



CONSTITUTIONALLY IMPOSED DEBT LIMITATIONS:
RESPONDING TO THE FINANCIAL EXIGENCY CAUSED BY
COVID-19

NEW JERSEY REPUBLICAN STATE COMMITTEE V. MURPHY,
243 N.J. 574 (2020)

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I. INTRODUCTION

While constitutionally imposed debt limits may not present a prima
facie sexy topic of inquiry, this topic’s importance in the context of the
COVID-19 pandemic cannot be overstated. In New Jersey Republican
State Committee v. Murphy, the Supreme Court of New Jersey was asked
to decide whether the New Jersey COVID-19 Emergency Bond Act
(“Bond Act”) represents a borrowing arrangement in violation of the

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state's constitution.¹ Chief Justice Rabner, writing for a unanimous court, opined that the Bond Act complies with the state constitution, especially in light of the economic emergency caused by the COVID-19 pandemic.² This Comment will analyze the historical background of the aforementioned constitutional challenge, specifically as it pertains to the appropriations clause and debt limitation clause of the New Jersey Constitution. Further, this Comment will identify why the court's analysis was a sound one, and why the "emergency exception" to the debt limitation clause is entirely applicable in light of the extreme circumstances presented by the COVID-19 pandemic.

II. STATEMENT OF THE CASE

The devastation caused by COVID-19 is astounding. By the time *Murphy* was granted certification by the Supreme Court of New Jersey, there were approximately 5 million confirmed cases of the virus and about 160,000 deaths in the United States.³ In the state of New Jersey, those numbers were 185,031 and 15,878, respectively.⁴ Of course, these totals have grown exponentially since then,⁵ and the health and safety of Americans continue to remain in jeopardy.⁶

In addition to the profound health toll, the economic decline resulting from the pandemic is similarly palpable. By June of 2020, New Jersey's unemployment rate rose to 16.6%, about 2% over the national average, and close to 1.4 million New Jersey citizens applied for unemployment compensation benefits.⁷ While some residents were able to return to their jobs, unemployment claims continued to remain around the 500,000 range in mid-July.⁸ After a series of executive orders by Governor Philip D. Murphy and legislation designed to assess the short term effects of the

1. N.J. Republican State Comm. v. *Murphy*, 236 A.3d 898, 900 (N.J. 2020).

2. *Id.* at 900–02.

3. *Id.* at 903.

4. *Id.*

5. See *United States COVID-19 Cases, Deaths, and Laboratory Testing (NAATs) by State, Territory, and Jurisdiction*, CTR. FOR DISEASE CONTROL & PREVENTION (Jan. 31, 2021), https://covid.cdc.gov/covid-data-tracker/#cases_totaldeaths.

6. See Steven Nelson, *Biden Warns of 600,000 COVID Deaths as He Signs Wage Hike, Food Aid Orders*, N.Y. POST (Jan. 22, 2021, 5:10 PM), <https://nypost.com/2021/01/22/biden-warns-of-600k-covid-deaths-as-he-signs-food-aid-order/>.

7. *Murphy*, 236 A.3d at 902–03.

8. *Id.* at 903; see also David Matthau, *NJ Economy Is Recovering from COVID, but Don't Hold Your Breath*, N.J.101.5 (Sep. 16, 2020), <https://nj1015.com/nj-economy-is-recovering-from-covid-but-dont-hold-your-breath/> ("How long is it going to take us to get back? Job-wise, we'll never be back to the level of jobs that we had, at least not for the foreseeable future, and that's like [thirty] years out[.]").

virus, the State Treasurer projected “a combined revenue shortfall of nearly \$10 billion” for the remainder of the 2020 and entirety of the 2021 fiscal years.⁹ While the estimated shortfall improved to about \$9.2 billion by June, the State Treasurer reported that reliance on state-provided services had “increased significantly” and emphasized the “[d]emand for and reliance on public health professionals, law enforcement, first responders, financial assistance, and Medicaid, just to name a few.”¹⁰

Realizing the severe economic condition of states like New Jersey,¹¹ the federal government extended \$500 billion for state and local governments to borrow.¹² The State was required to support any borrowing with the “strongest security typically pledged to repay publicly offered obligations.”¹³ Recognizing the ongoing financial impact of the virus, the New Jersey legislature drafted the Bond Act¹⁴ which Governor Philip Murphy subsequently signed into law on July 16, 2020.¹⁵ The Bond Act identified many of the fiscal crises experienced by the State and outlined its purpose as “respond[ing] to the fiscal exigencies caused by the COVID-19 pandemic and to maintain and preserve the fiscal integrity of the State.”¹⁶

With this goal in mind, the legislature made up to \$9.9 billion in bonds available for sale to the federal government or to any public or private sale.¹⁷ This imposing number reflected the State’s anticipated budget shortfall for the 2020 and 2021 fiscal years.¹⁸ The projected loss improved slightly to \$9.2 billion over the course of the following month.¹⁹

9. *Murphy*, 236 A.3d at 903.

10. *Id.* (alteration in original).

