



**NORTH DAKOTA SUPREME COURT RESTRAINS LEGISLATIVE  
AND EXECUTIVE POWER OVER APPROPRIATIONS BILLS.**

***NORTH DAKOTA LEGISLATIVE ASSEMBLY V. BURGUM, 916  
N.W.2D 83 (N.D. 2018).***

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## I. INTRODUCTION

In *North Dakota Legislative Assembly v. Burgum*,<sup>1</sup> the North Dakota Supreme Court addressed two issues. First, the court addressed the petition of the Legislative Assembly that North Dakota Governor Doug Burgum's partial vetoes on five appropriations bills were unconstitutional as beyond the governor's item veto authority.<sup>2</sup> Second, it addressed the cross-petition of Governor Burgum that the Legislative Assembly unconstitutionally conditioned access to appropriated funds upon the approval of a legislative committee in two bills, violating the non-delegation and separation of powers doctrines.<sup>3</sup>

This Comment will provide the factual and procedural history leading up to the decision of the North Dakota Supreme Court in *Burgum*, along with the constitutional and common law background on executive and legislative authority in North Dakota. This Comment will also evaluate the court's analysis in *Burgum* and ultimately argue that the court properly restricted Governor Burgum's item veto power. Additionally, and in spite of the dissenting opinions which criticize the breadth of the majority's analysis, the court properly addressed the non-delegation and separation of powers issues that arise in the governor's cross-petition.

## II. STATEMENT OF THE CASE

In 2017, at the end of North Dakota's Sixty-Fifth Legislative Assembly,<sup>4</sup> Governor Doug Burgum issued five partial vetoes spanning four appropriations bills.<sup>5</sup> Each of the partial vetoes struck language from the bill that described how the appropriation was to be conducted.<sup>6</sup> For example, Senate Bill 2003 section 18 stated, "Dickinson state university may not discontinue *any portion of* its department of nursing academic program during the biennium beginning July 1, 2017, and

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1. 916 N.W.2d 83 (N.D. 2018).

2. *Id.* at 90.

3. *Id.*

4. In North Dakota, the legislature assembles biennially, or every other year. N.D. CONST. art. IV, § 7. The legislative session lasts for eighty days. *Id.*

5. *Burgum*, 916 N.W.2d at 90. The vetoes arise in Senate Bill 2003 section 18 ("Any Portion Veto") and section 39 ("Credit Hour Veto"), House Bill 1020 section 5 ("Water Commission Veto"), Senate Bill 2013 section 12 ("IT Project Veto"), and Senate Bill 2018 section 12 ("Workplace Safety Veto"). *Id.*

6. *Id.*

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ending June 30, 2019.”<sup>7</sup> In what is referred to as the “Any Portion Veto,” Governor Burgum struck the language prohibiting Dickinson State University from discontinuing “any portion” of its Department of Nursing.<sup>8</sup>

In North Dakota, the governor has the authority to veto or partially veto appropriations bills passed through the Legislative Assembly,<sup>9</sup> however, the governor cannot selectively remove aspects of a bill so as to strike a “statement of legislative intent.”<sup>10</sup>

At the request of two legislators, Senator Rich Wardner and Representative Al Carlson, the Attorney General of North Dakota issued an opinion that three of the five vetoes were “ineffective because they exceeded the governor’s constitutional authority by attempting to veto a condition on an appropriation without vetoing the appropriation itself.”<sup>11</sup> The opinion of the Attorney General went on to state that although the governor’s Water Commission Veto and IT Project Veto would be ineffective, the bills themselves violated the separation of powers doctrine and would be deemed unconstitutional by a court.<sup>12</sup>

The Legislative Assembly next brought this case, seeking declaratory judgment that all five vetoes were ineffective, making the underlying, unmodified bills current law, or in the alternative, that the court grant a writ of mandamus “compelling the governor to treat the partial vetoes as a nullity.”<sup>13</sup> The Legislative Assembly’s petition for declaratory judgment is the first primary issue of the case.

Governor Burgum and Attorney General Steneham cross-petitioned for declaratory judgment that the vetoed language of the Water Commission Veto and IT Project Veto were unconstitutional because they conditioned the appropriation of certain funds on approval of the Budget

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7. *Id.* at 98.

8. *Id.* at 98. Each veto removes a clause that puts a condition on an appropriation. *Id.* at 90. As another example, the condition of House Bill 1020 section 5 subjects an appropriation to the State Water Commission to “budget section approval.” *Id.* at 99.

9. See N.D. CONST. art. V, § 9.

10. *Burgum*, 916 N.W.2d at 98.

11. *Id.* at 90 (citing 2017 N.D. Op. Att’y Gen. No. L-04 (N.D.A.G.), 2017 WL 2917895).

12. *Id.* The Budget Section is a forty-two-member committee of the Legislative Assembly that meets in between legislative sessions to “approve or reject certain expenditures.” Jack Dura, *N.D. Legislature v. Burgum Opinion Highlights Rare Collision of Constitutional Authority*, BISMARCK TRIB. (July 31, 2018), [https://bismarcktribune.com/news/local/govt-and-politics/nd-legislature-v-burgum-opinion-highlights-rare-collision-of-constitutional/article\\_90db1ce7-d85a-5461-97a0-59a70e4fbab4.html](https://bismarcktribune.com/news/local/govt-and-politics/nd-legislature-v-burgum-opinion-highlights-rare-collision-of-constitutional/article_90db1ce7-d85a-5461-97a0-59a70e4fbab4.html); *Budget Section*, N.D. LEGIS. BRANCH, <https://www.legis.nd.gov/assembly/65-2017/committees/interim/budget-section> (last visited Feb. 5, 2019). The Attorney General’s opinion addressed the language vetoed in the Water Commission Veto and IT Project Veto, which conditioned parts of each bill’s appropriation on the approval of the Budget Section. *Burgum*, 916 N.W.2d at 90.

13. *Burgum*, 916 N.W.2d at 90.

Section in violation of the separation of powers and non-delegation doctrines.<sup>14</sup> The governor's cross-petition is the second primary issue of the case.

The case was brought before the North Dakota Supreme Court as a matter of original jurisdiction.<sup>15</sup> Both the Legislative Assembly and the governor petitioned the court to exercise original jurisdiction, which the court granted because the issues mirrored a previous case of original jurisdiction, *State ex rel. Link v. Olson*.<sup>16</sup> Citing Federalist No. 48, the court accorded its grant of original jurisdiction to the concerns of "[the] balance of powers between the legislative and executive branches of government."<sup>17</sup>

On the first issue, the supreme court unanimously<sup>18</sup> held for the Legislative Assembly, finding four of the five partial vetoes issued by Governor Burgum unconstitutional as beyond the scope of the governor's veto power.<sup>19</sup> Those bills were treated as effective in their entirety, as originally passed by the Legislative Assembly.<sup>20</sup> On the second primary issue, a three-justice majority granted Governor Burgum's cross-petition, finding that House Bill 1020 section 5 and Senate Bill 2013 section 12 unconstitutionally violated the non-delegation and separation of powers doctrines.<sup>21</sup>

### III. BACKGROUND

#### A. *Item Veto Power*

Every bill passed by the legislative assembly must be presented to the governor for the governor's signature. If the governor signs the bill, it becomes law.

