

# PLAYING A LEADING ROLE: HOW RECENT CASES ARE THRUSTING THE ARIZONA COURTS INTO THE STATE'S BUDGET DRAMA

Christopher L. Hering

## INTRODUCTION

According to one commentator, “state budgets were a mess in . . . 2009, a debacle in . . . 2010, and look like an impending catastrophe in . . . 2011.”<sup>1</sup> Arizona’s budget is no exception. The state is in the worst fiscal crisis in its history, with deficits projected to be at least \$2.5 billion annually through at least 2013.<sup>2</sup> As the Arizona Legislature’s options for plugging the deficits have dwindled, legal challenges involving the budget have mounted,<sup>3</sup> thrusting the courts into the budget process and frustrating elected officials. Governor Jan Brewer, for example, has lamented the recent spike in lawsuits, complaining that interest groups “sue, sue, sue” rather than work out their differences with the political branches.<sup>4</sup> In the last few years, the Arizona Supreme Court has decided

---

1. Rick Cohen, *The Ghost of Christmas Future: State Budget Deficits in 2010*, NONPROFIT QUARTERLY, [http://www.nonprofitquarterly.org/index.php?option=com\\_content&view=article&id=1727:the-ghost-of-christmas-future-state-budget-deficits-in-2010&catid=149:rick-cohen&Itemid=117](http://www.nonprofitquarterly.org/index.php?option=com_content&view=article&id=1727:the-ghost-of-christmas-future-state-budget-deficits-in-2010&catid=149:rick-cohen&Itemid=117) (last visited Feb. 26, 2010).

2. JOINT LEGISLATIVE BUDGET COMM., FY 2010 AND FY2011 BASELINE ESTIMATES 16 (2010), available at <http://www.azleg.gov/jlbc/10-11baselineestimates.pdf>. Economists project that a recovery in Arizona’s economy, the surest way to alleviate the deficit, is several years away. Betty Beard, *Rebound in State May Be Years Away*, ARIZ. REPUBLIC, Dec. 3, 2009, at D1.

3. For example, in 2009, the Legislature was sued twelve times over budget issues, including six lawsuits over fund sweeps. Jim Small, *Arizona Lawmakers Getting Hammered in Court, Resources Strained*, ARIZ. CAPITOL TIMES, Nov. 13, 2009 [hereinafter *Arizona Lawmakers*].

4. Mary Jo Pitzl, *Brewer Pooh-Poohs the Urge to “Sue, Sue, Sue,”* ARIZ. REPUBLIC, Nov. 24, 2009, <http://www.azcentral.com/members/Blog/PoliticalInsider/68228>; see also Mary Jo Pitzl, *Groups Sue to Reverse Changes in State Policy*, ARIZ. REPUBLIC, Nov. 24, 2009, at B4 (“[Representative Kirk] Adams, R-Mesa, said the string of lawsuits is yet another symptom of the state’s tough budget times. ‘It tells me we’re in a financial crisis, and we have people upset about a lot of things,’ he said.”); Mary Jo Pitzl, *Suits Tied to Budget Take Toll on Coffers*, ARIZ. REPUBLIC, Dec. 30, 2009, at B1 [hereinafter *Suits*] (quoting Representative Sam Crump: “[The lawsuits] are a good jobs program for attorneys. . . . If you didn’t get what you wanted, file a lawsuit”).

several major cases involving the budget. These cases, which raised concerns about separation of powers and the proper role of the judiciary, provided the court an opportunity to develop its jurisprudence on standing, the political question doctrine, and special action jurisdiction—doctrines that effectuate the division of powers outlined in Article III of the Arizona Constitution. These cases provide both elected officials and potential litigants critical guidance regarding the judiciary's willingness to entertain future budget litigation.

### I. ARIZONA'S BUDGET CRISIS

The ongoing economic downturn has hit Arizona especially hard. In percentage terms, the state faces the second-worst budget deficit in the nation, behind only California.<sup>5</sup> Governor Brewer has stated that Arizona faces “some of the worst days” in its 98-year history because of gaping deficits.<sup>6</sup>

Arizona's budget woes began in fiscal year 2009 when the nationwide financial crisis annihilated tax collections.<sup>7</sup> By January 2009, the state faced a \$1.6 billion deficit, requiring legislators to take emergency action, which consisted of a mix of budget cuts, “fund sweeps” from state accounts, and accepting federal stimulus aid.<sup>8</sup> Revenues, however, continued to slide,<sup>9</sup> creating another \$500 million shortfall that required attention in April 2009.<sup>10</sup>

As painful as 2009 was, fiscal year 2010, the current fiscal year, is much worse. The shortfall is \$3.6 billion as revenues dropped over 30% from their 2006 peak.<sup>11</sup> To help close the gap, Arizona sold certain state buildings in a sale-leaseback arrangement that raised \$735 million.<sup>12</sup> For the first time in history,

---

5. Mary Jo Pitzl, *Arizona Fiscal Woes 2nd-Worst*, ARIZ. REPUBLIC, Nov. 12, 2009, at A1; Nicholas Riccardi, *Arizona Struggles with Budget Crisis*, L.A. TIMES, Nov. 27, 2009, at A24.

6. Richard Williamson, *Arizona COPs Feel The Heat: Twin Downgrades as Big Sale Nears*, BOND BUYER, Dec. 29, 2009, at 1 [hereinafter *Twin Downgrades*].

7. Jim Small, *Arizona's Revenue Numbers Falling Faster than Expected*, ARIZ. CAPITOL TIMES, Feb. 13, 2009 (noting that January 2009 revenues were 21.5% below January 2008's revenues).

8. Mary Jo Pitzl, *Plan Set to Erase Arizona Deficit*, ARIZ. REPUBLIC, Jan. 29, 2009, at A1.

9. Mary Jo Pitzl, *April Tax Revenue Shortfall Stings Budget*, ARIZ. REPUBLIC, May 30, 2009, at B1 (noting that April 2009 income tax collections were the lowest since 1996).

10. Luige del Puerto, *Arizona Senate Budget Still \$500M Short: No End in Sight*, ARIZ. CAPITOL TIMES, Apr. 17, 2009; Mary Jo Pitzl, *\$3 Billion Deficit Looms Large*, ARIZ. REPUBLIC, Mar. 29, 2009, at A1 [hereinafter *\$3 Billion*]; Small, *supra* note 7.

11. Mary Jo Pitzl, *State, for 1st Time, Forced to Get a Loan*, ARIZ. REPUBLIC, Nov. 18, 2009, at A1 [hereinafter *Forced*]; Riccardi, *supra* note 5; Richard Williamson, *Arizona Special Session Will Target Cuts to Education, Social Services*, BOND BUYER, Nov. 18, 2009, at 6 [hereinafter *Special Session*].

12. Mary Jo Pitzl, *State Gets \$735 Million in Sale-Leaseback Deal*, ARIZ. REPUBLIC, Jan. 14, 2010, available at <http://www.azcentral.com/news/articles/2010/01/14/20100114arizona-sale-leaseback-deal.html>; Jennifer Steinhauer, *In Need of Cash, Arizona Puts Offices on Sale*, N.Y. TIMES, Sept. 25, 2009, at 16. Under this arrangement, the state sells its buildings but continues to occupy the buildings by leasing the space for a 20-

Arizona borrowed \$700 million from outside lenders,<sup>13</sup> despite the Constitution's balanced-budget requirement.<sup>14</sup> Despite these moves, additional budget cuts and fund sweeps,<sup>15</sup> and more stimulus money,<sup>16</sup> the 2010 budget remains unbalanced with a deficit of \$700 million,<sup>17</sup> even after six special legislative sessions.<sup>18</sup> Because revenues are still falling,<sup>19</sup> the state may issue IOUs to its employees and vendors.<sup>20</sup>

Analysts believe that the state's worst fiscal crisis is yet to come in fiscal year 2011, which starts on July 1, 2010.<sup>21</sup> The 2011 deficit is currently projected at \$3.3 billion, approximately 30% of the entire budget.<sup>22</sup> This gap will be far tougher to close because the fiscal maneuvers—including fund sweeps—relied on by the Legislature in 2009 and 2010 are now exhausted, state agencies have already endured multiple rounds of deep budget cuts, and federal stimulus money will

---

year period from investors, who receive payments resembling that of a traditional mortgage. Alex Veiga, *States Turn to Commercial Properties for Cash*, ASSOCIATED PRESS, Feb. 12, 2010. Once the investors are paid back with interest, the state will recover the deeds to the properties. *Id.*

13. *Forced*, *supra* note 11; *Twin Downgrades*, *supra* note 6.

14. ARIZ. CONST. art. IX, § 3 (“The legislature shall provide by law for an annual tax sufficient, with other sources of revenue, to defray the necessary ordinary expenses of the state for each fiscal year.”); *but see* Knowledge@W.P Carey, *Arizona Town Hall Calls for Bold Action to Solve the State's Fiscal Crisis*, Nov. 10, 2009, <http://knowledge.wpcarey.asu.edu/article.cfm?articleid=1830> (quoting Arizona State University constitutional law professor Paul Bender: “The balanced budget requirement has no teeth”).

15. Amy Merrick, *States Scramble to Close New Budget Gaps*, WALL ST. J., Dec. 18, 2009, available at <http://online.wsj.com/article/SB126110075141996495.html>.

16. Mary Jo Pitzl, *Options Are Few for State Budget*, ARIZ. REPUBLIC, Jan. 11, 2010, at A1.

17. Mary Jo Pitzl, *Tax Was Rare Compromise*, ARIZ. REPUBLIC, Feb. 14, 2010, at B1 [hereinafter *Rare Compromise*]; *see also* Richard Williamson, *Arizona Tries to Stay in Business With Fifth Belt-Tightening, Issue*, BOND BUYER, Dec. 14, 2009, at 3; *Special Session*, *supra* note 11.

