THE JUDGES V. THE STATE: OBTAINING ADEQUATE JUDICIAL COMPENSATION AND NEW YORK'S CURRENT CONSTITUTIONAL CRISIS

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I. INTRODUCTION

Though the problem of obtaining secure and adequate compensation for judges, rightly deemed indispensable to maintaining an independent and qualified judiciary, has plagued our constitutional system since its inception,[1] the issue in New York has now reached the level of a "constitutional crisis."[2] In this year and the last, three separate lawsuits have been commenced in New York State Supreme Court by New York judges, including one brought by Chief Judge Judith S. Kaye on behalf of the judges and New York's Unified Court System, against the coordinate branches of government and their leaders, regarding the constitutionality of the near decade-long failure to provide judicial pay increases.[3] The actions present important yet novel New York State constitutional questions regarding separation of powers and judicial compensation, and the controversy in general has the potential to leave deleterious, lasting effects on New York's government and

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[1] *See* Luke Bierman, *Beyond Merit Selection*, 29 FORDHAM URB. L.J. 851, 851 (2002) (noting that "[a]uthority, selection, tenure and compensation are thus the bellwethers for assessing judicial independence").

[2] *See* Judith S. Kaye, Chief Judge, New York State Court of Appeals, Statement of the Chief Judge of the State of New York (Apr. 9, 2007), at 3–4 [hereinafter Kaye, Statement of the Chief Judge], http://courts.state.ny.us/press/JSKJudicialSalaryStatementApr9.pdf (noting that "[t]he only thing we can do is to search for a course of action that will achieve our objective while avoiding a constitutional crisis").

[3] Joel Stashenko & Daniel Wise, *Kaye Sues State Over Judicial Salaries*, N.Y.L.J., Apr. 11, 2008, at 1.

citizenry.[4]

New York's constitutional history contains scant legislative or decisional guidance on either the Constitution's judicial compensation clause or the separation of powers doctrine as it relates to judicial compensation.[5] Yet considering what can be gleaned from state constitutional developments since the founding, the Federal Constitution and its origins, and what few cases do exist, the article reaches two primary conclusions. First, it concludes that the plaintiffs in the several judicial compensation suits have not made out a violation of the New York State Constitution's article VI, section 25 no-diminution clause.[6] Furthermore, the article concludes, reluctantly, that absent a demonstration of an actual usurpation of judicial prerogative or a purposeful or punitive attack on the judiciary's independence of will and function in fulfillment of its constitutional duties, there is likewise no cognizable separation of powers violation.[7]

Part II examines the background of New York's current judicial pay crisis and provides comparative information regarding New York's judicial salaries. Part III reviews the three cases currently winding their way through New York's court system, the arguments of the parties, and the decisions thus far. Part IV studies the issue of judicial compensation in New York's constitutional history, and concludes, as have the courts, that legislative inaction in this instance does not constitute a violation. Part V does the same regarding separation of powers in New York's government, and concludes that it is unlikely the plaintiff judges will be able to demonstrate a violation based upon the facts as alleged. While the no-diminution clause and the doctrine of separation of powers as it relates to judicial compensation do not lend themselves to perfectly neat partition, the article treats them as separately as possible for analytical purposes. Part VI briefly discusses the question of what remedy—save for a declaration of unconstitutionality—could be ordered by the courts in a case such as this, without the remedy itself being a separation of powers violation.

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[4] *See* Brendan Scott, *Bench $upport Lacking—Little Sympathy for Judges' Pay Woes: Poll*, N.Y. POST, May 20, 2008, at 26. In a May 2008 poll conducted by Siena College, it was revealed that thirty-nine percent of those surveyed supported raises for judges while fifty-five percent opposed them. *Id.* The greatest harm of this situation is that the citizenry is placed opposite the judiciary, which has led to ill-conceived and undue resentment.

[5] *See infra* Parts IV, V.

[6] *See infra* Part IV.

[7] *See infra* Part V.

II. PRELUDE TO A CRISIS

Judges in New York State have not received a pay raise in nearly a decade, the most recent taking effect in 1999.[8] Of all the states, the compensation of New York's judges ranks forty-eighth when adjusted for cost of living, and no other judges have gone longer without a pay adjustment.[9] Since the most recent pay increase, the real "purchasing power" value of these salaries has declined by approximately twenty-seven percent due to inflation.[10]

This situation has resulted in a severely demoralizing environment for New York's judicial officers, with a corresponding risk of losing judicial talent and experience to employment arenas such as academia and the private sector.[11] A 2007 study of the National Center for State Courts on the issue of judicial compensation, described more fully hereafter, contains numerous quotations from New York's judges, provided anonymously, regarding the ongoing pay struggle. One judge commented, "I have taught at a Law School for eleven years and have had many publications including several decisions accepted by the state reporter. For how many years will my brightest students continue to secure employment with a starting salary higher than mine?"[12] Another remarked, "I've thought about retiring and going back to the practice of law, and quite honestly, if the raises aren't forthcoming I will have no alternative. I cannot fathom telling my daughters that their father can't pay for their wedding because 'I'm just a Supreme Court Justice.'"[13]

The issue of funding for the judiciary has not reached this level of crisis in New York since 1991, when then-Chief Judge Sol Wachtler and Governor Mario Cuomo came to blows in a similarly epic legal battle.[14] The Chief Judge protested both that Governor Cuomo had

[8] 1998 N.Y. Laws 3614 (providing for a 21% increase for all judges).

[9] DAVID B. ROTTMAN, ET AL., NAT'L CTR. FOR STATE COURTS, JUDICIAL COMPENSATION IN NEW YORK: A NATIONAL PERSPECTIVE 9 (2007) [hereinafter NCSC REPORT], *available at* http://courts.state.ny.us/publications/pdfs/NCSCJudicialCompReport.pdf; Complaint at 2, Kaye v. Silver, No. 400763-2008 (N.Y. Sup. Ct. Apr. 10, 2008), *available at* http://www.courts.state.ny.us/Whatsnew/pdf/JudicialCompensationlawsuit.pdf.

[10] *See* Stashenko & Wise, *supra* note 3.

[11] *See* Complaint, *supra* note 9, at 3.

[12] NCSC REPORT, *supra* note 9, at 13 (emphasis omitted).

[13] *Id.* (emphasis omitted).

[14] *See* Joel Stashenko, *Judiciary's 1992 Lawsuit Recalled as 'Painful Episode:' But Wachtler Says Courts Emerged in 'Good Shape'*, N.Y.L.J., Apr. 17, 2007, at 1 [hereinafter Stashenko, *N.Y. Judiciary's 1992 Lawsuit Recalled*]; *see also*, Matthew T. Crosson, Letter to the Editor, *New York Constitution Protects Courts From Governor's Cuts*, N.Y. TIMES, Apr. 29,

reneged on promises to fund new judgeships, and that he had cut $77 million of the $966 million requested by Wachtler for the 1991–1992 judiciary budget.[15] Declaring no other options, Wachtler sued Cuomo in *Wachtler v. Cuomo*, alleging violation of the separation of powers doctrine; in turn, the Governor sued the Chief Judge in federal court, in *Cuomo v. Wachtler*.[16] At the height of the calamity, the parties were able to settle the matter, and the cut funding was restored almost entirely.[17] It has been remarked that the episode was, "according to those who were involved, among the most disagreeable experiences of their lives."[18]

Since 2003, the New York State Judiciary has asked each session of the Legislature to increase judicial salaries, but nothing has been done.[19] Governors George Pataki, Eliot Spitzer, and David Paterson all have expressed support for the raises.[20] Yet the Legislature has refused to enact an increase in judicial salaries unless it is linked to an increase in its own members' pay.[21]

In the 2007 legislative session, Governor Spitzer proposed judicial pay increases unconnected to any legislative pay increases, but this measure was met with criticism.[22] The Senate twice passed bills providing for an increase in judicial salary, to put it on parity with the federal bench, but the Assembly failed to pass its companion measure, and the entire package of legislation went down in defeat.[23] The 2006–2007 State budget even contained a $69.5 million appropriation for increases in judicial salary, but as the salaries must be set by law, and as the Legislature and the Governor could not agree on enabling legislation, the so-called dry appropriation could not be used.[24]

1991, at A16.

[15] Stashenko, *Judiciary's 1992 Lawsuit Recalled*, *supra* note 14.

[16] *Id.*

[17] *Id.*; Kevin Sack, *Cuomo and Chief Judge Settle Court Budget Fight*, N.Y. TIMES, January 17, 1992, at B4.

[18] Stashenko, *N.Y. Judiciary's 1992 Lawsuit Recalled*, *supra* note 14.

[19] *See* NCSC REPORT, *supra* note 9, at 7–8.

[20] *See id.* at 7–8; John Eligon, *A Justice Orders a Pay Raise for New York's Judges,* N.Y. TIMES, June 12, 2008, at B2; Daniel Wise, *Governor, Legislative Ordered to Raise Pay of State's Judges*, N.Y.L.J., June 12, 2008, at 1.

[21] *See* NCSC REPORT, *supra* note 9, at 7–8.

[22] Danny Hakim, *Spitzer Seeks Raise for Judges, Not Legislators*, N.Y. TIMES, Apr. 27, 2007, at B2.

[23] *See* S. 5313, 2007–2008 Reg. Sess. (N.Y. 2007); S. 6550, 2007–2008 Reg. Sess. (N.Y. 2007); Assem. 7913, 2007–2008 Reg. Sess. (N.Y. 2007).

[24] *See* N.Y. Session Law Ch. 51, § 2 (2006), at 145 (not reproduced on page), *available at* http://public.leginfo.state.ny.us.bstfrmef.cgi.

Following approval of the state budget in 2007, Chief Judge Judith S. Kaye issued a public statement at the Court of Appeals, addressing the failure of the coordinate branches to approve the raises.[25] Expressing regret at the current state of affairs, Chief Judge Kaye announced a five-point plan designed to bring about the passage of judicial salary increases.[26] The plan provided: (1) the Chief Judge would request the opportunity to speak directly to the members of the Legislature on the subject; (2) Chief Judge Kaye would invite the governor and legislative leaders to the Court of Appeals, or she would go to the Capitol, to discuss the pay crisis; (3) New York's 2007 Law Day ceremonies would be devoted to the subject of judicial independence and how it relates to compensation; (4) a request to the National Center for State Courts to conduct an independent and comparative assessment on the effect of the lapse in salary increase; and (5) the Judiciary would seek an advisory opinion from the attorney general and state comptroller on the feasibility of unilateral branch action.[27] The NCSC report was subsequently published in May of 2007, and described glaring discrepancies between the judicial pay in New York and elsewhere, as well as a picture of a profoundly disheartened state judiciary.[28]

On the subject of a possible lawsuit, the Chief Judge commented at the time:

> [T]here are those who urge me, as Chief Judge, immediately to bring a lawsuit against the Legislative and Executive branches. Such a step cannot be taken lightly. To my mind, bringing such a lawsuit at this moment would be ill-conceived and counterproductive, as it would impede necessary inter-governmental dealings, paralyze and distract us in executing our constitutional mission, and expose us to extended adversarial proceedings, all of this with no guarantee of achieving our goal.[29]

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[25] *Chief Judge Announces Five-Point Plan to Address Judicial Pay Crisis*, 3 UCS BENCHMARKS 1 (Spring 2007) [hereinafter *Chief Judge Announces Five-Point Plan*], *available at* http://www.courts.state.ny.us/publications/benchmarks/issue6/UCSBenchmarksSpring2007.pdf; Kaye, Statement of the Chief Judge, *supra* note 2, at 1.

