Gubernatorial Impoundment: An Implied Solution for a Budgeting Challenge

ZACHARY BLAIR*

In recent years, states have had to make drastic cuts to their budgets even as the economy flourished in the wake of the Great Recession. The task of balancing state budgets has always been a formidable one, but recent shifts in revenue sources and their ability to generate reliable funding have made this challenge increasingly common and difficult. Historically, states have viewed budget balancing as a fundamentally legislative obligation and prerogative, which is often delegated to the executive branch in the form of impoundment statutes because of the executive's superior budgeting capabilities.

In several states, however, the legislature has either kept the power to balance the budget for itself or has delegated insufficient discretion to the executive, hampering the state's ability to meet its constitutional obligation to balance the budget. Consequently, this Note presents an alternative interpretation of the power to impound. It conceives of impoundment as a shared constitutional power exercisable by either the executive or legislature that can be constrained by statute. This interpretation permits the executive to better leverage its strengths in fiscal matters to resolve budget deficits quickly and efficiently, ensuring that the state meets its constitutional obligation to balance the budget.

I. INTRODUCTION

For decades, the power of governors to impound funds appropriated by state legislatures has challenged traditional notions of the separation of powers, particularly the extent to which legislatures can and should delegate budget-making power — historically

* Articles Editor, Colum. J.L. & Soc. Probs., 2019-2020. J.D. Candidate 2020, Columbia Law School. The author thanks Professor Richard Briffault for his guidance and insight, and the staff of the *Columbia Journal of Law and Social Problems* for their hard work and thoughtful feedback.

viewed as a legislative role — to the executive branch.[1] Impoundment — i.e., the withholding of appropriated funds from expenditure — allows states to manage deficits throughout a fiscal year by limiting spending until sufficient revenues materialize.[2] At the federal level, impoundment received significant attention when the practice peaked during the Nixon administration.[3] But the constitutional limits of state-level impoundment have received significantly less scholarly attention, even as the growing difficulty of fending off state budget deficits has made gubernatorial impoundment increasingly relevant.[4] Indeed, the COVID-19 crisis has amplified the need to revisit the power of governors to address fiscal shortfalls. Recent estimates of the economic fallout from the virus present a bleak picture for state finances; Massachusetts, for example, is expecting to lose $1.8 billion to $3 billion in fiscal year 2021, while New York faces a deficit of $10 billion to $13 billion for the year.[5]

Thus, now more than ever, states need the tools to address budget gaps. Almost all states are required to close these gaps under state laws requiring balanced budgets [hereinafter "balanced

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1. Jon L. Mills, *Battle of the Budget: The Legislature and the Governor Fight for Control*, 18 NOVA L. REV. 1101, 1102 (1994).

2. Glenn Abney & Thomas P. Lauth, *The End of Executive Dominance in State Appropriations*, 58 PUB. ADMIN. REV. 388, 392 (1998). There are multiple executive actions that may constitute impoundment. A typical example occurred in fiscal year 2017, when Massachusetts Governor Charlie Baker cut $98 million from the state's operating budget in order to balance the budget. Max Larkin, *Governor's Midyear Budget Cuts Include $12 Million From Education*, WBUR (Dec. 7, 2016), https://www.wbur.org/edify/2016/12/07/governors-midyear-budget-cuts-include-12-million-from-education [https://perma.cc/H34S-CQXT].

3. Christopher Wlezien, *The Politics of Impoundments*, 47 POL. RES. Q. 59, 60 (1994); *see also* Roy E. Brownell II, *The Constitutional Status of the President's Impoundment of National Security Funds*, 12 SETON HALL CONST. L.J. 1, 46–47 (2001) ("President Nixon took impoundment to its next possible step: as a means to effect policy ends not only in the national security realm but also in the domestic arena. President Nixon baldly asserted that he possessed a broad constitutional power to impound funds in order to combat inflation and prevent a tax increase. . . . By arguing that the 'executive power' clause empowered him to withhold funds, the Nixon administration attempted to terminate programs with which the President disapproved.").

4. James W. Douglas & Kim U. Hoffman, *Impoundment at the State Level: Executive Power and Budget Impact*, 34 AM. REV. OF PUB. ADMIN. 252, 252 (2004) ("[R]esearch on budget impoundments has focused almost exclusively on the federal process.").

5. Katie Lannan, *Projected Tax Revenue Shortfall in Mass. Sets Up Tough Budget Math, Tufts Researchers Say*, WBUR (Mar. 31, 2020), https://www.wbur.org/bostonomix/2020/03/31/dramatic-revenue-drop-billions-coronavirus [https://perma.cc/TWD3-KMU9]; Karen Dewitt, *Coronavirus Increases New York State Budget Deficit*, WAMC (Mar. 17, 2020), https://www.wamc.org/post/coronavirus-increases-new-york-state-budget-deficit [https://perma.cc/MG4N-4GHD].

budget requirements"].[6] Even before COVID-19's impact on state budgets, fulfilling this duty had grown increasingly complicated because of the counterintuitive economic trends that defined the post-Great Recession era. In contrast to the last bull market in the mid-2000s, the post-Recession environment paradoxically presented enormous budget-making challenges even as the economy rebounded and boomed.[7] This is largely the result of states' growing reliance on increasingly volatile revenue sources, such as personal income and excise taxes.[8] That volatility has frustrated the process of estimating expected revenue, making it harder for state officials to appropriate funds at levels that will remain consistent with actual receipts throughout the fiscal year.[9] Swings between deficits and surpluses have thus become more common as revenue predictions become more difficult.[10] Unfortunately for budget-makers, economic forecasts indicate that this uncertainty is a long-term phenomenon that will continue to plague state budgets even after the COVID-19 crisis is resolved.[11]

Existing scholarship reveals some disagreement in the field over whether the executive or legislative branch should be responsible for balancing budgets in such an uncertain climate.[12] However, this scholarship focuses largely on the federal budget context, and it therefore fails to address the unique challenges and

6. Richard Briffault, *The Item Veto in State Courts*, 66 Temp. L. Rev. 1171, 1179 (1993) ("Nearly all state constitutions require that state budgets be balanced.").

7. NAT'L CONFERENCE OF STATE LEGISLATURES, STATE BUDGET UPDATE: SPRING 2017 1 (2017), http://www.ncsl.org/Portals/1/Documents/fiscal/StateBudgetUpdate_Spring2017_1_31383.pdf [https://perma.cc/M2JE-AS76].

8. Elaine S. Povich, *State Income Tax Revenue is Increasingly Volatile*, GOVERNING (Oct. 14, 2014), http://www.governing.com/news/headlines/state-income-tax-revenue-is-increasingly-volatile.html [https://perma.cc/VRS9-AK9E].

9. *Id.* ("[T]he growth in forecasting errors is mostly attributable to tax revenue volatility."; "The unpredictability and the fact that the revenue is growing more slowly are creating major budgeting challenges for states.").

10. Kim S. Rueben & Megan Randall, *Revenue Volatility*, PEW CHARITABLE TR. (Nov. 27, 2017), https://www.urban.org/research/publication/revenue-volatility [https://perma.cc/5MBS-EZEB] ("Rising volatility in state tax collections has made it difficult for some states to accurately forecast revenues.").

11. *Id.* Rueben and Randall also suggest some policy changes to mitigate the effects of this long-term change. These suggestions, however, focus on back-end fixes, like investment in a budget stabilization fund, rather than on front-end fixes that reduce volatility. *See id.*

12. Tyler J. Siewert, Note, *The Cloying Use of Unallotment: Curbing Executive Branch Appropriation Reductions During Fiscal Emergencies*, 95 MINN. L. REV. 1071, 1077 (2011) (citing David Yassky, Note, *A Two-Tiered Theory of Consolidation and Separation of Powers*, 99 Yale L.J. 431, 446 (1989) (claiming that Bowsher v. Synar, 478 U.S. 714 (1986), finds that "the power to order budget cuts is an executive responsibility") and Michael Abramowicz, *Beyond Balanced Budgets, Fourteenth Amendment Style*, 33 TULSA L.J. 561, 609 (1997) ("[R]ewriting a budget is a quintessentially legislative task. . . .")).

opportunities in state-level budget balancing.[13] For example, unlike the federal government, states cannot always issue the types of debt needed to cover short-term deficits.[14] In fact, they are generally prohibited from doing so by balanced budget requirements.[15] With new debt off the table and revenue sources becoming increasingly volatile, states must more carefully monitor and make more frequent adjustments to their budgets throughout the fiscal year. Fortunately, the state-budgeting context also presents opportunities unavailable at the federal level. These opportunities arise from the way constitutional balanced budget requirements recalibrate the state separation of powers in favor of the executive branch — the branch best suited to make budget revisions. Although they do not explicitly say so, these requirements empower governors to assist in warding off ever more frequent budget crises by exercising the authority to impound funds under certain circumstances.

Thus, contrary to some scholarly assumptions, impoundment at the state-level is not a purely legislative task that can only be exercised by state executives when delegated.[16] In fact, such a legislative-driven interpretation reflects a misunderstanding of the basis for the executive power of impoundment. It fails to account for the executive's spending role in the constitutional order, and it fails to recognize the way many balanced budget requirements shift fiscal responsibility toward the executive branch.

Instead, the ability to impound should be viewed as an implied and shared power flowing from the executive's participation in both the budget process and in the duties set out in constitutional

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13. Douglas & Hoffman, *supra* note 4, at 252 ("[R]esearch on budget impoundments has focused almost exclusively on the federal process.").

14. *See, e.g.*, MICH. CONST. art. IX, § 14 (authorizing the issuance of short-term notes to meet general obligations but capping total indebtedness and requiring repayment within the fiscal year). Although states typically prohibit the use of bond proceeds to cover operating expenses, it has occurred in a few instances. *See, e.g.*, *Policy Basics: State and Local Borrowing*, CTR. ON BUDGET & POL'Y PRIORITIES, https://www.cbpp.org/research/state-budget-and-tax/policy-basics-state-and-local-borrowing#_ftn1 [https://perma.cc/C9WS-4W3F] (last visited Mar. 26, 2020); *see also* Nate Downing, Note, *Stemming the Tide of Fiscal Crisis: The Case for Gubernatorial Budget Reductions*, 47 NEW ENG. L. REV. 265 (2012).

15. For example, the California Constitution contains a balanced budget requirement that says that the legislature "shall not, in any manner create any debt or debts, liability or liabilities, which shall, singly or in the aggregate with any previous debts or liabilities, exceed the sum of three hundred thousand dollars ($300,000)," subject to several exceptions. CAL. CONST. art. XVI, § 1. Thus, any deficit over $300,000 would require budget-balancing steps other than issuing debt.

16. *See* Downing, *supra* note 14, at 268; *see also* Siewert, *supra* note 12, at 1077.

balanced budget requirements themselves. Specifically, state executives can impound funds because they are directed to fulfill sometimes conflicting duties: they must "take care" to implement state budgets, but in the event of a deficit, they must also enforce often constitutionally-based balanced budget requirements. In the face of these contradictory instructions, governors should enforce the law to the maximum extent possible, using impoundment as a form of discretionary underenforcement of the budget laws. Without a balanced budget requirement, no such discretion would exist. Thus, constitutional balanced budget requirements are what furnish state executives with the implied power to impound when faced with a budget deficit.

Where balanced budget requirements are constitutional, this power should be seen as constitutionally implied and should thus exist regardless of any statute granting the executive the authority to impound. But the legislature, with its control over the "power of the purse," also has this same power.[17] If both the legislative and executive branches attempt to exercise this power in conflicting ways, disagreements should be resolved using a separation of powers analysis similar to that proposed by Justice Jackson in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.[18] Justice Jackson's opinion defines ambiguous executive power in relation to legislative power, with executive power at its weakest when exercised in the face of legislative opposition.[19] In the state budgeting context, impoundment statutes are best seen as legislative opposition to certain types of executive impoundment. Thus, in states with both balanced budget requirements and impoundment statutes, those statutes, currently seen as affirmative grants of power, should be reconceived as restrictions on a constitutionally-derived implied executive power.

