NOTES

Washington's Partial Veto Power: Judicial Construction of Article III, Section 12

I. INTRODUCTION

The power of the governor to veto[1] legislation is a legislative power.[2] Article III, section 12 of the Washington Constitution grants the governor the power to veto not only entire bills, but parts of bills.[3] In this respect, Washington is like most other states.[4] However, the provisions of article III, section 12, both before and after amendment in 1974,[5] go beyond those of other states[6] by allowing the governor to partially veto bills that are not appropriation bills, subject to an override by two-thirds of the legislature.[7]

The effect of article III, section 12 is to allow the governor, with certain limitations, to legislate with only one-third of the votes in the legislature.[8] Thus, any judicial interpretation of the language in article III, section 12 can greatly alter the governor's power to legislate. Although the situation calls for

1. "Veto" means "I forbid." R. LUCE, LEGISLATIVE PROBLEMS 140 (1935). *See also* Beckman, *The Item Veto Power of the Executive*, 31 TEMP. L.Q. 27 (1957) (As generally used in the United States, the term includes both the refusal of the executive officer whose approval is necessary to perfect a law that has been passed by the legislative body and the message which is usually sent to the legislature stating the reasons for the lack of the executive's approval.) [hereinafter Beckman].

2. "In approving or disapproving legislation, the Governor acts in a legislative capacity and as part of the legislative branch of government." Hallin v. Trent, 94 Wash. 2d 671, 677, 619 P.2d 357, 360 (1980). The President's powers are analogous. In 1959, President Eisenhower stated, "I am part of the legislative process." R. NEUSTADT, PRESIDENTIAL POWER 33 (1961), *cited in* State ex rel. Kleczka v. Conta, 82 Wis. 2d 679, 709-711, 264 N.W.2d 39, 552-53 n.3 (1978).

3. *See* text, part II.

4. *See* Beckman, *supra* note 1, at 27.

5. 1974 WASH. LAWS, 1st Ex. Sess., 806-07, S.J.Res. No. 140, approved Nov. 5, 1974.

6. T. BURKE & M. MALNATI, REPORT ON THE PARTIAL VETO POWER AND THE 1985 PARTIAL VETOES, 47-48 (Office of Program Research 1985) [hereinafter BURKE & MALNATI].

7. *See infra* notes 12 and 16.

8. *See* Washington Fed'n of State Employees v. State, 101 Wash. 2d 536, 551, 682 P.2d 869, 877 (1984) (Rosellini, J., dissenting).

judicial restraint, the Washington Supreme Court has not, until recently, shown an inclination to carefully interpret the language of article III, section 12. The court has used two different subjective tests to determine the constitutional validity of partial vetoes. Both tests created uncertainty in the legislative process and produced confusing results. In 1984, the court abandoned the affirmative-negative test,[9] and the court may soon have a chance to abandon the separate subject test[10] for section vetoes.

This Note recommends that the separate subject test be abandoned like the affirmative-negative test before it. In the alternative, the Constitution should be amended to remove any perceived need for a subjective judicial test. As a last-choice solution to the problem of uncertainty and inefficiency in the legislative process, the legislature should use its override powers more extensively.

II. ARTICLE III, SECTION 12 AND THE 62ND AMENDMENT

Since 1889, when Washington's Constitution went into effect, the governor has had the authority to veto any entire bill passed by the legislature.[11] The framers also provided the legislature with the power to override the governor's veto.[12] Provisions for a gubernatorial veto of whole bills and a legislative override are standard in state constitutions. What distinguishes the Washington Constitution from other state constitutions, from 1889 to the present, is the provision in article III, section 12 allowing the governor to veto portions of non-appropriation bills. Most states only allow their governor to veto "parts" or "items" of appropriation bills. Before its amendment in 1974, article III, section 12 provided in part:

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9. *Id.* at 547, 682 P.2d at 875.

10. *See infra* part III, B.

11. Article III, section 12 provides in part:

> Every act which shall have passed the legislature shall be, before it becomes a law, presented to the governor. If he approves, he shall sign it; but if not, he shall return it, with his objections, to that house in which it shall have originated, which house shall enter the objections at large upon the journal and proceed to reconsider.

WASH. CONST. art. III, § 12.

12. Article III, section 12 provides in part:

> If after such reconsideration, two-thirds of the members present shall agree to pass the bill it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of the members present, it shall become a law . . . .

WASH. CONST. art. III, § 12.

> If any bill presented to the governor contain several sections or items, he may object to one or more sections or items while approving other portions of the bill. In such a case he shall append to the bill, at the time of signing it, a statement of the section, or sections; item or items to which he objects and the reasons therefor, and the section or sections, item or items so objected to, shall not take effect unless passed over the governor's objection, as hereinbefore provided.

This partial veto provision gave the governor tremendous legislative power by enabling the governor to substantially alter legislation. In the early 1970's, legislators voiced their objections to the scope of the governor's partial veto power.[13] In 1974, a staff member of the Washington House of Representatives recommended an amendment to article III, section 12 that would have eliminated the section veto power altogether and further, would have restricted the item veto power to appropriation items.[14] Such an amendment would have given Washington's governor the same partial veto power as most other states allow.[15]

Instead of the proposed amendment, the voters, in 1974, approved Senate Joint Resolution No. 140, which became the 62nd amendment. The amendment did not eliminate the section veto, but it restricted the section veto to "entire" sections. In addition, the amendment restricted item vetoes to "appropriation" items. The partial veto portion of article III, section 12 as amended provides:

> If any bill presented to the governor contain several sections or appropriation items, he may object to one or more sections or appropriation items while approving other portions of the bill: *Provided*, That he may not object to less than an entire section, except that if the section contains one or more appropriation items he may object to any such appropriation item or items.

