broader visions of the power by authorizing more sweeping modifications of the legislative product, even where the constitutional language creating the veto authority is similar.[21] Arizona's approach appears to be attributable, at least in part, to the operation

17. *See, e.g.*, THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1119 (unabridged ed. 1967) (defining "pork barrel" as a "government appropriation, bill, or policy which supplies funds for local improvements designed to ingratiate legislators with their constituents," and "pork" as "appropriations, appointments, etc. made by the government for political reasons rather than for public benefit, as for public buildings, river improvements, etc."); *see also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1767 (unabridged ed. 1966) (defining "pork barrel" as "a government project or appropriation yielding rich patronage benefits," and "pork" as "money grants, public works, or government jobs used by politicians as patronage with more regard to political advantage than to the public good.").

18. *See supra* note 2.

19. Fairfield v. Foster, 25 Ariz. 146, 214 P. 319 (1923); Rios v. Symington, 172 Ariz. 3, 833 P.2d 20 (1992).

20. *See supra* note 19.

21. *See, e.g.*, *Fairfield*, 25 Ariz. at 150, 214 P. at 321. The court found "considerable difference, both in reasoning and conclusions", in different state courts' decisions on the scope of the item veto power:

> Attempts are generally made to base the decision on the precise language of the particular Constitution construed, but a careful examination of the reasoning in each case will disclose that the conclusion is really based on the view the particular court takes as to the general nature of the veto power and the purpose to be accomplished by the special constitutional provision.

Id. This early observation has been borne out by later experience. *See* 1986 RULES COMMITTEE REPORT, *supra* note 6, at 4, 141; Fisher & Devins, *supra* note 6, at 167. Differences in application arise from varying judicial philosophies about the relative importance of the "sanctity of the legislative process" as against gubernatorial "coequal power" in budgetmaking. *Id.* at 170 (noting that despite similar constitutional partial-veto language in Wisconsin and New Mexico, courts in the former state permit fairly extreme gubernatorial activism while courts in the latter allow quite limited executive authority).

of the rules limiting appropriation bills.[22] Moreover, this narrow view of the scope of the item veto tracks the court's articulated position that the governor's role in budget making is secondary, and only reactive, to legislative policy choices.[23]

In comparison with practices in some other states, the item veto authority in Arizona has been sparingly used.[24] Many factors may explain such variation;[25] consequently the infrequency of vetoes reveals little about the value of the mechanism.

II. THE MEANING OF "APPROPRIATION"

A. Importance of the Concept

General appropriation bills, the legislature's main vehicle for state budget making, can contain "nothing but appropriations"; substantive legislation is excluded.[26] Further, only "items of appropriation" are subject to the governor's

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22. The fact that *general* appropriation bills, at least, are not supposed to contain any "legislation," *see infra* sections III.A. and III.B of this Article, renders unnecessary the purported use of an "item veto" on such material.

23. *See supra* note 3 and accompanying text.

24. The complete listing of item vetoes in Arizona since the time of statehood is found at *supra* notes 168–69. Compare the experiences of some other states in recent years alone: 400-plus vetoes in the 1991–1993 Wisconsin biennial budget, WIS. ST. J., Aug. 8, 1991, at 1A; 384 vetoes in New York 1992 budget, N.Y. TIMES, June 16, 1991, at 6; multiple vetoes in California in 1992, A.B. 979.

25. Legislative drafting techniques and judicial standards, for example, may limit the use of the item veto. Fisher & Devins, *supra* note 6, at 185. In Arizona, these reasons seem plausible. *See, e.g., infra* notes 214–21 and accompanying text (legislative technique of lump-sum appropriating limits item veto authority); *infra* notes 26–64, and accompanying text (judicial definition of "appropriation" limits item veto authority); *infra* notes 192–207 and accompanying text (judicial definition of "item" limits item veto authority). Other factors, however, may also play an important role. These include: simple gubernatorial approval of the legislative budget; a preference for the use of some other power; or a preference for ironing out differences with the legislature before reviewing the budget, which may make a governor reluctant to breach an agreement by subsequently applying the item veto. Fisher & Devins, *supra* note 6, at 185, 195.

It has been suggested in addition that, beginning in the 1960s on a national basis, greater gubernatorial staffing and liaison with legislatures led to more compromises before reaching the stage when there was no alternative to the veto. This produced more informal mechanisms of negotiation, including in some states, the technique of "bill recall." "Bill recall" is the governor's return of a bill to the legislature, with comments indicating his preferences and intentions, even where no constitutional or statutory provision exists for an "amendatory veto." 1986 RULES COMMITTEE REPORT, *supra* note 6, at 31–32; Fisher & Devins, *supra* note 6, at 182, 195. (The formal "amendatory veto" exists in seven states: Alabama, Illinois, Massachusetts, Montana, New Jersey, South Dakota and Virginia. Under this mechanism, the governor conditions his approval of a bill on certain changes and then returns it to the legislature. This power, of course, makes the executive more directly involved in the legislative process. 1986 RULES COMMITTEE REPORT, *supra* note 6, at 4–5; for text of these provisions, see *id.*, app. C–3, at 234–35).

Similarly, the *threat* of the item veto may have a significant impact on legislative budgets, but would not appear in any formal record illuminating its effectiveness one way or the other. Fisher & Devins, *supra* note 6, at 195. The relative frequency or infrequency of the item veto's use thus sheds little light on the effectiveness of the device, or on the relationship between the governor and legislature, because a host of such subtle factors, influenced by history and shifting politics, may have an impact. 1986 RULES COMMITTEE REPORT, *supra* note 6, at 5–6, 10–11; Fisher & Devins, *supra* note 6, at 167.

26. ARIZ. CONST. art. IV, pt. 2, § 20, *supra* note 1; *infra* notes 76–88 and accompanying text. Substantive legislation can, however, properly be included in the single-subject appropriations bills which section 20 also recognizes. *See infra* notes 66–75, 165 and accompanying text.

selective veto, and can be stricken only from bills containing "several" such items.[27]

The meaning of "appropriation," therefore, largely defines several important matters: the permissible content of general appropriation bills; the type of measure (general and one-subject appropriation bills) properly amenable to the item veto; and the nature of the material the governor may selectively delete therefrom. This section explores the meaning and application of "appropriation" as a threshold factor affecting legislative and gubernatorial power in budget making.

B. The Three-Part Test and Its Application

In *Hunt v. Callaghan*,[28] the Arizona Supreme Court distinguished several kinds of legislative fiscal acts. "Taxation" was the enforced contribution of persons and property, levied by government, to support public needs. "Apportionment" meant dividing and assigning money for particular purposes. "Appropriation" involved the setting aside from public revenues of a certain sum for a specified object, such that executive officers were authorized to use the money for a designated purpose.[29] Thus, an "appropriation" differed from an "apportionment" by virtue of the specific additional element of spending authority.[30]

Consistent with *Hunt v. Callaghan*, the elements of "appropriation" have been formulated into a three-part test. A legislative action constitutes an appropriation if it (1) sets aside for expenditure, from public revenues, a "certain sum" (2) for a specified object or purpose and (3) provides authority for officials to spend the money for the indicated purpose.[31]

Under the test, whether or not an "appropriation" has been made does not depend on the particular wording or language of the bill;[32] it is the overall substantive impact of the legislative action that matters. To this end, the Arizona Supreme Court reads legislative provisions *in pari materia* when evaluating whether an appropriation has been made.[33] In addition, the appro-

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27. *See* ARIZ. CONST. art. V, pt. 2, § 7, *supra* note 2.
28. 32 Ariz. 235, 257 P. 648 (1927).
29. *Id.* at 239, 257 P. at 649.
30. *Id.*
31. The first, preliminary version of this standard appears in Fairfield v. Foster, 25 Ariz. 146, 150–51, 153, 157, 214 P. 319, 321–23 (1923), requiring that in order to constitute an "item of appropriation" properly subject to veto, legislation must *set aside*, for *expenditure*, a *named amount* to a *named purpose*. More formal statements of the standard have followed. *See, e.g.*, Black and White Taxi Cab Co. v. Standard Oil Co., 25 Ariz. 381, 406–07, 413–15, 218 P. 139, 147–48, 150 (1923) (Lockwood, J., dissenting); Prideaux v. Frohmiller, 47 Ariz. 347, 365, 56 P.2d 628, 635 (1936) (Lockwood, J., dissenting); Carr v. Frohmiller, 47 Ariz. 430, 448–51, 56 P.2d 644, 651–52 (1936) (Lockwood, J., dissenting); Rios v. Symington, 172 Ariz. 3, 5, 833 P.2d 20, 22 (1992); Op. Ariz. Att'y Gen. 20 (1987). Comparable definitions are widely applied in other states. *See* 1986 RULES COMMITTEE REPORT, *supra* note 6, at 142.
32. *See, e.g.*, Windes v. Frohmiller, 38 Ariz. 557, 560, 3 P.2d 275, 276 (1931); Crane v. Frohmiller, 45 Ariz. 490, 496, 45 P.2d 955, 958 (1935); Prideaux v. Frohmiller, 47 Ariz. 347, 365, 56 P.2d 628, 635 (1936); *Rios*, 172 Ariz. at 5, 833 P.2d at 22; Op. Ariz. Att'y Gen. 20 (1987).
33. *See, e.g.*, Millett v. Frohmiller, 66 Ariz. 339, 343–46, 188 P.2d 457, 460–62 (1948) (Court looks to the existence of a session-law item in a general appropriation bill as evidence that the legislature did not intend a permanent statute on the same subject, standing alone, to make an appropriation); O'Neil v. Goldenetz, 53 Ariz. 51, 58, 85 P.2d 705, 708 (1938); *see also* Hunt v. Callaghan, 32 Ariz. 235, 257 P. 648, 652 (1927) (where statutes

priative provisions of a bill may be physically separated from related material with which they must be considered.[34]

Three additional, fairly well-settled points apply to the first element of the appropriation test. First, the term "certain sum" does not require that a precise dollar amount be fixed. Funding *formulae*, for example, are permissible;[35] the "certain" standard more accurately means ascertainable.[36] Second, federal funds (at least where earmarked for particular purposes) are not subject to state "appropriation."[37] Thus, they are not amenable to the governor's item

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governing general state financial practices and highway financing refer to the General Appropriation Bill as the source of highway appropriations, the statutes themselves made no "appropriation" for support of highway department; such appropriations authorizing expenditure of money had to appear elsewhere); Op. Ariz. Att'y Gen. 20 (1987) (statutes providing for funding levels of state assistance to education, which by their terms refer to appropriations to be made elsewhere to implement them, are not themselves appropriations).

34. Black and White Taxi Cab Co. v. Standard Oil Co., 25 Ariz. 381, 395–97, 218 P. 139, 144 (1923). Where this is the case, a veto of either the appropriative or the related unappropriative language alone, without the other, is impermissible; the governor must treat the provisions integrally as a single "item." *Id.*; *see infra* notes 192–207 and accompanying text.

35. *See, e.g., Carr,* 47 Ariz. at 435–36, 56 P.2d at 646 (1936) (majority opinion); *id.* at 448, 56 P.2d at 651 (Lockwood, J., dissenting).

36. The standard has been stated as "[t]hat is certain which can be made certain." *Black and White Taxicab Co.,* 25 Ariz. at 416, 218 P. at 151 (Lockwood, J., dissenting); *Carr,* 47 Ariz. at 448, 56 P.2d at 651 (Lockwood, J., dissenting); Rios v. Symington, 172 Ariz. 3, 6, 833 P.2d 20, 23 (1992).

The Court once stated that a valid appropriation from the *general* fund must include some kind of expenditure ceiling or limitation, whereas an appropriation from a special fund, itself limited in amount, need not do so. *See Crane,* 45 Ariz. at 497, 45 P.2d at 959. Presumably, this view was based on the potential for open-ended expenditure from the general fund, which would place extremely broad discretion in the hands of executive officials, thus violating the concept of legislative control of the budget. *Rios,* 172 Ariz. at 4, 833 P.2d at 21.

Under these standards, the Court has held that legislative language did not constitute a valid appropriation when it allowed the governor to authorize the tax commissioner to incur debts against the state general fund for the purpose of defending lawsuits challenging assessments. The reason was that the would-be "appropriation" from the general fund contained no fixed or maximum permissible amount of expenditure. *Crane,* 45 Ariz. at 498–500, 45 P.2d at 959–60; *see also Prideaux,* 47 Ariz. at 365, 56 P.2d at 635 ("certain sum" means either a statement of actual amount, or a statement that the expenditure is to be made from a specified fund which itself is limited in amount, that limitation being made by fixing the amount, or directing that it be replenished from a definite and limited source. Absent such legislative standards, there is no valid appropriation.)

37. *See* Navajo Tribe v. Arizona Dep't of Admin., 111 Ariz. 279, 280–81, 528 P.2d 623, 624–25 (1975) (state appropriation power extends to public funds—those raised by operation of some general law and belonging to the state—and not to funds for the benefit of contributors for which the state is "a mere custodian or conduit". Thus, the legislature has the power to make appropriations relating to state funds, but not funds from a purely federal source). It has been observed, however, that the case's application to "federal funds made available to state government with no or few strings attached is not clear." LESHY, *supra* note 5, at 211; *see also* Cochise County v. Dandoy, 116 Ariz. 53, 56, 567 P.2d 1182, 1185 (1977) (appropriation powers do not extend to funds originating from federal sources); *id.* at 60, 567 P.2d at 1189 (custodial funds, such as federal funds contributed to Medicaid, do not constitute state funds subject to the legislature's appropriation and are not subject to legislative control) (Gordon, J., dissenting but agreeing on this point).

A state constitutional amendment authorizing the legislature to appropriate federal money was defeated in 1984. *See* 11 ARIZ. REV. STAT. ANN. 690 (1990). Thus legislation under which the legislature was to "approve expenditures of and appropriate federal fund monies," enacted in anticipation of and contingent upon the constitutional change, failed by its own terms to become law. Act of Apr. 20, 1983, ch. 193, §§ 3, 4, 1983 Ariz. Sess. Laws 689, 691.

veto.[38] Finally, notwithstanding an early case to the contrary, money raised in or by the counties *is* subject to being "appropriated" by the state.[39] Such an appropriation, therefore, can be included in an appropriation bill and vetoed by the governor.

Although for many years the Arizona Supreme Court has consistently articulated the three-part "appropriation" test, the conclusions it has drawn from the test concerning the character of particular legislative action have not always been predictable or persuasive.

In *Black and White Taxicab Co. v., Standard Oil Co.*,[40] the Court held that the legislature's imposition of a gasoline sales tax, standing alone, was not an "appropriation".[41] Consequently the governor's selective veto of the tax, from a single-subject bill on highway financing, was without effect.[42] The same

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38. This conclusion is consonant with the purposes of the item veto. The acceptance of federal money does not appear to raise any risk of *state* legislative "pork barreling," the evil against which the item veto was aimed. Further, the inclusion of federal money in a budget only tends to supplement, rather than diminish or exhaust, state revenues for other purposes; thus a governor will not likely be concerned about the impact of a federal expenditure on the rest of the budget or the state's overall financial health.

39. In *Black and White Taxicab*, 25 Ariz. at 397–400, 218 P. at 144–46, the court held that 50% of a gasoline tax designated for counties to maintain highways did not constitute an appropriation (and thus could not be item-vetoed) because the revenues were levied for county use. The court viewed as implicit in *Fairfield v. Foster* a requirement that appropriations involved general revenues "of the state." *Id.* This holding seems to establish a fourth element to the three-part test: that the money must be "state money," not raised from, and/or designated to, a county purpose.

A dissenting opinion in *Black and White Taxicab* persuasively suggests error in this view. Justice Lockwood found that the legislative language had all the elements of an appropriation: it created an authority to spend (in county supervisors); it provided a specified object (highway maintenance); and it involved a certain sum (presumably, the amount the tax would raise). *Id.* at 414–15, 218 P. at 150. The Arizona Constitution says nothing about appropriations being limited to "state" money. More fundamentally, any money allocated by a legislative act to counties *is* "state money"; the state is simply choosing how to use it. Counties are creatures of the state, and the tax money in question was state money, levied by state authority; an act of the legislature was required to authorize it, and it did not become the counties' money until after the legislature had appropriated it to them. *Id.* at 415–16, 218 P. at 151.

While the majority holding in *Black and White Taxicab* on this issue has never been expressly overruled, a later case takes a view more closely aligned with Justice Lockwood's dissent. *See Cochise County*, 116 Ariz. at 56, 567 P.2d at 1185 (though state appropriations power does not extend to funds from *federal* sources, it does reach funds originating from county sources, in context of qualifying for federal contribution to Medicaid). This suggests that a would-be "fourth element," excluding county-raised revenues from qualification as "appropriations" for purposes of the item veto, should not be a part of the test.

40. 25 Ariz. 381, 218 P. 139 (1923).

41. "To state this proposition [that a tax, *per se*, is tantamount to an appropriation] is enough to dispose of it." *Black and White Taxicab*, 25 Ariz. at 395, 218 P. at 144. The same was true of taxes imposed on transportation carriers based on their capacity. *Id.* at 404; *see also supra* notes 28–30 and accompanying text. Both determinations were technically dicta, since these features of the legislation, though vetoed by the governor, were not in issue.

42. It has been suggested that this part of *Black & White Taxicab* raises the question of how much the governor's item veto authority can be "diluted" by the legislature's financing state programs through a revenue system rather than through appropriations. (At the federal level this is known as a "tax expenditure"—the provision of financial assistance through the tax code instead of through appropriations). *See* 1986 COMMITTEE REPORT, *supra* note 6, at 25–26, 143–45. However, the nature of the commentator's concern is not clear. In *Black & White Taxicab*, there was no legislative attempt to circumvent the appropriations process or the use of the item veto. The legislation in question imposed the tax, but also, in another section, expressly appropriated it. *See* Act of Mar. 20, 1923, ch. 76, §§ 5, 10, 1923 Ariz. Sess. Laws 207, 213,

was true of another provision in the same bill requiring the state treasurer to apportion 50% of the tax receipts into two accounts in the state general fund. These acts were mere "allotments"; if any appropriative language existed in the law it was to be found in other sections, which the governor had not touched.[43]

Finally, another provision of the bill in *Black and White Taxicab* created a property tax, earmarked it for highway construction, and allocated the proceeds between the state (25%) and each county of collection (75%). The court determined that the governor's vetoes of these two allocation provisions[44] were efforts to strike out a "condition or proviso" to an appropriation without vetoing the appropriation itself. This practice is impermissible under *Fairfield v. Foster*,[45] an early item veto case.[46] In fact, however, the provision allocating 75% to the county of collection—unlike the 25% state allocation—contained within it language authorizing expenditure of the money.[47] Thus, the correct conclusion would have been that this legislative act constituted an appropriation.[48]

In *Millett v. Frohmiller*,[49] a statute provided that in order to perform its rate-making duties, the corporation commission was to "make an assessment"

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222. It was the fact that the *governor attempted to veto* only the taxation language, without vetoing the appropriative language as well, that seemed to separate the acts of taxation and appropriation. It is difficult to see why the legislature's imposition of a tax, designation of its use and authorization of its expenditure should be thought to "dilute" the item veto power since, as here, that action is subject to a properly-exercised gubernatorial item veto.

43. *Black & White Taxicab*, 25 Ariz. at 395–97, 218 P. at 144; *see also supra* notes 28–30 and accompanying text. The Court did not analyze these tax and apportionment problems under the three-element test, though it cited with apparent approval another state's very similar version thereof. *Id.* at 400, 218 P. at 145. Applying the test suggests that the vetoed tax and apportionments lacked any stated *object* and *spending authority*. Accordingly, the court's conclusions that they were not "appropriations" seem to be sound.

44. The governor intended by his veto that all the tax revenues go to the state. *See* Governor's Veto Message, Act of Mar. 20, 1923, ch. 76, 1923 Ariz. Sess. Laws 199, 201–03.

45. 25 Ariz. 146, 214 P. 319 (1923).

46. *Black and White Taxicab*, 25 Ariz. at 400–04, 218 P. at 145–47. Again, this was dictum, because the validity of these vetoes was not assigned as error and was not argued or briefed. The court reached the issue in order "to settle the matter beyond further dispute or doubt" to assist state officers in levying and collecting the taxes in issue. *Id.* at 400, 218 P. at 145.

47. The taxes, once apportioned to the counties, were "*subject to be paid out*" by the counties for highway improvement. *Id.* at 387, 218 P. at 141 (citing ch. 76, § 10(1)(a), 1923 Ariz. Sess. Laws 207, 223).

48. The three-part test supports the conclusion reached by Justice Lockwood in dissent, *Black & White Taxicab*, at 410–12, 218 P. at 149–50, though he did not apply it. The language *authorized the expenditure* (by county officials) of a *certain sum* (75% of the taxes collected) for a *specified object* (highway construction). It thus constituted an appropriation. Justice Lockwood agreed that a "proviso" by itself was not a proper subject of the item veto under *Fairfield v. Foster*, but observed that the governor's action encompassed both the appropriation and its "proviso" and was, therefore, a valid veto.

Justice Lockwood agreed that the 25% state share was not subject to veto, but on different grounds than the majority: that it did not constitute an independent appropriation because it only provided for payment of the taxes *into* the general fund and lacked any provision regarding their *expenditure*. *Id.* at 410, 218 P. at 149. This, too, is analytically more satisfactory than the majority view. *See infra* note 266 and accompanying text.

As a practical matter, however, under Justice Lockwood's analysis, 75% of the property tax, once collected, would have been unallocatable, because the allocation provision (along with the appropriative one) would have been validly vetoed. *Id.* at 417–18, 218 P. at 149. It may well be that the majority was simply trying to avoid this unattractive outcome, notwithstanding the resulting doctrinal difficulty.

