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Note

Wachtler v. Cuomo: Does New York's Judiciary Have an Inherent Right of Self-Preservation?

I. Introduction

The combination of more than a decade of decreasing assistance from the federal government and a sudden economic downturn in the late 1980's has left many state governments with profound budget crises.¹ These crises have forced half of

1. Michael deC. Hinds, *Revenue Problems Endanger Budgets in Half the States*, N.Y. TIMES, Mar. 4, 1990, at A1 (economic decline in 1989 creates large budget deficits in many states, especially in the Northeast); Michael deC. Hinds, *States and Cities Fight Recession with New Taxes*, N.Y. TIMES, July 27, 1991, at A8 (rising expenses and falling revenues have forced states to increase taxes and fees, recession and increased state fiscal responsibility for national programs are primary causes; highlighting 20 states which enacted total of \$18 billion in new taxes and fees); Michael deC. Hinds, *U.S. Adds Programs with Little Review of Local Burdens*, N.Y. TIMES, Mar. 24, 1992, at A1, A14 (In article on expanding federally mandated spending, "[t]hree-quarters of the states . . . report worsening fiscal problems this year, and many governors . . . are saying the problems will linger or worsen over several years even if the economy recovers quickly."); Gwen Ifell, *Governors Seek \$10 Billion in Increased Taxes*, N.Y. TIMES, Apr. 18, 1991, at B10 (governors impose taxes and reduce expenditures to deal with worst financial conditions since 1983; slow recovery for state governments predicted regardless of speed of economic recovery); *Racing Against New Budget Year, States Work to Forge Pacts on Spending*, N.Y. TIMES, July 1, 1991, at A10 (legislators in California, Ohio, Massachusetts, Illinois, North Carolina, Maine and Pennsylvania faced with passing budgets that will require steep tax increases, substantial cuts in public services or both); Martin Tolchin, *Despite Billions in Tax Rises, States Slash Services*, N.Y. TIMES, Oct. 30, 1991, at A16 (twenty-nine states had to reduce 1991 spending by \$7.5 billion after 1991 budgets were enacted); Martin Tolchin, *States Take Up New Burdens to Pay for "New Federalism,"* N.Y. TIMES, May 21, 1990, at A1 (reductions in various federal aid programs to states and localities coupled with increases in spending mandated by the federal government have severely restricted the ability of states to deal with their own fiscal problems).

the states to reduce their judicial budgets.² At the same time, the state judiciaries have been inundated with a flood of new filings, primarily criminal cases resulting from the "war on drugs."³ These competing pressures on state judiciaries have resulted in a similar crisis in the civil courts, often effectively denying litigants access to the courts.⁴

The state of the judiciary in New York is typical of the trend nationwide. The workload of the courts in New York has greatly increased in the 1980s, fueled primarily by an increase in narcotics-related cases in the criminal and family courts.⁵ By 1991, New York State's fiscal problems placed severe limits on its ability to increase funding to aid the judiciary.⁶ Pleas by the judiciary for adequate funds to deal with the courts' increasing workload have gone unanswered.⁷

2. Bryan J. Holzberg, *Recession Forces Civil Court Cutbacks*, LITIG. NEWS, Oct. 1992, at 8.

3. *Id.* A study of court filings by a special committee of the American Bar Association indicates that nearly 80% of all filings are either criminal or family law matters, and these areas are the ones that have been most adversely affected by the drug crisis. *Id.*

4. *Id.* Delays in obtaining civil trials exceeds four years in both Philadelphia, Pennsylvania and Newark, New Jersey, and several states have temporarily suspended the trying of civil actions. *Id.* The Vermont Supreme Court ordered civil jury trials suspended in 1990 and rejected a constitutional challenge to that order. Vermont Supreme Court Admin. Directive No. 17 v. Vermont Supreme Court, 579 A.2d 1036 (Vt. 1990); see also Joseph F. Sullivan, *Years of Backlogs Snarl New Jersey Civil Courts*, N.Y. TIMES, July 1, 1991, at B2 (increase in criminal cases caused by stricter narcotics laws has caused an increase in backlog of civil cases; increase of 38% in cases pending from June 1988 to May 1991, including 35% increase in cases pending more than one year; president of the Conference of State Court Administrators says New Jersey is an example of the national trend).

5. CHIEF ADM'R OF THE COURTS, STATE OF NEW YORK, THIRTEENTH ANNUAL REPORT OF THE CHIEF ADM'R OF THE COURTS 3-4 (1991). This report noted significant increases in the caseload of the system between 1985 and 1990. *Id.* Felony filings in the supreme and county courts statewide increased from 51,000 to 80,000 between 1985 and 1990, a 55% increase. *Id.* at 3. Drug indictments in New York City increased 249% in the same period. *Id.* The backlog of cases in the New York City Criminal Court increased 256% from the end of 1980 to the end of 1989. *Id.* Criminal caseloads in the city courts outside New York City have increased between 55% and 129% between 1985 and 1990. *Id.* The overall caseload of the family court has increased 33% statewide and 57% in New York City between 1985 and 1990. *Id.* at 4. The family court caseload increase in New York City includes a 147% increase in child protective cases during the same period and a 650% increase in neglect and abuse cases between 1980 and 1989. *Id.* at 3.

6. See *infra* notes 261-62 and accompanying text.

7. See, e.g., Gary Spencer, *Cuomo Ignores Courts in State of the State Speech*, N.Y. L.J., Jan. 9, 1992, at 1; Gary Spencer, *Cuomo Vows to Veto Hike in Court*

After nearly a year of intense public debate with Governor Cuomo over the state judiciary's funding, Sol Wachtler, then Chief Judge of New York, took the controversial step of suing the Governor and the leaders of the legislature.⁸ The subject of the debate was severe staffing cutbacks which resulted in decreased access for civil litigants,⁹ and a "lag payroll" system for court employees that both state and federal courts invalidated.¹⁰ Chief Judge Wachtler alleged that the Governor and

Funds, N.Y. L.J., Nov. 4, 1991, at 1 (Governor Cuomo calls proposed increase in judiciary funding "unconscionable"); Gary Spencer, *New Cuts Sought from Budget*, N.Y. L.J., Nov. 1, 1991, at 1 (Governor Cuomo calls possibility of additional court funding "unrealistic").

Chief Judge Wachtler's complaint detailed the reductions in the judiciary's budget between 1982 and 1992:

Fiscal Year	Request	Appropriation	Reduction
1982-83	\$490,829,101	\$480,100,101	\$10,729,000
1983-84	\$574,322,858	\$555,712,058	\$18,601,800
1984-85	\$652,596,117	\$603,845,236	\$48,750,881
1985-86	\$670,947,137	\$655,397,237	\$15,549,900
1986-87	\$728,447,280	\$713,625,280	\$14,822,000
1987-88	\$790,886,410	\$767,385,910	\$23,500,500
1988-89	\$827,422,194	\$807,013,194	\$20,409,000
1989-90	\$876,548,464	\$866,887,464	\$ 9,661,000
1990-91	\$959,629,453	\$878,527,485	\$81,101,968
1991-92	\$949,454,702	\$874,217,702	\$75,237,000

Verified Complaint at 12, *Wachtler v. Cuomo*, No. 6034/91 (Sup. Ct. Albany County filed Sept. 27, 1991).

8. *Wachtler v. Cuomo*, No. 6034/91 (Sup. Ct. Albany County filed Sept. 27, 1991).

9. Gary Spencer, *Wachtler Details Drastic Court Cuts*, N.Y. L.J., Sept. 6, 1991, at 1. The budget passed by the legislature in July 1991 required the Chief Judge to close 34 of the 115 supreme court civil trial parts in New York City and 3 of the 19 supreme court civil trial parts in Suffolk County. *Id.*

10. The "lag payroll" system was a device designed to reduce the expenditures of the judiciary by delaying payment of nonjudicial employees' wages until sometime after they had been earned. The state legislature imposed a two-week lag payroll in 1990, Act of May 25, 1990, ch. 190, § 375, 1990 N.Y. Laws 507, 819-20 (Lawyers Coop.), and then imposed a one-week lag payroll in 1991. N.Y. STATE FIN. LAW § 200(2-b) (McKinney Supp. 1993). The 1990 lag payroll statute was invalidated by the Second Circuit Court of Appeals in *Association of Surrogates & Supreme Court Reporters v. New York*, 940 F.2d 766 (2d Cir. 1991), *certified question answered in*, 78 N.Y.2d 143, 577 N.E.2d 10, 573 N.Y.S.2d 19 (1991), *cert. denied*, 112 S. Ct. 936 (1992). The 1991 lag payroll statute was invalidated by the New York Court of Appeals in *Association of Surrogates & Supreme Court Reporters v. State*, 79 N.Y.2d 39, 588 N.E.2d 51, 580 N.Y.S.2d 153 (1992). See generally Gary Spencer, *Court of Appeals Voids Judiciary's Lag Payroll; More Layoffs Predicted*, N.Y. L.J., Jan. 17, 1992, at 1. Chief Judge Wachtler did not participate in either of the New York Court of Appeals decisions cited above. *Association of Sur-*

leaders of the legislature unconstitutionally denied the state judiciary the funds that it needed to operate as an equal branch of government.¹¹ After attempts to move the dispute into the federal courts,¹² the suit was settled through the negotiating efforts of the legislative leadership.¹³ The out-of-court settlement of this lawsuit leaves unresolved the extent of the judiciary's power in New York State to ensure that the Governor and the legislature (together "the political branches") allocate adequate funds for the necessary operations of the judiciary.

This unresolved issue has continuing relevance. *Wachtler v. Cuomo*¹⁴ is unique among court funding suits.¹⁵ As a general matter, local governments have had the responsibility, especially at the trial level, for financing judicial operations.¹⁶ In fact, the *Wachtler* suit appears to be the first challenge of an appropriation decision made by the political branches regarding a statewide judicial system.¹⁷ As the first such statewide case, *Wachtler v. Cuomo* also involves the most significant financial

rogates, 79 N.Y.2d at 48, 588 N.E.2d at 55, 580 N.Y.S.2d at 157; *Association of Surrogates*, 78 N.Y.2d at 157, 577 N.E.2d at 16, 573 N.Y.S.2d at 25.

11. *Wachtler v. Cuomo*, No. 6034/91 (Sup. Ct. Albany County filed Sept. 27, 1991).

12. *See infra* notes 269-78 and accompanying text.

13. Gary Spencer, *Wachtler, Cuomo Settle Funding Suit*, N.Y. L.J., Jan. 17, 1992, at 1.

14. *Wachtler v. Cuomo*, No. 6034/91 (Sup. Ct. Albany County filed Sept. 27, 1991).

15. *See infra* notes 16-20 and accompanying text. While *Wachtler v. Cuomo* is unique in its scope, *see infra* note 18 and accompanying text, it was not the only lawsuit to challenge the Governor's actions in regard to the judiciary's 1991-92 budget. In *Schulz v. State*, 152 Misc. 2d 589, 578 N.Y.S.2d 822 (Sup. Ct. Albany County 1991), three citizens sued seeking a declaration that the entire 1991-92 budget was void because of the Governor's failure to submit the judiciary's budget request "without revision." *Id.* at 590, 578 N.Y.S.2d at 823. Initially, this claim survived the State's motion to dismiss for lack of standing and lack of justiciability. *Id.* at 590-93, 595, 578 N.Y.S.2d at 823-25, 826. However, the Third Department dismissed the cause of action on the grounds of mootness. *Schulz v. State*, 187 A.D.2d 789, 789-90, 589 N.Y.S.2d 220, 221 (3d Dep't 1992).

16. *See Note, The Court's Inherent Power to Compel Legislative Funding of Judicial Functions*, 81 MICH. L. REV. 1687, 1687 n.6 (1983) (noting that inherent power cases typically involve city and/or county governments).

17. More accurately, *Wachtler v. Cuomo* is the first case in which the political branches' lump-sum appropriation for the judicial system has been challenged. *See Goodheart v. Casey*, 555 A.2d 1210 (Pa. 1988) (court had inherent power to order state retirement board to contribute to judges' pension plans at specified levels to provide adequate compensation to judges); *State ex rel. Bagley v. Blankenship*, 246 S.E.2d 99 (W. Va. 1978) (court could order legislative clerk to publish

issues to date.¹⁸ The failure of the appellate courts in New York to address this issue continues to leave this question open for dispute.¹⁹ New York State's chronic budget problems, and the judiciary's continuing struggle to deal with its increasing caseload mean that despite the settlement of the Chief Judge's action, questions remain unanswered. Two questions are likely to surface again: what constitutes an adequate level of funding for the judiciary, and what branch has the authority to make the final determination as to the adequacy of funding?²⁰

This Casenote will analyze the controversies created by *Wachtler v. Cuomo* and attempt to determine how those controversies would be resolved in the judicial process. Part II of this Casenote will first examine how other courts have developed the theory of an inherent power of the judiciary to order adequate funding for its operations. Part II will then examine two modern cases, *Commonwealth ex rel. Carroll v. Tate*,²¹ and *Morgan County Commission v. Powell*,²² and their competing views on the validity of the doctrine. The development of this doctrine in New York will then be examined. Part II will then examine the conditions under which the judiciary in New York will intervene in the budget process. Finally, Part II will examine the particulars of the state budget crisis of the late 1980s and the events leading up to, and including, the *Wachtler v. Cuomo* action. Part III will attempt to determine how a future case might be decided in the event that that future case cannot be settled.

appropriations bill to conform to chief justice's submission after legislature had impermissibly reduced some items in the budget).

18. Compare the \$5 million sought by the court in *Commonwealth ex rel. Carroll v. Tate*, 274 A.2d 193 (Pa. 1971), with the \$77 million sought in *Wachtler v. Cuomo*. See Gary Spencer, *Wachtler Sues for Full Budget Request*, N.Y. L.J., Sept. 27, 1991, at 1.

19. See *infra* notes 212-20 and accompanying text.

20. In an address to the New York State Bar Association's annual meeting, the Chief Administrator of the state's courts, Matthew Crosson, clearly indicated his belief that the courts' funding crisis would likely continue in the near future, regardless of any financial recovery by the state. Matthew T. Crosson, *Lawyers Respond to Needs of Courts in Fiscal Crisis*, N.Y. L.J., Jan. 29, 1992, at 37.

21. 274 A.2d 193 (Pa.), cert. denied, 402 U.S. 974 (1971).

22. 293 So. 2d 830 (Ala. 1974).

II. Background

A. *The Inherent Judicial Budgetary Power Doctrine*

1. *Origins of the Doctrine*

The doctrine of inherent judicial budgetary power is derived from the separation of powers doctrine, which is founded upon "the political maxim, that the legislative, executive and judiciary departments ought to be separate and distinct."²³ The belief that those departments must be absolutely separate resulted in objections to the proposed federal constitution in the 1780s and is still a part of most state constitutions.²⁴ Madison demonstrated that Montesquieu and the state constitutions did not require absolute separation of the departments of government.²⁵ Rather, a separation of powers concept, which prevented one department of government from exercising the entire power of another department, was capable of protecting the people from tyranny.²⁶ Merely marking out absolute or exclusive limits on the powers of the respective departments of government had not kept the departments completely separate in practice in the states, and an absolute separation on paper

23. THE FEDERALIST No. 47, at 243 (James Madison) (Gary Willis ed., 1982).

24. *Id.* While the federal constitution does not address the concept of "separateness," see U.S. CONST. art. I, § 1, art. II, § 1, & art. III, § 1, 40 of the states have adopted specific "separateness" provisions, such as Arizona's:

The powers of the government of the State of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; and, except as provided in this Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.

ARIZ. CONST. art. III; see also ALA. CONST. art. III, §§ 42, 43; ARK. CONST. art. IV, §§ 1, 2; CAL. CONST. art. III, § 3; COLO. CONST. art. III; CONN. CONST. art. II; FLA. CONST. art. II, § 3; GA. CONST. art. I, § II, ¶ 3; IDAHO CONST. art. II, § 1; ILL. CONST. art. II, § 1; IND. CONST. art. III, § 1; IOWA CONST. art. III, § 1; KY. CONST. §§ 27, 28; LA. CONST. art. II, §§ 1, 2; ME. CONST. art. III, §§ 1, 2; MD. CONST. Declaration of Rights art. 8; MASS. CONST. pt. I, art. 30; MICH. CONST. art. III, § 2; MINN. CONST. art. III, § 1; MISS. CONST. art. I, §§ 1, 2; MO. CONST. art. II, § 2; MONT. CONST. art. III, § 1; NEB. CONST. art. II, § 1; NEV. CONST. art. III, § 1; N.H. CONST. pt. I, art. 37; N.J. CONST. art. III, ¶ 1; N.M. CONST. art. III, § 1; N.C. CONST. art. I, § 6; OKLA. CONST. art. IV, § 1; OR. CONST. art. III, § 1; R.I. CONST. art. V; S.C. CONST. art. I, § 8; S.D. CONST. art. II; TENN. CONST. art. II, §§ 1, 2; TEX. CONST. art. II, § 1; UTAH CONST. art. V, § 1; VT. CONST. ch. II, § 5; VA. CONST. art. I, § 5, art. III, § 1; W. VA. CONST. art. V, § 1; WYO. CONST. art. II, § 1.