This reconceptualization presents a substantial power shift, the implementation of which would likely result in political struggles with legislatures that jealously guard their current roles in the budgeting process. Yet this proposal not only comports with states' constitutional systems of separation of powers, it also has the added policy benefit of allowing for more executive flexibility to achieve legislatively and constitutionally required balanced

17. Siewert, *supra* note 12, at 1075 ("The legislature . . . ultimately decides both the budget's social and policy objectives, and the extent of their funding.").

18. 343 U.S. 579, 635–38 (1952).

19. *Id.* at 637.

budgets. Such a shift will improve states' fiscal health because legislatures are poorly positioned to make needed budget adjustments throughout the year.[20] Collective action problems, procedural requirements, information delays, and regional focuses all combine to slow the implementation of budget maintenance.[21] Governors, by contrast, have better access to information, greater expertise, larger staffs, a statewide constituency, fewer hurdles in decision-making, a year-round operating schedule, and are better suited to function quickly and efficiently.[22] Still, the current impoundment landscape does not allow all executive branches to properly utilize these advantages. For these reasons, courts, legislatures, and governors should adopt this vision of state-level impoundment power as both a legislative power and an implied executive power.[23]

Part II of this Note begins with an overview of the budgetary challenges states are currently confronting and a review of the executive branch's role in addressing those challenges in the face of balanced budget requirements. Next, Part III explains why the impoundment power is essential for the successful implementation of balanced budget requirements. Part IV then argues for the constitutionality of equipping the executive to use that power without the consent of the legislature. Finally, Part V concludes by demonstrating how state legislatures can regulate executive authority to withhold funds.

II. The Problem: The Current Economic Landscape Demands Action from State Executives

One of the fundamental steps in building a state budget is developing revenue projections.[24] Because almost every state requires the governor to submit, and most states require the legislature to enact, a balanced budget, an accurate and reliable revenue estimate underlying the proposed appropriations is critical for

20. Briffault, *supra* note 6, at 1180.
21. *Id.*
22. *Id.*
23. This Note is not an effort to aggrandize executive power beyond its constitutional limits. It puts forth a functional conception of power, but it also advocates for necessary restraints, so as not to prize efficiency over accountability.
24. Ryan Maness, *How a Budget Becomes a Law*, MULTISTATE (Dec. 3, 2018), https://www.multistate.us/insider/2018/12/3/how-a-budget-becomes-a-law [https://perma.cc/AG85-SGXV] (describing "budget forecasting and revenue projections" as "the basis upon which all other policy discussions are based.").

fulfilling this duty.[25] However, in recent years, states have grown increasingly reliant on volatile revenue sources that are difficult to predict, making the required task of balancing a budget especially challenging.[26] This Part explores the economic trends that have complicated the duty to balance state budgets and the roles of the legislative and executive branches in responding to this challenge.

A. INCREASING REVENUE VOLATILITY HAS COMPLICATED STATE BUDGETING

Between the Great Recession of the late 2000s and the COVID-19 crisis, a new fiscal reality emerged in the states. Over the last several years, state and local tax revenues have "fluctuated wildly despite the booming economy."[27] This increasing volatility led to a puzzling circumstance: states faced unpredictable budgets despite strong economic growth.[28] Major shifts in tax streams and market trends suggest that volatility may be the new norm for many states.[29] Despite this challenge, state governments, under the regime of balanced budget requirements, must take steps to ensure that expenditures do not exceed available revenue. Although the legislature is often thought to control the budgeting process from start to finish, the executive also plays a crucial role in dealing with the complexity of continually shifting revenues.

Compared to the last bull market in the mid-2000s,[30] state budgeting after the Great Recession became a formidable task

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25. Daniel L. Smith & Yilin Hou, *Balanced Budget Requirements and State Spending: A Long–Panel Study*, PUB. BUDGETING & FIN. 1, 7 (2013).

26. Elaine S. Povich, *supra* note 8.

27. LUCY DADAYAN, ROCKEFELLER INST. OF GOV'T, STATE REVENUE REPORT (THIRD QUARTER, 2017): REVENUES LIKELY TO FLUCTUATE DUE TO THE PASSAGE OF THE FEDERAL TAX CUTS AND JOBS ACT AND AS STATES EXPLORE WAYS TO MITIGATE ITS IMPACT 5 (2018), https://rockinst.org/wp-content/uploads/2018/03/State_Revenue_Report_Third_Quarter_2017.pdf [https://perma.cc/497A-T7U5].

28. Liz Farmer, *State Spending Grows at Lowest Pace Since Great Recession*, GOVERNING (Dec. 14, 2017), https://www.governing.com/topics/finance/gov-nasbo-state-budgets-2018-report.html [https://perma.cc/F4VW-GUXP].

29. Elaine S. Povich, *supra* note 8 ("Because it is a structural economic problem, it is unlikely that states can fully correct for it solely by adjusting their tax policies.").

30. Thomas Franck, *A Look at Bear and Bull Markets Through History*, CNBC (Mar. 14, 2020), https://www.cnbc.com/2020/03/14/a-look-at-bear-and-bull-markets-through-history.html [https://perma.cc/HT2P-H64J]. For the purposes of this Note, the author has compared fiscal years 2004 to 2007 and 2014 to 2017 as approximately comparable periods of expansion in economic activity. While the period 2014 to 2017 saw more robust growth (average annual growth of 10.27% in the S&P 500 Index) than the earlier period (7.29% average annual growth), this difference only reinforces the conclusion that states have experienced greater budgeting challenges *despite* positive economic trends. *S&P 500 Index —*

despite similarly sustained economic growth. From 2004 to 2007, for example, there were twenty-nine instances of mid-year budget cuts totaling $6.2 billion to eliminate budget gaps of roughly $22.7 billion.[31] Over the same amount of time from 2014 to 2017, however, there were sixty-three cuts totaling $9.7 billion to address $44.1 billion in budget gaps, as depicted in Figure 1.[32]

FIGURE 1: STATE BUDGET CUTS AND GAPS FISCAL YEARS 2004-2007 AND 2014-2017[33]

Fiscal Year	Number of States Making Mid-Year Cuts	Total Amount Cut	Total Budget Gap
FY04	18	$4.8B	$4.6B
FY05	5	$891M	$1.8B
FY06	2	$521M	$1.7B
FY07	4	$11.1M	$14.6B
TOTAL	29	$6.2B	$22.7B
FY14	8	$1B	$6.4B
FY15	14	$1B	$6.3B
FY16	19	$2.8B	$14.4B
FY17	22	$4.9B	$17B
TOTAL	63	$9.7B	$44.1B

While the cause of budget deficits varies from state to state, the common thread across all states experiencing such challenges is

Historical Annual Data, MACROTRENDS, https://www.macrotrends.net/2324/sp-500-historical-chart-data [https://perma.cc/XB93-6X9J] (last visited Apr. 18, 2020).

31. *See* Figure 1.

32. *See id.*

33. All data in Figure 1 is drawn from the National Association of State Budget Officers (NASBO). *See Archive of Fiscal Survey of the States*, NAT'L ASS'N OF STATE BUDGET OFFICERS, https://www.nasbo.org/mainsite/reports-data/fiscal-survey-of-states/fiscal-survey-archives [https://perma.cc/H3HS-S352] (last visited Mar. 19, 2020) (individual reports on file with Colum. J.L. & Soc. Prob.). Note that from FY04–FY07, NASBO does not list the budget gap for each fiscal year. This was calculated by subtracting expenditures from revenues for each state and summing the total deficits.

that "revenue collections are not in line with spending plans."[34] Perhaps the most critical feature of modern budget-making that accounts for this trend is the volatility of revenue streams.

Revenue volatility is a product of both "the volatility of individual tax streams and the share of revenue that each stream represents."[35] Overall volatility rises as volatile streams make up larger portions of a state's total revenue.[36] Most states draw the bulk of their revenue from the four most common revenue streams: taxes on personal income, sales, corporate income, and natural resource extraction (also called severance taxes).[37] Each of these taxes has different levels of volatility. For example, "[p]ersonal income and sales taxes — levied in forty-one and forty-five states, respectively — form the largest share of most states' tax collections and are typically more stable year to year."[38] And yet the personal income tax can often exacerbate revenue volatility because it "includes the highly unpredictable capital gains tax."[39] Large scale economic trends, like increasing online sales and the rise of the "gig economy," have also rendered once-predictable revenue sources less stable.[40] Corporate taxes and severance taxes, meanwhile, "are significantly more volatile" than even those taxes.[41]

Recent data point to two changes that suggest volatility has increased over time: first, taxes have become more sensitive to business cycle fluctuations, and second, states have become more dependent on volatile revenue streams.[42] For example, post-Recession wage growth for high-income earners has far outpaced that of low- and middle-income earners; at the same time, wealthy households have accounted for an expanding share of state tax

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34. NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 7, at 1.

35. Mary Murphy et al., *States' Tax Portfolios Drive Differences in Revenue Volatility*, Pew Charitable Tr. (Oct. 16, 2017), https://www.pewtrusts.org/en/research-and-analysis/articles/2017/10/16/states-tax-portfolios-drive-differences-in-revenue-volatility [https://perma.cc/P9SU-WHA8].

36. *Id.*

37. *Id.*

38. *Id.*

39. Rueben & Randall, *supra* note 10.

40. *See* Jack Karsten & Darrell M. West, *Internet Sales Tax Gives E-commerce Companies a Stake in Local Government*, BROOKINGS (Aug. 7, 2018), https://www.brookings.edu/blog/techtank/2018/08/07/internet-sales-tax-gives-e-commerce-companies-a-stake-in-local-government [https://perma.cc/2MT4-ZBSY]; *see also* Zach Schiller & Carl Davis, *Taxes and the On-Demand Economy*, INST. ON TAX'N & ECON. POL'Y (Mar. 2017), https://itep.org/wp-content/uploads/ondemandeconomytaxes0317.pdf [https://perma.cc/EM5K-28GQ].

41. Murphy et al., *supra* note 35.

42. Rueben & Randall, *supra* note 10.

collections.[43] Because wealthy taxpayers are disproportionately affected by market performances, the task of estimating income tax revenue, "once a reliable workhorse for states," has become increasingly difficult.[44]

As a result, since 2001, revenues from the corporate and personal income taxes, "which are tightly linked to stock market performance," have become more volatile.[45] States have also relied on these volatile sources more heavily. From 1977 to 2014, "the personal income tax grew from 25 to 36 percent of total state tax revenues while revenues from the more-stable sales tax declined from 52 to 47 percent of that total."[46] In sum, income inequality and existing state tax structures have exacerbated the unpredictability of revenue streams.[47]

The other major budgeting component contributing to revenue instability is an increasing reliance on revenue from natural resources — i.e., severance taxes. Severance taxes are "highly volatile" and have "created problematic fluctuations for resource-dependent states such as Oklahoma and Montana."[48] Because of the share of total revenue derived from resource extraction in these states, drops in oil and mineral prices can depress state-wide economic activity, causing weak collections in other taxes as well.[49] The reverse is also true. For example, when resource prices spiked in mid-2017 after a period of depressed revenue levels, Wyoming saw double digit tax revenue growth in the following quarter.[50] Such a reliance on oil and mineral extraction only complicates

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43. Elaine S. Povich, *supra* note 8.
44. *Id.*
45. Rueben & Randall, *supra* note 10.
46. *Id.*
47. Studies have found that states' reliance on volatile streams — specifically, progressive income tax structures and severance taxes — results in "more wild revenue swings in the event of a fiscal shock." Liz Farmer, *The Week in Public Finance: Some States Are Less Prepared for a Recession Than a Decade Ago*, GOVERNING (Sept. 21, 2018), http://www.governing.com/topics/finance/gov-finance-roundup-states-budget-reserves-recession-moodys-sp.html [https://perma.cc/8NXG-7LMS]. The current COVID-19 crisis has only exacerbated concerns about state revenue streams. The economic uncertainty caused by the pandemic may ultimately result in state shortfalls totaling upward of $500 billion. Elizabeth McNichol et al., *States Need Significantly More Fiscal Relief to Slow the Emerging Deep Recession*, CTR. ON BUDGET AND POL'Y PRIORITIES (Apr. 14, 2020), https://www.cbpp.org/research/state-budget-and-tax/states-need-significantly-more-fiscal-relief-to-slow-the-emerging-deep [https://perma.cc/Q89J-YT8C].
48. Elaine S. Povich, *supra* note 8.
49. Dadayan, *supra* note 27, at 7.
50. *Id.*

budget forecasting and demands close monitoring and frequent adjustments throughout the fiscal year.