The third change made by the 62nd amendment was to give the legislature additional override powers. If the governor vetoes a bill or any part of one after the legislature adjourns, the 62nd amendment authorizes the legislature to reconvene in an extraordinary session within forty-five days after adjourn-

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13. *See infra* note 14.

14. Burke, *The Partial Veto Power: Legislation by the Governor*, 49 WASH. L. REV. 603, 613-14 (1974) [hereinafter Burke, *The Partial Veto Power*].

15. *Id.* at 604 n.3.

ment to reconsider any vetoes.[16]

Both before and after the 1974 amendment, the extent of the governor's partial veto powers under article III, section 12 has repeatedly caused concern, especially among state legislators, that the Washington governor has too much legislative power. Even Washington governors have recognized possible problems with the veto provision. In 1917, Governor Ernest Lister wrote in a letter:

> I feel that this provision is wise, in that it enables the Governor to hold a strong check on legislation . . . . I have often felt that the power could be broadened to good advantage, giving the Governor power to veto portions of a section or to reduce appropriation items. It is possible, however, that so doing would be to place too much power in the hands of the Chief Executive.[17]

Interpretations by the Washington Supreme Court of the words in article III, section 12 necessarily affect the balance of power between the legislature and the governor. Knowing this, the court has a duty to discern the intent embodied in the language and to make decisions accordingly. For the court to make decisions based on how it thinks the legislative power ought to be allocated is judicial policymaking. The Washington Supreme Court has not always recognized this distinction, but its recent abandonment of the affirmative-negative test indicates that the court has reassessed its role in partial veto cases.

III. JUDICIAL CONSTRUCTION OF THE PARTIAL VETO POWER

Court challenges to specific partial vetoes began as early as 1910[18] and continue to occur today.[19] The Washington Supreme Court has evaluated the constitutionality of partial vetoes both in terms of the express restraints in the constitu-

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16. Amendment 62 provides in part:

> *Provided*, That within forty-five days next after adjournment, Sundays excepted, the legislature may, upon petition by a two-thirds majority or more of the membership of each house, reconvene in extraordinary session, not to exceed five days duration, solely to reconsider any bills vetoed.

WASH. CONST. amend. 62.

17. R. LUCE, *supra* note 1, at 189.

18. Spokane Grain & Fuel Co. v. Lyttaker, 59 Wash. 76, 109 P. 316 (1910). *See infra* note 21.

19. *See* discussion of Washington State Motorcycle Dealers Ass'n v. State, No. 85-2-01488-7 (Thurston County Super. Ct. Mar. 27, 1987) *infra* notes 87-95 and accompanying text.

tion and in terms of restraints the court found to be necessarily implied. The tests developed by the court have been difficult to apply. Further, they have not enhanced predictability or efficiency in the legislative process. Changes in the partial veto power found in the express language of the 62nd amendment eliminate the need for semantic tests of validity, at least for the section veto power.[20] One such test, the affirmative-negative test, has recently been abolished. The court should do the same with its separate subject test for determining what a "section" is.

A. The Affirmative-Negative Test

1. Historical Background

Later cases credit *Spokane Grain & Fuel Co. v. Lyttaker*[21] with establishing the affirmative-negative test in Washington. Under this test, the governor may only exercise the partial

20. The scope of the governor's power to veto "appropriation items" has not been tested in court. An appropriation item could be considered strictly a dollar amount, on the one hand, or the term could be broadly construed to include conditions or restrictions on the monetary item. In many jurisdictions, a governor with the power to veto appropriation items may not veto conditions to, or restrictions on, the appropriation without vetoing the appropriation itself. *See, e.g.*, State ex rel. Link v. Olson, 286 N.W.2d 262, 271 (N.D. 1979). *Contra Kleczka*, 82 Wis. 2d at 715, 264 N.W.2d at 555. Governor Gardner seems to have given the term an expansive interpretation; in the 1985 Legislative Session he repeatedly vetoed conditions on appropriations. BURKE & MALNATI, *supra* note 6, at 13-37.

21. 59 Wash. 76, 109 P. 316 (1910). Although the case is cited as authority for the affirmative-negative test, the court considered the effect of the veto a nullity on other constitutional grounds. In March, 1909, the legislature passed a materialmen's lien statute. At a later session in 1909 the legislature passed another materialmen's lien bill. Section 5 of the later act repealed the March act, and section 6 declared an emergency. The first four sections of the later act contained the body of the materialmen's lien requirements. The governor repealed all but the repealing and emergency sections, sections 5 and 6, leaving only a repealing act. The court held the remaining repealing law unconstitutional because the nature of the act was not expressed in the title, as required by Washington Constitution article II, § 19. *See infra* note 90. In discussing the governor's actions the court said:

> The repealing clause was a mere incident to the affirmative legislation contained in the act, and when the latter fell under the veto the former fell with it. In other words, when the executive approved the repealing section he approved something that his veto had already destroyed. The legislature attempted to substitute one act for another and the executive had a right to place his veto on the substitution, but he could not defeat the one act by his veto, and the other by approving the repealing clause.

Id. at 86, 109 P. at 320. These words have been interpreted by members of the court to mean that the governor cannot use the veto power to legislate affirmatively. *See* State ex rel. Ruoff v. Rosellini, 55 Wash. 2d 554, 558, 348 P.2d 971, 973-74 (1960)(Finley, J., dissenting).

veto power in a negative or destructive manner. The power may not be used in an affirmative or creative way.[22] In other words, the power should be used to prevent some provision from becoming law, but not to add a new or different result from what the legislature intended.[23]

This test has been applied in several states and is based on notions of separation of powers.[24] Courts using the test often reason that because all affirmative power to legislate is granted to the legislature, what remains for the governor is only the power to delete or destroy. The governor does not have the power to change the legislature's intent.[25]

Washington courts have produced confusing results when applying the affirmative-negative test to partial veto disputes. Members of the Washington Supreme Court, moreover, have quite often disagreed among themselves on whether a partial veto was an "affirmative" or "negative" exercise of the partial veto power.