18. Jeremy Duda, *Arizona Governor Jan Brewer Urges Lawmakers to Action Amid Special Session Doubts*, ARIZ. CAPITOL TIMES, Dec. 16, 2009; Mary Jo Pitzl, *Brewer Calls Sixth Special Session to Deal With Budget*, ARIZ. REPUBLIC, Feb. 1, 2010, available at <http://www.azcentral.com/news/election/azelections/articles/2010/02/01/20100201special-session-arizona.html>.

19. Doug Murphy, *Lawmakers Return Monday to Red Ink*, AHWATUKEE FOOTHILLS NEWS, Jan. 5, 2010, <http://www.ahwatukee.com/news/year-8545-lawmakers-red.html>.

20. Morrison Institute, *What if: 5 Key Questions on State's Budget Mess*, ARIZ. REPUBLIC, Jan. 10, 2010, available at <http://www.azcentral.com/arizonarepublic/viewpoints/articles/2010/01/09/20100109budgetquestions10.html>.

21. Moody's and Standard and Poor's have downgraded Arizona's credit rating and issued negative outlooks, suggesting future downgrades. Richard Williamson, *Moody's, S&P Lower Arizona's Credit as Crisis Keeps on Going*, BOND BUYER, Dec. 23, 2009, at 5; *Twin Downgrades*, *supra* note 6.

22. Amanda Paulson, *Which States Are Facing the Worst Budget Deficits in 2010?*, CHRISTIAN SCI. MONITOR, Dec. 30, 2009; Mary Jo Pitzl, *Budget Woes Dog Lawmakers, Brewer*, ARIZ. REPUBLIC, Dec. 31, 2009, at B2 [hereinafter *Budget Woes*].

soon end.<sup>23</sup> The situation is so dire that all programs not mandated by the federal government risk being shut down, including prisons, parks, and the Highway Patrol.<sup>24</sup>

Many explanations have been offered for Arizona's fiscal trouble. Foremost among them is that nearly two-thirds of spending, or \$7.3 billion, is guaranteed by federal, court, or voter mandates.<sup>25</sup> The Voter Protection Act, passed in 1998, effectively prohibits the Legislature from interfering with \$4.8 billion in voter-approved spending for education, healthcare, transportation, and shared revenue for cities.<sup>26</sup>

Regardless, lawmakers are under siege from every conceivable angle. Sales taxes, which provide half of Arizona's revenue, have dropped sharply.<sup>27</sup> Tax increases are virtually impossible to enact absent a ballot measure because Proposition 108, passed in 1992, requires a two-thirds majority in each legislative chamber to approve a tax hike.<sup>28</sup> Spending is rising because of Arizona's growing prison population, increasing public school enrollment, and mounting demands on the state's Medicaid program.<sup>29</sup> Confounding the problems, prior budgets were balanced with accounting maneuvers instead of gradual reductions to the structural deficit.<sup>30</sup>

As deficits ballooned, the political climate has turned toxic<sup>31</sup> and the proposed solutions have grown more desperate. A special election will be held in

---

23. Matthew Benson, *Budget Stalls Legislative Session*, ARIZ. REPUBLIC, Apr. 7, 2009, at B1; Howard Fischer, *Brewer to Again Push for Tax Hike in Speech*, EAST VALLEY TRIB., Jan. 8, 2010, available at <http://www.eastvalleytribune.com/story/149292>; *Budget Woes*, *supra* note 22.

24. Mary Jo Pitzl, *Brewer Orders Agencies to Take Steps to Cut Costs*, ARIZ. REPUBLIC, Dec. 22, 2009, at A1.

25. Matthew Benson, *High Spending, Low Taxes Are Roots of Budget Crisis*, ARIZ. REPUBLIC, Mar. 29, 2009, at A17 [hereinafter *High Spending*]; *\$3 Billion*, *supra* note 10.

26. Luige del Puerto, *Arizona Republicans Target Voter-Approved Program Funds*, ARIZ. CAPITOL TIMES, Feb. 20, 2009; *Cities Focused on Protecting State-Shared Money*, EAST VALLEY TRIB., Jan. 8, 2010, available at <http://www.eastvalleytribune.com/story/149290>. All budget cuts, including those to close 2011's \$3.3 billion deficit, thus, must come from the remaining \$3.7 billion in non-protected spending. *\$3 Billion*, *supra* note 10.

27. *\$3 Billion*, *supra* note 10.

28. ARIZ. CONST. art. IX, § 22; Christian Palmer, *Arizona Supreme Court Decides in Favor of Cities in \$30M Suit*, ARIZ. CAPITOL TIMES, Feb. 6, 2009.

29. *High Spending*, *supra* note 25. The Governor's office estimates growth in these areas to account for \$657 million in additional spending. *Id.*; see also Gov. Jan Brewer, *I Plan to Right Our Ship and Restore Common Sense*, ARIZ. REPUBLIC, Jan. 10, 2010, available at <http://www.azcentral.com/arizonarepublic/viewpoints/articles/2010/01/09/20100109brewer10.html>.

30. *High Spending*, *supra* note 25. The structural deficit is computed by subtracting ongoing expenditures from ongoing revenues and does not include one-time revenues or expenditures. Financial Times Lexicon, Structural Deficit Definition, <http://lexicon.ft.com/term.asp?t=structural-deficit> (last visited Feb. 21, 2010).

31. During the debate about the sales tax increase, Republican legislators

May 2010 for an initiative that calls for a temporary sales tax increase, backed by Governor Brewer, which is expected to generate \$1 billion per year if passed.<sup>32</sup> The Legislature referred the tax increase to the voters only after a bitter year-long battle about the tax between Governor Brewer, a Republican, and the Legislature's Republican caucus.<sup>33</sup>

In an effort to cut costs, the state is privatizing prisons and proposing the release of 13,000 inmates,<sup>34</sup> while imposing mandatory furloughs on employees.<sup>35</sup> Lawmakers have proposed a four-day work week for government employees and public schools,<sup>36</sup> rolling over mandatory payments to education and healthcare programs into the next fiscal year,<sup>37</sup> borrowing against Arizona Lottery dollars or federal tobacco settlement payments,<sup>38</sup> selling more state assets,<sup>39</sup> violating the minimum funding levels set by federal stimulus legislation for education and healthcare,<sup>40</sup> and conducting more fund sweeps.<sup>41</sup> Conservative legislators have made a more controversial proposal: an array of corporate, income, and property tax cuts that they claim will plug the deficit by fostering economic growth and job creation.<sup>42</sup>

In addition to the sales tax increase, Governor Brewer has proposed cutting \$1.7 billion from state services, including health care and education programs,<sup>43</sup> shifting the cost of current programs, such as juvenile corrections, to

---

accused Governor Brewer of "bullying behavior" in the form of threats, blackmail, and scare tactics. Matthew Benson & Mary Jo Pitzl, *Infighting Divides Brewer, Legislators*, ARIZ. REPUBLIC, Mar. 15, 2009, at B1.

32. *Rare Compromise*, *supra* note 17. Standard and Poor's, a leading rating agency for municipal bonds, is skeptical that voters would agree to the tax increase, noting the difficulty of squeezing a tax increase out of Arizona's conservative voters. *Twin Downgrades*, *supra* note 6.

33. *Budget Woes*, *supra* note 22. Governor Brewer contends that the tax hike is necessary to solve the budget difficulties of the next few years while the legislators argue that a tax increase will further damage Arizona's economy. *\$3 Billion*, *supra* note 10; Riccardi, *supra* note 5.

34. *\$3 Billion*, *supra* note 10; Jim Small, *Gambling Pitched as Arizona's Budget Salvation*, ARIZ. CAPITOL TIMES, Oct. 23, 2009.

35. Katharine Q. Seelye, *More States Resort to Furloughs, Even as Need for Services Grows*, N.Y. TIMES, Apr. 24, 2009, at A1.

36. Riccardi, *supra* note 5.

37. Mary Jo Pitzl, *GOP Plan for State Budget is Criticized*, ARIZ. REPUBLIC, Apr. 29, 2009, at B1.

38. *\$3 Billion*, *supra* note 10.

39. Jeremy Duda, *State of Arizona Explores Asset Sales as Alternative to Tax Hike*, ARIZ. CAPITOL TIMES, Apr. 3, 2009.

40. Riccardi, *supra* note 5.

41. Luige del Puerto, *Arizona Lawmakers Eye Early Child Development Funds*, ARIZ. CAPITOL TIMES, Feb. 13, 2009; Jim Walsh, *Budget Sweep May Thwart Mesa Grande Opening*, ARIZ. REPUBLIC, Jan. 5, 2010, available at <http://www.azcentral.com/community/ mesa/articles/2010/01/05/20100105mr-mound0106.html>.

42. Paul Davenport, *Cost of Arizona Tax Proposal Put at \$942m by 2017*, USA TODAY, Feb. 12, 2010, available at [http://www.usatoday.com/news/nation/states/arizona/2010-02-12-1657750482\\_x.htm](http://www.usatoday.com/news/nation/states/arizona/2010-02-12-1657750482_x.htm).

43. Mary Jo Pitzl, *Counties Warn Against Shifting Juvenile Care*, ARIZ.

Arizona counties,<sup>44</sup> and reforming the Voter Protection Act to waive its spending mandates during economic downturns.<sup>45</sup>

As the proposed solutions have become more desperate and the political environment has deteriorated, the judiciary's role in the budget process has grown. In 2009, eighteen lawsuits were filed regarding the budget.<sup>46</sup> These cases, and other recent decisions involving the budget and appropriations, pose difficult questions about the proper role of the judiciary and separation of powers. The answers to these questions are critical because they will govern future budget-related litigation, which almost certainly will increase because many of the proposals to balance the budget are unprecedented and fraught with legal landmines.

