THE GOVERNOR—FROM FIGUREHEAD TO PRIME MINISTER: A HISTORICAL STUDY OF THE NEW YORK STATE CONSTITUTION AND THE SHIFT OF BASIC POWER TO THE CHIEF EXECUTIVE

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I. INTRODUCTION

This article traces the evolution of the New York State government from a legislatively dominated constitutional structure to a more executive dominated one, a movement that has been vindicated by the courts. The focus of this study of constitutional transformation shall be the budgetary process, arguably the most important function of state government, since it entails competing policy considerations arising from the amount and manner in which funds are to be raised, as well as the allocation of monies to various public services and projects. With the power over the budget comes the power to shape the course of the State.

While the Constitution of New York ("Constitution"), in all its permutations, has incorporated the general concept of a balance of powers among the three branches of government, it has often departed from traditional notions of which powers should be reposed in which branch. Thus, at various times, the Constitution has placed certain powers traditionally considered legislative in nature with the Governor (such as the responsibility for drafting the initial budget), or vice versa, and made some powers subject to the control of hybrid entities consisting of members of two branches, such as the Council of Appointment, composed of the Governor and

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certain members of the Legislature.[1] In addition, the "balance" of powers has not always been evenly calibrated, and one branch has enjoyed preeminence over the others at different times.

Part II.A of this article reviews New York's Constitutions, from the First Constitution, adopted in 1777 after the States' declaration of independence from Great Britain, through the Constitutions of 1821 and 1846, and up to and including the Fourth and current Constitution, adopted in 1894, as thereafter adjusted by various amendments. The First Constitution created a strong Legislature and a weak Governor in reaction to the former colony's perception of the King's representative, the Royal Governor, as a domineering executive. However, following official independence, the exponential population growth[2] and the developing state's need for increased capital and transportation improvements revealed some of the defects inherent in the 1777 Constitution and led to the ratification of the Second Constitution in 1821. The Second Constitution removed some of the more severe constraints on the Governor, yet left him still weak, and attempted to resolve the shortcomings of the First Constitution primarily by placing limits on the Legislature. A generation later, the sweep of Jacksonian Democracy, with its twin tenets of distrust of all branches of government and promised safeguard of giving voters greater control through subjecting all offices to short-term elections, brought about the Third Constitution in 1846, which further weakened both the Legislature and the Governor. In 1869, and again in 1872, the Third Constitution was amended, but the Legislature and Governor remained weak. Similarly, the Fourth Constitution, as promulgated in 1894, did little to alter the basic structure of government, notwithstanding the increasingly obvious need for reform and governmental efficiency due to the Empire State's rise as the commercial and financial leader of the nation.

The first stirrings of a concerted effort to reorganize the government were felt in 1906. And in 1915, a Constitutional Convention that promised momentous shifts was convoked. Due to a confluence of certain factors, the proposed Constitution was rejected. However, it was only a temporary setback, for by 1928 all

[1] Another hybrid entity still exists: the Court for the Trial of Impeachments, consisting of "the president of the senate, the senators, or the major part of them, and the judges of the court of appeals, or the major part of them." N.Y. CONST. art. VI, § 24.

[2] New York State's population grew from just over 190,000 in 1777 to more than 1,300,000 by 1820. PETER J. GALIE, ORDERED LIBERTY: A CONSTITUTIONAL HISTORY OF NEW YORK 74 (1966).

the important changes proposed by the 1915 Convention were adopted in the form of discreet amendments. Those amendments created a robust Governor, who now had a four year term of office, was in charge of all state agencies, and exercised extensive control over the budget process. Under the Constitution's new "Executive Budget," the Governor prepared the budget and submitted it to the Legislature, which was circumscribed to acting on the budget in one of four specific ways, subject to the Governor's difficult-to-override line item veto.

Part II.B of this article discusses in detail the role of the Governor and the Legislature in that budget process. Part II.C sets forth the significant court cases interpreting the Executive Budget amendments: *People v. Tremaine* ("*Tremaine I*");[3] *People v. Tremaine* ("*Tremaine II*");[4] *Saxton v. Carey*;[5] *N.Y. State Bankers Ass'n. v. Wetzler*;[6] *Silver v. Pataki*,[7] and *Pataki v. New York State Assembly*.[8]

In those cases, as discussed in Part II.C, the courts have ruled that the specific allocation of powers stated in the Constitution trumps any general ideas of a balance of power or what types of powers belong to the executive or legislature. The courts have construed the Executive Budget amendments as granting the Governor extensive control over the budget process. Eschewing an activist role, the courts have expressed a reluctance to intrude too deeply into the budget process, which the courts recognize is largely political in nature and therefore better left to the representatives of the people. Thus, the New York courts have been careful to confine themselves to interpreting, rather than making, the law. By the same token, the courts remain vigilant to ensure that the Constitution is adhered to, and they have declared that the Governor and Legislature may not act in concert to disregard constitutional provisions which those two branches deem merely technical in nature.

The final section of this article demonstrates how, through constitutional evolution and judicial interpretation over the course of two centuries, the Governor has been transformed from a mere "sentinel" or "figurehead" with little to do in governing New York[9]

[3] 168 N.E. 817 (1929).
[4] 21 N.E.2d 891 (1939).
[5] 378 N.E.2d 95 (1978).
[6] 612 N.E.2d 294 (1993).
[7] 824 N.E.2d 898 (2004).
[8] *Id*.
[9] *See* 1 CHARLES Z. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK, 1609-1822, at

into a strong executive and the *de facto* chief legislator with respect to budget matters—in essence, the chief parliamentarian of the State.

II. EVOLUTION OF THE EXECUTIVE BUDGET AMENDMENT

A. New York's Constitutions

New York has had four constitutions, each known by the year of its adoption: 1777, 1821, 1846 and 1894.[10] Various constitutional amendments have been incorporated into the different constitutions, from time to time, through a process of legislative enactment and electoral ratification.[11] Additionally, there have been three constitutional conventions which drafted documents that were rejected by the voters: 1867, 1915 and 1967.

1. The First Constitution of New York (1777): A Strong Legislature and a Weak Governor

Revolutionary New York emerged as a sovereign state in reaction to a colonial history defined by a strong executive who served as the King's representative, as well as the master of the provincial

175–76 (1994) [hereinafter 1 LINCOLN]. *See generally* LESLIE LIPSON, THE AMERICAN GOVERNOR FROM FIGUREHEAD TO LEADER (1939) (giving a detailed account of the evolution of the role of the American governor).

[10] My narrative on the four New York State Constitutions and the amendments thereto is derived from the following sources: 1 LINCOLN, *supra* note 9, at iii–xxx, 3–63, 162–756; 2 CHARLES Z. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK, 1822-1894, at 3–725 (1906) [hereinafter 2 LINCOLN]; 3 CHARLES Z. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK, 1894-1905, at 672–93, 695–757 (1906) [hereinafter 3 LINCOLN]; Edward P. Cheyney, *The Antirent Movement and the Constitution of 1846*, *in* 6 HISTORY OF THE STATE OF NEW YORK: THE AGE OF REFORM 281–321 (Alexander C. Flick ed., 1934) [hereinafter 6 HISTORY OF NEW YORK]; Victor Hugo Paltsits, *The Transition from Dutch to English Rule, 1664-1691*, *in* 2 HISTORY OF THE STATE OF NEW YORK: UNDER DUKE AND KING 73–119 (Alexander C. Flick ed. 1933) [hereinafter 2 HISTORY OF NEW YORK]; Finla G. Crawford, *Constitutional Developments, 1867-1915*, *in* 7 HISTORY OF THE STATE OF NEW YORK: MODERN PARTY BATTLES 199–239 (Alexander C. Flick ed., 1935) [hereinafter 7 HISTORY OF NEW YORK]; Finla G. Crawford, *Recent Political Developments, 1915-1935*, *in* 7 HISTORY OF NEW YORK, *supra*, at 241–80; Dixon Ryan Fox, *New York Becomes a Democracy*, *in* 6 HISTORY OF NEW YORK, *supra*, at 1–34; Denis Tilden Lynch, *Party Struggles, 1828-1850*, *in* 6 HISTORY OF NEW YORK, *supra*, at 61–85; Denis Tilden Lynch, *The Growth of Political Parties, 1777-1828*, *in* 6 HISTORY OF NEW YORK, *supra*, at 35–60; Edwin Platt Tanner, *Postwar Problems and Political Reformers, in* 7 HISTORY OF NEW YORK, *supra*, at 137–68; Edwin Platt Tanner, *State Politics from Cleveland to Sulzer, in* 7 HISTORY OF NEW YORK, *supra*, at 169–98; THOMAS SCHICK, THE NEW YORK STATE CONSTITUTIONAL CONVENTION OF 1915 AND THE MODERN STATE GOVERNOR (1978).

[11] For a succinct account of the history of New York's constitutional evolution, see GALIE, *supra* note 2.

legislature.[12] The Fourth Provincial Congress of the colony of New York was elected in June 1776 and met on July 9, 1776, when it ratified the Declaration of Independence. The next day, it changed its name to the "Convention of the Representatives of the State of New York."[13] A proposed Constitution was adopted on April 20, 1777;[14] John Jay, age thirty, was the chief author of the Constitution, together with his colleagues, Robert R. Livingston, age twenty-nine, and Gouverneur Morris, age twenty-four.[15]

Under the First Constitution, the Governor, who had a three-year term, commanded the military, convened the Legislature, recommended policy changes, transacted "necessary business with the officers of government," expedited such measures as the Legislature directed, and took "care that the laws are faithfully executed."[16] A short term of office, numerous statewide elected office holders who were often antagonistic towards the Governor, and proliferating state agencies which were run as independent fiefs not answerable to the Governor, contributed to an executive bereft of power or authority.[17] New York's nineteenth century Governor was, at his most effective, merely a negative force. The Governor's constitutional powers of recommending legislation and executing the laws proved insubstantial enough to render the nominal executive branch leader a mere "sentinel" who had virtually no relationship to the actual daily business of governing New York.[18]

The Legislature was divided into two houses, a Senate and an Assembly; the twenty-four Senators had a four-year term, while the seventy Assemblymen had one-year terms.[19] The Legislature

[12] *Id.* at 24; Edward Countryman, *From Revolution to Statehood (1776-1825)*, *in* THE EMPIRE STATE: A HISTORY OF NEW YORK 238–40 (Milton M. Klein ed., 2001); LIPSON, *supra* note 9, at 9.

[13] *See* 1 LINCOLN, *supra* note 9, at 471–84.

[14] While the Constitution contained no bill of rights, it did incorporate the entire Declaration of Independence and an article which might be called a guarantee of "due process of law," including trial by jury, and a provision that no acts of attainder were to be passed after the Revolutionary War. The Constitution severely restricted the eligibility to vote and run for office by imposing certain property qualifications. However, the principal regrets of John Jay were that he was not able to convince the delegates to insert an anti-slavery clause or a provision for "the encouragement of literature." 1 LINCOLN, *supra* note 9, at 554–56.

[15] *Id.* at 492–500.

[16] *Id.* at 176.

[17] LIPSON, *supra* note 9, at 21–23.

[18] *Id.* at 10.