For example, in *Cascade Telephone Co. v. Tax Commission*[26] a split court in 1934 upheld the partial veto of an excise tax bill covering business activities. The vetoed portion allowed certain classes of taxed businesses, such as telephone companies, to pass the tax burden on to the ultimate consumer. Without the vetoed portion of the legislation, these companies could not reimburse themselves for the tax paid.[27] According to the majority of the court, "[t]he Governor's act in vetoing this separable item, or section, was purely negative."[28] Justice Steinert, along with another dissenting judge, found the exercise of the partial veto power in this instance "affirmative, because it actually [created] a result different from that intended, and arrived at, by the Legislature."[29]

The court next considered the partial veto power in 1960

22. Washington Ass'n of Apartment Ass'ns v. Evans, 88 Wash. 2d 563, 565-66, 564 P.2d 788, 791 (1977).

23. *Id.*

24. Harrington, *The Propriety of the Negative—The Governor's Partial Veto Authority*, 60 MARQ. L. REV. 865, 869 (1977).

25. *See, e.g.*, Harrington, *supra* note 24, at 869-73; Comment, *Where's the Pork? Restoring Balance With A Line-Item Veto*, 1 NOTRE DAME J.L., ETHICS & PUB. POL'Y 259, 273 (1985).

26. 176 Wash. 616, 30 P.2d 976 (1934).

27. *Id.* at 619-20, 30 P.2d at 977-78.

28. *Id.* at 620, 30 P.2d at 978.

29. *Id.* at 623, 30 P.2d at 979.

in *State ex rel. Ruoff v. Rosellini*.[30] That case arose from the governor's veto of a salary increase for himself. Governor Rosellini approved the remainder of the bill, which raised the salaries of other elected officials. The majority upheld the veto as a valid exercise of the governor's power to veto items[31] under article III, section 12, but did not discuss the affirmative-negative test. Justice Finley, however, argued in dissent that the veto was an invalid affirmative legislative action by the governor because the governor used the veto to fix his own salary instead of accepting the salary designated by the legislature.[32]

Later, a unanimous court in *Washington Association of Apartment Associations v. Evans*[33] held invalid a series of vetoes to the Residential Landlord-Tenant Act of 1973.[34] The court considered affirmative all but one[35] of fourteen partial vetoes in eleven different sections of the Act. The effect of all the partial vetoes was to grant tenants more protection than the legislature had provided. For example, in one part of the Act, the governor vetoed a provision requiring that the tenant be current in the payment of all utilities the tenant had agreed to pay before the tenant could pursue any of the remedies under the Act. Without this provision, the tenant would only need to be current in rental payments.[36]

In 1980, the court decided the last case under the affirmative-negative test. *Hallin v. Trent*[37] concerned legislation creating new judicial positions for three counties. One section of the bill required that the judgeships be filled by general election.[38] Without this section, judicial positions would be filled by gubernatorial appointment. The court upheld the governor's veto of this section, finding that "the veto was used destructively without affecting the basic legislation," because "the principal objective of the legislation was the providing of

30. 55 Wash. 2d 554, 348 P.2d 971 (1960).

31. *Id.* at 556, 348 P.2d at 973. *See infra* note 62.

32. *Id.* at 561-62, 348 P.2d at 975.

33. 88 Wash. 2d 563, 564 P.2d 788 (1977).

34. *See infra* note 71.

35. The court found the other attempted partial veto invalid because it was not "severable" and only part of a single subject. Therefore, it was not an "item" that could be vetoed under WASH. CONST. art. III, § 12. 88 Wash. 2d at 569, 564 P.2d at 792.

36. *Id.* at 567-68, 564 P.2d at 792.

37. 94 Wash. 2d 671, 619 P.2d 357 (1980).

38. 1979 WASH. LAWS 1st Ex. Sess., ch. 202, § 6.

new judicial positions for various counties."[39] The veto did not change the legislature's intent to create new judgeships.

2. *Washington Federation of State Employees v. State of Washington*

In 1984, the Washington Supreme Court was again asked to invalidate a partial veto based on the affirmative-negative test. This time it declined to do so. The court abandoned the affirmative-negative test and upheld the governor's actions as a valid veto of an entire section.[40]

The case concerned a bill that amended the state civil service laws to permit the state to consider not only seniority, but also performance in decisions on salaries, layoffs, and reemployment. The governor approved the bill except for section 30 and all references to that section. Section 30, a legislative veto provision, mandated legislative review of all administrative rules implementing the Act. By vetoing section 30, the governor removed from the legislative branch the final say in implementing the Act.[41]

The Washington Federation of State Employees, AFL-CIO, challenged the governor's veto[42] of section 30 and the references to it. The union alleged, first, that the veto was prohibited under article III, section 12 as an item veto[43] and, second, that the veto was void as an "affirmative" veto.[44] After rejecting the union's challenge to the amendments as a whole,[45] the court discussed the veto issue.

First, the court dismissed the union's item veto contention,

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39. *Hallin*, 94 Wash. 2d at 678, 619 P.2d at 360.

40. *Washington Fed'n of State Employees v. State*, 101 Wash. 2d 536, 544, 682 P.2d 869, 875 (1984).

41. *Id.* at 551, 682 P.2d at 877 (Rosellini, J., dissenting).

