



The Philip Weinberg Forum

Balancing Budget Powers in New York

Panelists:

John M. Caher, Albany Bureau Chief, New York Law Journal
James McGuire, State Supreme Court Judge, Queens County,
and Former Chief Counsel to Governor Pataki

Abe Lackman, President, Commission on Independent Colleges
and Universities, and Former Secretary, New York State Senate
Finance Committee

Frank Mauro, Director of the Fiscal Policy Institute and Former
Secretary, New York Assembly Committee on Ways and Means

Moderator: Brian Stenson

March 23, 2005

Brian Stenson:

I'm Brian Stenson, deputy director of the Rockefeller Institute. I want to welcome everybody here this morning to the latest Weinberg Forum on balancing budget powers in New York. It's good to see some familiar faces. We had a session last week that touched on some of the same issues and I appreciate everybody coming out again. This is the ninth in a series of forums that honor the public service contributions of Philip Weinberg. He was appointments officer to Governor Rockefeller and Wilson and an

administrative counsel to Assembly Speaker Duryea. And like a lot of people with that background, he may have been conflicted about the implications of the court cases we are discussing today. We've tried to develop a real eclectic mix of issues to discuss at these forums. We've held forums on government reform, running a hospital, and Joe Persico's book about the last day of World War I. If you have any suggestions or topics on future forums, please see Michael Cooper or check our website at <http://www.rockinst.org/> where you can find the Weinberg Forums and you can [e-mail him](#). Our website also contains a complete list of scheduled forums and transcripts of previous sessions.



We have an exciting topic today for insiders and observers of Albany. We have a really well qualified panel to discuss this issue. I'll start from the far left with John Caher from the *New York Law Journal*. He'll explain the court cases in detail so everyone here has the same basic knowledge. John focuses

on the Court of Appeals for the *New York Law Journal* and he's won several awards from the ABA and the New York Bar Association. Following John is an overview from three experts who can talk about the practical implications of court cases. First we have Judge James McGuire, who is a Supreme Court judge from Queens and was previously counsel to Governor Pataki. He graduated from Cornell Law School. Abe Lackman is now president of the Commission of Independent Colleges and Universities and was previously secretary to the Senate Finance Committee. Frank Mauro is executive director of the Fiscal Policy Institute. They focus on New York State tax, budget, and economic issues. He was previously secretary to the Assembly Ways and Means Committee.

We will have approximately 10 to 15 minutes of an introduction and an overview from John Caher. Then we will ask panelists to limit their initial remarks to about 10 minutes each. Then we will have some time for questions and answers afterwards.

John Caher:

Thanks, Brian. When Dick Nathan invited me to take part in this and told me who was going to be on the panel and who was going to be in the audience, I thought, “I know less about the topic than anybody in the room.” I wasn’t being humble, just honest. I think the best is yet to come. While I don’t know very much about executive budgeting other than what I’ve read in a whole bunch of court decisions, I am familiar with the Court of Appeals. I think I’d say of the 1,500 or so decisions I’ve read over the years, I don’t know if I’ve ever seen one with such profound implications for the long-term manner in which the state is governed. It’s really an extraordinary one.

Just a brief synopsis of where we are and how we got there. Some of this may be old hat for some of you but hopefully we can lay the groundwork for what follows. In 1927, the citizens of the state amended the Constitution to institute what is called the “executive budgeting system.” That was kind of a sea change in the way New York was governed and the way the budget was put together. What it did was impose new responsibilities on the governor. The rationale was that the framers wanted to ensure that the one player in this process who was accountable to voters statewide, as opposed to legislators who are accountable to the voters in their district, had primary responsibility for the budget. In order to impose that responsibility, it also gave the governor what they thought was the appropriate amount of power to implement and carry forth his responsibilities. The degree of that power has been the matter of much interpretation and much controversy. We have Court of Appeals decisions going back pretty much when it started this, going back about 75 years. The process and the decisions have evolved over the decades to what we might call an uneasy truce, and maybe now less so as a result of what is going on.

The most recent case in the issue we are discussing today was decided just last December. I’m sure Judge McGuire, Frank, and Abe will give you a good idea of what those decisions mean in the real world of the Legislature, if that is the real world. Just allow me a moment to give a little synopsis of what the court did. There were two cases: *Pataki v. Assembly* and *Pataki v. Silver*. The facts and circumstances are a little bit

different, but the core nugget issue is really the same. It has to do with powers of the executive vis-à-vis the Legislature. In a nutshell, this is what the court said in its divided decision. It said that the governor and the Legislature have distinct constitutional roles in the budget process. The governor is the constructor or the architect of the budget. The Legislature is the critic. Under the Constitution, the Legislature has budgetary authority to only approve an appropriation in its entirety; delete an appropriation in its entirety; reduce the amount of an appropriation without changing the when, how, and where conditions on how that money is to be spent; or it can add a new separate item of appropriation subject to gubernatorial veto. What it can't do is substitute its judgment for the governor. It cannot delete the governor's appropriation for X, vote that down, and then conjure up its own version and put it in place.



As long as legislation is related to the appropriation, the governor can condition the appropriation on the legislation. In other words, as I understand it, the governor could for instance add language to a Medicaid appropriation bill. He could appropriate X number of dollars and put a line in there saying, "None of these dollars are to be used for abortion." The Legislature's option then would be to accept the appropriation with the limiting language — or reject the entire appropriation and shut down Medicaid. Those are the only options. It can't change the governor's language. It can't reject the governor's bill and replace it with one of its own making. That leaves the Legislature with the power to create chaos, to do nothing — to refuse to pass the governor's budget, to leave things hanging, and hopefully induce him by political pressure to negotiate. That's really the check and balance on the governor's power.

The decision itself was extremely unusual in my mind and my experience. There was no majority opinion, just a prevailing plurality opinion, a two-judge concurrence, and a two-judge dissent. The Supreme Court issues mainly plurality opinions. With the Court of Appeals, I get to write the word “plurality” about once a year, if that! The main opinion was written by Judge Robert Smith and joined by Judge Graffeo and Susan Phillips Read, all appointees of Governor Pataki. They upheld the governor in all-important respects and stressed that in 1927 a constitutional provision was drafted specifically to make the governor the “constructor” of the budget. They really hammered on that point. He is the “constructor.” He makes the budget. Judge Smith disputes the notion that the executive budgeting system and the governor’s use of that system somehow deprived the Legislature of its constitutional power. He stressed that the ruling leaves legislators’ constitutional prerogatives intact while preserving the role of the governor as the constructor of the budget. The plurality acknowledged that the governor’s power to originate appropriation bills is, as they said, “susceptible to abuse.” Theoretically anyhow, he could mislabel bills that really aren’t budgetary, calling them appropriation bills, and dictate policy. However, the court makes no effort to define that line between appropriations and policy. In fact, it explicitly leaves for another day the question of what limits there are on the language the governor could put in an appropriation bill. The main opinion implies I think that there is a limit, but it makes no attempt whatsoever to define it.

That was followed by a two-judge concurrence: Judge Rosenblatt and Judge George Bundy Smith. They agreed that the Legislature violated the “no-alteration” clause when it edited the governor’s budget bill. It’s one of the issues that brought one of these cases to the Court of Appeals. They agreed with the plurality that the governor did not go beyond his constitutional limits in limiting language in his appropriation bills. But they said the court should have made an effort to draw a line and provide some guidance to the governor and the Legislature over his budgetary powers. Judge Rosenblatt argued the court would be shirking its duty if it “punted and simply announced that if and when a case ever arises in which the executive branch goes too far, perhaps we will let you know.” But that’s pretty much what they did.

