GEORGE E. PATAKI, in his Official Capacity as the Governor of the State of New York, Plaintiff-Respondent, - against - THE NEW YORK STATE ASSEMBLY, and THE NEW YORK STATE SENATE, Defendants-Appellants, - and - H. CARL McCALL, in his Official Capacity as the Comptroller of the State of New York, Defendant.

No. 171

COURT OF APPEALS OF NEW YORK

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Initial Brief: Appellee-Respondent

COUNSEL: [*1] To be Argued by: PAUL SHECHTMAN.

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TITLE: Brief for Plaintiff-Respondent

TEXT: QUESTIONS PRESENTED

1. Did the Legislature violate Article VII, Section 4 of the New York Constitution by altering the Governor's appropriation bills?

2. Does this case present a justiciable controversy?

INTRODUCTION

In 1926, the people of New York State approved constitutional amendments that dramatically shifted the power to develop and initiate budget legislation from the Legislature to the Governor. Those amendments, now embodied in Article VII of the State Constitution, were designed to lay "responsibility for securing an economical and systematic plan for the annual budget of the State . . . squarely on [the Governor's] shoulders." Henry L. Stimson, Saving the State's

Money: The Sound and Far-Reaching Reforms Contained in the Proposed Constitution. Albany: Committee for the Adoption of the Constitution, 1915 No. 12 ("Stimson")(A. 307). n1 An Executive Budget system, it was believed, would prevent the "extravagance, waste and irresponsibility" inherent **[*2]** in legislative budgeting, id., by affording the Governor "the opportunity to present a complete financial plan drawn in the sole interest of the state at large." Report of the Committee on State Finances, Revenues, and Expenditures. Relative to a Budget System for the State. Doc. No. 32, State of New York in Convention, Aug. 4, 1915 ("1915 Report")(A. 299).

n1 "A." refers to Appellants' Joint Appendix on this appeal; "R." refers to the Record in the Appellate Division, which has been transmitted to this Court; "S. Br." refers to the Senate's brief on this appeal; "A. Br." refers to the Assembly's brief; and "G. Br. Silver" refers to the Governor's brief in the companion case of Silver v. Pataki.

That Article VII gave the Governor broad powers, legislative in nature, is undeniable. For the first time, the Governor was authorized, indeed obligated, to draft and put before the Legislature bills containing proposed appropriations. No individual legislator has a constitutional right or obligation to **[*3]** introduce bills, and none can put a bill before both houses. Article VII also imposed unprecedented constraints on the Legislature's otherwise plenary lawmaking authority. A critical element of the Executive Budget system is the "no-alteration" clause of Article VII, § 4, which sharply limits the Legislature's authority to act on the Governor's budget. It provides that "the legislature may not alter an appropriation bill submitted by the governor except to strike out or reduce items therein, but may add items of appropriation provided that such additions are stated separately and distinctly .. . and refer each to a single object or purpose." As its terms suggest, the no-alteration clause was intended to ensure that the Legislature would not cast aside the Governor's budget and substitute its own, and is therefore indispensable to maintaining the integrity of New York's Executive Budget system. See 1915 Report (A. 299)(no alteration provision eliminates the "easy temptation to the Legislature to throw [the Governor's budget] aside and begin over again a new budget of its own").

While the legislative powers that Article VII confers upon the Governor give him a strong voice in **[*4]** the State budget process, the true genius of Article VII is its carefully crafted system of checks and balances on each branch. In essence, the framers of Article VII effected a "singular reversal" in the roles of the Executive and Legislature in the budget process. 1915 Report (A. 296). Under the discredited legislative budget system, it was the Legislature that authored and introduced items of appropriation, and the Governor who was faced with the choice or approving or vetoing those items or seeking compromise through negotiation. And it was the Governor who was subject to a form of the no-alteration rule, insofar as he had to approve or veto an item of appropriation in its entirety and could not rewrite its terms and conditions to reflect his policy preferences. Now, it is the Governor who authors and introduces items of appropriation, and the Legislature that is faced with the choice of approving the item (at the same or a reduced level of spending) or striking it out or seeking compromise. And it is the Legislature that is subject to the no-alteration rule. Thus, the Legislature now effectively has the veto power, and with it, the final word. 1915 Report (A. 300)("[i]t would **[*5]** thus be the Legislature which will have the final word").

Three times since 1926, this Court has enforced the no-alteration clause and rebuffed attempts by the Legislature to reclaim the plenary authority that it formerly possessed over budget matters. See People v. Tremaine, 252 N.Y. 27 (1929)("Tremaine I"); People v. Tremaine, 281 N.Y. 1 (1939)("Tremaine II"); New York State Bankers Assoc. Inc. v. Wetzler, 81 N.Y.2d 98 (1993). Each time, the Court has held that Article VII, § 4 means what it says: that the Legislature may not unilaterally alter the provisions of appropriations in a Governor's budget bill that describe the purpose for which appropriated funds are to be spent or the terms and conditions under which such spending may occur. See, e.g., Tremaine II, 281 N.Y. at 11 ("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"). That is, it may not alter what Judge Breitel felicitously called the "when, how, or where" of proposed spending. Saxton v. Carey, 44 NY.2d 545, 550 (1978), quoting **[*6]** with approval. 28 N.Y.2d at 444 (Breitel, J. dissenting).

This appeal presents yet another legislative effort to circumvent the no-alteration clause, this time with respect to the 2001-2002 Executive Budget. The Legislature was more inventive this time in the stratagems that it employed, but its actions were no less objectionable. As the Appellate Division concluded below, "[h]owever prolonged and contentious the budget process [may have] become[], [the Legislature's] proper constitutional action was to refuse to pass [the Governor's] appropriation bills and induce negotiations . . . not to alter and amend them," which is what it did. (A. 7). That conclusion, we submit, is entirely correct and must be upheld if Article VII is to operate as the framers intended.

STATEMENT OF THE CASE

A. The 2001-2002 Budget Process

On January 16, 2001, Governor George E. Pataki submitted his 2001-2002 Executive Budget to the Legislature. Pursuant to Article VII of the State Constitution, the Governor also submitted 11 budget bills: a bill to meet the spending needs of the Legislature and the Judiciary, which the Governor submitted, without revision, as **[*7]** proposed by those branches; four itemized appropriation bills to fund the full array of State programs from education and health to public protection; a debt service bill; and five other budget bills (so-called "non-appropriation" bills), which contained revenue raising measures and other recommended legislation affecting State finances. n2

n2 As this Court has noted, the term "non-appropriation" bill does not appear in the Constitution, but is a convenient shorthand. Silver v. Pataki, 96 N.Y.2d 532, 535 n.l (2001).

On February 13, 2001, the Governor submitted amendments to his proposed budget bills within the 30-day period during which he may do so as of right. Article VII, § 3. Thereafter, on March 29, 2001, the Legislature passed the debt service bill, which was approved by the Governor the next day. (A. 60).

On July 30, 2001, the Legislature made substantial alterations to nine of the ten remaining budget bills (all but the Legislature and Judiciary bill) and printed amended versions **[*8]** of those nine bills. That same day and the next, it introduced 37 single-purpose appropriation bills. As discussed more fully below, each of those 37 bills was a substitute for one or more items of appropriation that the Legislature had stricken from the Governor's appropriation bills. (Id.). Each was a "uni-bill," bespeaking the concurrence of both houses in its content.

On August 2, 2001, the Legislature passed the altered versions of the Governor's budget bills. That day and into the early morning of August 3, it also passed the 37 single-purpose appropriation bills that it had originated. The effect of the Legislature's action was to alter dramatically the Governor's appropriation bills through three related stratagems: (i) the deletion of provisions within proposed items of appropriation that described the purposes for which those appropriations could be spent and the terms and conditions upon which spending could occur; (ii) the elimination of proposed appropriations and the substitution, by way of single-purpose appropriation bills, of the Legislature's own appropriations for the same purposes but with different terms and conditions; and (iii) the enactment of proposed **[*9]** items of appropriation accompanied by secretions within "non-appropriation" bills of provisions that referenced those items and purported to modify the purpose for which those appropriations could be spent or the terms and conditions under which spending could occur. (Id.). Examples of these three devices - all intended to alter what this Court has called the "when, how, or where" of spending - include the following:

1. Deletion of "When, How, or Where" Provisions in Proposed Appropriations

The Legislature deleted provisions in the Governor's Education, Labor and Family Assistance Bill that were intended to govern the distribution of billions of dollars for the State's public schools and the terms and conditions under

which the appropriated funds could be spent. For example, the Executive Budget contained a proposed appropriation authorizing funding for Improving Pupil Performance grants for the 2001-2002 school year and establishing maximum awards and eligibility criteria. The Legislature enacted the appropriation but only after deleting the portion of it setting the maximum award and eligibility criteria. The Legislature also excised a provision from the Deaf Infant **[*10]** Program that conditioned aid to private schools on their submission of an annual report of pupils served. (A. 66). Similarly, the Legislature deleted provisions governing the distribution and administration of billions of dollars in appropriations that the Governor had proposed for the State's Health and Medicaid programs. (A. 66-73). Thus, for example, the Executive Budget proposed an appropriation for an immunization program against German measles and other communicable diseases and authorized funds to be increased or decreased through interchange with certain other Department of Health funds, depending on public health needs. The Legislature enacted the appropriation but only after deleting the interchange provision. (A. 67). n3 The Legislature also altered four appropriation bills submitted by the Governor by deleting from each a provision requiring the Director of the Budget to issue a certificate of availability before appropriated funds could be expended. n4 This certification process was intended to enable the Director better to ensure that revenues were available before money was spent.

n3 Similar interchange provisions were attached to proposed items authorizing spending for, inter alia, a public health campaign for tuberculosis control, community-based AIDS services for high-risk populations, a rabies treatment and prevention program, the Cystic Fibrosis Program, and a Family Planning Services program. (A. 67-73).

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n4 Specifically, Section 1(g) of the four bills provided: "No moneys appropriated by this chapter shall be available for payment until a certificate of approval has been issued by the director of the budget." (A. 62).

2. Elimination of Proposed Appropriations and Substitution in Single-Purpose Bills of Appropriation for the Same Purpose but with Different "When, How, or Where" Provisions

The Executive Budget submission contained a proposed appropriation to the Division of Housing and Community Renewal (DHCR) for a homeless housing program. The Legislature struck the appropriation and substituted single purpose bills containing appropriations for the same purpose but redirected to the Office of Temporary and Disability Assistance (OTDA). (A. 75-76). Similarly, the Legislature eliminated proposed appropriations for a Council on the Arts within the Office for Cultural Affairs and enacted numerous single-purpose bills for the same purpose but directed to the State Education Department. (A. 78). The Legislature also struck hundreds of proposed reappropriations for capital projects initiated **[*12]** in prior fiscal years (totaling $ 19.6 billion) and substituted a single $ 1.1 billion lump sum appropriation limited to liabilities incurred through August 31, 2001.

3. Enactment of Proposed Appropriations and Secretion in Non-Appropriation Bills of Language Altering the "When, How, or Where" Provisions of those Appropriations

The Executive Budget submission contained a proposed appropriation to the State University of New York for services and expenses related to collective bargaining agreements, inflation, full-time faculty positions, and other priority needs identified by the Board of Trustees. The Legislature enacted the appropriation in haec verba, but then altered it by inserting language in a "non-appropriation" bill that directed the State University to use the appropriated funds only for collective bargaining agreements and enrollment growth. (A. 79). n5 Likewise, the Executive Budget contained a proposed appropriation for services and expenses of the Division of the Lottery. The Legislature enacted the appropriation but then altered it by inserting a provision in a "non-appropriation" bill that restricted the agency from

using the appropriation for the Youth **[*13]** Entrepreneurship Program, for new employees in the Retailer Sales Management Plan, or for advertising expenses at a level above fiscal year 2000-2001 spending. (A. 79). The Legislature also enacted a lump sum appropriation to CUNY (including the ability to spend up to $ 6.3 million for operating costs of Baruch College's new facility) as proposed in the Executive Budget, but then inserted a provision in a "non-appropriation" bill that directed the University Trustees to use the funds solely for contractual salary increments and other mandatory college costs. (A. 81). n6

n5 More specifically, the Governor's Education, Labor and Family Assistance Bill included an appropriation "to the State University of New York from the general fund/state operations, state purposes account-003 [f]or services and expenses of the university relating to collective bargaining agreements, inflation, full time family positions, and other priority needs identified by the board of trustees . . . $ 55,250,000." (R. 1321). The Legislature approved the item as stated and then in a "non-appropriation" bill referenced the appropriation and restated it in haec verba but added a provision that "[n]otwithstanding any other provision of law to the contrary, [such money] shall be available only for services and expenses of the university related to collective bargaining agreements and enrollment growth." (S. 1145-B: 20-28)(emphasis added).

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n6 It is the Governor's position that the Legislature's "non-appropriation bills" created new (or substitute) items of appropriation. See G. Br. Silver 60-65.