B. BALANCED BUDGET REQUIREMENTS AND THE EXECUTIVE'S ROLE IN THE BUDGETARY PROCESS

Because revenue has become harder to predict, states have had more difficulty contending with the long-standing obligations imposed by balanced budget requirements. These requirements compel officials to eliminate deficits — usually by way of impounding funds — caused in part by increasing volatility.[51] Simply put, balanced budget requirements prohibit states from spending more than they collect in revenue.[52] While the precise language and strength of balanced budget requirements differ from state to state, the requirements themselves are a near-universal feature of state fiscal policy.[53]

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51. Kim S. Rueben & Megan Randall, *Balanced Budget Requirements*, URBAN INST. (Nov. 27, 2017), https://www.urban.org/research/publication/balanced-budget-requirements [https://perma.cc/SCU7-22KR].

52. *Id.*

53. Briffault, *supra* note 6, at 1179 (citing THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 355–56 (1992–1993 ed.)). Because the term "balanced budget requirement" lacks a formal definition, it is notably difficult to determine precisely the number of states with such restrictions on their operating budgets. NAT'L CONFERENCE OF STATE LEGISLATURES, NCSL FISCAL BRIEF: STATE BALANCED BUDGET PROVISIONS 2 (Oct. 2010), https://www.ncsl.org/documents/fiscal/StateBalancedBudgetProvisions2010.pdf [https://perma.cc/DFF3-PL6P]. By using different criteria for identifying these requirements, academic and government studies differ in their accountings of the number of states requiring balanced budgets. For example, Professor Arik Levinson identifies two types of constitutional or statutory provisions that he considers balanced budget requirements: restrictions on (1) carrying deficits into the following fiscal year and (2) carrying deficits into the following budget cycle; however, he cites a 1987 study by the Advisory Commission on Intergovernmental Relations that uses five categories. *See* Arik Levinson, *Balanced Budgets and Business Cycles: Evidence from the States*, 51 NAT'L TAX J. 715, 719–20 (1998); *see also id.* at 717 ("(1) the governor has to submit a balanced budget; (2) the legislature has to pass a balanced budget; (3) the state may carry over a deficit but must correct it in the next fiscal year; (4) the state may not carry over a deficit into the next budget period (often two years long); (5) the state may not carry over a deficit into the next year."). Smith and Hou, meanwhile, use any constitutional or statutory provision that falls into one of nine categories. Smith & Hou, *supra* note 25, at 6. The nine categories are: (1) the governor must submit a balanced budget; (2) own-source revenue must match (meet or exceed) expenditures; (3) own-source revenue and (unspecified) debt (or debt in anticipation of revenue) must match (meet or exceed) expenditures; (4) the legislature must pass a balanced budget; (5) a limit is in place on the amount of debt that may be assumed for the purpose of deficit reduction; (6) the governor must sign a balanced budget; (7) controls are in place on supplementary appropriations; (8) within-fiscal-year controls are in place to avoid deficit; (9) no deficit may be carried over into the next fiscal year (or biennium). *Id.* Even when these studies use similar methods of categorization, they often classify the same provision differently. California's Constitution, for example, states that the legislature "shall not . . . create

Among the states with requirements, there is much variety: some require only a balanced budget proposal by the governor,[54] others require that the enacted budget be balanced,[55] still others grant permission for the legislature to use within-fiscal-year controls to avoid a deficit,[56] and the majority prohibit carrying a deficit

any debt . . . which shall . . . exceed the sum of three hundred thousand dollars ($300,000)" subject to several exceptions. CAL. CONST. art. XVI, § 1. The National Conference of State Legislatures (NCSL) regards this restriction on debt as a prohibition against carrying forward a deficit, but Smith and Hou do not. NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 53, at 3; Smith & Hou, *supra* note 25, at 7. Not surprisingly, academic and government studies differ in their analyses of the number of states requiring balanced budgets. A 2015 analysis found that forty-six states and the District of Columbia have either constitutional or statutory balanced budget requirements. Rueben & Randall, *supra* note 51. But according to a 1993 Government Accountability Office (GAO) report, thirty-nine states have statutory or constitutional requirements, while the NCSL concludes that thirty-seven states and Puerto Rico have this same restriction. U.S. GEN. ACCOUNTING OFFICE, BALANCED BUDGET REQUIREMENTS: STATE EXPERIENCES AND IMPLICATIONS FOR THE FEDERAL GOVERNMENT 15 (Mar. 1993), http://archive.gao.gov/d44t15/148877.pdf [https://perma.cc/XP7W-9H86] (noting that eleven of those states permit a deficit to be carried over into the following fiscal year if necessary); NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 53, at 3. Levinson has identified thirty-six such states, and Smith and Hou have found thirty-two. Smith & Hou, *supra* note 25, at 7. This calculation assumes that Smith & Hou's balanced budget requirement categories (8) and (9) fit the definition for a restriction on year-end deficits. Only balanced budget requirements that prevent the carryover of a deficit would necessitate executive impoundment. As a result, this Note defines a "balanced budget requirement" as a provision, either statutory or constitutional, that requires a state to balance its General Fund budget by the end of the fiscal year. Even this seemingly straightforward definition can be interpreted differently across states as a result of the variety of statutory and constitutional mechanisms, judicial precedents, and executive and legislative budget office interpretations that effectively impose budget restrictions. Whether a state has such a provision is best determined directly by that state's budget officials since, practically, their actions will be informed by their interpretations. Both the GAO and NCSL studies use this methodology in their calculations, which is why this Note relies primarily on their calculations. The focus of this Note, however, is on constitutional balanced budget requirements, as only requirements rooted in a state's constitution affect the inherent powers of the executive branch. According to the Urban Institute, thirty-seven states and Washington, D.C. have constitutional requirements. Rueben & Randall, *supra* note 51.

54. *See, e.g.*, MD. CONST. art. III, § 52(5a) ("The Budget and the Budget Bill as submitted by the Governor to the General Assembly shall have a figure for the total of all proposed appropriations and a figure for the total of all estimated revenues available to pay the appropriations, and the figure for total proposed appropriations shall not exceed the figure for total estimated revenues.").

55. *See, e.g.*, N.J. CONST. art. VIII, § II, cl. 2 ("No general appropriation law or other law appropriating money for any State purpose shall be enacted if the appropriation contained therein, together with all prior appropriations made for the same fiscal period, shall exceed the total amount of revenue on hand and anticipated which will be available to meet such appropriations during such fiscal period, as certified by the Governor.").

56. *See, e.g.*, CONN. CONST. art. III, § 18 ("The general assembly shall not authorize an increase in general budget expenditures for any fiscal year above the amount of general budget expenditures authorized for the previous fiscal year by a percentage which exceeds the greater of the percentage increase in personal income or the percentage increase in inflation, unless the governor declares an emergency or the existence of extraordinary

into the following fiscal year.[57] Most states have some combination of all of these requirements.[58] Even in the few states lacking formal balanced budget requirements, "debt restrictions and similar provisions effectively restrict their ability to run a deficit."[59]

Determining which branch is tasked with balancing budgets in the face of these requirements depends in part on the executive branch's role in the appropriations process more broadly. While history suggests that the "power of the purse" is largely a legislative power, the executive still plays an important role in managing the fiscal affairs of the state. In both the English and American traditions, the power of the purse has long been associated with legislative functions, grounded in democratic ideals and the prevention of tyranny. In seventeenth century England, for example, John Locke maintained that Parliament "must exercise [this power] responsibly and with the consent of the people."[60] Indeed, many of Locke's contemporaries viewed the power of the purse as Parliament's principal check on the king.[61] Almost a century later, James Madison, in Federalist Paper No. 58, described the power of the purse as "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."[62] The power to tax and spend was thus seen as central to the legislative function in a divided government.[63]

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circumstances and at least three-fifths of the members of each house of the general assembly vote to exceed such limit for the purposes of such emergency or extraordinary circumstances.").

57. *See* Rueben & Randall, *supra* note 51; *see also* NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 53, at 3; *see, e.g.*, TENN. CONST. Art. II, § 24 ("Expenditures for any fiscal year shall not exceed the state's revenues and reserves, including the proceeds of any debt obligation, for that year.").

58. Smith & Hou, *supra* note 25, at 7.

59. Rueben & Randall, *supra* note 51.

60. ROSS J. CORBETT, THE LOCKEAN COMMONWEALTH 92 (2006).

61. *Id.*; *see also* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 209–10 (1996) (citing 10 William Holdsworth, A HISTORY OF ENGLISH LAW 340–41 (1938) (noting how Parliament's "exclusive control over finance enabled it to criticize all the acts of the executive government, to stop projects of which it disapproved, to force the executive to adopt policies of which it approved, and to supervise the methods adopted to carry them out.")).

62. THE FEDERALIST NO. 58 (James Madison).

63. Richard D. Rosen, *Funding "Non-Traditional" Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 Mil. L. Rev. 1, 137 (1998) ("Through their control of revenues, [colonial] legislatures were able to wrest concessions from the royal governors at the expense of the governors' prerogatives.").

The Framers of the federal Constitution, with these concerns squarely in mind, lodged this power in the Congress: "No money," they determined, "shall be drawn from the treasury, but in consequence of appropriations made by law."[64] The Framers undoubtedly recognized that placing this power in a collective body would have costs.[65] They recognized that a "collection of diverse individuals representing diverse interests (and divided into separate chambers as well) would less efficiently and less coherently devise fiscal policy than would a single 'treasurer' or 'fiscal czar.'"[66] Yet the Framers viewed this hardship as a necessary cost of maintaining a critical check on unbridled executive power.[67]

Similar concerns motivated the framers of state constitutions. State legislative authority to appropriate funds derives from both constitutional and statutory grants.[68] In fact, all but three state constitutions include some form of appropriations clause, with most provisions mirroring the language of the federal Constitution.[69] That this is a legislative prerogative seemed evident from the start. The Supreme Court of California, for example, recognized that:

> The limitation that "no money shall be drawn from the treasury but in consequence of appropriations made by law" is taken literally from the constitution of the United States. . . . It had its origin in Parliament in the seventeenth century, when the people of Great Britain, to provide against the abuse by the king and his officers of the discretionary money power with which they were vested, demanded that the public funds should not be drawn from the treasury except in accordance with express appropriations therefor made by Parliament . . .; and the system worked so well in correcting the abuses complained of, our forefathers adopted it, and the

64. U.S. CONST. art. I, § 9, cl. 7.

65. Abner J. Mikva, *Congress: The Purse, the Purpose, and the Power*, 21 GA. L. REV. 1, 1 (1986).

66. *Id.* at 2.

67. *Id.*

68. Siewert, *supra* note 12, at 1074–75.

69. *See* Rosen, *supra* note 63, at 137 (noting that only the Mississippi, Rhode Island, and Utah Constitutions lack appropriations clauses mirroring the language of the federal Constitution).

