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Persuading a State to Budget It: Benefits, Consequences, and Obstacles to State Budget Default Rules

Margaret Nunne

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Persuading a State to Budge It: Benefits, Consequences, and Obstacles to State Budget Default Rules

MARGARET NUNNE*

The Illinois legislature’s budget impasse has led to a series of measures cobbled together to keep the state operational and state employees paid. Late budgets, impasses, and failed budgets lead to government shutdowns. Government shutdowns mean government services can be put at risk, which, in turn, can harm the public. In considering the future, as politicians continue to or refuse to negotiate, default budget rules have been used to some success in other states by preventing a complete shutdown of the state in the face of an impasse. However, the use of the rule can cause different problems and may be impossible to implement in a tense political climate. Ultimately, this Note explores the benefits, drawbacks, and consequences of default budget rules, and offers suggestions as to what a default budget rule could look like in Illinois.

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I. INTRODUCTION

In fiscal year 2016, Illinois achieved the dubious honor as the only state to operate without a full budget for the fiscal year, relying instead upon a stopgap budget,¹ passed and enacted hours before the expiration of the fiscal year, and upon court ordered spending² to muddle through. Illinois faces conditions that have caused a budget negotiation breakdown, created by “divided government, mix in red-hot tax issues, sprinkle with partisan politics, build on a base of pension liabilities, structural deficits and a dash of Great Recession hangovers, and you have the noxious stews that created the recent budget standoffs”³ In a dysfunctional state with a divided government like Illinois, the allure of a default rule in the event of a budget impasse that continues fulfilling state employee paychecks, paying bills, and ensuring government services can be appealing to a worn-out populace.⁴ A default rule that continues the status quo would, in theory, seemingly cure the immediate effects of a budget standoff.

However, a provision like a default rule may not cure society’s ills, and an improperly drafted mandate may even serve to engrain the very problems causing the need for a rule. The devil is in the details as to what form and function a default rule may take to avoid the pitfalls in accounting and governance. Another set of problems arise in considering how to pass such a provision in a divided state like Illinois. Despite the desperate need for default rules in the event of a shutdown in Illinois, with employees dependent on court orders⁵ and social services dependent upon the good will of the legislature,⁶ passing a default rule could be as impossible as passing a budget

1. S.B. 2047, 99th Gen. Assemb. (Ill. 2016).

2. *Am. Fed’n of State v. State*, 2015 IL App (5th) 150277-U.

3. Elaine S. Povich, *Rancor Between Governors and Legislatures Causes Record-Breaking Budget Impasses in Illinois and Pennsylvania*, ST. LEGISLATURES MAGAZINE 20 (July 27, 2016), <http://www.ncsl.org/bookstore/state-legislatures-magazine/rancor-causes-budget-impasses-illinois-pennsylvania.aspx>.

4. *E.g.*, David Scott Louk & David Gamage, *Preventing Government Shutdowns: Designing Default Rules for Budgets*, 86 U. COLO. L. REV. 181, 254-55 (2015).

5. *Am. Fed’n of State*, 2015 IL App (5th) 150277-U, ¶ 2.

6. S.B. 2047, 99th Gen. Assemb. (Ill. 2016); *see* Dave McKinney & Karen Pierog, *Illinois Lawmakers Pass Bills to Unblock State’s Budget Impasse*, REUTERS (June 30, 2016, 10:13 PM), <http://www.reuters.com/article/us-illinois-budget-idUSKCN0ZG16N>.

and would not fix the other imbalances in the budgeting process.⁷ The impossibility arises from the necessity of a budget provision in Illinois to be an amendment to the Illinois State Constitution in order to safeguard its future implementation.⁸ Even with the passage of a default rule, the existing bandage measures have not created the necessary environment to induce the Illinois General Assembly to pass a budget,⁹ and may be construed as an argument against default budget rules in Illinois.¹⁰ Yet constitutional provisions and statutes already do exist governing government budgets, procedures, and contracts in other states. Wisconsin¹¹ and Rhode Island¹² are models that may be followed by states that are looking to head-off the consequences of a budget impasse. This Note endeavors to examine the benefits and potential shortcomings of a default budget rule, using Illinois as a foil to discuss not only the causes and consequences of a budget impasse, which a default rule would not necessarily fix, but also the impossibility of passing such a default rule in an environment filled with political tension that is marked by positional politics. Finally, this Note concludes with the recommendations for qualities that any future default budget rule may need to incorporate to be accepted in Illinois.

Part II of this Note examines the features of a default budgeting rule and its basis in contract as an alternative or a supplement to a negotiated agreement. Part III of this Note examines budget rules already in existence, paying special attention to Wisconsin and Rhode Island and other state proposals of such default rules. Part IV examines the current state of the Illinois Constitution and Illinois statutes governing the budget procedure, noting the measures that have been taken up to this point to continue state government operations.

7. See Thomas Walstrum, *The Illinois Budget Crisis in Context: A History of Poor Fiscal Performance*, 2016 CHI. FED. LETTER NO. 365 (2016), <https://chicagofed.org/publications/chicago-fed-letter/2016/365> (pdf of article accompanying); see also Richard Dye & David Merriman, *First You Stop Digging: Projections of Illinois' Fiscal Imbalance and Paths to Remedy It*, FISCAL FUTURES PROJECT (Nov. 30, 2016), https://igpa.uillinois.edu/sites/igpa.uillinois.edu/files/reports/First-You-Stop-Digging_FFP_112816_FINAL2.pdf; Kim Geiger, Rauner, Madigan Now Can't Even Agree on How to Negotiate, CHI. TRIB. (Dec. 7, 2016, 6:45 AM), <http://www.chicagotribune.com/news/local/politics/ct-bruce-rauner-mike-madigan-illinois-budget-met-1207-20161207-story.html>.