The 46 bills passed by the Legislature (the nine bills that were initiated by the Governor and altered by the Legislature and the 37 single-purpose bills that were initiated by the Legislature) were presented to the Governor for his approval as the Legislature's "baseline budget." Rather than risk interrupting the delivery of vital public services, the Governor signed each bill into law and immediately commenced this action.

B. This Action

On August 16, 2001, one day after signing the 46 bills into law, the Governor brought this lawsuit in Albany County Supreme Court against the Senate, the Assembly, and the Comptroller. n7 The action sought, inter alia, a declaratory judgment (i) that the Legislature, in passing the so-called baseline budget, had violated Article VII, § 4 of the State Constitution, which prohibits it from altering an appropriation bill submitted by the Governor except by striking out or reducing **[*15]** items, or adding separate and distinct items of appropriation, and (ii) that the Legislature had violated Article VII, § 5 of the Constitution, which prohibits it from considering any other bill making an appropriation until it has acted upon all the appropriation bills submitted by the Governor. (A. 85-105). Thereafter, the Senate and Assembly served an answer and counterclaims seeking a declaration that the Governor had unconstitutionally included "substantive" legislation in his appropriation bills and that the Legislature's response was therefore permissible. The Assembly (but not the Senate) also raised two justiciability claims: that the action was barred under the Speech or Debate Clause (Article III, § 11) and that the Governor lacked standing to challenge bills that he had chosen not to veto. (A. 106-112).

n7 On November 7, 2001, the Supreme Court dismissed the Comptroller from the action because he "had no part in enacting into law the allegedly unconstitutional bills." Pataki v. McCall, Decision and Order at 4 (Sup. Ct. Albany Co. Nov. 7, 2001).

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C. The Supreme Court's Decision

On January 17, 2002, Justice Bernard J. Malone granted the Governor's motion for summary judgment. (A. 22-55). After determining that the controversy was justiciable, Justice Malone concluded (i) that the Governor was not limited in an appropriation bill merely to a "statement of dollar amounts and the purpose thereof," but could include provisions that implemented his budget plan, and (ii) that, under Article VII, § 4, the Legislature could not alter the Governor's appropriation bill, which it had impermissibly done. (A. 50). n8 These conclusions, Justice Malone emphasized, did not wrest control of public spending from the Legislature, for it could "simply fail to enact into law the Governor's appropriation bills, and the resulting deadlock, if a compromise cannot be reached, [would] cause public pressure to build to the point where these political questions [would] be settled 'in the voting booth.'" (A. 53-54)(citation omitted).

n8 As to justiciability, Justice Malone wrote: "the course chosen by the Governor [signing the bills into law and bringing suit] is the preferred course of proceeding in budget disputes of this nature." (A. 41).

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D. The Appellate Division's Decision

On September 3, 2003, the Appellate Division, Third Department, affirmed the grant of summary judgment for the Governor. n9 With two justices dissenting, the Court rejected the Assembly's justiciability claims. n10 On the merits, it wrote:

> In this appeal, a critical issue is the extent of a governor's constitutional authority to include substantive modifiers in a gubernatorial appropriation bill. Defendants contend that plaintiff's numerous insertions of substantive modifiers within his appropriation bills amount to an unconstitutional attempt to legislate by appropriation and that defendants had the power to strike such measures from plaintiff's proposed budget. We decline defendants' invitation to establish a bright-line rule defining the degree of itemization that may properly be included in a governor's budget submissions. We find sufficient authority to support plaintiff's argument that such substantive modifiers are part of a gubernatorial appropriation bill and subject to the protection of NY constitution, article VII, § 4.

(A. 6). The Court added these sage words: "[h]owever prolonged and contentious the budget **[*18]** process becomes, [the Legislature's] proper constitutional action was to refuse to pass [the Governor's] appropriation bills and induce negotiations . . . not to alter and amend them and then substitute [its] own spending plans in the form of 37 single-purpose bills in violation of NY Constitution, article vii, § 4." (A. 7)(citations omitted). n11

n9 The Senate and Assembly had appealed directly to this Court, which sua sponte transferred the appeal to the Third Department. 98 N.Y.2d 644 (2002).

n10 The Appellate Division majority concluded that the Governor had standing to challenge the constitutionality of the Legislature's actions. (A. 5)("when defendants altered [the Governor's] appropriation bills in an . . . unconstitutional manner, [he] was injured"). Two justices dissented from that conclusion on the ground that "[b]y affirmatively approving the legislation, [the Governor] deprived himself of standing to challenge the constitutionality of the acts of the Legislature." (A. 10). For those justices, "[h]ad [the Governor] vetoed the subject legislation, he would have had standing to challenge it if his veto had been overridden by the Legislature." (A. 8).

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n11 Also before this Court is a companion case from the First Department, which arises out of the Legislature's attempt in 1998 to alter the Governor's budget bills. Silver v. Pataki, 192 Misc.2d 117 (Sup. Ct. N.Y. Co. 2002), aff'd, 3 A.D.3d 101 (1st Dept. 2003). There, the First Department held that the Legislature had unconstitutionally altered the Governor's bills when it "approved" those bills only immediately to amend them by inserting language in "'non-appropriation bills' in ways that had the effect of modifying some of the Governor's appropriations." Id. at 102-03. That, of course, is one of the stratagems that the Legislature employed in 2001.

ARGUMENT

POINT I

THE LEGISLATURE UNCONSTITUTIONALLY ALTERED THE GOVERNOR'S APPROPRIATION BILLS IN VIOLATION OF ARTICLE VII, SECTION 4

Before this Court is yet another legislative effort to circumvent the no-alteration clause of Article VII, § 4, and thereby to revert to what this Court has called "the old system [of Legislative budgeting] which years of agitation and **[*20]** endeavor have sought to abolish." People v. Tremaine, 281 N.Y. 1 (1939). What is at stake on this appeal, as the courts below have recognized, is the very system of Executive budgeting that the people of the State adopted to ensure that New York would have sound fiscal policy. To understand the blatant unconstitutionality of the Legislature's actions and how those actions, if unrestrained, would eviscerate the Executive Budget system requires a brief history of the Executive Budget in New York and of the seminal decisions of this Court that have preserved that system in the face of past challenges.

A.

1. New York's Executive Budget

Prior to 1927, New York had a legislative budget system that gave the Legislature plenary lawmaking authority over the State budget. Under that system, "appropriation and revenue bills [were] made up in the comparative secrecy of legislative committees and rushed through in the . . . final days of a legislative session." 1915 Report (A. 292). The Governor's role was quite limited: he could only "exercise[] his veto power [at the end of the legislative session] in a series of disconnected acts." (ld.)(A. 296). The result, **[*21]** in the words of Henry L. Stimson, a leading reformer, was "extravagance, waste and irresponsibility." Stimson (A. 307). "Logrolling" and "pork barrel" spending were commonplace, and "economical and systematic plan[ning]" was non-existent. Id. The defects in this haphazard fiscal system became even more apparent with the rapid expansion of the functions of State government after 1900, and calls for reform, not surprisingly, mounted.

The first broad-scale reform effort came when the 1915 Constitutional Convention established a Committee to consider a new budget system for the State. n12 After identifying the numerous deficiencies in the legislative budget system, the Committee proposed "a drastic revision of our financial methods" to avoid the "grave danger of general discontent arising out of the constantly increasing burden of taxation." 1915 Report (A. 293). What was proposed - the so-called "Root Budget," named after Elihu Root, the President of the 1915 Constitutional Convention - was nothing short of a "singular reversal" of the relation between the Executive and Legislature. Id. (A. 296). In Root's words, the proposed budget system marked "a radical change in the method **[*22]** of providing for the necessary expenditures of the State." 1915 Constitutional Convention Doc. No. 54, at 6.

n12 The Committee was comprised of eminent New Yorkers: its chair was Henry L. Stimson, who had served as

> Secretary of War in the Taft administration, and its members included Seth Low, the former Mayor of New York and president of Columbia College; Harold Hinman, then Majority Leader of the State Assembly; and Robert F. Wagner, former Acting Lieutenant Governor and later United States Senator.

At the core of that radical reform proposal were two fundamental principles. The first was the belief that "th[e] ultimate responsibility of . . . preparing the budget must rest with the Governor." 1915 Report (A. 297). In the Committee's view, only an elected official who was accountable to all New Yorkers could produce a fiscally sound and responsible budget. Legislative members lacked that accountability; "instead of being responsible solely to the State as a whole, [they were] each responsible to and **[*23]** dependent upon a single district." Id. (A. 296). To quote Henry Stimson again, fiscal economy could not be expected "unless some one man . . . [lay] awake nights to accomplish it." Stimson (A. 307). Thus, the Governor was expected to be the State's chief fiscal policymaker - to "explain and defend a given fiscal policy to the people of the State and . . . [to] uphold before the people of the State a policy of economy and [to be] responsible to them for the success or failure of such a policy." 1915 Report (A. 297).

The second principle, which was a corollary of the first, was that the Legislature could not unilaterally alter the Governor's budget, but could only reduce or strike out proposed items or add monies for "new state activities" not provided for in the plan. (Id.)(A. 299). This restriction on the Legislature's power was deemed essential to a sound Executive budgetary system. Without it, the door would be left "open to an entire abandonment of the [proposed] system and an immediate return to present methods, [thus] destroy[ing] all incentive on the part of the Governor to prepare the budget carefully in advance and present it with a sense of responsibility. **[*24]** " (Id.). During the Convention, Henry Stimson explained the critical significance of this no-alteration rule as follows:

> [T]he plan proposed by the amendment .. . provides that when the Governor introduces his budget that budget must be disposed of without addition. The Legislature can cut down, the Legislature can strike out but they must approach it from the standpoint of a critic and not from the standpoint of a rival constructor. The budget must be protected against its being wholly superseded by a new legislative budget and a resort to the same situation that we have now. Otherwise you would have nothing.

(A. 399)(emphasis added); see also 1915 Report (A. 299)(no-alteration provision eliminates "easy temptation to the Legislature to throw [the Governor's budget] aside and begin over again a new budget of its own"). Under the proposed constitutional amendment, the Legislature could initiate financial legislation "to inaugurate new State activities," but only after it had fully considered the Governor's budget and only in separate bills, each for a single purpose, which would be subject to the Governor's veto.

The constitution proposed in 1915 failed **[*25]** for reasons unrelated to the merits of Executive budgeting. (A. 316). Experience in subsequent years reconfirmed that the "defects of the financial system of New York state [could only] be overcome . . . by the adoption of a thoroughgoing executive budget system." Report of Reconstruction Commission on Retrenchment and Reorganization in the State Government. Oct. 10, 1919 (A. 393). n13 In 1926, the State Reorganization Commission put forward constitutional amendments, modeled closely on the 1915 proposals, to create an Executive Budget and thereby to "establish on an authoritative basis the relations between the Governor and the Legislature in disposing of the budget." Report of the State Reorganization Commission. Feb. 26, 1926 ("1926 Report")(A. 318). Those amendments were approved by the electorate in 1926 and became part of the State Constitution the next year, first as Article IV-A and then, with slight modification, as Article VII when the Constitution was further amended in 1938. n14

> n13 In 1916, for example, Governor Whitman renewed efforts for fiscal reform by submitting budget proposals to the Legislature. Unconstrained by the no-alteration rule, the Legislature ignored the Governor's submission and passed its own appropriation bills. Public Papers of Governor Whitman 1916 at 587-88.

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n14 The principal difference between the 1915 and the 1927 amendments was the inclusion in the latter of a provision authorizing the Legislature "to initiate new items" in a Governor's appropriation bill itself, provided they were stated separately and distinctly and referred to a single object or purpose and thus were "in [a] form . . . subject to the Governor's veto." 1926 Report (A. 321). Under the 1915 proposal, the Legislature could not initiate new items until after the disposition of the Governor's bill. (Id.). In both instances, it was contemplated that the added items would be for "new State activities." (A. 299).

2. Article VII

Article VII effects a broad and unprecedented transfer of budgetary powers that are legislative in nature from the Legislature to the Governor. Article VII, § 2 provides that at the beginning of each year, "the governor shall submit to the legislature a budget containing a complete plan of expenditures proposed to be made [that fiscal year] and all . . . revenues estimated to be made available therefore, together with . . . recommendations of **[*27]** proposed legislation, if any, .. . deem[ed] necessary to provide .. . revenues sufficient to meet such proposed expenditures." n15 Article VII, § 3 provides that, along with the budget, "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." n16 Article VII, § 4 includes the no-alteration clause, which sharply curtails the Legislature's power to modify the Governor's budget submissions. It provides that once the Governor has submitted an appropriation bill, "[t]he legislature may not alter [it] 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." In keeping with their status as independent and co-equal branches, the Legislature and the Judiciary transmit estimates of their financial needs to the Governor for inclusion in the Executive Budget submission "without revision." Those estimates may then be modified as the Legislature deems appropriate.

n15 The budget may also contain "such other recommendations and information as the governor may deem proper." Article VII, § 2.

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n16 The Governor may freely amend his budget bills or submit supplemental bills "within thirty days thereafter" or, with the Legislature's consent, at any time after the 30-day period. Article VII, § 3.