[26] *Chief Judge Announces Five-Point Plan*, *supra* note 20, at 1.

[27] *Id.*

[28] NCSC REPORT, *supra* note 9, at 9, 13–16.

[29] Kaye, Statement of the Chief Judge, *supra* note 2, at 5–6 ("While bringing a lawsuit against the other branches is the last step that I would choose to take, I recognize that, if there is no action on judicial salaries before the Legislature adjourns in June, the only remaining course of action available to us may well be to institute litigation with the full

Not content with the meanderings of the political process, Nassau County District Court Judge Edward A. Maron, together with Supreme Court Justices Arthur Schack of the Second Judicial District and Joseph A. DeMaro of the Tenth Judicial District, commenced an action in 2007 against various governmental entities and actors in *Maron v. Silver*.[30] The cases mentioned in this section are discussed more fully in a subsequent section. Thereafter, Manhattan Family Court Judge Susan Larabee, Cattaraugus County Family Court Judge Michael Nenno, Brooklyn Criminal Court Judge Patricia Nunez, and Manhattan Civil Court Judge Geoffrey Wright, brought a separate suit, alleging similar constitutional violations.[31] Both suits have pending appeals in various departments of the Appellate Division.[32]

To add an additional wrinkle, several state supreme court justices began to recuse themselves from cases involving members of the Legislature and their firms, giving as a reason the pendency of the several lawsuits over judicial compensation.[33]

The practice became pervasive and pernicious enough to cause New York's Chief Administrative Judge Jonathan Lippman to seek an opinion from the court system's Advisory Committee on Judicial Ethics regarding the propriety of these recusals.[34]

The Committee issued Opinion 07-25, which concluded that judges should not, absent additional material conflicts, recuse themselves from such cases.[35]

On April 24, 2008, the Committee issued another opinion cautioning judges not to recuse themselves.[36]

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weight of the State Judiciary behind it. That truly would be a sad day for us, for State government and for the people of New York.").

[30] Maron v. Silver, No. 4108-07, 2007 N.Y. Misc. LEXIS 8086, at *1 (N.Y. Sup. Ct. Nov. 30, 2007); Joel Stashenko, *Pay Raise Not Mandated by Inflation, State Argues*, N.Y.L.J., Sept. 4, 2008, at 1 [hereinafter Stashenko, *Pay Raises Not Mandated*].

[31] Larabee v. Spitzer, 850 N.Y.S.2d 885, 885–87 (Sup. Ct. 2008); Stashenko, *Pay Raises Not Mandated*, *supra* note 30.

[32] Stashenko, *Pay Raises Not Mandated*, *supra* note 30.

[33] *See, e.g.*, *Washington Mutual Bank v. 334 Marcus Garvey Boulevard Corporation*, No. 3775/08, 2008 WL 624907, at *1–2 (N.Y. Sup. Ct. Mar. 10, 2008); *Suntrust Mortgage, Inc. v. Donald R.H. Byrd*, No. 2716007, 2008 WL 351003, at *1 (N.Y. Sup. Ct. Feb. 8, 2008).

[34] *See* Daniel Wise, *Judges Advised Not to Link Recusals to Pay Dispute*, N.Y.L.J., Mar. 9, 2007, at 1.

[35] *See* New York Advisory Committee on Judicial Ethics, Opinion No. 07–25, (2007), *available at* http://www.courts.state.ny.us/ip/judicialethics/opinions/07–25.htm.

[36] *See* New York Advisory Committee on Judicial Ethics, Joint Opinion No. 08–76, 08–84, 08–88, and 08–89, (2008), *available at* http://www.courts.state.ny.us/ip/judicialethics/opinions/08–76_08–84_08–88_08–89.htm.

At his first news conference after becoming New York's chief executive, Governor David Paterson said on the issue of judicial raises that given the state of the economy, it would be "very difficult to move on any type of enhancements at this particular time."[37] Governor Paterson acknowledged that judicial and legislative salaries are "obviously" connected, and that he would eventually like to break the linkage.[38]

Following passage of the 2007–2008 State budget without judicial pay raises,[39] Chief Judge Kaye brought her own suit, on behalf of the New York State Judiciary, naming as defendants Assembly Speaker Sheldon Silver, the State Assembly, Senate Majority Leader Joseph Bruno, the State Senate, Governor David Paterson, and the State of New York.[40] In a message from the Chief Judge and Chief Administrative Judge Ann Pfau to New York's judges, the chief judges called the action "'regrettable,'" but explained, "'[a]t this point, we are left with no choice but to take legal action to address this intolerable situation.'"[41]

III. A TRILOGY OF CONSTITUTIONAL CASES

The first of the judicial compensation cases, *Maron v. Silver*, involves a combined article 78 proceeding and declaratory judgment action brought "to test the constitutional adequacy of judicial compensation for the judges of the Unified Court System" and to compel the State Comptroller to disburse the $69.5 million appropriated in the 2006–2007 state budget for judicial salary increases.[42] The gravamen of the plaintiffs' action is that the Legislature's failure to provide for judicial salary increases constitutes a violation of the no-diminution clause and separation of powers doctrine of the New York State Constitution.[43]

On a motion to dismiss, Justice Thomas A. McNamara, sitting in Albany County, first denied the request for mandamus, holding that

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[37] *See* Joel Stashenko, *Citing Economy, Paterson Says Raise for Judges 'Very Difficult'*, N.Y.L.J., Mar. 14, 2008, at 1 [hereinafter Stashenko, *Citing Economy*].

[38] *Id.*

[39] *See* Joel Stashenko, *Raise Again Out of Budget; Kaye Talks of April Lawsuit*, N.Y.L.J., Apr. 1, 2008, at 1 [hereinafter Stashenko, *Raise Again Out of Budget*].

[40] Stashenko & Wise, *supra* note 3; James M. Odato, *Judge Sues for Pay Raises*, ALB. TIMES UNION, Apr. 11, 2008, at A1.

[41] Stashenko & Wise, *supra* note 3.

[42] Maron v. Silver, No. 4108-07, 2007 N.Y. Misc. LEXIS 8086, at *1 (N.Y. Sup. Ct. Nov. 30, 2007).

[43] *See id.* at *10–11.

because the state constitution requires judicial salary "'be established by law,'" the action of the State Comptroller in releasing the funds would not be "a purely ministerial act where there is a clear legal right to the relief sought."[44]

Regarding the no-diminution cause of action, the court ruled that the clause in question does not protect the absolute value of judicial compensation, as against ordinary inflation, and as such, dismissed the claim that the legislature's inaction was a violation of that provision.[45] On the claim of a violation of separation of powers and attack on the independence of the Judiciary, the court determined that an issue of fact existed as to this constitutional question, and refused to dismiss the cause of action.[46]

In so holding, however, Justice McNamara cautioned:

> Plaintiffs also allege that the Legislature has failed to maintain judicial salaries apace with inflation due, in part, to displeasure with certain court decisions. Cases mentioned by [the] plaintiffs include ones involving the Governor's power vis-a-vis that of the Legislature in the budget process; capital punishment; school funding; and a case involving the election of a state senator.
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> Given that legislators and senior Executive branch officials have also been denied raises, plaintiffs face a difficult task in establishing that the failure to provide salary increases is designed to influence the Judiciary. Even showing that political branch benign neglect is destructive of judicial independence presents a difficult task. Nonetheless, the issues are sufficiently raised in the amended petition (*CPLR 3013*) and as the issues cannot be resolved based on the submissions, a trial with respect to those questions must be held.[47]

The second case of the trilogy, *Larabee v. Spitzer*,[48] was brought in Supreme Court in New York County, likewise seeking a judgment declaring that the failure of the Legislature to provide for judicial pay increases violated the constitution's no-diminution

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[44] *See id.* at *3–6 (quoting N.Y. CONST. art. VI, § 25).

[45] *See id.* at *17, *20, *23–24.

[46] *See id.* at *20–21.

[47] *Id.* The court also dismissed a cause of action sounding in equal protection. *See id.* at *21–22. The ruling is currently on appeal to the Third Department. Noeleen G. Walder, *Stay Remains in Judges' Pay Lawsuit, Panel Rules*, N.Y.L.J., Aug. 29, 2008 at 1.

[48] 850 N.Y.S.2d 885 (Sup. Ct. 2008).

clause and separation of powers protections.[49] Although the complaint initially contained a request to impound the $69.5 million previously appropriated by the Legislature, that request was later withdrawn by the plaintiffs.[50]

On the CPLR 3211 motion in *Larabee*, Justice Edward H. Lehner dismissed the no-diminution claim, but held otherwise in the cause of action based upon a separation of powers violation, noting that an issue of fact did exist regarding the pay linkage and its constitutionality.[51]

In dealing with the no-diminution claim, Justice Lehner cited both the federal case law on the subject and Hamilton's comment in Federalist No. 79,[52] and noted,

> Since clearly the impact of inflation affects all, the decrease in the economic value of the salaries paid to judges over the past nine years has not had a particularized discriminatory impact on judges different from that upon any other person who did not receive a salary increase during that period, and thus, under the principles set forth in *Hatter*, it is declared that allegations that assert only a failure to increase salaries for nine years do not state a viable claim for a violation of the no-diminution clause.[53]

Regarding the separation of powers issue, the court cited *People ex. rel. Burby v. Howland*,[54] discussed below, as well as Federalist No. 78,[55] and decided that a trial was required, explaining:

> [I]t appears that the failure of the legislature to provide the judiciary with the undisputed compensation adjustment comes down in the end to the fact that the Governor and the Senate are embroiled in a political dispute as to the proper means of reforming the State's laws with respect to campaign financing. . . . However, the controversy in no way affects the judiciary, which has been caught in the crossfire between the executive and the legislature, and which has no seat at the bargaining table to in any manner affect or resolve that controversy. While clearly the legislative process involves tradeoffs and compromises on a myriad of

[49] *Id.* at 886–87.
[50] *Id.* at 887.
[51] *Id.* at 891–93.
[52] *Id.*
[53] *Id.* at 893 (emphasis added).
[54] 49 N.E. 775 (N.Y. 1898).
[55] *Larabee*, 850 N.Y.S.2d at 889–91.

