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CAN GOD CREATE A ROCK SO HEAVY THAT HE CANNOT LIFT IT?: OUTLAWING PENSIONS UNDER STATE CONSTITUTIONS

*Chad J. Pomeroy**

If you find yourself in a hole, stop digging.[1]

I. Introduction

Public pensions[2] are a problem. More than twenty-seven million people participate in state and local government pension plans.[3] And those plans are in the hole *trillions* of dollars.[4] This means that state and local governments are going to have to raise additional trillions in taxes (or shift those trillions away from schools, police, firemen, or other spending targets) to satisfy these obligations.

But it is not just the size of the problem that is so difficult; it is also the nature of the problem. Underfunding has become a systemic problem because of how human beings behave in general, and how the American political system works in particular. People, of course, do not like pain. And that dislike is so strong that they will seek to avoid it, even beyond the bounds of rationality, putting it off even if that avoidance is temporary and even if doing so ultimately causes greater pain at a later date. This is, in effect, what we are doing with our pension obligations—avoiding the pain of paying public employees what they are earning now, and promising to do so (that is, to incur the pain of doing so) in the future. That the trade-off is a larger amount of pain in the future (i.e., fiscal obligations that will have spiraled out of control) seems not to matter. And that is, unfortunately, just fine with our political class. "For a politician, it may be unwise to spend scarce budg-

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1. Often referred to as "the first law of holes," this adage has been attributed to a variety of sources. *See* Charles Doyle et al., The Dictionary of Modern Proverbs 122 (2012).

2. Note that, here, this term—as discussed in this article—means *only* defined benefit pension plans. *See infra* Part II.A.

3. *See* U.S. Gov't Accountability Off., GAO-12-322, State and Local Government Pension Plans: Economic Downturn Spurs Efforts to Address Costs and Sustainability 4 (2012), http://www.gao.bov/assets/590/589043.pdf.

4. *See* Alicia H. Munnell et al., *The Funding of State and Local Pensions: 2012-2016*, 23 Ctr. for Retirement Res., July 2013, at 1, 4, http://crr.bc.edu/wp-content/uploads/2013/07/slp_32-508.pdf; Jack M. Beermann, *The Public Pension Crisis*, 70 Wash. & Lee L. Rev. 3, 13 (2013) (discussing "the near-consensus that pension obligations are a ticking fiscal time bomb for state and local governments").

etary dollars on a pension plan contribution, which will help provide benefits decades in the future, compared to spending those budgetary dollars on something that provides immediate returns to the constituents that the politician relies upon for reelection."[5] Instead, it is easy to incur obligations, rack up the political support of current public employees, and leave future generations to worry about the bill.[6] "The bottom line is that many who have studied the current problems facing public pensions . . . believe that the defined benefit plan is simply not sustainable in the long run . . . ."[7]

What can we do about such a large, seemingly intractable problem? A number of states have installed specific pension funding requirements within their constitutions. Most state constitutions contain some kind of balanced budget requirement, and a number of states, zeroing in on the scope and difficulty of the pension issue, have expanded those to include language explicitly imposing annual pension funding discipline.[8] Unfortunately, even such specific attempts to counter this problem directly have not been very helpful in any state or jurisdiction.[9] So the problem is intractable. This is not a new or unique point, and many articles have already addressed this issue and struggled with how to resolve it,[10] but nothing has really taken hold.

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5. Amy B. Monahan, *State Fiscal Constitutions and the Law and Politics of Public Pensions*, 2015 U. ILL. L. REV. 117, 120 (2015).

6. This violates the concept of intergenerational fairness, an idea here that "refers to the belief that pension costs should be paid by the taxpayers who benefitted from the service of the employees." *Id.* at 121. Doing this amounts to "back door borrowing" against future budgets, but is, of course, very politically appealing. 1 Official Record, Michigan Constitutional Convention 772–73 (1961).

7. James R. Barth et al., *State Pension Plans for Public Employees: A Rough Road Ahead,* (Apr. 19, 2016) (unpublished manuscript) (on file with UA-Little Rock Law Review).

8. *See id.*; *see also* Federico Fabbrini, *The Fiscal Compact, the "Golden Rule," and the Paradox of European Federalism*, 36 B.C. INT'L & COMP. L. REV., 1, 29 (2013) ("A contemporary survey reveals that thirty-five states currently have constitutional balanced-budget requirements, and fourteen more have statutory or *de facto* obligations to ensure balanced budgets—Vermont being the only state with no such constraints whatsoever."). The states do this in different ways, and it strikes the author as helpful to set forth the relevant provisions, state-by-state, which is done in Appendix A. The author extends his gratitude to Alexandra C. Burks, a law student who researched this material and significantly contributed to the drafting of Appendix A. What is particularly important is that these provisions all focus on fiscal responsibility and that the placement of pension restrictions within the context of balanced budget provisions is appropriate and makes sense in a larger context.

9. Monahan, *supra* note 5, at 133 (indicating that multiple studies and analyses find "very little reason to believe that current state constitutional funding requirements are effective where a legislature chooses not to comply"); *see also* Natalya Shnitser, *Funding Discipline for U.S. Public Pension Plans: An Empirical Analysis of Institutional Design*, 100 IOWA L. REV. 663, 695–703 (2015).

10. *See*, *e.g.*, T. Leigh Anenson et al., *Reforming Public Pensions*, 33 YALE L. & POL'Y REV. 1 (2014); Kristen Barnes, *The Public Pension Crisis Through the Lens of State Constitutions and Statutory Law*, 92 CHI.-KENT L. REV. 393 (2017); Beermann, *supra* note 4, at 4–8; Vaneeta Chintamaneni, *The Unraveling of an American City: Pensions, Municipal Debt,*

Given the severity of the problem and the lack of progress anyone has had in addressing it, I suggest something simple: that we stop digging. Pensions are fatally flawed due to their structure: we should stop offering them. That is the basic argument offered herein. Part II elaborates on the size and scope of the nation's pension funding problem, which affects governmental entities of all kinds and threatens taxpayers everywhere. Part III lays out why this problem has been so difficult to solve and develops the idea that there are so many political, cultural, and even psychological factors weighing against the kind of action required that the change we need is unlikely to ever occur. Part IV recommends the straightforward solution identified above. It sets forth how such a solution would work—given the currently existing status of public pensions in America—and proposes the kind of prohibitory language that would suffice to solve the problem. And, just like that, our public pension crisis will be solved![11]

II. THE PROBLEM

Understanding the pension problem really starts with understanding that there are different kinds of pensions and that it is the defined benefit pension that consistently causes the problems discussed herein. And, of

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and Chapter 9 Bankruptcy, 22 ELDER L.J. 523. 524–26 (2015); Maria O. Hylton, *Combating Moral Hazard: The Case for Rationalizing Public Employee Benefits*, 45 IND. L. REV. 413 (2012); Eric M. Madiar, *Is Welching on Public Pension Promises an Option for Illinois? An Analysis of Article XIII, Section 5 of the Illinois Constitution*, 48 J. MARSHALL L. REV. 167 (2017); Amy B. Monahan, *When a Promise is Not a Promise: Chicago-Style Pensions*, 64 UCLA L. REV. 356 (2017); Terrance O'Reilly, *A Public Pensions Bailout: Economics and Law*, 48 U. MICH. J.L. REFORM 183 (2014); Scott A. Shepard, *The Lead Lemming: Illinois on the Pension-Crisis Brink*, 14 J.L. ECON. & POL'Y 151 (2017); Shnitser, *supra* note 9, at 695–703.

11. Unfortunately, this will only solve this problem *going forward*. Much of the discussion to date has focused on pension obligations that have been incurred historically and that are, therefore, already binding upon the states. There has been much contemplation— and, indeed, litigation—on this very broad topic. *See*, *e.g.*, Anenson et al., *supra* note 10; Barnes, *supra* note 10; Beermann, *supra* note 4; Hylton, *supra* note 10*;* O'Reilly, *supra* note 10; Monahan, *supra* note 10. This article has nothing to say on that point. Instead, I am suggesting a way to avoid this problem, going forward. Now, moving from a defined benefit plan to a defined contribution one (as discussed below) is not rocket science, and many states have recognized this and have begun to reshape their compensation schemes accordingly. *See*, *e.g.*, Steven Greenhouse, *Pension Funds Strained, States Look at 401(k) Plans*, N.Y. TIMES (Feb. 28, 2011), https://wwwnytimes.com/2011/03/01/business/01pension/html; *see also The Institute for Illinois' Fiscal Sustainability at the Civic Federation*, CIVIC FED'N (Oct. 20, 2011), https://www.civicfed.org/iifs/blog/states-consider-shift-traditional-pension-plans (providing information about states "that have created new [defined contribution] or hybrid plans since the mid-1990s"). The point herein, then, is that a good solution is even better when it is unavoidably adhered to and followed.

course, it is important to emphasize just how problematic and financially crippling this issue is.

A. Pensions vs. Pensions

A pension is, strictly speaking, a fixed sum, regularly paid.[12] Primarily, though, this phrase applies to retirement payments. Generally, retirement pensions are composed of two variations: defined benefit pension plans and defined contribution pension plans. A defined *contribution* plan is one in which employees invest their funds and "manage and bear the risk of their own retirement savings."[13] A defined *benefit* plan, on the other hand, is one that "obligate[s] employers to provide employees retirement income regardless of market performance."[14] This means that a defined benefit plan "provides an employee with a specific benefit expressed as an amount payable to the employee upon retirement," regardless of whether there are any funds available.[15]

It is that "regardless" phrase in the preceding sentence that causes so much trouble. A defined contribution plan is no problem[16] because it does not obligate any governmental entity or municipality to make payments if it lacks adequate funds. Indeed, it merely creates a mechanism whereby employees can invest or save funds, the defined contributions, for later spending.[17]

A defined benefit plan is a problem, though, if there is not enough money to meet its obligations. More specifically, defined benefit plans have to have enough assets to pay a lifetime stream of payments to the entitled recipient.[18] The plan sponsor (here, the state or local governmental entity promising the pension) ensures that there are sufficient assets to pay out to retirees. Doing so means either funneling funds to these individuals through a plan on a rolling, pay-as-you-go basis or trying to capitalize the plan as the

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12. *See Pension,* MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/pension (last visited Jun. 17, 2019).

13. *See* Karen Eilers Lahey & T. Leigh Anenson, *Public Pension Liability: Why Reform is Necessary to Save the Retirement of State Employees*, 21 NOTRE DAME J.L. ETHICS & PUB. POL'Y 307, 308 (2007).

14. *See id*.

15. *See* John R. Keville, *Retire at Your own Risk: ERISA's Return on Investment?*, 68 ST. JOHN'S L. REV. 527, 528–29 (1994).

16. Though it is also probably not technically a "pension," either.

17. Monahan, *supra* note 5, at 124 (stating oftentimes, employers will also contribute some money, as well—or "match" the employee contribution to some extent—but that does not change the basic nature of these pensions, or savings vehicles. The most common type of defined contribution plan is a 401(k)-style plan, and that kind of plan "cannot be underfunded").

18. *Id*.

obligations are incurred.[19] Public pensions choose the latter course, in an ostensible attempt to avoid shifting a worker's compensation expense to later years and later generations.[20]

However, funding a pension plan during an employee's working years is difficult. This is so from a budgetary standpoint, obviously.[21] But it is also difficult from a purely practical standpoint. Even if every relevant politician has the purest intentions, it is hard to properly fund the plan "[b]ecause the benefit is not payable until some years in the future, and its amount depends on many factors such as the age at which the participant retires, how long the participant lives, what their final salary is, and the rate of investment return from the time of contribution until payout."[22] There are accounting standards that theoretically act to cabin in these variables and effectively force states and cities to properly fund their plans.[23] However, these standards and rules are easily gamed and have not historically resulted in steady or reliable funding.[24] This means that states and other providers (or guarantors, if you will) of the defined benefits have to raise taxes or shift funds from other priorities in order to cover the fixed "liability" if those obligations are not adequately funded.[25]

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19. *See id*. at 125.

20. *See id*. ("If the state does not pay for that employee's retirement benefits over the course of her working career, it has essentially shifted a compensation expense to future taxpayers . . . even though her services did not benefit such taxpayers.").

21. *See infra* Section II.B.

22. *See* Monahan, *supra* note 5, at 125. This latter variable—the rate of investment return—is why pension plans become even more underfunded than normal during economic downturns. "For example, if a plan calculates contribution amounts assuming an eight percent rate of return on investments, but the plan earns only five percent, the plan will have a funding shortfall—referred to as an unfunded liability." *Id.* at 126. This is exactly what is happening. *See, e.g.*, Robert Novy-Marx & Joshua D. Rauh, *The Liabilities and Risks of State-Sponsored Pension Plans*, 23 J. ECON. PERSP., 191, 200–02 (2009) (discussing the effects of unrealistically assuming an eight percent rate of return); Robert C. Pozen & Brij S. Khurana, *Tough Choices for the Illinois Pension System*, HARVARD BUS. SCH. CASE, 311-139 (Revised September 2011) (noting that the rate of return achieved by the Illinois pension system from 2003-2008 was 1.7%, far short of the estimated 8.5% required).

23. *See* Monahan, *supra* note 5, at 126–27 (indicating that Government Accounting Standards Board ("GASB") standards "have . . . become de facto funding guidelines" that provide for a calculable Annual Required Contribution ("ARC")).

24. *See* Monahan, *supra* note 5, at 127 ("ARC is an imperfect measure, vulnerable to manipulation through aggressive determination of actuarial assumptions . . . ."); *see also* Novy-Marx & Rauh, *supra* note 22, at 192 ("[G]overnment accounting standards require states to use procedures that severely understate their liabilities."). It is perhaps notable, here, that private pensions have different funding rules, dictated and enforced by the federal government, ensuring that these private plans are properly funded. 29 U.S.C. §1083 (2015).

25. In a nutshell, this is what causes a city to raise its sales tax by two percent and dedicate *all* of that raise to pay its pension costs. *See, e.g.*, Cole Lauterbach, *Another Illinois City Raises Taxes to Pay Growing Pension Cost*, ILL. NEWS NETWORK (Mar. 29, 2018), https://www.ilnews.org/news/statewide/another-illinois-city-raises-taxes-to-pay-growing-

Public pensions have a long and storied history. They date to the Roman Empire, which awarded pensions for military service, and in America, public military pensions predate the Constitution.[26] The practice spread to state and local governments in the last half of the nineteenth century, with New York City creating the first municipal retirement plan in 1857.[27] Early plans paid out lump-sum payments, primarily to police officers, firefighters, and teachers.[28] Eventually, all states followed suit and expanded the concept to cover public employees generally, with these kinds of plans now covering nearly 20 million current and former government employees.[29]

Notably, underfunding was not historically a problem. Courts traditionally viewed pensions as mere gratuities that could be taken away at will, much like a conditional gift, which obviously solved any problem of paying out non-existent funds.[30] This view no longer prevails, however. Many courts have disclaimed the gratuity model and now view public pensions as an enforceable contractual right.[31] There is some nuance here—largely regarding presently vested rights versus future accruals—but it is fair to say that state and municipal pension rights and obligations can no longer be simply wished away,[32] with some states even going so far as to protect pen-

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pension-cost/article_78b79546-32cd-11e8-9d5a-9b43957a69f5.html;Aaron M. Renn, *Beneath Chicago's Gloss*, CITY J. (Sept. 24, 2015), http://www.city-journal.org/html/beneath-chicago%E2%80%99s-gloss-11673.html [https://perma.cc/TAW7-XPSX]. ("In September 2015, Mayor Emanuel proposed a $600 million property tax increase to help the city start making required pension payments . . . .").

26. *See* ROBERT L. CLARK ET AL., A HISTORY OF PUBLIC SECTOR PENSIONS IN THE UNITED STATES 1–2 (2003).

27. *See* OLIVIA S. MITCHELL ET AL., PENSIONS IN THE PUBLIC SECTOR 11–12 (2001).

28. *See* CLARK ET AL., *supra* note 26, at 4.

29. CLARK ET AL., *supra* note 26, at 4; U.S. CENSUS BUREAU, SUMMARY OF THE 2010 ANNUAL SURVEY OF PUBLIC-EMPLOYEE RETIREMENT SYSTEMS: STATE- PENSIONS 3 (2012).

30. *See, e.g.*, Lynch v. United States, 292 U.S. 571 (1934); Frisbie v. United States, 157 U.S. 160 (1895); United States v. Teller, 107 U.S. 64 (1883). This view prevailed, even if the pensioner had historically made contributions to the pensions. *See* Pecoy v. City of Chicago, 106 N.E. 435, 436–37 (1914) (holding that employee contributions were made as a condition of employment and that the employee understood that said contribution might not return to him but might instead be moved to a different department fund).

