COMMENT

THE CHEESE STANDS ALONE: WISCONSIN'S "QUIRKY" PARTIAL VETO IN ITS NEW CONSTITUTIONAL ERA

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Wisconsin occupies a unique position on the national stage as having one of the most powerful and expansive partial veto powers of any state. While the governors of most states use a pen to veto budget bills, the Wisconsin Governor holds a "pair of scissors," allowing him to slash legislative enactments and piece together new law, subject only to the rarely successful two-thirds veto override. While constitutional amendments in 1990 and 2008 have constrained this power to prohibit the striking and stringing together of individual letters within words and the creating of a new sentence by combining parts of two or more words across sentences, the Governor can still create policies never intended by the Legislature through a creative cobbling together of words within a sentence.

In 1930, Wisconsin amended its constitution to create the partial veto, which allows the Governor to veto appropriation bills "in whole or in part." In 1935, the Wisconsin Supreme Court first interpreted "part" using its broad dictionary definition, with no qualifications; the result is that the parts remaining after a partial veto must be a "complete, entire, and workable law." After decades of ensuing court decisions expanding the partial veto, failed amendments, and partisan battles over the partial veto, the Legislature passed in 1990 and again in 2008 constitutional amendments constraining the power. Though 2020 was poised to see an overhaul in the partial veto jurisprudence, the court's decision in *Bartlett v. Evers* and *Wisconsin Small Businesses United, Inc. v. Brennan* seemingly left the core of the partial veto power intact—but without the support of a majority rationale.

This Comment first argues that the court's initial interpretation of "part" in 1935 ignored the textual and extrinsic clues indicating that the Legislature intended not to create a unique and broad gubernatorial tool, but instead intended to create an item veto (a common tool to strike individual appropriations), bringing Wisconsin in line with the thirty-seven other states that, at the time, had an item veto. This Comment then suggests, however, that in structuring the 1990 and 2008 amendments to prohibit specific partial veto practices, the Legislature enshrined into the

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constitution the court's broad and erroneous definition of "part" as interpreted in 1935, precluding any future judicial return to the 1930 amendment's original intended meaning. Consequently, though these modern amendments—and even *Bartlett*—provide some constraints on the partial veto, a return to the originally intended item veto must come through another constitutional amendment; until then, Wisconsin stands alone as the unique and "quirky" partial veto state.

INTRODUCTION

The year 2020 marks the ninetieth anniversary of Wisconsin's unique partial veto power—and with this milestone came a reappraisal of the constitutional provision that had the potential to alter its fate. In 1930, Wisconsin amended its constitution to allow the Governor to veto

appropriations bills "in whole or in part."[1] This change was simply intended to maintain the appropriate separation of powers and the continued functioning of government with the practice of including multiple appropriations in one omnibus bill.[2] Instead, the amendment became the "most controversial"[3] in Wisconsin history, and the debate over the meaning and scope of the word "part" spurred two additional successful amendments[4] and decades of litigation,[5] with the most recent cases just having been brought before the Wisconsin Supreme Court.[6] Over the course of its judicial history, the partial veto grew in application and force.[7] Consequently, while most state governors hold a veto pen, Wisconsin's Governor was handed an "eraser,"[8] and then a "pair of scissors."[9] Since its inception, the partial veto has been used thousands of times in ranging forms—most notably the "Vanna White veto"[10] and the "Frankenstein veto,"[11] eliminated by a 1990 and a 2008 amendment, respectively—and has resulted in drastic and contradictory policy changes between the Legislature's and the Governor's versions of appropriations bills.[12] Further, the Governor's partial veto authority allows for the

1. WIS. CONST. art. V, § 10 (1930) (amended 1990, 2008).

2. Richard A. Champagne, Staci Duros & Madeline Kasper, *The Wisconsin Governor's Partial Veto*, 4 READING THE CONST. 1, 3, 7 (2019).

3. JACK STARK, THE WISCONSIN STATE CONSTITUTION 24 (G. Alan Tarr ed., 2011).

4. Frederick B. Wade, *The Origin and Evolution of Partial Veto Power*, 81 WIS. LAW. 12, 57 (2008).

5. Champagne, Duros & Kasper, *supra* note 2, at 1, 9 & n.57.

6. *See Bartlett v. Evers*, 945 N.W.2d 685, 719 (Wis. 2020) (Kelly, J., concurring in part, dissenting in part) ("What a vexatious thing the word 'part' can be, and indeed it has vexed us from the day we encountered it in Article V of our constitution."); *see also Wisconsin Small Businesses United v. Brennan*, 946 N.W.2d 101 (Wis. 2020).

7. *See* Arthur J. Harrington, *The Propriety of the Negative — the Governor's Partial Veto Authority*, 60 MARQ. L. REV. 865, 866 (1977) ("[B]road authority embodied in the provisions of the Wisconsin Constitution is a result of an unswerving line of judicial precedent in Wisconsin, culminating in the court's opinion in *Sundby*, which has expanded the [G]overnor's veto authority in Wisconsin.").

8. *State ex rel. Kleczka v. Conta*, 264 N.W.2d 539, 557 (Wis. 1978) (Hansen, J., concurring in part, dissenting in part).

9. Wade, *supra* note 4, at 13 (quoting TOMMY G. THOMPSON, POWER TO THE PEOPLE 129 (1996)).

10. *See* Champagne, Duros & Kasper, *supra* note 2, at 12 (citing *State ex rel. Wis. Senate v. Thompson*, 424 N.W.2d 385, 388).

11. Christie Taylor, *Like Monster, 'Frankenstein' Veto Inspires Fear in Some*, THE BADGER HERALD (Nov. 13, 2007), https://badgerherald.com/news/2007/11/13/like-monster-franken/ [https://perma.cc/VX64-QBQ3].

12. *See* Richard A. Champagne & Madeline Kasper, *The Veto Override Process in Wisconsin*, 4 READING THE CONST. 1, 7 (2019) (stating that Governors have used the partial veto on 2,560 items in budget bills since 1985).

writing in of numbers in appropriations—the Governor may thus use "the pointed end of the pencil" there.[13]

The Wisconsin Supreme Court first addressed the partial veto in 1935 in *State ex rel. Wisconsin Telephone Co. v. Henry*.[14] The court interpreted the then-new constitutional language to create the "complete, entire, and workable law" test, which became the basis for subsequent partial veto jurisprudence.[15] The seven state cases and one federal case that followed prior to 2020 built upon this test to create an expansive and unique partial veto authority,[16] which the Seventh Circuit even labeled "quirky."[17] In response to a 1997 case upholding a broad partial veto power[18] and a particularly creative veto by Governor Doyle in 2005, in which he spliced a 752-word item into 20 words, shifting $427 million from the state transportation fund to the Department of Administration,[19] the Legislature passed the two amendments in 1990 and 2008 to rein in the scope of the power.[20]

In July 2020, the Wisconsin Supreme Court again weighed in on the state's favorite debate, over two decades since its last consideration of the partial veto power.[21] In *Bartlett v. Evers*[22] and *Wisconsin Small Businesses United, Inc. v. Brennan*,[23] the court was presented with a constitutional challenge to four of Governor Evers' vetoes in the 2019–21 biennial budget bill,[24] and two of Governor Walker's vetoes in the 2017–19 biennial budget bill.[25] Though the court struck down three of Governor Evers' vetoes in *Bartlett* and dismissed *Wisconsin Small Businesses United* based on the doctrine of laches, it ultimately failed to reach a majority rationale; instead, it produced a fractured set of opinions, apparently leaving any significant changes to the partial veto to another day.[26]

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13. *Citizens Util. Bd. v. Klauser*, 534 N.W.2d 608, 618 (Wis. 1995) (Abrahamson, J., dissenting).

14. *State ex rel. Wis. Tel. Co. v. Henry*, 260 N.W. 486, 491 (Wis. 1935).

15. *Id.* at 491–92.

16. *See* Champagne, Duros & Kasper, *supra* note 2, at 9 & nn.57–58.

17. *Risser v. Thompson*, 930 F.2d 549, 554 (7th Cir. 1991).

18. *Risser v. Klauser*, 558 N.W.2d 108 (Wis. 1997).

19. Taylor, *supra* note 11, at 4.

20. *See* Champagne, Duros & Kasper, *supra* note 2, at 1, 5–6 (two resolutions were introduced in 1925, though both failed to pass).

21. Prior to 2020, the last time the Wisconsin Supreme Court considered the partial veto was in 1997 with *Risser v. Klauser*, 558 N.W.2d 108 (Wis. 1997).

22. 945 N.W.2d 685 (Wis. 2020) (per curiam).

23. 946 N.W.2d 101 (Wis. 2020).

24. *Bartlett*, 945 N.W.2d at 686–87.

25. *Wis. Small Bus. United*, 946 N.W.2d at 104–05.

26. *Bartlett*, 945 N.W.2d at 686–87; *Wis. Small Bus. United*, 946 N.W.2d at 103. *But see infra* note 269 (discussing the potential "groundbreaking" impact of *Bartlett*

This Comment joins an already extensive body of partial veto literature that suggests that the entire partial veto jurisprudence prior to the 1990 amendment is built on a faulty constitutional interpretation.[27] The court in *Henry* misinterpreted the partial veto language—resulting in the court's "complete, entire, and workable law" test—which charted the course for decades' worth of inevitable errant expansion anchored in stare decisis.[28] The text, legislative history, and purpose of the 1930 amendment indicate that this provision was intended to be an item veto—a more common power allowing a Governor to strike individual appropriations.[29]

This Comment goes on to argue, however, that in attempting to correct course through the 1990 and 2008 amendments, the Legislature instead enshrined this misinterpretation in the text of the constitution by inadvertently altering the meaning of "part."[30] Instead of moving the misguided court back onto the original path dictated by the 1930 text, the Legislature moved the path squarely under the feet of the court. By amending the constitutional text as it did, the Legislature eliminated the option for the court to remedy the error; consequently, the only way to return to the original and intended meaning of the partial veto power as enacted in 1930 is through another amendment.[31] And since the court

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in further constraining the Governor's scope of partial veto authority, but acknowledging that the lack of a governing rule leaves the partial veto's future uncertain).

27. *See, e.g.*, Wade, *supra* note 4; Mary E. Burke, *Comments, The Wisconsin Partial Veto: Past, Present and Future*, 1989 WIS. L. REV. 1395; John S. Weitzer, *Comment, The Wisconsin Partial Veto: Where Are We and How Did We Get Here? The Definition of "Part" and the Test of Severability*, 76 MARQ. L. REV. 625, 626, 638, 644 (1993) (arguing for the adoption of the Justice Hansen test or that the complete and workable law standard should apply to both the approved remnants and the portions stricken). This was also the argument made by the *Bartlett* petitioners. *See* Petitioners' Opening Brief, ¶ 1, *Bartlett*, 945 N.W.2d 685 (No. 2019AP1376-OA) [hereinafter *Bartlett* Petitioners' Brief]. *Contra* Benjamin W. Proctor, *Wisconsin's Chief Legislator: The Governor's Partial Veto Authority and the New Tipping Point*, 90 MARQ. L. REV. 739, 761 (2007) ("[B]y affirming a broad partial veto authority, the Wisconsin Supreme Court arguably reduced judicial entanglement in partial-veto disputes between the executive and legislative branches.").

28. *See* Wade, *supra* note 4, at 15; *see also* Burke, *supra* note 27, at 1403.

29. Wade, *supra* note 4, at 14.

30. *See* Wis. Eye, *Senate Committee on Ethics Reform and Government Operations*, Testimony from Marilyn Townsend on behalf of Fred Wade, at 2:01:41 (Jul. 18, 2007), https://wiseye.org/2007/06/18/senate-committee-on-ethics-reform-and-government-operations/ [https://perma.cc/AHS7-HX9C] (arguing that approving the 2008 amendment may "preclude judicial reconsideration of the supreme court decisions that have made it possible for the [G]overnors to create laws that the Legislature did not approve"). *Contra* Respondents' Brief, ¶ 18, *Bartlett*, 945 N.W.2d 685 (No. 2019AP1376-OA) ("[T]he Legislature's acquiescence in this Court's partial-veto decisions indicates that those decisions were correct.") [hereinafter *Bartlett* Respondents' Brief].

31. *See Bartlett* Respondents' Brief, *supra* note 30, ¶ 18 ("[A] new constitutional amendment is necessary to impose the new partial-veto restrictions that Petitioners seek.").

appeared to come short of reaching a governing rule in *Bartlett* and *Wisconsin Small Businesses United* to constrain Wisconsin's "quirky" partial veto, the Cheese continues to stand alone.

I. BACKGROUND

Wisconsin's partial veto authority has a long and storied history. Ninety years, nine Wisconsin Supreme Court opinions, one federal case, two subsequent amendments, and thousands of partial vetoes later,[32] the Governor's veto power is still contested, both in the political arena and in the courts. With two of those partial veto cases put before the Wisconsin Supreme Court and a constitutional amendment proposal successfully passing the Senate, 2020 appeared set to bring forth a potentially dramatic shift in partial veto interpretation.[33] However, the court's decisions in *Bartlett* and *Wisconsin Small Businesses United* and the Legislature's failure to adopt the amendment proposal have left the core of the partial veto—at least with regard to a governing rule—apparently intact.