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14. *Id.*

15. *Id.* at 92.

16. *Id.* "Similar to [*Olson*], the issues in this case involve the constitutionality of partial vetoes and the limits of the legislature's power as it approaches the powers properly exercised by the executive branch." *Id.* (citing *State ex rel. Link v. Olson*, 286 N.W.2d 262 (N.D. 1979)).

17. *Id.* "Because our constitution provides for a separation of legislative, executive, and judicial powers, actions which tend to undermine this separation are of great public concern. The petition and cross-petition . . . justify exercise of our original jurisdiction." *Id.*

18. The North Dakota Supreme Court is comprised of five justices, each elected for ten-year terms in staggered statewide elections that occur every two years. See N.D. CONST. art. VI, § 7.

19. *Burgum*, 916 N.W.2d at 109. Only the Workplace Safety Veto (Senate Bill 2018 section 12) was upheld. *Id.*

20. *Id.*

21. *Id.*

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The governor may veto a bill passed by the legislative assembly.  
The governor may veto items in an appropriation bill. Portions of  
the bill not vetoed become law.<sup>22</sup>

The central issue of *Burgum* is the scope of the governor's item veto power in appropriations bills. In a reference guide to the North Dakota Constitution, James E. Leahy summarized the state supreme court's characterization of the governor's item veto power in such bills. He writes that if the governor did not have item veto power in appropriations bills, he "would be placed in the position of vetoing a bill which contains many items which to him seem necessary and proper . . . . He is not compelled to balance the good against the evil for in the provision of [this] section . . . he may disapprove the evil and permit the good to stand."<sup>23</sup>

The item veto is a unique aspect of executive power found only at the state level; the President of the United States does not enjoy the power to partially veto any bill.<sup>24</sup> In fact, forty-three state constitutions confer item veto power, but forty-two of the forty-three states limit the item veto power to appropriations bills.<sup>25</sup> The purpose of the item veto can be deduced, in part, by its general limitation to the context of appropriation: state executives' desire to curb logrolling and implement budgetary restrictions on their legislatures.<sup>26</sup> Precisely what an "item" is has been a source of conflict leading to item veto litigation.<sup>27</sup> For example, if "one section of a bill is intertwined with another, the governor, by vetoing one section, may render a non-vetoed section meaningless or ineffective."<sup>28</sup> In that instance, the targeted provision is not an item that can simply be

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22. N.D. CONST. art. V, § 9.

23. JAMES E. LEAHY, THE NORTH DAKOTA STATE CONSTITUTION: A REFERENCE GUIDE 92 (2003) (citing *State ex rel. Sandaker v. Olson*, 260 N.W. 586, 589 (N.D. 1935)). Two cases relevant to this analysis are similarly named: *State ex rel. Sandaker v. Olson*, 260 N.W. 586, 589 (N.D. 1935) and *State ex rel. Link v. Olson*, 286 N.W.2d 262 (N.D. 1979). Although the cases are both cited in short form as "*Olson*," for the purpose of clarity (and continuity with the *Burgum* opinion) the 1935 North Dakota Supreme Court case will be referred herein as "*Sandaker*," and the 1979 case will be referred herein as "*Olson*."

24. See *Clinton v. City of New York*, 524 U.S. 417, 439 (1998); Richard Briffault, *The Item Veto in State Courts*, 66 TEMPLE L. REV. 1171, 1171 (1993). See generally ANDREW NOLAN, CONG. RESEARCH SERV., LSB10106, WHOSE LINE IS IT ANYWAY: COULD CONGRESS GIVE THE PRESIDENT A LINE-ITEM VETO? (2018) (discussing what possibilities exist for a constitutional line-item veto power for the president).

25. Briffault, *supra* note 24, at 1175–76. Washington is the only state that permits the governor to partially veto any type of legislation. *Id.*

26. *Id.* at 1177. Logrolling is "the practice of adding together in a single bill provisions supported by various legislatures in order to create a legislative majority." *Id.*

27. ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 307 (2009) (stating that exercises of item veto power are "often challenged by legislators, usually from the opposite political party, leading the state judiciary to have to solve these disputes").

28. Briffault, *supra* note 24, at 1183 (citing *Olson*, 286 N.W.2d at 270–71).

plucked from the larger appropriations bill while leaving what remains intact.<sup>29</sup>

Much of the discourse on gubernatorial item veto power in North Dakota refers to the *Sandaker* opinion, which specifically points to logrolling as the purpose of the item veto in North Dakota.<sup>30</sup> In *Sandaker*, the petitioner alleged that the governor failed to completely strike out an item in a partial veto but merely reduced an item, which would be beyond the constitutional veto authority.<sup>31</sup> The state supreme court disagreed and in doing so held that the item veto is meant to prevent “the adoption of omnibus appropriation bills [with] logrolling, the practice of jumbling together in one act incongruous subjects . . . in order to force the governor to veto the entire bill and thus stop the wheels of government or approve the obnoxious act.”<sup>32</sup>

Issues surrounding the item veto have rarely been litigated in North Dakota. Between 1935, when the seminal *Sandaker* case was decided, and 2018, when *Burgum* was decided, only three other cases were brought before the state supreme court in which the governor’s item veto authority was at issue.<sup>33</sup>

In 1979, the North Dakota Supreme Court restricted the governor’s item veto power “to those parts of bills that specifically appropriate funds.”<sup>34</sup> That case, *State ex rel. Link v. Olson*, held that the governor “may only veto items or parts in appropriations bills that are related to the vetoed appropriation and are so separate and distinct that, after removing them, the bill can stand as workable legislation *which comports with the fundamental purpose the legislature intended to effect* when the whole was enacted.”<sup>35</sup> In *Burgum*, the Legislative Assembly’s challenge to the governor’s partial vetoes springboards from the restrictions set forth in *Olson*.

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29. WILLIAMS, *supra* note 27, at 307 (“The question as to what constitutes an ‘item’ arises most often when a governor purports to veto *language* in a bill without also vetoing the appropriated *money*.”).

30. See, e.g., *Olson*, 286 N.W.2d at 269; N.D. Legislative Assembly v. Burgum, 916 N.W.2d 83, 93 (N.D. 2018).

31. *Olson*, 286 N.W.2d at 268.

32. *State ex rel. Sandaker v. Olson*, 260 N.W. 586, 589 (N.D. 1935).

33. The only relevant references to *Sandaker* have been in *Olson*, 286 N.W.2d at 268, *State ex rel. Dahl v. Dewing*, 131 N.W.2d 434, 437 (N.D. 1964), and *State ex rel. Olson v. Welford*, 260 N.W. 593, 599 (N.D. 1935). *Backman v. Guy*, 126 N.W.2d 910, 912 (N.D. 1964) also considers the validity of the governor’s item veto but does not rely on *Sandaker*.

34. LEAHY, *supra* note 23, at 92. The governor has no power to item veto bills that are not related to appropriations. If a bill does not “[make] appropriations of money or property” the bill must be vetoed altogether or not at all. See *Sandaker*, 260 N.W. at 587 (N.D. 1935).

35. *Olson*, 286 N.W.2d at 270–71 (emphasis added).