They even adopted a standard where “the more a provision affects the structural organization of government, the more it intrudes in the Legislature’s realm.” But that doesn’t really tell us much. A test for that definition would be difficult to impose, I would think.

There is also a dissent. Two judges dissented, led by the chief judge in which the chief judge and Judge Ciparick were especially concerned with the notion that the governor could rewrite substantive law through an appropriation bill. In their minds, the governor — I don’t know if they said it so much but I think they implied — that the governor’s role is not really the constructor of the budget, as the rest of the court agreed, but the agenda setter. There is a clear, or semi-clear, line that the governor may not cross and, unlike Judge Rosenblatt and the rest of the court, they said the governor crossed it here.

Where that leaves us, I guess, is the question. It is a big question right now. The process is ongoing right at this moment. Clearly, the governor has extraordinary power. Clearly, the governor has extraordinary responsibility. Clearly, the Legislature’s role in all this has been diminished, at least in its mind. The question of how this is played out and will play out is a perfect topic for the rest of the speakers. Thank you.

James McGuire:

The governor has never claimed any ability to dictate policy. What his position has been is that he has the constitutional right to propose policy with respect to the budget and it’s the Legislature’s responsibility to say yes or no. That’s pretty much under the legislative budgeting as a reversal of the roles. Under legislative budgeting, the Legislature proposed the terms and conditions. They proposed the policies and the governor was the one who could say only “yes” or “no.” The governor had no power to directly change that. All he could do was veto. What the framers did, because they wanted the governor to have strong powers because they wanted him to be held accountable for his fiscal policies, they reversed those roles. Under executive budgeting, the key difference is who’s got the powers. Not so much what the powers are but who has them. Under executive budgeting,

the governor, not the Legislature, is the one who has what we've always thought of as a legislative power, the power to write the budget bills, the power to author the terms and conditions and propose the amounts of the appropriations. It was a transfer by the people when they passed this amendment of powers that had been previously legislative in nature from the Legislature to the governor.

We all would agree I'm sure that the power to author bills and to submit them into the Legislature is a legislative power. That's one that the governor got. The governor is a super-legislator because no individual legislator in the Legislature has the right under the Constitution to introduce a bill. But the governor does have that right. He has other legislative powers that were given to him under this constitutional amendment. But for present purposes let's stop with that. He has the power to write, to propose the terms and conditions of appropriations. Now, under this reversal, it's the Legislature only that has the power to say yes or no. So it's the Legislature that can't change the terms and conditions. There's nothing unorthodox or unprecedented or extraordinary about the facts of, in the budget process, one of the two branches not having the ability to change the terms and conditions proposed by the other. It's just the question is: Which of the two branches is in that position? Under executive budgeting, it's the Legislature that's now in that position. It can say yea or nay. In other words, it has the power to veto that the governor used to have. This is part of that transfer of powers. The governor got legislative powers and, in a sense, the Legislature got executive powers because they are in a position where at the end of the day if they don't like a particular proposed item of appropriation they can say "no." They strike it, which is in effect a veto. If they like it then they say "yes" and they enact it.



There have been those who have urged, post-decision by the Court of Appeals, that this is some extraordinary, unprecedented transfer of power from the court to the governor. First, two points. One is I don't think that it is all that unprecedented and we'll get to that in a second. But two, this is precisely what the framers of Article 7 intended. These were very bright people. To me it defies all credulity to suppose that the giant minds in the early part of the last century — Charles Evans Hughes, Stimpson, Elihu Root, among others — who proposed these provisions didn't know exactly what they were doing. But back to the point that this is not an unprecedented amount of power. When push comes to shove, the governor's principal power here is conferred by the No Alteration rule. The rule that says to the Legislature, "You can't change what the governor proposes." What that does is it gives the New York governor constitutionally the same amount of power that governors in legislative budgeting states have when they can prevent an override. The governor commonly has in the legislative budgeting states, I think in virtually all of them, a line item veto power. If that governor has the ability in just one of the Houses of that Legislature to prevent an override that governor is in a position to basically block. That governor is able to say to the Legislature, "I don't like your terms and conditions of a particular appropriation — school aid, Medicaid, or whatever — and you have to deal with me as an equal partner if we're going to move forward and have some consensus compromise on what this appropriation is going to be."

I think the key point here is that the title of this is "balance of powers," but what the present budget scheme does is precisely confer equal powers on both branches. Neither branch, neither the Legislature nor the executive, under Article 7 can act without the consent of the other. So I don't think it's unprecedented. We have to look to legislative budgeting states where there is the ability to prevent an override and that's exactly what we have. This whole notion of a complete balancing of powers was essential to the whole scheme because under legislative budgeting the Legislature really had the power. The governor could veto but he could be overridden. They were concerned about decades of legislative profligacy where there was logrolling. Sorry Abe, I think part of what legislatures do is spend money. I'm sure Abe would agree, legislators in individual districts don't want to come home and answer questions from their constituents about,

“How come Senator Jones up there got \$10 million for the firehouses and you didn’t get \$10 million?” That’s the kind of pressures that they’re under to spend money. The restraint on that now is that neither branch can act without the consent of the other.

John mentioned that there is a concurring opinion by Judge Rosenblatt, which posits some limits on what the governor can propose in his terms and conditions. I think Judge Rosenblatt would concede it’s a vague test. We don’t really know what exactly he has in mind and that certainly is going to be something that is going to be explored in the future. Whether there will be four members of the court who will agree that there are those kind of limits or not, I don’t know what the answer to that question is. It will be very interesting to see how that plays out because one, it is not at all obvious to me how the court will go about defining what those limits are. Any limits that they do impose will necessarily curtail the governor’s ability to propose budgets in the future that are responsive to the needs of the time. The second point that I want to make is that it is not obvious to me at all why the judiciary needs to create some rules here. Why does the Legislature need the judiciary’s help? The Legislature has a perfect and complete remedy all its own. If it doesn’t like something that the governor proposes, all it has to do is to say no. So why do we need the courts to put some constraints and say, “The governor can propose to notwithstanding two laws in an item of appropriation but not three”? I don’t know what they’re going to do. But the point is it’s not at all clear that there’s any need for the judiciary to have these rules because the Legislature can just strike an item of appropriation any time it doesn’t like it. Other than that, I’ll just snipe at Abe.

Abe Lackman:

Jim sniping at me has been a long tradition. I’ve a personal view, which is what I’m going to express. I’ve left the Legislature and now I work as an advocate and represent independent higher education. This is my personal view. My personal view is that I do think that the court decision was unprecedented. I’ll try to explain why I think it was unprecedented. Everybody accepts the fact that under the Constitution it’s an executive budget. But the tradition that had evolved, and I’ll use the word “evolve” over those 50 or 60 or 70 years, is that we used to have appropriations, which were fairly simple and

clean. Then we had Article 7 language, which was the terms and conditions. What's evolved and I'm not going to say that it's the governor who is at fault because in many cases the Legislature set things into motion where in the political process the key was to take hostages. This process in Albany has been fundamentally to take hostages. You try to trap the other side. Either the two Houses trying to trap the governor or the governor tries to trap the Legislature in terms of where in a decision-making process it becomes all or nothing. When we used to have simple appropriations and Article 7 language, you could allow government to go forward on the simple appropriation and then fight in the Article 7 what I would call permanent law and you didn't have that type of hostage taking.

