



## **Committee on State Affairs**<sup>1</sup>

Association of the Bar of the State of New York

### ***The New York State Budget Process and the Constitution: Defining and Protecting the “Delicate Balance” of Power***

*The Appellate Division, First Department, rendered a decision on Sheldon Silver v. George E. Pataki on December 11, 2003, after the release of the following report. The Court affirmed the lower court ruling granting the Governor summary judgment and adjudging that the Legislature does not have the constitutional authority to modify the Governor’s appropriations in separate pieces of legislation. The Court declared that the disputed amendments had been unconstitutionally enacted by the Legislature and were, therefore, void. That decision is available at 2003 NYSlipOP 19408 and 2003 WL 22926923. The case is expected to be appealed to the Court of Appeals.*

## **Introduction**

The Appellate Divisions are currently considering two cases of substantial significance to the balance of budgetary power between New York’s Governor and Legislature. *Pataki v. Assembly* (“*Pataki*”) and *Silver v. Pataki* (“*Silver*”) both address the meaning of three constitutional provisions that define the State’s budget process: Article VII, sections 3, 4 and 6. The Committee on State Affairs provides this review of constitutional history and case law and proposes an approach to these provisions in the hope that this recommendation effectively protects and preserves the balance and separation of powers that are critical to a properly functioning state government in Albany.

In our view, the lower court decision in *Pataki* overstates the Governor’s power under section 3 of Article VII to include in budget bills almost any conditions on an appropriation, including the suspension of, or other changes to, existing statutes. That power is considerable, but not, as *Pataki* would have it, unlimited. *Silver* correctly suggests that there are meaningful limits to the Governor’s powers. These limits follow from the provisions of Article VII, section 6.

However, the main focus of this Report is *Pataki*’s interpretation of section 4. Under New York’s constitutionally-ordained budget process, section 4 limits the Legislature’s powers but it still leaves the Legislature with the authority to reject the conditions on an appropriation offered by the Governor. To interpret Article VII, as *Pataki* has done, to empower the Governor

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to set all the conditions on the use of appropriated moneys and leave the Legislature with only the option to strike the entire appropriation or to accept it with all of such conditions, sets up the Governor as all-powerful, not as a partner in the budget process.

The legislative history of the Constitution's budget provisions as well as their early interpretation by the Court of Appeals argue for reciprocal budgetary powers between the political branches. The Committee therefore reads section 4 to permit the Legislature to strike — but not replace — whatever conditions on an appropriation the Governor may properly include in a budget submission consistent with sections 3 and 6. Accordingly, the Committee believes that the lower court decision in *Pataki*, which would deny the Legislature this power, is mistaken.

Article VII, section 4, provides that the Legislature can alter the Governor's budget bills by striking out or reducing "items" therein. The Committee believes the term "items" to mean any matter in a budget bill "specifically related to" an "item of appropriation." This interpretation of "item" would assure that if the Governor can insert a matter in a budget bill, the Legislature has the authority to respond to the Governor's action by striking out the matter. This interpretation is supported by:

- the reformist purpose behind New York's executive budget process adopted in 1927, which sought to centralize the budget's preparation in the Governor's office while protecting the Legislature's authority to review and reject the Governor's proposals;
- judicial cases interpreting sections 3, 4 and 6, as well as related constitutional provisions; and
- the constitutional separation of powers.

This Report has three sections. First, it outlines sections 3, 4 and 6, and traces their origins back to the 1915 Constitutional Convention. Second, it reviews judicial interpretations of this constitutional design, from the two *Tremaine* cases in 1929 and 1939 through to the present litigation. Third, it presents what we believe to be the intended constitutional design for the budget process to achieve balance in the respective roles of the Legislature and Governor.

## **I. The Development of the Constitutional Design.**

The legislative history of sections 3, 4 and 6 shows that these constitutional provisions were intended to improve efficiency between the branches of government. More specifically, the provisions were meant to alter the roles of the Governor and Legislature while maintaining a balance of power between them. Three periods of constitutional development are discernible: first, the failure of an executive budget amendment in 1915; second, the adoption of an analogous amendment in 1927; and third, the reorganization of that amendment in 1938.

### **A. The Failed 1915 Amendment.**

The basic constitutional design intended by sections 3, 4 and 6 debuted at the Constitutional Convention of 1915. To correct the Legislature's inefficiency and profligacy, the

Convention's Finance Committee, which was named for its chair Henry Stimson, proposed an "executive budget." According to the Stimson Committee, the six-fold increase in state debt since 1885 resulted from the lack of a "scientific budget."

The Stimson Committee identified six main defects in the existing budget process. First, there was no centralized revision of departments' estimated expenditures. By the time they reached the Legislature, the estimates were "regularly so high that very little attention [was] paid to them."<sup>2</sup> Second, the Legislature drew up the budget but was poorly equipped to do so. It had no administrative control over spending departments; its members were accountable to different local districts, and thus were incapable of the compromises needed to establish statewide budget priorities, and were prone to "log rolling" and "pork barrel" politics; and it was slow, meaning that the work of drafting an appropriation was so long delayed that the members, and the public, were denied an opportunity to evaluate the budget.<sup>3</sup> Third, "nowhere, either in the Legislature or outside, is there now ever formulated or made public a really complete financial plan or budget."<sup>4</sup> Fourth, legislators could attach riders too easily: "[T]here is no restriction now imposed against additions at the behest of individual members being made to the budget after it is formulated and proposed by its framers."<sup>5</sup> Fifth, the executive veto over the elements of the Legislature's budget "has very nearly resulted in an abandonment to the Executive of the priceless legislative function of holding the purse."<sup>6</sup> Finally, legislators had no opportunity or incentive to question the budget's preparation.<sup>7</sup>

To correct these deficiencies, the Stimson Committee proposed an "executive budget" process whereby the Governor would have the power and obligation to prepare and submit to the Legislature a single, centralized budget. The Committee took pains to explain that this process was not intended to and would not undo the Legislature's power to check the Governor's actions.

Under present methods the Legislature has been gradually surrendering its most vital power in financial legislation to the executive veto. The proposed system would restore that power and make it final. . . . Nor is there the slightest force to the claim that the proposed system would give undue power to the Governor. It would add not one iota to the power that he now possesses through the veto of items in the appropriation bills.<sup>8</sup>

The proposed amendment had several elements. First, executive departments would revise their own estimates, "which would compel a greater sense of responsibility on the part of department heads in submitting their estimates of requirements."<sup>9</sup> Second, these estimates would be revised and coordinated by the Governor, who had authority over every department and who was accountable to the entire state.<sup>10</sup> The Governor's budget would be submitted to the

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<sup>2</sup> *Journal of the Constitutional Convention of the State of New York* ("1915 Journal"), at 390 (1915).

<sup>3</sup> *Id.* at 390-91.

<sup>4</sup> *Id.* at 392.

<sup>5</sup> *Id.* at 392-93.

<sup>6</sup> *Id.* at 394.

<sup>7</sup> *Id.* at 394-95.

<sup>8</sup> *Id.* at 401.

<sup>9</sup> *Id.* at 395.

<sup>10</sup> *Id.* at 396.

Legislature on or before the first of February.<sup>11</sup> There would then be public hearings on the budget, and the Governor, Comptroller, and heads of the executive departments would come before the Legislature for questioning on its terms.<sup>12</sup> The Stimson Committee even favorably invoked “Question Time” in the British House of Commons as a model for the Governor.<sup>13</sup>

The proposed amendment provided the basis for much of the language now appearing in sections 4, 5 and 6 of Article VII.<sup>14</sup> In light of the Stimson Committee’s careful statements that the amendment was not intended to undo the overall balance of power between the political branches, the Committee believes that Article VII should be read to allow the Legislature an effective and practical check on the Governor’s power to set the budgetary agenda.