## II. THE PROPER ROLE OF THE JUDICIARY

Article III of the Arizona Constitution provides that:

The powers of the government of the State of Arizona shall be divided into three separate departments, the Legislative, the Executive, and the Judicial; and, except as provided in this Constitution, such departments shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others.<sup>47</sup>

Some blending of powers, however, is inevitable: "absolute independence of the branches of government and complete separation of powers is impracticable."<sup>48</sup> As such, more than one branch may have "a legitimate and constitutionally permitted involvement in the same area."<sup>49</sup>

Arizona courts "carefully observe[] [Article III's] dividing lines," especially when the court is asked to prohibit or require legislative action.<sup>50</sup> The courts only test the Legislature's final enactment against constitutional requirements and do not wade into procedural questions, such as telling the

REPUBLIC, Jan. 20, 2010, at B1; Mary Jo Pitzl, *Brewer's Sweeping Budget Plan*, ARIZ. REPUBLIC, Jan. 16, 2010, at A1 [hereinafter *Budget Plan*] (noting that the Governor's plan eliminates funding for all-day kindergarten and cuts 310,000 residents from AHCCCS, 47,000 from KidsCare, and 17,000 from a program serving the seriously mentally ill); see also Casey Newton, *Agencies Paint Dire Picture of State Cutbacks*, ARIZ. REPUBLIC, Oct. 17, 2009, at A1 (noting that Governor Brewer asked state agencies to submit reports detailing the impact of a 15% budget cut).

44. *Budget Plan*, *supra* note 43.

45. *High Spending*, *supra* note 25; *Budget Plan*, *supra* note 43.

46. Mary Jo Pitzl, *Suits Tied to Budget Take Toll on Coffers*, ARIZ. REPUBLIC, Dec. 30, 2009, at B1. The Attorney General's Office estimates that the state has spent at least \$500,000 defending against these lawsuits. *Id.*

47. ARIZ. CONST. art. III.

48. *State v. Donald*, 10 P.3d 1193, 1203 (Ariz. Ct. App. 2000) (quoting *J.W. Hancock Enters. Inc. v. Ariz. State Registrar of Contractors*, 690 P.2d 119, 124 (Ariz. Ct. App. 1984)).

49. *State v. Ramsey*, 831 P.2d 408, 412 (Ariz. Ct. App. 1992).

50. *Fairness & Accountability in Ins. Reform v. Greene*, 886 P.2d 1338, 1342 (Ariz. 1994).

Legislature what its agenda should be, what bills it should pass, or what language it should use in any given bill.<sup>51</sup> Article III “prohibits the intervention of the judicial department in the internal workings of the legislative process.”<sup>52</sup>

The Constitution gives the Legislature the power and duty to draft Arizona’s budget,<sup>53</sup> subject to approval by the Governor.<sup>54</sup> Despite this textual commitment of the budget process to the political branches, the recent spike in budget-related litigation invites the judiciary to assume a greater role in budgeting, raising separation of powers concerns. In the recent budget cases, the Arizona Supreme Court has addressed three jurisdictional doctrines that effectuate Article III’s separation of powers and potentially limit the judiciary’s involvement in the budget process: (1) the standing requirement, (2) the political question doctrine, and (3) the discretionary nature of Arizona’s special action regime.

### *A. Standing*

To have standing to bring a lawsuit, a plaintiff must allege a distinct and palpable injury that is personal to that individual.<sup>55</sup> An allegation of generalized harm shared by many is insufficient to give a plaintiff standing.<sup>56</sup>

While in federal courts, the standing requirement is “firmly rooted” in Article III’s case or controversy requirement, the Arizona Constitution contains no analogous provision.<sup>57</sup> As a result, Arizona courts “are not constitutionally constrained to decline jurisdiction based on a lack of standing”<sup>58</sup> and can waive the

---

51. Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm’n, 208 P.3d 676, 685 (Ariz. 2009) (quoting *Mecham v. Gordon*, 751 P.2d 957, 962 (Ariz. 1988)).

52. *Queen Creek Land & Cattle Corp. v. Yavapai County Bd. of Supervisors*, 501 P.2d 391, 393 (Ariz. 1972).

53. ARIZ. CONST. art. IV, pt. 1, § 1(1) (“The legislative authority of the state shall be vested in the legislature . . .”); *id.* art. IV, pt. 2, § 20 (“The general appropriation bill shall embrace nothing but appropriations for the different departments of the state, for state institutions, for public schools, and for interest on the public debt. All other appropriations shall be made by separate bills, each embracing but one subject.”).

54. ARIZ. CONST. art. V, § 7; *see also* ARIZ. REV. STAT. § 35-111 (2009) (requiring the Governor to “submit to the legislature a budget containing a complete plan of expenditures proposed to be made before the close of . . . the next fiscal year . . . and all monies and revenues estimated to be available therefor”).

55. *Sears v. Hull*, 961 P.2d 1013, 1017 (Ariz. 1998).

56. *Id.*

57. *Bennett v. Napolitano*, 81 P.3d 311, 316 (Ariz. 2003). “The case or controversy requirement provides clear recognition of the separation of powers principle that was central to the creation of our national government.” *Id.* at 315.

58. *Sears*, 961 P.2d at 1019.

standing requirement for prudential reasons.<sup>59</sup> However, the courts impose a “rigorous” standing requirement for reasons of sound judicial policy.<sup>60</sup>

Arizona courts have recently addressed the standing requirement in budget disputes in three contexts: (1) the Legislature’s standing to sue the Governor, (2) the Governor’s standing to sue the Legislature, and (3) an individual’s standing to sue the state and challenge a budget item.

### *1. Legislative Standing*

Two recent cases involving the Governor’s line item veto power over appropriations addressed legislative standing, *Bennett v. Napolitano*<sup>61</sup> and *Forty-Seventh Legislature of the State of Arizona v. Napolitano*.<sup>62</sup>

In *Bennett*, four legislators, the majority party leaders of both chambers, challenged Governor Janet Napolitano’s line item veto of eleven appropriations provisions.<sup>63</sup> The Arizona Supreme Court concluded, however, that the legislators lacked standing to challenge the vetoes for two reasons.<sup>64</sup> First, the legislators did not show any injury to themselves personally or their private rights, only an injury that was “wholly abstract and widely dispersed” across the entire Legislature.<sup>65</sup> In reaching this conclusion, the court examined two U.S. Supreme Court cases addressing legislative standing, *Coleman v. Miller*<sup>66</sup> and *Raines v. Byrd*.<sup>67</sup>

*Coleman* held that twenty Kansas senators who voted against the proposed Child Labor Amendment to the U.S. Constitution had standing to challenge the lieutenant governor’s authority to cast a tiebreaking vote for the Amendment, a vote that resulted in the Amendment’s ratification.<sup>68</sup> Because the votes of the twenty senators were enough to defeat ratification, they would be nullified if the lieutenant governor exceeded his authority by voting for the

---

59. *Id.* (“Although, as a matter of discretion, we can waive the requirement of standing, we do so only in exceptional circumstances, generally in cases involving issues of great public importance that are likely to recur. The paucity of cases in which we have waived the standing requirement demonstrates both our reluctance to do so and the narrowness of this exception.”).

60. *Ariz. Ass’n of Providers for Persons with Disabilities v. State*, 219 P.3d 216, 223 (Ariz. Ct. App. 2009) (citing *Fernandez v. Takata Seat Belts, Inc.*, 108 P.3d 917, 919 (Ariz. 2005)) (noting that “[f]or reasons of judicial policy, however, Arizona courts nonetheless impose a ‘rigorous’ standing requirement”).

61. 81 P.3d 311 (Ariz. 2003).

62. 143 P.3d 1023 (Ariz. 2006).

63. *Bennett*, 81 P.3d at 313.

64. *Id.* at 317–18.

65. *Id.*

66. 307 U.S. 433 (1939).

67. 521 U.S. 811 (1997).

68. *Bennett*, 81 P.3d at 317 (citing *Coleman*, 307 U.S. at 435–36). Twenty senators voted for the Amendment, while the twenty plaintiffs voted against the Amendment. In the event of a tie, the Amendment would not have been ratified. The lieutenant governor’s vote for the Amendment broke the tie and paved the way for the Amendment’s ratification. *Id.* (citing *Coleman*, 307 U.S. at 435–36).



Amendment.<sup>69</sup> As such, the senators alleged an interference with the legislative process that injured them personally, giving them standing.<sup>70</sup>

*Raines*, in contrast, held that six individual members of Congress lacked standing to challenge the Line Item Veto Act's constitutionality.<sup>71</sup> The plaintiffs argued that the Act reduced the effectiveness of their votes by giving the President line item veto authority, injuring them in their official capacity.<sup>72</sup> However, this alleged injury "was not 'particularized' to the individual claimants and was not sufficiently 'concrete' to justify intrusion into a dispute between the legislative and executive branches."<sup>73</sup> The injury was "based on a loss of political power, not loss of any private right" and at most, an injury to Congress as an institution rather than the plaintiffs personally.<sup>74</sup> No nullification problem existed like in *Coleman* because the plaintiffs' votes against the Act were given their full constitutional effect.<sup>75</sup> The court explained that there was a "vast difference" between vote nullification and the "abstract dilution" of institutional Congressional power alleged by these six plaintiffs.<sup>76</sup>

The Arizona Supreme Court found the facts in *Bennett* more like *Raines* than *Coleman*.<sup>77</sup> Unlike *Coleman*, the Governor's vetoes did not nullify the votes cast by the four legislators because legislative action on the bills was complete when the Governor made her vetoes.<sup>78</sup> As such, the injury alleged by the legislators was "wholly abstract and widely dispersed," not the particularized and personal injury necessary to show standing.<sup>79</sup>

Second, these four legislators did not have standing to litigate claims of injury to the Legislature as an institution.<sup>80</sup> The court explained that the claim at issue belonged to the Legislature as a whole.<sup>81</sup> An individual member cannot bring the Legislature's claim on its behalf without authorization, except "perhaps in the most exceptional circumstances."<sup>82</sup> Because these four legislators did not have the Legislature's authorization to bring the claim, they had no standing.<sup>83</sup>

Three years later, in *Forty-Seventh Legislature*, the Arizona Supreme Court considered another legislative challenge to line item vetoes, with House Speaker James Weiers and Senate President Ken Bennett suing Governor Napolitano, both as individuals and on the Legislature's behalf.<sup>84</sup> Relying on

---

69. *Id.* (citing *Coleman*, 307 U.S. at 446).