42. The union also challenged the amendments as a violation of Washington's contract clause. Washington Constitution article I, § 13 provides: "No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed." According to the union, established practices under existing personnel laws gave rise to contractual expectancies on the part of state civil service employees, and the amendments would impair those contractual rights. *Washington Fed'n*, 101 Wash. 2d at 538-39, 682 P.2d at 871. The court rejected the union's contract argument: "The rights challenged here are neither deferred benefits [as compared to pension laws] nor do they give rise to contractual expectancies. Rather, the affected provisions . . . are best categorized as terms of public employment (tenure) and part of a system of personnel administration. *Cf.* RCW 41.06.010; RCW 28B.16.010. Tenure is regulated by legislative policy." *Id.* at 542, 682 P.2d at 872.

43. *Id.* at 542, 682 P.2d at 872.

44. *Id.*

45. *See supra* note 42.

noting that the code revisor would have taken out the references to section 30 if the governor had not done so himself, because without section 30 in the act, the references to that section would have been "manifestly obsolete."[46] Thus, the governor's removal of these references was purely a "ministerial act."[47]

Second, the court considered whether the veto of section 30 was affirmative. After reviewing its history of applying the affirmative-negative test, the court declared, "[W]e believe the affirmative-negative veto concept has outlived its usefulness."[48] The court noted that the test was subjective and unworkable.[49] No one could predict whether any given partial veto would be upheld or struck down.[50] Adopting the views of one member of the Wisconsin court in *State ex rel. Kleczka v. Conta*,[51] the court observed that " '[e]very veto may be perceived in affirmative or negative terms, and as either conforming to or defying the general legislative intent, depending on the observer's perspective.' "[52] This observation was particularly appropriate in *Washington Federation* because the justices did not agree on whether the veto in question was affirmative or negative. The majority of the court considered the veto of section 30 a negative veto.[53] Three dissenting justices found the governor's veto "clearly affirmative in nature."[54]

The court found that, in addition to promoting uncertainty, the affirmative-negative test also involved the court in the legislative process. The test forced the court to decide cases based on its assessment of the different policies of the legislature and the governor.[55] As the court explained, using the affirmative-negative test "is an intrusion into the legislative branch, contrary to the separation of powers doctrine, and substitutes judicial judgment for the judgment of the legisla-

46. *Washington Fed'n*, 101 Wash. 2d at 544, 682 P.2d at 873-74.

47. *Id.*

48. *Id.* at 546, 682 P.2d at 874.

49. *Id.*

50. *Id.*

51. 82 Wis. 2d 679, 264 N.W.2d 539 (1978).

52. *Washington Fed'n*, 101 Wash. 2d at 546, 682 P.2d at 875 (quoting *Kleczka*, 82 Wis. 2d at 721, 264 N.W.2d at 557-58).

53. *Id.* at 546, 682 P.2d at 874.

54. *Id.* at 551, 682 P.2d at 877 (Rosellini, J., dissenting, joined by Dore, J., and Williams, C.J.).

55. *Id.* at 546, 682 P.2d at 874.

tive branch."[56]

The court correctly abandoned the affirmative-negative test. Before its amendment in 1974, article III, section 12 allowed the governor to veto any "section" or "item" in a bill.[57] That the veto could only be a "negative" veto was nowhere expressed. By inferring such a requirement, the court not only inhibited the efficiency of the legislative process by throwing the validity of partial vetoes into doubt, but it also altered the relative balance of power in the legislative process between the legislative and executive branches.

Before the 62nd amendment, the court apparently thought the governor's powers were so extensive as to require restriction. The 62nd amendment tipped the constitutional balance of power back in the direction of the legislature by limiting the item veto to appropriation items, by limiting section vetoes to "entire sections," and by granting the legislature the power to reconvene to consider overriding vetoes.[58] These changes influenced the court in *Washington Federation* to abandon the affirmative-negative test:

> As the defendants note, *the test perhaps was needed prior to adoption of amendment 62* when the item veto was not limited to appropriations and the Legislature did not have the authority to call itself back into session to reconsider vetoes. *With the changes adopted in amendment 62, its use is no longer appropriate.*[59]

The court is correct in concluding that to use the affirmative-negative test under the 62nd amendment is inappropriate. However, the court is incorrect to think that the test was ever appropriate. If the governor's partial veto powers under article III, section 12 were too extensive before the 62nd amendment, then what the people needed was not a subjective judicial test, but a constitutional amendment. By using the affirmative-negative test, the court, in effect, amended the Constitution itself, instead of waiting for Washington voters to make the needed changes to the Constitution.

Just as the court today should allow the governor to veto any entire section or appropriation item in a bill, the court before 1974 should have allowed the governor to veto any sec-

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56. *Id.* (citations omitted).

57. *See supra* part II.

58. *See supra* note 16.

59. *Washington Fed'n*, 101 Wash. 2d at 547, 682 P.2d at 875 (emphasis added).

tion or item in a bill. The Constitution allowed the governor this power, and the court's duty did not extend to saying that the constitutional power granted was too extensive.[60] As the court in *Washington Federation* noted when discussing the veto and override provisions of article III, section 12, "these constitutional arrangements are for the people to determine, not this court. If these arrangements become unsatisfactory or subjected to abuse, the people are capable of making desired changes."[61]

The abandonment of the affirmative-negative test in *Washington Federation* indicates that the Washington Supreme Court may now be willing to let the language of article III, section 12 speak for itself. If this is a trend, it is a good one, but there is more work to be done. The court needs to re-evaluate its role in determining the validity of "section" vetoes.

