STEALING THE PUBLIC PURSE: WHY WASHINGTON’S COLLECTIVE BARGAINING LAW FOR STATE EMPLOYEES VIOLATES THE STATE CONSTITUTION

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Abstract: In 2002, the Washington legislature passed the Personnel System Reform Act (PSRA), which gives state employees the right to collectively bargain over wages and other economic terms of their employment. Section 302(3) of the PSRA further provides that once the Governor and collective bargaining units reach a proposed collective bargaining agreement, the legislature may not amend the agreement. Instead, the legislature may only express disapproval with any portion of the agreement by rejecting funding of the agreement as a whole. This Comment argues that section 302(3) of the PSRA, now codified at RCW 41.80.010(3), violates the separation of powers doctrine under the Washington State Constitution. The separation of powers doctrine forbids one branch of government from invading the province of another, especially if doing so alters the constitutional system of checks and balances. Under article VIII, section 4 of the Washington State Constitution, the legislature holds near-exclusive power to determine how public funds will be spent. By contrast, the Governor’s check on this process is limited to the line item veto. The PSRA turns this process on its head: the Governor determines the level of funding and the legislature holds the veto, thus giving the Governor primacy over spending in this area. By doing so, section 302(3) usurps one of the legislature’s core functions, upsets the system of checks and balances, and violates the separation of powers doctrine.

On June 20, 2005, Washington state government employees rushed to union offices to pay union dues for the first time—dues required for union membership.1 By paying dues, employees could reap the advantages of a 3.2% pay increase—beginning July 1—for union members only.2 Non-union employees would not receive any pay increase for an additional two months.3

The events leading to this two-month windfall for union employees culminated with legislative approval of the first-ever collective bargaining agreements over economic issues for state employees.4 Two

3. Id.
years earlier, the legislature had approved the Personnel System Reform Act (PSRA),\(^5\) which gives state employees the right to collectively bargain over wages and other economic terms and conditions of employment.\(^6\) Before the enactment of the PSRA, the legislature determined increases in compensation for state employees through the biennial appropriations process.\(^7\) However, under section 302(3) of the PSRA, now codified at RCW 41.80.010(3), the legislature cannot modify an agreement once it is reached. Rather, the legislature must either accept or reject funding for collective bargaining agreements as a whole.\(^8\)

The PSRA’s limitations on the legislature’s power have already made a difference.\(^9\) The 2005 legislature accepted the 3.2% raise beginning July 1, 2005, and the 1.6% raise beginning July 1, 2006, negotiated between the unions and the Governor—the first agreements ever negotiated under the PSRA.\(^10\) At the same time, however, section 302 prevented the legislature from amending the funding for the pay raise schedule without rejecting the entire collective bargaining agreement.\(^11\) Although the legislature also funded a similar pay raise for non-represented employees, the limitations of section 302(3) did not apply to employees who did not collectively bargain.\(^12\) Using its broader discretion to determine the details of compensation for these employees,

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6. See WASH. REV. CODE §§ 41.80.001–.905.
8. See WASH. REV. CODE § 41.80.010(3).
9. See Nonunion Pay Raises, supra note 2 (explaining that while the legislature honored the pay raise schedule negotiated by public employee unions because of the PSRA’s prohibition on amending the agreement, the legislature then delayed pay raises for non-represented employees, who were not covered by section 302(3)).
11. See Nonunion Pay Raises, supra note 2.
12. See WASH. REV. CODE § 41.80.010 (providing for an up-or-down vote only for agreements reached between employees represented by an exclusive bargaining representative and the Governor).
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the legislature delayed each raise for these workers by two months.\(^\text{13}\)

This Comment argues that section 302(3) of the PSRA violates Washington’s separation of powers doctrine. Washington courts generally find that a statute violates the separation of powers doctrine where the statute: (1) modifies the constitutionally established system of checks and balances; (2) acts in an area of executive-legislative relations lacking any previous history of inter-branch cooperation in the area; or (3) usurps a core function of another branch in the process. Section 302(3) satisfies all three criteria. First, by requiring the legislature to approve or reject funding for collective bargaining agreements without amendment, the statute reverses the roles of the executive and legislative branches in the appropriations process. Second, section 302(3) attempts to give the Governor broad powers in an area of the law where the legislature has traditionally fought to defend its prerogatives. Finally, the PSRA sharply detracts from the legislature’s near-exclusive power to determine the use of state funds by sharply curtailing the legislature’s role in funding collective bargaining agreements.

Part I of this Comment describes the PSRA. Part II describes the separation of powers doctrine in Washington. Part III outlines the special separation of powers concerns stemming from the constitution’s carefully defined roles for the Governor and legislature in the budgeting and appropriations process. Part IV argues that section 302(3) violates the heightened separation of powers doctrine concerning the appropriations power.

I. SECTION 302(3) OF THE PSRA LIMITS THE LEGISLATIVE ROLE IN MONITORING STATE WORKER COMPENSATION

The PSRA effectively surrenders to the Governor the legislature’s role in funding state employee compensation.\(^\text{14}\) Traditionally, the legislature determined the level of funding for state employee compensation in the biennial budget and delegated to executive branch agencies the authority to determine the details of compensation policy.\(^\text{15}\)


\(^{14}\) See WASH. REV. CODE § 41.80.010(3); Grennan, supra note 7, at 160 (commenting that the legislature previously held the power to set appropriations for state employee compensation).

\(^{15}\) See WASH. REV. CODE § 41.06.150 (2002), amended by PSRA, ch. 354, § 203, 2002 Wash. Sess. Laws 1800, 1805–08 [hereinafter Former § 41.06.150] (delegating authority to determine wages and other terms and conditions of employment to the Washington Personnel Resources Board); Grennan, supra note 7, at 160.
Although “covered employees” had some limited collective bargaining rights, they could not bargain over wages. The legislature changed this with the PSRA, which gives most covered employees collective bargaining rights over economic terms and conditions of employment. Under section 302(3), however, the legislature also surrendered its traditional power to regulate salary increases. For economic issues subject to the new collective bargaining authority, the legislature may not amend the funding for these agreements, but rather must accept or reject funding for collective bargaining agreements as a whole.

Before enactment of the PSRA, most terms and conditions of employment for covered employees were established by legislation and administrative rules. The Washington Personnel Resources Board (WPRB) held rulemaking authority over much of the state civil service system, which includes all state agencies and employees not specifically exempted by statute, as well as all boards, commissions, and other multi-member bodies. Specifically, the WPRB could promulgate rules governing civil service examinations, employee discipline, job classifications, salary schedules, leave, transfers, and hours. The Department of Personnel administered the system. Although the law allowed some collective bargaining, it was limited to agreements on

16. This Comment uses the term “covered employees” to refer to public employees protected by Washington’s civil service law. See WASH. REV. CODE § 41.80.005(6) (2004) (defining “employee” as anyone covered by chapter 41.06 of the Revised Code of Washington, with exceptions); id. § 41.06.900 (defining chapter 41.06 as the “state civil service law”). For a description of the specific employees who qualify for this protection, see infra note 33 and accompanying text.

17. See Former § 41.06.150(11), supra note 15 (permitting collective bargaining only for grievance procedures and other personnel matters for which the agency has discretion); FIFTY-SEVENTH WASH. STATE LEGISLATURE, 2002 FINAL LEGISLATIVE REPORT 8 (2002) (explaining that agencies did not have discretion to collectively bargain over matters covered by Washington Personnel Resources Board rulemaking, including wages and many other economic terms and conditions of employment).

18. See WASH. REV. CODE § 41.80.020(1).

19. Id. (providing that the legislature may no longer amend funding for state employee compensation when it is presented as part of a collective bargaining agreement).

20. See id.

21. See id. § 41.06.040 (extending coverage of the state civil service law to all boards, commissions, multi-member bodies, agencies, and agency employees not expressly exempted by statute); id. §§ 41.06.070–.79, .82–.94 (listing employees and positions exempt from civil service laws); Former § 41.06.150, supra note 15 (enumerating powers of WPRB to regulate personnel procedures).

