



1994

## **Appropriations: New York State Bankers Ass'n Inc. v. Wetzler**

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### **Recommended Citation**

(1994) "Appropriations: New York State Bankers Ass'n Inc. v. Wetzler," *Touro Law Review*. Vol. 10: No. 3, Article 11.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol10/iss3/11>

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**APPROPRIATIONS**

*N.Y. CONST. art. VII, § 4:*

*The Legislature may not alter an appropriation bill submitted by the governor except to strike out or reduce items therein, but it may add thereto items of appropriation provided that such additions are stated separately and distinctly from the original items of the bill and refer each to a single object or purpose. None of the restrictions of this section, however, shall apply to appropriations for the legislature or the judiciary.*

**COURT OF APPEALS**

New York State Bankers Ass'n, Inc. v. Wetzler<sup>51</sup>  
(decided April 1, 1993)

Plaintiffs claimed that the Audit Fee Provision of the 1990-91 State Operations Budget Bill was unconstitutional because it violated article VII, section 4 of the New York State Constitution,<sup>52</sup> since it neither struck out nor reduced an appropriated item, nor added a separately stated item of appropriation. Defendant argued that the controversy was nonjusticiable because it equaled a judicial assault on the budgetary process, the sole domain of the legislative and executive branches.<sup>53</sup> The court held that the provision was unconstitutional because the directive of the constitution is clear and unambiguous.<sup>54</sup> Additionally, the court found that the

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51. 81 N.Y.2d 98, 612 N.E.2d 294, 595 N.Y.S.2d 936 (1993).

52. N.Y. CONST. art. VII, § 4 provides in relevant part:

The Legislature may not alter an appropriation bill submitted by the governor except to strike out or reduce items therein, but it may add thereto items of appropriation provided that such additions are stated separately and distinctly from the original items of the bill and refer each to a single object or purpose. None of the restrictions of this section, however, shall apply to appropriations for the legislature or the judiciary.

*Id.*

53. *Wetzler*, 81 N.Y.2d at 102, 612 N.E.2d at 295, 595 N.Y.S.2d at 937.

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

controversy was justiciable, since it concerned a substantive constitutional violation.<sup>55</sup>

In June, 1990, the New York Legislature enacted the 1990-91 State Operations Budget Bill.<sup>56</sup> The bill contained an account for expenses for \$2,997,800 acquired "in conducting tax audits of banking corporations and bank holding companies subject to tax under article 32 of the Tax Law."<sup>57</sup> In addition, there was an Audit Fee Provision, which authorized the imposition of fees on taxpayers for the cost of their tax audits.<sup>58</sup> Although the Audit Fee Provision was not part of the original Budget Bill submitted by the Governor, the Legislature enacted it in its entirety.<sup>59</sup> However, the Governor signed the Budget Bill without deleting the Audit Fee Provision.<sup>60</sup>

As a result, the provision became law, and in July 1990, the Commissioner of the Department of Taxation and Finance began issuing invoices to banks.<sup>61</sup> Plaintiffs commenced an action seeking a declaratory judgment and an injunction.<sup>62</sup> The trial court granted summary judgment to the plaintiffs and declared that the Audit Fee Provision and its implementing regulations

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

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

57. *Id.* Article 32 of the Tax Law deals with franchise tax on banking corporations. See N.Y. TAX LAW § 32 (McKinney 1987 & Supp. 1994).

58. *Id.* at 101 n.2, 612 N.E.2d at 295 n.2, 595 N.Y.S.2d at 937 n.2. The Audit Fee Provision states:

Notwithstanding any other provision of law, the commissioner of taxation and finance is hereby authorized and directed to establish and implement fees to assess such taxpayers for cost [*sic*] associated with conducting such audits. Such assessments shall include all direct, indirect, fringe benefit and other costs resulting from conducting such audits, including costs incurred in other programs, with the exception of expenses incurred pursuant to administrative hearings and civil judicial proceedings. Notwithstanding any other provision of law, all income derived from fees levied by the commissioner of taxation and finance for such audit expenses shall be deposited to this account.

