Note

The Cloying Use of Unallotment: Curbing Executive Branch Appropriation Reductions During Fiscal Emergencies

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Money is the instrument of policy and policy affects the lives of citizens. The individual loses liberty in a real sense if that instrument is not subject to traditional constitutional constraints.
—Justice Anthony Kennedy[1]

On May 14, 2009, Minnesota Governor Tim Pawlenty signed the Omnibus Health and Human Services Bill, a major appropriations bill, into law.[2] Because an appropriation is binding law,[3] the Minnesota Constitution compelled the governor's faithful execution of the bill's spending authorizations.[4] But the governor announced that he would not fully enforce the recently enacted laws due to a budgetary impasse.[5] Despite his pledge, the legislature approved a revenue bill on the final day of its session, which secured adequate funding for the appropriations.[6] After the session ended, a gubernatorial veto of the

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1. Clinton v. City of New York, 524 U.S. 417, 451 (1998) (Kennedy, J., concurring).

2. *See* Brayton v. Pawlenty, 781 N.W.2d 357, 359 (Minn. 2010).

3. *See* MINN. CONST. art. XI, § 1.

4. *See id.* art. V, § 3.

5. *See* Letter from Tim Pawlenty, Minn. Governor, to Margaret Anderson Kelliher, Minn. Speaker of the House (May 14, 2009), *available at* http://www.governor.state.mn.us/stellent/groups/public/documents/web_content/prod009516.pdf.

6. *Brayton*, 781 N.W.2d at 359.

revenue bill eliminated the appropriations' necessary funding.[7] The State of Minnesota then faced a multibillion dollar deficit,[8] thus paving the way for the governor's exercise of his "unallotment" authority,[9] allowing for the executive branch's reduction of allotted appropriations to balance the state budget.[10]

Nearly one year later, the Minnesota Supreme Court invalidated the governor's unallotments for lack of an enacted balanced budget.[11] The ruling vacated merely one of the governor's numerous appropriation reductions.[12] Moreover, the court left a crucial question unaddressed—to what extent can a governor usurp the legislature's constitutionally reserved appropriations power during fiscal emergencies?

As a matter of public policy, the wisdom of discretionary unalloting has been polemic.[13] Although the term unallotment is unique to Minnesota,[14] the procedure is common—a substantial majority of state legislatures delegate a similar power to their governors.[15] As with Minnesota, economic crises in other states have precipitated unallotments and subsequent legal

7. *See* FISCAL ANALYSIS DEP'T, MINN. H.R., CHAPTER 179 (HF 2323/SF 2074) CONF. COMM. REP. MAY 18, 2009—VETOED, H. 86-2323, 1st Sess., at 1 (2009), *available at* http://www.house.leg.state.mn.us/fiscal/files/tax09.pdf.

8. *See id.*

9. *See* MINN. MGMT. & BUDGET DEP'T, PROPOSED UNALLOTMENTS & ADMINISTRATIVE ACTIONS 1 (2009), *available at* http://www.mmb.state.mn.us/doc/budget/unallotment/unallotment-2009.pdf.

10. *See* MINN. STAT. § 16A.152 subdiv. 4 (2008).

11. *See Brayton*, 781 N.W.2d at 368.

12. *See id.* at 361; *see also* Monica Davey, *Deal Follows All-Nighters in Minnesota*, N.Y. TIMES, May 18, 2010, at A16, *available at* 2010 WL 10232030 (stating that the legislature ratified most of the unallotments because little time remained in the legislative session to redraft the budget).

13. *Compare* Sandy Levinson, *Newsnotes from Our "Little Laboratories of Experimentation,"* BALKINIZATION (May 21, 2009, 7:44 AM), http://balkin.blogspot.com/2009/05/newsnotes-from-our-little-laboratories.html (equating Governor Pawlenty's unallotments to a "constitutional dictatorship"), *with* Press Release, Ams. for Tax Reform, Minnesota Supreme Court Decision: A Blow to Taxpayers (May 5, 2010), *available at* http://www.atr.org/minnesota-supreme-court-decision-blow-taxpayers-a4899# (commending Governor Pawlenty's use of unallotment as an effective "budget-cutting tool").

14. Unallotment derives from the executive branch's reduction of alloted appropriations. *See* § 16A.152 subdiv. 4. The author uses the term broadly in this Note to refer to circumstances where the executive branch reduces appropriations, withholds appropriations, reduces an allotment of appropriations, or reduces public expenditures. An allotment reduction is unique from an appropriation reduction, yet the effect is the same when the result contravenes legislative spending prerogatives.

15. *See* JAMES J. GOSLING, BUDGETARY POLITICS IN AMERICAN GOVERNMENTS 165–67 (1992).

challenges.[16] Compared to only nine states in a seven-year span ending in the mid-1980s,[17] forty-eight states have addressed budget deficits for fiscal year 2010 alone.[18] The majority of these states, as a result, either have experienced the repercussions of unalloting or are bracing for the impact.[19] Amid these pursuits lies an often unaddressed concern.[20] The very nature of discretionary unallotment statutes is antithetical to the principle that legislatures, rather than the executive branch, determine appropriation levels for the administration of public programs and projects.[21]

Accordingly, unalloting often results in a disastrous legal paradox. While governors are able to sustain balanced budgets, their usurpation of legislatively established policy overshadows these efforts. In addressing this predicament, this Note sets forth a model unallotment statute, which states should either adopt or employ as a reference when reforming their own laws. Part I introduces the importance of separation of powers in the budgetary process and the history of legal challenges to executive branch budget curtailments. Part II examines Governor Pawlenty's appropriation reductions to analyze the temporal and constitutional limitations of unallotment statutes. Part III introduces a model unallotment statute, which draws from the strengths of the most legally sound unallotment laws. Specifically, this Note advocates that all unallotment laws should precisely articulate the time frame in which unalloting can occur and either cap unallotments at a minimal percentage or require uniform reductions across the state's entire budget.

16. *See, e.g.*, Folsom v. Wynn, 631 So. 2d 890, 891–92 (Ala. 1993) (per curiam).

17. David Lubecky, Comment, *The Proposed Federal Balanced Budget Amendment: The Lesson from State Experience*, 55 U. CIN. L. REV. 563, 572 (1986).

18. Elizabeth McNichol et al., *Recession Continues to Batter State Budgets; State Responses Could Slow Recovery*, CENTER ON BUDGET & POL'Y PRIORITIES, 6 (Oct. 7, 2010), http://www.cbpp.org/files/9-8-08sfp.pdf.

19. *Actions and Proposals to Balance FY 2011 Budgets*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/?tabid=19644 (last visited Oct. 16, 2010).

20. Jim Rossi, *State Executive Lawmaking in Crisis*, 56 DUKE L.J. 237, 263 (2006) [hereinafter Rossi, *Lawmaking in Crisis*].

21. *See* D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS 12 (1991) (arguing that lawmakers should not "prevent their capacity to make policy" by delegating their appropriations power); Michael L. Buenger, *Of Money and Judicial Independence: Can Inherent Powers Protect State Courts in Tough Fiscal Times?*, 92 KY. L.J. 979, 1030 (2004) ("[T]he legislature itself cannot delegate critical spending matters to another branch of government.").

I. EVOLUTION OF UNALLOTMENT

To establish social and policy objectives, legislatures appropriate revenue for the administration of public programs and projects.[22] State spending must adhere to either constitutional or statutory balanced-budget provisions.[23] To ensure fiscal responsibility, the executive branch often balances the budget with unallotment statutes.[24] A state-court split exists as to whether legislatures can authorize executive branch unallotments by abdicating the legislature's constitutionally granted lawmaking power.[25] The recession that began in late 2008 heightened the necessity of unalloting[26] and therefore exacerbated this controversy. Part I introduces the legal and policy issues raised throughout the history of unallotment in the United States.

A. STATE BUDGET PROCESS

Constitutional and statutory criteria detail the budget-making procedures in each state.[27] Although these criteria derive from both years of strenuous trial and error and through the growth of democracy,[28] scholars, judges, and public officials alike have done more to muddy the roles rather than clarify the duties of the executive and legislative branches during this process.[29] Accordingly, this section briefly introduces the legal

22. *See* WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 1146–48 (4th ed. 2007).

23. Ronald Snell, *Budget-Balance Requirement*, *in* THE ENCYCLOPEDIA OF TAXATION & TAX POLICY 27, 27 (Joseph J. Cordes et al. eds., 2d ed. 2005) (indicating that all states except Vermont must balance their budget).

24. *See* GOSLING, *supra* note 15, at 165–66.

25. *Compare, e.g.*, State v. Fairbanks N. Star Borough, 736 P.2d 1140 app. at 1143 (Alaska 1987) (per curiam) (stating that Alaska's unallotment statute unconstitutionally delegates legislative authority), *with, e.g.*, N.D. Council of Sch. Adm'rs v. Sinner, 458 N.W.2d 280, 285–86 (N.D. 1990) (holding that North Dakota's unallotment statute does not unconstitutionally delegate legislative authority).

26. *See Actions and Proposals to Balance FY 2011 Budgets*, *supra* note 19.

27. *See generally* W. Mark Crain & James C. Miller III, *Budget Process and Spending Growth*, 31 WM. & MARY L. REV. 1021, 1024–34 (1990) (analyzing state budget processes).

28. *See* Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto*, 76 TUL. L. REV. 265, 320–31 (2001) (discussing how the evolution of budget making in England affected the Founding Fathers' beliefs about control of the public purse and separation of powers).

29. *Compare, e.g.*, Dan. T. Coenen, *A Constitution of Collaboration*, 42 WM. & MARY L. REV. 1575, 1781 n.872 (2001) ("[S]tate legislatures have re-

standards, public policies, and competing theories of budgetary control throughout the states.

To establish a budget, governors first submit a prospective plan to the legislature by virtue of the executive branch's first-hand knowledge of the revenue necessary to administer government programs.[30] The legislature, however, ultimately decides both the budget's social and policy objectives, and the extent of their funding.[31] Indeed, forty-seven state constitutions explicitly protect this legislative prerogative known as the appropriations process.[32] This process is the legislature's chief vehicle for affecting policy change,[33] despite the governor's line-item veto, which can annul appropriations if not overridden by a legislative supermajority.[34] Once signed into law, the executive branch allots appropriations for expenditure[35] and administers the budget in light of each appropriation's purpose.[36]

History confirms that this system is not an arbitrary set of legal standards, but rather a sophisticated creature, slowly advancing the interests of separation of powers over time.[37] To prevent tyrannical decisionmaking, separation of powers developed to concentrate authority in several hands through a system of checks and balances.[38] This principle of governance

sponsibility for balancing state budgets . . . ."), *with, e.g.*, David Yassky, Note, *A Two-Tiered Theory of Consolidation and Separation of Powers*, 99 YALE L.J. 431, 446 (1989) ("[T]he power to order budget cuts is an executive responsibility . . . .").

30. *See* TODD DONOVAN ET AL., STATE AND LOCAL POLITICS: INSTITUTIONS & REFORM 313 (2010).

31. *See id.* at 267–69.

32. Richard D. Rosen, *Funding "Non-Traditional" Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL. L. REV. 1, 134–39 (1998).

33. Michael L. Buenger, *Friction by Design: The Necessary Contest of State Judicial Power and Legislative Policymaking*, 43 U. RICH. L. REV. 571, 606 (2009).

34. *See* DONOVAN ET AL., *supra* note 30, at 314–15 (discussing various veto powers).

35. GOSLING, *supra* note 15, at 10.

36. *See, e.g.*, State *ex rel.* Meyer v. State Bd. of Equalization & Assessment, 176 N.W.2d 920, 926 (Neb. 1970); State *ex rel.* McLeod v. McInnis, 295 S.E.2d 633, 637 (S.C. 1982) (per curiam); THE FEDERALIST NO. 72, at 403–04 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating that "the application and disbursement of the public moneys in conformity to the general appropriations of the legislature" is an executive duty).

37. *See* M. Blane Michael, *The Power of History to Stir a Man's Blood*, 108 W. VA. L. REV. 593, 601–02 (2006).

38. *See, e.g.*, CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 157 (Anne M. Cohler et al. eds. & trans., 1989) (1748); MELVIN

gradually evolved from societal England's resentment of the King's plenary taxing and spending domain.[39] In the United States, such resentment was evident from statements by leading political and judicial figures such as James Madison[40] and Justice Joseph Story that the legislature must control the appropriations process because "otherwise, the executive would possess an unbounded power over the public purse [and] apply all its monied resources to his pleasure."[41] The legislature and executive's struggle for control of the public purse is notorious.[42] This conflict compels enduring budgetary oversight by both branches of government.