> restraint imposed by it has become a part of the fundamental law of nearly every state in the Union.[70]

Consequently, courts presiding over monetary disputes have historically deferred to legislative decisions concerning budgetary appropriations, restrictions, and conditions.[71] Some have even held that a legislature "cannot delegate critical spending matters to another branch of government."[72]

Yet state chief executives are not entirely powerless in state budgetary affairs. The scope of gubernatorial roles varies from state to state based on a number of factors, including constitutional differences, the ability of legislatures to express intent in addition to appropriation amounts in budget bills, and each branch's access to information and resources.[73] Generally, however, states follow a similar, executive-directed budgeting model.[74] It is the executive who, after consultation with the heads of various agencies, develops a proposed budget and thus "sets the fiscal and policy agenda for the state."[75] Once the legislature has made adjustments to the proposal and enacted a budget bill, the executive again asserts influence over the budgetary process by exercising the constitutional authority to veto provisions.[76] In this way, the executive branch often drives the budgeting agenda in state governments despite adhering to the formal requirements of legislative appropriations.

While both the executive and legislative branches participate in budget development, once "the appropriation is made, [the legislature's] work is complete and the executive authority takes over to administer the appropriation."[77] Execution of the budget involves releasing funds and making various alterations throughout the

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70. Humbert v. Dunn, 24 P. 111, 111–12 (Cal. 1890).

71. *See* Michael L. Buenger, *Of Money and Judicial Independence: Can Inherent Powers Protect State Courts in Tough Fiscal Times?*, 92 KY. L.J. 979, 1029–30 (2004).

72. *Id.* at 1030 n.172 (citing General Assembly v. Lamm, 738 P.2d 1156 (Colo. 1987)) (noting that the Governor of Colorado cannot "transfer funds between executive departments, even though authorized to do so by statute, because the statute creating such power violated the legislature's plenary power over appropriations.").

73. JAMES J. GOSLING, BUDGETARY POLITICS IN AMERICAN GOVERNMENTS 124 (1992).

74. Briffault, *supra* note 6, at 1180.

75. Gosling, *supra* note 73, at 112.

76. Briffault, *supra* note 6, at 1171.

77. State *ex rel.* Meyer v. State Bd. of Equalization & Assessment, 176 N.W.2d 920, 926 (Neb. 1970); *see* Common Cause of Pennsylvania v. Commonwealth, 668 A.2d 190, 206 (Pa. Commw. Ct. 1995) (citing Meyer approvingly); *see also* Comms. Workers of Am., AFL-CIO v. Florio, 617 A.2d 223, 235 (N.J. 1992) (noting that the legislature "cannot administer the money after it has been once appropriated") (internal quotation marks omitted).

fiscal year, including adjusting allotment schedules.[78] During this process executives must comply with appropriation goals; specifically, execution requires "that spending does not exceed authorized levels, that it occurs for approved purposes, and that it remains consistent with legislative intent."[79] This is because each budgetary appropriation — passed under the legislative process as dictated by state constitutions — has the force of law. Governors are therefore duty-bound by each state's "Take Care" clause to pursue these goals.[80] But chief executives must also square the constitutional requirement to "take care" that the budget be faithfully executed with the requirement to balance the budget. One way to address this challenge is through impoundment.

III. IMPOUNDMENT: THE STATES' RESPONSE TO THE BALANCED BUDGET REQUIREMENT

Impoundment is not inconsistent with the state legislature's appropriation goals, and it may in fact be required in certain circumstances to remain faithful to them. While states use the term "impoundment" differently, it is used broadly in this Note to encompass executive actions that either reduce or eliminate (i.e., rescind), or withhold or delay (i.e., defer) legislative appropriations or allotments.[81]

Early in the nation's history, legislatures quickly realized the budget process required some form of executive impoundment.[82] In particular, three situations seemed to call for use of the power: (1) when governors were able to fulfill legislative goals for less than

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78. Gosling, *supra* note 73, at 163, 165.

79. *Id.* at 164.

80. Norman R. Williams, *Executive Review in the Fragmented Executive: State Constitutionalism and Same-Sex Marriage*, 154 U. PA. L. REV. 565, 639 (2006) (asserting that every state constitution provides "in substance" that the state's chief executive must "take care" that the laws are faithfully executed). "Take Care" clauses do not necessarily require the full expenditure of all appropriated funds because just as the "Take Care" clause in the federal Constitution does not require the Department of Justice to prosecute all violations of the law, the "Take Care" clause in the budget context may represent a ceiling rather than a floor. *See* Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1847-48 (2016).

81. Christopher Wlezien, *The Politics of Impoundments*, 47 POL. RES. Q. 59, 60 (1994). Impoundments are most commonly employed selectively to reduce the amount of funding available rather than to prevent it from being spent altogether. Gosling, *supra* note 73, at 166. Reprogramming and transfers, which entail shifting funds within an appropriation or from one appropriation to another, are two other methods used to manage state budgets. *Id.* at 168.

82. PETER M. SHANE ET AL., SEPARATION OF POWERS LAW 197 (2018).

the amount appropriated; (2) when the process of apportionment (that is, the releasing of expenditures over time) produced a surplus; and (3) when changing circumstances removed the original reason for the appropriation.[83] In many instances under these conditions, impoundments have been seen as necessary parts of efficient administrative management and even as exercises of inherent executive powers.[84] More contentiously, governors have also attempted to use impoundment to block funding for programs that they find unconstitutional[85] or with which they disagree on policy terms.[86] The most common use of the power, however, has been "to maintain budgetary balance and to promote the responsible management of funds," particularly in light of balanced budget requirements.[87]

A. STRUCTURAL DIFFERENCES EXPLAIN STATE IMPOUNDMENT SUCCESS WHERE FEDERAL IMPOUNDMENT FAILS

Despite its sometimes-contentious history at the federal level, state level impoundment has largely served its intended purposes: controlling spending, reducing deficits, and managing cash flow.[88] These divergent results stem from at least three differences between gubernatorial and presidential impoundment that strengthen the process at the state level and reduce the likelihood that the executive will subvert legislative intent.

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83. *Id.* at 198 (citing President Jefferson's refusal to spend the full amount appropriated for gunboats because a "'favorable and peaceable turn of affairs' . . . had rendered the expenditure unnecessary.").

84. Note, *Impoundment of Funds*, 86 HARV. L. REV. 1505, 1509 (1973) (citing the refusals of Presidents Truman, Eisenhower, and Kennedy to proceed with weapons systems as efficient uses of executive power); Opinion of the Justices to the Senate, 376 N.E.2d 1217, 1222–23 (Mass. 1978) ("We think there is a constitutional basis for such an assumption, in that the exercise of judgment and discretion in the implementation of legislative policy is necessary to the efficient and effective operation of government. Inasmuch as it is the function of the executive branch to expend funds, it must be implied that the 'supreme executive magistrate,' as head of one of the three coequal branches of government, is not obliged to spend the money foolishly or needlessly.").

85. *See* Williams, *supra* note 80, at 613 (arguing that it is not unconstitutional for executives to make a finding of constitutionality on their own, as long as they submit to the decisions of state judiciaries once they have been made).

86. Douglas & Hoffman, *supra* note 4, at 255 (finding that of the states surveyed, five reported that their governors used the impoundment power to eliminate programs for policy reasons).

87. *Id.* at 253.

88. *Id.*

First, state-level impoundment processes are more finely tuned to regulate how and when the governor can execute budget adjustments without being unduly burdensome.[89] These conditions vary by state, but they may include requirements of legislative notice or across-the-board cuts (as opposed to those made account-by-account), legislative approval by oversight committees, or legislative vetoes.[90] The federal impoundment system also restricts the use of the impoundment power, but this condition is entirely restrictive. For instance, the Impoundment Control Act of 1974 [hereinafter "the Act"] empowers the President to propose rescissions and deferrals of funds, allowing the executive to temporarily withhold funds from obligation.[91] The Act permits the President to withhold funds for up to forty-five calendar days during Congressional considerations of these requests.[92] State restrictions, therefore, better balance the interests of budget management and legislative oversight.

Second, some have argued that constitutional variations, such as the frequency and ease with which state constitutions are amended, suggest that state separation of powers doctrines should be viewed more elastically than at the federal level.[93] As a result, the line between what is categorically executive and what is

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89. *Id.* at 254.

90. *Id.*

91. U.S. GOV'T ACCOUNTABILITY OFF., B-330330, IMPOUNDMENT CONTROL ACT — WITHHOLDING OF FUNDS THROUGH THEIR DATE OF EXPIRATION 3 (Dec. 10, 2018), https://www.gao.gov/assets/700/695889.pdf [https://perma.cc/6A8G-D9R6].

92. *Id.*

93. *See* Jim Rossi, *State Executive Lawmaking in Crisis*, 56 DUKE L.J. 237, 270 n.147 (2006); *see also* Kristien G. Knapp, Note, *Resolving the Presidential Signing Statement Controversy: New York State As A Separation of Powers Laboratory*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 737, 768–70 (2008) ("This trend of rolling back separation of powers doctrine within states is typical. One might assume that since the New York [c]onstitution looks similar to the federal [C]onstitution, its interpretations would be the same. However, the very structure of the New York executive branch suggests differently. Notably, while the President has the power to appoint his entire administration, the executive power in New York is divided amongst several elected offices. The New York Governor, Attorney General, and Comptroller, while all members of the executive branch, are elected separately and often represent different political parties. This separation within the executive branch creates an intuitive [structure] that discourages the expansion of power within one person. . . . Other differences between federal and New York state executive power include: the wider scope of presidential power, New York's executive budgeting scheme and the ease and frequency with which the New York Constitution can be and has been amended. These features suggest why one should assume a different expectation of separate powers within New York: because the powers themselves are less separate and more divided. Moreover, executive budgeting supports a different textually-based understanding of separation of powers in New York: the Governor is constitutionally given more institutionally legislative powers.") (internal citations omitted).

categorically legislative does not need to be guarded as jealously; adjustments can more easily be made when intra-branch encroachments threaten to disrupt the government.

Finally, state budgeting is much more a product of both executive and legislative input than federal budgeting. "[T]he openness of the process during preparation of the budget," for instance, "and the availability of the item veto, tend to reduce the risk of conflict between legislature and Governor in the execution of the budget."[94] Impoundment is therefore less likely to spark controversy, because the budget as initially signed frequently embodies more executive input than the federal budget.

As a result of these differences between state and federal budgeting processes, governors rarely attempt to cut spending in pursuit of a policy of small government or to withhold funds over policy disagreements.[95]

B. THE EXECUTIVE BRANCH IS BETTER SUITED THAN THE LEGISLATURE TO EXERCISE THIS POWER

Rather than abuse the impoundment power, governors tend to use both deferral and rescission powers "to maintain budgetary balance" and "to promote fiscal responsibility."[96] Deferrals allow the executive branch to withhold funds when shortfalls materialize; if the state's fiscal condition improves, the funds are released.[97] This process improves the management of resources by the branch that most closely monitors state finances: the executive. Of course, there is always room for abuse. One might easily imagine a governor withholding funding in the name of fiscal prudence in order to punish or send a message to a political foe with a government contract. By and large, however, the majority of state budget officials believe deferrals are used for the honest management of resources.[98] Rescission, the actual reduction of appropriations, is a

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94. L. Harold Levinson & Jon L. Mills, *Budget Reform and Impoundment Control*, 27 VAND. L. REV. 615, 628 (1974).

95. Douglas & Hoffman, *supra* note 4, at 252.

96. *Id.* at 252–53.

97. Takeshi Fujitani & Jared Shirck, *Executive Spending Powers: The Capacity to Reprogram, Rescind, and Impound*, 8 HARV. L. SCH. FED. BUDGET POL'Y SEMINAR 1, 1 (May 4, 2005).