[19] Note, however, article XI of the First Constitution: "that the fourth part of the senate, as nearly as possible may be annually chosen." 1 LINCOLN, *supra* note 9, at 172. Also, article XVI stated that, "the number of senators shall never exceed one hundred, nor the members of assembly three hundred. . ." *Id.* at 174. Article V provided that "once in every seven years,

determined its own agenda and was largely unrestrained as to what should be the subject matter of legislation at any particular point in time and as to how a bill became a law.[20] With the plenary power to determine public policy, raise revenues and expend public funds, the Legislature was the pre-eminent and dominant branch of government.[21]

The First Constitution maintained the colonial court system, including the supreme court, the court of chancery, and the admiralty, county and probate courts, but made the judiciary independent by the provision that the chancellor (the chief judge of the court of chancery), the judges of the supreme court, and the first judges of the county courts could hold office upon good behavior to the age of sixty.[22]

New York generally followed the doctrine of the separation of powers, with checks and balances, in its first state constitution.[23] However, some powers, such as veto and appointments, were conferred on entities composed of members of two branches of government.[24] For example, the Governor's power to appoint public officials was limited by a Council of Appointment, consisting of the Governor and certain members of the Legislature, who could thus outvote him.[25] Also, the judiciary provided a check on the executive

after the taking of the first...census," the legislature may reapportion the assembly, while article XII allows for reapportionment of the senate. *Id.* at 169, 172–73.

[20] *See* Barto v. Himrod, 8 N.Y. 483 (1853) (Public school bill found unconstitutional since enabling statute conditioned on subsequent ratification vote by electorate; Legislature unable to delegate its plenary legislative power); People *ex rel.* Wood v. Draper, 15 N.Y. 532 (1857) (Legislature has plenary power which includes determination of nature and boundaries of local governments); People *ex rel.* Unger v. Kennedy, 101 N.E. 442 (1913) (Legislature could create Bronx County statutorily and use ratification by election based on its plenary power); *see also* 1 LINCOLN, *supra* note 9, at 167–74.

[21] *See* 1 LINCOLN, *supra* note 9, at 162–88.

[22] *Id.* at 178–79.

[23] *Id.* at 178–84; E. Wilder Spaulding, *The State Government Under the First Constitution*, *in* 4 HISTORY OF THE STATE OF NEW YORK: THE NEW STATE 149, 161 (Alexander C. Flick ed., 1933) [hereinafter 4 HISTORY OF NEW YORK].

[24] *Id.* at 162–63.

[25] Article XXIII of the First Constitution created the Council of Appointment:

> That all officers other than those who, by this Constitution, are directed to be otherwise appointed, shall be appointed in the manner following, to wit: The assembly shall, once in every year, openly nominate and appoint one of the senators from each great district, which senators shall form a council for the appointment of said officers, of which the governor for the time being, of the lieutenant governor, or the president of the senate (when they shall respectively administer the government), shall be president, and have a casting voice, but no other vote, and, with the advice and consent of said council, shall appoint all of the said officers…The said senators shall not be eligible to the said council for two years successively.

1 LINCOLN, *supra* note 9, at 178. The use of the word "appoint" rather than "nominate" allowed the legislative members at the Council to claim a concurrent right to nominate

and the legislature through its majority presence on the Council of Revision, which vetoed legislation.[26] Such power combinations reflected a post-colonial distrust for the executive and a widespread consensus that legislative supremacy was the surest guarantee of the Revolution.[27]

The lack of restraint on the Legislature, and its consequent binge spending, inspired regular attempts to reform, which culminated, by the end of the nineteenth century, in a laundry list of banned legislative practices. Most constitutional amendments in the nineteenth century involved significant diminution of legislative powers, though coupled with even further dilution of the limited executive powers of the Governor, which tended to create deadlock.[28]

2. The Second Constitution (1821): A Weaker Legislature and a Weak Governor

The Second Constitutional Convention included sixty-eight farmers and thirty-seven lawyers.[29] In the Second Constitution, the Council of Appointment and the Council of Revision were abolished by unanimous vote.[30] The combination of powers reposed in those two bodies had proven more productive of conflict than a reasonable check or balance.[31] In place of the Council of Appointment, the power to appoint public officials was dispersed, with some positions elected at the local level, some nominated by the Governor (and appointed with the advice and consent of the Senate), and others appointed by the Legislature.[32] This constitution gave the Governor the power to veto legislation, although the veto could be overridden by the Legislature with a vote of two-thirds of the members present in each house.[33] The 1821 Constitution also contained the first

candidates, as well as vote on them; a Constitutional Convention convoked in 1801 agreed with the legislative members' interpretation. GALIE, *supra* note 2, at 42, 67–68.

[26] Article III of the Constitution created the Council of Revision:

> [T]he governor, . . .the chancellor [the chief judge at the court of chancery], and the judges of the supreme court, or any two of them . . . shall be . . . a council to revise all bills about to be passed into laws by the legislature. . . . [I]f . . . it should appear improper to . . . them [it is not enacted into law unless] two thirds of [each house approve]. . . . [I]f approved . . . [it] shall be a law.

1 LINCOLN, *supra* note 9, at 167–78.

[27] *See* GALIE, *supra* note 2, at 9–30; 4 HISTORY OF NEW YORK, *supra* note 23, at 162–65.

[28] LIPSON, *supra* note 9, at 31–46 ("A theory of democracy, misconceived and overapplied, had produced deadlock.").

[29] 2 LINCOLN, *supra* note 10, at 108.

[30] 1 LINCOLN, *supra* note 9, at 743–50.

[31] *Id.*

[32] GALIE, *supra* note 2, at 78, 88–89.

[33] *Id.* at 83.

specific restraints on the exercise of legislative power by: (1) fixing legislator salaries; (2) specifying methods of paying canal debt; (3) requiring a super-majority for private or local bills[34] spending money and for bills approving corporate charters; (4) prohibiting sales of certain state property; and (5) prohibiting lotteries.

"New provisions barred legislators from accepting positions in the executive or judicial branch and executive officials from serving in the legislature."[35]

Even with those amendments and the limits placed on legislative power, the Governor remained enfeebled for the remainder of the century due to the short term of office (which was reduced from three to two years), lack of executive branch authority over the various state agencies, and subservience to political party bosses (due to their control over patronage).[36]

3. The Third Constitution (1846): A Weakened Legislature and a Weak Governor

Forty-five delegates of this convention were lawyers and forty-three were farmers. The Constitution of 1846 made many alterations to the old system. It was "the people's constitution," a highwater mark of the Jacksonian era, in which a general distrust of each branch of government was manifest and the remedy of control through election often used.[37] It provided for universal suffrage for "white" men over twenty-one years of age, thus removing the requirement that they be taxpayers or have served in the militia or as firemen.[38]

The Governor continued to have a two-year term, and the secretary of state, comptroller, treasurer, attorney general, state

[34] The problem of undue legislative attention to "private" or "local" bills drew the attention of reformers throughout the nineteenth century. Private bills adjusted the legal privileges or liabilities of specific individuals or entities; local bills endowed particular municipal corporations with powers or burdened them with restrictions. The tendency was to get the Legislature out of the business of such retail law making and restrict it to expending its energies on laws of general applicability. GALIE, *supra* note 2, at 103–04, 142–44, 221–22.

[35] *Id.* at 89.

[36] LIPSON, *supra* note 9, at 18, 22, 31–63 (loss of post-colonial fear of executive only warranted new view of governor as a "watchful sentinel" and "zealous friend to admonish us of error" according to a speaker at the 1821 Convention); GALIE, *supra* note 2, at 81–82, 89 (Legislature had the dominant share of patronage and the power to remove state officials without cause; Governor's reduced role in patronage made it less likely that he would be independent of his party; Governor no longer had the power to adjourn the legislature or make an annual address to the Legislature in person).

[37] GALIE, *supra* note 2, at 105.

[38] *Id.* at 76, 95.

engineer and surveyor were also to be elected for two-year terms. Even canal commissioners and state prison inspectors were to be elected.[39] The decision to make most of the major executive offices elected reduced the Governor's power over patronage, thereby diminishing the Governor's effectiveness as a party leader and making it more difficult for him to exercise any control over the various departments of the executive branch.[40]

The Third Constitution also created a Court of Appeals, composed of eight judges, four of whom were elected for eight years, and four selected from the class of justices of the Supreme Court having the shortest time to serve. All other judges were also to be elected by the people.[41]

The Senate was increased to thirty-two members, but with two-year terms (rather than four); the Assembly was to consist of 128 members, elected to one-year terms.[42] The Senate no longer had appellate jurisdiction, as the Court for the Correction of Errors, which had existed since the First Constitution, was abolished.[43] In addition to the reduced terms of offices and increased number of senatorial districts, the 1846 Constitution further restrained the Legislature by: (1) requiring that all special and local legislation be confined to one subject; (2) prohibiting certain types of local legislation; (3) requiring that a legislative "majority" be defined as a majority of all members rather than all present; and (4) eliminating most legislative patronage by making virtually all offices elective.[44]

The Constitution provided that every twenty years the people should vote whether they wished to have a convention called to draw up a new constitution to be submitted to popular vote.[45]

4. The Constitutional Convention of 1867: A Weak Legislature and a Weak Governor

In the period from 1846 to 1867, only one constitutional amendment was adopted. It related to loans for canal improvements.[46] In 1867, a proposal was approved by a large majority of the electorate to have a constitutional convention.[47]

[39] GALIE, *supra* note 2, at 105; 2 LINCOLN, *supra* note 10, at 137.
[40] GALIE, *supra* note 2, at 105.
[41] *Id.* at 105–06.
[42] 2 LINCOLN, *supra* note 10, at 126–29.
[43] *Id.* at 144.
[44] GALIE, *supra* note 2, at 103–05.
[45] *Id.* at 109.
[46] *Id.* at 117.
[47] *Id.* at 118–19; 7 HISTORY OF NEW YORK, *supra* note 10, at 201–02.

Four separate proposals were submitted to the voters, viz: (1) a judiciary article,[48] (2) taxation provisions,[49] (3) the elimination of property qualifications for "colored" voters,[50] and (4) the amended constitution itself.[51] The judiciary article, which came to be known as the Judiciary Article of 1869, the year it was submitted to the voters, was the only part of the proposed convention accepted by the voters.

Under the Judiciary Article of 1869, the Court of Appeals was composed of a Chief Judge and six Associate Judges, chosen by popular vote for a term of fourteen years, and to retire at the age of seventy. The elected term of the Justices of the Supreme Court was extended from eight to fourteen years, with retirement at age seventy. Four "general terms" of the Supreme Court, each composed of a Presiding Justice and three other Justices, were designated to hear intermediate appeals.

By the terms of the Judiciary Article of 1869, the Legislature was required to submit to the voters at the general election of 1873 the issue whether judges should be appointed, rather than elected, which the people answered in the negative.[52]

5. The Constitutional Commission of 1872: A Weak Legislature and a Weak Governor

In 1872, a constitutional commission was created, consisting of thirty-two persons (four from each judicial district), evenly divided between the two major parties. The eleven amendments proposed by the commission were passed by the Legislature and then submitted to the electorate on one ballot.[53] The voters were permitted to cancel any proposition "with ink or pencil" and the inspectors were required to count the ballots for each proposition not so canceled.

The eleven propositions were as follows: "(1) suffrage and bribery; (2) legislature; (3) prohibition of special legislation, boards of county supervisors; (4) governor and lieutenant governor; (5) finance and canals; (6) corporations, local liabilities and appropriations; (7) state appropriations; (8) compensation of officers; (9) oath of office; (10)

[48] 7 HISTORY OF NEW YORK, *supra* note 10, at 202–03.
[49] *Id.* at 203.
[50] *Id.*
[51] *Id.* at 202–03.
[52] 2 LINCOLN, *supra* note 10, at 285–88.
[53] *See id*. at 464–574.

official corruption; [and] (11) time for amendments to take effect."[54] All of the amendments were adopted.[55]

The legislative amendment provided for the election to the assembly by counties, abolishing the prior assembly districts. No member of the Legislature was eligible during his term of office, or for 100 days before his election, for appointment to state, city or federal office.[56] The Legislature was limited in its ability to pass private and local bills for the street railroads. Private claims were not to be audited by the Legislature. The Legislature could not dispose of, lease, or sell the Erie, Oswego, Champlain, Cayuga, or Seneca Canals, but the lateral canals were omitted from this amendment so these unprofitable canals, which had been built south of the Erie Canal, could be sold.[57]

The term of Governor was extended from two to three years. The Governor's power to veto legislation was extended to thirty days after the Legislature adjourned.