49. 66 Ariz. 339, 188 P.2d 457 (1948).

against each corporation, based on a percentage of gross operating revenues, and place the assessed monies in the general fund.[50] The court held that this statute made no appropriation out of which an accountant could be paid for services that assisted the commission in meeting its rate-making responsibilities. The court relied on the existence of an independent appropriation for that purpose, in the general appropriation bill, to bolster its conclusion.[51] This ruling seems correct under the three-part test: the provision in question lacked "spending authority."[52]

One part of an early case, *Callaghan v. Boyce*,[53] has caused special confusion about whether *non*-appropriative legislative material is subject to the item veto. The *Callaghan* court upheld the governor's veto of section 51 of a general appropriation bill, which prohibited state expenditures not otherwise authorized by the bill and repealed several existing statutes, but *itself made no appropriation*.[54] The court's rationale for upholding this veto seemed to be that section 51 constituted a "distinct and separable part"[55] of the bill. As a result of this language, at least two commentators have understood *Callaghan* as authorizing the veto of "any separable portion" of an appropriation act,[56] apparently without regard to whether or not it contains appropriative language.

Such a view is inconsistent with the rest of *Callaghan*, in which the court held that repeals of prior appropriations could not, standing alone, be vetoed without a like veto of the substitutive appropriations accompanying them.[57] Moreover, such a view implies that the legislature may place matters unconnected with appropriations in a general appropriation bill in the first instance, which would violate Article V, section 20 of the Arizona Constitution.[58] Finally, it suggests that the governor is free to veto matters other than "items of *appropriation*," which is inconsistent with Article V, section 7.[59] While courts in other jurisdictions are divided on whether such non-appropriative provisions

50. *Id.*

51. This construction may itself have been bolstered by the fact that the governor had validly *vetoed* that appropriation, so it was no part of the law of the state. *Id.* at 343–46, 188 P.2d at 457.

52. The statute called for placing the money *into* the general fund but made no provision for expenditure therefrom. *See supra* notes 28–30, 48, *infra* note 266 and accompanying text.

53. 17 Ariz. 433, 153 P. 773 (1915).

54. Act of Feb. 12, 1915, Ariz. Sess. Laws ch. 3, § 51, 4, 47–48, 72.

55. The court stated that an "item" is synonymous with "subject" or "distinct or separate part." *Callaghan*, 17 Ariz. at 458, 153 P. at 778.

56. *See* Millard Ruud, *No Law Shall Embrace More Than One Subject*, 42 MINN. L. REV. 389, 414 (1958). Ruud concludes from this case that the Arizona and Wisconsin courts have adopted similar standards and are thus similarly liberal in their view of the scope of what the governor may veto. This is wrong. The Wisconsin courts have construed that state's partial veto authority as permitting, *inter alia*, the striking out of language alone, independent of its connection with appropriations. *See infra* note 207 and accompanying text. The Arizona courts, other than in this ambiguous portion of *Callaghan*, have consistently refused to authorize such a liberal use of the veto pen. For a similar reading of *Callaghan*, *see also* 1986 RULES COMMITTEE REPORT, *supra* note 6, at 21 ("To the extent that the sections were 'distinct and separable parts' of the appropriation bill, the governor's item veto was permissible.").

57. *See infra* notes 193–200 and accompanying text.

58. *See infra* section III.B. *passim* of this Article.

59. *See infra* notes 230–56 and accompanying text.

can be vetoed from appropriation acts,[60] no other Arizona case has articulated such views.

Despite the court's language, *Callaghan* might be interpreted as upholding the governor's veto of section 51 *in conjunction with* his veto of other appropriative sections of the bill with which section 51 was arguably connected (so as to constitute, together, an "item of appropriation").[61] So viewed, the veto reached the entire item, the repealer and the accompanying appropriations combined. Otherwise, this language in *Callaghan* must be seen as having been implicitly—and properly—overruled by later cases.[62]

In a recent case, *Rios v. Symington*,[63] the Arizona Supreme Court applied the three-part test to two novel problems: whether (1) legislative transfers of monies to the general fund, and (2) legislative reductions of prior appropriations made in the same budget session, should be treated as appropriations subject to the item veto. Section IV.C of this Article discusses in detail the court's dubious resolution of these issues.[64]

Based on the foregoing, the Article now turns in detail to the constitutional limitations imposed on the legislature in enacting appropriation bills, the reasons for those restrictions, and the problems the legislature and the courts have had implementing them.

III. SECTION 20 AND THE STRUCTURE OF APPROPRIATIONS LEGISLATION

Article IV, part 2, section 20 of the Arizona Constitution provides:

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

A. Introduction: Policy Purposes of Section 20

Section 20 contains two analytically distinct rules. The first is that the general appropriation bill (GAB) shall embrace "nothing but appropriations" for the stated subjects.[65] The second is that "other appropriations" are to be

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60. *See generally* 1986 RULES COMMITTEE REPORT, *supra* note 6, at 156–57. Cases which have disapproved the veto of substantive, non-appropriative provisions from appropriations measures include Bengzon v. Secretary of Justice, 199 U.S. 410, 412–13 (1937) (construing scope of governor's item veto power under Phillippines Organic Act); Mississippi v. Holder, 76 Miss. 158 (1898); Caldwell v. Meskill, 320 A.2d 788 (Conn. 1973). Cases which have upheld the practice include State *ex rel.* Sundby v. Adamany, 237 N.W.2d 910 (Wis. 1975); Opinion of the Justices to the House of Representatives, 425 N.E.2d 750 (Mass. 1981); Washington *ex rel.* Ruoff v. Rossellini, 348 P.2d 971, 973 (1960). By and large, the states upholding the practice lack a "no legislation" provision in their constitution analogous to Arizona's § 20. *Compare* the preceding cases *with* 1986 RULES COMMITTEE REPORT, *supra* note 6, app. C–5, at 255–57. Thus their expansive view of the scope of the veto authority allows the governor to combat with the veto pen the logrolling which their constitutions do not forbid.

61. Callaghan v. Boyce, 17 Ariz. 447, 453–54, 458–59, 153 P. 773, 778 (1915). See *infra* notes 192–207 and accompanying text, for discussion of the meaning of "item."

62. *See, e.g.*, Fairfield v. Foster, 25 Ariz. 146, 214 P. 319 (1923).

63. 172 Ariz. 3, 833 P.2d 20 (1992).

64. *See infra* notes 257–82 and accompanying text.

65. "Departments" means the three branches of government, not just the administrative agencies of the executive branch. *See* Ruud, *supra* note 56, at 418.

made by "separate bills," each on "one subject."[66] While the Arizona courts have not spoken in depth on the policy purposes of these rules, they appear to be essentially the same.

The first provision operates to keep "legislation of general character"[67] out of the multi-subject appropriation bills through which the state annually funds the machinery of government. This bill is assured of ultimate enactment, since its appropriations are essential to the operation of state government. Substantive "riders," lacking their own majority support, might pass on the coattails of the bill.[68] The anti-legislation rule is designed to prevent that practice. Thirteen other states have similar constitutional provisions.[69]

To like effect, the one-subject requirement applicable to all "other" appropriation bills—which *may* contain legislation—is meant to prevent logrolling, "the combining of disparate minorities into a majority through a combination of unrelated legislative goals in a single bill."[70] Through logrolling, multi-subject appropriation legislation might pass even though its individual components would fail on their own merits. (Logrolling, of course, can occur in *non*-appropriation measures as well. It is accordingly prohibited by a separate constitutional "one-subject" requirement, art. IV, pt. 2, § 13)[71]. One-subject rules are found in forty states.[72]

"Riders," prohibited by the first provision of section 20, are simply a variant form of "logrolling," prohibited by the second.[73] Both threaten the enactment of legislation by opportunistically combined, "false" majorities. By barring from GABs any substantive legislation, and from one-subject appro-

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66. A "global" one-subject rule applicable to "every act" is found in art. IV, pt. 2, § 13; *see supra* note 1. The meaning of the two one-subject requirements is essentially the same. *See infra* note 163 and accompanying text.

67. Sellers v. Frohmiller, 42 Ariz. 239, 246–47, 24 P.2d 666 (1933) (citing Missouri v. Thompson, 289 S.W. 338 (1926).

68. *Id.* at 246–47, 24 P.2d at 669. It has been observed:

> History tells us that the general appropriation bill presents a special temptation for the attachment of riders. It is a necessary and often popular bill which is certain of passage. If a rider can be attached to it, the rider can be adopted on the merits of the general appropriation bill without having to depend on its own merits for adoption.

Ruud, *supra* note 56, at 413. For these reasons, the framers of the Arizona provision "undoubtedly intended that members of the legislature should be free to vote on ... [the general appropriation bill] knowing that appropriations and nothing else were involved." *Sellers,* 42 Ariz. at 246, 24 P.2d at 669.

69. Alabama, Alaska, Colorado, Florida, Georgia, Illinois, Louisiana, Mississippi, Montana, New Mexico, North Dakota, Oklahoma, and Pennsylvania. For the text of these provisions, see 1986 RULES COMMITTEE REPORT, *supra* note 6, app. C–5, at 255–57; *id.* at 54–55.

70. Litchfield Elementary Sch. Dist. No. 9 v. Babbitt, 125 Ariz. 215, 223–24, 608 P.2d 792, 799 (Ct. App. 1980). The primary and "universally recognized" purpose of one-subject provisions in state constitutions is to prevent logrolling—the combination of minorities to obtain consensus where perhaps no majority could be mustered on the matters individually. Ruud, *supra* note 56, at 391. On § 20 generally, see LESHY, *supra* note 5, at 120–22.

71. *See supra* note 1.

72. For their text, see 1986 RULES COMMITTEE REPORT, *supra* note 6, app. C–6, at 258–64. Some states contain a single such rule; others have two one-subject rules, one applicable to "all" bills, the other to all appropriation bills *except* the general appropriation measure.

73. Ruud, *supra* note 56, at 391. Both practices combine unrelated provisions, one or more of which are unlikely to garner majority support standing on their own, for purposes of securing their enactment.

priation bills legislation unrelated to that subject, the section 20 rules thus seek to insure that a true majority of the legislature supports every enactment of general substantive law. These rules constrain the legislature *ex ante*, independently of any action by the governor.

These limitations on the permissible contents of general appropriation bills, which the courts have usually enforced, help to support the narrow view of the scope of the item veto power which Arizona courts have derived from the constitutional phrase "items of appropriation."[74] By contrast, the constitutions and courts of some states allow diverse legislative policy making in the GAB. This is probably one reason why the courts of such states have read their governors' item veto authorities much more broadly, enabling the governor to combat, *ex post*, substantive provisions that they view as improper riders or the product of logrolling.[75]

Finally, section 20 indirectly advances the same expenditure-constraining goal for which the item veto was designed. The *subjects* for which appropriations can be made in the GAB are limited to state agencies and institutions, public schools, and interest on the public debt; the subject of all other appropriation bills must be singular. As a result, "pork barrel" practices are discouraged, because they are especially likely to arise in appropriation bills whose subject matter is *un*constrained. Arizona courts have not recognized or discussed this effect of section 20.

Subsections B and C of this section explore in detail the reach and operation of section 20's two rules. They illuminate the structure and function of appropriation legislation, and its relationship to the governor's item veto power which is explored in section IV of the Article.

B. "Nothing But Appropriations" in the General Appropriation Bill

1. Introduction: General Appropriation Bills

General appropriation bills constitute the primary vehicle of state budget-making. In each legislative session there is either a single, plenary GAB, or several different "partial" GABs dealing with subsets of the overall state budget.[76] The observations that follow apply to both types of GABs.

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74. *See supra* section I and *infra* section IV.B.1. of this Article.

75. *See generally* 1986 RULES COMMITTEE REPORT, *supra* note 6, at 146–47 (observing, in addition, that some states' constitutional language regarding what constitutes an "item" is broad enough to allow the striking out of non-appropriative language). *See, e.g.*, Opinion of the Justices to the House of Representatives, 425 N.E.2d 750, 754 (Mass. 1981); Attorney Gen. v. Administrative Justice, 427 N.E.2d 735 (Mass. 1981); Massachusetts lacks constitutional provisions limiting bills to one subject and prohibiting legislation in appropriations measures. *See also infra* note 207 and accompanying text, discussing the very broadly construed item veto power of the Wisconsin governor. Wisconsin lacks any prohibition of legislation in appropriation bills.

76. *See infra* notes 164–78 and accompanying text. In the early years of statehood the budget bill was usually titled "the" general appropriation bill. *See, e.g.*, Act of May 28, 1912, ch. 92, 1912 Ariz. Sess. Laws 580; Act of Feb. 12, 1915, ch. 3, 1915 Ariz. Sess. Laws 4; Act of Mar. 20, 1917, ch. 90, 1917 Ariz. Sess. Laws 139; Act of Mar. 25, 1919, ch. 174, 1919 Ariz. Sess. Laws 346. After a time, the title changed to "a" general appropriation bill. *See, e.g.*, Act of Mar. 22, 1921, ch. 181, 1921 Ariz. Sess. Laws 440; Act of Apr. 27, 1922, ch. 42, 1922 Ariz. Sess. Laws 271. The latter practice continues today. This may constitute some legislative

Appropriations in GABs commonly provide annual funding for ongoing programs created and governed by permanent statutes. The pre-existing statutes define the purposes, terms, and conditions of expenditure;[77] the yearly appropriations made by the GAB, in session-law form, implement them.[78] For any given program, the appropriation cycle generally will recur unless the legislature repeals the underlying statutes by a separate bill.[79] Of course, the legislature might fail, in a particular GAB, to appropriate money to implement a program, causing the program to be unfunded for that cycle, but not repealed.[80]

The statutes creating each such program were enacted, of necessity, by a "true" majority of the legislature, considering and approving the program within a single-subject bill on its individual merits.[81] Thus, the policy decision to adopt the program, and the statutory framework for its operation, cannot be attributed to "logrolling."

Proper GABs contain only session-law language. They do not enact permanent, codified statutory material, and they cannot, at least formally, amend or repeal existing statutes.[82] Substantive "legislative" provisions are permissible only to the extent that they qualify as properly incidental to the appropriations they accompany.[83] Further, GABs apply only to the annual budget period, and their session-law appropriations (and any permissible accompanying language) expire at the end of that cycle. Appropriations must be re-enacted in order to apply to a future budget period.[84]

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recognition that the section 20 subjects covered by "the" general appropriation bill could be, and indeed now frequently are, addressed in more than one piece of legislation.

77. *See, e.g.*, Nevada *ex rel.* Abel v. Eggers, 136 P. 100, 102 (Nev. 1913):

> In general appropriation bills appropriations are made in concise language, usually intended to be supplemented by more definite, existing statutes, and for the purpose of meeting the expenses of the state government in accordance therewith.
>
> Sections of the general appropriation bill are *in pari materia* with the general acts controlling the purposes for which the appropriation is made. They are therefore to be considered in connection with the general provisions of law to which they relate.

Id.; *see also* Carr v. Frohmiller, 476 Ariz. 430, 440 , 56 P.2d 644 (1936) (to make lump sum appropriation in GAB "intelligible," reference to statutes it implements is "absolutely necessary.").

78. Of course, the amount may vary from year to year. Further, the legislature is free, in a single GAB, to *revise the amounts* of nonstatutory appropriations made earlier in the session on the § 20 subjects, irrespective of whether the earlier appropriations were made by individual bill or by a GAB. Op. Ariz. Att'y Gen. 20 (1987).

79. *Carr*, 47 Ariz. 430, 56 P.2d 644; Sellers v. Frohmiller, 42 Ariz. 239, 24 P.2d 666 (1933). *But see* Callaghan v. Boyce, 17 Ariz. 433, 153 P. 773 (1915), discussed at *infra* notes 151–61 and accompanying text.

80. *See infra* notes 135–40 and accompanying text.

81. *See* ARIZ. CONST. art. IV, §§ 13, 20. For the text of these sections, see *supra* note 1; *see also* Litchfield Elementary Sch. Dist. No. 79 v. Babbitt, 125 Ariz. 215, 608 P.2d 792 (Ct. App. 1980).

82. *See supra* note 79.

83. Regarding the limited nature of permissibly incidental provisions, see *infra* notes 110–45 and accompanying text.

84. "[N]othing of a permanent nature" can be included in a general appropriation bill. Ruud, *supra* note 56, at 430 (discussing a Colorado case); *see also Carr*, 47 Ariz. at 443, 56 P.2d at 649 ("'It is not expected that changes and amendments in the general laws of the state will be made in general appropriation bills, and the life of such acts is only two years.'" (quoting Nevada *ex rel.* Abel v. Eggers, 136 P. 100, 101 (Nev. 1913)).

However, GABs are not the only source of appropriations. Numerous permanent statutes, enacted by individual bill in compliance with the one-subject requirements of sections 13 and 20, contain all the necessary elements of an appropriation. These "statutory appropriations" do not depend on renewed legislative action each budget cycle for their ongoing funding,[85] and the GAB generally does not deal with them.

The Arizona Supreme Court has articulated a general standard regarding the permissible contents of GABs under section 20:[86] "The general appropriations bill can contain nothing but the appropriation of money for specific purposes, and such other matters as are merely incidental and necessary to seeing that the money is properly expended for that purpose only. Any attempt at any other legislation in the bill is void."[87]

Several questions emerge as to the meaning of the "nothing but appropriations" limitation. First, does section 20 prohibit purely "legislative," non-fiscal policy making through the GAB? Second, does section 20 prohibit inclusion in the GAB of *new* appropriations, that is, those whose policy wisdom has not been previously authorized or established by the legislature through enactment of a bill limited to that subject? Third, how far may the legislature go in the GAB when enacting substantive policy by defining (or redefining) the conditions under which appropriations made therein may be expended? Finally, to what extent, if at all, may the GAB revise or modify existing *statutory* appropriations?

2. *"General Legislation," Unconnected to Appropriations, Cannot Appear in the GAB*

Section 20 clearly excludes from GABs legislative policy making that is wholly unrelated to concomitant appropriations.[88] Thus, substantive rules of

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In one sense, the fact that appropriations are made by session law language—which expires at the end of the budget cycle—and not codified in statute makes them seem less "legislative" due to their impermanence. Beyond the distinctions of noncodification and impermanence, however, there is no conceptually clear line between such provisions and "legislation." The court has impliedly recognized that GAB language is a *kind* of "legislation," by referring to more substantial kinds of policy-language as "*other* legislation." State v. Angle, 54 Ariz. 13, 21, 91 P.2d 705 (1939) (emphasis added); *see also Sellers,* 42 Ariz. at 245, 24 P.2d at 668 (§ 20 bars from the GAB "all legislation except, perhaps, that which is clearly incidental to or explanatory of a particular appropriation."); *cf. Carr,* 47 Ariz. at 441, 56 P.2d at 648 (GAB not "'legislation'" in the "strict" sense); *Sellers,* 42 Ariz. at 246, 24 P.2d at 669 (GAB not "legislation" in the "true" sense).

85. Such statutes make self-executing, "continuing" appropriations. Once enacted, they operate on an ongoing basis, without the need for any further implementing action by the legislature. *See, e.g., Carr,* 47 Ariz. at 441, 56 P.2d at 648 (continuing statutory appropriation for old age pensions); Rios v. Symington, 172 Ariz. 3, 8, 833 P.2d 20, 25 (1992) (examples of statutory appropriations); Callaghan v. Boyce, 17 Ariz. 433, 451, 153 P. 773 (1915) (no constitutional infirmity in continuing statutory appropriations).

86. State v. Angle, 54 Ariz. at 21, 91 P.2d at 708.

87. *Id.* at 21. As to the "voidness" of such material, see Caldwell v. Board of Regents, 54 Ariz. 404, 413, 96 P.2d 401 (1939); Sellers v. Frohmiller, 42 Ariz. at 247. Legislation violating the one-subject requirement of § 13 is also void. *Callaghan,* 17 Ariz. at 456, 153 P. at 781.

88. For the meaning of "appropriation," see *supra* section II *passim* of this Article. Material in a GAB not meeting the substantive criteria of an "appropriation" and not connected to an appropriation as a permissible incident or condition thereto, *see infra* section III.B.4 *passim,* would constitute impermissible legislation. *See* Jansen, *supra* note 5, at 188 ("substantive legislation ... cannot be combined into an omnibus bill. The Legislature may not put legislation

law relating to private activities would be barred. Even where the *subject* of a legislative provision might relate to the public-sector topics identified in the first sentence of section 20—state departments, institutions, schools, and interest on the public debt—any provision not plausibly connected to an *appropriation* for one of these stated purposes is forbidden by section 20.[89] Beyond this, the reach of the limitation on GABs becomes less clear.

3. Are "New" Appropriations Permissible in a GAB?

Not all appropriations found in GABs implement specific statutes contemplating recurring funding. Some appropriations are one-time only,[90] or may tend to be re-enacted (in session law form) from one legislative session to the next, notwithstanding their lack of a specific statutory basis.[91] The purpose and wisdom of such appropriations have not been initially authorized by the legislature in the form of a bill limited to that single subject. Thus, the danger of a "false" majority arises. Does section 20 permit the legislature to make such appropriations in a GAB?

In *Carr v. Frohmiller*,[92] the court observed, in dictum, that the object of the GAB was "to provide funds to meet *previously authorized* expenses" of government,[93] suggesting that the answer was no. This strict standard might be defended on a purist view of constitutional policy. Section 20 was designed to keep substantive provisions that might fail on their own merits from receiving a "free ride" into law.[94] This policy against *substantive* riders might also be applied to prohibit added-on *appropriations* not previously authorized. Such "pork barrel" appropriating can arise from opportunistic compromise as a budgetary version of logrolling. Thus, the logic of section 20 could suggest that the authorization to appropriate for a particular purpose, and perhaps even the amount of the appropriation itself, should always be enacted initially in the form of a single-subject separate bill. Only subsequently could the appropriation be treated in the GAB, *en masse*. This would assure that all spending decisions, like all substantive legislation, would (initially at least) command "true" majority support.