A. The 1930 Partial Veto Amendment

In 1930, the Governor gained what has become a powerful policymaking tool when the Wisconsin Constitution was amended to include the "partial veto," allowing the Governor to veto appropriations bills "in whole or in part."[34] As amended in 1930, article V, section 10 provided that "[a]ppropriation bills may be approved in whole or in part by the Governor, and the part approved shall become law, and the part objected to shall be returned in the same manner as provided for other bills."[35] If two-thirds of the members of one house of the Legislature "agree[s] to pass the bill, or the part of the bill objected to," it is sent with the objections to the other house to be likewise reconsidered.[36] The names of the members "voting for or against the bill or the part of the bill objected to" are entered on each house's journal.[37] In the past thirty-five years, the Legislature has failed to override a Governor's veto.[38]

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32. Champagne & Kasper, *supra* note 12, at 7 (stating that the partial veto has been used on 2,560 items in budget bills since 1985).

33. *See Bartlett v. Evers*, 945 N.W.2d 685 (Wis. 2020) (per curiam); *Wis. Small Bus. United, Inc. v. Brennan*, 946 N.W.2d 101 (Wis. 2020); S.J. Res. 59, 104th Reg. Sess. (Wis. 2019).

34. J. Res. 43, 59th Leg. Sess. (Wis. 1929).

35. WIS. CONST. art. V, § 10 (1930) (amended 1990, 2008).

36. *Id.*

37. *Id.*

38. Champagne & Kasper, *supra* note 12, at 1 (stating that the last time the Legislature overrode a Governor's veto was in 1985).

Most recently, on November 7, 2019, the first attempted veto override in nine years failed when the Assembly could not gain sufficient votes to override Governor Tony Evers' vetoes in the 2019–21 budget bill.[39]

The 1930 amendment followed the passage of the State's new budget system,[40] which created an opportunity for the Legislature to "increas[e] the amounts of separate items in [a budget bill]" after receiving the bill from the Governor, leaving the Governor with the option of signing or vetoing the entire bill.[41] The argument before the amendment's passage was that the partial veto would "rebalance the powers of the executive and legislative branches"[42] and prevent the "very definite evils" of logrolling—defined by the court as "the practice of jumbling together in one act inconsistent subjects."[43] In 1927, Senator William Titus introduced a resolution to allow the Governor to veto "in whole or in part."[44]After the resolution passed both houses on first consideration, Senator Thomas M. Duncan reintroduced this proposal for second consideration; it passed both houses, and voters approved it in 1930.[45] Senator Titus, however, had requested language to "allow the Governor to veto *items* in appropriation bills."[46] At the time, thirty-seven states had some form of the "item" veto, though none used the word "part."[47] Almost entirely because of its alternative language choice, Wisconsin's partial veto power came to be regarded as something altogether different and unique.[48] This Part will first discuss the Wisconsin Supreme Court's initial interpretation of the 1930 amendment, as addressed in its first three partial veto cases, and will then address the cases in which the court significantly expanded the scope of the partial veto power, eventually prompting a successful response by the Legislature to constrain the partial veto in a 1990 constitutional amendment.

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39. Patrick Marley & Molly Beck, *Assembly Comes Up Short in Trying to Override Veto by Evers that Halted a Mental Health Center*, MILWAUKEE J. SENTINEL (Nov. 7, 2019, 9:14 AM CT) https://www.jsonline.com/story/news/politics/2019/11/07/wisconsin- republicans-try-override-vetoes-despite-shortage-votes/2510112001/ [https://perma.cc/C9VC-LZHY].

40. Act of May 17, 1929, ch. 97, 1929 Wis. Sess. Laws 95–107.

41. Champagne, Duros & Kasper, *supra* note 2, at 7.

42. *Id.*

43. *Kleczka*, 264 N.W.2d 539 (Wis. 1978) (Hasen, J., concurring in part) (citing *State ex rel. Martin v. Zimmerman*, 289 N.W. 662, 664 (Wis. 1940) (defining "logrolling")).

44. Champagne, Duros & Kasper, *supra* note 2, at 6.

45. *Id.* at 6–7.

46. *Id.* at 6 (emphasis added).

47. Wade, *supra* note 4, at 14.

48. *See id.* at 12–15.

1. THE WISCONSIN SUPREME COURT WEIGHS IN: *HENRY*, *FINNEGAN*, & *MARTIN*

The Wisconsin Supreme Court first addressed the newly amended Constitution in 1935 in *State ex rel. Wisconsin Telephone Company v. Henry*.[49] There, the court held that the word "part" should be given its "usual, customary, and accepted meaning,"[50] and concluded that for a valid partial veto, "the parts approved . . . [must] constitute, in and by themselves, a complete, entire, and workable law."[51] The *Henry* court then declined to decide whether a proviso or condition that is "inseparably connected with the appropriation" can be vetoed.[52] Finally, the court also noted that nothing in the provision suggests that the partial veto power "was not intended to be as coextensive as the Legislature's power to join and enact separable pieces of legislation in an appropriation bill," emphasizing the Governor's "quasi legislative" function.[53]

The next year, in *State ex rel. Finnegan v. Dammann*,[54] the court determined that an appropriation bill—the only bills subject to partial veto—must "within its four corners contain an appropriation."[55] The court also revisited the *Henry* test, affirming that the Governor is permitted to veto "any separable part of an appropriation bill."[56] In *State ex rel. Martin v. Zimmerman*,[57] the court focused on the amendment's purpose to prevent logrolling, the effect of which would "force the Governor to veto the entire bill and thus stop the wheels of government or approve the obnoxious act."[58] The court's explanation of the partial veto's purpose in *Martin* became the justification for future decisions.[59]

2. THE SCOPE BROADENS: *SUNDBY*, *KLECZKA*, AND *SENATE*

In *State ex rel. Sundby v. Adamany*,[60] the court, taking together the holdings of *Henry* and *Martin*, held that the Governor could use a partial

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49. *State ex rel. Wis. Tel. Co. v. Henry*, 260 N.W. 486 (Wis. 1935).

50. *Id.* at 491 (defined in Webster's New International Dictionary as "[o]ne of the portions, equal or unequal, into which anything is divided, or regarded as divided; something less than a whole; a number, quantity, mass, or the like, regarded as going to make up, with others or another, a large number, quantity, mass, etc., whether actually separate or not; a piece, fragment, fraction, member, or constituent.").

51. *Id.*

52. *Id.* at 490.

53. *Id.* at 492.

54. *State ex rel. Finnegan v. Dammann*, 264 N.W. 622 (Wis. 1936).

55. *Id.* at 624.

56. *Id.* at 623.

57. *State ex rel. Martin v. Zimmerman*, 289 N.W. 662 (Wis. 1940).

58. *Id.* at 664.

59. *See, e.g.*, *State ex rel. Sundby v. Adamany*, 237 N.W.2d 910 (Wis. 1976).

60. *Id.*

veto to "effectuate[] a change in legislative policy, as long as the portion vetoed is separable and the remaining provisions constitute a complete and workable law."[61] The court affirmed that the Governor has "a constitutionally recognized role in legislation," and that "[e]very veto has both a negative and affirmative ring about it," always involving policy change.[62]

Shortly after *Sundby*, the court in *State ex rel. Kleczka v. Conta*[63] significantly expanded partial veto authority by holding that conditions or provisos on an appropriation bill could be vetoed as long as "a complete and workable law" remains.[64] Though *Henry* suggested that provisos and conditions would not be subject to the partial veto as inseparable parts of the appropriation,[65] the *Kleczka* court found that this "dicta … does not correctly state the Wisconsin law."[66] With this shift in how the court would treat the partial veto, Justice Hansen's dissent in *Kleczka* urged that the court, having "gone too far," should instead adopt a new standard in line with the amendment's original purpose—that "the portions *stricken* must be able to stand as a complete and workable bill."[67]

Ten years later, Justice Hansen's predictions in *Kleczka* that the Governor would be able to "write with his eraser"[68] came to fruition when the court upheld the "Vanna White veto" in *State ex rel. Wisconsin Senate v. Thompson*.[69] There, Governor Thompson vetoed individual letters and digits to create new words and appropriations amounts.[70]

B. The Legislature Responds: The 1990 Amendment, Citizens Utility Board*, and* Risser

For the Legislature, the court's holding in *Wisconsin Senate* crossed the line: a mere sixteen days after the court's decision in that case, the Legislature held an extraordinary session and, on the same day, passed what would later become the first partial veto amendment in sixty years,

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61. *Id.* at 916.

62. *Id.* at 918.

63. *State ex rel. Kleczka v. Conta*, 264 N.W.2d 539 (Wis. 1978).

64. *Id.* at 551.

65. *State ex rel. Wis. Tel. Co. v. Henry*, 260 N.W. 486, 490 (Wis. 1935).

66. *Kleczka*, 264 N.W.2d at 555.

67. *Id.* at 558–60 (Hansen, J., concurring in part, dissenting in part) (emphasis added).

68. *Id.* at 557.

69. *State ex rel. Wis. Senate v. Thompson*, 424 N.W.2d 385 (Wis. 1988); *see* Champagne, Duros & Kasper, *supra* note 2, at 12 (referencing the veto as the "Vanna White" veto).

70. *See* Champagne, Duros & Kasper, *supra* note 2, at 17; *see also Citizens Util. Bd. v. Klauser*, 534 N.W.2d 608 (Wis. 1995).

attempting to constrain the scope of the power.[71] The 1990 amendment provided that, "in approving an appropriation bill in part, the [G]overnor may not create a new word by rejecting individual letters in the words of the enrolled bill."[72] Consequently, with the 1990 amendment, the Legislature ended the "Vanna White veto."[73] But, because the language of the amendment accepted the underlying authority as first explicated in *Henry* that "part" means any piece of the whole—however small—it would etch into the constitutional structure *Henry*'s interpretation of the word "part" and the overall broad partial veto authority.[74] As a result, and as the following analysis will show, in enshrining this definition in the constitution, the Legislature precluded a return through the court to the original and intended meaning of "part."[75]

Prior to *Bartlett* and *Wisconsin Small Businesses United*, the court had addressed the newly amended provision in only two cases—*Citizens Utility Board v. Klauser*[76] in 1995 and *Risser v. Klauser*[77] in 1997.[78] In *Citizens Utility Board*, the court held that the partial veto authority permits the Governor to "strike a numerical sum set forth in an appropriation and insert a different, smaller number as the appropriated sum."[79] The court stated as its rationale the "common sense reading" of "part" and stare decisis—namely *Henry* and *Wisconsin Senate*.[80] A strong dissent from Justice Abrahamson cautioned that the Constitution "speaks of appropriation bills, not appropriations," and that the majority opinion is "a series of contradictions."[81] Justice Abrahamson argued that the common sense interpretation of "part" is "a physical part of an

71. Petitioners' Opening Brief at 11–12, *Wis. Small Bus. United, Inc. v. Brennan*, 946 N.W.2d 101 (No. 2019AP2054-OA) [hereinafter *WSBU* Petitioners' Brief] (citing Champagne, Duros & Kasper, *supra* note 2, at 16).

72. WIS. CONST. art. V, § 10(1)(c).

73. *See* Champagne, Duros & Kasper, *supra* note 2, at 15–17.

74. *Bartlett* Respondents' Brief, *supra* note 30, at 39 ("[B]oth amendments presuppose that Article V, § 10(1)(b), empowers the Governor to veto any "part" of an appropriation bill, no matter how small."); *see also Bartlett v. Evers*, 945 N.W.2d 685, ¶ 73 (Roggensack, C.J., concurring in part, dissenting in part) (concluding that "there would have been no need for § 10(1)(c)" if the 1930 amendment had created an item veto, and that the new provision "has effect because by vetoing 'part,' smaller portions of an enrolled bill can be altered").

75. *See* Wade, *supra* note 4.

76. *Citizens Util. Bd. v. Klauser*, 534 N.W.2d 608 (Wis. 1995).

77. *Risser v. Klauser*, 558 N.W.2d 108 (Wis. 1997).

78. In addition, the Seventh Circuit in 1991 held that the Wisconsin partial veto provision did not violate the United States Constitution. *Risser v. Thompson*, 930 F.2d 549 (7th Cir. 1991).

79. *Citizens Util. Bd.*, 534 N.W.2d at 615.

80. *Id.*

81. *Id.* at 618, 620 (Abrahamson, J., dissenting).

appropriation bill, so that only the text physically present in a bill can be subject to the [G]overnor's partial veto power."[82]

In *Risser*, the court invalidated the Governor's write-in veto on a non-appropriation amount, holding that a "Governor's write-in veto may be exercised only on a monetary figure which is an appropriation amount."[83] Though the court refrained from expanding the partial veto power to non-appropriation amounts, the holding did not constrain any other part of the partial veto jurisprudence. Dissenting, Justice Crooks found that the approach adhered to by the majority "results in the [G]overnor's power to disassemble legislation not being coextensive with the [L]egislature's power to assemble it," contradicting the precedent giving the "[G]overnor joint authority with the Legislature to approve and veto appropriation bills."[84]

C. The 2008 Amendment and Bartlett v. Evers

The most recent amendment in 2008 prohibited the Governor from creating "a new sentence by combining parts of 2 or more sentences of the enrolled bill."[85] This change, eliminating the "Frankenstein veto," arose from Governor Doyle's creative partial vetoes during the 2005 biennial budget, including one that, for example, reallocated millions of dollars to public schools by vetoing all but twenty of 752 words across several sentences.[86] Until 2020, the court did not have an occasion to interpret the partial veto power in light of the 2008 amendment; however—more than twenty years after *Risser* and over a decade since the last amendment—the moment arrived with two partial veto challenges. In October 2019, the court granted the Petition for Original Action in *Bartlett v. Evers*, which challenged the constitutionality of four of Governor Evers's partial vetoes in the 2019–21 biennial budget bill.[87] One of the vetoes in question resulted in the reapportionment of funds designated by the Legislature as a grant program for school bus replacement, to one for alternative fuels and electric vehicle charging stations.[88] On the heels of *Bartlett* came *Wisconsin Small Businesses*

82. *Id.* at 622 (Abrahamson, J., dissenting).