8. See ILL. CONST. art. IX, § 9; ILL. CONST. art. XIV, § 2; ILL. CONST. art. IX, § 1.

9. See *Am. Fed'n of State*, 2015 IL App (5th) 150277-U; S.B. 2047, 99th Gen. Assemb. (Ill. 2016).

10. See Louk & Gamage, *supra* note 4, at 246-47; see also COLBEY SULLIVAN, MINN. HOUSE OF REPRESENTATIVES, POLICY BRIEF: AUTOMATIC CONTINUING APPROPRIATIONS & GOVERNMENT SHUTDOWNS 8 (Dec. 2011), <http://www.house.leg.state.mn.us/hrd/pubs/con-tappr.pdf>.

11. WIS. STAT. ANN. § 20.002(1) (West, Westlaw through 2017 Act 6).

12. 35 R.I. GEN. LAWS ANN. § 35-3-19 (West, Westlaw through Chapter 542 of the Jan. 2016 Sess.).

Part V examines the problems with default rules, their impact on the negotiation process, and their potential to stall progress towards passing a budget. Part VI moves on to the possible configurations of a default budget rule, specifically considering the provisions for such a rule in Illinois, in order to combat some of the problems laid out in Part V. Part VI concludes the Note.

II. WHAT ARE DEFAULT RULES

A. THE DIFFERENCE BETWEEN DEFAULT AND IMMUTABLE RULES

Default rules exist most clearly in contract law, and act as a reserve to prevent the incomplete contract from becoming ineffectual.¹³ Specifically, “[d]efault rules fill the gaps in incomplete contracts; they govern unless the parties contract around them.”¹⁴ Alternatively, immutable rules are immune to negotiated provisions that change or remove them, because “they govern even if the parties attempt to contract around them.”¹⁵ Immutable rules are considered to be beneficial when, “society wants to protect (1) parties within the contract, or (2) parties outside the contract.”¹⁶ The immutable rules can be considered too paternalistic, as “[i]mmutability is justified only if unregulated contracting would be socially deleterious because parties internal or external to the contract cannot adequately protect themselves.”¹⁷ Because immutable rules prevent the freedom of contract, when the circumstances surrounding the use of immutable rules is not justifiable, a default rule is employed to provide protection to the parties both within and outside the contract, but may also be negotiated around in the event the parties want a different term rather than the default rule.¹⁸

Default rules have been segregated into two different broad categories, the first stated conceptually as default rules “set at what the parties would have wanted . . . ‘should provide all the parties with the type of contract that they would have agreed to if they had had the time and money to bargain over all aspects of their deal.’”¹⁹ Alternatively, penalty defaults provides “at least one party to the contract an incentive to contract around the default rule

13. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989).

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 88.

18. Ayres & Gertner, *supra* note 13, at 89.

19. Ayres & Gertner, *supra* note 13, at 90 (quoting Douglas Baird & Thomas Jackson, *Fraudulent Conveyance Law and Its Proper Domain*, 38 VAND. L. REV. 829, 835-36 (1985)); see also RESTATEMENT (SECOND) OF CONTRACTS § 204(d) (2016).

and therefore to choose affirmatively the contract provision they prefer.”²⁰ The penalty default rule encourages the parties to continue negotiation over accepting the default.²¹ These categories can be supplemented by tailored and untailored default rules, with tailored default rules attempting to closely approximate what the parties would have contracted for.²² In contrast, untailored defaults seek to provide the parties with a pre-formulated rule that the majority of contracting parties would prefer to fill in in an incomplete contract.²³

B. APPLYING DEFAULT RULES TO THE PUBLIC SECTOR

These default and immutable rules have been used and supplied mainly to the private sector as individuals and businesses negotiate and contract with each other.²⁴ However, there have been some calls to apply immutable rule contract theory to public contract negotiations, because even though “conventional economic wisdom is that mandatory standards are undesirable because they hinder bargaining to efficient outcomes, that logic does not apply where there are market failures and contracts do not account for costs imposed on third parties who cannot protect themselves.”²⁵ These contracts are generally between the public government party and a private party, and the author calls for reading in a “mandatory duty to act in furtherance of the public interest. . . . [A] mandatory rule is justified here because the law must protect non-parties to the contract who cannot adequately protect themselves.”²⁶ These parties that cannot protect themselves are, effectively, the public.²⁷ The call for a default rule in the public sphere has been extended to the bargaining and negotiating of the public budget within the public body of the legislature,²⁸ with a default rule that is enacted each time the legislature

20. Ayres & Gertner, *supra* note 13, at 91.

21. Ayres & Gertner, *supra* note 13, at 91. *But see* Erick Maskin, *On the Rationale for Penalty Default Rules*, 33 FLA. ST. U. L. REV. 557-58 (2006).

22. Ayres & Gertner, *supra* note 13, at 91.

23. Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 971 (1983); Ayres & Gertner, *supra* note 13, at 91.

24. *See* Ayres & Gertner, *supra* note 13.