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*Olson* concerned a partial veto then-Governor Link made to Senate Bill 2460 in the wake of the Forty-Sixth Legislative Assembly.<sup>36</sup> The purpose of the bill was to replace the North Dakota division of economic opportunity and the state planning division with the new role of “federal aid coordinator,” which would be filled by the lieutenant governor.<sup>37</sup> Governor Link opposed the bill because he believed that the legislative delegation of duties to the lieutenant governor would infringe upon the governor’s constitutional authority to assign duties to his lieutenant.<sup>38</sup>

Subsequent to Senate Bill 2460’s passage, Governor Link vetoed the language assigning the role of Federal Aid Coordinator to the lieutenant governor and reassigned the same role to the Office of the Governor.<sup>39</sup> Similar to the facts in *Burgum*,<sup>40</sup> the Attorney General issued an opinion that the partial veto in Senate Bill 2460 was void, which led Governor Link to petition the court for a writ of prohibition forbidding the Attorney General from maintaining an opinion that Senate Bill 2460 was valid law, as well as a writ of mandamus requiring that Senate Bill 2460 be published without the vetoed language.<sup>41</sup> The court, however, determined that the vetoed language of Senate Bill 2460 constituted the intent of the Legislative Assembly and, therefore, was impossible to strike without violating the fundamental purpose the legislature intended to effect through the bill.<sup>42</sup>

### B. *Non-Delegation and Separation of Powers Doctrines*

The second primary issue decided in *Burgum* was the extent to which the legislature could condition appropriations in House Bill 1020 and Senate Bill 2013 on the future approval of the Budget Section, an interim legislative committee. The court approached Governor Burgum’s challenge of these issues through the non-delegation and separation of powers doctrines.<sup>43</sup>

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36. *Id.* at 264.

37. *Id.* The bill included an appropriation of \$20,000,000 to the Office of the Federal Aid Coordinator. *Id.*

38. *Id.*

39. *Id.* at 265.

40. *See* North Dakota Legislative Assembly v. Burgum, 916 N.W.2d 83, 90 (N.D. 2018). In *Burgum*, the opinion of the Attorney General was initially sought by two legislators, but in *Olson*, the opinion was requested by the governor himself. *Olson*, 286 N.W.2d at 265.

41. *Olson*, 286 N.W.2d at 265.

42. *Id.* at 271 (“We are left with a bill which refers to a nonexistent office, as the federal aid coordinator office is not created by legislative enactment in any of the remaining sections. [The vetoed language] is not a separate and distinct provision which can be removed without affecting the others, as the bill which remains is not workable legislation and the primary purpose . . . is destroyed.”).

43. *See Burgum*, 916 N.W.2d at 101–02.

Separation of powers in the states is distinct from the federal doctrine.<sup>44</sup> Professor Alan Tarr provides a brief overview of the development of separation of powers in the states, which foretells the issues faced by the North Dakota Legislature leading to House Bill 1020 and Senate Bill 2013. Professor Tarr recognizes that many state constitutions drafted in the nineteenth century restricted the frequency of legislative sessions, “reduc[ing] the ability of state legislatures to exercise influence through informal oversight mechanisms . . . . This has compelled the states to seek alternative means of asserting control.”<sup>45</sup> In North Dakota, the Legislative Assembly meeting for just eighty days every two years necessitates oversight mechanisms like the Budget Section, the legislative committee that approved the post-enactment use of funds designated in House Bill 1020 and Senate Bill 2013.<sup>46</sup>

Separation of powers and non-delegation doctrines conceptually overlap. This is especially true when the improperly delegated authority is not an abdication of a vested duty but an encroachment on the duty of another branch.<sup>47</sup> In the *Burgum* case, the cross-petition argues that a non-delegable encroachment occurred in House Bill 1020 and Senate Bill 2013 because the legislature delegated executive power to itself, not to the executive or judicial branch.<sup>48</sup> The New Jersey Supreme Court has

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44. G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329, 330 (2003) (citing *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 225 (1908) (observing that “the Federal Constitution does not impose separation-of-powers restrictions on the states”). The general thrust of Professor Tarr’s article is that each state requires a “distinctive separation-of-powers jurisprudence” because the constitutional texts and legislative and judicial histories surrounding each state’s doctrine are unique. *Id.* at 340.

45. *Id.* at 337. The North Dakota Constitution was ratified in 1889. LEAHY, *supra* note 23, at 11. *Cf.* WILLIAMS, *supra* note 27, at 235 (noting that state constitutions enacted during the Revolutionary War era gave *more* power to the legislature, which at the time was considered the dominant, or “omnipotent” branch, especially when juxtaposed temporally with the English monarchy). Professor Williams’s chapter on “State Constitutional Distribution of Powers” provides a comprehensive background of the development of separation of powers at the state level.

46. Dura, *supra* note 12.

47. WILLIAMS, *supra* note 27, at 243. Professor Williams addresses what he terms “reverse-delegation” through the example of a legislature appointing its own members to executive boards, encroaching on the executive branch and implicating separation of powers and non-delegation problems. *Id.* “The nondelegation doctrine is based on separation of powers concerns, underlying which are desires to shield citizens from arbitrary government.” *Id.* In *Burgum*, the legislature improperly appointed post-enactment oversight of appropriations to a legislative committee, the Budget Section. *Burgum*, 916 N.W.2d at 106.

48. *Burgum*, 916 N.W.2d at 104.



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commented that in delegation problems of encroachment, “greater judicial scrutiny” is required than in abdication problems.<sup>49</sup>

The North Dakota Supreme Court’s decision in *Olson* guides the separation of powers/non-delegation portion of the opinion in *Burgum*; the holdings of *Olson* foreshadow the court’s approach to both the petition and cross-petition in *Burgum* thirty-eight years later. In *Olson*, the court found that the governor exceeded his item veto power over Senate Bill 2460. However, the court held that the legislature, too, exceeded its power in conferring the duties of Federal Aid Coordinator upon the lieutenant governor.<sup>50</sup> “[The] assignment of duties to the lieutenant governor changes the nature of the office from a part-time office with legislative duties<sup>51</sup> to a full time office with executive duties.”<sup>52</sup> Because upholding the creation of the Office of the Federal Aid Coordinator under the lieutenant governor would violate the constitutional directive that the governor shall prescribe additional duties to the lieutenant governor, the court invalidated that portion of Senate Bill 2460 but upheld the rest of the law and permitted the governor to appoint an appropriate Aid Coordinator.<sup>53</sup>

#### IV. COURT’S ANALYSIS

##### A. *Original Jurisdiction and Justiciability*

The court begins in *Burgum* by granting original jurisdiction to hear the petition and cross-petition.<sup>54</sup> The supreme court is never obliged to

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49. WILLIAMS, *supra* note 27, at 243 (citing *Comm’n Workers v. Florio*, 617 A.2d 223, 232 (N.J. 1992)).

50. *State ex rel. Link v. Olson*, 286 N.W.2d 262, 273–74 (N.D. 1979)). The *Olson* Court relied on the separation of powers doctrine in its restriction of the legislature’s control over the duties of the lieutenant governor, however it does not delve into an analysis of the doctrine except to quote a case from the Nevada Supreme Court: “It is well settled by the courts that the legislature, in the absence of special authorization in the Constitution, is without power to abolish a constitutional office or to change, alter, or modify its constitutional powers and functions.” *Id.* at 274 (citing *State v. Douglas*, 110 P. 177, 180 (Nev. 1910)).