11. *See id.* at 904 (valuing New Jersey’s expenditures at \$30 billion by March notwithstanding an anticipated spending balance of \$38.7 billion for the entire year).

12. *Id.*

13. *Id.*

14. For the full text of the New Jersey COVID-19 Emergency Bond Act, see Assemb. No. 4175, 219th Leg., 2020-21 Sess. (N.J. 2020).

15. *Murphy*, 236 A.3d at 904.

16. *Id.* at 901; *see also* N.J. Assemb. No. 4175 (anticipating economic downturn from (1) “precipitous declines in revenues,” (2) substantial revision of the “estimated revenues and projected appropriations for Fiscal Years 2020 and 2021,” and (3) “future increases in the State’s actuarially recommended contributions to the State’s pension plans”).

17. *Murphy*, 236 A.3d at 904. The legislature supported this substantial figure with evidence that the State was anticipating “‘precipitous declines in revenue’ . . . from gross income taxes, corporate business taxes, sales and use taxes, motor fuels taxes, casino-related taxes, and lottery sales . . .” *Id.* (citations omitted) (quoting N.J. Assemb. No. 4175).

18. *Id.* at 919. The State Treasurer reported this anticipated shortfall on May 22, 2020. *Id.*

19. *Id.* at 919–20.

The difference between these figures would eventually become important in the court's analysis.²⁰

The Bond Act naturally flows through the issuing of bonds. The process is fairly simple: any two of the Governor, State Treasurer, or Director of the Division of Budget & Accounting decide to issue bonds, at which point the proposal is voted on by the Select Commission.²¹ Upon approval from the Commission, the State Treasurer is tasked with depositing the funds in the "New Jersey COVID-19 State Emergency Fund."²² The Bond Act states that the funds created from bond issuing is considered revenue, and that the legislature may appropriate from this emergency fund.²³ Of course, the State must "make interest payments and redeem the principal amount of the bonds," when they reach maturity after thirty-five years.²⁴

Prior to enactment of the Bond Act, the Office of Legislative Services ("OLS") offered their opinion on its constitutionality.²⁵ OLS is a nonpartisan advisory agency that operates closely with the New Jersey legislature on a wide variety of issues, including those matters that have constitutional repercussions.²⁶ Recognizing the constitutional conflict between the appropriations clause and debt limitation clause, OLS opined that the "sudden, unanticipated and precipitous shortfall of expected revenue, resulting from the COVID-19 pandemic is the type of emergency contemplated" by the emergency exception of the debt limitation clause.²⁷ OLS continued by defining the scope of the proposed borrowing scheme and specifying that the State may borrow "for expenses directly addressing COVID-19" and borrow to "replace certified, anticipated revenue."²⁸ The agency emphasized the "disaster" that is

20. *See id.* at 920.

21. *Id.* at 904–05. *See generally* *What Is a Bond?*, VANGUARD, <https://investor.vanguard.com/investor-resources-education/understanding-investment-types/what-is-a-bond#:~:text=Bonds%20are%20issued%20by%20governments,way%2C%20usually%20twice%20a%20year>. (last visited Aug. 23, 2022).

22. *Murphy*, 236 A.3d at 905.

23. *Id.* at 904–05. In order to pay the obligation of these bonds, the State will enforce taxes under the Sales and Use Tax Act. *Id.* at 905. If, however, there are available funds in the "New Jersey COVID-19 State Emergency Fund" at the end of the calendar year, the Treasurer must direct those excess funds to the payment of the principal and interest of the bonds. *Id.*

24. *Id.*

25. Letter from Jason M. Krajewski, Legis. Couns., N.J. Off. of Legis. Servs., to Assemblyman Jon Bramnick 1 (May 7, 2020).

26. *See Office of Legislative Services: An Overview*, N.J. LEGIS., <https://www.njleg.state.nj.us/legislativepub/oview.asp> (last visited Aug. 23, 2022).

27. Letter from Jason M. Krajewski to Jon Bramnick, *supra* note 25, at 3.

28. *Id.*

COVID-19, and specifically stated that borrowing in non-emergent circumstances to finance future budgets would run afoul of the constitution.²⁹ With this background information in mind, we can now delve into the constitutional implications of the Bond Act.

III. CONSTITUTIONAL BACKGROUND

Before analyzing the viability of the New Jersey Supreme Court's holding, an in-depth look into the disputed constitutional provisions will prove useful. Examining the historical context of these clauses and the conflict between them is critical to understanding the court's reasoning.³⁰

A. Appropriations Clause

Simply put, appropriation is the allocation of money for a specific purpose or use.³¹ The appropriations clause provides that “[a]ll moneys for the support of the State government and for all other State purposes . . . shall be provided for in one general appropriation law covering one and the same fiscal year”³² More consequential to this analysis, is that this clause also requires a balanced budget and states: “[n]o general appropriation law or other law appropriating money for any State purpose shall be enacted if the appropriation contained therein . . . shall exceed the total amount of revenue on hand and anticipated”³³ The balanced budget provision was not codified in the New Jersey Constitution until 1947 and represents an evolution of the appropriations clause.³⁴

As we will see in the debt limitation clause (and emergency exception), the Great Depression substantially contributed to the framers' construction of the appropriations clause.³⁵ When the topic of “dedicated funds” entered the 1947 Constitutional Convention, powerful voices spoke to the State's need to maintain flexibility with

29. See *id.* at 4 (“Borrowing to supplement anticipated revenue is inconsistent with the purpose of . . . (a balanced budget) and has been expressly rejected by the New Jersey Supreme Court . . .”).