Section 4 further provides that "when passed by both houses [a Governor's appropriation bill becomes] law . . . without further action by the governor." The exception to this no-veto provision is "appropriations for the legislature and judiciary and separate items added to the governor's bills by the legislature, [which are] subject to [his veto power]." This structure makes eminent sense. Under Section 4, the Governor is prohibited from vetoing items of appropriation that he proposed, a prohibition that reflects the fact that he approved those items by proposing them and that the Legislature cannot alter them except to strike or reduce the amounts appropriated. He may, however, veto appropriations for the Legislature and the Judiciary and appropriations added by the Legislature, a power that reflects the fact that he does not propose those items and considers them for the first time **[*29]** when they reach his desk after passage.

Two other provisions of Article VII are also noteworthy. The first is Section 5, which provides that the legislature

may not "consider any other bill making an appropriation until all the appropriation bills submitted by the governor . . . have been finally acted on by both houses." n17 This restriction is intended to prevent the Legislature from becoming distracted with other financial legislation until it has completed its constitutional obligation to act on the Governor's budget submissions. 1915 Report (A. 299-300). The second is Section 6, which includes the so-called "anti-rider" provision, also central to this appeal. It states that "[n]o provision shall be embraced in any appropriation bill submitted by the governor . . . unless it relates specifically to some particular appropriation in the bill, and such provision shall be limited in its operation to such appropriation." A similar provision was first adopted in 1894, then as Article III, § 22, to prevent the inclusion by the Legislature of general legislation in appropriation bills. Report of the Committee on State Finances and Revenues of the New York State Constitutional Convention. **[*30]** Doc. No. 3, State of New York Constitutional Convention, July, 8, 1938 ("1938 Report")(A. 335). Prior to the adoption of section 22, the Legislature had gone so far as to include provisions creating new criminal offenses within appropriation bills. Opinion of the Attorney General Oct. 15, 1915 ("1915 Opinion")(A. 344). The anti-rider provision was incorporated into Article VII in 1938 to "extend[] its operation to . . . the Governor's budget bills." 1938 Report (A. 336).

n17 Section 5 provides an exception to this rule if the Legislature receives a message from the Governor "certifying to the necessity of the immediate passage of such a bill."

In sum, Article VII effects a "singular reversal" of roles between the Governor and the Legislature in the budgetary process. Under the legislative budgeting system, the Legislature initiated the budget, and the Governor exercised a veto power at the end of the process. As a result, the Governor faced the choice of whether to approve an item of appropriation, veto **[*31]** it, or attempt to negotiate amendments with the Legislature with regard to its amount, terms or conditions. Under Article VII, the Governor initiates budget legislation, and the Legislature must decide whether to approve an item of appropriation, strike it out (or reduce it) or attempt to negotiate modifications in its terms and conditions with the Governor. What the Legislature cannot do, just as the Governor could not under the old budget system, is unilaterally alter the terms and conditions of a proposed item of appropriation.

3. This Court's Landmark Decisions

On three occasions since 1927, the Legislature has attempted to reclaim plenary authority over budgetary matters, and each time this Court has prevented it from doing so.

a. Tremaine I

Shortly after the approval of the new Constitutional provisions establishing an Executive Budget, this Court was presented with a controversy that implicated those provisions. People v. Tremaine, 252 N.Y. 27 (1929). In Tremaine I, the Governor had submitted to the Legislature a budget containing many lump-sum appropriations for certain State departments (e.g., $ 582,250 "[t]o permit the attorney-general **[*32]** to reorganize the department of law") with provisions that the Governor would be the sole approving authority as to how those monies would be segregated. The Legislature struck the lump sum items to which were attached the provision giving the Governor segregation control, restated those items, and substituted provisions requiring the consent of the chairmen of the legislative finance committees as to any segregations. It was the constitutionality of those legislative alterations that was challenged in the courts.

This Court invalidated the Legislature's segregation measures on the ground that they ran afoul of the Constitutional provision prohibiting members of the Legislature from holding civil appointments. Id. at 42 ("the designation of the [finance committee chairmen] to approve the segregation of lump sum appropriations amounts to the making of civil appointments by the Legislature"). The Court went on to state that those segregation provisions were also invalid under what was then Article IV-A, Section 3 of the Constitution (now Article VII, § 4). Because the

segregation provisions were an "alteration" of the Governor's budget bill "other than by striking **[*33]** out or reducing items therein" and were not "an addition of an item of appropriations stated separately and distinctly from the original items of the bill," their "insertion in the bill was improper." Id. at 49.

b. Tremaine II

Ten years later, this Court again considered the constitutional limitations on the Legislature's authority to amend a Governor's appropriation bill in People v. Tremaine, 281 N.Y. 1 (1939). In Tremaine II, the general appropriations bill submitted by the Governor included itemized schedules of appropriations for each of the State's departments. The bill, for example, included a provision for maintenance and repair of state highways, totaling $ 10,500,000, based upon "complete schedules for each of the ten highway districts, showing the specific amounts for personal service, equipment, machinery, etc . . . . from which the total was made up." People v. Tremaine, 257 A.D. 117, 121 (3d Dept.), modified, 281 N.Y. 1 (1939)). The Legislature amended the bill, striking out most of the items and substituting for them a single item of appropriation for each department. For maintcnance of **[*34]** state highways, the Legislature appropriated a lump sum of $ 10 million; "[g]one [were] the separate schedules for highway districts, [for which] the Legislature ha[d] substituted the uncontrolled power of the department head." Id. at 122.

On this record, this Court unanimously held that the Legislature had acted improperly and that the Governor's budget was "more than a mere source of information." 281 N.Y. at 8. Citing Article VII, § 4, Judge Crane emphasized that "the limitation on the Lcgislature [was] to reduce or strike out the items" in the Governor's submission and that "[t]o strike them all out and substitute lump sums [as the Legislature had done] [was] to revert to the old system [of legislative budgeting] which years of agitation and endeavor [had] sought to abolish." Id. at 10. He observed:

> [T]he Legislature may not alter an appropriation bill by striking out the Governor's items and replacing them for the same purpose in different form. Thus reads the fundamental law binding on us all . . . It may, however, add items of appropriation, provided such additions are stated separately and distinctly **[*35]** from the original items of the bill and refer each to a single object or purpose. The items thus proposed by the Legislature are to be additions, not merely substitutions. These words have been carefully chosen. The added items must be for something other than the items stricken out.

Id. at 11 (emphasis added).

c. Bankers

This Court considered the Legislature's authority to alter a Governor's budget bill a third time in New York State Bankers Assoc. Inc. v. Wetzler, 81 N.Y. 2d 98 (1993). Bankers involved the validity of an Audit Fee Provision which authorized the Department of Taxation and Finance to assess fees against banking corporations that were audited for certain taxes. The fee provision had been added as a legislative amendment to the Governor's budget bill to cover the costs of those audits, and the Governor signed the budget bill into law without deleting it. Thereafter, the New York State Bankers Association brought suit, claiming that the fee provision contravened Article VII, § 4. Writing for a unanimous Court, Judge Hancock agreed:

> [A]rticle VII, § 4 is part of a constitutional scheme for adoption **[*36]** of the budget under which, in general, the Governor is required to initiate and propose the budget legislation . . . . The constitutional command is unambiguous. The Legislature may not alter an appropriation bill . . . except to strike out or reduce items therein, but it may add thereto items of appropriation . . . . The Audit Fee Provision was adopted in violation of this command. To approve it would be to disparage the very foundation of the People's protection against abuse of power by the State - the tripartite form of government established in the Constitution.

(Id. at 105)(emphasis in original).

B.

Viewed against this historical and precedential backdrop, the Legislature's attempts to alter the Governor's 2001-2002 appropriation bills were plainly unconstitutional.

History makes clear that the no-alteration clause of Article VII, § 4 lies at the very heart of the Executive Budget process. In Henry Stimson's elegant phrase, the no-alteration clause forces the Legislature to approach the Governor's budget "from the standpoint of a critic and not from the standpoint of a rival constructor." (A. 399). Without it, the Legislature could effectively **[*37]** ignore the Governor's budget submission and author its own appropriations, thereby returning the State to the discredited legislative budget system. Put differently, if the Legislature were authorized to modify the terms and conditions of any item of appropriation submitted by the Governor, then it could modify every item of appropriation submitted by the Governor. The result, of course, would be the demise of the Executive Budget. See Stimson (id.)("the [Executive] budget must be protected against its being wholly superseded by a new legislative budget[;] otherwise you would have nothing").

Here, the Legislature did precisely what Section 4 forbids: it "alter[ed] .. . appropriation bill[s] by striking out the Governor's items and replacing them for the same purpose in different form." Tremaine II, 281 N.Y. at 11. In some instances, it did so directly, as when it deleted provisions establishing maximum awards and eligibility criteria from the proposed appropriation for Improving Pupil Performance grants. In other instances, it did so indirectly (but just as purposefully), as when it enacted the appropriation for services and expenses of the **[*38]** Division of the Lottery but then inserted a provision in a "non-appropriation" bill restricting the agency from using the funds for certain purposes, or when it struck the Governor's proposed appropriation for a homeless housing program in DHCR and then passed single-purpose bills containing an appropriation for the same purpose but redirected to OTDA. Simply put, each of the Legislature's ploys - (i) the deletion of provisions in proposed appropriations that described the "when, how, or where" of spending, (ii) the excising of proposed appropriations and the substitution of the Legislature's own appropriations for the same purpose but subject to different terms and conditions, and (iii) the enactment of the Governor's appropriations accompanied by the secretion of provisions within "non-appropriation" bills that effectively rewrote the terms of those appropriations - was a blatant attempt to circumvent the no-alteration clause, and is therefore unconstitutional.

The landmark decision in Tremaine II is especially instructive. Indeed, the brief for the Legislature there makes the very same arguments that the Legislature advances here. Defending the Legislature's actions, the Comptroller **[*39]** told this Court that Section 4 did not prohibit the Legislature from "strik[ing] out many items for particular departments or activities and add[ing] in other items providing for the same activities . . . in such terms as the Legislature approved," provided the Legislature did not increase the appropriation. (A. 437). In addition, the Comptroller warned that the construction of Section 4 urged by the Governor would "deprive[] the Legislature of all power over the form, purposes and conditions of appropriations" and "vest [legislative authority] in the Governor." (A. 435, 439). In rejecting these arguments, the Court made clear that Article VII, § 4 means what it says: that the Legislature may not unilaterally alter items of appropriation by replacing the Governor's proposed appropriations with ones "for the same purpose in a different form." 281 N.Y. at 11. Because the Legislature violated that unambiguous command in August 2001, the result here must be the same as in Tremaine II.

This conclusion is confirmed by the authoritative opinion of Attorney General Robert Abrams issued in 1982, when the Legislature attempted to "add restrictive language to items **[*40]** of appropriation in bills submitted by the governor." Opinion of the Attorney General No. 82-F5 (May 3, 1982). After reviewing the history of Section 4 and the relevant case law, Attorney General Abrams opined that "the Legislature may not add conditional language to the governor's appropriation bill." He wrote:

> We conclude that under section 4 of Article VII, the Legislature, in the course of passing appropriation acts submitted by the Governor:

> (a) may strike out items of appropriation, including the accompanying text;
>
> (b) may reduce items of appropriation but may not alter the accompanying text;
> (c) may not increase items of appropriation;
> (d) may add items of appropriation with accompanying text stating the object or purpose;
> (e) may not, at least in the absence of concurrence by the Governor, amend the bill otherwise than to the extent set forth in (a), (b) and (d) above.

Id. (emphasis added). This formal opinion of the State's chief legal officer is entitled to substantial interpretative weight. Knight-Ridder Broadcasting, Inc. v. Greenberg, 70 N.Y.2d 151, 158 (1987)(opinion of Attorney General entitled to weight in discerning **[*41]** drafter's intent). Because each of the devices employed by the Legislature in August 2001 had the effect of "alter[ing] the accompanying text" - that is, modifying the "when, how, or where" of spending - - none can survive constitutional scrutiny.

In sum, the courts below were correct in concluding that the Legislature altered the terms and conditions of the Governor's spending proposals in ways that flagrantly violate Article VII, § 4. If the Executive Budget is to be something "more than a mere source of information," Tremaine II, 281 N.Y. at 8, the deletions, substitutions, and secretions that the Legislature made to the Governor's budget bills must be declared invalid.

C.

The Legislature raises five arguments in its effort to defend the constitutionality of its actions and reclaim plenary authority over the budget process. At times the arguments of the Senate and the Assembly are dramatically at odds, as when the Senate argues that Article VII, § 6, the anti-rider provision, has no application to appropriation bills submitted by the Governor, and the Assembly argues that the provision is the very reason that certain aspects of his 2001-2002 budget bills **[*42]** were unconstitutional. As discussed below, each of the five arguments (those advanced jointly and those pressed separately) must be rejected if the Executive Budget is to survive.