> political issues, to continue to deprive the third, supposedly co-equal, branch of government with a pay adjustment, on which there is no policy dispute, for nearly a decade does raise an issue as to whether the two other branches have abused their power, and thus unconstitutionally interfered with the independence of the judiciary.[56]

Yet on a motion for summary judgment decided June 11, 2008, Justice Lehner found that the linkage did in fact exist, based largely upon the failure of any party to deny it, and that the failure to increase judicial compensation based upon that linkage constitutes a violation of the separation of powers doctrine.[57] The court granted the motion for a declaratory judgment of unconstitutionality, and further directed the governor and the Legislature to act within ninety days of the decision to "remedy such abuse by proceeding in good faith to adjust the compensation payable to members of the judiciary to reflect the increase in the cost of living since such pay was last adjusted in 1998." [58]

The third case in the trilogy, brought by Chief Judge Judith S. Kaye herself, on behalf of the Unified Court System and New York's judges, was filed in New York County Supreme Court in April, 2008.[59] The suit contains allegations similar to those in the foregoing suits, with the exception that the Chief Judge's claim of a violation of the no-diminution clause includes the additional element of discriminatory treatment; specifically, the suit alleges, that while these branches have regularly approved salary increases for virtually all other state employees—approximately 195,000 employees—to account for inflation, they have refused to adjust judicial salaries.[60] The case is currently in the motion stage of proceedings.

Having examined the background of New York's present judicial pay crisis and the judicial compensation cases currently in the courts, the article turns to consideration of each novel New York State constitutional claim.

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[56] *Id.* at 890.

[57] *See* Daniel Wise, *Governor, Legislature Ordered to Raise Pay of State's Judges*, N.Y.L.J., June 12, 2008, at 1.

[58] *Larabee*, 860 N.Y.S.2d at 894.

[59] Complaint for the Plaintiff at 1, *Kaye v. Silver*, No. 400763/08 (N.Y. Sup. Ct. N.Y. County Apr. 10, 2008).

[60] *See id.* at 20.

IV. THE NO-DIMINUTION CLAUSE

Although the Federal Constitution has contained a specific No-diminution Clause in Article III, Section 1, since it was first drafted, New York's Constitution did not contain a similar provision until the Constitution of 1846.[61] Since the Constitution of 1846, there has been only one reported decision dealing with the state constitution's clause,[62] although the U.S. Supreme Court has several times spoken on the subject.[63] However, New York's constitutional history, the federal clause and its origins, and New York and federal case law, all counsel that the clause was not intended to protect the absolute value of judicial salaries as against ordinary inflation in the face of non-discriminatory legislative inaction.[64]

A. History

In New York's colonial days, judges were appointed by the King or the colonial governor, and were generally paid and retained at their leisure.[65] It did not take long for the colonists to grow weary of this arrangement; as the King was a frequent participant in litigation in colonial courts, judges dependent solely on him for their continued employment or salary were feared to be less than impartial in such matters.[66]

The drafters of New York's First Constitution of 1777 thus had the importance of judicial independence squarely in mind. Neither

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[61] *See* N.Y. CONST. of 1846, art. VI, § 7, *reprinted in* 1 CHARLES Z. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK 251 (1906).

[62] *See* Black v. Graves, 12 N.Y.S.2d 785 (App. Div. 1939).

[63] *See, e.g.*, United States v. Hatter, 532 U.S. 557, 561 (2001); United States v. Will, 449 U.S. 200, 202 (1980); O'Malley v. Woodrough, 307 U.S. 277, 281–82 (1939).

[64] *See infra* Part IV.D.

[65] *See* ALFRED B. STREET, THE COUNCIL OF REVISION OF THE STATE OF NEW YORK 33 (1859) ("In 1774, the salary of Chief Justice Horsmanden was five hundred pounds sterling, paid by the Crown, and three hundred pounds New York currency, paid by the Province. That of the puisne judges, Robert R. Livingston, George D. Ludlow and Thomas Jones, was each two hundred pounds New York currency, paid by the Province. . . . The Chief Justices who succeeded Attwood (with the exception of De Lancey) received their appointment from the Crown, as did the Attorney-General, and all held during pleasure.").

[66] *An Elective Judiciary*, N.Y. TIMES, Nov. 20, 1858, at 4 ("[T]he reason why it was considered a great grievance that the Judges should be thus dependent on the King was that the King was frequently a plaintiff in the courts, in criminal and other prosecutions and trials, and it was feared that the Judges would thus override the constitution and the laws in their desire to please him. It was not because he was a King simply, but because he was frequently a party in causes.").

was it lost on the founders that judicial independence turned in large part upon the availability of secure and adequate judicial compensation. Indeed, the First Constitution, in the course of reciting the U.S. Declaration of Independence in full, echoed Thomas Jefferson's complaint of King George III that, "[h]e has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries."[67]

It is peculiar, then, that the First Constitution of 1777 makes no mention whatsoever of the subject of judicial salaries,[68] in stark contrast to its federal counterpart of a decade later, which ensured that judges of the Supreme and inferior courts would, "at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."[69]

The New York Legislature did provide for salaries of the higher judicial officers in 1778, shortly after the adoption of the First Constitution.[70] Yet correspondence from John Jay, one of the document's principal drafters, to George Clinton, who was then serving as New York's first governor, serves as notice that adequate judicial pay was a problem even in these early years:

> Mr. Benson writes me that your judges are industriously serving their country, but that their country has not as yet made an adequate provision for them. This is bad policy, and poverty cannot excuse it. The Bench is at present well filled, but it should be remembered that altho' we are told that justice should be blind, there are no proverbs which declare that she ought also to be hungry . . . .[71]

Neither did New York's Second Constitution of 1821 contain any express provision on the subject of judicial compensation.[72] Not until the Third Constitution of 1846 was a clause inserted to make certain that, "[t]he judges of the court of appeals and justices of the supreme court shall severally receive, at stated times, for their services, a compensation, to be established by law, which shall not

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[67] N.Y. CONST. of 1777, *reprinted in* THE CONSTITUTION OF THE STATE OF NEW YORK WITH NOTES, REFERENCES AND ANNOTATIONS 45 (Robert C. Cumming, Owen L. Potter & Frank B. Gilbert eds., 2d ed. 1899) [hereinafter CONSTITUTION OF NEW YORK ANNOTATED].

[68] *See id.*

[69] U.S. CONST. art. III, § 1.

[70] Act of Apr. 4, 1778, ch. 35, 1778 N.Y. Laws 75.

[71] Letter from John Jay to Governor George Clinton (Feb. 23, 1782), *available at* http://wwwapp.cc.columbia.edu/ldpd/app/jay/image?key=columbia.jay.07625&p=1. The papers of John Jay are collected online at the Columbia University Libraries.

[72] *See* N.Y. CONST. of 1821, *reprinted in* 1 LINCOLN, *supra* note 61, at 192–221.

be increased or diminished during their continuance in office."[73]

Interestingly, the clause was a matter of considerable debate in New York's 1846 Convention, with the delegates believing, contrary to the federal drafters, that a no-increase clause was necessary as well. Mr. Hoffman, a delegate to the convention, proclaimed:

> The question was how could we make judges independent of the legislature. We should see to it that the legislature should not increase the pay of the judge. If they could, they could pension him—they might reward him for his decisions, or punish him for his decisions, by refusing to reward him. They ought not to have the power to reduce or increase the pay of a judge.[74]

After debate on the matter, Mr. Cook proposed that the clause should provide "that the salary of no judge of the supreme court or court of appeals shall be increased or diminished during his continuance in office."[75] The proposal was voted in the affirmative.[76]

Both the "established by law" and the "no-diminution" clauses have traveled tortuous paths in New York's constitutional history. The term "established by law" was deleted by an amendment approved by the voters in 1909, which made judicial salary a specific numerical constitutional provision,[77] but was reinstated by amendments suggested at the Judiciary Convention of 1921,[78] and adopted by the voters in 1925.[79] The "no-diminution" provision, as noted, initially read, "shall not be increased or diminished."[80] The Amendment to the Judiciary Article drafted in the Constitutional Convention of 1867–1869 removed the phrase "increased or";[81] the

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[73] N.Y. CONST. of 1846, art. VI, § 7, *reprinted in* 1 LINCOLN, *supra* note 61, at 251.

[74] *See* REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK 778 (1846) [hereinafter DEBATES OF CONSTITUTIONAL CONVENTION OF 1846]. ("A man who would not go on the bench from any other motive than pay, was unfit to be there. So was the man who would go there without adequate pay. They must have bread, a shirt and lodgings. If you did not give it to them by law, they would have it, he would not say how. But they would have it.")

[75] *Id.* at 778–79.

[76] *Id.* at 779.

[77] *Adds $4,000 to Pay of City Justices*, N.Y. TIMES, Nov. 20, 1909, at 1 [hereinafter *Pay of City Justices*].

[78] PROCEEDINGS OF THE JUDICIARY CONSTITUTIONAL CONVENTION OF 1921, *reprinted in* PROBLEMS RELATING TO JUDICIAL ADMINISTRATION AND ORGANIZATION 458, 592–96 (1938) [hereinafter JUDICIAL ADMINISTRATION].

[79] *Amendments Ahead*, N.Y. TIMES, Nov. 4, 1925, at 1.

[80] N.Y. CONST. of 1846, art. VI, § 7, *reprinted in* 1 LINCOLN, *supra* note 61, at 251.

[81] *See* JOURNAL OF THE CONVENTION OF THE STATE OF NEW YORK 803–04 (1867).

1894 Constitutional Convention restored the language of the 1846 Constitution;[82] the 1909 amendment deleted the sentence entirely, as it fixed the number in the document;[83] and the 1925 amendment reinstated the phrase as it appears today.[84]

At present, article VI, section 25 provides for the compensation of the judges of the Court of Appeals, state supreme court, court of claims, county courts, surrogate's courts, family courts, New York city courts, district courts, as well as retired judges, "shall be established by law and shall not be diminished during the term of office for which he or she was elected or appointed."[85]

Because the gravamen of the causes in the judicial compensation cases is that the legislature has not acted to increase salaries, there is no issue regarding whether the legislature has affirmatively diminished judicial compensation. Rather, the core question is whether the no-diminution clause was intended to protect not only the nominal, but also the absolute value of a judge's salary; in other words, whether inflation coupled with legislative inaction makes a cognizable violation of the clause. As there is little constitutional legislative guidance on the state no-diminution clause, it is helpful to look to the federal counterpart to determine whether that clause was intended, as drafted, to account for the effects of inflation.