While many state judiciaries recognize that "the budget . . . is fundamentally a legislative matter,"[43] scholars continue to acknowledge the burgeoning presence of the executive budget movement.[44] This dichotomy may grow as additional state courts view budgetary authority as a joint responsibility.[45] According to the latter theory, the budget process bifurcates into

RICHTER, THE POLITICAL THEORY OF MONTESQUIEU 93 (1977); George Washington, Farewell Address (Sept. 17, 1796), *in* 13 THE WRITINGS OF GEORGE WASHINGTON 277, 305–07 (Worthington Chauncey Ford ed., 1892).

39. *See, e.g.*, Bill of Rights, 1689, 1 W. & M., c. 2, § 4 (Eng.), *reprinted in* ENGLISH CONSTITUTIONAL HISTORY 681, 682 (4th ed. 1886) (establishing Parliament's duty to detail the value and purpose of "money for or to the use of the Crowne"); WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 232 (Burt Franklin 2d ed. 1914) (requiring the King to gather a representative body to impose taxes).

40. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 232–33 (Max Farrand ed., 1911).

41. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 222 (Melville M. Bigelow ed., 5th ed. 1994) (1833).

42. *See* Louis Fisher & Neal Devins, *How Successfully Can the States' Item Veto Be Transferred to the President?*, 75 GEO. L.J. 159, 184–85 (1986) (stating that because governors more often use item vetoes to accomplish political aims than to reduce budgets, vetoes trigger numerous political battles and legislative challenges).

43. Legislative Research Comm'n *ex rel.* Prather v. Brown, 664 S.W.2d 907, 925 (Ky. 1984); *see also* Rateree v. Rockett, 852 F.2d 946, 950–51 (7th Cir. 1988); State v. Dankworth, 672 P.2d 148, 151 n.4 (Alaska Ct. App. 1983); Davis v. Moon, 289 P.2d 614, 617 (Idaho 1955); Daniel Feldman, *Legislating or Litigating Public Policy Change: Gunmaker Tort Liability*, 12 VA. J. SOC. POL'Y & L. 140, 158 (2004).

44. ALLEN SCHICK, BUDGET INNOVATION IN THE STATES 14–25 (1971); Richard Briffault, *The Item Veto in State Courts*, 66 TEMP. L. REV. 1171, 1180–81 (1993).

45. *See, e.g.*, Tihonovich v. Williams, 582 P.2d 1051, 1053–55 (Colo. 1978); Bell v. Assessors of Cambridge, 28 N.E.2d 1, 3 (Mass. 1940); Campaign for Fiscal Equity, Inc. v. State, 861 N.E.2d 50, 58 (N.Y. 2006); State *ex rel.* Wis. Senate v. Thompson, 424 N.W.2d 385, 395 (Wis. 1988).

distinct roles: the legislature enacts law through appropriations and the executive enforces those laws through its administrative departments.[46] This view denies the reality of the modern budgeting process. Instead, balanced-budget laws[47] may actually commingle the legislative and executive budgetary obligations.

B. BALANCING THE BUDGET THROUGH DELEGATION

While the overwhelming majority of state constitutions explicitly enumerate separation of powers clauses,[48] state courts often employ the doctrine with less impetus than the controlling text.[49] State legislatures are, therefore, more willing to delegate control of appropriations levels to the executive branch. This section explains the policy behind this near-universal practice and introduces the extent to which legislatures may delegate its control over appropriations.

Scholars question whether the legislature or the executive must balance their state's budget both prior to its establishment[50] and subsequent to its enactment.[51] Depending on the specific state, it could truly be the legislature, executive, both, or neither.[52] Once the fiscal year commences, nevertheless, most legislatures have all but surrendered any purported responsibility to the executive branch through unallotment stat-

46. *See, e.g.*, Op. of the Justices to the Senate, 376 N.E.2d 1217, 1226 (Mass. 1978).

47. Snell, *supra* note 23, at 27.

48. Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167, 1190 (1999) [hereinafter Rossi, *Institutional Design*].

49. Kristien G. Knapp, *Resolving the Presidential Signing Statement Controversy*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 737, 768–70 (2008).

50. *Compare* James M. Poterba & Kim Rueben, *State Fiscal Institutions and the U.S. Municipal Bond Market*, *in* FISCAL INSTITUTIONS AND FISCAL PERFORMANCE 181, 191 (James M. Poterba & Jürgen von Hagen eds., 1999) (noting that the majority of legislatures must pass balanced budgets), *with* Bruce A. Wallin, *Budget Processes, State*, *in* THE ENCYCLOPEDIA OF TAXATION & TAX POLICY, *supra* note 23, at 37, 38 (arguing that governors are the chief "budget balancer[s]" because they submit balanced budgets to the legislatures).

51. *Compare* Yassky, *supra* note 29, at 446 ("[T]he power to order budget cuts is an executive responsibility . . . ."), *with* Michael Abramowicz, *Beyond Balanced Budgets, Fourteenth Amendment Style*, 33 TULSA L.J. 561, 609 (1997) ("[R]ewriting a budget is a quintessentially legislative task . . . .").

52. *See* U.S. GEN. ACCOUNTING OFFICE, GAO/AFMD-93-58BR, BALANCED BUDGET REQUIREMENTS: STATE EXPERIENCES AND IMPLICATIONS FOR THE FEDERAL GOVERNMENT 10–23 (1993).

utes.[53] A respective governor's authority to unallot varies across states[54] but inherent in each statute is an underlying policy objective. One governor, rather than hundreds of often out-of-session legislators,[55] has "the greater institutional motivation and capacity for achieving fiscal restraint."[56] Despite this fact, the confines of each state's nondelegation doctrine prohibit unbridled statutory delegation of legislative authority to the executive branch.[57]

The doctrine, a legal cannon derived from John Locke's *The Second Treatise of Government*,[58] prevents the delegation of legislative power without guiding standards.[59] Each state's judiciary has developed its own nondelegation scheme rooted in common law.[60] Evidence suggests that most state judiciaries establish nondelegation doctrines that fall between the border of "moderate" and "strong."[61] Specifically, twenty-three states require a clear "legislative statement of policy" to satisfy nondelegation requirements while twenty other states demand "specific standards in legislation."[62] A mere seven states require a "procedural safeguard."[63] In practice, state courts find constitutional violations of the doctrine to a greater extent than the federal judiciary.[64] Though state courts have scrutinized

53. *See, e.g.*, ALASKA STAT. § 37.07.080(g) (2010); COLO. REV. STAT. ANN. § 24-75-201.5(1)(a) (West 2010); DEL. CODE ANN. tit. 29, § 6529 (2010); GA. CODE ANN. § 45-12-86 (West 2010).

54. GOSLING, *supra* note 15, at 167.

55. *See, e.g.*, Snell, *supra* note 23, at 28 ("[S]ome legislatures meet for only a few months every other year. Requiring legislative consent for every change in a budget would impose delays or the costs of special sessions.").

56. *See* Briffault, *supra* note 44, at 1180.

57. *See* Jim Rossi, *Dual Constitutions and Constitutional Duels*, 46 WM. & MARY L. REV. 1343, 1359–62 (2005) [hereinafter Rossi, *Dual Constitutions*].

58. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 81 (Thomas P. Peardon ed., Liberal Arts Press 1952) ("[T]he legislative cannot transfer the power of making laws . . . for it being but a delegated power from the people . . . .").

59. *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (federal doctrine); Lee v. Delmont, 36 N.W.2d 530, 538 (Minn. 1949) (Minnesota doctrine).

60. Gary J. Greco, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 ADMIN. L.J. AM. U. 567, 578–601 (1994).

61. Rossi, *Institutional Design*, *supra* note 48, at 1193–200.

62. *Id.* at 1201.

63. *Id.* at 1191–93.

64. *Id.* at 1216–17.

executive branch appropriation reductions in light of the non-delegation doctrine, their opinions often conflict.[65]

C. STATE-COURT SPLIT OVER EXECUTIVE BRANCH APPROPRIATION REDUCTIONS

Depending on respective statutory language, state judiciaries have either upheld or overturned various acts of unalloting. Unallotments without statutory authorization, commonly known as impoundment, confront a higher magnitude of judicial scrutiny but are not per se unconstitutional. This section aims to compartmentalize and clarify both valid and void executive branch unallotment decisions.

1. Constitutional and Valid

State courts have upheld the validity of executive branch appropriation changes in seven distinct areas: (1) where uniform cuts or percentage caps preserved legislative policy intent,[66] (2) where courts framed the delegation standard as one to prevent insolvency,[67] (3) where courts upheld unallotment on procedural grounds,[68] (4) where impoundment comported with

65. *Compare, e.g.*, Chiles v. Children A, B, C, D, E, & F, 589 So. 2d 260, 265 (Fla. 1991) (holding that the legislature may not delegate power to restructure appropriations), *with, e.g.*, Judy v. Schaefer, 627 A.2d 1039, 1040 (Md. 1993) (holding that the legislature may delegate power to reduce appropriations).

66. *See, e.g.*, Folsem v. Wynn, 631 So. 2d 890, 894–95 (Ala. 1993); Univ. of Conn. Chapter AAUP v. Governor, 512 A.2d 152, 158–59 (Conn. 1986); La. Ass'n of Planning & Dev. Dists. v. Treen, 435 So. 2d 1003, 1005–08 (La. Ct. App. 1983); *Schaefer*, 627 A.2d at 1052; Yelle v. Bishop, 347 P.2d 1081, 1090–91 (Wash. 1959); *see also* N.D. Council of Sch. Adm'rs v. Sinner, 458 N.W.2d 280, 284–86 (N.D. 1990) (upholding an unallotment statute that allowed uniform cuts only in limited circumstances). *But see* State *ex rel.* Holmes v. State Bd. of Fin., 367 P.2d 925, 926, 932–33 (N.M. 1961) (holding unallotment unconstitutional because a percentage cap along with other exceptions did not provide a sufficient standard).

67. *See, e.g.*, Roselli v. Noel, 414 F. Supp. 417, 424 (D.R.I. 1976); Legislative Research Comm'n *ex rel.* Prather v. Brown, 664 S.W.2d 907, 926 (Ky. 1984); Bruneau v. Edwards, 517 So. 2d 818, 826 (La. Ct. App. 1987); New Eng. Div. of Am. Cancer Soc'y v. Comm'r of Admin., 769 N.E.2d 1248, 1257 (Mass. 2002); Rukavina v. Pawlenty, 684 N.W.2d 525, 535 (Minn. Ct. App. 2004); Bd. of Educ. v. Gilligan, 301 N.E.2d 911, 914 (Ohio Ct. App. 1973), *aff'd on other grounds*, 311 N.E.2d 529 (Ohio 1974); Bd. of Educ. v. Bd. of Pub. Works, 109 S.E.2d 552, 559–60 (W. Va. 1959); *see also* Perth Amboy Bd. of Educ. v. Christie, 997 A.2d 262, 268–70 (N.J. Super. Ct. App. Div. 2010) (per curiam) (requiring unallotments to conform to legislative intent).

68. *See, e.g.*, *Gilligan*, 301 N.E.2d at 915.

legislative intent,[69] (5) where unallotment statutes required further legislative approval,[70] (6) where courts upheld unallotments without adjudicating the merits of the constitutional question,[71] and (7) where the executive branch transferred appropriations within a department.[72] The following paragraphs briefly discuss the former three methods in turn, as they best represent so-called emergency unallotments.

Of the several jurisdictions upholding uniform or percentage-capped reductions, the court in *University of Connecticut Chapter AAUP v. Governor*[73] advanced the clearest illustration of statutory compliance with the nondelegation doctrine. The court affirmed that unallotment statutes are constitutional where the text provides a temporal limit on when the executive may unallot, and provides a percentage limit on the extent to which the executive may do so.[74]

Courts upholding the delegation of appropriation reductions have often done so on divergent grounds. The Supreme Judicial Court of Massachusetts, for instance, framed the nondelegation standard as one where the legislature delegates the capacity to prevent insolvency, rather than the power to override legislative policy priorities.[75] A Louisiana appellate court, in contrast, enunciated its own standard, proclaiming that "[n]o restrictions, standards, or guidelines are required" for executive unalloting as long as it is to "avoid a deficit."[76]

69. *See, e.g.*, Rios v. Symington, 833 P.2d 20, 29 (Ariz. 1992) (holding impoundment as constitutional when "the legislative purpose of the appropriation is carried out and funds remain"); Op. of the Justices to the Senate, 376 N.E.2d 1217, 1222 (Mass. 1978) ("[A] refusal to expend funds for the purpose of amending or defeating legislative objectives is to be distinguished from the exercise of executive judgment that the full legislative objectives can be accomplished by a lesser expenditure of funds than appropriated.").