30. For a historical and detailed examination of the appropriations and debt limitation clauses in the New Jersey Constitution, see ROBERT F. WILLIAMS, *THE NEW JERSEY STATE CONSTITUTION* 172–76 (2d ed. 2012).

31. N.J. CONST. art. VIII, § 2, para. 2. It is common to conflate “appropriation” and disbursement, however, they are two distinct concepts. See *id.*

32. N.J. CONST. art. VIII, § 2, para. 2.

33. *Id.*

34. See *Murphy*, 236 A.3d at 908 (“The threadbare [a]ppropriations [c]lause . . . of the 1844 [c]onstitution did not require a single, balanced budget.”).

35. *Id.* at 908–09.

expenditures.³⁶ Specifically, appropriation of highway funds for Depression relief efforts were vital to the State in the years preceding this discussion.³⁷ Consequently, the framers at the 1947 Constitutional Convention included the phrase, “[a]ll moneys for the support of the State government and for all other State purposes *as far as can be ascertained or reasonably foreseen*, shall be provided in one general appropriation law” to provide the State flexibility in responding to unforeseeable disasters.³⁸

The New Jersey Supreme Court has previously discussed the relationship between bonds and the appropriations clause.³⁹ In the *Lance* case, the New Jersey Supreme Court opined that “contract bond proceeds used to fund general expenses . . . do not constitute ‘revenue’” with regard to the appropriations clause and that bonds “cannot be used to balance the annual budget.”⁴⁰ The court stated that to characterize bonds as a form of revenue would run directly against the appropriation clause’s intended purpose, namely, “to bar the State from adopting an annual budget in which expenditures exceed revenues.”⁴¹ Likewise, the borrowing purported by the Bond Act will absolutely count against the State’s revenue.⁴²

Important to note is that the appropriations clause lacks an emergency exception.⁴³ In theory, this means that without a showing of unforeseeable circumstances, the balanced budget requirement is unaffected. The State is, therefore, always required to ensure that appropriations do not exceed anticipated revenue. Keep this in mind as we discuss the debt limitation clause.

36. *See id.* at 910–11.

37. *Id.* at 911 (“If we now dedicate highway and kindred funds by constitutional provision, we shall forever seal off this vital source of revenue and foreclose its use for human need should the chaos and disaster of a depression or any other catastrophe come upon us again in New Jersey.”).

38. *See id.* at 914 (quoting N.J. CONST. art. VIII, § 2, para. 2).

39. *See Lance v. McGreevy*, 853 A.2d 856 (N.J. 2004) (per curium).

40. *Id.* at 857.

41. *Id.* at 859.

42. *See Lonegan v. State*, 819 A.2d 395, 402 (N.J. 2003) (holding that bonds backed by the full faith and credit of the State are “legally enforceable against the State” and “subject to the [d]ebt [l]imitation [c]lause.”).

43. *Murphy*, 236 A.3d at 914.

B. Debt Limitation Clause

The debt limitation clause provides in relevant part that:

The [l]egislature shall not, in any manner, create in any fiscal year a debt or debts, liability or liabilities of the State, which together with any previous debts or liabilities shall exceed at any time one per centum of the total amount appropriated by the general appropriation law for that fiscal year.⁴⁴

It wasn't until 1844 that this provision was enacted.⁴⁵ Prior to the addition of the fiscal clauses in 1844, many states (New Jersey included) engaged in less than wise borrowing activities.⁴⁶ For example, many states borrowed considerable amounts of money to fund infrastructural innovations in the early 19th century.⁴⁷ By the time the 1837 financial crisis transpired, states were indebted so severely that they were forced to default on bond obligations.⁴⁸ The framers at the 1844 Constitutional Convention recognized this problem and responded with the debt limitation clause.⁴⁹

At the 1947 Constitutional Convention, the framers added the emergency exception⁵⁰ which provides:

This paragraph shall not be construed to refer to any money that has been or may be deposited with this State by the government of the United States. Nor shall anything in this paragraph contained apply to the creation of any debts or liabilities for purposes of war, or to repel invasion, or to suppress insurrection or to meet an emergency caused by disaster or act of God.⁵¹

44. N.J. CONST. art. VIII, § 2, para. 3. *See generally* RICHARD BRIFFAULT, BALANCING ACTS: THE REALITY BEHIND STATE BALANCED BUDGET REQUIREMENTS (1996) (analyzing the notion that states generally have better balanced budgets than the federal government, and the real-life application of balanced budget requirements).