B. The Section Veto

Without the affirmative-negative test, the Washington Supreme Court is likely to focus more closely on the words "sections" and "items" when the court considers challenges to partial vetoes. Before 1974, the court refused to construe "item" to mean strictly items in appropriation bills.[62] The scope of the governor's power under the 62nd amendment to veto appropriation items has not yet been litigated. Unlike the item veto, the section veto has received a fair amount of attention and is currently the subject of litigation.[63]

1. Origin of the Separate Subject Test

In 1934, the Washington Supreme Court first interpreted the word "section" under article III, section 12 in *Cascade Telephone Co. v. Tax Commission*.[64] The challenged partial veto

60. The wisdom of constitutional provisions is not subject to judicial review. Anderson v. Chapman, 86 Wash. 2d 189, 196, 543 P.2d 229, 233 (1975).

61. *Washington Fed'n*, 101 Wash. 2d at 547, 682 P.2d at 875.

62. State ex rel. Ruoff v. Rosellini, 55 Wash. 2d 554, 348 P.2d 971 (1960). The "item" in question was the governor's salary, which was a monetary item, but not an appropriation item. In response to the argument that "item" as used in the Constitution meant an appropriation item, the court said, "[w]e find no merit in the contention that only an item in an appropriation bill is within the purview of the Constitutional provision." *Id.* at 556, 348 P.2d at 973. The court, however, left unclear whether "item" could mean any word or phrase, or just monetary provisions and appropriations. Burke, *The Partial Veto Power*, *supra* note 14, at 606.

63. *See supra* note 19.

64. 176 Wash. 616, 30 P.2d 976 (1934).

was of an entire numbered section[65] of a bill. Though the court had no reason to discuss whether a constitutional "section" could be less than an entire numbered section of a bill, it nonetheless decided that a "section" under article III, section 12 was not restricted to legislative designation.[66] Instead, the focus was on subject matter. The court held that the constitutional definition of "section" was any portion of a bill with separate, distinct, and independent subject matter.[67]

The court feared that if it left defining "section" for partial veto purposes to the legislature, "the Governor's power might be unduly limited or enlarged without reason" through "the artful arrangement of subject-matter and an arbitrary division into sections."[68] The court's fear that the legislature could strong-arm the governor was unfounded. The governor could respond to any "artful" legislative arrangements not only by vetoing the entire bill, but, unlike any governor in any other state, by vetoing any numbered section of the bill in which the legislature included material offensive to the governor.

Although the court claimed to be giving the word "section" its "fair and ordinary"[69] meaning by defining it in terms of subject matter, the court failed to consider the word in its context. Article III, section 12 speaks of sections of bills, not sections in the abstract. The fair and ordinary meaning of "sections of bills" would be the legislatively-numbered sections.

The next case to apply the *Cascade* "separate subject matter" definition of "section" was *Washington Association of Apartment Associations v. Evans*,[70] in which the court struck down the veto of a clause (italicized in the paragraph below) in the middle of a section of the Residential Landlord-Tenant Act:

> Whenever the landlord learns of a breach of section 13 of this 1973 amendatory act *or has accepted performance by the tenant which is at variance with the terms of the rental agreement or rules enforceable after the commencement of the tenancy*, he may immediately give notice to the tenant to

65. The section was numbered "2 1/2." *Id.* at 618, 30 P.2d at 977.
66. *Id.*
67. *Id.* at 620, 30 P.2d at 977.
68. *Id.* at 619, 30 P.2d at 977.
69. *Id.*
70. 88 Wash. 2d 563, 564 P.2d 788 (1977).

> remedy the nonconformance. Said notice shall expire after sixty days unless the landlord pursues any remedy under this act.[71]

The court considered the whole section to deal with only one subject matter, the right of the landlord to require conformance by the tenant to the rental agreement.[72] Thus, the clause was not severable and could not be vetoed separately.

No section vetoes were challenged after *Washington Association* until after passage of the 62nd amendment, when the voters restricted the governor's section veto to "entire" sections. Surprisingly, the court's determination of the scope of the section veto power remained the same.

2. "Entire Section"

In *Fain v. Chapman*[73] the court had its first opportunity to apply a new approach to section vetoes. The facts of *Fain* were almost identical to those in *Hallin v. Trent*.[74] Both cases concerned legislation that created new judicial positions, and both required that the new positions be filled by the electoral process. In *Hallin*, the legislature had placed this requirement in a separately numbered section, and the court upheld the veto of that section.[75] In *Fain*, the legislature had placed the requirement in a proviso to the section creating the new positions.[76]

In upholding the veto of the election requirement in *Fain*, the court noted the new language of the 62nd amendment pertaining to the section veto power,[77] but then proceeded to readopt the *Cascade* separate subject matter test to determine the validity of a section veto.[78] Emphasizing that what constitutes a section is a question of law, the court stated that judicial deference to legislative section divisions was not

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71. 1973 WASH. LAWS, 1st Ex. Sess., ch. 207, § 19 (codified in WASH. REV. CODE 59.18).

72. *Washington Ass'n*, 88 Wash. 2d at 568-69, 564 P.2d at 792. The court spoke of the clause as both the "vetoed section" and an "item," but applied the *Cascade* separate subject rule for section vetoes. *See* note 67 and accompanying text.

73. 94 Wash. 2d 684, 619 P.2d 353 (1980).

74. 94 Wash. 2d 671, 619 P.2d 357 (1980). *See supra* notes 37-39 and accompanying text.

75. *Id.* at 678, 619 P.2d at 360-61.

76. *Fain*, 94 Wash. 2d at 687, 619 P.2d at 355.

77. "*Provided*, That he may not object to less than an entire section." WASH. CONST. art. III, § 12 (amend. 62), *cited in Fain*, 94 Wash. 2d at 687, 619 P.2d at 355.