I probably can go back historically, it was the Legislature who really started the hostage taking in the Article 7 bill, which turned out to have 90 or 100 permanent law changes. It may have had 89 of them that the governor liked, and then had one, which the governor absolutely despised but he was faced with the decision. And this is going back prior to Governor Pataki, where that governor was faced with the decision that in order to get the 89 he liked he had to accept the one he absolutely despised. Ed Reinfurt is here and we joked about it. That process became an Article 7 bill that used to be known as the "Big Ugly." That was the first in my opinion looking at it historically when you start to get into using the budget for hostage taking.

The executive a number of years ago made a fundamental change. The fundamental change in my opinion that they did was that they started to take the permanent law changes or the Article 7 and actually put it into the appropriation bill copy. So then they in effect said to the Legislature, "Either you accept this permanent law change that I want or we shut the agency down. That is your only choice." That was a fundamental shift in the budget-making process. One of the examples of this was a number of years ago the current governor proposed to merge the State Police with the Department of Corrections. They actually had that language in the appropriation bill copy. Unless the governor backed away from that, he was in effect saying to the two Houses, "Either we merge the State Police with the Department of Corrections or we shut

down the prisons.” That was the only choice the Legislature had. Under the most recent court decision, the Legislature has no other choice. That again goes back to the notion of what I would call hostage taking and there has been a long tradition of that hostage taking. This is exactly the point that Judge Kaye focused in on, and it is a relatively new phenomenon, the notion of the governor being allowed to move permanent law change en masse into the appropriation process. I know Jim was saying, “Well the Legislature always has the ability to say no,” but you have to understand that the ability to say no is to shut government down. And that’s a very tough decision. So in effect the Legislature is forced to accept permanent law changes that it did not like and if they don’t accept it they feel the onus is on them in terms of shutting government down.



I’d like to try to bring that to where we are today, at least in terms of my view of where we are today. In the next 48 hours or 96 hours, we will know whether the two Houses have reached an agreement on the budget. In terms of their thinking, they seem to be moving towards an agreement, but there are some critical issues that they really haven’t addressed yet both in school aid shares and the health care issue. If they do reach an agreement, I don’t know what’s going to happen based on the court decision because they cannot pass that agreement. There are major areas still in the budget, as I understand it, particularly in health care, school aid, and in the TANF block grant, where they have to say to the governor, “In order to implement this agreement you have to resubmit your bill. You have to start to disentangle the permanent law changes to the appropriation.” The first step is whether the two Houses can actually reach an agreement. The second step, which will probably happen if they do reach an agreement in the next four or five days, will be a request to the governor to resubmit the bills. If the governor says no, we are at a total standstill. The system will shut down. We’ll probably get back to the emergency bills week by week.

What will be interesting is if they can reach an agreement. This will be a legal issue of whether than can resubmit. One of the difficulties of resubmitting is in the resubmittal process. The governor as I understand it loses the ability to veto. So I think there is going to be an attempt if they reach an agreement to allow a resubmittal. But I'm not certain legally it can be done and still preserve the governor's ability to veto.

I want to talk a little bit about the law of unintended consequences. I'm going to talk now about higher ed because I'm watching how this process plays out. The big fight in higher ed is not an issue that involves the private colleges. I'm going to try to bring the consequences of this court decision to something that I know fairly well. The big fight in higher ed right now involves SUNY's request to index tuition, a permanent law change that will fundamentally change the way SUNY and CUNY operate. The governor and particularly SUNY have asked that tuition be indexed, in effect, forever. This is a permanent law change. One of the key issues for the Legislature is that both Houses, more the Senate than the Assembly, but the Assembly is seriously entertaining the notion of indexing, to have a strong maintenance of effort provision. Meaning that if they do index tuition for SUNY, the state will not pull back its support for public higher education. In yesterday's conference committee, there was a very, I thought, fairly high-level conversation about the problems with indexing and the fundamental problem is, particularly in the Assembly but the Senate also recognizes the issue, if we pass a permanent law change that does indexing and has a strong maintenance of effort clause, next year or two years down the road the governor can come back in the appropriation process, pull out the maintenance of effort clause, and the Legislature then is stuck with either giving the governor the victory on the maintenance of effort clause or shutting higher ed down. The main argument that I heard yesterday in conference committee of why they do not want to do indexing all hinged on how, down the road, this court decision will play out.

So I'm saying this is a court decision that in my opinion was unprecedented. It is going to set into motion a number of issues in a lot of programmatic areas where you will

see the law of unintended consequences. With that I'm going to turn it over to Frank for yet another view.

Frank Mauro:

Good morning. This is a messy issue. I think the court decision for me was also strange, besides the reason that John gave that there was no majority opinion. That it was a 3 to 2 to 2 decision. It was also strange to me in that the plurality opinion repeatedly referred to a constitutional proposal, which was not adopted. It referred to the 1915 Constitutional Convention's recommendation for an executive budget system and it quoted repeatedly from the justification that was in the report of the 1915 Constitutional Convention. Why is that important? I mention it from a personal perspective. When that decision came out I kept getting calls from people saying, "Legislators say they can't add anything to the budget because of this decision." That's crazy. The Constitution clearly says that the Legislature can't alter an appropriations bill submitted by the governor except to strike out or reduce items therein. But it may add their two items of appropriation provided that such additions are stated separately and distinctly from the original items of the bill.

Then you go and look at the decision. On the first page of the decision, Judge Smith in his majority decision doesn't quote that provision, which is in the current Constitution, but actually quotes the line, which is from the 1915 constitutional provision, which says, "The Legislature may not alter an appropriations bill submitted by the governor except to strike out or reduce items therein." The 1915 proposal didn't even give the Legislature the ability to add items. All they could do was say yes or no or less, but they couldn't add things. This to me was quite an amazing victory by the constructors to use the courts decision from the 1915 report. Judge Kaye in her dissent counts the number of times that the plurality opinion repeats that phrase "the constructor of the budget," which comes from the 1915 report. Not from anything that actually happened.

In 1927, when the Constitution was amended, as John pointed out, it wasn't recommended by a convention. It was recommended by the Legislature to the voters and it included the language that the Legislature could add things.

The next difference in history, which the court did not focus on, is that the current Constitution includes the following language, which leaves open the possibility of including all of these changes in permanent law that Abe was talking about. It says, “At the time of submitting the budget to the Legislature, the governor shall submit a bill or bills containing all the proposed appropriations and reappropriations included in the budget and the proposed legislation of any recommended therein.” You should read this. This is a sentence-diagramming question of whether or not it’s two separate things. But the interesting thing is neither the 1915 Constitutional Convention nor the actual 1927 constitutional provision, which created the executive budget for the first time, included the tail on that sentence, “and the proposed legislation of any recommended therein.” That was not added until the 1938 Constitutional Convention. Until then, the only other legislation that the 1927 constitutional recommendation referred to was the ability to do tax legislation to provide sufficient money for the support of government, but that was expanded by the 1938 convention. The proponents of this rely on an anti-rider clause to the Constitution, which was not part of the executive budget article when it was enacted. It was part of the legislative article and had been in the Constitution since 1894 to deal with a logrolling issue that basically said that the Legislature could not include in any multiple appropriations bill any language that didn’t relate to the appropriation. That predated the executive budget article. It was not changed in 1927 by the executive budget article and was not brought into the executive budget article until 1938. This is being used to say, “This is what the founders meant when they were defining what the governor could include in the appropriations bill.”