6. The Fourth Constitution (1894): A Weaker Legislature and a Weak Governor

In 1893, delegates were elected to a Constitutional Convention. There were 175 delegates, 160 elected from senate districts (five from each district) and fifteen chosen at large. Eighty percent of the delegates were lawyers.[58] The convention considered and approved many important changes, including: (1) apportionment of the legislature, (2) reorganization of the judiciary, (3) elections, (4) forest lands, (5) the franchise, (6) prison labor, (7) the state commission on lunacy, and (8) education.[59]

The membership of the Senate was fixed at fifty and the Assembly at 150 (one assemblyman apportioned to every county, except Fulton and Hamilton).[60] Continuing the trend from the previous constitutions, the Legislature was further weakened by the enactment of thirteen new provisions removing subjects from the Legislature's discretion.[61]

The Court of Appeals was continued. Previously, every litigant

[54] 7 HISTORY OF NEW YORK, *supra* note 10, at 206–10.
[55] *Id.* at 208.
[56] 7 HISTORY OF NEW YORK, *supra* note 10, at 208.
[57] *Id.* at 209–10.
[58] GALIE, *supra* note 2, at 160.
[59] 7 HISTORY OF NEW YORK, *supra* note 10, at 216.
[60] *Id.*
[61] GALIE, *supra* note 2, at 183.

could appeal as of right to the Court of Appeals from the decision of the intermediate appellate court (the "general terms" of the Supreme Court). Consequently, there was a great backlog of cases waiting for several years to be heard by the Court of Appeals. Under the leadership of two distinguished lawyers, Joseph Choate, the President of the Convention, and Elihu Root,[62] the Floor Leader of the Convention and Judiciary Committee Chair, this problem was solved. The jurisdiction of the Court of Appeals was limited, except where a judgment was of death, "to the review of questions of law"; and the Legislature was authorized "further to restrict the jurisdiction of the Court of Appeals and the right to appeal thereto."[63] This meant that the Court of Appeals became a court to decide law, not facts. Under the 1894 Constitution, most appeals are finally determined in the Appellate Division; and the backlog of appeals before the Court of Appeals has been eliminated.

In place of the "general terms," an Appellate Division of the Supreme Court was established, the State being divided into four judicial departments. In each department, five judges were designated to act as a court of last resort on all questions of fact.[64]

The term of the Governor and other state officers was decreased from three years to two years.[65]

On November 6, 1894, the voters approved the amendments and the revised constitution.[66]

Although legislative powers had been the subject of constant revision and increasing restraint in 1821, 1846, 1867, 1874 and 1894, constitutional reformers had only resorted to limitations, either as outright curtailments of legislative powers or by enhancing the executive veto power.

By the end of the nineteenth century, although New York was the most populous, industrialized and wealthiest state,[67] its government

[62] Elihu Root (1845-1937), U.S. Attorney for the Southern District of New York (1883-1885); delegate at large to the New York State Constitutional Convention (1894); U.S. Secretary of War (1899-1904); Secretary of State (1905-1909); U.S. Senator from New York,(1909-1915); delegate at large to New York Constitutional Convention (1915); candidate for Republican nomination for President (1916); Awarded Nobel Peace Price (1912).

[63] N.Y. CONST. of 1894, art. VI, § 9. *See also* Document No. 53: Explanatory Statement of the Judiciary Committee Relative to the Proposed Judiciary Article, *in* 2 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK: MAY 8, 1894, TO SEPTEMBER 29, 1894, at 461–68 (1900) (Elihu Root, Chairman).

[64] GALIE, *supra* note 2, at 170–71.

[65] *Id.* at 170; 7 HISTORY OF NEW YORK, *supra* note 10, at 219.

[66] 3 LINCOLN, *supra* note 10, at 678.

[67] *See* Joel Schwartz, *The Triumph of Liberalism (1914-1945)*, *in* THE EMPIRE STATE: A HISTORY OF NEW YORK, *supra* note 12, at 527–31.

functioned without a regular budget process[68] and its Legislature was incapable or unwilling to reform its own chaotic annual appropriations.[69] Moreover, the Governor, the Chief Executive of the State, (1) had no effective control over the executive branch (since the agency heads were not appointed by him or directly answerable to him),[70] (2) had no input into the formulation of the annual budget bills,[71] (3) served only as the final "editor" of legislative appropriations through the line item veto,[72] and (4) oversaw administrations perennially afflicted by duplication, waste and irresponsibility.[73] Due to those legislative and executive deficiencies, New York State was unable to provide the quantity or quality of modern state services sought by citizens and corporations.[74]

7. Charles Evans Hughes (1906): The Beginning of the Fight for Reorganization

At the 1906 Republican State convention in Saratoga (New York), Charles Evans Hughes[75] was nominated by acclamation as the candidate for Governor. He endorsed the goal of state reorganization and, by a plurality of 57,897, he beat William Randolph Hearst, who was backed by the Independence League, Tammany Hall and the Democratic Party. However, no active steps were taken for the administrative reorganization of the State until 1909, when Governor Hughes recommended measures which he said would:

> 'tend to promote efficiency in public office by increasing the effectiveness of the voter and by diminishing the opportunities of the practical manipulators who take

[68] *See* Document No. 32: Report of the Committee on State Finances, Revenues and Expenditures, Relative to a Budget System for the State, *in* DOCUMENTS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 1915, at 9 (1915) (Henry L. Stimson) [hereinafter Stimson Committee].

[69] *Id.* at 10; Report of the New York State Reconstruction Commission: Retrenchment and Reorganization in the State Government 315 (1919) (Robert Moses, Chief of Staff) [hereinafter Moses Committee].

[70] LIPSON, *supra* note 9, at 31–16.

[71] *Id.* at 37.

[72] *Id.* at 37–38.

[73] *Id.* at 41–46.

[74] *Id.* at 10; Stimson Committee, *supra* note 68, at 9; Moses Committee, *supra* note 69, at 317.

[75] Charles Evans Hughes (1862-1948), Governor of New York (1907-1910); Candidate for Republican nomination for President (1908); Justice of the U.S. Supreme Court (1910-1916); candidate for President of the United States (1916); U.S. Secretary of State (1921-1925); Chief Justice of the U.S. Supreme Court (1930-1941).

> advantage of the multiplicity of elective offices to perfect their schemes at the public expense.'[76]

Hughes also believed in the centralization of power in the Governor, who should possess the power to appoint a cabinet of administrative heads.[77]

Although Hughes failed to bring all heads of departments under the control of the Governor, he did successfully reorganize the state insurance department, as well as two public service commissions. Governor Hughes resigned his office in October 1910 to accept an appointment to the Supreme Court of the United States.

8. William Sulzer (1912): Continued Rumblings for Reform

In 1912, William Sulzer, a Democrat, defeated Job E. Hedges, a Republican, by a vote of 649,559 to 444,105 to become Governor. Sulzer was just past fifty years of age. He was a successful lawyer who had been in public office since 1889, when he went to the Assembly. He was Speaker of the Assembly in 1893. Then he was a member of Congress for eighteen years.[78] The same year as Sulzer's gubernatorial election, the Democrats won 103 seats in the Assembly, the Progressives four, and the Republicans forty-three. The Senate was also Democratic. Alfred E. Smith, age thirty, with ten years of public service behind him, was elected Speaker of the Assembly; Robert F. Wagner was Temporary President of the Senate; and William Gaynor, the Mayor of the City of New York, was also a Democrat.[79]

The first real movement toward actual reorganization of the budget process was taken by Governor William Sulzer early in 1913. He appointed a three-man Committee of Inquiry to conduct investigations into the expenditures of the State. In late March of 1913, the Committee proposed the establishment of a permanent Department of Efficiency and Economy to investigate State administrative services and to make recommendations. The Committee's proposal was accepted by the Legislature, and the Commissioner of Economy and Efficiency also began to function as the Secretary of the Board of Estimate, which included the Senate and Assembly leaders and Chairs of the Senate Finance Committee

[76] 7 HISTORY OF NEW YORK, *supra* note 10, at 244–45.
[77] *Id.* at 245.
[78] *Id.* at 193.
[79] *Id.* at 192–94.

and the Assembly Ways and Means Committee.[80]

In 1913, a committee of the Assembly was appointed to look into Sulzer's campaign funds, and found that he had failed to report them accurately. By a vote of seventy-nine to forty-five, the Assembly presented the Senate with eight articles of impeachment. The Court for the Trial of Impeachments, consisting of the Senate and judges of the Court of Appeals, tried him. He was convicted on three charges: (1) that he filed a false account of his campaign funds (vote of thirty-nine to eighteen); (2) that he was guilty of perjury (thirty-nine to eighteen); and (3) that he committed a misdemeanor in suppressing evidence (forty-three to fourteen).[81]

This is the only time that a Governor of New York has been impeached and successfully removed from office.

9. Constitutional Convention of 1915: Rational Budget Planning

The 1894 Convention had specified 1916 as the year when the question of holding a convention would be submitted to the voters. However, due to the Democratic sweep of elective offices in 1912,[82] the Democrats pushed up the date in the hopes of effecting a redistricting more favorable to their party. The task of formulating constitutional reforms thus fell to the delegates to the 1915 Constitutional Convention, described as "the most qualified and experienced group of delegates to sit in any constitutional convention held in New York."[83] During the preceding two decades, academics, government officials and progressive reformers had been drawn to state government reorganization and had agreed on three

[80] SCHICK, *supra* note 10, at 24–27; GALIE, *supra* note 2, at 188–92.

[81] *See* 7 HISTORY OF NEW YORK, *supra* note 10, at 195; GALIE, *supra* note 2, at 189–91. Nevertheless, at the next election, Sulzer was elected an Assemblyman for the sixth Assembly district of New York City by a huge margin. Sulzer's speeches helped contribute to defeat Tammany in the state campaign of 1913 and to elect John Purroy Mitchell, the Progressive Mayor of New York. 7 HISTORY OF NEW YORK, *supra* note 10, at 196.

[82] *See supra* Part II.A.8.

[83] GALIE, *supra* note 2, at 191. Among the 168 delegates to the 1915 Constitutional Convention were such luminaries as Elihu Root, former Secretary of War, Secretary of State, U.S. Senator, U.S. Attorney, and winner of the Nobel Peace Prize; Henry L. Stimson, former Secretary of War, future Secretary of War and State; George W. Wickersham, former U.S. Attorney General; Seth Low, former Mayor of New York City and President of Columbia University; Jacob Gould Schurman, former President of Cornell University; Al Smith, former Speaker of the New York State Assembly, future Governor and candidate for U.S. President; and Robert F. Wagner, former Lieutenant Governor and member of the State Assembly and Senate, future U.S. Senator. Of the remaining delegates, three had served in the U.S. House of Representatives, thirteen in the State Senate, nineteen in the State Assembly, two as U.S. Attorneys, one as Lieutenant Governor, and thirteen as judges. In addition, there were leading constitutional and corporate lawyers, as well as physicians, journalists, architects, bankers and members of other professions and businesses.

goals: (1) consolidation of agencies; (2) gubernatorial control of agencies; and (3) an executive budget.[84]

The rationales for reorganization which would make the Governor, in reality, Chief Executive as well as Chief Legislator for budget matters, included: (1) fiscal control; (2) transparent governmental operations; and (3) political responsibility.[85] Although this Convention's proposed Constitution was defeated at the polls,[86] it later served as the template for the most comprehensive overhaul of New York's Constitution since the first State Constitution of 1777.[87]

In the proposed Constitution of 1915, most administrative agencies were to be reorganized within the Executive branch[88] and headed by Governor-appointed administrators.[89] The annual appropriations of the Legislature would henceforth be initiated by the preparation and submission of an Executive Budget by the Governor[90] which could only be approved or changed in a few, constitutionally-prescribed methods.[91] The Governor would be transformed into the primary legislator for budgetary matters since he would set the agenda at the front end of the process and retain his line item veto power at the tail end.[92] Charles Beard, who prepared research material for the 1915 Convention and who would later become acclaimed as an historian and political scientist, commented on the Convention's proposals:

> In breaking down the rigid separation of the governor and his cabinet from the legislature and admitting them to the floor of the house—a system of interpellation may be established which will contribute powerfully to efficient and responsible government and will open up undreamt possibilities in politics.[93]

It is critical to note that the 1915 reformers expressly intended the proposed reforms as methods to enable the Legislature to

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[84] GALIE, *supra* note 2, at 191–92; SCHICK, *supra* note 10, at 24–27.