... into the general appropriations act, but must scrutinize these proposals on their own merits in separate bills, to avoid the combination of unrelated legislative goals in a single bill"); *id.* at 188–89 (conditions or restrictions on an item of appropriation, for example in a footnote thereto, must relate to the budget process).

89. Examples might include free-standing legal rules, efforts to create, modify or alter statutory entities or programs, and a host of other policy measures constituting "legislation." The Supreme Court of Louisiana, a state which, like Arizona, has a constitutional provision limiting the content of the general appropriation bill to appropriations only, *see supra* note 69, has articulated the standard as follows:

> It is not enough that a provision be *related to* the institution or agency to which funds are appropriated. Conditions and limitations properly included in an appropriation bill must exhibit *such a connexity with money items of appropriation* that they logically belong in a schedule of expenditures.

Henry v. Edwards, 346 So. 2d 153, 158 (La. 1977) (emphases added).

90. *See infra* notes 91–100 and accompanying text.

91. Of course, like appropriations implementing statutes, their amount may vary from one year to the next.

92. 47 Ariz. 430, 56 P.2d 644 (1936).

93. *Id.* at 441 (emphasis added).

94. *See supra* notes 67–73 and accompanying text.

In this view, a prior, self-executing constitutional restraint on any new legislative spending would complement the governor's authority to contain spending through the item veto power. Indeed, under such a rule, the justification for the item veto might diminish significantly. No appropriation could be made in a GAB unless the wisdom of its initial policy already had been subjected to *individual* veto in a one-subject bill; thus the "pork barreling" risk would seem to decline substantially.[95] If no "new" appropriations were permissible in a GAB, then the item veto in such bills would be limited to appropriations for previously authorized expenditures, where, under "pork barreling" theory, it is arguably least needed.

One commentator seems to take the view that section 20 does bar any "new" appropriations from GABs.[96] However, Arizona courts have assumed, without addressing the issue, that such a strict rule does not apply. For example, in *Rios v. Symington*, the Supreme Court upheld the governor's vetoes of several "new" appropriations contained in a general appropriation bill.[97] The parties and the Court apparently ignored the question whether it was permissible for the legislature to include such appropriations in a GAB in the first place.[98] The same was true both in older Supreme Court cases[99] and in a more recent decision by the Court of Appeals.[100]

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95. Of course, even if the initial *policy wisdom* of whether to commit the state to support a program was separately considered in a single-subject bill, the *amount* of later appropriations in the GAB would still be subject to "pork barreling" tactics endorsed by false majorities. Yet, the Arizona item veto authority is of no value in *reducing* amounts of particular appropriations. *See infra* notes 222–29 and accompanying text. Thus, if no new appropriations were allowed in a GAB, any item veto would, by definition, disapprove an appropriation for a program which a prior legislature and governor, and indeed the currently sitting legislature, had all determined should receive ongoing funding.

96. *See* Jansen, *supra* note 5, at 187–88:

> The general appropriations act authorizes funding for all current programs .... Proposals for spending on new programs ... cannot be combined into an omnibus bill. The Legislature may not put ... new spending into the general appropriations act, but must scrutinize these proposals on their own merits in separate bills ....

Id. Jansen relies solely on the constitutional text of §§ 13 and 20 for this view. Case law suggests it is not correct, or at least not strictly followed by the legislature or enforced by the courts. *See infra* notes 97–100 and accompanying text. It is possible that Jansen means something other than what his words suggest: That new spending programs *accompanied by permanent codifiable statutory language* (and thus contemplating ongoing support in future budget cycles) is prohibited by § 20. If this is his meaning, the statement is correct. However, the breadth of his language suggests otherwise.

97. Without analysis, the court ruled that the governor "clearly has authority" to item veto such "new appropriations" under art. V, § 7. Rios v. Symington, 172 Ariz. 3, 833 P.2d 20 (1992). The vetoed "new" appropriations were: an appropriation of $205,800 from the state charitable, penal and reformatory land earnings fund for stated purposes, Act of Mar. 28, 1992, ch. 4, § 86, 1992 Ariz. Sess. Laws 2461, 2488; an appropriation of $636,800 from the drug and gang enforcement account of the criminal justice enhancement fund for stated purposes, *id.*, § 90, 1992 Ariz. Sess. Laws 2491; and an appropriation of $734,200 from the racketeer influenced corrupt organizations (RICO) account of the department of public safety donation fund for stated purposes, *id.*; *see Rios*, 172 Ariz. at 10, 833 P.2d at 27.

98. The court simply asserted that new appropriations were able to be vetoed, noting that counsel for Senator Rios conceded that proposition at oral argument. *Id.* at 8.

99. Sellers v. Frohmiller, 42 Ariz. 239, 24 P.2d 666 (1933). *Sellers* involved a new appropriation (a salary for a new staff member to perform a new function) for an existing department (the governor's office). The court made no mention of the *newness* of the appropriation as problematic. Instead the court struck down the appropriation and its accompanying "legislative" provision on the basis that the latter was, impermissibly, more significant than the former. *See infra* notes 114–18 and accompanying text; *see also* Fairfield v.

Comparison with analogous provisions of other state constitutions lends force to the view that section 20 was not meant to bar all new appropriations from the GAB.[101] In addition, Arizona courts' acceptance (at least in dictum) of limited substantive conditions incidental to appropriations[102] might be seen as supporting this view.[103]

In any event, the strict view suggested by the language of *Carr* has not been implemented. This might be explained by judicial deference to legislative practice, or by a view that the governor's item veto power renders unnecessary any prior constitutional restraint on "new" appropriations. Further, on balance, the need for the legislature to respond promptly and efficiently to the vagaries of the state's budgetary needs, without enacting separate bills in each instance, may outweigh the risk of "pork barrelling" presented by added-on appropriations in GABs.[104]

A somewhat less restrictive view of section 20's impact on new appropriations, which nevertheless still significantly constrains the legislature, probably is sound and workable. In *Sellers v. Frohmiller*,[105] the case that *Carr* cited for its stringent view, the court limited the contents of the GAB to "a setting apart of the funds [along with incidental or explanatory language][106] necessary for the use and maintenance of the various *departments* of the state government *already in existence*."[107] Carefully read, this dictum would prohibit

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Foster, 25 Ariz. 146, 153–54, 214 P. 319 (1923) (discussing, without objection, an apparently new appropriation for a building at the University of Arizona made by Act of Mar. 25, 1919, ch. 174, § 40–A, 1919 Ariz. Sess. Laws 345, 370).

100. Litchfield Elementary Sch. Dist. v. Babbitt, 125 Ariz. 215, 608 P.2d 792 (Ct. App. 1980). In that case no one seems to have questioned the validity, on grounds of their newness, of the two appropriations for prisons in the GAB which were the subject of the litigation. *Id.* at 217 (citing Act of June 6, 1978, ch. 165, § 1, 1978 Ariz. Sess. Laws 495, 498).

101. *See* Ruud, *supra* note 56, at 417–18. Ruud notes that the provisions of some state constitutions limit the subject of general appropriation bills to the "ordinary expenses" of state government. He suggests that such language might be read as precluding "new" appropriations in GABs on the grounds that they are not (yet) "ordinary" and should first be adopted by separate bill. *Id.* He then observes that, by contrast, Arizona, in § 20, and three other states, in comparable provisions, lack the "ordinary expenses" limitation. He seems to conclude from this that there is no requirement in those states for prior independent adoption of appropriations. *Id.* at 418, 415 (discussing the constitutions of Alabama, Oklahoma, and Georgia, which appear to bar from GABs appropriations not already contemplated by existing statutes).

102. *See infra* notes 111–13 and accompanying text.

103. If all appropriations were required to be pursuant to existing statutory provisions—that is, if there were no such thing as permissible "new" appropriations in GABs—then arguably there would be no need or justification for such "incidental conditions." This is because permanent statutes would fully control the conditions of all expenditures. Indeed, in such circumstances the "conditions" would arguably constitute impermissible legislation, since they would in substance "amend" the statutes for the duration of the budget cycle. *See infra* notes 114–45 and accompanying text.

104. If the *Rios* Court, *see supra* note 97, meant to endorse new appropriations in the GAB, that step is not without irony. Elsewhere in the case the court reiterated that the purpose of the item veto was to prevent "pork barreling" by empowering the governor to avoid the binary choice of signing or rejecting, *in toto*, budgets with a mixture of good and objectionable elements. Rios v. Symington, 172 Ariz. 3, 833 P.2d 20 (1992). "New appropriations" in the GAB would tend to encourage legislative practices leading to "pork barreling"—thus tending to increase the need for the governor to exercise the item veto.

105. 42 Ariz. 239, 24 P.2d 666 (1933).

106. *See infra* § III.B.4 *passim* of this Article.

107. *Sellers*, 42 Ariz. at 246, 24 P.2d at 669 (emphases added) (dictum), (citing with approval Missouri v. Thompson, 289 S.W. 338 (1926)).

the creation of new governmental entities (or their abolition)[108], while permitting, without statutory change, new individual appropriations for temporary or one-time *activities or programs* of existing units. This appears to be the practice that the cases have left unexamined and uncriticized. This may be a reasonable balance to strike: it prohibits unduly sweeping new policy making in a GAB without flatly prohibiting the legislature from modifying the contents of the GAB as budgetary needs change.

4. The Permissible Reach of "Incidental" or "Explanatory" Language: How Far Can a GAB Go in Adopting Substantive Terms and Conditions Through Language Accompanying Appropriations?

The legislature sometimes adds instructions, provisos or conditions to appropriations in a GAB. Beyond the language minimally necessary to constitute an "appropriation"—an identified sum, specified purpose and spending authority[109]—any such language is, in a sense, "legislation" (albeit effective only for the duration of the budget cycle). Accordingly section 20 might be thought to prohibit it, given the risk of logrolling.[110] Nonetheless, in dictum, the Arizona Supreme Court repeatedly has articulated a limited exception for such provisions.[111] The exception was first recognized in *Sellers v. Frohmiller*:[112] Language accompanying an appropriation would be permissible if "incidental to or explanatory of" the appropriation.[113] In analyzing this exception, we consider, first, appropriations having novel purposes or contents, and second, recurring appropriations.

a. "New" Appropriations

In *Sellers*, a GAB contained a new salary appropriation for a staff position in the governor's office.[114] It was accompanied by a session-law provision requiring the governor—through the efforts of the new employee—to approve all state agency expenditures for operations and travel. The state auditor previously had performed this fiscal-control function pursuant to statute. The court ruled that the substantive language was not permissibly "incidental to or explanatory of" the salary appropriation it accompanied. Instead, the opposite was true: The language shifting the executive responsibility constituted the *primary* feature of the legislative enactment, while the appropriation for a staff salary was the truly "incidental" part.[115] Because such policy making, though "rightful and proper"[116] as a general legislative matter,

108. Creation of an agency, board or sub-unit thereof would likely involve significant statutory language, which would amount to nonnegligible "legislation." Abolishing such a unit would likewise require the repeal of general legislation—as much an act of "legislation" as the creation of new laws, and thus properly precluded from a GAB because of concern that the repeal could be enacted by a "false" majority. *See infra* notes 135–40 and accompanying text.

109. *See supra* notes 28–64 and accompanying text.

110. *See supra* notes 65–75 and accompanying text.

111. The court has never actually upheld language under this standard.

112. 42 Ariz. 239, 24 P.2d 666 (1933).

113. *Id.* at 245, 24 P.2d at 668–69.

114. *Id.*

115. *Id.* at 245–46, 24 P.2d at 668–69.

116. *Id.* at 245, 24 P.2d at 668–69.

was barred from enactment in a GAB by section 20, the court held the substantive "legislation" component void.[117]

Sellers might be read on its facts as prohibiting only those provisions in a GAB that would conflict with existing positive statutory law.[118] However, Arizona courts also have prohibited policy-oriented appropriation language in a GAB *absent* any existing statutes on the subject. In *Litchfield Elementary School District No. 79 of Maricopa County v. Babbitt*,[119] a 1978 GAB contained items appropriating money for two new prisons.[120] The Court of Appeals ruled, *inter alia*, that the governor, who lacked any existing constitutional or statutory authority to choose sites for prisons, could not derive such siting authority by implication from the appropriations, because "the appropriations process cannot be used for legislation."[121]

This reasoning, *a fortiori*, would prohibit the legislature from *expressly* granting siting authority to the governor in a GAB.[122] *Litchfield* thus stands for the proposition that significant new authority or policy accompanying an appropriation, *whether or not* it contravenes any existing positive law, cannot properly be created or conferred by a GAB, but instead must be handled through separate legislation.[123]

b. Recurring Appropriations Governed by Existing Statutes

Most appropriations in a GAB are recurring ones, enacted in each budget cycle to implement existing statutes.[124] In these circumstances, the legislature's adoption of any new session-law terms or conditions in a GAB implicitly amends the underlying statutes for the length of the budget cycle.[125] No such

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117. *Id.* at 248, 24 P.2d at 669–70. The court also declared the appropriation for the new employee invalid, since without the language creating the position, the appropriation for it was "stillborn." The court, therefore, ruled that the Auditor properly had rejected a salary claim by the governor's new secretary, as he had been appointed under invalid legislation.

118. Language in the case can be read this way: the GAB legislation operated to "change the policy of the state." *Id.* at 244, 24 P.2d at 667; *see also* Ruud, *supra* note 56, at 424 n.143, observing that *Sellers* can be read as voiding the GAB provision on two grounds: that it was "legislation" and that it was "contrary to the previous general law."

In *Sellers* there was no *express* reference in the GAB to the existing statutes from which the court discerned a policy change. An express reference (of repeal or amendment) would, of course, have been impermissible; it simply would have made the same problem more vivid. *See also* Andrews v. State, 53 Ariz. 475, 90 P.2d 995 (1939) (GAB's implied amendment of statute disapproved).

119. 125 Ariz. 215, 608 P.2d 792 (Ct. App. 1980).

120. Act of June 6, 1978, ch. 165, § 1, 1978 Ariz. Sess. Laws 495, 498.

121. *Id.* at 223. There could be "no implication of authority" from the items in the appropriations bill. *Id.*

122. If the legislature had specified the prison sites in the legislation, there would have been no impermissible "legislating" in the sense of giving new power to the governor. *See id.* at 223. A policy decision of this magnitude, however, may approach the limits of acceptability for language properly "incidental" to the appropriation it accompanies. *See infra* notes 141–45 and accompanying text.

123. It might be thought that, since *Litchfield* implicated the sensitive issue of the balance of power between the legislative and executive branches, this overstates the reach of the holding. However, to similar effect is Caldwell v. Board of Regents, 54 Ariz. 404, 96 P.2d 401 (1939), not involving such matters. *See infra* notes 130–34 and accompanying text.

124. *See supra* notes 76–84 and accompanying text.

125. The New Jersey Supreme Court has observed that, because the life of the general appropriation bill is "limited to its fiscal year, its effect upon inconsistent enactments could endure only for as long as itself endures. It is therefore more accurate to discuss such an effect in

"temporary amendatory" provisions accompanying appropriations that implement existing law have been upheld by Arizona courts.

For example, in *Andrews v. State*,[126] the Arizona Supreme Court held that an appropriation in a GAB, lacking a limiting condition found in an earlier statute on the subject, would not be read as lifting the restriction.[127] Furthermore, the Attorney General has opined that GAB provisions cannot *add* spending limitations to existing statutes (even where, on the facts, the two are not in overt conflict).[128] Thus it appears that language in a GAB can neither remove nor add conditions to spending provisions found in existing law.[129]

The Supreme Court reached a similar result in *Caldwell v. Board of Regents*[130] by applying the *Sellers* "incidental-explanatory" test. In the 1939 GAB, along with appropriations for the salaries of state employees, the legislature added a new session-law prohibition against employment of both husband and wife by the state.[131] Declaring this provision unenforceable, the court concluded that, far from being "'merely incidental and necessary to seeing that the money [for the state employee salary appropriations

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terms of *implied suspension* rather than implied repeal." City of Camden v. Byrne, 411 A.2d 462, 472 (1980).

126. 90 P.2d 995 (Ariz. 1939).

127. The statute authorized payment of state national guardsmen for duty performed *in the state*. The appropriation in the GAB lacking that limitation could not serve as a legal basis for paying guardsmen for out-of-state duty, since the specific statute "could not be thus amended in the appropriation bill." *Id.* at 997. Instead, it had to be enacted through "proper" legislation, *id.*, by which the court presumably means a separate, single-subject bill. On this point, *see also* Hudson v. Brooks, 62 Ariz. 505, 515, 158 P.2d 661 (1945) (an appropriation in a GAB cannot supersede a prior, continuing appropriation until the latter is "constitutionally repealed"—that is, presumably, via separate legislation) (dicta).

The GAB in *Andrews* created no affirmative conflict with prior law; such overt conflict is not needed to render the change impermissible policymaking. *See supra* notes 118–23 and accompanying text.

128. Op. Ariz. Att'y Gen. 78–224 (R77–209). The 1977 GAB made an appropriation for state financial aid to local health departments, inserting a footnote prohibiting use of state money for abortions or abortion referrals or counseling. *See* Act of May 31, 1977, ch. 150, § 1, 1977 Ariz. Sess. Laws 879, 902–05; *see also* Act of June 9, 1978, ch. 206, § 1, 1978 Ariz. Sess. Laws 996, 1008–10 (same provision, subsequent year's GAB). The Attorney General opined that this "note" constituted an "indirect attempt to modify or amend" the statute under which the appropriation was authorized and made, since that statute contained no such proscription. *See* ARIZ. REV. STAT. ANN. § 36–189 (1993), which authorized the appropriation for state aid to local health department services in the first instance. The Attorney General concluded that the new limitation was "obviously" not simply "'incidental' [to] or 'explanatory' of the appropriation" and therefore was barred by § 20; *cf.* Op. Ariz. Att'y Gen. 179–172 (R79–188) (assuming permissibility, under § 20, of a "proviso" to an appropriation for family planning which prohibited appropriation of general fund money to Planned Parenthood). The legislature did subsequently enact, in a separate measure, a prohibition on the use of "public funds or tax monies" for abortion. *See* ARIZ. REV. STAT. ANN. § 35–196.02 (1993) (originally enacted as Act of Mar. 7, 1980, ch. 8, § 20, 1980 Ariz. Sess. Laws 1095, 1108).

129. *See* Nevada *ex rel.* Abel v. Eggers, 136 P. 100, 103 (Nev. 1913) ("Unquestionably the Legislature has the power to abolish or restrict ... [a provision in existing law] or otherwise change the law, but the proper way for manifesting such an intent is by an amendment or repeal of the existing statute").

130. 54 Ariz. 404, 96 P.2d 401 (1939).

131. Act of Mar. 21, 1939, ch. 88, § 2, 1939 Ariz. Sess. Laws 277, 333. The newly-enacted prohibition applied to employees "on the pay rolls mentioned in this act." Thus, the prohibition would be applicable for the term of the biennium. The court did not mention them, but there were existing statutes relating to the payment of state employees' salaries which contained no such limitation. *See, e.g.*, ARIZ. REV. CODE § 2799 (1928); ARIZ. REV. CODE § 12–709 (1939).

was]...properly expended'",[132] it constituted a new substantive rule of qualification for state employment and therefore was void under section 20.[133] Unlike *Sellers*, the impermissible "legislation" in *Caldwell* was separable from the appropriations, so the appropriations survived and only the new rule was invalidated.[134]

Although a GAB cannot be used to repeal general legislation formally or expressly, in *Cochise County v. Dandoy*[135] the court upheld essentially the same result. *Cochise* held that the legislature's decision to deny completely funding for a previously-enacted statutory program did not amount to "a use of the appropriations function for legislative purposes."[136] The court failed to explain this conclusion, even though it recognized that funding was essential to the program's operation. Efforts to defend *Cochise* might be made on several grounds. One is unripeness.[137] Alternatively, the court might have noted that a failure-to-fund applies to one budget cycle and leaves intact the underlying statutes for future implementation. Because the legislative scheme is not permanently altered, there is an "abeyance" rather than a repeal.[138] Finally, the result of the case might be defended on fundamental grounds: a court should not enforce the budgetary expectations of a prior legislature against the contrary preferences of a currently-sitting one.

None of these arguments is entirely satisfying. To be consistent with its other applications of section 20,[139] the court should probably have recognized that where the legislature decides to provide *no funding whatsoever* to a statutory program—rather than merely reducing its levels—a "constructive repeal" is indeed effected. Under section 20's anti-logrolling policy, that result should be accomplished directly by independent, single-subject legislation expressly articulating the repeal.[140]

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132. *Caldwell*, 54 Ariz. at 411, 96 P.2d at 408.

133. The court appeared to have some doubt about whether the rule in question would have been constitutional even if properly enacted through independent legislation: "Whether the legislature may constitutionally enact such legislation *in any manner* is not necessary for us to determine in the present case." *Id.* at 411, 96 P.2d at 408 (emphasis added).

134. *See supra* note 117 and accompanying text. Indeed, in *Caldwell*, the nexus between the salary appropriations and the new policy restriction was sufficiently tenuous that the case might be thought of as one where the substantive rule was, in essence "free standing"—not connected to any appropriation—and thus impermissible on its face, without further inquiry. *See supra* notes 88–89 and accompanying text.

135. 116 Ariz. 53, 567 P.2d 1182 (1977).

136. *Id.* at 1185; *see also* LESHY, *supra* note 5, at 121.

137. Because the GAB does not make an appropriation contemplated by an existing statute does not guarantee the legislature will fail utterly to make any such appropriation, since it could still do so by a separate appropriation bill.