22. See Former § 41.06.150, supra note 15.

23. See FIFTY-SEVENTH WASH. STATE LEGISLATURE, supra note 17, at 7–8 (describing the division of duties between WPRB and the Department of Personnel).
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grievance procedures and other personnel matters for which the employer-agency had specific authority to bargain.\(^{24}\) Despite the rulemaking delegation to the WPRB, the legislature retained discretion to control the use of funds for state employee compensation.\(^{25}\) The legislature does not adopt a line item budget.\(^{26}\) Instead, it historically appropriated a lump sum to the Office of Financial Management (OFM) to cover changes in employee wages and benefits, but would include budget provisos if it wished to further limit the executive branch’s discretion over the use of those funds.\(^{27}\) Before the PSRA, then, each agency’s compensation policy faced two constraints: the limits imposed by the budget proviso,\(^{28}\) and rules promulgated by the WPRB.\(^{29}\)

The PSRA fundamentally altered the state’s civil service laws.\(^{30}\) The Department of Personnel took over the WPRB’s rulemaking authority.\(^{31}\) Collective bargaining agreements, however, could now supersede most of the Department of Personnel’s new authority—including rules relating to transfers, sick leave, hours, and wages.\(^{32}\) The PSRA covers most employees previously within the WPRB’s jurisdiction, but the PSRA also exempts employees already covered by other collective bargaining statutes, employees connected to the agencies regulating employment relations, internal auditors, management, and “confidential” employees who assist or advise managers involved in labor relations policymaking.\(^{33}\)

\(^{24}\) Former § 41.06.150(13), *supra* note 15; Grennan, *supra* note 7, at 167 n.102.

\(^{25}\) See Grennan, *supra* note 7, at 160; *see also* Wash. State Legislature v. Lowry, 131 Wash. 2d 309, 321, 931 P.2d 885, 892 (1997) (explaining the legislature’s ability to control spending through the use of budget provisos).

\(^{26}\) See Lowry, 131 Wash. 2d at 321, 931 P.3d at 892.


\(^{28}\) See Lowry, 131 Wash. 2d at 321–22, 931 P.2d at 892 (explaining that the legislature traditionally used budget provisos to limit the use of lump sum appropriations to agencies).

\(^{29}\) See Former § 41.06.150, *supra* note 15.

\(^{30}\) See FIFTY-SEVENTH WASH. STATE LEGISLATURE, *supra* note 17, at 10 (describing the changes made by the PSRA as “historic”).

\(^{31}\) See WASH. REV. CODE § 41.06.150 (2004).

\(^{32}\) See id. § 41.06.133.

\(^{33}\) *Id.* § 41.80.005(6) (defining “employee”); *id.* § 41.80.005(4) (defining “confidential
Under the PSRA, employee bargaining units and the Governor collectively bargain over wages, hours, and other “terms and conditions of employment.” The PSRA provides that exclusive bargaining representatives (who may represent multiple bargaining units) are to arrive at a master collective bargaining agreement with the Governor (or her designee) that covers all employee units represented by the employee representative. The Governor must then request funding from the legislature after the director of the OFM certifies that the agreement is financially feasible.

Section 302(3) limits the legislature’s role in the process. Following OFM certification, the Governor requests funding for the master agreement’s compensation and fringe benefit provisions from the legislature as part of the Governor’s budget document. The legislature must then either approve or reject funding “as a whole.” If the legislature fails to act or rejects funding, then the employee representatives or the Governor may either reopen the agreement or, if the parties are at an impasse, resort to mediation. If, after approval by the legislature, the Governor or the legislature declares the existence of a significant revenue shortfall, the parties will immediately re-enter collective bargaining to reduce the contract under mutually agreed terms.

In sum, section 302(3) substantially reduces the legislature’s participation in funding state employee compensation. Prior to the

34. Id. § 41.80.020(1). See FIFTY-SEVENTH WASH. STATE LEGISLATURE, supra note 17, at 9, for a summary of the specific items which may be included in collective bargaining agreements.
35. WASH. REV. CODE § 41.80.010(2)(a).
36. Id. § 41.80.010(3).
37. Section 302(3) provides for the following:
The governor shall submit a request for funds necessary to implement the compensation and fringe benefit provisions in the master collective bargaining agreement or for legislation necessary to implement the agreement. The legislature shall approve or reject the submission of the request for funds as a whole. The legislature shall not consider a request for funds to implement a collective bargaining agreement unless the request is transmitted to the legislature as part of the governor’s budget document. If the legislature rejects or fails to act on the submission, either party may reopen all or part of the agreement or the exclusive bargaining representative may seek to [pursue mediated negotiations].
WASH. REV. CODE § 41.80.010(3).
38. Id.
39. Id.
40. Id.
41. Id. § 41.80.010(6).
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PSRA, the legislature could control compensation for state employees through use of budget provisos. Under section 302(3), however, the legislature loses this right because it may no longer amend the budget proposed by the Governor to the extent the budget funds collective bargaining agreements negotiated within the executive branch.

II. THE SEPARATION OF POWERS DOCTRINE PRESERVES THE SYSTEM OF CHECKS AND BALANCES

Washington’s separation of powers doctrine protects the legislature—indeed, any branch of government—from intrusion into its authority that undermines or otherwise upsets the system of checks and balances.42 Under the Washington State Supreme Court’s classical formulation of the doctrine, courts may void any governmental activity that unduly interferes with the independence, integrity, or prerogatives of another branch of government.43 In practice, however, the court focuses its review on activities implicating any of three factors: (1) attempts to usurp a “core function” of a branch,44 (2) acts affecting the constitutional system of checks and balances,45 and (3) actions without any historical basis.46

42. See, e.g., Zylstra v. Piva, 85 Wash. 2d 743, 750, 539 P.2d 823, 827 (1975) (holding that the court is to strike down laws that threaten the independence or integrity of any branch of government); Snider v. Bd. of County Comm’rs, 85 Wash. App. 371, 379, 932 P.2d 704, 708 (1997) (invalidating a court order compelling a county commission to exercise its eminent domain power because the order invaded a “core” legislative power).

43. See Zylstra, 85 Wash. 2d at 750, 539 P.2d at 827. At the national level, commentators have increasingly questioned the wisdom of using a separation of powers “verbal framework” (i.e., a framework in which government is conceived of as three distinct branches rather than a complex network) in constitutional analysis. See, e.g., EDWARD L. RUBIN, BEYOND CAMELOT 54–55 (2005) (arguing that the use of a three-branch metaphor to describe the American system of government has led to decisions striking down statutes for dubious reasons). Nevertheless, Washington state courts have invoked this formulation and have enforced the doctrine to strike down legislation. See, e.g., Wash. State Bar Ass’n v. State, 125 Wash. 2d 901, 907, 890 P.2d 1047, 1050 (1995) (invoking the separation of powers doctrine to strike down legislation). Consequently, this Comment will continue to employ the verbal separation of powers framework.

44. See Wash. State Bar Ass’n, 125 Wash. 2d at 907, 890 P.2d at 1050 (deciding that the legislature’s authority over the state bar association is limited because it falls within “basic” functions of the judiciary).


A. The Washington Separation of Powers Doctrine Forbids Acts that Undermine or Invade the Prerogatives or Functions of Another Branch of Government

Washington’s judiciary officially employs a very simple formula for evaluating separation of powers claims: while the activities of any two governmental branches may coincide, one branch’s act goes too far if it “threatens the independence or integrity or invades the prerogatives of [the other branch].” The Washington State Supreme Court first articulated this test in *Zylstra v. Piva*. *Zylstra* involved a claim that juvenile court employees were county (as opposed to state) employees and were therefore eligible to collectively bargain over wages and hours. The court agreed that the court workers were county employees for bargaining purposes and proceeded to consider whether this arrangement violated the separation of powers doctrine. Because the bargaining rights did not undermine the judiciary’s inherent power to compel its own funding if the compensation proved inadequate, the court found no violation of the doctrine. Although the *Zylstra* court found no violation, the test it set forth has been actively enforced by Washington courts in other contexts.