[85] Stimson Committee, *supra* note 68, at 4, 7–8; SCHICK, *supra* note 10, at 73.

[86] *See* THE EMPIRE STATE: A HISTORY OF NEW YORK, *supra* note 12, at 523.

[87] Report of the State Reorganization Commission (Legislative Doc. No. 72), at 10 (Feb. 26, 1926) (Charles E. Hughes, Chairman) [hereinafter Hughes Committee].

[88] *See* 1 RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, 1915, at 1134 (Unrevised ed., 1915) [hereinafter 1915 Convention]; Moses Committee, *supra* note 69, at 316.

[89] 1915 Convention, *supra* note 88, at 1134; Moses Committee, *supra* note 69, at 314.

[90] 1915 Convention, *supra* note 88, at 1134–35.

[91] Stimson Committee, *supra* note 68, at 13–20; SCHICK, *supra* note 10, at 81.

[92] GALIE, *supra* note 2, at 194–195.

[93] *Id*. at 200 (citation omitted).

function better. The Governor, in this view, would collect information about revenues and proposed agency expenditures, refereeing any disputed requests. The Governor would then provide the Legislature with a systematic plan for revenues and expenditures. Freed from the burdens of putting together an integrated budget, the Legislature would be able to rationally consider whether individual items were appropriate or excessive. Legislative resources would be expended in the process of deciding whether to approve or reduce or deny outright specific budget items.

Henry Stimson,[94] the chairman of the 1915 convention's Finance Committee, lauded the Executive Budget as the only "scientific" method of handling the fiscal affairs of the State. He advocated the constitutional amendment as the only way to bring financial responsibility to state government, ensure critical debate in the Legislature, and bring New York's Legislature in line with centuries-old parliamentary practice.[95] Governor Al Smith echoed this refrain in his Annual Message of 1925:

> The executive budget does not in the slightest degree decrease the power of the Legislature. It provides only for a more responsible method for the exercise of that power. There is nothing new or revolutionary about a proposal placing upon the Executive himself the duty in the first instance of certifying to the Legislature the amount required for the fixed and definite expenses of maintenance of the various departments of the government . . . . There is also no reason why the Legislature should make additions to these sums or indulge in new activities until provision has first been made for the absolutely necessary expenses of government. This method follows the policy of the wise and prudent housewife who puts aside the money for rent, light, heat, the butcher and the baker, before she contracts for a new piano, a victrola or a radio. It is plain everyday good business and stands out as such when compared with the present system or, rather, lack of system, which now characterizes the appropriation of public moneys.[96]

[94] Henry Lewis Stimson (1867-1950), U.S. Attorney for the Southern District of New York (1906-1909); unsuccessful Republican candidate for Governor of New York (1910); Secretary of War (1911-1913); World War I, colonel of 31st Field Artillery; Special Emissary to Nicaragua (1927); Governor General of the Philippines (1927-1929); Secretary of State (1929-1933); Secretary of War (1940-1945).

[95] Stimson Committee, *supra* note 68, at 8–11.

[96] *Annual Message of 1925*, *in* PUBLIC PAPERS OF ALFRED E. SMITH: FORTY-SEVENTH GOVERNOR OF THE STATE OF NEW YORK, THIRD TERM 1925, at 31, 75 (1927) [hereinafter

The defeat of the Constitution proposed by the 1915 Convention was the result of the confluence of several factors. First, the Constitution was submitted to the electorate *in toto*, rather than in separate amendments. Thus, segments of the populace that objected to only certain provisions, such as the conservationists, municipal employees, and union members, had no choice but to reject the entire document, instead of just the discreet amendments they opposed. To these large electoral blocks were added other powerful elements which actively campaigned against the new Constitution, either out of philosophical differences, such as the anti-reorganization Republicans, or out of sheer spite, such as the Tammany Hall Democrats and the Progressives (who never forgave Elihu Root for his contribution to the defeat of Teddy Roosevelt in the 1912 Presidential election). In addition, the proponents of the new Constitution had only six weeks to promote it to an electorate that knew little of the issues and that was increasingly distracted by the events of World War I.

In the wake of the rejection of the 1915 Constitution, the Governor attempted to formulate a budget, but the Legislature soon assumed the initiative with its own budget process. This process, however, proved little better than the previous unsystematic annual rituals of appropriation and spending.[97]

10. Executive Budget Amendment of 1928: The Governor as Fiscal Leader

The four terms of Governor Al Smith, spanning the Roaring Twenties, began with a Reconstruction Commission in 1919, under the *de facto* leadership of Robert Moses,[98] which picked up the Executive Reorganization model of the 1915 Convention, marshaled the same arguments for a strong Governor, and advocated the reforms of agency consolidation, executive reinvigoration and Governor's budget.[99] Charles Evans Hughes and Al Smith both argued that re-distributing the legislative budget power of

Smith Annual Message]. This same claim, that no powers of the Legislature were being transferred to the Governor, was reiterated by Charles Evans Hughes and Elihu Root, and underlay the confidence exuded by the Legislature in the *Tremaine I* litigation, discussed *infra* Part II.C.1.

[97] Moses Committee, *supra* note 69, at 315–16; Hughes Committee, *supra* note 87, at 9–10.

[98] Robert Moses began his long career in government as leader of this Commission. He subsequently became the key figure in the rebuilding of New York City and its suburbs through the creation of a modern highway and bridge system.

[99] Moses Committee, *supra* note 69, at 3–44, 317–19. *See* ROBERT A. CARO, THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK 91–112 (1974).

proposing the State's annual budget to the Governor permitted the Legislature to better carry out the quintessential legislative function of approving or disapproving fiscal policy.[100]

Administrative reorganization was accomplished in a 1925 ballot which approved a constitutional amendment creating a limited number of agencies, all administered by individuals serving at the pleasure of the Governor.[101] When coupled with the "short ballot" (reducing the number of statewide officeholders) and a lengthened gubernatorial term of four years, the Governor finally was able to exert power commensurate with his responsibility for the executive branch of government. The Governor had become, in reality, the Chief Executive of the State of New York, and not just a figurehead or sentinel.

The 1894 Constitution was amended again by ballot in 1928[102] to provide, as earlier advocated by the 1915 Constitutional Convention, that the annual state budget process commence with an Executive Budget prepared and submitted to the Legislature by the Governor. The executive now exercised a direct role in law making, viz. budget bill drafting, and was able to control the terms of any budget debate, since the Legislature was required to act on this budget in one of four specific ways, as discussed *infra*.[103] The Governor had become the Chief Legislator of the State of New York for the annual budget. In response to New York's experience of plenary legislative power and feeble gubernatorial power, the people had reconstituted the Governor as an effective head of the Executive Branch through administrative reorganization and then redistributed budget drafting legislative power to the Governor. It would still take a high stakes show-down between a truculent Legislature and an unbending Governor to frame a watershed court test of the Executive Budget.

To understand the novelty of judicial intervention in the immediate contest between the executive and legislative branches after adoption of the Executive Budget amendment, it is important to note that: (1) no one had experience with a strong executive; (2)

[100] *See* Hughes Committee, *supra* note 87, at 11 ("The only way in which the true order of procedure can be fully established and the Governor relegated to his true function of proposing a budget and the Legislature fully restored to its true function of disposing of that budget, is by the passage of a constitutional amendment."); Smith Annual Message, *supra* note 96, at 75 ("The executive budget does not in the slightest degree decrease the power of the Legislature.").

[101] GALIE, *supra* note 2, at 210.

[102] *See* THE EMPIRE STATE: A HISTORY OF NEW YORK, *supra* note 12, at 565.

[103] *See infra* note 110 and accompanying text. *See also* GALIE, *supra* note 2, at 211–12.

no legislative powers had previously been transferred to the executive; (3) the nineteenth century attempts to constrain the Legislature had taken the form of procedural regulations or substantive impairments; and (4) the 1915 Convention and subsequent groups which considered or promoted the Executive Budget had not considered the reach of a strong governor.

B. The Executive Budget, A Legislative Power

Although relocated within the text of the Constitution, and rephrased by a few technical amendments by the 1938 Constitutional Convention,[104] the Executive Budget, as adopted in 1928, has remained durable and constant during the past three quarters of a century.

The Executive Budget process begins with the receipt by the Governor of financial estimates and information from each executive department head,[105] now made directly answerable and subject to the Governor. The proposed itemized budgets for the Legislature and Judiciary are formulated by each respective branch and submitted to the Governor separately for inclusion in the Executive Budget "without revision but with such recommendations as [the Governor] may deem proper."[106] The Governor's annual budget is required to contain a "complete plan of expenditures . . . and all moneys and revenues estimated to be available . . ., together with an explanation of the basis of such estimates" and be submitted by the Governor by a certain date.[107] The Governor is further directed to submit "proposed legislation, if any, which [the governor] may deem necessary to provide moneys and revenues sufficient to meet [the] proposed expenditures" and to include other "recommendations and information" as the Governor deems proper.[108]

The text unambiguously grants the Governor the power to draft

[104] Document No. 3: Report of the Committee on State Finances and Revenues of the New York State Constitutional Convention, on Proposed Constitutional Amendment, *in* JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK: APRIL FIFTH TO AUGUST TWENTY-SIXTH, at 1938 (1938).

[105] N.Y. CONST. art. VII, § 1 (the financial estimates and information are to be provided to the Governor "in such form and at such times" as the Governor may require).

[106] *Id*. In this revealing method, the separation of powers persists even within the Governor's exercise of the legislative power of bill drafting and submission. The Legislature retains only the budget drafting power with respect to its own proposed budget, while the Judiciary is likewise afforded this constitutional power.

[107] N.Y. CONST. art. VII, § 2.

[108] *Id*.

and submit a comprehensive annual budget for the State. As the budget bill drafter with broad constitutional duties and authority, the Governor's exclusive ability to propose annual fiscal legislation has made him or her the Chief Legislator on budget matters. This was the clear intent of the constitutional reformers, since the Legislature had proved itself incapable of financial responsibility and the Governor, as the principal state-wide official, can be held politically accountable.[109]

The Governor's singular budget authority goes beyond the constitutional mandate that he gather financial information and make a timely submission of a comprehensive financial plan; the Legislature has only four options when the Governor's Executive Budget is submitted: (1) approve the comprehensive budget submitted by the Governor; (2) eliminate or (3) reduce proposed appropriations; or (4) add appropriations, but only if done separately and distinctly, and only if referring to a single object or purpose.[110] While the Governor's Executive Budget remains pending, the Legislature is prohibited from even considering any other appropriation bill, unless allowed by the Governor.[111] The Governor thus sets the financial agenda for State spending and holds the stage until the Legislature determines its response. The Governor also has line item authority to edit legislatively increased or new spending.[112]

The various sections of article VII of the State Constitution, the article pertaining to the budget process: (1) compel the Legislature to recognize the fiscal pre-eminence of the Governor as Chief Legislator for budgetary matters[113] and (2) continue nineteenth century constitutional substantive prohibitions or limits on long-term debt.[114] As a result of (a) nineteenth century restrictions placed on the Legislature, (b) the constitutional reorganization of the executive branch and (c) the constitutional redistribution of the legislative budget power, New York's Governor has become the undisputed master of the financial affairs of the State.