70. *Id.* (citing *Coleman*, 307 U.S. at 446).

71. *Id.* at 316 (citing *Raines*, 521 U.S. at 814).

72. *Id.* at 316–17 (citing *Raines*, 521 U.S. at 816).

73. *Id.* at 317 (quoting *Raines*, 521 U.S. at 829).

74. *Id.* (quoting *Raines*, 521 U.S. at 821).

75. *Id.* (citing *Raines*, 521 U.S. at 824).

76. *Id.* (quoting *Raines*, 521 U.S. at 825–26).

77. *Id.* at 318.

78. *Id.* at 317.

79. *Id.* at 317–18.

80. *Id.* at 318.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Forty-Seventh Legislature of the State of Ariz. v. Napolitano*, 143 P.3d 1023,

*Bennett*, the Governor claimed that the plaintiffs lacked standing.<sup>85</sup> The court agreed that Weiers and Bennett had no standing as individuals, citing *Bennett*'s rule that an individual legislator cannot bring a claim belonging to the entire Legislature.<sup>86</sup> The court, however, held that the legislators had standing to bring the claim on the Legislature's behalf, distinguishing *Bennett* in two ways.<sup>87</sup> First, both chambers authorized the legislators to bring a lawsuit on their behalf challenging the vetoes.<sup>88</sup> Second, the Legislature alleged a particularized injury to its power to make and amend legislation by a majority vote.<sup>89</sup> Like in *Coleman*, if the Governor's line item veto was unconstitutional, the Legislature's right to have the majority's votes given their full constitutional effect would be nullified, an injury to the Legislature as an institution.<sup>90</sup>

These rules on legislative standing have, as their backdrop, separation of powers concerns.<sup>91</sup> As *Bennett* explained, Article III's division of power "underlies" the standing requirement.<sup>92</sup> A more lenient approach to standing "inevitably open[s] the door to multiple actions asserting all manner of claims against the government."<sup>93</sup> In disputes between the executive and the Legislature, lenient standing rules could "too easily coerce[] [the judiciary] into resolving political disputes . . . , an area in which courts are naturally reluctant to intrude."<sup>94</sup> Thus, the standing rules are designed to minimize the judiciary's role as a referee of political disputes, upholding Article III's division of power.<sup>95</sup>

Several guiding principles emerge from the legislative standing cases. First, individual legislators cannot assert claims belonging to the Legislature as a whole without its authorization, though *Bennett*'s "exceptional circumstances" qualifier appears to create an escape hatch. Second, *Bennett* prohibits individual legislators from alleging a personal injury based on injuries to the Legislature as a

---

1025 (Ariz. 2006). The plaintiffs were the Forty-Seventh Legislature, the Arizona House of Representatives, the Arizona Senate, Speaker Weiers, and Senate President Bennett. *Id.*

85. *Id.* at 1027.

86. *Id.* at 1028 n.5 (citing *Bennett*, 81 P.3d at 317–18).

87. *Id.* at 1027–28.

88. *Id.* at 1028.

89. *Id.* at 1027–28.

90. *Id.* at 1028.

91. See *Bennett*, 81 P.3d at 315–16 (noting that the federal "case or controversy" requirement "provides clear recognition of the separation of powers principle[s]" implicit in the U.S. Constitution).

92. *Id.*

93. *Id.* at 315.

94. *Id.* at 316 (citing *Raines v. Byrd*, 521 U.S. 811, 819–20 (1997) ("[O]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.")).

95. See *Brewer v. Burns*, 213 P.3d 671, 674 (Ariz. 2009); *Bennett*, 81 P.3d at 317–18 ("[Article III's separation of powers] mandate underlines our own requirement that as a matter of sound jurisprudence a litigant seeking relief in the Arizona courts must first establish standing to sue. . . . [W]e are reluctant to become the referee of a political dispute.").

whole.<sup>96</sup> Third, a legislator who, with authorization, brings a claim on the Legislature's behalf must allege an injury to the institution, generally by alleging that a gubernatorial action injured the Legislature's constitutional authority.

These standing principles strike an appropriate balance between minimizing the judiciary's role as an arbiter of disputes between the political branches and preserving the judiciary's duty to prevent the executive branch from overstepping its constitutional authority.<sup>97</sup> *Bennett's* guidelines ensure that the legislative branch can invoke the judicial power only in significant constitutional disputes<sup>98</sup> and effectively disallow an individual from using the judicial process as a political tool.<sup>99</sup> Political disputes are kept in the political realm, minimizing the number of "head-on confrontations" between the judiciary and the political branches.<sup>100</sup> Although these rules prevent the courts from overreaching into political disputes,<sup>101</sup> they also allow for the necessary litigation to define the boundaries between the political branches and keep them within their constitutionally assigned role, upholding separation of powers.<sup>102</sup> Moreover, a

---

96. An escape hatch might also exist to this rule. According to *Forty-Seventh Legislature*, *Raines* characterized *Coleman* as holding that "legislators who sued as a bloc and had sufficient votes to defeat legislative action had standing to assert a claim of institutional injury." *Forty-Seventh Legislature*, 143 P.3d at 1027–28. If Arizona courts continue to base their legislative standing jurisprudence on *Raines* and *Coleman*, a majority of legislators might be able to assert a claim of institutional injury (though this would seem to clash with *Bennett's* rule requiring the chamber's authorization to assert institutional injury claims).

97. *Cf. Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1148 (2009) (noting that the standing inquiry is "founded in concern about the proper—and properly limited—role of the courts in a democratic society") (internal quotations omitted); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 473 (1982) ("The exercise of the judicial power also affects relationships between the coequal arms of the National Government. The effect is, of course, most vivid when a federal court declares unconstitutional an act of the Legislative or Executive Branch.").

98. *Bennett's* requirement that the Legislature authorize any lawsuits alleging an institutional injury presumably contemplates that the Legislature would not vote, as a body, to bring a lawsuit against the executive branch in the absence of a significant constitutional dispute.

99. *Cf. 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE* § 3531.11.2 n.36 (3d ed. 2009) ("Suits by individual members of Congress, however, should often be found nonjusticiable . . . because of the danger of short-circuiting and preempting the political process against the wishes of the majority of Congress.").

100. *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring) ("I also believe that repeated and essentially head-on confrontations between the lifetenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of the other branches.").

101. *See Summers*, 129 S. Ct. at 1148 ("[C]ourts have no charter to review and revise legislative and executive action.").

102. *See Valley Forge*, 454 U.S. at 472 ("Art. III limit[s] the federal judicial power "to those disputes which confine federal courts to a role consistent with a system of separated powers . . .") (internal quotations omitted); 13B WRIGHT, MILLER & COOPER,

lawsuit brought by the Legislature is more likely to turn on a purely constitutional issue as opposed to a suit challenging a specific budget item on policy grounds because the Legislature holds the power of policymaking in the first instance.<sup>103</sup> As such, the court's limits on legislative standing reflect a successful attempt to limit the judiciary's role while allowing judicial power to be exercised against a political branch when necessary.<sup>104</sup>

## 2. Executive Standing

The Arizona Supreme Court confronted the issue of the Governor's standing to sue the Legislature in *Brewer v. Burns*.<sup>105</sup> *Brewer* arose out of the bitter standoff between Governor Jan Brewer and the Arizona Legislature about the 2010 budget.<sup>106</sup> On June 4, 2009, both chambers of the Legislature passed ten budget bills.<sup>107</sup> Governor Brewer, however, announced that she would veto at least part of the bills.<sup>108</sup> The Legislature then decided not to transmit the budget bills to Governor Brewer, ostensibly until the Legislature and the Governor had reached an agreement on the budget.<sup>109</sup> Governor Brewer then sued the Legislature to compel it to transmit the bills.<sup>110</sup>

Governor Brewer argued that she had standing because the Legislature's refusal to present her with finally passed bills undermined her authority to veto or approve bills and violated the Constitution's lawmaking procedures.<sup>111</sup> The

*supra* note 99, at § 3531.11.2 (addressing congressional standing: “[d]ecision on the merits seems appropriate only when the executive has acted in a way that threatens a direct interference with the powers of Congress as a body and that cannot easily be remedied by more direct congressional action”).

103. *But see* discussion *infra* note 133 (arguing that even decisions that expound purely legal principles could have a major policy impact by forcing the political branches to make different policy choices). This point loses its force, however, when the court is delineating the boundaries between the political branches because of the overriding need to keep the political branches within their textually assigned role, upholding separation of powers.

104. *See Valley Forge*, 454 U.S. at 474 (noting that judicial review “has been recognized as a tool of last resort on the part of the federal judiciary throughout its nearly 200 years of existence”).

105. 213 P.3d 671 (Ariz. 2009).

106. *See supra* text accompanying notes 31–33.

107. *Brewer*, 213 P.3d at 673.

108. *Id.*

109. *Id.* However, both branches admitted to the court that their disagreement over the timing of the bills' presentment “reflects an effort by each branch to enhance its position in ongoing budget negotiations.” *Id.* at 673–74; *see also* Matthew Benson & Mary Jo Pitzl, *Governor Sues Legislature for Release of 2010 Budget Bills*, ARIZ. REPUBLIC, June 17, 2009, at B1 (“As the days have passed, Brewer has said that she has come to suspect that legislators plan to wait until the end of the month to send her the budget bills, forcing her at the eleventh hour to either sign a plan she doesn't like or shut down state government.”).

110. *Brewer*, 213 P.3d at 673.