B. Separation of Powers Applies Primarily to Governmental Activities that Alter Checks and Balances, Lack Precedent, or Intrude on the Core Functions of Another Branch

Although Washington courts adhere to the *Zylstra* test in theory, three factors predominate the Washington State Supreme Court’s separation of powers jurisprudence in practice. First, although courts generally

47. *Zylstra*, 85 Wash. 2d at 750, 539 P.2d at 827.
49. Id. at 744, 539 P.2d at 824.
50. See id. at 748, 539 P.2d at 826.
51. See id. at 749–50, 539 P.2d at 826–27.
52. See, e.g., Wash. State Bar Ass’n v. State, 125 Wash. 2d 901, 910, 890 P.2d 1047, 1052 (1995) (citing *Zylstra* and invalidating an attempt to assert executive labor-relations authority over the state bar). Unlike its cousin, the nondelegation doctrine, separation of powers has endured as an active restraint on government. See *In re Salary of the Juvenile Dir.*, 87 Wash. 2d 232, 240, 552 P.2d 163, 168 (1976). Although courts avoid interfering with disputes between the political branches, they will step in when one branch threatens to upset the balance of power. See Wash. State Bar Ass’n, 125 Wash. 2d at 907, 552 P.2d at 1050.
53. See, e.g., Wash. State Legislature v. Lowry, 131 Wash. 2d 309, 320–21, 931 P.2d 885, 891–92 (1997) (allowing the Governor to veto less than an entire section of a non-appropriations bill in
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tolerate and even encourage sharing of powers between branches, they less frequently uphold actions that modify constitutional checks and balances. Second, courts disfavor activities that lack any history of inter-branch cooperation. Finally, courts will rarely uphold an action that threatens to usurp a “core” function of another branch.

1. Courts Disfavor Changes to the Constitutional System of Checks and Balances

Courts approach governmental attempts to alter constitutional checks and balances with skepticism. Their suspicion derives from the framers’ belief that overlapping checks and balances—not strict division of power into three distinct branches—best protected the people from tyranny. Consequently, both federal and state courts have been more willing to intervene when an act potentially upsets this system.

The Washington State Supreme Court has long modeled Washington’s separation of powers doctrine on the federal system. When the federal Constitution’s framers met in Philadelphia, they relied certain cases, notwithstanding the constitution’s text, when there was a history of executive-legislative tension over use of the veto power, the legislature was trying to circumvent the Governor’s core veto authority, and the veto was part of the system of checks and balances).

54. See Spokane County v. State, 136 Wash. 2d 663, 668–70, 966 P.2d 314, 317–18 (1998) (upholding the application of labor relations laws to district court employees despite the traditional judicial prerogative to direct its own affairs).

55. See Juvenile Dir., 87 Wash. 2d at 242, 552 P.2d at 168 (emphasizing that overlapping functions between the branches allow for the existence of the system of checks and balances).

56. See Lowry, 131 Wash. 2d at 320–21, 931 P.2d at 891–92.


59. See, e.g., Clinton v. New York, 524 U.S. 417, 439–40 (1998) (quoting INS v. Chadha, 462 U.S. 919, 951 (1983)) (striking down a line item veto law because it attacked the “finely wrought” system of checks and balances in approving legislation); Lowry, 131 Wash. 2d at 320, 931 P.2d at 891 (upholding the Governor’s veto of a subsection when the legislature attempted to circumvent the partial veto by placing multiple provisions in a single section of a bill because the legislature’s actions threatened the “delicate” balance of the legislative process).

60. See Juvenile Dir., 87 Wash. 2d at 239–40, 552 P.2d at 167–68 (citing M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 18–19 (1967)).

61. See, e.g., Clinton, 524 U.S. at 439–40 (holding that Congress may not expand the President’s veto authority); Lowry, 131 Wash. 2d at 313, 931 P.2d at 888 (holding that the Governor could veto a subsection of a bill when the legislature tried to circumvent the Governor’s veto power).

on Enlightenment-era ideas about liberty in general, and those of the Baron de Montesquieu in particular, to develop their system of separation of powers. The framers thus viewed separation of powers to be fundamental to liberty: if any one branch could hold the powers of another, there would be fewer checks on oppressive or tyrannical behavior.

The term “separation of powers” was then, and remains today, a misnomer: the term actually focuses less on strict segregation of powers into three branches and more on maintaining a vital system of overlapping checks and balances. During the Revolution, many states attempted to incorporate express separation of powers clauses into their constitutions, but these provisions tended to concentrate power in the legislatures’ hands. Acknowledging this problem, the framers of the U.S. Constitution created three separate branches but also intended for partial overlap of powers. To the framers, overlap was not only permissible but also inevitable. Indeed, the framers viewed some overlap as necessary to provide checks and balances, which were the real guardians against concentrated power.

Later decisions interpreting the federal Constitution have sought to implement the framers’ vision. In *Clinton v. New York*, for example, the Court struck down the Line Item Veto Act, which empowered the president to “cancel” portions of congressional acts authorizing spending or conferring tax benefits. The decision rested on narrow grounds. Nevertheless, the Court presumed that, in the absence of express constitutional authorization, the Constitution forbids the line item veto because it would alter the “finely wrought” procedure for enacting...
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laws—a procedure based on checks and balances. 73

Looking to the U.S. Constitution, the Washington State Supreme Court has adopted the same vision of the separation of powers doctrine. 74 In Washington State Legislature v. Lowry, 75 for example, the court defended the Governor’s partial veto. 76 According to the court, the Governor could veto a subsection of a non-appropriations bill—despite the Veto Clause’s plain language stating otherwise—because the legislature tried to circumvent a partial veto by amending several statutes in that single section. 77 Turning to the appropriations line item veto, the court permitted the Governor to veto budget provisos, reasoning that doing so was necessary to give the appropriations line item veto any meaning. 78 The court defended its intervention, noting that if it were to cede its role, the “delicate constitutional balance” of the legislative process would be upset. 79

2. Unprecedented Intrusions Warrant Additional Attention by Courts

When applying the Zylstra test to specific cases, courts consider any history of inter-branch cooperation on the issue a highly persuasive factor. 80 In Carrick v. Locke, 81 the court relied on the long history of district court judge oversight of coroner inquests to reject a challenge to that practice. 82 Likewise, in State v. Wadsworth, 83 the court looked to the history of legislative delegation of rulemaking authority to the judiciary when evaluating a separation of powers challenge to a statute permitting

73. See id. at 439–40 (quoting INS v. Chadha, 462 U.S. 919, 951 (1983)). Contrast the approach used in Clinton with that in Mistretta v. United States, 488 U.S. 361 (1989), where the Court, upholding delegation of power to the U.S. Sentencing Commission, emphasized that the Constitution does not prevent overlapping or shared powers between the branches. Id. at 388–89.
75. 131 Wash. 2d 309, 931 P.2d 885 (1997).
76. See id. at 313, 931 P.2d at 888.
77. Id. at 320–21, 931 P.2d at 891–92.
78. Id. at 323, 931 P.2d at 893.
79. Id. at 320, 931 P.2d at 891.
82. See id. at 139, 882 P.2d at 179.
83. 139 Wash. 2d 724, 991 P.2d 80 (2000).
court officers to designate weapons-free areas of courthouses. There, the court held that the bail-jumping statute, statutes authorizing protection orders, and the criminal contempt statute demonstrated a sufficiently long history of legislative delegation of rulemaking power to the judiciary. In both cases, the history of inter-branch cooperation was central to the court’s separation of powers analysis.