1. The Governor's Appropriation Bills Were Properly Itemized

The Senate's principal contention is that the provisions it deleted from the Governor's appropriation bills included "substantive, non-appropriation, general legislation" (S. Br. 41) that was "void ab initio" and therefore could be "properly stricken by the Legislature." (Id. at 44). This argument is bottomed on the fallacious notion that, pursuant to Article VIII, § 3, an item of appropriation may consist only of "the sums being appropriated, their purpose, and the recipients." (Id. at 40). Any other condition that the Governor might seek to impose on spending is a "non-appropriation measure" (so the argument goes) that cannot "constitutionally be included as part of the Governor's proposed appropriation bill itself." (Id. at 41). n18

> n18 The Legislature suggests that Governor Pataki has acted differently from his predecessors by attaching extensive terms and conditions to items of appropriation. (A. Br. 10-11). A portion of an item of appropriation submitted by Governor Cuomo in 1991 belies this suggestion:
>
> > For income maintenance expenditures, including, but not limited to, aid to dependent children, home relief, supplemental security income, emergency assistance to families, emergency assistance to adults, and including up to $ 500,000 without local financial participation and subject to the approval of the director of the budget, for payments to court appointed receivers in adult facilities and, subject to availability of federal funds therefore, for assistance to United States citizens repatriated from abroad pursuant to section 1013 of the federal social security act. Of the amount appropriated herein, up to $ 1,000,000 may, subject to the approval of the director

> of the budget, be used for payments to tier 11 homeless family shelters operated pursuant to part 900 of title 18 of the codes, rules and regulations of the state to support emergency or unforeseen expenditures for major capital items. Provided, however, that such shelters shall immediately act to secure loans or other revenue necessary to refund such payments to the state. Notwithstanding any inconsistent provisions of title 8 of article 5 of the social services law, up to $ 3,000,000 of the amount appropriated herein shall be made available by the department to reimburse 50 percent of approved expenditures made by social services districts under the emergency assistance for aged, blind, and disabled program, after first deducting therefrom any federal funds received or to be received on account thereof, for emergency shelter payments which shall be provided to persons who have been medically diagnosed as having acquired immune deficiency syndrome (AIDS) or HIV-related illness and who are homeless or are faced with homelessness and for whom no viable and less costly alternative housing is available. Each emergency shelter payment provided hereunder shall equal the difference between such person's and his or her family's net available income, including any public assistance and supplemental security income benefits and/or additional state payments, and such person's and his or her family's public assistance needs using the hotel/motel per diem rate equivalent as the applicable shelter maximum. The hotel/motel per diem rate equivalent shall equal the hotel/motel per diem provided to recipients of public assistance as specified in department regulations in effect on January 1, 1988, and as appropriate to the size of the public assistance household which includes the person or persons with AIDS multiplied by 30.

The full item spans four pages. (S. 1753/A. 3053 at 132-35).

[*43]

The Senate's crabbed interpretation of what the Governor may include in an appropriation bill finds no support in the text or history of Article VII or in common sense. If accepted, it would mean that the Governor could propose items of appropriation consisting of no more than raw sums coupled with the barest description of purpose and intended beneficiaries. According to the Senate, the Governor may not constitutionally propose an item of appropriation (as he did in his 2001-2002 budget submission) for $ 65 million to private schools for the blind and deaf conditioned on the schools submitting an annual report of pupils served. The very notion that a Governor, to whom the framers of Article VII looked to ensure fiscal prudence, cannot propose that the expenditure of State funds be contingent upon a report designed to prevent waste or fraud is patently absurd.

The Senate's argument relegates the Governor to the role of a bookkeeper whose job it is to tote up sums of money to which are appended only the most general description of each program's aim. That is not the vision of the framers, who recognized that the functions of government were growing ever more complex and that what **[*44]** was needed was a policymaker to propose a comprehensive fiscal plan. As noted above, the framers expected the Governor to "explain and defend a given fiscal policy to the people of the State and [to] uphold[] before the people of the State a policy of economy and [to be] responsible to them for the success or failure of such a policy." 1915 Report (A. 297)(emphasis added). They expected a detailed fiscal blueprint for the upcoming year, not a tote sheet of simple sums.

An example confirms the point. As will be recalled, the Legislature altered the Governor's Budget submission by striking an appropriation to DHCR for a homeless housing program and enacted instead single-purpose bills containing appropriations for the same purpose but redirected to OTDA. On the Senate's view, this action was permissible, presumably became the agency to which money is directed is not part of the item of appropriation and therefore can be altered without violating Article VI, § 4. That remarkable notion would have taken the framers by surprise, since they believed that the Governor was "the man who can insist that a given department shall do its work with less money or decide between **[*45]** several departments which is to be given the preference in respect to available revenues." (Id.)(emphasis added).

Moreover, the labels "substantive" and "general," which are the lynchpin of the Senate's argument, afford no discernable basis for distinguishing between permissible and impermissible conditions in items of appropriation. If that supposed distinction were the law, courts would be saddled with the unenviable task of attempting to decide when a condition of spending was too prescriptive to constitute a mere statement of purpose and identification of recipients. The task of distinguishing between the two is unwelcome precisely because there are no "judicially discoverable and manageable standards" for accomplishing it. See Baker v. Carr, 369 U.S. 186, 217 (1962); see also Abrams v. New York City Transit Authority. 39 N.Y.2d 990, 992 (1976)("questions of judgment, discretion, allocation of resources and priorities [are] inappropriate for resolution in the judicial arena"). n19

n19 The Legislature complains that the Governor's proposed school aid appropriation runs to 16 1/2 pages (S. Br. 20), as if the number of bill pages was a judicially manageable standard.

[*46]

For example, assume the Governor proposed (as he did in his 2001-2002 Budget submission) a $ 48 million appropriation to the Education Department for grants to school districts for improving pupil performance (i) that was limited in use to "reading and literacy skills in the early grades with particular emphasis on grades two, three and four"; (ii) that required school districts to submit to the Commissioner of Education a plan which targeted the grant "to schools demonstrating the greatest need of improved skills proficiency"; and (iii) that fixed the maximum award a school could receive. What is properly included in the "item of appropriation" under the Senate's view? Is it merely $ 48 million to school districts for Improving Pupil Performance grants? Is the designation of the Education Department as the agency to distribute the funds a part of the item? May the item include the directive to focus expenditures on grades two through four? May it include the maximum award for any one district? May it contain a requirement that each district submit a plan to ensure that the money is well spent? And does it matter how many words it takes to specify those terms? If the Senate were to **[*47]** prevail, such questions would be regularly before our courts with no ascertainable standards to decide them.

As the Third Department recognized, the decision of this Court in Saxton v. Carey, 44 N.Y.2d 545 (1978), speaks directly to this point and compels rejection of the Senate's position. There, citizen-plaintiffs sought a declaratory judgment that the 1978-1979 budget was invalid because it was not sufficiently itemized to permit effective legislative review. According to the plaintiffs, this supposed defect was exacerbated by the inclusion of a provision "allowing the transfer of funds within particular programs and departments," which further "de-itemized" the scheduled appropriations. Id. at 548. This Court rejected the challenge, concluding that "[t]he Constitution . . . does not prescribe any particular degree of itemization." In so ruling, it relied principally upon Judge Breitel's dissenting opinion in Hidley v. Rockefeller, 28 N.Y.2d 439 (1971), where he wrote that "[i]temization is an accordion word . . . [so that] in one context an 'item' of $ 5,000,000 for construction of a particular expressway might seem specific; **[*48]** in another, void of any indication when, how, or where the expressway or segments of it would be constructed." Id. at 550, quoting 28 N.Y.2d at 444 (Breitel, J., dissenting)(emphasis added).

The Saxton Court emphasized that the proper degree of itemization was for the Legislature to determine as part of its constitutional obligation to review the Governor's budget. It wrote:

> Should the Legislature determine that a particular budget is so lacking in specificity as to preclude meaningful review, then it will be the duty of that Legislature to refuse to approve such a budget. If, however, as here, the Legislature is satisfied with the budget as submitted by the Governor, then it is not for the courts to intervene and declare such a budget invalid because of a failure to measure up to some mythical budget specifically delineating the exact fate of every penny of the public funds . . . . Should a Legislature fail in its responsibility to require a sufficiently itemized budget, the remedy lies not in the courtroom, but in the voting booth.

Id. at 550-51 (emphasis added). The same was true of the challenged transfer provisions: "if the **[*49]** Legislature is or should become concerned that the transfer provisions give the Executive too much leeway and deprives them of the supervisory power they have and wish to exercise, the remedy [refusal to approve] is in their hands." Id. at 551, quoting 28 N.Y.2d at 446 (Breitel, J., dissenting).

Saxton establishes three important points for this appeal. First, a transfer provision is among the class of "limitations and conditions" - those which indicate "when, how, or where" funds may be spent in Judge Breitel's phrase - that may be included within an appropriation proposed by the Governor. Such a provision, of course, is something more than a raw sum of money or a bare description of purpose and intended recipient, and therefore Saxton demolishes the Senate's argument. n20 Second, Saxton teaches that the degree of itemization is not justiciable. In Saxton, the claim was that the Governor's proposed budget did not sufficiently particularize the purposes and terms and conditions under which spending would be authorized. Here, by contrast, the Senate's claim is that the Governor's proposed budget was too prescriptive with respect to such purposes **[*50]** and terms and conditions. To accept the Senate's argument that the judiciary should determine whether and to what extent conditions in appropriation items are extraneous would be to enter the very political thicket from which this Court wisely extracted itself in Saxton. The third point is closely related, namely that if the Legislature believes that proposed conditions on an item of appropriation are too prescriptive, "the remedy is in [its] hands." 44 N.Y.2d at 551. To paraphrase Saxton, it is the duty of that Legislature "to refuse to approve such a budget." What it cannot do is unilaterally alter the Governor's conditions, for that is forbidden by Article VII, § 4.

n20 Remarkably, the Senate writes that Saxton's "when, how, or where language . . . is at best dicta with respect to what constitutionally may be included in appropriation bills." (S. Br. 59). That language, however, was essential to the Court's holding. Surely, after Saxton, it is beyond dispute that a Governor may include as part of an item of appropriation for highway construction a provision indicating (in Judge Breitel's words) "when, how, or where the expressway or segments of it would be constructed." We are hardpressed to believe that the Senate thinks otherwise.

[*51]

The Senate's attempt to distinguish Saxton (S. Br. 52-60) is wholly unpersuasive. First, it argues that Saxton is inapposite because there "the Governor and the Legislature . .. agreed on the [budget] legislation and the claimed unconstitutionality under Article VII [was] only asserted by a third party." (S. Br. 55). The short answer is that Saxton speaks authoritatively to situations in which the Legislature is not satisfied with the degree of itemization in the Governor's budget submission, and it just as authoritatively enunciates the Legislature's sole remedy: "to refuse to approve such a budget." Nowhere did the Court suggest that the Legislature may ignore the Governor's budget and enact its own. Moreover, this Court's decision in Bankers demonstrates that even when the Legislature and Executive are in accord (as they were with regard to the insertion of the Audit Fee Provision), the strictures of Section 4 remain applicable. The agreement of the two branches does not allow the Legislature to adopt a provision in violation of the no-alteration command.

Second, the Senate argues that "[t]his case [unlike Saxton] is about substance, not process - about **[*52]** what the Governor included in his proposed appropriation bills, not how they were presented." (S. Br. 58). Saxton, however, was also about substance, as is every budget dispute. See Bankers, 81 N.Y.2d at 104 ("article VII, § 4 is not . . . a mere procedural requirement"). There, after all, the plaintiffs challenged the authorization to transfer funds "within a particular program or department," and this Court held that such transfer provisions were constitutional "so long as . . . the executive proposed the appropriations and there is agreement as to the limitations and conditions they contain." Saxton, 44 N.Y.2d at 546. Here, the Governor's budget also included interchange provisions to allow flexibility in the use of appropriated funds. For example, as noted above, the Department of Health budget included proposed appropriations for various public health programs and authorized the amounts to be increased or decreased through

interchange, depending upon public health needs. (A. 67-72). The Legislature approved each of the appropriations but deleted the interchange provisions. If the Governor properly proposed those interchange provisions (and **[*53]** Saxton unmistakably teaches that he did), then the Legislature could not unilaterally alter them to achieve a degree of itemization that it preferred. n21

n21 The Senate argues that the decisions below advance "two different contradictory definitions of the term 'items of appropriation' in Article VII": (i) an "expansive" definition that permits the Governor to include "when, how, or where" provisions in an item and (ii) a "strict" definition that precludes the Legislature from striking out those provisions. (S. Br. 42-46). There is no such inconsistency. Rather, the courts below recognized that a "when, how, or where" provision - what the Appellate Division called a "substantive modifier" - is "part of a gubernatorial appropriation bill and [therefore] subject to the protection of Article VII, § 4." (A. 6)(emphasis added).

