

A SKIRMISH IN THE BATTLE FOR THE SOUL OF MASSACHUSETTS STATE GOVERNMENT: PRIVATIZATION OF GOVERNMENT SERVICES AND THE CONSTITUTIONALITY OF APPROPRIATION RESTRICTION MEASURES

"My criticisms of state government are not directed at the men and women who serve in its ranks . . . the problem is a system which dissipates their talents and frustrates their ingenuity—a system loath to incorporate competition and customer choice in steering us toward prosperity."

—William F. Weld¹

INTRODUCTION

William F. Weld was elected Governor of Massachusetts in the midst of an economic recession that had demystified the fabled "Massachusetts Miracle" of the 1980s, and a fiscal crisis that had left the Commonwealth with ballooning budget deficits and disintegrating bond ratings.² Weld, a fiscally conservative Republican, had promised voters that he would lower taxes *and* slash government expenditures by the sheer force of political will on the one hand, and by fundamentally changing the method by which government delivers services on the other.³ Soon after taking office, he began to make good on those promises by submitting the first of many balanced budget and tax reduction proposals to the Legislature,⁴ and embarking on a campaign

¹ Governor William F. Weld, Inaugural Address (Jan. 3, 1991), in EXECUTIVE OFFICE FOR ADMINISTRATION AND FINANCE, COMMONWEALTH OF MASSACHUSETTS, *PRIVATIZATION IN MASSACHUSETTS: GETTING RESULTS* 33 (1993).

² In the November 1990 general election, Weld narrowly defeated his democratic opponent, Boston University President John Silber. See Peter G. Gosselin, *Weld's Economic Challenge*, BOSTON GLOBE, Nov. 11, 1990, at A1, for a discussion of the many challenges Weld faced at the time of his election.

³ See, e.g., Scot Lehigh, *Budget Deficit Seen as Weld's Worst Problem*, BOSTON GLOBE, Jan. 1, 1991, at 1.

⁴ See, e.g., Frank Phillips, *Education, Local Aid, Human Services Hit*, BOSTON GLOBE, Feb. 1, 1991, at 1.

to privatize many services traditionally delivered by state government agencies.⁵

The Governor's views on privatization are guided by the belief that while there is a realm in which public sector entities are the most effective deliverers of services, numerous activities traditionally undertaken by state government agencies fall outside of this realm.⁶ The Weld Administration has sought to identify such activities and to change the method of undertaking them so as to benefit from the cost efficiencies that private sector entities can bring to bear on the provision of certain services.⁷ Accordingly, the Commonwealth has entered into "privatization contracts" for, among other services, skating rink management, highway maintenance and child support enforcement.⁸

The Weld Administration has argued that as a result of these and other initiatives undertaken during the Governor's first two years in office, the Commonwealth saved \$273 million and increased the quantity and quality of the services provided.⁹ The diverse group of individuals who have opposed the Governor's privatization initiatives, however, have leveled a barrage of criticisms at the goals, mechanics and results of privatization.¹⁰ State employees, for example, charged the Administration with union busting, and claimed that privatization was costing the taxpayers money and disproportionately affecting minority workers.¹¹ These concerns ultimately led the Legislature to take a position in the debate over privatization with the passage, in 1993, of the Pacheco Act.¹² The opening sentence of the Act reads: "The general court hereby finds and declares that using private contractors to provide public services formerly provided by state employees does not always promote the public interest."¹³ This declaration reveals that legislators intended not merely to enact a system of safeguards for

⁵ See, e.g., Bruce Mohl and Frank Phillips, *Weld States His Business: Takes Office, Vows New Approach*, BOSTON GLOBE, Jan. 4, 1991, at 1.

⁶ See, e.g., Governor William F. Weld, Address to Executive Branch Interns (July 15, 1995).

⁷ See generally EXECUTIVE OFFICE FOR ADMINISTRATION AND FINANCE, *supra* note 1.

⁸ See *id.* at 20-30.

⁹ See *id.* at 1.

¹⁰ See *id.* at 31-64 (explaining and countering charges made against privatization).

¹¹ See *id.* at 33-34, 40-42, 47-48.

¹² 1993 Mass. Acts 296 (Governor Weld vetoed the bill, only to be overridden by the Legislature).

¹³ MASS. GEN. LAWS ch. 7, § 52 (1994). The full text reads as follows:

The general court hereby finds and declares that using private contractors to provide public services formerly provided by state employees does not always promote the public interest. To ensure that citizens of the commonwealth receive high quality public services at low cost, with due regard for the taxpayers of the commonwealth and the needs of public and private workers, the general court finds it necessary to regulate such privatization in accordance with sections fifty-three to

assigning government contracts, but to put the Weld Administration on notice that further efforts to privatize government services would be actively resisted by lawmakers.¹⁴

The statute outlines a process that executive branch agencies must follow before contracting with a private company for the provision of services delivered by state employees.¹⁵ The statute applies to any such privatization contract with an aggregate value of at least \$100,000.¹⁶ An agency must demonstrate that the total cost to perform the service by private contract will be less than the in-house cost, and that the quality of the service provided will not decline.¹⁷ The agency must also ensure that private contracts, if awarded, contain certain provisions regarding wages, health insurance, the hiring of qualified agency employees, nondiscrimination and affirmative action.¹⁸ The agency must submit its plans to the State Auditor, who determines whether the agency has met the statute's various requirements.¹⁹

The law thus establishes both procedural requirements and substantive standards for the grant of contracts to private sector firms.²⁰

fifty-five inclusive. The general court does not intend to restrict the use of community facilities to provide care for clients of state agencies, if any privatization contract relating to such facilities otherwise complies with the provisions of said sections fifty-three to fifty-five, inclusive.

Id.

¹⁴ See *id.*

¹⁵ See *id.* § 53. The law also applies to various independent authorities, as illustrated by the definition of agency: "Agency", an executive office, department, division, board, commission or other office or officer in the executive branch of the government of the commonwealth, the Massachusetts Bay Transportation Authority, the Massachusetts Turnpike Authority and the Massachusetts Port Authority." *Id.*

¹⁶ See *id.* Privatization contract is defined as follows:

"Privatization contract", an agreement or combination or series of agreements by which a non-governmental person or entity agrees with an agency to provide services, valued at one-hundred thousand dollars or more, which are substantially similar to and in lieu of services theretofore provided, in whole or in part, by regular employees of an agency. Any subsequent agreement, including any agreement resulting from a re-bidding of previously privatized service, or any agreement renewing or extending a privatization contract, shall not be considered a privatization contract. An agreement solely to provide legal, management consulting, planning, engineering or design services shall not be considered a privatization contract.

Id.

¹⁷ See *id.* § 54(7)(ii)-(iii). The agency must prepare a detailed "statement of services" that estimates the most cost-efficient method of providing the service with agency employees, select a private contractor through a competitive bidding process and then compare the in-house cost with the cost of the contract. See *id.* § 54(1), (4)-(6).

¹⁸ See MASS. GEN. LAWS ch. 7, § 54(2)-(3) (1994).

¹⁹ See *id.* § 55 (stating that State Auditor is constitutional officer, elected by the citizens of Commonwealth every four years).

²⁰ See *id.* §§ 52-55.

The procedural requirements force reflection and analysis by executive branch agencies, and expose the decision-making process to independent scrutiny by the State Auditor and, ultimately, the media and people of the Commonwealth.²¹ The substantive standards forbid agencies from privatizing unless services of equal quality can be provided at a lesser cost by private contractors.²²

The Governor has attacked the Pacheco Act as an attempt to preserve an untenable status quo:

This bill is a huge barrier to change, and preserves nothing but the status quo. To dispense with any diplomatic niceties, this legislation is little more than a State Employee Preservation Act. It puts preserving jobs for state workers ahead of cost-efficient, quality services for the people of this state.²³

The Weld Administration has also criticized the statute for erecting unfair barriers to privatization.²⁴ Although the statute does erect obstacles, it does not prevent an agency from privatizing a service when that agency properly compiles an analysis showing that a particular service would be more effectively delivered by a private contractor.²⁵ Thus, opponents of privatization must employ additional devices to prevent agencies from contracting with private sector entities for the provision of services delivered by state employees.²⁶

This Note does not discuss whether privatization efforts represent sound public policy, but rests upon the fact that there is genuine disagreement on this point in the body politic. Neither does this Note address the constitutionality of privatizing government services—a question already much discussed in the growing literature in this field. Rather, this Note delves into the tactics that lawmakers employ in challenging or defending particular proposals to privatize services. Specifically, this Note considers the constitutionality of the appropriation restriction, a legislative tactic that has been used by opponents of privatization in other states²⁷ and seems ripe for use in Massachu-

²¹ See *id.* §§ 54–55.