45. *Murphy*, 236 A.3d at 908–09. Prior to the 1947 Constitutional Convention, the debt limitation clause contained a \$100,000 limit. *See WILLIAMS, supra* note 30, at 174. This was replaced with the one percent limit in 1947. *Id.*

46. *See WILLIAMS, supra* note 30, at 174.

47. *Id.* at 175 (“[M]any of the states borrowed for the development of highways, canals and other internal improvements.”) *Id.*

48. *Id.*

49. *Id.* Indeed, “the history of the time renders evident the purpose of the 1844 provision.” *Id.*

50. *Murphy*, 236 A.3d at 914.

51. N.J. CONST. art. VIII, § 2, para. 3(e).

Although the New Jersey Constitution fails to define “emergency” and “disaster,”⁵² the events leading up to the inclusion of this exception provide clarity as to its contextual applicability. At the 1947 Constitutional Convention, New Jersey was fresh off the heels of the Great Depression.⁵³ Because the debt limitation clause originally only provided an exception “for purposes of war, or to repel invasion, or to suppress insurrection,”⁵⁴ the legislature in 1932, essentially had to expand this provision in response to the extreme financial position of the State.⁵⁵ Due to mass unemployment and citizen dependence on state welfare benefits, the legislature was authorized to borrow \$20 million in bonds.⁵⁶ The State’s bond indebtedness continued to grow and reached its pinnacle in 1935, when the State owed about \$197,000,000 in financial obligations.⁵⁷

In order to “meet” the emergency caused by the Great Depression, the State funded a variety of public programs.⁵⁸ For example, “the Emergency Relief Administration provided aid through food, shelter, fuel, clothing, health services, work projects, and support for governing bodies and state agencies.”⁵⁹ Other public projects that are not as clearly connected to the crisis were also funded, including but not limited to “recreation activities, rural rehabilitation, relief gardens, adult education, student aid, junior college, and vocational rehabilitation.”⁶⁰ The 1844 constitution required that each of these measures be voted on and approved at general elections.⁶¹ In an effort to provide the State more “flexibility” in responding to disasters, the framers revised the debt limitation clause at the 1947 Constitutional Convention to no longer require voter approval before borrowing funds.⁶²

In sum, the financial crisis of 1847 and the Great Depression substantially influenced the framers’ implementation of the emergency exception. The exception has yet to be formally invoked, however.

52. *Murphy*, 236 A.3d at 915.

53. *Id.* at 912–13.

54. *Id.* at 912.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 912–13.

59. *Id.*

60. *Id.* at 913.

61. *Id.* See generally Clayton P. Gillette, *Direct Democracy and Debt*, 13 J. CONTEMP. LEGAL ISSUES 365, 366–67 (2004) (detailing the history and effects of requiring voter approval for bond financing).

62. *Murphy*, 236 A.3d at 913.

C. The Conflict

Having identified the constitutional origins of these respective clauses, their innate conflict becomes palpable. The framers produced a situation where the State of New Jersey may use the emergency exception to borrow monies in response to a disaster, while the appropriations clause restricts the allocation of those funds. Although the Great Depression influenced the framers' construction of both fiscal clauses,⁶³ the appropriations clause lacks a formal acknowledgment of the emergency exception.⁶⁴ Because the emergency exception is used so sparingly, the legal issue presented in *Murphy* is unprecedented and the plaintiffs' claim rests at the heart of this naturally conflicting interaction.⁶⁵

Pieces of the plaintiffs' argument were theoretically necessary. While the State did not have to necessarily "circumvent[] the [a]ppropriations [c]lause,"⁶⁶ the State did need to reconcile the conflicting fiscal clauses. To that end, the plaintiffs advanced that since the pandemic originally appeared in the first quarter of 2020, COVID-19 was "no longer a surprise or unforeseen."⁶⁷ They argued that because the State knew of the financial decline, the pandemic no longer represented an emergency sufficient to avoid the appropriations clause.⁶⁸ Not surprisingly, the State's argument revolved around emphasizing the severity of the pandemic in an effort to uphold the Bond Act.⁶⁹ The State looked to the intent of the framers at the time the emergency exception was codified to make an affirmative comparison to the present day.⁷⁰

What is the just balance between these clauses? Surely, the framers at the 1947 Constitutional Convention intended to maintain fiscal responsibility through the use of a balanced budget. It is also clear that they intended to provide for emergency remedial measures in the event of a disaster. How do we reconcile this inherent difference?

63. *Id.* at 913–14.

64. N.J. CONST. art. VIII, § 2, para. 2.

65. *Murphy*, 236 A.3d at 901, 906.

66. *Id.* at 906, 908. See generally Richard Briffault, *Foreword: Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 908–10 (2003), for a detailed analysis on state constitutional debt limitations.

67. *Murphy*, 236 A.3d at 906.