25. THE FEDERALIST No. 47 (James Madison):

26. *Id.* The origins of the doctrine of separation of powers predate Montesquieu. Note, *supra* note 16, at 1689 n.12 (tracing the origins of the doctrine).

did not necessarily mean that "encroachments which lead to a tyrannical concentration of all the powers of government in the same hands" would not occur.²⁷ The genius in the separation of powers doctrine was not the absolute separateness, but that there was "great security against a gradual concentration of the several powers in the same department, giving those who administer each department, the necessary constitutional means, . . . , to resist encroachments of the others."²⁸

In defending the proposed federal constitution's judiciary article, Hamilton noted that "[t]he complete independence of the courts . . . is peculiarly essential in a limited constitution."²⁹ Judicial review of legislative enactments for constitutional infirmities allows the judiciary to act as "an intermediate body between the people and the legislature, . . . , to keep the latter within the limits assigned to their authority."³⁰ In upholding the constitution by annulling laws contrary to it, the judiciary protects the people from legislative encroachments.³¹

In exercising its inherent budgetary powers, a court merely engages in the judicial review of a legislative enactment that the separation of powers doctrine requires. An appropriations law, after all, is only a law, passed by a legislature purporting to be acting within its constitutional powers.³² An appropriations

27. THE FEDERALIST No. 47, at 249 (James Madison) (Gary Willis ed., 1982); THE FEDERALIST No. 48, at 254 (James Madison) (Gary Willis ed., 1982); *see also* Note, *supra* note 16, at 1689 n.13.

28. THE FEDERALIST No. 51, at 262 (James Madison) (Gary Willis ed., 1982).

29. THE FEDERALIST No. 78, at 394 (Alexander Hamilton) (Gary Willis ed., 1982). The dependence of the colonial judiciary on the Crown was one of the grievances raised by the Continental Congress. THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

30. THE FEDERALIST No. 78, at 395 (Alexander Hamilton) (Gary Willis ed., 1982).

31. *Id.* at 396-97.

32. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power . . . to pay the Debts and provide for the common Defence and general Welfare of the United States . . ."). Cases involving the refusal of an officer of the executive department to pay bills incurred by the courts can be analyzed in the same way. The acts of the executive branch must conform to the applicable constitution as the acts of the legislature do. *See City of New Orleans v. Paine*, 147 U.S. 261 (1893); *Smith v. Meese*, 821 F.2d 1484 (11th Cir. 1987); *United States v. Carrasco*, 786 F.2d 1452 (9th Cir. 1986); *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985); *Daniel v. Citizens & S. Nat'l Bank*, 185 S.E. 696 (Ga. 1936); *Cooke v. Iverson*, 122 N.W. 251 (Minn. 1909); *Hearon v. Calus*, 183 S.E. 13 (S.C. 1935); *Ekern v. McGovern*, 142 N.W. 595 (Wis. 1913). If an act of the executive branch is

law may offend a constitution in two ways. It may disturb the separation of powers by usurping the judicial power either through controlling the disposition or nondisposition of cases, or by undermining the independence of the judiciary.³³ On the other hand, the appropriations law may deny people access to the courts to seek redress for their injuries.³⁴ In either case, the

contradictory to the constitution, the act must be voided to keep the executive within the limits of its authority. *See* *Public Clearing House v. Coyne*, 194 U.S. 497 (1904); *Smith v. Meese*, 821 F.2d 1484 (11th Cir. 1987); *United States v. Carrasco*, 786 F.2d 1452 (9th Cir. 1986); *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985); *San Christina Inv. Co. v. San Francisco*, 141 P. 384 (Cal. 1914); *State ex rel. Kinsella v. Eberhart*, 133 N.W. 857 (Minn. 1911); *State ex rel. Boone v. Metts*, 88 So. 525 (Miss. 1921); *Hobbs Gas Co. v. New Mexico Pub. Serv. Comm.*, 858 P.2d 54, 56 (N.M. 1993) (holding that court has authority to declare executive acts unlawful); *In re Legislative Adjournment*, 27 A. 324 (R.I. 1893); *Hearon v. Calus*, 183 S.E. 13 (S.C. 1935); *State ex rel. Mueller v. Thompson*, 137 N.W. 20 (Wis. 1912); *see also In re McKnight*, 550 N.E.2d 856, 859 (Mass. 1990) (holding that court has authority to order executive department to perform statutorily required act); *In re Lorie C.*, 49 N.Y.2d 161, 171, 400 N.E.2d 336, 341, 424 N.Y.S.2d 395, 401 (1980) ("[C]ourts do not normally have overview of the lawful acts of [executive] officials involving questions of judgment, discretion, allocation of resources and priorities.") (emphasis added) (citations omitted); *In re Dale P.*, 189 A.D.2d 325, 335, 595 N.Y.S.2d 970, 977 (2d Dep't 1993) (holding lawful acts of executive not subject to judicial review). The judiciary thus acts to protect the people against encroachments by the executive branch, as well as the legislature.

33. Note, *supra* note 16, at 1690-91 & nn.16-20.

34. Most states guarantee a right of access to the courts for civil actions in their constitutions, in provisions such as Alabama's: "That all courts shall be open; and that every person, for any injury done him, in his lands, goods, or person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay." ALA. CONST. art. I, § 13; *see also* ARK. CONST. art. II, § 13; COLO. CONST. art. II, § 6; CONN. CONST. art. I, § 10; DEL. CONST. art. I, § 9; FLA. CONST. art. I, § 21; GA. CONST. art. I, § I, ¶ 12; IDAHO CONST. art. I, § 18; ILL. CONST. art. I, § 12; IND. CONST. art. I, § 12; KAN. CONST. Bill of Rights § 18; KY. CONST. § 14; LA. CONST. art. I, § 22; ME. CONST. art. I, § 19; MD. CONST. Declaration of Rights art. 19; MASS. CONST. pt. I, art. 11; MINN. CONST. art. I, § 8; MISS. CONST. art. III, § 24; MO. CONST. art. I, § 14; MONT. CONST. art. II, § 16; NEB. CONST. art. I, § 13; N.H. CONST. pt. I, art. 14; N.C. CONST. art. I, § 18; N.D. CONST. art. I, § 9; OHIO CONST. art. I, § 16; OKLA. CONST. art. II, § 6; OR. CONST. art. I, § 10; PA. CONST. art. I, § 11; R.I. CONST. art. I, § 5; S.C. CONST. art. I, § 9; S.D. CONST. art. VI, § 20; TENN. CONST. art. I, § 17; TEX. CONST. art. I, § 13; UTAH CONST. art. I, § 11; VT. CONST. ch. I, § 4; WASH. CONST. art. I, § 10; W. VA. CONST. art. III, § 17; WIS. CONST. art. I, § 9; WYO. CONST. art. I, § 8.

In a number of states this right has been established by court decision. *See, e.g., State v. McCracken*, 520 P.2d 787 (Alaska 1973) (holding that denial of access to the civil courts violates due process); *Payne v. Superior Court*, 553 P.2d 565 (Cal. 1976) (holding that due process rights protected by the California Constitution embraces a right of access to the courts); *Rodriguez v. Grand Trunk Western R.R.*, 328 N.W.2d 89, 92 (Mich. Ct. App. 1982) (access to courts is a fundamental

inherent budgetary power question presents a potential conflict between a law and a constitution. As Chief Justice Marshall explained in *Marbury v. Madison*,³⁵ if there is a conflict between a law and the constitution, a court is constrained by its "duty [as part] of the judicial department to say what the law is," and must resolve the conflict between the law and the constitution by voiding the law and applying the constitution.³⁶ Despite the continuous debate over the legitimacy of judicial review,³⁷ the doctrine has been broadly accepted in the state courts.³⁸

right); *Moore v. Fragatos*, 321 N.W.2d 781 (Mich. Ct. App. 1982) (same); *Charles v. Fischer Baking Co.*, 187 A. 175 (N.J. 1935). However, in New York there is no per se constitutional right to access to the civil courts. *Colton v. Riccobono*, 67 N.Y.2d 571, 576, 496 N.E.2d 670, 673, 505 N.Y.S.2d 581, 584 (1986) ("As a general rule, access to the courts in and of itself is not a right protected by the Constitution."); *Motor Vehicle Mfrs. Ass'n v. State*, 146 A.D.2d 212, 540 N.Y.S.2d 888 (3d Dep't 1989), *aff'd*, 75 N.Y.2d 175, 550 N.E.2d 919, 551 N.Y.S.2d 470 (1990).

35. 5 U.S. (1 Cranch) 137 (1803).

36. *Id.* at 177; see also THE FEDERALIST No. 78 (Alexander Hamilton).

37. The literature on the legitimacy of judicial review is so voluminous that any listing can only be representative at best.

Classic statements viewing judicial review as undemocratic and as undercutting popular responsibility are Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," 7 Harv.L.Rev. 129 (1893), and Commager, Majority Rule and Minority Rights (1943). Important defenses of judicial intervention are Rostow, "The Democratic Character of Judicial Review," 66 Harv.L.Rev. 193 (1952), and C.L. Black, Jr., *The People and the Court: Judicial Review in a Democracy* (1960).

GERALD GUNTHER, CONSTITUTIONAL LAW 19 (12th ed. 1991). For recent articles on the subject, see Mary Becker, *Conservative Free Speech and the Uneasy Case for Judicial Review*, 64 U. COLO. L. REV. 975 (1993); Richard Delgado, *Comments on Mary Becker*, 64 U. COLO. L. REV. 1051 (1993); Caroline S. Earle, *The American Judicial Review Quagmire: A Canadian Proposal*, 68 IND. L.J. 1357 (1993); David E. Engdahl, *John Marshall's 'Jeffersonian' Concept of Judicial Review*, 42 DUKE L.J. 279 (1992); Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309 (1993); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993); Wallace Mendelson, *The Judiciary Act of 1789: The Formal Origin of Federal Judicial Review*, 76 JUDICATURE 133 (1992); Ron Replogle, *The Scope of Representation-Reinforcing Judicial Review*, 92 COLUM. L. REV. 1592 (1992); Symposium, *One Hundred Years of Judicial Review: The Thayer Centennial Symposium*, 88 NW. U. L. REV. 1 (1993).

38. See, e.g., *Dyer v. Tuskaloosa Bridge Co.*, 2 Port. 296, 303 (Ala. 1835); *Wickersham v. Smith*, 7 Alaska 522, 537 (1927); *People ex rel. State v. Childs*, 257 P. 366, 367 (Ariz. 1927); *Williams v. State*, 108 S.W. 838, 840 (Ark. 1908); *Attorney General v. Burbank*, 12 Cal. 378, 384 (1859); *People ex rel. Tucker v. Rucker*, 5 Colo. 455, 458 (1880); *Trustees of the Bishop's Fund v. Rider*, 13 Conn. 87, 92 (1839) (citing prior Connecticut cases); *Bailey v. Philadelphia, W. & B. R.R.*, 4 Del. (4 Harr.) 389, 402-03 (1846); *Cotten v. County Comm'rs*, 6 Fla. 610, 613-16 (1856);

Flint River Steamboat Co. v. Foster, 5 Ga. 194, 204-05 (1848); *State ex rel. Amemiya v. Anderson*, 545 P.2d 1175, 1181 (Haw. 1976); *Gillesby v. Board of Comm'rs*, 107 P. 71, 73 (Idaho 1910); *Lane v. Doe ex rel. Dorman*, 4 Ill. (3 Scam.) 238, 240 (1841); *Maize v. State*, 4 Ind. 342, 344 (1853); *Reed v. Wright*, 2 Greene 15, 20-21 (Iowa 1849); *Mayberry v. Kelley*, 1 Kan. 116, 125 (1862); *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90, 93-94 (1822); *Syndics of Brooks v. Weyman*, 3 Mart. 9, 12 (La. 1813); *Bowdoinham v. Richmond*, 6 Me. 112, 114 (1829); *Whittington v. Polk*, 1 H. & J. 236, 242-45 (Md. 1802); *Mueller v. Commissioner of Pub. Health*, 30 N.E.2d 217, 221 (Mass. 1940); *Carolene Products Co. v. Thomson*, 267 N.W. 608, 610 (Mich. 1936); *Minnesota St. Bd. of Health v. City of Brainerd*, 241 N.W.2d 624, 633 n.5 (Minn. 1976); *Reed v. Bjornson*, 253 N.W. 102, 104 (Minn. 1934); *Runnels v. State*, 1 Miss. (1 Walker) 146, 147 (1823); *Baily v. Gentry*, 1 Mo. 164, 165-66 (1822); *State ex rel. Toomey v. State Bd. of Examiners*, 238 P. 316, 319-20 (Mont. 1925); *State ex rel. Stull v. Bartley*, 59 N.W. 907, 909 (Neb. 1894); *State ex rel. Perry v. Arrington*, 4 P. 735, 737 (Nev. 1884); *State v. Ramseyer*, 58 A. 958, 960 (N.H. 1904); *State v. Parkhurst*, 9 N.J.L. 427 (N.J. Sup. Ct. 1802), *aff'd*, 9 N.J.L. 434 note; *Torres v. Board of Comm'rs*, 65 P. 181, 182 (N.M. 1901); *Bayard v. Singleton*, 1 N.C. (Mart.) 42, 45 (1787); *State ex rel. Linde v. Taylor*, 156 N.W. 561, 563-64 (N.D. 1916); *Cincinnati, W. & Z. R.R. v. Commissioners of Clinton County*, 1 Ohio St. 77, 81 (1852); *State ex rel. Cruce v. Cease*, 114 P. 251, 252 (Okla. 1911); *King v. City of Portland*, 2 Or. 146, 152 (1865); *Emerick v. Harris*, 1 Binn. 416, 419, 422-23 (Pa. 1808); *Respublica v. Duquet*, 2 Yeates 493, 501 (Pa. 1799); *In re Legislative Adjournment*, 27 A. 324, 327 (R.I. 1893); *Lindsay v. Commissioners*, 2 S.C.L. (2 Bay) 38, 61-62 (S.C. 1796); *Metropolitan Casualty Ins. Co. v. Basford*, 139 N.W. 795, 798-99 (S.D. 1913); *Memphis Freight Co. v. Mayor of Memphis*, 44 Tenn. 419, 430 (1867); *Williams v. Taylor*, 19 S.W. 156, 156 (Tex. 1892); *Block v. Schwartz*, 76 P. 22, 23 (Utah 1904); *Beecham v. Leahy*, 287 A.2d 836, 841 (Vt. 1972); *Commonwealth v. Caton*, 8 Va. (4 Call) 5, 20 (1782); *State ex rel. Case v. Howell*, 147 P. 1162, 1164 (Wash. 1915); *Harmison v. Ballot Comm'rs*, 31 S.E. 394, 395 (W. Va. 1898); *Bonnett v. Vallier*, 116 N.W. 885, 887, 888 (Wis. 1908); *In re Board of Comm'rs*, 32 P. 850, 851 (Wyo. 1893).

In New York as well, this doctrine has been one of long standing. Professor Corwin traces judicial review of statutes in New York all the way back to 1783, and the first invalidation to 1821. Edward S. Corwin, *The Extension of Judicial Review in New York: 1783-1905*, 15 MICH. L. REV. 281, 282, 286 n.11 (1917). However, "judicial review" in this context is a misnomer for two reasons. The first is that under the Constitution of 1777, statutes were submitted to a Council of Revision, consisting of the Governor, the Chancellor and the two justices of the supreme court, which effectively eliminated the need for judicial review. N.Y. CONST. of 1777 art. III; 1 CHARLES Z. LINCOLN, *THE CONSTITUTIONAL HISTORY OF NEW YORK* 743-79 (1906); 2 *id.* at 145.