B. Legislative Intent

The drafters of the Federal Constitution were likewise profoundly aware that the concepts of judicial independence and compensation were inextricably intertwined. Indeed, the question of compensation was raised regarding both the judges and the newly created executive.[86] In the Federalist No. 79, Alexander Hamilton,

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[82] *See* JOURNAL OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 628–33, 650–54 (1894).

[83] *Pay of City Justices*, *supra* note 77.

[84] PROCEEDINGS OF THE JUDICIARY CONSTITUTIONAL CONVENTION OF 1921, *reprinted in* JUDICIAL ADMINISTRATION, *supra* note 78, at 592–96.

[85] N.Y. CONST. art VI, §25.

[86] Akhil Read Amar, a leading Constitutional authority, has commented that the no-diminution clause was specifically intended to protect judges from the effects of inflation:

> Th[e] rigid Article II system risked unfairness if prices jumped unexpectedly within a single term, but every four years, corrections could be made. Article III required a different approach. . . . To do justice to the men charged with doing justice, Congress needed authority to increase judicial salaries whenever unforeseeable inflation arose.

AKHIL READ AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 220–21 (2005).

> Prices had indeed fluctuated wildly in many states during and immediately after the Revolution, and the Philadelphia framers were acutely aware of the inflation issue as they crafted the salary rules of Articles I, II, and III. On several occasions, Madison

New York's only remaining delegate to the meeting at Independence Hall, remarked:

> Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. The remark made in relation to the president, is equally applicable here. In the general course of human nature, *a power over a man's subsistence amounts to a power over his will*.[87]

The drafters were also cognizant of the existence and effects of inflation, and a review of constitutional history reveals that the decision to place control over judicial compensation in the hands of the legislature, subject to its good faith, was a carefully considered decision. For one, the notion of placing a set numerical figure for compensation in the constitution itself was unworkable, due to the difficulties associated with the amendment process. In the Federalist No. 79, Hamilton notes that, in the alternative, "[s]ome of [the state constitutions] indeed have declared that *permanent* salaries should be established for the judges; but the experiment has in some instances shewn that such expressions are not sufficiently definite to preclude legislative evasions. Something still more positive and unequivocal has been evinced to be requisite."[88] He explains that the Federal charter therefore provides that judges will receive compensation "at *stated times*" which compensation "shall not be *diminished* during their continuance in office."[89]

The initial proposal at the federal convention called for judges "to receive fixed salaries," in which "no increase or diminution shall be made . . . so as to affect the persons at the time in office."[90] Gouverneur Morris was critical of this proposal, and moved to strike out "'or increase'" as "[h]e thought the Legislature ought to be at liberty to increase salaries as circumstances might require, and that

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> suggested a kind of automatic cost–of–living adjustment pegged to the price of wheat or some other constitutionally designated benchmark.

Id. at 574 n.31.

[87] THE FEDERALIST NO. 79, at 400 (Alexander Hamilton) (Bantam 1982). Hamilton added:

> This provision for the support of the judges bears every mark of prudence and efficacy; and it may be safely affirmed that, together with the permanent tenure of their offices, it affords a better prospect of their independence than is discoverable in the constitutions of any of the states, in regard to their own judges.

Id. at 401.

[88] *Id.* at 400.

[89] *Id.*

[90] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 44 (Max Farrand ed., 1911) [hereinafter RECORDS OF THE FEDERAL CONVENTION OF 1787], *available at* http://memory.loc.gov/ammem/amlaw/lwfr.html.

this would not create any improper dependence in the Judges."[91] Madison opposed the change, maintaining his belief that, "judges might tend to defer unduly to the Congress when that body was considering pay increases."[92] Instead, he suggested an automatic cost-of-living adjustment: "The variations in the value of money, may be guarded agst. by taking for a standard wheat or some other thing of permanent value."[93] Gouverneur Morris was concerned that the later proposal might "leave the judges undercompensated,"[94] and noted:

> The value of money may not only alter but the State of Society may alter. In this event the same quantity of wheat, the same value would not be the same compensation. The Amount of salaries must always be regulated by the manners & the style of living in a Country.[95]

The motion to strike out the word "increase" was voted on and passed by the convention, and the plan for an automatic cost-of-living adjustment abandoned.[96]

Thus did Hamilton later comment, in Federalist No. 79, a passage that is most often cited as evidence that the founders were cognizant of inflation when drafting the No-diminution Clause, but had determined to rely on the legislature's good faith as a coordinate branch of government:

> This, all circumstances considered, is the most eligible provision that could have been devised. It will readily be understood, that the fluctuations in the value of money, and in the state of society, rendered a fixed rate of compensation in the constitution inadmissible. What might be extravagant to day, might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances; yet under such

[91] *Id.*

[92] United States v. Will, 449 U.S. 200, 219 (1980).

[93] *See* RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 90, at 45 ("The dependence will be less if the *increase alone* should be permitted, but it will be improper even so far to permit a dependence Whenever an increase is wished by the Judges, or may be in agitation in the legislature, an undue complaisance in the former may be felt towards the latter. If at such a crisis there should be in Court suits to which leading members of the Legislature may be parties, the Judges will be in a situation which ought not [be] suffered, if it can be prevented.").

[94] *Will*, 449 U.S. at 220.

[95] RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 90, at 45.

[96] *See id.*

> restrictions as to put it out of the power of that body to change the condition of the individual for the worse.[97]

It is apparent that the federal counterpart to New York's no-diminution clause was drafted with the potential effects of inflation in mind, but with every hope that the Congress would act in good faith in this regard. Given the foregoing, it seems also that although the founders did intend the clause to protect judicial independence, they did not intend it to protect the absolute value of judicial salaries as against ordinary inflation.

C. Case Law

There are no reported federal or New York State cases or opinions dealing with the issue of the no-diminution clauses as they relate to the effects of inflation on judicial salaries.

Though cases do exist on the subject of the No-diminution Clause, all decisions deal with the effects of a tax on the absolute value of judicial salary. However, the U.S. Supreme Court and New York State decisions dealing with the tax issue, all signal that the clauses do not protect the absolute value of a salary in the face of inflation and non-discriminatory action or inaction by the coordinate branches.[98]

The U.S. Supreme Court's first pass at the no-diminution clause came in the case of *Evans v. Gore*,[99] in connection with the federal income tax levied pursuant to the Sixteenth Amendment to the U.S. Constitution.[100] The plaintiff, a U.S. District Court judge, brought suit challenging the government's mandate that his judicial salary be included for purposes of calculating the tax, claiming a violation of the no-diminution clause.[101] Noting that the case involved an indirect, rather than a direct numerical diminution in salary, the Supreme Court nonetheless held that the tax, as applied to judges, was unconstitutional.[102] The decision contained a strong dissent, however, by Justices Holmes and Brandeis, who argued that the no-

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[97] THE FEDERALIST NO. 79, at 400–01 (Alexander Hamilton) (Bantam 1982).

[98] *See supra* notes 91–92, 96 and accompanying text; *infra* notes 100, 104, 107 and accompanying text.

[99] 253 U.S. 245 (1920), *overruled by* U.S. v. Hatter, 532 U.S. 557 (2001).

[100] *Evans*, 253 U.S. at 246, 247, 260–61. The holding was extended in *Miles v. Graham*, 268 U.S. 501, 509 (1925), which established that the prohibition in *Evans* applies to the income of a judge appointed after the enactment of the Federal Revenue Statute, as well the income of those appointed before.

[101] *Evans*, 253 U.S. at 246–47.

[102] *Id.* at 254, 263–64.

diminution clause was intended to protect the independence of the judiciary, which was not threatened by a uniform tax:

> To require a man to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a judge. I see nothing in the purpose of this clause of the Constitution to indicate that the judges were to be a privileged class, free from bearing their share of the cost of the institutions upon which their well-being if not their life depends.[103]

In *O'Malley v. Woodrough*,[104] however, the Supreme Court retreated from this position, and determined that the No-diminution Clause was not violated by application of a non-discriminatory tax laid generally upon the income of all individuals.[105] In response to the *Evans* decision, Congress had enacted § 22 of the Revenue Act of 1932, which contained a specific provision requiring that the salary of judges be included in "'gross income'" for purposes of calculating the tax.[106] The Court departed from its holdings in *Evans* and *Miles*, essentially adopting the reasoning of the dissent in *Evans*, explaining: "To subject [judges] to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering."[107]

The decision in *Evans* was not followed by many of the state courts in their own state constitutional arenas.[108] Indeed, in a prescient decision by the Third Department in *Black v. Graves*, decided a mere two days after the decision was handed down in *O'Malley*, it was decided that a non-discriminatory tax was not a violation of the state constitution's counterpart no-diminution clause.[109] *Black* is the only reported New York decision dealing with the no-diminution clause of the state constitution. Noting that the tax in question was "nondiscriminatory and imposed on all residents alike,"[110] the court declined to follow *Evans* and further

[103] *Id.* at 265 (Holmes and Brandeis, JJ., dissenting).
[104] 307 U.S. 277 (1939).
[105] *See id.* at 282.
[106] *See id.* at 280.
[107] *Id.* at 282.
[108] *See* Black v. Graves, 12 N.Y.S.2d 785, 789 (App. Div. 1939).
[109] *See id.* at 785, 789–90; *see O'Malley*, 307 U.S. at 277.
[110] *Id.* at 786.

added that the tax statute in question contained a specific statement of public policy on the matter:

> [The statute] declares as the policy of the state that salaries and compensation of public officials and judges shall be subject to personal income taxation under the laws of the state, that equality of burden is a cornerstone of sound tax policy, and inequality results where the burden of taxation is unequally distributed. This declaration of the public policy of the state must be held to be paramount to the theory that the imposition of the tax affects the independence of the judiciary.[111]

The U.S. Supreme Court reaffirmed its central position on the no-diminution clause in *United States v. Will*,[112] which involved an attempt by Congress to postpone or repeal previously authorized judicial salary increases.[113] The somewhat complicated decision in that case involved the more particular question of when the salary increases became "'vest[ed],'" such that a repeal would be considered a diminution in salary.[114]

Eventually, in *United States v. Hatter*,[115] the Court fully and finally overruled the central holding of *Evans*.[116] The *Hatter* decision involved the application of the Medicare and Social Security taxes to federal judges.[117] The Supreme Court stated flatly, "[i]n our view, the Clause does not prevent Congress from imposing a 'non-discriminatory tax laid generally' upon judges and other citizens, but it does prohibit taxation that singles out judges for specially unfavorable treatment."[118] The Court continued, "[w]e now overrule *Evans* insofar as it holds that the Compensation Clause forbids Congress to apply a generally applicable, nondiscriminatory tax to the salaries of federal judges, whether or not they were appointed before enactment of the tax."[119]

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[111] *Id.* at 789.
[112] 449 U.S. 200 (1980).
[113] *Id.* at 202.
[114] *Id.* at 221.
[115] 532 U.S. 557 (2001).
[116] *Id.* at 567.
[117] *Id.* at 560–61.
[118] *Id.* at 561 (citation omitted) ("Consequently, unlike the Court of Appeals, we conclude that Congress may apply the Medicare tax—a nondiscriminatory tax—to then-sitting federal judges. The special retroactivity-related Social Security rules that Congress enacted in 1984, however, effectively singled out then-sitting federal judges for unfavorable treatment. Hence, like the Court of Appeals, we conclude that the Clause forbids the application of the Social Security tax to those judges.")
[119] *Id.* at 567.