68. *Id.*

69. See *id.* at 907.

70. *Id.*

IV. COURT'S REASONING

Chief Justice Rabner, writing for the unanimous court, outlined three central issues produced by the Bond Act.⁷¹ First, the court considered whether the COVID-19 pandemic constituted a “disaster” that created an emergency within the meaning of the debt limitation exception.⁷² Justice Rabner dispensed of the “disaster” inquiry fairly quickly (and in the affirmative)⁷³ and continued by considering the nature of the emergency presented by the pandemic.⁷⁴ Plaintiffs argued that while it may be a disaster, COVID-19 no longer posed an emergency to the State because it was “no longer a surprise or unforeseen.”⁷⁵ In response to this argument, Justice Rabner highlighted the lack of such a distinction in the debt limitation clause.⁷⁶ Justice Rabner opined that the nature of the emergency posed by the pandemic was an ongoing one that does not require the element of surprise.⁷⁷ In essence, the fact that the emergency will continue “does not make it any less of one.”⁷⁸

Second, having established that COVID-19 was an emergency caused by a disaster, the court went on to consider the types of borrowing that “meet an emergency caused by disaster.”⁷⁹ The word “meet” presented some difficulty in defining.⁸⁰ After consulting the *Webster’s Dictionary* and the appropriations clause itself, the court ultimately found that incurring debt to “meet” an emergency “must relate to or provide for that emergency.”⁸¹ To that end, the court was tasked with evaluating what types of borrowing provide for an emergency, in addition to permissible amounts of borrowing.⁸²

In regard to the types of borrowing allowable to meet an emergency, Justice Rabner pointed to the history leading up to inception of the

71. *Id.* at 916 (“[W]e consider several issues that the Bond Act presents: (1) whether COVID-19 qualifies as a ‘disaster,’ and, if so, the nature of the emergency it has caused; (2) what type of borrowing ‘meet[s] an emergency caused by disaster’; and (3) the interplay between the [e]mergency [e]xception and the fiscal clauses of the constitution.”) (second alteration in original).

72. *Id.* at 917.

73. *Id.* (“Whatever else the [e]mergency [e]xception may encompass, it includes a rare, once-in-a-century, infectious disease of the magnitude of COVID-19.”).

74. *Id.*

75. *Id.* at 906.

76. *Id.* at 917.

77. *Id.*

78. *Id.*

79. *Id.*

80. *See id.*

81. *Id.* at 917–18.

82. *Id.* at 918.

emergency exception previously discussed.⁸³ The court emphasized the “wide array” of borrowing that the legislature was obliged to perform to meet the crises precipitated by the Great Depression.⁸⁴ Similarly, Justice Rabner outlined an illustrative list of services that may be provided through borrowed funds, in addition to those services necessary for immediate medical relief.⁸⁵ While Justice Rabner explicitly stated that it was not for the court to decide which services were best suited for the pandemic, the main takeaway was that there must exist a nexus between the service and the pandemic.⁸⁶ In response to the plaintiffs’ claim that the Bond Act effectually funds general expenses of the State,⁸⁷ Justice Rabner concluded that limiting borrowing strictly for medical services connected to the pandemic would not “meet” the present emergency.⁸⁸

The overall amount of borrowing allowable under the emergency exception was also addressed by the court.⁸⁹ Clearly, encouraging unencumbered borrowing would not promote fiscal responsibility on behalf of the State. The baseline rule established by the court in *Murphy* states that the legislature may not borrow in excess of the valued deficit caused by the pandemic.⁹⁰ The valuation requires public certification from either the Governor or Treasurer and takes into account the expected revenue for the fiscal year and the subsequent decline due to the effects of the pandemic.⁹¹ Thus, in the context of this case, the State Treasurer’s late June estimate of a \$9.2 billion shortfall meant that the State was only authorized to borrow said amount.⁹² Justice Rabner

83. *Id.*

84. *Id.*

85. *Id.* (“[T]he State, for example, may borrow to provide for public services like education, police, fire, first aid, child welfare, and prisons, among other services—to secure the continued functioning of government.”).

86. *Id.* (“Borrowing for programs unrelated to the emergency would not satisfy the language of the exception or the Act. For example, using \$1 billion in borrowed funds to subsidize a new sports arena could hardly be said ‘to respond to the fiscal exigencies caused by the COVID-19 [p]andemic’ . . .”); see also Letter from Jason M. Krajewski to Jon Bramnick, *supra* note 25, at 3 (stating that paragraph 3(e) of the debt limitation clause “sets forth a nexus test,” that can be similarly compared to the COVID-19 pandemic).

87. *Murphy*, 236 A.3d at 906.

88. *Id.* at 918–19 (“In practical terms, debt can be incurred to provide not only for masks, respirators, and field hospitals . . . but also for the impact on the public fisc caused by COVID-19.”).

89. *Id.* at 919.

90. *Id.*

91. *Id.* While the Bond Act allowed the legislature to borrow up to \$9.9 billion, the legislature may only borrow to the extent certified by the Governor or Treasurer. *Id.* at 919–20.