98. Douglas & Hoffman, *supra* note 4, at 255 ("Only five (18.5%) states reported that their governors use the rescission power to eliminate programs inconsistent with their policy agendas. Not surprising, the governors in each of these states are permitted to propose rescissions even when revenue shortfalls are not present. Four states reported that

more drastic step than deferral. But because of restrictions on what the executive branch can cut and how, rescission has also proven an effective method for balancing budgets and reducing spending without abuse.[99] Legislatures often statutorily approve or acquiesce to exercises of rescission power because of the difficult and politically unpopular decisions required in executing it.[100]

In fact, the executive branch is generally better suited than the legislature in exercising impoundment power through either deferral or rescission because of its unique characteristics. The same features that pushed the executive toward the center of the budget process during the executive budget reform of the early twentieth century make it more efficient in developing and executing fiscal strategies that require immediate or regularly monitored implementation.[101]

Among those features are: (1) the executive faces fewer collective action and holdout problems than the legislature because of its singular nature; (2) as the seat of state budget agencies, the executive has greater access to information, which allows for continual monitoring, decreased negotiation costs associated with decision-making, and lower risk of error;[102] (3) the executive continually operates unlike some legislatures, which sometimes only operate for a few months out of the year;[103] and (4) the executive represents a statewide constituency, rather than regional interests,

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governors use the rescission to eliminate pork barrel projects, and no state reported that governors use the rescission to punish or reward legislators.").

99. *See id.* at 254–55 (citing evidence that "governors use their rescission powers to undertake fiscally prudent actions").

100. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2255–56 (2001) (providing reasons why Congress delegates authority to the executive branch).

101. Briffault, *supra* note 6, at 1180 ("The turn to the executive reflected the view that governors have the greater institutional motivation and capacity for achieving fiscal restraint. Legislators represent local constituencies and may be more likely to seek state tax dollars for local projects. The competition among local legislators for state moneys tends to drive up the overall size of the state budget. Governors may be more likely to seek statewide budget goals and hold down the size of the budget because they answer to a state-wide constituency and are in a better position to assess the impact of spending measures on the state budget.") (internal quotation marks omitted).

102. Even though twenty-nine of the fifty state legislatures have some form of independent access to budgetary materials, the role of the governor as chief executive officer "may always place legislatures at a disadvantage in information." Glenn Abney & Thomas P. Lauth, *The End of Executive Dominance in State Appropriations*, 58 PUB. ADMIN. REV. 388, 390 (1998).

103. Rossi, *supra* note 93, at 246.

streamlining the process of making decisions and preserving high-impact programs over local pet projects.[104]

Indeed, "[t]he very traits that make the American Congress" — or in this case, a state legislature — "so representative also make it less than perfectly efficient."[105] According to Judge Abner Mikva of the United States Court of Appeals for the District of Columbia Circuit, "the hurdles that stand in the way of legislative effectiveness are at their highest when [the legislature] attempts to make fiscal decisions."[106] While the legislature's direct connection to the citizenry suggests that it may be better able to represent the people's fiscal policy interests, it is still an enormous challenge "to ask 535 men and women [in the case of Congress], most of whom have no expertise in the area and all of whom are subject to parochial pressures, to agree on wise and judicious budgetary measures."[107]

"Convenience and efficiency," however, "are not the primary objectives — or the hallmarks — of democratic government," and so do not bear on the constitutionality of a particular method for ordering government.[108] But in the case of impoundment, efficiency and responsiveness actually are relevant to impoundment's constitutionality. Eliminating these virtues would subvert the goals of balanced budget requirements because efficiency and responsiveness improve the state's ability to fulfill its obligation to balance the budget.

The more time that passes before budget adjustments are enacted, the fewer resources there are with which to correct course. In practice, the earmarked funds for a local playground paid out in October can no longer be used to reduce a deficit in May. The inability to respond quickly and decisively thus results not only in fewer options for adjusting appropriations, but also in more dramatic and less optimal reductions later on. Waiting too long to make adjustments can also exacerbate recessions if officials cut line items on which there is greater reliance or which have more dramatic effects on macroeconomic forces. State legislatures also

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104. *See* Briffault, *supra* note 6, at 1180 ("Legislators represent local constituencies and may be more likely to seek state tax dollars for local projects. The competition among local legislators for state moneys tends to drive up the overall size of the state budget. Governors may be more likely to seek state-wide budget goals and hold down the size of the budget because they answer to a state-wide constituency and are in a better position to assess the impact of spending measures on the state budget.").

105. Mikva, *supra* note 65, at 5.

106. *Id.* at 6.

107. *Id.*

108. I.N.S. v. Chadha, 462 U.S. 919, 944 (1983).

face comment periods, hearings, debates, votes, and veto-overrides, all of which further delay decisive action and make legislatures too cumbersome to make the swift, frequent, and often minor adjustments needed to ensure balanced budgets.[109]

IV. Reconceptualizing the Scope of the Gubernatorial Impoundment Power to Meet Balanced Budget Requirements

Given the ever-increasing likelihood of budget deficits even during times of economic growth, and the corresponding need for the executive's greater institutional abilities to respond to fiscal challenges, states should reconsider the scope of the executive power to withhold funds as it applies within a separation of powers framework. To understand the scope of state-level impoundment power, one must first determine its source and whether it is a fundamentally executive or legislative power. In many states, impoundment statutes grant the executive branch the authority to defer or rescind funds. However, executive impoundment is not necessarily a statutorily-derived power. Even when a state lacks an impoundment statute, the governor may still have the authority to withhold funds when facing a deficit because this power can be derived from constitutional balanced budget requirements.[110]

A. The Current Conception of Impoundment

Much of the scholarship regarding the separation of powers in the budget context concerns federal actors. As noted, many scholars in fact disagree about whether the executive or legislative

109. *See, e.g.*, Texas's impoundment statute at TEX. CODE ANN. § 317.005(a) ("After a governor's proposal under this chapter is published in the Texas Register, the Legislative Budget Board may conduct a public hearing on the proposal. The board shall give notice of a hearing under this section in the manner provided by law for notice of regular meetings of the board. The board also shall provide notice by mail of its meetings to each member of the Legislature. The notice of the meeting must include a description of the nature of the proposal or order to be considered. If the agenda includes a public hearing on a proposal, the notice must so state. After a hearing and at a meeting held not less than 10 days after the date notice of the meeting was given in the manner provided for regular board meetings, in response to a governor's proposal the board, subject to the restrictions provided by Subsection (e), may: (1) ratify the proposal by adopting an order changing the relevant appropriation in the manner specified in the proposal; (2) reject the proposal; or (3) recommend changes in the proposal."). The statute provides for additional steps depending on the course of action taken. *See id.* § 317.005(b)–(h).

110. *See infra* Part IV.C.

branch is responsible for cutting spending.[111] Still, courts have generally held that the President has no inherent power to withhold appropriated funds.[112]

The thinking behind this assertion is as follows: Article I, Section 1 of the federal Constitution vests "[a]ll legislative Powers herein granted" in Congress; "the power to repeal or nullify a law is a legislative power"; impoundment "in effect repeals a law"; therefore, the President unconstitutionally encroaches upon legislative power when withholding funds.[113] Chief Justice Rehnquist, while serving as Assistant Attorney General, agreed: "With respect to the suggestion that the President has a constitutional power to decline to spend appropriated funds, we must conclude that existence of such a broad power is supported by neither reason nor precedent."[114] Following the Nixon impoundment crisis of the 1970s, when President Nixon withheld congressionally appropriated funds over policy disagreements, this reasoning largely prevailed: Congress passed the Congressional Budget and Impoundment Control Act of 1974,[115] and the Supreme Court decided *Train v. City of New York*, invalidating the President's impoundment power on statutory grounds but leading to several lower court cases finding that the Presidential impoundment power lacked a constitutional basis.[116]

These analyses, however, only go so far in defining the scope of *state*-level impoundment power.[117] While state constitutions can

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111. *See* Siewert, *supra* note 12 (citing disagreements).

112. *See, e.g.*, Louisiana *ex rel.* Guste v. Brinegar, 388 F. Supp. 1319, 1325 (D.D.C. 1975) (rejecting the argument that the vesting of executive power in the President authorizes refusal to fund congressionally approved programs); *see also* Sioux Valley Empire Elec. Ass'n v. Butz, 367 F. Supp. 686, 698 (D.S.D. 1973) (holding that the President does not have the power to impound congressionally appropriated funds to promote sound fiscal policy), *aff'd*, 504 F.2d 168 (8th Cir. 1974); Local 2677, Am. Fed'n of Gov't Employees v. Phillips, 358 F. Supp. 60, 75 (D.D.C. 1973) (finding that the President may not effectively legislate the termination of congressionally funded programs by impounding the appropriated funds as the Constitution vests all legislative powers in Congress).

113. Abner J. Mikva & Michael F. Hertz, *Impoundment of Funds — the Courts, the Congress and the President: A Constitutional Triangle*, 69 NW. U. L. REV. 335, 376 (1974).

114. *Presidential Authority to Impound Funds Appropriated for Assistance to Federally Impacted Schools*, 1 Op. O.L.C. 303, 309 (Dec. 1, 1969).

115. Congressional Budget and Impoundment Control Act of 1974, Pub. L. 93-344, 88 Stat. 297 (1974) (prior to 2011 amendment).

116. Train v. City of New York, 420 U.S. 35, 41 (1975); *see, e.g.*, *Brinegar*, 388 F. Supp. at 1325 (rejecting the argument that the President possesses express or implied constitutional powers to withhold appropriated funds).

117. Some state courts that have addressed the issue have rejected the idea of an implied constitutional authority to impound funds under certain circumstances. *See, e.g.*, Cty. of Oneida v. Berle, 404 N.E.2d 133, 138 (N.Y. 1980) ("[U]nder the State Constitution, the

often be interpreted in light of analogous federal provisions, separation of powers analyses will necessarily diverge in the presence of structural differences between the two levels of government.[118] While the concept of separation of powers has a common goal across governments — namely, "avoiding tyranny and ensuring effective governance" — the doctrine in one system does not necessarily result in the best distribution of political power in another system.[119] For example, state governments often exhibit more diffused authority within the executive branch, sometimes with several independently elected officials wielding independent executive power.[120] Such an internal check may partially satisfy some of the need for a strict observance of separation of powers.[121]

This need might also be offset by the flexibility in state constitutions generally; they are far easier to amend than the federal Constitution and alterations thus happen with greater frequency.[122] The federal government, with its constitutional requirement to guarantee a republican form of government, can also serve as a check on state tyrannies; a check that does not exist at the federal level. In sum, because of the changing nature of separation of powers problems and the growth of the modern administrative state, some scholars believe that reliance on historical conceptions

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executive possesses no express or inherent power based upon its view of sound fiscal policy to impound funds which have been appropriated by the Legislature."); *see also* W. Side Org. Health Servs. Corp. v. Thompson, 391 N.E.2d 392, 402 (Ill. App. Ct. 1979), *rev'd*, 404 N.E.2d 208 (Ill. 1980) ("We cannot agree that the Governor's inherent powers as supreme executive officer (ILL. CONST. 1970, art. V, § 8) provides the necessary authority to reserve part of an appropriation for fiscal purposes."). However, these cases do not squarely fit with the model proposed in this Note. In *Oneida*, for example, the court addressed whether the executive had an obligation to maintain a balanced budget at all times throughout a fiscal year, whereas the current analysis addresses whether the executive has the authority to prevent carrying a deficit into a new budget cycle in light of a balanced budget requirement. 404 N.E. 2d at 136. In *W. Side Org. Health Servs.*, the court found that the governor's withholding of appropriated funds for policy purposes had no constitutional support. 391 N.E.2d at 402. The court's only mention of deficits and the need to balance budgets was in affirming the legislature's ability borrow funds during "failures of revenue." *Id.*

118. Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79, 93 (1998) ("[I]nterpreting state constitutions in lockstep with federal separation of powers law would not further the cause of uniformity. Because federal doctrine in this realm does not apply to the states, only one body of separation of powers law will exist. Whether or not states follow the federal lead, the separation of powers doctrine developed by state courts alone will bind the action of state officials.").

119. *Id.* at 100.

120. *Id.* at 102.