111. *Id.* at 674. Governor Brewer contended that the Legislature violated Article IV of the Arizona Constitution, which states that “[e]very measure when finally passed shall be presented to the governor for [her] approval or disapproval.” *Id.* at 676 (quoting ARIZ.

Legislature contended that the Governor suffered no constitutional injury because her power to veto or approve a bill is not triggered until the bill is presented to her.<sup>112</sup>

Governor Brewer's argument prevailed.<sup>113</sup> According to the court, the Legislature's argument that the Governor lacked *standing* presumed that the Legislature was correct *on the merits*—that it could withhold finally passed bills from the Governor.<sup>114</sup> The standing analysis, however, examines only whether a plaintiff has plausibly alleged an injury, not the dispute's merits.<sup>115</sup> Because Governor Brewer alleged that the Legislature violated the Constitution by withholding the budget bills from her review, she alleged a “direct injury to her constitutional authority,” giving her standing to sue the Legislature.<sup>116</sup>

Executive standing implicates many of the same separation of powers issues as legislative standing,<sup>117</sup> and the court once again appears to strike an appropriate balance. Similar to legislative standing, the touchstone of establishing executive standing is alleging an injury to the Governor's constitutional authority. This ensures that suits brought by the executive will concern constitutional questions implicating the division of power between the political branches rather than policy questions or political disputes.<sup>118</sup> Although *Brewer* is the first Arizona decision addressing executive standing, its citation to *Bennett's* separation of powers concerns<sup>119</sup> suggests that the court will, in future litigation, look to the legislative standing cases and create uniform rules of standing for cases between the political branches.

### 3. Individual Standing

While the judiciary need not referee a political dispute when an individual challenges an appropriation, the judiciary nevertheless becomes embroiled in the budget and appropriations process, an area it has discomfort entering.<sup>120</sup> Judicial review of an appropriation's legality thus inherently implicates concerns about the role of the judiciary.

---

CONST. art. IV, pt. 2, § 12) (alterations in original).

112. *Id.* at 674.

113. *Id.*

114. *Id.* at 674–75.

115. *Id.* at 675.

116. *Id.* at 674–75.

117. See discussion and text accompanying *supra* notes 97–104.

118. Similar to lawsuits brought by the Legislature, lawsuits brought by the Governor are unlikely to present a policy question regarding a specific budget item because the Governor holds a political remedy against undesirable policy—the veto power. See *supra* discussion and text accompanying note 103.

119. *Brewer*, 213 P.3d at 674 (citing *Bennett v. Napolitano*, 81 P.3d 311, 316 (Ariz. 2003) (noting that the court's concern over standing is “particularly acute” in disputes between the political branches)).

120. See *Bennett*, 81 P.3d at 318 (quoting *Rios v. Symington*, 833 P.2d 20, 22 (Ariz. 1992)) (“[I]t would be a serious mistake to interpret our acceptance of jurisdiction in this case as a general willingness to thrust the Court into the political arena and referee on an . . . [annual] basis the assertions of the power of the executive and legislative branches in the appropriations act . . . .”) (internal quotations omitted) (alterations in original).

The Arizona Court of Appeals recently examined whether several individuals impacted by budget cuts to the Division of Developmental Disabilities (DDD) had standing to challenge the cuts in *Arizona Association of Providers for Persons with Disabilities v. State*.<sup>121</sup> In the midst of 2009's \$1.6 billion deficit, the Legislature cut the Department of Economic Security's (DES) budget by \$100 million.<sup>122</sup> The Legislature allowed DES to determine which programs to cut to satisfy the \$100 million reduction, prompting DES to suspend some DDD programs and slash the reimbursement rates paid to all DDD providers.<sup>123</sup> In response, a group of DDD beneficiaries and providers obtained a preliminary injunction enjoining DES's cuts to DDD programs.<sup>124</sup>

On appeal, the state argued that the individuals and providers did not have standing to challenge DES's reductions.<sup>125</sup> The court, however, disagreed and held that all but one individual had standing.<sup>126</sup> Because the plaintiffs sought to prevent a future injury arising from the budget measures, they had to show an "actual concrete harm that is not merely some speculative fear."<sup>127</sup> The providers successfully established that they would suffer an economic injury from the rate reductions, while the beneficiaries established an injury due to service reductions and changes to their living conditions.<sup>128</sup> These injuries gave the plaintiffs standing to challenge the cuts.<sup>129</sup>

*Arizona Association* thus affirms the basic idea that the courts can review the legality of specific appropriations or budget items if the plaintiffs establish standing.<sup>130</sup> While this gives the judiciary a check on the Legislature's power of the purse, judicial review of specific budget items inevitably plunges the courts into the thorny and often difficult decisions inherent in budgeting.<sup>131</sup> As these decisions become more painful in the next few years, the judiciary will almost certainly find itself reviewing more budget items. Given the Legislature's lack of viable options for balancing the budget,<sup>132</sup> the courts could thus unwittingly end up influencing, or even directing, the Legislature's ultimate policy choices,<sup>133</sup> making

121. 219 P.3d 216 (Ariz. Ct. App. 2009).

122. *Id.* at 221.

123. *Id.*

124. *Id.* at 221–22. The plaintiffs challenged both DES's implementation of the Legislature's \$100 million cut and the legality of the Legislature's appropriation on the ground that the Legislature improperly delegated to DES the authority to determine which services to cut, a violation of Article III. *Id.* at 225–26. They also argued that the cuts violated Medicaid regulations. *Id.* at 227.

125. *Id.* at 223.

126. *Id.*

127. *Id.* (internal quotations omitted).

128. *Id.*

129. *Id.* The preliminary injunction was, however, vacated on the merits. *Id.* at 231.

130. *Id.* at 224 ("No serious contention can be made that a court cannot review an appropriation's legality.").

131. See *Brewer v. Burns*, 213 P.3d 671, 674 (Ariz. 2009) ("The enactment of a budget often involves political disagreement, bargaining, and compromise.").

132. See *supra* discussion accompanying notes 25–45.

133. Even when the Legislature decides a purely legal question, its interpretation

*Arizona Association*'s result somewhat disconcerting from a separation of powers perspective.

However, the standing inquiry is not the appropriate place to limit the judiciary's involvement in budgeting decisions. A traditional standing analysis examines whether the litigant is the right person to litigate the action, requiring a showing of injury, causation, and redressability,<sup>134</sup> not whether the subject matter, as a class, is appropriate for the court's consideration. Using standing in an effort to limit budget litigation risks muddling Arizona's standing jurisprudence based strictly on the dispute's subject matter rather than a defect in the traditional elements of standing. The political question doctrine potentially furnishes a better justification for limiting the judiciary's involvement in budget disputes as a class.<sup>135</sup>

### ***B. Political Question Doctrine***

The political question doctrine flows from separation of powers concerns<sup>136</sup> and the notion that the Arizona Constitution commits certain issues to

---

of the relevant law can have a significant impact on the policy choices made by the political branches. For example, if the court interprets Medicaid statutes and regulations in a manner that invalidates a budget cut to AHCCCS (Arizona's Medicaid program), the Legislature could be required to cut funding from another government function, such as education, to achieve a balanced budget. Given the dwindling number of options for balancing the budget, the judiciary could thus wield significant influence over which programs bear the brunt of budget cuts. Programs governed by outside statutes and regulations, such as Medicaid and some education programs, will be protected from budget cuts when the judiciary enforces the governing regulations, with the degree of protection depending on how courts choose to interpret the regulations. On one hand, this could be viewed as the judiciary making a policy choice that these programs are more important than other programs and functions. On the other hand, this result—protecting certain programs against legislative whims—is precisely the goal of the statutory and regulatory regime governing programs like Medicaid.

134. *E.g.*, *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 472 (1982).

135. The federal courts are split regarding whether standing determinations ought to consider “the separation-of-powers values that inhere in political-question doctrines.” *See* 13B WRIGHT, MILLER & COOPER, *supra* note 99, at § 3531.12 (arguing that “standing analysis should incorporate more often, and more openly, a limited form of political-question doctrine”); *compare* *Lamont v. Woods*, 948 F.2d 825, 831 (2d Cir. 1991) (“The fact that the issues in this case touch on foreign policy concerns does not bear on the question whether appellees are the proper parties to request adjudication of those issues.”), *with* *Ry. Labor Executives Ass'n v. Dole*, 760 F.2d 1021, 1023–24 (9th Cir. 1985) (denying standing on the ground that any remedy would infringe too greatly on the authority of executive officers).

136. *See* 20 CHARLES ALAN WRIGHT & MARY KAY KANE, *FEDERAL PRACTICE AND PROCEDURE DESKBOOK* § 15 (2009) (“Courts are held incompetent to decide either because of a conclusion that a particular matter has been confided to the superior authority of another branch or because of a belief that judicial procedures and abilities are not adequate to the task of decision. Whichever perspective is chosen, the focus is on separation of powers.”).

the political branches rather than the judiciary.<sup>137</sup> Arizona courts refrain from addressing political questions in an effort to uphold Article III's separation of powers.<sup>138</sup>

A lawsuit presents a political question if it involves "a textually demonstrable constitutional commitment of the issue to a coordinate political department" or lacks "judicially discoverable and manageable standards" for its resolution.<sup>139</sup> When a lawsuit involves a political question, the judiciary abstains from judicial review of the issue's merits.<sup>140</sup> Examples of clear political questions include the Governor's decision whether to veto a bill or the Legislature's decision whether to override a veto, enact particular legislation, or include specific items in a budget.<sup>141</sup>

A lawsuit involving a dispute between the political branches does not automatically present a political question.<sup>142</sup> Similarly, lawsuits implicating the budget or appropriations do not inherently present a political question.<sup>143</sup> The inquiry remains the same: whether the Constitution commits the issue to a coordinate branch or whether judicially discoverable and manageable standards exist for determining whether the action at issue is constitutional.<sup>144</sup>

The Arizona Supreme Court rejected political question arguments in two recent budget and appropriations cases, *Forty-Seventh Legislature of the State of*

---

137. *Kromko v. Ariz. Bd. of Regents*, 165 P.3d 168, 171 (Ariz. 2007).