1990 N.Y. Laws 613.

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

60. *Id.*

61. *Id.*

62. *Id.*

were void because they violated article VII, section 4 of the New York State Constitution.<sup>63</sup> The court also enjoined enforcement of the provision.<sup>64</sup> The appellate division affirmed, and in addition found no merit to defendant's further argument that plaintiffs' challenge to the provision "did not present a justiciable controversy."<sup>65</sup>

The court of appeals affirmed, stating that article VII, section 4 is not a "mere procedural requirement" in the constitutional process of adopting the budget.<sup>66</sup> Nor is it a requirement which may be waived by mutual agreement of the executive and legislative branches. Rather, article VII, section 4 is an exception. It gives limited authority to the legislature, by the people of the state, to alter the governor's proposed budget, but only in certain instances.<sup>67</sup> The court concluded that the words of article VII, section 4 are plain and the Audit Fee Provision was a violation of this constitutional requirement.<sup>68</sup> The court refused to approve a provision which would weaken the people's protection of "abuse of power by the State."<sup>69</sup>

In reaching its conclusion, the court relied on the reasoning of several state legislative decisions. For example, in *Saxton v. Carey*,<sup>70</sup> the New York Court of Appeals held that the degree of budget itemization required by the constitution was a matter which called for judgment and discretion by the governor and

63. *Id.*; see also *New York State Bankers Ass'n. v. Wetzler*, 151 Misc. 2d 684, 686, 573 N.Y.S.2d 816, 818 (Sup. Ct. Cayuga County 1991).

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

65. *Id.* at 101-02, 612 N.E.2d at 295, 595 N.Y.S.2d at 937; see also *New York State Bankers Ass'n. v. Wetzler*, 184 A.D.2d 1077, 1077, 586 N.Y.S.2d 779, 779 (4th Dep't 1992). The appellate court summarily rejected the defendant's argument of judicial interference in the budgetary process. *Id.*

66. *Wetzler*, 81 N.Y.2d at 104, 612 N.E.2d at 297, 595 N.Y.S.2d at 939. The court struck down the Legislature's attempt to circumvent the requirements of the Constitution, even though the Governor and the Legislature agreed on the change which had been added by the latter. *Id.*

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

68. *Id.* at 104-05, 612 N.E.2d at 297, 595 N.Y.S.2d at 939.

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

70. 44 N.Y.2d 545, 378 N.E.2d 95, 406 N.Y.S.2d 732 (1978).

legislature.<sup>71</sup> Thus, the court found that the matter was beyond its power to review and dismissed the complaint as nonjusticiable.<sup>72</sup> Most importantly, the court in *Saxton* refrained from suggesting that the budgetary process could never be considered by the judiciary.<sup>73</sup>

In fact, in *Wetzler*, the court reasoned that the relevant question was not one of interpretation of constitutional terms, but rather, whether the Legislature had authority to enact the provision at all.<sup>74</sup> The court found that it did not, and thus held that the controversy was justiciable.<sup>75</sup>

Similarly, in *Saxton*, the plaintiffs argued that the 1978-79 state budget submitted by the Governor was not sufficiently itemized to give the legislature enough information to properly guard public funds.<sup>76</sup> The plaintiffs also suggested that a provision in the budget which allowed for the transfer of funds between departments and programs unconstitutionally prevented legislative control over the spending of public resources.<sup>77</sup>

Thus, the court found that the case turned on the extent to which it could “intervene in the budgetary process.”<sup>78</sup> They reasoned that the degree of itemization required by the constitution was the degree “necessary for the Legislature to effectively review that budget.”<sup>79</sup> This decision was described as one “best left to the Legislature, for it is not something which

71. *Id.* at 549, 378 N.E.2d at 97-98, 406 N.Y.S.2d at 734.