121. *Id.*

122. *See* Rossi, *supra* note 93, at 270 n.147.

of separation of powers may simply prove inadequate for modern state governments.[123]

In the state budgeting context, the balanced budget requirement renders federal-based constitutional scholarship inadequate. This provision has no federal analog, "and thus state jurisprudence in this area is free to develop outside the dominating shadow of the Federal Constitution and the federal courts."[124] Indeed, balanced budget requirements should be viewed as having actually shifted the balance of power by redefining budgetary roles. As a result, they should not be seen as a deviation from the "standard federal constitutional 'model' of executive-legislative relations" but instead as a conception of separation of powers that simply "differs from the federal norm."[125]

There is tremendous variety among states in the codification of these requirements, with two features being especially important: (1) whether balanced budget requirements are constitutional or statutory, and (2) whether the requirement assigns the responsibility to control deficits to a particular branch. Because the majority of balanced budget requirements are constitutional,[126] and because only constitutional requirements can give rise to implied executive powers, this Note excludes statutory requirements from its analysis. Therefore, the critical inquiry is whether the responsibility to balance the budget is assigned to the executive or legislative branch.

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123. *See* Schapiro, *supra* note 118, at 100 ("Because of the changing nature of separation of powers problems, deference to the historical status quo also represents an inadequate response. The growth of the modern administrative state provides the context for understanding the inadequacy of either aping federal doctrine or conferring normative authority on long-standing practice."); *see also* Briffault, *supra* note 6, at 1171 ("[T]he study of the structural features of state constitutions can enable us to consider alternative means of organizing representative democratic governments, assess the efficacy of different mechanisms for governing, and illuminate the implications and consequences of aspects of the federal government's structure that we ordinarily take for granted.").

124. Briffault, *supra* note 6, at 1171. Professor Briffault writes in the context of the line item veto. However, the reasoning — the idea that, without a federal analog, state constitutions require new analyses — still applies.

125. *Id.* at 1174.

126. According to the Urban Institute, thirty-seven states and District of Columbia have constitutional requirements. Rueben & Randall, *supra* note 51.

B. RESPONSIBILITY TO BALANCE THE BUDGET DIRECTLY ASSIGNED

Among the variations of balanced budget requirements, one of the most critical is the branch of government responsible for balancing the budget and thus eliminating year-end deficits. Some state constitutions assign this task directly either to the executive or legislative branch. If the duty is legislative, then the legislature has a choice whether to address budget shortfalls on its own or to delegate that authority to the executive. When delegating, statutory language often assigns the balancing responsibility to the executive branch without any guidance on whether to raise revenue, cut spending, or issue debt.[127] Practically speaking, however, spending cuts are the first and most commonly used method.[128] They are not only perhaps less harmful to economic growth than tax increases, but they are also the more politically popular strategy for addressing government deficits.[129] Many states also cap the amount of debt officials can issue for deficit reduction.[130] If, on the other hand, the task of balancing the budget is assigned directly to the executive branch, the governor should determine the appropriate method to address the deficit.[131]

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127. *See* Alice M. Rivlin & Isabel V. Sawhill, *How to Balance the Budget*, BROOKINGS INST. (Mar. 1, 2004), https://www.brookings.edu/research/how-to-balance-the-budget [https://perma.cc/HBQ5-U4TS] (reviewing methods for balancing the federal budget). In Florida, for example, Section 216.221(1) of the Florida Statutes says: "It is the duty of the Governor, as chief budget officer, to ensure that revenues collected will be sufficient to meet the appropriations and that no deficit occurs in any state fund." Fla. Stat. Ann. § 216.221(1) (West 2008). This vague language assigns the task of balancing the budget to the executive without prescribing how that task should be accomplished.

128. *See* Smith & Hou, *supra* note 25, at 1 ("Fiscal restraint is generally equated with constraining expenditures; this reflects the political reality [that] 'in most state and local governments, the politics of public budgeting dictate that policy makers first turn to budget reductions and reallocations to balance revenues and expenditures.'").

129. *See* Alberto Alesina et al., *Climbing Out of Debt*, 55 FIN. & DEV. 6 (2018); Jeffrey M. Jones, *On Deficit, Americans Prefer Spending Cuts; Open to Tax Hikes*, GALLUP (Jul. 13, 2011), https://news.gallup.com/poll/148472/deficit-americans-prefer-spending-cuts-open-tax-hikes.aspx [https://perma.cc/Q2JJ-QBHE].

130. *See* Smith & Hou, *supra* note 25, at 7 (finding that twenty-two states cap debt used for deficit reduction).

131. In some states, the *constitution* vests the authority to impound (not just to balance budgets) directly in the executive. *See, e.g.*, MO. CONST. art. IV, § 27; *see also* N.C. CONST. art. III, § 5(3). In that case, that constitutional provision clearly alters the balance of power in budgeting. The Supreme Court of Missouri, in Missouri Health Care Ass'n v. Holden, 89 S.W.3d 504, 512 (Mo. 2002), stated that, under Article IV, § 27 of the Missouri Constitution, the authority of the Governor to reduce expenditures when actual revenues are less than revenue estimates supersedes any state statute or state regulation that would purport to require the expenditure. Similarly, the Court of Appeals of North Carolina in Stone v. State,

C. UNCERTAINTY OVER THE RESPONSIBILITY TO BALANCE

There are also numerous constitutional balanced budget requirements that do not define the branch responsible for enforcing them.[132] In this case, the question of which branch holds the power and the duty to make budget cuts in the event of a deficit persists, especially because there is no federal analog to these provisions.[133] Under these circumstances, both the executive and the legislature should have the authority to balance the budget, and therefore, the implied authority to impound funds.[134]

There are at least four reasons why this responsibility can be said to rest with both the executive and the legislature when it has not been explicitly assigned to a particular branch. First, like the President in the federal constitutional scheme, governors hold the spending power; that is, while the legislature has the power to appropriate funds, the executive has the power to spend those funds.[135] When the people have expressed an intent to prioritize balanced budgets over full expenditure of any particular appropriation, both the spending power and the power to appropriate are implicated.[136] Specifically, the spending power is implicated

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664 S.E.2d 32, 42 (N.C. 2008), stated that the balanced budget requirement of the state constitution clearly placed a duty upon the governor to balance the budget and prevent a deficit.

132. *See* RONALD K. SNELL, NAT'L CONF. OF ST. LEGS., STATE CONSTITUTIONAL AND STATUTORY REQUIREMENTS FOR BALANCED BUDGETS (2004), http://www.ncsl.org/research/fiscal-policy/state-constitutional-and-statutory-requirements-fo.aspx [https://perma.cc/4DKJ-KGN5]. *See also* Haw. Const. art. VII, § 5 ("General fund expenditures for any fiscal year shall not exceed the State's current general fund revenues and unencumbered cash balances. . . ."); Md. Const. art. III, § 52(5a) ("[I]n the Budget Bill as enacted the figure for total estimated revenues always shall be equal to or exceed the figure for total appropriations."); Tenn. Const. art. II, § 24 ("Expenditures for any fiscal year shall not exceed the states' revenues and reserves, including the proceeds of any debt obligation, for that year.").

133. *See* Schapiro, *supra* note 118, at 93 ("Whether or not states follow the federal lead, the separation of powers doctrine developed by state courts alone will bind the action of state officials."); *see also* Briffault, *supra* note 6, at 1 ("State jurisprudence in this area is free to develop outside the dominating shadow of the [f]ederal Constitution and the federal courts.").

134. *See, e.g.*, Bd. of Educ. of Fairfield Twp. v. Kean, 457 A.2d 59, 63 (N.J. Super. Ct. Ch. Div. 1982) (finding that the New Jersey Constitution requires a balanced budget and assigning the basic responsibility for making cuts to both the legislature and the executive).

135. *See* 38 Am. Jur. 2d Governor § 4 (2010) (citing New Eng. Div. of the Am. Cancer Soc'y v. Comm'r of Admin., 769 N.E.2d 1248, 1256 (Mass. 2002) (discussing generally gubernatorial budget power in different states)).

136. The recognition that the spending power is implicated is what motivated the Massachusetts Supreme Judicial Court to conclude that while the power to appropriate money is a legislative power, "the activity of spending money is essentially an executive task." *Am. Cancer Soc'y*, 769 N.E.2d at 1256. The statute at issue, the court concluded, "constitutes,

because the discretion involved in spending necessarily implies the power *not* to spend under certain circumstances.[137]

Second, by ratifying balanced budget requirements, the people express values of fiscal restraint and prudence. The requirements seek to prevent taxpayers from shouldering a heavier burden tomorrow than today. If the task of balancing a budget is left solely to the legislature, procedural and political hurdles would slow the process and make it less likely that this intent could be realized.[138]

Third, the power to impound should be viewed, in part, as an exercise of executive underenforcement. In the event that sufficient revenue fails to materialize to fund all budgeted expenditures, the constitutional balanced budget requirement forces prioritization; it implicates two executive responsibilities — "taking care" that the purposes and goals of the legislature's line items are executed and "taking care" that the purposes and goals of balanced budget requirements are also executed — which become mutually exclusive in the case of a budget deficit. Impoundment must therefore be viewed as an effort to comport with competing duties to expend funds according to the legislature's will and to end the fiscal year without a deficit.

Under these circumstances, impoundment may be viewed as an instance of legal executive underenforcement of a statute. While

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not the legislative power of appropriation, but rather the executive power of expenditure." *Id.* It did not give the Governor "authority to set aside money from the treasury to be spent for a particular purpose," or "to direct that any money so appropriated be spent in a manner different from what the Legislature intended." *Id.* at 1257. Instead, it allowed the Governor to use his or her "executive judgment to reduce public expenditures in a time of true financial emergency," reflecting "a legislative determination that the Commonwealth's need to remain solvent overrides particular statements of social policy contained in . . . appropriation items." *Id.*; *see also* New Hampshire Health Care Ass'n v. Governor, 13 A.3d 145, 158 (N.H. 2011) (approving of the Massachusetts court's interpretation of the spending power in Am. Cancer Soc'y v. Comm'r of Admin., 769 N.E.2d 1248, 1256 (Mass. 2002)).

137. *See* Opinion of the Justices to the Senate, 376 N.E.2d 1217, 1223 (Mass. 1978) ("The constitutional separation of powers and responsibilities . . . contemplates that the Governor be allowed some discretion to exercise his judgment not to spend money in a wasteful fashion."); *see also American Cancer Society*, 769 N.E.2d at 1256 ("Thus, '[a] distinction must be made between the power of the Legislature to control the expenditure of funds in the sense that it determines the purposes for which expenditures may be made, and the power to control the extent of expenditures committed to a particular purpose.' Opinion of the Justices, 375 Mass. at 835–836 n.4, 376 N.E.2d 1217. We conclude that § 9C is an example of the latter power and constitutes, not the legislative power of appropriation, but rather the executive power of expenditure.").

138. *See supra* Part III.B (concluding that the efficiency of the executive branch in the budgetary area makes that branch better suited to respond to the frequent changes and constant monitoring needed for effective budget management, and that delayed action can compromise the effort to eliminate deficits).

the concept of underenforcement largely arises in the context of prosecutorial discretion,[139] the executive branch may also underenforce other laws under certain conditions.[140] According to legal scholars Jeffrey Love and Arpit Garg, writing in the federal context:

> When a president chooses to enforce a law below the statutory baseline, the presumption is that he has engaged in impermissible unilateral policymaking. But this presumption is rebuttable: there are many reasonable excuses for a failure to act. For example, resource constraints might require that the president underenforce some laws, even below statutory baselines. . . . Indeed, some argue that resource allocation is inherent in the president's constitutional role as the federal government's chief executive and in the concept of prosecutorial discretion. As the executive, the president is supposed to make the hard resource-balancing decisions that cannot be entrusted to a 538-person political body that will rarely be able to reach consensus on micro decisions, not to mention a group that will invariably want the best for its members' individual constituencies. Moreover, it would be illogical to hold the president responsible where Congress has failed to provide sufficient resources to fund all of its legislative priorities. These constitutional and pragmatic principles may trump even legitimate concerns about inaction.[141]

Professor Saikrishna Prakash agrees, arguing that "the President is to carry out his duties the best he can given the constraints of time, resources, and funding. When he does this, he fulfills his constitutional obligations."[142] Although these scholars wrote specifically about federal separation of powers issues, there is nothing in state constitutions that alters their reasoning when applied to state executive and legislative branches. In the budget balancing

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139. *See* Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1759–60 (2006).