83. *Risser v. Klauser*, 558 N.W.2d 108, 110 (Wis. 1997).

84. *Id.* at 121–22 (Crooks, J., dissenting).

85. WIS. CONST. art. V, § 10(1)(c).

86. Champagne, Duros & Kasper, *supra* note 2, at 17.

87. Amended Petition to the Supreme Court of Wisconsin to Take Jurisdiction of an Original Action at 5, *Bartlett v. Evers*, 945 N.W.2d 685 (Wis. 2020) (No. 2019AP001376-OA).

88. Memorandum in Support of Petition to the Supreme Court of Wisconsin to Take Jurisdiction of an Original Action at 16–17, *Bartlett v. Evers*, 945 N.W.2d 685 (Wis. 2020) [hereinafter *Bartlett* Petition Memo].

United v. Brennan, challenging the constitutionality of two vetoes during Governor Walker's administration.[89]

The *Bartlett* petitioners requested that the court overrule *Kleczka* and hold that the partial veto may not be used to disapprove of provisions that are "essential, integral, and interdependent parts of those which [the Governor] approved."[90] The *Bartlett* respondents countered that petitioners' arguments "contradict the plain language of the Wisconsin Constitution[,] . . . run afoul of [the] Court's partial-veto jurisprudence in its entirety[,] . . . [and] ignore the Legislature's own implicit approval of that jurisprudence by its failure to amend article V, section 10 in the manner urged by Petitioners."[91] The respondents contended that overruling *Kleczka* would require the court to overrule most of its case law dealing with the partial veto, disrupting the relationship between the Governor and the Legislature with regard to the appropriations process as defined by article V, section 10.[92] The respondents further argued that the petitioners asked the court to "nullify" the 1990 and 2008 amendments; recognizing the partial veto as an item veto would "improperly render those two amendments superfluous," when in fact the amendments "ratified the traditional understanding of the partial-veto power."[93]

With *Bartlett*, the court faced reconciling the original language of the 1930 amendment, decades' worth of partial veto decisions since *Henry*, and the new language of the Constitution with the 1990 and 2008 amendments. This Comment argues that neither party in *Bartlett* was quite right. This Comment agrees with the petitioners' contention that *Henry* and the resulting line of cases were decided incorrectly. However, this Comment then joins the respondents in emphasizing the transformational effect of the 1990 and 2008 amendments on the Constitution.[94] Indeed, these amendments set forth a new constitutional era for the partial veto; this new language changed the interpretative meaning of article V, section 10 from its original intended meaning.[95] The court in *Bartlett*, while finding three of the four vetoes unconstitutional, ultimately did not come to a majority rationale,

89. *Wis. Small Bus. United, Inc. v. Brennan*, 946 N.W.2d 101 (Wis. 2020). This Comment, however, focuses primarily on the arguments and decision in *Bartlett*.

90. *Bartlett* Petition Memo, *supra* note 88, at 4, 16, 22–23 (quoting *State ex rel. Wis. Tel. Co. v. Henry*, 260 N.W. 486, 493 (Wis. 1935)).

91. Response to Petition for Original Action at 1–2, *Bartlett v. Evers*, 945 N.W.2d 685 (Wis. 2020) (No. 2019AP1376-OA) [hereinafter *Bartlett* Petition Response].

92. *Id.* at 14–15.

93. *Bartlett* Respondents' Brief, *supra* note 30, at 1–2.

94. *Id.*

95. *Id.* at 2.

seemingly leaving this new constitutional era intact—though not explicitly sanctioning it.[96]

II. ANALYSIS

The partial veto's powerful and "quirky"[97] policymaking features arose not from the constitutional text of its enactment, a 1930 amendment introduced by the Legislature, but rather from decades of constitutionally unwarranted—yet precedentially inevitable—judicial expansion by the Wisconsin Supreme Court, beginning with *Henry's* "complete, entire, and workable law" test.[98] In attempting to rein in the Governor's resulting "coextensive" and "quasi-legislative" powers, the Legislature's 1990 and 2008 constitutional amendments narrowed the partial veto's scope—insofar as it prohibited the kinds of creative vetoes that *Wisconsin Senate* allowed and that Governor Doyle accomplished in the 2005 biennial budget—but, in doing so, enshrined in the Constitution the incorrect and overly broad understanding of "part" first adopted in *Henry*.[99]

In interpreting the Constitution's partial veto language in future cases, the court cannot, this Comment argues, overturn this line of precedent without contravening the 1990 and 2008 amendments, which changed the original meaning of the partial veto authority to reflect the court's decades-long partial veto jurisprudence.[100] The decisions in *Bartlett* and *Wisconsin Small Businesses United* did not provide any clarity on the role of the amendments.[101] Part A will show that the court in *Henry* triggered the partial veto chaos by incorrectly adopting an unqualified definition of the word "part," as evidenced by the intended meaning of the 1930 amendment, the *Henry* court's interpretative flaws, and the subsequent reliance in later decisions on *Henry*'s interpretation. Part B will suggest that the Legislature, in passing two constitutional amendments qualifying the meaning of "part," enshrined *Henry*'s expansive interpretation in the constitution, ultimately precluding a judicial return to the true intended meaning of the partial veto as an item veto. Part C will discuss this change in the constitutional text in light of *Bartlett* and *Wisconsin Small Businesses United*, which challenged the

96. *Bartlett*, 945 N.W.2d at 687; *see also infra* note 269 (further discussing the impact of *Bartlett*).

97. *Risser v. Thompson*, 930 F.2d 549, 554 (7th Cir. 1991).

98. *See State ex rel. Wis. Tel. Co. v. Henry*, 260 N.W. 486, 491 (Wis. 1935); Wade, *supra* note 4, at 15 (quoting *State ex rel. Klezca v. Conta*, 264 N.W.2d 539, 551 (1978).

99. *See* Champagne, Duros & Kasper, *supra* note 2, at 12–14, 17.

100. *Id.* at 20–21.

101. *Bartlett*, 945 N.W.2d; *Wis. Small Bus. United, Inc. v. Brennan,* 946 N.W.2d 101 (Wis. 2020).

breadth of the partial veto as it has been interpreted but which ultimately left the core of the partial veto authority mostly intact.

A. Off to a Bad Start: The Henry *Court Leaves a Crack in the Foundation*

The 1930 amendment creating the Governor's power to veto an appropriation bill "in whole or in part" is considered to be a drastic shift in authority from the Legislature to the Governor.[102] However, what the 1930 amendment was intended to do—based on its text, structure, legislative history, and purpose—was neither groundbreaking nor any more revolutionary than what other states allowed at the time.[103] The first time that the Wisconsin Supreme Court addressed this amendment was in the 1935 *Henry* case.[104] But, instead of adhering to a faithful interpretation of the Wisconsin Constitution, the *Henry* court failed to appropriately qualify the meaning of "part," deciding merely to apply the "common sense" dictionary definition.[105] This precedent set into motion decades of expanding gubernatorial authority.

1. THE ORIGINAL INTENDED MEANING OF THE 1930 AMENDMENT

Prior to 1930, the Wisconsin Constitution provided for the gubernatorial veto of entire bills only.[106] With the introduction of omnibus budget bills in 1911—in which the Legislature could package multiple appropriations and policy provisions—and the subsequent call by Governor Frances E. McGovern in 1913 for a rebalancing of power to eliminate the false choice of either vetoing such omnibus bills in their entirety or approving policies that the Governor disagreed with, the 1930 amendment added the partial veto language ("in whole or in part") for appropriation bills.[107] This new constitutional language (italicized) did not include a definition of "part":

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102. Michael K. McChrystal, *Forward: Reappraising the Wisconsin Constitution*, 90 MARQ. L. REV. 407, 408 (2007) ("The gubernatorial veto . . . . [I]s unusual in its shifting of power to the executive, permitting the [G]overnor an extraordinarily range of tactics in approving or vetoing individual words and numbers in appropriation bills.").

103. *See* Wade, *supra* note 4, at 15.

104. *State ex rel. Wis. Tel. Co. v. Henry*, 260 N.W. 486, 491 (Wis. 1935).

105. *Id.*

106. THE BLUE BOOK OF THE STATE OF WISCONSIN 28 (1909) ("Every bill which shall have passed the Legislature shall, before it becomes a law, be presented to the Governor; if he approve, he shall sign it, but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large upon the journal, and proceed to reconsider it.").

107. Champagne, Duros & Kasper, *supra* note 2, at 1, 3–4.

> *Appropriation bills may be approved in whole or in part by the [G]overnor, and the part approved shall become law, and the part objected to shall be returned in the same manner as provided for other bills*. If, after such reconsideration, two-thirds of the members present shall agree to pass the bill, *or the part of the bill objected to*, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of the members present it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the members voting for or against the bill *or the part of the bill objected to*, shall be entered on the journal of each house respectively.[108]

Even applying the method of constitutional interpretation used by the Wisconsin Supreme Court at the time of *Henry*,[109] this amendment should have been understood to have authorized what was commonly enacted by other states as an "item" veto.[110] A number of cases decided in the *Henry* era reveal the court's approach to constitutional interpretation at that time. The court began by following a plain-meaning rule, to the extent that the text was unambiguous.[111] However, because "it is difficult to perceive of a truly plain and unambiguous constitutional provision," the court often extended its analysis beyond the plain meaning of the words alone.[112] The court recognized that ambiguity or uncertainty in the text could arise from "conflicts with other clauses in the same instrument, or from incongruities between the words and the apparent intention of the whole instrument or its avowed object."[113] Overall, in interpreting a constitutional provision, the court's "duty . . . [is] to discover and give effect to the intent of the Legislature."[114]

In discerning the purpose of a provision, the court took into account "any relevant evidence of the true meaning of the clause at issue," including, in addition to the text, the "antecedent and contemporary

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108. J. Res. 43, 59th Leg. Sess. (Wis. 1929).

109. Since 1976, the Wisconsin Supreme Court when interpreting constitutional provisions has adhered to the methodology described in *Buse v. Smith*, looking to "(1) The plain meaning of the words in the context used; (2) The historical analysis of the constitutional debates . . . ; and (3) The earliest interpretation of this section by the [L]egislature as manifested in the first law passed following the adoption of the constitution." John Sundquist, *Construction of the Wisconsin Constitution—Recurrence to Fundamental Principles*, 62 MARQ. L. REV. 531, 539–40 (1979) (quoting *Buse v. Smith*, 247 N.W.2d 141, 149 (Wis. 1976)).

110. *See* Wade, *supra* note 4, at 14.

111. *See* Sundquist, *supra* note 109, at 537.

112. *Id.* at 538.

113. *Id.*

114. *State ex rel. Zimmerman v. Dammann*, 228 N.W. 593, 595 (Wis. 1930).

historical setting."[115] Further, in assessing ambiguity, the court presumed that lawmakers "did not intend anything clearly unreasonable or absurd."[116] The court also cautioned against "determinations based purely on technical or verbal argument," instead emphasizing that "where there is a reasonable ground to differ concerning the sense in which language is used, the provision should be examined in its setting in order to find out, if possible, the real meaning and substantial purpose of those who adopted it."[117] Ten years before *Henry*, the court in *State ex rel. Ekern v. Zimmerman*[118] stated that "[t]he purpose of construction of a constitutional amendment is to give effect to the intent of the framers and of the people who have adopted it; '. . . Constitutions . . . are to be construed so as to promote the objects for which they were framed and adopted.'"[119] Of most import here, the *Zimmerman* court further stated that the intent should be ascertained not in the words of any part alone, but by "the general purpose of the whole, in view of the evil which existed calling forth the framing and adopting of such instrument, and the remedy sought to be applied; and . . . the whole is to be made to conform to reason and good discretion."[120]

In applying this interpretative framework to the 1930 partial veto amendment by beginning with the text, the meaning of the word "part" is ambiguous: the provision itself does not include a definition, and the dictionary definition[121] (which the *Henry* court found sufficient), is too expansive to provide meaningful clarity.[122] For this reason alone, the court should not have stopped its analysis there. Indeed, a cautionary principle in using dictionaries is that a court should account for "semantic nuances" that vary between different contexts so, as in this case, where "part" has multiple meanings, a court should look to the surrounding context to determine the word's "aptest, most likely sense."[123]

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115. Sundquist, *supra* note 109, at 535.