51. *See* N.D. CONST. art. 5, § 12 (“The powers and duties of the lieutenant governor shall be to serve as president of the senate, and he may, when the senate is equally divided, vote on procedural matters, and on substantive matters if his vote would be decisive.”).

52. *Olson*, 286 N.W.2d at 274.

53. *Id.* The Court found that the legislative intent of Senate Bill 2460 was primarily to create the Office of the Federal Aid Coordinator. *Id.* Therefore, the provision of the bill instructing the Governor to appoint an alternative if the lieutenant governor could not serve as the Coordinator made the bill viable, even after the court struck down delegation to the lieutenant governor as unconstitutional.

54. *N.D. Legislative Assembly v. Burgum*, 916 N.W.2d 83, 90 (N.D. 2018).

invoke its original jurisdiction—it is always discretionary—and the threshold for the court to act with that discretion arises only in matters *publici juris*.<sup>55</sup> Relying on the grant of original jurisdiction in *Olson*, the court determined that the constitutional issues of the partial veto and the limits of legislative authority sufficiently warranted original jurisdiction because the issues “concern the balance of powers between the legislative and executive branches of government.”<sup>56</sup>

As an additional preliminary matter, the court addressed Governor Burgum’s claim that challenges to the partial vetoes are nonjusticiable.<sup>57</sup> The court disagreed and stated that, generally, a legislature may bring claims to defend against executive use of the partial veto when it is used to encroach upon the legislative branch.<sup>58</sup>

One of Governor Burgum’s specific justiciability arguments was that because he agreed with the opinion of the Attorney General that the Any Portion, Water Commission, and IT Project Vetoes were invalid, the vetoes were null and unfit for review by the court.<sup>59</sup> The court again disagreed and stated that the governor has no authority to withdraw a veto: “Under the constitution, a veto is either effective when made or it exceeds the Governor’s authority and is a legal nullity . . . . Because an unauthorized veto has no effect, if the Governor exceeded his constitutional authority, the bills with ineffective vetoes became law in their entirety.”<sup>60</sup>

The court’s opinion as to the issues of original jurisdiction and justiciability were unanimous.<sup>61</sup>

### B. *Petition of the Legislative Assembly*

The court prefaces its analysis of each of the challenged vetoes<sup>62</sup> by reviewing the veto authority of the governor. That authority is derived from article V, section 9 of the North Dakota Constitution, which was revised in 1997.<sup>63</sup> The revision is notable because the guiding supreme

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55. “It is well settled that [the court] invoke original jurisdiction ‘only in cases *publici juris* and those affecting the sovereignty of the state, its franchises and prerogatives, or the liberties of its people.’” *State v. Nelson Cty.*, 45 N.W. 33, 38 (N.D. 1890).

56. *Burgum*, 916 N.W.2d at 92.

57. *Id.* at 91.

58. *Id.* (citing *Colorado Gen. Assembly v. Lamm*, 704 P.2d 1371, 1378 (Colo. 1985)).

59. *Id.* at 92.

60. *Id.*

61. *Id.* at 109–10.

62. Although Governor Burgum conceded that three of the five partial vetoes were ineffective, the Court addressed the merits of all five partial vetoes because they were all justiciable claims. *Id.* at 92.

63. *Id.*

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court decision, *Olson*, was decided in 1979 under a different iteration of the veto power.<sup>64</sup> The court determined that the revision did not impact *Olson's* relevance to the issues in *Burgum*, stating that “[t]he parties have not provided a substantive reason for this textual alteration, and we have found none. The available evidence suggests the voters who approved the amended provision intended to simplify rather than narrow the provision . . . the analysis in [*Olson*] is unaffected by the amendment.”<sup>65</sup>

The court also applied the “long-established definition of ‘item’” to each of the challenged vetoes: “An ‘item’ subject to partial veto includes a specified sum of money designated for a particular purpose. An ‘item’ may be vetoed in its entirety, but may not be reduced or scaled.”<sup>66</sup>

### 1. Workplace Safety Veto

The court first addressed Governor Burgum’s partial veto in Senate Bill 2018 section 12 and found that veto to be constitutional.<sup>67</sup> The bill appropriated \$2.25 million for entrepreneurship grants to be administered by the department of commerce, and Governor Burgum partially vetoed part of the bill that granted “\$300,000 to an organization that provides workplace safety.”<sup>68</sup>

The Legislative Assembly argued that the \$300,000 to be spent on workplace safety was a condition on the larger \$2.25 million appropriation, but the court disagreed and found that the \$300,000 was “a component *item* of the larger appropriation.”<sup>69</sup> The rationale for holding that the \$300,000 was a discrete item relied heavily on the principles that animate the item veto discussion in *Sandaker*; namely, to prevent logrolling.<sup>70</sup> This is illustrated in the way the court responded to the Legislative Assembly’s argument that Senate Bill 2018 was unconstitutionally vetoed.

First, the Legislative Assembly argued that the \$300,000 was not subtracted from the total appropriation of \$2.25 million, so by vetoing a portion of section 12, Governor Burgum effectively only removed a

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64. In *Olson*, the relevant provision provided that “[t]he governor shall have power to disapprove of any item or items or part or parts of any bill making appropriations of money or property embracing distinct items.” *State ex rel. Link v. Olson*, 286 N.W.2d 262, 268 (N.D. 1979) (citing N.D. CONST. § 80 (amended 1997) (emphasis added)). The italicized language of the former veto provision was removed in N.D. CONST. art. V, § 9.

65. *Burgum*, 916 N.W.2d at 93.

66. *Id.* (citing *Sandaker*, 260 N.W. at 589).

67. *Id.* at 97.

68. *Id.* at 94.

69. *Id.* at 94–97 (emphasis added).

70. *See State ex rel. Link v. Olson*, 286 N.W.2d 262, 269 (N.D. 1979).

condition (that some of the appropriation be spent toward workplace safety) and retained the allotted \$300,000 to use at his own discretion.<sup>71</sup> The court clarified that this was not the case and that “any vetoed items are as a matter of law subtracted from any larger amount in which they are included.”<sup>72</sup> Second, the Legislative Assembly argued that section 1 of the bill was an appropriation, and the provisions of section 12 were conditions on that appropriation shielded from the item veto.<sup>73</sup> The court rejected this interpretation of Senate Bill 2018, stating that:

Although Section 1 contains traditional appropriation language, this does not preclude a conclusion that Section 12 also contains items making an appropriation . . . . To conclude otherwise would permit sheltering certain items from a veto by providing for them in any other section other than the traditional appropriation section.<sup>74</sup>

Finally, the Legislative Assembly argued that the Workplace Safety veto struck a non-item because the source of the \$300,000 was not clear; Senate Bill 2018, section 1 indicated that part of the appropriation would come from the general fund and part would come from special funds, but section 12 does not specify from which fund the workplace safety provision would come.<sup>75</sup> The court denied this argument as well, reiterating its reluctance to provide any way for the legislature to “insulate an item from veto by including it within a larger appropriation” and finding that the source of the workplace safety funding could be ascertained in section 14 of Senate Bill 2018.<sup>76</sup>

Thus, the court found the Workplace Safety Veto to be valid and held that the larger appropriation was reduced by the amount of the vetoed item—\$300,000.<sup>77</sup>

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71. *Burgum*, 916 N.W.2d at 94–95.