D. Conclusion

Based upon the foregoing, it is apparent that the plaintiffs to date have not made out a violation of the Constitution's no-diminution clause based solely upon legislative inaction coupled with inflation.

Although there is no case directly on point, the legislative history makes plain that inflation was considered in connection with at least the federal counterpart to New York's no-diminution clause, and the authority to set judicial salaries was, after careful consideration, vested in the legislature subject to exercise in good faith. The case law that does exist, state and federal, suggests that a diminution of absolute value of a judge's salary, by way of a non-discriminatory across-the-board tax, is not a violation of the clause. It seems unlikely, then, that a diminution in absolute value due to inflation, occasioned by a non-discriminatory failure of the legislature to act, and not associated with an attack on the independence of the judicial branch in the exercise of its constitutional will and prerogatives, could constitute a violation.

This conclusion gains further support from dicta in both *Evans* and *Hatter*, which concurred in the *Evans* dicta albeit not the holding, to the effect that the no-diminution clause is not a right of the judges, but rather one of the public.[120] The Court stated in *Hatter*:

> *Evans* properly added that these guarantees of compensation and life tenure exist, "not to benefit the judges," but "as a limitation imposed in the public interest." They "promote the public weal," in part by helping to induce "learned" men and women "to quit the lucrative pursuits" of the private sector, but more importantly by helping to secure an independence of mind and spirit necessary if judges are "to maintain that nice adjustment between individual rights and governmental powers which constitutes political liberty."[121]

That the compensation clause was meant to benefit the public, not the judges themselves, fairly supports the conclusion that no violation has occurred in this case.

V. SEPARATION OF POWERS

The concept of maintaining judicial independence through

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[120] *Id.*, 532 U.S. at 568–70; Evans v. Gore, 253 U.S. 245, 253 (1920).

[121] *Hatter*, 532 U.S. at 568 (citations omitted).

adequate compensation is a core consideration in the separation of powers doctrine.[122] However, the essence of the doctrine represents and embodies more than simply protecting judicial independence through adequate salary.[123] This section addresses the separation of powers argument as an analytically separate and distinct New York State Constitutional claim.

Viewed through the prism of history, the concept of separation of governmental powers got off to a turbulent beginning in New York, and the course was not set fully aright until the Constitution of 1846.[124] In the period since New York's First Constitution of 1777, there has been scant decisional law in this area generally, and specifically regarding judicial compensation as it relates to separation of powers issues, to aid the inquiry. Yet examining historical developments and constitutional materials reveals that the separation of powers doctrine embodies two equally important and intertwined concepts: (a) the avoidance of undue concentration or accumulation of governmental powers in one person or body, for fear of the potential for tyrannical abuse; and (b) the protection of the co-equal branches, subject to checks and balances, from encroachment or attacks on independence of will and function by another coordinate branch.[125]

A. History

New York's First Constitution, which Hamilton described in 1787 as "justly celebrated both in Europe and in America as one of the best of the forms of government established in this country,"[126] and which was authored during the full tide of the Revolutionary War, admirably combined an understandable fear of executive authority with a fair respect for the English institutions most familiar to New York's common law colonists.[127] Though New York's First

[122] *See id.* at 567 (noting that life tenure and the Compensation Clause guarantee the "'complete independence of the courts'" (quoting THE FEDERALIST NO. 78, at 394 (Alexander Hamilton) (Bantam 1982)).

[123] *See Evans*, 253 U.S. at 249.

[124] N.Y. CONST. of 1846, art. VI, *reprinted in* 1 LINCOLN, *supra* note 61, at 248–59.

[125] *See* THE FEDERALIST NO. 78, at 393–94 (Alexander Hamilton) (Bantam 1982).

[126] THE FEDERALIST NO. 26, at 127 (Alexander Hamilton) (Bantam 1982).

[127] *See* 1 LINCOLN, *supra* note 61, at 471 ("The framers of our first Constitution worked in the stress of war and revolution and without a model, except as they may possibly have derived assistance from Constitutions of other states, recently adopted, but under which there had been little, if any, actual experience"); *Under Five Constitutions*, N.Y. TIMES, May 7, 1894, at 1 ("The first convention was called amid the strife and turbulence of the War of the Revolution").

Constitution contained no express declaration concerning separation of powers, as did some other early state constitutions, the document "appears very clearly to have been framed with an eye to the danger of improperly blending the different departments."[128] Nonetheless, the First Constitution combined New York's governmental powers in a manner foreign to most modern examiners, and contrasting starkly with the Federal Constitution's design just a decade later.

The First Constitution did "separate" the governmental powers into three general departments, providing for a bicameral legislature, a court system, and an executive, as was the English tradition, but it substantially deprived the office of governor of many functions today considered the essential prerogative of the executive branch.[129]

In the area of official appointments, the First Constitution combined the authority in a council of appointment, made up of the governor and four senators chosen by the assembly, with the former having only a casting vote, and a quorum of only three required to conduct business.[130] Suggestions that the power should be vested solely in the governor were considered by New York's Fourth

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[128] THE FEDERALIST NO. 47, at 247 (James Madison) (Bantam 1982). In writing that New York's Constitution contained "no declaration on this subject," Madison was contrasting the constitutions of several of the colonies, including Massachusetts, which document specifically provided, "'that the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them.'" *See id.*

[129] *See* N.Y. CONST. of 1777, art. II, XVII, XXIV, XXV, *reprinted in* 1 LINCOLN, *supra* note 61, at 167, 175, 178–79; 1 LINCOLN, *supra* note 61, at 591 ("Three general departments of government were established, namely, the legislative, executive, and judicial. These three divisions were already familiar, both from English precedents, and from colonial experience for nearly a century. The influence of tradition and custom is shown by the unwillingness of the Constitution makers to vest in these departments the distinct and independent powers naturally belonging to them. They did not seem to appreciate fully the importance of a clear separation of the powers of the three great departments into which the government was divided."); *Under Five Constitutions*, *supra* note 127 ("In fact, the power of the Governor was subjugated almost completely to two councils—the Council of Appointment, which consisted of the Governor and four Senators, and the Council of Revision . . . .").

[130] *See* N.Y. CONST. of 1777, art. XXIII, *reprinted in* 1 LINCOLN, *supra* note 61, at 178; 1 LINCOLN, *supra* note 61, at 533–34.
("The method of appointing officers was one of the most important matters considered by the Convention, and the plan finally adopted had a very significant influence on the political history of the state prior to the adoption of the second Constitution. . . . The proposition shows that the time had not yet come for general popular elections, and it also shows the disinclination to vest the power of appointment in the governor. It was a curious mingling of executive and legislative functions, making the whole legislature practically an executive council.").

Provincial Congress (the First Constitutional Convention)[131] and rejected.[132]

As for the veto power, this was vested in a council of revision, made up of the governor, "the chancellor and the judges of the supreme court, or any two of them";[133] such was in contrast to the English Monarch who has long enjoyed an absolute veto over legislative acts of the Houses. This council is generally attributed to Robert R. Livingston, although the plan as adopted was only partially his.[134]

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[131] *See* 1 LINCOLN, *supra* note 61, at 484 ("The Fourth Provincial Congress, which became the First Constitutional Convention, met at the court house in White Plains on the 9th of July, 1776."); *Under Five Constitutions*, *supra* note 127 ("The Fourth Provincial Congress convened July 9, 1776, at Kingston, and, adopting the new order of things, dropped its colonial name and assumed the more independent title of the 'Convention of the Representatives of the State of New York.' It had already approved the Declaration of Independence 'at the risk of our lives and fortunes,' and in August, appointed a committee of thirteen to draw up a form of government. . . . The committee made its report March 12, 1777, and after a five weeks' discussion, the Constitution of the State of New-York was adopted April 20 following.").

[132] John Jay wrote to Robert R. Livingston and Gouverneur Morris on April 29, 1777, (nine days after the document's adoption):

> The fact was this. The Clause directing the governor to nominate officers to the Legislature for their approbation being read and debated, was generally disapproved. Many other methods were divised by different members, and mentioned to the House merely for Consideration. I mentioned several myself, and told the Convention at the time, that however I might then incline to adopt them, I was not certain but that after considering them I should vote for their Rejection. . . . and [I] well remember that I spent the evening of that day with Mr. Morris at your lodgings; in the course of which I proposed the Plan for the Institution of the Council as it now stands, and after conversing on the subject, we agreed to bring it into the House the next day.

Letter from John Jay, N.Y. Congressman, to Robert R. Livingston, Chancellor, N.Y., and Gouverneur Morris, N.Y. Congressman (Apr. 29, 1777) (on file with the Columbia University Libraries), *available at*
http://wwwapp.cc.columbia.edu/ldpd/app/jay/image?key=columbia.jay.02819&p=1.

[133] N.Y. CONST. of 1777, art. III, *reprinted in* 1 LINCOLN, *supra* note 61, at 167; *Under Five Constitutions*, *supra* note 127 ("The Council of Revision was the child of Robert R. Livingston, subsequently Chancellor of the state. The section of the Constitution which was in his handwriting provided that 'the Governor for the time being, the Chancellor, and the Judges of the Supreme Court or any two of them' shall constitute a council to revise all bills about to be passed by the Legislature. When the council objected to a measure it was returned, with its objections, to the house in which it originated. A two-thirds vote of the Legislature could overturn the decision of the council. The council sat with closed doors. It returned in all 169 bills to the Legislature, 51 of which became laws.").

There is some debate in New York's constitutional literature as to who actually wrote the First Constitution, but clearly it was a product of spirited debate among numerous early government actors.

[134] *See* J. HAMPDEN DOUGHERTY, CONSTITUTIONAL HISTORY OF THE STATE OF NEW YORK 107 (2d Ed., The Law Book Exchange, Ltd. 2004) (1915) ("[U]nder Livingston's plan vetoed bills would have been returned to the senate in all cases, Livingston's idea doubtless being to make the senate the citadel of the landed interests and thus protect land owners against hostile legislation. On Hobart's motion, Livingston's draft was amended by the Convention of 1777 to require a disapproved bill to be returned to the house in which it originated.").