138. *Id.* at 170.

139. *Id.*; *Forty-Seventh Legislature of the State of Ariz. v. Napolitano*, 143 P.3d 1023, 1026 (Ariz. 2006) (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)). These two prongs are not entirely separate, however—the lack of a judicially manageable standard may support a conclusion that the issue is committed to another branch. *Kromko*, 165 P.3d at 171 (quoting *Nixon v. United States*, 506 U.S. 224, 228–29 (1993)).

140. *Brewer v. Burns*, 213 P.3d 671, 675 (Ariz. 2009); *Forty-Seventh Legislature*, 143 P.3d at 1026. When a matter is a political question, separation of powers principles counsel that it is *not* the province of the judiciary to say what the law is. 13C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3534 (3d ed. 2009).

141. *Brewer*, 213 P.3d at 676; *Forty-Seventh Legislature*, 143 P.3d at 1026.

142. *Brewer*, 213 P.3d at 675 (citing *INS v. Chadha*, 462 U.S. 919, 942–43 (1983)); *see also* 13C WRIGHT, MILLER & COOPER, *supra* note 99, at § 3534.1 ("Second, political-question doctrine is not invoked simply because the issues presented are sensitive, and decision may involve the courts in considerable popular turmoil."). The judiciary, if anything, endeavors to provide guidance to the political branches regarding budget issues. *See infra* discussion accompanying notes 184–186.

143. *See Kromko*, 165 P.3d at 173 ("Nor do we today hold that all funding decisions by other branches of government are insulated from judicial review."); *Ariz. Ass'n of Providers for Persons with Disabilities v. State*, 219 P.3d 216, 224 (Ariz. Ct. App. 2009) ("No serious contention can be made that a court cannot review an appropriation's legality."); *see also League of Ariz. Cities & Towns v. Martin*, 201 P.3d 517, 519 (Ariz. 2009) (accepting special action jurisdiction to review the constitutionality of a section of an appropriations bill).

144. *Kromko*, 165 P.3d at 173; *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 808 (1994) (concluding that a funding scheme for public education violated Article XI, Section 1 of the Arizona Constitution).



*Arizona v. Napolitano*<sup>145</sup> and *Brewer v. Burns*.<sup>146</sup> *Forty-Seventh Legislature* addressed whether Governor Napolitano could exercise line item veto authority on a bill granting state employees a pay raise, requiring the court to determine whether the bill was an appropriation within the meaning of Article V, Section 8 of the Constitution.<sup>147</sup> Former Governor Janet Napolitano argued that the issue could be resolved “only by entering the political arena” while the Legislature claimed it was purely a legal issue.<sup>148</sup> The court held that the Legislature’s suit presented a legal question—whether the Governor’s exercise of her veto power was constitutional.<sup>149</sup> The court explained that the Legislature’s suit required it to construe the Constitution’s language to determine whether the Governor exceeded her authority, a question that “traditionally fall[s] to the courts to resolve.”<sup>150</sup> The issue was not committed by the Constitution to another branch, making it a legal question rather than a political question.<sup>151</sup>

In *Brewer v. Burns*, the court considered whether Governor Jan Brewer’s lawsuit to force the Legislature to present her with the eleven passed budget bills was a political or a legal question.<sup>152</sup> The Legislature first argued that Article IV, Part 2, Section 8 of the Arizona Constitution allows each chamber to determine its own rules of procedure, demonstrating that the Constitution committed the timing-of-presentment issue to the legislative branch.<sup>153</sup> The court rejected this argument because Section 8 could not limit or qualify Section 12’s provision that “every measure when finally passed shall be presented to the Governor.”<sup>154</sup>

Alternatively, the Legislature argued that there were no judicially discoverable or identifiable standards to determine how promptly the Legislature must present bills to the Governor.<sup>155</sup> According to the Legislature, if it did not have unfettered discretion to determine when to present bills to the Governor, the only alternative was for the courts to apply a reasonableness standard, an inherently political inquiry.<sup>156</sup> The court rejected this argument for two reasons.<sup>157</sup> First, it noted that courts routinely assess the reasonableness of actions in many different contexts.<sup>158</sup> More importantly, the Legislature’s argument presumed a specific resolution on the merits—that it must present the bills to the Governor

---

145. 143 P.3d 1023 (Ariz. 2006).

146. 213 P.3d 671 (Ariz. 2009).

147. *Forty-Seventh Legislature*, 143 P.3d at 1025.

148. *Id.* at 1025–26.

149. *Id.* at 1026.

150. *Id.* (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

151. *Id.*

152. *Brewer v. Burns*, 213 P.3d 671, 675 (Ariz. 2009). According to the Constitution, “[e]very measure when finally passed shall be presented to the governor for [her] approval or disapproval.” *Id.* at 673 (quoting ARIZ. CONST. art. IV, pt. 2, § 12). A bill is finally passed once every bill is read three times and a majority of members in each chamber approves the bill in the same form. *Id.* at 676.

153. *Id.* at 675 (citing ARIZ. CONST. art. IV, pt. 2, § 8).

154. *Id.* (quoting ARIZ. CONST. art. IV, pt. 2, § 12).

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

within a reasonable time after final passage.<sup>159</sup> Governor Brewer, in contrast, contended that the Legislature can delay its presentment of bills only for such time as necessary to complete ministerial tasks.<sup>160</sup> As such, the dispute concerned the “respective powers of the Legislature and the Governor once the Legislature has finally passed a bill[,]” making it appropriate for judicial resolution.<sup>161</sup> Like *Forty-Seventh Legislature*, Governor Brewer’s lawsuit required the court to construe the Constitution, making the question legal rather than political.<sup>162</sup>

Two insights emerge from *Brewer* and *Forty-Seventh Legislature*. First, the court revealed its willingness to embroil itself in the fiercest of political disputes based on just a few words of constitutional language. The court’s assertiveness does not diverge from its recent jurisprudence, which has abstained on political question grounds only once. The court has refused to apply the political question doctrine in two lawsuits challenging the validity of election procedures<sup>163</sup> and a lawsuit regarding the Secretary of State’s choice of voting machines.<sup>164</sup> Moreover, in *Roosevelt Elementary School District No. 66 v. Bishop*, the court never discussed the political question doctrine when it struck down a statutory formula for funding public education as a violation of the “general and uniform” requirement for school funding.<sup>165</sup> Like in the election cases and *Roosevelt*, the issues in *Brewer* and *Forty-Seventh Legislature* presented questions squarely addressing the powers and duties of the political branches.

At first blush, *Brewer* construed constitutional language that was far thinner than that in *Kromko v. Arizona Board of Regents*, the only recent case where the court has abstained under the political question doctrine.<sup>166</sup> In *Kromko*, the court held that a lawsuit alleging that state university tuition rates violated the Constitution’s mandate that tuition “shall be as nearly free as possible” posed a

---

159. *Id.*

160. *Id.* at 675–76.

161. *Id.* at 676.

162. *Id.*

163. *Fairness & Accountability in Ins. Reform v. Greene*, 886 P.2d 1338, 1343 (Ariz. 1994) (stating that the court has “the duty of insuring that the constitutional and statutory provisions protecting the electoral process . . . are not violated”) (internal quotation omitted); *Green v. Osborne*, 758 P.2d 138, 140 (Ariz. 1988) (“Elections are political matters to be decided by the electorate, but the legality of holding an election is a judicial question to be decided according to the requirements of the constitution.”).

164. *Chavez v. Brewer*, 214 P.3d 397, 405 (Ariz. 2009). According to the Court, the political question doctrine forecloses judicial review of questions that are *constitutionally* committed to a coordinate department. *Id.* at 404 (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)). In this case, the Constitution did not commit any specific duties to the Secretary, stating only that the duties of this office were as prescribed by statute. *Id.* The Legislature promulgated statutes setting forth both the procedures the Secretary must follow in selecting voting machines and the substantive requirements the machines must meet. *Id.* As such, the lawsuit presented questions of statutory interpretation, with the statutes furnishing judicially discoverable standards. *Id.*

165. 877 P.2d 806, 808 (Ariz. 1994).

166. *Compare Brewer*, 213 P.3d at 673 (construing “when finally passed”), with *Kromko v. Ariz. Bd. of Regents*, 165 P.3d 168, 170 (Ariz. 2007) (construing “as nearly free as possible”).

political question.<sup>167</sup> The court explained that it could not assess whether the tuition rates violated the Constitution's standard without making policy decisions of the kind that were "clearly reserved" to the political branches.<sup>168</sup> Although "shall be as nearly free as possible" appears to give a more concrete standard than "when finally passed," the latter clause's meaning can be construed without the need to, at the threshold, make a policy decision that is reserved to the political branches. As such, *Kromko*'s rationale does not apply in *Brewer*.

Second, the court demonstrated a continued willingness to entertain budget litigation, a somewhat surprising result given its prior statements. In *Rios v. Symington*, the court warned that its acceptance of jurisdiction to resolve a line item veto dispute did not indicate a "general willingness" to resolve budget disputes, stating that it would view attempts to invoke the judicial power on budget matters "with great circumspection."<sup>169</sup> Despite this cautionary note, the court has not, outside its discretion to refuse special action jurisdiction,<sup>170</sup> acted to back up its warning, even as budget litigation has become an annual event. A reason for this disconnect is perhaps found in the court's special action jurisprudence. The court often justifies its grant of special action jurisdiction on the need to give the political branches guidance on budget issues,<sup>171</sup> a consideration that perhaps prevents the court from expanding the political question doctrine's reach into budget matters. However, given that the political question doctrine is, at its core, an abstention mechanism, the court could resurrect it to enforce *Rios*'s admonition if either the volume of budget litigation continues to increase or the cases become

---

167. *Kromko*, 165 P.3d at 169 (quoting ARIZ. CONST. art. XI, § 6).