25. Wendy Netter Epstein, *Contract Theory and the Failures of Public-Private Contracting*, 34 CARDOZO L. REV. 2211, 2217 (2013).

26. *Id.* at 2211; *see also* John Ferejohn & Barry Friedman, *Toward a Political Theory of Constitutional Default Rules*, 33 FLA. ST. U. L. REV. 825, 829 (2006).

27. Epstein, *supra* note 25, at 2214-15.

28. *See* Louk & Gamage, *supra* note 4, at 182; *see also* Katharine G. Young, *American Exceptionalism and Government Shutdowns: A Comparative Constitutional Reflection on the 2013 Lapse in Appropriations*, 94 B.U. L. REV. 991 (2014).

fails in its task to pass a budget to prevent harms to the public at large but may be contracted around by the legislature when it passes a budget.²⁹

This idea arises out of the concept that legislatures face greater political divisiveness from the rise of political partisanship.³⁰ The control of the large amounts of money comprising the state budget,³¹ the relatively short period of time for its consideration,³² coupled with rules imposing greater vote majorities, also known as supermajorities, on not only imposing or increasing taxes but on merely passing a state budget,³³ raises the concern that those most vulnerable to a budgetary impasse should have greater protections afforded to them than solely the ability to vote for their own representative each election cycle.³⁴ Several states currently have increased budget vote requirements, including Nebraska, which requires a two-thirds majority for any budget passed after March 31,³⁵ and Maine, which requires the budget to be passed with a two-thirds majority as an emergency act after April 1.³⁶ Despite the supermajority vote requirements to pass a budget among states, including Illinois's three-fifths majority requirement to pass bills after May 31 to encourage the legislature to pass a budget bill on time,³⁷ a 1995 report from California analyzing California's supermajority requirement showed that such procedural measures did not restrain spending.³⁸ Instead, small groups used the requirement to hold the budget process hostage, and trading votes became costly as the deadline approached.³⁹ It has been observed that "[t]he budget is the blueprint for the state government's priorities in the coming

29. Louk & Gamage, *supra* note 4, at 188-192.

30. See generally Louk & Gamage, *supra* note 4.

31. Luke Martel et al., *State Fiscal Health Workgroup: A Guide to Better State Budgeting Practices*, NAT'L CONF. OF ST. LEGISLATURES 22 (Oct. 2016), http://www.ncsl.org/documents/fiscal/NCSL_A_Guide_to_Better_State_Budgeting_Practices_Oct_2016.pdf ("Total state budgets range from about \$4.5 billion in South Dakota to more than \$282 billion in California.").

32. *Id.* ("South Dakota's Legislature has 12 weeks to consider its budget, while the California Legislature has about 20.").

33. Erica MacKellar, *Supermajority Vote Requirements to Pass the Budget*, NAT'L CONF. OF ST. LEGISLATURES (Feb. 14, 2017), <http://www.ncsl.org/research/fiscal-policy/supermajority-vote-requirements-to-pass-the-budget635542510.aspx>.

34. Louk & Gamage, *supra* note 4, at 183-84 ("In recent years, as party polarization and partisan fiscal politics have made it ever more difficult to reach agreement, government shutdowns have been occurring at both the federal and state levels with increasing frequency. But few Americans consider government shutdowns to be a functional default option when negotiations fail." (footnotes omitted)).

35. MacKellar, *supra* note 33.

36. Todd Haggerty, *Shutdown Showdowns*, ST. LEGISLATURES MAG. (Dec. 1, 2013), <http://www.ncsl.org/research/fiscal-policy/shutdown-showdowns.aspx>.

37. 5 ILL. COMP. STAT. ANN. 75/2 (West, Westlaw through P.A. 99-983 of the 2016 Reg. Sess.).

38. Martel et al., *supra* note 31, at 25.

39. Martel et al., *supra* note 31, at 25.

year or biennium. To the extent legislators can improve the budgeting process, they also can improve efficiencies in their state governments.”⁴⁰

C. BENEFITS TO DEFAULT RULES

The most obvious direct benefit of a default rule that continues the appropriation of government funds, even without the express consent of the legislature, is its prevention of the costs of a shutdown and its continuance of government services.⁴¹ On the state level, Illinois’s current budget impasse has offered a number of examples of the costs of the state budget’s absence, from colleges and universities,⁴² to public health,⁴³ and even future debt service.⁴⁴ However, Illinois is not the only state to have experienced a recent budget impasse. In 2007, Michigan’s four-hour shutdown resulted in campers being asked to leave state parks and decreased police presence on highways.⁴⁵ New Jersey’s partial shutdown in fiscal year 2007 had the unique

40. Martel et al., *supra* note 31, at 2.

41. Louk & Gamage, *supra* note 4, 190-93; *see also* SULLIVAN, *supra* note 10, at 9-16.

42. *See* Ashley A. Smith, *Struggling to Cope in Illinois*, INSIDE HIGHER ED (July 11, 2016), <https://www.insidehighered.com/news/2016/07/11/illinois-community-colleges-deal-budget-impasse>; Rick Seltzer, *‘Nail in the Coffin’ for Chicago State?*, INSIDE HIGHER ED (Oct. 5, 2016), <https://www.insidehighered.com/news/2016/10/05/chicago-state-struggles-under-questions-enrollment-finance-leadership>; Elizabeth Campbell, *Illinois Colleges Besieged By Cuts as Budget Fight Trickles Down*, BLOOMBERG (July 26, 2016, 2:06 PM), <https://www.bloomberg.com/news/articles/2016-07-26/illinois-colleges-besieged-by-cuts-as-budget-fight-trickles-down>; Jodi S. Cohen, *State Universities: Illinois Budget Stalemate Causing Damage ‘Beyond Repair’*, CHI. TRIB. (Jan. 20, 2016, 9:15 AM), <http://www.chicagotribune.com/news/ct-illinois-higher-education-funding-20160119-story.html>.