The very structure of Article VII also belies the Senate's itemization argument. If the Senate were correct and an item of appropriation were limited to a bare statement of **[*54]** sum, purpose and recipient, there would be no need for Section 6, the anti-rider provision. See Silver v. Pataki, 3 A.D. 3d at 107 ("the language of Article VII, § 6 . . . provides further support that the Governor's items of appropriation . . . may include directory or programmatic language that is integrally related to [the appropriation]"). Section 6 prohibits the inclusion in "any appropriation bill submitted by the governor" of any provision that does not "relate[] specifically to some particular appropriation in the bill and [is not] limited in its operation to such appropriation." If Section 3 required items of appropriation to be as bare-boned as the Senate suggests, Section 6 would be superfluous. That cannot be so, since meaning and effect must be "given to every word of a [legal text and] words are not to be rejected as superfluous." Leader v. Maroney, Ponzini & Spencer, 97 N.Y.2d 95, 104 (2001).

No doubt recognizing that its definition of item of appropriation would render Section 6 otiose, the Senate argues that the section does not apply to appropriation bills submitted by the Governor. (S. Br. 25-39). That extraordinary argument **[*55]** is addressed at length in the Governor's brief in Silver, the companion case to this. (G. Br. Silver 22-28). Suffice it to say (i) that the express terms of Section 6 make plain that it applies to "any provision . .. in any appropriation bill submitted by the Governor" and (ii) that the pertinent history shows that it was incorporated into Article VII "to extend[] its operation to . . . the Governor's budget bills." (A. 335-36)(emphasis added). It is pure legerdemain to assert that Section 6 is inapplicable to that which it was clearly intended to apply. Moreover, the Senate's tortured construction produces a result so anomalous - one that would have this Court read the phrase "submitted by the Governor" to mean "made by the legislature" - that it cannot be taken seriously. See Castro v. United Container Machinery Group. 96 N.Y.2d 398, 401 (2001)(words "are to be given their plain meaning without resort to forced or unnatural interpretations"). In short, Section 6 plainly applies to the Governor's appropriation bills, and thus the Senate's restrictive definition of item of appropriation is plainly wrong.

To support its argument, the Senate grasps **[*56]** at language in Article VII, § 3, which authorizes the Governor to include with his budget submissions "the proposed legislation, if any, recommended therein." According to the Senate, provisions detailing the "when, how, or where" of spending are "non-appropriation measures, i.e., the proposed legislation, if any, recommended [in the budget]," (S. Br. 30) and therefore are beyond the reach of the no-alteration clause. Tellingly, however, the language the Senate relies on, as even it recognizes (S. Br.36), was added to Article VII in 1938 to allow the Governor to submit revenue proposals as part of his budget submissions. See 1938 Report (A. 334)("[b]elieving that the revenue side of the budget is of equal importance with the expenditure side, the committee feels that any [proposed] legislation affecting the revenues of the State . . . should have the same dignity . . . as his appropriation bills, and all should be submitted directly by the Governor and treated as budget bills"); see also Winner v. Cuomo, 176 A.D.2d 60, 64-65 (3d Dept. 1992)(confirming that the reference to "proposed legislation" in Section 3 refers to revenue raising measures). This **[*57]** history demonstrates beyond peradventure that the "proposed

legislation" language of Section 3 was never intended to operate as a nebulous limitation on the Governor's authority to include provisions in an appropriation bill specifying "when, how, or where" appropriated funds could be spent. n22

n22 This is not meant to suggest that a Governor may include only revenue measures in such "proposed legislation." As discussed infra at 35-37, to the extent a Governor proposes legislation that would operate outside the context of particular appropriations, he can not do so in an appropriation bill. See Article VII, § 6.

In sum, the Senate's attempt to defend its unconstitutional conduct by advancing a constricted definition of item of appropriation (one that excludes any provision delineating the "when, how, or where" of spending) is fatally flawed. It finds no support in the constitutional text; if accepted it would render Section 6, the anti-rider provision, surplusage; it would immerse the courts of **[*58]** this State in the morass of having to define the degree of particularization that is constitutionally permissible in an item of appropriation, which "is not something which can be accurately delineated by a court," Saxton v. Carey, 44 N.Y.2d at 550; and it would diminish the role of the Governor from a fiscal policymaker to a bookkeeper and thereby destroy Executive budgeting.

2. The Governor's Appropriation Bills Complied With Article VII. § 6

The Assembly (but not the Senate) argues that the provisions it deleted from the Governor's budget bills were "substantive policy items" that were improperly included in those bills in violation of Article VII, § 6 "and were thus void." (A. Br. 34) As shown below, this argument is simply wrong. The Governor's budget submissions fully complied with Section 6, and therefore that section provides no support for the Legislature's unconstitutional conduct.

As discussed above, the predecessor to Section 6 - Article III, § 22 - was added to the State Constitution in 1894 to "forbid the incorporation in appropriation bills of general legislation, not necessarily or directly connected with the subject of appropriation. **[*59]** " 1915 Opinion (A. 345). It was intended to eliminate the practice "of tacking on to budget bills propositions which had nothing to do with money matters." Schuyler v. South Mall Constructors. 32 A.D.2d 454, 455 (3d Dept. 1969)(emphasis added). In 1938, this anti-rider provision was incorporated into Article VII (as the second paragraph of Section 6), with minor language changes, to confirm its applicability to the Governor's budget bills under the Executive budgeting system. (A. 336).

By its terms, the anti-rider provision of Section 6 sets forth two rules to ensure that only fiscal matters are addressed in appropriation bills. First, no provision may be included in an appropriation bill submitted by the Governor unless it "relates specifically to some particular appropriation in the bill." Second, any such provision "shall be limited in its operation" to the appropriation to which it relates. Neither of these rules prevents the Governor from including provisions in an appropriation bill that define the conditions under which appropriated funds can lawfully be spent, since such conditions necessarily and directly relate to the subject of the appropriation. Put **[*60]** simply, the Governor's budget may contain a provision limiting the ways in which the Department of Corrections may spend its funds (a valid condition of spending) but not a provision creating a new standard of liability for assaults in prisons (a general legislation rider). See Silver v. Pataki, 192 Misc.2d at 126 ("[w]hile this is not to say that the Governor may submit substantive legislation as part of an appropriation bill, e.g., amend the Penal Law to alter the definition of robbery in a bill appropriating monies to construct a new prison, he may propose in such bill the location and type of prison to be built, which the Legislature may accept or reject").

An opinion of Attorney General Woodbury in 1915 addressing the scope of Article 111, § 22 (the predecessor of Section 6) confirms the points. That year, an appropriation bill included a provision intended to rescind certain post-election salary increases that had been awarded by a lame duck administration. The disputed provision stated that "no moneys appropriated [by the annual Appropriation bill of 1915] shall be available for salary or compensation of any [State officer or employee] in excess **[*61]** of the salary or compensation allowed [prior to November 1, 1914], except

as expressly provided by law." (A. 342)(emphasis omitted). The effect was that the salary of an employee or officer fixed by law after the election was "superseded . . . by the amount appropriated in the appropriation bill." 1915 Opinion (A. 343). The provision, the Attorney General concluded, was not general legislation and therefore did not violate the anti-rider clause:

> Th[e] fundamental object [of the anti-rider clause] is to forbid the incorporation in appropriation bills of general legislation, not necessarily or directly connected with the subject of appropriation, and by so doing forcing the passage of extraneous matters not germane to the basic purpose of the bill, namely, in this instance, appropriation for the support of government. A broad and reasonable construction of such a constitutional requirement would not exclude a provision in an appropriation bill directly relevant to the main fact of appropriation, as this prohibitory clause surely is.

(A. 345). Nor did the Attorney General attach legal significance to the fact that the challenged provision referenced and applied to **[*62]** multiple appropriations in the bill: since it "refer[red] to all the appropriations distributively, [it] therefore may be said to refer specifically to 'some particular appropriation in the bill.'" (Id.). n23

> n23 It is, of course, fair to presume that the delegates to the 1938 convention were aware of the Attorney General's opinion when they reconstituted Article HI, § 22 as Article VII, § 6. Cf. Uniformed Firefighters Association v. Beekman, 52 N.Y.2d 463, 472 (1981)(construing statute in accordance with agency's interpretation where Legislature was aware of agency's interpretation when it reenacted the statute without amendment).

The decision in Schuyler, supra, also demonstrates that the anti-rider clause was not intended to prevent the inclusion in appropriation bills of provisions specifying the "when, how, or where" of spending. At issue there was a provision in an appropriation bill authorizing the Commissioner of General Services to negotiate a contract **[*63]** for the construction of the State Library and Museum. Rejecting an argument analogous to that advanced here, the Third Department held that the "negotiation provision [did] not violate the spirit or purpose of section 6 of article VII." 32 A.D.2d at 456. It wrote:

> [W]e conclude that the negotiation provision relates specifically to some particular appropriation in the bill within the meaning of section 6. The bill, which is general in character, specifically appropriates over $ 136,000,000 for the construction of State buildings and other public improvements, including the erection of the building in question. Since the negotiation provision concerns an item which may be constructed with funds from the appropriation, the provision relates specifically to some particular appropriation in the bill . . . .

Id.

Here, too, the provisions at issue directly related to the allocation of funds, and therefore did not contravene Article VII, § 6. The provisions that the Legislature deleted from the appropriations for education, for example, dealt with the manner in which State aid would be distributed to eligible school districts. They specified the methodology **[*64]** under which funds would be allocated to eligible recipients, defined when payments would be made from the appropriation, and established a priority order in which certain funds would be dispensed. (A. 62-66). For example, the deleted provisions from the Improving Pupil Performance grants delineated the proposed maximum awards and eligibility criteria for that program. Plainly, such provisions were not general legislation "which had nothing to do with money matters," Schuyler, 32 A.D.2d at 455; rather, each spoke directly to the "when, how, or where" of spending and thus was integral to the Governor's proposed fiscal plan.

The provisions authorizing the transfer and interchange of appropriated funds and those requiring the Director of the Budget to issue a certificate of approval before appropriated funds could be expended also pass Section 6 scrutiny. The transfer and interchange provisions were included within particular appropriations and related specifically to those appropriations. Moreover, as this Court explained in Saxton, transfer and interchange provisions represent a method of increasing the level of generality of a particular appropriation so as to **[*65]** expand the purposes for which appropriated funds may validly be spent. See Saxton, 44 N.Y.2d at 551 ("[t]ransfer provisions are really strings attached to the appropriated items and . . . 'de-itemize' them depending how unrestricted .. . [they] are"). To suggest that "strings attached to the appropriated items" are not germane to those items ignores Saxton and flouts common sense.

To support its position the Assembly cites to Chief Judge Fuld's dissenting opinion in Hidley v. Rockefeller, 28 N.Y.2d 439, 448 (1971), in which he wrote that "provisions which permit the free interchange and transfer of funds are unconstitutional on their face." (A. Br. 37). Hidley involved a challenge to the degree of itemization in the 1971-1972 budget, a challenge which this Court rejected on the ground that the citizen-plaintiffs lacked standing. Chief Judge Fuld would have reached the merits and invalidated the provisions that authorized the interchange and transfer of funds. Such provisions, he argued, allowed the Executive branch "to directly contravene and override the Legislature's intent by shifting funds from one item to another." (Id.). Also **[*66]** writing in dissent in Hidley was Judge Breitel, who would have reached the merits and rejected the plaintiffs' challenge to the degree of itemization as non-justiciable. Of course, it was the reasoning of Judge Breitel, not that of Chief Judge Fuld, that prevailed seven years later in Saxton, when this Court (quoting Judge Breitel at length) upheld the constitutionality of the transfer provisions in the 1978-1979 budget. Thus, to rely upon Chief Judge Fuld's dissent in Hidley is to turn a blind eye to the course of Article VII law in this Court. n24

n24 As the Legislature notes, there is dicta in Tremaine I that "[i]f the Legislature may not add segregation provisions to a budget bill proposed by the Governor . . . it would necessarily follow that the Governor ought not to insert such provisions in his bill." 252 N.Y. at 50. The Court's language was hortatory ("ought not to") and not mandatory. Perhaps more significantly, the language cannot be reconciled with Saxton, which made clear that the Governor may properly attach segregation provisions to his proposed appropriations. Plainly, this Court's Article VII jurisprudence has evolved since 1929. The Assembly also seeks comfort in a single sentence in Tremaine II: "All agree that the 'general provisions' are unconstitutional and have no place in the budget." 281 N.Y. at 12. As the briefs to the Court in Tremaine II demonstrate, neither party chose to defend the constitutionality of what were denominated the "General Provisions." (R. 3595-98). There was thus "no real controversy before the court" on the issue. See Johnson v. Flynn, 248 A.D. 649 (2d Dept. 1938); see also Tremaine II, 281 N.Y. at 12-13 ("the Appellate Division has by inadvertence included in its judgment certain provisions about which there is no controversy"). Principal among the "General Provisions" were transfer and interchange provisions. As to them, Saxton establishes that the concession of the parties in Tremaine II was erroneous. Finally, the Assembly cites to a 1938 Report of the Joint Legislative Committee on State Fiscal Policies, in which it is stated that Section 6 was adopted "to declare the inclusion of sections regulating the transfer of appropriations [and] authorizing classification of expenditure" unconstitutional. (A. Br. 48). This report was prepared by a committee consisting of members of the Legislature after its defeat in Tremaine I and is entirely selfserving. It is not as the Assembly would have it, a statement of "the framers." Id.; see Mark v. Board of Higher Education, 303 N.Y. 154 (1951)(refusing to rely on "self serving documents" in ascertaining legislative intent); United States v. Rumely, 345 U.S. 41, 48 (1953)(noting "the usual infirmity of post litem motam self-serving declarations" in legislative committee reports).