31. *See, e.g.*, Payne v. Bd. of Trs. of the Teachers' Ins. & Ret. Fund, 35 N.W.2d 553, 554 (N.D. 1948); Layman v. State, 630 S.E.2d 265, 267 (S.C. 2006); Tait v. Freeman, 57 N.W.2d 520, 522 (S.D. 1953); Bakenhus v. City of Seattle, 296 P.2d 536, 541 (Wash. 1956). Notably, the view of pensions as a gift or gratuity continues on in federal court. *See* Deborah Kemp, *Public Pension Plans: The Need for Federal Regulation*, 10 HAMLINE L. REV. 27, 32 (1987).

32. *See supra* note 10; Some courts have considered statutory language in determining whether a contractual right exists, some have instead found property rights to pension benefits, and still others have found some rights, regardless of whether explicit contractual rights exist. *See, e.g.,* Pineman v. Oechslin, 488 A.2d 803 (Conn. 1985); Spina v. Consol. Police & Firemen's Pension Fund Comm'n, 197 A.2d 169, 173 (N.J. 1964); Pierce v. State, 910 P.2d 288 (N.M. 1995); *Layman*, 630 S.E.2d 265; Peterson v. Sweetwater Cty. Sch. Dist. No. One,

sioner benefits through constitutional amendments granting contractual or property rights.[33]

B. Brobdingnagian

This loss of flexibility resulting from the treatment of pensions as vested rights has had Brobdingnagian consequences. This word means "marked by tremendous size,"[34] and that is probably the best way to describe the problems of public pension funding.

"The amount of unfunded pension benefits currently owed to [firefighters, teachers, police officers, and other public employees] tops $1 trillion."[35] And the problem reaches into every state and into all facets of this kind of compensation. In Chicago, for example, "[i]n 2013, each household in the city . . . would have needed to contribute between $28,472 and $66,900 in order to fully fund the city's pension plans."[36] "In Pennsylvania, nearly half of the state's municipal pension plans are considered 'dis-

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929 P.2d 525 (Wyo. 1996); *see also*, *e.g.*, Amy B. Monahan, *Statutes as Contracts? The "California Rule" and Its Impact on Public Pension Reform*, 97 IOWA L. REV. 1029 (2012).

33. *See* Whitney Cloud, Comment, *State Pension Deficits, the Recession, and a Modern View of the Contracts Clause*, 120 YALE L.J. 2199, 2203 n.20 (2011) (indicating that Alaska, Arizona, Hawaii, Illinois, Louisiana, Michigan, New Mexico, New York, and Texas all have constitutional amendments addressing pensions). The Alaska Constitution, for example, states that "[m]embership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship. Accrued benefits of these systems shall not be diminished or impaired." ALASKA CONST. art. XII, § 7. And New Mexico's constitution indicates that "[u]pon meeting the minimum service requirements of an applicable retirement plan created by law for employees of the state, a member of a plan shall acquire a vested property right with due process protections under the applicable provisions of the New Mexico and United States constitutions." N.M. CONST. art XX, § 22(D). Not every state's protection is as strong as these. *See, e.g.*, TEX. CONST. art XVI, § 66(a) (indicating that Texas's protections "appl[y] only to a public retirement system that is not a statewide system" and allowing local governments to exempt their systems through voter referendum). And there are also disparate views as to whether past and future benefit accruals or only past accruals are protected. *Compare* ALASKA CONST. art. XII, § 7, ARIZ. CONST. art. XXIX, § 1, ILL. CONST. art. XIII, §5, *and* N.Y. CONST. art. V, § 7 (protecting past and future accruals), *with* HAW. CONST. art. XVI, § 2, LA. CONST. art. X, § 29, *and* MICH. CONST. art. IX, § 24 (protecting only past accruals). In the end, any protection is significant, with these provisions generally placing pension benefits under the aegis of the federal Contract Clause, thus ensuring significant, if not absolute, protection against modification or cancellation of benefits. *See, e.g.*, Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 427–29 (1934) (discussing the application of the Contract Clause).

34. *Brobdingnagian*, MERRIAM WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/Brobdingnagian. "Brobdingnag is the name of a land that is populated by a race of human giants 'as tall as an ordinary spire steeple.'" *Id.* (quoting JONATHAN SWIFT, GULLIVER'S TRAVELS 101 (1826)).

35. Monahan, *supra* note 10, at 358.

36. Monahan, *supra* note 10, at 358.

tressed,' and the city of Philadelphia, alone, has over "$5.3 billion in unfunded liabilities."[37] As another example, Kentucky's largest statewide plan is underfunded so badly that it can only pay twenty-one percent of already earned benefits.[38]

This list goes on and on and on, affecting state after state and municipality after municipality.[39] Earlier this decade, estimates revealed underfunding in excess of three trillion dollars.[40] This amount of underfunding "works out to $10,625 for every man, woman, and child in the United States."[41] And there is every reason to think things will only get worse.[42]

This, then, is an enormous problem that shows no signs of abating. Unfortunately, this is not surprising. There are simply a number of basic, structural problems with these types of plans, attributable to the way people view risks and rewards over long time frames and the way people respond to adversity.

III. IN OUR OWN NATURES FRAIL[43]

Knowing the scope of defined benefit plans, one might suppose that governmental entities could fashion safeguards or solutions to prevent the accumulation of trillions of dollars of unfunded debt. But this supposition is wrong because of how defined benefit plans work in conjunction with mod-

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37. Monahan, *supra* note 10, at 359.

38. Monahan, *supra* note 10, at 359.

39. *See*, *e.g.*, Novy-Marx & Rauh, *supra* note 22, at 197–99 (analyzing each state in relative terms and noting that Vermont, the state with the smallest underfunding burden relative to its tax revenues (at "merely" -171%) "would have to dedicate over 20 months of tax revenue . . . to make up for its pension shortfall").

40. Novy-Marx & Rauh, *supra* note 22, at at 192 ("Using market-based discount rates that reflect the risk profile of the pension liabilities, we calculate that the present value of the already-promised pension liabilities of the 50 U.S. states amount to $5.17 trillion, assuming that states cannot default on pension benefits that workers have already earned. Net of the $1.94 trillion in assets, these pensions are underfunded by $3.23 trillion.").

41. *See* Novy-Marx & Rauh, *supra* note 22, at at 196.

42. *See* Novy-Marx & Rauh, *supra* note 22, at at 201 ("In this highly leveraged investment strategy, the pension system, while funded in expectation, realizes a shortfall at maturity in 15 years with 99.5% probability. The shortfall exceeds $9.2 trillion with greater than 99% probability.").

43. WILLIAM SHAKESPEARE, HENRY THE EIGHTH act 5, sc. 3 l. 8-19 (Funk & Wagnalls Co. 1909) ("My good lord archbishop, I'm very sorry To sit here at this present, and behold That chair stand empty: but we all are men, In our own natures frail, and capable Of our flesh; few are angels: out of which frailty And want of wisdom, you, that best should teach us, Have misdemean'd yourself, and not a little, Toward the king first, then his laws, in filling The whole realm, by your teaching and your chaplains, For so we are inform'd, with new opinions, Divers and dangerous; which are heresies, And, not reform'd, may prove pernicious.").

ern politics and the human psyche, creating a systemic problem that is structurally toxic and effectively impossible to resolve.

Again, the pensions we are concerned with define the benefit as of a future date—and defining the benefit for the payee is simply the other side of defining the cost for the payor. This means that any argument regarding the prohibition of future payments in favor of present ones is, at its most basic, simply an argument that costs should be incurred now rather than in the future. Of course, it is easy to bolster this claim by pointing out how enormous defined pension liabilities have gotten.[44] And that is important! If something is working terribly, then we should change our current approach. But we can do more—we can dig a little deeper and come up with a more concrete explanation that both explains why it is that we continue to make promises we know we cannot keep and why it is unlikely to change without binding self-enforcement.

To begin this analysis, ask yourself a simple question: would you choose a punch in the nose now or in 40 years? Which would you choose? Put differently, how do you perceive the pain of being punched?[45] Evidence indicates that people routinely undervalue the pain of being punched in the future (or overvalue the value of not being punched right now).[46] Indeed, it

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44. *See supra* Section II.B.

45. Different authorities approach this same question, or, at least, information that relates to this question, from one of two sides: by assessing how one values consumption over time or how one assesses cost over time. *See*, *e.g.*, Colin F. Camerer, *Prospect Theory in the Wild: Evidence from the Field*, *in* CHOICES, VALUES, AND FRAMES, 288 (Daniel Kahneman and Amos Tversky eds., 1998) ("In economic models of lifetime savings and consumption decisions, people are assumed to have separate utilities for consumption in each period . . . ."). So, we can either ask how much you value not getting punched now (versus not getting punched later)—or how you view the "cost" of a punch now versus the "cost" of a punch later. *See* George Loewenstein, *Anticipation and the Valuation of Delayed Consumption*, 97 ECON. J. 666, 676–77 (1987) (pointing out that there is a distinct value in anticipating future events, which can be termed either "anticipal pleasure" or "anticipal pain") (quotations omitted). It is distinctly possible that discounting pleasure functions differently from discounting pain, but, for purposes of the present discussion, such a distinction need not be made, and here, either question collapses to the same issue: how do we assess utility over a prolonged temporal period?

46. There is some contrary authority, though it is explicable. *See*, *e.g.*, George Loewenstein & Richard H. Thaler, *Anomalies: Intertemporal Choice,* 3 J. OF ECON. PERSP., 181, 181–193 (1989). There, the authors note that, "For . . . electric shock, subjects were willing to pay substantially more to avoid a shock to be received in one or ten years than one in the immediate future." *Id*. at 190. Similarly, in the same paper, the authors noted a study where subjects were asked, "What is the least amount of money you would accept for cleaning 100 hamster cages at the . . . animal laboratory. You will be paid immediately . . . . The job is unpleasant but takes only three hours. How much would you need to be paid to clean the cages: (1) once during the next 7 days; (2) once during the week beginning one year from now?" *Id*. at 190–91. "The mean reservation wage for cleaning the cages next week was $30 while the reservation wage for doing the task in a year was $37." *Id*. at 191. Both of these sets of data indicate that people actually assess a higher cost to later than to earlier pain. This seems somewhat

is a standard economic assumption that people "discount the future,"[47] and "of the various assumptions underlying analyses of intertemporal choice, perhaps the assumption of positive discounting is the most widespread and noncontroversial."[48] Of course, some discounting is appropriate. People should be willing to discount based on the market rate of interest, which, in theory, could be positive or negative.[49] However, individual discounting does not follow this logical course. Instead, consumers consistently over-value the present (or under-value the future) when they make intertemporal trade-offs.[50]

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unexpected, and the authors surmised that such a choice was because "[i]n this case[,] subjects seemed to be willing to pay to avoid having to worry about the event over an extended period of time." *Id*. at 190. This concept of savor and dread somewhat undercuts a basic premise here, namely that people systematically under-assess future costs (like those of defined benefit pensions). This inconsistency has been addressed in a holistic sense. *See, e.g.,* Loewenstein, *supra* note 45, at 666. ("A more inclusive theory of intertemporal choice should be able to account for both extremes of behavior—myopic and far-sighted."). However, that is not necessary here. Here, note how the authors term their explanation: "subjects seemed . . . willing to pay to avoid *having to worry* about the event . . . ." *Id.* at 190 (emphasis added). "Worry," here, is an individualistic activity. People worry about things (like future payments)—polities do not. I might pay more to avoid a future, enormous, unfunded mandate that will bankrupt me because I really, really do not want that hanging over me. Society, on the other hand, is perfectly capable of kicking the can down the road. Indeed, even individuals fall into this mode of thinking when the outcomes being assessed are large or prolonged. *See* Loewenstein, *supra* note 45, at 673–74. ("People should . . . be especially likely to get fleeting outcomes over with quickly and defer those for which consumption is prolonged. This has the sensible implication that people will always defer outcomes whose effects are prolonged or permanent, e.g. loss of a leg."). If a particular outcome is not vivid (or, put differently, cannot be savored), then it is difficult for individuals to accurately assess it ahead of time, and this effect is surely deepened when filtered through mass perception or activity, which necessarily dampens individual applicability or consideration. *See id*. at 677. ("In a recent series of interviews with family heads that aimed at a preliminary understanding of saving behavior, one theme that emerged was the apparent need of many individuals for highly specific goals to motivate savings. Such individuals seem incapable of saving for a future retirement in the abstract . . . .").

47. Loewenstein & Thaler, *supra* note 46, at 192; *see also* R.H. Strotz, *Myopia and Inconsistency in Dynamic Utility Maximization*, 23 REV. ECON. STUD. 165, 177 (1955-56).

48. Loewenstein, *supra* note 45, at 666 (stating also that "a recent study which explicitly questioned the general applicability of positive discounting concluded that the case for positive time preference is absolutely compelling") (internal quotations omitted).

49. "[At the margin,] people should discount money streams at the (after-tax) market rate of interest (*r*). . . . If presented with an investment option that pays off at a rate higher than *r*, the consumer can enjoy greater consumption in every period by accepting the option and borrowing appropriately at rate *r*. . . . The implication is that consumers should make intertemporal trade-offs so that their marginal rate of time preference equals the interest rate." Loewenstein & Thaler, *supra* note 46, at 182.

50. *See* Loewenstein & Thaler, *supra* note 46, at 182. Simply put, "[t]he research [on the psychology of decision-making] often provides evidence that individuals violate certain assumptions of rational choice . . . ." Loewenstein & Thaler, *supra* note 46, at 192. Again, there are subtleties here, but this discounted utility theory is, I think, noncontroversial here.

This improper discounting has been shown numerous times, in both targeted studies and in observations of everyday economic life.[51] Perhaps the easiest way to drive this home is to tie it to the way in which many of us approach our income taxes. "[A] large majority of U.S. taxpayers receive refunds every year from the Internal Revenue Service."[52] These are interest-free loans, and there is no argument that the dollars received in the future are equivalent to the dollars that could be received in real-time by adjusting one's withholding rate. Yet people routinely do this and other things indicating an inherent inability (or unwillingness) to assess cost over time.

What this means is that people (especially beyond the individual level, where group dynamics permits a kind of collective glossing over of non-individualized, but nevertheless systemic, cost) will never truly value a future cost (or, at least, not do so naturally, without exterior pressure).[53] On an individual level, this is because an "individual over time is an infinity of individuals, and the . . . problems of interpersonal utility comparisons are there to plague us" as we attempt to understand the nature of intertemporal decision-making.[54] On a collective level, no imagination is required: there

See, e.g., Loewenstein, *supra* note 45, at 673 (discussing the bounded nature of discounting, depending on the length of delay and the fleeting nature of the future event).

51. *See, e.g.*, Loewenstein & Thaler, *supra* note 46*,* at 186 ("A similar myopia is evident in the lament of a dermatologist that her warnings about the risk of skin cancer have little effect, but 'My patients are much more compliant about avoiding the sun when I tell them that it can cause large pores and blackheads.'"); Strotz, *supra* note 47, at 177 ("The many schemes for installment buying (notably of used automobiles in the U.S.) which require 'no down payment and nothing due for two months' are evidence of the effectiveness of enticements of the same kind. Indeed, all purchases on credit can be viewed as pre-commitments that often . . . exchange future costs for a present pleasure."); Camerer, *supra* note 45, at 4 ("In fact, the teachers in Shea's study did spend more when their future wages were expected to rise, but they did not cut back when their future wages were cut.").

52. Loewenstein & Thaler, *supra* note 46, at 182.

53. Or, put differently, our "intertemporal tussle" will forever remain "unsolved." Strotz, *supra* note 47, at 177. Indeed, "unsolved" is perhaps too kind a word. *See*, *e.g.*, Loewenstein & Thaler, *supra* note 46, at 182–83 (A "study of air conditioner purchases, which examined consumer tradeoffs between purchase price and delayed energy payments, estimated an average consumer discount rate of about 25 percent."). "Thus, there is an intertemporal fiscal externality, in which present voters do not fully take into account the costs of borrowing on succeeding residents." Brian Galle & Jonathan Klick, *Recessions and the Social Safety Net: The Alternative Minimum Tax as a Countercyclical Fiscal Stabilizer*, 63 STAN. L. REV. 187, 200 (2010).

54. Strotz, *supra* note 47, at 179. Compounding this myopia, individuals who find themselves in difficult situations often engage in more and more risky behavior, in an attempt to "catch up" or regain lost ground. *See* Barth, *supra* note 7, at 8 ("For the time period 2001 to 2011, they find that public pension plan managers take on greater risk when their plans are underfunded. This in essence suggests that the unfunded problems lead to what is commonly referred to as 'kicking the can' down the road."); *see also* Jasmin Sethi, *Another Role for Securities Regulation: Expanding Investor Opportunity*, 16 FORDHAM J. CORP. & FIN. L. 783, 825–26 (2011) ("Money managers . . . are also subject to behavioral biases. For example,

are millions (or tens of millions) of individuals at issue, even at the present,[55] and so the collective will never make decisions that accurately value future individuals or the pain they will experience at some distant, unknown date.