43. *See* Phil Kadner, *Illinois Financial Chaos Hurts Those Most in Need*, CHI. TRIB. (June 30, 2015, 5:49 PM), <http://www.chicagotribune.com/suburbs/daily-southtown/news/ct-sta-kadner-state-crisis-st-0701-20150630-story.html>; Maggie Thomas, *Public Health Without a Budget: Budget Crisis in Illinois*, PUB. HEALTH POST (Dec. 2, 2016), <http://www.publichealthpost.org/news/public-health-without-budget-budget-crisis-illinois/>; Dean Olson, *Health Care, Human Service Providers Cope as State’s Unpaid Bills Pile Up*, ST. J. REG., <http://www.sj-r.com/news/20160605/health-care-human-services-providers-cope-as-states-unpaid-bills-pile-up> (last updated June 6, 2016, 8:08 PM); Monique Garcia & Kim Geiger, *Illinois Women Hit ‘Disproportionately Hard’ By Record State Budget Impasse*, CHI. TRIB. (June 17, 2016, 1:30 PM), <http://www.chicagotribune.com/news/local/politics/ct-illinois-budget-women-met-20160617-story.html>.

44. *See* Rating Action: *Moody’s Downgrades Illinois GOs to Baa2 from Baa1; Related Ratings Also Downgraded*, MOODY’S INV’RS SERV. (June 08, 2016), https://www.moodys.com/research/Moodys-downgrades-Illinois-GOs-to-Baa2-from-Baa1-related-ratings--PR_903266220 [hereinafter *Rating Action*].

45. *Late State Budgets*, NAT’L CONF. OF ST. LEGISLATURES (Aug. 27, 2010), <http://www.ncsl.org/research/fiscal-policy/late-state-budgets.aspx> [hereinafter *Late State Budgets*].

distinction of being the cause of a three-day shutdown of Atlantic City's casinos as state casino inspectors were furloughed.⁴⁶ Similarly, in fiscal year 2003, Tennessee's partial shutdown meant public university classes becoming cancelled, state park closures, the non-issuance of driver's licenses, and a stoppage of road construction.⁴⁷ Individually, these events reveal varied costs of the stoppage of government services and the wide impact that stoppage can have upon a state's economy.

The costs of an absentee budget can be categorized into increased expenses, reduced revenues, and a decrease in confidence in the government.⁴⁸ An increase of expenses arises from the costs associated with extending the legislative session or adding days to the legislative calendar, local governments being unable to budget effectively, and the costs from associated lawsuits.⁴⁹ Without a budget, state employees may or may not be paid, which translates into less state economic activity and tax revenue.⁵⁰ A one-day shutdown in Pennsylvania resulted in 24,000 employees being furloughed and approximately \$3.5 million in lost employee wages.⁵¹ Further, the New Jersey casino shutdown in fiscal year 2007 led to a loss of \$3.9 million in gambling tax revenue for just three days of closure.⁵² The long-term consequences of a budget impasse and government shutdown include a possible downgrade in the state's credit rating,⁵³ which affects interest rates and debt service. Former New York Comptroller H. Carl McCall argues that late budgets were a contributing factor to the state's low credit rating, and a report from the New York Comptroller's Office noted "a credit upgrade of one rating would have saved the state an estimated \$158 million."⁵⁴ Also in the long term, in a protracted period without a budget, a state risks reduction in constituent confidence in the stability and efficacy of the government.⁵⁵ Illinois has already seen its credit rating lowered,⁵⁶ and a lack of confidence in government may theoretically combine with other dissatisfactions, like taxes and weather, to create a desire to leave the state, and thereby possibly reduce the tax base.⁵⁷ Continuing the flow of state money can theoretically help prevent

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Late State Budgets*, *supra* note 45.

51. *Late State Budgets*, *supra* note 45.

52. *Late State Budgets*, *supra* note 45.

53. *Late State Budgets*, *supra* note 45; *see also Rating Action*, *supra* note 44.

54. Haggerty, *supra* note 36.

55. Haggerty, *supra* note 36.

56. *Rating Action*, *supra* note 44.

57. Haggerty, *supra* note 36; *see Poll: Illinois Voters Divided Over Remaining in the State*, NEWS S. ILL. U. (Oct. 10, 2016), <http://news.siu.edu/2016/10/101016par16116.html>

some of these consequences by giving legislators and constituents a fallback in the event of a failed negotiation.

III. EXAMPLES OF STATE DEFAULT BUDGET RULES

In order to understand the default budget rules that already exist in Wisconsin and Rhode Island, they must be considered in context of the budgeting procedure as a whole.

A. WISCONSIN

In Wisconsin, the budget process is a system similar to the Illinois budget process in that it includes both the Governor and the Legislature.⁵⁸ However, there are key differences that, in combination with its default budget rule, are significant to create a process that is transparent and offers a safety net to everyday citizens.