The second reason is that between 1777 and 1846, New York's highest court was in fact dominated by the State Senate. In the state constitutions of 1777 and 1821, the highest court of the state was the Court for the Trial of Impeachments and the Correction of Errors, which was comprised of the state senators, the chancellor and the judges of the supreme court. N.Y. CONST. of 1777 art. XXXII; N.Y. CONST. of 1821 art. V, § 1. However, the Chancellor could not vote in appeals from equity and the judges, or justices as they were called in the constitution of 1821, could not vote in appeals in law. N.Y. CONST. of 1777 art. XXXII; N.Y. CONST. of 1821 art. V, § 1. With the number of senators at 32 after 1801, N.Y. CONST. of 1777 amend. III (1801), the decision of the senators inevitably carried the day in each

The trend of American jurisprudence for the past 120 years has been to recognize that the judiciary, as an independent branch of government, retains an inherent power to compel the expenditure of public funds for the judiciary's necessary functions.³⁹ One of the first expressions of this power was in *In re Janitor of Supreme Court*,⁴⁰ in which the Wisconsin Supreme Court ordered the reinstatement of that court's janitor⁴¹ after the janitor had been dismissed by another state official. In concluding that it alone had the power to appoint and remove its janitor, the court stated:

It is a power inherent in every court of record, and especially courts of last resort, to appoint such assistants; and the court itself is to judge of the necessity. This principle is well settled and familiar, and the power so essential to the expedition and proper conducting of judicial business, that it may be looked upon as very doubtful whether the court can be deprived of it.⁴²

2. *Classification of Inherent Judicial Budgetary Power Cases*

Cases involving inherent judicial budgetary powers can be broadly classified into two categories: "expenditure cases" and "appropriations cases." In expenditure cases, the court orders the acquisition of goods or services for its use, and then orders the appropriating body⁴³ to pay for it. In the appropriations cases, the court challenges the appropriating body's decisions

case. See FRANCIS BERGAN, *THE HISTORY OF THE NEW YORK COURT OF APPEALS, 1847-1932*, at 12-14 (1985). While the convention of 1846, which created the Court of Appeals, cited the failure of the Court of Errors to declare a statute unconstitutional as a reason for creating the Court of Appeals, both Lincoln and Corwin conclusively dispute that assertion. 2 LINCOLN, *supra*, at 145-46; Corwin, *supra*, at 283, 285.

39. Note, *supra* note 16, at 1688 n.8 (noting wide acceptance of doctrine in American courts); see also Ted Z. Robertson & Christa Brown, *The Judiciary's Inherent Power to Compel Funding: A Tale of Heating Stoves and Air Conditioners*, 20 ST. MARY'S L.J. 863, 868-78 (1989).

40. 35 Wis. 410 (1874).

41. *Id.* at 421. The janitor at this time performed minor clerical tasks for the justices in addition to his custodial duties. Robertson & Brown, *supra* note 39, at 870.

42. *In re Janitor*, 35 Wis. at 419.

43. "Appropriating body" is used in this article to refer to the legislative or quasi-legislative body that is responsible for providing the court in question with its operating funds.

regarding the level of court funding before those decisions are put into effect.

State ex rel. Kitzmeyer v. Davis,⁴⁴ is a classic example of an expenditure case. The Supreme Court of Nevada requested that the board of capitol commissioners purchase chairs and carpet for the court's offices.⁴⁵ The board refused to approve such a purchase, and in response, the court ordered the court's bailiff to purchase the items.⁴⁶ The bailiff purchased the items from Kitzmeyer.⁴⁷ Kitzmeyer presented his bill to the state, which the auditors approved, but the state controller refused to pay.⁴⁸ Kitzmeyer sought a writ of mandamus⁴⁹ against the controller.⁵⁰

The court granted the writ, holding that the court had an inherent power "growing out of and necessary to the exercise of its constitutional jurisdiction"⁵¹ to order the purchases. To vest total control of the court's facilities to the capitol commissioners would grant the legislature, which created the board, the power to destroy the entire judiciary.⁵²

An example of an appropriations case is *Judges for Third Judicial Circuit v. County of Wayne*.⁵³ The judges of the Third Judicial Circuit, which included Wayne County, brought an action against the county, the board of supervisors and the county treasurer to compel them to provide funds for additional probation officers, law clerks and a judicial assistant.⁵⁴ The circuit

44. 68 P. 689 (Nev. 1902).

45. *Id.* at 690. The board was charged with controlling the expenditure of funds appropriated by the legislature for the maintenance of the state capitol building. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. Mandamus is a command issuing from a court of law of competent jurisdiction, in the name of the state . . . , directed to some inferior court, tribunal or board, or to some corporation or person, requiring the performance of a particular duty . . . , which duty results from the official station of the party to whom the writ is directed, or from operation of law.

52 AM. JUR. 2D *Mandamus* § 1 (1970) (footnotes omitted); see also 55 C.J.S. *Mandamus* § 1 (1948).

50. *Kitzmeyer*, 68 P. at 690.

51. *Id.* at 691.

52. *Id.*

53. 190 N.W.2d 228 (Mich.), *cert. denied*, 405 U.S. 923 (1971).

54. *Id.* at 229 (Brennan, J., separate opinion).

court granted the relief and issued a writ of mandamus ordering the defendants to provide the necessary funds for certain positions and for the judges' legal expenses in bringing suit.⁵⁵ The Michigan Court of Appeals affirmed the lower court.⁵⁶ The Michigan Supreme Court affirmed in part and reversed in part,⁵⁷ and then granted a petition for rehearing.⁵⁸

On rehearing, the Court adopted the separate opinion of Justices Black and Dethmers⁵⁹ from the first Supreme Court decision.⁶⁰ The Supreme Court in Michigan has the responsibility of ensuring that the "one court of justice" prescribed by the Michigan Constitution⁶¹ functions as a coequal branch of government. The needs of the circuit court, never denied by the county, were adequately proven, and the ability of the county to make those payments was not a limitation on the court's right to order them.⁶² The court then adopted the constitutional necessity argument of *Commonwealth ex rel. Carroll v. Tate*:⁶³

[t]he Judiciary must possess the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer Justice, if it is to be in reality a coequal, independent Branch of our Government. This principle

55. *Id.*

56. *Judges for Third Judicial Circuit v. County of Wayne*, 167 N.W.2d 337 (Mich. App. 1969).

57. *Judges for Third Judicial Circuit v. County of Wayne*, 172 N.W.2d 436 (Mich. 1969). It appears that the original decision was 5-2 for affirming the court of appeals, but once the court's opinion for the majority was completed, one justice switched his vote and dissented, and one justice joined the majority reluctantly to preserve the judgment, preferring the decision to be grounded on inherent power, rather than statutory, grounds. *See id.* at 448 (Black, J., separate, supplemental opinion).

58. *County of Wayne*, 190 N.W.2d at 229 (Brennan, J., separate opinion).

59. *County of Wayne*, 172 N.W.2d at 445-48 (Black, J., affirming in part).

60. *County of Wayne*, 190 N.W.2d at 241-42 (Per curiam, on rehearing).

61. MICH. CONST. art. 6, § 1.

The judicial power of this state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish.

Id.

62. *County of Wayne*, 172 N.W.2d at 446 (Black, J., affirming in part).

63. 274 A.2d 193 (Pa.), *cert. denied*, 402 U.S. 974 (1971).

has long been recognized, not only in this Commonwealth but also throughout our Nation.⁶⁴

Courts in twenty-nine states, besides New York, have acknowledged their inherent power to compel appropriating bodies to spend funds for the court's purposes.⁶⁵ The dividing line between courts does not lie in finding the existence of the power, but rather between those that exercise the power by compelling payment or appropriation of funds,⁶⁶ and those that

64. *County of Wayne*, 190 N.W.2d at 241 (quoting *Commonwealth ex rel. Carroll v. Tate*, 274 A.2d 193, 197 (Pa. 1971)).

65. See cases cited *infra* notes 66-67 (Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Ohio, Pennsylvania, South Dakota, Texas, Washington, and Wisconsin).

66. *Millholen v. Riley*, 293 P. 69 (Cal. 1930) (holding that the judiciary had the power to displace impediments to its efficient operation subject to reasonable restrictions that do not materially interfere with constitutional functions, thus the court could fix the salary of a law secretary and order it paid from public funds); *Rappaport v. Payne*, 35 P.2d 183 (Cal. App. 1934) (applying principle of *Millholen*, trial court could order county to pay salary of temporary court reporter); *Hart Bros. Co. v. Los Angeles County*, 82 P.2d 221 (Cal. App. Dep't Super. Ct. 1938) (stating that the inherent power to promote the efficient operation of the courts supported the order to pay expenses of lodging, meals, and transportation of jurors kept together during criminal trial); *Smith v. Miller*, 384 P.2d 738 (Colo. 1963) (stating that the court had inherent power to compel the board of county commissioners to pay judicial employees at salaries set by the court); *Board of County Comm'rs v. Curry*, 545 So. 2d 930 (Fla. Dist. Ct. App. 1989) (stating that the trial court had inherent power to order the county to pay appointed counsel in excess of statutory maximum); *Grimsley v. Twiggs County*, 292 S.E.2d 675 (Ga. 1982) (stating that the court had inherent power to order the county to pay for temporary clerical assistance as a necessary operating expense, and the power to compel appropriations not limited by state statute); *People ex rel. Conn v. Randolph*, 219 N.E.2d 337 (Ill. 1966) (stating that the court had inherent power to compel state officials to pay the fees and expenses of attorneys defending prisoners charged with murder of prison guards); *McAfee v. State ex rel. Stodola*, 284 N.E.2d 778 (Ind. 1972) (stating that the court had an inherent power to order the county to pay the salaries of judicial employees at amounts set by judges as part of the power to compel expenditures necessary for the proper functioning of the court); *Carlson v. State ex rel. Stodola*, 220 N.E.2d 532 (Ind. 1966) (stating that the city court had inherent power to order the city council to provide the funds necessary to operate the court); *Knox County Council v. State ex rel. McCormick*, 29 N.E.2d 405 (Ind. 1940) (stating that the court had an inherent power to order the county to pay counsel appointed by the court to defend indigents charged with murder; and appointment of counsel in such cases was constitutional power, refusal to pay for counsel amounted to impairment of constitutional powers); *Jefferson County ex rel. Grauman v. Jefferson County Fiscal Court*, 192 S.W.2d 185 (Ky. 1946) (stating that the inherent power of court to make appointments implied an inherent power

to compel appropriations for the compensation of appointees); *City Court v. Town of Breau Bridge*, 440 So. 2d 1374 (La. Ct. App. 1983) (stating that the court had an inherent power to order the city to pay reasonable expenses of the court's operations, including miscellaneous expenses such as postage, etc.), *cert. denied*, 444 So. 2d 1219 (La. 1984); *O'Coin's, Inc. v. Treasurer of Worcester County*, 287 N.E.2d 608 (Mass. 1972) (stating that the court has an inherent power to order any expense reasonably necessary to operate the court and therefore the court could order the county to pay for a tape recorder and tapes purchased by the court to substitute for absent court reporter); *Judges for Third Judicial Circuit v. County of Wayne*, 190 N.W.2d 228 (Mich. 1971) (stating that the court had the power to order the county to provide the funds for immediate appointment and compensation of additional judicial employees), *cert. denied*, 405 U.S. 923 (1972); *State ex rel. Douglas v. Westfall*, 89 N.W. 175 (Minn. 1902) (stating that the court has the power to appoint all necessary employees essential to conducting the court's business); *State ex rel. Anderson v. St. Louis County*, 421 S.W.2d 249 (Mo. 1967) (stating that the juvenile court had the power to hire employees, at the county's expense, that were reasonably necessary to carry out its functions); *State ex rel. Schneider v. Cunningham*, 101 P. 962 (Mont. 1909) (stating that the court has the inherent power to appoint necessary assistants, determine their compensation, and order the payment of compensation at public expense); *Azbarea v. North Las Vegas*, 590 P.2d 161 (Nev. 1979) (stating that the court had the inherent power to order the city to pay the overtime claims of judicial personnel where the reasonableness of the overtime and claims for it were not contested); *State ex rel. Marshall v. Eighth Judicial Dist. Court*, 396 P.2d 680 (Nev. 1964) (stating that the court had the inherent power to order the county to supply counsel appointed for retrial with the transcript of the first trial at county expense); *State ex rel. Kitzmeyer v. Davis*, 68 P. 689 (Nev. 1902) (stating that the judiciary possessed the power to prevent control of its functions by another branch of government and therefore could order the state treasurer to pay for courtroom furnishings ordered by the court); *State v. Horton*, 170 A.2d 1 (N.J. 1961) (stating that the court's constitutional obligation to provide counsel to indigents in murder cases meant that it had an inherent power to order the payment of all expenses necessary for a proper defense, in addition to attorney's fees); *Mowrer v. Rusk*, 618 P.2d 886 (N.M. 1980) (stating that the constitutional court has an inherent right to preserve its independent existence); *Smith v. Smith*, 114 N.E.2d 480 (Ohio Ct. App. 1952) (stating that the court had an inherent power to do what was necessary to perform its functions, and, therefore, the court could order the payment of expenses incurred in statutorily-mandated investigations in matrimonial actions); *Commonwealth ex rel. Carroll v. Tate*, 274 A.2d 193 (Pa.) (stating that the judiciary has an inherent power to order the city government to provide funds which are reasonably necessary for a court to perform its mandated responsibilities), *cert. denied*, 402 U.S. 974 (1971); *Edwards v. Prutzman*, 165 A. 255 (Pa. 1933) (stating that the court has the power to engage a handwriting expert in an election fraud case and compel the county officials to pay the expert's bill as part of the court's inherent power to order expenditures necessary for the proper administration of justice); *Scott v. Minehaha County*, 152 N.W. 699 (S.D. 1915) (stating that the court had an inherent power to order the county to pay for the publication of court calendars as a necessary carrying on of its public business); *Commissioners Court v. Martin*, 471 S.W.2d 100 (Tex. Ct. App. 1971) (stating that the court had an inherent power to appoint probation personnel and fix their salaries when such personnel were necessary for the court administration); *Dane County v. Smith*, 13 Wis. 585 (1861) (stating that the court had the

acknowledge that they possess the power but do not compel the payment of specific expenses or appropriation for specific purposes.⁶⁷ This distinction is based on the deciding court's deter-

power to order the county to pay attorneys for defending indigent criminal defendants irrespective of a contrary statute, as a necessary consequence of the power to appoint counsel).

67. *Lockwood v. Board of Supervisors*, 297 P.2d 356 (Ariz. 1956) (stating that the inherent power of the court authorized it to mandate spending in excess of the amount budgeted for it by the county, but where the court had not shown that the county budget had prevented operation of the court, the exercise of inherent power was not warranted); *State v. Superior Court*, 409 P.2d 750 (Ariz. Ct. App. 1966) (stating that the court's inherent power did not authorize compelling payment of disbursements of appointed counsel since such expenses were not necessary for the court's existence and operation); *Venhaus v. State ex rel. Lofton*, 684 S.W.2d 252 (Ark. 1985) (stating that the court could not compel the county to pay probation officer's salaries, determined by the court, in the absence of substantial evidence that the officers were essential to the court); *Pena v. District Court*, 681 P.2d 953 (Colo. 1984) (stating that the trial court could not exercise an inherent power to compel county expenditures to render facilities adequate for the court's needs, where judicial administrative rules vested such authority in the state supreme court and its designees, because the trial court judge was not a designee of the supreme court); *Schmelzel v. Board of Comm'rs*, 100 P. 106 (Idaho 1909) (stating that the expenses for shaving and cutting of jurors' hair were not necessary to administer justice); *Webster County Bd. of Supervisors v. Flattery*, 268 N.W.2d 869 (Iowa 1978) (stating that the inherent power to employ assistants and compel their compensation did not entitle the court to compel continued employment of a criminal investigator where there was no showing that such investigator was necessary to the court's functions); *Commissioners of Neosho County v. Stoddart*, 13 Kan. 207 (1874) (stating that the court's inherent power did not extend to the purchase of courtroom carpeting); *Greene v. Ballard*, 192 S.W. 841 (Ky. 1917) (stating that the court's inherent power could not be extended to compel the state to pay the cost of bringing indigent's witnesses to the murder trial; such power was not necessary in light of the court's ability to compel attendance without compensation); *Twenty-First Judicial Dist. Court v. State ex rel. Guste*, 563 So. 2d 1185 (La. App.) (stating that while the court had an inherent power to compel the appropriation of funds necessary for its operations, the power could not be exercised to compel the state to fund operation of the court where adequate funds were available to eliminate the court's operating deficit), *cert. denied*, 568 So. 2d 1082, *and cert. denied*, 568 So. 2d 1088 (La. 1990); *State ex rel. Hillis v. Sullivan*, 137 P. 392 (Mont. 1913) (stating that the exercise of the inherent power of courts was limited to situations where the court is deprived of the assistance necessary for the exercise of its duties or other emergencies, and therefore, the court could not order the county to pay personally-appointed assistant's salary where the county had provided adequate personnel); *Shaw v. Holt County*, 129 N.W. 552 (Neb. 1911) (stating that the expenses of a special bailiff who was appointed by the court, acting outside its authority, were not necessary and the county was not liable for them); *Board of County Comm'rs v. Devine*, 294 P.2d 366 (Nev. 1956) (stating that the inherent power to compel authorities to pay the salary of an attendant appointed by the court could only be exercised where the efficient administration of justice was impaired or in emergencies; here there was no showing that the assignment of

mination of how "necessary" the proposed expenditure is to the court's functions.