Finally, the ultimate judicial authority was vested in a court "for the trial of impeachments and the correction of errors," which consisted of "the president of the senate for the time being, and the senators, chancellor, and judges of the supreme court, or the major part of them . . . ."[135] This tribunal was modeled after the English House of Lords,[136] which until the Constitutional Reform Act of 2005 created Great Britain's first "supreme court," generally possessed the power of final judicial review in England.[137]

These arrangements met with difficulties in the ensuing years, resulting in necessary remediation in New York's subsequent constitutions. Regarding the council of appointment, struggles arose between Governor George Clinton, the first governor, and then Governor John Jay, as to who possessed the right to propose candidates to the council for nomination.[138] This series of disagreements culminated in a resolution, adopted at a constitutional convention in 1801, vesting the nomination power concurrently in the governor and the council members.[139]

The process lasted through New York's Second Constitution of 1821, which abolished the council and vested the appointment power with the governor, subject to the advice and consent of the

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[135] N.Y. CONST. of 1777, art. XXXII, *reprinted in* 1 LINCOLN, *supra* note 61, at 181–82. Fortunately, the section at least provided that:

> [W]hen an appeal from a decree in equity shall be heard, the chancellor shall inform the court of the reasons of his decree, but shall not have a voice in the final sentence. And if the cause to be determined shall be brought up by writ of error, on a question of law, on a judgment in the supreme court, the judges of the court shall assign the reasons of such their judgment, but shall not have a voice for its affirmance or reversal.

Id., *reprinted in* 1 LINCOLN, *supra* note 61, at 182.

[136] 2 CHARLES Z. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK 145 (1906); *see also* N.Y. CONST. of 1777, art. XXXII, *reprinted in* 1 LINCOLN, *supra* note 61, at 181–82.

[137] *See* GLENN DYMOND, THE APPELLATE JURISDICTION OF THE HOUSE OF LORDS 17–18 (2007), *available at* http://www.parliament.uk/documents/upload/hllappellate.pdf (explaining the current appellate jurisdiction of the House of Lords and discussing subsequent changes pursuant to the Constitutional Reform Act of 2005). The House of Lords has continued to exercise its appellate jurisdiction pending the full organization of the new court, anticipated for October 2009. *See* THE HOUSE OF LORDS BRIEFING: JUDICIAL WORK 2 (2008), *available at* http://www.parliament.uk/documents/upload/HofLBpJudicial.pdf.

[138] *See* DOUGHERTY, *supra* note 134, at 72–73.

[139] *See* 1 LINCOLN, *supra* note 61, at 602–03, 610. The Convention met in 1801 for the purpose of determining, among other things, whether the right of nomination was vested exclusively with the governor or concurrently with members of the council. *Id.* The final resolution, as adopted, read: "'the right to nominate all officers other than those who, by the Constitution, are directed to be otherwise appointed, is vested concurrently in the person administering the government of this state for the time being, and in each of the members of the Council of Appointment.'" *Id.* at 610.

senate.[140] It has been variously described that during the years it existed, the council came to be a cabalistic and right unholy political machine, which dispensed its vast patronage networks with a heavy hand and unjustly encroached upon authority fairly belonging to the executive.[141]

Alexander Hamilton, in Federalist No. 77, lamented the council at work in New York, calling it a "small body, shut up in a private apartment, impenetrable to the public eye," and opining, "[e]very mere council of appointment, however constituted, will be a conclave, in which cabal and intrigue will have their full scope."[142] Similarly, Charles Z. Lincoln explains, in his *Constitutional History of New York*,

> Under the construction given by [the 1801] Convention the council became a powerful and sometimes a very objectionable political machine, and at the time of its abolition, twenty-one years later, it wielded a patronage including nearly 15,000 officers, with an aggregate salary list of one million dollars. It often dispensed patronage with a high hand, making appointments and removals at will; it reduced the dignity and responsibility of the governor, so that, instead of being the chief executive of the state, he had

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[140] *See* N.Y. CONST. of 1821, art. IV, §§ 2, 6, 7, *reprinted in* 1 LINCOLN, *supra* note 61, at 202–05. The Constitution of 1821 provided that most judges would be appointed by the governor, upon the advice and consent of the senate, and vested in the legislature the power to appoint the secretary of state, comptroller, treasurer, attorney-general, surveyor-general, and commissary-general. N.Y. CONST. of 1821, art. IV, §§ 6, 7, *reprinted in* 1 LINCOLN, *supra* note 61, at 203–05.

> The work of [the 1821 convention] more nearly approached the idea of popular government than that of the original convention. The experiment of 1777 was an established fact in 1821. The necessity of restricting the power of the Governor, of curtailing his prerogatives, of maintaining one council to make appointments for him, and another to regulate the work of the Legislature, no longer existed. There was no longer danger that the Governor would become seized of monarchical notions and put them into execution were he given the power of appointment and the veto.

Under Five Constitutions, *supra* note 127.

[141] *See Under Five Constitutions*, *supra* note 127 ("[The 1801 Convention] decided . . . that the members of the council had the same power to make nominations as the Governor, thus clipping away a large slice of the Executive prerogative, and rendering the position more of a figurehead than ever.").

[142] THE FEDERALIST NO. 77, at 390 (Alexander Hamilton), (Bantam 1982). *See also* DOUGHERTY, *supra* note 124, at 70–71 (explaining that General Philip Schuyler was a member of the Council of Appointment during part of Governor Clinton's term, and, "Schuyler was almost violent in his antipathy to Governor Clinton, whose use of the appointing power he had often censured, and owing, perhaps, to the intimate relations between him and Hamilton, they were in accord in the opinion expressed by Hamilton in *The Federalist*, that scandalous appointments to important offices had been made [by the Council] under Clinton").

> only a casting vote in this appointing body, and only one fifth of the power of making nominations.[143]

The veto power likewise remained with the Council of Revision through the 1821 Constitution,[144] which vested the veto in the Governor, subject to a two-thirds override provision.[145] Lincoln explains:

> The most substantial reason for abolishing the [Council of Revision] was the intermingling of judicial and legislative functions, occasioned by requiring the judges to consider all bills passed by the legislature. The council might reject bills because it did not agree with the legislature on questions of policy; and it was charged that the council had in fact rejected bills for this reason; but it [was] evident, from the small number of bills vetoed, that the council did not seriously interfere with the legislature in determining matters of policy.[146]

J. Hampden Dougherty, in his *Constitutional History of the State of New York*, notes that the Convention of 1821 was "unanimous in its condemnation of the council," and "[t]he committee upon the council of revision reported without a dissenting vote in favor of its abolition, and the report was unanimously sustained."[147] The New York Times called the Council of Revision, "positively obnoxious, as its operations were in conflict with the spirit of constitutional rights."[148]

Though the experience with the Court for the Trial of Impeachments and Correction of Errors was not grossly dissatisfactory, the tribunal proved less useful as a true constitutional check than might be desired, with the senators

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[143] 1 LINCOLN, *supra* note 61, at 611–12.("The evolution of [the Council of Appointment], and its final destruction, without a dissenting vote, by the Convention of 1821, shows that even the cohesive power of patronage as a political force must yield to higher principles of constitutional government when it is discovered that the dispensing of such patronage by an unrestrained and irresponsible body is inimical to the best interests of the state.").

[144] *Under Five Constitutions*, *supra* note 127.

[145] N.Y. CONST. of 1821, art. I, § 12, *reprinted in* 1 LINCOLN, *supra* note 61, at 196–97.

[146] *See* 1 LINCOLN, *supra* note 61, at 745.

[147] *See* DOUGHERTY, *supra* note 134, at 105–06. Dougherty further explains:

> The conviction was often expressed in the Convention of 1821 that in the council of revision there was an improper union of legislative and judicial powers. It was not the percentage of the bills which it vetoed, for this was small when compared with the liberal use of the veto power by modern governors and presidents, but their character, which made it the subject of public odium. It had seemed to put itself deliberately in the way of public opinion, and public sentiment would not endure its opposition.

Id. at 86 (footnote omitted).

[148] *Under Five Constitutions*, *supra* note 127.

composing the court finding little need to revisit the propriety of statutes they had already deemed constitutional.[149]

> When the Convention of 1846 was called, there was a general, if not universal, conviction that the court for the correction of errors, or, as it was familiarly called, "the court of errors," had outlived its usefulness; that a court including one entire branch of the legislature, with only a very small minority of members representing the judiciary, was not the best form of a high judicial tribunal under our system of government, and that the semipolitical and semijudicial tribunal so constituted could not be expected to work out the best results in the administration of justice.[150]

Lincoln further explained:

> One ground of criticism against the court of errors, stated in the Convention of 1846, was that the court had never declared a statute unconstitutional. The reason . . . was that the senators, who controlled the court, were unwilling to declare unconstitutional a statute which they had passed, and which they must have considered constitutional at the time of its passage. An examination of the reported decisions of this court shows that the statement made in the Convention was not quite accurate . . . .[151]

He noted that in examining the reported decisions of the court during the whole period of its existence from 1777 to 1847, only three statutes were declared unconstitutional.[152] New York's Constitution of 1846 abolished the body, in favor of our modern

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[149] *See* 2 LINCOLN, *supra* note 126, at 145–46 (noting that in the seventy years the Council of Revision existed (1777 to 1847), only three statutes were declared unconstitutional by the Court for the Correction of Errors). Lincoln explained:

> I have already called attention to the fact that, under the [F]irst Constitution, which provided for a council of revision, there was little occasion to ask the judicial tribunals to pass on the constitutionality of statutes, for the reason that the members of these tribunals, the chancellor and judges of the supreme court, composing a majority of the Council of Revision, had already determined the constitutionality of the statutes before they were passed.

Id. at 145.

[150] 2 LINCOLN, *supra* note 136, at 145.

[151] *Id.* at 145–46 ("Whatever might have been the advantages of this form of tribunal as illustrated in the English House of Lords, which was the model on which the framers of the [F]irst Constitution constructed the court, the radical difference in the official tenure and constitution of the upper branch of the legislature, the unwieldy size of the court, composed, in all, of thirty-seven members, under the [S]econd Constitution, and the fact that the majority of the senators were or were likely to [have been] laymen, made such a court an incongruous element in any well-ordered judicial system.")

[152] *Id.* at 146.

Court of Appeals.[153]

Since 1846, New York's government has, on paper, maintained the separation and balance of governmental powers and ostensibly the independence of each coordinate branch in the manner familiar to the Federal Constitution and modern readers. New York's constitutional history serves as a quintessential reminder of the first of the separation of powers concepts, namely the danger of an improper blending of governmental powers.