Under Article VIII, Section 2 of the Wisconsin Constitution, “No money shall be paid out of the treasury except in pursuance of an appropriation by law.”⁵⁹ The Wisconsin budget procedure is a biennial process,⁶⁰ which has persisted even though the Legislature meets on an annual basis.⁶¹ The process starts with Wisconsin agencies submitting budget proposals to the State Budget Office in the executive Department of Administration no later than September 15 of even-numbered years.⁶² By November 20 of even-numbered years, the Department of Administration delivers a compilation of each agency’s total biennial budget request to the Governor or Governor-elect and every member of the legislature.⁶³ After the Department of Administration delivers the budget requests, the non-partisan Legislative Fiscal Bureau issues a summary of the major points of the agency budget requests to the members of the legislature in December of the even-numbered years, and

(“Policy-makers argue over whether people are leaving or not,” Yepsen said. “The most troubling finding in this poll is that so many younger people are thinking about it. That’s the state’s future.”).

58. See *Wisconsin Budget Toolkit*, WIS. BUDGET PROJECT, <http://www.wisconsin-budgetproject.org/wp-content/uploads/2012/07/Budget-toolkit.pdf> (last updated Apr. 2017) [hereinafter *Wisconsin Budget Toolkit*].

59. WIS. CONST. art. VIII, § 2.

60. BOB LANG & SANDY SWAIN, STATE BUDGET PROCESS INFORMATIONAL PAPER 73, WIS. LEGISLATIVE FISCAL BUREAU 15 (Jan. 2017), https://docs.legis.wisconsin.gov/misc/lfb/informational_papers/january_2017/0073_state_budget_process_informational_paper_73.pdf.

61. *Id.*

62. WIS. STAT. ANN. § 16.42 (West, Westlaw through 2017 Act 6); LANG & SWAIN, *supra* note 60, at 3.

63. WIS. STAT. ANN. § 16.43 (West, Westlaw through 2017 Act 6); LANG & SWAIN, *supra* note 60, at 4.

a revenue estimate disseminated to legislators in January of the odd-numbered years.⁶⁴

Meanwhile, the State Budget Office in the Department of Administration provides information to the Governor, who incorporates it into a budget address and a proposed budget bill in February of the odd-numbered years.⁶⁵ The Governor's budget bill is introduced without changes to a Joint Committee on Finance, which is comprised of members from both houses⁶⁶ and holds public hearings on the Governor's proposed budget, which included both agency experts and members of the general public.⁶⁷ After the public hearings, the Joint Committee on Finance holds executive sessions that result in the drafting of a budget bill that generally contains changes from the Governor's proposed budget bill.⁶⁸

The Joint Committee on Finance's bill is returned to the house of the Legislature that it was introduced into, and that house schedules briefings with the non-partisan Legislative Fiscal Bureau staff to brief the legislators, which usually leads to the political parties caucusing on the bill.⁶⁹ If a member of the Legislature wishes to amend the bill at this stage, the member must have an amendment drafted, or alternatively, the majority caucus drafts a package of amendments that are considered.⁷⁰ If the houses pass different versions of the budget bill, they can meet in a conference committee, or alternatively to "successively pass, between the houses, narrowing amendments dealing with only the points of difference between the respective budgets as initially recommended by the two houses."⁷¹ When the budget bill is agreed upon, it is sent to the Governor, who signs, vetoes, or partially vetoes the bill.⁷²

However, in the event that a budget is not passed and signed, Section 20.002(1) of the Wisconsin Statutes provides:

(1) Effective period of appropriations. Unless otherwise provided appropriations shall become effective on July 1 of the fiscal year shown in the schedule under s. 20.005 and shall be expendable

64. LANG & SWAIN, *supra* note 60, at 4.

65. WIS. STAT. ANN § 16.47 (West, Westlaw through 2017 Act 6); LANG & SWAIN, *supra* note 60, at 6.

66. WIS. STAT. ANN § 13.093(1) (West, Westlaw through 2017 Act 6); LANG & SWAIN, *supra* note 60, at 6.

67. LANG & SWAIN, *supra* note 60, at 6-7; *see also Wisconsin Budget Toolkit, supra* note 58.

68. LANG & SWAIN, *supra* note 60, at 8.

69. LANG & SWAIN, *supra* note 60, at 10.

70. LANG & SWAIN, *supra* note 60, at 11.

71. LANG & SWAIN, *supra* note 60, at 12.

72. LANG & SWAIN, *supra* note 60, at 13.

until the following June 30. If the legislature does not amend or eliminate any existing appropriation on or before July 1 of the odd-numbered years, such existing appropriations provided for the previous fiscal year shall be in effect in the new fiscal year and all subsequent fiscal years until amended or eliminated by the legislature.⁷³

This provision allows the state agencies to continue to operate in the absence of a budget, although any appropriations made subsequently will be offset by the expenses already incurred.⁷⁴ Enacted in 1953,⁷⁵ the provision has led to a continuing of government functions despite a total of eleven budgets being passed after July 1 since 1977.⁷⁶ The latest date a new budget was enacted in Wisconsin was December 20, 1995.⁷⁷ The greatest consequence of a late budget is that new programs created after the prior biennial budget was enacted, and if there were no amendments made by the Governor or legislature mid-course to accommodate those programs,⁷⁸ then those programs will not be funded until the new biennial budget is passed.⁷⁹ Past these consequences, Wisconsin Legislative Fiscal Bureau Director Bob Lang says “No one in our state knows the difference between June 30 and July 1.”⁸⁰

However, examining the budget process as a whole provides a clearer picture as to why a default budget rule is so successful in Wisconsin, particularly when considering the biennium budget process and the concentrated power in the Joint Committee of Finance that heads off differences between the houses of the legislature. Although there have been no clear determinations as to the superiority of either the biennial or annual budget systems, the biennial budget process may give the executive branch reduced costs in salary and staff time as the longer period of time between budgeting periods

73. WIS. STAT. ANN. § 20.002(1) (West, Westlaw through 2017 Act 6).

74. LANG & SWAIN, *supra* note 60, at 20.

75. 1953 Wis. Sess. Laws 226.