The proposed amendment passed 137-4 in 1915, but the proposed constitution was not ratified at the polls.<sup>15</sup>

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<sup>11</sup> *Id.* at 398.

<sup>12</sup> *Id.* at 398-99.

<sup>13</sup> *Id.* at 399.

<sup>14</sup> See *Proposed Amendments of the Constitutional Convention of the State of New York 1915*, Vol. III (1915).

<sup>15</sup> *Revised Record of the Constitutional Convention of the State of New York, Vol. III: April 6th to September 10th, 1915*, at 2383-86 (1916).

## B. The 1927 Amendments.

In 1919, with budgetary inefficiencies persisting, Governor Smith appointed a nonpartisan commission to report on the reorganization and retrenchment of state government.<sup>16</sup> Later that year, the commission presented its report to Governor Smith advocating revisions in the budget process “in large part built upon the plans developed by the Constitutional Convention of 1915.”<sup>17</sup> Governor Smith then presented these proposals to the Legislature in early 1920, where they stalled for two years while he was out of office.

On his return in 1923, the Governor renewed the reorganization effort and, in 1925, the Legislature agreed to refer the matter to another commission, this one chaired by former Governor Hughes.<sup>18</sup> The Hughes Commission then recommended the constitutional adoption of an executive budget, which “[i]n its essentials differed but little from the amendment proposed by the Constitutional Convention in 1915.”<sup>19</sup>

The Legislature adopted the Hughes Commission amendment in 1927. It was easily ratified by public referendum later the same year.<sup>20</sup> The amendment was placed at Article IV-A of the Constitution in four sections.<sup>21</sup>

Section 1 provided that on or before October 15, the heads of the executive departments would submit itemized estimates of appropriations to the Governor, and that appropriate hearings on such estimates would be conducted. With the exception that the submission date was moved from October 15 to December 1, this section is substantially similar to section 1 of the current Article VII.

Section 2 provided that on or before January 15, the Governor would submit a budget to the Legislature, with a “complete plan of proposed expenditures and estimated revenues.” This section is substantially similar to sections 2 and 3 of the current Article VII.

Section 3 began with a provision concerning the right and duty of the Governor and executive department heads to appear and be heard at legislative hearings. This language now

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<sup>16</sup> New York State Constitutional Convention Committee, *Problems Relating to Taxation and Finance* 18 (1938) (“Finance Report”).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 19.

<sup>19</sup> *Id.* at 20-21.

<sup>20</sup> See A. Int. No. 1860, A. Pr. Nos. 2271, 232, by Reorganization Commission. S. Int. No. 1504, S. Pr. Nos. 1871, 1941, 1959; S. Int. N. 120, S. Pr. No. 120. A. Int. No. 191, A. Pr. No. 191. The vote count totaled 1,291,990 in favor and 446,107 against. See Legislative and Ratification History set forth in Amendments Proposed to New York Constitution, 1895-1937: New York State Constitution Annotated, at 303 (1938).

<sup>21</sup> The structure of old Article IV-A, in which sections 1 and 2 related to the function of the Governor, while sections 3 and 4 related to the function of the Legislature, strengthens the argument that Article VII also sets forth, first, provisions relating to the Governor (Art. VII, secs. 1-3), and second, provisions relating to the Legislature (Art. VII, secs. 4-6). Indeed, old Article IV-A, section 3, clause 1, concerning the right and duty of the Governor and other executive department heads to appear before the Legislature, was moved to the end of new Article VII section 3, such that the first three sections concern the executive, and the latter three concern the Legislature. This structure again suggests that the Governor cannot look to Article VII section 6 as a source of authority. See *infra* note 77.

appears at section 3 of Article 7. The effective remainder of the old section 3 is now found in section 4 of the current Article VII.

Section 4 prohibited further appropriations until the Governor's appropriations were made; required that appropriations be presented in single bills; and provided for emergency bills. These provisions now appear in sections 5 and 6 of the current Article VII.<sup>22</sup>

In January 1929, the Governor submitted the first executive budget, which contained several lump-sum appropriations to be spent in accordance with the directions of the Governor. As discussed *infra*, the Legislature unsuccessfully challenged this budget in *People v. Tremaine*, 252 N.Y. 27 (1929).

### C. The 1938 Amendments.

The 1938 Constitutional Convention repackaged these provisions with certain changes into a single Article VII. There was relatively little debate over the adoption of this Article.<sup>23</sup> The committee report on the amendments explained:

The executive budget system has been in operation for ten years, and it has firmly established its worth. However, in light of experience during its operation, it seems to the committee that a few improvements can be made, and, in conjunction with the present codification, the committee has incorporated these improvements. Otherwise, the existing language of the Constitution has not been altered, except where, in the opinion of the committee, necessary for purposes of codification, clarification, and the removal of nonessential matter.<sup>24</sup>

Consequently, the 1938 amendments represent the present form of the Stimson Committee's original design for an executive budget process.

The key provisions of Article VII, as enacted in 1938 and as they remain today, are as follows:

- Section 2 requires that the Governor submit to the Legislature a budget containing “a complete plan of expenditures to be made before the close of the ensuing fiscal year and all moneys and revenues estimated to be available therefor, together with an explanation of the bases of such estimates and recommendations as to proposed legislation, if any, which he may deem necessary to provide moneys and revenues sufficient to meet such proposed expenditures.”

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<sup>22</sup> Amendments Proposed to New York Constitution, 1895-1937: New York State Constitution Annotated, New York State Constitution Annotated, at 301-03 (1938).

<sup>23</sup> *Revised Record of the Constitutional Convention of the State of New York, Vol II: April 5th to August 6th, 1938*, at 940 (July 13, 1938); *see also id.* at 1062 (“[T]his is the proposed codification and revision of the sections of the Constitution relating to State finances.”) (July 18, 1938). *See id.*, at 2631, 2636-2641. Article VII was approved 102-0 on August 14, 1938. *See id.* at 2641. After further minor edits, it was reapproved 144-1 on August 17, 1938. *See id.* at 2976-2981.

<sup>24</sup> Proposed Amendments to the Constitution of the State of New York, No. 748, Int. 665 (July 8, 1938), at 16.

- Section 3 states how the budget is to be submitted, specifically that “the Governor shall submit a bill or bills containing all the proposed appropriations and reappropriations included in the budget and the proposed legislation, if any, recommended therein.”<sup>25</sup> The words “and the proposed legislation, if any” were not added until the 1938 recodification.
- Section 4 limits the power of the Legislature, specifically that it “may not alter an appropriation bill submitted by the Governor except to strike out or reduce items therein, but it may add thereto items of appropriation provided that such additions are stated separately and distinctly from the original items of the bill and refer each to a single object or purpose. Such an appropriation bill shall when passed by both houses be a law immediately without further action by the governor, except that appropriations for the legislature and judiciary and separate items added to the governor’s bills by the legislature shall be subject to his approval as provided in section 7 of article IV.” Relatedly, section 7 authorizes the Governor to veto items of appropriation without vetoing an entire appropriations bill.
- Section 5 prohibits the Legislature from “consider[ing] any other bill making an appropriation until all the appropriation bills submitted by the governor shall have been finally acted on by both houses.”
- Section 6 states two requirements. “Except for appropriations contained in the bills submitted by the governor and in a supplemental appropriation bill for the support of government, no appropriations shall be made except by separate bills each for a single object or purpose.” In addition, “[n]o provision shall be embraced in any appropriation bill submitted by the governor or in a supplemental appropriation bill unless it relates specifically to some particular appropriation in the bill, and any such provision shall be limited in its operation to such appropriation.” This second requirement was derived from what had been section 22 of Article III, not from Article IV-A.