B. Legislative Intent

The constitutional literature on the separation of powers doctrine also supports the notion that the concept is concerned both with improper accumulation and with independence of the coordinate branches.[154] The discrete philosophical concept of a clear separation of governmental powers is generally attributed to Montesquieu, who devoted a portion of his famed *Spirit of Laws* (*De l'Esprit des Lois*) to a discussion of the English Constitution and the divisions of power therein.[155]

In Book 11, which is entitled, "Of the Laws Which Establish Political Liberty, with Regard to the Constitution," Montesquieu writes at Chapter 6:

> The political liberty of the subject is a tranquillity of mind arising from the opinion each person has of his safety. In order to have this liberty, it is requisite the government be so constituted as one man needs not be afraid of another.
>
> When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

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[153] N.Y. CONST. of 1846, art. VI, §2, *reprinted in* 1 LINCOLN, *supra* note 61, at 248–49; 2 LINCOLN, *supra* note 126, at 146 ("The germ of the court of appeals has already been noted in a 'court of review,' suggested in an amendment proposed in the legislature in 1841."); *Under Five Constitutions*, *supra* note 127 ("The court stood the test of the Convention of 1821, and went out of existence and into history with the adoption of the Constitution of 1846. It was supplanted by the present Court of Appeals.").

[154] *See generally* DONALD S. LUTZ, PRINCIPLES OF CONSTITUTIONAL DESIGN 109–10 (2006) (noting that separation of powers is "significantly strengthened" when a constitution calls for a separate election of parliament and an executive and an independent review of legislation by the Supreme Court).

[155] 1 M. DE SECONDAT, BARON DE MONTESQUIEU, SPIRIT OF LAWS 174–86 (Thomas Nugent trans., 1878).

> Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.
>
> There would be an end of every thing, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.[156]

James Madison discussed the separation of powers issue in several of the Federalist Papers. In Federalist No. 47, which was principally devoted to the separation of powers discussion, and which references Montesquieu at length, Madison agreed that:

> The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny. Were the [F]ederal [C]onstitution therefore really chargeable with this accumulation of power or with a mixture of powers having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system.[157]

In Federalist No. 48, he wrote:

> It is agreed on all sides, that the powers properly belonging to one of the departments, ought not to be directly and compleatly administered by either of the other departments. . . . It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it.[158]

And in No. 51, Madison comments: "In a single republic, all the power surrendered by the people, is submitted to the administration of a single government; and usurpations are guarded against by a division of the government into distinct and separate departments."[159]

It is also clear that in addition to the danger of improper

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[156] *Id.* at 174.

[157] THE FEDERALIST NO. 47, at 244 (James Madison) (Bantam 1982).

[158] THE FEDERALIST NO. 48, at 250 (James Madison) (Bantam 1982).

[159] THE FEDERALIST NO. 51, 263–64 (James Madison) (Bantam 1982).

accumulation, the importance of protecting the independence of the co-equal branches was equally important to the federal drafters. As was noted at length in the last section, the concept of adequate and secure judicial compensation was a key aspect of this protection, for the judiciary and the executive, lest the legislature be in a position to wrangle the wills of these constitutional officers in the performance of their separated governmental duties by way of deprivation or enticement. The authority was vested in the legislature, after careful deliberation, but with the admonition that:

> As the legislative department alone has access to the pockets of the people, and has in some Constitutions full discretion, and in all, a prevailing influence over the pecuniary rewards of those who fill the other departments, a dependence is thus created in the latter, which gives still greater facility to encroachments of the former.[160]

Thus, the constitutional materials and New York's own history counsel that the separation of powers doctrine embodies two equally important and intertwined concepts: (a) the avoidance of undue concentration or accumulation of governmental powers in one person or body, for fear of the potential for tyrannical abuse; and (b) the protection of the co-equal branches from encroachment or attacks on the independent performance of their duties by another coordinate branch.[161] It follows that proof of one of these situations constitutes a necessary precondition to establishing a cognizable violation of the separation of powers doctrine.

C. Case Law

Few reported New York cases have involved the issue of judicial compensation as it relates to separation of powers. Indeed, although conflicts have arisen in New York's constitutional history

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[160] *See* THE FEDERALIST NO. 48, at 252 (James Madison) (Bantam 1982). In Federalist No. 51, Madison further comments:

> It is equally evident that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal.

THE FEDERALIST NO. 51, at 262 (James Madison) (Bantam 1982).

[161] *See also* ABA MODEL CODE OF JUDICIAL CONDUCT (2007), *reprinted in* 2008 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 553 (Thomas D. Morgan & Ronald D. Rotunda eds., 2007) *available at* http://www.abanet.org/judicialethics/approved_MCJC.html ("'Independence' means a judge's freedom from influence or controls other than those established by law.").

that raise separation of powers concerns, even among co-equal branches in exercise of their respective functions, there is scant decisional guidance regarding the issue as it relates to judicial compensation.[162] As noted above, the issue was brought to the fore in the conflict between Chief Judge Sol Wachtler and Governor Mario Cuomo over the judicial budget, but that crisis was resolved without a court's final word on the merits of the separation of powers arguments.[163] However, all decisions express a continuing commitment to the preservation of a meaningful separation and balance of powers between the three branches of New York's government.

One older New York decision, *People ex rel. Burby v. Howland*,[164] the only reported Court of Appeals edict on the subject, held unconstitutional a legislative act altering the duties and removing in part the compensation of justices of the peace in the Town of Fort Edward.[165] The section of the act in question, which act provided for the election of police justices in each town to take over the duties of criminal law administration, was passed at the request of the Town to relieve it of excess tax burdens.[166] It provided that no justice of the peace would receive any compensation for any act performed in administration of the criminal law.[167]

A Fort Edward justice of the peace who had performed said services brought suit in Supreme Court, Special Term requesting a writ of mandamus that the town board audit and pay his bill.[168] Special Term granted the motion and issued the writ, and the Appellate Division in the Third Department affirmed the supreme court's decision.[169]

The Court of Appeals determined that a provision such as in

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[162] *See, e.g.*, Cohen v. State, 720 N.E.2d 850, 851 (N.Y. 1999) (upholding law requiring that legislators pay be withheld if a budget is not passed by the first day of a fiscal year because it did not violate separation of powers principles); Campaign for Fiscal Equity, Inc. v. State (*CFE III*), 861 N.E.2d 50, 53, 58 (N.Y. 2006) (holding that court as final arbiter of state constitutional issues does have power to direct executive and legislature to affirmatively act to remedy constitutional violation, even in light of serious separation of powers concerns); Pataki v. New York State Assembly, 824 N.E.2d 898, 914 (N.Y. 2004) (Rosenblatt, J., concurring) (arguing for implementation of a test to determine when the Executive has acted "unconstitutionally legislative").

[163] *See supra* notes 14–18 and accompanying text.

[164] 49 N.E. 775 (N.Y. 1898).

[165] *Id.* at 779.

[166] *Id.* at 775–76.

[167] *Id.* at 776.

[168] *Id.* at 775.

[169] *Id.*

issue, that deprives a constitutionally specified judicial officer of judicial compensation, was a violation of the constitutional protection of separation of powers.[170] In so holding, the court stated plainly: "Any legislation that hampers judicial action, or interferes with the discharge of judicial functions, is in conflict with the principles of the constitution."[171] In a lengthier dissertation of the subject, the court explained:

> The 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. The safety of free government rests upon the independence of each branch, and the even balance of power between the three. Unite any two of them, and they will absorb the third, with absolute power as a result. Weaken any one of them, by making it unduly dependent upon another, and a tendency towards the same evil follows. It is not merely for convenience in the transaction of business that they are kept separate by the constitution, but for the preservation of liberty itself, which is ended by the union of the three functions in one man, or in one body of men. It is a fundamental principle of the organic law that *each department should be free from interference, in the discharge of its peculiar duties*, by either of the others. Nothing is more essential to free government than the independence of its judges, for the property and the life of every citizen may become subject to their control and may need the protection of their power.[172]

Two instructive lower court cases address the issue of judicial compensation as it relates to separation of powers principles. The case of *Kelch v. Town Board of the Town of Davenport*,[173] involved an article 78 proceeding seeking, among other things, an order of the Supreme Court compelling the Davenport Town Board to pay the petitioner a higher salary.[174] Both this case and the next involve a clear misuse of legislative power by setting judges' salaries in a vain and purposeful effort to affect the independence of judicial decision-making.

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170 *Id.* at 779.
171 *Id.*
172 *Id.* (emphasis added).
173 829 N.Y.S.2d 250 (App. Div. 2007).
174 *Id.* at 250–51.

The petitioner, Britt Kelch, was elected as a Davenport Town Justice in November 2004 for a four-year term of office.[175] "After petitioner was elected, but before he took office, [the Davenport Town Board] set the salaries for the two town justices by raising the incumbent's salary from $5,000 to $7,500 annually and setting petitioner's salary at $500 annually."[176] The town justice claimed that although a town board has the authority to set the salaries for town employees, the board's action in this instance constituted an unconstitutional violation of the U.S. and New York Constitutions' separation of powers doctrines and a purposeful encroachment on the independence of the Judiciary.[177]

The state supreme court dismissed the article 78 application, prompting appeal to the Appellate Division Third Department.[178] The appellate division reversed, finding that the town board's action did indeed constitute a constitutional violation of the separation of powers guarantees.[179] The court noted that it was "confronted with a tension between competing legal principles, both based on the separation of powers. On one hand, the judiciary as a coequal branch of government should not interfere with a legislative body's actions or exercise of discretion,"[180] yet on the other,

> "[l]egislation cannot be sustained where 'the independence of the judiciary and the freedom of the law will depend upon the generosity of the legislature.'" For example, courts have held that fundamental constitutional principles of separation of powers forbid any legislative body from reducing the salary of any judge during his or her term of office.[181]

The court continued:

> We are presented with a situation in which either the judiciary, in the guise of this Court, must interfere with the actions of the legislative branch, or we must allow respondent, as a legislative body, to affect the independence of the judiciary by fixing petitioner's salary at only $500 per year.[182]

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175 *Id.* at 251.
176 *Id.*
177 *Id.*
178 *Id.* at 250–51.
179 *Id.* at 253.
180 *Id.* at 251.
181 *Id.* at 251–52 (quoting Catanise v. Town of Fayette, 543 N.Y.S.2d 825, 826 (App. Div. 1989)) (citations omitted).
182 *Id.* at 252.

The court further noted:

> Permitting the governmental branch holding the purse strings to evaluate the performance of the judiciary and dole out pay based on those evaluations is particularly disturbing. One of respondent's members commented during the budget process that respondent could incrementally raise petitioner's salary based on his performance, if he lasted. A real threat strikes at the heart of judicial independence if the judiciary must cater to the ideological whims of the legislature or personally suffer the financial consequences for rendering legally correct but unpopular decisions. . . . Of further concern is that qualified citizens would be discouraged from seeking judicial office by the less-than-minimum wage allocated to the position.[183]

The Court granted petitioner's application and directed the Town Board to "reconsider petitioner's salary and set an appropriate amount, consistent with the principles stated herein."[184]

In *Catanise v. Town of Fayette*,[185] a town justice of the Town of Fayette in Seneca County challenged the decision of the Fayette Town Board to reduce his annual salary from $5,000 to $3,000 prior to the start of the third year of a four-year term.[186] The judge's claim that this action constituted "an unconstitutional encroachment upon the independence of the judiciary was rejected by the Special Term," which dismissed the petition.[187] The Fourth Department of the Appellate Division modified the judgment, and granted petitioner's request for an order directing the town board to restore his former salary.[188] Of note, the claim was brought and decided under the separation of powers doctrine, as a 1961 Amendment to New York's Constitution removed town justices from the auspices of the no-diminution clause.[189]

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[183] *Id.*

[184] *Id.* at 253.