Compounded over time, this "mañana effect"[56] is particularly powerful when it is tied to *present* consumption (as, of course, it is in the case of defined benefit pensions). Indeed, the entire calculus is one of delaying the payment for present consumption, i.e., paying governmental employees at a later time to perform services for society now, and, in effect, pits the present generation against future generations.[57] And this can never really be a fair contest *because* of the human psychological conditions discussed here,

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when failing to meet a perceived benchmark, a money manager may take an overly risky position in an attempt to 'catch up.'") (citations omitted); Thomas H. Stanton, *The Failure of Fannie Mae and Freddie Mac and the Future of Government Support for the Housing Finance System*, 18 J.L. & POL'Y 217, 222–23 (2009) ("According to press reports, the chief executives . . . disregarded warnings from their risk officers and greatly increased their purchases of risky loans to catch up with the market.").

55. "Th[e] interpersonal aspect of the intertemporal problem becomes clear [and the analogy to our discussion here is solidified] if we think of a . . . problem involving a family of brothers where each has a utility function depending not only on his own utility but upon a weighted sum of the utilities of all of them. Suppose the oldest brother always has the power to allocate the annual proceeds of an estate, but with it being foreknown that each year one brother will die off, the oldest next. The shifting of the discount function of the family head gives rise to the danger of inconsistent planning[,] and the family head of the moment may consider . . . an irrevocable trust . . . ." Strotz, *supra* note 47, at 179.

56. *Id.* at 173.

57. *See* Monahan, *supra* note 5, at 121; Barth, *supra* note 7, at 8. In fact, in many ways, this is a potent encapsulation of so much that ails the current American economy. Unfunded mandates like Social Security and Medicare consume a large percentage of the current U.S. budget and are on non-sustainable courses. *See, e.g.*, Daniel N. Shaviro, *Reckless Disregard: The Bush Administration's Policy of Cutting Taxes in the Face of an Enormous Fiscal Gap*, 45 B.C. L. REV. 1285 (2004). These are, in essence, defined benefit plans writ large. The Baby Boomer generation is presently consuming vast resources at the expense of all future generations, and there is little to no resistance because there is no one who properly values the future costs to be borne by those future generations. Of course, many of those future generations do not yet exist (or cannot participate in American politics, given their age, a point that conjures the unfortunate, though true, image of a generation taking resources from their grandchildren and great-grandchildren), but even those who do (i.e., the next generation or the few among the immediately following who are old enough to vote) simply do not fight the present consumption because they do not adequately appraise the future costs associated with it. This means that methods of spreading cost into the future (all of which are relatively new, historically speaking, given the recent co-advent of non-precious metal-backed currencies and globally accepted, debt-driven fundraising) will *always* result in the present generation consuming the future ones' resources. Such a state of affairs might lead one to term the Baby Boomers the "Cronus Generation," being, as it is, the first generation likely to leave future generations less well off than they otherwise would have been, due to its own consumption. Though interesting, such a conversation is clearly beyond the scope of this article.

which fundamentally prevent groups of people from accurately assessing the true, future cost of present benefits.[58]

This collective lack of will manifests itself in a variety of obvious ways, given the overtly political nature of this conversation (defined pensions being granted by politicians who are voted into, or out of, office). In a very direct sense, it is almost impossible to imagine politicians holding the line on any kind of future-present trade-off. "[T]he consequences of underfunding are not felt until decades in the future,"[59] and few politicians are willing to reduce present outlays to valued constituencies in order to reduce later expenses they will not be answerable for.[60] Of course, this merely derives from the pressures put on politicians by us the citizens. In this instance, politicians are merely a summing of voter preferences and pressures, and—as discussed here—voters cannot accurately assess future costs, so they will not demand the kinds of political decisions necessary to alter or eliminate unsustainable defined benefit plans promised by politicians with limited time horizons.[61] This comes out both in the demands that voters (and, in a more concentrated way, special interest groups) place on politicians and in how voters routinely vote. It also comes out in the seemingly complete lack of any Tieboutian market pressure regarding pension funding.[62]

Again, this problem is not a new one, but what is notable here is placing this problem within the context of human psychology. Doing so indi-

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58. People do not, in fact, do a very good job of intertemporal planning in a variety of contexts. Camerer, *supra* note 45, at 4. ("In economic models of lifetime savings and consumption decisions, . . . [t]he central prediction is that people should plan ahead by anticipating future income to make a guess about their permanent income, and consume a constant fraction of that total in any one year. . . . But . . . spending on consumption tends to be close to a fixed fraction of current income, and does not vary across the life cycle nearly as much as standard theory predicts."). Camerer's paper lists a number of such apparent anomalies in the face of expected utility theory.

59. Monahan, *supra* note 5, at 155.

60. "Taxes can remain low even as services expand." Beermann, *supra* note 4, at 26.

61. *See* Monahan, *supra* note 5, at 155; *see also* Galle & Klick, *supra* note 53, at 200–02 (citing a study finding that officials in their last term have a tendency to spend more than at other times and suggesting that such politicians are "less attentive to future costs of their decisions").

62. Monahan, *supra* note 5, at 155 n.225. A Tieboutian market is one in which jurisdictions are pressured by citizens to self-organize in ways that are attractive to citizens. "In the pension context, if a state underfunds its pension plans, thereby creating significant unfunded liabilities, it may lose taxpayers to other jurisdictions because those taxpayers do not want to face the possibility of having to pay off those liabilities in the future." *Id.* Or, perhaps derivatively, people will leave a state where their property tax bill is weighted with the cost of prior unfunded plans that are now coming to bear. There seems to be no such pressure at all. In fact, "[b]efore a pension plan reaches critical underfunding, it may in fact be the case that Tieoubtian markets operate to put pressure on state legislators to favor current needs over annual pension funding." *Id.* at n.226 (citing Brian Galle & Kirk J. Stark, *Beyond Bailouts: Federal Tools for Preventing State Budget Crises*, 87 IND. L. REV. 599, 607 (2012)).

cates that the problems we face in this context are merely part of who we are—they are entrenched, not just in politics or economics, but also in human nature. If this is so, then the solution is not simply a political or an economic one, but one that accounts for the systemic risk human organizations face when given the ability to trade future cost for present consumption. Such a solution is, I believe, set forth in Part IV below.

IV. A BINDING SOLUTION

The political structure at issue here is the immediate, intractable part of this problem; it feeds upon (and is maybe the direct result of) the psychological leanings of human beings, as discussed above, and unquestionably ensures that defined benefit plans (and the "easy" current money they represent) will not ever go away.[63] The use of the word "ever" is intentional. As we have seen, there are a lot of really good and creative ideas out there that could theoretically solve this problem, but we know that they will not solve the problem because they will not be enacted (or if enacted, they will not be faithfully executed when financial times get hard). What we need, then, is a really big rock—one that is so big that even God cannot move it.

The analogy here is that the legislature is godlike in its power. It is wonderful that it can create and promulgate rules that tell others what to do and how to behave (good, wonderful, helpful rules that work to the betterment of mankind). And it is just as wonderful that it can create rules wherein the legislature purports to bind itself, telling itself what to do and how to behave. But, of course, what it makes it can unmake (either directly, via legislative diktat, or indirectly by simply ignoring its own statutes); in other words, the legislature is God, and it cannot make a rock (or statute) that is so big that it cannot lift (or ignore) it. So, what we need is a rule or law that *is* so big that it cannot be ignored.[64]

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63. Indeed, the "problems" identified herein are really only problems insofar as one is focused on the fiscal and economic issues at hand. Looked at from a different angle, the political and psychological issues discussed above are really "features" of a defined benefit plan in that these plans are effectively designed to create present social benefits while delaying any social cost. In that sense, then, we can be agnostic about the fiscal consequences of a system structurally designed to finance present benefits on credit.

64. What we need to do is create binding "precommitment" from which we cannot turn. Strotz, *supra* note 47, at 173.

> [I]t is . . . rational for the man today to try to ensure that he will do tomorrow that which is best from the standpoint of today's desires. Unpleasant things which today we want to do sometime in the future are continually put off until tomorrow . . . unless we can find some way of precommitting ourselves to actually doing the task tomorrow. . . . Evidence of this in economic and other social behavior is not difficult to find. It varies from the gratuitous promise, from the familiar phrase 'Give me a good kick if I don't do such and such' to savings plans such as

This is where state constitutions come in. These documents can create these kinds of truly binding laws.[65] "[S]tate legislatures have their bounds set by what the people have enacted in . . . state constitutions."[66] These, then, can restrict legislatures (and all subsidiary entities deriving power therefrom) and can therefore create a rock so big that God cannot lift it.

Given this binding and unavoidable effect, we have the means to reach a binding solution. Each state should simply state in its constitution that defined benefit pension plans are not permitted—period. Something as simple as the following would suffice:

> From and after [effective date], neither the State of [jurisdiction] nor any city, county, or any other municipal entity that derives its power in whole or in part from the State of [jurisdiction] shall offer to any employee, contractor, or retained agent of any kind any retirement system that guarantees any payable amount to any participant therein or that accrues any liability in any manner. This shall not be interpreted to eliminate or reduce any obligation of the State extant prior to the [effective date].

That would work.[67] From and after the specified effective date, the State (and all its constituent parts) would no longer be faced with accruing,

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> insurance policies and Christmas Clubs which may often be hard to justify in view of the low rates of return.

Id. One form of precommitting is putting one in a position where one cannot default on incurred debt. *Id.* Of course, that does not hold when it comes to governmental debt (or, at least, it does not hold in a traditionally understood way), so a different kind of precommittment must be thought of in this situation.

65. The U.S. Constitution is the supreme law of the land, but each state has its own constitution, which controls within its geographic and political boundaries, so long as it does not undercut the federal Constitution. *See*, *e.g.*, Earl M. Maltz, *Lockstep Analysis and the Concept of Federalism*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 98, 102–03 (1988). That control extends to municipalities organized therein. *See* Peter J. Egler, *What Gives Cities and Counties the Authority to Create Charters, Ordinances, and Codes*, 9 No. 3 PERSP: TEACHING LEGAL RES. & WRITING 145 (2001) ("A state's constitution and/or legislative code sets forth the powers of cities and counties organized under the laws of that state.").

66. *Maynard v. Valentine*, 3 P. 195, 199–200 (Wash. 1880). This is a fairly straightforward aspect of state and local governance—state constitutions can restrict state action (so long as doing so does not impermissibly conflict with the federal Constitution).
See Chief Justice Robert N. Wilentz, Address at Princeton University (Jan 15, 1985) *in* 49 RUTGERS L. REV. 887, 892–93 (1997) ("[A] state court can 'expand your liberty by using the state constitution to restrict state action even more than the Federal Constitution would restrict it; it cannot, however, even if it concludes that the state action involved is permissible under the state constitution, permit it if it finds that the Federal Constitution prohibits it.").

67. This article does not grapple with the varied logistics of passing state constitutional amendments. *See*, *e.g.*, John Dinan, *State Constitutional Amendments and Individual Rights in the Twenty-First Century*, 76 ALB. L. REV. 2105, 2106 (2013) ("[T]he flexibility of state constitutions affords ample opportunity for state constitutional amendment processes . . . ."); *see also, e.g.*, Stephen M. Griffin, *The Problem of Constitutional Change*, 70 TUL. L. REV.

underfunded retirement obligations. A huge number of problems would simply cease. Of course, the relevant governmental entities would still be liable for obligations that are outstanding to existing retirees and for obligations that are currently accruing under pension plans that existing employees are contractually entitled to. The final sentence of the provision acknowledges and secures those rights, and those are very large problems, as discussed above. But this would help immensely, prospectively.

One of the primary objections to this will be what it always is when talking about retirement, insurance, and other forms of compensation: money. A funded retirement is a big deal to those entitled to it. It represents a large amount of compensation for many public employees,[68] and it also provides a psychologically important feeling of safety. To simply propose stripping this away is significant.[69] And many people will claim—or have claimed— that doing so is unacceptable and irrevocably and unjustly damaging to public employees.[70] However, in the end, money is money, whether that money comes to you in the future or not, and conflating issues of market valuation with issues of equity or justice is unhelpful and beside the point.

This is so because, in the end, all we are talking about here is money and the concept of present value. If I offer you a job and offer to pay you $100,000 right now, then you will make $100,000, and we would all say the

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2121 (1996); James W. Hillard, *The 1970 Illinois Constitution: A Well-Tailored Garment*, 30 N. ILL. U. L. REV. 269 (2010); Jonathan L. Marshfield, *Courts and Informal Constitutional Change in the States*, 51 NEW ENG. L. REV. 455 (2017).

68. *See supra* Section III.B. for an aggregate description of the scope of this benefit (and its concomitant costs). It is helpful, here, to also give an example of this benefit in a more granular fashion. Leslie Kan, *What Is the Average Teacher Pension in My State?*, TEACHER PENSIONS (Apr. 13, 2016), https://www.teacherpensions.org/blog/what-average-teacher-pension-my-state (listing state averages for teacher pensions).

69. Though, to be fair, many states have already begun moving in this direction. This article does propose making this move concrete and final, which is not a small thing, but the idea that public employees cannot rely on a guaranteed income stream upon retirement (or at some other defined future time) is not a new one.

70. *See, e.g.*, Lois Court & Daniel Kagan, *Public Employees Deserve a Better Pension Reform*, DENVER POST (Mar. 28, 2018), https://www.denverpost.com/2018/03/28/public-employees-deserve-a-better-pension-reform/ ("A strong public retirement system is one of the most effective tools we have to attract and retain talented, committed state employees."); Daniel Suddeath, *Public Employees Deserve Respect, Promised Pension*, GLASGOW DAILY TIMES (Sep. 6, 2017), https://www.glasgowdailytimes.com/news/column-public-employees-deserve-respect-promised-pension/article_466a919c-9345-11e7-aecc-87c124d4101d.html ("It seems at times as if we don't want sound educators in our state."); Jennifer Watkins, *How Can We Honor Public Employees? By Protecting Their Pensions*, NAT'L. PUB. PENSION COAL. (June 1, 2017), https://protectpensions.org/2017/06/01/how-can-we-honor-public-employees-by-protecting-their-pensions/ ("Public employees often accept lower pay than their counterparts in the private sector in exchange for the security of a defined benefit pension.").

value of that job to you is $100,000. If, on the other hand, I offer you a job and offer to pay you $100,000 in a year, then you will still make $100,000, but we would not all say that the value of the job to you is $100,000. That is because the payment is not to be made presently—it is to be made in the future, and future money is not as good as present money because it cannot be utilized right now. Gratification delayed is gratification reduced. And it is relatively easy to assess how much that delay has "cost" you: the amount of income (or interest) the (foregone) money could have generated for the time you forewent it (a year, in our example). So, how much is the $100,000, payable in a year, worth to you? $100,000, discounted by the applicable interest rate.[71] We can extrapolate this concept out as many years into the future as we want, and we can also do this for streams of income.[72] Add to this the ability to estimate life expectancy over large groups, and we can fairly easily estimate the value of a pension.[73]

Given that we can do that . . . we should do that. That is the solution to the claim that eliminating defined benefit plans is "unfair." Instead of paying people part of what they are worth now and augmenting that with the promise of a future, unfunded pension, let us just estimate the value of current pension promises and pay those to public employees now. This can be

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71. If you assume the interest rate is ten percent, then it would be worth $100,000 / 1.1, or $90,909.09 (i.e., the amount you would need to have, right now, to end up with $100,000 in one year's time). As you can see, the interest rate one uses is critical in this calculation, and there is not an explicit rule for determining the appropriate interest rate (also known as the "discount rate") when performing present value calculations. *See, e.g.*, PAUL MUNTER & THOMAS A. RATCLIFFE, APPLYING GAAP AND GAAS, Part II § 21.02 (2003). The specifics of a given calculation are not relevant here, though the difficulty in settling on an appropriate rate actually augurs in favor of *not* utilizing delayed payment schemes, as it is so difficult to accurately assess (and so properly allocate) valuation. *See, e.g.*, Monahan, *supra* note 5, at 126–27.

72. *See*, *e.g.*, Joel L. Tabas, *The § 1111(B) Election: A Decision-Making Framework*, 22 JAN. AM. BANKR. INST. J., 48, 48 (Dec./Jan. 2003) ("The 'net present value' or 'NPV' of a stream of payments is defined as the discounted value of that payment stream. It is calculated by adding all projected future cash receipts less all projected future cash disbursements and then applying an appropriate discount factor to such amounts, thereby reducing cash flow to its net present value.").