## **II. Judicial Practice from *Tremaine* to *Pataki*.**

### **A. *Tremaine I* and *Tremaine II*.**

#### 1. *People v. Tremaine I*.<sup>26</sup>

The executive budget provisions became effective in 1928. Governor Roosevelt’s budget bills for 1929-30 contained several lump-sum appropriations for personal service expenses for state officials in various departments. Provisions in the bills authorized the relevant department heads, acting with the approval of the Governor, to segregate appropriated amounts for specific positions and salaries.

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<sup>25</sup> In the pending litigation, the State Senate and Assembly read section 3, so far unsuccessfully, to direct the governor to put proposed legislation in a bill separate and apart from the appropriation. Under this reading, the restrictions of section 4 do not apply to the governor’s proposed legislation.

<sup>26</sup> *People v. Tremaine*, 252 N.Y. 27 (1929).

The Legislature struck all the items for which the Governor purported to retain control over segregation. Then it restated the items, requiring that gubernatorial approval be supplemented with approval from the chairs of the Senate Finance Committee and of the Assembly Ways and Means Committee.

The Legislature made appropriations dealing with agencies undergoing reorganization subject to section 139 of the State Finance Law. That section provided that when a state department was reorganized and a lump sum appropriated for its maintenance, operations and personal service, no payments could be made until a schedule of payments had been approved by the Governor and the chairs of the Legislature's two finance committees.

The Legislature made lump-sum appropriations dealing with construction subject to section 11 of one budget bill, which barred the use of any payments for personal services without the approval of the Governor and the finance chairs. Governor Roosevelt ultimately disapproved the general segregation clause of section 11, and insisted that section 139, as applied to the budget items at issue, was unconstitutional.

In *People v. Tremaine* (“*Tremaine I*”), the Attorney General sued on behalf of the Legislature to enjoin the Comptroller from making payments without the approval of the finance chairs. *Tremaine I* held that by giving the finance chairs power over the segregation of funds, both section 139 of the State Finance Law and the new provisions added by the budget bills violated the constitutional prohibition on legislators receiving civil appointments.<sup>27</sup> The Court of Appeals viewed the power to review and reject proposed segregations of funds as administrative; the resulting combination of legislative and administrative power was unconstitutional. The legislative additions were therefore ineffective, while the appropriations stood. “The Legislature may not attach void conditions to an appropriation bill. If it attempts to do so, the attempt and not the appropriation fails.”<sup>28</sup>

Having disposed of the constitutional issue under the appointments clause, the Court of Appeals considered two other issues: whether the legislative action was inconsistent with the executive budget process, and whether the executive veto of the conditions on the appropriation was constitutional. Without giving a direct answer, the Court hinted that the legislative language was unconstitutional under Article VII, but that were it proper for the Legislature to add such language, the Governor could veto it.

The Attorney General argued that the legislation was constitutional because it met the germaneness test in section 22 of Article III, which required all provisions of an appropriation bill to “relate[s] specifically to some appropriation in the bill.” The Court disagreed. With respect to appropriation bills submitted by the Governor, it was not enough for the Legislature to follow section 22. The new executive budget provisions now limited the Legislature to striking out or reducing items, or adding new items of appropriation that were separately and distinctly stated.<sup>29</sup>

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<sup>27</sup> 252 N.Y. 27, 45 (1929).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 48-49.

The Court then stated that “[a]ssuming . . . section 11 was a proper item for the Legislature to insert in a budget appropriation bill, much force attaches to the contention that such a direction is one which the Governor might veto. It is an item or particular, distinct from the other items of the bill, although not an item of appropriation.”<sup>30</sup> Significantly, the Court continued:

If the Legislature may not add segregation provisions to a budget bill proposed by the Governor without altering the appropriation bill . . . it would necessarily follow that the Governor ought not to insert such provisions in his bill. He may not insist that the Legislature accept his provisions in regard to segregation without amendment, while denying to it the power to alter them. The alternative would be to strike out the items of appropriation thus qualified in toto and a possible deadlock over details on a political question outside the field of judicial review.<sup>31</sup>

In concurrence, Judge Crane went further and flatly determined that section 11 was not an item of appropriation within the meaning of the Constitution. “If anything, it is an attempted alteration, which is void.”<sup>32</sup>

*Tremaine I*'s treatment of the executive budget provision is both unsatisfying and revealing. It is unsatisfying because the Court of Appeals did not definitively resolve – even in *dicta* – whether the executive budget provisions of the Constitution were consistent with the Legislature's proposed segregation provision. On the one hand, section 11 was plainly germane to the appropriations it affected. On the other hand, it seemed to involve legislative alteration of the Governor's bill without either a strike out or reduction of an item, or the addition of a separate new item of appropriation, which should have made it unconstitutional. As, indeed, Judge Crane would have held.

Yet *Tremaine I* is revealing because it shows significant judicial concern with preserving the proper balance of legislative and executive power. The Court of Appeals assumed that if the Legislature could add the provisions, then the Governor must be able to strike them out. Conversely – and of great relevance to the recent budget battles – the Court also assumed that if the Legislature lacked the power to alter the Governor's provisions, then the Governor ought to be barred from including such provisions in the first place.

## 2. *People v. Tremaine II*.<sup>33</sup>

Ten years later, the *Tremaine II* decision was more straightforward. In Governor Lehman's budget bill for 1939 were general appropriations for state government departments that included detailed itemizations for personal service expenditures. The Legislature struck out every item and substituted a single item of appropriation for each of the departments, thereby

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<sup>30</sup> *Id.* at 49-50.

<sup>31</sup> *Id.* at 50.

<sup>32</sup> *Id.* at 63.

<sup>33</sup> *People v. Tremaine*, 281 N.Y. 1 (1939).

combining expenses for maintenance and operation, personal services, and travel outside the state into lump-sum appropriations.

The Court found that the Legislature's action was unconstitutional under section 4 of Article VII because that provision required new items proposed by the Legislature "to be additions, not merely substitutions."<sup>34</sup> Under section 4, "the Legislature may not alter an appropriation bill by striking out the Governor's items and replacing them for the same purpose in different form."<sup>35</sup> Unlike in *Tremaine I*, the Court of Appeals in *Tremaine II* did not address what this limitation meant for the balance of powers between the branches. However, it did approve the reasoning of the Appellate Division, which noted in rejecting the Legislature's changes that "[i]f the appropriation bill submitted by the Governor can be reconstructed in altered form it becomes impossible for the Legislature to act as the Constitution has directed by reducing or striking out items thereof."<sup>36</sup>

*Tremaine II* also suggested that a legislative preference for lump-sum appropriations was inconsistent with the 1927 reforms. "The present Constitution emphasizes the necessity of items, not lump sums, for an entire department or bureau."<sup>37</sup> The Court of Appeals tempered this position, however, by recognizing the impracticability of itemization in all cases. It called for the executive and legislative branches to pursue a course "between the two extremes" of inadequate and excessive itemization."<sup>38</sup>

## **B. Budget Cases Between *Tremaine II* and the Current Litigation.**

In the five decades following *Tremaine II*, the executive budget provisions drew little attention from the courts, and most of the cases involved challenges by citizens and taxpayers, not lawsuits by the Governor or the Legislature against the other branch.