²² See *id.* § 54.

²³ Governor William F. Weld, Testimony Before the Joint Committee on State Administration, in EXECUTIVE OFFICE FOR ADMINISTRATION AND FINANCE, *supra* note 1, at 49.

²⁴ See *id.* at 49–54. Weld claimed, for example, that the bill requires the cost of competitive bids to be artificially inflated and the cost of services provided by state employees to be artificially deflated. See *id.* at 49.

²⁵ See MASS. GEN. LAWS ch. 7, §§ 54(7), 55 (1994).

²⁶ For example, the Legislature might change the requirements of the Pacheco Act so as to make it more difficult for the Administration to advance privatization proposals.

²⁷ Legislators in New Mexico, for example, employed an appropriation restriction in an effort

setts.²⁸ The appropriation restriction is a creature of the budget process; to oppose an executive branch agency's plan to privatize a particular program, the Legislature might structure a budget line-item in such a way as to condition funding for the program on its being provided by public employees.²⁹ In response, the Governor would likely use his line-item veto power to excise this condition, thus allowing the agency to contract with a private sector entity for the provision of services related to the program.³⁰ A legal struggle over the validity of that line-item veto would likely ensue.

This Note argues that any attempt by the Massachusetts Legislature to legislate how certain government services must be delivered constitutes an improper invasion of the executive function.³¹ Part I of this Note explores the limits of the Governor's line-item veto power.³² Part II discusses the respective roles of the Legislature and Executive under the Massachusetts Constitution.³³ Part III poses a hypothetical appropriation battle between those branches over a condition in an appropriation for prison services, and examines how the Massachusetts Supreme Judicial Court ("SJC") might resolve the dispute.³⁴ The Note concludes that the SJC should declare the appropriation restriction an unconstitutional method of halting privatization efforts.³⁵

1. THE GOVERNOR'S LINE-ITEM VETO POWER

The Massachusetts Constitution grants the Governor two types of veto power.³⁶ Pursuant to the constitution's general provisions on the executive branch, the Governor may veto any measure placed before

to prevent the privatization of a commodities support program. *See State v. Carruthers*, 759 P.2d 1380, 1387 (N.M. 1988).

²⁸ Indeed, in the late spring of 1995, during the legislative debates on the Fiscal Year 1996 budget, Governor Weld's Office of Legal Counsel prepared to make the case against the constitutionality of the appropriation restriction. Anticipating the use of such measures in the line items for several of the Commonwealth's mental hospitals, the Governor's lawyers drafted briefs to accompany their planned request for an advisory opinion of the Supreme Judicial Court on the subject. The occasion to seek the opinion of the Commonwealth's highest court, however, did not arise.

²⁹ *Accord Carruthers*, 759 P.2d at 1387 ("It is the intent of the legislature that the appropriation of six hundred forty thousand dollars (\$640,000) to the commodities support bureau shall not be expended to contract with a non-governmental contractor for warehousing and delivery in the commodities support program.").

³⁰ *Accord id.*

³¹ *See infra* notes 183-248 and accompanying text.

³² *See infra* notes 36-118 and accompanying text.

³³ *See infra* notes 119-82 and accompanying text.

³⁴ *See infra* notes 183-248 and accompanying text.

³⁵ *See infra* notes 183-248 and accompanying text.

³⁶ *See* MASS. CONST. Part II, ch. 1, § 1, art. 2; MASS. CONST. amend. art. 63, § 5.

him by the Legislature.³⁷ Pursuant to article 63 of the amendments to the constitution, the Governor may also "[d]isapprove or reduce items or parts of items in any bill appropriating money."³⁸ This line-item veto power enables the Governor to remove portions of appropriation bills before signing the remainder of those bills into law.³⁹ The SJC has delineated the scope of this power in a series of cases spanning the past sixty years.⁴⁰

In a 1936 *Opinion of the Justices*, the SJC established the basic framework for analyzing gubernatorial exercises of the line-item veto power.⁴¹ The opinion involved a general appropriation bill that contained a line item authorizing the payment of \$100,000 for "extraordinary expenses."⁴² The line item contained language designating \$65,000 of the total for particular extraordinary expenses, such as entertaining the President of the United States.⁴³ The Governor approved the \$100,000 sum, but vetoed the restrictions placed upon its expenditure.⁴⁴

The SJC ruled the Governor's veto invalid, reasoning that article 63 does not give the Governor the power to remove restrictions imposed upon the use of appropriated funds.⁴⁵ The court explained that article 63's limited application to appropriation bills indicated that the expression "items or parts of items" refers to *separable fiscal units* and not to words or phrases.⁴⁶ The court reasoned that by removing the restrictions in question, the Governor had effectively enlarged the

³⁷ See MASS. CONST. Part II, ch. 1, § 1, art. 2.

³⁸ MASS. CONST. amend. art. 63, § 5. The full text reads as follows:

Section 5. Submission to the Governor: The governor may disapprove or reduce items or parts of items in any bill appropriating money. So much of such bill as he approves shall upon his signing the same become law. As to each item disapproved or reduced, he shall transmit to the house in which the bill originated his reason for such disapproval or reduction, and the procedure shall then be the same as in the case of a bill disapproved as a whole. In case he shall fail so to transmit his reasons for such disapproval or reduction within five days after the bill shall have been presented to him, such items shall have the force of law unless the general court by adjournment shall prevent such transmission, in which case they shall not be law.

Id.

³⁹ See *id.*

⁴⁰ See *Opinion of the Justices*, 643 N.E.2d 1036 (Mass. 1994); *Barnes v. Secretary of Admin.*, 586 N.E.2d 958 (Mass. 1992); *Opinion of the Justices*, 582 N.E.2d 504 (Mass. 1991); *Opinion of the Justices*, 428 N.E.2d 117 (Mass. 1981); *Attorney Gen. v. Administrative Justice*, 427 N.E.2d 735 (Mass. 1981); *Opinion of the Justices*, 212 N.E.2d 562 (Mass. 1965); *Opinion of the Justices*, 2 N.E.2d 789 (Mass. 1936).

⁴¹ See *Opinion of the Justices*, 2 N.E.2d at 790-91.

⁴² *Id.* at 790.

⁴³ See *id.*

⁴⁴ See *id.*

⁴⁵ *Id.* at 791.

⁴⁶ *Opinion of the Justices*, 2 N.E.2d at 790.

appropriation made by the Legislature by "[t]hrowing the \$100,000 into a common fund to be used for any one of several different purposes."⁴⁷ The court explained further that only the Legislature has the power to enlarge appropriations—the Governor's role in the appropriation process is limited to either reducing or eliminating line items.⁴⁸ As a result, the court deemed the Governor's attempt to remove the restrictive language from the appropriation an invalid exercise of his article 63 veto power.⁴⁹ In the years since formulating this basic framework, the court has analyzed many line-item vetoes and clarified its jurisprudence on the scope of article 63.⁵⁰

In 1981, in *Attorney General v. Administrative Justice of the Boston Municipal Court Department of the Trial Court*, the SJC ruled that article 63 does not necessarily prevent the Governor from removing language from a budget bill that appears to constitute a restriction on an appropriation.⁵¹ *Attorney General* involved the 1982 fiscal year general appropriation bill that included funding for the housing court department of the Commonwealth's trial court system; the appropriation did not include funding for the administrative office of the housing court department.⁵² Another line item, providing funding for the Boston municipal court, stated that the municipal court's administrative justice would assume the duties of the administrative justice for the housing court department.⁵³ The Governor vetoed the portion of the line item that transferred authority over the housing court department to the municipal court's administrative justice.⁵⁴ The SJC determined that the veto constituted a proper exercise of the Governor's article 63 powers.⁵⁵

⁴⁷ *Id.* at 791.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See *infra* notes 51–108 and accompanying text. In addition to considering the issues discussed therein, the SJC has also, for example, sought to determine when the Governor actually has before him a bill that is subject to an article 63 veto. See *Opinion of the Justices*, 212 N.E.2d at 565–67. The Governor reduced the amount approved by the Legislature in the annual county bill. See *id.* at 564. The bill authorized the counties of the Commonwealth to spend certain moneys for certain items and authorized them to raise these amounts by levying county taxes. See *id.* at 565–66. The court held that the bill was not an appropriations bill and that the Governor thus had no power to reduce the amounts established by the Legislature. *Id.* at 567. The court reasoned that the bill purported to make no appropriation of state funds from the treasury of the Commonwealth and that the substance, rather than the form, of the bill controlled its interpretation. See *id.* at 566–67.