70. *See, e.g.*, *Prather*, 664 S.W.2d at 924; Hunter v. State, 865 A.2d 381, 387, 392–96 (Vt. 2004).

71. *See, e.g.*, Bd. of Educ. v. Waihee, 768 P.2d 1279, 1288 (Haw. 1989); *see also* Mich. Ass'n of Cntys. v. Dep't of Mgmt. & Budget, 345 N.W.2d 584, 591–92 (Mich. 1984) (citing MICH. CONST. art. V, § 20); Cnty. of Cabarrus v. Tolson, 610 S.E.2d 443, 445–46 (N.C. Ct. App. 2005) (citing N.C. CONST. art. III, § 5(3)).

72. *See, e.g.*, Bussie v. McKeithen, 259 So. 2d 345, 351–52 (La. Ct. App. 1971); Advisory Op. *in re* Separation of Powers, 295 S.E.2d 589, 593–94 (N.C. 1982).

73. 512 A.2d 152 (Conn. 1986).

74. *See id.* at 159.

75. *See* New Eng. Div. of Am. Cancer Soc'y v. Comm'r of Admin., 769 N.E.2d 1248, 1257 (Mass. 2002).

76. Bruneau v. Edwards, 517 So. 2d 818, 826 (La. Ct. App. 1987).

Although the preceding ensemble of cases upheld the facial constitutionality of unallotment statutes, a few courts have adjudicated their procedural scope. In *Board of Education v. Gilligan*, an Ohio appellate court upheld former Governor John Gilligan's application of Ohio's unallotment statute.[77] At the time Governor Gilligan instituted the unallotments, the legislature had yet to enact an appropriations bill or a final budget.[78] In defending the governor's actions, the court dismissed the implicit requirement that the state must first enact a budget to unallot.[79] While a number of courts have considered and confirmed the constitutionality of executive branch appropriation reductions, albeit on conflicting grounds, a commensurate number of courts have held otherwise.

2. Unconstitutional and Void

State courts have overturned executive changes of appropriations in four particular circumstances: (1) where discretionary unallotments usurped legislative policy intent,[80] (2) where the executive impounded appropriations,[81] (3) where the executive failed to follow proper statutory procedures,[82] and (4) where the executive transferred appropriations across depart-

77. *See* Bd. of Educ. v. Gilligan, 301 N.E.2d 911, 915 (Ohio Ct. App. 1973), *aff'd on other grounds*, 311 N.E.2d 529 (Ohio 1974).

78. *Id.*

79. *See id.*

80. *See, e.g.*, State v. Fairbanks N. Star Borough, 736 P.2d 1140, 1142–43 (Alaska 1987) (per curiam); Chiles v. Children A, B, C, D, E, & F, 589 So. 2d 260, 264–65 (Fla. 1991); Brayton v. Pawlenty, 781 N.W.2d 357, 369–70 (Minn. 2010) (Page, J., concurring); State Emps. Ass'n, Inc. v. Daines, 824 P.2d 276, 279–80 (Nev. 1992) (per curiam); Commcn's Workers v. Florio, 617 A.2d 223, 234 (N.J. 1992) ("The Legislature properly has the power to reduce appropriations for the operate of State government."); State *ex rel.* Schwartz v. Johnson, 907 P.2d 1001, 1008 (N.M. 1995); State *ex rel.* Hudson v. Carter, 27 P.2d 617, 626 (Okla. 1933) ("The legislature is without authority of law to confer upon the governor the power to reduce . . . appropriation[s]."); *see also* Winter v. Barrett, 186 N.E. 113, 127 (Ill. 1933) (per curiam) (holding that the legislature determines the "objects and purposes" for appropriations and shall not delegate this discretionary power).

81. *See, e.g.*, W. Side Org. Health Servs. Corp. v. Thompson, 391 N.E.2d 392, 402 (Ill. App. Ct. 1979), *rev'd on grounds of mootness*, 404 N.E.2d 208 (Ill. 1980); Cnty. of Oneida v. Berle, 404 N.E.2d 133, 137 (N.Y. 1980) (per curiam); *In re* Advisory Op. to the House of Representatives, 576 A.2d 1371, 1373–74 (R.I. 1990).

82. *See, e.g.*, Etherton v. Wyatt, 293 N.E.2d 43, 50–51 (Ind. Ct. App. 1973); *Brayton*, 781 N.W.2d at 368; Gilstrap v. S.C. Budget & Control Bd., 423 S.E.2d 101, 105 (S.C. 1992) (per curiam).

mental budgets.[83] The following paragraphs briefly discuss the former three because they represent emergency unallotments within this context.

A trio of state cases has offered corresponding justifications against an executive's discretion to abate appropriations.[84] The Florida Supreme Court held that constitutional unalloting could only exist where "legislative intent [to delegate the power to reduce appropriations] is clearly established and can be directly followed."[85] Taking the analysis one step further, the court in *State v. Fairbanks North Star Borough* concluded that unabridged unallotments constituted nothing more than a second veto power that the legislature could not override.[86] The clearest articulation of these holdings, expressed by the New Mexico Supreme Court, is that the legislature cannot delegate "its policy-making responsibility"[87] and allow the "discretionary fiscal policy" of the governor to take its place.[88] Courts have overturned gubernatorial impoundments on parallel grounds.

In *County of Oneida v. Berle*, former New York Governor Hugh Carey impounded appropriations to ensure that the state's budget had a positive balance shortly after the fiscal year commenced.[89] The court found the act unconstitutional because Governor Carey had a duty to "faithfully execute" the appropriations he signed into law.[90] The decision added to the notion that governors may not inject their fiscal policy objectives into enacted appropriations.[91] Instead, governors must first make a good faith effort to properly expend such appropriations.[92]

83. *See, e.g.*, Colo. Gen. Assembly v. Lamm, 700 P.2d 508, 520–23 (Colo. 1985); Goldston v. State, 683 S.E.2d 237, 249 (N.C. Ct. App. 2009); State *ex rel.* Condon v. Hodges, 562 S.E.2d 623, 630–31 (S.C. 2002).

84. *See Fairbanks N. Star Borough*, 736 P.2d at 1143 (noting that the statute failed to set forth "principles, intelligible or otherwise, to guide the executive"); *Chiles*, 589 So. 2d at 265 n.7 (Overton, J., concurring) (asserting that the statute delegated "unlimited legislative policy-making discretion" to the governor and cabinet); *Schwartz*, 907 P.2d at 1004 (finding the statute "lacked sufficient standards" to allow the governor to decrease allotments).

85. *Chiles*, 589 So. 2d at 268.

86. *Fairbanks N. Star Borough*, 736 P.2d at 1143.

87. *Schwartz*, 907 P.2d at 1007.

88. *Id.* at 1008.

89. Cnty. of Oneida v. Berle, 404 N.E.2d 133, 135–36 (N.Y. 1980) (per curiam).

90. *Id.* at 137.

91. *See Schwartz*, 907 P.2d at 1007.

92. *See Cnty. of Oneida*, 404 N.E.2d at 137.

In *Brayton v. Pawlenty*, Minnesota Governor Tim Pawlenty signed into law appropriations in excess of his budget proposal and vetoed tax legislation. He purportedly intended to set in motion an unallotment scheme on the first day of the fiscal year.[93] Rather than address the constitutional question, however, the court in *Brayton* ruled on whether the unallotments conformed to the statute's procedural elements.[94] The court explained that unallotment is a mechanism to cure "unanticipated deficits,"[95] not a "weapon" to be used by the governor to circumvent the legislative process.[96] Since a balanced budget is a prerequisite to unallotment, the court voided Governor Pawlenty's unallotments.[97] Although *Brayton* is now settled law, it appears to be merely one of the first waves in a sea of future unallotments.

D. INCREASING EXECUTIVE BRANCH APPROPRIATION REDUCTIONS DURING THE RECESSION

As the United States languishes in the worst recession since the Great Depression, states continue to brave the economic plight.[98] Unfortunately, public revenue continues to depreciate; states expect budget deficits though 2012.[99] Present legislative action has been unsuccessful in securing long-term balanced budgets.[100] Recently, an unprecedented number of governors have taken the unilateral action of unallotment.[101] In light of these recent events, those affected by the budget cuts have increasingly questioned the legal validity of the unallotment process.[102]

93. Brayton v. Pawlenty, 781 N.W.2d 357, 359–61 (Minn. 2010).

94. *See id.* at 363.

95. *Id.* at 367.

96. *Id.* at 362.

97. *Id.* at 368.

98. *See* McNichol et al., *supra* note 18, at 3.

99. NAT'L CONFERENCE OF STATE LEGISLATURES, STATE BUDGET UPDATE: JULY 2010 (PRELIMINARY REPORT) 5–6, 13 (2010).

100. *See id.* at 5–14 (noting that deficits continue to prevail).

101. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, STATE BUDGET UPDATE: NOVEMBER 2009, at 16–18 (2009); *Actions and Proposals to Balance FY 2011 Budgets*, *supra* note 19.

102. *See, e.g.*, Ariz. Ass'n of Providers for Persons with Disabilities v. State, 219 P.3d 216, 226 (Ariz. Ct. App. 2009); *Brayton*, 781 N.W.2d at 359; *In re* Fiscal Year 2010 Judicial Branch Appropriations, 27 So. 3d 394, 395–96 (Miss. 2010); N.H. Health Care Ass'n v. Lynch, No. 09-E-214, 2009 WL 2364094, at *1 (N.H. Super. Ct. June 30, 2009); Perth Amboy Bd. of Educ. v. Christie, 997 A.2d 262, 262 (N.J. Super. Ct. App. Div. 2010) (per curiam); Conn. Op. Att'y

With a probable increase in executive branch appropriation reductions in the future, this Note analyzes the temporal limitations and delegation standards necessary for a constitutional unallotment law. In so doing, Part II builds upon *Brayton* in order to dissect the legal and policy implications of aggressive executive unallotments.

II. UNALLOTMENT'S TEMPORAL AND CONSTITUTIONAL LIMITATIONS

This Part expands upon *Brayton* to construct a foundation for examining both the procedural and substantive scope of unalloting. For three primary reasons, *Brayton* is a more appropriate vehicle to clarify the dissatisfaction with unallotment than a superficial national survey. First, the case was unique because it called into question both the procedural and substantive limits of unallotment.[103] Second, Minnesota's nondelegation doctrine parallels a significant number of its peers.[104] Third, Minnesota's unallotment statute exhibits the two flaws found in many statutes—failure to discernibly articulate temporal limitations[105] and delegation of discretionary power to reduce appropriations.[106] In the sphere of unallotment, the broad legal and policy issues seen in *Brayton* transcend state lines.

The first section revisits *Brayton* in order to define the temporal limitations and procedural scope of unallotment. The

Gen. No. 2009-011, 2009 WL 3406965, at *1 (Oct. 20, 2009); Kan. Op. Att'y Gen. No. 2009-16, 2009 WL 2356270, at *1 (July 29, 2009).

103. *See Brayton*, 781 N.W.2d at 359–63.

104. *See* Rossi, *Institutional Design*, *supra* note 48, at 1191–201, 1223 (stating that most states require "at a minimum, some legislative statement of policy").

105. *Compare* MINN. STAT. § 16A.152 subdiv. 4(a) (2008) ("If the commissioner determines that probable receipts for the general fund will be less than anticipated . . . ."), *with* LA. REV. STAT. ANN. § 39:75(C) (2009) ("Upon receiving notification that a projected deficit exists . . . ."), *and* TEX. GOV'T CODE ANN. § 317.002 (West 2009) ("After finding that an emergency exists . . . .").