In *C.V.R. Schuyler v. South Mall Constructors*,<sup>39</sup> the Appellate Division rejected the argument that a provision of the 1969 Deficiency Budget authorizing the Commissioner of General Services to negotiate a contract for the construction of the Albany Mall violated section 6 of Article VII, which required that all provisions of an appropriation bill be specifically related to an appropriation within it. The Court found that the negotiation provision was contained in a bill making \$136 million in appropriations for the construction of state buildings and other improvements. "Since the negotiation provision concerns an item which may be constructed with funds from the appropriation," the constitutional nexus was satisfied, "even though the particular appropriation to which it relates is not precisely itemized in the general appropriation bill."<sup>40</sup> At the same time, the Court was clear that section 6 imposed real limits on non-appropriation "budget" legislation. Echoing *Tremaine I*, *Schuyler* held that the purpose of section 6 is to "eliminate the legislative practice of tacking onto budget bills propositions which had nothing to

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<sup>34</sup> *Id.* at 11.

<sup>35</sup> *Id.*

<sup>36</sup> *People v. Tremaine*, 257 A.D. 117, 120.

<sup>37</sup> *Tremaine*, 281 N.Y. at 7.

<sup>38</sup> *Id.* at 12.

<sup>39</sup> *C.V.R. Schuyler v. South Mall Constructors*, 32 A.D.2d 454 (3<sup>rd</sup> Dep't 1969).

<sup>40</sup> *Id.* at 456.

do with money matters; that is, to prevent the inclusion of general legislation in appropriation bills.”<sup>41</sup>

Similarly in *Saxton v. Carey*,<sup>42</sup> a challenge by a private party, the Court of Appeals unanimously rejected the argument that the 1978-79 budget was invalid because the Governor’s budget bills were insufficiently itemized for the Legislature to analyze and act on them effectively. The plaintiffs also attacked various provisions for the intra-program transfer of appropriated funds. By the time the case reached the Court of Appeals, the Legislature had already passed the budget. The Court of Appeals held that although subject to review, the budget process is primarily a matter for the political branches. So long as the Legislature approved the Governor’s actions, “the degree of itemization and the extent of transfer allowable are matters which are to be determined by the Governor and the Legislature, not by judicial fiat.”<sup>43</sup>

In a later case, *Schulz v. State*,<sup>44</sup> the Supreme Court, Albany County, rejected the argument that a lump-sum appropriation of \$48 million added by the Legislature to the 1992-93 local assistance budget for so-called “member items” – which would assertedly be doled out to pet projects of individual legislators – was unconstitutional. The member-item appropriation was an addition to, not a substitution for, the Governor’s budget, and was thus consistent with section 4 and *Tremaine II*. Although the expectation was that allotments would respect the preferences of individual legislators, the budgetary language gave the Governor complete control, such that there was no violation of *Tremaine I*.

In two budget cases decided during this period, the Court of Appeals took a more aggressive posture, but neither involved the executive budget process *per se*. *Matter of County of Oneida v. Berle* held in 1980 that the Governor lacked inherent authority to impound funds that had been appropriated by law.<sup>45</sup> The next year, in *Anderson v. Regan*,<sup>46</sup> a closely divided Court of Appeals held that section 7 of Article VII, which provides that “[n]o money shall ever be paid out of the state treasury . . . except in pursuance to an appropriation by law,” applied to federal funds transmitted to the state for the support of particular state programs. As a result, such funds could not be spent without a legislative appropriation in the form of a duly enacted appropriation bill.

Although *Berle* was instituted by the beneficiary of an impounded appropriation and not by the Legislature, both these cases can be seen as limitations on the power of the Governor. In addition, both *Berle* and *Regan* invoked the “delicate balance” of executive and legislative powers.<sup>47</sup> As *Berle* explained, “history teaches that a foundation of free government is imperiled when any one of the coordinate branches absorbs or interferes with another.”<sup>48</sup> *Regan* was more pointed in stressing that the appropriations clause, which dates back to the Constitution of 1846, was part of an effort “to stabilize the financial management of the State and to superimpose a

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<sup>41</sup> *Id.* at 455-56.

<sup>42</sup> *Saxton v. Carey*, 44 N.Y.2d 545 (1978).

<sup>43</sup> *Id.* at 551.

<sup>44</sup> *Schulz v. State*, 160 Misc. 2d 741 (Sup. Ct. Albany Co. 1994).

<sup>45</sup> *Matter of County of Oneida v. Berle*, 49 N.Y.2d 515 (1980).

<sup>46</sup> *Anderson v. Regan*, 53 N.Y.2d 356 (1981).

<sup>47</sup> *Berle*, 49 N.Y.2d at 515; *Anderson*, 53 N.Y.2d at 365.

<sup>48</sup> *Berle*, 49 N.Y.2d at 522.

measure of legislative control over the then unbridled power of the executive branch to spend.”<sup>49</sup> If the Governor could spend federal funds without a legislative appropriation, “the balance of power [would be] tipped irretrievably in favor of the executive branch,” a result the Court of Appeals was not willing to sanction.<sup>50</sup>

In a recent case that touched tangentially on the constitutionality of present budget practices, the Court of Appeals was more deferential to the executive. *Matter of Cohen v. State* rejected the argument that Chapter 635 of the Laws of 1998 – which seeks to promote compliance with the April 1 budget deadline by deferring the payment of legislative salaries until a delayed budget is actually enacted – violates the separation of powers. The Court acknowledged that the separation of powers “has deep, seminal roots in the constitutional distribution of powers among the three coordinate branches of government,” but concluded that separation of powers in fact dictates judicial acceptance of a measure agreed to by both branches to lubricate the “delicately calibrated mechanism” of the budget process.<sup>51</sup>

Finally, in 1993, for the first time in more than half a century, the Court of Appeals considered the core executive budget provisions, although once again the case involved suit by a private party and not a direct conflict between the Governor and the Legislature. The Governor’s 1990-91 state operations budget bill contained an appropriation for New York’s Department of Taxation and Finance to audit banks. The Legislature added to that appropriation a provision authorizing the Department’s Commissioner to charge banks a fee for their audit costs. The Governor did not challenge this provision, but rather sought to enforce it. In *New York State Bankers Association v. Wetzler*, the Court of Appeals held that the Legislature’s fee provision violated section 4. The Court reasoned that because this provision was not an “item of appropriation,” it could not be added by the Legislature.

### C. The Current Litigation.

#### 1. *Pataki v. New York State Assembly*.<sup>52</sup>

In January 2001, Governor Pataki submitted six appropriations bills and five bills that contained legislation to implement the budget. In some cases, the Governor’s stated “when, how, and where” conditions on an appropriation modified existing statutory law. Thus, the Governor proposed as part of an appropriation bill more than twenty-five pages of substantive provisions altering existing section 3602 of the Education Law. Another item of appropriation would have reauthorized the lapsed section 153-i of the Social Services Law.<sup>53</sup>

In March of the same year, one appropriation bill passed without substantial amendment. In August, however, the Legislature passed “altered and amended” versions of the Governor’s remaining budget bills, with some amendments stipulating how certain appropriations were to be spent. Immediately thereafter, the Legislature also passed thirty-seven single-purpose

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<sup>49</sup> *Anderson v. Regan*, 53 N.Y.2d at 363-64 (plurality opinion).