78. *Fain*, 94 Wash. 2d at 688, 619 P.2d at 355.

inevitable.[79]

The court also pointed out that the vetoed portion had no effect on the basic thrust of the legislation providing for new judicial positions.[80] This focus on "basic thrust" requires the same kind of examination as the affirmative-negative test. Essentially, one would look to see if the intent of the legislature had been altered.[81] After *Washington Federation*, a basic thrust analysis is of questionable validity.

Without a doubt, interpretation of the Constitution is the province of the court. However, the court's first task in interpreting the provisions of the Constitution is to determine the intent of the language.[82] In the 62nd amendment, the phrase "entire section" seems very clear. An entire section of a bill is commonly understood as a legislatively numbered portion of a bill. To term anything less than a legislatively numbered section an "entire section" strains reason and renders the change wrought by the 62nd amendment meaningless.

In the face of clear language in the 62nd amendment and informative legislative history,[83] the court in *Fain* chose to construe "entire section" just as it had construed "section"

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79. *Id.* at 689, 619 P.2d at 356.

80. *Id.*

81. *See supra* notes 22-23 and accompanying text.

82. State ex. rel. Billington v. Sinclair, 28 Wash. 2d 575, 183 P.2d 813 (1947).

83. The legislative history of the joint resolution that became the 62nd amendment supports the notion that the new section veto power was to be restricted to legislatively-designated sections. In particular, the following points of inquiry are instructive:

> Senator Dore: "Now the second question is in reference to page 2, which reads on line 6, PROVIDED, That he may not object to less than an entire section, except that if the section contain one or more appropriation items he may object to any such appropriation item or items.' Now presumably you are referring to an appropriation bill, but my question is, assuming you do not have an appropriation bill but a plain bill which alludes to appropriation, either in terms of dollars or merely that it shall provide for an appropriation. Now that is an exception. Is it your intent then in that case that he should veto parts of the section? That is the way it reads to me."
>
> Senator Grant: "Senator Dore, it is the intent, I believe, that he be restricted in the use of his item veto, that is to a veto of less than a section, primarily to appropriations bills."

1974 Senate Journal, 43rd Leg., 3rd Ex. Sess., at 90.

> Senator Grant: ". . . It is intended by this measure to return the veto power to its status as of about 1959. That is the governor, of course, can veto an entire bill. . . . If an enactment is so structured in sections, he can veto entire sections of bills. The question now is the item veto and how that affects it. There would no longer be an item veto under this constitutional amendment, with the exception of appropriations amounts, that is less than a section. . . . [H]e cannot under this constitutional amendment, according to our caucus

since 1934, ostensibly to avoid the clever draftsmanship that the court in *Cascade* feared would result if the legislature's numbered sections were considered sections under article III, section 12.[84] In fact, *Fain* presented just the situation the court was trying to avoid. The court stated that the legislature used a bill consisting of a single sentence in order to avoid the veto of the election provision, which had been successfully vetoed as a separately numbered section in *Hallin*.[85] According to the court, the one-sentence bill embraced several subjects, only one of which was the election provision.[86]

Under the facts of *Fain*, the legislature was not abusing its legislative powers, but using them in a manner that would force the governor to veto the entire section (which also happened to be the entire bill) or not veto the section at all. Forcing the governor to make this choice is exactly what article III, section 12 contemplates. This was a legitimate use by the legislature of its own powers to draft bills, with which the court should have been loathe to interfere.

By returning to the *Cascade* separate subject matter test in *Fain*, the court greatly softened the effect of the new restrictions on the partial veto power. As a result, the balance of legislative power laid out in the 62nd amendment between the legislative and executive branches was subtly shifted back in the direction of the governor.

Just as it abandoned the affirmative-negative test, the court should abandon the separate subject matter test for a section. Both tests have been relied on when the court has apparently not been comfortable with the constitutional allocation of powers, and the application of either test shifts the constitutional balance of legislative power. Moreover, the separate

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attorney, veto any less than a section; that is, language that is less than a section, except for the appropriation itself."

Senator (Harry) Lewis: "Senator Grant, a further question. In the event an appropriation bill had a proviso in it which proviso would be less than a full section, would you clarify the intent of this constitutional amendment as to the right of the governor to veto that proviso or an amount within the proviso or an amount indicated as part of the proviso?"

Senator Grant: "It is my understanding and it is our intent, the intent of the sponsors of this measure, that he could not veto less than an entire section, a proviso that was less than an entire section, except for the appropriations amount."

1974 Senate Journal, 43rd Leg., 3rd Ex. Sess., at 116.

84. *See supra* note 68 and accompanying text.

85. *Fain*, 94 Wash. 2d at 688, 619 P.2d at 356.

86. *Id.*

subject matter test is just as flawed in practical terms as the affirmative-negative test. It is equally difficult to apply and is no more predictable, as an example from current litigation will show.

3. Application of the Separate Subject Test

In *Washington State Motorcycle Dealers Association v. State*,[87] Judge Richard Strophy of the Thurston County Superior Court recently attempted to apply the separate subject test to twenty-four challenged section vetoes to the Motorcycle Dealers' Franchise Act of 1985.[88] The Act contained fifteen numbered sections. Governor Gardner vetoed numbered sections and portions of numbered sections, including subsections and even parts of sentences.

Of the twenty-four challenged partial vetoes, Judge Strophy found seventeen to be valid section vetoes under the separate subject test and seven to be invalid vetoes of less than a section. In his Memorandum Opinion he commented:

> This task has been, frankly, extremely difficult, because of the degree of subjectivity inherent in each determination of what constitutes a separate subject and, thus, an "entire section." The Court is sympathetic to the argument . . . that the "separate subject" test lends itself to line-drawing of a type that renders predictability difficult.[89]

The difficulty of Judge Strophy's task can be illustrated with two examples from the case.