72. *Id.* at 96 (citing *Sandaker*, 260 N.W. at 587). “The veto power is an eraser, not a pencil. The Governor may strike words or numbers in a bill, but he may not insert them.” *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 96–97.

76. *Id.* at 97. “Section 14 states that the \$1.5 million for entrepreneurship grants and vouchers is funded by the research North Dakota fund . . . [which] corresponds directly with the five specific entrepreneurship grants and vouchers identified in Section 12.” *Id.*

77. *Id.*

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## 2. Credit Hour Veto

The court next addressed Governor Burgum's partial veto in Senate Bill 2003 section 39 and found that veto to be unconstitutional.<sup>78</sup> Section 39 of the bill, titled "Legislative Intent," states that future appropriations to the North Dakota state university nursing program should be adjusted for "savings resulting from facility lease negotiations and for credit hours completed at the school."<sup>79</sup> Governor Burgum vetoed the language "and for credit hours completed at the school."<sup>80</sup>

The court held that Senate Bill 2003 was an appropriations bill and the language of section 39 was a statement of legislative intent, over which the governor has no item veto authority.<sup>81</sup> The Credit Hour Veto, therefore, was ineffective and the unmodified version of Senate Bill 2003 became law at the time it was signed by Governor Burgum.<sup>82</sup>

## 3. Any Portion Veto

The court next addressed Governor Burgum's partial veto in Senate Bill 2003 section 18 and found that veto to be unconstitutional.<sup>83</sup> Section 18 of Senate Bill 2003 addressed the use of funds for Dickinson State University and required that Dickinson not "discontinue any portion of its department of nursing academic program."<sup>84</sup> Governor Burgum vetoed the words "any portion of."<sup>85</sup>

Although Governor Burgum conceded that this item veto was invalid, the court still addressed the veto and found it to be unconstitutional as modifying a condition on an appropriation.<sup>86</sup> Again, the unmodified version of Senate Bill 2003 went into effect.<sup>87</sup>

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78. *Id.* at 97–98.

79. *Id.* at 97.

80. *Id.*

81. *Id.* at 98.

82. *Id.* "Under the constitution, a veto is either effective when made or it exceeds the Governor's authority and is a legal nullity . . . . Because an unauthorized veto has no effect, if the Governor exceeded his constitutional authority, the bills with ineffective vetoes became law in their entirety." *Id.* at 92.

83. *Id.* at 98.

84. *Id.* (emphasis omitted).

85. *Id.*

86. *Id.*; see *supra* text accompanying note 62.

87. *Burgum*, 916 N.W.2d at 98.

#### 4. Water Commission Veto

The court next addressed Governor Burgum's partial veto in House Bill 1020 section 5 and found that it was unconstitutional.<sup>88</sup> Section 5 of the bill set specific parameters on the section 1 appropriation for water and atmospheric resources: "The funding designated in this section is for the specific purposes identified; however, the State Water Commission may transfer funding among these items, subject to the budget section approval and upon notification to the legislative management's water topics overview committee."<sup>89</sup> Governor Burgum vetoed the final language, starting with "subject to the budget section approval."<sup>90</sup>

Although Governor Burgum conceded that this item veto was invalid, the court still addressed the veto and found it to be unconstitutional as modifying a condition on an appropriation, not striking an appropriation item.<sup>91</sup> Unlike Senate Bill 2003 sections 18 and 39, this bill did not go into effect in its unmodified version, because the bill was found defective on other grounds in the court's analysis of Governor Burgum's cross-petition.<sup>92</sup>

#### 5. IT Project Veto

The court finally addressed Governor Burgum's partial veto in Senate Bill 2013 section 12 and found that veto to be unconstitutional.<sup>93</sup> Section 12 of the bill provides details for a \$3.6 million appropriation to an information technology project and requires that, "[o]f the \$3,600,000, \$1,800,000 may be spent only upon approval of the budget section."<sup>94</sup> Governor Burgum vetoed the above-excerpted language requiring approval of the budget section to spend \$1.8 million of the \$3.6 million appropriation.<sup>95</sup>

Although Governor Burgum conceded that this item veto was invalid, the court still addressed the veto and found it to be unconstitutional as modifying a condition on an appropriation, not striking an appropriation item.<sup>96</sup> Unlike Senate Bill 2003 sections 18 and 39, this bill did not go into effect in its unmodified version, however, because it was found

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88. *Id.* at 98–99.

89. *Id.* at 98–99 (emphasis omitted).

90. *Id.* at 99.

91. *Id.*

92. *See infra* Section IV.C.2 (discussing Governor Burgum's cross-petition regarding Senate Bill 2013).

93. *Burgum*, 916 N.W.2d at 99.

94. *Id.* (citing S. B. 2013, 65th Legis. Assemb., Reg. Sess. § 12 (N.D. 2017)).

95. *Id.*

96. *Id.*

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defective on other grounds in the court's analysis of Governor Burgum's cross-petition.<sup>97</sup>

*C. Cross-Petition of Governor Burgum*

The second primary part of the North Dakota Supreme Court's analysis in *Burgum* addressed the cross-petition of Governor Burgum, which challenged the constitutionality of the vetoed provisions in House Bill 1020 and Senate Bill 2013.<sup>98</sup> The court found that the governor's attempted veto of the two bills, while beyond the scope of his item veto power, highlighted an unconstitutional legislative overreach because the two bills conditioned an appropriation on the post-enactment approval of the legislature.<sup>99</sup>

Before entertaining the merits of House Bill 1020 and Senate Bill 2013, the court addressed the Legislative Assembly's objection to the Attorney General representing Governor Burgum because the legislature argued that the Attorney General "has a duty to defend state statutes against constitutional challenge."<sup>100</sup> The court permitted the Attorney General to represent the governor because, when the Attorney General's roles conflict (here, the role of representing a state officer or defending the constitutionality of a state statute), he can choose whom to represent.<sup>101</sup>

Moving onto the merits of the cross-petition, the court began by reviewing the separation of powers doctrines under the lens of the "vesting clause" for each branch of government.<sup>102</sup> "The three branches are 'coequal' . . . 'each supreme in its own sphere.'"<sup>103</sup> The court was careful to explain its role as arbiter of the North Dakota Constitution, which may parallel the separation of powers doctrine in the federal constitution and throughout other states, but which can only be persuaded—not bound—by such authorities.<sup>104</sup>

The court prefaced the non-delegation claims of Governor Burgum's cross-petition by assessing the non-delegation doctrine in North

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97. See *infra* Section IV.C.1 (discussing Governor Burgum's cross-petition regarding House Bill 1020).

98. *Burgum*, 916 N.W.2d at 99.

99. *Id.* at 107, 109.

100. *Id.* at 100.

101. *Id.* (citing N.D. CENT. CODE ANN. § 54-12-01(3) (West 2020); *Solberg v. State Treasurer*, 54 N.W.2d 49, 52–53 (N.D. 1952)).

102. *Id.* (citing N.D. CONST. art III, § 1 ("[T]he legislative power of this state shall be vested in a legislative assembly . . ."), N.D. CONST. art. V, § 1 (establishing the governor as executive), and N.D. CONST. art. VI, § 1 (vesting judicial authority in the courts)).