[185] 543 N.Y.S.2d 825 (App. Div. 1989).

[186] *Id.* at 825.

[187] *Id.*

[188] *Id.* at 827.

[189] *See id.* at 825–26. The Court noted that the Court of Appeals had decided in 1940 that a justice of the peace was "a constitutional officer whose compensation could not be increased or decreased during the term of office," but also noted that the decision came before the 1961 Amendments. *See id.* at 825 (citing Town of Putnam Valley v. Slutzky, 28 N.E.2d 860 (N.Y. 1940); Giuffreda v. Stout, 220 N.Y.S.2d 215 (Sup. Ct. 1961)). The Court determined, however, that it did not read the 1961 Amendments, whose principle purpose was to provide for a unified court system, as removing the constitutional protections afforded to justices of the peace. *See id.* at 826.

Citing *People ex rel. Burby*, the Fourth Department noted: "Our State courts applied constitutional principles of separation of powers to preserve and protect the independence of the judiciary and specifically, justices of the peace, well before the adoption in 1925 of an express provision prohibiting a salary reduction during the term of office."[190] The Court added:

> The threat to independence of the judiciary presented by the power to diminish a justice's salary during his term of office is obvious; indeed, petitioner alleges that the Town Board purposefully reduced his salary because it was unhappy with some of his decisions and wanted to punish him for those decisions and, at the same time, influence future rulings. . . . [T]o interfere with or to influence the exercise of judicial functions contravenes the fundamental principles of separation of powers embodied in our State Constitution and cannot be sustained.[191]

D. Conclusion

In keeping with these themes, it would seem that a separation of powers violation of constitutional magnitude would need to involve one of the two noted constitutional situations, either an actual encroachment upon or interference with a function which is the prerogative of the judiciary, or a purposeful or punitive attempt to interfere with the independence of the decision-making function of the judicial branch. On its face, then, mere legislative inaction, without purposeful motivation to punish or influence the judicial branch, although certainly a breach of the legislature's good faith obligation to fulfill its constitutional duties, and deplorable public policy, would seem insufficient to make out a constitutional violation.

Yet in *Maron v. Silver*,[192] this is not the end of the question, for the plaintiffs in that case also alleged that the legislature's action in withholding the salary increase is meant as a retaliatory measure for unpopular decisions by New York's courts, and separation of powers, as envisioned by the founders and embodied in New York case law, most certainly protects the independence of the judiciary

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[190] *Catanise*, 543 N.Y.S.2d at 826.
[191] *Id.*
[192] No. 4108-07, 2007 N.Y. Misc. LEXIS 8086, at *1 (N.Y. Sup. Ct. Nov. 30, 2007).

from direct retaliatory action by a coequal branch.[193] Were this to be proven as a matter of fact, however unlikely or difficult such a feat may be, it seems almost certain that the Legislature would be guilty of a constitutional violation, and the courts appropriately situated to make a declaration of unconstitutionality.

VI. PROPER REMEDY

The question of what, if any, remedy is available, should the courts determine a constitutional violation, also implicates critical separation of powers concerns. Although it is the exclusive province of the courts to determine the constitutionality of legislative acts,[194] the legislative process itself is, rightfully, the exclusive province of the legislative branch. It is therefore very constitutionally dubious that any one branch of the government, in this situation the state judiciary, has the authority to direct a coequal branch to affirmatively perform an act that is its own constitutional prerogative and in its constitutional discretion. Fashioning such a remedy indeed raises its own separate and gravely serious concerns regarding a violation of separation of powers principles.

In his first *Larabee* decision, Justice Lehner noted:

> While the complaint does seek the payment of money, at oral argument plaintiffs' counsel acknowledged that the court could not direct members of the legislature to vote for an increase. Accordingly, the relief sought by plaintiffs was, in essence, amended to only seek a declaration that the failure to increase compensation is unconstitutional.[195]

Strangely, the decision on the summary judgment motion in the second *Larabee* decision takes this additional step, directing the governor and the Legislature to act within ninety days to provide an increase in salary.[196] How the appellate division will deal with these issues remains to be seen.

Nevertheless, there is precedent in New York's constitutional case law to support the ability of the state judicial branch to direct its coequal branches of the state government to affirmatively act if necessary to remedy a constitutional violation. In the several decisions and opinions rendered in connection with the *Campaign*

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[193] *See id.* at *19–21.
[194] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–78 (1803).
[195] Larabee v. Spitzer, 850 N.Y.S.2d 885, 887 (Sup. Ct. 2008) (citation omitted).
[196] *See id.* at 894.

for Fiscal Equity school-funding cases, the issue of the courts' proper role in fashioning a remedy for constitutional violations has been central. In *Campaign for Fiscal Equity v. State* (*CFE II*),[197] the Court of Appeals determined that New York City school children were not receiving the opportunity for a "sound basic education," as is required by the state constitution, and directed the State to ensure, by way of "[r]eforms to the current system of financing school funding and managing schools . . . that every school in New York City would have the resources necessary for providing the opportunity for a sound basic education."[198] The court further instructed the State to ascertain the actual cost of providing a sound basic education in New York City, rather than the entire state, and gave the State a deadline by which to implement the necessary measures.[199] The difficulties attendant upon the state fashioning a new system led to further litigation in *CFE III*.[200] Yet with no further judicial review, the remedy stands as directed.

Whatever precedent may exist, as a constitutional matter, the jurisdiction of a court to direct the Legislature to perform a discretionary legislative function is highly suspect, and such an order would in any event not likely pass muster upon review by the present members of the U.S. Supreme Court.[201]

VII. CONCLUSION

In testimony given by Associate U.S. Supreme Court Justice Anthony M. Kennedy to the United States Senate Committee on the Judiciary, on the subject of the need for a federal judicial pay increase, the eminent Justice remarked:

> As I have tried to convey, separation of powers and checks and balances are not automatic mechanisms. They depend upon a commitment to civility, open communication, and good faith on all sides. Congress has certain functions that cannot be directed or initiated by the other branches; yet those prerogatives must be exercised in good faith if

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[197] 801 N.E.2d 326 (N.Y. 2003).

[198] *Id.* at 348.

[199] *Id.* at 348–49.

[200] 861 N.E.2d 50, 53–57 (N.Y. 2006) (discussing the holdings in *CFE I* and *CFE II*, Governor Pataki's response in compliance with the judicial directives therein, and remaining problems with New York City school's level of performance insofar as it correlates with state funding).

[201] *See infra* Part VII.

> Congress is to preserve the best of our constitutional traditions. You must be diligent to protect the Constitution and to follow its letter and spirit, and, on most matters, no one, save the voters, can call you to account for the manner in which you discharge these serious responsibilities. This reflects, no doubt, the deep and abiding faith our Founders placed in you and in the citizens who send you here.
>
> Please accept my respectful submission that, to keep good faith with our basic charter, you have the unilateral constitutional obligation to act when another branch of government needs your assistance for the proper performance of its duties.[202]

Although this article concludes, with great reluctance, that it is unlikely the plaintiffs can prove a cognizable claim of a state constitutional violation, this should not in any manner be read as an endorsement of the present situation or the government's failure to provide its judges with fair and adequate compensation.[203] Withholding reasonable pay increases from the judiciary, particularly over so prolonged a period of time, is atrocious public policy, and requires immediate corrective action. Although the public may well believe, in current economic circumstances, that the salary of judicial officers is excessive as is, the plain fact, unbeknownst to most of the public, is that New York's judiciary is one of the finest in the nation, and few people possess the qualifications and experience to be a successful New York judge. Yet to continue to place the public opposite the judiciary by open and notorious exacerbation of the controversy can only have painful and potentially lasting effects on our governmental process. The Legislature and the governor should perform their constitutional duties in good faith, irrespective of electoral considerations—in order to ensure that the nation's finest judiciary is not also its lowest paid—and immediately implement pay increases for New York's judges.

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[202] *Judicial Security and Independence: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 73 (2007) (testimony of Hon. Anthony M. Kennedy, Associate J. of United States Supreme Court), *available at* http://judiciary.senate.gov/hearings/testimony.cfm?id=2526&wit_id=6070.

[203] *See* N.Y. State Bd. of Elections v. López Torres, 128 S. Ct. 791, 801 (2008) (Stevens, J., concurring) ("[A]s I recall my esteemed former colleague, Thurgood Marshall, remarking on numerous occasions: 'The Constitution does not prohibit legislatures from enacting stupid laws'").

AFTERWORD

The Third Department of the Appellate Division, in a decision dated November 13, 2008, partially reversed the lower court's decision in *Maron v. Silver*, and dismissed the judges' complaint in its entirety.[204] Like the court below, the Appellate Division determined, based upon constitutional history and case law, that the compensation clause had not been violated by legislative inaction in the face of ordinary inflation.[205] Departing from the lower court, however, the Third Department determined that the judges had not pleaded a plausible separation of powers violation.[206]

Specifically, the court found that neither of the grounds upon which the lower court permitted the suit to proceed, including allegations that judges have been forced to resign and that the legislature has refused to enact salary increases due to displeasure with certain decisions, was sufficient on its face to survive dismissal.[207] As for the later allegation of a punitive motivation, the court explained, "To merely state the existence of this threat, without alleging any support whatsoever for the assertion of displeasure on the part of the Legislature or evidence of any actions taken to reduce judicial salaries, is merely to acknowledge the inherent tension in our tripartite system of government. The existence of that ever-present tension cannot, on its own, be a violation of the Constitution that deliberately gave rise to it."[208]

The lone dissent was authored by Judge Peters, who opined that given the early posture of litigation, and according the judges' complaint all favorable inferences, the Supreme Court properly resolved the issues by permitting the separation of powers allegation to proceed.[209]

The plaintiffs in *Maron* have expressed their intention to further appeal the Third Department's decision.[210]

[204] Maron v. Silver, 2008 WL 4889089, at *4–15 (N.Y. App. Div. Nov. 13, 2008).
[205] *Id.* at *4–8.
[206] *Id.* at *8–13.
[207] *Id.* at *10.
[208] *Id.* at *11.
[209] *Id.* at *16.
[210] *See* Joel Stashenko, *Albany Panel Dismisses Judicial Pay Suit*, N.Y.L.J., Nov. 14, 2008, at 1.