76. Molly Beck, *July 1: What Happens If Lawmakers Miss Their Budget Deadline?*, WIS. ST. J. (June 29, 2015), http://host.madison.com/wsj/news/local/govt-and-politics/july-what-happens-if-lawmakers-miss-their-budget-deadline/article_b7888f6e-583d-5f74-a0e5-676f1bd268f6.html.

77. *Id.*

78. LANG & SWAIN, *supra* note 60, at 20-21 (“The budget may be modified by: (1) separate legislation authorizing an additional appropriation or eliminating or modifying an existing appropriation; (2) a budget adjustment bill (generally in the second annual session of the Legislature) to make changes to the adopted biennial budget; and (3) the authorization of limited emergency changes to existing appropriations at the request of state agencies with the approval of the Joint Committee on Finance.”).

79. Beck, *supra* note 76.

80. Beck, *supra* note 76.

allow staff to examine both the budget that has been implemented and prepare more extensively for the following biennium.⁸¹ A common complaint about biennial budgeting is their time-consuming nature and impreciseness in the face of state revenues dependent on sales and personal income taxes.⁸² However, Wisconsin's budgeting process does provide for course corrections in the second year of budgeting, correcting the two-year budget previously passed.⁸³ Wisconsin's default budget rule is thus implemented only if a two-year process of developing a budget fails to create a consensus among all parties as to an agreeable budget bill, and serves only to maintain the status quo as a means of giving the legislature more time to decide which changes will be made to the previous biennium's budget to be applied to the current fiscal biennium.⁸⁴

In considering the power structure of the budget process, the bill passed by the Joint Committee is a bicameral feat, subject to public and administrative testimony, and amendments to the bill are considered separately from the bill itself.⁸⁵ Composed of sixteen members, eight senators, and eight representatives, the members are appointed by the Speaker of the House and the President of the Senate, and the Committee's review of the "Governor's recommended budget is—because of both the complexity of the document and its significance on state government operations—the most extensive and involved review given any bill in a legislative session."⁸⁶ Indeed, the Joint Committee on Finance occupies a prominent place in the Wisconsin legislature, making the budget process streamlined as it deals with the more than one hundred agency reports filed by state agencies each biennium.⁸⁷ The Committee also is responsible for "a myriad of other duties and responsibilities to the Committee relating to the approval of executive branch agency actions, authority to make appropriations and position adjustments to numerous state agency appropriations, and the authority to approve scores of policies and actions by state agencies."⁸⁸ To help aid the Committee, an entire non-partisan Legislative Fiscal Bureau is devoted to the service of the Committee.⁸⁹ The power of the Joint Committee, its bicameral nature, and the non-partisan staffing can point to the intended objective of the committee, to

81. Ron Snell, *State Experiences with Annual and Biennial Budgeting*, NAT'L CONF. OF ST. LEGISLATURES (Apr. 2011), <http://www.ncsl.org/research/fiscal-policy/state-experiences-with-annual-and-biennial-budgeti.aspx>.

82. *Id.*

83. LANG & SWAIN, *supra* note 60, at 20-22.

84. *See* WIS. STAT. ANN. § 20.002(1) (West, Westlaw through 2017 Act 6).

85. LANG & SWAIN, *supra* note 60, at 11.

86. LANG & SWAIN, *supra* note 60, at 6.

87. LANG & SWAIN, *supra* note 60, at 6.

88. LANG & SWAIN, *supra* note 60, at 22.

89. LANG & SWAIN, *supra* note 60, at 22.

review and recommend a budget bill that can pass with or without amendment.⁹⁰ Therefore, at any point in time, sixteen members of Wisconsin's legislature are responsible for agreeing on a passable version of the budget for Wisconsin.

The history of the Joint Committee points to its efficacy among the other members of the legislature as in 1954, right after Wisconsin's default rule was passed, former Wisconsin State Budget Director E.C. Giessel pointed out that at the time the Joint Committee's version of the budget was usually passed without amendment as "[a]ll amendments from the floor of the senate or the assembly to the budget bill normally are killed on the floor. Consequently, in most instances, the budget drafted in the Joint Finance Committee is passed by the 2 houses of the legislature without change and referred to the Governor."⁹¹ That the default rule was enacted at a time when it was not necessarily needed can make the default rule be considered an accessory feature to the power of the Joint Committee on Finance, as the entire system is devised in a manner to encourage the passage of a budget bill.⁹² The default rule's long history, the possible effects of the biennial budgeting process, combined with the standing of the Joint Committee, with its features of encouraging communication between both houses of the legislators and creating a stand alone budget bill, are what make a default budget rule successful in Wisconsin.