106. *See* GOSLING, *supra* note 15, at 10 (asserting that most legislatures "delegate some of their authority [over the budget] to the executive branch"). *Compare* MINN. STAT. § 16A.152 subdiv. 4(b) (2008) ("An additional deficit shall, with the approval of the governor . . . be made up by reducing unexpended allotments . . . ."), *with* N.J. STAT. ANN. § 52:27B-26 (West 2010) ("[T]he commissioner, on order of the governor, shall have the power to revise the quarterly allotments."), OHIO REV. CODE ANN. § 126.05 (West 2010) ("[T]he governor may declare a fiscal emergency and may issue such orders as necessary . . . to reduce expenditures . . . ."), *and* W. VA. CODE ANN. § 11B-2-21 (LexisNexis 2005) ("[The governor] may instruct the secretary to reduce all appropriations out of general revenue . . . as necessary . . . .").

second section analyzes and settles the dispute over the proper nondelegation standard for unallotments. The final section scrutinizes Governor Pawlenty's expansive utilization of Minnesota's unallotment statute. The following three sections are not merely an analysis of unalloting in Minnesota but a foundation for highlighting the respective procedural, constitutional, and public-policy shortcomings representative in discretionary executive branch appropriation reductions.

A. DEFINING UNALLOTMENT'S TEMPORAL LIMITATIONS

Unallotment challenges often entail the delegation of legislative authority. The Minnesota Supreme Court, however, recently engaged in a statutory-interpretation analysis to elucidate the ambiguous time frame in which a governor can unallot.[107] This section builds upon *Brayton* and juxtaposes the court's holding with prior executive branch appropriation reduction cases that both refute and corroborate the decision.

1. *Brayton* Revisited

The central issue in *Brayton* was the disputed nature of the statute's temporal language: that the executive branch must determine that "probable receipts for the general fund will be less than anticipated, and that the amount available for the remainder of the biennium will be less than needed" before unalloting.[108] The governor proposed that this language authorized unalloting at any moment in time, even before the biennium commenced.[109] The plaintiffs challenged the governor's assertion, contending that the statute only applied to unanticipated budget crises.[110] After grappling with the parties' dissension, the court found the statute ambiguous for failing to make clear exactly when the governor should first anticipate receipts and for failing to define the purpose for which the government needs the revenue.[111] To resolve the ambiguity, the court concluded that the drafters' intent was not to facilitate a prospective budget-balancing mechanism, but rather to create a meth-

107. *See Brayton*, 781 N.W.2d at 362–68.

108. *Id.* at 360 (citing § 16A.152 subdiv. 4(a)).

109. *Id.* at 362; *see also* Peter Nelson, *In Oral Arguments, Justice Gildea Hinted at Another Interpretation of the Unallotment Statute*, CENTER AM. EXPERIMENT (Mar. 26, 2010), http://www.americanexperiment.org/publications/2010/20100326nelson.php (arguing that unallotment is permissible any time a projected budget deficit exists).

110. *Brayton*, 781 N.W.2d at 363.

111. *See id.* at 363–64.

od to "address unanticipated deficits" arising subsequent to the enactment of a budget.[112] In other words, the governor's premature unallotments evaded the "constitutionally prescribed [budget] process."[113] The court further clarified the statute by announcing that the value of anticipated receipts "appeared to be adequate to fund" the appropriations in the enacted budget.[114] The result was that the unallotments were void, in part due to the governor's tax increase veto that prevented the enactment of a balanced budget.[115] But what if the budget was balanced?

2. Parsing Through Further Textual Ambiguities

The Minnesota Supreme Court made an ambitious effort to define the pivotal unallotment phrases "less than anticipated" and "remainder of the biennium."[116] Where a balanced budget exists, the court's opinion does little to prevent unalloting at the very beginning of a biennium, however. The time frame to unallot principally arises upon the executive's expectation that projected revenues will be, at some point in the future, less than anticipated.[117] Essentially, governors can sign appropriations into law and unallot upon the belief that a future recession will put the state's budget into deficiency.

This textual ambiguity exists in the seemingly harmless word "will," which frustrates the policy behind unallotment.[118] For example, governors need not establish that revenue has already become less than anticipated. Instead, they must establish only that revenue *will be* less than anticipated in future

112. *Id.* at 366–67.

113. *Id.* at 367.

114. *Id.* at 368.

115. *See id.* at 361, 368; *see also* Bd. of Educ. v. Bd. of Pub. Works, 109 S.E.2d 552, 562 (W. Va. 1959) (suggesting that unallotment would be improper where the state enacts an unbalanced budget).

116. *See Brayton*, 781 N.W.2d at 363–64, 368.

117. MINN. STAT. § 16A.152 subdiv. 4(a) (2008); *see, e.g.*, MO. REV. STAT. § 33.290 (West 2001); N.H. STAT. ANN. § 9:16-b (LexisNexis 2008); OHIO REV. CODE ANN. § 126:05 (West 2010); WIS. STAT. ANN. § 16.50(7) (West 2009). *But see* State *ex rel.* Bd. of Educ. v. Rockefeller, 281 S.E.2d 131, 135 (W. Va. 1981) (holding that the executive has the burden of persuasion in proving that a probable budget deficiency necessitates unalloting).

118. *See* Bardsley v. Colo. Dep't of Pub. Safety, 870 P.2d 641, 646 (Colo. App. 1994) (noting that the purpose of unallotment is to "allow the governor to act on the basis of immediacy").

months or perhaps years.[119] It remains uncertain if a governor would employ this expansive, but plausible, interpretation. It would be an arresting act of power, but perhaps not much greater than that seen in Minnesota. Because state judiciaries construe the plain meaning of statutes,[120] this interpretation may persist. In at least three states with the same statutory language as Minnesota—Arkansas, Hawaii, and Indiana[121]—legal challenges have been less than helpful in explicating these concerns.[122] Furthermore, precedent from other jurisdictions calls *Brayton*'s progeny into question.

3. Juxtaposing *Brayton* with Precedent

In *Brayton*, the court rightfully hesitated to rely on precedent from outside Minnesota.[123] The following two cases provide factual circumstances similar to *Brayton* but arrive at inconsistent rulings. Of the utmost importance in discussing these cases is acknowledging the courts' divergent treatment of unallotments by governors.

In *Gilligan*, the Ohio Court of Appeals held that whatever unallotment's purpose, governors could reduce appropriations even before the legislature enacts them into law.[124] The statute authorized unalloting upon the governor's determination that revenue "will in all probability be less than the appropriations for" the fiscal year.[125] *Gilligan*'s acceptance of gubernatorial appropriation reductions in the absence of an enacted budget appears to support the procedural validity of Governor Pawlen-

119. *See, e.g.*, ME. REV. STAT. ANN. tit. 5, § 1668 (2002); MASS. ANN. LAWS ch. 29, § 9B (LexisNexis 2010); MICH. COMP. LAWS ANN. § 18.1391 (West 2010); MISS. CODE ANN. § 27-104-13(1) (2009).

120. *See* ESKRIDGE, JR. ET AL., *supra* note 22, at 763–64.

121. *Compare* § 16A.152 subdiv. 4(a) (stating that "probable receipts . . . will be less than anticipated" and the "amount available for the remainder of the biennium will be less than needed"), HAW. REV. STAT. § 37-37(a) (2009) (same), *and* IND. CODE ANN. § 4-13-2-18(f) (LexisNexis 2010) (same), *with* ARK. CODE ANN. § 19-4-608(4) (2010) (stating that "estimated revenues . . . will be less than was anticipated" and "the funds available for the remainder of the fiscal year will be less than the amount estimated").

122. *See* Mottl v. Miyahira, 23 P.3d 716 (Haw. 2001); Bd. of Educ. v. Waihee, 768 P.2d 1279 (Haw. 1989); Etherton v. Wyatt, 293 N.E.2d 43 (Ind. Ct. App. 1973).

123. Brayton v. Pawlenty, 781 N.W.2d 357, 367 n.5 (Minn. 2010).

124. *See* Bd. of Educ. v. Gilligan, 301 N.E.2d 911, 913 (Ohio Ct. App. 1973), *aff'd on other grounds*, 311 N.E.2d 529 (Ohio 1974).

125. *Id.* at 914 (citation and internal quotation marks omitted).

ty's comparable unallotments. Such an unforeseen application of the statute,[126] however, demands statutory revision.

Alternatively, the New York Court of Appeals in *County of Oneida* held that former Governor Hugh Carey violated his constitutional duty to "take care that [the laws be] faithfully executed" when he impounded appropriations directly after signing them into law.[127] Much like Governor Pawlenty, Governor Carey signed into law specific appropriations exceeding those in his budget proposal rather than exercising his line-item veto.[128] The governor, shortly after the fiscal year commenced, impounded those exact appropriations to ensure the state budget had a positive balance.[129] If the Minnesota Supreme Court adhered to the same line of reasoning, Governor Pawlenty's application of the unallotment statute would have violated the state constitution.[130]

It is well documented that judiciaries defer to executive interpretations of ambiguous statutes, at least in federal court.[131] Extensive deference, however, is counterintuitive within a doctrinal scheme that purports to require guiding standards for administrative action.[132] One author has recognized that statutes that delegate emergency decisionmaking authority not only engender ambiguous interpretations respecting their temporal and discretionary limitations, but also face further questions of constitutionality.[133] Appropriately, the next section confirms that the nondelegation doctrine prohibits unbridled executive discretion during the unallotment process.

126. *Id.* at 915 (acknowledging that the legislature likely did not intend to allow the governor to make "selective and discriminatory cuts in state programs to force the legislature into concurrence with the fiscal policies of the executive").

127. Cnty. Of Oneida v. Berle, 404 N.E.2d 133, 137 (N.Y. 1980) (per curiam) (quoting N.Y. CONST. art. IV, § 3).

128. *See id.* at 133–35.

129. *Id.* at 135–36.

130. *See* MINN. CONST. art. V, § 3 (noting that the governor "shall take care that the laws be faithfully executed").

131. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984).

132. *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 330–31 (2000) ("Executive interpretation of a vague statute is not enough when the purpose of the [nondelegation doctrine] . . . is to require Congress to make its instructions clear.").

133. *See* Rossi, *Lawmaking in Crisis*, *supra* note 20, at 274.

B. ESTABLISHING THE NONDELEGATION STANDARD

State legislatures, in accordance with their respective constitutions, determine how, when, and for what purposes the executive branch shall apply public funds for government administration.[134] The critical unallotment question remains the extent to which a legislature may delegate this power, if at all. In order to formulate unallotment's proper nondelegation standard, one must resolve three debated issues: which branch is obligated to balance the budget, what power an unallotment statute delegates to the executive, and the extent to which a legislature may delegate the appropriations power. This section attempts to answer these questions.

The first inquiry is whether constitutions entrust the legislature or the executive branch with budget-balancing responsibility. Legislatures must enact a balanced budget in thirty-seven states.[135] Thus, many states hold the legislature accountable for equating receipts and expenditures.[136] Yet in so doing states ignore the oscillation of anticipated receipts, which often fall below baseline, thereby affirming the inconsequentiality of the legislature's budget implementation by fiscal period's end. Irrespective of this legislative action, the majority of state constitutions mandate a balanced budget at the close of the fiscal period.[137] Budget balancing, therefore, demands continued enforcement.[138] Since governors retain the spending power, it is a gubernatorial responsibility to ensure a balanced budget exists while taking into consideration prior legislative appropriations.[139] This is not to suggest, however, that legislatures cannot reduce appropriations to place the state's budget into equi-

134. JEFFREY M. ELLIOT, THE STATE AND LOCAL GOVERNMENT POLITICAL DICTIONARY 93 (1988).

135. Poterba & Rueben, *supra* note 50, at 191.

136. *See* Coenen, *supra* note 29, at 1781 n.872.

137. One report argues that although few constitutions explicitly require a year-end balance, thirty-nine states interpret their constitutions as such. U.S. GEN. ACCOUNTING OFFICE, *supra* note 52, at 16–17.

138. *See* Norman R. Williams, *Executive Review in the Fragmented Executive: State Constitutionalism and Same-Sex Marriage*, 154 U. PA. L. REV. 565, 639 (2006) (confirming that all governors must faithfully execute the laws of their state).

139. *Cf.* Kate Stith, *Congress' Power of the Purse*, 97 YALE L.J. 1343, 1382 (1988) (explaining that in the federal government, "the underlying substantive legislation creating the entitlement or authorizing the executive branch to incur the obligation . . . constitutes the ultimate source of spending authority").

librium,[140] but simply that the legal responsibility lies with the governor, especially when the legislature has adjourned. This executive authority cannot be plenary, and may actually require legislative authorization, because executive budget cuts infringe upon the legislature's constitutional power of appropriations.