<sup>50</sup> *Id.* at 366 (plurality opinion).

<sup>51</sup> *Cohen v. State*, 94 N.Y.2d 1, 12.

<sup>52</sup> *Pataki v. N.Y. Assembly*, 190 Misc. 2d 716 (Sup. Ct. Albany Co. 2002).

<sup>53</sup> Affidavit by Dean Fuleihan in support of Assembly’s Cross-Motion for Summary Judgment, at 15, 17.

appropriation bills, which added further conditions on the appropriations made in the Governor's bills.

The Governor protested that these actions were unconstitutional, but signed all the bills into law. Shortly thereafter, he sued the Senate and Assembly in the Supreme Court for Albany County for a declaratory judgment that many of the Legislature's amendments and additional new bills violated section 4 because they "replac[ed] the items of appropriations submitted by the Governor."<sup>54</sup>

The Assembly and Senate counterclaimed for a declaratory judgment. On their cross-motions for summary judgment, they contended that the Governor's inclusion of "general," "substantive" and/or "programmatic" material within appropriation bills usurped legislative authority under Article III, and violated the constitutional design of Article VII. Because this material was constitutionally void, they argued, striking it out did not constitute an illegal "alteration" under section 4. Any such substantive material, according to the Legislature, should have been submitted in separate "programmatic budget bills," which the Legislature would have the "unfettered discretion to amend and alter . . . in any manner that it sees fit."<sup>55</sup>

Thus, the case squarely presents the question of whether the Legislature can alter or amend the "when, how and where" language accompanying an appropriation proposed by the Governor other than by reducing or deleting the appropriation itself. The Court put the issue as follows: "may the Legislature strike out what it finds to be extraneous nonappropriation measures from the Governor's proposed budget."<sup>56</sup> In a decision rendered in January 2002, Justice Malone ruled for the Governor.

The Court focused first on the propriety of the Governor's inclusion of programmatic language in the budget bills. Citing section 3, the Supreme Court noted that the Constitution gives the Governor the option of submitting his budget in "a bill or bills" and that his budget bills could contain not simply "all the proposed appropriations and reappropriations included in the budget" but also "the proposed legislation, if any, recommended therein."

It would seem inappropriate to conclude that the framers did not intend to mean what they said when by the literal language they carefully chose they gave the Governor the option of submitting his 'proposed appropriations and reappropriations included in the budget and the proposed legislation, if any, recommended therein' in 'a bill or bills.'<sup>57</sup>

Citing *Schuyler* and *Saxton*, the Court noted that on "the few prior occasions when the issue has come before New York courts those courts have not limited appropriations bills solely to the statement of dollar amounts and the purpose thereof."<sup>58</sup> (However, the Court did not note that

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<sup>54</sup> The suit also named the Comptroller as a defendant. However, the Comptroller successfully moved to dismiss the action against him. *See id.* at 728.

<sup>55</sup> *Id.* at 732.

<sup>56</sup> *Id.* at 733.

<sup>57</sup> *Id.* at 734-35.

<sup>58</sup> *See id.* at 735. The Court also cited *Rice v. Perales*, 156 Misc. 2d 631, 640 (Sup. Ct. Monroe Co. 1993), *modified on other grounds*, 193 A.D.2d 1135 (4<sup>th</sup> Dep't 1993). *Rice* concerned a change to the rule under which the

these cases were brought by private parties after the Legislature had *accepted* the Governor’s language.)

The most troubling part of *Pataki*, however, is its consideration of section 4 and the power of the Legislature to respond to the Governor’s proposed budget. Justice Malone acknowledged that language in *Tremaine I* suggests that the Governor and the Legislature have parallel powers over the budget process. According to *Pataki*, “it is language that gives this lower court some pause.”<sup>59</sup> However, the Court ultimately described this language as “dictum which is not binding authority upon lower courts.”<sup>60</sup>

Citing both *New York State Bankers Association* and section 4, the Court concluded that the Legislature is without power to alter by deleting allegedly unconstitutional language from the Governor’s budget bills. By deleting such allegedly unconstitutional text, the Legislature violated Article VII by attempting “to discard the executive budget and write one of its own.”<sup>61</sup> According to the Supreme Court, to counter legislative policies advanced by the Governor in the budget the Legislature must “simply fail to enact into law the Governor’s appropriation bills. . . . [T]he resulting deadlock, if compromise cannot be reached, will cause public pressure to build to the point where these political questions” will be settled politically.<sup>62</sup>

Appeals by the Senate and Assembly are now pending in the Third Department of the Appellate Division.

## 2. *Silver v. Pataki*.

Although decided after *Pataki*, *Silver* addresses the earlier 1998-99 budget. Six of the nine bills that comprised the budget contained appropriations. Three others did not. These so-called “non-appropriation” bills contained provisions, schedules, and suballocations for already budgeted funds.<sup>63</sup> All nine bills “struck out or reduced certain appropriations proposed by the Governor, while adding new appropriations and directives.”<sup>64</sup>

In addition to vetoing several provisions of the appropriations bills, Governor Pataki exercised fifty-five line item vetoes to remove specific “legislative directions, segregations and limitations” from the non-appropriation bills. In response, Speaker Silver sued in the State

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Department of Social Services calculated Home Relief benefits for “mixed households” in which one member receives Supplemental Security Income. The authorization for the rule change came from the 1991 Aid to Localities Budget, which sought a revision of the methodology for calculating mixed household benefits. *Rice* rejected the argument that the language directing the change in benefits “was general legislation in a budget bill,” in violation of Art. VII, section 6, *see* 156 Misc. 2d 631, 639, finding instead that “[b]y no means was the direction to contain welfare costs ‘general legislation’ that had nothing to do with the money matters that were the focus of the Aid to Localities budget,” *id.* at 640.

<sup>59</sup> *Pataki v. N.Y. Assembly*, 190 Misc. 2d 716, 736 (Sup. Ct. Albany Co. 2002).

<sup>60</sup> *See id.*

<sup>61</sup> *Id.* at 737 (quoting *People v. Tremaine*, 257 A.D. 117, 122, *aff’d* 281 NY 1).

<sup>62</sup> *Id.*

<sup>63</sup> *Silver v. Pataki*, 96 N.Y.2d 532, 535 (2001).

<sup>64</sup> *Id.*

Supreme Court for New York County for a declaratory judgment that under section 7 the Governor was without constitutional authority to veto items in non-appropriation bills.<sup>65</sup>

By agreement of the parties, Justice Lehner addressed only thirteen of the Governor's fifty-five line item vetoes. All but one of the thirteen vetoed provisions that referred to appropriations. More specifically, these provisions "either (i) suballocated appropriated funds, (ii) provided that the appropriation was contingent on the enactment of subsequent legislation, or (iii) set forth criteria to implement the appropriation."<sup>66</sup> The Governor maintained that the provisions thereby violated section 4 by "altering" his "items of appropriation," all of which properly related to an appropriation as required by section 6. The Speaker countered that section 4's limitations applied only to legislative action on appropriations bills, and the measures were therefore immune from the item veto.