116. *Id.* at 538 (quoting *State ex rel. Williams v. Samuelson*, 111 N.W. 712, 714 (Wis. 1907)).

117. *Id.* (quoting *State ex rel. Martin v. Heil*, 7 N.W.2d 375, 381 (1941)).

118. 204 N.W. 803 (Wis. 1925).

119. *Id.* at 805 (quoting George F. Tucker, *Constitutional Law*, *in* 8 CYCLOPEDIA OF LAW AND PROCEDURE 695, 730 (William Mack & Howard P. Nash eds., 1903)).

120. *Id.* (quoting Tucker, *supra* note 119, at 731).

121. *State ex rel. Wis. Tel. Co. v. Henry*, 260 N.W. 486, 491 (Wis. 1935) (quoting *Part*, WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1934) ("[O]ne of the portions, equal or unequal, into which anything is divided, or regarded as divided; something less than a whole; a number, quantity, mass, or the like, regarded as going to make up, with others or another, a larger number, quantity, mass, etc., whether actually separate or not; a piece, fragment, fraction, member, or constituent.")).

122. *See* Wade, *supra* note 4, at 57–58.

123. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 418 (2012).

Next, the context of "part" and its repeated use within article V, section 10, clarifies the word's meaning.[124] Prior to the 1990 and 2008 amendments, "part" appeared five times within section 10—not only in reference to the Governor's new appropriations veto authority but also to the override process for vetoed bills or parts of vetoed bills.[125] The 1930 amendment provided that, when a Governor partially vetoes an appropriation bill, the "part approved shall become law," while "the part objected to shall be returned in the same manner as provided for other bills."[126] This structure results in the "parts" of an appropriation bill splitting in two directions in the event of a partial veto—the approved part becomes law, while the rejected part returns to the Legislature.[127] These are mutually exclusive paths.[128] Further, once the "part objected to" has been returned to the Legislature for reconsideration, if two-thirds of each house approve the part objected to," then "it shall become law."[129]

This process is the key to understanding the meaning of "in whole or in part" within section 10.[130] For the override procedure in section 10 to make sense, the Legislature needs a meaningful "part" to reconsider: if the "part objected to" is a hodge-podge of the letters, words, or punctuation that remains from the "part approved," then the Legislature's override is meaningless.[131] In context, then, "part" most reasonably

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124. *See* Wade, *supra* note 4, at 14–15; *see also Bartlett v. Evers*, 945 N.W.2d 685, 722 (Wis. 2020) (Kelly, J., concurring in part, dissenting in part) (per curiam) ("[The dictionary] provided a reasonably adequate etymological meaning; but what we needed was a constitutionally contextualized meaning.").

125. J. Res. 43, 59th Leg. Sess. (Wis. 1929). The 1990 amendment, in addition to creating a new restriction on the partial veto power, also restructured section 10 into subsections and paragraphs. WIS. LEGIS. REFERENCE BUREAU, LRB-89-IB-1, CONSTITUTIONAL AMENDMENTS GIVEN "FIRST CONSIDERATION" APPROVAL BY THE 1987 WISCONSIN LEGISLATURE, at 2 (1989). Though this restructuring did not significantly alter the section's substance or function, it separated out the override procedure from the partial veto authorization, resulting in—as relevant here—article V, section 10(1)(a) and (b), and (2)(b) and (c). *Id.* In addition, the 1990 amendment changed the phrase, "part objected to" to "rejected part." *Id.* For the purposes of this Comment, these phrases will be treated as functionally the same.

126. J. Res. 43, 59th Leg. Sess. (Wis. 1929).

127. Non-Party Brief of the Legislature as *Amicus Curiae* Supporting Petitioners at 3–4, *Bartlett v. Evers*, 945 N.W.2d 685 (Wis. 2020) (No. 2019AP1376-OA) [hereinafter *Bartlett* Amicus Brief].

128. *See id.*

129. J. Res. 43, 59th Leg. Sess. (Wis. 1929).

130. *See Bartlett* Amicus Brief, *supra* note 127, at 3–6.

131. *See* Wade, *supra* note 4, at 15, 57; J. Res. 43, 59th Leg. Sess. (Wis. 1929). From 1947 to at least 1978, however, the practice was to "return neither the entire bill nor the vetoed portions of the bill to the Legislature," but rather to provide only a letter and the Governor's objections. *State ex rel. Kleczka v. Conta*, 264 N.W.2d 539, 549 (Wis. 1978). The court in Kleczka concludes that what must be returned to the Legislature cannot be "the excised clippings from the enrolled bill. . . . [But] the Governor's

refers to an independent item in the appropriation bill, which on its own could form a piece of legislation capable of enactment by the Legislature.[132] To find otherwise would result in absurdity: the Legislature would have to contend with leftover alphabet soup from the Governor's post-partial-veto policy agenda.[133]

Though the text and structure sufficiently reveal the meaning of "part" within the provision, any remaining ambiguity can be resolved by the amendment's legislative history, its purpose, and the circumstances in which it arose.[134] No drafting materials reveal why the drafter used "part" instead of "item" in crafting the partial veto amendment;[135] however, the existing extrinsic evidence overwhelmingly points to a common understanding that the amendment would enact an item veto. First, the drafting request from Senator William Titus in 1927 asked for a resolution that would permit the Governor "to veto items in appropriation bills."[136] Second, although the referendum ballot itself used "part,"[137] the press at the time of ratification widely referred to the partial veto as an "item veto."[138] For example, two days before the vote, the Capital Times published a piece claiming that voters would be asked to vote on a proposed amendment that would "enable the [G]overnor to veto

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recitation of the portions of the bill he has refused to approve and the reasons therefor." *Id.* at 548. In current practice, when a Governor rejects "any part" of the bill, it is the bill with the Governor's objections—not the rejected part—that is returned to the Legislature. Champagne & Kasper, *supra* note 12, at 1–3.

132. This interpretation mirrors that of Justice Hansen's dissent in *Kleczka*. *Kleczka*, 264 N.W.2d at 560 (Hansen, J., concurring in part, dissenting in part) ("[T]he partial veto power should be exercised only as to the individual components, capable of separate enactment, which have been joined together by the [L]egislature in an appropriation bill. That is, the portions stricken must be able to stand as a complete and workable bill.").

133. *Id.* at 547–48.

134. *See* Sundquist, *supra* note 109, at 547–48 ("The Wisconsin Supreme Court has consistently recognized that, in the construction of a provision of the state constitution, the intent of the framers cannot be discovered merely by looking at the words of the clause alone without ascertaining the purpose of the whole instrument in view of the circumstances which gave rise to the particular clause.").

135. Champagne, Duros & Kasper, *supra* note 2, at 6 (discussing J. Res. 37, 58th Leg. Sess. (Wis. 1927)).

136. *Id.*; *see also Bartlett v. Evers*, 945 N.W.2d 685, 693–94 (Wis. 2020) (Roggensack, C.J., concurring in part, dissenting in part) (providing a robust review of the drafting and ratification history of the 1930 amendment).

137. *See, e.g.*, *Sample Official Referendum Ballot*, THE CAP. TIMES (Wis.), Oct. 27, 1930, at 10 ("Shall the constitutional amendment, proposed by Joint Resolution No. 43 of 1929, be ratified so as to authorize the Governor to approve appropriation bills in part and to veto them in part?").

138. Champagne, Duros & Kasper, *supra* note 2, at 7; *see also Bartlett* Petitioners' Brief, *supra* note 27, at 5–7. *Contra Bartlett*, 945 N.W.2d at 744–45 (Hagedorn, J., concurring).

single items in an appropriations bill without vetoing the entire bill."[139] Further, the article claimed that the amendment:

> [W]ould give the Governor the power to express his disapproval of certain items without vetoing the entire bill. Thirty-seven states provide in their statutes that the Governor may veto single items in appropriation bills. "The power to veto single items is important under any budget bill," Sen. Duncan states. "Under our new budget plan, in which appropriations are made in a single bill, it is absolutely indispensable."[140]

Indeed, the drafter himself submitted a brief in *Henry* in support of the amendment, which used the term "item" exclusively.[141]

Third, the purpose of the amendment was ostensibly to "rebalance" the power of the Executive and the Legislature after the practice of omnibus appropriation bills began—the court itself mentions this in many of its partial veto opinions.[142] While an item veto would provide the Governor with the ability to "unpack" omnibus legislation by removing unwanted policy provisions, a partial veto that allows the Governor to create new policy provisions by removing words, letters, or any component of an appropriation bill (under the *Henry* court's definition of "part") dramatically shifts the balance of power in favor of the Governor.[143] In this sense, the Legislature is providing a canvas of numbers and letters from which the Governor can craft his or her budget priorities—with almost no practical check on that power.[144] It is unlikely that the Legislature would have willingly handed over this power to the Executive.

At a time when thirty-seven other states had a form of the item veto, Wisconsin's use of "part" instead of "item" is undoubtedly peculiar and

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139. *League of Voters Draws Attention to Voting at Election on Tuesday*, THE CAP. TIMES (Wis.), Nov. 2, 1930, at 16.

140. *Id.*

141. Brief in Support of the Proposed Amendment to the Constitution to Allow the Governor to Veto Items in Appropriation Bills, *State ex rel. Wis. Tel. Co. v. Henry*, 260 N.W. 486 (Wis. 1930) (No. 43); *see also* JACK STARK, THE WISCONSIN STATE CONSTITUTION 24 (G. Alan Tarr ed., 2011).

142. Champagne, Duros & Kasper, *supra* note 2, at 7; *see e.g.*, *State ex rel. Kleczka v. Conta*, 264 N.W.2d 539, 556–60 (Wis. 1978) (Hansen, J., concurring in part, dissenting in part).

143. *See Kleczka*, 264 N.W.2d at 559–60 (Hansen, J., concurring in part, dissenting in part).

144. The Legislature has not been able to successfully override a Governor's partial veto since 1985. WIS. LEGISLATIVE COUNCIL, IM-2015-11, GOVERNOR'S PARTIAL VETO AUTHORITY, at 6 (2015).

warrants further inquiry into that linguistic choice.[145] Nevertheless, while the *Henry* court found this word choice dispositive, it remains but one factor in divining the meaning of the section. Based on a more robust textual analysis of the amendment, it is clear that what was "quirky"[146] about Wisconsin's partial veto was not the *substantive* divergence from other state constitutional practices, but merely the *linguistic* divergence that resulted from employing the word "part" over "item."[147]

2. THE *HENRY* COURT'S INTERPRETATION OF THE 1930 AMENDMENT

In *Henry*, the court placed disproportionate emphasis on one dictionary definition of "part," as that word's "usual, customary, and accepted meaning."[148] The court further erred, however, in concluding that the meaning of "part" was not "qualified or limited, or otherwise rendered doubtful by reason of context, or uncertainty as to application to a particular subject matter, or otherwise."[149] The decision in *Henry* did not singularly create the broad partial veto authority of today, but the crack in its analysis—finding no qualifications or limitations on the word "part"—gradually widened through stare decisis until it became a chasm fixable only by a constitutional amendment.

Not only did the *Henry* court draw the incorrect conclusion that the meaning of "part" in the 1930 amendment was not qualified, but the court also suggested that its textual analysis was correct even if that meaning was not intended by the Legislature.[150] By finding that nothing in the provision "warrants the inference or conclusion that the Governor's power of partial veto was not intended to be as coextensive as the Legislature's power to join and enact separable pieces of legislation in an appropriation bill,"[151] the court focused on the severability of a provision and the Governor's power to "pass . . . on each separable piece of legislation or law on its own merits."[152] The only limiting factor prescribed by the court on the Governor's partial veto power was that the

145. Wade, *supra* note 4, at 14; *see also Bartlett v. Evers*, 945 N.W.2d 685, 702 (Wis. 2020) (Roggensack, C.J., concurring in part, dissenting in part).

146. Writing for the majority, Judge Posner referred to Wisconsin's partial veto as "quirky." *Risser v. Thompson*, 930 F.2d 549, 554 (7th Cir. 1991).

147. *See State ex rel. Wis. Tel. Co. v. Henry*, 260 N.W. 486, 490–91 (Wis. 1935).

148. *Id.* at 491.

149. *Id.*

150. *Id.* at 492 ("It may well be that section 10, art. 5, Wis. Const., was not intended to empower the Governor, in vetoing parts of an appropriation bill, to dissever or dismember a single piece of legislation which is not severable, or so as to leave merely provisions which are not a complete or fitting subject for a separate enactment by the Legislature.").