3. Generally, One Branch of Government May Not Usurp the Core Functions of Another Branch

Generally, Washington courts will invalidate governmental actions that usurp or invade a “core function” of another branch. Any action that invades a power clearly belonging to another branch may violate the separation of powers doctrine. When the courts have perceived violations of this principle, they have not hesitated to intervene and

84. Id. at 736, 991 P.2d at 87.  
85. Id. at 736–37, 991 P.2d at 87–88.  
86. Id. at 743, 991 P.2d at 90.  
87. See id.; Carrick, 125 Wash. 2d at 139, 882 P.2d at 179.  
88. See, e.g., Snider v. Bd. of County Comm’rs, 85 Wash. App. 371, 379, 932 P.2d 704, 708 (1997) (invalidating a judicial order requiring a county commission to exercise its eminent domain powers because to do so would require invasion of a core legislative power). Some tension exists between the “core functions” concept and the traditional judicial rejection of a taxonomic approach to separation of powers questions. See Carrick, 125 Wash. 2d at 136–37, 882 P.2d at 178 (noting that Washington does not rely on categorization of powers to determine whether the separation of powers doctrine is violated). Notwithstanding this sentiment, however, courts—both federal and state—maintain that certain powers clearly assigned to one branch may not be invaded by another. See TRIBE, supra note 65. For an example of this contradiction in Washington, see State v. Manussier, 129 Wash. 2d 652, 668–69, 921 P.2d 473, 480–81 (1996), which upheld a statute requiring life sentences for persistent offenders because the prosecutor’s discretion was not a “legislative” power.  
89. See, e.g., State Highway Comm’n v. Pac. Nw. Bell Tel. Co., 59 Wash. 2d 216, 222, 367 P.2d 605, 609 (1961) (holding that the legislature may not define or interpret the meaning of constitutional provisions. This is equally true when a delegation of authority to the executive branch faces scrutiny under the nondelegation doctrine. First, certain inherently legislative powers may not be delegated. See, e.g., Brower v. State, 137 Wash. 2d 44, 54, 969 P.2d 42, 49 (1998) (citing Keeting v. Pub. Util. Dist. No. 1, 49 Wash. 2d 761, 767, 306 P.2d 762, 766 (1957)) (“[I]t is unconstitutional for the Legislature to abdicate or transfer its legislative function to others.”). Second, courts have never allowed the legislature to cede control over its core functions, regardless of the limits imposed on executive discretion. Cf. Clinton v. New York, 524 U.S. 417, 436–40 (1998) (holding that the Presentment Clause of the federal constitution prevents Congress from giving the President line item veto authority even if the statute imposes substantial limits on the President’s use of that power); Amalgamated Transit Union Local 587 v. State, 142 Wash. 2d 183, 233, 11 P.3d 762, 794 (2000) (emphasizing that courts may review the constitutionality of an initiative that diminishes the legislature’s power even though the legislature could repeal the limitation on its power at a later date).
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invalidate acts threatening another branch’s core functions.\(^90\)

Courts have frequently applied the prohibition against usurping core functions to prevent the legislature from taking core powers of the judiciary. In *City of Tacoma v. O’Brien*,\(^91\) the court invalidated the legislature’s decision to excuse certain public works contracts for impossibility (as authorized by statute).\(^92\) The legislature’s findings of fact were deemed adjudicatory and thus “exclusively judicial.”\(^93\) Moreover, the court held in *Washington State Highway Commission v. Pacific Northwest Bell Telephone Co.*\(^94\) that the legislature could not define terms appearing within constitutional provisions, again because the power at issue—constitutional construction—was “exclusively” judicial.\(^95\)

Courts invariably repel attempts to nullify court rules because they view their rulemaking authority as a “core” function.\(^96\) In *Washington State Bar Ass’n v. State*,\(^97\) the court held that a state labor relations commission could not subject the state bar association to state collective bargaining laws because doing so would conflict with court rules giving the bar discretion over bargaining.\(^98\) The court held that its power over the bar association fell within its exclusive control over court-related functions.\(^99\) Although the court in *Zylstra* held that collective bargaining laws could apply to court employees, it maintained that the laws would only apply to the extent that they did not otherwise intrude on the court’s internal administrative powers.\(^100\)

Washington state courts also protect the political branches from

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\(^91\) 85 Wash. 2d 266, 534 P.2d 114 (1975).

\(^92\) Id. at 272, 534 P.2d at 117.

\(^93\) Id.

\(^94\) 59 Wash. 2d 216, 367 P.2d 605 (1961).

\(^95\) Id. at 222, 367 P.2d at 609.


\(^98\) Id. at 910, 890 P.2d at 1052.

\(^99\) Id. at 909, 890 P.2d at 1051.

\(^100\) *Zylstra*, 85 Wash. 2d at 748–50, 539 P.2d at 826–27 (1975); see also *Spokane County v. State*, 136 Wash. 2d 663, 669, 966 P.2d 314, 317 (1998) (holding that state labor relations laws could apply to district court employees where, unlike in *Washington State Bar Association*, there was no direct or unavoidable conflict with a court rule).
judicial encroachment onto their core functions. In *Snider v. Board of County Commissioners*, an appeals panel reversed a court order requiring Walla Walla County’s Board of County Commissioners to acquire the rights of way over property, reasoning that eminent domain is a “core function” of the board of commissioners. Courts have also been reluctant to order the legislature to appropriate funds, barring extraordinary circumstances.

In sum, courts will typically intervene whenever any of several factors exist. First, courts are wary of attempts to alter the constitutional system of checks and balances, particularly when it involves the lawmaking process’ “delicate” legislative-executive balance. Second, courts will look for a history of cooperation between the branches. Finally, courts will rarely uphold any action that invades a core or basic function of another branch. An act faces a particularly strong challenge to its validity when it implicates all three factors.

III. THE CONSTITUTION ENVISIONS LIMITED EXECUTIVE AUTHORITY IN THE APPROPRIATIONS PROCESS

The Washington State Constitution establishes a carefully defined framework for authorizing spending. Article VIII, section 4 of the Washington State Constitution (Appropriations Clause) requires that any spending be approved by the legislature through an appropriations bill. This clause assigns to the legislature the exclusive power to set the state’s basic spending priorities. By contrast, article III, section 12

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102. Id. at 378–81, 932 P.2d at 708–09.
103. See, e.g., Seattle Sch. Dist. No. 1 v. State, 90 Wash. 2d 476, 518, 585 P.2d 71, 95 (1978) (finding an exception to the general rule against requiring the legislature to appropriate funds and compelling the legislature to spend more on education because funding is constitutionally mandated); *In re Salary of the Juvenile Dir.*, 87 Wash. 2d 232, 245, 552 P.2d 163, 170–71 (1976) (explaining that courts will normally defer to a legislative determination of the judiciary’s funding unless ordering funding is necessary to the judiciary’s survival).
104. *See Wash. Const.* art. VIII, § 4 (requiring that any spending from the state treasury be approved by legislative appropriation); *id.* art. III, § 12 (giving the Governor a line item veto over appropriations bills); *see also* Wash. State Legislature v. Lowry, 131 Wash. 2d 309, 323, 931 P.2d 885, 893 (1997).
106. *See State ex rel. Peel v. Clausen*, 94 Wash. 166, 173, 162 P. 1, 3–4 (1917). This rule is subject to a few judicially created exceptions; the judiciary may, under rare circumstances, compel spending when spending is constitutionally required or necessary to protect the basic functions of another branch. *See, e.g., Seattle Sch. Dist. No. 1*, 90 Wash. 2d at 518, 585 P.2d at 95 (compelling funding for education because of a constitutional mandate); *Juvenile Dir.*, 87 Wash. 2d at 245, 552
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of the constitution (Veto Clause) assigns a limited formal role to the Governor in the appropriations process: although the Governor may veto budget provisos or line items and has substantial informal power to shape the budget through persuasion and political pressure, the Governor may not directly change the priorities set by the legislature. 107

A. The Appropriations Clause Gives the Legislature Broad Power to Establish the State’s Spending Policies

The Washington State Constitution vests the power to authorize expenditures of public funds with the legislature. 108 By preventing the executive and judicial branches from drawing on the state treasury without legislative approval, the Appropriations Clause assigns primacy over spending matters to the sitting legislature. 109 More fundamentally, the clause gives the legislature broad—indeed, near-exclusive—power to guide the state’s spending priorities. 110 Moreover, the legislature holds a correlative power to pass judgment on the merits of individual appropriation items. 111

The Washington State Constitution requires that the legislature authorize spending from the public purse. 112 An appropriation is “an authority from the legislature . . . to supply sums of money out of that

P.2d at 170–71 (holding that the judiciary may compel funding of the court system when necessary for the efficient administration of justice).

107. See WASH. CONST. art. III, § 12 (defining the Governor’s veto powers); Hillis v. Dep’t of Ecology, 131 Wash. 2d 373, 389, 932 P.2d 139, 147 (1997) (upholding the principle that the executive branch may not alter the funding decisions of the legislature by spending more than allowed by an appropriation).