[*67]

Similarly, the certification provisions fully comply with Section 6. At issue is the inclusion of a provision in the header of each budget bill requiring the Director of the Budget to issue a certificate of approval before appropriated

funds can be expended. By its express terms, the provision applies to each and every appropriation proposed by the Governor and therefore relates specifically to each such appropriation. Moreover, the use of a single "header" provision applying to multiple appropriations is precisely the drafting technique approved by Attorney General Woodbury in his 1915 Opinion: it is intended to "refer[] to all the appropriations distributively, and therefore may be said to refer specifically to 'some particular appropriation in the bill.'" (A. 345). Surely, nothing in Section 6 requires the Executive to eschew a convenient shorthand that has been used for decades in budgetary drafting and instead laboriously insert the certification provision into each appropriation item. Section 6 precludes riders, not headers.

3. Prior Legislative Enactments Do Not Limit the Governor's Authority to Propose Appropriations

The Legislature gives only brief attention to **[*68]** an argument that it pressed below, namely that Article VII's grant of power to the Governor to propose items of appropriation is limited by the enactments of prior legislatures. See, e.g., A. Br. 38 (arguing that the new formula for distributing education aid was unconstitutional because it "would have operated to nullify existing substantive law"). Because this argument is mentioned only in passing, we limit our response to it here.

Notably, prior to Executive budgeting, the Legislature was free to include within its appropriation bills provisions that disregarded its own previous enactments. Thus, it will be recalled, the Legislature included a provision in its 1915 Appropriation Bill that fixed the salaries of certain state officers and employees and "superseded" any general laws to the contrary. It was this provision that Attorney General Woodbury upheld against an anti-rider challenge. 1915 Opinion at 373 (A. 343); see also supra at 36. Nothing in the constitutional history or text suggests that in 1927, when responsibility for authoring and submitting appropriation bills was transferred from the Legislature to the Executive, the Governor was to be deprived of the freedom **[*69]** that the Legislature previously enjoyed to propose a budget unconstrained by prior years' enactments.

Moreover, the Legislature's argument runs afoul of the principle that a provision in general law specifying an intention to distribute State funds in future years is not binding on the State. Seneca County v. State of New York, 47 N.Y.S. 2d 687 (Ct. CI. 1942), aff'd, 266 A.D. 815 (1943), aff'd, 292 N.Y. 501 (1944)(such laws "express a purpose or plan on furnishing future financial aid to counties and towns by the state" and become effective "only when implemented by appropriations and [then] only to the extent of the appropriations"). And it flouts the fundamental precept that one legislature may not bind the lawmaking power of a future legislature. See, e.g., People ex rel. Devery v. Coler, 173 N.Y. 103, 110 (1903)("[n]othing is better settled in our jurisprudence than that one legislature cannot bind the hands or limit the power of subsequent legislatures"); People ex rel. Schaap v. Martin. 6 N.Y.2d 371 (1959)(describing as a "cardinal principle" the rule that "no session of the Legislature **[*70]** can bind its successor"). This cardinal prineiple reflects the fact that public needs are ever changing and that to give past legislation binding effect would limit the flexibility needed to meet the exigencies of current events. To suggest that the Governor's future fiscal plans are circumscribed by prior years' legislation is to imprison him, and the State, in the past. n25

n25 The Assembly even suggests that the Governor could not properly include a provision within an appropriation bill providing for a certain distribution of funds to local social service districts, because such a provision had been included in an expired statute. (A. 11). The suggestion that an expired statute, which binds no one else, is binding on the Governor may be the best proof that the Assembly's argument cannot be the law.

4. The Legislature May Not Do Indirectly What it is Prohibited From Doing Directly

The Legislature argues that it is free to modify the "when, how, or where" of spending proposed by the Governor **[*71]** so long as it does so through single-purpose appropriation bills or through language inserted into

"non-appropriation" bills. (S. Br. 61-66; A. Br. 41-48). As the courts below recognized, to accept this claim would be to allow the Legislature, by artful drafting, to escape the strictures of the no-alteration clause.

Two examples demonstrate that the Legislature's substitutions and secretions were unconstitutional devices that altered the Governor's proposed appropriations. As discussed above, the proposed appropriation for the State University of New York authorized $ 55.2 million for services and expenses "related to collective bargaining agreements, inflation, full-time faculty positions, and other priority needs identified by the board of trustees." Rather than alter the appropriation in the Executive Budget submission (which would have directly violated Section 4), the Legislature enacted the appropriation but then immediately modified it by inserting language in a "non-appropriation" bill restricting the university from using the funds for any purpose other than "services and expenses of the university related to collective bargaining agreements and enrollment growth." This indirect **[*72]** alteration was supposedly constitutional because, in the Senate's words, "the Legislature [has] the power to add provisions to or otherwise alter non-appropriation bills - regardless of the impact the provisions may have on previously enacted legislation." (S. Br. 65-66).

The second example involves the Governor's proposed appropriation to DHCR for a homeless housing program, which the Legislature struck only to enact single-purpose bills containing appropriations for the same purpose but redirected to OTDA. This indirect alteration was supposedly constitutional (again to quote the Senate) because "there is no restriction on the subject matters of [single-purpose] bills or their object or purpose . . . [since] they are new legislative measures and not changes to the Governor's appropriation bills." (S. Br. 62-63).

These drafting ploys violate the fundamental maxim of New York constitutional jurisprudence that forbids the Legislature from doing indirectly what it may not do directly. The First Department in the companion Silver case, which presents this same issue, put the point especially well:

> Moreover, we are unable to discern in plaintiffs' assertions any constitutional **[*73]** basis for the Legislature's alteration of items of appropriation outside the appropriation bill affected by those alterations . . . The framers of the Constitution did not mean to grant the Legislature carte blanche to modify appropriations at will in some other piece of legislation. To conclude otherwise would allow plaintiffs to accomplish by indirection something which the Constitution directly forbids and would "violate[] the spirit of the fundamental law" (Wein v. State of New York, 39 N.Y.2d 136, 145, quoting People ex rel. Burby v. Howland, 155 N.Y. 270, 280). It would also fatally undermine the non-alteration provision of Article VII, § 4 and the other amendments adopting the Executive Budget System.

3 A.D. 3d at 108; see also Forster v. Scott; 1 N.Y. 577, 584 (1893)(the "Constitution guards as effectually against insidious approaches as an open and direct attack"). n26

n26 This Court's decision in People ex rel. Burby v. Howland, 155 N.Y. 270 (1898), which the First Department cited, puts it this way:

> > [If the Legislature attempts to] evade the Constitution by effecting indirectly that which cannot be done directly, the act is to that extent void, because it violates the spirit of the fundamental law. Otherwise the Constitution would furnish frail protection to the citizen, for it would be at the mercy of ingenious efforts to circumvent its object and to defeat its commands.
>
> Id. at 280-81.

[*74]

The Senate argues that the rule that the Legislature may not do indirectly what it is prohibited from doing directly is inapplicable here because Section 4 does not apply to the Legislature's single-purpose bills. (S. Br. 66 n. 30). This argument misses the point. The maxim that the Legislature may not evade the Constitution "indirectly" applies precisely in those instances when there is no express constitutional prohibition on the action in question. Otherwise, the violation would be direct. For example, at the time of the Tremaine 1 decision, the Civil Appointments Clause (Article III, § 7) provided that "[n]o member of the Legislature" could receive any civil appointment. The challenged budget provision conferred segregation authority not on any particular "member of the Legislature," as expressly proscribed, but instead on the chairmen of the finance committees. In striking down the segregation provision, the Court wrote:

> Obviously the prohibition of the Constitution applies equally when a member of the Legislature receives a civil appointment ex officio, as chairman of a committee and when he is appointed by name. Otherwise it would be possible . . . for the Legislature **[*75]** to provide, e.g., that the Chairman of the Senate Finance Committee should be ex officio the State Superintendent of Banks, and to distribute offices to their own members by description rather than by name. No such evasion of the letter and spirit of the Constitution could be tolerated.

252 N.Y. at 41-42 (emphasis added). What the Legislature seeks here is for this Court to tolerate an evasion of the no-alteration clause because it was accomplished indirectly. n27

> n27 The deficiency in the Legislature's argument was starkly exposed during oral argument in the Supreme Court in the companion Silver case:
>
> > "THE COURT: . . . [W]ould you agree, Mr. Reiss, [counsel for the Assembly] if - can you - in all these non-appropriation bills, if you included all that material in the appropriation bill, could you do that?
> >
> > "MR. REISS: I think that the procedures don't allow that, your Honor, but that's a point of why they are doing it in non-appropriation bills.
> >
> > "THE COURT: And that's why you're proving Mr. Shulman's [Governor's counsel's] case, you're doing indirectly [that] which you can't do directly."
>
> See G. Br. Silver 44.

[*76]

Yet another Attorney General Opinion, this one issued by Attorney General Lefkowitz in 1978, confirms the point. There, the Legislature had employed an indirect stratagem similar to what was used here: it had used a succeeding appropriation bill to alter the terms and conditions of an item of appropriation proposed by the Governor. The Attorney General opined that the Legislature had acted unconstitutionally:

> [Section 4] only authorizes the Legislature to act in relation to appropriation bills by reducing, striking or adding items of appropriation and . .. where there is no change in the dollar amount of an item of appropriation, there is no authority for the Legislature to add the item to a succeeding appropriation bill for the sole purpose of adding qualifying language thereto.

Opinion of the Attorney General No. 78-76 (1978)(emphasis added). In short, it was forbidden for the Legislature to alter the Governor's budget bills indirectly in 1978, and it remains so today.

To escape this conclusion, the Assembly argues that it did not violate the noalteration clause because its substitutions were "not for the same 'purpose' as the appropriations proposed by the **[*77]** Governor." (A. Br. 43). As this Court made clear in Tremaine II, however, "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[;] the added items must be for something other than the items stricken out." 281 N.Y. at 11 (emphasis added). In the Court's words, the new items must be additions "not merely substitutions." Id. (emphasis added). Plainly, the shift of the homeless housing program from DHCR to OTDA was a substitution and not an addition. Indeed, any other conclusion would render the Executive Budget system a dead letter, for it would mean that the Legislature could alter a term or condition of an item, even by a jot, and then miraculously pronounce the resulting item an "addition for a different purpose."

The illogic of the Assembly's position is all the more transparent when one appreciates that the Legislature would have no reason ever to substitute an item that appropriates money for the exact same purpose as an item in the Governor's submission. It would make no sense for the Legislature to delete a Governor's item calling for $ 10 million to **[*78]** agency X for A and then enact its own bill calling for $ 10 million to agency X for A. That substitution would accomplish nothing. In short, the Assembly's position - that it may excise proposed appropriations and substitute its own, provided that its appropriation contains at least one different term or condition - prevents it from doing only that which it would never have reason to do. For the Assembly, the no-alteration clause forbids the Legislature from altering a Governor's proposed item of appropriation except when anything in the item causes it discomfort. n28

n28 The Assembly attributes to the Governor various versions of the following contention: "Once [the Governor] proposes an item of appropriation, the Legislature is forever preempted from proposing policies that 'affect' the 'when, how, and where' of, or otherwise relate to, that appropriation." (A. Br. 31). The Governor, however, has never advanced that contention. Nor does this appeal present an issue as to the extent of the Legislature's authority to enact general laws that affect State spending. Rather, the issue here is whether the Legislature can alter the Governor's budget submission by devices that rewrite the terms and conditions of specific appropriations.

[*79]

Nor does it advance the argument to say, as the Legislature does, that its substitutions and secretions should be unobjectionable because the Governor can veto them. See, e.g., A. Br. at 46 ("nonappropriation bills are subject to gubernatorial review via the general veto power and, therefore, legislative alterations to nonappropriation bills in no way implicate the concerns of Section 4"). If the framers believed that affording the Governor the power to veto at the end of the process was sufficient to ensure fiscal prudence, they would not have adopted the Executive Budget system.