This is a situation far removed from those earlier days of

[109] Stimson Committee, *supra* note 68, at 8; Hughes Committee, *supra* note 87, at 9–10.
[110] N.Y. CONST. art. VII, § 4.
[111] *Id.* § 5.
[112] *Id.* art. IV, § 7.
[113] *See id.* art. VII, § 7 (all State payments require legal appropriation). *Id.* § 6 (appropriation bills other than Governor's Executive Budget or governmental support must be for single object or purpose and subject to general or line item veto power of Governor in art. IV, § 7).
[114] *Id.* §§ 8–17.

unfettered legislative power, when bills with fiscal implications could be enacted by the Legislature at will, and spending could be authorized in oblique ways. In those days, often no individual could be held responsible for waste or extravagance, and the Governor was effectively sidelined from the day-to-day business of state government as a mere "sentinel." The Executive Budget amendments shifted significant legislative powers and created a unique institutional arrangement, weakening the Legislature and empowering the Governor.

C. Judicial Review of the Executive Budget

After the adoption of the Executive Budget amendment, there followed judicial review of legislative powers exercised by the Governor and the Legislature through six Court of Appeals cases decided over an eighty year span.[115] From these cases we learn of the Court's commitment to interpreting and enforcing the text of the Constitution. This required the Court to abandon traditional notions of a separation of powers[116] and to recognize that the Governor is now the initiator and the primary coordinator of State fiscal policy.

1. *Tremaine I*

The first Executive Budget was prepared by Governor Al Smith in 1928, but was submitted by Governor Franklin D. Roosevelt in January 1929. That first budget contained several lump sum appropriations for agencies that had not completed consolidation and were thus unable to itemize. Relying on a State Finance Law provision that had been used under the prior legislative budget system and not been repealed, the Legislature struck Roosevelt's lump sum appropriations, added lump sum appropriations totaling twice the amount appropriated in the Executive Budget, and created a joint legislative-executive commission which would have the power to approve post-enactment expenditures.[117]

Roosevelt had been advised by several constitutional experts to avoid litigation.[118] In fact, George W. Wickersham, a former U.S.

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[115] *See supra* notes 3–8 and accompanying text.

[116] EDWARD S. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 2–3 (Revised by Harold W. Chase & Craig R. Ducat, 14th ed. 1978).

[117] People v. Tremaine, 168 N.E. 817, 818–19 (N.Y. 1929) ("*Tremaine I*").

[118] *See* KENNETH S. DAVIS, FDR: THE NEW YORK YEARS, 1928-1933, at 79–87 (1985); CARO, *supra* note 99, at 307.

Attorney General and one of the sponsors of the constitutional budget amendment, told Roosevelt that he was inclined to believe that the amendment permitted the actions taken by the Legislature.[119] Therefore, Roosevelt chose to submit two supplemental bills, one restating certain portions of his original lump sum appropriations, which would be subject to the Governor's exclusive power to segregate, and the other itemizing most of the appropriations that had appeared in lump sum in his first bills.[120]

Roosevelt's opponents in the Legislature were encouraged by Wickersham's statement, as well as by an opinion by the Republican New York Attorney General, Hamilton Ward, that the Executive Budget amendment did not confer upon the Governor the exclusive authority to segregate lump sums or nullify the effect of the Finance Law provision.[121] The Legislature approved most of the segregated items, but replaced Roosevelt's lump sums with their own and reiterated that segregation of such appropriations would require the approval of the Governor, the Chairman of the Senate Finance Committee, and the Chairman of the Assembly Ways and Means Committee, pursuant to Finance Law section 139.[122] Roosevelt took his case directly to the people, in a radio address broadcast over the statewide network, and then vetoed all but two of the Legislature's lump sum appropriations.[123] Roosevelt declared that the Legislature had "deliberately violated the spirit and letter of the Constitution" by substituting its own lump sum appropriations and appointing the two finance chairmen to participate in itemizing.[124] Hamilton Ward, assisted by former Governor Nathan L. Miller, commenced an action on behalf of "The People of the State of New York." Roosevelt lost the first round of litigation in the Appellate Division.[125] Nevertheless, he prevailed in the Court of Appeals.

The specific issue for the Court in *Tremaine I* was whether the Governor had the authority to include, in his Executive Budget, a provision which made him the sole arbiter of future itemizations from lump sum appropriations. The Legislature claimed that exactly how lump sum funds should be spent was governed by an existing statute, Finance Law section 139, which provided for the

[119] DAVIS, *supra* note 118, at 84.
[120] *Tremaine I*, 168 N.E. at 819.
[121] *See* NEW YORK STATE DIVISION OF THE BUDGET, THE EXECUTIVE BUDGET IN NEW YORK STATE: A HALF-CENTURY PERSPECTIVE 49 (1981).
[122] *Tremaine I*, 168 N.E. at 819.
[123] DAVIS, *supra* note 118, at 83–84.
[124] *Id*. at 84.
[125] *See* People v. Tremaine, 235 N.Y.S. 555 (N.Y. App. Div., 3d Dept. 1929).

creation of a tripartite commission including the Governor, the Chairman of the Senate Finance Committee, and the Chairman of the Assembly Ways and Means Committee.[126] The Legislature also argued that the Governor did not have the power to strike provisions which were not appropriations, such as references to, or implementation of, the Finance Law. The Governor responded that the Legislature did not have the authority to appoint its own members to carry out the executive power of post-enactment itemization, since the Constitution prohibited members of the Legislature from receiving any "civil appointment" during their tenure in office.[127] The Appellate Division stated that the nature of the act of approving segregations was difficult to define and probably fell "within the twilight zone where the function is legislative and the act of approval is administrative," but the exercise of such duties did not constitute a "civil appointment" and therefore was not unconstitutional.[128]

The Court of Appeals found that: (1) the appropriation power is legislative;[129] (2) executive and legislative powers are distributed to the executive and legislative departments respectively, and ought to be kept separate;[130] and (3) "nothing in the abstract division of powers" prevents the Legislature from creating an administrative office, such as a budget itemization commission, and selecting legislators to be appointed to such office.[131] However, the *Tremaine I* Court held that article III, section 7, of the Constitution, originally adopted in 1821, prohibits a legislator from simultaneously holding elective office and a "civil appointment" in an executive branch position,[132] and that the itemization commission constituted such an appointment. The Court further noted that even if the appointments were considered "legislative" in nature, they would amount to an impermissible delegation of the legislators' constitutional responsibilities concerning the power over appropriations.

Although recognizing that the separation of powers holding rendered the remaining claim against the Governor moot,[133] the Court nonetheless proceeded to find that the provisions inserted by

[126] *Tremaine I*, 168 N.E. at 819.
[127] *Id.*
[128] *People v. Tremaine*, 235 N.Y.S. at 564–66.
[129] *Tremaine I*, 168 N.E. at 819–20.
[130] *Id.* at 820.
[131] *Id.*
[132] *Id.* at 820–21.
[133] *Id.* at 823–24.

the Legislature (which were line item vetoed by the Governor) were unconstitutionally added, in that such amendments altered the bill other than by striking or reducing, running afoul of the Constitution.[134] Even assuming that the Legislature could insert such segregation provisions into an appropriations bill, however, the Court indicated that the Governor should be able to use his line item veto since the Executive Budget bill is an appropriation bill; to deny the Governor the use of the line item veto would be a circumvention of the veto power.[135] The Court's opinion ends with (1) the observation that segregation and post-enactment itemization appear to draw into the appropriation process a "matter foreign to the budget appropriation bills"[136] and (2) a recognition of reliance on those constitutional amendments which reorganized administrative agencies to shift itemization from either the Legislature or the Governor to the agency head for whom the lump sum appropriation had been enacted.[137]

The *Tremaine I* Court resolved the first legislative challenge to the new Executive Budget powers by essentially finding that the Legislature had attempted to enact an unconstitutional method of controlling spending. Reliance on a statute which had been used during the era of legislative budgets was to no avail since an express constitutional provision precluded a legislator from exercising executive powers. In setting out black letter rules, the Court, while reflecting the traditional orthodoxy that legislative powers belonged to the Legislature, expressed its opinion that there existed no ban on transferring powers exercised by one branch to another.[138] While the intermediate appellate court had apprehended a traditional separation of powers conflict[139] and read

[134] *Id*. at 824.
[135] *Id*. at 824.
[136] *Id*.
[137] *Id*. at 824–25.
[138] *Id*. at 825.

> It may be said *in general terms* that the Legislature makes laws and the executive enforces them when made, and each is, in the main, supreme within its own field of action, although common sense and the necessities of government do not require or permit a captious, doctrinaire, and inelastic classification of governmental functions.

Id. at 820. Indeed, the Court reviewed the then-recent constitutional amendment which had created the executive budget and found that the Legislature was bound to adhere to its strictures which stripped the Legislature of its previous power to formulate budget legislation and that the Legislature's attempt to amend Governor Roosevelt's budget bills was void. *Id*. at 822.

[139] *People v. Tremaine*, 235 N.Y.S. at 558.

> The questions presented here represent one phase of the ceaseless controversy between departments of government jealous of their respective prerogatives and resentful of any real or fancied invasion or usurpation of rights deemed to be vested solely in one or the

the executive budget amendment narrowly,[140] the Court of Appeals acted on the recognition that the new budgetary amendment marked a fundamental redistribution of legislative power from the Legislature to the Governor.[141]

It was the new institutional arrangements, including the delegation of significant legislative powers to the Governor, which required a new jurisprudence of deference to the Governor in his role as Chief Legislator.

2. *Tremaine II*

While the 1929 *Tremaine I* litigation arose from Executive Budget use of lump sum appropriations which the Legislature sought to control through post-enactment itemization by a joint commission, the 1939 *Tremaine II* dispute concerned an itemized Executive Budget that was partially converted into lump sum appropriations by the Legislature. Judge Crane, author of a concurrence in the *Tremaine I* opinion,[142] wrote for the majority in *Tremaine II*. Judge Crane characterized the *Tremaine I* opinion as involving only the narrow issue of whether the Legislature can require that a Governor's lump sum appropriation be itemized, post-enactment, by a joint legislative-gubernatorial commission.[143] Judge Crane cautioned that "the whole spirit of the Constitution [is] against lump sum appropriations and in favor of appropriations showing the items of expenditure,"[144] namely, "what money is to be expended, and for what purpose," so that the Legislature can exercise its judgment as to whether the funds that are demanded should be granted.[145]

In *Tremaine I*, appropriations had to be made in lump sum form

> other. Such differences have existed from the earliest days of our constitutional government. The differences which have arisen between these parties relate to the executive budget and certain lump sum appropriations made by the Legislature, and involve constitutional powers and rights.

Id. (citation omitted). The intermediate appellate court held that legislative powers are properly exercised by the Legislature, gutting any power transfer to the Governor.

[140] *Id*. at 563–64.

[141] *Tremaine I*, 168 N.E. at 825.