Answering the second inquiry is a more arduous task. The question is whether unallotment is a delegation of emergency budget balancing or of reducing appropriations. State judiciaries have lacked harmonization in their answers.[141] The gravamen of unallotment statutes is that they assist governors in balancing budgets during emergencies,[142] but its effect is unmistakably one of altering appropriations. The idea that state constitutions endow the executive branch with budget-balancing accountability implies that the legislature cannot delegate the very same thing. Unallotment statutes, therefore, necessarily prescribe the manner in which the executive branch is to balance the budget. Thus, the power to reduce appropriations is a delegated means to achieve this end, and not vice versa.

Several constitutional law professors recently insinuated that budget balancing is, in fact, a gubernatorial responsibility. Accordingly, scrutinizing unallotment statutes as a legislative encroachment of executive power is unavoidable.[143] The professors erroneously rely on an influential Supreme Court case, *Bowsher v. Synar*,[144] and argue that the discretion to reduce appropriations is an executive power.[145] If correct, unallotment

140. Vermont's unallotment statute addresses this argument. *See* VT. STAT. ANN. tit. 32, § 704(a) (LexisNexis Supp. 2009).

141. *Compare, e.g.*, State v. Fairbanks N. Star Borough, 736 P.2d 1140, 1142–43 (Alaska 1987) (per curiam), *with, e.g.*, New Eng. Div. of Am. Cancer Soc'y v. Comm'r of Admin., 769 N.E.2d 1248, 1257 (Mass. 2002).

142. *See, e.g.*, Bardsley v. Colo. Dep't. of Pub. Safety, 870 P.2d 641, 646 (Colo. App. 1994); Brayton v. Pawlenty, 781 N.W.2d 357, 367 (Minn. 2010).

143. *See* Brief of Amici Curiae of Professors of Constitutional Law and Separation of Powers at 5, 7, *Brayton*, 781 N.W.2d 357 (No. A10-64) [hereinafter Brief of Professors of Constitutional Law] (arguing that legislative oversight of executive expenditures "risks unconstitutionally intruding on the powers of the executive branch"). *But see* Legislative Research Comm'n *ex rel.* Prather v. Brown, 664 S.W.2d 907, 926 (Ky. 1984) (holding that unallotment statutes do not constitute "administration of the budget," but are simply laws that the executive must enforce).

144. 478 U.S. 714 (1986).

145. Brief of Professors of Constitutional Law, *supra* note 143, at 8–11. *Contra* Abbey v. Rowland, 359 F. Supp. 2d 94, 99–100 (D. Conn. 2005) (holding that a governor's discretionary budget cuts are a legislative function). The is-

statutes are unconstitutional because they encroach upon the executive's budget-balancing domain.[146] Therefore, unalloting would be invalid if executed under the statute.[147] More persuasive are the professors' acknowledgments of the statute's limiting specifications: setting forth temporal standards, suggesting initial sources of unalloting, requiring legislative consultation, and arguing that the legislature may override unallotments.[148] But ambiguous temporal limitations, permissive suggestions, mere legislative consultation, and the legislature's capacity to override unallotments months after the reductions do nothing to restrain executive discretion. Governor Pawlenty's unallotments are more than enough to prove this.[149]

As previously argued, budget balancing is an exercise of the executive branch's spending authority; nevertheless, it cannot be exclusive or it would permit the governor's partial usurpation of the appropriations power.[150] Accordingly, the third inquiry ponders the degree to which the legislature can delegate control over appropriations. Legislatures can never delegate their exclusive appropriations power because it is a constitutionally derived source of lawmaking.[151] In circumstances concerning unallotment, the legislature already set the maximum appropriations level to ensure that legislative intent is fulfilled.[152] It naturally follows that the legislature must prom-

sue in *Bowsher* was whether Congress could both write and execute a budget reduction statute. *See Bowsher*, 478 U.S. at 733–34. State legislatures, on the other hand, do not write and execute unallotment statutes.

146. Henry L. Chambers, Jr. & Dennis E. Logue, Jr., *Separation of Powers and the 1995-1996 Budget Impasse*, 16 ST. LOUIS U. PUB. L. REV. 51, 82 (1996) ("If making budget cuts is an exercise of executive power, passing legislation regarding budget cuts could be deemed as violative of separation of powers . . . .").

147. *Id.*

148. Brief for Professors of Constitutional Law, *supra* note 143, at 15–18; *see also* Rossi, *Lawmaking in Crisis*, *supra* note 20, at 264 ("[A] presumption of state executive lawmaking recognizes that spending decisions during a crisis may be made by the executive, *subject to legislative ratification or override*." (emphasis added)).

149. *See generally* Brief of Amicus Curiae for Minnesota House of Representatives, Brayton v. Pawlenty, 781 N.W.2d 357 (Minn. 2010) (No. A10-64) (indicating the legislature's disapproval of the governor's unallotments).

150. *See* State *ex rel.* Schwartz v. Johnson, 907 P.2d 1001, 1006 (N.M. 1995) (holding that the "power to *reduce* appropriations . . . is a legislative function" (quoting Chiles v. Children A, B, C, D, E, & F, 589 So. 2d 260, 265 (Fla. 1991))).

151. *See* Rosen, *supra* note 32, at 134–39.

152. *See, e.g.*, Rios v. Symington, 833 P.2d 20, 29 (Ariz. 1992); Colo. Gen. Assembly v. Lamm, 700 P.2d 508, 520, 522 (Colo. 1985); Op. of the Justices to

ulgate guiding unallotment standards so that the executive does not contravene its intent.[153]

State judiciaries revere the nondelegation doctrine much more than federal courts.[154] Indeed, several justifications exist for enhancing an unallotment nondelegation standard. While the doctrine's central tenet is to "limit executive discretion,"[155] many unallotment laws have failed to reflect this maxim.[156] The limited institutional capacity of state legislatures, as compared to that of Congress, necessitates a stronger judicial review of delegated duties.[157] Accordingly, when a legislative delegation involves the purse strings, state judiciaries must be much more cognizant of a separation of powers violation.[158] Due to the legislature's failure to preserve the scope and purpose of its appropriations, Minnesota's unallotment statute[159] and those similarly situated[160] are unconstitutional. The follow-

the Senate, 376 N.E.2d 1217, 1223 (Mass. 1978); Island Cnty. Comm. on Assessment Ratios v. Dep't of Revenue, 500 P.2d 756, 763 (Wash. 1972).

153. *See, e.g.*, Train v. City of New York, 420 U.S. 35, 44 (1975) (prohibiting presidential impoundment); Detroit Fire Fighters Ass'n v. City of Detroit, 537 N.W.2d 436, 440 (Mich. 1995) (prohibiting mayoral impoundment); Cnty. of Oneida v. Berle, 404 N.E.2d 133, 137 (N.Y. 1980) (per curiam) (prohibiting gubernatorial impoundment); Thomas P. Lauth & Paula E. Steinbauer, *Budgeting in State Government: Control and Management*, *in* HANDBOOK OF STATE GOVERNMENT ADMINISTRATION 155, 166–67 (John J. Gargan ed., 2000) ("Budget offices can also limit the amount of revenue allotments to agencies" but should "adher[e] . . . to legislative intent as expressed in the appropriations act . . . .").

154. Rossi, *Dual Constitutions*, *supra* note 57, at 1359.

155. Sunstein, *supra* note 132, at 318.

156. *See, e.g.*, COLO. REV. STAT. ANN. § 24-2-102(4) (West 2010); MASS. GEN. LAWS ANN. ch. 29, §§ 9B–9C (West 2010); NEV. REV. STAT. ANN. § 353.225 (LexisNexis 2009).

157. *See* James E. Westbrook, *The Use of the Nondelegation Doctrine in Public Sector Labor Law*, 30 ST. LOUIS U. L.J. 331, 363 (1986).

158. *See* Woodrow E. Turner, Note, *The New Post 9/11 America or the Making of King George: A Review of Executive Power in the Effort to Combat Global Terrorism as It Relates to the Power of the Purse*, 106 W. VA. L. REV. 445, 479 (2004) (arguing for a stronger nondelegation doctrine to prohibit the legislature from delegating the power of the purse); *cf.* Harold J. Krent, *Delegation and Its Discontents*, 94 COLUM. L. REV. 710, 711 (1994) (reviewing DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY (1993)) ("[I]ndividual jurists at times joined the chorus of those condemning delegation of policymaking authority . . . .").

159. MINN. STAT. § 16A.152 subdiv. 4(b) (2008) ("Notwithstanding any other law to the contrary, the commissioner is empowered to defer or suspend prior statutorily created obligations . . . .").

160. *See, e.g.*, KAN. STAT. ANN. § 75-3722 (2009); W. VA. CODE ANN. § 11B-2-21 (West 2010).

ing section bridges the gap between the nondelegation doctrine and unallotment's policy shortcomings.

C. DISCRETIONARY UNALLOTING JEOPARDIZES DEMOCRACY

If legal underpinnings were not reason enough for unallotment reform, then policy justifications surely suffice. The act of unalloting does, in fact, authorize gubernatorial lawmaking. This section discusses this problematic policy ramification implicit in executive branch appropriation reductions.

The quintessential illustration of unallotment's ultimate shortcoming is the executive's unchecked authority to unilaterally change substantive law vis-à-vis the modification of statutory language.[161] In Minnesota, this arrogation of power included the governor's complete elimination of a special diet program,[162] reduction of a property tax rebate program,[163] and reduction of hours for which personal care attendants could receive monthly public payments.[164] The state legislature, of course, created each of these programs by law. The latter two instances confirm unallotment's expanding role in Minnesota. Governor Pawlenty, in his budget proposal, requested that the legislature decrease the statutory value of "rent attributable to property taxes"—a formulaic value used to refund renters whose rents are high relative to their incomes—from nineteen to fifteen percent.[165] After consideration, the legislature passed on the recommendation.[166] Nonetheless, when the legislative session ended, the governor used unallotment to redraft the statutory language from nineteen to fifteen percent.[167] During the same session, the legislature redrafted the language of a statute that capped public payments to personal care assistants

161. *Compare, e.g.*, Baker v. Fletcher, 204 S.W.3d 589, 593 (Ky. 2006) (invalidating unallotment), *with, e.g.*, Am. Fed'n of State, Cnty., & Mun. Emps. v. Olson, 338 N.W.2d 97, 103 (N.D. 1983) (upholding unallotment).

162. Brayton v. Pawlenty, 781 N.W.2d 357, 358–59 (Minn. 2010).

163. *See* MINN. MGMT. & BUDGET DEP'T, *supra* note 9, at 2.

164. *See id.* at 4.

165. *See Tax Policy, Aids and Credits*, ST. MINN., 18 (Jan. 27, 2009), http://www.mmb.state.mn.us/doc/budget/narratives/gov09/tax-policy.pdf. This document is part of a larger collection of recommendations from the governor. *See* MINN. MGMT. & BUDGET DEP'T, AGENCY LEVEL NARRATIVES INCLUDING GOVERNOR'S RECOMMENDATIONS FISCAL DATA 1/27/2009 (2009), *available at* http://www.doer.state.mn.us/gov-bud-10.

166. *See* MINN. STAT. § 290A.03 subdiv. 11 (2009) (reflecting the current statutory rate for "[r]ent constituting property taxes" as nineteen percent).

167. *See* MINN. MGMT. & BUDGET DEP'T, *supra* note 9, at 2.

at 310 hours of service per month.[168] The governor signed the new provision into law, only to further reduce it to 275 hours after the legislative session ended.[169] Before the decision in *Brayton*, which merely overturned the unallotments on procedural grounds,[170] the governor eliminated at least seven legislatively established programs[171] and altered the language of multiple statutes in the areas of education, health care, and local government aid.[172]

With respect to similar instances of gubernatorial lawmaking, however, what appears overtly unconstitutional is not as conclusive as it may appear.[173] More important is that unalloting in this manner raises legitimacy issues with the state's constituency.[174] In one-half of a century, Minnesota governors employed the unallotment power only twice, each time unalloting

168. *See* MINN. STAT. § 256B.0659 subdiv. 11(a)(10) (2009).

169. *See* MINN. MGMT. & BUDGET DEP'T, *supra* note 9, at 4.

170. *See* Brayton v. Pawlenty, 781 N.W.2d 357, 363–68 (Minn. 2010).