I think the decision was in large extent based on mixed history. They could’ve reached the same decision anyway, but I think the strength of the decision was based on this repeated quoting from the documents of the 1915 Constitutional Convention in terms of the rhetoric of the power of the executive. I think that the system that was being replaced deserved to be replaced. I think in terms of how Jim phrased this that it went from a system where the governor had a veto to a system where the Legislature had a veto. That’s a reasonable way to look at it. But that isn’t the way it should be. So I think that the implication for where we are now is this decision creates a situation, which we do

not think of as a separation of powers, balance of power and democracy. When I worked in the legislative process, we thought we could change the appropriations language. The governor thought we could change it and he would veto some of the changes that we made every year. But in 1993, there was a decision, not initiated by the governor but initiated by a commercial bank and the New York Bankers Association, challenging a provision the Legislature had added to an appropriations bill in either 1990 or 1991 requiring the banks to pay for their tax audits. Banks didn't like that. They couldn't say it was unfair so they challenged it based on this ability to change the budget. The governor was actually on the Legislature's side then and the state in this case said, "Well, the governor approved this so it indicates that he's for it." The court said, "If the governor was for it, he had to resubmit it." Their line was, "just because something could have been done legally doesn't mean that it was done legally." So that's where the resubmission concept was developed, which has worked off and on in years since then.



I think the Constitution has to be amended to create a situation, which clarifies the punctuation of the 1938 requirement in 1938 language, in terms of the other legislation recommended in the budget. I think it's inconsistent in the Constitution to allow the governor to change permanent law. Let's take education.

What is the provision on which the Court of Appeals decision in the Campaign for Fiscal Equity (CFE) case is based? It's a provision of the Constitution that says, "the Legislature shall provide for a system of free common schools wherein all the children of the state may be educated." So let's say, we're not at that point; we had a Legislature that did that, that provided for a solution to the CFE case. And it was a multiyear phase-in solution like the special Masters recommended last November. Let's say they did that, that the Legislature actually this summer passes a law which says over the next three or four or five years we're going to phase-in the following systematic change to the system to

comply with our constitutional responsibility to provide for a system of free common schools. But then the following year, the governor could, if this court decision is allowed to stand and the Constitution isn't amended, include language in the appropriations bill undoing what the Legislature did.

There are other provisions in the Constitution like that. "The Legislature shall provide for the aid and care of the needy." Now this doesn't mean that the governor doesn't have a role in that? The governor does have a role in the legislative process but the Legislature can change the law over the governor's veto if it wants to. So the Legislature if it wanted to could provide for a legitimate solution to the Campaign for Fiscal Equity lawsuit. But under this other decision by the Court of Appeals, the governor could then come along the following year and undo that. I don't think that is the right balance of power. I think the Legislature needs to go forward with constitutional amendments to right this ship. Thank you.

James McGuire:

I think Frank fundamentally doesn't like one thing, which is that the framers of the Constitution decided that for fiscal prudence in this state we have to trust the governor more than we trust the Legislature. The governor cannot undo. All he can do is propose. Frank and I have had this debate in letters. There is a rhetorical level, which is, "Oh, the governor can change permanent law." He can't. He can only propose to do it. That's a power that was given to him in the Constitution by people who trusted the governor over the Legislature. That's all he has. He has the power to propose it. The Legislature has an equal voice. They can say either yes or no.

Abe talks about how all they can do is shut down government. But that's a false dilemma that they're impaling themselves on. It's not that. The alternative is to negotiate. Why is it that if the governor proposes something that the Legislature doesn't like all they can do is shut down government? Under legislative budgeting, when the Legislature proposed things all the governor could do was veto, i.e., shut down government. It wasn't

a bad thing then. Why is it a bad thing now when it's the Legislature who in effect can be compelled to negotiate?

This talk about permanent law I find really kind of interesting. I don't think the label, the term, is really informative. It doesn't really help the analysis in any way. What is permanent law? When we're talking about fiscal measures, provisions to spend money or raise money, they're good for one year. They're only as good as the next legislative session with the Legislature that pumps the money in the way it did the prior year or not. No Legislature is bound from one year to the next. They're not bound from one week to the next by the so-called provisions of permanent law. The Legislature can change them whenever they want. So what is this mystical significance of the notion of permanent law? Again, all the governor can do is propose to change it. Why should it be that these provisions of permanent law, which don't bind the Legislature, should somehow bind the governor? So that he can't even propose to change them. That makes no sense. That means that if we're in a period where the state is flush with cash and there are some pressing economic needs and the Legislature and the governor at that time agree to pass a provision of permanent law that spends money for these worthy causes — be it education or Medicaid or whatever — that when the economy contracts in the future the governor who is then in power cannot recognize that reality and propose to change the so-called permanent law? I really think that absolutely does not make any sense at all, to think that there should be those kinds of constraints on the governor. I really have not heard anybody articulate any reasonable explanation of why the governor should not be able to do that. We all tend to think it's the Legislature that has legislative power. Yes, that's true. But our Constitution unquestionably took legislative powers, the powers to propose the terms and conditions of appropriations, which is laden with policy decisions — how are you going to spend, how much, what ways, what are the terms and conditions — they transferred that from the Legislature to the governor. The Legislature can't have any claim on these powers other than what the Constitution gives them. The Legislature had it. The framers said in effect, "You squandered it and now we're giving this power to the governor." The result of that is there is now an even balance of powers.

Neither branch can act without the consent of the other, which again I repeat is not an unprecedented power, precisely because in the legislative budgeting states whenever a governor has enough political support in one area to prevent an override, he's in the exact same position. That governor can say, "I want to change permanent law. I'm not going to approve this appropriation for education or whatever until you change the terms and conditions. If you don't like it, I'm prepared to negotiate with you, but don't try to override my veto because I have support in the one house." It's the same. We haven't seen governments shutting down all over the nation. We haven't had a huge crisis. We never had it in New York. We've had some additional crisis now, but we haven't had government shutting down. We haven't had periods where dollars haven't gone out for education at all. That's because we're talking about political actors and there are powerful pressures on them to come to compromise and to negotiate.

Frank mentioned the 1915 versus 1927 constitutions. It's true that there are some differences in the text but with respect to Frank's point of view, the change between the 1915 proposal and the 1927 proposal is completely irrelevant to the issue that we're talking about. The no-alteration clause effectively did not change. The Legislature was given the power to propose additional spending, to propose to spend money on additional ways and matters that weren't contemplated by the governor. But that doesn't change the fundamental question. The fundamental question is: Does the Legislature have the power to rewrite/alter/modify the terms and conditions of the governor's proposed appropriations? There's not a hint or any logic to the notion that that prohibition in the 1915 text was altered in the slightest by the 1927 text. Certainly, a majority of the court accepted that. In fact, five of the seven accepted that. It's true that there was a provision that said that the governor can propose legislation but the history of that makes it absolutely clear that the purpose of that was for the governor to be able to put revenue-raising bills into the Legislature. The revenue side was every bit as important as the expenditure side.