The Motorcycle Dealers' Franchise Act was designed to regulate relations between motorcycle dealers and motorcycle manufacturers. Section 3 contains all the Act's definitions. The governor vetoed the following italicized language in section 3(2):

> (2) "Designated family member" means (a) an heir as defined in RCW 11.02.005(6) if the motorcycle dealer dies intestate or (b) a legatee or devisee as used in Title 11 RCW if the deceased motorcycle dealer leaves a will. *A motorcycle dealer also may name in a notarized statement any person as the designated family member for the purposes of receiving an interest in the motorcycle dealership. Title 11 RCW applies to this chapter. However, in cases of conflict, the*

87. No. 85-2-01488-7 (Thurston County Super. Ct. Mar. 27, 1987).
88. 1985 WASH. LAWS ch. 472.
89. *Motorcycle Dealers*, No. 85-2-01488-7, Mem. Op. at 23.

> *notarized inter vivos designation prevails over testamentary and intestate succession. Notarized inter vivos designations under this subsection are not codicils to wills.*

Depending on how broadly one defines the term "subject,"[90] section 3(2) can be viewed as encompassing only the subject of the classes of persons who could be considered designated family members, or as including both the subject of who is a designated family member and the subject of how a dealership can be transferred inter vivos. The court followed the latter course and found the veto of the last three sentences of section 3(2) a valid veto of an entire section.[91]

In another veto of part of a subsection, the court found the vetoed portion to be less than an entire section.[92] The governor vetoed the following italicized language in section 8(1):

> The manufacturer, distributor, or franchisor shall compensate the dealer for labor, parts, and other expenses incurred to comply with the manufacturer, distributor, or franchisor's warranty agreements, and for work and services performed in connection with delivery and preparation of motorcycles received from the manufacturer, distributor, or franchisor. *The compensation shall not be less than the rates reasonably charged by the dealer for like services and parts to retail customers.*

The plaintiffs argued that the subject matter of section 8(2) was compensation for dealer work.[93] Defendants, on the other hand, argued that the vetoed portion concerned only the rate of compensation and should have been separately codified.[94] The court concluded that because the excised language "would substantially alter the import and effect of the remaining lan-

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90. In another context, the Washington Supreme Court has interpreted the word "subject" quite broadly. WASH. CONST. art. II, § 19 provides: "No bill shall embrace more than one subject, and that shall be expressed in the title." *See, e.g.*, Kueckelhan v. Federal Old Line Ins. Co, 69 Wash. 2d 392, 403, 418 P.2d 443, 451 (1966) ("[T]his constitutional requirement is to be liberally construed so as not to impose awkward and hampering restrictions on the legislature . . . . Consequently, the legislature is deemed the judge of the scope which it will give the word 'subject.' "); State v. Huntley, 99 Wash. 2d 27, 29, 658 P.2d 1246, 1247 (1983)(only need a "rational unity" between the general subject and the various subsections to meet the requirement of article II, § 19).

91. *Motorcycle Dealers*, No. 85-2-01488-7, Mem. Op. at 9.

92. *Id.* at 21.

93. *Id.* Plaintiff was the Washington State Motorcycle Dealers Ass'n. Plaintiff-intervenor was the Washington State Legislature.

94. *Id.* Defendants were the State of Washington, Booth Gardner as Governor, and the Motorcycle Industry Council, Inc.

guage,"[95] the provision was not a separate subject so as to be considered an entire section. Therefore, the veto was invalid.

To analyze the partial vetoes in both sections 3(2) and 8(1) under the separate subject test, the court felt compelled to a) determine the basic thrust of the whole subsection; b) determine the basic thrust of each sentence in the subsection; c) determine whether the basic thrust of the subsection would be substantially altered by taking out the vetoed portion; and d) determine whether the vetoed portion was sufficiently independent to stand alone as its own separate subject. This was a difficult task indeed.

For a court to go through this tedious exercise every time the governor puts a pen to parts of a bill is detrimental to the legislative process. First, the test is too subjective and may allow the court to make decisions based on its own view of the policy. Second, the separate subject test creates uncertainty. The governor may be unsure what parts can be vetoed, the legislature may be unsure how to arrange bills, and neither the executive nor legislative branches would be sure of the final contents of the bill until after the court had made a final judgment on the validity of the partial vetoes. All this uncertainty leads to an inefficient legislative process.

The 62nd amendment does not necessitate this inefficiency. At its next opportunity, the Washington Supreme Court should reconsider the appropriateness and necessity of continuing to use the separate subject test to determine the validity of section vetoes.

IV. SUGGESTIONS FOR CHANGE

Changes are needed to reduce uncertainties in the current legislative process. The best solution is to reduce judicial involvement to the minimum required by the Constitution. This can be accomplished either by abandoning the separate subject test or by amending article III, section 12 once more. A less desirable remedy, because it only treats the symptoms and not the cause, is to rely on the legislature to override any partial veto it believes is either politically unacceptable or constitutionally invalid. Each of these suggestions shall be considered in turn.

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95. *Id.*

A. Abandon the Separate Subject Test

If *Motorcycle Dealers* reaches the Washington Supreme Court, the court will have no better opportunity to consider abandoning the separate subject test. Governor Gardner's partial vetoes to the Motorcycle Dealers' Franchise Act present twenty-four examples of what a separate subject may or may not be. The court is likely to experience frustration trying to discern whether any portion of a numbered section is "separate" or "independent" from the rest of the section.

Beyond examining the practical problems associated with the separate subject test, the court should take a hard look at the power-shifting effect the separate subject test has in the legislative process. The test allows the governor more partial veto power than the words "entire section" reasonably imply. For the court to allow the governor this extra power is just as much of an "intrusion into the legislative branch"[96] as the use of the affirmative-negative test was.