168. *Id.* at 172. University budgets, a key determinant of tuition rates, are "set . . . only after [the Board of Regents] mak[es] a series of policy decisions about the quality of the state universities and the level of instruction to be offered." *Id.* As such, the students who challenged the tuition rates as unconstitutional "must effectively argue either that the Board [of Regents] should have made less expensive policy decisions about the operation and the maintenance of the state universities or that more money should have been appropriated [by the Legislature]." *Id.* The court could not assess the constitutional claim without making policy determinations of the kind that were "clearly reserved to the Legislature and the Board." *Id.*

169. *Rios v. Symington*, 833 P.2d 20, 22 (Ariz. 1992) ("[I]t would be a serious mistake to interpret our acceptance of jurisdiction in this case as a general willingness to thrust the Court into the political arena and referee on an . . . [annual] basis the assertions of the power of the executive and legislative branches in the appropriations act . . . [F]uture attempts to invoke this Court's jurisdiction on similar grounds will be viewed with great circumspection.") (quoting *Brown v. Firestone*, 382 So. 2d 654, 671 (Fla. 1980) (internal quotations omitted)). Other lawsuits involving the budget have also sounded a cautionary note about embroiling the judiciary in budget disputes and political matters, while also hearing the case. *Forty-Seventh Legislature of the State of Ariz. v. Napolitano*, 143 P.3d 1023, 1027 (Ariz. 2006); *Bennett v. Napolitano*, 81 P.3d 311, 316 (Ariz. 2003).

170. *See infra* discussion Part II.C.

171. *See infra* discussion accompanying notes 184–186; *cf.* 13C WRIGHT, MILLER & COOPER, *supra* note 140, at § 3534.1 (citing *Kennedy v. Sampson*, 511 F.2d 430, 433–36 (D.C. Cir. 1974)) ("The need for judicial resolution of disputes between Congress and the executive also has been found to defeat political-question objections to determination of a suit to enforce a Congressional investigating subpoena against the President.").

increasingly entangled with policy choices as opposed to pure constitutional issues.<sup>172</sup>

### C. *Special Action Jurisdiction*

The Arizona Supreme Court has original jurisdiction in actions seeking extraordinary writs against state officers, such as mandamus, prohibition, and certiorari.<sup>173</sup> The court exercises this jurisdiction through the special action procedures.<sup>174</sup> Generally, special action relief is appropriate when there is no adequate remedy in any other procedure or forum, often because of time constraints.<sup>175</sup>

According to the court, its special action jurisdiction is “highly discretionary”<sup>176</sup> and it is “rare” for the court to accept jurisdiction.<sup>177</sup> When certain factors are present, however, the court is more likely to accept jurisdiction, such as if the issue is of statewide importance,<sup>178</sup> the issue is likely to recur,<sup>179</sup> the issue is purely legal and does not require an extensive factual record,<sup>180</sup> or the issue is of first impression.<sup>181</sup>

Many budget cases come to the court as a special action petition. The court is more likely to accept jurisdiction in budget issues because these disputes (1) often require construing the Constitution,<sup>182</sup> (2) often involve a dispute between the political branches,<sup>183</sup> and (3) require a prompt resolution so that the political branches have guidance in budget matters.<sup>184</sup> For example, the court accepted

172. At least with respect to judicial review of specific funding decisions, the rationale for abstention on political question grounds is that budget decisions are textually committed to the political branches. *See supra* discussion accompanying notes 53–54.

173. *Brewer v. Burns*, 213 P.3d 671, 674 (Ariz. 2009) (citing ARIZ. CONST. art. VI, § 5(1)); *Forty-Seventh Legislature*, 143 P.3d at 1026; *Bennett*, 81 P.3d at 315.

174. *Brewer*, 213 P.3d at 674; *see generally* ARIZ. R. P. SPECIAL ACTIONS 1-10 (2009).

175. *Fairness & Accountability in Ins. Reform v. Greene*, 886 P.2d 1338, 1342 (Ariz. 1994); *see also Brewer*, 213 P.3d at 674 (“In light of the parties involved, the issue, and the timing of the dispute in relation to the enactment of a budget, special action relief was properly sought.”).

176. *Brewer*, 213 P.3d at 674; *Ariz. Early Childhood Dev. & Health Bd. v. Brewer*, 212 P.3d 805, 806 (Ariz. 2009); *League of Ariz. Cities & Towns v. Martin*, 201 P.3d 517, 519 (Ariz. 2009); *Forty-Seventh Legislature*, 143 P.3d at 1026.

177. *Forty-Seventh Legislature*, 143 P.3d at 1027.

178. *Brewer*, 213 P.3d at 674; *Ariz. Early Childhood*, 212 P.3d at 807.

179. *Ariz. Early Childhood*, 212 P.3d at 807; *Forty-Seventh Legislature*, 143 P.3d at 1027.

180. *Brewer*, 213 P.3d at 674; *Ariz. Early Childhood*, 212 P.3d at 807.

181. *Ariz. Early Childhood*, 212 P.3d at 807.

182. *Brewer*, 213 P.3d at 674; *League of Ariz. Cities & Towns v. Martin*, 201 P.3d 517, 519 (Ariz. 2009). This also applies when the petition involves a dispute over the scope and meaning of a prior court decision. *Forty-Seventh Legislature*, 143 P.3d at 1027.

183. *Brewer*, 213 P.3d at 674; *League of Ariz. Cities*, 201 P.3d at 519; *Forty-Seventh Legislature*, 143 P.3d at 1027.

184. *State Comp. Fund v. Symington*, 848 P.2d 273, 277 (Ariz. 1993) (“A prompt resolution is needed so that the legislative and executive branches will know where they

jurisdiction in *Brewer* because the petition concerned a good faith disagreement between the political branches over their powers in the lawmaking process.<sup>185</sup> Similarly, the court accepted jurisdiction in *Forty-Seventh Legislature*, noting that political disputes often present issues of great public importance because “limiting the actions of each branch of government to those conferred upon it by the constitution is essential to maintaining the proper separation of powers.”<sup>186</sup>

Despite the court’s emphasis on giving the political branches guidance on budget issues, it has frequently declined to exercise its special action jurisdiction to resolve challenges to legislative fund sweeps.<sup>187</sup> The court accepted jurisdiction and decided a petition objecting to the Legislature’s sweep of \$7 million in interest accrued on a fund created to accumulate revenue from a voter-enacted tobacco tax.<sup>188</sup> But the court declined to hear at least three other petitions that contested fund sweeps. First, the court rejected a petition by the Industrial Commission of Arizona challenging a \$4.7 million fund sweep of Commission funds.<sup>189</sup> Second, it declined to hear a petition by the Central Arizona Water Conservation District challenging the Legislature’s sweep of \$14 million from a fund operated by the Arizona Water Banking Authority.<sup>190</sup> Finally, the court turned away a petition by the Irrigation and Electrical Districts Association of Arizona that objected to a proposed \$2 million fund sweep from the Arizona Power Authority, though this was perhaps because the Legislature had already decided not to conduct the sweep.<sup>191</sup>

---

stand and can take such action as they determine necessary relative to budgetary matters. Timely resolution of the matter before us would not be promoted by requiring the Fund to proceed through the trial and appellate courts.”) (internal citation omitted); *see also Brewer*, 213 P.3d at 674; *Ariz. Early Childhood*, 212 P.3d at 807; *League of Ariz. Cities*, 201 P.3d at 519 (examining whether a provision included in a general appropriations bill is an appropriation); *Hull v. Albrecht*, 960 P.2d 634, 636 (Ariz. 1998) (“Several factors lead us to accept jurisdiction in this matter. First, the funding of public schools in Arizona is dependent on the outcome of this litigation; accordingly, the case presents important issues of obvious statewide significance.”); *Rios v. Symington*, 833 P.2d 20, 22 (Ariz. 1992) (examining several line-item vetoes by Governor Fife Symington).

185. 213 P.3d at 674. It also noted that the relevant facts were undisputed and the merits turned on the meaning of a constitutional provision. *Id.*

186. 143 P.3d at 1026–27 (noting that special actions are appropriate in limited circumstances to test the constitutionality of the executive’s conduct).

187. Christian Palmer, *Arizona Courts Busy in 2009, but Definitive Rulings Sparse*, ARIZ. CAPITOL TIMES, Dec. 28, 2009 [hereinafter *Arizona Courts*]. This made lawmakers and fund operators “desperate” for guidance on this issue. *Id.*

188. *Ariz. Early Childhood*, 212 P.3d at 809–10 (overturning legislative fund sweep approved by a majority of the Legislature because the Voter Protection Act of 1998 required a supermajority vote of each chamber to divert the funds at issue); Christian Palmer, *High Court to Consider Challenge of Kids’ Health Program Fund Sweep*, ARIZ. CAPITOL TIMES, June 5, 2009 [hereinafter *High Court*].

189. *High Court*, *supra* note 188.

190. *Arizona Courts*, *supra* note 187.

191. *Id.*; Christian Palmer, *Water, Power Groups Seek Arizona Supreme Court Review of Fund Sweeps*, ARIZ. CAPITOL TIMES, Feb. 27, 2009.

Because the court does not comment on why it declines special action jurisdiction,<sup>192</sup> it remains mysterious why the court accepted one challenge to a fund sweep and rejected multiple others.<sup>193</sup> The fund sweep petitions, however, clearly show that the “highly discretionary” nature of special action jurisdiction allows the court to limit how often it intrudes into the budget process, even if a particular budget dispute does not present a clear political question and the parties have standing. As a practical matter, many budget disputes require the rapid resolution provided by the special action statutes, making the court’s refusal to accept jurisdiction the death knell for the lawsuit.<sup>194</sup> The special action regime thus enables the court to exercise judicial restraint by avoiding jurisdiction over every budget dispute, upholding Article III’s separation of powers.<sup>195</sup>

The special action process, however, only limits the Supreme Court’s involvement in the budget process, not the entire judiciary’s involvement. For example, several industries and government entities have filed fund sweep challenges at the trial court level.<sup>196</sup> After the Supreme Court rejected a special action petition by the Arizona Education Association (AEA) contesting budget legislation that affects public school employees, the AEA simply filed the same lawsuit in superior court.<sup>197</sup> While the court might have avoided the AEA’s petition by declining special action jurisdiction, the entire judicial branch cannot avail itself of the self-restraint allowed by the special action procedures. As a result, the court’s standing and political question jurisprudence are the primary tools that separate the entire judiciary from the budget process.