Abe Lackman:

I'm going to comment on one point again, which I think is a fundamental difference of opinion. The executive changed the whole process in the mid-1990s. In my mind there's no ambiguity on that. Prior to the mid-1990s, permanent law changes were in the Article 7 bill and the appropriation was fairly simple. I'll use an example that John Caher used. In the past, if the governor wanted to change the policy on Medicaid abortion or the Legislature wanted to change the policy on Medicaid abortion that was in a separate Article 7 bill. The Legislature didn't have to act on it, but it could pass the whole Medicaid appropriation of \$50 billion and allow that money to flow. Under this court decision, and there have been some examples, the governor can now propose that change in the appropriation bill copy, which is a fundamental break with tradition. The Legislature then has only one of two choices — accept the governor's language or it doesn't pass any Medicaid appropriation or negotiate. But that change was unprecedented. I know Jim wants to try to argue that there has not been a fundamental break, but until the mid-1990s no governor was putting permanent law changes directly into the appropriation bill copy. That, to me, is a very factual point. It was a real change and I think it was that change more than anything else that led to the lawsuits. Now, the Legislature lost on those lawsuits, but to argue that it wasn't a fundamental change in process, I would make the argument that it's just not correct.

James McGuire:

In fact, I don't make that argument, Abe. I don't make the argument there wasn't a fundamental change in process in the 1990s. I accept that. I think it is true. I don't think it is the case, and I can cite specifics, that prior to the mid-1990s, governors never proposed a change of so-called permanent law in their appropriation bills. They did. But I think that Abe's point, and the larger point that he's making, which is one I'll accept, is that the incidence of that, how common it was, changed dramatically in the 1990s and it changed very dramatically primarily in the Pataki administration. I guess my point is the fact that prior governors did not go the full extent of their constitutional powers. From that fact I don't know what we can conclude. Maybe prior governors weren't sure or were uncertain

about what their powers were. Maybe they were uncertain that if they went further with respect to their powers and lost a court case, they would end up with even less powers. Maybe the Legislature didn't want to test it because they were afraid of what the outcome would be. I think there were a lot of reasons why, starting in the mid-1990s, governors started to do this. I think a lot of it has to do with the Bankers decision, which is not something either the Legislature or the governor in effect precipitated. But the decision by the Court of Appeals in the Bankers case where they said a provision that was added by the Legislature to one of the governor's appropriations that added a fee, a tax, was unconstitutional because the Legislature had added it. It had enormous impact. A lot of the uncertainty that the executive had about what his powers were was completely eliminated. In effect that it was then free to go further with some considerable comfort that the Court of Appeals was going to end up agreeing with them, which was in fact what happened.

Abe Lackman:

The other part of that, which I think Frank talked about it, is the Legislature always believed that if they reached an agreement on an overall budget they could have the ability to pass it. I think what we're now going to potentially see in the next week is that the Legislature no longer has that ability. I believe the Legislature, if they reach an agreement, which is still an open question, will get to a critical point where they can't pass their agreement unless the governor concurs. And that is a fundamental shift. One can argue whether that is going back to a balance of power or whether it's a change of power but it is a fundamental shift. I think by next Monday or Tuesday, if the Legislature agrees, they are going to go to the executive and say, "We have an agreement. We'd like you to resubmit or give us a platform that we can pass it." If the governor says no that will clearly state in a very public way the Legislature cannot pass their own agreement.

James McGuire:

I haven't been following what's been going on. Are you talking about an agreement that the Legislature would present, i.e., between the two Houses and say that....

Abe Lackman:

Yes, the public comment....

James McGuire:

...and say to the governor, "We have agreed. You haven't been involved in our discussions. But we have agreed. So here's our agreement and just do whatever we want you to do to enact it"?

Abe Lackman:

That's changed I think.

James McGuire:

That won't happen.

Abe Lackman:

It's in prior years that the two Houses agreed. They believed that they had the power to actually pass that agreement and give it to the governor. I believe under their current condition they don't believe they have that power anymore.

James McGuire:

You never want to underestimate the ingenuity of lawyers and the ability to come up with some argument to the contrary.

Abe Lackman:

I always never underestimate that possibility.

James McGuire:

It's certainly not obvious to me how it could possibly be the case if the Legislature came to an agreement between the two Houses as to what they would like to do with the budget the governor proposed, which the Constitution says they can only do certain things with. They don't have any legal right. They can ask the governor if he will agree. I suppose what happened in those situations is what has happened in the past, people then start to negotiate. That would reflect the kind of crystallization of the Legislature's view about how the money would be spent. They figured it out among themselves with certain political purposes. But they then move forward with that document and then the two branches will sit down and negotiate over a final resolution, which would constitutionally entail the governor resubmitting it.

Frank Mauro:

To go back to the big picture, I think that Jim has posited a false dichotomy that we have a choice between the pre-1927 system and the post-December 2004 system. Maybe, let's say the post-2004 system is better than the pre-1927 system. It might be, but I don't think it is. But let's say it is. That doesn't mean that it's right or that it's the system we have to live with. What is going on now was wondered about at the 1915 Convention and they didn't believe it would happen. Let me read from remarks by one of the delegates in a very short debate that occurred on the floor of the Constitutional Convention on this. It says, "That was my opinion when I came to this convention but I was shown by some of the delegates how a prohibition of all initiative upon the Legislature would make it possible for a governor elected we shall say in 1914 to nullify the laws of the state passed a year before he became governor by refusing to initiate appropriations to execute them. This of course would put him under the ban of failure to execute the laws and he might be impeached. But we cannot write into the Constitution a provision, which would make it possible for the executive to nullify the laws of the state passed by the Legislature and signed by another governor." So I don't think they were envisioning what we have today. Maybe they were, or maybe they weren't, but I think that this would indicate to me they

weren't. And I don't think we should feel that we have to live with the situation we have now that this system has to be recalibrated.

James McGuire:

We certainly shouldn't feel like we have to live with it. We all obviously have the ability to change it. I certainly agree that because we have the system we have now, as interpreted by the Court of Appeals, it doesn't mean that it is the best or the wisest one. I think it's important to try to get a sense of exactly what the thinking was of the framers because I don't think you can criticize the current system unless you have an adequate grasp of what they were trying to do and why they were trying to do it. Their fundamental insight or their belief was that the state's money would not be spent wisely unless one person, who would lie awake at night, has the power and the responsibility over the state's fiscal policies. That's why they gave the governor strong powers, recognizing that if there was financial extravagance, the people could blame one person and should be able to blame one person. I'm not familiar with the particular individual that Frank was quoting, but suffice to say quoting one delegate from a convention really is not particularly informative or illuminating. There are a lot of people who played a role in this and I think that it's very, very difficult to accept the notion that they did not know exactly what they were doing when they said, "Governor, you now have the power to propose the terms and conditions. And Legislature, you can't change it." To think that they didn't know what they were doing when they did that is, I think, mind-boggling.

Again, I want to make one other point here. Frank again spoke about this delegate talking about the governor having the power to nullify. You're being asked to accept something that's not true. It's what's constantly being said, that the governor is claiming the power to unilaterally change, to nullify. That's not the case. He has been given the power to propose changes in law. That's a big difference.

James Lytle:

I'm with Manatt, Phelps and Phillips. Just to get back to that Medicaid example that John started with, there are at least three things the Legislature could do if the governor proposed that appropriation. They could reject it outright and theoretically shut down the Medicaid program. They could negotiate. They could accept it. I think there's a fourth. One of the things that have been interesting is to see the Governor's Counsels Office now preparing memoranda on all the things that the Legislature in fact can do in response to the budget. To some extent the Legislature is saying, "Our hands are tied." Wouldn't the Legislature be able constitutionally to adopt and pass the appropriation as drafted and then add an appropriation that says, "Notwithstanding the forgoing," which is a favorite line of the Budget Commission isn't it? "The Legislature hereby appropriates whatever millions of dollars necessary to fund Medicaid apportionments."