⁵¹ See *Attorney Gen.*, 427 N.E.2d at 738–39.

⁵² *Id.* at 736.

⁵³ See *id.* at 737.

⁵⁴ See *id.*

⁵⁵ *Id.* at 738–39.

The court noted that the history and language of article 63 dictated that the Governor could eliminate or reduce any *separable* provision in a general appropriation bill.⁵⁶ The court reasoned that a provision is separable, and thus susceptible to a line-item veto, if it does not direct the way an appropriation is to be used.⁵⁷ The court explained that it determines if an item is separable by analyzing whether deletion of the item 1) alters the purpose of the appropriation, or 2) eliminates a valid restriction or condition on the appropriation.⁵⁸

The court determined that deletion of the transfer provision would not affect the purpose of the appropriation, which was to provide funds for the operation of the municipal and housing courts.⁵⁹ Further, the court noted that the language in the line item ("[p]rovided that . . . the administrative justice of said Boston municipal court department shall serve as the administrative justice of the housing court") did not appear on its face to constitute a condition or restriction on the expenditure of funds.⁶⁰ The court contrasted this language with wording it had deemed restrictive in the past, such as "[s]ubject, however, to the condition that."⁶¹ The court then explained: "While we do not intimate that skillful drafting may transform a separable provision of general legislation to a restriction or condition, we note that the Legislature here did not use conditional or restrictive wording in the disapproved provisions."⁶² In addition, the court explained that in contrast to the veto invalidated in the 1936 *Opinion of the Justices*, this veto served neither to enlarge an appropriation nor infringe on the Legislature's power to set apart certain sums of money for specified purposes.⁶³ The SJC thus upheld the Governor's act as a valid exercise of the article 63 veto power.⁶⁴

In another 1981 case, *Opinion of the Justices*, the court further clarified the nature of a restriction on an appropriation by addressing

⁵⁶ *Attorney Gen.*, 427 N.E.2d at 737 (citing *Opinion of the Justices*, 425 N.E.2d 750, 752-53 (Mass. 1981)) (emphasis added).

⁵⁷ See *id.* at 738. The court noted that this is the majority view in states which permit partial vetoes and cited a number of cases from other jurisdictions. *Id.* at 738 n.3 (citing *State ex rel. Turner v. Iowa State Highway Comm'n*, 186 N.W.2d 141, 150-51 (Iowa 1971); *Henry v. Edwards*, 346 So. 2d 153, 157-58 (La. 1977); *State ex rel. Cason v. Bond*, 495 S.W.2d 385, 389-90 (Mo. 1973)).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Attorney Gen.*, 427 N.E.2d at 738-39 (citing *Opinion of the Justices*, 2 N.E.2d at 790).

⁶² *Id.* at 738 (emphasis added).

⁶³ *Id.*

⁶⁴ *Id.*

three budget provisions the Governor had vetoed.⁶⁵ Line item 1101–2100 appropriated money for the Fiscal Affairs Division of the Executive Office of Administration and Finance.⁶⁶ The Governor vetoed language in this line item that required the Commissioner of Administration to report to the House and Senate Ways and Means Committees on the progress of collective bargaining negotiations.⁶⁷ Line item 1201–0100 appropriated money for the Department of Revenue.⁶⁸ The Governor vetoed language in this line item that required the Governor to file periodic revenue reports with the Legislature and participate in ensuring that state government outlays would not exceed revenues in the course of a fiscal year.⁶⁹

In deeming these vetoes legitimate, the court reasoned that the language the Governor had deleted from the bill neither directed the manner in which appropriated funds were to be used nor imposed restrictions or conditions on the expenditure of funds.⁷⁰ The court explained that the deleted language had not even referred to the executive branch bodies being funded by the line items.⁷¹ The court reasoned that despite the administrative connections between the Fiscal Affairs Division and the Commissioner of Administration on the one hand, and the Department of Revenue and the Governor on the other, the language removed by the Governor's veto did not relate to the use of funds appropriated for the operation of those executive branch agencies.⁷² The court thus held that the language, although

⁶⁵ See *Opinion of the Justices*, 428 N.E.2d at 118–23. The first three of the six questions related to a budget issue already resolved by the SJC in *Attorney Gen.*, 427 N.E.2d at 738–39. See *Opinion of the Justices*, 428 N.E.2d at 120.

⁶⁶ See *id.*

⁶⁷ See *id.* The line item read, in pertinent part and with vetoed portions in brackets, as follows: *Fiscal Affairs Division*. For the administration of the division; [*provided that during the negotiation of any collective bargaining agreement the commissioner shall file with the house and senate committees on ways and means the provisions of each offer made by the Commonwealth . . .*] including not more than forty-nine permanent positions. . . \$1,337,200.

Id. (emphasis added).

⁶⁸ See *id.* at 121.

⁶⁹ See *id.* The line item read, in pertinent part and with vetoed portions in brackets, as follows: For the administration of the department, [*and provided further that no moneys shall be allotted to said department unless the following provisions were implemented in the previous quarter . . .*] including audits . . . \$29,014,000.

Id. (emphasis added).

⁷⁰ *Opinion of the Justices*, 428 N.E.2d at 120, 122.

⁷¹ *Id.* The Commissioner of Administration, who was burdened by the vetoed language in item 1101–2100, is not an employee of the Fiscal Affairs Division; similarly, the Governor, who was burdened by the vetoed language in item 1201–0100, is not an employee of the Department of Revenue. See *id.*

⁷² *Id.* at 121, 122.

conditional on its face, was separable, noting again that skillful drafting cannot convert a separable piece of legislation to a restriction or condition on the expenditure of an appropriation.⁷³

On the third budget issue, by contrast, the SJC held that the Governor had exceeded his article 63 powers.⁷⁴ Line item 4800-0010 appropriated money for the Department of Social Services ("DSS") and set guidelines for levels of spending for day care and battered women programs.⁷⁵ The Governor did not change the total appropriation for DSS, but attempted to delete the language which required certain levels of funding for particular programs.⁷⁶

The court reasoned that the provisions at issue reflected the Legislature's intent to allocate certain portions of the appropriations for day care and battered women programs.⁷⁷ Thus, the deletion of those provisions directly affected the legislative purpose underlying the budget line item.⁷⁸ The court reasoned that the Governor had violated the principle that it is for the Legislature to determine which social objectives or programs are worthy of funding.⁷⁹ The court thus concluded that the language at issue was an inseparable restriction that the Governor could not remove by an article 63 veto.⁸⁰

The court solidified its views on that which constitutes an inseparable restriction in a 1991 *Opinion of the Justices*, in which it considered a number of line-item vetoes regarding three budget issues.⁸¹ Line item 9221-1000 appropriated money for the Commissioner of Banks and made the funding contingent on the passage of a number of outside sections.⁸² These outside sections altered the Deposit Insurance Fund ("Fund"), an entity regulated by the Commissioner of Banks.⁸³ The court reasoned that the outside sections were directed at the Fund and not at the Commissioner.⁸⁴ Consequently, the outside sections did not impose a condition or restriction directly related to the use of the appropriated funds, and their deletion did not impact the legislative

⁷³ *Id.* at 122 (citing *Attorney Gen.*, 427 N.E.2d at 738).

⁷⁴ *Id.* at 123.

⁷⁵ See *Opinion of the Justices*, 428 N.E.2d at 122-23.

⁷⁶ See *id.*

⁷⁷ *Id.* at 123.

⁷⁸ See *id.*

⁷⁹ *Id.* at 123 (citing *Opinion of the Justices*, 376 N.E.2d 1217, 1221 (Mass. 1978)).

⁸⁰ *Opinion of the Justices*, 428 N.E.2d at 123.

⁸¹ See *Opinion of the Justices*, 582 N.E.2d at 509-13.

⁸² See *id.* at 509-10.

⁸³ See *id.* at 510.