103. *Id.* (citing N.D. CONST. art. XI, § 26).

104. *Id.* at 101.

Dakota.<sup>105</sup> This first required the court to explore the general rule against delegation of vested powers and, second, to examine the characteristics of legislative and executive powers. The court explained that the Legislative Assembly is generally not permitted to delegate its legislative power to another branch of government.<sup>106</sup> That said, there may be an exception to the general rule forbidding delegation, so long as the legislature “set[s] forth reasonably clear guidelines to enable the appropriate body to ascertain the facts.”<sup>107</sup> That is to say the legislature can, in limited circumstances, delegate legislative duties so long as the purpose and scope of the delegation are clearly established.

As a final preliminary matter, the court addressed the nature of legislative and executive power. “‘The power to make a law is legislative,’ but the power to administer or execute the law ‘under the provisions of the law itself, as enacted by the Legislature,’ is executive.”<sup>108</sup>

#### 1. House Bill 1020

Section 5 of House Bill 1020 stated that the State Water Commission could divide its appropriation between water and atmospheric projects “subject to budget section approval.”<sup>109</sup> The court found that the Legislative Assembly unconstitutionally conditioned the Water Commission’s control over its appropriation on the approval of the Budget Section.<sup>110</sup> The language of House Bill 1020, section 5 violated the non-delegation doctrine because it “[did] not set forth any standard for the budget section to apply in deciding whether to permit the [W]ater [C]ommission to transfer funds.”<sup>111</sup> The court initially rested the weight of this decision on the non-delegation doctrine, describing the lack of

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105. *Id.* at 102–03.

106. *Id.* at 102 (citing *County of Stutsman v. State Historical Soc’y of N.D.*, 371 N.W.2d 321, 327 (N.D. 1985)).

107. *County of Stutsman*, 371 N.W. 2d at 327. In *County of Stutsman*, the North Dakota Supreme Court found that the Legislative Assembly had permissibly delegated authority to the State Historical Board to determine state historical sites and add the sites to a state registry. *Id.* at 327–29. The delegation was permissible because the Legislative Assembly restrained the Board’s power to add sites to the registry to those places having “historical value.” *Id.*

108. *Burgum*, 916 N.W.2d at 103 (citing *Ralston Purina Co. v. Hagemeister*, 188 N.W.2d 405, 410–11 (N.D. 1971)).

109. *Id.* at 98–99.

110. *Id.* at 109.

111. *Id.* at 103 (“[T]he budget section has no . . . guidance to constrain it. The budget section has unfettered discretion to approve or reject the water commission’s request to transfer funding among the four specific categories.”).



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constraints over the budget section as a clear sign of an improper delegation.<sup>112</sup>

The majority, however, continued its constitutional critique of House Bill 1020, stating that the bill would still be unconstitutional even if it had properly constrained the power of the Budget Section in overseeing the Water Commission's appropriation.<sup>113</sup> The deeper problem, said the court, laid within the separation of powers doctrine.<sup>114</sup> "The Legislative Assembly was not attempting to delegate its core legislative power to the executive branch, *but to retain control over executing a law* after it is enacted by delegating power to a committee of its own members."<sup>115</sup>

This portion of the court's analysis looked beyond the North Dakota Supreme Court jurisprudence into sister states and federal law. For instance, the South Carolina Supreme Court invalidated the creation of a legislative review committee that could control appropriations with a legislative veto.<sup>116</sup> The South Carolina committee, like the intended function of the Budget Section under House Bill 1020, encroached on the executive function, which should govern discretionary decision-making after a law is enacted.<sup>117</sup>

The final measure taken by the court in its review of House Bill 1020 was to determine if the bill could stand as workable legislation without the unconstitutional provisions.<sup>118</sup> The court found that House Bill 1020 could stand without the Budget Section's oversight, but because the legislature clearly conditioned the Water Commission's power to transfer funds between projects on the Budget Section's approval, "it would not result in legislation that was contemplated or desired by the Legislative

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112. *Id.*

113. *Id.* at 103–04.

114. *Id.* at 104.

115. *Id.* at 104 (emphasis added).

116. *Id.* (citing *State ex rel. McLeod v. McInnis*, 295 S.E.2d 633, 637 (S.C. 1982)).

117. *Id.* at 104–05. The Court also relied on two U.S. Supreme Court cases regarding separation of powers: *INS v. Chadha*, 462 U.S. 919, 959 (1983) and *Bowsher v. Synar*, 478 U.S. 714, 717 (1986). In *Chadha*, the Court struck down a one-house legislative veto of immigration decisions made by the Attorney General. *Chadha*, 462 U.S. at 959. In *Bowsher*, a legislature-appointed comptroller general was given ultimate authority over budget cuts, essentially allowing Congress to retain control over the appropriations process after appropriations bills are passed into law. *Bowsher*, 478 U.S. at 717. These cases declare that any legislative action retaining executive power for the legislature is unconstitutional. To satisfy separation of powers under the North Dakota Constitution—as with the U.S. Constitution—a legislative measure must attain bicameral and executive approval. N.D. CONST. art. IV, § 13; N.D. CONST. art. V, § 9.

118. "If a legislative act be in part unconstitutional, the valid portion shall stand, unless the result be one not contemplated or desired by the legislature." *State ex rel. Link v. Olson*, 286 N.W.2d 262, 274 (N.D. 1979).

Assembly” if the power to transfer funds was left unchecked.<sup>119</sup> Therefore, the Water Commission’s ability to reallocate funds between projects *and* the Budget Section’s power to review those allocations were struck from House Bill 1020. The remainder of the bill was left unmodified.

## 2. Senate Bill 2013

Senate Bill 2013 section 12, “provides that of the \$3.6 million allocated for an information technology project, \$1.8 million ‘may be spent only upon approval of the budget section.’”<sup>120</sup> The Supreme Court of North Dakota found the Budget Section’s post-enactment review to be unconstitutional due to the non-delegation and separation of powers doctrine.

Relying on the principles applied to House Bill 1020, the court rejected the argument of the Legislative Assembly that the Budget Section’s function in Senate Bill 2013 was merely to gather facts for determining future expenditures.<sup>121</sup> The language of Senate Bill 2013 “provides the budget section with the ultimate authority to approve or disapprove the use of [the] appropriation,” which violates separation of powers because the power to administer the appropriation of an enacted law is an executive function.<sup>122</sup>

Again, the bill had a secondary ground for disqualification via non-delegation. The court found no sufficient constraint on the delegation of power to the Budget Section because the only standard provided to the Committee was the broad policy goal of Senate Bill 2013, to “achieve efficiencies and budgetary savings . . . through the use of innovative ideas and through alternative solutions relating to information technology.”<sup>123</sup> That was not an adequate restraint because “it is a duty of all public officials to efficiently use public funds,” and the bill did not guide the Budget Section’s decision to approve or deny the second \$1.8 million of the appropriation.<sup>124</sup>

The court concluded its review of Senate Bill 2013 by allowing the appropriation of \$3.6 million to stand without the Budget Section’s oversight.<sup>125</sup> This decision was justified by the fact that the Legislative

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119. *Burgum*, 916 N.W.2d at 106.