[142] Judge Crane agreed as to the result, but found that legislation authorizing post-enactment itemization was not an illegal legislative delegation and that there was no explicit constitutional prohibition on a legislator's serving on a post-enactment itemization commission. *Id*. at 825–27 (Crane, J., concurring). He joined in the court's decision based on a theory of implicit limits to the exercise of legislative, executive and judicial power flowing from generic separation of powers principles. *Id*. at 826–28 (Crane, J., concurring).

[143] 21 N.E.2d 891, 893–94 (N.Y. 1939) ("*Tremaine II*").

[144] *Id.* at 893–94.

[145] *Id.* at 893.

because it was impossible to predict the particular expenses of the agencies which were still being reorganized. Judge Crane also acknowledged that various uncertain contingent expenses could be authorized in lump sum. However, the dispute before the Court of Appeals in *Tremaine II* involved the wholesale elimination of the Governor's itemized appropriations and their replacement by the Legislature with a lump sum for each governmental department, division and bureau, when there was no need to do so, other than an asserted legislative attempt to achieve savings. In fact, the Legislature did not even divide the funds between personnel and maintenance expenses.

The Court reviewed the meaning of the phrase "items of appropriation," as used in the Constitution, and found that a lump sum for a department is not an "item."[146] The Court held that the replacement of itemized appropriations with lump sum amounts by the Legislature is prohibited by implication, since the Executive Budget amendment specifies permissible legislative responses (i.e., striking out or reducing an item, or adding an item for something other than a stricken item), and the challenged legislative actions went beyond such allowed options.[147] The Court ended its opinion with an appeal for flexibility and good faith by the litigants to make the executive budget system work[148] and a statement of the Court's commitment to the text of the Constitution:

> Much has been and may be said on all sides. These are, however, not for our consideration. We start with a Constitution which it is our province to interpret as it is written, and not as we think it might have been written. Thus it is, why we confine this opinion to the words used,

[146] *Id*. at 894–95.

[147] *Id*. at 895–96. In contrast to Judge Crane's 1929 separation of powers analysis, which limited each branch of government to correlative duties and powers which are by their intrinsic nature legislative, executive or judicial, Chief Judge Crane's 1939 opinion vindicated the constitutional reallocation of the legislative power to draft and submit annual budget bills to the Governor, enforced impairment of basic legislative powers, and jettisoned the implied separation of powers analysis. Although Chief Judge Crane stated that "[t]he Legislature has complete power over appropriations," he immediately followed this overbroad generalization with the rule that the Legislature "does not have to make them [i.e. appropriations], but when it does attempt to do so, it is obliged to follow the provisions of the Constitution. The control of the purse strings is not unlimited control; it is subject to veto in some instances and to method of action in all." *Id*. at 895. In other words, the traditional, generic separation of powers analysis which had assumed that only legislators exercise legislative powers and that the executives are confined to carrying out legislative mandates, must give way to the sovereign power of the people, embodied in the text of the Constitution, who are free to reallocate legislative powers to the Governor. This, of course, is a fairly traditional method of analysis: the specific controls over the general; the written controls over course of practice.

[148] *Id*. at 895–96.

> giving to them not only their ordinary meaning but that which previous acts, measures and reports intended them to have.[149]

The clear and unambiguous language of the Executive Budget amendment largely removed fiscal bill drafting responsibility from the Legislature, transferred it to the Governor, and conferred upon the Governor the same presumptions which would normally attach to any exercise of legislative power.

3. *Saxton v. Carey*

The Court of Appeals next reached the merits of budget bill litigation in 1978 in *Saxton v. Carey*,[150] which involved a taxpayers' challenge to a budget that had been passed by the Governor and the Legislature. The taxpayers asserted that the budget was insufficiently itemized and impermissibly included a provision allowing for the transfer of funds within particular programs after approval of the budget. While noting that the Constitution does require itemization (the issue at stake in *Tremaine II*), the Court nevertheless stated that the Constitution does not prescribe any particular degree of itemization, and a fixed definition was impossible since the specificness or generality of itemization depends upon the context in which it is used.[151] The degree of itemization required by the Constitution is "whatever degree of itemization is necessary for the Legislature to effectively review that budget," which is a decision best left to the Legislature.[152] If the Legislature determines that a budget is lacking sufficient specificity so as to preclude meaningful review, then the Legislature should refuse to approve the budget; if the Legislature fails to act, then the remedy is to be found in the voting booth, not the courtroom.[153] Thus, the *Saxton* Court concluded that the specificity of itemization is a function of the political process and one for which the judiciary is "neither constituted, suited, nor, indeed, designed."[154] Similarly, the Court refused to intervene with respect to the provision for an intra-program transfer of funds following approval of the budget, since the Governor and Legislature had determined that a certain degree of flexibility in the use of

[149] *Id.* at 896.
[150] 378 N.E.2d 95 (N.Y. 1978).
[151] *Id.* at 97–98.
[152] *Id.* at 98.
[153] *Id.* at 98–99.
[154] *Id.* at 97.

appropriated funds was necessary.[155] However, the Court noted that not every issue involving the budget process is beyond judicial review and that the courts "will always be available to resolve disputes concerning the scope of that authority which is granted by the Constitution to the other two branches of the government."[156]

4. *N.Y. State Bankers Ass'n. v. Wetzler*

The next Court opinion to resolve the merits of litigation arising from an Executive Budget involved, like *Saxton,* a private party aggrieved by the budget process. In *N.Y. State Bankers Ass'n. v. Wetzler,*[157] banking corporations challenged the Legislature's addition of an audit fee to the Governor's appropriation bill. The Court held that the restrictions on legislative budget authority are not mere technicalities, but substantively define the limited powers remaining to the Legislature.[158]

The audit fee provision, which authorized the Commissioner of the Department of Taxation and Finance to assess fees against banking corporations audited for taxes so as to cover the cost of the audits, had not been included within the budget bill submitted by the Governor, although he did not object to its inclusion by the Legislature and he signed the bill into law.[159] When the Commissioner began to assess the fees, the banking corporations sought a declaration that the method of legislative addition violated the Constitution.[160] The Court of Appeals rejected the Commissioner's argument that the inclusion of the audit fee provision presented a non-justiciable budget matter.[161] Unlike *Saxton*, which involved discretionary decisions by the Executive and Legislature, *Wetzler* involved an action by the Legislature that is expressly prohibited by the Constitution, namely, altering the Executive Budget in a manner other than by striking out or reducing items or adding a separately stated item of appropriation.[162]

Thus, it was of no moment that the Governor and Legislature agreed on the audit fee provision.[163] Similarly, the fact that there

[155] *Id.* at 98–99.
[156] *Id.* at 99.
[157] 612 N.E.2d 294 (N.Y. 1993).
[158] *Id.* at 296.
[159] *Id.* at 295.
[160] *Id.*
[161] *Id.* at 295–96.
[162] *Id.*
[163] *Id.* at 297.

might be a way for the Governor and Legislature to constitutionally enact that which they unconstitutionally attempted to do did not excuse the illegality.[164] The dictates of the Constitution cannot be waived, even with the consent of the Governor and Legislature, since the very object of a written constitution is to "'regulate, define and limit the powers of government by assigning to the executive, legislative and judicial branches distinct and independent powers,'" in order to protect the people against abuses by the power of the State.[165]

5. *Silver* and *Pataki*

Recently, two more cases involving the budgetary process, *Silver v. Pataki* and *Pataki v. N.Y. State Assembly*, have been brought before the courts.[166] They were decided together by the Court of Appeals[167] after two intermediate appellate courts, the First Department[168] and the Third Department,[169] reviewed them.

In *Silver v. Pataki*, the Legislature approved the Governor's appropriation bills, but then amended three of his "non-appropriation bills"[170] in ways that effectively modified some of the Governor's appropriations, by re-allocating or itemizing the appropriations or by conditioning them on subsequent legislative action. For example, the Governor had proposed a $180 million appropriation for the Department of Correctional Services for "the development of a new 750 cell maximum security facility to be located in the county of Franklin"; the Legislature incorporated that language verbatim into a non-appropriation bill and added the condition that no funds were to be available for that purpose "until a subsequent chapter of the laws of 1998 is enacted which allocates and authorizes the disbursement of such funds." The Governor struck the Legislature's alterations by exercising line-item vetoes, after which the Speaker of the Assembly, later joined by the Senate, sought a judicial declaration that the Legislature's alterations did not constitute "items of appropriation" and therefore were not subject to a line-item veto.

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[164] *Id.*

[165] *Id.* (quoting People *ex rel.* Burby v. Howland, 49 N.E. 775, 779 (N.Y. 1898)).

[166] In both cases, retired Judge Stewart Hancock, the author of the Court of Appeals opinion in *Wetzler*, argued on behalf of the Senate.

[167] 824 N.E.2d 898 (N.Y. 2004).

[168] *See* Silver v. Pataki, 769 N.Y.S.2d 518 (N.Y. App. Div., 1st Dept. 2003).

[169] *See* Pataki v. N.Y. State Assembly, 774 N.Y.S.2d 891 (N.Y. App. Div., 3d Dept. 2004).

[170] As the Court of Appeals has noted, the term "'non-appropriation bill'" does not appear in the New York Constitution. *See* Silver v. Pataki, 755 N.E.2d 842, 844 n.1 (N.Y. 2001).

After reviewing *Tremaine I*, *Tremaine II*, *Saxton*, and *Wetzler*, the Supreme Court, New York County, stated:

> The bottom line here is that the legislature has inserted several directions, segregations and limitations with respect to the spending of appropriated monies in a few voluminous bills submitted by the Governor amending numerous substantive provisions of state law. . .and the Speaker would require the Governor to veto these substantive bills in toto in order to disapprove the inserted appropriation limitations, segregations and directions.[171]

The Supreme Court found such insertions to be alterations of "items of appropriation" in a manner prohibited by article VII, section 4.[172] While the Governor may not submit substantive legislation as part of an appropriation bill, the Constitution permits the Governor to include in appropriation bills "proposed legislation,"[173] provided that it relates "specifically to some particular appropriation in the bill" and is "limited in its operation to such appropriation."[174] Thus, the Governor may not insert into a bill appropriating funds for the construction of a new prison an amendment to the Penal Law altering the definition of robbery, but the Governor may propose in such an appropriation bill the location and type of prison to be built.[175] There was no claim that the Governor had made amendments to substantive law in the appropriation bills at issue, and the Legislature was constitutionally prohibited from placing in non-appropriation programmatic bills alterations to the Governor's appropriation-related legislation stating "when, how or where" monies may be expended.[176] Concluding that the Legislature's alterations were void, in that they had been unconstitutionally enacted, the Supreme Court declined to address the issue of the constitutionality of the Governor's line-item vetoes to the subject legislative provisions.[177] In a "'postscript,'" the Court "observed that should the legislature believe that the constitutional balance of power in the budgetary process is unwise, it, of course, is free to submit to the voters by joint resolution a proposal for a constitutional amendment, which resolution would not be subject to

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[171] Silver v. Pataki, 744 N.Y.S.2d 821, 828 (N.Y. Sup. Ct., New York Co. 2002) *aff'd* 769 N.Y.S.2d 518 (N.Y. App. Div., 1st Dept. 2003), *aff'd* 824 N.E.2d 898 (N.Y. 2004).

[172] *Silver v. Pataki*, 744 N.Y.S.2d at 828–29.

[173] N.Y. CONST. art. VII, § 3.

[174] *Id.* § 6.

[175] *Silver v. Pataki*, 744 N.Y.S.2d at 828–29.