B. *Divergent Modern Analyses of the Inherent Power Problem*

1. Commonwealth *ex rel.* Carroll v. Tate

The leading modern case on inherent power, *Commonwealth ex rel. Carroll v. Tate*,⁶⁸ finds that the inherent power is based on the judiciary's "right and power to protect itself against any impairment" of "its functions and duties."⁶⁹

Carroll arose from a dispute between the judges of the Court of Common Pleas of Philadelphia and the Mayor and city council of Philadelphia.⁷⁰ When the city council refused to ap-

an inadequate number of bailiffs to the court impaired its functions, and therefore, the county did not have to pay the salary of the court appointed bailiff); *State v. Weeks*, 101 A. 35 (N.H. 1917) (stating that the court could not compel the county to pay the fees of indigent murder defendant's experts where statutes only authorized payment of attorney's and witness' fees); *State ex rel. Finley v. Pfeiffer*, 126 N.E.2d 57 (Ohio 1955) (stating that the judiciary possesses all powers necessary for unimpeded exercise of its functions; however, the court here failed to show the reasonable necessity of facilities that it had ordered built at public expense); *Committee for Marion County Bar Ass'n v. County of Marion*, 123 N.E.2d 521 (Ohio 1954) (stating that the court has an inherent power to compel expenditures for providing facilities and improvements necessary to perform its governmental functions, but that power did not include the power to compel the installation of an elevator in the courthouse); *Leahey v. Farrell*, 66 A.2d 577 (Pa. 1949) (recognizing that the court has an inherent power to fix salaries of court employees and compel their payment, but denying relief where the court failed to follow statutory procedures for fixing salaries before invoking inherent powers); *In re Salary of Juvenile Director*, 552 P.2d 163 (Wash. 1976) (stating that the court could not exercise an inherent power to increase the salary for a probation officer, set by the county according to statute, in the absence of evidence that the salary was so inadequate as to prevent the court from fulfilling its responsibilities or that the increase was reasonably necessary for the administration of justice); *Stevenson v. Milwaukee County*, 121 N.W. 654 (Wis. 1909) (stating that the court had an inherent power to appoint court personnel, but where a statute fixed the manner in which compensation of such personnel was to be determined, the court could not compel the county to pay attendants based on compensation fixed by the court).

68. 274 A.2d 193 (Pa.), *cert. denied*, 402 U.S. 974 (1971).

69. *Id.* at 197.

70. *Id.* at 194. In December 1969, the court of common pleas of Philadelphia submitted a \$19.7 million budget request to the Finance Director of the City of Philadelphia for the operations of that court and the municipal court for the 1970-71 fiscal year. *Id.* at 194-95. The finance director recommended a budget of \$16.5 million, which was adopted in the Mayor's budget, which was then submitted to the city council. *Id.* at 195. Several judges of the court of common pleas and members of their administrative staffs appeared before the city council regarding their original budget request and requested an additional \$5.2 million for the upcoming

propriate additional funds for the operation of the court of common pleas, Carroll, the President Judge⁷¹ of the court, sued various city executive officials and the city council seeking the funds that the city council refused to appropriate.⁷² The defendants raised the defense that the appropriation approved by the city council, if properly utilized, was sufficient to provide for all of the operations of the court of common pleas and the municipal court, including those for which funds were sought in the action.⁷³ The trial judge⁷⁴ rejected this defense and ruled that the court of common pleas had met its burden of proof to demonstrate the "reasonable necessity" of its request and ordered the defendants to pay nearly \$2.5 million.⁷⁵ Both sides appealed to

fiscal year, including \$2 million that was not in their previous request. *Id.* The city council then approved the amount in the Mayor's budget. *Id.*

71. The president judge is "administrative head" of the court of common pleas, responsible for supervision of the court's business. PA. CONST. art. V, § 10(d), Sched. art. V, § 16(f), *superseded by* 42 PA. CONS. STAT. ANN. § 325 (1981).

72. *Carroll*, 274 A.2d at 195.

73. *Id.*

74. *Id.* The Pennsylvania Supreme Court designated a judge of the Superior Court to decide the case. *Id.* That judge heard arguments from the parties on several different occasions. *Id.*

75. *Id.* at 195-96. The trial court's apportionment of the amount awarded to the court of common pleas, as compared to the amounts sought in Carroll's complaint was as follows:

	Original Request	Amended Request	Court Order 9/30/70
Adult Probation	\$1,782,216	\$1,071,937	\$800,000
Juvenile Probation	539,922	345,032	250,000
Data Processing	453,934	434,175	250,000
Apprehension of Fugitives	335,910	284,322	285,000
Courtroom Personnel	224,452	152,420	100,000
Attorney Fees	300,000	300,000	300,000
Arbitration Fees	390,000	390,000	200,000
Writ Service	100,000	100,000	75,000
Gibson Building Personnel	227,036	113,518	Disallowed
Probation Relocation	24,500	24,500	Disallowed
Repairs — 1801 Vine Street	40,000	40,000	Disallowed
Janitorial Staff	56,940	47,431	Disallowed
Microfilm	96,822	88,335	Disallowed
Bail Project	172,857	145,881	Disallowed
Dental Equipment	10,413	10,413	Disallowed
Domestic Relations	61,912	51,593	Disallowed
Total Copy System	23,000	23,000	23,000
Building Services	145,377	129,449	Disallowed
Law Clerks	133,206	133,206	100,000
Station Wagon	2,320	2,320	Disallowed
Prothonotary Relocation	35,000	Withdrawn	
Crime Commission Grant	75,000	75,000	75,000
Totals	\$5,230,817	\$3,962,532	\$2,458,000

the commonwealth court, and while that appeal was pending, the Pennsylvania Supreme Court granted a petition for plenary review.⁷⁶

The Pennsylvania Supreme Court first analyzed the relationship of the three branches and found that the judiciary was "independent and co-equal" with the other two branches.⁷⁷ The independent nature of the judiciary required that it have "rights and powers co-equal with its functions and duties, including the right and power to protect itself against any impairment thereof."⁷⁸ That power to protect meant that "the Judiciary [possessed] the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer Justice"⁷⁹

The trial judge applied the correct standard in the case, which was that the judiciary is entitled to the funds that are "reasonably necessary" to provide "for the efficient administration of justice."⁸⁰ To fail to provide such funds would impair the administration of the justice system and erode the confidence and trust of the public in the judiciary.⁸¹ The judiciary's need for funding cannot be balanced against the ability of the legislature to provide funds because to do so would ignore the clear "[c]onstitutional mandate that the Judiciary shall be free and independent and able to provide an efficient and effective system of Justice."⁸² To fail to grant the judiciary the power to compel reasonably necessary funding for its operations place it, and the commonwealth's tripartite form of government, at the whim of the legislature.⁸³ The trial court correctly concluded that the funds allocated by the city were inadequate for the reasonable needs of the court of common pleas for the 1970 fiscal

Id. at 196. "Amended request" refers to the court of common pleas' reduction in the amount sought in the complaint when the record was closed. *Id.* at 195-96.

76. *Id.* at 196.

77. *Id.* at 196-97.

78. *Id.* at 197.

79. *Id.*

80. *Id.* at 199 (quoting *Leahey v. Farrell*, 66 A.2d 577, 580 (Pa. 1949)).

81. *Id.*

82. *Id.*

83. *Id.*

year and correctly determined the amount needed to correct the inadequacy.⁸⁴

Three justices concurred,⁸⁵ but one stated that the standard of proof must take the fiscal condition of government into consideration.⁸⁶ The concurrence contended that the majority opinion essentially bestowed on the judiciary a superior power regarding its fiscal affairs by granting to it the power to compel "reasonably necessary" funds.⁸⁷ This supremacy was fundamentally at odds with the asserted constitutional basis of the judiciary's power, which was the coequal nature of the branches of government.⁸⁸ The concurrence conceded that the executive branch was capable of dealing with disputes such as the one in this case in the political arena, but found the "mercurial world of politics" unsatisfactory as a court for redress, especially as the sole method of redress.⁸⁹

Logical consistency, in the concurrence's view, required the granting of a similar power to the executive branch.⁹⁰ But granting the agencies of the executive branch the same power to compel the "reasonably necessary" funding of their operations created the possibility in which an appropriating body could not raise sufficient funds to meet the expenditures it was compelled to appropriate.⁹¹ Any standard, therefore, which failed to take the financial situation of the city into account was not appropriate.⁹²

2. Morgan County Commission v. Powell

While the *Carroll* case follows the majority rule in finding that an inherent power to compel funding of judicial operations,

84. *Id.* at 199-200. The judgment was modified to reflect that only four months of the fiscal year were left at the time the decision was handed down. *Id.* at 200.

85. *Id.* at 203-04 (Jones, J., concurring).

86. *Id.* at 204 (Jones, J., concurring). The fact that funds sufficient to satisfy any potential judgment had been set aside pending resolution of the action so that Philadelphia would not face "involuntary bankruptcy" was determinative of Justice Jones' decision to concur. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

that view is not unanimous. Despite the wide acceptance of the doctrine by the courts,⁹³ the doctrine was rejected by the Alabama Supreme Court in *Morgan County Commission v. Powell*.⁹⁴

The *Morgan County* case was the result of a dispute between the judges of the Circuit Court for Morgan County and the Morgan County Commission (the "Commission") over the power to set the salaries of the judges' secretaries.⁹⁵ When the Commission refused to approve the salaries fixed by the judges, the judges ordered the Commission to pay their secretaries in accordance with the schedule they had approved.⁹⁶

In reversing the judgment, the Alabama Supreme Court applied a restrictive view of what functions were part of the judicial function and its inherent power.⁹⁷ The court first noted that the state government was divided into three branches, legislative, executive and judicial.⁹⁸ "Within their respective

93. See *supra* notes 39, 65-67 and accompanying text.

94. 293 So. 2d 830 (Ala. 1974).

95. *Id.* at 831-34. A state statute allowed the judges of the Eighth Judicial Circuit, which included Morgan County, "to employ such clerical or stenographic assistance as may be necessary to carry out the duties of his office." *Id.* at 831-32. The salary of these employees was to be set by the judge, with the approval of the county governing board. *Id.* The Commission requested a tentative budget for the court in 1971. *Id.* at 832. The judges submitted the budget with varying amounts for secretarial salaries for each judge, based on the seniority of the judge. *Id.* The Commission informed the court that the pay scale reflected in the proposed budget would not be followed and instead the secretaries would be paid pursuant to a State Personnel Board classification. *Id.*

The pay scale submitted by the judges for 1973 was also rejected by the Commission. *Id.* at 832-33. When a judge's secretary resigned in March 1973, the court held a convocation of the judges to conduct a wage survey to determine what a reasonable salary for secretaries would be. *Id.* The wage survey was conducted, and the judges made a detailed finding of fact as to what a reasonable salary was based on the survey, fixed the salaries of the secretaries and sent the matter to the Commission. *Id.* The Commission rejected the findings and refused to alter the salaries. *Id.*

96. *Id.* at 833. The court issued an *show cause* order to the commissioners why the proposed salary schedule should not be implemented as reasonable. *Id.* The commissioners filed a motion to recuse, which was denied, and then answered, essentially defending on the basis that the salaries paid to the court's secretaries were reasonable in light of the county's other financial responsibilities. *Id.* The court then determined that its salary schedule for its secretaries was reasonable and ordered the Commission to pay the secretaries the amounts specified by the court. *Id.*

97. *Id.* at 834-38.

98. *Id.* at 834 (citing ALA. CONST. § 42).

spheres each branch of government is supremel]” and is immune from encroachment by another branch.⁹⁹ The Alabama Constitution and prior decisions of the court had made clear that the power to determine what the appropriate level of funding was for the necessary functions of the government was exclusively a legislative function.¹⁰⁰ The power of the judiciary to preserve its independence is limited to the protection of the operation of the adjudicatory process and the payment of small sums, incurred in an emergency, essential for the operation of the court.¹⁰¹ That power was not designed to completely insulate the judiciary from political control.¹⁰²

The separation of powers provision in the Alabama Constitution and the delegation of the “power of the purse” to the legislative branch merely reflected the people’s view that the legislature was better equipped to take into consideration the fiscal needs of government as a whole. Additionally, the legislature is better equipped to make decisions regarding the apportionment of a fund that is inevitably too small to meet the demands placed on it, whereas the judiciary “have neither the time nor the equipment for making such decisions.”¹⁰³ The court also noted its holding in an earlier case, *Jefferson County v. Capanes*,¹⁰⁴ that regardless of any inherent judicial budgetary powers that had been expressed in other jurisdictions, the courts of Alabama had no power to alter the compensation of a public employee without statutory authority.¹⁰⁵ This led the court to conclude that the fundamental problem with the inherent power doctrine as adopted by *Carroll* was that:

[i]f the courts have inherent power to determine their fiscal needs and to order the same paid, then surely this same power should be

99. *Id.* (citing *Ex parte Huguley Water Sys.*, 213 So. 2d 799 (Ala. 1968) and *State ex rel. French v. Stone*, 139 So. 328 (Ala. 1932)).

100. *Id.* (citing ALA. CONST. § 72 and *Abramson v. Hard*, 155 So. 590 (Ala. 1934)).

101. *Id.* at 835.

102. *Id.*

103. *Id.*

104. 179 So. 637 (Ala. 1938).

105. *Morgan County*, 293 So. 2d at 836-37. The *Jefferson County* case involved the payment of the cost of meals served to a bailiff who was “attending jurors ordered to be kept together.” *Id.* at 836. Since there was no allowance for the payment for such meals by statute, the court could not order the county to pay the bill. *Id.* at 837.

accorded to the executive branch even though this branch possesses no machinery of its own to order such payments. In their wisdom the people have given to the legislative branch the power and authority to appropriate public monies. Without the centralization of this power in one branch, and if each branch of government be considered fiscally independent, though the judicial and executive branches are without power to tax and raise money, then it can be said with certitude that fiscal chaos would follow as day follows night.¹⁰⁶

Chief Justice (and now United States Senator) Heflin dissented.¹⁰⁷ While the Chief Justice felt that the trial court could be sustained on statutory grounds or on the failure of the Commission to properly respond to the order to show cause,¹⁰⁸ the majority's rejection of any inherent judicial budgetary power in support of its decision required him to state the basis for the existence of such a power in Alabama.¹⁰⁹ The dissent distinguished the *Jefferson County* case on the basis that the real issue was not inherent judicial power, but rather whether a court could grant a judgment to a plaintiff in assumpsit,¹¹⁰ where the basis for the action was the incurring of expenses by a public officer without statutory authority.¹¹¹ Save *Jefferson County*, which Chief Justice Heflin distinguished, there was no case in Alabama dealing with an inherent judicial budgetary power. Further, all of the prior Alabama cases addressing inherent judicial powers had upheld the existence of the inherent power in question.¹¹²

106. *Id.* at 837.

107. *Id.* at 841-56 (Heflin, C.J., dissenting).

108. *Id.* at 846. The Chief Justice interpreted the statute in question to mean that the judges set the salaries for their secretaries and the Commission was bound to approve the judges' determination unless the Commission could demonstrate the "unreasonableness" of the determination. *Id.* at 841-44. In any event, the failure of the Commission to introduce any evidence in response to the show cause order that the court's determination was unreasonable under the circumstances created a presumption that the determination was reasonable. *Id.* at 844-45 (citing *American Nat'l Bank & Trust Co. v. Long*, 207 So. 2d 129 (Ala. 1968) and *McWilliams v. Phillips*, 71 Ala. 80 (1881)).

109. *Id.* at 846-53.

110. "A common law form of action which lies for the recovery of damages for the performance of a parol or simple contract." BLACK'S LAW DICTIONARY 122 (6th ed. 1990).

111. *Morgan County*, 293 So. 2d at 846-47 (Heflin, C.J., dissenting).