---

192. See Mary Jo Pitzl, *State High Court Won’t Hear Board’s Suit vs. Legislature*, ARIZ. REPUBLIC, Dec. 2, 2009, at B2.

193. Representative Kirk Adams believes the court is simply not “interested in weighing in too heavily on this process,” but notes that “‘at some point’ challenges arising from lower courts will be unavoidable.” *Arizona Courts*, *supra* note 187.

194. A refusal by the court to accept jurisdiction could end the case either because the dispute is time sensitive, as in *Brewer*, or because the plaintiff is unwilling to fully litigate the dispute beginning at the trial court.

195. This restraint is perhaps the way the court has chosen to effectuate *Rios*’s warning against extensive budget litigation, instead of using the political question doctrine.

196. Matthew Benson, *Court Rules State Erred by Raiding 3 Specialty Funds Tied to Farming*, ARIZ. REPUBLIC, July 15, 2009, at B5 (reporting that the Arizona Farm Bureau Federation prevailed in their superior court challenge to a legislative sweep of \$160,000 from private funds collected to advance agricultural research); *Arizona Courts*, *supra* note 187; Mary Jo Pitzl, *Health Boards Sue Legislature over Funds*, ARIZ. REPUBLIC, Apr. 9, 2009, at B1 (noting a lawsuit filed in superior court by the Arizona Medical Board and Arizona Pharmacy Board challenging the Legislature’s sweep of \$13.2 million of fee revenues); *Arizona Lawmakers*, *supra* note 3 (listing lawsuits filed in superior court by the Industrial Commission of Arizona, the Science Foundation of Arizona, and state-run insurance guaranty funds).

197. *Ariz. Union to Launch Challenge to Budget Law Anew*, ARIZ. REPUBLIC, Jan. 6, 2010, available at <http://www.azcentral.com/news/election/azelections/articles/2010/01/06/20100106teachers-challenge-ON.html>; *Ariz. High Court Rebuffs Challenge to Budget Law*, ARIZ. REPUBLIC, Jan. 5, 2010, available at <http://www.azcentral.com/news/articles/2010/01/05/20100105teachers-challenge-ON.html>.

### CONCLUSION

The recent decisions concerning Arizona's budget have set some limits on the judiciary's involvement in the budget process but largely clear the way for litigants to bring lawsuits about the hottest budget controversies. The Supreme Court's rules regarding legislative and executive standing strike an appropriate balance between allowing the judiciary to expound the constitutional boundaries between the political branches and keeping the judiciary out of as many political disputes as possible. While the courts rightfully decline to use the standing inquiry to limit an individual's ability to challenge an appropriation, this result, combined with the court's refusal to invoke the political question doctrine in the budget context, risks thrusting the judiciary into the intricate and often painful policy decisions inherent in budgeting.

The "highly discretionary" nature of the Supreme Court's special action jurisdiction acts as an escape hatch that allows the court to regulate its involvement in the budget process. Perhaps this method of judicial restraint accomplishes the same result for the court as a more robust political question doctrine. However, trial courts cannot use the special action regime to limit their involvement in budget disputes in the same way the political question doctrine would allow. As a result, the court's recent budget jurisprudence does not reflect a widespread effort to discourage budget litigation as a class and across the entire judiciary.<sup>198</sup>

Litigants have taken advantage of the court's hospitable attitude toward budget disputes, resulting in an increasing number of rulings that significantly impact the budget process and the policy choices made by the political branches. For example, in *Arizona Early Childhood Development & Health Board v. Brewer*, the court held unconstitutional a legislative fund sweep of \$7 million of interest income on a fund created by voter initiative.<sup>199</sup> In *League of Arizona Cities & Towns v. Martin*, the court struck a portion of a general appropriations bill that required Arizona cities and counties to pay the state approximately \$30 million.<sup>200</sup> Although the reasoning in these cases appears to be constitutionally sound, they nevertheless deprived the Legislature of funding sources that would have more evenly distributed the deficit's impact among all government services, demonstrating the significant policy consequences of a pure constitutional determination.<sup>201</sup>

---

198. Cf. *Arizona Lawmakers*, *supra* note 3 (quoting Arizona State University constitutional law professor Paul Bender: "I have noticed the [Supreme Court's] willingness to step into disputes that traditionally courts have been leery to step into.").

199. 212 P.3d 805, 810 (Ariz. 2009). The Legislature cannot divert funds "allocated to a specific purpose by an initiative measure" unless the action "furthers the purpose" of the initiative. *Id.* at 809 (quoting ARIZ. CONST. art. IV, pt. 1, § 1(6)). According to the court, the sweep of the interest income into the general fund did not further the initiative's purpose, making the action unconstitutional. *Id.*

200. 201 P.3d 517, 518 (Ariz. 2009). Because the bill failed to connect this assessment with a prior appropriation to cities and counties, it did not fall within the Constitution's definition of an appropriation. *Id.* at 522. As such, the municipalities were not required to remit the \$30 million.

201. The court's decision effectively forced the Legislature to find funds from

While the court's legal and jurisdictional analysis in each budget case appears to be technically sound, the cases, in the aggregate, form a body of case law that risks giving the judiciary an overly-ambitious role in the budget process. Budgeting is fraught with sensitive and painful policy decisions that should be made by the branches that are accountable to the electorate. Although judicial review is certainly "an essential check on democratic excesses,"<sup>202</sup> the judiciary risks, for all practical purposes, usurping the policymaking role of the political branches if it assumes the role of error-correction regarding specific budget items.<sup>203</sup> "[A]s a matter of democratic principle,"<sup>204</sup> the judiciary should arguably leave most budgeting decisions, at least as they relate to specific appropriations, to the political branches.<sup>205</sup>

By way of counterargument, the court's ambitious approach gives the judiciary a valuable role in ensuring that the political branches do not use the budget crisis as a pretext to trample Article III's division of power and flagrantly violate constitutional provisions. Under Article III, the judiciary can legitimately involve itself in budget-making when it is enforcing legal mandates. Arguably, the judiciary's role should be at its greatest during a time of crisis to ensure that the political branches behave appropriately.<sup>206</sup> The need to monitor the political

---

other sources in order to help balance the budget, forcing the Legislature to choose different government programs that would bear the brunt of budget cuts. *See supra* discussion note 133 (emphasizing that the distinction between a legal decision and a policy decision is often thin in the budgeting context).

202. 13A WRIGHT, MILLER & COOPER, *supra* note 99, at § 3531.3.

203. *See Renck v. Superior Court*, 187 P.2d 656, 660 (Ariz. 1947) ("Both our state and federal governments are constructed upon the principle of separation of powers into three equal and co-ordinate branches. For any one of these to police or supervise the operations of the others strikes at the very heart and core of the entire structure. Abuses within the reserved sphere of any of these branches of government may arise, but that fact does not give license to one of the other co-ordinate branches to correct. Correction comes from within that branch itself or from the people to whom all public officers are responsible for their acts."); *see also* *United States v. Richardson*, 418 U.S. 166, 188 (1974) (Powell, J., concurring) ("We should be ever mindful of the contradictions that would arise if a democracy were to permit general oversight of the elected branches of government by a nonrepresentative, and in large measure insulated, judicial branch.").

204. 13A WRIGHT, MILLER & COOPER, *supra* note 99, at § 3531.3.

205. This reasoning is most persuasive in cases like *Arizona Association*, challenging an individual budget item on, among other claims, statutory grounds and *Roosevelt Elementary*, construing a constitutional mandate that nevertheless has an enormous impact on specific funding decisions. It would relegate the cities in *League of Cities & Towns*, the initiative fund in *Arizona Early Childhood*, the schools in *Roosevelt Elementary*, and the disabled individuals in *Arizona Association* to strictly political remedies for their grievances. However, because this analysis is fundamentally grounded in separation of powers, it loses its vitality in cases that, at their core, define the constitutional boundaries between the Legislature and the Governor, such as *Brewer*, *Bennett*, and *Forty-Seventh Legislature*, even if the results have significant policy impacts. *See supra* discussion note 103. It also loses its force in *Arizona Association's* claim that the Legislature improperly delegated its authority to DES. *See supra* note 124.

206. *See Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting) ("Precisely because the need for action . . . is manifest, the need for vigilance against unconstitutional excess is great. History teaches that grave threats to



branches is especially great in the budget context because of the enormous impact budget decisions have on every Arizonan. A robust regime of judicial review gives the disaffected a forum for their complaints<sup>207</sup> and could allow the judiciary to inject much-needed sobriety into the budget frenzy.

Each view about the proper role of the judiciary in budget matters ultimately “reflect[s] differ[ing] judgments about the nature of democracy.”<sup>208</sup> In light of the state’s increasingly desperate fiscal and political situation, the judiciary should exercise great caution and restraint when it involves itself in the budget, always striving to minimize its intrusion into policymaking and maintain Article III’s division of power. In the absence of a contrary signal from the court, however, the judiciary will continue to enjoy a robust power of judicial review over Arizona’s budget. As a consequence, Arizona courts will find an ever-growing number of budget cases on their dockets. As options for balancing the budget dwindle, the judiciary could thus assume a leading role in Arizona’s budget drama.

---

liberty often come in times of urgency, when constitutional rights seem too extravagant to endure.”).

207. 13A WRIGHT, MILLER & COOPER, *supra* note 99, at § 3531.3.

208. *Id.*

\*\*\*