B. RHODE ISLAND

Rhode Island has also enacted statute that provides for the continuation of the state funding in the event of a failure to pass a state budget, though the provisions are slightly different in comparison to Wisconsin. Putting the statute into context, Article IX Section 15 of the Constitution of the State of Rhode Island and Providence Plantations provides that "[t]he governor shall prepare and present to the general assembly an annual, consolidated operating and capital improvement state budget."⁹³ Rhode Island's legislature must pass a budget by a supermajority of two-thirds in order for the budget to become effective.⁹⁴ Rhode Island's statutes offer a greater explanation of Rhode Island's budget process, as the legislature annually appropriates money for

90. LANG & SWAIN, *supra* note 60, at 11.

91. E.C. Giessel, *The Plan and Development of Wisconsin's Budget*, in WIS. BLUEBOOK 79, 83 (Wis. 1954).

92. *See* 1953 Wis. Sess. Laws 226.

93. R.I. CONST. art. IX, § 15.

94. R.I. CONST. art. VI, § 11.

the state budget⁹⁵ and provides that by the third Thursday in January for sitting governors and by the first Thursday of February for newly inaugurated governors, the governor submits to the general assembly a budget that contains “a complete plan of estimated revenues and proposed expenditures, with a personnel supplement detailing the number and titles of positions of each agency and the estimates of personnel costs for the next fiscal year . . .”⁹⁶

After the governor submits a budget to the general assembly, it is sent to the House Finance Committee⁹⁷ in the House of Representatives,⁹⁸ which considers the bill in a number of subcommittee hearings that report their recommendations back to the full committee.⁹⁹ The Senate Finance Committee also considers the governor’s budget bill, simultaneously or after the bill has passed the House of Representatives.¹⁰⁰ Before final actions by the General Assembly, the Governor can offer supplements to the budget as amendments to the appropriation bill or bills.¹⁰¹ After passage by each house of the General Assembly, the Governor has the option to sign the bill into law, veto the bill, or allow the bill to become law without his signature after six days of no action.¹⁰² The General Assembly can overturn the Governor’s veto with a three-fifths vote in both houses.¹⁰³

In the event that a budget is not passed, Rhode Island has enacted a statutory provision to prevent government shutdown, providing:

In an emergency caused by a failure of the general assembly to pass the annual appropriation bill, the same amounts appropriated in the previous fiscal year shall be available for each department and di-

95. 35 R.I. GEN. LAWS ANN. § 35-3-2 (West, Westlaw through Chapter 542 of the Jan. 2016 Sess.).

96. 35 R.I. GEN. LAWS ANN. § 35-3-7(a) (West, Westlaw through Chapter 542 of the Jan. 2016 Sess.).

97. R.I. OFFICE OF MGMT. & BUDGET, STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS BUDGET FISCAL YEAR 2017 EXECUTIVE SUMMARY: APPENDIX G, at G-6, http://www.omb.ri.gov/documents/Prior%20Year%20Budgets/Operating%20Budget%202017/ExecutiveSummary/14_Appendix%20G%20The%20Budget%20Process.pdf.

98. 35 R.I. GEN. LAWS ANN. § 35-3-9 (West, Westlaw through Chapter 542 of the Jan. 2016 Sess.).

99. R.I. OFFICE OF MGMT. & BUDGET, *supra* note 97, at G-5.

100. 35 R.I. GEN. LAWS ANN. § 35-3-10 (West, Westlaw through Chapter 542 of the Jan. 2016 Sess.); *see also* R.I. OFFICE OF MGMT. & BUDGET, *supra* note 97, at G-5.

101. 35 R.I. GEN. LAWS ANN. § 35-3-12 (West, Westlaw through Chapter 542 of the Jan. 2016 Sess.).

102. R.I. OFFICE OF MGMT. & BUDGET, *supra* note 97.

103. R.I. OFFICE OF MGMT. & BUDGET, *supra* note 97.

vision thereof, subject to monthly or quarterly allotments, in accordance with seasonal requirements, as determined by the budget officer; provided, that expenditures for payment of bonded indebtedness of the state and interest thereon shall be in such amounts as may be required, regardless of whether or not an annual appropriation bill is passed by the general assembly.¹⁰⁴

The provision was enacted as part of a package in the Administrative Code Act in 1935, as the Rhode Island Legislature was working to “organize the State’s power structure into departments and assign certain functional tasks and responsibilities to those departments.”¹⁰⁵ Despite the provision’s long history, it has been rarely invoked, since the most recent impasses occurred in 1992 and 1993, with each lasting about two weeks,¹⁰⁶ and a late budget in Fiscal Year 2004.¹⁰⁷ This lack of use of the default budget rule may be the result of the annual budgeting process that takes place in Rhode Island,¹⁰⁸ the slightly smaller General Assembly,¹⁰⁹ but most likely is correlative with the fact that the Rhode Island General Assembly has been primarily and consistently controlled by the Democratic Party since 1960.¹¹⁰ This wide margin meets Rhode Island’s supermajority two-thirds voting requirement for passing the state budget,¹¹¹ making impasses unlikely because there is no opposition.

C. OTHER STATES

There are multiple examples of punitive measures if the legislature fails to pass the budget. In Washington state, a legislator could be found guilty of a misdemeanor if the legislature does not pass a budget thirty days before the

104. 35 R.I. GEN. LAWS ANN. § 35-3-19 (West, Westlaw through Chapter 542 of the Jan. 2016 Sess.).