120. *Id.* at 107.

121. *Id.*

122. *Id.* The Court responded to the Legislative Assembly’s “fact gathering” argument, stating that “[c]onvenience is no substitute for the mandatory legislative process.” *Id.*

123. *Id.*

124. *Id.* at 108.

125. *Id.*

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Assembly gave the Budget Section the authority to approve the second \$1.8 million of the appropriation, indicating that the legislature had contemplated the result of a full \$3.6 million appropriation for information technology.<sup>126</sup> In this regard, Senate Bill 2013 was distinct from House Bill 1020—which had to be further trimmed once the Budget Section oversight was struck from the bill—because there, the Legislative Assembly did not contemplate the Water Commission having unrestricted ability to transfer funds between its own projects.<sup>127</sup>

*D. Chief Justice VandeWalle Concurring in Part and Dissenting in Part*

Chief Justice VandeWalle concurred with the court's opinion on the petition of the Legislative Assembly but dissented with regard to the discussion of separation of powers in the cross-petition.<sup>128</sup> For VandeWalle, it was unclear that separation of powers would be violated had the delegation to the Budget Section been proper. The short dissent appears to apply to both House Bill 1020 and Senate Bill 2013, however, VandeWalle uses House Bill 1020 (the Water Commission Bill) to illustrate his point that the power the Legislative Assembly attempted to convey to the Water Commission (to transfer funds between projects) actually gave the executive branch “more leeway in spending appropriated funds,” which did not clearly violate the separation of powers doctrine.<sup>129</sup> This, he said, seemed to support an “all or nothing” approach, i.e., the legislature may appropriate funds with no further oversight or it may deny expenditure authority.<sup>130</sup> Because the authority given to the Budget Section was not power to prohibit the expenditure of funds, but only to oversee the transfer of funds between projects, there was not a clear violation of separation of powers.

*E. Justice Crothers Concurring in Part and Dissenting in Part*

Much in line with Chief Justice VandeWalle, Justice Crothers concurred with the majority but for the discussion of separation of powers

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126. *Id.*

127. *See id.* at 106–07.

128. *Id.* at 109 (VandeWalle, J., concurring and dissenting) (“I respectfully dissent to that portion of Part IV of the opinion and its extensive discussion and holdings under the doctrine of separation of powers. I do so because 1) it is unnecessary to our decision, and 2) I am not convinced the delegation to the budget section, if proper standards were in place, would violate that doctrine.”).

129. *Id.* at 110.

130. *Id.*

regarding House Bill 1020.<sup>131</sup> Justice Crothers provided a more thorough review of the court's principles regarding judicial restraint<sup>132</sup> and opined that the non-delegation doctrine discussion as to House Bill 1020 was narrower because those issues could be remedied "through more artful legislative drafting while the [separation of powers issue] tends to implicate the structure of governance."<sup>133</sup>

#### V. AUTHOR'S ANALYSIS

The *Burgum* decision relies on—and does not stray from—numerous state constitutional principles implicating executive and legislative authority. The discussion of veto power, separation of powers, and non-delegation doctrine are consistent with the North Dakota Constitution and relevant case law.

This Comment cannot point to any error in the North Dakota Supreme Court's assessment of the Legislative Assembly's petition. Additionally, while the criticisms of the two dissenting justices are thought-provoking, the court correctly evaluated Governor Burgum's cross-petition.

##### A. *The Court's Analysis of the Petition of the Legislative Assembly Was Properly Reasoned*

The court's unanimous opinion on the Legislative Assembly's petition addresses each of the five challenged vetoes made by Governor Burgum individually.<sup>134</sup> This is done tediously and thoroughly, despite Governor Burgum himself conceding that three of the vetoes were ineffective.<sup>135</sup> In fact, one of the legislators who originally asked the State Attorney General to provide an opinion on the vetoes reacted to the decision, stating, "I don't think there's anything really earth shaking."<sup>136</sup>

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131. *Id.* (Crothers, J., concurring and dissenting) ("I believe the constitutional analysis should have stopped after the non-delegation holding.").

132. *Id.* at 111 ("As a general rule a court will inquire into the constitutionality of a statute only to the extent required by the case before it and will not anticipate a question of constitutional law in advance of the necessity of deciding it, and will not formulate a rule of constitutional law broader than is required.") (quoting *State v. King*, 355 N.W.2d 807, 809 (N.D. 1984)). Justice Crothers specifically noted the caution required in a constitutional review of the other coequal branches of government. *Id.* at 111 (Crothers, J., concurring and dissenting).

133. *Id.*

134. *Id.* at 92–100, 109–10.

135. *Id.* at 98–99. Governor Burgum conceded that his item vetoes in Senate Bill 2003 ("Any Portion Veto"), House Bill 1020 ("Water Commission Veto"), and Senate Bill 2013 ("IT Project Veto") were ineffective, but the Court still addressed the merits. *Id.*

136. *Dura*, *supra* note 12 (statement of Senator Richard Wardner).

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*State ex rel. Link v. Olson* was cited throughout the court's opinion, and its relevance to the challenged vetoes informs the predictable result of *Burgum*.<sup>137</sup> The court in *Burgum* upheld the directive of *Olson* that the governor may veto items of appropriations bills as long as "the fundamental purpose the legislature intended to effect" remains intact.<sup>138</sup>

Perhaps the noteworthy aspect of the Legislative Assembly's petition was the decision to bring the suit at all. The Legislative Assembly had to pass a resolution through the Legislative Management Committee to try to quash Governor Burgum's vetoes in court.<sup>139</sup> This required the legislators to balance their odds at success, the state resources used to litigate the matter,<sup>140</sup> and the potential consequences of letting the governor go unchecked in his efforts to veto parts of appropriations bills that constituted legislative intent. The Legislative Management Committee's decision, then, was not in vain, as the court upheld the State Constitution and its subsequent interpretations regarding item veto power.<sup>141</sup> Going forward, the Legislative Assembly should be empowered by the decision in *Burgum*, which will be fresher in the minds of governors than the 1979 *Olson* decision. A twenty-first century reiteration of the limits to executive veto authority is, in itself, a sufficient justification for the legislative resolution to bring suit, even after the State Attorney General opined on the invalidity of Governor Burgum's item vetoes.

*B. The Court's Analysis of Governor Burgum's Cross-Petition Was Properly Restrained*

The second part of the *Burgum* decision, Governor Burgum's cross-petition, was also properly decided. This Comment's analysis of the cross-petition is focused on the criticism of the two concurring and dissenting opinions from Chief Justice VandeWalle and Justice Crothers, who both suggest that the cross-petition should have been decided on non-

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137. See *supra* Section III.A (discussing *State ex rel. Link v. Olson*, 286 N.W.2d 262 (N.D. 1979)).

138. *Burgum*, 916 N.W.2d at 93.

139. John Hageman, *North Dakota Legislators to Challenge Burgum's Veto Power*, THE BISMARCK TRIB. (Sept. 28, 2017), [https://bismarcktribune.com/news/local/govt-and-politics/north-dakota-legislators-to-challenge-burgum-s-veto-power/article\\_6799c48f-3f04-58f5-9b1b-23873905db51.html](https://bismarcktribune.com/news/local/govt-and-politics/north-dakota-legislators-to-challenge-burgum-s-veto-power/article_6799c48f-3f04-58f5-9b1b-23873905db51.html).