138. *See supra* note 125. Of course, this could continue indefinitely. Moreover, it does not address the possibility that the failure to fund, or abeyance, is a result of what might be called "negative logrolling," in which case a false legislative majority would be undoing the prior work of a true one. That result would seem to fall squarely within the policy of § 20's "no legislation" prohibition.

The court might also have argued, instrumentally, that section 20's rule against formal repeal by a GAB protects against the repeal (or amendment) of *non*-budgetary, as well as budgetary, legislation. Nonfunding decisions do not raise the threat of such a practice.

139. *See, e.g.*, State v. Angle, 54 Ariz. 13, 91 P.2d 705 (1939); *infra* notes 148–50 and accompanying text. Justice Gordon suggested the inconsistency in a dissenting opinion in *Cochise*, 116 Ariz. at 59–61, 567 P.2d at 1188–90.

140. Such a rule, superficially intrusive on the legislature's budgetary prerogatives, would actually be quite limited in application. If a legislature comes to disfavor a program, but not so

c. Conclusion and Standard

Because "incidental" legislative conditions to appropriations have never actually been upheld in Arizona, judicial approval of the practice, in dictum, has a somewhat hollow ring.[141] Such wisdom as this exception possesses, however, might be applied as follows.

First, under no circumstances should GAB language be given effect if it conflicts with existing law.

Second, when an appropriation is made to fund a program governed by existing statutes, virtually no "incidental" language should be accepted. In such a situation, the legislature already has enacted the terms and conditions of expenditure by independent, single-subject legislation, which commanded a "true" legislative majority. Any amendments thereto—and that is the impact of any new or changed terms or conditions—should be subject to the same requirement, rather than to the vagaries of non-majoritarian compromise inherent in omnibus budget legislation.[142] Therefore, only the most ministerial (as opposed to policy making) qualifications of the statute should be permitted.

Finally, where the appropriation is one *not* governed by existing statutes, the GAB alone controls the expenditure. In determining the permissibility of session-law language beyond the bare elements of an appropriation,[143] the "incidental-explanatory" standard requires inquiry into the importance of the language relative to the appropriation it accompanies.[144] Better still, only language that helps to define the *purpose* of the appropriation should be allowed. This would be consistent with the results in the reported cases, further the anti-legislative goal of section 20, and confine the analysis to the three-part test itself.[145]

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radically as to lead to its formal repeal, "underfunding" is probably a far more common strategy than outright refusal to fund. But since the *level* of funding is properly a matter of plenary legislative discretion, such decisions would be unreviewable by courts.

141. There are, however, examples from other states. These include a provision limiting per diem reimbursement to $5 per day; a provision authorizing employment of a clerk in the supreme court and appropriating salary money therefor; and a provision authorizing issuance of certificates of indebtedness to provide funds for appropriations made elsewhere in the appropriation bill for the payment of deficiencies and the construction of buildings. *See* Ruud, *supra* note 56, at 423. It is doubtful whether such "provisos" would be upheld under the Arizona cases dealing with the problem.

In general, courts have struggled to distinguish acceptable provisos or conditions from unacceptable substantive legislation. *See* 1986 RULES COMMITTEE REPORT, *supra* note 6, at 153–54. Because of the logrolling problem that accompanies the uncertainty, the strict standards recommended at *infra* notes 142–45 and accompanying text seem advisable.

142. This is true even though the amendment via GAB is only session law language lasting for the duration of the budget cycle. Any such change could be quite important, even if "temporary." Moreover, the change could be repeated virtually in perpetuity, resulting in a *de facto* amendment of the statute without "true" majority support.

143. An indicated sum, a stated purpose and an authority to spend; *see supra* section II of this Article, *passim*.

144. The tail ought not wag the dog. *See, e.g.*, Sellers v. Frohmiller, 42 Ariz. 239, 24 P.2d 666 (1933). Inquiry, likewise, might be made into the abstract substantiality or significance of the policy development: The "larger" or more important the policy, the more problematic its inclusion in a GAB. *See supra* notes 119–23, 130–34 and accompanying text.

145. Where the legislature *does* include language in a GAB constituting impermissible legislation, governors have sometimes purported to use the item veto to selectively delete it. The propriety of this "remedy" is explored in section IV.C. *passim* of this Article.

5. The Special Problem of Statutory Appropriations Affected by Appropriations in the GAB

The preceding subsection has dealt with the permissible impact of GABs where (a) there is no pre-existing law, and (b) there are pre-existing statutes that establish *terms and conditions* for expenditure without themselves making appropriations. Several troublesome cases deal with a different problem: appropriations in a GAB conflicting with statutes that make *continuing appropriations.*

In *Carr v. Frohmiller,*[146] the Court ruled that a GAB's sum-certain appropriation for pension benefits could not replace a continuing statutory appropriation, sum-sufficient in nature, for the same purpose. The statutory appropriation had been enacted as part of the program's original legislation, and established higher benefit levels than its would-be replacement. The court reasoned that a "mere" appropriation in the GAB could not have the effect of "amending or repealing or suspending a general law" in this fashion.[147] Similarly, in *State v. Angle,*[148] the court held that the legislature could not, by lesser appropriations in a GAB, reduce minimum wage rates established by a state agency pursuant to statute; this would impermissibly alter appropriations made by existing general law.[149]

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146. 47 Ariz. 430, 56 P.2d 644 (1936).

147. *Id.* at 444, 56 P.2d at 650. The rationale for this conclusion, however, is odd. The court did not appear to rely on § 20's prohibition of legislation in a GAB, under which the only proper way to modify prior substantive law would be by a separate, one-subject bill directly making the change. Instead, the court vaguely invoked "certain fundamental reasons." *Id.* The Court apparently was referring to the constitutional requirement that all bills address one subject, properly reflected in the bill's title; *see* ARIZ. CONST. art. IV, pt. 2, § 13, *supra* note 1. Since no repeal of the earlier law was mentioned in the GAB's title, none could be given effect. *Id.*

The titling component of § 13, like its counterpart in other states, is probably independent of the "one subject" component. The purpose of the "titling" component is to prevent fraud and surprise. The purpose of the one-subject component is to prevent "logrolling" and "riders," and to advance orderly legislative procedure. Ruud, *supra* note 56, at 391–92; *see also infra* text accompanying notes 162–78.

148. 54 Ariz. 13, 91 P.2d 705 (1939).

149. The "latest general law on the subject fixed the wages to be paid such employees at a certain figure," *id.* at 22, 91 P.2d at 709, and could not be altered by a reduced appropriation in the GAB. Reviewing the precedents, the court articulated the following standard:

> The general appropriation bill can contain nothing but the appropriation of money for specific purposes and such other matters as are merely incidental and necessary to seeing that the money is properly expended for that purpose only. Any attempt at any other legislation in the bill is void. An attempt, therefore, to repeal the general legislation [regarding minimum wages] ... in the general appropriation bill would necessarily be invalid and of no effect.

Id. at 21, 91 P.2d at 708. The statement (apparently dictum) in the last sentence of the standard seems to reject even the possibility of *express* repeal of existing legislation, not just the implied repeal presented by the facts of the case. *But cf.* Callaghan v. Boyce, 17 Ariz. 433, 153 P. 773 (1915); *infra* notes 151–61 and accompanying text.

A dissenting opinion argued, first, that the GAB appropriation applied to a group of state employees who were *not in fact covered* by the minimum wage statute, and whose salaries therefore were properly set by the GAB in each budget cycle; and second, that the state agency setting the minimum wage rates had no authority to set a wage higher than that adopted by the legislature. *Angle,* 54 Ariz. at 26–31, 91 P.2d at 710-12 (Ross, J., dissenting). Whether or not correct on the first point, Justice Ross fails in the second to explain how he would circumvent the "no legislation in the GAB" policy of § 20. *Cf.* State v. Ash, 53 Ariz. 197, 87 P.2d 270 (1939), holding a class of state employees (prison guards) ineligible for salaries payable to "manual laborers" under minimum wage statutes. The basis was that the legislature's recurring practice of making GAB appropriations for guards demonstrated that they were not covered by

Carr and *Angle* require procedural rectitude of the legislature when altering general law, even when appropriations alone are involved. They seem correctly decided under the anti-logrolling policy of section 20.[150] The earliest case on these matters, however, seems to run to the contrary.

In *Callaghan v. Boyce*,[151] the legislature used a GAB to repeal a number of continuing statutory appropriations, simultaneously making substitute session-law appropriations on the same subjects.[152] Apparently, the court found no section 20 prohibition against "legislating" such repealers-cum-appropriations in the GAB, and upheld them.[153]

One of the repealers in *Callaghan* presented a different issue. A statute had made a multipurpose, continuing appropriation for the state Board of Control. The GAB specifically appropriated an amount for *one* of these purposes—the salary of the board's citizen-member—but purported to repeal the *entire* earlier statute. The Court held that this repeal was effective only *insofar as it related to the scope of the new appropriation*—that is, the salary of the citizen-member—and void as to any other attempted repeal.[154]

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the statute. Analytically, the case establishes that it is permissible for the court to look to the GAB to assist in determining the meaning or reach of the general statute. In dictum, the court stated that the legislature may not repeal or modify general legislation in a GAB. *Id.* at 273. This statement seems to suggest that the guards were arguing that their lower, GAB-salaries were ineffectual "amendments" of minimum wage laws.

150. This view protects duly-enacted statutes against the possibility of modification by a "false majority" achieved in the appropriations process, which is one of the policy bases of § 20's prohibition against legislation in the GAB. *See supra* notes 65–75 and accompanying text.

A later case, Cochise County v. Dandoy, 116 Ariz. 53, 567 P.2d 1182 (1977), in substance authorized the "constructive" temporary repeal or abeyance of statutes by refusal to fund them in a GAB. I argue elsewhere that *Cochise* was wrongly decided and suggest a remedy. *See supra* notes 137–40 and accompanying text. One might try to reconcile *Cochise* with *Carr* and *Angle* by reading *Cochise* for the limited (and abstractly correct) proposition that a legislature cannot, *in substance*, "bind" a future legislature to particular policies or budget decisions. Under this view, *Cochise* simply does not address the proper *procedural* methods for making a change, which are dealt with by *Carr* and *Angle*. But *Cochise*'s inattention to the anti-logrolling policy of § 20 remains problematic.

151. 17 Ariz. 433, 153 P. 773 (1915).

152. The governor "item-vetoed" a number of these provisions on the ground that they exceeded legislative power under § 20. As to the propriety of such use of the item veto, *see infra* notes 230–56, and accompanying text.

153. Similar to *Carr v. Frohmiller*, *see supra* notes 146–47 and accompanying text, in the *Callaghan* court's view, the contents of a GAB were limited only by the *topics* identified in the text of § 20—the machinery of state government—and the related bill-*titling* requirement of section 13. The court ruled that matters in the GAB "not embraced within the subjects ... specified [by § 20], and properly connected therewith, are such subjects as are not expressed in the title [of the GAB], and are void for that reason, under section 13 ... of the state Constitution." *Callaghan*, 17 Ariz. at 456, 153 P. at 782. Otherwise, the court seemed to indicate no apparent difficulty in accepting "legislation" in the GAB: "The subject operated upon must be one falling within the purview of the General Appropriation Bill; otherwise the legislature has no power to *legislate* upon the subject under the title of and as a part of the General Appropriation Bill." *Id.* (emphasis added). Provisions in an appropriation bill not *connected to an appropriation* and not expressed in the title of the bill were "void" for these reasons, even absent an exercise of the item veto. I argue later, *see infra* notes 230–56 and accompanying text, that an item veto is formally improper as a remedy for such legislative action.

154. Thus a claim under the old appropriation for a chauffeur's salary (which was not a subject of the new appropriation) was upheld notwithstanding the purportedly complete sweep of the repealer language. Under section 13's requirement that bills address only "one subject and

Under *Callaghan*, therefore, a repeal in a GAB of a continuing statutory appropriation is constitutionally permissible, but only *if*, and *to the extent that*, the GAB contains a new appropriation on the same subject. A repeal can reach only as far as the substitute appropriation accompanying it.

Can *Callaghan* be reconciled with the later cases, which flatly prohibit the GAB's repeal or amendment of statutes (and none of which cite *Callaghan* with approval)?[155] *Callaghan* contains no exploration of the "no legislation" aspect of section 20.[156] The court simply may not have yet recognized, in this early case, section 20's full reach. If it had the court might not have allowed the repeal of existing statutory appropriations by a GAB. In this view, *Callaghan* has been impliedly abandoned. The anti-logrolling purpose of section 20 implicitly supports the correctness of this view: for a GAB to repeal or modify earlier statutes in any manner may result in a "false" legislative majority undoing the work of a prior "true" majority.

An alternative explanation recognizes some arguable merit in the outcome of *Callaghan* as a limited exception to the "no legislation" thrust of section 20. The appropriations whose repeal and replacement by the GAB the court upheld were continuing ones. It may be sensible budgetary policy to allow the legislature, in a GAB, to "amend" such appropriations,[157] at least to the limited extent of shortening their duration, especially if their other terms and conditions are not modified.[158] The *Callaghan* court itself, while recognizing the constitutional validity of continuing appropriations, expressed unease about their wisdom.[159] A recent Attorney General's opinion, though it makes no mention of *Callaghan*, seems consistent with its result.[160] Finally, there may be

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matters properly connected therewith," the repealer was void to the extent it reached beyond the subject of the appropriation it accompanied. 17 Ariz. at 460, 153 P. at 783.

155. *See, e.g.*, Hudson v. Brooks, 62 Ariz. 505, 515, 158 P.2d 661 (1945) (an appropriation in a GAB cannot supersede a prior, continuing appropriation until the latter is "constitutionally repealed"—that is, presumably, by means of separate legislation) (dictum); State v. Angle, 54 Ariz. 13, 91 P.2d 705 (1939); Andrews v. State, 53 Ariz. 475, 480, 90 P.2d 995, 997–98 (1939); State v. Ash, 53 Ariz. 197, 202, 87 P.2d 270, 273 (1939) (legislature may not repeal or modify general legislation in a GAB) (dictum); Carr v. Frohmiller, 47 Ariz. 430, 56 P.2d 644 (1936); Sellers v. Frohmiller, 42 Ariz. 239, 24 P.2d 666 (1933).

156. The same is true of *Carr v. Frohmiller*. *See supra* note 147 and accompanying text. Both cases turned on whether the contents of the bill were within the *subject-matter* scope of § 20 (state government) and, if so, whether they complied with the *bill-titling* requirements of section 13. Both would have been more satisfying if analyzed under of the anti-legislation provision of § 20. However, in *Carr*—unlike *Callaghan*—the *result*, at least, tracked the policy of later cases: the court preserved the existing statutory enactment and rejected its modification by later GAB language. *See supra* notes 146–47 and accompanying text.

157. *See* Ruud, *supra* note 56, at 425, apparently justifying the result in *Callaghan* on the ground that "to hold that a permanent appropriation law, one making a continuing appropriation, cannot be replaced by a provision in a general appropriation act would very seriously interfere with and impede the normal biennial appropriation process."

158. This might help distinguish *Carr*, in which the court read the GAB as changing such terms and conditions. *See supra* notes 146–47 and accompanying text.

159. The court observed, as a matter of policy, that continuing appropriations may be "dangerous and tend to open the doors of extravagance and directly lead to the squandering of the revenues." Callaghan v. Boyce, 17 Ariz. 433, 451, 153 P. 773, 780 (1915). Of course, as the court recognized, this is ultimately a matter of legislative discretion.

160. The Attorney General has opined that a GAB may permissibly change the duration of a prior (non-statutory) appropriation from non-lapsing to lapsing status, at least where it does not otherwise alter the earlier terms or conditions. Op. Att'y Gen. 93 (1981). A close reading of the Attorney General's assumptions may explain this apparently doubtful conclusion. He stated that the questioned GAB provision "only reverted monies allocated in a prior appropriation. This

some arguable importance in the fact that the repealers in *Callaghan* were *express*: The new appropriations accompanying them were unambiguously intended by the legislature to be substitutive. In no other reported case was this the legislative practice.[161]

Notwithstanding such distinctions, *Callaghan* strains for survival in the face of cases such as *Carr v. Frohmiller* and *State v. Angle.*

6. Concluding Observations

Arizona courts have articulated rules to implement the constitutional goal of preventing substantive legislation from being logrolled into enactment on the coattails of the general appropriation bill. Application of the rules, however, varies somewhat from their articulation. The rule against new appropriations in GABs seems, in practice, to be less stringent than has been thought. On the other hand, application of the rule allowing "incidental" legislative language to be attached to appropriations appears to be *more* strict than the courts have suggested in dictum. Judicial practice, in this instance, serves constitutional policy more soundly than does doctrine, and should be heeded by the legislature; the formulation of the rule probably should be altered accordingly. Finally, cases which endorse a GAB's express or implied repeal or modification of existing statutory appropriations seem wrongly decided, in light of the policies underlying section 20's prohibition of "legislation" in the GAB.

C. General Appropriation Bills and Others: the One-Subject Problem

Under section 20 the general appropriation bill contains numerous appropriations on a wide variety of subjects. All "other" appropriations are limited to a single-subject bill (although multiple appropriations can appear therein if they all relate to that one subject[162]).

The plenary general appropriation bill contemplated by section 20 is, by its very nature, a miscellany. It must be understood either as an implied

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action does not appear to constitute substantive legislation ...." Thus, in his view, *neither* the original appropriation (which was nonstatutory) *nor* its amendment (which changed duration only and no other conditions) was "legislation"; *both* were appropriations. There was thus no § 20 problem: no "general law" on the subject existed to be impermissibly modified, *and* the GAB change itself did not constitute substantive legislation.

161. Under this view the legislature could, in a GAB, repeal or modify earlier statutory appropriation legislation so long as it did so expressly; that action would be effective to the extent that it was within the topical scope of an accompanying appropriation. Such a practice, however, would be open to the kind of logrolling compromise on the amendment of substantive terms and conditions of appropriations which, I have argued elsewhere, section 20 should prohibit. *See supra* notes 141–42 and accompanying text. Moreover, this "express/implied" distinction is not consistent with the sweeping views articulated in the later cases, whose *facts* deal with only implied repeals and modifications, but whose *language* broadly proscribes any repeals and modifications in principle, whether express or implied. *See supra* note 155 and cases cited therein.

162. Litchfield Elementary Sch. Dist. No. 79 v. Babbitt, 125 Ariz. 215, 225, 608 P.2d 782, 802 (1980); *see also* Ruud, *supra* note 56, at 426–27 ("it seems clear that special appropriation acts may contain more than one item of appropriation .... Of course, the various items must all relate to one subject, object, or purpose.").

exception to the "one subject" requirement or as a *sui generis* (and somewhat artificial) "single subject" created by operation of law.[163]

In practice, despite section 20's reference to "*the* general appropriation bill," the legislature often adopts *more* than one "truly 'general'" appropriation bill in a budget cycle, each dealing therein with subsets of section 20 topics. An Arizona court has approved this practice.[164] What characterizes a permissible "partial-general" appropriations bill, and what (if anything) distinguishes it from a "separate" appropriation bill?[165] In *Litchfield Elementary School Dist. No. 79 v. Babbitt*,[166] the court of appeals reached the conclusion, on the dubious rationale of the single-subject rule, that in effect there is no difference between the two.

The *Litchfield* court confronted a bill containing seven sections. Several made individual appropriations to different state agencies for specified, unrelated purposes. The fifth appropriated money to the department of corrections for architectural fees for two new prisons (and for other specified

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163. The text of § 20 implicitly seems to exempt GABs from its one-subject requirement. *See, e.g.*, Jansen, *supra* note 5, at 187 ("The general appropriations act ... could be characterized as an unconstitutional omnibus bill if it were not specifically provided for in the constitution."). By contrast, § 13's one-subject requirement, governing "[e]very act", might be taken to apply even to GABs. However, the meaning of the two one-subject requirements is substantially the same. *See Litchfield Elementary Dist. No. 79*, 125 Ariz. at 225–26, 608 P.2d at 802–03; Black and White Taxicab Co. v. Standard Oil Co., 25 Ariz. 381, 389–95, 218 P.2d 139, 142–44 (1923); LESHY, *supra* note 5, at 121–22. Accordingly, there is no clear resolution of the problem at the formal level: One provision can be read to limit GABs to the "one subject" requirement, another to exempt it therefrom. In substance, though, this irresolution is not terribly significant.

Of eighteen states (including Arizona) whose constitutions limit the permissible contents of appropriation bills, seven (excluding Arizona) expressly exempt GABs from the one-subject rule. Ruud, *supra* note 56, at 413–14. Four other states *lacking* content-limitations on appropriation bills likewise expressly exempt the GAB from the one-subject rule. *Id.* at 416. In reality, such provisions probably should be thought of not as "exceptions" to the one-subject rule, but simply as declarations that the rule does not apply to appropriation measures. *Id.* at 416 & n.114, 433–34.

In any event, even in states, like Arizona, lacking an express exemption for GABs, such bills do not violate the general one-subject rule: "It is not seriously argued now that a general appropriations act violates the general one-subject rule; an act making appropriations for the operation of the various departments and agencies of government deals with a single subject even though a large number of appropriation items concerning the entire range of governmental programs is included." *Id.* at 437 (discussing those states which lack both express exemptions for GABs and "one-subject" requirements specific to appropriation measures).

164. *Litchfield Elementary Sch. Dist. No. 79*, 125 Ariz. at 224, 608 P.2d at 801; *see also infra* note 170. Further, while the legislature may use a single omnibus GAB to fund all the subjects identified in § 20, it is not required to do so. Op. Ariz. Att'y Gen. 20, 23 (1987) (appropriations for § 20 purposes "may" be combined in one general appropriation bill); Ruud, *supra* note 56, at 430–31. In the unlikely event it wished to do so, surely the legislature could enact *each* of the appropriations contemplated in § 20 by individual bills, each on one subject. The purpose of the "one subject" rule is to prevent logrolling, *Litchfield*, 125 Ariz. at 223–24, 608 P.2d at 800–01; Ruud, *supra* note 56, at 391, a danger that disappears when individual bills, each limited to a single subject, are under deliberation.