140. *See* Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195, 1206 (2014) ("[M]odern presidents enjoy unprecedented opportunities to use inaction to make policy in every realm—by failing to appoint agency heads, refusing to enforce certain laws, or instructing their agencies not to regulate despite a congressional mandate.").

141. *Id.* at 1216–17.

142. Saikrishna Prakash, *Regulating Presidential Powers*, 91 CORNELL L. REV. 215, 253 n.192 (2005) (reviewing HAROLD J. KRENT, PRESIDENTIAL POWERS (2005)).

context at the state level, the executive faced with a deficit must enforce two competing duties without the resources necessary to achieve both. Resource constraints thus require underenforcement of some appropriations.[143] While the legislature can intervene by enacting its own spending cuts or by increasing revenue, political realities and procedural hurdles make these actions unlikely to occur with the frequency and speed needed to address each deficit.[144] Instead, legislatures may try to constrain gubernatorial discretion with impoundment statutes, but even these measure cannot entirely eliminate executive discretion because legislatures are unlikely to capture all of their priorities and all of their decisions regarding what cuts to make under all possible deficit levels in a single impoundment statute.

The final reason why ambiguous balanced budget requirements should be read to empower both the legislature and the executive is that budget bills are often written as maximum appropriations.[145] Specifically, a legislature enacts a budget with the knowledge that the probability of revenue exactly matching total expenditures is extraordinarily small. As a result, there must necessarily be some discretion built into the expenditure process to control for the likelihood that sufficient revenue will not materialize. When this situation arises, the executive has discretion, unless limited by statute, over how to achieve the legislature's intent to the maximum extent.[146]

Understanding legislative intent, however, poses another problem for the executive. While many state level appropriations may represent a spending ceiling, there are other circumstances in which the budget bill says that funds "must" or "shall" be spent on

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143. *See* Love & Garg, *supra* note 140, at 1216–17 (analogous reasoning applied to federal executive discretion).

144. *See supra* Part III.B.

145. *See, e.g.*, *How the Budget Is Made*, KENTUCKY.GOV: TRANSPARENCY, https://transparency.ky.gov/transparency/Pages/How-the-Budget-is-Made.aspx [https://perma.cc/EF4G-LY8K] (last visited Mar. 27, 2020) ("An appropriation authorizes a state agency to spend a maximum sum of public funds during a fiscal year."); *see also* ALASKA LEGIS. FIN. DIV., ALASKA LEGISLATIVE BUDGET HANDBOOK 89 (Nov. 2018) ("'[A]ppropriation' means a maximum amount available for expenditure by a state agency for a stated purpose set out in an appropriation act[.]").

146. For an explanation of this scenario in the federal context, see U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-464SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW: THE LEGAL FRAMEWORK 36 (4th ed. 2016) ("If the agency cannot get additional funding and the program legislation fails to provide guidance, the agency may, within its discretion, establish reasonable classifications, priorities, and/or eligibility requirements, as long as it does so on a rational and consistent basis.").

a particular program.[147] At the federal level, the Supreme Court has found that language authorizing funds "not to exceed" a particular amount for a given program is not a green light to the executive to distribute less than Congress has appropriated.[148] Scholars tend to agree.[149] Yet, as previously stated, the President does not have the same budget authority as a governor; nor do governors face the same separation of powers limitations as the President. Because governors in many states have the responsibility to balance budgets, "must" or "shall" language in the budget should be viewed as prioritizing language from the legislature. It is an indication to the executive that if funds need to be withheld, they should be withheld from that particular program last. In addition to this type of budgetary language, the legislature has another, even more powerful way to control executive impoundment: the impoundment statute.

V. State Legislatures Can Regulate the Use of the Impoundment Power

It is thus up to both the executive and the legislature to eliminate deficits when a constitutional balanced budget requirement fails to assign the task directly to a particular branch. What a governor can do with this responsibility and the implied powers that flow from it should be determined by the stance of the

147. *See, e.g.*, Act of Jul. 30, 2019, ch. 41, 2019 Mass. Acts 160 ("[P]rovided further, that not less than $25,000 shall be expended for the city of Salem's parks and recreation department for the purposes of repairing the handicap lift repairs at the forest river park's baseball field[.]"); *see also* Act effective Jul. 1, 2019, No. 1001, § 3(B), 2019 Ind. Acts 11 ("In each fiscal year, the office of guardian ad litem shall set aside at least thirty thousand dollars ($30,000) from the above appropriations to provide older youth foster care.").

148. Train v. City of New York, 420 U.S. 35, 44–46 (1975).

149. *See* Mikva & Hertz, *supra* note 113, at 365 ("It seems clear that, when Congress uses mandatory language such as 'shall,' there is no basis for Executive refusal to spend funds, and numerous recent cases have so held. Even assuming that a general appropriations act does not use such mandatory language, this does not *a fortiori* endow an administrator with the authority to use unfettered discretion as to when and how the monies may be used. The Act circumscribes that discretion and only an analysis of the statute itself can dictate the latitude of the questioned discretion. An appropriations or an authorization act which is not specifically discretionary should be interpreted to prevent the termination of the program it supports. At the very least, the act indicates a clear congressional intent that the program remains in existence. Similarly, executive cutbacks which drastically diminish a program should not be allowed.") (internal quotation marks omitted) (citing Illinois *ex rel.* Bakalis v. Weinberger, 368 F. Supp. 721, 726 (N.D. Ill. 1973); Pennsylvania v. Weinberger, 367 F. Supp. 1378, 1381 (D.D.C. 1973); Sioux Valley Empire Elec. Ass'n v. Butz, 367 F. Supp. 686, 693–94 (D.S.D. 1973); Nat'l Council of Cmty. Mental Health Centers, Inc. v. Weinberger, 361 F. Supp. 897, 902 (D.D.C. 1973)).

legislature. At the federal level, such constitutional ambiguities are often analyzed using the framework set out in Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.[150]

Although textual and structural differences between the federal and state constitutions may result in diverging constitutional jurisprudences, federal analogs, like *Youngstown*, are appropriate analytical tools where the federal and state constitutions overlap. The *Youngstown* framework derives from a system of separation of powers shared by the federal and state governments.[151] In fact, the highest courts in numerous states have explicitly adopted the *Youngstown* analysis when interpreting their own constitutional structures.[152] As a result, while *Youngstown* analyzes the structure of the federal Constitution, its reasoning applies to state constitutions as well.

A. LEGISLATIVE CONTROL OVER IMPOUNDMENT

The *Youngstown* framework divides presidential power into three categories. First, when "the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[153] Second, "in absence of either a

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150. 343 U.S. 579, 634–55 (1952).

151. Both state and federal executive branches face the issue of taking action either in concert with, or in conflict with, the legislative branch. Under these circumstances, "state courts might find analogies in the reasoning approach of . . . federal decisions addressing similar separation of powers issues." Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1239 (1999).

152. *See, e.g.*, Under 21 v. City of New York, 482 N.E.2d 1, 4 (N.Y. 1985) ("One of the fundamental principles of government underlying our [f]ederal Constitution is the distribution of governmental power into three branches — the executive, legislative and judicial — to prevent too strong a concentration of authority in one person or body. . . . We have consistently recognized that this principle of separation of powers among the three branches is included by implication in the pattern of government adopted by the State of New York.") (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634–35 (1952) (Jackson, J., concurring)); *see also* Matter of Salary of Juvenile Dir., 552 P.2d 163, 168 (Wash. 1976) (noting that "[t]he constitutions of the several states, inheritors of the federal constitutional legacy, also embody the principle [of separation of powers]," which forms the "delicate balance" described by Justice Jackson in *Youngstown*); Chang v. Univ. of Rhode Island, 375 A.2d 925, 928–29 (R.I. 1977) (agreeing that "federal cases dealing with executive power establish standards by which to measure the power of the Governor to issue executive orders" before applying Justice Jackson's Youngstown analysis); Opinion of the Justices, 392 A.2d 125, 129 (N.H. 1978); Fed'n of City Emps v. Arrington, 432 So. 2d 1285, 1288 (Ala. 1983); Billis v. State, 800 P.2d 401, 415 (Wyo. 1990).

153. *Youngstown*, 343 U.S. at 635.

congressional grant or denial of authority" there is a "zone of twilight in which [the President] and Congress may have concurrent authority."[154] Notably, in the second category, "congressional inertia, indifference or quiescence may" invite the exercise of executive power.[155] Finally, when "the President takes measures incompatible with the expressed or implied will of Congress . . . he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[156] The Supreme Court has since confirmed that "[t]o succeed in this third category, the President's asserted power must be both 'exclusive' and 'conclusive'" on the issue.[157]

Application of this analysis to the state budgeting context reveals the extent of the governor's impoundment power. When a state has a constitutional balanced budget requirement but no impoundment statute, the second category is implicated. Assuming no other relevant laws or pronouncements on behalf of the state legislature, the governor acts in the face of legislative silence. Whether this silence is indicative of legislative "inertia, indifference or quiescence," the governor should be able to exercise the implied power to impound funds to balance the budget.

When a state has both a constitutional balanced budget requirement and an impoundment statute, the analysis shifts to the third category. The governor's implied power to impound is thus at its "lowest ebb."[158] There, the legislature has spoken on the subject, so the executive "can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[159] Lacking an "exclusive" and "conclusive" power to impound, the governor may only take a budget balancing action if it can be supported by constitutional executive powers after subtracting "any constitutional powers of [the legislature] over the matter," including, in this case, any lawful prohibitions or affirmative directions by the legislature.[160] In other words, the legislature can

154. *Id.* at 637.
155. *Id.*
156. *Id.*
157. Zivotofsky v. Kerry, 135 S. Ct. 2076, 2084 (2015) (citing *Youngstown*, 343 U.S. at 637–38).
158. *Youngstown*, 343 U.S. at 637.
159. *Id.*
160. *Id.*

regulate the executive's implied power to impound using an impoundment statute.[161]

Executives in the thirty-three states with impoundment statutes must therefore heed the legislature's instructions when exercising that power.[162] Of course, they may also take any budget balancing action not prohibited by the legislature, as long as they also fulfill any affirmative legislative directives.