Moreover, on the Legislature's view, the Governor's only remedy is to exercise his general veto power and refuse to approve the entire non-appropriation bill. Such a bill, however, may contain numerous provisions addressing vital concerns with which he wholeheartedly agrees. To put the Governor in this untenable position is to return the State to the days of "logrolling" from which the framers thought they had escaped. See (Reply Brief of Attorney General in Tremaine II)(lamenting that the Legislature's view would "hurl[] [us] back . . . to the complaint of Governor Morgan . . . that in **[*80]** acting upon appropriation bills he was compelled to choose between depriving honest creditors of their due by vetoing them, or authorizing the payment of large amounts without foundation by approving them"). And even if the Governor exercised his general veto power, the Legislature believes that it could override that veto and give effect to its alterations. Surely, no Governor would "lay awake nights" to accomplish fiscal economy if his powers were so easily diminished. n29

n29 Throughout its brief, the Assembly cites to a report of the Association of the Bar of the State New York. See

Report of the Committee on State Affairs, The New York State Budget Process and the Constitution, Defining and Protecting the "Delicate Balance" of Power. ("Bar Report"). Notably, the Bar Report agrees with the position enunciated herein that the Governor may include "when, how, or where" provisions in proposed appropriations. See Bar Report at 18 ("[a]n 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 to be opened"); id at 20 ("there can be no question but that the Governor's power to include programmatic language is . . . significant"). The Bar Report, however, would allow the Legislature to "strike items of programmatic material without striking an appropriation in its entirety." Id at 22. Whatever one might think of this proposal, it is not the budgetary process that the framers created. Nowhere in Article VII is there authority for the Legislature to strike portions of an item of appropriation and unilaterally substitute terms that are more to its liking.

[*81]

Simply put, substitutions and secretions "implicate the concerns of Section 4" (to use the Assembly's words) because they alter the Governor's proposed appropriations, which is precisely what that section forbids.

5. The Decision Below Does Not Violate Established Separation of Powers Doctrine

The Legislature's final argument is that the decision below, if affirmed, would "subver[t] . . . the apportionment of power among the executive and legislative branches" and make "the governor a czar." (S. Br. 48); see also A. Br. 44 ("[t]he Third Department's [decision] . . . undermines the constitutional design, which requires that the Legislature make the critical policy decisions"). As discussed below, this argument is premised on a serious mischaracterization of the carefully crafted system of checks and balances that is the foundation of Article VII.

The mischaracterization appears most obviously on the very first page of the Senate's brief, where it writes that the issue on this appeal is whether "Article VII . .. empower[s] the Governor to attach to his appropriation bills general, policy-related, nonappropriation measures . . . and thereafter prevent the Legislature **[*82]** from making any changes in these measures so that they become law without approval or any participation by the Legislature." (S. Br. l)(emphasis added). In preceding sections, we have demonstrated that the "when, how, or where provisions" included in the Governor's appropriations were not impermissible general laws. What is important to emphasize here is that the Governor can do nothing other than to propose budget bills without the approval or participation of the Legislature. It is the Legislature which has the final word. Stimson (A. 308)("[t]he responsibility is placed square upon the Legislature to make to final decision"). n30

n30 The same distortion appears repeatedly in the Senate's brief. See, e.g., S. Br. 9 (the decisions below confer on the Governor "the extraordinary power to establish state policy . .. without the Legislature's involvement); id. at 49 ("the holdings below give the Governor "control over general, non-appropriation legislation [allowing him to] make changes to state law impervious to legislative action"). It also undergirds the Senate's faulty assertion that the Governor "amended .. . the . . . Education Law [and] violated . . . the Constitution" when he proposed moving certain functions from the State Education Department to the Office for Cultural Affairs. (S. Br. 5-6). And, of course, the same misimpression is created by the Assembly's "my way or the highway" hyperbole.

[*83]

In this context, it is worth recalling that Article VII was intended to effect a "singular reversal" in the roles of the Executive and Legislature and transfer to the Governor powers legislative in nature. Under the legislative budget system, the Legislature proposed and the Governor approved or vetoed or sought compromise. Under Article VII, it is the Governor who proposes and the Legislature that approves or strikes or must seek compromise. At bottom, the Legislature's complaint is that it must grapple with the Governor's proposals and cannot discard them and start anew.

That, however, is precisely the system that the framers designed so as to ensure that the Legislature would be a "critic" and not a "rival constructor."

At times, the Assembly reluctantly acknowledges that the adoption of Article VII reduced its powers over the budget-making process, but it quotes In the Matter of the Application of the Thirty-Fourth Street Railroad Co., 102 N.Y. 343, 351 (1886), for the proposition that "a constitutional provision which withdraws [legislative power as to] a particular subject, leaves all other matters . . . under its control." What it omits to quote is the very **[*84]** next sentence of this Court's venerable opinion: "[n]othing is subtracted from the sum of legislative power [by a constitutional provision], except that which is expressly or by necessary implication withdrawn." Id. at 350-51 (emphasis added). Expressly and by necessary implication, the legislature is without power unilaterally to alter the Governor's budget bills, no matter its stratagem.

The separation of power cases that the Legislature cites are not to the contrary. None of those cases involved the powers and responsibilities of the branches under Article VII with regard to the enactment of budget legislation. Thus, in Saratoga County Chamber of Commerce v. Pataki, 100 N.Y.2d 801 (2003), the Court concluded that the Governor could not unilaterally negotiate and execute tribal gaming compacts. And in Oneida County v. Berle, 49 N.Y.2d 515 (1980), the Court held that the Director of Budget could not unilaterally impound monies that had been lawfully appropriated. In each instance, the Executive had "usurp[ed] [the Legislature's] prerogatives [and hence] the doctrine of separation [was] violated." Clark v. Cuomo, 66 N.Y.2d 185, 189 (1985). **[*85]** Here, in stark contrast, the Governor did nothing that usurped the Legislature's prerogatives. To the contrary, he proposed budget bills that set forth a comprehensive fiscal plan (bills that comported fully with Article VII, § 6), as was his constitutional duty. For the Legislature, which altered the Governor's budget bills in contravention of Section 4, to claim that he acted ultra vires is to turn the world on its head.

We recognize, as did the courts below, that the Executive Budget process may lead to "prolonged and contentious" negotiations if each branch is reluctant to compromise on key issues. (A. 7). But the fact that Article VII induces such inter-branch negotiations is not its vice but its virtue. Any other outcome would result either in a reversion to legislative budgeting (if the Legislature could ignore the Governor's submissions) or in an unwarranted transfer of policymaking power to the Governor (if he could impose his will on the Legislature). If neither branch is to be the "czar" of budgetary matters, the carefully crafted system of checks and balances that is the genius of Article VII must be maintained.

In sum, none of the Legislature's arguments is meritorious, **[*86]** and its conduct in altering the Governor's appropriation bills was plainly unconstitutional. n31

n31 The courts below pretermitted the issue of whether the Legislature had violated Article VII, § 5 when it "consider[ed]" its 37 single-purpose bills before it had "finally acted upon" the Governor's appropriation bills. In this Court, only the Senate addresses the Section 5 issue. (S. Br. 77-83). The Governor's position on this issue is straightforward: by originating the 37 single-purpose bills, introducing them, placing them on the desks of the Members, and referring them to legislative committees in the days before it purported to take final action on the Governor's appropriation bills, the Legislature "consider[ed]" those bills in violation of Section 5. In response, the Senate argues that the word "consider" means only "passage of the single-purpose appropriation bills," (S. Br. 78), and therefore that it was allowed to take the pre-passage actions that it did. This argument is mistaken. Had the framers intended Section 5 to restrict only the "passage of bills" - rather than the origination, introduction, printing, placement on the Members' desks and referral to legislative committees - they could easily have said so. See, e.g., Sinker v. Sweeney. 89 N.Y.2d 485, 487-88 (1997)(drafters could easily have adopted different phraseology if they intended a particular construction). Notably, other provisions of the Constitution refer expressly to the "passage" of bills, see Article VII, §§ 4, 5; Article HI, §§ 12, 14, 15, 16, 17, 20, so it is clear that the drafters were familiar with the term. Indeed, they used the word "passage" in section 5 just 38 words after stipulating that the Legislature could not "consider" any other bill making an appropriation.

Finally, the relevant history demonstrates that the framers intended precisely what they wrote. See 1915 Revised Record at 1662 (Saxe: "[I]t is understood that [appropriation bills initiated by the Legislature] cannot be introduced by a member of the Legislature until after the appropriation bill [submitted by the Governor] is finished")(emphasis added); id at 1150 (Smith: "You say here that neither house shall consider - [t]hat means that they cannot even have a committee meeting . . . until they have passed the budget"). In sum, if this Court reaches the Section 5 issue, it should give the word "consider" its intended broad meaning, and not countenance the evasion of the Executive budgeting system that occurred in 2001.

[*87]

POINT II

THE GOVERNOR'S CLAIMS ARE JUSTICIABLE

The Assembly (but not the Senate) seeks to avoid judicial resolution of the Governor's claims on the ground that they are "not justiciable." (A. Br. 20). n32 It advances two distinct arguments: (i) that the Governor lacks standing to bring suit and (ii) that his lawsuit is barred by the doctrine of legislative immunity. These arguments founder on the established principle that the courts of this State "will always be available to resolve disputes concerning the scope of that authority which is granted by the Constitution to the other two branches of the government." Silver v. Pataki, 96 N.Y.2d at 542 (emphasis in original), quoting Saxton, 44 N.Y.2d at 551 (citations omitted).

n32 In the Appellate Division, the Senate described this case as presenting a "quintessentially justiciable controversy." (S. Br. App. Div. 53 n. 30).

A. The Governor Has Standing to Sue

The legal requirements for standing **[*88]** are well established: "A plaintiff has standing to maintain an action alleging an injury that falls within his or her zone of interest." Silver v. Pataki, 96 N.Y.2d at 539; accord New York State Association of Nurse Anesthetists v. Novello, 2 N.Y.3d 207, 211 (2004). Here, by altering the Governor's budget bills in violation of Article VII, § 4, the Legislature infringed upon his constitutional authority. The resultant injury falls squarely within the Governor's "zone of interest" and affords him standing to bring this action.

The Assembly principally argues that the Governor lacks standing because he suffered only an "institutional injury" that is too "abstract . . . to rise to the level of a cognizable injury in fact." Silver v. Pataki, 96 N.Y.2d at 559 n. 5. In Silver, the Court considered whether the Speaker had standing to bring suit against the Governor for vetoing line items in "non-appropriation bills" that the Legislature had approved. n33 In finding that the Speaker had standing, the Court emphasized that "[c]ases considering legislator standing generally fall into one of three categories [-] lost political battles, **[*89]** nullification of votes and usurpation of power [-and] only the circumstances presented by the latter two categories confer standing." Id. at 539. In those latter circumstances, standing to seek judicial redress "is essential to protect the separation of powers and rights of the Legislative branch." Id. at 542.

n33 Silver is before this Court again as the companion case to this appeal. See supra at 11, n. 11.

As this discussion makes clear, Silver, fairly read, supports the Governor's position and not the Assembly's. Here,

the Legislature encroached upon the Governor's constitutional prerogatives when it enacted its so-called baseline budget. It usurped his role in the budget process by treating his submissions as informational and unconstitutionally altering them. Moreover, the Legislature also engaged in a form of vote nullification. Under the Executive budgeting system, the Governor casts his "vote" in favor of a particular appropriation by proposing it in his **[*90]** Executive Budget, knowing that the no-alteration rule limits the Legislature to approving the item in the form proposed (at the same or a reduced level of spending). It was for precisely this reason that the framers of Article VII removed the Governor's veto power over such items. Here, by impermissibly altering the "when, how, or where" of spending, the Legislature nullified the effectiveness of the Governor's vote.

The law could hardly be otherwise. As this Court has recently emphasized, "[t]he rules governing standing help courts separate the tangible from the abstract or speculative injury, and the genuinely aggrieved from the judicial dilettante or amorphous claimant." Saratoga County Chamber of Commerce, Inc. v. Pataki, 100 N.Y.2d 801, 812 (2003). They "ensur[e] that the party seeking review has some concrete interest in prosecuting the action which casts the dispute 'in a form traditionally capable of judicial resolution.'" Silver, 96 N.Y.2d at 539, quoting Society of Plastics Indus. v. County of Suffolk. 77 N.Y.2d 761, 772 (1991). In this context, it is difficult to imagine a plaintiff who is more "genuinely aggrieved" **[*91]** and less a "judicial dilettante" than the Governor, whose constitutional role in the budget process was usurped. If the Speaker had standing in Silver "to protect the separation of powers and rights of [his] branch," then the Governor has it here for that very same purpose. n34

n34 Notably, the dissent in Silver would have found standing if the claim there had been asserted "by the [Legislature] itself." 76 N.Y.2d at 547. See also Colorado General Assembly v. Lamm, 704 P.2d 1371 (Colo. 1985)(legislature has standing to challenge governor's veto as "an intrusion upon the legislative domain"); Romer v. Colorado General Assembly, 810 P.2d 215, 219 (Colo. 1991)(governor has standing to challenge legislative action that impairs "[his] constitutional power and duty to either approve or veto legislative acts"); Dye v. State ex rel. Hale, 507 S.2d 332, 338 (Miss. 1987)(senators have standing to challenge actions of executive branch as "depriv[ing] them of power and prerogatives lawfully theirs as Senators").