[176] *Id.*

[177] *Id.* at 829.

gubernatorial approval."[178]

The Appellate Division, First Department, held that "'items of appropriation' properly include both the appropriation itself (amount and purpose) as well as directory provisions relating to the appropriation ('when, how or where')."[179] Since the Constitution limits the manner in which the Legislature may alter a Governor's appropriation bill to three courses of action (striking out or reducing items, or adding entirely new, separately stated items), the Legislature could not modify the appropriation provisions in a "non-appropriation bill" in an attempt to do indirectly that which it is expressly prohibited from doing directly. In light of those rulings, the First Department found it unnecessary to reach the issue of the propriety of the Governor's exercise of his line-item veto power.

In *Pataki v N.Y. State Assembly*, the Governor proposed several budget bills which the Legislature altered by deleting various appropriations and replacing them with funds stated in thirty-seven single-purpose bills. For example, the Governor's proposed items of appropriation for assistance to needy families, arts, and state archives were deleted from his budget and replaced in different forms and terms in the single-purpose legislative bills.[180] The Legislature also deleted from the executive budget various provisions concerning the purposes, terms and conditions of spending certain funds, and replaced them with new purposes, terms and conditions in the single-purpose bills. For example, the Governor's executive budget had directed that the proposed appropriation for the State University of New York be used for expenses related to collective bargaining agreements, inflation, full-time faculty positions, and other priority needs identified by the Board of Trustees; the Legislature appropriated the sum requested by the Governor, but in a subsequent single-purpose bill directed that the funds be used only for collective bargaining agreements and enrollment growth.[181] Rather than exercise his veto power, the Governor signed the Legislature's bills into law, and then commenced a declaratory judgment action.

The Supreme Court, Albany County, phrased the issues as: (1) what proposals may properly be included by the Governor in an

[178] *Id.*

[179] *Silver v. Pataki*, 769 N.Y.S.2d at 522.

[180] *See* Pataki v. N.Y. State Assembly, 738 N.Y.S.2d 512, 521–23 (N.Y. Sup. Ct., Albany Co. 2002), *aff'd* 774 N.Y.S.2d 891 (N.Y. App. Div, 3d Dept. 2004), *aff'd* 824 N.E.2d 898 (N.Y. 2004).

[181] *Pataki v. N.Y. State Assembly*, 738 N.Y.S.2d at 523–24.

appropriation bill; and (2) may the Legislature strike out from the Governor's proposed budget what it finds to be extraneous, non-appropriation measures.[182] The Court rejected the Legislature's argument that the Governor must submit appropriations and proposed legislation to implement the budget in separate bills, since article VII, section 2 of the Constitution requires the Governor to submit a "budget containing a complete plan of expenditures proposed" and section 3 states that at "the time of submitting the budget to the legislature the governor shall submit *a bill or bills* containing all the proposed appropriations and reappropriations included in the budget *and the proposed legislation, if any, recommended therein*."[183] The Legislature's interpretation would render meaningless the language permitting the Governor to submit a "bill or bills" to recommend "appropriations. . .and the proposed legislation," and would compel the Governor to always submit multiple bills.[184] Moreover, the version of section 3 originally adopted in 1927 did not contain the "proposed legislation" provision, and its addition by amendment in 1938 must be deemed intentional and meaningful.[185] The Court also took note of prior decisions, including *Saxton*, which found that appropriation bills are not limited to a statement of dollar amounts and the purpose of proposed appropriations.[186]

With respect to whether the Legislature may strike from the Governor's budget what it considers to be extraneous, nonappropriation matters, the Court felt bound by the language in *Wetzler* that "the 'constitutional command is unambiguous' in directing that the Legislature may not alter the Governor's appropriation bill except to strike out or reduce specific items of appropriation or add new appropriations."[187] The Albany Supreme Court noted that dictum in *Tremaine I* indicated that the Legislature lacks authority to strike out unconstitutional language

[182] The Court rejected the Legislature's affirmative defenses of failure to state a cause of action, non-justiciability, constitutional immunity, and unclean hands. Specifically, the Court noted that: similar causes of action were found to have been stated and to be justiciable in *Saxton* and *Wetzler*; the constitutional immunity conferred by article III, section 11 applies to individual members of the Legislature, not the institution as a whole, particularly where judicial review of budget disputes is required; and the fact that the Governor did not veto the bills did not warrant invocation of the doctrine of unclean hands, since the Governor's action is the preferred course of action in budget disputes. *Id*. at 522–24.

[183] *Id*. at 525 (emphasis in original).

[184] *Id*.

[185] *Id*. at 525–26.

[186] *Id*. at 526–27.

[187] *Id*. at 527 (quoting N.Y. State Bankers Ass'n. v. Wetzler, 612 N.E.2d 294, 297 (N.Y. 1993)).

included in a Governor's budget and is limited to striking out the appropriations themselves, which presumably would force the Governor to negotiate; even if the two branches became deadlocked, public pressure would eventually force some sort of settlement.[188]

Based on the foregoing, the Court declared that the Governor had the authority to include the implementing language in the executive budget and that the Legislature's deletion of the language and substitution with provisions in the thirty-seven single-purpose bills was unconstitutional.[189]

By a three to two majority, the Third Department affirmed. The majority agreed with the Supreme Court that the Governor's failure to veto the forty-six legislative bills did not deprive him of standing or effect a waiver, since an alleged unconstitutional usurpation of power "is a classic case for which standing is recognized," and the interposition of a veto would merely prolong the fractious budget process.[190] Relying on *Saxton*, the majority also held that "substantive modifiers are part of a gubernatorial appropriation bill," not "an unconstitutional attempt to legislate by appropriation."[191] Therefore, the Governor was entitled to include both items of appropriation and substantive modifiers within the same proposed budget bills, and the Legislature had violated article VII, section 4, of the State Constitution by attempting to alter such measures through various single-purpose appropriation bills.[192] Echoing *Saxton*, the majority declared that it:

> should not and will not immerse itself into the very heart of the "political process" upon which the formation of the state budget depends. However prolonged and contentious the budget process becomes, we are of the opinion that [the Legislature's] proper constitutional action was to refuse to pass [the Governor's] appropriation bills and induce negotiations, not to alter and amend them and then substitute their own spending plans in the form of 37 single-purpose bills in violation of N.Y. Constitution, article VII, § 4. Alternatively, "the remedy is to amend the Constitution to prescribe new standards for budget-making and appropriations."[193]

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[188] *Id.* at 527.
[189] *Id.* at 528.
[190] *Pataki v. N.Y. State Assembly,* 774 N.Y.S.2d at 893–94.
[191] *Id.* at 894.
[192] *Id.* at 893–94.
[193] *Id.* at 894 (internal citations omitted).

While acknowledging that a claim of usurpation of constitutional power will confer standing, the dissent would have required the Governor to veto the legislative bills in order to maintain standing.[194] The dissent therefore did not reach the merits of the dispute.

Silver and *Pataki* were both appealed to the Court of Appeals and were consolidated. The three-judge plurality (Judges R.S. Smith, Graffeo, and Read) largely adopted the reasoning of the First and Third Departments, two judges concurred in the result (Judges Rosenblatt and G.B. Smith), and two judges dissented (Chief Judge Kaye and Judge Ciparick).[195]

In the context of *Silver*, the plurality ruled that the Legislature could not "discard the Governor's budget and enact its own, by the simple procedure of passing his appropriation bills and then amending them out of existence," since that would render the no-alteration clause of article VII, section 4 "a completely formal, ineffectual requirement," as well as contradict the very purpose of the executive budget process.[196] Similarly, the language of article VII, section 4, and the central concept of executive budgeting, preclude the Legislature from amending the words of appropriation, even if it leaves the dollar amounts untouched.[197] The authors of the no-alteration clause would not have used the cumbersome phrase, the Legislature "may not alter . . . except to strike out or reduce items" of the Governor's budget, if they had intended to say only that the Legislature "may not increase" the amount of appropriation.[198] Thus, the "may not alter" provision applies to language describing the purposes of, and conditions to, appropriations, as well as monetary amounts. Even counsel for the Assembly admitted at oral argument that if the Governor's bill included money for a prison, the Legislature "could not strike out the word 'prison,' and substitute the words 'football stadium.'"[199]

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[194] *Id.* at 895 (Peters, J., dissenting).

[195] Pataki v. N.Y. State Assembly, 824 N.E.2d 898 (N.Y. 2004). In *Pataki*, the Assembly pressed its argument that, by signing the legislative bills, the Governor was deprived of standing, and that the Governor's action was barred by the Speech or Debate Clause, of the Constitution, article III, section 11. The plurality ruled that since the Senate waived those defenses, the only relief sought was a declaratory judgment, and because the declaration would be the same regardless of whether the claims were dismissed against the Assembly, it was "unnecessary to decide the standing or Speech or Debate issue." *Id.* at 904. The concurrence and dissent did not specifically address the issue, but presumably agreed, since they both proceeded immediately to the merits.

[196] *Id.* at 905.

[197] *Id.*

[198] *Id.*

[199] *Id.*

The plurality doubted that it was possible to draw "a meaningful line between broad and narrow changes," of the gubernatorial appropriation language by the Legislature.[200] In any event, to permit the Legislature to rewrite the details of the Governor's budget would be inconsistent with the basic theory of the executive budget system, in which the Governor is the "constructor" and the Legislature is the "critic."[201] Where the Legislature disagrees with a spending proposal of the Governor, its remedy is to reduce or eliminate the spending, or refuse to act at all, and thereby force the Governor to negotiate.[202]

In *Pataki*, the plurality categorized the Legislatures' arguments as: (1) the Legislature may enact legislation that effectively amends the Governor's proposed appropriation legislation; and (2) the Governor's appropriation bills at issue contained a significant amount of non-appropriation matter, which was thus not protected by the no-alteration clause.[203]

With respect to the first issue, the analysis in *Silver* was generally applicable. The main difference between *Silver* and *Pataki* was that in the former, the Legislature passed the Governor's appropriation bills and then tried to alter them by amending other budget legislation, whereas in the latter the Legislature struck out items from the Governor's budget and then replaced them with single-purpose bills. Citing the ruling in *Tremaine II* that single-purpose items proposed by the Legislature must be "additions, not merely substitutions,"[204] the plurality stated that the "use of single-purpose bills is no different in principle from the use of other legislation to amend appropriation bills, and it is no less contrary to the idea of executive budgeting."[205]

The plurality acknowledged that there might be cases where it would be difficult to distinguish a single-purpose bill as an "addition to," rather than a "substitution for," a deleted item. Moreover, not every legislative bill that touches upon the same subject matter as an appropriation is unconstitutional. Nevertheless, the single-purpose legislation at issue, by the Legislature's own description of the bills, were clearly impermissible substitutions for items in the

[200] *Id*.
[201] *Id*. at 900 (quoting 2 RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, 1915, at 1586 (Unrevised ed., 1915)).
[202] *Id*. at 902.
[203] *Id*. at 905–06.
[204] *Id*. at 907 (quoting People v. Tremaine, 21 N.E.2d 891, 895 (N.Y. 1939)).
[205] *Id*. at 906–07.