73. *See*, *e.g.*, Stephan R. Leimberg, *Life Expectancy Analysis: Estate Planning Tool of the Future Is Here Now*, 35 EST. PLAN. (Sept. 2008), at 3, 11 n.34 (indicating that performing a present valuation of a pension "must be calculated using actuarial assumptions relative to the pension holder's expected life span"); *see also* Jeffrey D. Mamorsky, *Basis of Actuarial Costs*, *in* 1 EMPLOYEE BENEFITS HANDBOOK, § 12:14 (2018) (setting forth the following steps in attempting to actuarially predict the correct contribution pattern necessary to result in a fully-funded pension fund: (1) selecting actuarial assumptions regarding future benefits, expenses, and investment return; (2) choosing an appropriate contribution pattern; (3) calculating actuarial liabilities; (4) comparing liabilities with assets; and (5) determining the appropriate level of contribution).

done in all sorts of ways through salary, bonus, improved benefits, or current contributions to defined contribution plans.

The main thrust of this argument, then, is that we can, and should accelerate future benefits into the present. Accelerating future benefits is good for public employers and taxpayers in that it permanently eliminates the gigantic underfunding problem identified above[74] by side-stepping, in one fell swoop, structural and systemic problems inherent in political promises of future compensation.[75] Simply put, there is no more hiding the true cost of employment. There is no longer a question about what public employees are paid (or will be paid), to the benefit of everyone.

Notably, in theory, this clarity includes the employees themselves. Imagine the following scenario: I approach you and offer you a job in exchange for $100,000, payable in one week. Another fellow approaches you and offers you a job, also payable in exchange for $100,000. But his offer stipulates that you will be paid $50,000 right now and $100,000, payable in 10 years. This ostensible employer is careful to note that the future payment will be paid from a currently unfunded account and that it will likely be highly contentious when the relevant stakeholders are asked to capitalize the account. Which would you choose? It is almost inconceivable that anyone would pick the latter option.[76] And yet public employees are asked to accept payment of value in the form of unfunded, likely-to-be-controversial pension payments. Accordingly, doing away with this should be to their benefit.[77]

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74. *See supra* Section II.B.

75. *See supra* Part III.

76. *See*, *e.g.*, Monahan, *supra* note 5, at 119 (outlining various public employees faced with reduced pension benefits or threatened reductions).

77. Of course, if instead of the second option outlined above, you were offered $50,000 now and *$1,000,000* in ten years (even under the same conditions), you may well choose the latter option. And that, in truth, is the rub: there is significant evidence indicating that public employees are receiving compensation that *significantly* exceeds their value on the open market, and there seems no doubt that the opacity of pensions makes this possible, or at least contributes to the problem. Indeed, it is conceivable that these protestations about reducing public employee pensions really signal both an acknowledgement that these pensions "overcompensate" particular parties and a desire to continue this. *See, e.g.*, Beermann, *supra* note 4, at 17 (noting one study claiming that public pensions can be 4.5 times as large as the Social Security benefits accruing to a non-public employee, assuming the same work history). In fact, the problematic nature of pensions is problematic precisely because they enable this very problem. Thus, the refrain "we should be paid fair value," when filtered through the pension controversy, may better be heard as, "we would like to receive benefits the present value of which significantly exceed what we could get in an open and transparent market." Simply move compensation to the present and do away with all this. In a sense, simply "immanentize the eschaton." *See Immanentize the Eschaton,* WIKIPEDIA, https://en.wikipedia.org/wiki/Immanentize_the_eschaton (last edited Mar. 31, 2019) (explaining the meaning as attempting to bring that which belongs to the afterlife to the here and now). *See*, *e.g.*, John Cochrane, *The Value of Public Sector Pensions*, GRUMPY ECONOMIST

This proposal, then, makes sense across the board, with respect to every constituency (except, perhaps, politicians who can no longer garner political support by making promises they will never have to keep). Indeed, it is this insulation from political pressure that is the very thing sought. This is particularly beneficial in our current environment, given the economic nature of pension obligations and how that interacts with state constitutional balanced budget requirements.

Every state except Vermont has such a requirement that, in combination with other deficit and debt limits, effectively prohibits a state from spending more than it brings in.[78] These budget restrictions have been subject to substantial criticism, both in terms of their efficacy and in terms of their wisdom,[79] but it is clear that they can act to restrict state spending (and the political benefits that accrue to local politicians when they engage in that kind of spending) in significant ways. When they do so, politicians look for sources of funds, which they often find by raiding pension contribution funds.[80] Again, a municipality has to forecast its pension obligations and set

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(July 23, 2013), https://johnhcochrane.blogspot.com/2013/07/the-value-of-public-sector-pensions.html (hypothesizing about the result of liquidating current shortfall estimates by issuing new debt to cover outstanding obligations and paying out future recipients now, in current retirement assets, and speculating about just how high that debt issue would have to be); *see also, e.g.*, O'Reilly, *supra* note 10, at 186. Of course, a rejoinder to this may be that the future payments have to be high because there is a risk inherent in their payment—i.e., because too many people like me will come along and argue that that they should not be paid, even though accrued. This makes sense, in terms of a typical risk-reward analysis. *See*, *e.g.*, Mark I. Schickman, *The Czar and the Capitalists,* 19 CAL. EMP. L. LETTER, no. 6, June 22, 2009, at 3 (2009) ("We have been taught for decades that there is a risk/reward component to capitalist models and that investment returns are directly tied to the degree of risk."). But it does not make sense to build this kind of inherently unstable risk-reward analysis into public employee compensation. Neither the public nor the employee at issue should be exposed to the risk of being wrong (either paying too much or receiving too little, respectively), and there is no good policy justification for doing so. Further, any argument against accurately valuing pension obligations and building the requisite level of compensation into present day pay because doing so might result in a current-day cost that is "too high" is so internally inconsistent as to constitute a *non sequitur*: in an open market place, "too high" does not exist. If valuing current pension obligations now results in increasing present public employee pay, that is because those employees are, by definition, properly valued at that "higher" amount. In the end, then, the argument must cut both ways—the market should determine compensation and thusly value service and labor providers appropriately. The key is simply to do the valuation now, rather than attempting to do it later, filtered through unknown political and economic circumstances.

78. *See infra* app. A.

79. *See* Adam J. Levitin, *Bankrupt Politics and the Politics of Bankruptcy*, 97 CORNELL L. REV. 1399, 1415–16 (citations omitted) ("For example, because states operate on cash budgets, some states have balanced their budgets by simply not paying obligations during a fiscal year.").

80. *See, e.g.*, Monahan, *supra* note 5, at 119–120 ("For a politician, it may unwise to spend scarce budgetary dollars on a pension plan contribution, which will help provide bene-

aside funds to meet those needs, and those required set-asides have to be met if a plan is to be considered fully funded, which means that missing any such payment or contribution is, in a very real sense, a liability.[81] But it is not so, in an accounting sense. "Pension debt . . . is not recognized for purposes of balanced budget amendments . . . and is therefore an easy way to engage in debt-financed spending while staying within the confines of the law."[82] In other words, politicians can cut (directly or using creative accounting) pension payments and use those funds for other, more present concerns. "As a New Hampshire politician explained, 'it becomes budget desperation when you're looking to balance the budget. You need a few million dollars, well, we'll just adjust some projections, and short-fund the retirement system and take six million dollars, and spend it someplace else.'"[83]

In the end, then, balanced budget amendments do not constitute any kind of sensible, workable solution to the kind of systemic pension problems discussed herein. These mechanisms are attempts by states to bind themselves to (ostensibly) responsible budgeting processes, but they cannot really address the issues at play here, given how easily they are moved on and off the states' balance sheets. This is so even when states implement constraints that seem tailored to address the problem of future discounting in the specific context of defined benefit plans. Though not uniform, many states have instituted constitutional provisions that require the states to fund benefits on an annual basis in an actuarially sound way.[84] But even these do not work.[85] Indeed, many of the pressures on politicians to overpromise current

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fits decades in the future, compared to spending those budgetary dollars on something that provides immediate returns to the constituents that the politician relies upon for reelection.").

81. Because it will have to be made up—set aside at a later date—otherwise.

82. *See*, *e.g.*, *id.* at 120 (citing Steven M. Sheffrin, *State Budget Deficit Dynamics and the California Debacle*, 18 J. ECON. PERSP. 205, 206 (2004)).

83. *See*, *e.g.*, Monahan, *supra* note 5, at 120 (quoting *Bd. of Trs. of The N.H. Judicial Ret. Plan v. Sec'y of State*, No. 2009-621, at *6 (Merrimack N.H. Oct. 27, 2010) (citing N. H. J. CONST. CONVENTION 263 (1984) (statement of Delegate King)).

84. *See*, *e.g.*, Monahan, *supra* note 5, at 135. These provisions vary from state to state, *see id.* app. at 169–171, and some are quite general, but the concept is to prevent states from either not funding these obligations at all or to stop them from doing so in a way that "games" the system by setting unreasonable economic assumptions, such as rates of return.

85. *See id.* at 136–47. Professor Monahan identifies various reasons for this failure and suggests a number of positive solutions. In the end, the primary stumbling block is that "actuarially sound" is not really a binding concept. *See id.* at 161 ("Without being more specific about what is required of legislators, there will be no possibility of enforcement. Politicians will be free to adopt those actuarial assumptions that satisfy their political needs."). Indeed, "[i]ronically, state balanced budget requirements are negatively correlated with pension funding to full actuarial standards." Beermann, *supra* note 4, at 34. This might be solved through governing standards promulgated by qualified actuaries or independent experts or through a self-executing provision that is sufficiently specific enough to not require legislative involvement. *See* Monahan, *supra* note 5, at 161. However, it is hard to see how any require-

benefits from future funds are actually exacerbated in harsh economic times, given that these kinds of pension funding requirements are countercyclical, meaning that increased funding is needed more than ever when the economy is bad, in order to compensate for declining asset valuations.[86]

But, again, all these concerns go away if the underlying methodology of attempting to pre-fund pensions goes away. In such a world, there would be no underfunding of future obligations because there would be no future obligations. Employees would have to be compensated at agreed rates, and that would be that.[87]

Briefly, a relevant response to this suggestion is to point out that, regardless of whether employee pay is properly accelerated into the present, there will always be a need for some form of security upon retirement. After all, regardless of lifetime compensation and life choices, there is some basic social need to provide for the retired and the elderly. This should sound like a familiar argument because this is the historical argument for social security,[88] currently the single largest component of federal spending.[89] And, at

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ment will be binding and independent enough to truly constrain a politician whose constituents are clamoring for services. This is not surprising, given the relevant research. "Time inconsistency occurs when an individual makes a long-term plan at time *t* but systematically departs from that plan in later periods. As has been said, subsequent departures tend to be myopic in character—i.e. to allocate greater consumption to the immediate period than was originally planned." Loewenstein, *supra* note 45, at 677. In other words, people are not capable of truly assessing cross-temporal costs and balancing and planning for them adequately, as this article argues throughout. Thus, there is a need for a *binding* precommitment.

86. *See*, *e.g.*, Monahan, *supra* note 5, at 120. To the extent truly binding restrictions are actually implemented, then, adverse economic circumstances will lead to significantly negative consequences. *See id.* at 166 ("If the state has no choice but to make its full pension contribution in that year, it may be that the state has insufficient funds to provide a basic safety net for its unemployed citizens that year . . . .").

87. This would not eliminate the lack of flexibility discussed immediately above. *See infra* app. A. Paying employees in direct, present value dollars is also subject to the vagaries of state revenues and so may also be upset when the economy worsens (likely when citizens most need help). However, here, the difficulty—measured by the shortfall in revenues required to provide adequate services—is easy to perceive and understand. If the government needs 25 more police officers, who are paid (say) $100,000 per year, then it needs $2.5 million more in available funds. And that is achievable—the government can borrow the funds, in the way that governments presently borrow funds. Remember, the amendment suggested herein is not a balanced budget amendment, as such. Instead, it prohibits a particular kind of borrowing that is particularly susceptible to psychological and political misperception or manipulation. So, flexibility still exists—it is merely in a form that is understandable and not misleading.

88. *See, e.g.*, John Burritt McArthur, *Private Pensions and the Justification for Social Security*, 48 S. TEX. L. REV. 1 (2006).

89. *See, e.g.*, Ryan K. Seale, *Resources in Social Security Cases*, 94 MICH. B. J. 46, 46 (2015) (noting that the Social Security Administration comprises nearly one-quarter of the federal budget); Susan L. Maupin, *Large Medicaid Providers Have New Policy Obligations*, 14 S.C. EMP. L. LETTER, no. 11, Aug. 2006, at 6 ("Estimates by the federal government indi-

present, it is true that public employees do not participate in social security in the same fashion as the vast majority of private sector employees.[90] However, the solution to this hypothetical problem is incredibly simple: bring (newly disenfranchised from pension) employees into the social security compact by doing away with this complexity and putting all workers into one "insurance" pot. Of course, this does not do away with the potential for unfunded retirement benefits.[91] Indeed, given the present state of social security, adding *more* people to that imbalance will certainly make the system less solvent. However, this is not relevant to the larger issue here. An unfunded promise is an unfunded promise, no matter whose balance sheet it is on, so these new social security beneficiaries will be no worse off. Better to bring them all together in one place (particularly if doing so causes the over-promisor to accurately assess the values being promised and so incur obligations that are realistic and reasonable), as this makes a multi-prong and complicated situation somewhat less complicated and, presumably, somewhat more amenable to solution. Moreover, and critically, this move to the federal government's balance sheet is useful in that the federal government is not saddled with the same kinds of debt-funding restrictions faced by the states. The federal government is the most logical place to bring together these enormous obligations, given that it is the ultimate governmental authority and the only one in the country in charge of its own money supply and with unfettered and unlimited (for now) access to borrowed money.

All things told, then, our current patchwork of unworkable and non-functioning retirement systems makes little sense and should be stripped away in favor of our currently functioning social security retirement system. Only then can we begin to truly assess what we owe and actually grapple with how to pay it.

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cate that by 2030, spending for Medicare, Medicaid, and social security alone will be almost 60 percent of the entire federal budget.").

90. *See, e.g.*, Michelle Anderson, *The New Minimal Cities*, 123 YALE L. J. 1118, 1121–1124 (2014); Tyler Bond, *Why Are Some Public Employees Not in Social Security?*, PROTECT PENSIONS (May 4, 2017), https://protectpensions.org/2017/05/04/public-employees-not-social-security/; Leslie Kan, *Why Aren't All Teachers Covered By Social Security?*, TEACHER PENSIONS (Dec. 19, 2014), https://www.teacherpensions.org/blog/why-aren't-all-teachers-covered-social-security.

91. *See, e.g.*, Ralph M. Silberman, *White House Conference on Aging to Urge Workplace Changes on President and Congress*, 23 EMP. ALERT, no. 5, Mar. 2, 2006, at 1 ("One of the speakers addressing the delegates before they began their deliberations, Comptroller General David Walker extended this thought by showing that 'to close the hole between what we have already built up in liabilities and our unfunded promises' for Social Security and Medicare, 'we would have to confiscate most of the net worth of virtually every American.'").

V. CONCLUSION

As this article makes clear, the fiscal problems posed by public pensions are large, difficult, and growing. There are many reasons why this is so, but the sum result is that cities, counties, and states throughout the country simply do not have enough money to pay for the promises made by our fathers. This problem persists despite numerous attempts to impose some level of discipline and to create some kind of pension structure that balances public employee needs with taxpayer capacity (and fiscal sanity). There is no real reason to suppose that this dynamic will change anytime soon. None of the solutions previously tried have had a significant impact, and it does not appear that any of the solutions out there will do so (either because they will not suffice or because they will simply be cast aside by future legislatures in times of need).

Accordingly, I recommend that states impose the single binding solution available to them: a prohibitory constitutional provision that flatly does away with defined benefit pensions. This may seem controversial, but the real nub of that controversy is (or should be) compensation—which can be dealt with directly (via an open and honest discussion regarding presently valued compensation). Of course, this would not solve existing problems, but it would eliminate future ones. In the end, then, such a proposal is a simple and direct one and is really the only concrete and foolproof way to ensure that we stop digging the hole we currently find ourselves in.

APPENDIX A

As indicated above, most of the states with constitutional or statutory requirements can be organized into four general groups: (1) the proposed budget must be balanced, (2) the enacted budget must be balanced, (3) no deficit can be carried forward from one fiscal period into the next, and (4) the state is only permitted to incur debt up to a certain amount. The states and provisions falling within each group are outlined below in Part I.[92] Part II is organized alphabetically by state and provides a more detailed overview regarding the balanced budget provisions of each state.