[*92]

The Legislature argues that there is "no basis for relaxing the standing requirement in this case" since there are other "availabl[e] plaintiffs." (A. Br. 24). The opposite is more true. To paraphrase Silver, "that other parties may also be aggrieved by some of the [Legislature's actions] does not diminish the direct injury suffered by [the Governor]" in this case. 96 N.Y.2d at 541. Moreover, it is hard to imagine that an aggrieved Governor must wait for a private litigant to come forward in order to vindicate the Executive's interest in preserving its constitutional authority. n35

n35 The Assembly notes that the Attorney General brought suit in both Tremaine cases in the name of the People. (A. 24). The true party in interest, of course was the Governor. See (A. 435) (Comptroller's brief in Tremaine II responding to arguments raised "by the Attorney-General and the Governor")(emphasis added). A Governor's ability to obtain judicial review in these circumstances should not depend upon whether the Attorney General is willing to inject himself into an inter-branch dispute or whether "the People" or "the Governor" is denominated the plaintiff.

[*93]

Although the Assembly principally relies upon a misreading of Silver to support its standing argument, it also places weight on the fact that the Governor is "challeng[ing] legislation he signed into law." (A. Br. 22). This, and not Silver, was the basis of the dissenting opinion below. See A. 8 ("[h]ad [the Governor] vetoed the subject legislation, he

would have standing to challenge it if his veto had been overridden by the Legislature"). This argument is wrong for several reasons.

First, as this Court instructed in Silver, "[t]he existence of other possible political remedies .. . does not negate the injury in fact." 96 N.Y.2d at 541. There, it was argued that the Speaker did not have standing because "he still had a remedy within the political process - seeking to override the vetoes by a two-thirds supermajority." Id. This Court rejected that argument, noting that "[t]he supermajority override [was] a political remedy for validly imposed vetoes." Id. (emphasis added). If the Speaker could sue and not seek to override in Silver, then surely the Governor could sue and not veto here. That course permitted him to obtain a judicial **[*94]** determination and prevent future injury to himself and his successors without jeopardizing vital government functions. See Winner v. Cuomo, 176 A.D.2d at 105 ("[a]ccepting and acting on the budget bills while simultaneously commencing a declaratory judgment action to resolve the dispute . . . is a more prudent and less detrimental course of action").

Second, the course that the Governor pursued was closely analogous to that in Tremaine II, which presented a justiciable controversy. There, the governor "allow[ed] the [budget bills that the Legislature had altered] to become law without affirmative action on his part 'for the sole purpose of having this issue of constitutionally presented to the courts.'" People v. Tremaine, 257 A.D. 117, 120 (3d Dept.), modified. 281 N.Y. 1 (1939). It would be a strange doctrine indeed that conferred standing when a governor "pocket approved" a budget bill (as Governor Lehman did in Tremaine II) but denied standing when he signed it and challenged it the next day (as Governor Pataki did here).

Third, with regard to the deletion of "when, how, or where" provisions that the Legislature **[*95]** made from the Governor's submissions, the exercise of the veto power was no remedy at all. Once those provisions were excised, the veto could not make them reappear. Rather, the Governor's only recourse was to invoke Section 4 and bring suit.

Moreover, the claim that the Governor is seeking "winner's standing" (A. Br. 23) rings hollow on the facts of this case. The Governor was hardly a winner in this budget dispute in which the Legislature unconstitutionally altered his budget submissions. In that respect, this case is analogous to Kansas v. United States. 24 F. Supp.2d 1192 (D. Kan. 1998), aff'd, 214 F.3d 1196 (10th Cir. 2000). There, Kansas opted to participate in a federal welfare program but then brought suit contesting certain federal mandates as violative of the Tenth Amendment. The District Court held that Kansas had standing to challenge those mandates, rejecting the claim that its injury was "self-inflicted":

> The purpose of the [standing] requirement is to insure that the injury alleged by plaintiff is attributable to the defendant. The injury noted by the [plaintiff] - the . . . costs of complying with [the federal mandates] **[*96]** - appears to be directly traceable to the challenged action of the defendant. Accordingly we have little difficulty in determining that . . . Kansas has standing . . . even though [it] agreed to participate in the program.

Id. at 1195. Here, too, the Governor's injury was not "self-inflicted" but was directly attributable to the Legislature's unconstitutional conduct. n36

> n36 That the Assembly's position lacks merit can also be seen by considering its consequences. Assume the Legislature enacts a bill that the Governor believes is beneficial to the State, but a provision of which infringes on his authority in one narrow respect. According to the Assembly, if the Governor were to sign the bill, he would lack standing to challenge the objectionable provision. That would be true even if the provision's unconstitutionality became clear from a subsequent court decision or Attorney General's opinion. Indeed, it would be true even if a subsequent Governor sought to challenge the provision. Those untoward consequences flow inexorably from the Assembly's position that once a Governor approves a bill, and for whatever reasons he does so, any injury that the bill inflicts on Executive authority magically disappears.

[*97]

In sum, the Governor has standing here for the same reasons that the Speaker had standing in Silver.

B. The Speech Or Debate Clause Does Not Immunize The Legislature From Suit

The Assembly's second justiciability argument is that the Speech or Debate Clause "immunizes from legal challenge the . .. legislative function of amending and passing budget bills." (A. Br. 28). This argument is flawed, however, because the doctrine of legislative immunity on which the Assembly relies shields legislators from the consequences of litigation only "as long as their actions fall within the 'sphere of legitimate legislative activity.'" Urbach v. Farrell, 229 A.D.2d 275, 277 (3d Dept. 1997). Where the Legislature has acted outside that sphere and has usurped powers that belong to the Executive, as it did here, the immunity does not apply. Rivera v. Espada, 98 N.Y.2d 422, 428 (2002)("[a] legislator is . . . afforded immunity from any proceeding challenging lawful action taken in his or her official capacity")(emphasis added).

Closely on point is the en banc decision of the Colorado Supreme Court in Romer v. Colorado General Assembly, 810 P.2d 215 (Colo. 1991). **[*98]** There, the Colorado legislature included "headnotes and footnotes" in an appropriation bill which "sought to restrict or explain the use of the relevant appropriation." Id. at 217. The governor approved the bill, but only after line vetoing some of the headnotes and footnotes. After the legislature effectively over-rode that veto (it announced that it would ignore the veto and treat the headnotes and footnotes as "duly enacted law"), the governor brought suit, seeking a declaratory judgment that the legislature had acted unconstitutionally. In its answer, the legislature claimed absolute immunity, as the Assembly does here.

On this record, the Colorado Supreme Court concluded that the protection of the speech or debate clause did not apply where the governor was "attacking the procedure employed by the legislature as an encroachment into the executivc sphere." Id. at 223. It wrote:

> Here . . . the governor claims the activity itself, an alleged improper override, violated the constitution and impermissibly infringed on the executive's power to veto legislation. It is incumbent upon the court, when such an allegation is made, to determine whether **[*99]** that act may fairly be deemed within [the legislature's] province . . . .
>
> * * *
>
> Moreover, the governor seeks a declaration that his vetoes are valid, rather than to hold the legislators personally liable for legislative activities. The members are not required to defend themselves, nor are deliberations or communications impaired. It is also unnecessary to explore the motivation behind any legislator's actions.
>
> * * *
>
> When the General Assembly is engaged in legitimate legislative activity, the speech or debate clause protects individual legislators and the legislature as a whole from being named defendants in an action challenging the constitutionality of legislation. When, on the other hand, an action challenges the constitutionality of the procedure employed to enact the legislation, it is incumbent on the judiciary to resolve whether the challenged actions fall within the sphere of legitimate legislative activity.

Id. at 224-25 (citations omitted). Here, too, it is incumbent upon this Court to determine whether the Legislature acted within its province when it altered the Governor's appropriation bills. n37

n37 Remarkably, the Assembly cites Romer in support of its position. (A. Br. 26). It ignores entirely the above-quoted language and instead fastens onto the portion of the Court's opinion which holds that the speech and debate privilege barred the Governor's challenge to the Legislature's conduct in inserting footnotes and headnotes in the appropriation bill (as opposed to its subsequent conduct in effectively overriding the Governor's veto of those insertions). What the Assembly fails to mention is that in Romer "[t]he governor [did] not complain that the legislators usurped an executive function when they passed the footnotes and headnotes." 810 P.2d. at 222. Thus, Romer draws this sensible distinction: (i) the speech and debate privilege bars an action against the legislature alleging only that it enacted an unconstitutional law, but (ii) it does not bar an action alleging that the legislature "encroach[ed] into the executive sphere." Id. at 223. This case, of course, falls into the latter category.

[*100]

That legislative immunity does not apply here is wholly consistent with its "central purpose" of "preserv[ing] the constitutional structure of separate, coequal, and independent branches of government." United States v. Gillock, 445 U.S. 360, 369 (1980), quoting United States v. Helstoski, 442 U.S. 477, 491 (1979); see also Davis v. Passman, 442 U.S. 228, 236 n.11 (1979)("[i]n the American governmental structure the [Speech or Debate] clause serves the . .. function of reinforcing the separation of powers so deliberately established by the Founders")(citation omitted). Indeed, the framers "viewed the speech or debate privilege as fundamental to the system of checks and balances." Gillock, 445 U.S. at 369. Given this central purpose, it is unthinkable that the Legislature can eviscerate the carefully crafted checks and balances established in our Constitution, and then take refuge behind legislative immunity. n38

n38 Significantly, none of the cases the Assembly cites involved a dispute alleging that one branch of government unconstitutionally encroached on the prerogatives of another. See, e.g., Warden v. Pataki, 35 F.Supp. 2d 354, 358-59 (S.D.N.Y. 1999)(legislative immunity bars actions brought by parents against Governor, individual legislators, and Legislature challenging their roles in enacting legislation relating to composition of Board of Education); Kennedy v. Commonwealth. 546 A.2d 733, 735-36 (Pa. Cmwlth. 1988)(legislative immunity bars suit by citizen-taxpayers against Legislature for enacting legislation raising the salary of legislators); San Pedro Hotel Co., Inc. v. City of Los Angeles, 159 F.3d 470, 476 (9th Cir. 1998)(legislative immunity bars suit by local property owner against local legislator for "voting or persuading his colleagues to vote one way or another on approval of .. . loan"); Tolman v. Finneran, 171 F.Supp.2d 31, 35-36 (D. Mass. 2001)(legislative immunity bars suit by gubernatorial candidate against state legislators for not appropriating sufficient money to state election fund).

[*101]

If the Assembly were correct that legislative immunity applied here, the consequences would be astonishing. Although the courts of this State are supposedly "always .. . available to resolve disputes concerning the scope of that authority which is granted by the Constitution to the other two branches of the government," Silver v. Pataki, 96 N.Y.2d at 542, the Governor would not be entitled to bring suit against the Legislature when it exceeds its authority in the budgetary process. He would have to locate some surrogate (who had done nothing wrong) to name as a defendant before he could seek judicial review. See Ellington Construction Corp. v. Zoning Board of Appeals of Incorporated Village, 77 N.Y.2d 114, 124-25 (1990)(it is presumed that drafters did not intend an interpretation which produces "unreasonable and potentially unjust consequences").

Moreover, presumably the same would hold true if the Legislature challenged the constitutionality of the Governor's Executive Budget submission (as it did in its counterclaims in this action) or his exercise of line item veto authority (as it did in Silver v. Pataki). That is because when the Governor **[*102]** proposes a budget or signs or vetoes

appropriation bills, he is acting in a legislative capacity and enjoys the same Speech or Debate protection as a legislator. See Teeval Co. v. Stern, 301 N.Y. 346, 362 (1950) ("in exercising his power to approve or veto legislation the Governor performs a legislative function"); Campaign for Fiscal Equity, Inc. v. State of New York, 265 A.D.2d 277 (1st Dept. 1998)(executive branch officials entitled to "legislative privilege . . . in the performance of their legislative functions"). If legislative immunity applies in such circumstances, then the Legislature also could sue only a surrogate, not the Governor himself. The notion that inter-branch disputes over Article VII authority must be fought by third parties, with the real disputants watching from the sidelines, is simply too farfetched to be the law. n39

> n39 As noted above, the Senate has not raised a legislative immunity defense. Thus, even if the Assembly were correct on this score, this appeal would proceed as to the Senate. See Kalkstein v. DiNapoli, 228 A.D.2d 28, 31 (3d Dept. 1997)(legislative privilege waived if not timely asserted).

[*103]

In sum, this case presents a quintessentially justiciable controversy for this Court to review.

CONCLUSION

In his brief in Tremaine II, Attorney General John J. Bennett described the actions of the 1939 Legislature as follows:

> It is submitted that the Legislature has succumbed to the "easy temptation" to throw the budget bill aside "and begin over again a new budget of its own";. .. that it has not proceeded "by methods which will not disrupt the budget"; that it has approached the subject in the spirit of a "rival constructor" rather than a "critic," and that the items which it calls "additions" are not for "new State activities," but are, rather, items in substitution of those already contained in the bill. The result of such procedure is the circumvention of the executive budget plan and the thwarting of the expressed will of the people.

(R. 3590). The very same is true here. Under Article VII, § 4, the Legislature may not discard the Governor's budget bills and write its own, for that is at odds with our constitutional system. Because that is precisely what occurred, the decision of the Appellate Division should be affirmed.

New York, New **[*104]** York
October 20, 2004

/s/ [Signature]
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