Justice Lehner rejected the Speaker's contention. By "inserting several directions, segregations, and limitations with respect to the spending of appropriated monies," the Legislature had unconstitutionally "altered" the Governor's "items of appropriation" in violation of section 4 and *Tremaine II*. It did not matter that the Legislature had made its alterations in *non-appropriation* bills. Although the Legislature had thereby done so indirectly rather than directly, it was still unconstitutionally substituting its language for the Governor's items of appropriation.<sup>67</sup>

The Court declined to go further and find that the Governor can veto provisions that the Legislature unconstitutionally adds to the budget. Yet, while it refused to resolve this matter formally, the Court noted that it was aware of "no provision in the Constitution granting such right on that basis."<sup>68</sup>

However, having disposed of the issue directly before it, by way of *dictum* the Court went significantly farther than *Tremaine II* when it considered the extent to which the Governor can constitutionally include language in budget bills that goes beyond appropriations. The Court noted that while section 3 authorizes the Governor to submit as part of any proposed appropriation bills "proposed legislation recommended in connection therewith," under section 6 such material must relate "specifically to some particular appropriation in the bill" and be "limited in its operation to such appropriation."<sup>69</sup> Quoting *Saxton*, the Court stated that non-

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<sup>65</sup> *Silver v. Pataki*, 179 Misc. 2d 315 (Sup. Ct. N.Y. Co. 1999). For the first three years, the case focused on the question of standing. Justice Lehner of the State Supreme Court, New York County, held that Silver had standing as Speaker and as a Member of the Assembly to challenge the item vetoes. The First Department reversed on a 3-to-2 vote. *Silver v. Pataki*, 274 A.D.2d 57 (1<sup>st</sup> Dep't 2000). The Court of Appeals reversed in part, finding that the Silver had standing as a Member of the Assembly, but not as Speaker because the Assembly had not passed a resolution "expressing its will that the Speaker engage in this litigation." *Silver v. Pataki*, 96 N.Y.2d 532, 538. (Judge Graffeo dissented, finding that Silver lacked standing even as a member of the Assembly.)

<sup>66</sup> *Silver v. Pataki*, 192 Misc. 2d 117, 122 (Sup. Ct. N.Y. Co. 2002). For example, with respect to an approved appropriation of \$180 million for the development, design and construction of a new maximum security facility in Franklin County, the Legislature added language providing that the money could not be spent unless certain conditions were met and the expenditure authorized in a separate chapter, and that, if built, the facility was to have certain indoor common space.

<sup>67</sup> *Id.* at 125-26.

<sup>68</sup> *Id.* at 127.

<sup>69</sup> *Id.* at 126.

appropriation provisions may set forth “when, how or where” appropriated monies are to be spent, and such provisions the Legislature may not alter.<sup>70</sup> Thus, the Governor can stipulate “the location and type of prison to be built” in a bill appropriating monies for a new prison, and the Legislature can only accept or reject that. The Court was clear that this did not mean that the Governor can submit substantive legislation as part of an appropriation bill, for example by “amend[ing] the Penal Law to alter the definition of robbery in a bill appropriating monies to construct a new prison.”<sup>71</sup> However, as the Court noted, the Speaker did not challenge the Governor’s proposed budget on this basis.

*Silver*’s core is entirely correct. Section 4, *New York State Bankers Association* and *Tremaine II* together mean that all the Legislature may add to the Governor’s budget bills are separately-stated “items of appropriation,” and thus that the Legislature cannot simply substitute its own items of appropriation for the Governor’s proposed items. But *Silver* effectively serves to raise a much more difficult question that it does not answer. What is the Governor’s power to add non-appropriation language to his budget bills relative to the Legislature’s power to delete such language?

### **III. Restoring the “Delicate Balance” of Power.**

As the Court of Appeals first noted in *Tremaine I*, one fundamental issue in interpreting the executive budget provisions is to maintain the “delicate balance” of power between the Governor and the Legislature. It is clear from their legislative history that the core provisions of Article VII were not intended to upset that balance. In *Regan*, the Court of Appeals reaffirmed the importance of balance to the constitutional design of the budget process, noting that “application of the strictures imposed by section 7 of Article VII to federal funds is necessary to the maintenance of the delicate balance of powers that exists between the legislative and executive branches.”<sup>72</sup>

The lower court decision in *Pataki* reveals a budget process increasingly inconsistent with the basic norms of that balance. Section 3 is taken to be completely open-ended: not only may existing statutes be stretched to accommodate a Governor’s budget plan, but they may be completely rewritten, and wholly new statutes may be submitted by the Governor as part of an appropriation bill.<sup>73</sup> Moreover, *Pataki* reads section 4 to give the Legislature only one response: to reject the appropriation in its entirety, and attempt to force a compromise on that basis.<sup>74</sup> *Silver*, in contrast, is more consistent with the interpretation of Article VII that the Committee proposes, and with the “delicate balance of power” between the Governor and the Legislature.

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<sup>70</sup> *Id.* at 124, 126-27.

<sup>71</sup> *Id.* at 126.

<sup>72</sup> *Anderson v. Regan*, 53 N.Y.2d 356, 365. In *Berle*, the Court of Appeals was mindful of this balance when it held that “once [an] appropriation was approved,” the Governor could not impound it. “Such usurpation of the legislative function cannot receive judicial sanction.” *Matter of County of Oneida v. Berle*, 49 N.Y.2d 515, 523.

<sup>73</sup> As described above, *Silver* is more measured. Justice Lehner specifically noted that “no claim is made herein that the Governor included substantive law amendments in the appropriation bills at issue.” The Court also distinguished the Governor’s submission of modifications of the Penal Law from language concerning the location and type of prison to be built. See 192 Misc. 2d 117, 126-127.

<sup>74</sup> See *Pataki v. N.Y. Assembly*, 190 Misc. 2d 716, 737.

Extended analysis is not needed to detail the dangers of upsetting the delicate balance of power existing among the three, for history teaches that a foundation of free government is imperiled when any one of the co-ordinate branches absorbs or interferes with another. . . .<sup>75</sup>

As designed by the Stimson Committee, New York's centralized budget mechanism allows the Governor to set the budgetary agenda. That design was intended to improve accountability, defeat logrolling, and expose proposed budgets to public scrutiny. At the same time, the Stimson Committee was mindful of the overall balance of executive and legislative power, and thus intended for the Legislature to have the power to review and reject the Governor's budget proposals.

To restore that balance to the budget process and for the reasons that follow in this section, this Committee proposes that:

- the Governor's section 3 power to submit conditions on the use of proposed expenditures within an appropriation bill should be read as limited by section 6; and
- the Legislature's section 4 power to strike "items" should be read to extend to all such conditions.

The Committee believes that these interpretations recognize that "the State Constitution is . . . to be construed liberally and with regard to its fundamental aim and object and not with the acute verbal criticism to which a penal ordinance is properly subjected."<sup>76</sup> The executive budget provisions are also thereby "construed from a common sense standpoint in a way that makes their operation practicable."<sup>77</sup>

While the Committee's proposed reading of the constitutional text can ameliorate the present constitutional conflicts between the political branches, it cannot fully realize the budget process that the Stimson Committee envisioned and that New Yorkers deserve. For example, one of the Stimson Committee's most pressing concerns was the need for public participation and scrutiny in the budget process. To be sure, the Committee's proposed reading of section 4 would likely increase friction between the political branches with respect to conditions on appropriations, which might lead in turn to greater public awareness of the constituent elements of the proposed budget, such as the suspension of or other changes in existing statutes. But even with a revitalized section 4, there is unlikely to be significant public participation where the political branches agree on a budgetary item. In short, achieving much of the Stimson Committee's agenda will require specific legislative reforms well beyond the scope of the present report.

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<sup>75</sup> *Berle*, 49 N.Y.2d at 522.

<sup>76</sup> *Tremaine I*, 252 N.Y. at 40.