92. *Id.* The court opined, however, that if a shortfall valuation exceeds \$9.9 billion, the maximum amount borrowable will remain \$9.9 billion (as specified by the Bond Act). *Id.* at 920.

concluded this discussion by seemingly encouraging the legislature to provide “greater specificity” with regard to the allocation of future pandemic-related borrowing.⁹³

Third, the court reflected on the inevitable constitutional challenge at issue in this case: the relationship between the emergency exception and the fiscal clauses of the New Jersey Constitution.⁹⁴ The court refused to accept the plaintiffs’ position that because the emergency exception appears exclusively in the debt limitation clause, the exception fails to trigger the “appropriations process.”⁹⁵ Justice Rabner opined that such an interpretation of the fiscal clauses would result in an absurd outcome—previously discussed in this Comment—where the State would be allowed to borrow money under the emergency exception while the appropriations clause would restrict its allocation.⁹⁶ Another theoretical deficiency of this interpretation proffered by the Chief Justice included a scenario where the State could borrow lesser funds to respond to a “relatively limited crisis,” while remaining incapable of borrowing greater amounts for “times of great crisis.”⁹⁷

Again, pointing to the historical context that led to the inception of the emergency exception, Justice Rabner reiterated the primary purpose of this provision: to promote responsible fiscal procedures while maintaining flexibility when disaster strikes.⁹⁸ The court’s analysis was based substantially on the framers’ intent which, according to the court, was not the consequence reasoned by the plaintiffs.⁹⁹ Thus, the court upheld the constitutional validity of the Bond Act subject to the aforementioned parameters outlined by the court.¹⁰⁰

V. ANALYSIS

Evaluating the court’s analysis holistically, this decision can hardly be characterized as navigating around the appropriations clause.¹⁰¹ On the contrary, the court interpreted the emergency exception in

93. *Id.* “[T]he borrowing of a specific sum for direct relief to the unemployed” would not require certifications from the Treasurer or Governor. *Id.*

94. *Id.* at 916.

95. *Id.* at 920.

96. *Id.* (“[S]uch a reading of the fiscal clauses would also render the [e]mergency [e]xception meaningless when it is needed the most.”).

97. *Id.*

98. *Id.* at 921.

99. *Id.*

100. *Id.*

101. See Briffault, *supra* note 66, at 940 (“As the New Jersey Supreme Court observed . . . ‘the modern science of government has found a method of avoiding [the debt] clause, and the courts have approved it.’”) (second alteration in original).

conjunction with the fiscal clauses of the New Jersey Constitution.¹⁰² The recurring theme throughout the opinion revolves around permitting invocation of the emergency exception, albeit with certain limitations. These limitations are critical to striking a balance between providing emergency relief and maintaining a balanced budget (as required by the appropriations clause).¹⁰³ In many ways, the concerns raised by the plaintiffs in this case seemed to influence the court in its analysis.¹⁰⁴

The many parameters set by the court were necessary in order to avoid “circumventing the [a]ppropriations [c]lause.”¹⁰⁵ These parameters manifested in the form of requiring a nexus between the virus and the service funded through borrowed funds,¹⁰⁶ limiting excessive borrowing wherever possible,¹⁰⁷ and reinforcing a cap to the proposed borrowing scheme.¹⁰⁸ In light of the constitutional conflict between the fiscal clauses and the emergency exception, the court could not simply ignore one clause or the other. Rather, the only way to maintain the emergency exception as a long-term avenue of fiscal relief for the State was to resolve its relationship with the appropriations clause. Even in the context of a once-in-a-century pandemic, the name of the game is to always maintain a balanced budget, and the court did its best to strike that delicate balance.¹⁰⁹

That said, there were a couple stones left unturned that deserve to be addressed. Almost certainly the court felt hurried to issue an opinion with the impending fiscal viability of the State hanging on an unprecedented constitutional challenge.¹¹⁰ On the other hand, the court intentionally avoided certain arguments that would help to further elucidate the logical validity of its decision.¹¹¹ Accordingly, a couple aspects of this opinion require further consideration: the absence of voter

102. *Murphy*, 236 A.3d at 916. The intent of the framers at the time the fiscal clauses were enacted also justifiably informed the court. It was clear that the framers desired flexibility especially considering the economic downturn that was the Great Depression. *Id.* at 912–13.

103. N.J. CONST. art. VIII, § 2, para. 2.

104. *See Murphy*, 236 A.3d at 906.

105. *Id.*

106. *See id.* at 918.

107. *Id.* at 919.

108. *Id.* at 919–20.

109. WILLIAMS, *supra* note 30, at 174 (“The purpose of [the debt limitation clause] is to limit the amount of debt the state government may incur . . . to prevent a present legislature from incurring debts that must be paid by future legislatures.”).

110. *See Murphy*, 236 A.3d at 906. The haste with which this case was granted certification demonstrates the time sensitivity in deciding the issue before the end of the fiscal year.

111. *See id.* at 921 n.37.

approval of debt and the implications of the discretion allotted to the legislature in deciding which services to fund.