⁸⁴ *Id.*

purpose of funding the Commissioner's office.⁸⁵ The court thus held that the Governor's vetoes of the outside sections were valid, despite the Legislature's attempt to make their passage a condition precedent to the appropriation.⁸⁶

Line item 0340-0130 appropriated money for the victim and witness assistance programs of eleven district attorneys' offices.⁸⁷ The Governor vetoed language that expressly permitted the district attorneys to use these funds for salaries and litigation expenses.⁸⁸ The court reasoned that the Legislature had not specifically directed any part of the appropriation to be spent on salaries or expenses for litigation.⁸⁹ Because the entire sum was thus already available for other program needs, the Governor had not enlarged the appropriation for those programs by removing the language regarding salaries and litigation expenses.⁹⁰ Therefore, because the Governor had not lifted restraints on the use of the appropriated money or made money available for particular items that was not already available, the court deemed his veto valid pursuant to article 63.⁹¹

On the third budget issue, the SJC held that although the Governor had overstepped his article 63 powers by removing language from line items appropriating money for the Department of Environmental Management ("DEM") and the Metropolitan District Commission ("MDC"), his veto of related outside sections was constitutionally valid.⁹² Line items 2100-0001 and 2440-0012 appropriated funds for DEM's division of parks and the MDC's division of parks and recreation.⁹³ The Governor vetoed language in those line items that specified that the funds could not be expended until sufficient revenue was present in the revolving funds of those agencies.⁹⁴ A related measure, outside section 50, established the aforementioned revolving funds.⁹⁵

The court explained that the Legislature had specified a particular source of funding for a reason: to ensure that the entities named in

⁸⁵ *See id.*

⁸⁶ *Opinion of the Justices*, 582 N.E.2d at 510.

⁸⁷ *See id.* at 511.

⁸⁸ *See id.*

⁸⁹ *Id.* at 512.

⁹⁰ *See id.*

⁹¹ *Opinion of the Justices*, 582 N.E.2d at 512.

⁹² *Id.* at 511.

⁹³ *See id.* at 510-11.

⁹⁴ *See id.* at 511.

⁹⁵ *See id.*

the line items operated in a fiscally responsible manner.⁹⁶ The SJC reasoned that the Governor's veto, which removed references to the revolving funds, would thus alter the legislative purpose underlying the line items.⁹⁷ The court held, however, that the Governor was within his article 63 powers in vetoing the outside section that established the revolving funds.⁹⁸ The court explained this apparent contradiction, saying, "[t]he Governor cannot be deprived of his authority to veto a separable, outside section on the ground that, by doing so, certain items are rendered ineffective. It is as though the Governor disapproved those items in their entirety, a result that would be constitutionally permissible."⁹⁹ The court thus invalidated the Governor's veto of the language within the budget line items but upheld his veto of the related outside section, ruling it within the scope of his article 63 powers.¹⁰⁰

Lastly, in *Barnes v. Secretary of Administration*, the SJC established that it would not examine the Governor's motives when analyzing his use of the article 63 veto power.¹⁰¹ This 1992 case involved a budget proposal in which the Governor had suggested a substantial restructuring of a certain welfare program and a correspondingly smaller appropriation than had been allocated the previous year.¹⁰² The Legislature ignored these suggestions and appropriated significantly more money for the program than had the Governor.¹⁰³ Upon receiving the general appropriation bill, the Governor reduced the amount of the appropriation and, in an accompanying message to the Legislature, explained that his purpose was to force changes in the structure of the program.¹⁰⁴

The Legislature¹⁰⁵ argued that the court should invalidate the Governor's veto, because he had attempted to accomplish through "defunding" what he could not accomplish through the legislative process.¹⁰⁶ The court rejected this argument and stated that it would not look behind the substance of the Governor's action or engage in

⁹⁶ *Opinion of the Justices*, 582 N.E.2d at 511.

⁹⁷ *Id.*

⁹⁸ *Id.* (citing *Opinion of the Justices*, 425 N.E.2d 750, 753-54 (Mass. 1981)).

⁹⁹ *Id.* at 511.

¹⁰⁰ *Id.*

¹⁰¹ *See* 586 N.E.2d at 961.

¹⁰² *Id.* at 959.

¹⁰³ *See id.*

¹⁰⁴ *See id.*

¹⁰⁵ The plaintiffs were actually a group of non-profit agencies seeking a declaratory judgment that the Governor had exceeded his article 63 veto powers. *See id.* at 958 & n.1.

¹⁰⁶ *See Barnes*, 586 N.E.2d at 961.

an analysis of his motives.¹⁰⁷ The court explained that the Governor had simply reduced the sum appropriated for a program; this action was in accordance with the plain language of article 63 and was thus a proper exercise of his line-item veto power.¹⁰⁸

The Supreme Judicial Court's jurisprudence on the scope of the Governor's article 63 veto power has become well-defined after sixty years of development.¹⁰⁹ According to the language of article 63 itself, the Governor may eliminate or reduce "items or parts of items" in any bill appropriating money.¹¹⁰ The constitutional expression "items or parts of items" refers to separable fiscal units.¹¹¹ At one time, the SJC narrowly defined "separable fiscal unit" as monetary figures only.¹¹² Today, however, certain words and phrases also qualify as separable.¹¹³

To determine whether a provision is separable, the SJC considers the consequences of its being vetoed.¹¹⁴ Specifically, the court analyzes whether the deletion of a provision alters the purposes of the appropriation or eliminates a valid condition or restriction on it.¹¹⁵ The court thus looks beyond the language of the provision at issue, emphasizing that skillful drafting cannot transform a separable piece of legislation into a restriction or condition.¹¹⁶ Further, the SJC will not make any effort to identify the Governor's reasons for exercising his line-item veto power.¹¹⁷ The court is, however, careful to ensure that the Governor has not effectively enlarged an appropriation for a particular purpose and thus infringed upon the Legislature's right and obligation to order social priorities.¹¹⁸

II. SEPARATION OF POWERS

In addition to limiting the Governor's ability to infringe on the legislative function, the SJC is concerned about the Legislature infringing-

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* ("We have never inquired into a Governor's motives in the use of the line item veto power. The language of the constitutional amendment clearly authorizes the Governor's reduction; his action was wholly lawful, and our inquiry ends there.")

¹⁰⁹ See *supra* notes 36-108 and accompanying text.

¹¹⁰ MASS. CONST. amend. art. 63, § 5.

¹¹¹ See *Opinion of the Justices*, 2 N.E.2d at 790.

¹¹² See *id.*

¹¹³ See, e.g., *Attorney Gen.*, 427 N.E.2d at 738-39 (holding that words effecting transfer of administrative responsibilities for housing court department were properly vetoed).

¹¹⁴ See *id.* at 738.

¹¹⁵ See *id.*

¹¹⁶ See *id.*

¹¹⁷ See *Barnes*, 586 N.E.2d at 961.

¹¹⁸ See *Attorney Gen.*, 427 N.E.2d at 738.

ing on the province of the Executive.¹¹⁹ The Commonwealth's separation of powers provision, like those of only a handful of other states, is more explicit than the federal Constitution in that it calls for a complete and rigid division of the three branches.¹²⁰ Article 30 of the Massachusetts Declaration of Rights provides: "In the government of the Commonwealth, the legislative department shall never exercise the executive and judicial powers . . . to the end it may be a government of laws and not of men."¹²¹ Recognizing this rigidity in the constitutional scheme, the SJC early declared itself, "[e]ver solicitous to maintain the sharp division between the three departments of government."¹²² At the same time, the court has recognized that an absolute division of the three branches is neither possible nor desirable.¹²³ Thus, some flexibility in allocating functions is desirable, as long as "[i]t creates no interference by . . . [one] department with the power of . . . [another] department."¹²⁴

In a 1978 *Opinion of the Justices*, the SJC delineated the respective powers of the Legislature and Executive in the appropriation process.¹²⁵ In that case, the court considered the constitutionality of an act that would have required executive branch agencies to spend appropriated funds in their entirety.¹²⁶ The legislation permitted agencies to make less than full expenditure only with the approval of both houses of the Legislature.¹²⁷ The court stated that the Legislature has the power to make laws consistent with the constitution, and thus "[f]ocus the energies of society into the accomplishment of designated objectives or programs."¹²⁸ The appropriation process provides a crucial means by which the Legislature exercises its lawmaking power to ac-

¹¹⁹ See, e.g., *Opinion of the Justices*, 429 N.E.2d 1019 (Mass. 1981); *Opinion of the Justices*, 376 N.E.2d 1217 (Mass. 1978); *Opinion of the Justices*, 341 N.E.2d 254 (Mass. 1976).

¹²⁰ See *Opinion of the Justices*, 309 N.E.2d 476, 478 (Mass. 1974).