112. *Id.* at 847 (citing *Ex parte Huguley Water Sys.*, 213 So. 2d 799 (Ala. 1968) (power to strike parties irrespective of statute on third party practice); *Broadway*

The dissent then noted the majority's acknowledgment of the existence of an inherent power¹¹³ and declared:

*Once the power is recognized, the issue is no longer its existence, but its bounds. The fact that no case has arisen in which it became necessary for the courts to exercise their dormant power to accomplish things not of a strictly judicial nature is no indication that the power is limited to those acts which are strictly judicial.*¹¹⁴

The dissent reviewed the state of the law on inherent judicial budgetary powers in the nation and found that "every court . . . which has considered the issue has upheld the power of the judicial branch to provide for itself when the real needs of justice have been slighted by a legislative branch pre-occupied with other, more visible problems."¹¹⁵ The dissent noted that there were significant restraints on the judiciary's use of that power: direct accountability to the voters, the right of the people to further amend the state constitution and the judiciary's adherence to a standard of reasonableness and self-restraint in dealing with such matters.¹¹⁶

The majority's final arguments, the necessity for an equal power in the executive branch and the "fiscal chaos" argument, were summarily disposed of.¹¹⁷ The dissent noted that the "thrust of the development of Anglo-American constitutional law has been to limit the power of the executive branch and to secure the independence of the judiciary."¹¹⁸ This thrust was responsible for the lack of inherent executive powers and lim-

v. State, 60 So. 2d 701 (Ala. 1952) (power to grant new trial); *Ex parte Wetzel*, 8 So. 2d 824 (Ala. 1942) (power to punish contempt); *Brown v. McKnight*, 114 So. 40 (Ala. 1927) (rulemaking); *Ex parte State*, 43 So. 490 (Ala. 1907) (power to stay executions); *Ex parte Mayor*, 33 So. 13 (Ala. 1902) (rulemaking and contempt); and *Larkin v. Mason*, 71 Ala. 227 (1881) (power to prevent abuse of process)).

113. See *supra* text accompanying note 101.

114. *Morgan County*, 293 So. 2d at 847 (Heflin, C.J., dissenting).

115. *Id.* at 847-48 (citing cases).

116. *Id.* at 849-50 ("It is therefore incumbent upon members of the judicial department to proceed cautiously, and with due considerations for the prerogatives of the executive department and the Legislature whenever exercise of an inherent judicial power would bring us near the sphere of another department.") (quoting *O'Coin's, Inc. v. Treasurer of Worcester County*, 287 N.E.2d 608, 615 (Mass. 1972)).

117. *Id.* at 851-53.

118. *Id.* at 851 (citing THE MAGNA CARTA; THE DECLARATION OF INDEPENDENCE; U.S. CONSTITUTION; and the ALA. CONSTITUTION).

ited the power of the executive to that explicitly granted by the constitution.¹¹⁹ The "fiscal chaos" argument was rejected on the ground that the amount spent on Alabama's judicial system was minuscule in terms of overall state government spending.¹²⁰ In view of the overwhelming sister-state authority in favor of an inherent judicial budgetary power and the lack of any persuasive Alabama authority against it, the dissent found such a power to exist.¹²¹

C. *The Inherent Budgetary Power in the New York Courts*

The history of the inherent power doctrine in New York has been marked by three stages: 1) theoretical acceptance coupled with a reluctance to apply the doctrine in specific cases; 2) amendment of the New York Constitution to sharply limit the doctrine; and 3) revival of the doctrine by lower courts by placing limitations on the otherwise explicit constitutional language.

1. *Theoretical Acceptance / Practical Rejection*

a. *The Cole Cases*

In *People ex rel. Cole v. Hill*,¹²² and *People ex rel. Cole v. Board of Supervisors*,¹²³ New York courts were first faced with the inherent judicial budgetary power question. Cole, a newspaper publisher, sought a peremptory mandamus¹²⁴ from the supreme court ordering Hill, the treasurer of Greene County, to

119. *Id.* at 852 (quoting Charles S. Hyneman, *Bureaucracy and the Democratic System*, 6 LA. L. REV. 309, 315, 330 (1945)).

120. *Id.* at 853 (noting that proportion of appropriations for state judicial system at 1/2% of all appropriations).

121. *Id.*

122. 43 N.Y. Sup. Ct. 619 (Sup. Ct. Gen. T. 3d Dep't 1885).

123. 46 N.Y. Sup. Ct. 299 (Sup. Ct. Gen. T. 3d Dep't 1886).

124. A peremptory writ of mandamus is a writ of enforcement "requiring that the act or acts which are sought to be enforced, and which the relator has shown himself entitled to, be done absolutely," and "constitutes both a judgment and an execution." 52 AM. JUR. 2D *Mandamus* § 475 (1970); see also 55 C.J.S. *Mandamus* § 343 (1948). Under New York's Code of Civil Procedure, a peremptory writ of mandamus was available "in the first instance, where the applicant's right to the mandamus depend[ed] only upon questions of law." Code of Civil Procedure § 2070, Act of June 2, 1876, ch. 448, [1876] 2 N.Y. Laws 1, as amended by Act of May 6, 1880, ch. 178, [1880] 2 N.Y. Laws 1, 193, repealed by Act of May 22, 1937, ch. 526, 1937 N.Y. Laws 1186; see also N.Y. JUR. 2D *Article 78 and Related Proceedings* § 1 (1980).

pay the cost of publishing court calendars.¹²⁵ The supreme court, sitting in special term in Greene County, issued the mandamus.¹²⁶ The general term of the supreme court reversed, holding that because the Code of Civil Procedure already provided for the publication of court calendars, the original order was a usurpation of legislative authority and was not supported by any inherent power of the judiciary.¹²⁷ Cole then sought payment of the bill from the county's board of supervisors.¹²⁸ After the board refused to pay the bill, Cole sought a peremptory mandamus from the supreme court against the board.¹²⁹ The general term affirmed a denial of the mandamus, acknowledging "an inherent power of the court, when in session, to incur such expense as may judicially be determined to be necessary."¹³⁰ In order to preserve that power, however, it must "exclud[e] from its scope whatever does not strictly fall within it."¹³¹ Since the legislature had made some provision for the publication of court calendars, the courts here did not have the power to order publication beyond what was provided for in the statute.¹³²

125. *Hill*, 43 N.Y. Sup. Ct. at 619. A justice of the supreme court sitting in the special term in Greene County issued an order requiring the publication of the schedule of the terms of various courts in a local newspaper, the *Windham Journal*. *Id.* The county treasurer was ordered to the publisher upon proof of publication out of monies raised for "court expenses." *Id.* Cole, the publisher, published the schedules and sought payment. *Id.* *Hill*, the county treasurer, refused. *Id.*

126. *Id.*

127. *Id.* at 620 (citing Code of Civil Procedure § 3317, Act of June 2, 1876, ch. 448, [1876] 2 N.Y. Laws 1, *as amended by* Act of May 6, 1880, ch. 178, [1880] 2 N.Y. Laws 1, 670, *repealed by* Act of May 22, 1937, ch. 526, 1937 N.Y. Laws 1186). The New York Constitution of 1846 provided for the division of the supreme court into four general terms statewide, as organized by the legislature, as well as for special terms, circuit courts, and courts of oyer and terminer in each county. N.Y. CONST. of 1846, art. VI, § 6, *amended by*, art. VI, § 7 (repealed 1938). The special term was responsible for the trial of equitable actions and for hearing motions, petitions and special proceedings. 28 N.Y. JUR. 2D *Courts and Judges* § 3 (1983). The general term heard appeals from special term, the circuit courts and the Courts of Oyer and Terminer. *Id.*

128. *Id.*

129. *Board of Supervisors*, 46 N.Y. Sup. Ct. at 299.

130. *Id.*

131. *Id.* at 300.

132. *Id.* at 299-300 (citing Code of Civil Procedure §§ 225, 226, 232, 233, Act of June 2, 1876, ch. 448, [1876] 2 N.Y. Laws 1, *repealed by* Act of May 22, 1937, ch. 526, 1937 N.Y. Laws 1186).

b. *Moynahan v. City of New York*¹³³

The New York Court of Appeals in *Moynahan* reversed in part a judgment for a stenographer in his action for fees for producing transcripts during a trial.¹³⁴ The court acknowledged that "[t]he general rule is that the higher courts have such inherent powers as are necessary to the proper discharge of their duties and the exercise of their jurisdiction."¹³⁵ The transcript provided to the trial judge served a necessary purpose, assisting him in ruling on evidence correctly, so that the further public expense that a retrial would entail could be avoided.¹³⁶ There was no statutory limitation on the power regarding supplying transcripts to trial judges.¹³⁷ The trial judge, therefore, possessed the inherent power to order the transcript for himself at public expense and it was not important that the copy for the judge had been ordered by the district attorney, since the judge was the intended recipient of the transcript.¹³⁸ That inherent power did not, however, include the power to order the public payment of a defense copy of the transcript because such expenditures were limited, in time and manner, by statute.¹³⁹

133. 205 N.Y. 181, 98 N.E. 482 (1912)

134. *Id.* at 183, 98 N.E. at 483. During the course of a trial for first degree murder, Moynahan delivered several daily copies of the trial transcript: two for the district attorney, one of which went to the trial judge, one for the Governor, and one for defense counsel. *Id.* Defense counsel's copy was provided on the order of the trial judge, who ordered that it be provided at public expense. *Id.*

Moynahan sued the city for the cost of the transcripts. The City admitted liability for the cost of the district attorney's and the Governor's copies. After plaintiff's case at trial, the plaintiff's motion for a directed verdict was granted and the defendant's motion for a nonsuit was denied. *Id.* The city appealed and the appellate division affirmed. *Moynahan v. City of New York*, 140 A.D. 911, 125 N.Y.S. 1132 (1st Dep't 1910).

135. *Moynahan*, 205 N.Y. at 188, 98 N.E. at 485 (citation omitted).

136. *Id.*, 98 N.E. at 484-85.

137. *Id.*, 98 N.E. at 485.

138. *Id.* at 187-88, 98 N.E. at 484-85.

139. *Id.* at 192, 98 N.E. at 486 (citing Code of Criminal Procedure § 456, Act of June 1, 1881, ch. 442, [1881] 2 N.Y. Laws 1, *as amended by* Act of May 14, 1897, ch. 427, § 1, [1897] 1 N.Y. Laws 569, 570, *repealed by* Act of May 20, 1970, ch. 996, § 4, 1970 N.Y. Laws 3117, 3372 (providing for transcript to be given to defendant's counsel for purposes of appeal at public expense)). The city was willing to admit liability for the defendant's counsel's transcript if Moynahan waived further payment under section 456, but Moynahan refused. *Id.* at 184, 98 N.E. at 483.

A brief dissent¹⁴⁰ held that the inherent powers of the judiciary were limited to those powers which always existed, or which grew out of some preexisting power.¹⁴¹ Court stenography did not fit either category, therefore any remedy to Moynahan must be statutory.¹⁴²

c. *In Re Kenney*¹⁴³

Kenney was assigned to defend an indigent charged with first degree murder.¹⁴⁴ After the trial, Kenney submitted an affidavit of his expenses incurred in the defense.¹⁴⁵ Included in those expenses were fees for a translator's services before the trial and charges for daily transcripts of the trial supplied to Kenney, which the trial judge ordered supplied to him at public expense.¹⁴⁶ The City Comptroller failed to pay any of the expenses set forth in the affidavit.¹⁴⁷ Kenney obtained an order to show cause for a peremptory mandamus to compel payment.¹⁴⁸ On the return date, the writ was issued, ordering the Comptroller to make payment.¹⁴⁹ The Comptroller appealed.¹⁵⁰ On appeal, the only charges contested were for the transcripts and the translator.¹⁵¹ The appellate division reversed the trial court's order.¹⁵² *Moynahan* answered the transcript charges question.¹⁵³ Additionally, there was no evidence in the record that the services of the translator before trial were "necessary and proper," therefore, they could not be charged to the public.¹⁵⁴

140. *Id.* at 193-94, 98 N.E. at 486-87 (Bartlett, J., dissenting). Chief Judge Cullen joined in this dissent.

141. *Id.* at 193, 98 N.E. at 486.

142. *Id.* at 193-94, 98 N.E. at 486-87.

143. 153 A.D. 325, 137 N.Y.S. 1097 (2d Dep't 1912).

144. *Id.* at 325, 137 N.Y.S. at 1097-98.

145. *Id.* at 325-26, 137 N.Y.S. at 1098.

146. *Id.* at 326, 137 N.Y.S. at 1098.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 327, 137 N.Y.S. at 1099.

153. *Id.*; see *supra* notes 133-42 and accompanying text.

154. *Kenney*, 153 A.D. at 326, 137 N.Y.S. at 1098.

d. *In re Sullivan*¹⁵⁵

In *Sullivan*, the district attorney of Queens County brought an action to transfer a patient from one mental institution to another, as the patient had become a threat to the safety of herself and others in the first institution.¹⁵⁶ The court appointed an attorney to act as counsel for the patient.¹⁵⁷ The court noted that the Mental Hygiene Law provided for payment for the rendering of two types of services in such a proceeding: service as a commissioner, and service as a medical witness.¹⁵⁸

In moving to confirm the commissioner's recommendation that the patient be moved, the district attorney requested that the court fix fees and expenses.¹⁵⁹ The supreme court entered an order providing for fees for the attorney.¹⁶⁰ The Appellate Division, Second Department, affirmed.¹⁶¹ The Court of Appeals reversed, holding that the inherent power of the courts does not extend to the power to direct the state or a county to pay assigned counsel.¹⁶² Such a power may only be exercised in the presence of a legislative provision for payment.¹⁶³ Since that provision was not made for assigned counsel in this type of proceeding, as it was for service as commissioner and service as a medical witness, the court could not order the city to pay Morrison's fees.¹⁶⁴

155. 297 N.Y. 190, 78 N.E.2d 467 (1948).

156. *Id.* at 193, 78 N.E.2d at 468.

157. *Id.*

158. *Id.* at 193-94, 78 N.E.2d at 469 (citing Mental Hygiene Law § 85(6), Act of March 30, 1927, ch. 426, 1927 N.Y. Laws 981, *as amended by* Act of March 31, 1932, ch. 574, § 1, 1932 N.Y. Laws 1223, 1223-24, Act of April 24, 1933, ch. 395, § 24, 1933 N.Y. Laws 926, 935, Act of April 29, 1935, ch. 561, 1935 N.Y. Laws 1172, Act of April 7, 1944, ch. 666, § 40, 1944 N.Y. Laws 1407, 1434-35, *repealed by* Act of July 1, 1972, ch. 251, 1972 N.Y. Laws 468).

159. *Id.* at 193, 78 N.E.2d at 468.

160. *In re Sullivan*, 187 Misc. 687, 689, 64 N.Y.S.2d 365, 367 (Sup. Ct. Queens County 1946).

161. *In re Sullivan*, 272 A.D. 780, 70 N.Y.S.2d 572 (2d Dep't 1947).

162. *Sullivan*, 297 N.Y. at 196, 78 N.E.2d at 470.

163. *Id.* at 195-96, 78 N.E.2d at 470.

164. *Id.* at 196, 78 N.E.2d at 470.

e. *In re Eaton*¹⁶⁵

The treasurer of a state mental hospital sued Onondaga County, its board of supervisors, and its treasurer and auditor, seeking an order compelling them to audit and pay bills for housing patients committed by judges sitting in the county.¹⁶⁶ The court held that even if there were no law requiring counties to pay for the maintenance of the criminally insane within the county,¹⁶⁷ "still a magistrate has the power to, by order, obtain information for the proper determination of his judicial functions and direct the county in which he serves to pay the expense thereof."¹⁶⁸ That power included the power to commit the potentially insane for short periods of time for observation in order to determine their proper disposition.¹⁶⁹

From these expenditure cases¹⁷⁰ a two-step analytical framework emerges for inherent judicial budgetary power cases in New York. A court ordering expenditure of funds must first determine if the legislature has enacted limits on the type of expenditure in question.¹⁷¹ If limits have been enacted, the applicant is limited to the statutorily approved expenditures, and the court cannot invoke its inherent power to order additional

165. 196 Misc. 648, 92 N.Y.S.2d 461 (Sup. Ct. Onondaga County 1949), *aff'd mem.*, 279 A.D. 1038, 113 N.Y.S.2d 279, *motion for leave to appeal denied*, 280 A.D. 881, 114 N.Y.S.2d 264 (4th Dep't 1952).