171. *See* FISCAL ANALYSIS DEP'T, MINN. H.R., GOVERNOR'S FY 2010–11 UNALLOTMENT AND OTHER ADMINISTRATIVE ACTIONS, H. 86, 1st Sess., at 2 tbl.1 (2009), *available at* http://www.house.leg.state.mn.us/fiscal/files/09unallotsum.pdf (noting the elimination of various grants and other funding programs).

172. *See id.* at 6–20.

173. *Compare, e.g.*, Baker v. Fletcher, 204 S.W.3d 589, 591–93 (Ky. 2006) (reversing the governor's reduction of a statutorily based five percent salary increase for state employees to 2.7 percent because the action was "'antithetical to the [executive's] constitutional duty to take care that the laws be faithfully executed'" (quoting Fletcher v. Commonwealth, 163 S.W.3d 852, 872 (Ky. 2005) (internal citations and quotation marks omitted))), State of Nev. Emps. Ass'n, Inc. v. Daines, 824 P.2d 276, 277, 279–80 (Nev. 1992) (per curiam) (holding that the executive branch could not unallot a statutorily based four percent wage increase to state employees because it would "essentially rewrite" the statute), *and* Weaver v. Evans, 495 P.2d 639, 649 (Wash. 1972) (finding that the legislature did not intend to allow the governor to use unallotment to "modify the legislative provision of a systematic funding program," as doing so would "defeat the legislative purpose" of such provisions), *with, e.g.*, Abramson v. Hard, 155 So. 590, 597 (Ala. 1934) (stating that allotment reductions could apply to appropriations "fixed" in statute if authorized by law), Am. Fed'n of State, Cnty., & Mun. Emps. v. Olson, 338 N.W.2d 97, 100, 103 (N.D. 1983) (upholding the governor's reduction of a statutorily based state employee salary increase from eight percent to four percent in light of an expected budget deficit because an appropriation is merely an authorization to spend), *and* Kan. Op. Att'y Gen. No. 2009-16, 2009 WL 2356270, at *2 (July 29, 2009) (acknowledging that the state's unallotment statute "authorizes the [executive] to suspend . . . statutory obligation[s]" because the legislature, if it so chooses, can statutorily exempt programs from unallotment).

174. *See* Duxbury v. Donovan, 138 N.W.2d 692, 696 (Minn. 1965) ("[T]he necessary public acceptance of a law is assured more definitely when legislation opposed by the chief executive has been confirmed by a two-thirds vote of both houses.").

across-the-board.[175] What was once a device to safeguard financial stability has become cloying. Since 2003, Governor Pawlenty has unalloted on three separate occasions,[176] quickly turning the statute into a political tool to abandon appropriations,[177] redraft statutory language,[178] and eliminate public programs.[179] The principle that the governor's "power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker"[180] cannot be reconciled with unbridled, discretionary unalloting.

This discussion is not merely an attempt to analyze unalloting in Minnesota, but rather an effort to demonstrate the manner in which a governor can transcend the lines of separation of powers through unallotment. Whether it is a matter of law or a change in policy, legislatures must begin reform efforts so that the executive branch once again exercises unallotment not as a political tool, but as a financial safeguard.

III. MODEL STATUTE FOR LEGISLATIVE ENACTMENT

In light of the foregoing analysis, this Part develops a model unallotment statute, which states can implement or reference while reforming their current law or while proposing new legislation.[181] In so doing, the model statute synergizes the

175. *See* Minn. Fed'n of Teachers v. Quie, No. 447358, slip op. at 2–3 (Minn. Dist. Ct. Feb. 27, 1981) (describing Governor Albert Quie's 1980 unallotment); ROYCE HANSON, TRIBUNE OF THE PEOPLE: THE MINNESOTA LEGISLATURE AND ITS LEADERSHIP 183 (1989) (describing Governor Rudy Perpich's 1985 unallotment).

176. *See* Peter S. Wattson, *Legislative History of Unallotment Power*, MINN. SENATE, 11–13 (June 29, 2009), http://www.senate.leg.state.mn.us/departments/scr/treatise/unallotment/Unallotment.pdf.

177. *See* Levinson, *supra* note 13 (discussing Governor Pawlenty's attempts to "slash spending on all sorts of public services").

178. *See* MINN. MGMT. & BUDGET DEP'T, *supra* note 9, at 2.

179. *See* Brayton v. Pawlenty, 781 N.W.2d 357, 361 (Minn. 2010) (discussing the elimination of payments to one public program).

180. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952). While the expanding role of the administrative state and its related rulemaking and adjudicatory functions are well known, these lawmaking powers are not comparable to amending legislatively created laws through unallotment.

181. At least one New York organization is already calling for that state to adopt an unallotment statute. *See* Robert B. Ward, *Gubernatorial Powers to Address Budget Gaps During the Fiscal Year*, NELSON A. ROCKEFELLER INST. GOV'T, 20–22 (June 17, 2010), http://www.rockinst.org/pdf/budgetary_balance_ny/2010-06-17-Gubernatorial_Powers.pdf.

foremost elements of existing laws.[182] The first section addresses the necessity of immediate legislative action.[183] The second section then details the model statute and the variables reform-minded legislators must observe. The third section analyzes the model statute. This Part concludes by proposing alternative avenues to reform.

A. MODEL STATUTE AS A FRAMEWORK FOR REFORM

In 1972, a disingenuous act of presidential power[184] forced Congress to constrain the executive branch's power to rescind appropriations under what one may consider the federal unallotment statute.[185] Considering the disquieting incidents in *Brayton*,[186] now is the most suitable time for legislatures to contemplate reform. The legislative process first afforded the executive branch the capacity to prevent budget deficiencies,[187] so it is only appropriate that legislatures invoke the same process to curb executive discretion.

The practicality of adopting the following model statute is favorable because it protects legislative power. The judicial system, as it has proven, is an ineffective vehicle for reform because of the uncertainty of litigation,[188] the justiciability concerns surrounding unallotment,[189] the binding nature of

182. The author uses unallotment, allotment reduction, and appropriate reduction interchangeably. Statutory text, however, must be consistent when referring to either allotment reductions or appropriation reductions.

183. *See, e.g.*, Joanna M. Myers, Note, *When the Governor Legislates: Post-Enactment Budget Changes and the Separation of Powers in Nevada*, 10 NEV. L.J. 229, 231–35 (2009) (discussing the recent fiscal crisis precipitating similar unallotment issues in Nevada).

184. *See* Train v. City of New York, 420 U.S. 35, 40 (1975) (detailing President Nixon's impoundments).

185. *See* Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, §§ 1011–1017, 88 Stat. 297, 333–39 (codified as amended at 2 U.S.C. §§ 682–688 (2006)) (requiring, inter alia, congressional approval of presidential budget reductions).

186. 781 N.W.2d 357, 361 (Minn. 2010).

187. *See, e.g.*, ALASKA STAT. § 37.07.080(g) (2010); DEL. CODE ANN. tit. 29, § 6529 (Michie Supp. 2008); MISS. CODE ANN. § 27-104-13(1) (West Supp. 2009).

188. *Cf.* Michael E. Libonati, *The Legislative Branch*, *in* 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY 37, 40 (G. Alan Tarr & Robert F. Williams eds., 2006) (noting that state courts' nondelegation doctrine jurisprudence is "unpredictable and inconsistent").

189. *See, e.g.*, Mottl v. Miyahira, 23 P.3d 716, 730 (Haw. 2001) (dismissing for lack of standing a university faculty members' suit against the governor over unallotment); W. Side Org. Health Servs. Corp. v. Thompson, 404 N.E.2d 208, 211 (Ill. 1980) (dismissing for mootness a health organization's suit against the governor over impoundment); State *ex rel.* Bd. of Educ. v. Caper-

precedent,[190] and the judicial system's preference to have legislatures overturn precedent.[191] Even if those courts that uphold the constitutionality of discretionary unalloting are correct, legislation is proper as a means of changing policy or closing loopholes.

A governor's veto power and the shrewd political choices of legislators may act as the only barriers to the model statute's adoption. A veto, of course, remains subject to a legislative override,[192] which may be likely considering some legislators' dissatisfaction with gubernatorial appropriation reductions.[193] As a method of garnering political capital, on the other hand, some legislators may value discretionary unalloting as a mechanism to both eschew difficult, unpopular budget cuts and to blame the executive branch for any consequential public backlash.

Nevertheless, effective reform must account for three variables. First, reform must preserve legislative policy initiatives established in appropriations. Second, the model statute must enforce retroactive unalloting with a clearly articulated time frame, rather than encouraging premature, prospective budget reductions. Finally, the model statute must safeguard the executive's authority to protect solvency when the legislature lacks a similar capacity to act.[194] The following model statute aims to incorporate these three variables.

B. MODEL UNALLOTMENT STATUTE

(1)[195] The Legislature recognizes that acts of appropriations and their sources of funding reflect the priorities for ex-

ton, 441 S.E.2d 373, 376 (W. Va. 1994) (dismissing for mootness a teachers' suit against the governor over unallotment).

190. *See* Yair Listoken, *Learning Through Policy Variation*, 118 YALE L.J. 480, 538 (2008) (discussing the judiciary's reluctance to overturn precedent even if it would institute a positive policy change).

191. Joseph William Singer, *Normative Methods for Lawyers*, 56 UCLA L. REV. 899, 939 (2009).

192. *See, e.g.*, Briffault, *supra* note 44, at 1181 ("Legislatures are more inclined to challenge gubernatorial budgetary priorities . . . in state budgets.").

193. For example, the plaintiff in the Minnesota unallotment case, *Rukavina v. Pawlenty*, was a state legislator. 684 N.W.2d 525, 529 (Minn. Ct. App. 2004).

194. *See* Snell, *supra* note 23, at 28 (noting the limitations on a legislature's power to effectively address budgetary concerns).

195. This section borrows heavily from the language of title 32, section 704(a) of the Vermont Statutes. VT. STAT. ANN. tit. 32, § 704(a) (LexisNexis Supp. 2009).

penditures of public funds enacted by the Legislature and that major reductions or adjustments, when required by reduced state revenues, ought to be made whenever possible by an act of the Legislature reflecting its revisions of those priorities. Nevertheless, authorized appropriations and their sources of funding may be adjusted pursuant to the provisions of this section.

(2) If following the proper enactment of the fiscal year's budget,[196] the Governor first discovers that estimated fiscal-year-end revenues are not sufficient to meet the expenditures authorized by the Legislature,[197] creating a budget deficit within the current fiscal year,[198] the Governor shall reduce the budget reserve account to the extent necessary to eliminate the budget deficit.[199]

(3) Should an additional deficit continue:

(a) The Governor shall reduce any appropriation in an amount not to exceed ten percent[200] as specified in subsection (3)(b) to the extent necessary to eliminate the budget deficit. If the Governor reduces each appropriation by ten percent and the budget deficit continues, the Governor shall reduce any appropriations by an additional amount not to exceed five percent of the original appropriation as specified in subsection (3)(b) to the extent necessary to eliminate the budget deficit. If all appropriations are reduced by fifteen percent and the budget deficit continues, additional reductions shall consist of a uniform percentage reduction of all appropriations[201] to the extent necessary to eliminate the budget deficit.[202]

196. *Cf.* WIS. STAT. ANN. § 16.50(7)(a) (West 2009) ("If following the enactment of the biennial budget act . . . .").

197. *Cf.* ME. REV. STAT. ANN. tit. 5, § 1668 (2002) ("Whenever it appears to the [executive] that the anticipated income and other available funds . . . will not be sufficient to meet the expenditures authorized by the Legislature . . . .").

198. *Cf.* R.I. GEN. LAWS § 35-3-8(b) (Supp. 2009) ("[Whenever state agencies are] expected to incur a deficiency within the current fiscal year . . . .").

199. *Cf.* MINN. STAT. § 16A.152 subdiv. 4(a) (2008) ("[The executive shall] reduce the amount in the budget reserve account as needed to balance expenditures with revenue.").

200. *Cf.* CONN. GEN. STAT. ANN. § 4-85(b) (West Supp. 2010) (limiting reductions by three percent of any appropriation).