James McGuire:

One, I'm not really up to speed on what's going on with particular proposals now. I haven't read these memos. I just had them printed out the other day and I haven't had the opportunity to read them. I can answer your question this way, I think. If the governor proposes in Medicaid or elsewhere a certain sum of money and says spend it this way and that way and you can't spend it for purpose X or for purpose Y or for purpose Z, the Legislature can't go in and change that. They could strike it out entirely. They could negotiate and come up with a different one. But if the question is can they pass it and then propose a law that says, "We're going to propose \$10 million to be spent on Medicaid for this particular purpose," I think there is a very strong argument that they can do that. We'll try to simplify. The governor says, "We're going to spend all this money on Medicaid but no money for this particular purpose." Say that this Medicaid money is federal money, for example, that doesn't mean the Legislature can't tap into general fund moneys and say, "We're going to propose to spend \$10 million for this particular purpose." Those are some of the unanswered questions here.

Abe Lackman:

I'd like to comment on that. It's going to again lead to a law of unintended consequences because I'm dealing with that in the higher ed issue where I understand that potential contract. You have a capital program worth, let's say, \$400 million and it has language in it that the Legislature doesn't like. One of the alternatives is you don't go in and touch that appropriation and that language at all. You then add another \$400 million on top of that \$400 million with language in that appropriation that undoes the language in the first appropriation. You might wind up getting \$800 million when that was never anybody's intent. That possibility really exists.

James McGuire:

I think it in part depends upon what the governor's appropriation is. If the governor's appropriation purports to be an expenditure of a defined pot of money like federal money for specific purposes, the Legislature can't change that. But the Legislature could once it enacted that, once it was going to draw on other revenue sources, it could spend money in ways that were not authorized by the appropriation that they had.

Abe Lackman:

Then the question is just from your view on the legal, I think this is what Jim is saying, could you have this appropriation with language the Legislature doesn't like. There is an interpretation that the Legislature can add a separate appropriation and in that separate appropriation, not touching the governor's original appropriation, have new language that undoes the language in Appropriation A.

James McGuire:

If I understand the hypothetical, the answer to that is no. What happened in the *Silver v. Pataki* cases there were particular appropriations the Legislature didn't like. They struck them out of the budget and then they purported to pass a number of single-purpose

appropriation bills that rewrote and changed it. The Court of Appeals said, “You can’t do it directly in the appropriation bills that the governor proposes, nor can you do it indirectly by the device of including these changes in so-called single-purpose appropriation bills.”

Anne Erickson:



I’m with the Greater Upstate Law Project. I seem to be hearing two different things because they did talk about the no-alteration. You can’t do, through another means, what you’re not allowed to do through the first means. But you initially said that in fact they could pass the appropriation and then pass another appropriation

that says, “By the way, we’re going to not withstand what we just said.”

James McGuire:

Again, we can talk about these but this is all highly nuanced and it’s going to depend upon the specific language. All I’m saying is that if the governor proposed and said, “I want to spend \$25 million of general fund money on this particular purpose for some medical program for A, B, and C, but not D. I don’t want to spend any of this \$25 million for D because I don’t think that D is really a wise use of our money.” The Legislature can pass that and then they can say, “You know, the governor made the decision that he didn’t think that \$25 million should be spent on D, but we think D is a good purpose. So we’re going to put up an appropriation that we’re going to add to our budget to spend \$5 million on D.” They’re not changing the government because they’re not altering the governor’s appropriation, which was for \$25 million with certain terms and conditions. One of them being not D. They now have their own appropriation for \$5 million for D, then the governor can veto it and they can override it.

We've heard some talk about what if the governor does these crazy things like what if he proposes in some Medicaid bill or whatever something horrible like defund abortion. These are called "parade of horrible arguments." The thing to keep in mind here is that a governor could abuse the power in that sense. He could do something crazy but then he gets hammered politically. That's what the whole system is all about. But the other thing is we're talking about the power to propose the terms and conditions of items of appropriation. It used to be that the Legislature had it. The power was taken from the Legislature because the framers believed that they didn't exercise it responsibly. So why is there an argument against the governor having the power, that he could abuse it, when it was taken from the Legislature because the framers believed that they hadn't exercised it responsibly? Under legislative budgeting there is a less effective check on the possibility of abuse of that power. Under legislative budgeting, if the Legislature does something that goes too far or would be considered an abuse and the governor vetoes, that veto can get overridden. But under executive budgeting, it can't get overridden because the governor proposes to do some crazy thing. The same hypothetical crazy thing that the Legislature could have just have done is his budget, the Legislature strikes it, that's the end of it. The governor can't override the strike.

Frank Mauro:

In the 1915 Convention, they weren't focusing on the terms and conditions. What they thought the Legislature was doing wrong wasn't adding terms and conditions to the appropriations but that it was logrolling and adding appropriations. So Al Smith, who was one of the big advocates of this, his example is that they're adding money for specific bridges in upstate New York. And then a legislator from Oswego gets up and says, "These five bridges we did over the last few years and are all very good bridges." It was focusing on logrolling in terms of appropriations. There was not a debate about the terms and conditions at the time. There was a debate about who should structure the budget and they were envisioning the budget, as Abe said, that was really line items. If you look at a county budget today in New York or if you look at other state governments' budgets or New York City's budget, they were envisioning a budget that looked like that.

That was lines and columns and it actually defined it more in the 1915 proposal than in the 1927 proposal. And it was defined more in the 1927 proposal than it is today in terms of the columns and lines. But that was what they were thinking about. A budget that was simple and they were thinking that it was for the operations of government.

James McGuire:

Certainly, the world was simpler back then. But the fundamental issues are the same and that is in terms of the expenditure of state money it calls for policy judgments and that power to propose those policy judgments in the form of appropriation bills was given to the governor. I think the framers unquestionably knew that they were transferring to the governor powers over policy. The history of that is replete with the framers using exactly that term, that the governor was getting policy powers. If all it was were schedules and numbers, why was it that in the very first year of executive budgeting there was a huge fight over policy between the Legislature and the governor, because that in fact is what happened. Logrolling, you throw that term around, but the practice that was entrenched when the Constitution was changed was the Legislature saying, “In one item of appropriation we’re going to spend money for purposes A, B, C, and D. The governor loves those. He wants those but we’re going to make him spend money for E, F, and G as a price of getting A, B, C, and D.” Now with the governor having the power, he can’t get logrolled. It’s true that the governor could now logroll the Legislature. That’s true. The governor is now in that position. But we have to go back to the first principles. I’m not purporting on whether this is ultimately right or not, but they gave the power to the governor, which means that he would have the possibility of logrolling the Legislature. They did that in the belief that, of the two, it was the better that the governor have that power than the Legislature.

John Caher:

I’m beginning to think that debating what the founders and framers of this provision intended almost a century ago is really moot. The Court of Appeals has just told us what the framers intended and that is a closed subject. The question now is how do we go

forward? What will the Legislature do in response? Will they try to retake power? The only way they can do it is amend the Constitution. I think that is the fundamental question at this point. We know where we are right now. We don't know where we're going to be.