165. *See* ARIZ. CONST. art. IV, pt. 2, § 20. For the text of § 20, see *supra* note 1. Under Arizona's and many other states' constitutions, individual appropriation bills can contain substantive legislation. Ruud, *supra* note 56, at 427–29. The governor can use his item-veto authority on the *appropriations* provisions of both kinds of bills, but not on the substantive legislation of individual appropriation bills. *See* ARIZ. CONST. art. V, pt. 2, § 7. For the text of § 7, see *supra* note 2. *See also supra* notes 27–64 and accompanying text (what constitutes an "appropriation"); *infra* notes 193–207 and accompanying text (what constitutes an "item.").

166. 125 Ariz. 215, 608 P.2d 792 (Ct. App. 1980).

capital improvements to correctional facilities). The sixth directed the governor to select the sites of the new prisons, and reverted the architectural fee appropriations under section 5 if selection was not made by a given date. Section 7 prohibited (except as stated in section 6) the lapsing of the appropriations made under section 5.

The court refused to give this bill any effect whatsoever, ruling that it could not properly qualify as *either* a partial-general *or* an individual appropriation bill. The reason for both conclusions was the same: the bill was a "miscellany" lacking any "realistic commonality" of its elements or any "single 'general design' in...[its] various provisions.... Clearly, there is multiple subject matter."[167]

Multiplicity of subject-matter satisfactorily explains why, under the second sentence of section 20, the bill could not constitute an *individual* appropriation bill. It does not, however, justify the court's conclusion that the bill was not a permissible "partial"-general appropriation bill,[168] since "the" general appropriation bill contemplated by the constitution is not itself limited to a single subject.[169]

The court articulated a new test: in order to be acceptable as a partial-general appropriation bill, a measure must "'deal with all or substantially all of some segment of state activity, such as public free schools, higher education, or the judiciary.'"[170] The unrelated miscellaneous appropriations in question failed to meet this test.[171]

The policy basis of this test is not clear. As the *Litchfield* court recognized, the purpose of the "one subject" requirement is to prevent logrolling.[172] But logrolling of *substantive* legislation cannot occur in a bill characterized as a "general" appropriation bill—partial or plenary—since section 20 permits only *appropriations* in such a bill and renders other material

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167. *Id.* at 225, 608 P.2d at 802. For the same reason, the court held the bill impermissible under the constitution's general one-subject requirement, art. IV, pt. 2, § 13. *Id.* Given the multiplicity of subject matter, the court declined to inquire into what part of the bill was "dominant" in the interests of salvaging that part. Instead, it concluded that the proper practice was to strike down such measures in their entirety, rather than injecting courts into the inquiry of whether "logrolling" occurred by trying to ascertain "dominance." *Id.* at 226–27, 608 P.2d at 803–04.

168. Further, to require (as the court did) that a partial-general appropriation bill contain only one subject means, in substance, that it must meet the same criterion as an individual appropriations bill. Accordingly, there would seem to be little reason, in policy, to distinguish between the two with respect to whether they can contain legislation.

169. *See supra* note 163 and accompanying text.

170. 125 Ariz. at 224–25, 608 P.2d at 801–02 (quoting with approval Ruud, *supra* note 56, at 431). The examples of "partial-general" appropriation bills that the court approved each contained some kind of unity of subject matter (e.g., operational appropriations to state departments and institutions and for public schools; capital improvements and appropriations for new prison facilities; capital expenditures by the Board of Regents; and an "omnibus claims bill"). *Litchfield Elementary Sch. Dist. No. 79*, 125 Ariz. at 224, 608 P.2d at 801.

171. At a purely *formal* level there may be some basis for such a test. In effect, § 20 allows a *plenary* GAB to bypass the substance of the one-subject requirement. *See supra* note 163. Section 13, however, requires "Every act" to embrace but one subject. In that view, § 13 could be read as requiring unity of all bills *with the sole exception* of a plenary GAB; thus § 13's one-subject rule would apply to partial-GABs.

172. *Litchfield Elementary Sch. Dist. No. 79*, 125 Ariz. at 223–24, 608 P.2d at 800–01.

void.[173] And the risk of logrolling of *appropriations alone* would seem to diminish, rather than increase, in a partial (as compared with a plenary) GAB dealing with subsets of the section 20 topics, because of the smaller number of appropriations and topics involved. Thus, the "logrolling" rationale does not seem to justify the court's conclusion.

Furthermore, if a single bill made "complete" appropriations for (for example) public schools and the judiciary, it would address *two* subjects, thus violating the "subject matter unity" standard for partial-GABs articulated by the *Litchfield* court. But it is not clear, under a logrolling rationale, why such a bill should be held invalid, or even whether the *Litchfield* court itself would have so ruled.[174]

The result in *Litchfield* may, perhaps, be justified on other grounds. Some Arizona cases, including *Litchfield*, have understood section 13 as designed to prevent the "evils" of "omnibus," "surreptitious"[175] and also "'hodgepodge'" legislation.[176] The cases do not suggest what the "evils" of "hodge-podge" bills are, but they might be thought to include simple incoherence.

Beyond logrolling prevention, orderly legislative procedure has been identified as a secondary justification for state constitutional one-subject requirements.[177] Bills that seem randomly compiled, making various appropriations on different topics, are simply not an orderly way for the legislature to conduct its business. It may be difficult for legislators, the governor and the public to comprehend such bills, their relationship to one another and the overall state budgetary picture. *Litchfield* thus might be justified by a standard of *coherence* for partial-GABs. This standard would lead to the same result on *Litchfield*'s facts, permit greater legislative freedom to construct partial-general GAB's than the court's single-subject test would

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173. The court observed that §§ 6 and 7 of the bill, relating to the governor's siting authority, constituted "substantive legislation" (albeit nonstatutory). *Id.* at 225. Had the court found the bill a partial-GAB, therefore, it could and should have simply declared these legislative provisions void; *see supra* note 87 and accompanying text.

174. The court quoted Ruud, *supra* note 56, at 431, who suggests that such a bill would be impermissible. *Litchfield Elementary Sch. Dist. No. 79*, 125 Ariz. at 225, 608 P.2d at 802. But the logrolling concern underlying this conclusion, proffered by Ruud and embraced by the court, does not seem very persuasive in this context.

175. *See, e.g.*, State v. Espinosa, 101 Ariz. 474, 476, 421 P.2d 322, 324 (1966) (purpose of § 13 is to prevent "the surprise and evils of omnibus bills and surreptitious legislation by requiring the title of an act to generally inform the public of the act's contents"). In fact, "omnibus" and "surreptitious" legislation are two different problems addressed by two different clauses of § 13. *See* Ruud, *supra* note 56, at 391–92.

> The *one-subject* rule is aimed at logrolling; to prevent logrolling it limits each act to a single subject. If the act has unity, then the purpose of this rule is satisfied. The *title* requirement is designed to give interested persons notice of the subject of a bill and prevent deception through use of misleading titles. If the title gives adequate notice, the purpose of the title requirement is satisfied. *Two independent purposes are served by ... the two rules.* If the two purposes are fulfilled in the particular case, the act should be held valid.

Id. at 402 (emphases added).

176. *See, e.g.*, *Litchfield Elementary Sch. Dist. No. 79*, 125 Ariz. at 224, 608 P.2d at 801; Taylor v. Frohmiller, 52 Ariz. 211, 215–16, 79 P.2d 961, 963–64 (1938); Board of Control v. Buckstegge, 18 Ariz. 277, 284–85, 158 P. 837, 840 (1916); *In re* Dos Cabezas Power Dist., 17 Ariz. App. 414, 419, 408 P.2d 488, 493 (1972).

177. *See* Ruud, *supra* note 56, at 391.

allow,[178] and yet also protect the same constitutional values. Accordingly it seems a more satisfactory rationale.

IV. THE ITEM VETO POWER

A. Introduction and Historical Policy Purpose

Article V, section 7 of the Arizona Constitution permits the governor to veto one or more "items of appropriations" from "any bill" containing "several" such items.[179] In almost all instances the item veto has been used on *general* appropriation bills.[180] Governors have rarely applied it to single-subject appropriation bills containing more than one item of appropriation,[181] although that practice appears to be permissible.[182]

The item veto was adopted as part of the original State Constitution. In *Porter v. Hughes*,[183] the Arizona Territorial Supreme Court held that the governor lacked authority, under the federal legislation governing the Arizona Territory, to selectively veto an item of appropriation from a budget measure.

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178. The "coherence" standard would support the validity of a partial-general appropriation bill dealing with, for example, the two subjects of the judiciary and public schools. *See supra* text accompanying note 174. The joining of these two subjects may have an arbitrary quality, but it does not create any particular risk of logrolling of substantive provisions or appropriations, and can be readily understood by legislators, the governor and the public.

179. For the full text of art. V, § 7, see *supra* note 2. The authority to veto an item of appropriation from any bill containing several items of appropriation constitutes a "clear exception" to the general rule permitting only vetoes of entire bills. Callaghan v. Boyce, 17 Ariz. 433, 457–58, 153 P. 773, 782–83 (1915).

180. The complete list of item vetoes made in GABs since the time of statehood follows: Act of May 28, 1912, ch. 92, 1912 Ariz. Sess. Laws 580 (one veto); Act of Feb. 12, 1915, ch. 3, 1915 Ariz. Sess. Laws 4 (forty vetoes); Act of Mar. 20, 1917, ch. 90, 1917 Ariz. Sess. Laws 139 (seven vetoes); Act of Mar. 25, 1919, ch. 174, 1919 Ariz. Sess. Laws 346 (two vetoes); Act of Mar. 22, 1921, ch. 181, 1921 Ariz. Sess. Laws 440 (twelve vetoes); Act of Apr. 27, 1922, ch. 42, 1922 Ariz. Sess. Laws 271 (twenty-two vetoes); Act of Apr. 27, 1922, ch. 77, 1922 Ariz. Sess. Laws 249 (twenty vetoes); Act of Mar. 24, 1931, ch. 113, 1931 Ariz. Sess. Laws 366 (fifteen vetoes); Act of Mar. 27, 1941, ch. 122, 1941 Ariz. Sess. Laws 276 (eight vetoes, constituting entire budget for one agency); Act of Mar. 25, 1943, ch. 96, 1943 Ariz. Sess. Laws 246 (one hundred forty-four vetoes, all but one of which constituted the entire budget for one agency); Act of Mar. 31, 1947, ch. 142, 1947 Ariz. Sess. Laws 324 (four vetoes); Act of May 1, 1979, ch. 172, 1979 Ariz. Sess. Laws 596 (one veto); Act of Mar. 28, 1992, ch. 4, 1992 Ariz. Sess. Laws 2461 (ten vetoes); Act of July 13, 1992, ch. 2, 1992 Ariz. Sess. Laws 2569 (fourteen vetoes).

181. The complete list of item vetoes made in measures other than GABs follows: Act of Mar. 22, 1921, ch. 157, 1921 Ariz. Sess. Laws 388 (highway construction bill); Act of Mar. 20, 1923, ch. 76, 1923 Ariz. Sess. Laws 207 (highway construction bill); Act of July 10, 1947, ch. 36, 1947 Ariz. Sess. Laws 457 (travel authorization bill for secretary of state); Act of July 13, 1992, ch. 312, 1992 Ariz. Sess. Laws 1864 (six vetoes of changes to statutes relating to public finances); Act of Mar. 28, 1992, ch. 3, 1992 Ariz. Sess. Laws 2457 (six vetoes in fund transfer bill); *see also* vetoes discussed *infra* note 240.

182. Single-subject appropriation bills may contain more than one item of appropriation. *See supra* note 162 and accompanying text. The constitutional text does not limit the item veto to "the general" appropriation bill identified in § 20, but instead authorizes its use on "any" bill making multiple appropriations. *See, e.g.*, Dickson v. Saiz, 308 P.2d 205 (N.M. 1957) (veto from bill other than GAB permissible where constitution authorizes use of item veto in "any bill appropriating money"). Moreover, in policy terms, multiple items of appropriation relating to the same general subject could easily include one or more that the governor finds ill-advised. Since the item veto was designed to allow the governor to avoid "all-or-nothing" choices about appropriation measures, *see infra* notes 185–91 and accompanying text, the policy rationale seems applicable to such single-subject, as well as general, appropriation measures.

183. 4 Ariz. 1, 32 P. 165 (1893).

The governor was required instead to accept or reject the entire measure. The adoption of the item veto was meant to authorize the gubernatorial power disapproved in *Porter*.[184]

In an early case, *Fairfield v. Foster*,[185] the Arizona Supreme Court explored the "apparent purpose of the framers of the Constitution" in creating this selective veto.[186] The "evil they foresaw" was the same that had prompted many other states to adopt similar provisions: legislative "pork barreling"[187] in appropriation bills. Legislatures, in the court's view, tended to combine many matters of varying worthiness in the same measure.[188] With only a binary option—the all-or-none veto—the governor could not combat this tendency, because he was confronted with the Hobson's choice between vetoing an entire budgetary measure notwithstanding its worthy elements (thereby halting the machinery of government) and signing it into law notwithstanding its objectionable features.[189] The *Fairfield* court concluded: "In plain English, they [the framers] wished the Governor to have the right to object to the expenditure of money for a specified purpose and amount, without being under the necessity of at the same time refusing to agree to another expenditure which met his entire approval."[190]

Thus the item veto was designed to enable the governor to selectively restrain undesired expenditures.[191]

B. What Properly May Be Vetoed: Legislative Primacy in Budget Making

1. The Meaning of "Item"

Because the governor can veto only "items" of appropriation, the meaning of that term, along with "appropriation,"[192] defines the scope of the veto authority. The first exploration of "item" came in 1915, in *Callaghan v. Boyce*.[193] The governor vetoed from a general appropriation bill numerous appropriations, as well as language repealing prior statutory appropriations on the same subjects. This left the original statutory appropriations intact. The court sustained these vetoes, holding that a new appropriation combined with

184. Callaghan v. Boyce, 17 Ariz. 433, 458, 153 P. 773 (1915).
185. 25 Ariz. 146, 214 P. 319 (1923).
186. *Id.* at 152, 214 P. at 321.
187. *Id.* at 152–53, 214 P. at 321–22.
188. *Id.* Section 20, of course, bars substantive legislation from GABs and limits the permissible *subjects* of appropriation therein, *see supra* notes 76–161 and accompanying text, and § 20 and § 13 limit all other bills to a single subject, *see supra* notes 162–178 and accompanying text. Thus the constitution independently helps to constrain the worrisome legislative practices.
189. Like the President, who had no item-veto power, the Governor would then be forced to choose between taking "the nauseous dose [of the objectionable parts of appropriation bills] to the last drop," or suspending the operations of government. 25 Ariz. at 153, 156–57, 214 P. at 322–23.
190. *Id.* at 153, 214 P. at 322.
191. *See* J.R. MURDOCK, THE CONSTITUTION OF ARIZONA 78 (1929) (under item veto power governor can selectively veto "questionable public expenditures"; the power "permits him to use the 'pruning knife' on bills appropriating public money and enables him to economize greatly.").
192. *See supra* section II of this Article *passim*, discussing "appropriation."
193. 17 Ariz. 433, 153 P. 773 (1915).

the repeal of a former one on the same topic *together* constituted an "item" of appropriation.[194]

Callaghan also addressed instances in which the governor let new GAB appropriations stand, but vetoed language repealing prior appropriations on the same subjects, in effect giving life to both. The court struck down these vetoes on grounds of inseparability. It concluded that the repealers, by virtue of their nexus with the new appropriations, could not validly be split away by the veto pen.[195] As to this second group of vetoes the court might have given an alternative—and arguably clearer—rationale: Because repealer language standing alone makes no "appropriation,"[196] it cannot meet the conditions of article V, section 7—that vetoed material must constitute an "item *of appropriation.*" In addition, it should be noted that the net outcome of these purported "vetoes" would have been to increase state spending authority. This would hardly have served either the expenditure-constraining purpose of the item veto later recognized in *Fairfield v. Foster*,[197] or the notions of legislative primacy in budget making emphasized in later cases.[198]

Under *Callaghan*, all "incidents" of a particular appropriation—that is, all provisions of the bill on that topic—should be considered integral with and part of the same "item."[199] Separation of powers principles underlie this notion. It is clear from reading the bill in *Callaghan* that the legislature intended the appropriations vetoed from the GAB to wholly replace prior appropriations on the same topics. Thus, it was *legislative* policy that tied the repealers to the new appropriations. Where the governor treated these provisions as "distinct," "separable," or on "different subjects" by splitting them apart through use of the veto, he acted beyond his authority.[200]

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194. *Id.* at 458–59, 153 P. at 782–83. The court viewed the repeals as "incidental" to the appropriations and thus a part of the item. *Id.* at 459–61, 153 P. at 783–84. The governor had made a number of such vetoes in that year's GAB. Act of July 9, 1915, ch. 3, § 44, 1915 Ariz. Sess. Laws 4, 43, 57; *id.*, § 1, 1915 Ariz. Sess. Laws 50, 61; *id.*, § 1, 1915 Ariz. Sess. Laws 54, 62; *id.*, § 1, 1915 Ariz. Sess. Laws 52, 65; *id.*, § 1, 1915 Ariz. Sess. Laws 51, 66.

195. 17 Ariz. at 459–61, 153 P. at 783–84. The Governor attempted a number of such vetoes. Act of July 9, 1915, ch. 3, § 1, subd.'s 10, 12, 14, 15, 56, 57, 58, 72, 74, 77, 78, 79, 82, 84, 86, 87, 88, 90, 99; §§ 2, 4, 7, 8, 17(c), 35, 43.G, 1915 Ariz. Sess. Laws 4, 49.

The *Callaghan* court approved repeals, by the GAB, of appropriative statutes. *Callaghan*, 17 Ariz. at 456, 153 P. at 782. The constitutional validity of such a practice is doubtful under the "no legislation" provision of section 20 which later cases developed. *See supra* notes 146–61 and accompanying text. However, *Callaghan* still seems useful for its guidance as to the meaning of "item."

196. *See supra* notes 27–64 and accompanying text.

197. *See supra* notes 185–91 and accompanying text.

198. *See supra* note 3 and cases cited therein.

199. *Callaghan*, 17 Ariz. at 458, 153 P. at 782–83.

200. On separation of powers in Arizona government, *see generally* Leshy, *supra* note 5, at 84–85 (discussing Article III of the Arizona Constitution). Of course, such separation of powers notions apply at the federal level as well, notwithstanding the absence of express constitutional provision on the subject:

> In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952).

Fairfield v. Foster,[201] decided a few years after *Callaghan*, strengthens this view. Without any discussion of the holdings in *Callaghan*, the Arizona Supreme Court stated that the governor could not veto a "condition or proviso" while leaving undisturbed the appropriation to which it was attached.[202] The reason was that the latter "would be affirmative legislation without even the concurrence of the legislature."[203] The resulting change could not be given effect because it was not what the legislature enacted and might well constitute something the legislature would not have approved.[204] Based on separation of powers notions, most states have taken comparable positions on the veto of

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201. 25 Ariz. 146, 214 P. 319 (1923).

202. *Id.* at 153, 214 P. at 322 (dictum); *see also* Black and White Taxicab Co. v. Standard Oil Co., 25 Ariz. 381, 400–04, 218 P. 139, 146–47 (1923) (governor's veto of the provisions of a property tax levy allocating 25% thereof to state and 75% to counties held ineffectual because it constituted attempt to veto "condition or proviso" while leaving appropriation itself alone); Op. Ariz. Att'y Gen. I79–172 (R79–188) (1979) (same principle).

203. Fairfield v. Foster, 25 Ariz. 146, 153, 214 P. 319, 322 (1923). Here, in passing, *Fairfield* uses language suggesting a distinction based on "negative" (permissible) versus "affirmative" (impermissible) partial vetoes. *Fairfield*, 25 Ariz. at 149, 153, 214 P. at 320, 322. Over the years, some courts have become skeptical about their ability to distinguish vetoes on this basis in all circumstances, since in one sense every veto has an affirmative effect, by creating a result different from the one contemplated by the legislature. *See, e.g.*, 1986 RULES COMMITTEE REPORT, *supra* note 6, at 28; Fisher & Devins, *supra* note 6, at 172; Wisconsin *ex rel.* Kleczka v. Conta, 264 N.W.2d 539, 557–58 (Wis. 1978) (Hansen, J., concurring and dissenting, criticizing "affirmative/negative" distinction); Washington Fed'n v. Washington, 682 P.2d 869, 874 (Wash. 1978) (affirmative/negative distinction a "conclusion, not a test."). In general it has proven difficult to consistently apply such formulaic approaches. *See* 1986 RULES COMMITTEE REPORT, *supra* note 6, at 15–16.

Formulaic analysis, however, does not seem to characterize the Arizona cases, with the possible exception of Rios v. Symington, 172 Ariz. 3, 833 P.2d 20 (1992). *See infra* notes 257–82 and accompanying text. First, the *Fairfield* court did not rely on the "affirmative/negative" distinction in a mechanical way. Instead, it applied it in connection with an exploration of substantive issues of legislative and gubernatorial power and their proper separation. Second, the court has carefully defined the meaning of "item" and "appropriation" and, in general, has limited permissible vetoes to such matters. This approach itself has very significantly constrained the range of gubernatorial discretion in exercising the partial veto. Finally, the *Fairfield* "affirmative/negative" standard has not been repeated. For a suggested analytic framework expanding on the separation of powers approach, *see infra* section IV. B. 4. *passim* of this Article.