151. *Id.*

152. *Id.*

part *approved* after the veto must be a "complete, entire, and workable law."[153]

The crux of the *Henry* decision's problem is its broad language, which was redirected then expanded by later courts.[154] The court incorrectly applied the dictionary definition of "part" as that word's usual, customary meaning, instead of qualifying the meaning based on the override structure in section 10 (now structured as 10(2)(b) and (c)), or on the intent of the Legislature in addressing omnibus budget bills; this resulted in future courts and Governors using *Henry* as precedent to define "part" as any component of an appropriation bill.[155] By failing to extend its analysis to the provision as a whole—despite recognizing the "evil consequences of improper joinder"[156] that the amendment was intended to address—the *Henry* court laid the foundation for decades' worth of textually unsupported judicial expansion.[157]

3. NO GOING BACK: THE PERILS OF STARE DECISIS AND THE EXPANSION OF THE *HENRY* RULE

With each iteration of the court's partial veto analysis, *Henry's* "complete, entire, and workable"[158] law rule persisted.[159] Once *Henry* established this standard, the court relied on it heavily in future decisions,[160] often without finding the need to revisit the definition of "part." Instead, the court was content to limit its partial veto analysis to "application of principles expressed by this court in previous cases in which the exercise of the partial veto was challenged."[161]

However, in relying on stare decisis and *Henry*'s "complete, entire, and workable law" test,[162] the court not only moved further from the text of the constitution but also began to run into the inevitable problems

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153. *Id.*

154. *See e.g.*, *State ex rel. Sundby v. Adamany*, 237 N.W.2d 910, 915–16 (Wis. 1976); *State ex rel. Kleczka v. Conta*, 264 N.W.2d 539, 550–51 (Wis. 1978); *State ex rel. Wis. Senate v. Thompson*, 424 N.W.2d 385, 393, 396 (Wis. 1988).

155. *See Thompson*, 424 N.W.2d at 392 (citing *Sundby*, 237 N.W.2d at 916).

156. *Henry*, 260 N.W. 486, 492.

157. *See* Memorandum in Support of Petition to the Supreme Court of Wisconsin to Take Jurisdiction of an Original Action at 10, *Bartlett v. Evers*, 945 N.W.2d 685 (Wis. 2020) (No. 2019AP1376-OA) [hereinafter *Bartlett* Memo].

158. *Henry*, 260 N.W. at 491.

159. *See* Harrington, *supra* note 7, at 866 (The "broad authority embodied in the provisions of the Wisconsin Constitution is a result of an unswerving line of judicial precedent in Wisconsin . . . .").

160. *See e.g.*, *Kleczka*, 264 N.W.2d at 551 ("We conclude that the test of severability has clearly and repeatedly been stated by this court to be simply that what remains be a complete and workable law.").

161. *State ex rel. Sundby v. Adamany*, 237 N.W.2d 910, 915 (Wis. 1976).

162. *Henry*, 260 N.W. at 491.

arising from the unqualified and unlimited definition of "part."[163] For example, the court in *State ex rel. Martin v. Zimmerman*,[164] focusing on the constitution as a whole and the intent behind the amendment, concluded that "[i]f the Legislature had remained in session, only the parts of [the bill] to which the Governor objected would be returned to the legislative body."[165] Interpreting the provision to require that the entire bill be returned to the Legislature "would destroy the whole purpose and effect of the 1930 amendment."[166] Despite this accurate interpretation of the text and context of the provision, the *Martin* court did not go on to reconcile its procedural conclusion with the *Henry* "complete workable law" test—in finding that the approved parts so meet this standard, the court simply concluded that they must be given effect.[167] This counterintuitive result is indicative of *Henry*'s substantial influence on partial veto jurisprudence, even in the face of compelling evidence that *Henry* got it wrong.

The court took the partial veto jurisprudence another step toward its illogical end with its decision in *Wisconsin Senate*, finding that its result had been "presaged," "augured," and "dictated" by its past partial veto decisions.[168] In *Wisconsin Senate*, the court concluded that the Governor's partial veto authority extended to individual words, letters, and digits, and also permitted the Governor to reduce appropriations by striking digits.[169] *Henry* makes another appearance in *Wisconsin Senate*'s reemphasis that "the test in the veto of parts is simply whether what remains after the Governor's veto is a complete and workable law."[170] By adhering to this test, the court can further expand the partial veto authority while asserting that its decision "break[s] no new ground."[171] The court's commitment to stare decisis here, however, goes against the proper analysis of constitutional precedent, which under greater scrutiny may have much earlier detected the need for a limitation on the word

163. *See* Burke, *supra* note 27, at 1403 ("Later litigation concerned the partial veto of ever smaller 'parts' of legislative bills. The *Henry* opinion does not reflect the court's anticipation that its textual analysis eventually would be applied to individual digits and letters, or that the meaning of a 'part' itself would become completely ambiguous.").

164. 289 N.W. 662 (Wis. 1940).

165. *Id.* at 664–65; *see also* Burke, *supra* note 27, at 1405–06.

166. *Martin*, 289 N.W. at 664; *see also* Burke, *supra* note 27, at 1405–06.

167. *Martin*, 289 N.W. at 665; *see also* Weitzer, *supra* note 27, at 638.

168. *State ex rel. Wis. Senate v. Thompson*, 424 N.W.2d 385, 388, 395 (Wis. 1988).

169. *Id.* at 388.

170. *Id.* at 396.

171. *Id.* at 388.

"part."[172] In the context of the home rule amendment, for example, Justice R.G. Bradley warned in *Black v. City of Milwaukee*[173] that

> [t]he durability of erroneous decisions interpreting the home rule amendment under the Wisconsin Constitution illustrates the danger of rigidly adhering to the doctrine of stare decisis at the expense of fidelity to the Constitution. It is this court's duty to reconsider interpretations of the home rule amendment that depart from a proper understanding of that constitutional provision.[174]

B. The Legislature Constitutionalizes the Error: The New Partial Veto

Shortly after *Wisconsin Senate*, and prior to the 1990 amendment, Assembly Speaker Tom Loftus remarked,

> [W]e are the first Legislature to serve under the Supreme Court's decision that extended the Governor's partial veto power to the point where the Wisconsin Governor is also a Legislature . . . The court's majority eviscerated this institution and if we don't adjust in this session, we will have sealed the fate of future Legislatures.[175]

In attempting to constrain the Governor's partial veto authority through the 1990 and 2008 amendments, however, the Legislature instead sealed its fate by implicitly adopting the court's overly broad interpretation that began with *Henry* and widened over the next six decades.[176] Even though these recent amendments do limit the Governor, they also change the nature of the partial veto provision within the constitution itself.

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172. *See State ex rel. Kleczka v. Conta*, 264 N.W.2d 539, 559 (Hansen, J., concurring in part, dissenting in part) ("I fear that the court may now have painted itself into a corner, and that a time may come when we regret having done so."); *Thompson*, 424 N.W.2d at 398 ("Again, we point out that our five earlier decisions which have broadly construed the [G]overnor's partial veto authority, have ineluctably led to the decision we reach today.").

173. 882 N.W.2d 333 (Wis. 2016).

174. *Id*. at 357–58 (R.G. Bradley, J., concurring).

175. Memorandum in Support of Petition for Leave to Commence an Original Action at 3 n.1, *Wis. Small Bus. United, Inc. v. Brennan*, 946 N.W.2d 101 (Wis. 2020) (2019AP2054-OA) (quoting REMARKS BY THE SPEAKER, STATE OF WIS. ASSEMB. J., A. 89-1989-01-03, 89th Sess., at 7 (1989)) [hereinafter *WSBU* Memo].

176. *See Bartlett* Petition Response, *supra* note 91, at 1–2 ("Petitioners' arguments . . . ignore the Legislature's own implicit approval of [the court's partial-veto jurisprudence] by its failure to amend article V, section 10 . . . .").

1. THE CONSTITUTION'S MEANING UNDER THE 1990 AND 2008 AMENDMENTS

Going forward, when the court interprets the partial veto provision—looking to precedent and the constitutional text—it is no longer looking at the same text as the *Henry* court. If it were, the court would likely be well within its authority to overturn six decades' worth of precedent,[177] because the meaning of the 1930 amendment as a whole is clear.[178] However, the *text* of the constitution today has changed, and when a constitutional provision is amended, the court must "construe it anew."[179] When looking anew at the text of the constitution after the 1990 and 2008 amendments, the partial veto provision redefines "part" (from its original meaning) by implicitly incorporating the broad definition crafted by the court while adding particular constraints.[180]

The court's well-established contemporary approach to interpreting constitutional amendments is to look to "the plain meaning, the constitutional debates and practices of the time, and the earliest interpretations of the provision by the Legislature, as manifested through the first legislative action following adoption."[181] An analysis of the 1990 and 2008 amendments through this framework of constitutional interpretation indicates that the amendments had the effect of enshrining the broad understanding of "part" into the constitution.[182]

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177. *See* Daniel R. Suhr & Kevin LeRoy, *The Past and the Present: Stare Decisis in Wisconsin Law*, 102 MARQ. L. REV. 839, 854 (2019) ("In a case of statutory interpretation, if the court errs, the [L]egislature may amend the statute to clarify its desired outcome. That is not nearly so easy if the court botches a case of constitutional interpretation, which suggests the court must exercise greater scrutiny of its precedents in constitutional cases."); *see also Black*, 882 N.W.2d at 357 (R.G. Bradley, J., concurring) ("The principle of stare decisis does not compel us to adhere to erroneous precedents or refuse to correct our own mistakes." (quoting *State v. Outagamie Cnty. Bd. of Adjustment*, 628 N.W.2d 376, 383 (Wis. 2001))). *Contra United States v. Lopez*, 514 U.S. 549, 600 n.8 (1995), (Thomas, J., concurring) ("Although I might be willing to return to the original understanding, I recognize that many believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years. Consideration of *stare decisis* and reliance interests may convince us that we cannot wipe the slate clean.").

178. *See* discussion *supra*, Part II.A.1.

179. *State ex rel. Dep't of Nat. Res. v. Wis. Ct. of Appeals*, 909 N.W.2d 114, 129 n.16 (Wis. 2018) ("[A]n amended statute is to be given the meaning that it would have had if it had read from the beginning as amended." (quoting *State ex rel. Dep't of Agric. v. Marriott*, 296 N.W. 622, 625 (Wis. 1941))).

180. *Bartlett* Respondents' Brief, *supra* note 30, at 16, 39; *see also Bartlett*, 945 N.W.2d 685, 702 (Roggensack, C.J., concurring in part, dissenting in part).

181. *Black v. City of Milwaukee*, 882 N.W.2d 333, 355 (Wis. 2016) (R.G. Bradley, J., concurring) (quoting *Dairyland Greyhound Park, Inc. v. Doyle*, 719 N.W.2d 408, 422 (Wis. 2006)).

182. *Bartlett* Petition Response, *supra* note 91, at 15–16; *see also Bartlett* Respondents' Brief, *supra* note 30, at 39.

Starting with plain meaning, the text "must be construed as a whole."[183] In so doing, context becomes critical as a "primary determinant of meaning."[184] In construing article V, section 10 as a whole, the interpretation must be informed by the "interrelated" references to "part," including those found in the new amendments.[185] When viewed as a whole, the 1990 and 2008 amendments add a qualification of the word "part," where *Henry* had identified none.[186] The addition of section 10(1)(c), first by the 1990 amendment's explicit prohibition on the Governor's ability to "create a new word by rejecting individual letters," then by the 2008 amendment's prohibition on the ability to "create a new sentence by combining parts of 2 or more sentences of the enrolled bill,"[187] implicitly *permits* the Governor to veto individual words and sentences.[188]

Section 10(1)(c) provides a contextual definition of the word "part," so that in construing the meaning of "in whole or in part" in section 10(1)(b), it no longer makes sense to argue that the definition is confined to an "item."[189] Finding otherwise would render the new language superfluous.[190] If the Governor were limited to approving and rejecting items, then the limitations in article V, section 10(1)(c) would have no purpose; rather, they would be subsumed into the broader prohibition against vetoing anything other than an item.[191] "If a provision is susceptible of (1) a meaning that gives it an effect already achieved by another provision, or that deprives another provision of all independent effect, and (2) another meaning that leaves both provisions with some independent operation, the latter should be preferred."[192]

Further, where a provision is absent, it is not up to the court to supply it.[193] The plain text of the amendments clearly and unambiguously limits the Governor from creating a new word by rejecting individual letters and creating a new sentence by combining parts of two or more

183. SCALIA & GARNER, *supra* note 123, at 167.

184. *Id.*

185. *Id.*

186. *State ex rel. Wis. Tel. Co. v. Henry*, 260 N.W. 486, 491 (Wis. 1935). See discussion *supra*, Part II.A.2, for an explanation of the Henry court's failure to qualify "part" in the context of the procedural requirements for returning the "parts rejected" to the Legislature.

187. WIS. CONST. art. V, § 10(1)(c).

188. *See Bartlett* Respondents' Brief, *supra* note 30, at 11.

189. *Id.* at 10, 17.

190. *Id.* at 2, 17.

191. *See Bartlett,* 945 N.W.2d 685, 716 (Wis. 2020) (A.W. Bradley, J., concurring in part, dissenting in part) ("We are to construe constitutional provisions . . . to avoid rendering any language superfluous.").