109. See, e.g., Hillis, 131 Wash. 2d at 388–89, 932 P.2d at 147–48 (executive); Juvenile Dir., 87 Wash. 2d at 248–50, 552 P.2d at 172–73 (judiciary). In addition, courts in at least some jurisdictions conclude that past legislatures may not interfere with the spending prerogatives of a sitting legislature, see 51 Op. Att’y Gen. No. 4, 2005 WL 1631092 (Mont. July 5, 2005) (summarizing cases in other jurisdictions limiting the enforceability of statutes purporting to bind future legislatures), although at least one commentator believes that in many cases the principle simply means that a sitting legislature may freely repeal the enactments of a previous session. See Kristen L. Fraser, Method, Procedure, Means, and Manner: Washington’s Law of Law-Making, 39 GONZ. L. REV. 447, 478 (2004).

110. Peel, 94 Wash. at 173, 162 P. at 3.


which may be in the treasury in a given year to specified objects or demands against the state.” 113 Specifically, the Appropriations Clause requires the following:

No moneys shall ever be paid out of the treasury of this state, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made within one calendar month after the end of the next ensuing fiscal biennium . . . . 114

This provision requires that funds deposited in the state treasury be spent only at the legislature’s direction. 115

I. The Appropriations Clause Gives the Legislature the Exclusive Power to Guide Expenditures of Public Funds

The Appropriations Clause affirms legislative control over the spending of public funds. 116 This clause gives the legislature the exclusive prerogative to decide “how, when, and for what purpose” public funds are used. 117 This prerogative also includes the right to consider the merits of individual appropriations items. 118 Courts have enforced legislative supremacy over spending policy on several


114. WASH. CONST. art. VIII, § 4. When exercising its power under this provision, the Washington State Legislature generally does not appropriate funds through detailed line item budgets; instead, the legislature enacts lump sum appropriations for each agency, while retaining power to direct the use of funds through earmarked appropriations and budget provisos. See Wash. State Legislature v. Lowry, 131 Wash. 2d 309, 321–22, 931 P.2d 885, 892 (1997). The capital budget, however, frequently uses line item appropriations. E.g., Capital Budget (2005–07 Capital Budget), ch. 488, § 112, 2005 Wash. Sess. Laws 2065, 2069–70 (requiring funds appropriated to the Washington State Department of Community, Trade, and Economic Development to be used for specific capital projects).

115. WASH. CONST. art. VIII, § 4.

116. See State ex rel. Peel v. Clausen, 94 Wash. 166, 173, 162 P. 1, 3 (1917).

117. State ex rel. Decker v. Yelle, 191 Wash. 397, 400, 71 P.2d 379, 379–80 (1937). The legislature may, however, give the OFM substantial authority to regulate the use of state funds by individual agencies in a manner consistent with the legislature’s spending priorities, provided the OFM conforms to the terms and conditions of the appropriations act. See Yelle v. Bishop, 55 Wash. 2d 286, 302, 347 P.2d 1081, 1090–91 (1959).

118. See Robert C. Byrd, The Control of the Purse and the Line Item Veto Act, 35 HARV. J. ON LEGIS. 297, 307 (1998). The right to determine funding may implicate another constitutional provision; specifically, article II, section 20 of the Washington State Constitution gives each house the right to amend bills originating in the other. Consequently, a law that prevents the originating house from amending a bill would presumably violate the other house’s rights under this provision.
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occasions. The Appropriations Clause gives the legislature control over the public purse—and along with it, the power to set the state’s spending priorities. The constitution aims “to prevent expenditures of the public funds at the will of those who have them in charge, and without legislative direction.” Consequently, the Appropriations Clause’s “central object” is to give the legislature “the exclusive power of deciding how, when, and for what purposes” public funds will be spent.

Courts have respected the legislature’s exclusive control over appropriations on several occasions. For example, in *Pannell v. Thompson*, the Washington State Supreme Court rejected a lawsuit seeking additional funding from the Department of Social and Health Services for a state-administered general assistance plan for unemployed individuals. In reply to the plaintiffs’ claims that they had a statutory right to the funding, the court described the decision to fund such programs as “strictly a legislative prerogative.”

119. *See*, e.g., *Hillis v. Dep’t of Ecology*, 131 Wash. 2d 373, 388–89, 932 P.2d 139, 147 (1997) (reversing a trial court order requiring the Department of Ecology to immediately process water rights applications because the agency had no statutory duty to process applications beyond the extent to which the legislature provided adequate funding); *City of Ellensburg v. State*, 118 Wash. 2d 709, 712–16, 826 P.2d 1081, 1083–84 (1992) (holding that a city could not recover its actual costs for fire protection services from the state based on a statutory interpretation on the grounds that recipients of state assistance have no enforceable rights against the state beyond the extent to which the legislature has funded a program); *Pannell v. Thompson*, 91 Wash. 2d 591, 599, 589 P.2d 1235, 1240 (1979) (rejecting a lawsuit seeking additional state funding because the decision to fund the program was a legislative, not a judicial, prerogative).

120. *See* *Wash. Ass’n of Neighborhood Stores v. State*, 149 Wash. 2d 359, 365, 70 P.3d 920, 923 (2003); *Hillis*, 131 Wash. 2d at 389, 932 P.2d at 147.

121. *Peel*, 94 Wash. at 173, 162 P. at 3.

122. *Neighborhood Stores*, 149 Wash. 2d at 365, 70 P.3d at 923 (quoting *Peel*, 94 Wash. at 173, 162 P. at 3).

123. *See* *Hillis*, 131 Wash. 2d at 388–89, 932 P.2d at 147; *Ellensburg*, 118 Wash. 2d at 712–16, 826 P.2d at 1083–84; *Pannell*, 91 Wash. 2d at 599, 589 P.2d at 1240.


125. *Id.* at 595–96, 589 P.2d at 1238–39. In *Pannell*, a budget proviso specifically capped the available funding for the general assistance plan. *Id.* at 594, 589 P.2d at 1237.

126. *Id.* at 599, 589 P.2d at 1240. For other examples, see *Hillis*, 131 Wash. 2d at 388–89, 932 P.2d at 147 (holding that a statutory requirement to promptly process water rights applications is not enforceable when the legislature does not adequately fund the processing agency by specifically capping the funds available for that program), and *Ellensburg*, 118 Wash. 2d at 712–16, 826 P.2d at 1083–84 (holding that a statute requiring the state to contract with local governments to provide fire protection at state facilities does not require the state to fully fund those costs). *See also* *WASH. REV. CODE § 43.88.290* (2004) (barring state agencies from spending in excess of their legislative...
principle, courts have strictly prevented the executive branch from spending funds in excess of a legislative appropriation.\(^{127}\)

This exclusive power to authorize spending is threatened when legislators lose the power to consider the individual merits of spending items.\(^{128}\) In *Power, Inc. v. Huntley*,\(^{129}\) for example, the Washington State Supreme Court singled out logrolling (the practice of incorporating several unrelated measures into a single bill) as “corruptive of the legislator and dangerous to the state.”\(^{130}\) The court explained that when several measures are rolled into one, legislators are effectively forced to vote for measures they would otherwise oppose.\(^{131}\)

Although the Washington State Supreme Court has not found all forms of logrolling per se unconstitutional, it does interpret the constitution to limit the practice whenever logrolling would directly interfere with a specific constitutional prerogative.\(^{132}\) In *Power*, the court invalidated a statute under the “single subject” requirement of the state constitution.\(^{133}\) In *Lowry*, the court interpreted the Governor’s line item veto authority to extend to “nondollar” budget provisos precisely because the alternative interpretation would allow the legislature to
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logroll measures and undermine the Governor’s veto power in the
process. There, the court interpreted the constitution to preclude
logrolling when it would permit one branch to undermine a check
belonging to another branch.

2. The Appropriations Power Is a Constitutional Check on Executive
Power

The appropriations power operates as an important check on the
executive branch. The framers of the federal Constitution recognized
its value in limiting executive power. In that spirit, courts have
generally protected the legislative branch from intrusions by the
executive on its broad power over spending.