Abe Lackman:

I would differ with that because I don't think people quite know how this process is going to work out. What's going to be really fascinating to watch in the next two to three weeks is how the respective parties interpret the court decision.

John Caher:

A good question will be if the governor pushes it to a point that the Legislature finds unacceptable and intolerable. I don't know if they're there yet.

Abe Lackman:

I don't think so either.

John Caher:

They're close.

Abe Lackman:

They don't have an agreement yet on the budget.

Jo Brill:

I'm from the Citizens Budget Commission. I have been thinking that what the current Governor's Counsel has said is that you can restore programs. The Legislature can at least propose restoring any of its favorite programs, but that gets expensive. The

Legislature is in a position that it can't reprogram the governor's money. All it can do is to propose adding on top and that will become very expensive if they are put in a position of being taxers and spenders. Which brings me to a question that I don't understand. How does the resubmission process work and to what extent is veto power preserved or not preserved? I just don't know that.



Frank Mauro:

That's the dilemma that Abe talked about. The governor can't veto something that he submits. So Abe was implying that they might try to figure out some extra-legal compromise.

Abe Lackman:

There is a piece of this puzzle that nobody has yet seen. The Senate passed its own version. The governor did a resubmittal, which nobody has seen. I think it's embedded in bill copy with a new platform. I haven't seen it in this last one. I'm not certain if the two houses work off that platform, what type of flexibility they have or not. I think it's still a murky area.

Barbara Bartolotti:

I'm with the League of Women Voters. Abe, are you saying that the governor and the Senate actually have agreed to something?

Abe Lackman:

My understanding is that in order for the Senate to pass their one-house budget, which I think was a D Print; there was a C Print, which never saw the light of day. It was a resubmittal by the executive, which the Senate then amended in order to do their changes. They felt that they could not do their changes in a number of areas off of the governor's base budget. So they asked and negotiated with the executive for a resubmittal. I heard there were some areas where it was more favorable to the Legislature and there were other areas the governor would not change his proposal. But I don't think anybody has really examined carefully that. There has already been a resubmittal, as I understand it.



Barbara Bartolotti:

Has the Assembly though been negotiating with the Senate off of that?

Abe Lackman:

I don't know. They don't have an agreement yet. If the Senate and Assembly have an agreement, as I understand it, they will have to amend a bill. I don't know if they can use the original version or the resubmittal. That's a technical question as Jim was eluding to that the lawyers may have to be creative or imaginative, but I'm not certain what the platform is anymore and I think it's not clear.

Robert Ward:

I'm with the Public Policy Institute of the Business Council. I'd like to go back to really the fundamental issues here and that is are we better off with the executive having more power over the budget or the Legislature? We've heard a pretty good argument from the advocate of the executive position, but I don't think we've heard an answer from Abe and Frank. I've gone back through about 20 years of executive budgets and haven't yet found

one where the succeeding year had a balanced budget. In other words, we always have a structural and often very sizable budget deficit driven partly by gubernatorial actions but arguably more by the Legislature than has been advanced by the governor's budget. My question is if the assumption is correct that the current constitutional structure was written in order to restrain the Legislature from spending more or at least creating imbalance in the budget, is that a good thing or a bad thing? I guess also where do we go from here if anywhere in terms of resolving the continual problem of pretty sizable budget gaps?

Frank Mauro:

That might have been true for what was proposed in 1915, but what was actually adopted didn't limit the Legislature's ability to add to the budget.

Robert Ward:

No, my idea was if we give the governor more power, he's more likely to make sure we have a balanced budget.

Frank Mauro:

I don't think just because I'm saying that there should be a constitutional amendment that I'm saying we shouldn't continue the executive budget system and the governor shouldn't submit a budget. The governor should submit a budget and we should consider continuing some of these limits in terms of how the Legislature can change it. I think the problem is should the governor be able to include such extensive terms and conditions, which amount to amending the school aid laws in the appropriations bill and becoming a standoff. Where it really becomes an issue of who blinks first.

Abe Lackman:

I see consequences in what is going on now. In all likelihood, we're going to have a string of late budgets as far as the eye can see. This process is getting more and more contentious all the time. The legal structure, to me, is reinforcing that it's going to be harder and harder to ever get a budget on time. I will be very surprised if we make April 1st because I think the issue that hasn't played out is this issue of, if the two houses reach an agreement lets say on March 28th, March 29th, or March 30th, how are they going to print bills? As Jim said, they are going to have to start yet another round of serious negotiations with the executive and the public right now fundamentally judges Albany on why can't you get a budget done by April 1st? I just don't see it.

James McGuire:

I think Bob's question really gets to the heart of some things though. There are going to be a lot of things every year that are going to make for difficult budget processes. It is going to be nothing is going to be, or not going to be there. There are going to be various groups clamoring for funds for arguably incredibly important programs. Those kinds of dynamics are always going to be there. There's always going to be tensions in the sense of a major philosophical difference between the houses themselves over how to spend money and the wise way to spend money, and there will be differences collectively between the houses and the executive. Those kinds of things are always going to happen. But I think it does make sense to keep the eye on the ball and that is recognizing that there are always going to be those kinds of problems. What is the best system? And that of course depends on what you want out of it. If you want economy and prudence, you want to maximize the opportunities to be economical with the state's resources; I think there are very powerful arguments for the executive side. But it may be that's not what you want.

A couple of other points and that is it really has not been until the Court of Appeals decision just this year that governors are now going to be able, close to being able, to exercise the full extent of their powers. They haven't had them in the past. The

Legislature hasn't recognized them. And when the Legislature hasn't recognized them, it follows that the governor doesn't really even have them. I can get into the reason for that. But my point is executive budgeting has not had a fair test in this state. There was always uncertainty on what the rules are. Now we know a lot more about what the rules are. Somebody said to me after the argument in the Court of Appeals, "Knowing what the rules are certainly can help the game go faster."

Jeff Nesich:

Jeff Nesich from the Division of Parole. I have a real-world question in terms of basic appropriations and what the Legislature and the governor can and can't do. If we go back to a situation a couple years for example, there was a proposal to merge all the Criminal Justice agencies into a Department of Justice (DOJ). That was rejected. Now, under the current set of rules that we're talking about here, would the Legislature's only choice be to reject the entire appropriation for DOJ? Then they would be precluded from adding back or to reprogram that money for separate new appropriations for Corrections, State Police, and Parole, which is actually what they did three years ago.

Abe Lackman:

That to me is not a mythical horror that Jim and I argue about. That was a case in point where the governor made a fundamental change in policy. They do have another option now. They do have the option, as I think Jim alludes to, if the Legislature feels it is really bad policy to have the State Police and Parole as a super agency, they can ask the governor to resubmit. If the governor decides, or an executive decides, he does not want to resubmit then the Legislature has only one of two options. They can shut all of Criminal Justice down or they accept the change. They don't have any other choice.

James McGuire:

I agree with most of that. I think though that it's not an argument against the governor having this power that someone can come up with a hypothetical, which may strike a lot

of people as an imprudent exercise of that power because the Legislature can just say no. The other point is that if you recognize that is a legitimate argument to make then you have to recognize that is a legitimate argument to make against legislative budgeting because when the Legislature has that power they can propose the same hypothetical and then the governor would be in the same position. He would be in a position of saying, “Well, maybe I better shut down government if they’re not going to negotiate or talk to me.” If he has the ability to override in just one house that is what’s going to happen.