192. SCALIA & GARNER, *supra* note 123, at 176.

193. *Id.* at 94 ("What the [L]egislature 'would have wanted' it did not provide, and that is an end of the matter.").

sentences.[194] That the Legislature (and, subsequently, the voters) did not place any other restrictions on the partial veto power does not create a "gap" for the court to fill.[195] Indeed, the fact that the Legislature introduced the 2008 amendment after the partial veto abuses in the 2005 biennial budget is evidence that the Legislature was capable of filling the gap left by the 1990 amendment, and can do so in the future.[196]

Although the "authoritative, and usually final, indicator of the meaning of a provision is the text—the actual words used,"[197] constitutional interpretation also uses extrinsic sources in order to ascertain original meaning—not to identify the framers' subjective intent, but to "display how the text . . . was originally understood."[198] The court "presumes that . . . the information used to educate the voters during the ratification campaign provides evidence of the voters' intent"; this can include such information as public statements and news accounts, as well as polls.[199] The construction and interpretation of the acts must follow such intention as it is revealed.[200] Here, the plain meaning analysis is reinforced by the ratification campaign surrounding passage of the 1990 and 2008 amendments.[201] Newspaper articles, public statements, and Legislative Reference Bureau documents from the time indicate a general understanding among the legislators and voters that the amendments were intended only to address discrete abuses of the partial veto, not to redefine what was accepted as the broad and unique partial veto authority retained by the Governor (as interpreted and expanded by the court).[202]

Leading up to the 2008 constitutional referendum on the partial veto, several newspaper articles conveyed that the "Frankenstein veto" being considered for elimination via amendment was only a subset of the Governor's partial veto power, the remainder of which the Governor would retain. For example, the Badger Herald printed,

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194. WIS. CONST. art. V, § 10(1).

195. SCALIA & GARNER, *supra* note 123, at 97.

196. *See Bartlett* Respondents' Brief, *supra* note 30, at 2, 22.

197. *Coulee Catholic Schs. v. Lab. & Indus. Rev. Comm'n*, 768 N.W.2d 868, 885 (Wis. 2009); *see also Bartlett* Respondents' Brief, *supra* note 30, at 30.

198. *Black v. City of Milwaukee*, 882 N.W.2d 333, 358 (Wis. 2016) (R.G. Bradley, J., concurring) (quoting ANTONIN SCALIA, A MATTER OF INTERPRETATION 38 (Amy Gutmann ed., 1997)).

199. *Dairyland Greyhound Park v. Doyle*, 719 N.W.2d 408, 426 (Wis. 2006) (citing *State ex rel. Ekern v. Zimmerman*, 204 N.W. 803, 808 (Wis. 1925)).

200. *Id.*

201. *Cf. Black*, 882 N.W.2d at 362 (R.G. Bradley, J., concurring) ("The original meaning of the home rule amendment communicated to the voters who ratified the amendment, along with the interpretation detailed by the drafter of the amendment, reinforce the plain meaning analysis above and collectively support the interpretation . . . .").

202. *See infra* notes 203–06.

> Most states, including Wisconsin, grant their governors a line-item veto, in which governors may strike individual items from a piece of legislation. Wisconsin's "partial veto" is uniquely broad in allowing the Governor to also strike paragraphs, sentences, words, numbers and symbols from the text of a budget bill, and then piecing the remaining fragments together to effectively create new legislation. . . . [The joint resolution] would amend the state Constitution . . . from combining multiple sentences in budget bills by deleting words.[203]

This description suggests that the proposal contemplated only one type of veto abuse, not the entirety of the Governor's partial veto power.

In another example, a guest column in the Wisconsin State Journal—authored by Fred Wade, a widely regarded partial-veto expert—warned that the Legislature's proposal to eliminate the "Frankenstein veto" would not actually accomplish what it set out to do, and instead proposed an alternative amendment to require the Governor to "approve or reject separate items or appropriations in their entirety":

> [I]f the evil of the "Frankenstein veto" is the creation of laws that the Legislature did not approve—as supporters of the amendment contend—why is there no proposal that would actually stop governors from creating laws that the Legislature did not approve? There are 42 other states with part or item vetoes, but there is no other state in the nation that allows that authority to be used as a dictatorial power to make laws without the consent of the governed as decided by their representatives in the Legislature. The text of such an amendment might read, "In approving an appropriation bill in part, the [G]overnor shall approve or reject separate items or appropriations in their entirety." It could be adopted in lieu of, or to follow, passage of the pending amendment. This alternative would be consistent with the intent of both the framers of the constitutional amendment that created the partial veto power, and of the voters who ratified it in 1930.[204]

With regard to legislative statements on the ban on "Frankenstein vetoes,"[205] there was a similar understanding that the amendment was

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203. Taylor, *supra* note 11, at 4.

204. Fred Wade, *Legislature Needs to Really Ban 'Frank Veto'*, WIS. STATE J., (Nov. 23, 2007), https://madison.com/news/opinion/legislature-needs-to-really-ban-frank-veto/article_8db1d35d-2fbe-5d07-89d6-290ef79ddf6d.html [https://perma.cc/XMC9-K2W7].

205. *Id.*

limited in scope. The designated topic listed in the co-author's initial drafting request to the Legislative Reference Bureau in the 2005–06 session was to "prohibit vetoes from piecing together sentences."[206] Further, 2005 Senate Joint Resolution 33 did not ultimately include a proposed amendment to prohibit the Governor from rejecting "any individual word in a sentence of the enrolled bill unless the entire sentence is rejected."[207] Though this amendment was initially adopted, the Senate refused to concur in the amendment by a vote of 32–0, and the bill was published as 2005 Enrolled Joint Resolution 46 in its original language.[208] On second consideration in the 2007–08 session, 2007 Senate Joint Resolution 5 passed without any amendments.[209] This history suggests that if the Legislature wanted to return the partial veto to its original meaning, it had ample opportunity to do so; instead, it sought to impose limited restrictions premised on the court's broad interpretation.[210]

In further support of the contention that the Legislature intended only to constrain the partial veto as defined by the court in particular ways are legislative statements leading up to the amendment's ratification. At the public hearing held by the Senate Committee on Ethics Reform and Government Operations on July 18, 2007, Senator Sheila Harsdorf, co-author of the 2008 amendment (2007 Senate Joint Resolution 5 and 2007 Assembly Joint Resolution 1), remarked, "I support the partial veto, but I do not support abuses of the partial veto."[211] Her statements went on to indicate that legislators were well aware that the proposal would not (and should not) eliminate the partial veto as it had been interpreted, only that it should be constrained in this particular way; she clarified that a partial veto allows a Governor to reduce an appropriation, while an item veto does not, with the rationale that

206. Legis. Reference Bureau, 2005 Drafting Request, S.J. Res. 33, 2005–06 Leg. (Wis. 2005) (unenacted). This proposal would ultimately go on to become the 2008 amendment, after approval on the first and second reconsideration by the Legislature and ratification by voters.

207. *Id.*; Assembly Substitute Amendment 1 (ASA1-SJR33) (Wis. 2005).

208. Wis. State Legislature., S.J. Res. 33 (2005–06), History, https://docs.legis.wisconsin.gov/2005/proposals/sjr33 [https://perma.cc/M7TV-HWY7] (last visited Sept. 14, 2020); *See also* WIS. LEGIS. REFERENCE BUREAU, LRB-08-4, WISCONSIN BRIEFS FROM THE LEGISLATIVE REFERENCE BUREAU, CONSTITUTIONAL AMENDMENT TO BE CONSIDERED BY WISCONSIN, APRIL 1, 2008 (2008).

209. Wis. State Legislature, S.J. Res. 5 (2007–08), History, https://docs.legis.wisconsin.gov/2007/proposals/sjr5 [https://perma.cc/7BGD-5PJK] (last visited Sept. 14, 2020).

210. *Bartlett* Respondents' Brief, *supra* note 30, at 22 ("The Legislature clearly knows how to [amend the Constitution if it believes that the Constitution assigns too much veto authority to the Governor], as it did through the 1990 and 2008 amendments abolishing single-letter and combining sentence vetoes.").

211. Wis. Eye, *supra* note 30, at 1:27:06.

reducing an appropriation is accepting "a part; a portion of what has passed and has been authorized by the Legislature."[212] Senator Harsdorf further asserted, "we can fix the partial veto today . . . and continue to have that discussion on if Wisconsin should go to the item veto authority . . . It's a *different debate* that we can continue to have."[213] In other words, the Legislature accepted the expansive partial veto power as first defined by the court in *Henry*[214] and later reiterated in *Wisconsin Senate*—that Wisconsin's partial veto was distinct from an item veto—and changed the constitutional text in a manner that reflected this assumption.[215] In addition, Senator Harsdorf claimed that "even with banning the Frankenstein veto, the Wisconsin Governor will have the broadest veto authority of any governor in the nation."[216] Her comments show that the amendment was intended to address a particular abuse of the broad partial veto power, not to eliminate it.

To reiterate that the Legislature was aware of the 2008 amendment's effect, at the same hearing, testimony from Fred Wade warned that the proposal would still permit Governors to delete words within sentences and create laws that the Legislature did not approve.[217] Further still, Mr. Wade's testimony suggested that the proposed amendment would "make matters worse by contradicting the explicit constitutional command that the legislative powers shall be vested in the Senate and the Assembly."[218] Particularly on point, the testimony posits that ratification may actually "preclude judicial reconsideration of the supreme court decisions that have made it possible for Governors to create laws that the Legislature did not approve."[219]

Informational reports issued by the Legislative Reference Bureau (LRB) leading up to the ratification of the amendments provide an equally clear indication of how the partial veto was understood at the time and what the amendments were intended to achieve. Prior to the ratification of the 1990 amendment banning the "Vanna White veto,"[220] the LRB reported that 1987 Senate Joint Resolution 71 (Enrolled Joint Resolution 76):

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212. *Id.* at 1:36:02.

213. *Id.* at 1:36:52 (emphasis added).

214. *State ex rel. Wis. Tel. Co. v. Henry*, 260 N.W. 486 (Wis. 1935).

215. *See State ex rel Wis. Senate v. Thompson*, 424 N.W.2d 385 (Wis. 1988).

216. Wis. Eye, *supra* note 30, at 1:42:07.

217. Wis. Eye, *supra* note 30, at 1:57:30 (remarks delivered to the committee on behalf of Fred Wade by Marilyn Townsend).

218. *Id.* at 2:01:24. See Wade, *supra* note 4, and Wade, *supra* note 204, for Fred Wade's additional partial veto discussions.

219. Wis. Eye, *supra* note 30, at 2:01:37.

220. *See* Champagne, Duros & Kasper, *supra* note 2, at 12.

> redefines the limits of the Governor's power to veto appropriations bills in part. Although the Governor would still have broad veto authority, including the authority to veto individual numbers to change numeric amounts and individual words to change sentences, the striking of letters to form new words would be prohibited.[221]

Prior to the 1990 amendment, none of the attempts to modify the Governor's partial veto power had been successful, including 16 joint resolutions introduced on first consideration and one introduced on second consideration.[222] Further, in considering 1987 Senate Joint Resolution 71, two Assembly Amendments were laid on the table, including one that "replace[d] the phrase 'letters in the words of' with 'letters from words, or create a new sentence by rejecting individual words'" and another that prohibited the Governor from "not delet[ing] less than a complete legislative concept."[223] Though failed amendments might be "dangerous ground on which to rest an interpretation,"[224] the failed amendments here—along with the plain text of what was ultimately adopted and ratified—speak to the Legislature's intent in merely constraining the partial veto rather than returning it to its intended meaning.[225]

Prior to the 2008 referendum, LRB reported that Wisconsin's partial veto language is "far more expansive than the provisions found in most state constitutions or statutes."[226] Further, LRB explained that the effect of the 1990 amendment, prohibiting the Governor from "creating 'a new word by rejecting individual letters in the words of the enrolled bill[,]'"

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221. WIS. LEGIS. REFERENCE BUREAU, LRB-89-IB-1, CONSTITUTIONAL AMENDMENTS GIVEN "FIRST CONSIDERATION" APPROVAL BY THE 1987 WISCONSIN LEGISLATURE, at 2 (1989).

222. *Id.* at 5. In addition, 1979 SJR-7 was adopted on first consideration but on second consideration, failed in the Assembly. *Id.*

223. *Id*. at 6. The Senate also rejected a proposed amendment to allow the Governor to "reject the amount of any appropriation made in the enrolled bill and write a lesser amount." *Id.* The variation in proposed amendments calls into question the consistency by which the Legislature understood the scope of the partial veto, as the Governor's ability to write in a lesser appropriation amount served an important distinction between the item veto and the partial veto for Senator Harsdorf later on, as suggested by her public testimony. Wis. Eye, *supra* note 30, at 1:35:14.

224. *Bartlett* Amicus Brief, *supra* note 127, at 8 (quoting *Lockhart v. United States*, 546 U.S. 142, 147 (2005)).

225. *See* Respondents' Brief in Response to the Legislature's Brief as Amicus Curiae in Support of Petitioners, *Bartlett v. Evers* at 11, 945 N.W.2d 685 (Wis. 2020) (No. 2019AP1376-OA).