The court should not assume that the legislature will place numerous items into every numbered section of a bill that otherwise could have been placed in a separately numbered section. The legislature has a practical interest in drafting bills logically and understandably. Its interests are not merely political.

It is time for the court to acknowledge that the words "entire section" probably mean just what they seem to say. The governor's choices will be more difficult, but no great catastrophe is likely to result, and the legislative process will be more certain and efficient.

B. Amend the Constitution

If the court continues to hold that the words "entire section" refer to separate, independent subject matter rather than to a legislatively designated section, then article III, section 12 should be amended once more. The language needs to be made perfectly clear. One possibility would be to add the following bracketed phrase:

> *Provided*, That he may not object to less than an entire section [,as designated by the Legislature,] except that if the section contain one or more appropriation items he may object to any such appropriation item or items.

96. *Washington Fed'n*, 101 Wash. 2d at 546, 682 P.2d at 874.

Such an amendment would eliminate subjective judicial determinations of what a "section" is. Judicial review of section vetoes would not, however, be entirely precluded. The governor's partial veto powers would still be subject to implicit restraints. For instance, one would expect that the governor could not veto a provision in a bill that prevents the remainder from operating as law, unless the governor vetoed the whole bill. In other words, the remaining provisions must constitute a complete and workable law.[97]

By minimizing the need for judicial determinations of what constitutes a valid section veto, a new constitutional amendment would speed up and smooth out the legislative process. The legislature would draft bills according to both policy and common sense. The governor would veto any numbered section containing politically or legally unacceptable material. Then the legislature would have to attempt to override any partial veto it found politically unacceptable.[98] At this point, the process would end.

Judicial abandonment of the separate subject test and amendment of article III, section 12 are equally effective remedies for correcting the problems in the legislative process generated by the section veto power. Less effective and less appropriate is heavy reliance on the legislature to override every partial veto to which it objects.

C. Increase Legislative Overrides

One of the changes worked by the 62nd amendment to the former veto powers under article III, section 12 was the addition of a post-adjournment legislative override provision.[99] The legislature's ability to override a governor's veto has always been a most important check on a governor's veto powers. The Washington Supreme Court has emphasized on several occasions the need for the legislature to override vetoes, rather than to rely on the courts to declare exercises of the veto power invalid.[100]

One way to measure a governor's influence is to examine

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97. *See Kleczka*, 82 Wis. 2d 679, 707, 264 N.W.2d 539, 551 (1978) (citing State ex rel. Martin v. Zimmerman, 233 Wis. 442, 450, 289 N.W. 662, 665 (1940)).

98. *See infra* notes 99-104 and accompanying text.

99. *See supra* note 16.

100. *See Washington Fed'n*, 101 Wash. 2d at 547, 682 P.2d at 875; *Hallin*, 94 Wash. 2d at 678, 619 P.2d at 360.

the frequency with which vetoes are overridden.[101] The additional override power in the 62nd amendment gives the legislature a greater opportunity to override vetoes. Under the present constitutional wording, the legislature is not penalized as heavily as previously for failing to distribute its workload over the entire session to avoid congestion before adjournment.[102]

Although governors with strong veto powers are less likely to experience overrides than those governors with weak veto powers,[103] overrides are more highly associated with divided party control of state government than with the strength of the governor's formal veto powers.[104] Thus, the Washington governor's uniquely broad veto powers should not alone excuse the legislature from attempting to override both pre- and post-adjournment vetoes. If *Washington Federation* is an indication that the court is unwilling to arbitrate partial veto disputes, then the Washington legislature would be wise to exercise its override powers freely, or at least attempt to do so.

To hold the legislature responsible for overriding partial vetoes is a good idea when the scope of the governor's partial veto powers can be objectively determined by reading the Constitution. On the other hand, to rely on the legislature to override partial vetoes is inappropriate when the scope of the partial veto power is obscured by a subjective judicial test such as the separate subject test. Such reliance forces the legislature to wear two hats, policymaker and interpreter of the Constitution. The second role belongs to the court, not the legislature. The legislature should not be asked to override vetoes of questionable constitutional validity. Although the legislature holds the hammer, that hammer is a political tool, and should not be used to determine the scope of the governor's partial veto powers under the Constitution.

If the Washington Supreme Court continues to use the separate subject test, the legislature should exercise its override powers to reduce the uncertainty caused by waiting for a judicial determination of a veto's validity under the Constitu-

101. Prescott, *The Executive Veto in American States*, 3 W. POL. Q. 98, 104 (1950).

102. According to Prescott, legislative ineptitude is a controlling factor in the growth of the governor's powers. *Id.* at 112.

103. Wiggins, *Executive Vetoes And Legislative Overrides In The American States*, 42 J. POL. 1110, 1115 (1980).

104. *Id.* at 1117.

tion. This is an impractical and inefficient way to remedy the current problems in the legislative process, but it may be the only way to check the governor's use of the section veto power until the court abandons the separate subject test or the voters amend article III, section 12.

V. CONCLUSION

Over the years, Washington governors have enjoyed uniquely broad partial veto powers. Judicial interpretation of the partial veto powers granted to the governor in article III, section 12 led to the development of two subjective, unworkable tests, the affirmative-negative test, which worked to the governor's disadvantage, and the separate subject test, which works to the legislature's disadvantage. Both tests cause uncertainty and inefficiency in the legislative process. Moreover, in applying these tests, the Washington Supreme Court inappropriately alters the balance of power between the legislative and executive branches. Although the court should be applauded for abandoning the affirmative-negative test, it also needs to reconsider its use of the separate subject section veto test. The language of article III, section 12 contemplates a legislative process with minimal judicial intervention.

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