Governor's proposed budget.[206]

Turning to the content of the Governor's appropriation bills, the plurality recognized the potential for abuse if a Governor inserted "legislation whose primary purpose and effect is not really budgetary" into appropriation bills, and then tried to invoke the no-alteration clause as a shield.[207] The plurality rejected the Governor's position that the only limitation on the content of his appropriation bills is the anti-rider clause of article VII, section 6, which states, in pertinent part: "No provision shall be embraced in any appropriation bill submitted by the governor . . . unless it relates specifically to some particular appropriation in the bill, and any such provision shall be limited in its operation to such appropriation."[208] The anti-rider clause, by itself, did not answer the question of what may properly be included in an appropriation bill, since "it is quite possible to write legislation that plainly does not belong in an appropriation bill, and yet 'relates specifically to' and is 'limited in its operation to,' an appropriation."[209] Three hypothetical situations were given that would appear to go beyond the legitimate purpose of an appropriation bill: (1) a Governor tries to raise the mandatory retirement age for firefighters by making the age a condition to appropriations to fire departments; (2) a Governor inserts into an appropriation for State construction projects a provision that the "scaffold law" (Labor Law section 240) would be inapplicable; and (3) a Governor inserts into an appropriation bill a provision that workers in certain State-financed activities are free to engage in conduct otherwise prohibited by the Penal Law.[210] Nevertheless, the plurality rejected the dissent's claim that "public policy matters" and "substantive or programmatic" legislation never belongs in an appropriation bill, since "[t]he line between 'policy' and 'appropriations' is not just thin, but essentially nonexistent," in that "every dollar the State spends is spent on substance, and the decision of how much to spend and for what purpose is a policy decision."[211] Even though there can be substantive legislation that does not contain appropriations, there is no such thing as a "non-substantive" or "non-policy" appropriation bill.[212] The "purest and simplest appropriation bill imaginable . . . [is] plainly the legislative

[206] *Id*. at 907.
[207] *Id*.
[208] *Id*. at 908 (quoting N.Y. CONST. art. VII, § 6).
[209] *Id*.
[210] *Id*. at 907.
[211] *Id*. at 908.
[212] *Id*.

embodiment of a substantive policy choice."[213]

After tracing the Court's prior decisions in *Tremaine I*, *Tremaine II*, and *Saxton*, which all indicated a judicial unwillingness to intrude upon the political process, the plurality further cautioned that while "political stalemate over a budget is an unattractive prospect . . . to invite the Governor and the Legislature to resolve their disputes in the courtroom might produce neither executive budgeting nor legislative budgeting but judicial budgeting—arguably the worst of the three."[214] A dispute might eventually come before the Court in which a Governor attempts to use appropriation bills for non-budgetary purposes, in which case the Court would have to decide whether to place limits on the Governor's actions or leave the matter to the political process; however, the appropriation bills at issue in the instant case presented no such problem, since they contained "true fiscal measures."[215]

As an example, the plurality cited the bill most vigorously assailed by the Legislature: the school funding proposal.[216] The purpose and effect of the appropriation was to determine how much State money goes to each school district, which is "almost as purely budgetary a question as can be imagined."[217] Although the bill contained a long narrative instead of an identification of recipients and dollar amounts, the narrative was merely a complex formula for distributing the money; there could be no constitutional objection to reciting a long formula, rather than writing the result of the formula (specifying the exact amount that would go to every named school district) into the legislation.[218] The fact that, historically, the details of school aid had not been the subject of appropriation bills was inconsequential; the Constitution does not mandate that "custom must be immutable," and budgets must be adjustable in accordance with the "changing needs of an increasingly complex society."[219] To the extent the dissent argued that the Governor's proposal altered existing statutory provisions for the distribution of school aid, there is no constitutional prohibition to an appropriation bill's temporarily superseding existing legislation,[220] and one of the

[213] *Id.*
[214] *Id.* at 910.
[215] *Id.* at 910–11.
[216] *Id.* at 911 (citing 2001 N.Y. Senate-Assembly Bill S905, A 1305).
[217] *Id.*
[218] *Id.*
[219] *Id.*
[220] The effect of appropriation bills is limited to two years. *See* N.Y. CONST. art. VII, § 7.

single-purpose bills the dissent would uphold was of the same nature.[221]

Agreeing with the result, two judges wrote a concurrence to delineate a test for determining "when an appropriation becomes unconstitutionally legislative."[222] The concurrence asserted that "anything that is more than incidentally legislative should not appear in an appropriation bill,"[223] as determined by such factors as the appropriation's effect on substantive law, its durational impact, and the history and custom of the budgetary process. The concurrence acknowledged that the test was "necessarily imperfect," but found it preferable to no standard at all.[224] The concurrence declared unequivocally that the plurality's three hypothetical gubernatorial actions would be unconstitutional.[225] The concurrence also would have found unconstitutional a Governor's proposed use of an appropriation bill to transfer the State Library and State Museum to the control of a newly created Office of Cultural Resources, but accepted the plurality's explanation that the Governor did not attempt a restructuring of State agencies, but merely appropriated money in anticipation of the Legislature's creating the new entity.[226]

The dissent would have found that the Governor had crossed the line between his budget-making responsibility and the Legislature's law-making authority. Conceding that the line between items of appropriation and items of proposed legislation is difficult to fix, the dissent chose to analyze the issue as "not what the Governor can do in an appropriation bill, but what the Legislature can do in response."[227] Essentially, the dissent concluded that the Governor "may propose what he likes" in appropriation bills, but the Legislature may alter anything other than a dollar amount and the "purpose" for the proposed expenditure in any way it sees fit, through separate legislation.[228] However, the dissent noted in passing that "[a]greement that only items of appropriation of money belong in an appropriation bill resolves little . . .once it is understood that an 'item' is itself a slippery thing."[229]

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[221] *Pataki*, 824 N.E.2d at 911–12.
[222] *Id.* at 914 (Rosenblatt, J., concurring).
[223] *Id.* (Rosenblatt, J., concurring).
[224] *Id.* at 915 (Rosenblatt, J., concurring).
[225] *Id.* at 914–15 (Rosenblatt, J., concurring).
[226] *Id.* (Rosenblatt, J., concurring).
[227] *Id.* at 920 (Kaye, C.J., dissenting).
[228] *Id.* at 921 (Kaye, C.J., dissenting).
[229] *Id.* at 921 n.7 (Kaye, C.J., dissenting).

The dissent also reached the issue of the Governor's line-item veto power,[230] raised in *Silver*.[231] In contrast to the powers the dissent would confer upon the Legislature in addressing executive budget bills, the dissent would restrict the Governor's line-item veto to striking "items" from appropriation bills containing several "items," but no other provisions or qualifications.[232]

III. CONCLUSION

As we have seen in the preceding sections, a two hundred year period of constitutional evolution, at times incremental at times revolutionary—has transformed the Governor of New York State from a mere nominal head of a weak branch of government into the supreme commander of a powerful executive branch and the chief legislator for all budget-related matters. The constitutional reformers of the late nineteenth and early twentieth centuries chose a novel method to curb legislative abuses, namely restructuring the legislative process to place the Governor at the beginning, by bill drafting for annual budgets, as well as retaining him at the end, relying upon his general and line item veto powers. These reformers' plan to make the Legislature fiscally responsible coincided with executive branch reorganization. Contrary to the publicly announced claims of the reformers, their scheme involved the reallocation of basic legislative budget powers to the Governor, who currently is accorded the pre-eminent role in the budget process. The Governor-as-legislator has extensive and unreviewable discretion to make policy decisions when drafting the annual budget and when exercising any vetoes. The Legislature, in stark contrast, is explicitly circumscribed in reacting to the policy embodied in the Executive Budget. Thus, the power of the purse, traditionally a legislative power, is no longer the plenary, or even the primary, domain of the Legislature, although enactment of the budget remains with the Legislature.

Even more striking than the metamorphosis of the Governor, however, is the fact that New York has maintained three peculiar aspects in its constitution: (1) one branch of government that is dominant over another; (2) powers traditionally thought to be legislative or executive in nature are freely allocated to other branches; and (3) a clear division of powers is not always observed.

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[230] *See* N.Y. CONST. art. IV, § 7.
[231] *Pataki*, 824 N.E.2d at 927–28 (Kaye, C.J., dissenting).
[232] *Id.* at 928 (Kaye, C.J., dissenting).

Prior to the advent of the Executive Budget, the Court of Appeals had elaborated a jurisprudence of deference to the Legislature's exercise of legislative power, on the theory that enactments by the Legislature are an expression of popular democratic power:

> The people are vested with the supreme and sovereign authority. The Constitution is the voice of the people speaking in their sovereign capacity. An act of the Legislature is the voice of the people speaking through their representatives. The authority of the representatives in the Legislature is a delegated authority and it is wholly derived from and dependent upon the Constitution.[233]

The presumption of legislative correctness required that the Court only disturb the "arbitrary use of alleged discretionary power as to be wholly invalid and void"[234] or legislative action which runs counter to the clear text or necessary and unavoidable implication of the Constitution.[235] On either ground of judicial nullification, the authority of the Court rests on protecting the people from the grossly illegitimate use of legislative power. The scope and reach of legislative power is "absolute and unlimited, except by the express restrictions of the fundamental law."[236]

The cumulative restrictions on the Legislature, when coupled with the invigoration of the Governor, have prompted the New York courts to accord the reconstituted Governor the same deferential review of the exercise of his legislative powers as formerly given the Legislature in its use of such powers. Of course, both the Governor and the legislators are elected by the people, and both branches are therefore representatives of the people. However, legislators have localized constituencies, while the Governor is a statewide representative. Viewed in that context, it is perhaps not so peculiar that the People of New York have adopted a constitution that makes the Governor the chief parliamentarian with respect to the crucial aspect of fiscal policy.

As discussed in Part II.C, *supra*, the New York courts have, to date, consistently rebuffed the Legislature's repeated attempts to reclaim certain traditionally legislative powers of the purse that the Constitution has reallocated to the Governor. In so doing, the courts have taken note of the fact that the Constitution places

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[233] *In re* Sherill v. O'Brien, 81 N.E. 124, 128 (N.Y. 1907) (finding statutory apportionment of senatorial districts unconstitutional under the 1894 Constitution).

[234] *Id*. at 126.

[235] Barto v. Himrod, 8 N.Y. 483, 485 (1853).

[236] Bank of Chenango v. Brown, 26 N.Y. 467, 469 (1863).

substantive limits on the Legislature in budgetary matters, and the Governor's fiscal legislative powers include the ability to dominate substantive lawmaking if germane to State spending.

Of even greater import is the Judiciary's declaration that, to the extent there might exist areas of dispute between the Governor-as-legislator and the Legislature, those may be classified as essentially political and non-justiciable. That is possibly the most salient point of this story of constitutional amendment. Staying the course of executive reorganization, fiscal rationality and restoring the Legislature to its core power of finally deciding public policy (instead of providing leadership), New York's judicial branch has managed to cross a bridge from the nineteenth to the twenty-first century by adhering to the constitutional text, without becoming "activist." In its consistent interpretations of the unprecedented emergence of Governor-as-legislator, the Court has relied on the authority of popular sovereignty as expressed through New York's Constitution. While committed to generic principles of separation of powers and a presumption of legislative discretion, the Court has nonetheless applied the logic of institutional reform to enable the emergence of a Chief Executive as leader, still subject to checks and balances, albeit now diminished, of the Legislature, through veto override and impeachment. This has been done on the basis of an unimpeachably democratic and republican principle, namely that the sovereign people can choose to distribute power to whichever branch of government they decide has the competence to responsibly handle it. The branch chosen to exercise such power should be able to do so with sufficient discretion to permit effective use of such power, and generic theories of government will not restrict the people's desire to obtain competent, responsible and effective government.

Although this article's review has reached its ending, the story of the budgetary powers of the Governor is still being written. As described in one legal periodical, "[n]o case in recent decades has as much potential to shake up the Capitol as Pataki v. Assembly and Silver v. Pataki."[237] It is still open to debate whether the people of New York have allocated powers in a manner best suited to the changing needs of the State, as it proceeds into the 21st century. What is fairly certain is that the current Constitution will not be the last one, and however the people modify that document, it will be a unique distribution of powers, and the Governor and

[237] John Caher, *The Top Cases of 2004*, N.Y.L.J., Feb. 28, 2005, at 1.

Legislature will continue to test the limits of their powers.