204. *Fairfield*, 25 Ariz. at 153–54, 214 P. at 322. As an example of a proper veto, the court referred to the governor's veto of both an appropriation (for a girls' dormitory at the University of Arizona) and a related condition or proviso thereto (that a like sum be raised by outside contributions). (Though no cite is given, this provision can be found at Act of Mar. 25, 1919, ch. 174, § 40–A, 1919 Ariz. Sess. Laws 345, 370). It would have been improper for the governor to veto the condition alone and let the appropriation stand, because "the legislature might well have been willing to have spent a certain amount for the given purpose, if others would do likewise, but been utterly averse to the unconditional appropriation." 25 Ariz. at 154, 214 P. at 322 (dictum). Thus the impropriety in a gubernatorial veto of a proviso or condition is its potential inconsistency with the legislative will.

Later cases underscore this approach. In Millett v. Frohmiller, 66 Ariz. 339, 345, 188 P.2d 457, 462 (1948), referring to *Black and White Taxicab Co. v. Standard Oil Co.*, the court described an attempt to veto a proviso and let the appropriation stand as "an improper exercise by our chief executive of legislative powers." *Id.* In McDonald v. Frohmiller, 63 Ariz. 479, 489, 163 P.2d 671, 675 (1945), the court observed that lawmaking power in Arizona is composed of the two houses and the governor, "and all laws, either creating or repealing, must have the approval of all three of these branches of the lawmaking power.... [W]hile they, *acting together*, may change or alter the law so made at their pleasure, it takes all three of them *concurring* to make the alteration." *Id.* (emphases added). A governor's change of terms and conditions undermines concurrence.

provisos or conditions,[205] and on other "creative" use of the item veto power to change the meaning or impact of legislation,[206] though there are noteworthy exceptions.[207]

2. How Much (or Little) Itemization—and Who Decides?

The specificity of a legislative budget affects the usefulness of the item veto. The more "itemization" there is, the greater the opportunity for selective gubernatorial excision of particular appropriations. Conversely, the more the budget resembles one or more "lump sums," the more limited the capacity to use the item veto. This section explores the construction of budgets in relation to this problem.

In *Fairfield v. Foster*[208] the court ruled that the salary of a rate clerk individually set forth in the GAB, rather than the appropriation for the entire agency (the corporation commission) of which it was an element, constituted an "item"[209] and was thus subject to a proper veto. In so ruling the court rejected

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205. *See, e.g.*, 1986 RULES COMMITTEE REPORT, *supra* note 6, at 148–52 (discussing both the majority view (prohibiting the striking of instructions, provisos, limitations or conditions accompanying appropriations) and the minority view (allowing the practice)). Where gubernatorial authority to strike conditions or provisos *is* recognized, such vetoes do not serve as a "tool of fiscal restraint" (since they do not reduce overall expenditures), but "merely enable[] the governor—for good or for ill—to replace the legislature's priorities with his own." Bellamy, *supra* note 6, at 568. In such circumstances, the governor's "ability to design and implement public policy is greatly increased and the role of the legislature is simultaneously diminished." *Id.* at 569.

206. "Creative" use of the veto by striking out words, phrases or sentences so as to alter meaning of legislation is not permitted by most states. *See* 1986 RULES COMMITTEE REPORT, *supra* note 6, at 159–60.

207. The most dramatic counter-example is Wisconsin. There the court permits a very wide range of partial vetoes that change the meaning of legislation, so long as what *remains* after the veto is a "complete, entire, and workable bill." Wisconsin *ex rel* Wisconsin Senate v. Thompson, 424 N.W.2d 385 (Wis. 1988) (citing Wisconsin *ex rel.* Kleczka v. Conta, 264 N.W.2d 539, 552 (Wis. 1978)). Most recently, the Wisconsin Supreme Court allowed the governor to delete phrases, provisos, words and digits from omnibus budget legislation under this standard. *Id.* Wisconsin views the purpose of the item veto as not limited to preventing logrolling, but as contemplating a "legislative" role for the governor in the omnibus budget bill process. *Id.* The practices just noted have withstood federal constitutional challenges on several grounds. Risser v. Thompson, 930 F.2d 549 (7th Cir. 1991), *reh'g. den., cert. den.*, 112 S. Ct. 180 (1991); *see also* Wisconsin *ex rel.* Kleczka v. Conta, 264 N.W.2d 539 (Wis. 1978), discussed in the 1986 RULES COMMITTEE REPORT, *supra* note 6, at 152, 160; Wisconsin *ex rel.* Sundby v. Adamany, 237 N.W.2d 910 (Wis. 1976). For review of the Wisconsin practices, see Mary E. Burke, Comment, *The Wisconsin Partial Veto: Past, Present and Future*, 1989 WIS. L. REV. 1395; Arthur J. Harrington, *The Propriety of the Negative—The Governor's Partial Veto Authority*, 60 MARQ. L. REV. 865 (1977). For another state's deference to the political process on resolving the scope of the item veto, see Washington Fed'n v. Washington, 682 P.2d 869 (Wash. 1984).

208. 25 Ariz. 146, 214 P. 319 (1923).

209. *Id.* at 154. The GAB, Act of Apr. 27, 1922, ch. 42, 1922 Ariz. Sess. Laws 271, contained, *inter alia*, the following provisions:

> Sec. 1. The following sums herein set forth are hereby appropriated
> ....
> Subdivision 5. For the Corporation Commission:
> For Salaries and Wages $53,880
> ....
> For the following positions not to exceed the annual rates herein specified:
> ....
> 1 Rate Clerk $2,100 per annum
> ....

an invitation to conclude that the salary line was merely a "direction"—binding, but not itself subject to veto—for the expenditure of the larger sum.[210]

The court's conclusion was based in part on the dictionary[211] but, more centrally, on the policy underlying the item veto. To force the governor to choose between vetoing and approving only aggregate sums, where their individual elements were nonetheless specified in the budget, would resemble the very binary dilemma the item veto was designed to avoid: disapproving an entire budget bill notwithstanding the virtues of some of its components, or signing it notwithstanding the flaws of other parts.[212] The court seemed especially concerned that this would encourage the legislature to write budgets detailed and binding in fact, but whose specifics, considered as "directions" rather than individual "items," would not be reviewable, such that the "special veto [was] practically abolished."[213]

Fairfield focused on the threat of legislative subterfuge to circumvent the item veto. As a result, the opinion might be read as suggesting that the legislature is not free to constrain the item veto straightforwardly, by the use of lump sum appropriations *without* detailed "directions."[214] In fact, there is no

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For Operation	$11,000
For Travel	$5,000
For Office Equipment	$500
For Contingencies	$2,500
Total	$72,880

Id. at 273–74. The governor vetoed the entry for the rate clerk (and a number of other salaried positions). The issue was whether that veto—rather than a veto of the entire agency appropriation ($72,880) or the salary section ($53,880)—was permissible. The governor also had vetoed the "For Contingencies" line. *Id.* at 268–70.

210. *Id.* at 154–55; *accord,* People *ex rel.* Illinois Bd. of Agric. v. Brady, 115 N.E. 204 (Ill. 1917); *see also* Welden v. Ray, 229 N.W.2d 706 (Iowa 1975) (discussing same point in dictum).

211. The court offered a dictionary definition of "item" as a "'separate particular in an enumeration account or total,'" *Fairfield,* 25 Ariz. at 155–56, 214 P. at 322–23.

212. To take the larger sum as the "item" and its constituent elements only as "directions," not subject to veto, would render "utterly nugatory" the policy purpose of the item veto. *Id.* at 156, 214 P. at 323.

213. *Id.* at 157, 214 P. at 323. The court said:

> If we follow that line of reasoning, the legislature may simply make a separate appropriation in any lump sum for each department, or, by proper language in the general appropriation bill, consolidate the funds for almost the entire state government, and, under guise of "directing" the expenditure of the money, limit its application to matters and amounts which the Governor believes to be highly injurious in part to the best interests of the state, practically compelling him to choose between abandoning the veto power, or suspending the operations of the government, thus nullifying the provisions of the Constitution under consideration, and going back to the very conditions its makers sought to avoid.

Id. at 156, 214 P. at 323. There is a rough analogy here to federal budgetary practices, in which Congress often makes formal appropriations for Presidential signature in rather general terms, leaving the details in Committee reports and other materials that do not constitute "law" and do not reach the President's Desk—and are thus insulated from review. *See* 1986 RULES COMMITTEE REPORT, *supra* note 6, at 86.

214. *See, e.g.*, 1986 RULES COMMITTEE REPORT, *supra* note 6, at 20, 61 (ambiguous reading of *Fairfield*). In fact, *Fairfield* does not constrain the legislature with regard to the specificity of budgets. It simply holds that the legislature cannot have it both ways: it cannot produce a highly detailed budget, binding on the executive, and at the same time define those details as something other than "items", so as to avoid their amenability to veto. *See* Fisher & Devins, *supra* note 6, at 173 (correct reading of *Fairfield*). On the relationship between lump-sum appropriating and the merits of the "item-reduction" veto, *see also infra* note 229.

restriction on lump sum appropriations,[215] as later courts have recognized,[216] and the practice remains quite common.[217]

Competing political pressures probably check any legislative tendency to vitiate the item veto power through lump-sum appropriations. If the legislature writes a budget of relatively general appropriations, the executive branch then has greater discretion over how to allocate the appropriated funds within those general categories.[218] If, on the other hand, the legislature opts to "micro-manage" executive spending by writing a detailed budget of specific items that would limit the governor's discretion over how to spend,[219] then those details, under *Fairfield*, are subject to individual gubernatorial disapproval. From the legislature's viewpoint, the competing goals of greater control over spending and greater insulation from gubernatorial review, which flow from these two models of budget making, probably operate to constrain both extremes.

Moreover, judicial intervention in this area could be problematic. Standard setting on the degree of required itemization in a budget could raise difficult problems of justiciability[220] and involve the court in extensive oversight of the budget making process.[221]

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215. Current statutes governing the budgetary process impose on the *governor* certain obligations of specificity and itemization in preparing his budget request to the legislature. *See* ARIZ. REV. STAT. ANN. §§ 35-101, 35-111 to 35-119 (1990 & Supp. 1993). There are not, however, any corresponding obligations on the *legislature* to draft or enact the general appropriation bill at any particular level of specificity or itemization, or in any particular form. *Id.*; *see also* ARIZ. REV. STAT. ANN. § 41-1272 (1992) (powers and duties of joint legislative budget committee); ARIZ. REV. STAT. ANN. § 41-1273 (1992 & Supp. 1993) (committee budget analyst).

216. *See* Board of Health v. Frohmiller, 42 Ariz. 231, 23 P.2d 941 (1933). In that case the legislature had, in the general appropriation bill, made some lump sum appropriations to state agencies and left their expenditure in the agencies' discretion,

> rather than itself fixing the number of employees and their salaries, or segregating operation into different items, etc., leaving this detail to the institution, department, or office. This method of appropriating the public funds is not one that commends itself, inasmuch as it is so easy to abuse the trust confided by using the funds intended for one purpose for another and different purpose, *but we know of no rule that prohibits the Legislature from reposing the discretion and power in such departments, institutions or offices.*

Id. at 235-36, 23 P.2d at 942 (emphasis added); *see also* Hutchins v. Swinton, 56 Ariz. 451, 456-57, 108 P.2d 580, 583 (1940); Op. Ariz. Att'y Gen. 20 (1987).

217. Lump sum appropriations are part of the budgets of numerous state agencies enacted annually in the General Appropriation Bill. *See, e.g.*, Act of June 28, 1991, ch. 287, 1991 Ariz. Sess. Laws 1467, *passim*, including, *inter alia*, Department of Administration, *id.*, § 2, 1991 Ariz. Sess. Laws 1467; Attorney General, *id.*, § 4, 1991 Ariz. Sess. Laws 1468; Department of Commerce, *id.*, § 12, 1991 Ariz. Sess. Laws 1470-71; Department of Agriculture, *id.*, § 35, 1991 Ariz. Sess. Laws 1482-83; University of Arizona, Arizona State University, and Northern Arizona University, *id.*, §§ 76-78, 1991 Ariz. Sess. Laws 1491-93; Department of Public Safety, *id.*, § 90, 1991 Ariz. Sess. Laws 1502.

218. Given legislative and public concerns over bureaucratic accountability, the legislature can probably be expected not to relinquish utterly budgetary control in this fashion.

219. If the governor had not vetoed the salary in question in *Fairfield*, the executive branch would not have had general discretion to refuse to hire the clerk whose salary the item appropriated, or to pay him a lesser amount. This conclusion arises from the constitutional requirement that the governor "faithfully execute" the laws (ARIZ. CONST. art. V, § 4) and from the principle that the governor has no authority to impound legislative appropriations. Rios v. Symington, 172 Ariz. 3, 833 P.2d 20 (1992) (discussed at *infra* notes 283-99 and accompanying text).

220. The plausible standards for judicial intervention seem few and unsatisfactory. For example, a court might require the level of "itemization" contained in ARIZ. CONST. art. IV, pt.

For these reasons, the generality or specificity of the budget, notwithstanding the attendant implications for the governor's item veto power, should be left to the discretion of the political branches.

3. Item Reduction Authority

In *Fairfield v. Foster*[222] the court rejected, in dictum, a view of the item veto broad enough to allow the governor to *lower or otherwise alter the amount* of an appropriation, rather than to strike it out entirely.[223] In elaborating its view of the Arizona provision the court refused to follow the Pennsylvania Supreme Court, which had found such "item reduction" power implied in constitutional item veto language similar to Arizona's.[224]

Item reduction authority would serve the expenditure-constraining policy purpose of the item veto articulated by the *Fairfield* court. However, it also increases the governor's influence in the budget making process;[225] tends to

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2, § 20 of the constitution (that is, separate budget entries for "the different departments of the state, ... state institutions, ... public schools, and ... interest on the public debt"). These, however, would be unhelpfully general lump sums. Alternatively, a court might require that the budget be itemized to the degree of specificity represented by all statutes creating the particular agencies, programs, funds and accounts with which the appropriations process annually deals. Or, more aggressively, a court could impose on the legislature the same degree of required budgetary itemization which the legislature has imposed by law on the governor. *See supra* note 215. Such approaches might ensure some reasonable degree of specificity, and might help avoid the courts' generating their own standards for the requisite degree of "itemization," since the framework would exist in current legislative product. However, any such steps would require the judiciary to supervise budgetmaking to a problematic degree. Further, even assuming workable standards, judicial authority for such oversight is doubtful. Finally, the costs in relationships among the branches might not be worth any putative gain in protecting the item veto against legislative manipulation.

221. *See, e.g.,* Rios v. Symington, 172 Ariz. 3, 833 P.2d 20 (1992). In *Rios*, the court accepted original jurisdiction in a dispute over the scope of the governor's item veto authority, notwithstanding the legislature's failure to exhaust political remedies by first taking an override vote on the disputed items. But the court cautioned that it "did not do so lightly," and was wary of becoming a "referee" in the annual power struggle between the legislature and the governor over the budget.

222. 25 Ariz. 146, 214 P. 319 (1923).

223. *Id.* at 157, 214 P. at 323 (dictum).

224. In Commonwealth *ex rel.* Attorney Gen. v. Barnett, 48 A. 976 (Pa. 1901), the court approved a governor's *reduction in amount* of an appropriation in a GAB, notwithstanding the absence of any express authority to that effect in the constitutional language creating the item veto power. A dissenting opinion argued persuasively that the item veto provision was unambiguous in authorizing the governor to veto an "item" rather than "a fractional part" thereof. *Id.* at 985. The dissent also argued that finding an implied item-reduction power authorized gubernatorial infringement on the legislative "constitutional prerogative" to determine the amounts of appropriations. *Id.* at 986. The Arizona court likewise believed that such a rule "would transform the merely negative legislative power of the Governor into an affirmative one, and that it would be in consonance with neither the plain language of the Constitution nor the purpose of its makers." *Fairfield,* 25 Ariz. at 157, 214 P. at 323.

The Pennsylvania decision seems to be unique. Ten states have *express* "item reduction" provisions in their constitutions: Alaska, California, Hawaii, Illinois, Massachusetts, Missouri, Nebraska, New Jersey, Tennessee and West Virginia. *See* 1986 RULES COMMITTEE REPORT, *supra* note 6, at 4, 47, 157–59. For the texts of these provisions, see *id.*, app. C–2, at 232–33. Only Pennsylvania has found such implied authority by judicial decision. *Id.* at 4, 157–59; Bellamy, *supra* note 6, at 570.

225. Bellamy, *supra* note 6, at 570 (where available as an additional alternative to the *complete* veto of a bill or an entire item, item reduction authority "maximizes the governor's influence and power in the legislative process. He has more options and more opportunities to influence and shape the outcome."); *id.* at 560 (item reduction power gives governor enhanced "lawmaking" power).

encroach on legislative hegemony over funding decisions;[226] and strains the constitutional text.[227] The *Fairfield* court's unwillingness to find, *by implication*, such enhanced gubernatorial authority to act in a "legislative capacity"[228] seems sound, given the court's emphasis on legislative control of the budget. Periodic calls for a constitutional amendment to provide the Arizona governor with item-reduction authority have thus far been unavailing.[229]

4. Conclusion

The item veto cases discussed above seem to rest on two related constitutional policy premises which are not always clearly articulated: (1) the primacy of the legislature's role (and thus of the legislative product) in budget making; and (2) the need for concurrence between the branches on the overall policy impact—amount, terms and conditions—of those legislative appropriations any part of which the governor would approve. Thus, an "item" properly subject to veto encompasses *all* language relating to a particular appropriation's specific object or purpose, sum, and spending authority. An "item" should be defined from the standpoint of the *legislature's policy purpose*, as evidenced by the bill's language and construction, rather than the governor's preferences as evidenced by his use of the veto pen. It must then be either vetoed or left alone in its entirety; vetoes "within" an "item"—that is, of any parts thereof (including terms, conditions or amount)—are impermissible.

An abstract threat to the item veto's availability arises from "lump sum" appropriating, a practice that is within the legislature's discretion. This threat is probably offset by legislative desire to control spending through more specific appropriations. However, the legislature cannot simultaneously evade the item veto power and control executive spending by characterizing detailed spending instructions in a budget as something other than "items."

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226. This is true in at least two senses. First, it would enable the governor to cut "lump sum" appropriations, made in the legislature's discretion. Second, it would also enable the governor to reduce the amounts of even highly specific items with whose funding levels he disagreed. A number of state courts have refused to find implied item reduction authority because of the danger it presents to the legislative prerogative of determining the amount to be appropriated. Others have taken the view that reducing a sum is tantamount to the prohibited practice of vetoing "part" of an item, rather than its entirety. *See* 1986 COMMITTEE REPORT, *supra* note 6, at 158.

227. *See* Commonwealth *ex rel* Attorney Gen. v. Barnett, 48 A. at 985 (Mestrezat, J., dissenting); *Fairfield*, 25 Ariz. at 157, 214 P. at 323 (such a finding would not be in consonance with the "plain language of the Constitution.").

228. *Fairfield*, 25 Ariz. at 150, 214 P. at 321.

229. *See* H. Con. Res. 2002, 34th Leg., 1st Reg. Sess., 1979 Ariz. Sess. Laws 57, 884 (proposing a constitutional amendment to grant item reduction authority); *see also* J. Ashcroft, *Governor Deserves Item-Reduction Veto*, ARIZ. REPUB., Mar. 22, 1993, at A11 (former governor of Missouri urges an Arizona constitutional amendment adopting item-reduction veto, on grounds that this authority enables governor to contain spending by reducing "lump sum" appropriations which legislature uses to circumvent item veto, and that it imposes fiscal discipline on legislature because of threat of item-reduction by governor); *Governor May Go to Voters for Broader Spending Veto*, ARIZ. REPUB., Mar. 24, 1993, at B2 (Governor announces plan to seek item-reduction authority in order to enable him to reduce lump-sum appropriations made by legislature).

C. Use of the Veto for Purposes Other Than Elimination of Appropriations: A Proper Remedy for Legislative Overreaching?

A number of Arizona governors have used the item veto power to selectively excise from GABs language *other than* items of appropriation.[230] Their reasons have included claims that the legislative provisions (a) violated Article IV, section 20's limitation of the GAB to "nothing but appropriations,"[231] (b) exceeded the scope of the governor's "call" for a special session under Article IV, section 3,[232] and (c) constituted impermissible "special legislation" under Article IV, section 19.[233] Is a partial veto a proper remedy for such asserted legislative impropriety?[234]

The limited case law from other states on this question is not uniform.[235] At least at the formal level, however, there is an ironic inconsistency in these

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230. *See, e.g.*, Act of Feb. 3, 1915, ch. 3, § 4, 1915 Ariz. Sess. Laws 4; Act of Mar. 6, 1915, ch. 20, 1915 Ariz. Sess. Laws 43, 49; Act of Mar. 9, 1915, ch. 24, 1915 Ariz. Sess. Laws 57–61; Act of Mar. 9, 1915, ch. 22, 1915 Ariz. Sess. Laws 51, 54, 62; Act of Mar. 9, 1915, ch. 29, 1915 Ariz. Sess. Laws 66; Act of Mar. 9, 1915, ch. 31, 1915 Ariz. Sess. Laws 67; Proclamation of the Governor, Apr. 3, 1915, 1915 Ariz. Sess. Laws xi–xii (Governor vetoes repealer language, accompanying a new appropriation, on grounds that repealer violates ARIZ. CONST. art. IV, § 14 requiring full publication of, and not mere reference to, an amended section; violates the "call" to special session (art. IV, pt. 2, § 3), which was only for "affirmative legislation in the form of appropriations" and did not contemplate "statutory restrictions" upon state departments; and violates ARIZ. CONST. art. IV, § 20's limitations on the contents of a GAB); *see also id.*, § 1, subd.'s 10, 12, 14, 15, 56–58, 72, 74, 77–79, 82, 84, 86–88, 90, 99; §§ 2, 4, 7, 8, 17(c), 35, 43.G., 49–51, 1915 Ariz. Sess. Laws 68, 72–73 (governor vetoes various non-appropriative provisions on grounds that they "exceed the call" to special session, are improper in a GAB (presumably because of § 20 and/or § 13), and create administrative problems); Act of May 2, 1979, ch. 172, § 1, 1979 Ariz. Sess. Laws 596, 607, 1010 (Governor vetoes from appropriation for family planning services a provision prohibiting appropriation of general fund monies to Planned Parenthood, on grounds that provision constitutes "legislation" in the GAB contrary to § 20 and also "special legislation" discriminating against an individual or entity in violation of ARIZ. CONST. art. 4, pt. 2, § 19).