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161. Although the legislative regulation of implied, constitutional executive powers (as opposed to explicit powers) may seem unusual, federal examples, which again, are instructive in this context because of the similarities between the federal and state constitutions and states' open embrace of the *Youngstown* framework, reveal otherwise. For example, the President has the implied power to enter into executive agreements with other countries and governments "on his own inherent constitutional authority," but "[s]trict legal limits govern the kinds of agreements that presidents may enter into under their constitutional authority through . . . sole executive agreements." Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 146, 154 (2009). Indeed, the federal Constitution "is the source of both the President's unilateral international lawmaking authority and the limits thereon. . . . In fact, the President's approval is only sufficient, by itself, in those limited cases in which the President acts within his own constitutional authority. As Justice Jackson explained in Youngstown, when the President 'acts in absence of either a constitutional grant or denial of authority, he can only rely upon his own independent powers.' In other words, any time the President acts beyond his own independent powers (including when he concludes ex ante congressional-executive agreements), genuine collaboration between Congress and the President is necessary." *Id.* at 210–11. One of those limits on executive agreements is the Case-Zablocki Act, which requires the executive branch to notify Congress of executive agreements within sixty days. Case-Zablocki Act, Pub. L. No. 92-403, 86 Stat. 619 (1972). This limitation gives Congress the time and knowledge to consider how to respond to the President's actions, even though "Congress has no power to reject the agreement short of passing a joint resolution or statute (subject to presidential veto)." Hathaway, *supra* note 161, at 232. As the Supreme Court said in the context of war powers, the President "may not disregard limitations the Congress has, in the proper exercise of its own . . . powers, placed on his powers." Hamdan v. Rumsfeld, 548 U.S. 557, 593 n.23 (2006). Another implied Presidential power is the ability to remove executive officers. Although Congress has no power to restrict the removal of certain executive officials, it does have the authority to fix the length of service and require for-cause removal for the heads of independent agencies and for inferior officers. *See* Humphrey's Executor v. United States, 295 U.S. 602, 631–32 (1935); Morrison v. Olson, 487 U.S. 654, 692 (1988). In *Morrison v. Olson*, the Supreme Court even upheld a statute that permitted removal of an independent counsel — a seemingly "purely executive" official — only by the Attorney General for good cause. *Morrison*, 487 U.S. at 660. It found that such a good cause requirement was constitutional as long as "Congress [did] not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II." *Id.* at 689–90. This requirement, which undoubtedly "reduce[d] the amount of control or supervision that the Attorney General and, through him, the President exercise[d] over the investigation and prosecution of a certain class of alleged criminal activity," was warranted because Congress was not aggrandizing itself. *Id.* at 695 ("As we stated in *Buckley* v. *Valeo* . . . the system of separated powers and checks and balances established in the Constitution was regarded by the Framers as 'a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'") (internal citations omitted).

162. NAT'L ASS'N OF STATE BUDGET OFFICERS, BUDGET PROCESSES IN THE STATES 41 (Spring 2015).

The impact of this analysis will be greatest for the executive branches in the seventeen states that do not currently have statutory or constitutional provisions permitting their governors to impound funds.[163] Under this analysis those governors, when operating under constitutional balanced budget requirements, should use their independent budget balancing authority to withhold funds when needed during a deficit. Given the increasing volatility of state revenue, this step is not only constitutionally appropriate, it is also fiscally prudent; delaying adjustments will only cause greater harm to agencies and other recipients.

Many of these seventeen states are especially in need of this authority and flexibility because of their increasing reliance on volatile revenue sources. To illustrate, Pew Trusts assigns a revenue volatility score to each state, the average of which is a score of 6.5.[164] Among the states with volatility scores above seven — that is, states that are highly dependent on volatile sources — fifty-five percent (i.e., six out of eleven states) do not currently permit their governors to withhold funds.[165] Alaska, with an extraordinary volatility score of 37.6, does not currently view its governor as capable of making the types of adjustments necessary to manage budget shortfalls.[166] But by reconceptualizing balanced budget requirements as sources of the executive's implied power to impound, states like Alaska could better deal with fiscal uncertainty and fulfill their legal obligations.

The broad power that accompanies this reinterpretation of executive authority may give some scholars and policymakers pause. State legislators, particularly in those states without impoundment controls, may hesitate to recognize an interpretation of state checks and balances that gifts the executive branch substantial control over the budget whenever a deficit arises. They may fear that governors will misuse the implied power to impound either for personal gain or to substitute their policy goals for those of the legislature. If legislators have these concerns, the appropriate response is not to refuse what the executive can rightly claim as its

163. Those states are Alaska, Delaware, Georgia, Hawaii, Illinois, Indiana, Iowa, Maine, Maryland, Nevada, New Mexico, New York, North Dakota, Pennsylvania, Vermont, Virginia, West Virginia, and Wyoming. *Id.*

164. Murphy et al., *supra* note 35.

165. *Tax Revenue Volatility Varies Across States, Revenue Streams*, PEW CHARITABLE TR. (Aug. 29, 2018), https://www.pewtrusts.org/en/research-and-analysis/data-visualizations/2014/fiscal-50#ind6 [https://perma.cc/U3CK-YBAF].

166. Murphy et al., *supra* note 35.

own: the implied power to impound; instead, the response should be to adopt an impoundment statute to confine the broad powers of the executive.

B. IMPOUNDMENT STATUTE IN PRACTICE

This Note has sought to reconceptualize the source of impoundment power in states with constitutional balanced budget requirements. When the executive branch has the responsibility to balance the budget, and when that responsibility is implicated by the presence of a deficit, governors have an implied power to impound funds in pursuit of that goal. Contrary to the generally accepted view of impoundment, however, which conceives of impoundment as a delegation of legislative authority granted through an impoundment statute, impoundment statutes should be seen as ways to limit the executive authority that flows from balanced budget requirements. Even without any express limitation on this authority, a governor would still be unable to reduce appropriations outside the context of a deficit, because a surplus would not trigger the authority under a balanced budget requirement. Yet absent any limitations by the legislature, an executive faced with a deficit would likely be able to reduce funding for more controversial recipients, including funding for private contracts and local aid to municipalities.[167]

An effective impoundment statute must therefore clearly express legislative priorities and constrain gubernatorial discretion without sacrificing the traits that make the executive best suited to monitor and adjust the budget as needed. Florida's impoundment statute provides a good example. Of all the impoundment statutes surveyed for this Note, Florida's most clearly expresses the legislature's intent in prioritizing spending cuts and responsibly cabining executive discretion.[168] Florida's statute lists fourteen

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167. Whether the governor would be permitted to reduce funding from special funds, however, is unclear. There is some contention over whether funding from a special fund even represents an "appropriation," calling into question whether a governor could impound it. *See* Briffault, *supra* note 6, at 1202.

168. The text of the statute leading in to the fourteen directives reads as follows:

> In developing a plan of action to prevent deficits in accordance with subsection (7), the Governor and Chief Justice shall, to the extent possible, preserve legislative policy and intent, and, absent any specific direction to the contrary in the General Appropriations Act, the Governor and Chief Justice shall comply with the following guidelines for reductions in the approved operating budgets of the executive branch and the judicial branch.

directives for the executive to heed when exercising the power to impound:

> (1) Education budgets should not be reduced more than provided for in [a separate statute]. (2) The use of nonrecurring funds to solve recurring deficits should be minimized. (3) Newly created programs that are not fully implemented and programs with critical audits, evaluations, and reviews should receive first consideration for reductions. (4) No agencies or branches of government receiving appropriations should be exempt from reductions. (5) When reductions in positions are required, the focus should be initially on vacant positions. (6) Reductions that would cause substantial losses of federal funds should be minimized. (7) Reductions to statewide programs should occur only after review of programs that provide only local benefits. (8) Reductions in administrative and support functions should be considered before reductions in direct-support services. (9) Maximum reductions should be considered in budgets for expenses including travel and in budgets for equipment replacement, outside consultants, and contracts. (10) Reductions in salaries for elected state officials should be considered. (11) Reductions that adversely affect the public health, safety, and welfare should be minimized. (12) The Budget Stabilization Fund should not be reduced to a level that would impair the financial stability of this state. (13) Reductions in programs that are traditionally funded by the private sector and that may be assumed by private enterprise should be considered. (14) Reductions in programs that are duplicated among state agencies or branches of government should be considered.[169]

With these guidelines, the executive is still able to exercise its implied impoundment power to ward off deficits and ultimately honor Florida's balanced budget requirement. But the directives in the statute constrain the governor's discretion; they represent the legislature's constitutional expression of its position on the subject, which, under Justice Jackson's formulation in *Youngstown*, pushes the executive's power to its "lowest ebb."[170]

Fla. Stat. Ann. § 216.221(5)(c) (West 2008).

169. *Id.*

170. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952).

In addition to the limitations that the Florida legislature enacted, legislatures should consider these additional factors: whether impoundment should be restricted during a recession of a certain severity so as not to further depress the economy; whether funding for the legislative and judicial branches should be exempt from executive reductions;[171] whether items for which funding must be dispersed earlier in the fiscal year (as opposed to in twelve or twenty-four even installments, as is common) should be protected from cuts; whether impounded funds should be distributed in the event that revenues recover sufficiently; whether special funds should be vulnerable to reductions; and whether these guiding principles should be ordered according to the legislature's priorities in case of a conflict between them.

States should also consider whether an accurate definition of a budget deficit should be required of the executive branch. This could, perhaps, be enacted by placing a precondition on any executive impoundment action that other budget-focused elected officials — controllers, auditors, and treasurers, for example — sign off on the existence of a substantial deficit. Governor Tim Pawlenty of Minnesota famously vetoed a tax provision to intentionally create a deficit, allowing him to cut spending through impoundment.[172] Requiring the support of other independently-elected officials would reduce the likelihood of bad faith efforts to impound funds for policy reasons. A notice requirement may also provide the legislature with enough financial information to make its own judgment regarding the scale of the deficit.

Given these options, legislatures have tremendous power to constrain the executive in its use of the impoundment power. They should keep in mind, however, that the executive authority to impound can promote efficiency and responsible fiscal management in the face of deficits. Any constraints, therefore, should be narrowly tailored to prevent abuse without stifling the flexibility that best serves the citizens of the state.

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171. *See, e.g.*, CONN. GEN. STAT. § 4-85(e) ("The provisions of this section shall not be construed to authorize the Governor to reduce allotment requisitions or allotments in force concerning . . . any budgeted agency of the legislative or judicial branch, except that the Governor may propose an aggregate allotment reduction of a specified amount in accordance with this section for the legislative or judicial branch.").

172. *See* Siewert, *supra* note 12, at 1071–72.

VI. Conclusion

For the foreseeable future, and especially during the economic crisis caused by COVID-19, state legislatures will likely struggle to control deficits. Growing reliance on volatile revenue sources will only make available revenue harder to predict. At the beginning of calendar year 2018, for example, twenty-five states faced revenue shortfalls, even though the country was nine years into its economic recovery.[173] In 2019, collections proved more resilient,[174] but states will surely face massive deficits in 2020 as they attempt to combat a global pandemic and lose out on tax revenue because of social distancing protocols and changing consumer behavior.[175]

Balanced budget requirements only compound this challenge. They restrict the use of certain tools, like the issuance of debt, that could ease the fiscal burden on states. But these requirements also present an opportunity. By tipping the balance of power in state constitutional schemes toward the executive, these balanced budget requirements equip governors with the constitutionally implied power to impound appropriated funds. Governors can thus make adjustments to the budget when confronted with a deficit, avoiding the slow pace, collective action problems, and provincialism of the legislative process that reduce the likelihood that state budgets will remain balanced.

The executive branch is not only best suited to use impoundment to address budget challenges, it is also responsible for doing so to ensure a balanced budget. In reexamining the source of the impoundment power, it is clear that in many states, some degree of power to withhold appropriated funds must flow directly from the requirement for a balanced budget, a requirement that tasks both the executive and legislative branches with eliminating budget deficits. This conception has the additional benefit of freeing the executive to manage the state's finances early, often, and efficiently, unless limited by the legislature through an impoundment statute. This additional flexibility will equip state executives

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173. *See* Ryan Maness, *Twenty-Five States Face Revenue Shortfalls in 2018*, MULTISTATE (Jan. 9, 2018), https://www.multistate.us/insider/2018/1/9/twenty-five-states-face-revenue-shortfalls-in-2018 [https://perma.cc/8BGX-T5CY].

174. NAT'L ASS'N OF STATE BUDGET OFFICERS, *Fiscal Survey of the States* (Fall 2019), https://higherlogicdownload.s3.amazonaws.com/NASBO/9d2d2db1-c943-4f1b-b750-0fca152d64c2/UploadedImages/Fiscal%20Survey/NASBO_Fall_2019_Fiscal_Survey_of_States_S.pdf [https://perma.cc/TE2W-9PNM].

175. *See, e.g.*, Lannan, *supra* note 5; *see also* Dewitt, *supra* note 5.

to make the necessary changes to state budgets to secure financial health and fiscal prudence in their states and to obey the will of the people by balancing budgets.