The few courts in other jurisdictions to intervene in a legislative-
executive tug-of-war over the spending power have generally supported
the legislature. In Florida, for example, the state supreme court expressly
held that the legislature had the right to amend collective bargaining
agreements despite an express constitutional right to collectively
bargain, relying on the exclusive legislative right to appropriate funds.
Florida, which has an appropriations provision in its constitution
virtually identical to that in Washington’s constitution, has a view of

134. See Lowry, 131 Wash. 2d at 329, 931 P.2d at 895–96.
135. See id.
137. See Byrd, supra note 118, at 305–06.
1014-3 (Wash. Super. Ct. 1982) (on file with author) (invalidating a statute ceding to the Governor
the power to make selective reductions in spending authorized by appropriations acts); see also
Clinton v. New York, 524 U.S. 417, 448–49 (1998) (invalidating a statute giving the President
authority to veto line items in appropriations acts); State v. Fla. Police Benevolent Ass’n (Florida
PBA), 613 So. 2d 415, 418–19 (Fla. 1992) (holding that the legislature may amend collective
bargaining agreements).
139. See Florida PBA, 613 So. 2d at 418–19. That decision has not been immune to criticism. See
generally David M. Orta, Note, Public Employee Bargaining in Florida: Collective Bargaining or
criticism, however, has relied heavily on the express constitutional right to collectively bargain, a
feature unique to Florida’s constitution. See id. at 298–302.
140. Compare FLA. CONST. art. VII, § 1(c) (“No money shall be drawn from the treasury except
in pursuance of appropriation made by law.”), with WASH. CONST. art. VIII, § 4 (“No moneys shall
ever be paid out of the treasury of this state, or any of its funds, or any of the funds under its
management, except in pursuance of an appropriation by law . . . .”). The Washington State
Supreme Court uses jurisprudence from other states with identical constitutional provisions when
interpreting the state constitution. See Wash. Water Jet v. Yarbrough, 151 Wash. 2d 470, 493, 90
the appropriations power that has been favorably commented on by the Washington State Supreme Court.\footnote{141}

In Washington, moreover, at least one court has blocked the Governor from tinkering with the legislature’s spending priorities.\footnote{142} In a Thurston County Superior Court case, the court held unconstitutional a statute allowing the Governor to make selected reductions in funds allotted to agencies pursuant to an appropriation.\footnote{143} The superior court held that, although the Governor may order uniform reductions to funding levels to ensure that expenditures match actual revenues, the statute permitting selective reductions impermissibly let the Governor alter the spending priorities set by the legislature.\footnote{144}

B. Unlike the Legislature’s Broad Role in the Appropriations Process, the Governor’s Legal Authority Is Limited to the Partial Veto

Although the Governor has a broader role in the appropriations process relative to other arenas of legislation, the Governor’s formal role is nevertheless limited to the line item veto described in the Veto Clause.\footnote{145} Although this is a legislative power, the framers intended it to be only a limited check on the legislature.\footnote{146} The legislature maintains the basic power over spending.\footnote{147}

The state constitution describes the executive’s veto authority in the Veto Clause:

> 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

143. See id.; Fraser, supra note 109, at 479–80 (describing the Washington Federation of Public Employees decision).
145. See Wash. State Motorcycle Dealers Ass’n v. State, 111 Wash. 2d 667, 675, 763 P.2d 442, 446 (1988) (holding that the people, by ratifying the current version of the Veto Clause, established the precise extent of the Governor’s authority in the legislative process).
146. See In re Salary of the Juvenile Dir., 87 Wash. 2d 232, 238–39, 552 P.2d 163, 167 (1976) (characterizing the veto power as a limited power to interfere with the legislature).
147. See id.
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enter the objections at large upon the journal and proceed to reconsider.148

If the Governor fails to act on a bill, it becomes law.149 The Governor also has partial veto authority, and may veto individual sections of a bill or specific line items of an appropriations bill.150 Governors may not, however, replace the stricken text with language of their choosing.151 The legislature may override the veto with a two-thirds majority of both houses.152

The veto power is legislative in nature.153 The Washington State Supreme Court has long held that the Governor, by exercising her veto or partial veto authority, is acting in a legislative capacity.154 Unlike the legislature, however, the Governor’s ability to shape legislation is sharply limited. The Governor may alter legislative policy only by removing entire sections or line items of appropriations bills or refusing to approve the bill at all.155 Additionally, while the legislature’s failure to act defeats proposed bills, the Governor’s silence results in enactment of the law.156 Most of a veto’s power comes from its use as a “bargaining device.”157

Although it is legislative, the veto provides only a limited power granted for the purpose of checking the legislature.158 As the Washington State Supreme Court has noted, the constitution cedes only limited

148. WASH. CONST. art. III, § 12.
149. Id.
150. Id.
151. Cf. Wash. State Grange v. Locke, 153 Wash. 2d 475, 489, 105 P.3d 9, 17 (2005) (upholding the Governor’s veto of several sections of a bill in order to enact a different primary system than the one intended by the legislature because the Governor accomplished this result solely by removing sections of the bill).
152. WASH. CONST. art. III, § 12.
155. See WASH. CONST. art. III, § 12 (providing that the Governor may veto an individual line item); Wash. State Motorcycle Dealers Ass’n v. State, 111 Wash. 2d 667, 679, 763 P.2d 442, 448 (1988) (holding that the Governor’s veto power may only be exercised in accordance with the plain language of the Veto Clause).
156. See WASH. CONST. art. III, § 12.
157. Juvenile Dir., 87 Wash. 2d at 237, 552 P.2d at 166.
158. See id. at 238–39, 552 P.2d at 167; W. LAIR HILL, WASHINGTON: A CONSTITUTION ADAPTED TO THE COMING STATE 43 (1889) (noting that the line item veto is necessary to constrain logrolling within appropriations bills by the legislature).
authority to the Governor.\textsuperscript{159} The Governor’s control is merely passive, while the legislature has active power to affirmatively shape the legislation before it.\textsuperscript{160}

In sum, the Appropriations and Veto clauses of the Washington State Constitution define a precise balance of power between the Governor and legislature. The legislature has plenary control over spending power. Included in this power is the right to pass judgment on the individual merits of spending proposals. Consequently, the legislature holds the power of the purse with very little interference from the other branches or even past legislatures. In contrast, the Governor has a limited role in the appropriations process. Beyond the veto and line item veto, the Governor generally may not interfere with the legislature’s budget priorities.

IV. SECTION 302(3) OF THE PSRA VIOLATES THE SEPARATION OF POWERS DOCTRINE

By requiring that the legislature accept or reject collective bargaining agreements as a whole, section 302(3) of the PSRA violates the separation of powers doctrine. In Washington, courts frequently invalidate governmental actions that interfere with the independence, integrity, or prerogatives of another branch,\textsuperscript{161} act in the absence of traditional inter-branch cooperation,\textsuperscript{162} or invade the “core” functions of that branch.\textsuperscript{163} The PSRA is vulnerable to separation of powers challenges because: (1) it represents an invasion of the legislature’s prerogatives over spending in an area where the legislature has traditionally defended its authority; (2) it alters the delicate balance

\textsuperscript{159} See Juvenile Dir. at 238–39, 552 P.2d at 167 (concluding that under the proper assignment of roles, the legislature has the broad power to draft legislation and the Governor has the “limited” power of the veto). Although the Governor has line item veto powers, this does not confer an “active” role in the process. The line item veto is a limited tool meant to ensure fiscal restraint and prevent logrolling. See Wash. State Legislature v. Lowry, 131 Wash. 2d 309, 316–17, 931 P.2d 885, 889–90 (1997). Moreover, the people intended the line item veto to be the full extent of the Governor’s additional authority. See Motorcycle Dealers, 111 Wash. 2d at 679, 763 P.2d at 448 (concluding that by ratifying the constitution and later amendments, the people set the precise balance between the legislature’s lawmaking power and the Governor’s veto authority).

\textsuperscript{160} See Juvenile Dir., 87 Wash. 2d at 238–39, 552 P.2d at 167 (characterizing the Governor’s veto as limited in contrast with the broader power held by the legislature).

\textsuperscript{161} See, e.g., Zylstra v. Piva, 85 Wash. 2d 743, 750, 539 P.2d 823, 827 (1975).

\textsuperscript{162} See, e.g., State v. Wadsworth, 139 Wash. 2d 724, 736, 991 P.2d 80, 87 (2000).