Other governors have vetoed appropriations from a GAB on the grounds that the appropriations were required by ARIZ. CONST. art. IV, pt. 2, § 20 to be made by separate bill limited to a single subject. *See, e.g.*, Message From the Governor, Mar. 20, 1917, 1917 Ariz. Sess. Laws 136–37; Act of Mar. 20, 1917, ch. 90, § 32, 1917 Ariz. Sess. Laws 139, 159 (governor views appropriation in a GAB, made to compensate for the death of state employee, as inconsistent with § 20 because it is not for state departments, institutions, schools or interest on the public debt and thus must be enacted by a separate bill); Act of Mar. 22, 1921, ch. 181, § 1, 1921 Ariz. Sess. Laws 440, 448 (governor views appropriation in a GAB to pay "state's proportion" of sum needed to build a roof for a particular building as inconsistent with § 20, though reasoning is unclear; perhaps governor thought building not a "state institution" within meaning of § 20).

231. *See supra* note 230.

232. *See supra* note 230. ARIZ. CONST. art. IV, pt. 2, § 3 provides in relevant part that "In calling a special session, the Governor shall specify the subjects to be considered, and at such special session no laws shall be enacted except such as relate to the subjects mentioned in the call."

233. *See supra* note 230. ARIZ. CONST. art. IV, pt. 2, § 19 prohibits a variety of "local or special laws."

234. The court in Callaghan v. Boyce, 17 Ariz. 433, 456, 153 P. 773, 782 (1915), observed that the governor's veto is "not essential" to void legislation violative of § 13 (which requires all material in a bill to have subject matter unity and to be reflected in the bill's title), since "the constitutional provision [itself] avoids them." This identifies the self-executing nature of § 13. Section 20 is likewise self-executing. *See supra* note 87 and accompanying text; *see also* 1986 RULES COMMITTEE REPORT, *supra* note 6, at 21 (discussing *Callaghan*). The argument in this section is that such vetoes are formally improper as well as "not essential".

235. *See, e.g., In re* Karcher, 462 A.2d 1273 (N.J. Super. App. Div. 1983) (governor's purported use of item veto power held ineffective to delete from appropriation bill material not

vetoes. The governor's constitutional authority to strike out selected provisions is limited to "items of appropriation." A partial veto based on the claim that the stricken material constitutes (for example) substantive legislation in the general appropriation bill, in contravention of Article IV, section 20, necessarily asserts that the matter stricken is *not* an "appropriation"[236]—and thereby proclaims its own illegitimacy. Such a veto attempts to remedy a *legislative* act that assertedly is *ultra vires* by means of a *gubernatorial* act that *by definition* is *ultra vires*.[237]

More substantively, the accepted purpose of the item veto has historically been to allow the governor to curtail *spending* he deemed unwise.[238] Because its use for other purposes does not track that aim,[239] it is not a proper remedy.[240] How, then, might a governor treat appropriation legislation a part of which he believes is unconstitutional?[241]

A first step might be simply to declare his view of the suspect provision's unconstitutionality at the time of signing the legislation. A few Arizona governors have taken this step.[242] There is, however, a risk that the governor

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constituting "items of appropriation," even though, on merits, court upheld governor's argument that material unconstitutionally intruded upon his authority in violation of separation of powers); Anderson v. Lamm, 579 P.2d 620 (Colo. 1978) (court independently determined that material which legislature included in general appropriation bill constituted impermissible substantive, non-appropriative legislation in violation of constitutional provision prohibiting that practice. Thus court expressly declined to reach question of effectiveness of governor's purported veto of that material on same ground).

Cf. Henry v. Edwards, 346 So. 2d 153 (La. 1977) (where court agreed with governor's view that legislature improperly inserted substantive, non-appropriative legislation into general appropriation bill in violation of constitutional prohibition thereof, court upheld governor's treatment of the objectionable language as "item" properly subject to item veto power. *But see id.* at 165–66 (Dennis, J., dissenting), arguing illogic and mischief of validating governor's treatment of substantive legislation as "items of appropriation," and urging instead that proper ruling would be for court, independently, to strike down the improper provisions as an exclusively judicial act. This was the approach used by the Colorado court in *Anderson. See also* Opinion of the Justices to the House of Representatives, 425 N.E.2d 750, 753–54 (Mass. 1981); Attorney Gen. v. Administrative Justice, 427 N.E.2d 735 (Mass. 1981).

236. *See supra* section III. B. *passim* of this Article.

237. *See In re* Karcher, 462 A.2d at 1282, 1286 (unconstitutional for governor to use line item veto power on non–appropriative legislative matter, even where court ultimately rules that such provisions themselves are unconstitutional). The cycle could well end with the legislature's overriding the veto by a two-thirds vote, simply repeating the alleged prior constitutional error. *See* ARIZ. CONST. art. V, pt. 2, § 7. For the text of § 7, see *supra* note 2. It is also possible, of course, that the legislature could heed the governor's constitutional objection and fail to override such a veto.

238. As to whether that remains the only purpose of the item veto after the recent case of Rios v. Symington, 172 Ariz. 3, 833 P.2d 20 (1992); *see infra* notes 257–82 and accompanying text.

239. The main argument in support of a partial veto in these circumstances is that such authority is implied by the very provisions imposing constitutional constraints on the form and manner of legislative enactment. Such a rule, however, might invite gubernatorial abuse based on policy differences rather than constitutional principles. Moreover, it would seem less satisfactory than the alternative approach set forth in the *infra* text accompanying notes 242–56.

240. *See also* Act of July 13, 1992, ch. 312, 1992 Ariz. Sess. Laws 1864, 1867–70, 2267–68 (unclear that legislative changes to the terms and conditions of various state funds, which governor vetoed in part on grounds that he doubted their legality, were properly subject to veto).

241. The governor's oath to uphold the state constitution might serve as the source of an obligation to take some action. Arguably, however, the governor's obligation to "take care that the laws be faithfully executed" (ARIZ. CONST. art. V, § 4) cuts the other way.

242. In 1977, the legislature inserted footnotes in the GAB prohibiting the departments of administration, health services, and economic security, and the state treasurer, from spending

might be tempted to refuse to implement a provision on assertedly constitutional grounds when the real reason was mere policy disagreement. The governor is constitutionally obligated to faithfully execute the laws.[243] Therefore, a governor should, before declining to implement such a provision, seek an attorney general's opinion,[244] or perhaps, more authoritatively, a declaratory judgment. Should the opinion or ruling confirm his view, the governor could then instruct the relevant agency not to implement the provision. There the matter would rest, barring further challenge by either an intended beneficiary of the provision[245] or the legislature.[246]

An attorney general's opinion, sought by a legislator in response to use of the item veto on non-appropriative material, nicely illustrates the problem.[247] A 1979 GAB appropriated money for family planning, but a footnote prohibited, *inter alia*, the "appropriation" of any general fund money to Planned

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any portion of their appropriations on the state's newly-created Medicaid program. Indeed the legislature went so far as to declare in each case that if the footnote prohibiting such expenditure "is finally adjudicated invalid, the [entire] appropriation [for the particular agency] shall ... be null and void." Act of May 31, 1977, ch. 150, § 1, subd.'s 1, 19, 22, 23, 1977 Ariz. Sess. Laws 879, 884, 897, 902, 905. Clearly, the legislature intended to make this "anti-Medicaid" condition "stick"—and probably to deter the governor or agencies from challenging it in court—by conditioning the entire agency's budget on its validity. *See also* H. Res. 2007, 33d Cong., 1st Reg. Sess., 1977 Ariz. Sess. Laws 1228–29. Governor Castro signed the GAB but, by letter filed with the bill, indicated that these footnotes were invalid and unconstitutional. *See* Cochise County v. Dandoy, 116 Ariz. 53, 55, 567 P.2d 1182, 1184 (1977) (referring to these matters without comment). The Governor was clearly correct on the merits: these purported "conditions" were far too sweeping to withstand constitutional scrutiny under ARIZ. CONST. art. IV, § 20's prohibition of "legislation" in a GAB. *See supra* text accompanying notes 109–45.

See also Governor Mecham's comments in respect to Act of May 22, 1987, chs. 334, 335, 1987 Ariz. Sess. Laws 1204, 1251; Veto Messages, 1987 Ariz. Sess. Laws 1479–81. Governor Mecham made only very general and nonspecific comments about "Numerous provisions" of these appropriation measures which he considered to be violative of ARIZ. CONST. art. IV, pt. 2, § 20. *Id.* at 1481. Had he been more specific and taken additional steps to challenge the provisions he found objectionable, the approach might have been sound. Prudently, he refrained from vetoing these provisions. *Id.*; *cf. infra* notes 251–52 and accompanying text.

243. ARIZ. CONST. art. V, § 4.

244. *See, e.g.*, General Assembly v. Byrne, 448 A.2d. 438, 440 (N.J. 1982) (governor instructs state agencies to disregard a bill, after obtaining an attorney general's opinion that it was unconstitutional and had no force and effect upon state agencies).

One concern with a unilateral declaration of unconstitutionality of a portion of a bill is that the governor might be thought to encroach on the judicial function. In substance, the governor does the same thing when he vetoes on entire bill on the ground that he believes it to be unconstitutional. However, in the case of such a veto the legislature may try to override the governor's action; if it succeeds, the veto does not block implementation of the law, irrespective of the governor's reasons for the veto.

245. Most of the item veto cases have arisen when public- or private-sector claimants have sought payment out of state appropriations whose availability, because of the exercise of the item veto, had been doubted by the state officials presented with the claim. In only one case has the *legislature* challenged gubernatorial exercise of item veto powers. Rios v. Symington, 172 Ariz. 3, 833 P.2d 20 (1992).

246. If the governor purported to "veto" the objectionable provision notwithstanding the fact that it did not constitute an appropriation, then the legislature might try to "override" the "veto" as a practical matter, short of pursuing relief in the courts. Such a legislative step ought, however, to be taken with the expressed view that the governor lacked authority to veto the provision in the first instance since it was not an "item of appropriation." This would avoid any implication of legislative waiver or acquiescence in the validity of the governor's veto which might be raised by the taking of an override vote.

247. Op. Ariz. Att'y Gen. I79–172 (R79–188).

Parenthood.[248] The governor asserted that this language constituted "an attempt to legislate in the appropriations bill" in violation of Article IV, section 20.[249] Accordingly, the governor declared that, in his view, the provision was "unconstitutional and of no force and effect."[250] This seems a proper first step, and might have been followed by a request for legal advice and (if the advice confirmed his view) a refusal to implement it. However, the governor also vetoed the footnote as an "added precaution" against the "unlikely event" it would be judicially upheld.[251] This step muddied the water, enabling the attorney general to ignore completely the governor's stated rationale and opine instead that the governor had impermissibly vetoed an inseparable condition or proviso to an appropriation.[252]

The above recommendations for gubernatorial action should be applied carefully.[253] Any sweeping authority to selectively enforce legislation—especially lacking the imprimatur of an attorney general's opinion or a declaratory judgment—could tempt the governor, under the guise of constitutional objection, to decline to enforce provisions of bills with which he simply disagreed as a matter of policy.[254] Where general appropriation bills are involved, however, the choice between complete veto and complete approval is

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248. Act of May 2, 1979, ch. 172, § 1, 1979 Ariz. Sess. Laws 596, 607. The legislation read as follows:

> Section 1. Subject to applicable laws, the sums or sources of revenue herein set forth are appropriated for the fiscal year beginning July 1, 1979 for the purposes and objects herein specified:
>
> Subdivision 25. DEPARTMENT OF ECONOMIC SECURITY.
>
> ....
>
> Social Services
>
> ....
>
> Family Planning..... $56,600***
>
> ....
>
> ***No state money may be spent on abortion procedures, abortion referrals to physicians or agencies which offer abortion procedures or for counseling for abortion procedures. Further, no state general fund monies may be appropriated to Planned Parenthood or any of its affiliates.

Id. The governor struck out the second sentence of the footnote. *Id.* at 1010 (Governor's veto message).

249. *Id.* at 1010 (Governor's veto message). The governor offered a secondary rationale, as well: that the provision was, "in effect, special legislation that discriminates against a particular individual or entity" in violation of art. IV, pt. 2, § 19. *Id.*

250. *Id.*

251. *Id.* The two actions are logically inconsistent. The limiting language cannot simultaneously be substantive "legislation" inconsistent with § 20 and an "item of appropriation" properly included in the GAB and subject to veto under ARIZ. CONST. art. V, § 7. Indeed the governor probably knew that the material was not really subject to veto, since he characterized his authority as encompassing "the right to item veto a *provision* of the appropriations bill." *Id.* (emphasis added). Only such an overbroad assertion could justify the veto of what was clearly not an "item of appropriation."

252. Op. Ariz. Att'y Gen. I79–172 (R79–188). The Attorney General was technically correct in finding the language to be inseparable from the appropriation, *see supra* notes 192–207 and accompanying text, but failed to address whether it was impermissible legislation.

253. For discussion of *Presidential* selective nonenforcement of Congressional legislation based on constitutional grounds, see Michael B. Rappaport, *The President's Veto and the Constitution*, 87 Nw. U. L. Rev. 735, 766–83 (1993); 1986 RULES COMMITTEE REPORT, *supra* note 6, at 124–28.

254. Thus, such steps aimed at selective non-enforcement should probably not be taken in connection with substantive, single-subject bills, where the remedy to be preferred is the complete veto.

a poor one: the governor must either halt government or approve language he believes to be unconstitutional.[255] Moreover, the constitutional issues involved here are limited but recur within legislative budgetary process. The above recommendations for an approach to selective non-enforcement, based on *bona fide* gubernatorial constitutional objection and bolstered by a legal opinion, do not appear to create a significant danger of executive abuse of power, and probably would help control any objectionable legislative practices.[256]

D. Rios v. Symington: A Broadened View of the Item Veto Power

The recent case of *Rios v. Symington*[257] addressed two novel problems: whether (1) legislative "transfers" of monies and (2) direct "reductions" of prior appropriations made in the same legislative session were subject to the item veto. The result in each instance was a significant, and questionable, expansion of the item veto power. A third aspect of the case, the court's rejection of a gubernatorial authority to "impound" appropriated funds, highlights the anomalous quality of the first two rulings.

1. House Bill 2001: Vetoes of Transfers

Arizona House Bill 2001 (1992) made numerous transfers of stated sums from specified funds to the state general fund.[258] The governor vetoed five of these transfers,[259] and the legislature challenged his authority to do so. The court first determined that, "viewed in isolation," the transfers were not "appropriations" because they met none of the conditions of the three-part "appropriations" test.[260] However, the court next ruled that because the five vetoed transfers were *from* previously-created, statutory funds *that did constitute appropriations*,[261] the transfers must, in effect, be *considered* "appropriations" properly subject to the item veto.[262] Otherwise, the court

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255. *See supra* note 189 and accompanying text.

256. A governor's non-enforcement of a particular provision might also be justified where the governor believes that legislation enacted in a special session exceeds the scope of his "call" for the session. *See* ARIZ. CONST. art. IV, pt. 2, § 3. This area too deals with circumscribable problems of legislative process in relation to the executive branch.

257. 172 Ariz. 3, 833 P.2d 20 (1992).

258. Act of Mar. 28, 1992, ch. 3, §§ 2–5, 1992 Ariz. Sess. Laws 2457, 2457–61.

259. *Id.*, § 3, subd.'s 8, 13; § 4, subd.'s 12, 18, 35, 1992 Ariz. Sess. Laws 2458–61.

260. *Rios*, 172 Ariz. at 9, 833 P.2d at 26. In fact, analytically it seems that only the third condition, an authority to spend, was lacking. A specific *amount* was identified in each of the transfer provisions. A *purpose* was also arguably present, at least in a general sense: several of the transfers were stated to be "for the purposes of providing adequate support and maintenance for agencies of this state and offsetting the state general fund loss." Act of Mar. 28, 1992, ch. 3, §§ 3–5, 1992 Ariz. Sess. Laws 2457, 2458–61. The absence of *spending authority* appears to arise from the fact that the fund into which the transfers were to be made was the general fund. Legislative action placing money "into" a fund is an "apportionment" or "allocation," rather than an "appropriation;" an appropriation requires the creation of authority to spend money *from* such a fund. *See supra* notes 28–30, *infra* note 266 and accompanying text. In short, the transfers amounted to "dis"- or "un"-appropriations.

261. The statutes creating these funds not only defined the terms and conditions of expenditure but also set aside certain sums and created expenditure authority. The court recognized this. *Rios*, 172 Ariz. at 8–9, 833 P.2d at 25–26. No further legislative action (for example, in a GAB) was needed to complete these appropriations.

262. At the formal level, the conclusion that the bill contained no "appropriations" would by definition preclude the governor's exercise of the item veto: The veto can only be used on "items of appropriation," and only in a bill containing "several" such items. ARIZ. CONST. art. V, pt. 2, § 7. For the text of § 7, see *supra* note 2.

reasoned, the legislature would be free to enact appropriations sufficient in amount for given purposes and gain the governor's assent. Then, by transferring money from them, the legislature could reduce those appropriations in a manner not subject to gubernatorial review and disapproval under the item veto power.[263]

This conclusion runs counter to the previously accepted purpose of the item veto. The court expressly recognized that the item veto authority was designed to constrain "pork barrel" expenditures[264]—unnecessary or unwise *appropriations* in budget bills.[265] The legislative transfers in *Rios*, however, operated to "un"- or "dis"-appropriate money, moving it from existing appropriation funds to the general fund where—absent further legislative action—it had to remain, since the transfers contained no spending authorization.[266] The court's ruling thus upheld the governor's use of the veto to *protect* the funding levels of programs he favored against legislative *reduction*. The court may prefer this as a matter of policy. But it hardly seems consistent with prior cases,[267] with the court's own identification of the "anti-pork barreling" purpose of the item veto,[268] or with the court's emphasis on legislative control of budget making.[269]

Analytically, in the court's view the amenability to veto of transfers depended on whether the original legislative product—the fund *from* which the transfer was made—constituted an "appropriation." This focus on the "transferor" fund seems misplaced. A transfer unaccompanied by new spending authority, like the five vetoed in *Rios*, creates no risk of budgetary excess or unwise affirmative spending, the problems at which the item veto was aimed. Thus, the nature of the "transferor" fund would not seem to matter.

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263. *Rios*, 172 Ariz. at 9, 833 P.2d at 26:

> The legislature could then later direct that some or all of that fund be transferred to another fund. By placing the transfer provision within a larger transfer bill, the Legislature could evade the Governor's line item veto power notwithstanding the fact that the later transfers completely alter the original appropriation. Such procedures, if authorized, would eviscerate the line item veto power. Although we are urged to construe the governor's line item veto authority narrowly and strictly, we hold that it should be construed in such a way as to carry out the obvious constitutional intent.
>
> In our view, if the Governor's constitutional power to line item veto an appropriation is to mean anything, the Governor must be constitutionally empowered to line item veto a subsequent reduction or elimination of that appropriation.

Id.

264. *Id.* at 6, 833 P.2d at 23.

265. *See, e.g.*, Fairfield v. Foster, 25 Ariz. 146, 154, 214 P. 319, 322 (1923); *see also supra* notes 178, 184–90 and accompanying text.

266. *See* Black & White Taxicab Co. v. Standard Oil Co., 25 Ariz. 381, 410, 218 P. 139, 148 (1923) (legislative act directing money *into* general fund not an "appropriation" because such act lacks spending authority) (Lockwood, J., dissenting); *supra* notes 28–30, 48 and accompanying text. Additional legislative action "appropriating" the money, of course, would itself be subject to veto.

267. *See, e.g*, *Fairfield*, 25 Ariz. 146, 214 P. 319.

268. Rios v. Symington, 172 Ariz. 3, 6, 833 P.2d 20, 23 (1992).

269. *Id.* at 6, 9, 833 P.2d at 23, 26 ("Logically, the [Legislature's] power to appropriate includes the power to amend an appropriation, and we agree that such power is also exclusively a legislative function."); *id.* at 6, 833 P.2d at 23 (citing LeFebvre v. Callaghan, 33 Ariz. 197, 204, 263 P. 589, 591 (1928), for the proposition that all power to appropriate money or incur indebtedness resides in the legislature).

By contrast, the nature of the "transferee" fund *could* matter. Unlike the general fund into which the vetoed transfers in *Rios* were made, some funds are subject to appropriative language.[270] If the legislature transferred money *into* such a fund, no additional legislative act would be needed to complete an "appropriation."[271] Consequently, the transfer would be subject to the governor's item veto authority.[272] But where, as in *Rios*, the transferee fund *lacks* one or more of the three elements of appropriative language, then the transferred money has simply been "dis"-appropriated and cannot be spent without further legislative action, a circumstance for which the item veto was not designed and to which, until *Rios*, it did not apply. Given the policy purposes of the item veto, the proper inquiry would seem to be whether the "transferee" fund meets the three elements of an "appropriation."