92. The balanced budget requirements of some states may fit into more than one group, and some state's requirements do not fit within any group.

I. Each State's Balanced Budget Requirements

Proposed Budget Must Be Balanced

- Alabama: Ala. Code §§ 41-4-90, -19-4, -19-9 (2019).
- Alaska: Alaska Stat. § 37.07.020(a), (c) (2019).
- Arkansas: Ark. Code Ann. § 19-4-201(a), (b)(1) (2019).
- Colorado: Colo. Rev. Stat. § 24-37-301 (2018).
- Hawaii: Haw. Rev. Stat. Ann. § 37-74(c)(1) (LexisNexis 2015).
- Illinois: Ill. Const. art. VIII, § 2(a)–(b).
- Maine: Me. Stat. tit. V, § 1664(1)(a)–(b) (2013).
- Maryland: Md. Const. art. III, § 52(5a).
- Massachusetts: Mass. Const. art. LXIII, § 2.
- Michigan: Mich. Const. art. V, § 18.
- Minnesota: Minn. Stat. § 16A.11, subdiv. 2 (2011).
- Mississippi: Miss. Code Ann. § 27-103-125 (2001).
- Missouri: Mo. Const. art. IV, §§ 24, 27(1).
- Nevada: Nev. Rev. Stat. Ann. § 353.205(1) (2013).
- New Hampshire: N.H. Rev. Stat. Ann. § 9:8 (1985).
- New Jersey: N.J. Stat. Ann. §§ 57:27B-21, -22 (2019).
- New York: N.Y. Const. art. VII, § 2.
- North Carolina: N.C. Const. art. III, § 5(3); N.C. Gen. Stat. Ann. § 143C-4-1 (2007).
- Oklahoma: Okla. Stat. tit. 62, § 34:37 (2009).
- Oregon: Or. Const. art. IX, § 2.
- Pennsylvania: Pa. Const. art. VIII, § 12 (a); 71 Pa. Stat. and Cons. Stat. Ann. § 233 (West 1991).
- Rhode Island: R.I. Gen. Laws. Ann. § 35-3-13 (1956).
- South Dakota: S.D. Codified Laws § 4-7-10(1)(a)–(c) (1980).
- Washington: Wash. Rev. Code Ann. § 43.88.050 (1987).

Enacted Budget Must Be Balanced

- Alabama: Ala. Code §§ 41-4-90; 41-19-9 (2019).
- Arkansas: Ark. Code Ann. § 19-1-212 (2019).
- Colorado: Colo. Const. art. X, § 2; Colo. Rev. Stat. § 24-37-301 (2018).
- Florida: Fla. Const. art. VII, § 1(d); Fla. Stat. Ann. § 216.221(1) (2005).
- Georgia: Ga. Const. art. III, § IX, para. IV(b); Ga. Code Ann. § 45-12-76 (1983).

- Iowa: Iowa Code Ann. § 8.22(a) (2018).
- Kansas: Kan. Const. art. XI, § 4.
- Kentucky: Ky. Const. § 171.
- Massachusetts: Mass. Gen. Laws Ann. ch. 29, § 6E (West 2013).
- Michigan: Mich. Const. art. IV, § 31.
- Minnesota: Minn. Stat. § 16A.11, subdiv. 2 (2011).
- Montana: Mont. Const. art. VIII, § 9.
- Nevada: Nev. Const. art. IX, § 2(1).
- New Jersey: N.J. Const. art. VIII, § 2, ¶ 2.
- New York: N.Y. Legis. Law § 54(2)(a) (2007).
- North Carolina: N.C. Const. art. III, § 5(3); N.C. Gen. Stat. Ann. § 143C-4-1 (2007).
- North Dakota: N.D. Const. art. X, § 13.
- Oklahoma: Okla. Const. art. X, § 23.
- Rhode Island: R.I. Gen. Laws. Ann. § 35-3-13 (1956).
- South Carolina: S.C. Const. art. X, § 7(a).
- Virginia: Va. Const. art. X, § 7.
- Wisconsin: Wis. Const. art. VIII, § 5.

No Deficit Can Carry Forward into Future Fiscal Period

- Alabama: Ala. Const. art. XI, § 213.
- Alaska: Alaska Const. art. IX, § X.
- Arkansas: Ark. Code Ann. § 19-1-212 (2019).
- Colorado: Colo. Const. art. X, §§ 2, 16.
- Florida: Fla. Const. art. VII, § 1(d); Fla. Stat. Ann. § 216.221(1) (2005).
- Idaho: Idaho Const. art. VIII, § 1.
- Kansas: Kan. Stat. Ann. § 75-3722(b) (2016).
- Kentucky: Ky. Const. § 171.
- Louisiana: La. Const. art. VII, § 10(G), (F)(2).
- Michigan: Mich. Const. art. V, §§ 18, 20.
- Minnesota: Minn. Stat. § 16A.152, subdiv. 4 (2017).
- Mississippi: Miss. Code Ann. § 27-103-204 (2002).
- Missouri: Mo. Const. art. IV, § 27(1).
- Montana: Mont. Const. art. VIII, § 9.
- Nebraska: Neb. Const. art. XIII, § 1.
- New Hampshire: N.H. Rev. Stat. Ann. §§ 9:13-e(II), :16-b(I) (1990).
- New Jersey: N.J .Const. art. VIII, § 2.

- Ohio: Ohio Const. art. XII, § 4; Ohio Rev. Code Ann. § 126.05 (LexisNexis 2009).
- Oregon: Or. Const. art. IX, § 6.
- Rhode Island: R.I. Gen. Laws. Ann. § 35-3-13 (1956).
- South Carolina: S.C. Const. art. X, § 7(a).
- Tennessee: Tenn. Const. art. II, § 24.
- Virginia: Va. Const. art. X, § 7.
- Washington: Wash. Rev. Code Ann. §§ 43.88.050, .110(7) (2014).

State Debt Is Limited to Defined Amount

- Arizona ($350,000): Ariz. Const. art. IX, §§ 3, 5.
- California ($300,000): *Resources in Social Security Cases*, 94 Mich. B. J., Jan. 2015, Cal. Const. art. IV, § 12(a); *id.* art. XVI, § 1.
- Iowa ($250,000): Iowa Const. art. VII, § 2.
- Kansas ($1,000,000): Kan. Const. art. XI, § 6.
- Kentucky ($500,000): Ky. Const. §§ 49, 50, 171.
- Maine ($2,000,000): Me. Const. art. IX, § 14.
- Missouri ($1,000,000): Mo. Const. art. III, § 37.
- Nebraska ($100,000): Neb. Const. art. XIII, § 1.
- New Mexico ($200,000): N.M. Const. art. IX, §§ 7, 8.
- Ohio ($750,000): Ohio Const. art. VIII, §§ 1, 2.
- Rhode Island ($50,000): R.I. Const. art. VI, § 16.
- South Dakota ($100,000): S.D. Const. art. XIII, § 2.
- Texas ($200,000): Tex. Const. art. III, § 49.
- Wisconsin ($100,000): Wis. Const. art. VIII, § 6.

II. Overview of Each State's Balanced Budget Requirements

ALABAMA

The State of Alabama has balanced budget requirements that are both constitutionally and statutorily based; the requirements mandate the state to pass a balanced budget and forbid the state from carrying a deficit forward.[93] The constitutional provision provides, "[N]o new debt shall be created against, or incurred by the state, or its authority [and,] . . . [a]t the end of each fiscal year all unpaid appropriations which exceed the amount of mon-

93. *See* ALA. CONST. art. XI, § 213; ALA. CODE §§ 41-19-4, 41-19-9, 41-4-83; 41--4-90 (2019); *State-By-State*, AMS. FOR A BALANCED BUDGET, http://www.abbonline.org/state-by-state-balanced-budget-breakdown (last visited Feb. 1, 2018) [https://perma.cc/4N5K-D9MJ].

ey in the state treasury subject to the payment of the same after the proration above provided for, shall thereupon become null and void to the extent of such excess."[94] Section 41-4-83 of the Alabama Code sets forth the parameters of Alabama's budget.[95] The Code further provides that, "The purpose of this provision is to insure that there shall be no overdraft or deficit in the several funds of the state at the end of any fiscal year, and the Governor is directed and required so to administer this article to prevent any such overdraft or deficit."[96]

ALASKA

The balanced budget requirements for the state of Alaska are constitutionally and statutorily based.[97] The Governor of Alaska is tasked with preparing the budget.[98] The Alaska constitution permits the state to borrow money so long as all debt is paid by the end of the following fiscal year.[99] Further, "Proposed expenditures may not exceed estimated revenue for the succeeding fiscal year. The expenditures proposed in the six-year capital improvements program may not exceed the estimated revenue and bond authorizations passed and proposed."[100]

ARIZONA

While Arizona is not prohibited from carrying a deficit forward, the constitution requires the legislature to create an annual tax for the purpose of paying any debt within twenty-five years of the debt's creation:

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94. ALA. CONST. art. XI, § 213 (alternatively cited as ALA. CONST. amend. XXVI).

95. *See* § 41-4-83 (2019) (setting forth the "Contents of Budget" provision).

96. § 41-4-90 (2019); *see also* § 41-19-4 ("The Governor is responsible for the preparation and administration of the state budget . . . [p]roposed expenditures shall not exceed estimated revenues and resources."); § 41-19-9 ("The [l]egislature shall consider the Governor's proposed comprehensive program and financial plan . . . and determine the comprehensive program and financial plan . . . to be provided the citizens of the state; provided, however, that in such determination authorized expenditures shall not exceed estimated revenues and resources.").

97. *See* ALASKA CONST. art. IX, §§ VIII, X; ALASKA STAT. §§ 37.07.020 (2019).

98. *See* ALASKA STAT. § 37.07.020(a) (2019) ("The governor shall prepare a budget for the succeeding fiscal year that must cover all estimated receipts . . . and all proposed expenditures of the state government."); *see also State-By-State*, *supra* note 93 ("Alaska law forbids the run-over of a deficit from one year to the next, and the state must pass a 'balanced budget' from year to year.").

99. *See* ALASKA CONST. art. IX, § X ("The State and its political subdivisions may borrow money to meet appropriations for any fiscal year in anticipation of the collection of the revenues for that year, but all debt so contracted shall be paid before the end of the next fiscal year.").

100. ALASKA STAT. § 37.07.020(c) (2019).

> The legislature shall provide by law for an annual tax sufficient, with other sources of revenue, to defray the necessary ordinary expenses of the state for each fiscal year. And for the purpose of paying the state debt, if there be any, the legislature shall provide for levying an annual tax sufficient to pay the annual interest and the principal of such debt within twenty-five years from the final passage of the law creating the debt.[101]

"The state may contract debts to supply the casual deficits or failures in revenues, or to meet expenses not otherwise provided for; but the aggregate amount of such debts . . . shall never exceed the sum of three hundred and fifty thousand dollars . . . ."[102]

ARKANSAS

The Arkansas Constitution permits the state to incur debt according to the following provision:

> Except for the purpose of refunding the existing outstanding indebtedness of the [s]tate and for assuming and refunding valid outstanding road improvement district bonds, the State of Arkansas shall issue no bonds or other evidence of indebtedness pledging the faith and credit of the [s]tate or any of its revenues for any purpose whatsoever, except by and with the consent of the majority of the qualified electors of the [s]tate voting on the question at a general election or at a special election called for that purpose.[103]

The authority to compute the budget of the state of Arkansas rests with the Governor.[104] However, among the responsibilities of the Director of the Department of Finance and Administration is the duty to "[s]ee that no obligation shall be incurred which shall not be payable when the obligation shall become due . . ."[105] Further, the Arkansas Code simply states the "[p]roposed expenditures shall not exceed estimated available resources."[106]

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101. ARIZ. CONST. art. IX, § 3; *see also State-By-State*, *supra* note 93 (providing a summary of Arizona's balanced budget requirements).

102. ARIZ. CONST. art. IX, § 5; *see also* ARIZ. REV. STAT. ANN. § 35-115 (2018) (setting forth the statutory provision defining the contents of the budget report).

103. ARK. CONST. amend. XX.

104. *See* ARK. CODE ANN. § 19-4-201(a) ("The Governor shall direct the execution of the state budget as approved by the General Assembly.").

105. ARK. CODE ANN. § 19-1-212.

106. *See* ARK. CODE ANN. § 19-4-201(b)(1); *see also State-By-State*, *supra* note 93 ("As there are no statutory requirements to govern what kinds of assumptions can be made about revenue or expenses, the Arkansas budget will be 'unbalanced' in different ways in different years.").

CALIFORNIA

In the state-by-state analysis of balanced budget requirements, Americans for a Balanced Budget provided the following summary of California's requirements:

> The California [c]onstitution limits appropriations from the previous year, adjusted for inflation and the change in population . . . [the] state law prohibits the annual budget act from authorizing expenditures in excess of revenues. California law forbids the carrying over of a deficit from one year to the next. The [s]tate only budgets for expenditures, not revenues.[107]

The California constitution states, "Within the first 10 days of each calendar year, the Governor shall submit to the [l]egislature . . . a budget for the ensuing fiscal year containing itemized statements for recommended state expenditures and estimated state revenues. If recommended expenditures exceed estimated revenues, the Governor shall recommend the sources from which the additional revenues should be provided."[108] The constitution further provides, "The [l]egislature 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), except in case of war to repel invasion or suppress insurrection . . . ."[109]

COLORADO

The state of Colorado is required to enact a balanced budget, and is forbidden from carrying any deficit forward.[110] The Colorado Constitution states:

> No appropriation shall be made, nor any expenditure authorized by the general assembly, whereby the expenditure of the state, during any fiscal year, shall exceed the total tax then provided for by law and applicable for such appropriation or expenditure, unless the general assembly making such appropriation shall provide for levying a sufficient tax, not ex-

107. *State-By-State*, *supra* note 93.
108. CAL. CONST. art. IV, § 12(a).
109. *Id*. art. XVI, § 1.
110. *See* COLO. CONST. art. X, § 2 ("The general assembly shall provide by law for an annual tax sufficient, with other resources, to defray the estimated expenses of the state government for each fiscal year."); *State-By-State*, *supra* note 93 ("Colorado is required to pass a 'balanced budget.' [The] [c]onstitution prevents appropriations from being passed which would exceed tax revenue. Colorado law forbids the carrying over of a deficit from one year to the next.").

> ceeding the rates allowed in section eleven of this article, to pay such appropriation or expenditure within such fiscal year.[111]

Under the Colorado Statutes, "Proposed expenditures in the budget shall not exceed estimated moneys available . . . ."[112] Additionally, "The [G]overnor . . . shall direct the formulation of his decisions into a financial plan encompassing all sources of revenue and expenditure. He shall propose this plan for the consideration of the general assembly in the form of an annual executive budget. . . ."[113]

CONNECTICUT

In the state-by-state analysis of balanced budget requirements, Americans for a Balanced Budget provided the following summary of Connecticut's requirements:

> Connecticut is required to pass a 'balanced budget.' [The constitution] states that the 'amount of general budget expenditures authorized for any fiscal year shall not exceed the estimated amount of revenue for such fiscal year.' Moreover, [s]ection 2.35 of state law requires an estimate of the revenue for each fund from which money is appropriated. The statute then requires that the estimated revenue going into the fund cannot be less than the moneys being appropriated out of the fund. Section 4-72 charges the [G]overnor to match revenues with expenditures. Connecticut law allows the carrying over of a deficit from one year to the next. Connecticut budgets for two years at a time, and then evaluat[es] and adjust[s] the budget midway through. Connecticut has an Office of Policy and Management, which is responsible for keeping an eye on the [s]tate's fiscal health.[114]

DELAWARE

"No appropriation, supplemental appropriation or budget act shall cause the aggregate State General Fund appropriations enacted for any given fiscal year to exceed 98 percent of the estimated State General Fund revenue for such fiscal year from all sources, including estimated unencumbered funds remaining at the end of the previous fiscal year . . . ."[115] The same provision subsequently establishes a "Budget Reserve Account" in subsection (d):

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111. COLO. CONST. art. X, § 16.
112. COLO. REV. STAT. § 24-37-301 (2018).
113. *Id.*
114. *State-By-State*, *supra* note 93.
115. DEL. CONST. art. VIII, § 6(b).