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between legislative and executive power envisioned by the constitution; and (3) it invades the legislature’s core power to establish the state’s spending priorities. Specifically, the PSRA warrants invalidation for two reasons: it deprives the legislature of the power to pass on the merits of specific items in the collective bargaining agreements and reverses the roles of the Governor and legislature, giving the executive primary authority to formulate the state’s spending priorities for collective bargaining agreements and relegating the legislature’s role to a veto.

A. Section 302(3) of the PSRA Is Subject to Invalidation on Separation of Powers Grounds Because of Its Extensive Intrusion on the Legislature’s Power over Appropriations

Section 302(3) is subject to judicial invalidation because it implicates all three factors that the courts typically apply when considering separation of powers challenges under the Zylstra test. First, section 302(3) changes the constitutional system of checks and balances associated with the lawmaking process. Second, past struggles over control of the appropriations power reveal a lack of legislative-executive cooperation on appropriations. Finally, the PSRA reduces the legislature’s power over spending, one of the legislature’s core functions. When all three factors are present, courts will strictly enforce the separation of powers doctrine.

1. Section 302(3) Alters the Delicate System of Constitutional Checks and Balances Related to the Lawmaking Process

Section 302(3) is subject to invalidation because it limits the extent of the legislature’s check on the Governor. This is not a case where the

164. See infra Part IV.A.
165. See infra Part IV.B.1.
166. See supra Part II.B for a description of the three factors.
167. C.f. State ex rel. Peel v. Clausen, 94 Wash. 166, 173, 162 P. 1, 3 (1917) (describing the appropriations power as the “exclusive” province of the legislature).
170. See supra Part II.B.
171. See WASH. REV. CODE § 41.80.010(3) (2004) (limiting the legislature’s power to amend the funding for collective bargaining agreements negotiated and approved by the Governor).
legislature is merely sharing power with the executive branch. Rather, section 302(3) threatens to alter the delicate constitutional balance of the legislative process, which the courts tend to review with suspicion.

Courts generally permit the legislature to share some of its powers with the other branches. Indeed, most delegations of rulemaking authority are upheld. Section 302(3), however, takes away part of the legislature’s control over appropriations, a measure recognized by the framers as one of the most important checks on executive power.

The PSRA also upsets the “finely wrought” lawmaking process. The people who ratified the original state constitution and later amendments defined a precise and exclusive system of give-and-take between the legislature and Governor. The courts will therefore intervene to keep the Governor or the legislature from stepping outside their defined roles. The Appropriations Clause makes clear, moreover, that the legislature—and not the Governor—holds the power of the purse. Section 302(3), however, takes some of those purse strings from the legislature and gives them to the Governor. As a
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statute that upsets the precisely crafted appropriations process and threatens to undermine a fundamental check on executive power, the PSRA is vulnerable to invalidation.

2. **Section 302(3) of the PSRA Implicates an Area of the Law Traditionally Devoid of Legislative-Executive Cooperation**

The history of executive-legislative budget relations is one of conflict, not cooperation.\(^{183}\) An absence of longstanding cooperation between the branches may be strong evidence of a governmental act’s invalidity under the separation of powers doctrine.\(^{184}\) In Washington, however, the legislature and Governor have historically clashed over the balance of power in the lawmaking process.\(^{185}\) If anything, the framers intended for the executive and legislature to be at loggerheads over spending.\(^{186}\) For instance, the legislature often objects to many attempted exercises of the Governor’s veto authority—indeed, the legislature often challenges gubernatorial vetoes in court.\(^{187}\) Moreover, in the one case where the legislature had given the Governor discretionary control over spending, a superior court judge struck it down.\(^{188}\) Finally, in other disputes between branches, the courts have generally guarded the legislature’s spending power.\(^{189}\) In sum, conflict primarily characterizes the relationship

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\(^{183}\) See generally Lowry, 131 Wash. 2d 309, 321–22, 931 P.2d 885, 892 (describing the history of vetoes of appropriations legislation).

\(^{184}\) Cf. Carrick v. Locke, 125 Wash. 2d 129, 138, 882 P.2d 173, 178 (1994) (holding that when there is a history of longstanding cooperation, that history is “prima facie” evidence of the statute’s validity).

\(^{185}\) See, e.g., Lowry, 131 Wash. 2d at 313–15, 931 P.2d at 888–89 (describing a conflict between the legislature and Governor over vetoes of appropriations items); Transcript of Oral Opinion at 21, Wash. Fed’n of Pub. Employees v. State, No. 82-2-1014-3 (Wash. Super. Ct. 1982) (on file with author) (striking down a law attempting to give the Governor authority to make selective reductions in agency appropriations under certain circumstances, in a lawsuit brought by State Senator Phil Talmadge).

\(^{186}\) See State ex rel. Peel v. Clausen, 94 Wash. 166, 173, 162 P. 1, 4 (1917); Byrd, supra note 118, at 307 (characterizing the appropriations power as intended to check executive power).

\(^{187}\) See, e.g., Lowry, 131 Wash. 2d at 313, 931 P.2d at 888.


\(^{189}\) See, e.g., Hillis v. Dep’t of Ecology, 131 Wash. 2d 373, 388–89, 932 P.2d 139, 147 (1997) (limiting the enforceability of unfunded statutory rights); In re Salary of the Juvenile Dir., 87 Wash. 2d 232, 249–50, 552 P.2d 163, 173 (1976) (limiting the circumstances where the judiciary may compel funding for the courts).
between the executive and legislative branches with respect to appropriations.

3. **Section 302(3) Implicates the Legislature’s Spending Power, a “Core Function” of that Branch**

Legislative control over spending is a core function of the legislative branch. In *O'Brien*, the Washington State Supreme Court held that the legislature may not take on functions that are exclusively the province of the judiciary.\(^{190}\) Similarly, courts have intervened when faced with potential intrusions into the judiciary’s “exclusive” rulemaking authority over court-related functions\(^{191}\) and a legislative body’s “core” eminent domain power.\(^{192}\) Likewise, courts frequently describe legislative control over appropriations as an “exclusive” power.\(^{193}\) In practice, courts rarely permit intrusions into this power.\(^{194}\) Finally, legislative control over appropriations is a central means of ensuring popular representation in government.\(^{195}\)

Section 302(3) infringes on the legislature’s core power to control spending in two ways. First, it expands the Governor’s existing role—the veto—to a broader role in which the Governor may dictate the specifics of the appropriations for collective bargaining agreements.\(^{196}\) Second, by preventing the legislature from amending the proposed budget, it limits the legislature’s authority to determine “how, when, and for what purpose” public funds will be used.\(^{197}\)

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190. See City of Tacoma v. O’Brien, 85 Wash. 2d 266, 272, 534 P.2d 114, 117 (1975) (rejecting a legislative attempt to assume the core judicial adjudicative function by making case-by-case determinations of fact).


193. See, e.g., State ex rel. Peel v. Clausen, 94 Wash. 166, 173, 162 P. 1, 3 (1917) (describing legislative control over appropriations as “exclusive” in nature).

194. See Hills, 131 Wash. 2d at 388–89, 932 P.2d at 147 (holding that an agency may not spend in excess of its legislative appropriation); Transcript of Oral Opinion at 20–21, Wash. Fed’n of Pub. Employees v. State, No. 82-2-1014-3 (holding that the Governor may not make selected reductions to budget allotments).

195. See Byrd, supra note 118, at 305–06.

196. See infra Part IV.B.1.

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B. PSRA Section 302(3) Violates the Separation of Powers Doctrine as Applied to the Appropriations Process

Section 302(3) violates the separation of powers doctrine in two main ways. First, section 302(3) undermines the prerogative of the legislature to establish the state’s spending priorities by forbidding the legislature to amend compensation for unionized state employees through any means other than outright rejection of the bargaining agreement. Second, section 302(3) reverses the traditional roles of the executive and legislative branches, permitting the Governor to take on the core function of setting spending priorities but relegating the legislature’s role to a very limited veto power.

1. Section 302(3) Encourages Logrolling by the Governor, Limiting the Legislature’s Power to Set the State’s Spending Priorities

Section 302(3) undermines the legislative prerogative to guide the use of public funds. Courts will strike down acts that threaten to invade the “prerogatives” of any legislative body. Moreover, a key component of the power to spend is the power to guide the use of public funds. Section 302(3) limits this power by forcing the legislature to either accept the Governor’s proposed spending priorities or reject the agreement wholesale.