Jeff Nesich:

My question didn’t even get to the merits of good or bad. I’m trying to understand the mechanics of how the crisis works.

Frank Mauro:

This is an unclear issue because there was not a majority in the court for this because this was a point on which Judge Rosenblatt and the concurring opinion that made the plurality a majority disagreed. He went along with the governor’s submission of an appropriation for the new cultural resources department, or whatever it was called, to replace Education, saying, “We will accept that the governor proposed that appropriation on the assumption that his legislation, which was not an appropriations bill in an Article 7 bill, would be passed.” So that is really left unclear. I think what the executive did this year was that they didn’t try to push on that point. So they submitted this combination of taking the Museum out of the Education Department again, but they did not try to do the legislation creating that in the appropriations bill.

Unknown Speaker:

But similarly if in the governor’s appropriations bill there is \$10 million for a specific program, the Legislature under this new interpretation of the rules would have the option to pass the budget bill only putting \$8 million into that program. They either have to reject it or....

James McGuire:

They have the power to reduce a proposed appropriation.

Frank Mauro:

And add separately and distinctly.

Barbara Bartolotti:

In the real world today, on the Senate calendar, is S1, which is the second passage of the constitutional amendment the Assembly has already passed with the implementation language. Do any of you think that that is a ploy to force the governor on the negotiations whether it's this new platform or whatever it is, or do you think the Legislature has now made it's mind up about forcing this issue with the constitutional amendment, sending it to the voters in November and fight it out in public opinion over the summer?

Abe Lackman:

I have no insight....

Frank Mauro:

You're saying it's on the calendar for the first time?

Barbara Bartolotti:

Yes. This session. Do you think this may be a ploy?

Frank Mauro:

You have to answer this question. You're more of an insider on this.

Barbara Bartolotti:

Yes, I think there is a frustration but there are too many people out there who really have differing opinions on this constitutional amendment and their constituencies will be at work, whether it's the large unions or it's my organization or whatever. But does this indicate that they have now reached the point with the governor that they are saying, "If you don't, then we will do this"?

James McGuire:

I don't think anybody here is going to feel comfortable speculating about what the Legislature collectively or some large number of them or leadership may be intending to do. They passed in the first passage, which occurred last year before the Court of Appeals decision. I understand the Assembly has passed again second passage. So it could go to the voters this November if the Senate passes it. Whether they will, I don't know. I don't want to speculate on that, but I will say that I don't know what's going to happen. I think as Abe was pointing out there are some powerful reasons why there may not be an on-time budget this year. I think the reasons for that will be very complex. But precisely the issue about the allocation of powers could play a role in it. If I was someone in the Assembly or in the Senate who thought that this was a terrible decision and that we have to get back the powers that we once had, I don't think it's overly cynical to suggest the possibility that some legislators might say, "Well, you know a really late budget here might not be so bad because we'll be arguing and it's that damn Constitution that's the fault here." Who knows?

Barbara Bartolotti:

This has actually become who's going to look better in the public eye. If we do have a late budget....

Abe Lackman:

I would argue they all look bad. I haven't seen anybody win in this.

Barbara Bartolotti:

Who's going to get the upper hand as far as perhaps this governor refuses to negotiate with us? Even say that the Legislature, Senate and Assembly, the institution, actually stand up together on this, which appears they may be headed toward and say to the public, "We can't get this governor to negotiate with us. So we're going to actually bring it to you to help us get back our powers so that we can give you a good budget." I mean that's a PR that they may begin to employ because I don't think the Legislature sees any way out right now.

John Caher:

It's very tempting, and very easy, to portray this as a crass power play between the Legislature and the governor, and it has been portrayed that way — and probably by me. As I listen to this, I have to step back a moment and think that what's going on over there and what's going on in this room is precisely what the framers of our Constitution and the federal constitution had in mind. This tension we're seeing between the branches strikes me as extremely healthy. How it plays out is a mystery to all of us, but I think the tension is very, very good.



David Shaffer:

I'm with the Business Council. The politics of this amendment aside, Frank specifically mentioned the need for an amendment. I put this question more to you than the rest but anybody else can chime in, what substantively

do you think of the amendment that has been proposed? Is it a good solution from your point of view?

Abe Lackman:

I will take both credit and blame for setting this into motion many years ago when I was in Senate Finance. It really came out of a conversation with Senator Bruno. To me the key to the amendment is just to go look at county governments. Simply to say, "If we have this enormous inability to get an April 1st budget," and I'm not going to talk about the specific details of this amendment because it's changed, "we should go back to a default mechanism, which is simple to say we know we're going to have arguments. It's a long bitter process. Can we just have government operate at last year's level?" It gets complicated at what you mean by last year's level. But the heart of the amendment process is to have a default budget. I've always been sympathetic and it's something we've had for almost every county in the state including the City of New York where if you can't reach an agreement, can we just go back to a default? The executive has been going back and forth on this issue actually. I've had conversations over the years with the governor on this and there have been times I think he has been intrigued by this idea. But the biggest difficulty that the executive had on the default mechanism is that once every 20 years tax revenues, with a serious recession, are going to be below a year ago. So last year's budget inherently is unbalanced and the executive has been sensitive to what are the rules under a default budget for that once every 20 years where you have negative revenue. I don't know the latest amendment and I don't have an opinion on whether that cures that problem or doesn't cure that problem.

David Shaffer:

I'm interested in that because it could be on the ballot in November.

James McGuire:

I've got to say I have not studied it in all its details, but I've seen enough of it to know a couple things about it. One of them is that if the goal is in part to obtain timely passage of a budget, the proposal will guarantee that there will never be a timely passage of a budget. The language of it absolutely prevents that possibility because the terms of the amendment come down to this: All the rules under the Constitution that the Legislature hates, that we chafe under because we can't change the terms and conditions of the governor's appropriation, they remain in full force and effect under this new amendment to the Constitution. In full force and effect until the first day of the new fiscal year. After the first day of the new fiscal year then they all go away and the Legislature can do what they want. If I'm a legislator, you're not passing a budget before the fiscal year because you have all the current constitutional constraints on you. Maybe they could come less on time because maybe as soon as the new fiscal year starts and now they don't have these constraints, maybe they can get a budget done more quickly. But that will also depend upon what the relative strength of a governor is at any given point and time. Can he prevent the veto in one the houses or not?

Frank Mauro:

The Assembly gave second passage to this constitutional amendment and first passage to another constitutional amendment. I think this constitutional amendment has technical problems but given how the governor has used his power I think that I would live with those problems for a year or two. I think that this constitutional amendment should go forward but that this other one, which would not go on to the ballot until two years later, should also go forward. I don't think this is a technically proficient constitutional amendment. It doesn't address all the issues that need to be addressed, but given what the governor has done, I would prefer to see this done rather than not done despite all the criticisms I have of it. At the same time, I would like to see the Legislature give first passage this year to a well-thought-out restructuring of the process that maintains the executive budget system more than the current one. Jim is right in his criticism and have that go to the voters in 2007, if this one goes in 2005.

Barbara Bartolotti:

And actually the Assembly gave it unanimous approval, the second one you're talking about, Frank, that won't go into effect until 2008. The Assembly during the debate, which was a rather bipartisan debate and in fact did carry unanimously, except maybe just one.

James McGuire:

There's always one.

Barbara Bartolotti:

There's always one negative vote.

Brian Stenson:

Thank you very much.