> There is hereby established a Budget Reserve Account within the General Fund. Within 45 days after the end of any fiscal year, the excess of any unencumbered funds remaining from the said fiscal year shall be paid into the Budget Reserve Account, provided, however, that no such payment will be made which would increase the total of the Budget Reserve Account to more than 5 percent of only the estimated State General Fund revenues as set by subsection (b) of this section . . . The General Assembly by a three-fifths vote of the members elected to each House, may appropriate from the Budget Reserve Account such additional sums as may be necessary to fund any unanticipated deficit in any given fiscal year or to provide funds required as a result of any revenue reduction enacted by the General Assembly.[116]

FLORIDA

The State of Florida is forbidden from carrying a deficit forward and is suggested to have one of the most aggressive policies to ensure the budget is balanced.[117] Accordingly, the provision within the Florida Statutes provides, "All appropriations shall be maximum appropriations, based upon the collection of sufficient revenues to meet and provide for such appropriations."[118] Further, "It is the duty of the Governor . . . to ensure that revenues collected will be sufficient to meet the appropriations and that no deficit occurs in any state fund."[119]

GEORGIA

The Constitution of the State of Georgia provides:

> The General Assembly shall not appropriate funds for any given fiscal year which, in aggregate, exceed a sum equal to the amount of unappropriated surplus expected to have accrued in the state treasury at the beginning of the fiscal year together with an amount not greater than the total treasury receipts from existing revenue sources anticipated to be collected in the fiscal year, less refunds, as estimated in the budget report

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116. *Id.* § 6(d); *see also State-By-State*, *supra* note 93 ("While preparing for revenue shortfalls by leaving some revenues unappropriated has had varying degrees of success, there are no statutory requirements that govern what kinds of assumptions can be made about revenue or expenses. Therefore, the Delaware budget could be 'unbalanced' in different ways in different years.").

117. FLA. CONST. art. VII, § 1(d) ("Provision shall be made by law for raising sufficient revenue to defray the expenses of the state for each fiscal period."); *see also State-By-State*, *supra* note 93 ("Florida has one of the most aggressive policies for maintaining a balanced budget in the country, requiring that when the budget isn't balanced, it is to be made balanced . . . [i]f a deficit is developing, then [costs are to be reduced] to eliminate the deficit.").

118. FLA. STAT. ANN. § 216.221(1) (2005).

119. *Id.*

> and amendments thereto. Supplementary appropriations, if any, shall be made in the manner provided in Paragraph V of this section of the Constitution; but in no event shall a supplementary appropriations Act continue in force and effect beyond the expiration of the general appropriations Act in effect when such supplementary appropriations Act was adopted and approved.[120]

The Georgia Legislature has enacted an almost identical provision.[121] Together, the constitutional and statutory balanced budget requirements in Georgia can be summarized by stating, "The total amount of appropriations recommended shall not exceed the cash resources available to meet expenditures under such appropriations."[122]

HAWAII

Hawaii's constitution declares, "No public money shall be expended except pursuant to appropriations made by law. General fund expenditures for any fiscal year shall not exceed the State's current general fund revenues and unencumbered cash balances, except when the [G]overnor publicly declares the public health, safety or welfare is threatened . . . ."[123]

The legislature has enacted additional budget requirements, including that "[t]he appropriations by the legislature for a biennium shall be allocated between the two fiscal years of the biennium in the manner provided in the budget or appropriations act and as further prescribed by the director of finance."[124] Further, the legislature has designated that the duties of the department of budget and finance include ensuring "[t]hat appropriations have been made for the planned purpose and will not be exhausted before the end of the fiscal year . . . ."[125]

IDAHO

"The fiscal year shall commence on the second Monday of January in each year, unless otherwise provided by law."[126] "The legislature shall not in

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120. GA. CONST. art. III, § IX, para. IV(b).
121. *See* GA. CODE ANN. § 45-12-76 ("The General Assembly shall not appropriate funds for any given fiscal year which, in aggregate, exceed a sum equal to the amount of unappropriated surplus . . . together with an amount not greater than the total treasury receipts from existing revenue sources . . . less refunds, as estimated in the budget report . . . .").
122. *Id.* § 45-12-75(7).
123. HAW. CONST. art. VII, § 5.
124. HAW. REV. STAT. ANN. § 37-74(b) (LexisNexis 2015).
125. *Id.* § 37-74(c)(1).
126. IDAHO CONST. art. VII, § 1.

any manner create any debt or debts, liability or liabilities . . . ."[127] However, the provision contains a limitation:

> This section shall not apply to liabilities incurred for ordinary operating expenses, nor shall it apply to debts or liabilities that are repaid by the end of the fiscal year. The debts or liabilities of independent public bodies corporate and politic created by law and which have no power to levy taxes or obligate the general fund of the state are not debts or liabilities of the state of Idaho. The provisions of this section shall not make illegal those types of financial transactions that were legal on or before November 3, 1998.[128]

ILLINOIS

The Illinois Constitution provides the state's balanced budget requirement:

> The Governor shall prepare and submit to the General Assembly, at a time prescribed by law, a State budget for the ensuing fiscal year. The budget shall set forth the estimated balance of funds available for appropriation at the beginning of the fiscal year, the estimated receipts, and a plan for expenditures and obligations during the fiscal year of every department, authority, public corporation and quasi-public corporation of the State, every State college and university, and every other public agency created by the State, but not of units of local government or school districts. The budget shall also set forth the indebtedness and contingent liabilities of the State and such other information as may be required by law. Proposed expenditures shall not exceed funds estimated to be available for the fiscal year as shown in the budget.
>
> The General Assembly by law shall make appropriations for all expenditures of public funds by the State. Appropriations for a fiscal year shall not exceed funds estimated by the General Assembly to be available during that year.[129]

INDIANA

The Indiana Constitution provides, "No law shall authorize any debt to be contracted, on behalf of the State, except in the following cases: to meet casual deficits in the revenue; to pay the interest on the State Debt; to repel

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127. *Id*. art. VIII, § 1
128. *Id.*
129. ILL. CONST. art. VIII, § 2(a)–(b).

invasion, suppress insurrection, or, if hostilities be threatened, provide for the public defense."[130]

IOWA

The Iowa Constitution permits the state to incur debt:

> The state may contract debts to supply casual deficits or failures in revenues, or to meet expenses not otherwise provided for; but the aggregate amount of such debts, direct and contingent, whether contracted by virtue of one or more acts of the general assembly, or at different periods of time, shall never exceed the sum of two hundred and fifty thousand dollars; and the money arising from the creation of such debts, shall be applied to the purpose for which it was obtained, or to repay the debts so contracted, and to no other purpose whatever.[131]

However, the legislature has required the Governor to ensure "for appropriations to meet the expenditure needs of the government from each general class of funds . . . ."[132]

KANSAS

The constitutional requirements set forth by the Constitution of the State of Kansas include that, "The legislature shall provide, at each regular session, for raising sufficient revenue to defray the current expenses of the state for two years."[133] The Kansas Constitution further provides:

> For the purpose of defraying extraordinary expenses and making public improvements, the state may contract public debts; but such debts shall never, in the aggregate, exceed one million dollars, except as hereinafter provided. Every such debt shall be authorized by law for some purpose specified therein, and the vote of a majority of all the members elected to each house, to be taken by the yeas and nays, shall be necessary to the passage of such law; and every such law shall provide for levying an annual tax sufficient to pay the annual interest of such debt, and the principal thereof, when it shall become due; and shall specifically appropriate

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130. IND. CONST. art. X, § 5; *see also State-By-State*, *supra* note 93 ("Indiana is required to pass a balanced budget in that according to statute "no law shall authorize any debt to be contracted," except for "causal deficits" which must be covered by loans "as may be necessary to meet the demands of the state.").

131. IOWA CONST. art. VII, § 2.

132. IOWA CODE ANN. § 8.22(a) (2018); *see also State-By-State*, *supra* note 93 ("[T]he Iowa Code states the [G]overnor must ensure all expenditures equal revenues. Iowa law forbids the carrying over of a deficit from one year to the next. The state of Iowa must pass a balanced budget from year-to-year.").

133. KAN. CONST. art. XI, § 4.

> the proceeds of such taxes to the payment of such principal and interest; and such appropriation shall not be repealed nor the taxes postponed or diminished, until the interest and principal of such debt shall have been wholly paid.[134]

Moreover, Kansas's constitutional budget requirements announce that "[n]o debt shall be contracted by the state except as herein provided . . . ."[135]

With these constitutional requirements in mind, the legislature enacted the following provision:

> Whenever for any fiscal year it appears that the resources of the general fund or any special revenue fund are likely to be insufficient to cover the appropriations made against such general fund or special revenue fund, the secretary of administration, on the advice of the director of the budget, shall, in such manner as the secretary may determine, inaugurate the allotment system so as to assure that expenditures for any particular fiscal year will not exceed the available resources of the general fund or any special revenue fund for that fiscal year. When reviewing the resources of the general fund or any special revenue fund for the purposes of issuing an allotment, the secretary shall not take into consideration the balance in the budget stabilization fund.[136]

KENTUCKY

The Kentucky Constitution states:

> The General Assembly may contract debts to meet casual deficits or failures in the revenue; but such debts, direct or contingent, singly or in the aggregate, shall not at any time exceed five hundred thousand dollars, and the moneys arising from loans creating such debts shall be applied only to the purpose or purposes for which they were obtained, or to repay such debts: Provided, The General Assembly may contract debts to repel invasion, suppress insurrection, or, if hostilities are threatened, provide for the public defense.[137]

Additionally the constitution provides that, "The General Assembly shall provide by law an annual tax, which, with other resources, shall be

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134. *Id.* § 6.
135. *Id.* § 7.
136. KAN. STAT. ANN. § 75-3722(b) (2016); *see also State-By-State*, *supra* note 93 ("Kansas is required to pass a 'balanced budget.' . . . Kansas law forbids the carrying over of a deficit from one year to the next.").
137. KY. CONST. § 49.

sufficient to defray the estimated expenses of the Commonwealth for each fiscal year . . . ."[138]

LOUISIANA

The foundation of Louisiana's balanced budget requirements is constitutionally based: "If a deficit exists in any fund at the end of a fiscal year, that deficit shall be eliminated no later than the end of the next fiscal year."[139] However, the budget requirements become complicated where the Louisiana Constitution contemplates intersecting with the legislature.[140]

The Louisiana Constitution allows for the use of adjustments to ensure that a balanced budget is achieved:

> Notwithstanding any other provision of this constitution to the contrary, adjustments to any constitutionally protected or mandated allocations or appropriations . . . are authorized when state general fund allocations or appropriations have been reduced in an aggregate amount equal to at least seven-tenths of one percent of the total of such allocations and appropriations for a fiscal year. Such adjustments may not exceed five percent of the total appropriation or allocation from a fund for the fiscal year . . . . Notwithstanding any other provisions of this constitution to the contrary, monies transferred as a result of such budget adjustments are deemed available for appropriation and expenditure in the year of the transfer from one fund to another, but in no event shall the aggregate amount of any transfers exceed the amount of the deficit.[141]

More specifically, in order "to avoid a budget deficit in the next fiscal year," the Louisiana Constitution provides a procedure to follow "when the official forecast of recurring revenues for the next fiscal year is at least one percent less than the official forecast for the current fiscal year."[142] This procedure provides:

> An amount not to exceed five percent of the total appropriations or allocations for the current fiscal year from any fund established by law or

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138. *Id.* § 171; *see also State-By-State*, *supra* note 93 ("Kentucky is required to pass a 'balanced budget.'. . . Kentucky law forbids the carrying over of a deficit from one year to the next.").

139. LA. CONST. art. VII, § 10(G).

140. *See id.* § 10(F)(1) ("The legislature by law shall establish a procedure to determine if appropriations will exceed the official forecast and an adequate method for adjusting appropriations in order to eliminate a projected deficit . . . ."); *see also id.* § 10(E) ("Appropriations by the legislature from the state general fund and dedicated funds for any fiscal year except funds allocated by Article VII, Section 4, Paragraphs (D) and (E) shall not exceed the official forecast in effect at the time the appropriations are made.").

141. *Id.* § 10(F)(2)(a).

142. *Id.* § 10(F)(2)(b).

> this constitution shall be available for expenditure in the next fiscal year for a purpose other than as specifically provided by law or this constitution. For the purposes of this Subsubparagraph, an amount not to exceed one percent of the current fiscal year appropriation for expenditures required by Article VIII, Section 13(B) of this constitution shall be available for expenditures for other purposes in the next fiscal year. Notwithstanding any other provisions of this constitution to the contrary, monies made available as authorized under this Subsubparagraph may be transferred to a fund for which revenues have been forecast to be less than the revenues in the current fiscal year for such fund. Monies transferred as a result of the budget actions authorized by this Subsubparagraph are deemed available for appropriation and expenditure, but in no event shall the aggregate amount of any such transfers exceed the amount of the difference between the official forecast for the current fiscal year and the next fiscal year.[143]

MAINE

The state of Maine is forbidden from carrying a deficit forward and is required to pass a balanced budget.[144] The Maine Constitution permits the state to incur debt:

> The credit of the State shall not be directly or indirectly loaned in any case, except as provided in sections 14-A, 14-B, 14-C and 14-D. The [l]egislature shall not create any debt or debts, liability or liabilities, on behalf of the [s]tate, which shall singly, or in the aggregate, with previous debts and liabilities hereafter incurred at any one time, exceed $2,000,000.[145]

Additionally, Maine's legislative requirements mandate the budget include, among other things, "a budget message by the Governor-elect or the Governor that outlines the 4-year financial plan of State Government for the ensuing biennium and the following biennium" as well as "a general budget summary setting forth the aggregate figures of the budget . . . to show the balanced relationship between the total proposed expenditures and the total anticipated revenues together . . . contrasted with the corresponding figures for the last completed fiscal year and the fiscal year in progress . . . ."[146]

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143. *Id.*
144. *See State-By-State*, *supra* note 93 (summarizing the balanced budget requirements of Maine).
145. ME. CONST. art. IX, § 14.
146. ME. STAT. tit. V, § 1664(1)(a)–(b) (2013).

MARYLAND

The Constitution of the State of Maryland sets forth the state's balanced budget requirements in the following provision:

> 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. Neither the Governor in submitting an amendment or supplement to the Budget Bill nor the General Assembly in amending the Budget Bill shall thereby cause the figure for total proposed appropriations to exceed the figure for total estimated revenues, including any revisions, and in the Budget Bill as enacted the figure for total estimated revenues always shall be equal to or exceed the figure for total appropriations.[147]

MASSACHUSETTS

In Massachusetts, it is the Governor's responsibility to recommend a budget consisting of "a statement of all proposed expenditures of the commonwealth for the fiscal year, including those already authorized by law, and of all taxes, revenues, loans and other means by which such expenditures shall be defrayed."[148] "[This] budget shall be arranged in such form as the general court may by law prescribe, or, in default thereof, as the governor shall determine."[149] And further, "[f]or the purpose of preparing his budget, the governor shall have power to require any board, commission, officer or department to furnish him with any information which he may deem necessary."[150] The state is only permitted to "borrow money to repel invasion, suppress insurrection, defend the commonwealth, or to assist the United States in case of war . . ." but "may also borrow money in anticipation of receipts from taxes or other sources, such loan to be paid out of the revenue of the year in which it is created."[151]

The legislature has enacted the true balanced budget requirement:

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147. MD. CONST. art. III, § 52(5a); *see also State-By-State*, *supra* note 93 ("According to [the Maryland constitution] in the budget the [G]overnor submits, the balance for total appropriations shall not exceed the balance of total revenues. Neither the governor not the general assembly shall cause the total appropriations to exceed total revenues.").

148. MASS. CONST. art. LXIII, § 2; *see also State-By-State*, *supra* note 93 ("Massachusetts law does not forbid the carrying over of a deficit from one year to the next, requiring them to balance the budget each year.").

149. MASS. CONST. art. LXIII, § 2.

150. *Id.*

151. *Id.*

> The [G]overnor shall recommend, the general court shall enact and the governor shall approve a general appropriation bill which shall constitute a balanced budget for the commonwealth. No supplementary appropriation bill shall be approved by the governor which would cause the state budget for any fiscal year not to be balanced.[152]

MICHIGAN

In Michigan, under the state's constitution "[t]he [G]overnor shall submit to the legislature at a time fixed by law, a budget for the ensuing fiscal period setting forth in detail, for all operating funds, the proposed expenditures and estimated revenue of the state."[153] The same constitutional provision further provides:

> Proposed expenditures from any fund shall not exceed the estimated revenue thereof. On the same date, the governor shall submit to the legislature general appropriation bills to embody the proposed expenditures and any necessary bill or bills to provide new or additional revenues to meet proposed expenditures. The amount of any surplus created or deficit incurred in any fund during the last preceding fiscal period shall be entered as an item in the budget and in one of the appropriation bills. The [G]overnor may submit amendments to appropriation bills to be offered in either house during consideration of the bill by that house, and shall submit bills to meet deficiencies in current appropriations.[154]

However, "[n]o appropriation shall be a mandate to spend."[155] The Governor of Michigan "shall reduce expenditures authorized by appropriations whenever it appears that actual revenues for a fiscal period will fall below the revenue estimates on which appropriations for that period were based."[156] But "[t]he [G]overnor may not reduce expenditures of the legislative and judicial branches or from funds constitutionally dedicated for specific purposes."[157]

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152. MASS. GEN. LAWS ANN. ch. 29, § 6E (West 2013); *see also id*. § 9C (providing the procedure to address a deficiency of revenue).