140. Representative Corey Mock recognized that a legal battle over executive authority "is not on the minds of his constituents," which could be interpreted as legislators anticipating backlash for spending state resources on the supreme court litigation. *Id.*

141. N.D. Const. art. V, § 9; *Olson*, 286 N.W.2d at 262; *State ex rel. Sandaker v. Olson*, 260 N.W. 586, 589 (N.D. 1935).

delegation grounds alone, without a discussion of separation of powers.<sup>142</sup> These critiques of the majority opinion do not explicitly attack the majority's outcome, which results in the opinions reading more like concurrences, but they are each labeled as "concurring and dissenting."<sup>143</sup>

The reasoning of the concurring and dissenting opinions is not without merit. North Dakota, much like under federal common law, has an established doctrine of judicial restraint regarding constitutional issues.<sup>144</sup> For example, at the federal level, no case has been struck down on the basis of a non-delegation challenge since the 1930s,<sup>145</sup> as courts have labored to find restraints placed on Congressional delegations to executive agencies.<sup>146</sup> It makes sense, then, that Chief Justice VandeWalle and Justice Crothers would prefer the court end its analysis of the cross petition on the narrower issue of non-delegation instead of address two constitutional issues.<sup>147</sup> Here, however, to analyze the cross-petition based only on non-delegation without discussing separation of powers would have a negative impact on the clarity of the decision as a whole.

Non-delegation and separation of powers are conceptually related: both concern the action or inaction of one branch of government as it relates to the functions of another.<sup>148</sup> A typical non-delegation problem

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142. *Burgum*, 916 N.W. 2d at 109–11 (VandeWalle, J., and Crothers, J., both concurring and dissenting).

143. *Id.*

144. *See, e.g.*, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217 (1995) (courts should limit their decision to the "narrower ground for adjudication of the constitutional questions in the case" without further analysis); *State v. King*, 355 N.W.2d 807, 809 (N.D. 1984) ("[A] court will inquire into the constitutionality of a statute only to the extent required by the case before it and will not anticipate a question of constitutional law in advance of the necessity of deciding it, and will not formulate a rule of constitutional law broader than is required . . ."); *Hosp. Servs. Inc. v. Brooks*, 229 N.W.2d 69, 71 (N.D. 1975) (stating that courts should examine claims on non-constitutional grounds before examining any constitutional issues).

145. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1240 (1994).

146. *See, e.g.*, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001) (noting that Justice Scalia successfully searched the Clean Air Act for an "intelligible principle" restraining Congress's delegation to the Environmental Protection Agency to avoid facing a constitutional, non-delegation problem).

147. "[T]he non-delegation basis is narrower than the separation of powers grounds because the former usually can be fixed through more artful legislative drafting while the latter tends to implicate the structure of governance." *Burgum*, 916 N.W.2d at 111 (Crothers, J. concurring and dissenting).

148. *See WILLIAMS, supra* note 27, at 243 ("The nondelegation doctrine is based on separation of powers concerns, underlying which are desires to shield citizens from arbitrary government."); *supra* Section III.B (discussing separation of powers and non-delegation doctrine).

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involves the abandonment of, for example, a legislative duty. This can be seen in *County of Stutsman v. State Historical Society of North Dakota*, where the Legislative Assembly (permissibly) delegated authority to the State Historical Board to determine state historical sites and add the sites to a state registry.<sup>149</sup> This type of delegation can be framed broadly as an abdication or a giving away of the legislature's own power to another branch of government, and it is only permissible in a narrow circumstance.<sup>150</sup> In *Burgum*, the cross-petition concerns an *encroachment*, not an abdication, because the Legislative Assembly retains for itself what should be the duty of the executive branch: namely, the power to control an appropriation after an appropriations bill has been enacted.

The overlap between separation of powers and non-delegation doctrines becomes much more obvious in this case, where House Bill 1020 and Senate Bill 2013 each allow the Budget Section to oversee the execution of appropriations to executive agencies. The majority opinion briefly addresses the criticism of the concurring and dissenting opinions that separation of powers should not be invoked, stating:

The separation of powers issue here is not how much discretion is given regarding expenditure of appropriations, but to whom the discretion is given after a bill is enacted . . . . The Legislative Assembly violates separation of powers when it retains discretion after enactment for itself or its agent, the budget section.<sup>151</sup>

When an improper legislative delegation is made not to another branch of government, but to a "legislative agent," separation of powers is simultaneously implicated with non-delegation. It would be difficult, if not impossible, for the North Dakota Supreme Court to take on one issue without at least addressing the other, as the concurring and dissenting opinions advocate.

The majority does not delve into detail about why they go past the non-delegation analysis, but the decision to address separation of powers is justified. Because of the rarity of this case<sup>152</sup>—directly pitting two branches of government against each other—it was important for the North Dakota Supreme Court to thoroughly address the issues

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149. 371 N.W. 2d 321, 327 (N.D. 1985).

150. WILLIAMS, *supra* note 27, at 241–43.

151. *Burgum*, 916 N.W.2d at 106.

152. See Jack Dura, *Without Precedent? N.D. Legislature v. Burgum May Stand Alone*, BISMARCK TRIB. (Aug. 12, 2018), [https://bismarcktribune.com/news/local/govt-and-politics/without-precedent-n-d-legislature-v-burgum-may-stand-alone/article\\_5b7efc33-c4f8-549f-9703-735127e8e8bd.html](https://bismarcktribune.com/news/local/govt-and-politics/without-precedent-n-d-legislature-v-burgum-may-stand-alone/article_5b7efc33-c4f8-549f-9703-735127e8e8bd.html).

presented. If the court stopped short in its analysis, there could have been a lack of clarity going forward. Even Justice Crothers's concurring and dissenting opinion suggests that "artful legislative drafting" could avoid the non-delegation doctrine issues, making it "narrower grounds" upon which to decide the cross-petition.<sup>153</sup> If that were the case, however, the Legislative Assembly in its next session could attempt the same unconstitutional encroachment through Budget Section oversight, but with "more artful legislative drafting"<sup>154</sup> to avoid the non-delegation issue. Then, the legal battle would resume, taking up more of the state government's time and resources. Instead, the North Dakota Supreme Court was able to fully address the executive and legislative authority issues and set forth clear principles in the process.

The concurring and dissenting promotion of judicial restraint is well founded and, arguably, deserving of more recognition in the majority opinion. Nevertheless, the benefits of addressing the non-delegation and separation of powers flaws in House Bill 1020 and Senate Bill 2013, as well as the difficulty in addressing one doctrine without the other, justifies the majority's approach.

#### VI. CONCLUSION

The North Dakota Supreme Court decision in *Legislative Assembly v. Burgum* dealt losses to both Governor Burgum and the Legislative Assembly. By restraining the governor's item veto power over appropriations bills as well as the Legislative Assembly's authority to oversee enacted appropriations through the Budget Section, the decision addresses a number of state constitutional issues. In doing so, the North Dakota Supreme Court conforms to its precedent and the North Dakota Constitution, resulting in a balanced, thorough opinion.

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153. *Burgum*, 916 N.W.2d at 111.

154. *Id.*