201. *Cf.* ALA. CODE § 41-4-90 (LexisNexis 2000) ("prorating without discrimination"); IOWA CODE ANN. § 8.31(5) (West 2008) ("uniform and prorated"); ME. REV. STAT. ANN. tit. 5, § 1668 (2002) ("curtail allotments equitably"); N.D. CENT. CODE § 54-44.1-12 (2008) ("uniform percentage basis"); OK. STAT. ANN. tit. 62, § 34.49(F) (West 2010) ("in the ratio"); OR. REV. STAT. ANN. § 291.261(2)(a) (West Supp. 2010) ("by the same percentage"); S.C. CODE ANN.

(b)[203] Prior to directing agencies to reduce appropriations as provided in subsection (3)(a), the Governor shall direct each agency to analyze the nature of each program that receives a general fund appropriation to determine whether the program is mandatory or permissive and to analyze the impact of the proposed reduction in spending on the legislative purpose of the program. An agency shall submit its analysis to the Budget Director and shall at the same time provide a copy of the analysis to the Legislative Fiscal Analyst. The Budget Director shall review each agency's analysis and shall submit to the Governor and Legislative Fiscal Analyst a copy of the Budget Director's recommendations for reductions in spending. The Legislative Finance Committee shall meet within fifteen days of the date that the proposed changes to the recommendations for reductions in spending are provided to the Legislative Fiscal Analyst. The Legislative Fiscal Analyst shall provide a copy of the Legislative Fiscal Analyst's review of the proposed reductions in spending to the Budget Director at least five days before the meeting of the Legislative Finance Committee. The Committee may make recommendations concerning the proposed reductions in spending. The Governor must consider each agency's analysis, the recommendations of the Budget Director, and the Legislative Finance Committee in determining the reduction of appropriations. The reductions must be designed to have the least adverse impact on the provision of services determined to be most integral to the discharge of the agency's statutory responsibilities[204] and must match the recommendations as closely as possible. The Governor shall not reduce appropriations under this subsection by a value that exceeds the amount necessary to eliminate the budget deficit.[205]

§ 1-11-495(A) (2009) ("as uniformly as may be practicable"); WASH. REV. CODE ANN. § 43.88.110(7) (West 2010) ("across-the-board").

202. *Cf.* UTAH CODE ANN. § 63J-1-217(3)(b) (West Supp. 2010) (directing the executive to reduce allotments "by an amount proportionate to the amount of the deficiency").

203. This section borrows heavily from the language of section 17-7-140(1)(b) of the Montana Code. MONT. CODE ANN. § 17-7-140(1)(b) (2009).

204. *See generally* State *ex rel.* Bd. of Educ. v. Rockefeller, 281 S.E.2d 131 (W. Va. 1981) (invalidating public education unallotments).

205. *Cf.* OR. REV. STAT. ANN. § 291.261(2)(b) (West Supp. 2010) ("The department and the governor may not reduce allotments under this section by a total amount that exceeds the amount necessary to bring the total estimated General Fund ending balance to zero.").

(4) Nothing in this section shall affect the Legislature's capacity to modify appropriations in accordance with legislative standards and procedures.[206]

(5) Reductions shall not be used to modify, amend, or redraft statutory language and shall not apply to unencumbered appropriations affecting [any programs the legislature expressly exempts].[207]

(6) If the deficit conditions of section (2) no longer exist, the governor may restore any appropriations previously reduced under section (3) up to its original level so long as the restoration will not create an additional budget deficit.[208]

C. ANALYSIS

This statute aims to improve executive branch budget-balancing mechanisms during fiscal emergencies. Of course, each state's budgetary and legislative processes are statutorily crafted in a manner unique to that state. This statute, therefore, is not exhaustive in scope. Nor would it be necessary to enact every section. Instead, the language stands as a framework for reform.

In highlighting several specifics, the rest of this section seeks to clarify the model statute.

1. Purpose Clause

The statutory language begins with a purpose clause. In light of this Note's dedication to explaining the purpose and text of unallotment statutes, one might deem a purpose clause unnecessary. Courts, however, have substituted the legislature's ostensible intent with the executive's specious plain-meaning arguments.[209] While this clause remains beneficial, the following two sections are the most essential.

206. *Cf.* UTAH CODE ANN. § 63J-1-217(3)(c) (West Supp. 2010) ("The governor's directions . . . are rescinded when the Legislature rectifies . . . the General Fund budget deficit.").

207. *See, e.g.*, CONN. GEN. STAT. ANN. § 4-85(e) (West Supp. 2010) (exempting aid to municipalities, and legislative and judicial agencies); MD. CODE ANN., STATE FIN. & PROC. § 7-213(b) (LexisNexis 2009) (exempting the legislature, the judiciary, state debt interest, public schools, salaries of public officers, and certain state employees); VT. STAT. ANN. tit. 32, § 704(d) (Supp. 2009) (exempting the legislature, judiciary, debt obligations, and salaries of elected officials).

208. *Cf.* HAW. REV. STAT. § 37-37 (2010) ("The governor at any time by executive order may restore spending authority.").

209. *See* Bd. of Educ. v. Gilligan, 301 N.E.2d 911, 914–15 (Ohio Ct. App. 1973) (finding no statutory limitation on the governor's selective cutbacks de-

2. Articulating Temporal Limitations

Section 2 of the model statute serves two purposes. First, it clearly states that the governor cannot unallot until after both the enactment of a proper budget and the beginning of the fiscal year for which the governor determines there is a budget deficit. Commanding an executive determination that revenues *are* less than needed, instead of *will be* less than needed,[210] prohibits premature unalloting based upon the executive's suspicion that revenue will decrease in the future. To further discourage hasty unalloting, the second purpose of section 2 is to mandate the drawdown of a budget reserve prior to the executive's appropriation reductions. Indeed, a reserve's purpose is to rectify budget shortfalls[211] and to alleviate the need for what could be economy-killing tax increases during a recession.[212]

This section of the model statute may endure criticism for two reasons. First, state budgets are contingent upon future cash flows, rather than previously acquired revenues.[213] At one moment in time, a state never has the necessary amount of revenue in the treasury to fund the full extent of every appropriation. Accordingly, one may note the inconsistency between this notion and the model statute because the present value of state revenue is always less than enacted appropriations.[214] While this concern proposes factual merit, it deserves greater

spite the "unlikely" chance that the legislature intended to confer such power upon him), *aff'd on other grounds*, 311 N.E.2d 529 (Ohio 1974).

210. *See, e.g.*, CONN. GEN. STAT. ANN. § 4-85(b) (West Supp. 2010) (allowing allotment reductions when revenues "will be insufficient"); FLA. STAT. ANN. § 216.221(5)(a) (West 2010) (providing for unallotment when "a deficit will occur"); HAW. REV. STAT. § 37-37(a) (2009) (allowing unallotment when revenues "will be less than the amount estimated or allotted therefor"); IND. CODE ANN. § 4-13-2-18(f) (LexisNexis 2002) (same).

211. Dick Thornburgh, *Gramm-Rudman-Hollings and the Balanced Budget Amendment: A Page of History*, 25 HARV. J. ON LEGIS. 611, 616 (1988) (noting that the purpose of budget reserves is "to set aside current revenues during good times to be used for counter-cyclical purposes during economic retrenchment").

212. *See* Tom Scheck, *Some Cities Warn of Budget Cuts While Sitting on Rainy Day Funds*, MPR NEWS (Mar. 3, 2009), http://minnesota.publicradio.org/display/web/2009/03/02/cityreserves/ (noting a Minnesota state representative's call to tap city budget reserves to alleviate the effects of a recession, since "[t]his is what budget reserves are for . . . to kind of ride out tough times until the economy improves").

213. Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 730 n.180 (2002) ("[S]tate budgets are designed to balance short-term cash flows, rather than long-term present values.").

214. *See* GOSLING, *supra* note 15, at 5 (describing "revenue constraints that are usually tight and a budget heavily committed to the costs of" salaries and benefits).

discussion. In Minnesota, Governor Pawlenty justified the fulfillment of the statutory conditions upon knowledge that the state was "in the midst of a lengthy economic downturn," meaning that receipts "will be less than anticipated [and] needed."[215] This would not have been such a laborious standard to satisfy had the legislature and the governor balanced the budget prior to unalloting.[216]

Second, opponents may rightfully question the policy decision to ignore a growing deficit. However, governments should not prematurely unallot because of the uncertainty of oscillating expenditures and revenues. If nothing else, a one-time, significant unallotment at the end of the fiscal period has a higher degree of administrative efficiency than multiple unallotments. One suggestion to cure this predicament, which is absent from the model statute, is to forbid unallotments until the latter half of the fiscal year. For states with fiscal bienniums, the statute could limit the triggering language to the second year of the biennium. Alternatively, the statute could authorize unalloting only after the legislature adjourns *sine die*, thereby respecting the legislature's capacity to resolve the deficit. Finally, the statute could limit the length of any appropriation curtailment to only three or four months at a time.[217]

3. Delegating the Appropriations Power

This section of the statute curbs discretionary appropriation reductions. As the statute's primary delegation clause, section 3(a) prohibits arbitrary appropriation-by-appropriation unallotments by guiding executive discretion under a three-tier unallotment system. The governor, pursuant to the first tier, may only reduce an appropriation by up to ten percent. Should the state continue to confront a deficit after the governor reduces every appropriation by up to ten percent, the statute's second tier will emerge, in which case the governor shall then reduce any appropriation by an additional five percent of the

215. Letter from Tom J. Hanson, Comm'r, Minn. Mgmt. & Budget, to Tim Pawlenty, Minn. Governor 1 (June 4, 2009), *available at* http://minnesota.publicradio.org/features/2009/06/04_tscheck_unallot/hansonletter.pdf.

216. *See* Brayton v. Pawlenty, 781 N.W.2d 357, 368 (Minn. 2010) ("Reading the statute to require enactment of a balanced budget as a predicate to the exercise of unallotment authority provides a definite and logical reference point for measuring whether current revenues are 'less than anticipated.'" (citing MINN. STAT. § 16A.152 subdiv. 4 (2010))).

217. *See* COLO. REV. STAT. § 24-2-102(4) (2009) (limiting suspensions or discontinuations of state agencies or services to three-month intervals).

original appropriation as needed. A deficit subsequent to the governor's fifteen percent reduction of all appropriations, if one exists, requires unallotments on a uniform percentage basis until the deficit is disspelled.

One may contend that the third section would be counterproductive during excessive budget deficiencies. A provision that emphasizes uniformly prorated unallotments appears to be inconsistent with the first two tiers, which reduce each permissible appropriation by a set percentage.[218] Although this is true, any deficit in excess of fifteen percent of the general fund deserves legislative attention. Section 4 further explores this issue.

Section 3(b), mirroring Montana's unallotment law,[219] attempts to underscore governmental efficiency while still preserving separation of powers. Pursuant to this section, each agency drafts a report that analyzes "the impact of the proposed" unallotments on subjected programs.[220] An executive budget department and a legislative oversight committee, upon receiving copies of the report, formulate recommendations.[221] Thereafter, the governor evaluates the reports and recommendations in order to implement unallotments that "have the least adverse impact on the provision of services determined to be most integral" to each agency.[222] In practice, governors would unallot appropriations with excess funds, rather than from those with insufficient revenues. This method should cause minimal inconvenience to affluent agencies while mitigating the burden on those with threatened appropriations.[223] Indeed, it remains unnecessary to completely exhaust an appropriation where its purpose, such as completing a construction project, has been accomplished by expending less than the full amount.[224] To reach the same end, the model statute could

218. The statute, of course, could also continue the system of increasing percentage caps.

219. *See* MONT. CODE ANN. § 17-7-140 (2009).

220. *Supra* Part III.B.3.b.

221. *See supra* Part III.B.3.b.

222. *Supra* Part III.B.3.b.

223. This method benefits states where the executive allots appropriations over a long period, in contrast to those with quarterly or monthly allotments that more adequately preserve funding throughout the fiscal year. *See generally* GOSLING, *supra* note 15, at 10 (noting that allotment periods range from monthly or quarterly periods to entire fiscal years).

224. *See, e.g.*, WASH. REV. CODE ANN. § 43.88.110(9) (West 2009) ("The [executive] may exempt certain public funds . . . if it is not practical or necessary to allot the funds."); WIS. STAT. ANN. § 16.50(2) (West 2009) ("If the [executive]

authorize the governor's transfer of revenue from an affluent fund into the general fund,[225] but this proposal may face questions of constitutionality.[226] In conclusion, legislatures must strongly consider the merits of this model statute's delegation provision.