153. MICH. CONST. art. V, § 18.

154. *Id.*; *see also id.* art. IV, § 31 ("One of the general appropriation bills as passed by the legislature shall contain an itemized statement of estimated revenue . . . for the ensuing fiscal period, the total of which shall not be less than the total of all appropriations made from each fund in the general appropriation bills as passed.").

155. *Id.* art. V, § 20.

156. *Id.*

157. *Id.*

MINNESOTA

Minnesota's balanced budget requirements are found solely in the Minnesota Statutes.[158] These statutory requirements provide the following relevant budget requirements:

> Part one of the budget, the governor's message, shall include the [G]overnor's recommendations on the financial policy of the state for the coming biennium, describing the important features of the budget plan, embracing a general budget summary setting forth the aggregate figures of the budget so as to show the balanced relation between the total proposed expenditures and the total anticipated income, with the basis and factors on which the estimates are made, the amount to be borrowed, and other means of financing the budget for the coming biennium, compared with the corresponding figures for at least the last two completed fiscal years and the current year.[159]

"If the commissioner determines that probable receipts for the general fund will be less than anticipated[,] . . . the commissioner shall, with the approval of the governor, and after consulting the Legislative Advisory Commission, reduce the amount in the budget reserve account as needed to balance expenditures with revenue."[160] Accordingly, if a deficit exists, it will "be made up by reducing unexpended allotments of any prior appropriation or transfer . . . ."[161] Significantly, " the commissioner is empowered to defer or suspend prior statutorily created obligations which would prevent effecting such reductions."[162] Taken together, Minnesota puts much emphasis on preventing deficits once they are found.[163]

MISSISSIPPI

Mississippi is required to enact a balanced budget.[164] The following provision exhibits the requirement that the total proposed expenditures shall not exceed estimated revenues:

158. *See* MINN. STAT. § 16A.11, subdiv. 2 (2011); § 16A.152, subdiv. 4 (2017); *see also State-By-State*, *supra* note 93 ("Minnesota is required to pass a 'balanced budget.' . . . Minnesota law forbids the carrying over of a deficit from one year to the next.").

159. MINN. STAT. § 16A.11, subdiv. 2.

160. *Id.* § 16A.152, subdiv. 4(a).

161. *Id.* § 16A.152, subdiv. 4(b).

162. *Id.*

163. *See id.* § 16A.152, subdiv. 4(c) ("If the commissioner determines that probable receipts for any other fund, appropriation, or item will be less than anticipated, and that the amount . . . will be less than needed, the commissioner [shall] . . . reduce the amount allotted or to be allotted so as to prevent a deficit.").

164. *See* MISS. CODE ANN. § 27-103-113 (2001) ("It shall be the duty of the Legislative Budget Office to prepare an overall balanced budget of the entire expenses and income of the

> The total proposed expenditures in Part 1 of the overall budget shall not exceed the amount of estimated revenues that will be available in the general and special funds for appropriation or use during the succeeding fiscal year, including any balances other than unencumbered balances in general funds that will be on hand in the general and special funds at the close of the then current fiscal year . . . . The Legislative Budget Office may recommend additional taxes or sources of revenue if in its judgment those additional funds are necessary to adequately support the functions of the state government.[165]

Mississippi has also enacted what is known as the "Budget Reform Act of 1992."[166] Among other things, the Budget Reform Act provides:

> The State Treasurer is authorized and directed to borrow funds from the Working Cash-Stabilization Reserve Fund created in Section 27-103-203 or from special funds in the State Treasury, or both, to offset any temporary cash flow deficiencies in the Budget Contingency Fund created in Section 27-103-301regarding Budget Contingency Fund monies generated under Laws, 2002, Ch. 539. The amount borrowed from the Working Cash-Stabilization Reserve Fund or from special funds in the State Treasury, or both, shall not exceed One Hundred Nineteen Million Two Hundred Thousand Dollars ($119,200,000.00) in the aggregate. The State Treasurer shall reimburse, from Budget Contingency Fund monies generated under Laws, 2002, Ch. 539, the Working Cash-Stabilization Reserve Fund or special funds in the State Treasury, or both, for all sums borrowed for such temporary cash flow deficiency purposes. The State Treasurer shall immediately notify the Legislative Budget Office and the State Department of Finance and Administration of each transfer into and out of such funds.[167]

MISSOURI

Similar to many other states, the Governor in Missouri has a duty to "submit to the general assembly a budget for the ensuing appropriation period, containing the estimated available revenues of the state and a complete and itemized plan of proposed expenditures of the state and all its agencies . . . ."[168] In computing the budget, "[t]he governor shall not determine estimated available revenues of the state using any projection of new revenues to be created from proposed legislation that has not been passed into

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state for each fiscal year . . . ."); *see also State-By-State*, *supra* note 93 ("Mississippi law forbids the carrying over of a deficit from one year to the next. Mississippi has set an expenditures cap, which allows appropriations only up to 98% of the estimated revenue.").

165. MISS. CODE ANN. § 27-103-125 (2017).

166. *Id.*

167. *Id.* § 27-103-204.

168. MO. CONST. art. IV, § 24.

law by the general assembly."[169] However, the "[e]stimates of any unspent fund balances, without regard to actual or estimated revenues but accounting for all existing appropriations, that will constitute a surplus during the fiscal year immediately preceding the fiscal year or years for which the [G]overnor is recommending a budget" are permitted to be "included in the estimated revenue available for expenditure during the fiscal year or years for which the [G]overnor is recommending a budget."[170]

Further, the Governor of Missouri has the ability to circumvent any deficit in the budget by "control[ing] the rate at which any appropriation is expended during the period of the appropriation by allotment and . . . reduc[ing] the expenditures of the state or any of its agencies below their appropriations whenever the actual revenues are less than the revenue estimates upon which the appropriations were based."[171] However, "[t]he [G]overnor shall not reduce any appropriation for the payment of principal and interest on the public debt."[172]

In Missouri, as a general rule "[t]he general assembly shall have no power to contract or authorize the contracting of any liability of the state, or to issue bonds therefor . . . ."[173] However, the general assembly has the power to contract liability under the following three exceptions: 1) "to refund outstanding bonds, the refunding bonds to mature not more than twenty-five years from date," 2) "on the recommendation of the governor, for a temporary liability to be incurred by reason of unforeseen emergency or casual deficiency in revenue, in a sum not to exceed one million dollars for any one year and to be paid in not more that five years from its creation," and 3) "when the liability exceeds one million dollars, the general assembly as on constitutional amendments . . . may also submit a measure containing the amount, purpose and terms of the liability, and if the measure is approved by a majority of the qualified electors . . . the liability may be incurred . . . ."[174]

MONTANA

Montana's constitutional balanced budget requirement is short and simple: "Appropriations by the legislature shall not exceed anticipated revenue."[175]

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169. *Id.*
170. *Id.* ("As used in this section, new revenues shall not include existing provisions of law subject to expiration during the ensuing appropriation period.").
171. *Id.* § 27(1).
172. *Id.*
173. *Id.* art. III, § 37.
174. *Id.*
175. MONT. CONST. art. VIII, § 9.

NEBRASKA

The state of Nebraska has a constitutional balanced budget requirement that provides:

> The state may, to meet casual deficits, or failures in the revenue, contract debts never to exceed in the aggregate one hundred thousand dollars, and no greater indebtedness shall be incurred except for the purpose of repelling invasion, suppressing insurrection, or defending the state in war, and provision shall be made for the payment of the interest annually, as it shall accrue, by a tax levied for the purpose, or from other sources of revenue, which law providing for the payment of such interest by such tax shall be irrepealable until such debt is paid.[176]

NEVADA

While Nevada has both constitutional and statutory balanced budget requirements, the following constitutional provision paves the way for the Nevada Revised Statutes:

> The legislature shall provide by law for an annual tax sufficient to defray the estimated expenses of the state for each fiscal year; and whenever the expenses of any year exceed the income, the legislature shall provide for levying a tax sufficient, with other sources of income, to pay the deficiency, as well as the estimated expenses of such ensuing year or two years.[177]

The legislature has provided that the annual budget consist of the following four parts: (1) "a budgetary message by the Governor," (2) "the detailed budgetary estimates both of expenditures and revenues," (3) "the results of the analyses conducted by [the Office of Economic Development and the Office of Energy]" for the prior two years, and (4) "a recommendation . . . for drafting of a general appropriation bill authorizing . . . all expenditures of the Executive Department of the State Government for the next two fiscal years . . . ."[178]

The first part of the budget (the budgetary message) is especially relevant because it must include, among other things, "[a]n explanation of the means by which the proposed budget will provide adequate funding for those governmental functions and services such that ratable progress will be

176. NEB. CONST. art. XIII, § 1; *see also State-By-State*, *supra* note 93 ("Nebraska's 'balanced budget' requirement comes in the form of a limit [on] the issuance of debt. . . . Nebraska law forbids the carrying over of a deficit from one year to the next.").

177. NEV. CONST. art. IX, § 2(1).

178. NEV. REV. STAT. ANN. § 353.205(1) (West 2019).

made toward achieving those long-term performance goals."[179] Significantly, part two of the budget requires "[a]n explanation of the means by which the proposed budget will provide adequate funding for those governmental functions and services such that those intermediate objectives will be met and progress will be made toward achieving those long-term performance goals" as well as "[s]tatements of the bonded indebtedness of the State Government, showing the requirements for redemption of debt, the debt authorized and unissued, and the condition of the sinking funds" and "[a]ny statements relative to the financial plan which the Governor may deem desirable, or which may be required by the Legislature."[180]

It is also worth noting that Nevada has the following provision: "A supplementary appropriation is not valid if it exceeds the amount in the State Treasury available for the appropriation, unless the Legislature making the appropriation provides the necessary revenue to pay the appropriation by a tax, direct or indirect, to be laid and collected as directed by the Legislature."[181]

NEW HAMPSHIRE

In New Hampshire, the Governor has a duty to form the state's budget, and "[i]n doing so he shall give such weight to the estimates of income . . . and to the estimates of expenditure requirements as submitted by the departments and to the testimony elicited at the hearings thereon as he deems proper . . . ."[182] Ultimately, however, "the proposals contained in the budget shall represent his judgment and recommendations in respect to the provision to be made for meeting the revenue and expenditure needs of the state for each of the fiscal years of the ensuing biennium."[183] The Governor is permitted to order reductions of expenditures if he determines that the "[p]rojected state revenues will be insufficient to maintain a balanced budget and that the likelihood of a serious deficit exists" or if "[t]he actual lapse for each fiscal year is not going to equal the level estimated in the forecast of funds, unappropriated surplus, as issued by the legislative budget assistant."[184]

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179. *Id.* § 353.205 (2).
180. *Id.* § 353.205(1)(b).
181. *Id.* § 353.235(2).
182. N.H. REV. STAT. ANN. § 9:8 (2019).
183. *Id.*
184. *Id.* § 9:16-b(I).

NEW JERSEY

The Constitution of the State of New Jersey provides the following provision relating to balanced budget requirements:

> No money shall be drawn from the State treasury but for appropriations made by law. All moneys for the support of the State government and for all other State purposes as far as can be ascertained or reasonably foreseen, shall be provided for in one general appropriation law covering one and the same fiscal year; except that when a change in the fiscal year is made, necessary provision may be made to effect the transition. 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.[185]

The New Jersey constitution further provides, "The [l]egislature shall not . . . create in any fiscal year a debt or debts, liability or liabilities of the [s]tate, which together with any previous debts or liabilities shall exceed at any time one per centum of the total amount appropriated by the general appropriation law for that fiscal year . . . ."[186]

The New Jersey Statutes set forth the same general requirements set forth in the New Jersey constitution while providing, "The Governor may recommend in connection with his budget message and under separate head new or additional sources of revenue, and set forth in connection therewith his recommendations as to the purpose or purposes to which such proposed new or additional revenue may be appropriated . . . ."[187] This provision is subject to the limitation requiring that "[t]he total of the recommendations in the budget shall not be in excess of the estimate of all funds available for disbursement during the fiscal year to which such recommendations are applicable."[188]

NEW MEXICO

The New Mexico Constitution provides, "The state may borrow money not exceeding the sum of two hundred thousand dollars in the aggregate to

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185. N.J. CONST. art. VIII, § 2, para. 2.
186. *Id.* § 2, ¶ 3(a).
187. N.J. STAT. ANN. § 57:27B-21 (West 2019).
188. *Id.*; *see also* § 57:27B-22 ("[T]he Governor shall not approve and recommend any appropriation in excess of the total anticipated funds available for disbursement during the fiscal year to which such recommendations are applicable.").

meet casual deficits or failure in revenue, or for necessary expenses . . . [and] may also contract debts to suppress insurrection and to provide for the public defense."[189] However, "[n]o debt other than those specified in the preceding section shall be contracted by or on behalf of this state, unless authorized by law for some specified work or object" and "[n]o debt shall be so created if the total indebtedness of the state . . . would thereby be made to exceed one percent of the assessed valuation of all the property subject to taxation in the state as shown by the preceding general assessment."[190]

NEW YORK

The New York Constitution provides:

> Annually, on or before the first day of February in each year following the year fixed by the constitution for the election of governor and lieutenant governor, and on or before the second Tuesday following the first day of the annual meeting of the legislature, in all other years, the governor shall submit to the legislature a budget containing a complete plan of expenditures proposed to be made before the close of the ensuing fiscal year and all moneys and revenues estimated to be available therefor, together with an explanation of the basis of such estimates and recommendations as to proposed legislation, if any, which the governor may deem necessary to provide moneys and revenues sufficient to meet such proposed expenditures. It shall also contain such other recommendations and information as the governor may deem proper and such additional information as may be required by law.[191]

Further, "[T]he legislature shall enact a budget for the upcoming fiscal year that it determines is balanced in the general fund."[192]

NORTH CAROLINA

North Carolina is required to enact a balanced budget:

> The Governor shall prepare and recommend to the General Assembly a comprehensive budget of the anticipated revenue and proposed expenditures of the State for the ensuing fiscal period. The budget as enacted by the General Assembly shall be administered by the Governor.

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189. N.M. CONST. art. IX, § 7; *see also State-By-State*, *supra* note 93 ("New Mexico is required to pass a 'balanced budget.' New Mexico law forbids the carrying over of a deficit from one year to the next.").

190. N.M. CONST. art. IX, § 8(A).

191. N.Y. CONST. art. VII, § 2.

192. N.Y. LEGIS. LAW § 54(2)(a) (2007); *see also State-By-State*, *supra* note 93 ("Under New York law, deficits can be carried over from one year to the next, but the state must pass a balanced budget.").

> The total expenditures of the State for the fiscal period covered by the budget shall not exceed the total of receipts during that fiscal period and the surplus remaining in the State Treasury at the beginning of the period. To insure that the State does not incur a deficit for any fiscal period, the Governor shall continually survey the collection of the revenue and shall effect the necessary economies in State expenditures.[193]

Additionally, "The budget recommended by the Governor and the budget enacted by the General Assembly shall be balanced and shall include two fiscal years beginning on July 1 of each odd-numbered year. Each fiscal year and each fund shall be balanced separately . . . ."[194] "The budget for a fund is balanced when the beginning unreserved fund balance for the fiscal year, together with the projected receipts to the fund during the fiscal year, is equal to or greater than the sum of appropriations from the fund for that fiscal year."[195]

NORTH DAKOTA

As provided by the constitution, North Dakota is required to enact a balanced budget:

> The state may issue or guarantee the payment of bonds, provided that all bonds in excess of two million dollars shall be secured by first mortgage upon real estate in amounts not to exceed sixty-five percent of its value; or upon real and personal property of state-owned utilities, enterprises, or industries, in amounts not exceeding its value, and provided further, that the state shall not issue or guarantee bonds upon property of state-owned utilities, enterprises, or industries in excess of ten million dollars.
>
> No further indebtedness shall be incurred by the state unless evidenced by a bond issue, which shall be authorized by law for certain purposes, to be clearly defined. Every law authorizing a bond issue shall provide for levying an annual tax, or make other provision, sufficient to pay the interest semiannually, and the principal within thirty years from the date of the issue of such bonds and shall specially appropriate the proceeds of such tax, or of such other provisions to the payment of said principal and interest, and such appropriation shall not be repealed nor the tax or other provisions discontinued until such debt, both principal and interest, shall have been paid. No debt in excess of the limit named herein shall be incurred except for the purpose of repelling invasion, suppressing insurrection, defending the state in time of war or to provide for the public defense in case of threatened hostilities.[196]

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193. N.C. CONST. art. III, § 5(3).
194. N.C. GEN. STAT. ANN. § 143C-4-1 (2007).
195. *Id.*
196. N.D. CONST. art. X, § 13.