<sup>77</sup> *People Ex. Rel. Boyle v. Cruise*, 197 A.D. 705, 710 (1<sup>st</sup> Dep't 1921).

**A. The Governor’s Power to Include Substantive Language in the Budget is Broad but not Unlimited.**

As intended, Article VII clearly gives the Governor substantial power to set the budgetary agenda. Outside of the executive budget, the Governor has no constitutional power to introduce proposed legislation. Section 3, however, *requires* the Governor to propose the appropriations in the budget and “the proposed legislation, if any, recommended therein.” To similar effect, section 2 requires the Governor to submit “a complete plan of expenditure . . . together with recommendations as to proposed legislation, if any, which he may deem necessary to provide moneys and revenues sufficient to meet such proposed expenditures.”<sup>78</sup> The Governor’s final budget power is to veto any of the Legislature’s additions to the budget.<sup>79</sup>

Even beyond these formal powers, it is evident that some non-monetary language must be included in a budget bill. The State cannot just appropriate \$100 million. It has to be appropriated for a purpose, which entails some description – what Justice Malone, borrowing from then-Justice Breitel, described as the appropriation’s “when, how, or where.”<sup>80</sup> An appropriation for a prison can reasonably describe the prison’s location and size, whether it is to be a maximum- or medium-security facility, and when it is scheduled to open. Indeed, the Legislature cannot perform its proper function if the Governor’s budget bill simply contained bare numbers, which do not show for what purpose or in what department or program the money is to be expended.<sup>81</sup> If the Governor has the authority to introduce the budget, then that authority must extend to such matters.

Yet the language in budget bills now goes far beyond a simple description of the program to be funded by the appropriation.

1. “General Provisions.”

Thus, *Pataki* addresses in part provisions that subject the flow of appropriated funds to the Director of the Budget’s approval and that allow the interprogram transfer of funds. Such provisions are certainly “related to” the budget, but they do much more than state the “when,

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<sup>78</sup> It appears that Governor Pataki has erroneously used section 6 to justify the inclusion of detailed programmatic material, including changes in existing statutes, in an appropriation. *See* Governor’s Br. to Appellate Division, Third Department. Section 6 provides in relevant part: “No provision shall be embraced in any appropriation bill submitted by the governor . . . unless it relates specifically to some particular appropriation in the bill, and any such provision shall be limited in its operation to such appropriation.” In *Tremaine I*, the Court of Appeals considered the argument that section 6 — which was then section 22 — supported a legislative addition as “germane to the particular appropriations in the bill to which it applied and . . . limited in its operation to such appropriations.” *Tremaine I*, 252 N.Y. at 49. *Tremaine I* squarely rejected the Legislature’s reliance on this text, stating that the provision “which is prohibitory in terms, has no affirmative application to ‘an appropriation bill submitted by the governor’ so as to permit the addition of the rider in question.” *Id.* Moreover, the legislative history of section 6 confirms that the provision is prohibitory and lacks affirmative application. *See* Report of Committee on State Finance, 1938 Constitutional Convention \_\_ (noting that provision was adopted in 1894 for the express purpose of “prevent[ing] the inclusion of riders in appropriation bills”); *accord* 1915 Opinions of the Attorney General at 368 (quoting 1894 debate).

<sup>79</sup> *See* art. IV, section 7.

<sup>80</sup> *See Hidley v. Rockefeller*, 28 N.Y.2d 439, 444 (1971) (Breitel, J., dissenting).

<sup>81</sup> *See Saxton v. Carey*, 44 N.Y.2d 548, 550 (1978) (“itemization is necessary to facilitate proper legislative review of the proposed budget”).

how, or where” of an appropriation. They depart from procedures in existing legislation for the appropriation or transfer of funds — which is why they are put into the legislation in the first place.

Such language does not necessarily violate the Constitution. It is clear that section 6 blocks the Governor from submitting budget bill provisions that do not “relate[] specifically to some particular appropriation in the bill.” Some case law echoes this language in rejecting generally applicable budget provisions that do not relate to a specific appropriation. In *Tremaine II*, for example, the Court of Appeals noted curtly: “All agree that the ‘general provisions’ are unconstitutional and have no place in the budget.” While there is little indication in the opinion what the Court meant by this remark, the Legislature’s brief (which the opinion openly praised) provides intriguing background.<sup>82</sup> According to this submission, “general provisions dealing with the power of allocation of appropriations made, and with the transfer and interchangeability of such appropriations,” violate Article VII, sections 1 through 4, because they are not “items” and are the proper subject of general laws, and they violate section 6 because they relate to all appropriations and not “some particular appropriations.”<sup>83</sup> In addition, as noted, *Tremaine I* and, forty years later, *Schuyler* both confirmed that the purpose of section 6 is to prevent the “inclusion of general legislation” in budget bills.<sup>84</sup>

On the other hand, the Court of Appeals has upheld budget provisions allowing “the transfer of funds within particular programs and departments.”<sup>85</sup> The exact scope of the constitutional prohibition, if any, against including “general provisions” or “general legislation” in budget bills is therefore hard to determine.

## 2. Programmatic Provisions.

The constitutional prohibition may, however, encompass programmatic provisions that address neither the procedure for paying an appropriation nor the “when, how, or where” of its expenditure, but instead the substantive programs funded by the budget. The budget for the Department of Correctional Services, for instance, might include not just money for a new prison, but amendments to the Penal Law that, by reducing the period of incarceration for certain penalties, would reduce the size of the planned facility and, thus, the size of the appropriation. Here, there is a logical nexus between the appropriation and the substantive change to the Penal Law, but it is far more attenuated than the nexus between the appropriation for the prison and the location of the prison. In addition, the change in substantive law — even if “sufficiently ‘related’” to the budget — is not “limited in its operation” to an appropriation, and may therefore violate section 6. Likewise, a change in the Medicaid eligibility rules, for instance, is in some sense “related” to a budgetary appropriation, but would not be “limited in operation” to the

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<sup>82</sup> *Tremaine II*, 281 N.Y. at 12.

<sup>83</sup> *Pataki*, Br. for the People of the State of New York, Plaintiffs-Respondents, by John J. Bennett Jr., Attorney-General, Point III pp. 89-92, reprinted in Exhibit C to cross-motion of State Assembly.

<sup>84</sup> *Tremaine I*, 252 N.Y. at 48; *Schuyler*, 32 A.D.2d at 455-56.

<sup>85</sup> *Saxton*, 44 N.Y.2d at 548, 551. The Court found that the transfer provisions were not properly subject to judicial consideration, but were a matter for the political branches to resolve between them. *See id.*

budget.<sup>86</sup> *Silver* suggests that this distinction may be significant. The language of *Pataki* — even if not the substance of the decision — obliterates it.

The distinction is important because the budget is essential legislation; although often delayed, it is always enacted. If the budget can properly include material that goes beyond the “when, how, or where” of an appropriation, the Governor may be able to force the passage of measures that change existing law but that would lack legislative support if considered separately.