Although unlikely to occur, policy-driven executive actors may still unallot funding from programs that are inconsistent with gubernatorial initiatives.[227] Two states in particular have created expedited appeal systems that may help to avoid such outcomes. Agency directors in Kansas and Idaho may challenge gubernatorial budget reductions in front of, respectively, an executive[228] or a legislative board.[229] Meanwhile, North Dakota's statute sets forth standards for a legislative challenge in the judiciary.[230] In light of section 3(b)'s ample details, such a provision would appear extraneous, but nonetheless effective.[231]

4. Legislative Override

Pursuant to section 4, the legislature may override or modify the executive's unallotments in a manner more consistent with legislative intent. To do so, the legislature must be in session and must override the governor's unallotments in accordance with its standard lawmaking procedures. It may be the

is satisfied that an estimate for any period is more than sufficient[,] . . . he or she may modify or withhold approval of the estimate.").

225. *See* COLO. REV. STAT. ANN. § 24-75-201.5(g) (West 2009) (allowing for transfers of excess revenue from a selection of sources to the general fund for the fiscal year 2008–2009).

226. *See, e.g.*, Goldston v. State, 683 S.E.2d 237, 247–49 (N.C. Ct. App. 2009) (holding that only the legislature can authorize appropriations transfers between funds).

227. A governor's tendency to preserve his or her budgetary priorities, potentially at the expense of conflicting programs, is well established. *See* DALL W. FORSYTHE, MEMOS TO THE GOVERNOR: AN INTRODUCTION TO STATE BUDGETING 38 (2d ed. 2004) ("[F]ew governors will sacrifice their own program priorities to [unallotment]."); *see also* Bruce E. Cain & Roger G. Noll, *Malleable Constitutions: Reflections on State Constitutional Reform*, 87 TEX. L. REV. 1517, 1538–39 (2009) (discussing the contention between legislatures and the executive branch over whether governors should be able to unallot).

228. *See* KAN. STAT. ANN. § 75-3722 (1997) (allowing for review by the state finance council upon agency request).

229. *See* IDAHO CODE ANN. § 67-3512A (2006) (providing for a hearing before the state board of examiners upon the request of department heads).

230. *See* N.D. CENT. CODE § 54-44.1-12.1 (Supp. 2009).

231. *See generally* Stanley H. Friedelbaum, *State Courts and the Separation of Powers: A Venerable Doctrine in Varied Contexts*, 61 ALB. L. REV. 1417, 1452–57 (1998) (noting that courts seek to find a balance between sufficient guiding standards and excessive oversight when considering unallotment statutes).

case, however, that the legislature cannot reach a consensus or cannot override a veto. Indeed, the existence of unallotment statutes is primarily due to these circumstances.[232] Still, another positive aspect of the state budgeting process is that legislatures appropriate new revenue each fiscal year or biennium.[233] Therefore, in months' time, the legislature can reappropriate revenue to defunded agencies.

5. Exempting Appropriations

Section 5 preserves legislative priorities before the governor can unallot. This section recognizes the legislature's competence to conditionally exempt appropriations from unallotment each fiscal period. Understanding the cumbersome and repetitive approach of legislating in this manner, lawmakers could include within the statute itself programs, initiatives, or priorities that are repeatedly exempt from unallotment. In other words, the legislature can either preserve its policy initiatives in each fiscal period's appropriations act or protect the most important funding priorities when reforming its state's unallotment law. Section 5 further prohibits the kinds of attempted gubernatorial lawmaking and statutory modifications that have been addressed in several cases.[234]

6. Executive Restoration

This final section authorizes executive action if the deficit subsides. Should any positive balance in the state budget occur subsequent to the appropriation reductions, the governor can reallot appropriations to their respective agencies.[235] This reauthorization of appropriations would not amount to an unconstitutional delegation of the appropriations power because gover-

232. *See* Bardsley v. Colo. Dep't of Pub. Safety, 870 P.2d 641, 646 (Colo. App. 1994).

233. *See* Ronald Snell, *Budgeting, State*, *in* THE ENCYCLOPEDIA OF TAXATION & TAX POLICY, *supra* note 23, at 28–29 (noting the standard state budgeting time frames).

234. *See, e.g.*, Brayton v. Pawlenty, 781 N.W.2d 357, 359–62 (Minn. 2010) (describing the governor's series of vetoes and unallotments); Am. Fed'n of State, Cnty., & Mun. Emps. v. Olson, 338 N.W.2d 97, 98–100 (N.D. 1983) (describing the unallotments affecting legislatively appropriated salary increases for state workers).

235. *Cf.* IDAHO CODE ANN. § 67-3512A (2006) ("The governor at any time by executive order may restore spending authority which has been temporarily reduced to its original level."); N.J. STAT. ANN. § 52:27B-27 (West 2010) (allowing for revisions to quarterly allotments at the executive's discretion upon application by a requesting officer).

nors would not be alloting appropriations in excess of their original amount. One should be weary, however, of crafty executive actors that may use this provision to cut appropriations uniformly only to reauthorize appropriations to programs consistent with gubernatorial initiatives. To prevent this from occurring, Florida's statute, for instance, forbids gubernatorial restoration of unallotments.[236] As a matter of policy, states actually may choose to preserve the enacted budget cuts in order to ensure a positive balance on the budget at the end of the fiscal year.[237] Depending on a state's aims, such a provision could easily be inserted in lieu of section 6 of the model statute.

The preceding statute integrates unallotment's most effective legal standards while adding further provisions to establish a paradigm for reform. Consistent with the majority of current statutes, the model statute respects the executive branch's capability to promulgate discretionary budget reductions. The model statute, however, advances several mechanisms that encourage unalloting to remain consistent with legislative intent. While other legally sound reform alternatives have merit, this Note's model statute is the best option for reform.

D. ALTERNATIVE AVENUES FOR REFORM

When developing a model statute, the drafter must be conscious of each state's unique statutory and constitutional provisions. While the foregoing statute is a useful scheme for any state to adopt, others may surmise that some alternative is a more suitable means for reform. This section briefly proposes several reform alternatives—single-tier unallotments, legislative confirmation, and constitutional reform—and explores the merits and inefficiencies of each.

The first reform alternative is the development of a single-tier unallotment system, which either caps appropriation reductions at a specific percentage or reduces appropriations in a uniform manner. The benefits and disadvantages of capped and uniformly prorated unallotments correspond to those addressed in the model statute. Percentage cap unallotments permit executive discretion, but in doing so they establish a route to undermine legislative funding priorities. Uniformly prorated un-

236. *See* FLA. STAT. ANN. § 216.221(11) (West 2010).

237. *See, e.g.*, MONT. CODE ANN. § 17-7-140(1)(a) (2009) (requiring spending to be reduced to "an amount that ensures that the projected ending general fund balance for the biennium will be at least 1% of all general fund appropriations").

allotments prohibit unbridled executive discretion, but this comes at the cost of pitting forced budget reductions against overextended appropriations and agencies. Deciding between the two is, therefore, a matter of cost-benefit analysis.

The model statute, however, painstakingly accounts for both concerns. The first two tiers encourage the executive to unallot in a manner consistent with the legislative purpose intrinsic in the affected appropriations. Yet, the statute caps the executive's overall discretion to unallot at fifteen percent. Above this level, the governor must uniformly prorate unallotments to preserve the legislature's policymaking authority. Alternatively, other statutes provide legislatures a greater role in the unallotment process.[238]

States looking to craft statutes that generate a greater legislative presence during unallotment have done so in a variety of ways. The executive branch in Vermont has discretion to unallot certain appropriations up to five percent, but a legislative committee must approve any cuts beyond this level.[239] Florida's unallotment statute also provides for discretionary reductions, but if the deficit reaches a certain level, the legislature must resolve the crisis.[240] In Kentucky, the legislature must include a "budget reduction plan" in each budget for the executive branch to implement.[241] Several statutes even require legislative approval of any unallotment.[242] Finally, Wisconsin so strictly mandates legislative approval of unallotments that, if necessary, governors must call a special session so that legislators can consider all proposed reductions.[243] Along these lines, one author encourages a system of legislative checks on execu-

238. *See, e.g.*, LA. REV. STAT. ANN. § 39:75(C)(2)(e) (Supp. 2010) (requiring approval from a legislative committee before unallotments may take effect); R.I. GEN. LAWS § 35-3-8 (Supp. 2009) (requiring the executive to submit unallotment requests to the general assembly).

239. *See* VT. STAT. ANN. tit. 32, § 704(b)(2) (Supp. 2009); *see also* CONN. GEN. STAT. ANN. § 4-85(c) (West Supp. 2010) (establishing a similar procedure in Connecticut).

240. *See* FLA. STAT. ANN. § 216.221(6) (West 2010).

241. KY. REV. STAT. ANN. § 48.130(1) (West 2009).

242. *See, e.g.*, MICH. COMP. LAWS ANN. § 18.1391(3) (West 2004) (subjecting unallotment recommendations to majority vote by a legislative committee); N.H. REV. STAT. ANN. § 9:16-b (2008) (same); TEX. GOV'T CODE ANN. § 317.005 (West 2005) (same).

243. WIS. STAT. ANN. § 16.50(7)(b) (West 2009). *But cf.* Campbell v. White, 856 P.2d 255, 262 (Okla. 1993) (refusing to issue an opinion that would force a special legislative session during a fiscal downturn because the "session would be costly and might result in precious resources . . . being expended to support the session itself").

tive budgetary decisions in lieu of "micromanaging" through traditional unallotment statutes.[244] Unfortunately, a large body of case law questions the constitutional validity of a direct legislative presence during the executive's administration of the budget.[245]

The final alternative to adoption of the model statute is reform through the constitutional amendment process. State constitutions that currently address executive branch unalloting promote unfettered discretion that is adverse to public policy.[246] Despite this fact, constitutional reform would dispense of all legal questions with respect to unconstitutional delegations of legislative power. Still, while this proposal may work for several states, the practicality of multistate constitutional reform is minimal. Although the lawmaking process is generally consistent from state to state,[247] the procedures for constitutional amendments deviate substantially.[248] In fact, nineteen states have yet to even amend their own constitution.[249] In conclusion, legislation is a much more practical agent for reform than the constitutional amendment process.

These three alternative avenues to reform are all viable options. Single-tier unallotments, greater legislative involvement, and constitutional reform are all more effective solutions than the status quo. As feasible as these alternatives are, they each lack the practicality and effectiveness of this Note's model statute.

CONCLUSION

The heart of unallotment reform does not extend far beyond the purview of an introductory civics class: the legislature creates the law, the executive enforces the law, and the ju-

244. *See* Rossi, *Lawmaking in Crisis*, *supra* note 20, at 274.

245. *See* John Devlin, *Toward A State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205, 1251–52 & nn.173–75 (1993) (acknowledging the mixed constitutional results of legislative finance councils and "similar legislative bodies" with quasi-administrative functions).

246. *See, e.g.*, MO. CONST. art. IV, § 27 (conferring broad unallotment powers on the governor); N.C. CONST. art. III, § 5(3) (same).

247. Victor B. Flatt, *The "Benefits" of Non-Delegation: Using the Non-Delegation Doctrine to Bring More Rigor to Benefit-Cost Analysis*, 15 WM. & MARY BILL RTS. J. 1087, 1088 (2007) ("Similar state constitutional doctrines underlie state lawmaking.").

248. *See* Cain & Noll, *supra* note 227, at 1521–23.

249. *See id.* at 1519.

diciary interprets the law. In the age of excessive government spending, state legislatures have bestowed upon governors the power to reduce appropriations. Perhaps the enticement of ease and simplicity are to blame, but as Justice Brandeis famously stated, the objective of separation of powers is "not to promote efficiency but to preclude the exercise of arbitrary power."[250] The cloying use of unallotment in Minnesota, one that must not spread throughout the United States, should not entirely overshadow the procedure's purpose of solvency sustainment. Indeed, unallotment laws are an essential fixture within state governments. The model statute in this Note presents a promising means of curbing the executive's arbitrary discretion to reduce appropriations and to amend laws in a fashion inconsistent with legislative intent. The utility of unallotment statutes is necessarily limited because they assume financial shortcomings as a prerequisite to act. Thus, one should not see unallotment reform as the end of the debate, but rather as a useful procedural mechanism to ensure the protection of legislative policy initiatives during budget deficits.

250. Myers v. United States, 272 U.S. 52, 85 (1926) (Brandeis, J., dissenting).