OHIO

Ohio's 'balanced budget' requirements come in the forms of a limit [on] the issuance of debt and an appropriations cap that is tied to the actual revenue raised during previous years. Section 107.33 of the [s]tate law creates a cap on appropriates that is the previous year's revenue, adjusted for inflation and population growth, or the previous year's revenue plus 3.5%, whichever is greater. Article 8, [s]ections [one] and [two] of the 1851 [c]onstitution permit the state to contract debts, to supply causal deficits or failures in revenues, or to meet expenses not otherwise provided for as long as those costs do not exceed $750,000. Title [One], [s]ection 126.05 of the [s]tate law requires the director of the budget to notify the [G]overnor each month on the status of available revenue receipts and balances. The [G]overnor must then prevent expenses of state agencies from exceeding those revenue receipts. Ohio law forbids the carrying over of a deficit from one year to the next.[197]

OKLAHOMA

The Oklahoma Budgetary Comparison Schedules within its annual report indicated the [s]tate ran budget deficits (negative net transactions) for each of the years studied. State law forbids the carrying over of a deficit from one year to the next. [Oklahoma state law] requires a budget message outlining the fiscal policy of the [s]tate for the biennium and describing the important features of the budget plan. This plan provides a summary of the budget setting forth aggregate figures of proposed revenues and expenditures and the balanced relations between the proposed revenues and expenditures and the total expected income and other means of financing the budget compared with the corresponding figures for the preceding biennium. Additionally, Article [X], [s]ection 23 of the [c]onstitution sets regulations 'to ensure a balanced annual budget.' The Oklahoma [c]onstitution limits appropriations to the appropriations limit from the previous year, adjusted for inflation and the change in population. This is commonly called 'budgeting for fiscal discipline,' and is a way to keep the growth of appropriations from outpacing the growth in revenues from year to year.[198]

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197. *State-By-State*, *supra* note 93; *see also* OHIO CONST. art. VIII, § 1 ("The state may contract debts . . . but the aggregate amount of such debts . . . shall never exceed seven hundred and fifty thousand dollars . . . ."); *id*. art. XII, § 4 ("The General Assembly shall provide for raising revenue, sufficient to defray the expenses of the state, for each year, and also a sufficient sum to pay principal and interest as they become due on the state debt."); OHIO REV. CODE ANN. § 126.05 (LexisNexis 2009) (providing the Governor with the authority to issue orders to reduce expenditures or to declare a fiscal emergency).

198. *State-By-State*, *supra* note 93; *see* OKLA. CONST. art. X, § 23 (setting for the procedures to enact a balanced budget and providing, "The state shall never create or authorize the creation of any debt or obligation, or fund or pay any deficit, against the state, or any depart-

OREGON

The Oregon Constitution states, "The Legislative Assembly shall provide for raising revenue sufficiently to defray the expenses of the [s]tate for each fiscal year, and also a sufficient sum to pay the interest on the [s]tate debt, if there be any."[199] In setting forth the requirements of the state budget, the legislature has provided:

> The Governor's budget shall include a budget message prepared by the Governor, including recommendations of the Governor with reference to the fiscal policy of the state government for the coming biennium, describing the important features of the budget, embracing a general budget summary setting forth the aggregate figures of the budget so as to show a balanced relation between the total proposed expenditures and the total anticipated income, with the basis and factors on which the estimates are made, the amount to be borrowed, and other means of financing the estimated expenditures for the ensuing biennium, compared with the corresponding figures for at least the last completed biennium and the current biennium.[200]

PENNSYLVANIA

In Pennsylvania, preparing an annual balanced budget is the duty of the Governor.[201] This budget should set forth "proposed expenditures classified by department or agency and by program" as well as "estimated revenues from all sources."[202] Further, "If estimated revenues and available surplus are less than proposed expenditures, the Governor shall recommend specific additional sources of revenue sufficient to pay the deficiency and the estimated revenue to be derived from each source."[203] But any "[o]perating budget appropriations made by the General Assembly shall not exceed the actual and estimated revenues and surplus available in the same fiscal

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ment, institution or agency thereof, regardless of its form or the source of money from which it is to be paid . . . ."); OKLA. STAT. tit. 62, § 34:38 (2009) (outlining the two parts of the budget which must be submitted to the legislature); *see also* OKLA. STAT. tit. 62, § 34:37 (2009) ("[T]he Governor shall accompany the budget document with a proposal of new revenue raising measures sufficient to effect a balanced budget for the ensuing fiscal year.").

199. OR. CONST. art. IX, § 2; *see also id*. § 6 ("Whenever the expenses, of any fiscal year, shall exceed the income, the Legislative Assembly shall provide for levying a tax, for the ensuing fiscal year, sufficient, with other sources of income, to pay the deficiency, as well as the estimated expense of the ensuing fiscal year.").

200. OR. REV. STAT. ANN. § 291.216 (2016).

201. PA. CONST. art. VIII, § 12 (a). ("[T]he Governor shall submit to the General Assembly . . . A balanced operating budget for the ensuing fiscal year . . . .").

202. *Id*.

203. *Id*.

year."[204] The legislature of Pennsylvania has enacted a statute with similar requirements.[205]

RHODE ISLAND

The Rhode Island Constitution limits the debt the state may incur setting forth the following provision:

> The general assembly shall have no powers, without the express consent of the people, to incur state debts to an amount exceeding fifty thousand dollars, except in time of war, or in case of insurrection or invasion; nor shall it in any case, without such consent, pledge the faith of the state for the payment of the obligations of others. This section shall not be construed to refer to any money that may be deposited with the state by the government of the United States.[206]

The state's balanced budget requirement comes from the legislature:

> The [G]overnor shall submit the budget and the appropriation bill or bills for the fiscal year to the general assembly, which may increase, decrease, alter, or strike out the items contained therein; provided, that no action on its part shall be taken which will cause an excess of appropriations for revenue expenditures over expected revenue receipts. If additional appropriations are deemed necessary by the general assembly, it shall not make the appropriations unless it shall provide the necessary additional revenue therefor.[207]

SOUTH CAROLINA

The balanced budget requirement in South Carolina is found in the state's constitution and simply states, "The General Assembly shall provide by law for a budget process to insure that annual expenditures of state government may not exceed annual state revenue."[208]

SOUTH DAKOTA

The Constitution of the State of South Dakota allows the state to contract debt "[f]or the purpose of defraying extraordinary expenses and mak-

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204. *Id*. § 13(a).
205. *See* 71 PA. STAT. AND CONS. STAT. ANN. § 233 (West 1991).
206. R.I. CONST. art. VI, § 16.
207. R.I. GEN. LAWS. ANN. § 35-3-13 (1956).
208. S.C. CONST. art. X, § 7(a); *see also State-By-State*, *supra* note 93 ("South Carolina is required to pass a 'balanced budget.' . . . South Carolina law forbids the carrying over of a deficit from one year to the next.").

ing public improvements, or to meet casual deficits or failure in revenue . . . ."[209] These debts are "never to exceed with previous debts in the aggregate one hundred thousand dollars . . . ."[210]

The legislature has required that the state's budget report to include "[s]ummary statements of the financial condition of the state, accompanied by such detailed schedules of assets and liabilities as the Governor deems desirable . . . ."[211] Aside from the Governor's discretion, the legislature has provided that these schedules of assets and liabilities shall include "[a] comparative consolidated balance sheet showing the fiscal condition of the state general fund and the surplus or deficit, as the case may be, at the close of each of the two fiscal years last concluded" along with "[s]ummary statements of the general fund balance showing in detail the surplus or deficit at the beginning of each of the two fiscal years last concluded, the actual revenue of that year, the total appropriations of that year, and the total expenditures of that year" and "[s]imilar summary statements of the estimated fund balance for the current fiscal year and the next fiscal year."[212]

TENNESSEE

The Constitution of the State of Tennessee sets forth the state's balanced budget requirements:

> No public money shall be expended except pursuant to appropriations made by law. Expenditures for any fiscal year shall not exceed the state's revenues and reserves, including the proceeds of any debt obligation, for that year. No debt obligation, except as shall be repaid within the fiscal year of issuance, shall be authorized for the current operation of any state service or program, nor shall the proceeds of any debt obligation be expended for a purpose other than that for which it was authorized.
>
> In no year shall the rate of growth of appropriations from state tax revenues exceed the estimated rate of growth of the state's economy as determined by law. No appropriation in excess of this limitation shall be made unless the General Assembly shall, by law containing no other subject matter, set forth the dollar amount and the rate by which the limit will be exceeded.
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> Any law requiring the expenditure of state funds shall be null and void unless, during the session in which the act receives final passage, an appropriation is made for the estimated first year's funding.

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209. S.D. CONST. art. XIII, § 2.
210. *Id.*
211. S.D. CODIFIED LAWS § 4-7-10(1) (1980).
212. *Id.* § 4-7-10(1)(a)–(c).

> No law of general application shall impose increased expenditure requirements on cities or counties unless the General Assembly shall provide that the state share in the cost.
>
> An accurate financial statement of the state's fiscal condition shall be published annually.[213]

TEXAS

The Texas Constitution states, "In no case shall appropriations exceed revenues as provided in Article III, Section 49a, of this constitution. Nothing in this section shall be construed to alter, amend, or repeal Article III, Section 49a, of this constitution."[214] Article III, section 49a provides:

> No debt shall be created by or on behalf of the State, except: (1) to supply casual deficiencies of revenue, not to exceed in the aggregate at any one time two hundred thousand dollars; (2) to repel invasion, suppress insurrection, or defend the State in war; (3) as otherwise authorized by this constitution; or (4) as authorized by Subsections (b) through (f) of this section.[215]

Article III, section 49 further provides:

> The legislature, by joint resolution approved by at least two-thirds of the members of each house, may from time to time call an election and submit to the eligible voters of this State one or more propositions that, if approved by a majority of those voting on the question, authorize the legislature to create State debt for the purposes and subject to the limitations stated in the applicable proposition. Each election and proposition must conform to the requirements of Subsections (c) and (d) of this section.[216]

Subsection (c) states, "The legislature may call an election during any regular session of the legislature or during any special session of the legislature in which the subject of the election is designated in the governor's proclamation for that special session . . . ."[217] Subsection (d) provides:

> A proposition must clearly describe the amount and purpose for which debt is to be created and must describe the source of payment for the debt. Except as provided by law under Subsection (f) of this section, the

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213. TENN. CONST. art. II, § 24.
214. TEX. CONST. art. VIII, § 22(c).
215. TEX. CONST. art. III, § 49.
216. *Id.* § 49(b); *see also id.* § 49(f) ("State debt that is created or issued as provided by Subsection (b) of this section may be refunded in the manner and amount and subject to the conditions provided by law.").
217. *Id.* § 49(c).

> amount of debt stated in the proposition may not be exceeded and may not be renewed after the debt has been created unless the right to exceed or renew is stated in the proposition.[218]

"State debt that is created or issued as provided by Subsections (b) through (f) of [Article III, section 49] and that is approved by the attorney general in accordance with applicable law is incontestable for any reason."[219]

UTAH

The Utah Constitution provides:

> To meet casual deficits or failures in revenue, and for necessary expenditures for public purposes, including the erection of public buildings, and for the payment of all Territorial indebtedness assumed by the State, the State may contract debts, not exceeding in the aggregate at any one time, an amount equal to one and one-half per centum of the value of the taxable property of the State, as shown by the last assessment for State purposes, previous to the incurring of such indebtedness. But the State shall never contract any indebtedness, except as provided in Article XIV, Section 2, in excess of such amount, and all monies arising from loans herein authorized, shall be applied solely to the purposes for which they were obtained.[220]

Additionally the Utah Code states, "The total appropriations requested for expenditures authorized by the budget may not exceed the estimated revenues from taxes, fees, and all other sources for the next ensuing fiscal year."[221]

VERMONT

Vermont is the only outlier among the fifty states by not implementing constitutional or statutory balanced budget requirements. However, in the state-by-state analysis of balanced budget requirements, Americans for a Balanced Budget has provided the following summary regarding Vermont's requirements:

> No 'balanced budget' requirement was found for the state of Vermont. However, [c]hapter [five], [s]ection 308 of the [s]tate law creates a 'budget stabilization trust fund' to offset any fund deficits for that fiscal

218. *Id.* § 49(d).
219. *Id.* § 49(g).
220. UTAH CONST. art. XIV, § 1.
221. UTAH CODE ANN. § 63J-1-201.

year. Vermont law permits the carrying over of a deficit from one year to the next.[222]

VIRGINIA

The Virginia Constitution sets forth the state's balanced budget requirements:

> All taxes, licenses, and other revenues of the Commonwealth shall be collected by its proper officers and paid into the State treasury. No money shall be paid out of the State treasury except in pursuance of appropriations made by law; and no such appropriation shall be made which is payable more than two years and six months after the end of the session of the General Assembly at which the law is enacted authorizing the same.
>
> Other than as may be provided for in the debt provisions of this Constitution, the Governor, subject to such criteria as may be established by the General Assembly, shall ensure that no expenses of the Commonwealth be incurred which exceed total revenues on hand and anticipated during a period not to exceed the two years and six months period established by this section of the Constitution."[223]

WASHINGTON

In the state-by-state analysis of balanced budget requirements, Americans for a Balanced Budget has provided the following summary of Washington's requirements:

> Washington is engaged in a practice called budgeting for fiscal discipline. Instead of the varying assumptions inherent in other states' budgets, Washington estimates revenue to grow at a fixed rate, and caps spending accordingly. While this system has varying degrees of success, keeping any shortfalls in revenue from getting out of hand, Washington also requires the budget document to conform to generally accepted accounting principles, as applicable to the states. Washington is required to pass a 'balanced budget.' Section 43.88.033 of the [s]tate law mandates the budget shall not propose expenditures in excess of the statutory limit. Section 43.88.050 requires the governor to ensure anticipated revenues match estimated expenditures. Section 43.88.110(7) requires the [G]overnor to make an 'across-the-board' reduction in allotments to funds to prevent any cash deficits due to projected cash deficits. Section

222. *State-By-State*, *supra* note 93.
223. VA. CONST. art. X, § 7.

43.135.025[224] limits state expenditures to the previous year's appropriations limits plus the fiscal growth factor, which is the average growth in state personal income for the preceding ten years. Washington law forbids the carrying over of a deficit from one year to the next.[225]

WEST VIRGINIA

The West Virginia Constitution states:

> No debt shall be contracted by this state, except to meet casual deficits in the revenue, to redeem a previous liability of the state, to suppress insurrection, repel invasion or defend the state in time of war; but the payment of any liability other than that for the ordinary expenses of the state, shall be equally distributed over a period of at least twenty years.[226]

WISCONSIN

The balanced budget requirements for the state of Wisconsin are both constitutional and statutory. The Constitution of Wisconsin provides:

> The legislature shall provide for an annual tax sufficient to defray the estimated expenses of the state for each year; and whenever the expenses of any year shall exceed the income, the legislature shall provide for levying a tax for the ensuing year, sufficient, with other sources of income, to pay the deficiency as well as the estimated expenses of such ensuing year.[227]

The state of Wisconsin is permitted to contract public debts "[f]or the purpose of defraying extraordinary expenditures" provided "such debts shall never in the aggregate exceed one hundred thousand dollars . . . ."[228]

WYOMING

The Constitution of Wyoming states, "The State of Wyoming shall not, in any manner, create any indebtedness exceeding one per centum on the assessed value of the taxable property in the state, as shown by the last gen-

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224. *See* § 43.135.025(3) ("The state expenditure limit for any fiscal year shall be the previous fiscal year's state expenditure limit increased by a percentage rate that equals the fiscal growth factor.").

225. *State-By-State*, *supra* note 93.

226. W. VA. CONST. art. X, § 4.

227. WIS. CONST. art. VIII, § 5.

228. *Id.* § 6; *State-By-State*, *supra* note 93 ("Wisconsin law allows the carrying over of a deficit from one year to the next.").

eral assessment for taxation, preceding; except to suppress insurrection or to provide for the public defense."[229] Further, the constitution provides:

> No debt in excess of the taxes for the current year, shall in any manner be created in the State of Wyoming, unless the proposition to create such debt shall have been submitted to a vote of the people and by them approved; except to suppress insurrection or to provide for the public defense.[230]

229. WYO. CONST. art. XVI, § 1.
230. *Id*. § 2.