¹²¹ MASS. CONST. Part I, art. 30. The full text reads as follows:

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not men.

Id.

¹²² *Attorney Gen. v. Brissenden*, 171 N.E. 82, 87 (Mass. 1930).

¹²³ See *Opinion of the Justices*, 309 N.E.2d at 478.

¹²⁴ *Id.* at 479 (quoting *Opinion of the Justices*, 94 N.E. 852, 853 (Mass. 1911)).

¹²⁵ See *Opinion of the Justices*, 376 N.E.2d at 1220-23.

¹²⁶ *Id.* at 1218.

¹²⁷ See *id.* at 1219.

¹²⁸ *Id.* at 1220.

comply with social purposes.¹²⁹ The court explained, however, that it is the constitutional prerogative and duty of the Governor to execute the laws.¹³⁰ As "supreme executive magistrate" of the Commonwealth, the Governor has exclusive authority to implement the policies and goals for which the Legislature appropriates funds.¹³¹ Further, the Governor may use discretion in applying the energies of the executive branch in achieving legislative goals.¹³²

Turning to the full expenditure requirement, the court reasoned that the Governor must be allowed some discretion in executing the laws and must not be forced to spend money in a wasteful fashion, provided that he does not compromise the achievement of underlying legislative purposes.¹³³ The court explained that it is an executive function to make spending decisions: "[i]nasmuch as it is the function of the executive branch to expend funds, it must be implied that the 'supreme executive magistrate,' as one of the three co-equal branches of government, is not obliged to spend money foolishly or needlessly."¹³⁴ Having established that the Governor has a constitutional prerogative to spend less than the full amount of an appropriation, the court considered the legislation's provision allowing the Governor to do so only with the approval of the Legislature.¹³⁵

The SJC reasoned that a vote in the Legislature regarding a request by the Governor to spend less than the full amount of an appropriation would constitute "legislation" not subject to gubernatorial veto.¹³⁶ Such a "legislative veto" of proposed gubernatorial action would constitute, "[a]n open-ended means of regulating the conduct of members of the executive branch according to the consensus of the Houses of the Legislature."¹³⁷ The court decided that this abrogation of the Governor's veto power was unconstitutional.¹³⁸ The legislation would have prevented the Governor from both vetoing legislative action and exercising his discretion in spending funds.¹³⁹ In light of these inter-

¹²⁹ See *id.*

¹³⁰ *Opinion of the Justices*, 376 N.E.2d at 1221.

¹³¹ See *id.* (citing MASS. CONST. Part II, ch. 2, § 1, art. 1).

¹³² See *id.*

¹³³ *Id.* at 1222-23.

¹³⁴ *Id.*

¹³⁵ See *Opinion of the Justices*, 376 N.E.2d at 1223.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* (describing violation of Part II, chapter 1, section 1, article 2 of Massachusetts Constitution requiring that bills be laid before Governor before gaining force of law).

¹³⁹ See *id.* at 1224.

locking infirmities, the court held that the legislation violated the principle of separation of powers embodied in article 30 of the constitution.¹⁴⁰

In a 1981 *Opinion of the Justices*, the SJC invalidated another such legislative veto.¹⁴¹ Senate Bill No. 2335 required executive branch departments to obtain approval from the Legislature before enacting plans to alter certain specified public benefit programs.¹⁴² The Governor vetoed the bill and proposed replacing the requirement that the agency receive approval from the Legislature with a requirement that it merely notify the Legislature of impending changes.¹⁴³ The Governor noted that the mechanism he proposed would give the Legislature an active role in developing policies relating to federally subsidized welfare programs, while preserving his constitutional prerogatives.¹⁴⁴

The Governor argued that the bill would violate the doctrine of separation of powers by immunizing legislative action from the executive veto and giving the Legislature an ongoing right of prior approval as to the manner in which a program is executed, thus impairing the executive prerogative of executing the laws.¹⁴⁵ The court agreed, invalidating the bill on the grounds that the effect of the Legislature's proposal would be to abrogate the Governor's veto power.¹⁴⁶ The SJC thus held that the bill violated the Massachusetts Constitution by requiring legislative approval of executive branch decisions regarding plans for altering public benefit programs.¹⁴⁷

A 1976 *Opinion of the Justices* held another such legislative veto invalid—this one regarding executive branch staffing.¹⁴⁸ In an effort to reduce public expenditures, the Legislature had passed a bill forbidding the filling of vacancies in state positions in the absence of a "critical need."¹⁴⁹ The bill required the Governor to receive the approval of both the House and Senate Ways and Means Committees before appointing or promoting personnel to fill vacancies.¹⁵⁰

¹⁴⁰ See *Opinion of the Justices*, 376 N.E.2d at 1225.

¹⁴¹ See *Opinion of the Justices*, 429 N.E.2d at 1020-22; see also *Opinion of the Justices*, 493 N.E.2d 859, 861-65 (Mass. 1986) (invalidating measure that would have required legislative approval of decisions of executive branch on low-level radioactive waste site licenses).

¹⁴² See *Opinion of the Justices*, 429 N.E.2d at 1019-20.

¹⁴³ See *id.* at 1020.

¹⁴⁴ See *id.*

¹⁴⁵ See *id.*

¹⁴⁶ See *id.* at 1022.

¹⁴⁷ *Opinion of the Justices*, 429 N.E.2d at 1022.

¹⁴⁸ See *Opinion of the Justices*, 341 N.E.2d at 255-58.

¹⁴⁹ See *id.* at 256.

¹⁵⁰ See *id.* at 255.

The court noted that the Legislature could have limited appropriations to pay state officers and employees, provided funds only for cases of "critical need," and delegated to appropriate executive officers the power to determine what positions were critical.¹⁵¹ By requiring legislative approval of the Governor's decisions as to what positions in the executive branch were "critical," however, the Legislature had done something fundamentally different.¹⁵² The court reasoned that legislative approval of such gubernatorial determinations would require the exercise of judgment and discretion in the expenditure of money by legislative officers.¹⁵³ The court concluded that "[t]o entrust the executive power of expenditure to legislative officers is to violate art. 30 by authorizing the legislative department to exercise executive powers."¹⁵⁴ The court noted that flexibility in the allocation of functions may sometimes be permissible, but only if it creates no interference by one department with the power of another.¹⁵⁵ In this case, the legislation created such interference by entrusting the executive power of expenditure to the Legislature in violation of the constitutional principle of separation of powers embodied in article 30.¹⁵⁶

The SJC's separation of powers jurisprudence is thus well-defined.¹⁵⁷ The SJC has made clear that the Legislature has the power to make laws consistent with the constitution, and consequently, to order the Commonwealth's social priorities.¹⁵⁸ The Governor, however, has the power to execute the laws, and has exclusive authority to implement the policies and goals for which the Legislature appropriates funds.¹⁵⁹ The Governor's responsibility for executing the laws carries with it an authority to use discretion in spending appropriations.¹⁶⁰ The SJC has recognized that the exercise of this discretion is manifest in the allocation of staff and resources, and that laws that entrust the executive power of expenditure to legislative officers violate article 30 of the Massachusetts Constitution.¹⁶¹

The statutes invalidated by the SJC for infringing on the Governor's responsibility for making staffing and resource decisions all con-

¹⁵¹ *Id.* at 256-57.

¹⁵² *See id.*

¹⁵³ *Opinion of the Justices*, 341 N.E.2d at 257.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 256.

¹⁵⁶ *See id.* at 257.

¹⁵⁷ *See supra* notes 119-56 and accompanying text.

¹⁵⁸ *See Opinion of the Justices*, 376 N.E.2d at 1220.

¹⁵⁹ *See id.* at 1221.