226. WIS. LEGIS. REFERENCE BUREAU, LRB-08-4, WISCONSIN BRIEFS FROM THE LEGISLATIVE REFERENCE BUREAU, CONSTITUTIONAL AMENDMENT TO BE CONSIDERED BY WISCONSIN, APRIL 1, 2008, at 2 (2008).

was to eliminate the "pick-a-letter" veto.[227] In addition, Attorney General J.B. Van Hollen provided an explanatory statement of the proposed amendment, stating that,

> [a]t the present time, this partial veto power is limited in the text of the Constitution only to the extent of prohibiting the Governor from creating new words by eliminating individual letters in the words of the bill passed by the Legislature. Thus, this partial veto power allows the Governor to take parts of sentences in the bill passed by the Legislature and combine them to form new sentences that were not contained in the original bill.[228]

Last, the ballot question for voters in the April 2008 referendum asked, "Shall section 10(1)(c) of article V of the constitution be amended to prohibit the [G]overnor, in exercising his or her partial veto authority, from creating a new sentence by combining parts of two or more sentences of the enrolled bill?"[229] Attorney General Van Hollen's explanatory statement provided that "[a] 'yes' vote would place an additional limit on the Governor's power to veto parts of an appropriation bill by prohibiting the Governor from creating a new and different sentence by combining parts of two or more sentences as they are written in the bill passed by the Legislature," while "[a] 'no' vote would leave the Governor's partial veto power as it is, and continue to permit the Governor to create a new sentence by combining parts of several sentences in the bill passed by the Legislature."[230] This language proposed a specific limitation on the partial veto authority, which only makes sense if the Governor had the broad power to create a new sentence by combining parts of several sentences in the first instance.

Though the amendments in and of themselves did indeed restrict isolated partial veto abuses,[231] for the foregoing reasons, the constitutional provision read as a whole can no longer reasonably be understood to limit "part" to a discrete item or independent policy provision. The amendments thus functioned to broaden the definition of "part" beyond its original and intended meaning in 1930. In this way, the Legislature effected within the text of the Constitution itself—sealing

227. *Id.* at 3 (quoting WIS. CONST. art. V, § 10(1)(c) (April 1990)).

228. *Id.* at 2.

229. *Id.* at 1.

230. *Id.* at 2.

231. The 1990 amendment addressed Governor Thompson's "Vanna White vetoes," while the 2008 amendment ended Governor Doyle's "Frankenstein vetoes." *See* Champagne et al., *supra* note 2, at 15–17.

its own fate—the Governor's "uniquely broad and expansive" partial veto authority.[232]

One piece that does not quite fit, however, is what to make of the subsections that arguably qualified "part" before the new amendments. Article V, section 10(2)(b) requires that "the rejected part of an appropriation bill, together with the Governor's objections in writing, shall be returned to the house in which the bill originated," where that house will "proceed to reconsider the rejected part."[233] The *Bartlett* respondents argued that the Constitution imposes only two constraints on the Governor's partial veto power, each of which originates from the 1990 and 2008 amendments: that he "may not create a new word by rejecting individual letters," or "create a new sentence by combining parts of 2 or more sentences."[234] Yet, this argument fails to take into account the article V, section 10(2)(b) procedure for reconsidering and approving a rejected part. On the other hand, the *Bartlett* petitioners' argument that the partial veto is an item veto fails to take into account the effect of the 1990 and 2008 amendments in reinterpreting "part" as used in article V, section 10(1)(b).[235]

The result is a Constitution in conflict. In order to preserve the intent of the Legislature and the voters in ratifying the two recent amendments, one approach would be to interpret "part" as used in article V, section 10(2)(b) as any portion of the text of an appropriation bill, with the exception of individual letters or words that have been stricken across sentences. That could lead to absurdity—the Governor might return to the Legislature a garbled set of words that the Legislature must somehow reconsider for approval—but is not foreclosed by the text or by reason. This interpretation might, however, insulate the Governor's partial vetoes from a veto override. Though the answer here is not clear, the court must contend with every subsection of the partial veto provision, and in doing so, will likely have to address this inconsistency in future cases.[236]

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232. *See State ex rel. Wis. Senate v. Thompson*, 424 N.W.2d 385, 393 (Wis. 1988).

233. WIS. CONST. art. V, § 10(2)(b).

234. *Id.* § 10(1)(c); *see also Bartlett* Respondents' Brief, *supra* note 30, at 10 ("The text expresses no other limits on the Governor's partial-veto authority over appropriation bills.").

235. *See Bartlett* Memo, *supra* note 157, at 2, 15–16.

236. *See* SCALIA & GARNER, *supra* note 123, at 167; *see also Bartlett v. Evers*, 945 N.W.2d 685, 721 (Wis. 2020) (Kelly, J., concurring in part, dissenting in part) ("[W]hen given a choice, we do not read one constitutional provision to conflict with others.").

2. THE WISCONSIN SUPREME COURT AND THE NEW PARTIAL VETO

In 2020, the Wisconsin Supreme Court had its first opportunity to review the partial veto both since *Risser v. Klauser* in 1997 and since the most recent amendment in 2008. First, in March 2020, the court heard oral arguments in *Bartlett v. Evers*, challenging the constitutionality of four of Governor Evers' vetoes in the 2019–21 budget bill, relating to vehicle fee schedules, a school bus modernization fund, a grant for local road improvements, and a vapor products tax.[237] The petitioners in *Bartlett* asked the court to overrule *Kleczka* and return the partial veto authority to its scope as intended in 1930.[238] The petitioners argued not only that *Henry* incorrectly interpreted the word "part," but that the correct interpretative approach is that a Governor's partial veto may not "disapprov[e] of provisions which are 'essential, integral, and interdependent parts of those which [he] approved.'"[239] The respondents, conversely, argued that *Henry* was correctly decided in broadly defining "part," and that the 1990 and 2008 amendments indicate the Legislature's agreement with *Henry* and its progeny.[240]

The court, in a fractured opinion reflecting the contentious history of the partial veto, did not come to a majority rationale.[241] In a per curiam decision, the court concluded that while the vetoes to the vehicle fee schedule were constitutional, the other three vetoes in question were unconstitutional: five justices found the school bus modernization fund vetoes unconstitutional, five justices found the local roads improvement fund vetoes unconstitutional, and four justices found the vapor products tax vetoes unconstitutional.[242] However, by refraining from affirmatively adopting either party's requested interpretative framework, the court seemingly provided no guiding rule for interpreting the partial veto.

There were four opinions filed in addition to the per curiam opinion.[243] Chief Justice Roggensack relied on a germaneness rationale, concluding that two vetoes were unconstitutional because they "resulted in topics and subject matters that were not found in the enrolled bill."[244] Justice Ann Walsh Bradley, joined by Justice Dallet, relied on *Henry* and *Kleczka* to conclude that all of the vetoes were constitutional because they "result[ed] in objectively complete, entire, and workable laws."[245] Justice

237. *Bartlett*, 945 N.W.2d at 687.

238. *See Bartlett* Memo, *supra* note 157, at 1, 4, 16.

239. *Id.* at 4 (quoting *State ex. rel. Wis. Tel. Co. v. Henry*, 260 N.W. 486, 493 (Wis. 1935)).

240. *Bartlett* Respondents' Brief, *supra* note 30, at 12, 16.

241. *Bartlett*, 945 N.W.2d at 687 (Wis. 2020).

242. *Id.*

243. *See id.* at 686–751.

244. *Id.* at 708 (Roggensack, C.J., concurring in part, dissenting in part).

245. *Id.* at 687, 719 (A.W. Bradley, J., concurring in part, dissenting in part).

Kelly, joined by Justice Rebecca Grassl Bradley, concluded that all of the vetoes were unconstitutional because they "violate[d] the Wisconsin Constitution's origination clause, amendment clause and legislative passage clause."[246] Finally, Justice Hagedorn, joined by Justice Ziegler, concluded that only one veto was constitutional because it "merely negated a policy proposal advanced by the Legislature."[247]

This Comment's approach is that neither party in *Bartlett* was entirely correct—and neither was entirely wrong. While the petitioners accurately assessed the original and intended meaning of the 1930 partial veto, their argument that the court should overrule *Kleczka* and return to this intended meaning undermines the 1990 and 2008 amendments.[248] Respondents, on the other hand, gave the correct interpretative weight to the amendments but erroneously argued that the partial veto was originally intended to be broad.[249] Fundamentally, the constitutional limitation on the Governor's partial veto authority imposed by the two new amendments, in turn, applies to the court's ability to return to the originally intended scope of the partial veto. In applying the current constitutional language to the challenged vetoes, the court must interpret "part" within the *new context* of the provision.[250] The *Bartlett* opinions take varying approaches to the effect of the amendments. Justice Hagedorn explains that the

> amendments should be given substantive effect, but they should not be read as green-lighting everything less than the limitations they impose. While the amendments represent the people's effort to rein in certain excesses, these constitutionally prescribed procedural limitations aren't particularly instructive

246. *Id.* at 687 (Kelly, J., concurring in part, dissenting in part); *see id.* at 738–40 (Kelly, J., concurring in part, dissenting in part).

247. *See id.* at 687, 740, 749 (Hagedorn, J., concurring) ("[A] bill presented to the [G]overnor is not sand on a seashore from which a [G]overnor can construct any sandcastle his ingenuity conceives.").

248. *See Bartlett* Petitioners' Brief, *supra* note 27, at 1, 3–7, 36–44; *see also Bartlett* Amicus Brief, *supra* note 127, at 2–7; Wis. Eye, *supra* note 30, at 2:00:03 (testimony of Fred Wade).

249. *See Bartlett* Respondents' Brief, *supra* note 30, at 10, 12–18.

250. SCALIA & GARNER, *supra* note 123, at 418; *see also Koschkee v. Taylor*, 929 N.W.2d 600, 607 (Wis. 2019) ("When we interpret an undefined constitutional term we examine the common law as it existed at the time the constitutional provision was enacted, the constitutional debates that bore on the undefined term, the plain meaning of the term at the time the constitutional provision was adopted, and the earliest interpretation in laws passed shortly after adoption of the constitutional provision or our opinions that interpreted the provision.").

> regarding whether the constitution still contains other substantive limitations on the partial veto power.[251]

Justice Kelly, meanwhile, comments that the amendments do not "have something to say about the meaning of the original partial veto power," but were instead "directed at [the court]; they were meant to rein in . . . jurisprudential excesses, not limit the meaning of the constitution's actual text."[252]

Though this Comment posits that the two amendments fundamentally changed the constitutional meaning of "part" to align with the interpretation of the *Henry* court and its progeny, it should be noted that the court in *Citizens Utility Board* and *Risser* declined to follow the foregoing analysis in interpreting the provision in light of the 1990 amendment.[253] In *Citizens Utility Board* and *Risser*, the court had interpretative guidance provided by the new amendments.[254] However, instead of analyzing "part" through the lens of the constitutional amendments, the two cases relied on the dictionary definition of "part" and stare decisis.[255] An alternative analysis incorporating looking at the provision "anew" would have recognized that the Legislature and the voters memorialized the court's broad interpretation.

Despite the 1990 and 2008 amendments' redefining the word "part" to incorporate its broad meaning under *Henry* and *Kleczka*, the interpretative hurdle that remains is how to make sense of the "rejected part" language that this Comment (and a *Bartlett* amicus) argues served as the original qualification of the word "part."[256] When the Legislature amended article V, section 10 in 1990 and 2008, it did not alter the provision laying out the process and structure to the partial veto: that the "rejected part" would return to the Legislature to be voted upon, and if approved, would become law.[257] Consequently, there are now two distinct provisions within article V, section 10 that qualify the meaning of "part"—article V, section 10(1)(c), created by the 1990 and 2008 amendments, and article V, section 10(2)(b), providing the override procedure for the "rejected part."

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251. *Bartlett*, 945 N.W.2d at 746 (Hagedorn, J., concurring).

252. *Id.* at 728 n.7 (Kelly, J., concurring in part, dissenting in part).

253. *See Citizens Util. Bd. v. Klauser*, 534 N.W.2d 608, 614 (Wis. 1995); *Risser v. Klauser*, 558 N.W.2d 108, 111 (Wis. 1997).

254. *See Citizens Util. Bd.*, 534 N.W.2d at 614; *Risser*, 558 N.W.2d at 111.

255. *See Citizens Util. Bd.*, 534 N.W.2d at 608; *Risser*, 558 N.W.2d at 117–18.

256. *Bartlett* Amicus Brief, *supra* note 127, at 7–8.

257. WIS. CONST. art. V, § 10(2)(b). Prior to 1990, article V, section 10 used "the part objected to" instead of "the rejected part." WIS. CONST. art. V, § 10 (1930) (amended Apr. 1990, Apr. 2008). Though the 1990 amendment separated section 10 into subsections and paragraphs, it did not change the override procedure; this Comment therefore treats these two phrases as functionally the same. *See supra* note 125.

In *Bartlett*, the 2019–20 Legislature, participating as an amicus in support of petitioners, homed in on this issue, asserting that the "rejected part" and the "part approved" in section 10(2)(b) should have a "parallel interpretation," and therefore should both be subject to the "complete and workable" law test and should "carry the same meaning each time."[258] However, the amicus claimed not only that the interpretation accounts for "*all* of the constitutional text," but that there is "no textual basis for distinguishing between 'rejected part' and the 'part approved' in this respect."[259] Though that was certainly the case before 1990, the new constitutional language—if the amendment is to have any effect—arguably *does* provide a textual distinction. Respondents argued that finding otherwise would render the amendments "superfluous" and "useless," which would "violate the maxim that 'constitutional provisions, should be construed to give effect 'to each and every word, clause and sentence' and 'a construction that would result in any portion of the constitution being superfluous should be avoided wherever possible.''"[260]

Thus, at issue in *Bartlett* were not only provisions of the same constitutional section that are seemingly in conflict (article V, section 10(1)(c) and article V, section 10(2)(b)), but, in the context of the separation of powers argument, also constitutional articles that are potentially in conflict (article IV, section 1 and article V, section 10). Though not the focus of this Comment, the separation of powers argument presents myriad questions, including—most relevant to this Comment's emphasis—whether the Legislature through constitutional amendment can shift some of its legislative authority, through a broad partial veto power, to the executive, and how the court should interpret article IV, section 1 (vesting the legislative power in the senate and assembly) in light of that apparent delegation.[261] Specifically, can the

258. *Bartlett* Amicus Brief, *supra* note 127, at 5 (quoting *State ex rel. Dep't of Nat. Res. v. Wis. Ct. of Appeals, Dist. IV*, 909 N.W.2d 114, 126 (Wis. 2018)).