166. *Id.* at 650, 92 N.Y.S.2d at 464-65. Eaton, the named party, was the treasurer of the Syracuse Psychopathic Hospital, operated by the State Department of Mental Hygiene. *Id.* at 648, 92 N.Y.S.2d at 461. During the period of May 1942 to July 1949, various judges within the city of Syracuse had signed orders committing several hundred persons to the hospital for a specified period of observation. *Id.* The hospital honored the orders and provided care commensurate with the ordered observation. *Id.* The bills for these services were approved by the judges signing the commitment orders and were presented for payment, which was refused. *Id.*

167. Note that in this case there was such a law. *Id.* at 652-54, 92 N.Y.S.2d at 465-68 (citing Mental Hygiene Law § 79, Act of March 30, 1927, ch. 426, 1927 N.Y. Laws 981, *as amended by* Act of March 11, 1931, ch. 71, § 2, 1931 N.Y. Laws 392, 393, Act of April 24, 1933, ch. 395, § 17, 1933 N.Y. Laws 926, 934, Act of April 7, 1944, ch. 666, § 36, 1944 N.Y. Laws 1407, 1431-32, Act of April 14, 1946, ch. 769, 1946 N.Y. Laws 1504, *repealed by* Act of July 1, 1972, ch. 251, 1972 N.Y. Laws 468).

168. *Id.* at 654, 92 N.Y.S.2d at 468.

169. *Id.* at 654-55, 92 N.Y.S.2d at 468.

170. See *supra* notes 43-67 and accompanying text for distinction between expenditure and appropriations cases.

171. See *supra* notes 130-32, 135-39, 162-64 and accompanying text.

expenditures.¹⁷² This applies if the limitation states a formula for determining the amount of an expenditure, such as in *Moy-nahan*¹⁷³ and the *Cole* cases,¹⁷⁴ or if it is exclusive, such as in *Sullivan*.¹⁷⁵ If the contemplated expenditure is not limited under this part of the test, the court may order the expenditure if it is necessary and proper for the court's functions.¹⁷⁶

2. Constitutional Amendment

Before 1961, the state constitution's judiciary article contained no express provision on court funding.¹⁷⁷ Article VI, section 29(c), added in 1961, provided that:

Insofar as the expense of the courts is borne by the state or paid by the state in the first instance, the final determination of the itemized estimates of the annual financial needs of the courts shall be made by the legislature and the governor in accordance with articles four [executive branch] and seven¹⁷⁸ [state finances] of this constitution.¹⁷⁹

A new judiciary article, containing section 29(c), was passed by concurrent resolution by the Senate and Assembly in the 1959

172. See *supra* notes 130-32, 135-39, 162-64 and accompanying text.

173. See *supra* notes 133-42 and accompanying text.

174. See *supra* notes 122-32 and accompanying text.

175. See *supra* notes 155-64 and accompanying text.

176. Compare *In re Kenney*, 153 A.D. 325, 137 N.Y.S. 1097 (2d Dep't 1912) with *In re Eaton*, 196 Misc. 648, 92 N.Y.S.2d 461 (Sup. Ct. 1949), *aff'd mem.*, 279 A.D. 1038, 113 N.Y.S.2d 279, *motion for leave to appeal denied*, 280 A.D. 881, 114 N.Y.S.2d 264 (4th Dep't 1952).

177. See, e.g., THE CONSTITUTION OF THE STATE OF NEW YORK, 1956-1957, which reprints N.Y. CONST. art. VI, amended by N.Y. CONST. art. VI, as in force on January 1, 1956. The only provisions related to judicial finances related to the liability of local authorities for the compensation of county judges and judges of the City Court of the City of New York. N.Y. CONST. art. VI, §§ 11, 15, amended by N.Y. CONST. art. VI, reprinted in THE CONSTITUTION OF THE STATE OF NEW YORK, 1956-1957.

178. "Itemized estimates of the financial needs of . . . the judiciary, . . . shall be transmitted to the governor . . . for inclusion in the budget without revision but with such recommendations as he may deem proper." N.Y. CONST. art. VII, § 1.

179. N.Y. CONST. art. III, § 29(c).

session.¹⁸⁰ The amendment, including the new section 29(c), became effective September 1, 1962.¹⁸¹

The legislative history of the new article VI is ambiguous. What records exist of the proposed article by the Assembly and Senate deal generally with their actions, not their debates.¹⁸² A temporary group of nonlegislators, however, was formed to study judicial reform and advise the legislature on reorganizing the state judiciary.¹⁸³ This group implicitly rejected any judicial role in the decisionmaking process of judicial appropriations.¹⁸⁴ On the other hand, the attorney general's required opinion¹⁸⁵ does not mention court funding or the mandate power of the New York City courts.¹⁸⁶ The opinion states that, other than the effects on other areas mentioned, the new article would have no effect on the constitution.¹⁸⁷

180. See 1959 N.Y. Laws lxi-lxxv (McKinney). Several technical amendments to the new article were made, necessitating that the process start over in 1960. See Nelson Rockefeller, *Governor's Annual Message*, in 1960 N.Y. Laws 1955, 1965 (McKinney) (noting desired amendments); 1960 N.Y. Laws lxxxv (McKinney) (detailing changes); see also N.Y. CONST. art. XIX, § 1 (amendment procedure requires passage of identical concurrent resolutions in successive years). Concurrent resolutions regarding the new article were passed by the Senate and Assembly in 1960, Concurrent Resolution of March 23, 1960, 1960 N.Y. Laws 2693-2718, and 1961, Concurrent Resolution of January 16, 1961, 1961 N.Y. Laws 2708-34, and the article was approved by the voters in the general election held November 7, 1961. 1962 N.Y. Laws 4025.

181. N.Y. CONST. art. VI, § 37.

182. See, e.g., 1961 N.Y. ASSEM. JOURNAL 180-81, 239-66, 1960 N.Y. ASSEM. JOURNAL 3206, 3313, 3401-3426, 1959 N.Y. ASSEM. JOURNAL 2842, 3041, 3095-3120.

183. TEMPORARY COMM'N ON THE COURTS, PART I, RECOMMENDATIONS FOR THE REORGANIZATION OF THE STRUCTURE OF THE COURTS OF THE STATE OF NEW YORK AND THEIR ADMINISTRATION, Leg. Doc. 1958 No. 36, at 23-24.

184. *Id.* The Commission document rejects mandate power of certain New York City courts and states that judicial needs need to be balanced against the needs of the community at large and that balancing should be done by *appropriating bodies*, not the courts. *Id.*

185. The attorney general is required to report to the Senate and Assembly on the potential constitutional effect of proposed amendments to the constitution. N.Y. CONST. art. XIX, § 1.

186. 1961 N.Y. ASSEM. JOURNAL 226-27.

187. *Id.*

3. *Imposition of Implicit Restrictions on Article VI, Section 29(c)*

McCoy v. Mayor,¹⁸⁸ the first case to deal with the problem of inherent judicial budgetary power after the enactment of article VI, section 29(c), arose after the City of New York refused to fund a new court created by the legislature.¹⁸⁹ The State Administrator and the administrative judge of the civil court brought an Article 78 proceeding¹⁹⁰ to overturn the city's determination and compel funding of the new court.¹⁹¹ The city and its officials defended on the basis of an alleged lack of standing on the part of the judges and that any budgetary modifications were within the sole discretion of the city and its officials.¹⁹²

188. 73 Misc. 2d 508, 342 N.Y.S.2d 83 (Sup. Ct. N.Y. County), *mod. on other grounds*, 41 A.D.2d 929, 344 N.Y.S.2d 984 (1st Dep't 1973).

189. *Id.* at 509-10, 342 N.Y.S.2d at 85 (citing Act of June 8, 1972, ch. 982, 1972 N.Y. Laws 3852). The state legislature created a housing part for the Civil Court of the City of New York and transferred jurisdiction of violations of various housing laws to that part from the Criminal Court of the City of New York. *Id.* The Civil Court then sought funding from city officials for the new Housing Part, but city officials refused to appropriate any monies for it. *Id.* at 510, 342 N.Y.S.2d at 85. "Insofar as the expense of the courts is not paid by the state . . . and is borne by . . . the City of New York . . . the final determination. . . of the annual financial needs of the courts shall be made by the appropriate governing bodies of . . . the city of New York . . ." N.Y. CONST. art. VI, § 29(d).

190. An Article 78 proceeding is an action to obtain the "[r]elief previously obtained by writs of certiorari to review, mandamus or prohibition." N.Y. Civ. PRAC. L. & R. 7801 (McKinney 1981). The remedies of certiorari to review, mandamus and prohibition were combined into a single proceeding in the Civil Practice Act, 23A CARMODY-WAIT 2D 145:1 (citing Act of May 22, 1937, ch. 526, 1937 N.Y. Laws 1186), and that procedure was retained when the CPLR replaced the Civil Practice Act. Act of April 4, 1962, ch. 308, 1962 N.Y. Laws 1297. The purpose of the consolidation was to eliminate the technical distinctions between the remedies which served primarily to hamper the ability of the courts to grant relief to parties who had demonstrated a right to relief but who chosen the wrong method of pursuing it. 23A CARMODY-WAIT 2D 145:2 (citing *Toscano v. McGoldrick*, 300 N.Y. 156, 83 N.E.2d 873 (1949)); *see also* N.Y. Civ. PRAC. L. & R. 7801 commentary at 25-26 (McKinney 1981) (reform to eliminate technical procedural distinctions); *id.* at 26-29 (difficulty in establishing standards for determining which writ to pursue). No change in the substantive law was made, therefore to prevail in an Article 78 action, the plaintiff must show that certiorari, mandamus or prohibition could have been obtained at common law. *Id.* at 26 (citing *Sanford v. Rockefeller*, 35 N.Y.2d 547, 324 N.E.2d 113, 364 N.Y.S.2d 450 (1974), *appeal dismissed sub nom.* *Sanford v. Carey*, 421 U.S. 973 (1975)).

191. *McCoy*, 73 Misc. 2d at 509, 342 N.Y.S.2d at 84.

192. *Id.*, 342 N.Y.S.2d at 84-85.

The supreme court's analysis started at the inherent power doctrine's conventional starting point: "The Judiciary has the right and power to protect itself from the impairment of its functions and it has the co-ordinate authority to make full use of its jurisdiction."¹⁹³ The state administrator and the administrative judge, therefore, acting for the State Judicial Conference and the civil court, respectively, had standing to seek relief that would give effect to the new grant of jurisdiction.¹⁹⁴ The court acknowledged that article VI, section 29 eliminated the judiciary's inherent power to control its budgeting and transferred the power of appropriation to the political branches for determination.¹⁹⁵ This power, however, was limited to review of budget estimates and could not be read to release the city "of its obligation to furnish the necessary funds as required by the Courts for their functioning in the proper discharge of the constitutional requirement to operate an efficient system of justice."¹⁹⁶

Thus, despite the apparently clear mandate of article VI, section 29, the city had no authority "to cut-off all funds for the Courts within the City of New York"¹⁹⁷ and that the "limits of respondents' [the city and its officials] discretion are constitutionally proscribed."¹⁹⁸ The court then ordered the city to begin funding of the court in question.¹⁹⁹

The deterioration of New York City's financial condition resulted in the two most recent cases on inherent judicial budgetary power, *Ascione v. City of New York*²⁰⁰ and *Blyn v. Bartlett*.²⁰¹ The underlying dispute was the firing of law clerks and law sec-

193. *Id.* at 510, 342 N.Y.S.2d at 85 (citations omitted).

194. *Id.*, 342 N.Y.S.2d at 85-86.

195. *Id.* at 511, 342 N.Y.S.2d at 86.

196. *Id.* at 510-11, 342 N.Y.S.2d at 86.

197. *Id.* at 511, 342 N.Y.S.2d at 86, 87 (citing *Commonwealth ex. rel. Carroll*, 274 A.2d 193, 199 (Pa. 1971)).

198. *Id.*

199. *Id.* at 509-10, 513, 342 N.Y.S.2d at 85, 88. The appellate division's only modification was to change the effective date of the supreme court's order, to reflect a change in the law creating the housing part. *McCoy v. Mayor*, 41 A.D.2d 929, 344 N.Y.S.2d 984 (1st Dep't 1973).

200. 84 Misc. 2d 414, 379 N.Y.S.2d 599 (Sup. Ct. N.Y. County 1975), *modified on other grounds sub nom.* *Blyn v. Bartlett*, 50 A.D.2d 442, 379 N.Y.S.2d 616 (3d Dep't), *aff'd as modified*, 39 N.Y.2d 349, 348 N.E.2d 555, 384 N.Y.S.2d 99 (1976).

201. 84 Misc. 2d 394, 379 N.Y.S.2d 580 (Sup. Ct. N.Y. County 1975), *rev'd*, 50 A.D.2d 442, 379 N.Y.S.2d 616 (3d Dep't), *aff'd*, 39 N.Y.2d 349, 348 N.E.2d 555, 384 N.Y.S.2d 99 (1976).

retaries of various judges in New York City as a cost-saving measure.²⁰²

As in *McCoy*, the court in *Ascione* started with the general principles expressed in *Carroll*: 1) that our government divides responsibilities among the three branches, which are separate and coequal; 2) that the branches may not encroach on each other's jurisdiction, nor prevent another branch from performing its duties; and 3) that each branch has the inherent power to protect itself from impairment.²⁰³

The court then cited *McCoy* for the proposition that while the courts no longer had mandatory budget powers, an "appropriating body" was limited in its discretion to review the budget request of the courts.²⁰⁴ The court then examined the Judiciary Law and concluded that "final determination" language present in article VI, section 29 only applied to the sums appropriated for a specific court and not to specific items present in the estimates prepared by the courts.²⁰⁵ To hold otherwise would allow the "appropriating body" a voice in the administration of the courts, which precedent specifically did not allow.²⁰⁶ The court then held that the Judiciary Law prohibited the state adminis-

202. *Ascione*, 84 Misc. 2d at 416, 379 N.Y.S.2d at 603-04. The Mayor of New York told the state administrative judge to make further cuts in the courts' budget for May 1975. *Id.* The administrative judge did so, preparing a budget that would reduce court expenditures by \$5.8 million. *Id.*, 379 N.Y.S.2d at 603. To accomplish this, the administrative judge eliminated personnel, including the personal attendants to the justices of the supreme court in the First Judicial District, *id.*, and the law secretaries to the judges of the Civil Court of the City of New York. *Blyn*, 84 Misc. 2d at 395-96, 379 N.Y.S.2d at 582-83. The Administrative Board of the State Judicial Conference then passed a resolution directing that the positions be eliminated, and the Office of Court Administration gave notice to the persons in those positions that they would be terminated. *Ascione*, 84 Misc. 2d at 416-17, 379 N.Y.S.2d at 603-04.

The personal attendants' association and the justices of the supreme court each brought an Article 78 action to overturn the determinations of the state administrative judge and the city. *Id.* at 415, 379 N.Y.S.2d at 602-03. The lawsuits of the personal attendants association and the justices were consolidated. *Id.* In *Blyn*, the law secretaries to the judges of the Civil Court of the City of New York and the judges of the civil court each brought an Article 78 action to overturn the determinations of the state administrative judge and the city. *Blyn*, 84 Misc. 2d at 395-96, 379 N.Y.S.2d at 582. The lawsuits of the law secretaries and the civil court judges were also consolidated. *Id.*

203. *Ascione*, 84 Misc. 2d at 419, 379 N.Y.S.2d at 606.

204. *Id.*

205. *Id.* at 421, 379 N.Y.S.2d at 607.

206. *Id.* at 420-22, 379 N.Y.S.2d at 607-08.

trative judge or the city from dismissing the personal assistants of city court judges and ordered them reinstated.²⁰⁷

The court in *Blyn* relied primarily on Judiciary Law section 222²⁰⁸ to hold that the administrative board's resolution eliminating the positions was void.²⁰⁹ In dealing with the constitutional question, the court held that the budget powers contained in article VI, section 29 were at most, coordinate with the power of the judiciary.²¹⁰ To hold otherwise would allow "the Legislative and Executive branches of government [to] invade and encroach unlawfully upon the functions and authority duly delegated by our constitution and state laws to the judicial branch of government."²¹¹ The appeals in *Blyn* and *Ascione* were consolidated and transferred to the Third Department.²¹² In each of the consolidated suits, the constitutional issues regarding inherent judicial budgetary power that were raised and decided in the supreme court were ignored by the appellate courts.

The appellate division reversed the judgment in *Blyn* and modified the judgment in *Ascione*,²¹³ holding that the language in Judiciary Law section 222 clearly made the appointment of assistants to judges subject to the budget powers of appropriating bodies.²¹⁴ This allowed the administrative board and the city to eliminate the positions by acting in concert — the administrative board submitting a budget that eliminated the positions, and the city approving that budget.²¹⁵ The Court of Appeals affirmed, holding that the extreme financial emergency

207. *Id.* at 424-427, 430, 379 N.Y.S.2d at 610-13, 616.