¹⁶⁰ *See id.*

¹⁶¹ *See Opinion of the Justices*, 341 N.E.2d at 257.

tained a constitutionally objectionable "legislative veto."¹⁶² The high courts of other states have been called upon to decide cases involving the executive's prerogatives in the staffing and resource allocation realm in the absence of a legislative veto provision; like the SJC, they have emphasized the executive's exclusive rights in this realm.¹⁶³

In the 1978 case *Anderson v. Lamm*, the Colorado Supreme Court held portions of a general appropriation bill invalid as violative of that state's separation of powers doctrine.¹⁶⁴ In *Anderson*, the Governor vetoed a provision of a general appropriation bill that required the Colorado Department of Social Services ("DSS") to fund a certain number of full-time positions in each of the state's counties.¹⁶⁵ The plaintiffs, members of the Colorado Legislature, challenged the validity of the Governor's veto.¹⁶⁶ A district court dismissed the complaint for failure to state a claim, reasoning that the vetoed provisions were unconstitutional and thus finding no need to reach the issue of whether the Governor used the line-item veto power properly.¹⁶⁷

The Supreme Court of Colorado affirmed, reasoning that the conditions on the number of full-time employees to be placed in each county interfered with executive authority and were thus unconstitu-

¹⁶² See, e.g., *Opinion of the Justices*, 429 N.E.2d at 1020; *Opinion of the Justices*, 376 N.E.2d at 1218-19; *Opinion of the Justices*, 341 N.E.2d at 255. Accord *Opinion of the Judges*, 532 A.2d 195, 195 (N.H. 1987) (invalidating appropriation item that would have required executive branch departments to seek legislative approval before using funds appropriated for purchase of computer equipment and maintenance of buildings and grounds); *Karcher v. Kean*, 462 A.2d 1273, 1281-82 (N.J. Super. Ct. App. Div. 1983), *aff'd on other grounds*, 479 A.2d 403, 414 (1984) (invalidating appropriation items governing hiring and release of executive branch employees).

¹⁶³ See, e.g., *Communications Workers v. Florio*, 617 A.2d 223, 232-37 (N.J. 1992). The Supreme Court of New Jersey invalidated a statute requiring the Governor to execute state employee layoffs in accordance with a plan devised by the Legislature. See *id.* at 237. The Legislature argued that the provision was to ensure that the personnel cuts required by a shortfall in funds were made in the most efficient manner possible, with the least possible disruption in the provision of state services. See *id.* at 234. The court responded:

Legislative oversight of or cooperation with the Executive was not necessary. . . .

Not only was the legislative mandate unnecessary for the effectuation of the statutory scheme, but the Legislature's attempt to micro-manage the staffing and resource allocations in administering the appropriated funds was a serious intrusion on the Governor's authority and ability to perform his constitutionally-delegated functions.

Id. (emphasis added); see also *Anderson v. Lamm*, 579 P.2d 620, 623-29 (Colo. 1978); *State v. Carruthers*, 759 P.2d 1380, 1387-88 (N.M. 1989).

¹⁶⁴ See *Anderson*, 579 P.2d at 626.

¹⁶⁵ *Id.*

¹⁶⁶ See *id.* at 622.

¹⁶⁷ See *id.* Colorado's separation of powers provision appears in article III of the state constitution and is substantially the same as article thirty of the Massachusetts Constitution:

The powers of the government of this state are divided into three distinct depart-

tional.¹⁶⁸ The court agreed with the Governor's argument that the executive branch needs flexibility to determine the proper allocation of manpower.¹⁶⁹ The court reasoned that the constitution does not permit the general assembly to interfere with the executive's power to administer appropriated funds, which includes making specific staffing and resource allocation decisions.¹⁷⁰ The court thus invalidated the Legislature's attempt to encroach on the Governor's prerogatives.¹⁷¹

Similarly, in the 1988 case *State v. Carruthers*, the New Mexico Supreme Court invalidated certain conditions the New Mexico Legislature had placed upon the use of funds by the state's commodities support bureau.¹⁷² The bill at issue stated: "It is the intent of the legislature that the appropriation of six hundred forty thousand dollars (\$640,000) to the commodities support bureau shall not be expended to contract with a non-governmental contractor for warehousing and delivery in the commodities support program."¹⁷³ The Governor vetoed this conditional language on the grounds that compliance would have resulted in the unnecessary expenditure of taxpayer dollars.¹⁷⁴

The court reasoned that the basic purpose of the appropriation of the \$640,000 was to provide commodities to qualified recipients.¹⁷⁵ The court found it unacceptable for the Legislature to attempt to hamper the Governor's control over those funds by prohibiting the privatization of the services funded by the appropriated moneys.¹⁷⁶ The court reasoned that the Governor's veto did not change the basic purpose for which the fund was established; it merely removed a condition that improperly limited the manner and means by which the commodities could be delivered.¹⁷⁷ The court thus upheld the Governor's veto.¹⁷⁸

ments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others except as in this constitution expressly directed or permitted.

COLO. CONST. art. III.

¹⁶⁸ *Anderson*, 579 P.2d at 626.

¹⁶⁹ *Id.* at 626.

¹⁷⁰ *Id.* at 623-24.

¹⁷¹ *See id.* at 624.

¹⁷² *See* 759 P.2d at 1387.

¹⁷³ *Id.*

¹⁷⁴ *See id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 1388.

¹⁷⁷ *Carruthers*, 759 P.2d at 1388.

¹⁷⁸ *Id.*

The Legislatures of Colorado and New Mexico thus attempted to directly affect staffing and resource allocation through the budget process.¹⁷⁹ The high courts of those states invalidated these legislative efforts to encroach on executive prerogatives by approving the Governors' decisions to veto the constitutionally objectionable budget language.¹⁸⁰ The SJC has, several times, invalidated a more subtle type of legislative effort to control staffing and resource allocation—the legislative veto.¹⁸¹ The court has not yet been asked to consider statutes, like those invalidated in *Anderson* and *Carruthers*, that directly dictate a particular outcome with regard to the use of government employees or the source of services.¹⁸²

III. THE APPROPRIATION RESTRICTION

The opponents of privatization in the Massachusetts Legislature might seek to oppose an agency's plans to contract with a private sector entity for the provision of certain services by embedding an appropriation restriction in that agency's budget. By including budget language that conditions an appropriation on public employees delivering the services funded by a particular line item, the Legislature could effectively prevent an executive branch agency from entering into privatization contracts.¹⁸³ While it seems clear that a legal battle over such budget language would ensue, it is not clear how the constitutional questions implicated by such an appropriation restriction would be presented to the SJC. The Colorado Supreme Court's decision in *Anderson v. Lamm* provides one possible model.¹⁸⁴ There, the Governor of Colorado vetoed certain provisions in an appropriation bill, legislators brought suit challenging that veto and the courts dismissed the suit on the grounds that the vetoed language was unconstitutional and should never have been included in the bill.¹⁸⁵ Given the prevalence of advisory opinions of the SJC in disputes between the Legislature and Executive in the Massachusetts jurisprudential tradition, however, I

¹⁷⁹ See *Anderson*, 579 P.2d at 626; *Carruthers*, 759 P.2d at 1387–88.

¹⁸⁰ See *Anderson*, 579 P.2d at 626; *Carruthers*, 759 P.2d at 1387–88.

¹⁸¹ See, e.g., *Opinion of the Justices*, 429 N.E.2d at 1022; *Opinion of the Justices*, 376 N.E.2d at 1224; *Opinion of the Justices*, 341 N.E.2d at 257.

¹⁸² See *Anderson*, 579 P.2d at 626; *Carruthers*, 759 P.2d at 1387–88.

¹⁸³ See, e.g., *Carruthers*, 759 P.2d at 1387–88. Indeed, this was the intent of the New Mexico Legislature. See *id.*

¹⁸⁴ See 579 P.2d at 622, 626.

¹⁸⁵ See *id.*

offer the following hypothetical as indicative of how the issue would likely play out in this jurisdiction.¹⁸⁶

* * * * *

The Governor of Massachusetts appoints Ms. New as the Commissioner of the Department of Public Safety ("DPS"). In her former position as a Deputy Commissioner at DPS, Ms. New was critical of the department's efforts at rehabilitating prisoners. As Commissioner, she enlists the aid of a management consulting firm to study the delivery of educational and training services to inmates of the state prisons.¹⁸⁷ A six-month study reveals that Massachusetts' prisoners, as compared to those of other states with comparable per capita expenditures, score poorly on high school equivalency exams and have little success at finding employment upon release. Commissioner New considers the consultants' recommendations concerning the staffing and resource needs of the state prison system and informs the Governor that various services should be privatized.

DPS complies with all of the requirements of the Pacheco Act, and Commissioner New demonstrates and certifies to the State Auditor that better educational and training services can be delivered at a substantially lower cost by a private contractor.¹⁸⁸ The Governor submits his budget proposal for the next fiscal year to the Legislature and proposes decreasing line item xxxx-zzzz by twenty percent as compared to the previous year; he also proposes altering the line item's language to reflect the fact that the educational and training services will be privatized.¹⁸⁹ The public employees' unions are greatly troubled by this development. The unions convince a number of influential members of the House Ways and Means Committee to offer the following language with line item xxxx-zzzz in the DPS budget:

For educational and training services in the state prisons,
[provided that these are delivered by employees of the Department of Public Safety]. . . \$5,000,000.¹⁹⁰

¹⁸⁶ As evidenced by the citations throughout this Note, the court's jurisprudence on separation of powers and the extent of the Governor's line-item veto power has developed, in large part, through the advisory opinion device.