72. *Id.* at 550-51, 378 N.E.2d at 98-99, 406 N.Y.S.2d at 735-36. *Cf.* *Posner v. Rockefeller*, 60 Misc. 2d 597, 304 N.Y.S.2d 28 (Sup. Ct. New York County 1969). The court held that the Governor must submit a budget that is itemized as to all budgetary items. *Id.* at 601, 304 N.Y.S.2d at 35. Allowing the Governor to appropriate “lump sum” payments to budgetary items denies the legislature its constitutional right to “strike out” or reduce items in the budget bill. *Id.*

73. *Saxton*, 44 N.Y.2d at 551, 378 N.E.2d at 99, 406 N.Y.S.2d at 735.

74. *Wetzler*, 81 N.Y.2d at 100, 612 N.E.2d at 294, 595 N.Y.S.2d at 936.

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

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

77. *Id.*

78. *Id.* at 548, 378 N.E.2d at 97, 406 N.Y.S.2d at 734.

79. *Id.* at 550, 378 N.E.2d at 98, 406 N.Y.S.2d at 735.

can be accurately delineated by a court.”<sup>80</sup> Thus, if the legislature was satisfied with the level of itemization, the court would also be satisfied.<sup>81</sup>

On the issue of the constitutionality of the provision, the court also considered the defendant’s “substantial compliance” argument. The defendant contended that the situation was analogous to that of *Schneider v. Rockefeller*.<sup>82</sup> In *Schneider*, there was an “alleged violation of the constitutional requirement that a bill lie on the desks of the Legislature for three calendar legislative days prior to its passage.”<sup>83</sup> The bill had been placed on the desks at 10:00 a.m. on a Wednesday morning, was later removed to correct errors, was returned at 11:15 p.m. that evening and was passed on Saturday.<sup>84</sup>

The court held that there had been “substantial compliance with the letter and spirit of the constitutional requirement.”<sup>85</sup> The purpose of the provision was to prevent hasty and careless legislation, to prohibit last minute amendments and to insure that proposed legislation received adequate publicity and consideration.<sup>86</sup> The court determined that these purposes had been fulfilled.<sup>87</sup>

In contrast, in the instant case the court found “a conceded violation of the constitutional provision and no basis for a claim of partial compliance.”<sup>88</sup> The court reasoned that the legislature

80. *Id.*

81. *Cf. People v. Tremaine*, 281 N.Y. 1, 10, 21 N.E.2d 891, 895 (1939) (holding that the Legislature is not free to strike out itemized appropriations in the Governor’s bill and substitute lump sums in the same areas); *Korn v. Gulotta*, 72 N.Y.2d 363, 369, 530 N.E.2d 816, 818 534 N.Y.S.2d 108, 110 (1988) (finding board’s approval of budget was a nullity when county executive failed to comply with the requirement that the County Charter “account in the budget for all estimated revenues”).

82. 31 N.Y.2d 420, 293 N.E.2d 67, 340 N.Y.S.2d 889 (1972).

83. *Id.* at 434, 293 N.E.2d at 75, 340 N.Y.S.2d at 900.

84. *Id.* at 434-35, 293 N.E.2d at 75, 340 N.Y.S.2d at 901.

85. *Id.* at 434, 293 N.E.2d at 75, 340 N.Y.S.2d at 901.

86. *Id.* at 434, 293 N.E.2d at 75, 340 N.Y.S.2d at 900.

87. *Id.* at 434, 293 N.E.2d at 75, 340 N.Y.S.2d at 901.

88. *Wetzler*, 81 N.Y.2d at 103-04, 612 N.E.2d at 297, 595 N.Y.S.2d at 939.

had simply decided to alter the Budget Bill which the Governor had submitted, disregarding the mandates of the constitution completely.<sup>89</sup> The court found it self-evident that, "total noncompliance cannot amount to substantial compliance."<sup>90</sup>

Therefore, article VII, section 4 of the New York State Constitution must be viewed as unambiguous in its command to the legislature. Violations of this section will be deemed unconstitutional. In addition, in cases involving substantive constitutional questions under article VII, section 4, the controversy will be found to be justiciable by the state's courts.

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

90. *Id.*