208. "Wherever . . . a judge or justice . . . is authorized to appoint personal assistants to render to him legal or clerical services, the power of such judge or justice . . . shall continue . . . subject to the final determination of budgets by appropriating bodies as provided in section twenty-nine of article six of the constitution." Judiciary Law § 222, Act of Apr. 24, 1962, ch. 684, § 3, 1962 N.Y. Laws 3030, 3036, as amended by Act of May 22, 1969, ch. 742, § 1, 1969 N.Y. Laws 1947, repealed by Act of May 19, 1978, ch. 156, § 6, 1978 N.Y. Laws 323.

209. *Blyn*, 84 Misc. 2d at 414, 379 N.Y.S.2d at 598.

210. *Id.* at 406, 379 N.Y.S.2d at 591.

211. *Id.*

212. *Blyn v. Bartlett*, 50 A.D.2d 442, 444, 379 N.Y.S.2d 616, 619 (3d Dep't 1976).

213. *Id.* at 449-50, 379 N.Y.S.2d at 623.

214. *Id.* at 447-48, 379 N.Y.S.2d at 621-22.

215. *Id.* at 449, 379 N.Y.S.2d at 623.

created a situation that required centralized action, action that only could be taken by the Administrative Board.²¹⁶

Judge Cooke's dissent²¹⁷ rested on three separate grounds. First, the positions eliminated were created by legislative act and could only be eliminated through legislative act.²¹⁸ Second, a common sense reading of section 29, that the budget power could be wielded to control the compensation of persons in legislatively created positions, is the correct one.²¹⁹ Third, the majority abandoned precedent that held that the city could not create or abolish positions simply by adopting a budget.²²⁰

D. *Justiciability of Controversies Involving Budgetary Procedures*

Whether the Governor, the legislature, or both have complied with the procedures for the formulation, submission, and passage of a state budget outlined in article VII of the state constitution has been the subject for a number of decisions of the Court of Appeals.²²¹ How the court has dealt with these cases has been a function of what it perceives the real controversy to be in each case.

In *People v. Tremaine*,²²² the Court of Appeals dealt with a direct legislative challenge to the Governor's power to direct the budget process. In 1939, the Governor submitted to legislature a budget and four appropriations bills that itemized the amounts for various types of expenses for each of the departments of the government.²²³ When the legislature acted on the

216. *Blyn v. Bartlett*, 39 N.Y.2d 349, 358-59, 361-62, 348 N.E.2d 555, 559-60, 561-62, 384 N.Y.S.2d 99, 104, 106 (1976).

217. *Id.* at 362-64, 348 N.E.2d at 562-63, 384 N.Y.S.2d at 106-07 (Cooke, J., dissenting). Judge Fuchsberg concurred in Judge Cooke's dissent. *Id.*

218. *Id.* at 362, 348 N.E.2d at 562, 384 N.Y.S.2d at 106 (citing *Morrall v. County of Monroe*, 271 N.Y. 48, 51, 2 N.E.2d 40, 41 (1936) and *Koch v. Mayor*, 152 N.Y. 72, 75, 46 N.E. 170, 171 (1897)).

219. *Id.* at 363, 348 N.E.2d at 563, 384 N.Y.S.2d at 107 (Cooke, J., dissenting).

220. *Id.* at 364, 348 N.E.2d at 563, 384 N.Y.S.2d at 107 (Cooke, J., dissenting).

221. *See infra* notes 221-60 and text accompanying.

222. 281 N.Y. 1, 21 N.E.2d 891 (1939).

223. *Id.* at 5-6, 21 N.E.2d at 893. The Governor's bill:

as required by section 36 of the State Finance Law (Consol. Laws, ch. 56), the appropriations for the department, division or bureau were divided into two main items, namely, expenses for personal service and expenses for maintenance and operation. The appropriations for personal service were by an accompanying schedule itemized so that amounts should be available

Governor's bill for governmental operations, it struck out all of the itemization, and combined all the requests into a single lump sum appropriation for each department.²²⁴ The Governor signed the budget bill solely so it could be challenged in the courts.²²⁵ While the court specifically stayed away from the question of what level of itemization was necessary in the budget,²²⁶ the court held that the legislature had violated the provisions of the state constitution by striking out the Governor's itemization and replacing it with lump sum appropriations.²²⁷

In a recent case, the Court of Appeals returned to the same issue. In *New York State Bankers Association, Inc. v. Wetzler*,²²⁸ a challenge to an amendment to the state operations budget bill was upheld. In amending the state operations budget bill, the legislature tacked on a provision authorizing the commissioner of taxation to assess fees against certain banking corporations for the cost of conducting tax audits of those corporations.²²⁹ The Governor signed the bill, including the "audit fee" provision, into law.²³⁰ When the commissioner started acting pursuant to his authority, the Cayuga Lake National Bank and the Association sued.²³¹ The supreme court and the appellate divi-

for each of the various positions or groups of positions in the department, division or bureau. These items are commonly referred to as 'line items.' Likewise in each instance of an appropriation for maintenance and operation, there is an itemized statement accompanying the schedule showing the amounts which were to be available for the various expenses.

Id. at 6, 21 N.E.2d at 893.

224. *Id.* at 6-7, 21 N.E.2d at 893.

225. *People v. Tremaine*, 257 A.D. 117, 120, 13 N.Y.S.2d 125, 128 (3d Dep't 1939).

226. *Tremaine*, 281 N.Y. at 11-12, 21 N.E.2d at 896:

In between the two extremes [between complete itemization and the use of lump sum appropriations] we must rely upon the Executive and Legislative Branch of the government to provide a budget sufficiently itemized to comply with the spirit and words of the Constitution, and yet containing lump sum appropriations when experience in the line of work or in the department shows that details and items in a budget would be impracticable or almost impossible unworkable.

Id.

227. *Id.* at 8, 10-11, 21 N.E.2d at 894, 895.

228. 81 N.Y.2d 98, 612 N.E.2d 294, 595 N.Y.S.2d 936 (1993).

229. *Id.* at 101, 612 N.E.2d at 295, 595 N.Y.S.2d at 937.

230. *Id.*; see Act of June 6, 1990, ch. 50, 1990 N.Y. Laws 144 (Lawyers Coop.).

231. *Wetzler*, 81 N.Y.2d at 101, 612 N.E.2d at 295, 595 N.Y.S.2d at 937.

sion both found that the enactment of the audit fee provision violated section 4 of article VII of the state constitution, and enjoined enforcement of the law.²³²

The Court of Appeals held that the controversy was justiciable.²³³ The court rejected the state's argument that the matter was not justiciable because the budgetary process was the exclusive domain of the executive and legislative branches, for which the state cited the court's prior holding in *Saxton v. Carey*.²³⁴ First, the court noted that *Saxton* had not said that the budgetary process was totally immune from judicial review, and had expressly reserved to the judicial branch review of "disputes concerning the scope of that authority which is granted by the Constitution to the other two branches of the government," including budgetary disputes.²³⁵ Second, the controversy, in the court's view, was not regarding what was enacted, but whether the legislature had any authority to enact the law at all, which was justiciable.²³⁶

On the merits, the court found that the audit fee provision violated article VII, section four.²³⁷ That section created an unambiguous, limited grant of authority to the legislature to alter budget bills in certain ways. Those ways were limited to striking out items, reducing items, or adding items of appropriation.²³⁸ The "audit fee" provision was adopted by the legislature in direct violation of this command. As to the court stated: "To approve it [the "audit fee" provision] 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."²³⁹ The court then affirmed the order of the appellate division.

232. *Id.* (citing 151 Misc. 2d 684, 573 N.Y.S.2d 816 (Sup. Ct. Cayuga County 1991), *aff'd*, 184 A.D.2d 1077, 586 N.Y.S.2d 779 (4th Dep't 1992)).

233. *Id.* at 102-03, 612 N.E.2d at 295-96, 595 N.Y.S.2d at 937-38.

234. 44 N.Y.2d 545, 378 N.E.2d 95, 406 N.Y.S.2d 732 (1978); *see infra* notes 249-60 and text accompanying.

235. *Wetzler*, 81 N.Y.2d at 102, 612 N.E.2d at 296, 595 N.Y.S.2d at 938 (quoting *Saxton*, 44 N.Y.2d at 551, 378 N.E.2d at 99, 406 N.Y.S.2d at 735).

236. *Id.* (citing *Korn v. Gulotta*, 72 N.Y.2d 363, 369-70, 530 N.E.2d 816, 818-19, 534 N.Y.S.2d 108, 110-11 (1988); *Saxton*, 44 N.Y.2d at 548-51, 378 N.E.2d at 97-99, 406 N.Y.S.2d at 734-35).

237. *Id.* at 103-05, 612 N.E.2d at 296-97, 595 N.Y.S.2d at 939-40.

238. *Id.* at 104, 612 N.E.2d at 297, 595 N.Y.S.2d at 939.

239. *Id.* at 105, 612 N.E.2d at 297, 595 N.Y.S.2d at 939.

However, when the challenge is not based on a direct violation of the budgetary procedures, in the words of *Wetzler*, "concern[ing] not what was enacted or its effect on the budgetary process, but whether there was authority to enact the provision at all,"²⁴⁰ but rather a challenge directed at the substance of the appropriations bills, the Court of Appeals have consistently held that those challenges are not justiciable. In *Hidley v. Rockefeller*,²⁴¹ state employees challenged the constitutionality of the appropriations bills for the 1971-72 fiscal year.²⁴² The basis of the challenge was that the bills approved by the legislature were not sufficiently itemized pursuant to article VII of the state constitution.²⁴³ The supreme court had held that the appropriations bills were unconstitutional,²⁴⁴ but the appellate division reversed and held that bills were valid.²⁴⁵

The Court of Appeals reversed the appellate division, and ruled that the plaintiffs lacked standing to challenge the bills.²⁴⁶ The court stated: "Plaintiffs' real quarrel is with the amount of the appropriations, not with the form or method whereby they were requested and enacted. . . . Neither is there any showing that any positions would be more secure had the budgetary and legislative processes taken the form that plaintiffs assert are constitutionally mandated."²⁴⁷ The court consequently dismissed the complaint.²⁴⁸

The Court of Appeals confronted this issue in more depth seven years later in *Saxton v. Carey*.²⁴⁹ In *Saxton*, the plaintiffs challenged the entire 1978-79 budget on the basis that the Governor failed to submit a proper budget.²⁵⁰ The perceived flaw in the budget was again the level of itemization, or rather the lack

240. *Id.* at 102, 612 N.E.2d at 296, 595 N.Y.S.2d at 938.

241. 28 N.Y.2d 439, 271 N.E.2d 530, 322 N.Y.S.2d 687 (1971).

242. *Id.* at 441, 271 N.E.2d at 532, 322 N.Y.S.2d at 688-89 (Breitel, J., dissenting).

243. *Id.*, 271 N.E.2d at 532, 322 N.Y.S.2d at 689.

244. *Hidley v. Rockefeller*, 65 Misc. 2d 954, 320 N.Y.S.2d 836 (Sup. Ct. Albany County 1971).

245. *Hidley v. Rockefeller*, 36 A.D.2d 387, 320 N.Y.S.2d 957 (3d Dep't 1971).

246. *Hidley*, 28 N.Y.2d at 440, 271 N.E.2d at 531, 322 N.Y.S.2d at 688.

247. *Id.*

248. *Id.*

249. 44 N.Y.2d 545, 378 N.E.2d 95, 406 N.Y.S.2d 732 (1978).

250. *Id.* at 548, 378 N.E.2d at 97, 406 N.Y.S.2d at 733.

thereof.²⁵¹ The supreme court dismissed the action,²⁵² but the appellate division reinstated the complaint,²⁵³ and held that the budget was valid.²⁵⁴ Unlike *Hidley*, on this occasion the Court of Appeals addressed the merits.²⁵⁵

On the merits, the court rejected the notion that it had a proper role in supervising the level of itemization in the budget submitted by the Governor.²⁵⁶ The court stated that each of the branches of government had particular functions to pursue, and that while pursuing them, "each department should be free from interference, . . . by either of the others."²⁵⁷ The court then examined the constitutional scheme of budgeting, and found that the "creation and enactment of the State budget is a matter delegated essentially to the Governor and the legislature."²⁵⁸ Itemization, the court held, was necessary for the legislature to properly conduct its role in the budget process, to approve or reject the Governor's proposed expenditures. However, itemization is an elastic term, not easily defined.²⁵⁹ These two facts led

251. *Id.*

252. *Id.*

253. *Saxton v. Carey*, 61 A.D.2d 645, 403 N.Y.S.2d 779 (3d Dep't 1978).

254. *Saxton*, 44 N.Y.2d at 548, 378 N.E.2d at 97, 406 N.Y.S.2d at 733.

255. The standing requirement that was fatal to the complaint in *Hidley* was no longer an issue by the time of *Saxton* because of the Court of Appeals's decision in *Boryszewski v. Brydges*, 37 N.Y.2d 361, 334 N.E.2d 579, 372 N.Y.S.2d 623 (1975). *Saxton*, 44 N.Y.2d at 548, 378 N.E.2d at 97, 406 N.Y.S.2d at 733-34.

256. *Saxton*, 44 N.Y.2d at 548-49, 378 N.E.2d at 97, 406 N.Y.S.2d at 734.

257. *Id.* at 549, 378 N.E.2d at 97, 406 N.Y.S.2d at 734 (quoting *People ex rel. Burby v. Howland*, 155 N.Y. 270, 282, 49 N.E. 775, 779 (1898)).

258. *Id.*, 378 N.E.2d at 97-98, 406 N.Y.S.2d at 734.

259. *Id.* at 549-50, 378 N.E.2d at 98, 406 N.Y.S.2d at 734-35. To illustrate this point, the court quoted Judge Breitel's dissent in *Hidley*:

There is a constitutional mandate to itemize. There is no constitutional definition of itemization. There is no judicial definition of itemization and no inflexible definition is possible. Itemization is an accordion word. An item is little more than a 'thing' in a list of things. A house is an item, and so is a chair in the house, or the nail in the chair, depending on the depth and purpose of the classification. The specificity or generality of itemization depends upon its function and the context in which it is used. In one context of a budget or appropriation bill the description of 1,000 police officers within a flexible salary range would be specific and particular; in another it would leave the appointing power with almost unlimited control. In one context an 'item' of \$5,000,000 for construction of a particular expressway might seem specific; in another, void of indication when, how, or where the expressway or segments of it would be constructed. This suggests that there is something of a battle over words in debating the need for items, rather than a grappling with a functional concept.

the court to a single conclusion, that whether the Governor's submission to the legislature was properly itemized was a matter for legislative, not judicial, determination.²⁶⁰

E. *Wachtler v. Cuomo*

1. *Facts*

Faced with a six billion dollar budget deficit,²⁶¹ Governor Cuomo submitted a budget for the fiscal year beginning April 1, 1991, that did not include the judiciary's request of \$976 million for the year.²⁶² Instead, the proposal contained the Governor's request for \$879 million, \$97 million less than the judiciary's request.²⁶³ The legislature restored some of the funds cut, even-

Hidley, 28 N.Y.2d at 444, 271 N.E.2d at 533, 322 N.Y.S.2d at 691 (Breitel, J., dissenting).

260. *Saxton*, 44 N.Y.2d at 550-51, 378 N.E.2d at 948, 406 N.Y.S.2d at 735. The court stated:

the degree of itemization necessary in a particular budget is whatever degree of itemization is necessary for the Legislature to effectively review that budget. This is a decision which is best left to the Legislature, for it is not something which can be accurately delineated by a court. . . . 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.

261. Gary Spencer, *Battle is Joined Over State Judiciary Budget*, N.Y. L.J., Feb. 1, 1991, at 1. Governor Cuomo's financial plan for the 1991-92 fiscal year anticipated a \$6 billion deficit in a \$51.9 billion budget. *Id.*

262. *Id.*

263. Gary Spencer, *Budget Seeks 15 Judges, No Pay Hike*, N.Y. L.J., Dec. 3, 1990, at 1. The judiciary submitted a \$976 million request for the 1991-92 fiscal year. *Id.* The Governor then demanded a \$90 million reduction in the request, to which the judiciary refused. Spencer, *supra* note 261, at 1. The Governor actually submitted the request without revision as required by the state Constitution. See N.Y. CONST. art. VII, § 1. The Governor reduced the request by 10% in his financial plan submitted to the legislature. Gary Spencer, *Wachtler, Cuomo Spar Over Budget*, N.Y. L.J., Apr. 11, 1991, at 1.