A. *Why Not Require Voter Approval?*

In a footnote, the court declined to entertain any notion that the emergency exception requires voter approval to permit a proposed borrowing mechanism.¹¹² As the court alluded to on multiple occasions, the Great Depression was a primary impetus for the emergency exception and served as the only comparable “disaster” in this context.¹¹³ The major distinction between the Great Depression and the COVID-19 pandemic is the absence of the emergency exception during the former.¹¹⁴ While the *Murphy* court designated a great deal of discretion to the legislature about how to best respond to the pandemic,¹¹⁵ the State required direct citizenry approval during the Great Depression.¹¹⁶ While the framers eventually removed the requirement of voter approval for borrowed funds at the 1947 Constitutional Convention,¹¹⁷ this fact does not preclude an analysis of whether voter approval *should* be required for debt financing.

Some scholars have advanced the benefits of requiring voter approval for bond borrowing.¹¹⁸ For example, bond elections promote direct democracy and can better reflect the views of constituents.¹¹⁹ In addition, scholars have noticed a trend that voting referendums have been effective in limiting the total debt of a state.¹²⁰ As it stands, the debt limitation clause requires voter approval for any borrowing that exceeds one percent of the amount appropriated in any given fiscal year.¹²¹ Why should the emergency exception be exempt from the voice of the people?

112. *Id.* (“Because the [e]mergency [e]xception to the [d]ebt [l]imitation [c]lause applies here, the [c]lause’s . . . requirement of voter approval, does not apply.”).

113. *See generally id.*

114. *See id.* at 913–14.

115. *Id.* at 918–19 (“Reasonable people may differ about how to meet the challenges society now faces. Those questions ‘are for the [l]egislature and the people to decide, subject only to constitutional bounds.’” (quoting *N.J. Ass’n on Corr. v. Lan*, 403 A.2d 437, 443 (N.J. 1979))).

116. *Id.* at 913.

117. *Id.*

118. *See, e.g., Gillette, supra* note 61, at 367.

119. *See id.* (“[B]ond elections . . . promise to track constituent preferences more closely than general elections because voters decide issues singly rather than select among candidates who represent an amalgam of positions that attract various levels of support.”).

120. *See id.* at 372.

121. *See Murphy*, 236 A.3d at 901 (citing N.J. CONST. art. VIII, § 2, para. 3(a)); *see also* Briffault, *supra* note 66, at 916 (“Most commonly, state constitutions rely on a procedural restriction: Debt may not be incurred without the approval of a supermajority in the legislature, of voters in a referendum, or both.”); WILLIAMS, *supra* note 30, at 174 (“The

The reply to this inquiry is both fact specific and theoretical and requires more of an explanation than simply to provide “flexibility” for responding to emergencies. Requiring voter approval during the COVID-19 pandemic would be problematic for many reasons. First, it would be nearly impossible to hold in-person elections without violating the CDC guidelines for prevention of transmission or exposing voters to the risk of COVID-19.¹²² Second, even if the State could manage a vote-by-mail system, such a process would be inefficient and run contrary to the State’s interest of responding quickly to financial exigency. Third, it is unreasonable to vest the financial viability of the State in citizens who lack the depth of information that is commonly available to legislators.¹²³ While the citizens are feeling the unfortunate effects of the pandemic, they are not in a position to best decide how to respond to its turmoil.

It is also worth noting that the omission of voter approval is exclusive to the emergency exception.¹²⁴ Any argument that this decision could result in continued legislative borrowing provisions that exceed the one percent limit articulated in the debt limitation clause is mistaken. The legislature is still required to invoke voting referendums when exceeding the one percent limit is implicated, assuming the emergency exception is not invoked.¹²⁵

B. Discretion to the Legislature

To what services should the Bond Act be applied? This question speaks once again to what “meets” the disaster triggered by the pandemic. In *Lance*, the court did not allow borrowed funds designated to fund general expenses to constitute revenue.¹²⁶ Doing so would not “preserve the fiscal integrity of the State.”¹²⁷ Further, the *Lance* court went on to define general expenses as “the ordinary, operating, and day-to-day costs of government.”¹²⁸ Therefore, the Bond Act only allows the

[debt limitation clause] therefore requires direct involvement of the voters in most major fiscal indebtedness decisions.”).

122. See *How to Protect Yourself & Others*, CTR. FOR DISEASE CONTROL AND PREVENTION (Feb. 25, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>, for a comprehensive list of preventative transmission measures, some of which would reasonably be implicated in the event of in-person voting.

123. See *Murphy*, 236 A.3d at 918–19 (“Courts traditionally defer to the will of the [l]egislature and the choices it makes, provided they do not run afoul of the [c]onstitution.”).

124. See N.J. CONST. art. VIII, § 2, para. 3(e).

125. *Id.* at § 2, para. 3.

126. See *Lance v. McGreevey*, 853 A.2d 856, 857 (N.J. 2004) (per curiam).

127. *Murphy*, 236 A.3d at 904; see also *Lance*, 853 A.2d at 859–60 (“[R]elying on such proceeds belies the common-sense notion of a balanced budget and is contrary to the framers’ original intent in drafting the [a]ppropriations [c]lause.”).