259. *Id.* at 6.

260. Respondents' Brief in Response to the Legislature's Brief as Amicus Curiae in Support of Petitioners at 7, *Bartlett v. Evers*, 945 N.W.2d 685 (Wis. 2020) (No. 2019AP1376-OA) (quoting *Wagner v. Milwaukee Cnty. Election Comm'n*, 666 N.W.2d 816, 831 (Wis. 2003)).

261. See *Bartlett* Petitioners' Brief, *supra* note 27, and *Bartlett* Amicus Brief, *supra* note 127, at 8–9, for further discussions on the separation of powers rationale. Another consideration in the separation-of-powers context is the unique design of the budget process, in which the budget bill, after months of input from agencies, stakeholders, and even legislators, is introduced to the Legislature by the Governor. Richard Champagne, *The Legislature and the State Budget*, *in* 3 LEGISLATING IN WIS. 1, 2–5 (2016); *see also Wis. Small Bus. United, Inc. v. Brennan*, 946 N.W.2d 101, 104 (Wis. 2020) ("Relying on fiscal estimates and projections from the various branches and agencies making up state government, the [G]overnor creates a budget bill and submits it to the legislature."). The bill provides a "blueprint" from which the Legislature

Governor "'affirmatively legislate' by selectively striking sentence fragments" when the Legislature has, through two separate constitutional amendments, given him the power to do so?[262]

On the same day as *Bartlett*, the court heard oral arguments in *Wisconsin Small Businesses United, Inc. v. Brennan*, yet another example of the interpretative chaos borne out of the partial veto precedent—but from the other side of the partisan aisle.[263] The petitioners in *Wisconsin Small Businesses United* challenged the constitutionality of two partial vetoes in which former Governor Walker struck parts of dates in the 2017–19 biennial budget bill.[264] These vetoes changed one legislative program's effective date from July 1, 2018, to July 1, 2078, and, by "deleting two digits and a comma," moved the expiration date on a legislative moratorium from December 31, 2018, to December 3018, a "full millennium" later.[265]

The issue presented in *Wisconsin Small Businesses United* was whether the Governor's partial veto authority, "as amended in 1990,

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"examines, modifies or rejects, and altogether recreates" what the Governor presented. Champagne, *supra*, at 2, 4. Further, the Governor's role in the budget process "allows the Legislature to work from a document that may require modification . . . but which already contains numerous budgetary matters and details that the Legislature need not address." *Id.* at 2. As a result of the Legislature's role in "evaluating, reacting to, and amending the proposals of the [G]overnor," and because the budget bill is the "most important bill" that the Legislature considers, "[l]egislating in Wisconsin is often a matter of reacting to the [G]overnor." Champagne, *The Foundations for Legislating in Wisconsin*, in 1 LEGISLATING IN WIS. 1, 5 (2015). This process is often explicitly reflected in the executive veto message, which demonstrates the Governor's sense of ownership over the budget bill. *See, e.g.*, Veto Message of Governor Jim Doyle Accompanying 2005 Wis. Act 25 (July 25, 2005) ("The end result is a budget that much more closely resembles the one I submitted in February than the one passed in the dead of night by the Legislature"); Veto Message of Governor Tony Evers Accompanying 2019 Wis. Act 9 (July 3, 2019) ("Thus, I am exercising my broad constitutional authority to reshape this budget, to address areas where the Legislature failed to do the right thing or padded the budget with earmarks to buy votes, and to align it more closely with the budget we put together with the people of Wisconsin."). *But see Bartlett*, 945 N.W.2d at 743 (Hagedorn, J., concurring) ("The [L]egislature must be the primary policymaker, and the [G]overnor cannot usurp that role by creating new policies from the reworked language of enacted bills"). The separation-of-powers theory further acknowledges that "the Wisconsin Constitution itself sometimes takes portions of one kind of power and gives it to another branch." *Serv. Emps. Int'l Union Loc. 1 v. Vos*, 946 N.W.2d 35, 46 (Wis. 2020); *see also Bartlett*, 945 N.W.2d at 706 (Roggensack, C.J., concurring in part, dissenting in part) ("Wisconsinites are free to assign powers traditional to one branch of government to another branch by constitutional amendment.").

262. *Bartlett* Amicus Brief, *supra* note 127, at 9 (quoting *State ex rel. Wis. Senate v. Thompson*, 424 N.W.2d 385, 394 (Wis. 1988)); *see also Bartlett*, 945 N.W.2d at 751 (Hagedorn, J., concurring) ("We cannot myopically focus our attention on the words of the partial veto provisions in our constitution at the expense of the rest of the document's text.").

263. *Wis. Small Bus. United, Inc.*, 946 N.W.2d at 105.

264. *WSBU* Petitioners' Brief, *supra* note 71, at 5.

265. *Id.*

[may] reject individual digits and punctuation marks in a date set forth in an enrolled appropriation bill so as to create a new, later date that was never approved by the [L]egislature."[266] The court, however, dismissed the original action based on the doctrine of laches, concluding that the respondents successfully "proved the three elements of a laches claim—unreasonable delay, lack of knowledge a claim would be brought, and prejudice."[267] In its dismissal, the court further noted "the reliance interests at stake and the need for stability and certainty in the enactment of state budget bills."[268] Thus, on July 10, 2020, with the seeming lack of a guiding principle on *Bartlett* and the dismissal of *Wisconsin Small Businesses United*, the court left the question of the partial veto's future for another date.[269]

3. 2020: THE YEAR OF THE PARTIAL VETO?

The year 2020 began poised to overhaul the partial veto as it had been understood for almost a century. With an administration change in 2018 and a politically split Executive and Legislature, there had been much ado about the partial veto authority leading up to *Bartlett* and *Wisconsin Small Businesses United*.[270] Nevertheless, as went 2020,

266. *Id.* at 8.

267. *Wis. Small Bus. United, Inc.*, 946 N.W.2d at 103.

268. *Id.*

269. *See Bartlett v. Evers*, 945 N.W.2d 685, 710 (Wis. 2020) (A.W. Bradley, J., concurring in part, dissenting in part) ("Evidence of the lack of clarity is highlighted by the very fact that this case has generated four separate writings with various rationales. And not one of them has garnered a majority vote of this court. Thus, we are left with no clear controlling rationale or test for the future."). *But see* Richard A. Champagne, Staci Duros & Madeline Kasper, *The Wisconsin Governor's Partial Veto after* Bartlett v. Evers, 5 READING THE CONST. 3, 1 (2020) (claiming that "*Bartlett* is significant, as it potentially reconfigures the entire field of partial veto jurisprudence."). The argument there is that "from one perspective, *Bartlett* upends 85 years of relatively settled Supreme Court jurisprudence on the meaning and application of the [G]overnor's partial veto power," but "from a different perspective, this decision, although groundbreaking, continues a trend that began in the late 1980s and early 1990s to curtail the [G]overnor's partial veto power through amendments to the constitution and litigation." *Id.* Though the authors suggest that "*Bartlett* marks a new direction in partial veto jurisprudence," they acknowledge that its "future is uncertain, as its precedential value will depend on whether future courts accept the proposition that the complete, entire, and workable law test is not a sufficient condition for a valid partial veto, and on whether the [G]overnor's use of the partial veto is limited by the subjects or topics, ideas, or policies contained within a bill." *Id.* at 20. Though in this sense *Bartlett* allegedly "diminished" the Governor's role, the reasons for this curtailment "remain to be determined." *Id.* at 3.

270. See Martin J. Schreiber, *The Partial Veto as a Negotiating Tool*, 77 MARQ. L. REV. 433 (1994), Anthony S. Earl, *Personal Reflections on the Partial Veto*, 77 MARQ. L. REV. 437 (1994), and Patrick J. Lucey, *The Partial Veto in the Lucey Administration*, 77 MARQ. L. REV. 427 (1994), for a discussion of the political aspects of partial veto decisions during their respective gubernatorial administrations.

uncertainty remains with the court failing to reach a majority rationale in *Bartlett* and dismissing the original action in *Wisconsin Small Businesses United*.[271] Further, while the Senate passed a proposed constitutional amendment in November 2019[272] to create section 10(1)(d) of article V, prohibiting the Governor from "increas[ing] state expenditures for any purpose over that provided in the enrolled bill,"[273] the Assembly ultimately failed to adopt it.[274] Though 2020 began on the cusp of a potentially monumental shift in the partial veto's scope, the year will close with much remaining the same.[275]

CONCLUSION

Because of the effect of the 1990 and 2008 amendments in redefining "part" to move away from the original meaning of the 1930 amendment—that "part" means "item"—and instead enshrining into the constitution the broad definition that developed over the course of six decades of judicial interpretation, Wisconsin both gained and retained its unique and "quirky" partial veto power.[276] With the court's lack of a majority rationale in *Bartlett* and a dismissal in *Wisconsin Small Businesses United*, the status quo remains.[277] One lingering question of constitutional interpretation implicated by this debate is the role of a constitutional amendment in substantively changing the constitution. Should a future Wisconsin Supreme Court interpret the 1990 and 2008 amendments as merely suggestive of voter dissatisfaction with the partial veto, that result would not be untenable. Yet, this approach contravenes both expressed voter intent and, of broader concern, by removing a heavily contested debate from the Legislature and resolving it by judicial decree, the constitutional amendment process as a whole.[278] To what end does the constitutional amendment process serve if, after four total legislative sessions, multiple iterations of amendment text, numerous public hearings, and two public referendums—in addition to the numerous failed attempts over the years to modify the partial veto

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271. *Bartlett*, 945 N.W.2d at 686; *Wis. Small Bus. United*, 946 N.W.2d at 103.

272. S. Journal, 104th Reg. Sess. 491 (Wis. 2019).

273. S.J. Res. 59, 2019–20 Leg., 104th Reg. Sess. (Wis. 2019).

274. Assemb. Journal, 104th Reg. Sess. 731 (Wis. 2019).

275. *But see supra* note 269 (discussing *Bartlett*'s role in diminishing the Governor's partial veto authority); *see also* Champagne, Duros & Kasper, *supra* note 269, at 3 (further suggesting that "the partial veto is now in retreat.").

276. *See* discussion *supra*, Part II.B.1.

277. *See Bartlett*, 945 N.W.2d at 686; *Wis. Small Bus. United, Inc.*, 946 N.W.2d at 103.

278. *See* Wis. Eye, *supra* note 30, at 1:36:53 (assuring that the [L]egislature, after passing the 1990 amendment to ban the "Frankenstein veto," can "continue to have the discussion on if Wisconsin should go to the item veto authority").

power—the court may suggest that these amendments only serve to indicate what the voters thought they wanted?[279] The result would be judicial usurpation over express legislative and voter intent in the form of the amendment's text.[280] Indeed, this is why interpreting a constitutional amendment warrants additional scrutiny from the court.[281] Therefore, unless the partial veto is substantially constrained through another amendment,[282] the court in the future takes a limited approach to the effect of the amendments and overrules *Henry* and *Kleczka* (perhaps by divining a controlling rule out of the multiple *Bartlett* separate opinions), or other states decide to broaden their own gubernatorial partial veto powers, the Cheese stands alone.[283]

279. *See Bartlett* Respondents' Brief, *supra* note 30, at 7 (claiming that the Legislature has considered at least ten constitutional amendment proposals to turn the partial veto into an item veto, but has declined to advance any to the voters).

280. *Id*. at 2–3 ("While their policy arguments may ultimately persuade the Legislature and the people to amend our Constitution, this Court is the wrong forum for their plea.").

281. *Serv. Emps. Int'l Union Loc. 1 v. Vos*, 946 N.W.2d 35, 45 (Wis. 2020) ("The text of the constitution reflects the policy choices of the people, and therefore constitutional interpretation similarly focuses primarily on the language of the constitution."); *id*. at 45 n.10 ("But where necessary, helpful extrinsic aids may include the practices at the time the constitution was adopted, debates over adoption of a given provision, and early legislative interpretation as evidenced by the first laws passed following the adoption.").

282. *Bartlett* Respondents' Brief, *supra* note 30, at 18 ("[A] new constitutional amendment is necessary to impose the new partial-veto restrictions that Petitioners seek.").

283. *See State ex rel. Wis. Senate v. Thompson*, 424 N.W.2d 385, 398 (Wis. 1998) ("[W]e simply reaffirm our prior opinions which have placed Wisconsin in the singular position of having the most liberal and elastic constitutional provision—adopted almost 60 years ago—regarding the [G]overnor's partial veto authority over appropriation bills."). Time is sure to tell, as the only certain result of *Bartlett* is that "[f]uture litigation is all but assured." Champagne, Duros & Kasper, *supra* note 269, at 20.