In doing so, the Governor clearly violated the spirit, if not the letter of article VII. Section 2 of article VII requires the Governor to submit a budget that "contain[s] a complete plan of expenditures proposed to be made before the close of the ensuing fiscal year." N.Y. CONST. art. VII, § 2. The Governor's budget bills must

tually passing a budget that allocated some \$899 million for the judiciary.²⁶⁴ The new budget forced the judiciary into a series of cost-cutting moves, including the wide scale closure of civil trial parts in New York City and dismissal of court personnel.²⁶⁵ After several months of bitter arguments between the Governor and the Chief Judge, the Chief Judge sued the Governor in September 1991 in Albany County Supreme Court.²⁶⁶

2. *Procedural History*

The suit sought an injunction barring the Governor from altering the judiciary's budget request prior to submitting it to the legislature for action as well as an order requiring the legislature to fund the judiciary at the level it requested from the Governor.²⁶⁷ The cause of action for additional funds relied on no specific state constitutional or statutory provisions, but instead on the "constitutional and inherent right [of the judicial

necessarily reflect the content of the budget that the Governor has submitted. N.Y. CONST. art. VII, § 3. Because the power of the legislature to alter the budget bills is limited, N.Y. CONST. art. VII, § 4, the Governor's budget and financial plan become the base line from which all debate and negotiation on the budget occurs. George F. Carpinello, *Is Governor Cuomo's Budget Unconstitutional?*, N.Y. L.J., Apr. 22, 1991, at 1. By doing so, the Governor, for all intents and purposes, revised the Judiciary's budget request before submitting it to the legislature, by interposing his revisions in the financial plan and budget bills.

But the constitutional convention that proposed article VII moved to limit the Governor's power to revise the estimated needs of the judiciary. *Id.* (quoting COMMITTEE ON STATE FIN., N.Y. STATE CONSTITUTIONAL CONVENTION OF 1915, REPORT, in 2 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF 1915, at 1153). The convention's intent was to require the Governor to transmit the judiciary's request as part of the Governor's budget, without revision, along with any recommendations regarding the request that the Governor might see fit to make. *Id.* Therefore, the Governor's failure to include the judiciary's request in his budget was a violation of his duty under article VII.

264. Gary Spencer, *Legislature Appropriates \$899 Million for Judiciary*, N.Y. L.J., June 4, 1991, at 1.

265. Spencer, *supra* note 9, at 1. The failure of the unions representing court employees to agree to an extension of the lag payroll forced the Office of Court Administration to lay off nearly 500 of those employees. Gary Spencer, *Wachtler v. Cuomo: See You in Court*, N.Y. L.J., Sept. 26, 1991, at 1.

266. *Wachtler v. Cuomo*, No. 6034/91 (Sup. Ct. Albany County filed Sept. 27, 1991); see also Spencer, *supra* note 18, at 1. The suit also named Ralph Marino, the Temporary President of the State Senate, Melvin Miller, the then Speaker of the State Assembly, and the New York State Legislature as defendants. Plaintiffs Verified Complaint at 1-2, *Wachtler v. Cuomo*, No. 6034/91 (Sup. Ct. Albany County filed Sept. 27, 1991).

267. Verified Complaint at 29-31, *Wachtler* (No. 6034/91).

branch], under the doctrine of separation of powers, to compel defendants to fulfill their obligations and responsibilities to provide the minimum amount of money reasonable and necessary for the judicial branch to fulfill its constitutional and statutory functions."²⁶⁸

The Governor then filed both a civil rights action and a miscellaneous proceeding to enjoin the state court action in the U.S. District Court for the Eastern District of New York.²⁶⁹ The district court denied the motion to enjoin Chief Judge Wachtler's state court action, and appointed former United States Secretary of State Cyrus Vance to mediate the dispute.²⁷⁰ When attempts at mediation failed,²⁷¹ the Governor abandoned this action for a new litigation strategy.²⁷²

This strategy brought the Governor to the U.S. District Court for the Northern District of New York. First, on October 25, 1991, the Governor filed a petition to remove the state court action to the federal court.²⁷³ On October 31, the district court ordered the parties to submit papers on the issue of jurisdiction over the removed action.²⁷⁴ The Governor then refiled his civil rights complaint in the Northern District.²⁷⁵ Later, the Governor then backed down and asked the court to dismiss his action and remand Chief Judge Wachtler's action back to the Albany

268. *Id.* at 25-26.

269. *Cuomo v. Wachtler*, No. CV-91-3874 (JBW) (E.D.N.Y. filed Oct. 7, 1991) and *Cuomo v. Wachtler*, No. Misc. 91-469 (JBW) (E.D.N.Y. filed Oct. 7, 1991); see also Gary Spencer, *Cuomo Sues to Block Wachtler Lawsuit*, N.Y. L.J., Oct. 8, 1991, at 1. A proceeding is designated miscellaneous when it requires the immediate attention of the court. U.S. Dist. Ct. E.D.N.Y. Div. of BUSINESS R. 50.1, 50.5.

270. *Cuomo v. Wachtler*, No. CV-91-3874 (JBW) (E.D.N.Y. filed Oct. 7, 1991) and *Cuomo v. Wachtler*, No. Misc. 91-469 (JBW) (E.D.N.Y. filed Oct. 7, 1991) (one order).

271. Gary Spencer, *Court Dispute Mediation at an Impasse*, N.Y. L.J., Oct. 17, 1991, at 1.

272. Gary Spencer, *New Cuts Sought From Court Budget*, N.Y. L.J., Nov. 1, 1991; see also *Wachtler v. Cuomo*, No. 91-CV-1235, slip op. at 2-3 (N.D.N.Y. Nov. 21, 1991).

273. *Wachtler v. Cuomo*, No. 91-CV-1235 (N.D.N.Y. filed Oct. 25, 1991); see also Spencer, *supra* note 272.

274. See *Wachtler v. Cuomo*, No. 91-CV-1235, slip op. at 3 (N.D.N.Y. Nov. 21, 1991).

275. *Cuomo v. Wachtler*, No. 91-CV-1270 (N.D.N.Y. filed Nov. 1, 1991).

County Supreme Court.²⁷⁶ The district court considered the merits of the removal petition and dismissed it, assessing costs and attorney's fees against the Governor.²⁷⁷ The court then dismissed the Governor's civil rights action, declining to exercise jurisdiction in favor of the state court.²⁷⁸

3. Settlement

The state court action proceeded to the point where the judge hearing the case set a trial date for February 1992.²⁷⁹ The Governor and the Chief Judge then settled the lawsuit in January. The Governor promised not to amend the judiciary's requests and agreed to the judiciary's request for the current fiscal year, and the Chief Judge agreed to an outside audit of the judiciary's operations.²⁸⁰

III. Analysis

The amendments to article VI of the state constitution clearly limit the judiciary's inherent power to ensure adequate funding.²⁸¹ In this sense, courts can no longer incur expenses and then compel other authorities to pay the bills. This ended the expenditure cases, except in the limited situation of payment of emergency expenses from a fund set up for that purpose, which even the court in *Morgan County* conceded.²⁸²

In the appropriation cases in New York, such as *Wachtler v. Cuomo*, the question remains, is there an inherent power of the judiciary to act in this area? Historically, the courts in New York have been reluctant to give the power any effect, and have always made that power subject to legislative enactment.²⁸³ Giving this rule a literal application, this would preclude any challenge to the budget passed by the legislature, since that

276. Affidavit of Kenneth R. Feinberg, *Wachtler v. Cuomo*, No. 91-CV-1235 (N.D.N.Y. filed Nov. 14, 1991); see also Gary Spencer, *Cuomo Drops Effort to Shift Funding Suit*, N.Y. L.J., Nov. 15, 1991 at 1.

277. *Wachtler v. Cuomo*, No. 91-CV-1235 (N.D.N.Y. Nov. 21, 1991).

278. *Cuomo v. Wachtler*, No. 91-CV-1270 (N.D.N.Y. Dec. 27, 1991).

279. *Today's News: Update*, N.Y. L.J., Dec. 19, 1991, at 1.

280. Spencer, *supra* note 13, at 1.

281. See *supra* notes 177-220 and accompanying text.

282. *Morgan County Comm'n v. Powell*, 293 So. 2d 830, 835 (Ala. 1974); see *supra* text accompanying note 101.

283. See *supra* notes 122-76 and accompanying text.

budget is a legislative enactment, which would preclude the exercise of an inherent power. In this respect, the early New York cases reach the same result as the Alabama Supreme Court did in *Morgan County*, although the methodology in reaching the result is somewhat different.²⁸⁴

In both the early New York cases and in *Morgan County*, the analysis fails to take into account the judiciary's role as a check on the legislature, which is part of the doctrine of separation of powers.²⁸⁵ As *Carroll*²⁸⁶ and *Wayne County*,²⁸⁷ and the trial court opinions in *McCoy*,²⁸⁸ *Blyn*,²⁸⁹ and to a lesser extent, *Ascione*,²⁹⁰ show, the absolute separation of powers envisioned by the *Morgan County* majority is a mere fiction. The judiciary's lack of total immunity from the political process has, as an almost inescapable corollary, demonstrated that the legislative branch is not totally immune from judicial control of its functions, including appropriations.²⁹¹

Whatever the failings of the analysis of *Morgan County* or the early New York cases, today section 29(c) of article VI of the state constitution has eliminated whatever vestiges of the inherent power remained in New York. This section of the constitution squarely places the "final determination" of the judiciary's needs in the hands of the legislature and the Governor.²⁹² This limitation imposed on the judiciary is similar to the limitation on the legislature's lawmaking power in article VII, section 4, which was strictly enforced in *Wetzler*.²⁹³ Therefore,

284. Compare *Morgan County's* constitutional analysis, see *supra* notes 98-106 and accompanying text with the inherently statutory analysis of the New York cases, *supra* notes 170-76 and accompanying text.

285. See *supra* notes 23-38 and accompanying text.

286. *Commonwealth ex rel. Carroll v. Tate*, 274 A.2d 193 (Pa.), *cert. denied*, 402 U.S. 974 (1971); see *supra* notes 68-92 and accompanying text.

287. *Judges for Third Judicial Circuit v. County of Wayne*, 190 N.W.2d 228 (Mich.), *cert. denied*, 405 U.S. 923 (1971); see *supra* notes 53-64 and accompanying text.

288. *McCoy v. Mayor*, 73 Misc. 2d 508, 342 N.Y.S.2d 83 (Sup. Ct. N.Y. County 1973); see *supra* notes 188-99 and accompanying text.

289. *Blyn v. Bartlett*, 84 Misc. 2d 394, 379 N.Y.S.2d 580 (Sup. Ct. N.Y. County 1975); see *supra* notes 202, 208-11 and accompanying text.

290. *Ascione v. City of New York*, 84 Misc. 2d 414, 379 N.Y.S.2d 599 (Sup. Ct. N.Y. County 1975); see *supra* notes 202-07 and accompanying text.

291. See *supra* notes 32-38 and accompanying text.

292. See *supra* notes 177-87 and text accompanying.

293. See *supra* notes 228-39 and text accompanying.

any use of a claimed inherent power is inconsistent with this constitutional limitation, and must be struck down, as the audit fee provision in *Wetzler* were struck down.²⁹⁴

If there is an inherent power, to be kept consistent with the case law in New York, it must be limited to cases in which the appropriating body seeks to divest a court of its jurisdiction through its funding decisions. This standard, while much more limited than the holding in *Carroll*,²⁹⁵ harmonizes the holding in *McCoy*²⁹⁶ with the results in *Blyn*²⁹⁷ and *Ascione*.²⁹⁸

Likewise, the failure of the Governor to submit the judiciary's budget "without revision" as required by article VII, section 1,²⁹⁹ will not entitle the judiciary to the funds eliminated by the Governor prior to submission of the budget to the legislature. Such an action is closer to plaintiffs' attempts to invalidate appropriations bills in *Hidley*³⁰⁰ and *Saxton*,³⁰¹ rather than those efforts in *Tremaine*³⁰² and *Wetzler*.³⁰³ If the legislature is dissatisfied with the level of itemization in a budget submitted by the Governor, the legislature's recourse, as *Saxton* holds, is to reject the budget and if the level of itemization is appropriate in the legislature's view, the courts have no business reviewing that judgment.³⁰⁴ Likewise, if the legislature is dissatisfied with the Governor's proposed judiciary budget, the legislature is empowered to reject it and if the legislature is satisfied with the level of judicial funding proposed by the Governor and enacts the Governor's bill, the courts should not invalidate that judgment. If a court were to invalidate an appropriations bill on the basis of a violation of article VII, section 1, it would be

294. See *supra* notes 228-39 and text accompanying.

295. See *supra* notes 77-84 and accompanying text.

296. See *supra* notes 194-99 and accompanying text.

297. See *supra* notes 212-16 and accompanying text.

298. See *supra* notes 212-16 and accompanying text.

299. See *supra* note 263.

300. *Hidley v. Rockefeller*, 28 N.Y.2d 439, 271 N.E.2d 530, 322 N.Y.S.2d 687 (1971); see *supra* notes 240-48 and accompanying text.

301. *Saxton v. Carey*, 44 N.Y.2d 545, 378 N.E.2d 95, 406 N.Y.S.2d 732 (1978); see *supra* notes 249-60 and text accompanying.

302. *People v. Tremaine*, 281 N.Y. 1, 21 N.E.2d 891 (1939); see *supra* notes 222-27 and text accompanying.

303. *New York State Bankers Ass'n, Inc. v. Wetzler*, 81 N.Y.2d 98, 612 N.E.2d 294, 595 N.Y.S.2d 936 (1993); see *supra* notes 228-40 and text accompanying.

304. See *supra* notes 259-60 and text accompanying.

actually reviewing what was enacted, rather than the process, which precedent has prohibited.³⁰⁵

Applying these principles to *Wachtler v. Cuomo*, it appears that the Chief Judge would not have prevailed on his claim for additional operating funds. While the effect of the cut on the judiciary was extreme, it did not divest the Unified Court System³⁰⁶ of any of its jurisdiction. The budgetary cuts did not force any courts to close, but only caused a reallocation of trial parts in the supreme court between civil terms and criminal terms.³⁰⁷ This change that was not mandated, but reflected the choice of the judiciary's administration. In the absence of a state constitutional right to timely prosecution of civil claims,³⁰⁸ there was no deprivation of jurisdiction. Since the judiciary could not show a deprivation of its constitutionally mandated jurisdiction, it would not be entitled to the order for the additional funds that it sought.³⁰⁹

IV. Conclusion

The state of the judicial system in New York is of continuing concern to the bench, the bar, and the public at large as well. That system has been ravaged by chronic underfunding and an exploding docket in the 1980's.³¹⁰ The pressures created by those forces left the Chief Judge with few options when the

305. See *supra* note 240 and accompanying text.

306. N.Y. CONST. art. VI, § 1(a) provides:

There shall be a *unified court system* for the state. The state-wide courts shall consist of the court of appeals, the supreme court including the appellate divisions thereof, the court of claims, the county court, the surrogate's court and the family court, as hereinafter provided. The legislature shall establish in and for the city of New York, as part of the unified court system for the state, a single, city-wide court of civil jurisdiction and a single, city-wide court of criminal jurisdiction, as hereinafter provided, and may upon the request of the mayor and the local legislative body of the city of New York, merge the two courts into one city-wide court of both civil and criminal jurisdiction. The unified court system for the state shall also include the district, town, city and village courts outside the city of New York, as hereinafter provided.

Id. (emphasis added).

307. See *supra* note 9.

308. See *supra* note 34.

309. See *supra* notes 295-98 and text accompanying.

310. See *supra* notes 5-7 and accompanying text.

Governor refused to submit the Unified Court System's budget request for 1991-92 to the legislature "without revision."

In response to the Governor's actions, the Chief Judge chose the avenue designed to generate the most publicity for his cause, suing the other two branches of state government, seeking the courts to act pursuant to their inherent powers. Other judges and courts have been successful in obtaining necessary funds for judicial operations,³¹¹ and the expression of such an inherent power is not necessarily incompatible with the concept of separation of powers.³¹² But the history of attempts to use the doctrine in New York,³¹³ the manner in which the courts of record are funded in this state, and the Court of Appeals' reluctance to disturb the acts of the Governor and the legislature in the budget process³¹⁴ all lead to the conclusion that such a power cannot be expressed by the New York courts.³¹⁵ If there is any remedy for underfunding of the judicial system, it is solely in the ability of the advocates for the system, particularly the bench and the bar, to convince the legislature to fund the judicial system at an appropriate level.

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311. *See supra* notes 17 and 66.

312. *See supra* notes 23-38 and accompanying text.

313. *See supra* notes 122-76, 188-220 and accompanying text.

314. *See supra* notes 221-60 and accompanying text.

315. *See supra* 281-309 and accompanying text.

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