In a budget of thousands of pages, legislators and the public will hardly even have the opportunity to consider their substantive merits — if they notice them at all. In practice, budget bills are enormously detailed, complex, and obscure. Thus, they are simply not subject to the kinds of scrutiny that interested members of the public can give to other bills. Plus, when the Governor and the Legislature agree on substantive changes, the judiciary may be less likely to intervene.<sup>87</sup>

Whether or not the judiciary is willing to police the line between “general” legislative provisions submitted with the budget and provisions that “relate specifically to some particular appropriation,” there can be no question but that the Governor’s power to include programmatic language is still significant. Thus, to maintain the basic purposes of the executive budget process, and respect the constitutional separation of powers, the Legislature must have the power to block such executive initiatives. In fact, the broader the Governor’s power to propose detailed and sweeping programmatic legislation, the more the “delicate balance” of legislative and executive power requires that the Legislature be able to check the Governor “item” by “item.”<sup>88</sup>

## **B. The Legislature Must Have the Effective Power to Check What the Governor May Propose.**

Central to Justice Lehner’s decision in *Silver* is the notion that “when, how, or where” provisions, “being part of an item of appropriation, . . . are subject to the ‘no alteration’ restrictions of section 4 of Article VII.”<sup>89</sup> However, the “no alteration” restrictions of section 4 are not absolute. According to the plain language of this constitutional provision, the Legislature may “strike out or reduce items” in the Governor’s budget bills. One way for the courts to restore the delicate balance of power, therefore, is to recognize that non-monetary provisions attached to appropriations are separable “items,” and subject to limited alteration accordingly.

Once read as separable “items,” programmatic provisions become subject to deletion without deletion of the rest of the appropriation. For example, the Legislature can delete language giving the Director of the Budget control over the flow of appropriated funds without deleting the appropriation to which that language was attached. Further, the Legislature can delete the detailed specifics for an appropriation for the construction of a new prison without

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<sup>86</sup> Conversely, budget language requiring Budget Director approval of the payment of certain funds, or authorizing the interprogram transfer of specific funds, or even spelling out the details of an appropriation, such as the exact facilities to be included in a new prison, would all be “limited to the operation” of such appropriation.

<sup>87</sup> See *Saxton*, 44 N.Y.2d at 545.

<sup>88</sup> *Berle*, 49 N.Y.2d at 515; *Regan*, 53 N.Y.2d at 365.

<sup>89</sup> *Accord* 1982 Opinion of Attorney General.

deleting the appropriation for the prison. In this way, the Legislature can maintain the existing legislative framework, while accepting the new appropriation.

Without this reading of section 4, the Governor's programmatic proposals, once attached to an item of appropriation, are made invulnerable to legislative action except by the Legislature's striking the entire appropriation. Yet the appropriation itself may be supported by the Legislature. To take one example, the Legislature may support needed funding for prison maintenance but not be willing to accept a tangentially-related change in the Penal Code as the price of that funding. If section 4 is read as it is in *Pataki* to bar all deletions of programmatic material, the Legislature then faces a Hobson's Choice. It can either accept a policy change of which it disapproves in order to obtain needed funding, which is evidently contrary to the anti-log-rolling animus of the Stimson Committee. Or it can forego the funding altogether, and precipitate a budgetary crisis, even though both the Governor and Legislature agree on the appropriation in question.

The Legislature therefore should be able to assert its power one step further. Precisely because of the Governor's enormous power, it makes sense to read the Constitution as enabling the Legislature to strike out anything the Governor can insert.

Such a reading is entirely consistent with both the textual provisions and case law barring legislative additions – as well as the underlying policy goal of enabling the Governor to limit overall spending through control of the budget submission and the item veto. So, too, it would be consistent with the constitutional structure of simultaneously curbing the Legislature's power to add new material while protecting its power to reject gubernatorial proposals. Indeed, enhancing the Legislature's power to reject gubernatorial language legitimates a broad gubernatorial power to add such language because it assures that, as with appropriation items and all other legislation, enactment requires the active participation of both branches.<sup>90</sup>

In addition, this interpretation of section 4 responds directly to *Tremaine I*'s "fundamental question."

If the Legislature may not add . . . without altering the appropriation bill, it would necessarily follow that the Governor ought not to insert such provisions in his bill. He may not insist that the Legislature accept his propositions in regard to segregation without amendment, while denying to it the power to alter them.<sup>91</sup>

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<sup>90</sup> In *King v. Cuomo*, 81 N.Y.2d 247, 254-55 (1993), the Court of Appeals struck down the Legislature's century-old practice of recalling a passed bill formally transmitted to the Governor. According to *King*, "this unconstitutional procedure 'creates a negotiating position in which, under the threat of a full veto, the Legislature may recall a bill and make changes in it desired by the governor, thus allowing him to exercise de facto amendatory power.'" *Id.* at 254-255. As a result, "the practice undermines the integrity of the law-making process as well as the underlying rationale for the demarcation of authority and power in this process." *Id.* at 255.

By the same token, if sections 3 and 4 are together interpreted in such a manner that legislative proposals made by the Governor are enacted *ipso facto* into law, without deliberative legislative action, the same kind of situation could result. Upon the Legislature's deletion of an entire appropriation, the Governor would submit an amended bill. That paralyzing process undermines the integrity of legislative power as well as the underlying rationale for the demarcation of authority and power in the executive budget process.

<sup>91</sup> *Tremaine I*, 252 N.Y. at 50 (Pound, J. (*dictum*)).

Finally, this interpretation of section 4 not only serves to protect the “delicate balance” of executive and legislative power, but also accords with the very open-ended meaning given to the concept of “itemization” by the Court of Appeals. Thus, in *Saxton* the Court of Appeals quoted at length the dissenting opinion of Justice Breitel in *Hidley v. Rockefeller*:<sup>92</sup>

There is no constitutional definition of itemization. There is no judicial definition of itemization. Itemization is an accordion word. An item is little more than a ‘thing’ in a list of things. A house is an item, and so is a chair in the house, or the nail in the chair, depending on the depth and purpose of the classification. The specificity or generality of itemization depends upon the function and the context in which it is used.<sup>93</sup>

Likewise, in considering the meaning of an “item” of appropriation, *Tremaine II* stated that “details must not run into absurdities, and only those details need be given which are necessary or appropriate to show where and for what the money is to be spent.”<sup>94</sup> *Saxton* reaffirms *Tremaine II*, holding that “[t]he degree of itemization necessary in a particular budget is whatever degree of itemization is necessary for the Legislature to effectively review that budget.”<sup>95</sup>

## **Conclusion**

The Committee agrees that the Legislature should be able to “alter” items of appropriation only as provided in section 4. As the Court of Appeals recognized in *Tremaine II*, the Legislature cannot simply submit “substitute” items of appropriation. Allowing it to do so would undermine the unique constitutional design of the executive budget process. By giving the Governor the primary responsibility for proposing appropriations, that design tends to create accountability, restrain government spending, and minimize favoritism across the multitude of constituencies represented by each legislator. But this same design does not bar the Legislature from altering items of appropriation that are loaded with programmatic material in conflict with existing state policy.

We believe that this approach would restore the proper, “delicate balance” between the political branches. Our analysis leads us to conclude that section 6, section 3 does not grant the Governor *unlimited* power to submit substantive legislation with an appropriation. The legislation that is included by the Governor must be specifically related to and limited in its operation to an appropriation. Second, and more important, section 4 allows the Legislature to strike items of programmatic material without striking an appropriation in its entirety.

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<sup>92</sup> In *Hidley v. Rockefeller*, 28 N.Y.2d 439, 444 (1971), the majority of the court determined the plaintiff lacked standing and dismissed the claim. Justice Breitel dissented on the question of standing but would have dismissed the claim on the merits.

<sup>93</sup> *Saxton*, 44 N.Y.2d at 550 (quoting 28 N.Y.2d 439, 444).

<sup>94</sup> *People v. Tremaine*, 281 N.Y. 1, 10 (1939).

<sup>95</sup> *Saxton*, 44 N.Y.2d at 549.