Finally, even if one accepted as proper the Court's focus on the appropriative nature of the "transferor" fund, the Court appears to have misapplied that test in at least one instance. The Court concluded that a sixth vetoed provision of H.B. 2001, a transfer of RICO monies from county to state, was *not* based on an underlying "appropriation"[273]. Properly applied, the test suggests that the "transferor" fund in this instance *was* an appropriation, and

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270. Indeed the five "transferor" funds the court reviewed are in this category. *See supra* note 259 and accompanying text.

271. The same would be true if the "transferee" fund lacked appropriative language but such language were *created* as a part of the legislative act of transfer. The transfer would then constitute an appropriation and, as such, would be subject to veto.

272. The point is illustrated by H.B. 2001 itself, which contained at least one such "appropriative" transfer, section 6:

> *Sec. 6. Transfers; fund monies to state highway fund; uniform budget reduction.*
> Notwithstanding any other law, on the effective date of this act the total of $348,500 from the following funds is transferred to the state highway fund [ARIZ. REV. STAT. ANN. 28-1821 et seq.] in fiscal year 1991-92 for the purposes of providing adequate monies for funding the department of public safety appropriation from the state highway fund:
> 1. The special number plate replacement fund established by section 28-803, Arizona Revised Statutes, $177,500.
> 2. The special fund for registering and titling vehicles established by section 28-301.03, Arizona Revised Statutes, $171,000.

Act of Mar. 28, 1992, ch. 3, § 6, 1992 Ariz. Sess. Laws 2457, 2461. The earlier appropriation (emphasis added) had been made in that session's GAB, Act of June 27, 1991, ch. 287, § 90, 1991 Ariz. Sess. Laws 1467, 1502:

> *Sec. 90. DEPARTMENT OF PUBLIC SAFETY*
> ... from the state highway fund, there is appropriated the sum of $25,253,200;
> .... The sums appropriated shall be deposited in a department of public safety joint account for the following purposes:

FTE positions	1,616.8
Lump sum appropriation	$85,306,100
Arizona criminal justice information system	452,300
Total appropriation—department of public safety	85,758,400

Id. Applying the three-part test: the transfer made by § 6 of H.B. 2001 (1) specified a sum ($348,500); (2) stated its purpose (to provide "adequate monies" for the DPS needs identified in the earlier GAB: FTE positions, lump sum appropriation, and Arizona criminal justice information system); and (3) derived authority for its expenditure from the earlier GAB ("there is appropriated" from the highway fund the amount which the transfer supplemented; the transfer, accordingly, succeeded to the spending authority provided by the GAB). Thus, this transfer constituted an appropriation, and would have been subject to veto as such had the governor wished to do so.

273. Rios v. Symington, 172 Ariz. 3, 9-10, 833 P.2d 23, 26-27 (1992).

therefore, under the court's own standard, it was error not to uphold the veto of the transfer.[274]

2. *House Bill 2002: Vetoes of Legislative Reductions of Appropriations Made Earlier in the Same Session*

Another part of *Rios* dealt with the legislature's enactment, in an appropriation bill (H.B. 2002 (1992)), of changes in the funding levels of numerous appropriations made earlier in the same budget session by a GAB.[275] Some of the modifications *increased* prior appropriations. The court concluded that these changes were "appropriations" and upheld the governor's item vetoes thereof.[276] Under the traditional, expenditure-constraining rationale for the item veto, these rulings make sense.[277]

Other provisions of H.B. 2002, however, *decreased* the levels of prior appropriations. In substance, like the transfers in H.B. 2001, these reductions were "un"-appropriations, not expenditures which the governor might wish to

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274. Act of Mar. 31, 1992, ch. 3 (H.B. 2001), § 7, 1992 Ariz. Sess. Laws 2457, 2461, vetoed by the governor, provided:

> Sec. 7. *Transfer of state forfeiture monies held by counties; state donations fund deposit.*
>
> Notwithstanding the provisions of section 13–4315, Arizona Revised Statutes, or any other provision of law, immediately after the effective date of this act, the county treasurer of each county in this state shall transfer to the state treasurer for deposit in the racketeer influenced corrupt organizations (RICO) account of the department of public safety fund all monies in the county treasury that are held by the county for the department of public safety or any other state agency as a result of any seizure or forfeiture of property in a criminal or civil proceeding.

Id. The court viewed the statute creating the "accounts" referenced in section 7 as ARIZ. REV. STAT. ANN. § 13–4315 and concluded that this statute did not constitute an appropriation. *Rios,* 172 Ariz. at 9, 833 P.2d at 26. The conclusion does not withstand application of the three-part test. First, section 13–4315 adequately identified a "certain sum," namely the value of the forfeited property itself. (The present indeterminacy of that sum was not problematic. It would *become* certain by operation of the practices that the statute contemplated, that is, the forfeitures made by operation of law and their distribution to the statutorily-contemplated recipients. *See supra* notes 35–36 and accompanying text. The statute also adequately created both a "specified object" and an "authority to spend," since it provided that the forfeited property must be transferred to the prosecuting or seizing government entity, which in turn could: (1) *sell, lease or transfer* the property to government entities *"for official ... use within this state"* (§ 13–4315.A.1.); (2) *sell* the property and *use the proceeds to pay the expenses of handling it and pay valid claims* (§ 13–4315.A.2.); (3) *compromise/pay claims* against *this or other forfeited property* (§ 13–4315.A.5.); and make *"any other" lawful disposition* of the property (§ 13–4315.A.6.) (emphases added) (indicating specific object or purpose and authority to spend).

Accordingly, § 13–4315 made an "appropriation" notwithstanding the court's contrary conclusion. Thus, under the court's test a provision transferring money from that appropriation should have been properly subject to item veto.

275. Act of Mar. 31, 1992, ch. 4 (H.B. 2002), 1992 Ariz. Sess. Laws 2461. This bill, entitled "Budget—Reductions, Increases, Appropriations and Reporting," made numerous changes in the dollar amounts of particular appropriations enacted earlier that session by the General Appropriation Bill, Act of June 28, 1991, ch. 287, 1991 Ariz. Sess. Laws 1467.

276. *Rios,* 172 Ariz. at 10, 833 P.2d at 27.

277. House Bill 2001 contained a number of "new" appropriations, which the court ruled were properly subject to the item veto. *Rios,* 172 Ariz. at 10, 833 P.2d at 27. The Court reasoned that if "new" appropriations could be vetoed, so could increases in prior appropriations because such an increase "is, in essence, a new appropriation." *Id.* The reasoning is consistent, though it ignores the propriety of including "new" appropriations in a GAB in the first place. *See supra* notes 90–108 and accompanying text.

restrain.[278] In upholding their vetoes, therefore, the court again failed to apply the accepted policy purpose of the item veto. Instead, it authorized the governor to selectively prevent, for the duration of the budget cycle, a legislative *reduction* in programmatic support previously enacted.[279]

The court tried to explain this result by characterizing the issue before it broadly, and by raising the specter of legislative usurpation of gubernatorial authority.[280] Such issues, however, were not presented by the facts nor readily imaginable therefrom.[281]

The traditional, expenditure-constraining rationale does not explain the results in *Rios*. The rulings seem to support the view of some commentators that item veto case law has tended to move beyond gubernatorial restraint of legislative spending, toward a more general increase in the executive branch's role in determining public policy.[282] More important, notwithstanding the court's articulation of traditional doctrine about legislative authority, the holdings could encourage future Arizona governors to exercise the item veto in ways that would increase their role in determining the contents of the budget, contrary to past practice and norms.

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278. In substance the changes merely effected "un"-appropriations of a portion of the original appropriation. *See supra* notes 266–69 and accompanying text.

279. *Id.*

280. The Court stated:

> Logically, the power to appropriate includes the power to *amend* an appropriation, and we agree that such power is also exclusively a legislative function. However, we conclude here that to prevent the Governor from vetoing an *amendment* to an appropriation would unlawfully allow the Legislature to *accomplish indirectly that which it could not accomplish directly*. To hold otherwise would give the Legislature *plenary authority* over appropriations, a result clearly not intended by the Constitution.
>
> ... If we follow the petitioner's argument to its logical conclusion, the end result is that the Legislature may *circumvent* the Governor's veto power and *encroach upon the Executive's constitutional right to participate meaningfully in the appropriation process*. The framers of our Constitution did not intend such a result.

Rios, 172 Ariz. at 11, 833 P.2d at 28 (emphases added).

281. It was not nonspecific "amendments", *see supra* note 280, to appropriations that were at issue: the facts presented *reductions*. Moreover, the Court had already ruled that *increases* in prior appropriations *were* properly subject to the item veto. *See supra* note 276 and accompanying text. It is difficult, therefore, to give substance to the constitutional "parade of horribles" the Court purports to have had in mind. It is also worth noting the absence of evidence offered to support the assertions about what the Constitution and framers intended. *Rios*, 172 Ariz. at 11, 833 P.2d at 28.

282. The salient overall meaning of cases from different jurisdictions, in this view, has been the creation by courts of

> a framework that generally works to increase the chief executive's power—power that can be used not simply to reduce spending but which can also be exercised to determine or redirect public policy. [Citations omitted]. It is this aspect of the item veto which deserves more forthright discussion at the federal level. Fiscal restraint is not the real issue. The question that needs answering is this: Is it wise to introduce at the national level a tool like the item veto that defies clear definition and has the potential for changing the balance of power between the President and Congress?

Bellamy, *supra* note 6, at 571; *see id* at 567; *see also* Gosling, *supra* note 6, at 297 (item veto in that state used primarily as a tool of gubernatorial policy making and partisan advantage rather than of fiscal restraint).

3. The Governor's "Revertment"/Impoundment Authority

In *Rios*, the court also determined that the governor has no general constitutional power to "impound" or "revert" appropriations.[283] He can duly exercise the veto of a complete item,[284] but cannot administratively decline to spend part of an appropriation because he disagrees with its wisdom or necessity.[285] The rationale for these rulings underscores the oddness of the case's item veto rulings.

a. H.B. 2001

As explained in a preceding subsection,[286] the effect of the legislative transfers in H.B. 2001 was to reduce, or "dis"-appropriate money from, prior appropriations. In addition to vetoing a number of these reductions because of their impact on programs he favored, in two instances the governor simultaneously announced offsetting "reversion" orders: instead of accepting the lower appropriations mandated by the legislature, he would require the affected agencies to find comparable savings elsewhere in their budgets.[287]

These "reversion" orders would, in effect, reduce the amount of *other* appropriations—which the governor did not identify—that had been made to the agencies. The court declared the purported reversions to be impermissible, under language in *Fairfield v. Foster*[288] that denied the governor authority to alter the amount of appropriations.[289] In the court's view, such reversions would enable the Governor to improperly "reallocate" funds appropriated by the legislature in violation of the separation of powers.[290]

Strictly speaking, the reversions would not "reallocate" money, since they contemplated *non*-expenditure rather than a shifting of funds among

283. *Rios*, 172 Ariz. at 11–15, 833 P.2d at 28–32.

284. *Id.* at 13, 833 P.2d at 30.

285. A narrow exception, based on "fiscal management" and recognized in dictum, may exist in order to prevent waste, provided the legislature's purposes have been fulfilled. *Rios*, 172 Ariz. at 12–13, 833 P.2d at 29–30. In Arizona, the governor has historically "informally" impounded appropriations when a revenue shortfall is predicted. JANSEN, *supra* note 5, at 183. Such changes in appropriations by the executive have been "perceived by legislators as invading the Legislature's exclusive constitutional power to appropriate funds." *Id.* at 184; *see also* Opinion of the Justices to the Senate, 376 N.E.2d 1217 (Mass. 1978) (governor may spend less than full amount of an appropriation, to avoid wastefulness, provided he can achieve the objectives of the underlying legislation). *But see* County of Oneida v. Berle, 49 N.Y.2d 515, 521 (1980) (governor has no authority to impound mandated appropriations even where his goal is to achieve a balanced budget; governor's authority is to *propose* a balanced budget, but not to maintain one if his actions countermand legislative appropriations). In Missouri, the constitution allows the governor to withhold appropriated funds to maintain a balanced budget. MO. CONST. art. IV, § 27, discussed in Fisher & Devins, *supra* note 6, at 182.

On Presidential impoundment, *see generally* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 256–62 (2d ed. 1988); 1986 RULES COMMITTEE REPORT, *supra* note 6, at 120–22, 128–40.

286. *See supra* notes 258–66 and accompanying text.

287. *See* Governor's Veto Message to H.B. 2001, Mar. 28, 1992, 1992 Ariz. Sess. Laws 2500, 2501. In substance, the governor here sought (by the item vetoes of the transfers) to compel the legislature to maintain support for programs he favored, yet also (by the "reversion" orders) to satisfy the legislature's budget-cutting wishes through comparable savings found elsewhere.

288. *See supra* note 208.

289. *Rios*, 172 Ariz. at 13, 833 P.2d at 30 (citing dictum in Fairfield v. Foster, 25 Ariz. 146, 157, 214 P. 319, 323 (1923)).

290. *Id.* at 13, 833 P.2d at 30.

programs.[291] Nonetheless, the court's concern about separation of powers was sound, and the decision can be explained in those terms. As discussed elsewhere,[292] item *reductions* are impermissible intrusions on the legislative domain, because of both constitutional policy and text.[293] These reversion orders were analogous to item reductions of the appropriations from which the savings were to be sought.[294] Moreover, reversion orders, whether they purport to impound part or all of an appropriation, lack the procedural safeguards of legislative review which surround the item veto.[295] Accordingly, the court's ruling, notwithstanding the lack of clarity in its "reallocation" language, seems correct.

b. H.B. 2002.

In H.B. 2002 the governor item vetoed a number of reductions in appropriations because he thought the legislative cuts of programs he favored were too deep.[296] In their stead he directed the agencies to "revert" to the general fund *lesser* reductions, and to spend the difference on those programs.[297] Unlike H.B. 2001, here the "revertments" were to come from the now-restored (more generous) versions of the *very same appropriations* whose successors he had vetoed, rather than from other sources within the agency's budget. The court struck down these "revertments", again on the somewhat misleading ground that they constituted impermissible gubernatorial "reallocation."[298] The real problem was the same as that with H.B. 2001: the "revertments" amounted to item reductions, which are impermissible for the reasons noted above.

These impoundment rulings implement the principle of legislative control of the budget which the *Rios* court articulated.[299] As such, they highlight the inconsistency with that principle of the case's item veto rulings.

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291. The reversion orders would only achieve "reallocation" in a limited sense: they would cause a smaller amount of money to be spent, on those appropriations from which the savings would be found, than the legislature had specified. The fact that a *larger* amount than the legislature specified would also be spent on *other* appropriations—those whose reduction the governor item vetoed—was due to the *vetoes* which the reversion orders accompanied, rather than the reversion orders themselves.

292. *See supra* notes 222–29 and accompanying text.

293. *See supra* notes 225–28 and accompanying text.

294. A reversion order is more analogous to an impermissible "item reduction" than to a permissible "item veto," since it commonly only *partly* diminishes a particular appropriation, rather than rejecting it in its entirety.

295. A true item veto is subject to legislative override. *See supra* note 2. This protects legislative authority over the budget. In contrast, there is no apparent constitutional mechanism for legislative response to a reversion order, irrespective of whether the order is one that depletes an appropriation in whole (thus mimicking a permissible item veto) or in part (thus mimicking an impermissible item reduction). This problem is exacerbated by two additional facts. A reversion order may (as in *Rios*) fail utterly to specify the specific appropriations in which savings are to be found, thus further enhancing unreviewable gubernatorial discretion. Further, the reversion order may be issued quite some time after the particular appropriation bill has been signed, the legislature having adjourned. For all these reasons, legislative oversight and review may be frustrated or prevented.

296. Governor's Veto Message to H.B. 2002, Mar. 28, 1992, 1992 Ariz. Sess. Laws 2502–05.

297. *Id.*

298. *Rios*, 172 Ariz. at 13–14, 833 P.2d at 30–31.

299. *Id.* at 6, 833 P.2d at 23 (citing Lefebvre v. Callaghan, 33 Ariz. 197, 204, 263 P. 589, 591 (1928)).

V. CONCLUSION

Constitutional rules limit the structure and content of appropriations legislation in Arizona. Under Article IV, section 20 of the Constitution, general appropriation bills, which make appropriations for multiple subjects, may contain nothing but "appropriations." Other appropriation measures, containing substantive legislation, may address only a single subject.

These are anti-rider and anti-logrolling rules. They seek to assure that a true, independently-generated legislative majority supports every substantive policy measure that the legislature enacts. By dampening the legislative impulse to enact such laws on the strength of appropriations, or to combine appropriations and unrelated legislation, the rules advance orderly legislative process.

The "appropriations only" rule serves further to protect existing statutes from amendment or repeal by a general appropriation bill. The hazard that general law might otherwise be altered by an opportunistic majority arising from budget negotiations is thus avoided. Notwithstanding some conflict in the cases, policy considerations suggest that this protection should extend to continuing statutory appropriations, not just to *non*-appropriative general law; changes in either can constitute significant shifts in existing public policy.

Section 20's "nothing but appropriations" rule, properly applied, is in one sense more stringent than has been thought. Dictum in cases suggests that "incidental or explanatory" legislative language is permissible in general appropriation bills. However, where such language in substance adds policy to existing statutes on which recurring appropriations are based, or removes policy from those statutes, it has the effect of amending general law for the duration of the budget cycle. This is improper under the anti-logrolling rationale of section 20.

Section 20 has a fiscal impact as well as an anti-legislative one. By limiting the subjects for which appropriations can be made in the general appropriation bill (and limiting all other appropriation bills to a single subject), it helps to control "pork barrel" appropriating. Its restrictions, however, are not absolute. Contrary to some commentary and dictum, it appears that the general appropriation bill may properly contain a limited class of "new" appropriations on the permitted subjects, even though those appropriations were not specifically provided for by previous legislatures.[300] In this sense section 20 is *less* strict than has been thought. However, the language accompanying such "new" appropriations should be limited to defining their purpose, in order to avoid improper substantive lawmaking in a general appropriation bill.

These constitutional rules facilitate gubernatorial review of appropriation bills. First, in the case of single-subject appropriation measures containing legislation, the governor's signature will not endorse any unrelated general law to which he might object. Conversely, the governor's complete veto of such a bill will not mean the rejection of unrelated legislative matter of which he

300. Were this not so, the logic and utility of the item veto would be diminished. The general appropriation bill could then contain (and, *a fortiori*, the governor could item veto) only appropriations that had received prior endorsement in a single-subject bill. Such appropriations are less likely to be the product of "pork barrel" appropriating, the evil at which the item veto was aimed. *See generally supra* notes 94–95 and accompanying text.

might approve. Multi-subject general appropriation bills cannot properly contain legislative provisions, so the governor is generally not faced with a need to weigh their relative merits. In sum, the rules governing both types of appropriation bills largely obviate gubernatorial "balancing" problems respecting the merits of substantive legislation.

In both kinds of bills, moreover, the governor may object to individual appropriations with which he disagrees, by use of the item veto power conferred by Article V, section 7 of the Constitution.

The purpose of the item veto is to enable the governor to selectively restrain expenditures he deems unwise, avoiding "all or none" judgments about complex bills whose other provisions he finds desirable or essential. The item veto power thus complements the self-executing rules of section 20 that constrain appropriation legislation, by giving the *governor* an additional, independent role in constraining legislative "excess." That role, however, while important, is a traditionally limited one.

The Arizona Supreme Court has historically recognized the principle of legislative primacy in budget making. It has defined the nature and scope of the item veto power in pursuance of that view. Accordingly, the governor must accept the legislature's structuring of appropriation bills, which, in turn, largely dictates the range and content of material he may delete. The effort to identify and characterize an "item" properly subject to the selective veto must be undertaken in consideration of legislative, rather than gubernatorial, intent. Moreover, once properly identified, an "item" cannot be *partially* disapproved so as to alter its meaning or impact in any way: its amount cannot be altered, nor the terms or conditions of its expenditure changed. Further, no judicial effort should be made to control the structure or specificity of budget making. The only limitation on these principles appears to be a judicial unwillingness to allow the legislature to write a highly specific budget and simultaneously, through legerdemain, insulate it from the item veto.

In short, the governor's authority in structuring budgets has been seen as reactive to, rather than coequal with, the legislature's. The governor can respond to appropriations with approval or disapproval, but cannot reshape their contents.

While most Arizona case law echoes this idea, portions of the recent case *Rios v. Symington* upheld vetoes of "un"-appropriation. These holdings cannot be understood on the basis of allowing the governor to restrain expenditures. Their effect is the opposite: they authorize the governor to compel higher expenditures than the legislature prefers, thus enhancing his authority to determine the contents of the budget. These portions of *Rios* seem wrongly decided. As has happened in other jurisdictions, they may suggest the beginnings of a judicially-sanctioned increase in gubernatorial policy making power in the appropriation process. Such a trend would surely continue if, as has been recently suggested, the Arizona Constitution were amended to confer on the governor an "item reduction" authority. That power, currently held by eleven governors, would give the governor formal authority to revise legislative decisions about the amount to be spent on a wide range of state appropriations.

Finally, the item veto power applies only to items of "appropriation," a term not consistently applied by Arizona courts. Properly construed, this means the item veto cannot be exercised on any non-appropriative provisions of budget bills. The logic of this view, at least as applied to *general* appropriation bills, is undergirded by section 20's limitation of such measures to "nothing but appropriations." Unlike some other states, there is little occasion, and scant judicial approval, for the Arizona governor to purport to use the item veto power on substantive legislative language.

For the same reasons, the item veto is ill-suited to serve as a gubernatorial remedy for legislation that exceeds state constitutional restraints on legislative power. Other steps are available to the governor, more consonant with orderly resolution of conflict between the branches.