¹⁸⁷ Ms. New need not meet the requirements of the Pacheco Act in choosing a consultant. See MASS. GEN. LAWS ch. 7, § 53 (1994) (exempting services like management consulting from Pacheco Act's strictures).

¹⁸⁸ See *id.* § 54.

¹⁸⁹ See MASS. CONST. amend. 63, § 2 (imposing duty on Governor to submit budget to Legislature for its consideration).

¹⁹⁰ See *id.* § 3 (requiring Legislature to submit to Governor general appropriation bill).

Upon receiving the general appropriation bill from the Legislature, the Governor vetoes the words contained in brackets and reduces the amount of the appropriation to four million dollars. In an accompanying message to the Legislature, he explains that he intends to increase the quality of the services provided to the inmates and reduce the cost of providing them by contracting with private vendors.¹⁹¹ The legislative sponsors, knowing that they do not have the votes to override this veto, request an opinion of the SJC as to the constitutionality of the Governor's action; the Legislature poses the following questions:

- 1) May the Governor reduce the amount of the appropriation for the Department of Public Safety where his intent is to force the Legislature to accept the privatization of services?
- 2) May the Governor delete the language contained in brackets from that same appropriation?

* * * * *

In light of its jurisprudence on articles 30 and 63 of the Massachusetts Constitution, the SJC would likely answer both of the Legislature's questions in the affirmative.¹⁹² As for the question pertaining to the Governor's reduction of the appropriation for DPS, the SJC has established that sums of money are separable fiscal units that the Governor has the power to eliminate or reduce pursuant to article 63 of the constitution.¹⁹³ The court has also established that it will not examine the motives underlying the Governor's exercise of his line-item veto power.¹⁹⁴ Thus, although the SJC might accept the argument that the Governor is attempting to force privatization upon the Legislature, it would still rule that the Governor has reduced the amount of the appropriation for educational and training services in the state prisons in accordance with the plain language of article 63.¹⁹⁵ The court would thus answer the Legislature's first question in the affirmative: the Governor may reduce the amount of the appropriation for the Department of Public Safety.¹⁹⁶

As for the Governor's deletion of certain language from line item xxxx-zzzz: the court would surely note that the language, "[p]rovided

¹⁹¹ See *id.* § 5 (obliging Governor to inform the Legislature of his reasons for disapproving items).

¹⁹² See *infra* notes 193-248 and accompanying text.

¹⁹³ See, e.g., *Barnes v. Secretary of Admin.*, 586 N.E.2d 958, 960 (Mass. 1992).

¹⁹⁴ See *id.* at 961.

¹⁹⁵ See *id.*

¹⁹⁶ See *supra* notes 193-95 and accompanying text.

that these [services] are delivered by employees of the Department of Public Safety" is, on its face, clearly restrictive. Although the language *seems* to constitute an inseparable part of line item xxxx-zzzz, the SJC has consistently stated that skillful drafting will not convert a separable piece of legislation into a restriction or condition.¹⁹⁷ The court would then seek to determine whether deletion of the bracketed language alters the legislative purpose underlying the appropriation or eliminates valid restrictions or conditions on it.¹⁹⁸

To make these determinations, the SJC would seek to identify the possible purposes underlying the DPS appropriation and then ask, 1) whether each purpose is valid pursuant to separation of powers jurisprudence, and 2) whether the Governor's veto has altered that purpose.¹⁹⁹ If a proposed purpose is not valid pursuant to separation of powers jurisprudence, the Governor's veto must stand. Further, if a proposed purpose is valid but unaltered by the Governor's veto, the veto must also stand.

A. *Preservation of Public Employment as a Legislative Purpose*

The Legislature would very likely argue that the primary purpose underlying line item xxxx-zzzz is to preserve public employment. The Legislature would argue that by appropriating five million dollars for services that DPS employees would deliver, it has made a statement concerning the value of public employment; it has exercised its power to order social priorities, "[a]nd focus the energies of society into the accomplishment of designated objectives or programs."²⁰⁰ The Legislature thus would charge that the Governor, by deleting the language that provides for public employment, is not executing the law.²⁰¹ The defenders of this appropriation restriction would claim that the Governor is not implementing the policies and goals for which the Legislature appropriated five million dollars.²⁰²

The court, however, would likely decide that providing public employment is not a valid legislative purpose.²⁰³ The fundamental problem with line item xxxx-zzzz is that it dictates how an executive branch agency's organizational chart will be structured. The Legislature has

¹⁹⁷ See, e.g., *Attorney Gen. v. Administrative Justice*, 427 N.E.2d 735, 738 (Mass. 1981).

¹⁹⁸ See, e.g., *id.*

¹⁹⁹ See *id.*

²⁰⁰ See *Opinion of the Justices*, 376 N.E.2d 1217, 1220 (Mass. 1978).

²⁰¹ See *id.* at 1221.

²⁰² See *id.*

²⁰³ See, e.g., *Carruthers*, 759 P.2d at 1387-88.

dictated that the Department of Public Safety assign state employees to the task of delivering educational and training services in the state prisons. The Legislature has thus established a staffing regime within DPS. In doing so, the Legislature has usurped the executive function of deciding how to spend appropriated funds.²⁰⁴ The Legislature has exercised judgment and discretion in the expenditure of funds in place of the Governor.²⁰⁵ Consequently, the Legislature has eliminated the Governor's discretion in spending the taxpayers' money and making staffing decisions.²⁰⁶

Line item xxxx-zzzz is comparable in its effect on the balance of powers to the law the SJC invalidated in the 1976 *Opinion of the Justices*.²⁰⁷ In that case, the court invalidated a measure that made the Legislature the arbiter of hiring within the executive branch.²⁰⁸ The Legislature had not merely set aside a limited amount of money that the Governor could use for hiring personnel, it had taken upon itself the responsibility of choosing which particular vacancies in state positions could be filled.²⁰⁹ The court invalidated this regime, holding that the Legislature must not be allowed to undertake the executive task of exercising judgment and discretion in the expenditure of money.²¹⁰ With line item xxxx-zzzz, the Legislature has again entrusted itself with making staffing decisions for the executive branch.²¹¹ The Legislature has precluded the Governor from deciding what individual or group would best provide educational and training services.²¹²

Line item xxxx-zzzz also resembles statutes that the high courts of other states have invalidated as improper incursions on executive prerogatives.²¹³ In *Anderson v. Lamm*, the Colorado Supreme Court invalidated the Legislature's attempt to specify the number of full-time employees to be placed in each office of the Colorado Department of Social Services.²¹⁴ The court concluded that the Legislature's action was unconstitutional, because the Legislature may not interfere with the executive's power to make staffing and resource allocation deci-

²⁰⁴ See *Opinion of the Justices*, 341 N.E.2d 254, 257 (Mass. 1976).

²⁰⁵ See *id.*

²⁰⁶ See *Opinion of the Justices*, 376 N.E.2d at 1222-23; *Opinion of the Justices*, 341 N.E.2d at 257.

²⁰⁷ See 341 N.E.2d at 255.

²⁰⁸ See *id.* at 257.

²⁰⁹ See *id.* at 256-57.

²¹⁰ *Id.* at 257.

²¹¹ See *id.*

²¹² See *Opinion of the Justices*, 341 N.E.2d at 257.

²¹³ See *Carruthers*, 759 P.2d at 1387; *Anderson*, 579 P.2d at 626.