The Appropriations Clause clarifies the ownership of the prerogative to spend public funds. This clause gives the legislature near-exclusive power over spending, and specifically assigns to the legislature the authority to decide “how, when, and for what purposes” public funds will be used. For the appropriations power to serve as a meaningful check on executive power, the legislature’s actions must be more than a “rubber-stamp.”

If the legislature wishes to object to the spending on state government...
employees negotiated by the Governor, it must reject the agreement outright. Even if one element of the collective bargaining agreement would not normally pass on its own, legislators can defeat it only if they are willing to pay the political price attached to rejecting the entire agreement. Moreover, section 302(3) undermines the legislative minority’s right to introduce amendments to legislation, a check on majority rule that can sometimes force supporters to either amend the act to the minority’s liking or face a politically awkward vote. This dilemma is exactly why courts interpret the constitution to prevent logrolling whenever possible.

2. Section 302(3) Overly Expands the Governor’s Power at the Legislature’s Expense

Section 302(3) upsets the intended balance of power between the legislature and Governor. Indeed, it reverses their roles: while the Governor can establish specific funding levels and propose funding, the legislature may only accept or reject the proposal. The legislature may not, however, give up its basic role in the lawmaking process.

206. See WASH. REV. CODE § 41.80.010(3).
207. Cf. Wash. State Legislature v. Lowry, 131 Wash. 2d 309, 329, 931 P.2d 885, 895–96 (1997) (expanding the Governor’s veto authority to include line item vetoes of non-dollar budget provisos because otherwise the legislature could force the Governor to approve measures he or she would veto if standing alone); Power, Inc. v. Huntley, 39 Wash. 2d 191, 198–99, 235 P.2d 173, 178 (1951) (citing logrolling-related concerns to justify vigorous enforcement of the single subject requirement of article II, section 19); Blaine v. City of Seattle, 62 Wash. 445, 449–50, 114 P. 164, 165–66 (1911) (holding that the people’s right to pass judgment on measures is undermined when they are forced to vote for multiple proposals in the same ballot question). For example, the legislature might normally oppose as unfair a pay raise given to represented workers two months before non-represented employees, but also oppose moving the pay raise for non-represented workers two months forward because of its expense. The legislature could not reduce funding to force a uniform schedule for raises without rejecting an otherwise popular collective bargaining agreement.
208. See WASH. REV. CODE § 41.80.010(3). In most contexts, both houses have control in the first instance as to the extent of their power to introduce amendments. See WASH CONST. art. II, § 9 (giving both houses the power to govern their rules of procedure). While they may limit the power to amend their own legislation, see id., the PSRA limits their power to amend legislation proposed by an executive agency, see WASH. REV. CODE § 41.80.010(3).
209. See City of Burien v. Kiga, 144 Wash. 2d 819, 824–25, 31 P.3d 659, 662–63 (2001) (declaring an initiative unconstitutional for violating the “single subject” requirement of article II, section 19 of the Washington State Constitution because it placed voters in the dilemma of having to vote against an entire measure if they disagreed with one portion); Blaine, 62 Wash. 445, 450-51, 114 P. 164, 166 (1911) (concluding that a city ballot proposition requiring voters to approve or reject multiple proposals in the same ballot question violated the “spirit” of the constitution).
210. See WASH. REV. CODE § 41.80.010.
211. See Brower v. State, 137 Wash. 2d 44, 54, 969 P.2d 42, 49 (1998) (“[I]t is unconstitutional
Collective Bargaining Agreements

Section 302(3) reverses the intended roles of the Governor and legislature. The Governor, rather than the legislature, has primary responsibility for formulating and proposing appropriations for state employee compensation.212 The legislature, by contrast, has the role normally exercised by the Governor: it may accept or reject, but may not change, the agreement.213 Although this veto is still a form of legislative control over appropriations, Washington courts have held that the veto is only a “limited” type of power, not the usual near-plenary control the legislature is constitutionally entitled to when setting appropriations.214

A textual comparison of the Veto Clause to section 302(3) shows the extent to which the legislature’s role is no more than a veto.215 In fact, only two differences exist. First, legislative silence defeats a bargaining agreement216 while gubernatorial silence equals acceptance.217 This difference, however, does not remedy the fundamental problem: unless it is willing to reject the agreement wholesale, the legislature may not evaluate the merits of any individual portion of the agreement.218
other contexts, courts zealously act to prevent this sort of logrolling.\textsuperscript{219} Moreover, unlike a gubernatorial partial veto, the legislature may not excise specific portions of the funding proposed for the collective bargaining agreements.\textsuperscript{220} In this respect, the legislature has even less of a check than the Governor would normally exercise over budget legislation.\textsuperscript{221} Unless legislators possess the political will to reject an entire agreement, they may not decide “how, when, and for what purposes” public funds will be spent.\textsuperscript{222}

In sum, section 302(3) is unconstitutional. It falls into the category of measures courts traditionally disfavor: it is an unprecedented change to the spending process, it affects the system of checks and balances, and it imposes new conditions on the “delicate” lawmaking process. Specifically, it creates two clear violations of the separation of powers doctrine: (1) by restricting the power to amend funding for collective bargaining agreements, it promotes logrolling and thereby undermines the legislature’s power to guide spending of public funds; and (2) it invades the legislature’s power to set appropriations by reversing the traditional roles of the executive and legislative branches—that is, by giving the Governor broad authority to determine the spending for state employee compensation and limiting the legislature’s role to a form of veto.

V. CONCLUSION

In its present form, the PSRA would not survive a challenge under Washington’s separation of powers doctrine. Section 302(3), which requires the legislature to accept or reject funding as a whole for proposed collective bargaining agreements, runs afoul of three factors courts often use when applying the separation of powers doctrine. The

\textsuperscript{219} See, e.g., City of Burien v. Kiga, 144 Wash. 2d 819, 824–25, 31 P.3d 659, 661 (2001) (striking down an initiative that violated the “single subject” requirement and noting that this constitutional requirement is designed to limit logrolling).

\textsuperscript{220} See WASH. REV. CODE § 41.80.010(3) (providing that the legislature must consider the entire agreement “as a whole”).

\textsuperscript{221} Cf. WASH. CONST. art. III, § 12 (giving the Governor authority to veto line items in appropriations bills); Wash. State Legislature v. Lowry, 131 Wash. 2d 309, 323, 931 P.2d 885, 893 (1997) (permitting the Governor to veto budget provisos). In fact, the power to exercise a line item veto is also used to control logrolling. See W. LAIR HILL, WASHINGTON: A CONSTITUTION ADAPTED TO THE COMING STATE 43 (1889). To that extent, the reversal of legislative-executive roles also serves to increase the opportunities for logrolling.

\textsuperscript{222} See State ex rel. Peel v. Clausen, 94 Wash. 166, 173, 162 P. 1, 3 (1917) (quoting Humbert v. Dunn, 24 P. 111, 111 (Cal. 1890)).
PSRA upsets the delicate balance between the Governor and the legislature in the appropriations process, it transfers power to the Governor in an area of the law traditionally marked by legislative-executive conflict, and it infringes on the legislature’s core function of controlling spending policy. Specifically, section 302(3) contains two constitutional flaws. First, section 302(3) reverses the traditional roles of the Governor and the legislature. Second, by forcing legislators into a dilemma of either approving an appropriations act containing measures that would not pass if considered alone or rejecting the act wholesale, it undermines the legislature’s core power to substantively set the state’s spending priorities.

This Comment does not suggest that collective bargaining is undesirable. To the contrary, union representation is an important means of securing rights for public employees that their private counterparts enjoy. Strong institutional respect for workers rights is vital to recruiting and retaining highly qualified public servants. However, the separation of powers doctrine is not a trivial rule; rather, it has long been regarded as a fundamental protection for democracy. The legislature can fix this problem by simply reserving in itself a right to amend the funding of a collective bargaining agreement and clarifying to unions that the agreement reached with the Governor is subject to legislative modification (and that any such modification, of course, could always be vetoed). By doing so, the legislature can provide a system that protects the interests of workers without reducing the legislature’s constitutionally mandated responsibilities to the state’s taxpayers.