128. *Lance*, 853 A.2d at 859.

legislature to fund expenses with some nexus to the effects of the pandemic.¹²⁹ General expenses are not within the ambit of the Bond Act.¹³⁰

There are two avenues of interpretation for the nexus standard. A narrow interpretation would allow borrowed funds to apply only to services that relate to the “health aspects of the pandemic, such as respirators and field hospitals.”¹³¹ This assessment naturally prevents potential instances of legislative abuse because the legislature would be restricted to borrowing only for health-related programs. Perhaps the State would create less immediate debt; however, such a confined view clearly ignores the vast impact of COVID-19. The impressive reliance on State provided programs subsequent to the inception of the pandemic demonstrates the scope of its effect.¹³² Additionally, while the State would prevent immediate creation of debt in this instance, the lack of State funded social programs could perhaps result in an even more devastating economic status.¹³³ Instead of borrowing early on to combat the financial distress of the State, the result of the plaintiffs’ assertion could mean a dire budgetary crisis for years to come.

On the other hand, if the legislature looks to the Great Depression for application of the nexus standard, like the court expressed on multiple occasions,¹³⁴ the service/pandemic relationship is a fairly liberal one. Chief Justice Rabner cited to a plethora of State provided programs that were funded via bond financing during the Great Depression.¹³⁵ Many of them lack that nexus at first glance.

129. See *Murphy*, 236 A.3d at 918. Following this decision, New Jersey borrowed about \$4 billion from banks like Bank of America to revive the State’s budget. See John Reitmeyer, *What It Has Cost NJ to Borrow Billions During a Health Crisis*, WHYY (Jan. 22, 2021), <https://whyy.org/articles/what-it-has-cost-nj-to-borrow-billions-during-health-crisis/>.

130. See *Murphy*, 236 A.3d at 918.

131. *Id.* at 919.

132. Sacha Pfeiffer, *New Jersey Gov. Phil Murphy: Economic Impact Has Been ‘Staggering Across the Board’*, NPR (Sept. 8, 2020, 3:55PM), <https://www.npr.org/sections/coronavirus-live-updates/2020/09/08/910788634/new-jersey-governor-on-the-coronavirus-in-his-state>. Governor Murphy stated that “[s]mall businesses have been crushed . . . [t]he impact has been staggering across the board.” *Id.* The Governor also cited a figure that out of approximately 9 million citizens, there were over 1.5 million unemployment claims. *Id.*

133. Assemb. No. 4175, 219th Leg., 2020-21 Sess. (N.J. 2020) (“Events surrounding COVID-19 have . . . increased and will continue to increase volatility in long-term and short-term capital markets on which local government units rely to meet operating expenses.”).

134. *Murphy*, 236 A.3d at 918–21.

135. *Id.* at 912–13. In addition to services such as “food, shelter, fuel, clothing, health services, work projects, and support for governing bodies and state agencies. The [Emergency Relief] Administration also provided a diverse array of special programs including recreation activities, rural rehabilitation, relief gardens, adult education, student aid, junior college, and vocational rehabilitation, among others.” *Id.* (citation omitted).

The source of concern here is that the court vested a considerable amount of discretion in the legislature with this decision. Certainly, it is not the court's duty to select which programs are best suited to respond to the pandemic,¹³⁶ and doing so would undoubtedly implicate a separation of powers conflict. Conversely, if the legislature was allowed to fund junior college and vocational rehabilitation during the Great Depression,¹³⁷ it remains to be seen how distant the permissible connection between the pandemic and the service funded will be under the Bond Act. Still, the court will hold the legislature accountable if they stray too far from the footprint of the pandemic. In the meantime, the State and its citizens have some security as to their financial well-being.

VI. CONCLUSION

While the plaintiffs in this case were associated with a political party,¹³⁸ this issue was not a political one. Rather, this case serves to illustrate the court's recognition that the COVID-19 pandemic was a profound disaster that substantially impacted the emotional and financial condition of New Jersey. The court responded to this fiscal exigency by requiring the branches of state government to work together in alleviating the dire financial position of the State while limiting excessive creation of debt in the process.¹³⁹ The plaintiffs' constitutional interpretation of the fiscal clauses ignored the framers' intent when the provisions were amended in 1947.¹⁴⁰ Such a prioritization of the appropriations clause is unsupported and would effectively eliminate the emergency exception. Denying the State the discretion to borrow large sums of money in response to a profound disaster would essentially tie the hands of the State behind its back. This result not only directly conflicts with the intent of the framers, but also could have disastrous consequences for the citizens of the state of New Jersey. Accordingly, the *Murphy* court appropriately balanced the concerns of both parties and allowed the legislature to help the State get back on its feet.

136. *Id.* at 918–19.

137. *Id.* at 913.

138. *Id.* at 906.

139. *See id.* at 919. The Governor or Treasurer must certify the anticipated decline in revenue, at which point the legislature can issue bonds to recover said revenue. *Id.*

140. *See id.* at 921.