²¹⁴ *Anderson*, 579 P.2d at 626.

sions.²¹⁵ Line item xxxx-zzzz specifies what type of service providers should be placed in the state prisons. That appropriation, like the one invalidated in *Anderson*, interferes with the executive's power to make staffing and resource allocation decisions.²¹⁶

In *State v. Carruthers*, the New Mexico Supreme Court considered an appropriation that was practically identical to the one at issue in line item xxxx-zzzz.²¹⁷ The court invalidated the Legislature's attempt to prevent the commodities support bureau from using private vendors to warehouse and deliver commodities.²¹⁸ Without even considering the Legislature's intent on the issue, the court held that the relevant purpose of the appropriation was to provide commodities to qualified recipients.²¹⁹ The court found it unacceptable for the Legislature to attempt to hamper the Governor's control over those funds by prohibiting the privatization of the services funded by the appropriated monies.²²⁰ The court reasoned that the Governor's veto merely removed a condition that improperly limited the manner and means by which the commodities could be delivered.²²¹

As a result, the SJC would likely conclude that preserving public employment is not a valid legislative purpose.²²² In light of this finding, the court would not have to consider whether the Governor has altered that purpose; rather, the court could proceed to assess the other potential goal of the appropriation.²²³

B. *Funding of Educational and Training Programs as a Legislative Purpose*

The Governor would argue that line item xxxx-zzzz's only valid purpose is to fund educational and training programs in the state prisons. He would argue, further, that he has not improperly altered that purpose by deleting the language requiring that the services be delivered by employees of DPS. Providing useful educational and training programs in the state prisons is a valid legislative goal.²²⁴ By appropriating five million dollars for such programs, the Legislature has

²¹⁵ *Id.*

²¹⁶ *See id.*

²¹⁷ *See Carruthers*, 759 P.2d at 1387.

²¹⁸ *Id.* at 1388.

²¹⁹ *See id.* at 1387.

²²⁰ *See id.* at 1388.

²²¹ *Id.*

²²² *See supra* notes 200-21 and accompanying text.

²²³ *See Attorney Gen.*, 427 N.E.2d at 738.

²²⁴ *See Opinion of the Justices*, 376 N.E.2d at 1220.

made a statement concerning the value of rehabilitating prisoners.²²⁵ It has exercised its power to order social priorities, "[a]nd focus the energies of society into the accomplishment of designated objectives or programs."²²⁶ The Legislature has chosen a worthy social objective to pursue (rehabilitating prisoners) and made reference, in the line item appropriating money for the task in DPS' budget, to the types of programs that it believes will be effective (educational and training programs).²²⁷

The Governor has changed the amount of the appropriation and the language of the budget line item, but he has not improperly altered the purpose underlying line item xxxx-zzzz: funding educational and training programs.²²⁸ From an article 30 standpoint, the Legislature has discharged its duty by choosing this goal and appropriating money for its pursuit; the Legislature has made law.²²⁹ The constitution charges the Governor and his agents at DPS with executing that law.²³⁰ The constitution makes the Governor the "supreme executive magistrate," and dictates that he has exclusive authority to implement the policies and goals for which the Legislature appropriates funds.²³¹ The Governor has decided not to place the responsibility for rehabilitating prisoners in the hands of the public employees at DPS. In doing so, he has exercised discretion in applying the energies of the executive branch to achieve the purposes of the laws.²³² The SJC has stated explicitly that, "[t]he executive branch is the organ of government charged with responsibility [for] . . . having detailed and contemporaneous knowledge regarding spending decisions."²³³ The Governor has determined that better services can be provided at lower cost by contracting with a private sector firm.

In light of these findings by the Governor, enforcement of the requirement that DPS employees provide the services in question would result in a waste of the taxpayers' money. In this way, line item xxxx-zzzz resembles the Legislature's attempt to require executive branch agencies to spend *all* of the funds appropriated for given programs—an effort invalidated in the 1978 *Opinion of the Justices*.²³⁴ The court con-

²²⁵ See *id.*

²²⁶ See *id.*

²²⁷ See *id.*

²²⁸ See *Attorney Gen.*, 427 N.E.2d at 738.

²²⁹ See *Opinion of the Justices*, 376 N.E.2d at 1220.

²³⁰ See *id.* at 1221.

²³¹ See *id.* (citing MASS. CONST. Part II, ch. 2, § 1, art. 1).

²³² See *id.* at 1223.

²³³ *Id.*

²³⁴ See *Opinion of the Justices*, 376 N.E.2d at 1224.

cluded in that case, as it would here, that the Governor must have discretion not to spend money in a wasteful fashion, provided that he does not compromise the achievement of underlying legislative purposes and goals.²³⁵ Assuming that the proper purpose of the appropriation is to educate and train prisoners, the Governor has exercised his discretion without altering the appropriation's purpose.²³⁶

Further, this scenario stands in marked contrast to the cases in which the SJC has invalidated gubernatorial action as beyond the scope of the article 63 veto power.²³⁷ The Governor has not, for example, changed the DPS appropriation's purpose by altering a funding mechanism.²³⁸ In a 1991 *Opinion of the Justices*, the Governor vetoed language regarding the source of funding for various parks programs.²³⁹ This language contained a restriction that the money for those programs be on hand at the outset.²⁴⁰ The SJC invalidated the Governor's veto, because it would have altered the legislative purpose of ensuring the self-sufficiency of the parks through the creation of revolving funds.²⁴¹ The language was thus not separable and not subject to removal by line-item veto.²⁴² There is no funding mechanism at issue in line item xxxx-zzzz; whether or not the language in question is removed, four million dollars will be drawn from the general fund for educational and training programs in the state prisons.

The concerns that led the SJC to invalidate the Governor's veto in a 1981 *Opinion of the Justices* are also not present in this scenario.²⁴³ In that case, the Governor vetoed language requiring DSS to devote a particular level of funding to day care and battered women services.²⁴⁴ The court explained that the effect of the Governor's veto would be to ignore the Legislature's decision that these social objectives should be pursued through the appropriation for DSS.²⁴⁵ In the line item xxxx-zzzz scenario, however, the same social objectives will be pursued whether or not the bracketed language appears in the final budget: inmates of the state's prisons will receive educational and training

²³⁵ See *id.* at 1222-23.

²³⁶ See *id.*

²³⁷ See *Opinion of the Justices*, 582 N.E.2d 504 (Mass. 1991); *Opinion of the Justices*, 428 N.E.2d 117 (Mass. 1981).

²³⁸ See *Opinion of the Justices*, 582 N.E.2d at 510-11.

²³⁹ *Id.*

²⁴⁰ See *id.*

²⁴¹ *Id.* at 511.

²⁴² See *id.*

²⁴³ See *Opinion of the Justices*, 428 N.E.2d at 123.

²⁴⁴ *Id.* at 122-23.

²⁴⁵ *Id.* at 123.

services.²⁴⁶ The quandary whose resolution rides on the validity of the Governor's veto, is *how* that social objective will be pursued.

As a result, the SJC would likely conclude that funding educational and training programs in the state prisons is a valid legislative purpose.²⁴⁷ Further, it would recognize that the Governor's veto has not altered this purpose and thus hold that he properly deleted the bracketed language from line item xxxx-zzzz.²⁴⁸

CONCLUSION

In November 1996, Governor Weld failed in his bid to unseat Senator John F. Kerry in one of the nation's highest profile Senate races.²⁴⁹ In the same election, both Republican members of Congress from Massachusetts lost re-election campaigns.²⁵⁰ While no one factor can account for these results, commentators agree that unions were instrumental in delivering "Reagan Democrats," the important group of right-leaning, working class workers, to the Democratic party.²⁵¹ As a result, pressure is mounting on Republican party leaders to back away from controversial efforts to privatize public service jobs.²⁵² Despite this pressure and in the face of a furious outcry from union leaders and community activists, the Weld Administration has continued to discuss the possibility of privatizing the Massachusetts Bay Transportation Authority's bus service.²⁵³ If the Governor does continue to push privatization proposals before a hostile Legislature, the SJC may soon be forced to assess the constitutionality of the appropriation restriction. In that event, the court would likely hold, in light of its jurisprudence on articles 30 and 63 of the Massachusetts constitution, that the Governor *may* veto language in an appropriation bill that conditions funding for services on their being delivered by public employees.

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²⁴⁶ See *id.*

²⁴⁷ See *supra* notes 224-46 and accompanying text.

²⁴⁸ See *supra* notes 224-46 and accompanying text.

²⁴⁹ See Frank Phillips & Don Aucoin, *The Tide Works Against Governor*, BOSTON GLOBE, Nov. 6, 1996, at A1.

²⁵⁰ See Anthony Flint, *GOP Faces Democratic Sweep: McGovern Defeats Blute; Tierney Leads Torkildsen*, BOSTON GLOBE, Nov. 6, 1996, at B1.

²⁵¹ See Don Aucoin, *State GOP Looks to Mend Ties to Labor: Stung by Losses, Party May Back Off Privatization*, BOSTON GLOBE, Nov. 11, 1996, at A1.

²⁵² See *id.*

²⁵³ See, e.g., Robert A. Jordan, *Privatization May Also Require Public—and Public's—Assistance*, BOSTON GLOBE, Dec. 8, 1996, at D4.