105. Rhode Island Council 94 v. Carcieri, C.A. No. P.C. 08–5073 (R.I. Super. 2008), <https://www.courts.ri.gov/Courts/DecisionsOrders/carcieri-final.pdf>.

106. SULLIVAN, *supra* note 10, at 8.

107. *Late State Budgets*, *supra* note 45.

108. Snell, *supra* note 81.

109. R.I. GEN. ASSEMBLY, <http://www.rilin.state.ri.us/Pages/Default.aspx> (last visited Mar. 21, 2017).

110. Philip Bump, *How Your State’s Politics Have Shifted Over the Years*, In 49 Charts, WASH. POST (Sept. 13, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/09/11/49-charts-that-tell-the-partisan-history-of-state-legislatures/?utm_term=.cb4b98fa89a6.

111. R.I. CONST. art. VI, § 11; MacKellar, *supra* note 33.

new fiscal biennium¹¹² if not for an opinion from the Washington Attorney General.¹¹³ New York and California legislators can suffer withholding of their salaries until the passage of the state budget. In New York, the law provides:

If legislative passage of the budget as defined in subdivision three of this section has not occurred prior to the first day of any fiscal year, the net amount of any such bi-weekly salary installment payments to be paid on or after such day shall be withheld and not paid until such legislative passage of the budget has occurred whereupon bi-weekly salary installment payments shall resume and an amount equal to the accrued, withheld and unpaid installments shall be promptly paid to each member.¹¹⁴

This statutory provision has been upheld by New York state's highest court, the Court of Appeals of New York, which found that the statute didn't violate the separation of powers but instead was "the adoption of a regimen and incentive predicated upon one Branch's own resonance to a more efficacious discharge of its allocated and collective constitutional duties"¹¹⁵ The legislature was then regulating itself by passing such language.

Similarly, California has a provision in its Constitution that permits the withholding of a legislator's pay if a budget is not passed on time.¹¹⁶ The provision holds that,

(h) Notwithstanding any other provision of law or of this Constitution, . . . in any year in which the budget bill is not passed by the Legislature by midnight on June 15, there shall be no appropriation from the current budget or future budget to pay any salary or reimbursement for travel or living expenses for Members of the Legislature during any

112. WASH. REV. CODE ANN. § 43.88.080 (West, Westlaw through 2016 Reg. & Special Sess. & Laws 2017, chs. 1 to 4 of the Washington legislature); WASH. REV. CODE ANN. § 43.88.270 (West, Westlaw through 2016 Reg. & Special Sess. & Laws 2017, Chs. 1 to 4 of the Wash. Leg.).

113. Legislature-Appropriations-Crimes-Failure of Legislature to Comply with RCW 43.88.080, Op. Att'y Gen., AGLO No. 21 (1979).

114. N.Y. LEGIS. LAW § 5 (West, Westlaw through L.2017, Ch. 1-23).

115. *Cohen v. State*, 720 N.E.2d 850, 857 (N.Y. 1999).

116. CAL. CONST. art. IV, § 12.

regular or special session for the period from midnight on June 15 until the day that the budget bill is presented to the Governor. No salary or reimbursement for travel or living expenses forfeited pursuant to this subdivision shall be paid retroactively.¹¹⁷

The Constitutional provision was enacted as part of a ballot initiative in 2010 and raised an issue in 2011 when the State Controller withheld pay when the legislature passed a budget that was \$2 billion out of balance due to unrealized and unimplemented taxes.¹¹⁸ As part of the interpretation of the constitutional provision, the Third District California Court of Appeal held that the State Controller had no basis to audit the passed budget that depended on yet to be realized tax revenue and had no authority to withhold legislator pay on that basis.¹¹⁹

Yet other states have considered continuing appropriation procedures¹²⁰ as divisiveness, time constraints, and the amount of money involved in the budgeting process has made the prospect of a legislature passing a state budget a daunting concept.¹²¹ Minnesota has considered a budget default rule at least fifteen times from 2005 onward, with bills drafted by both political parties.¹²² All the bills were similar to Wisconsin's law or were a more involved process, and all proposed to continue appropriations at the current rate in the event of a budget impasse, but none of the bills advanced into law.¹²³ There have also been calls for a default budget rule in Connecticut as the state deals with a complicated web of executive orders, judicial rulings, and current statutory provisions that a default budget rule could potentially streamline.¹²⁴

117. *Id.*

118. Jim Christie, *No Budget, No Pay is Word to California Lawmakers*, REUTERS (June 21, 2011, 5:31 PM), <http://www.reuters.com/article/us-economy-california-budget-pay-idUSTRE75K6RI20110621>.

119. *Steinberg v. Chiang*, 167 Cal. Rptr. 3d 249, 255-57 (Cal. Ct. App. 2014).

120. *See Louk & Gamage*, *supra* note 4, at 241.

121. Martel et al., *supra* note 31, at 27.

122. SULLIVAN, *supra* note 10.

123. SULLIVAN, *supra* note 10, at 9.

124. Shelley Geballe, *When the State Budget is Late: Establishing Clearer Guidelines for Connecticut*, CONN. VOICES FOR CHILD. 2 (Oct. 2009), <http://www.ctvoices.org/sites/default/files/bud09statebudgetlate.pdf> ("These changes would reduce the confusion and uncertainty in the operation and delivery of state-funded services that result from current law and practice, assure greater predictability for those reliant on state funding, and assure a closer adherence to the constitutionally-mandated separation of powers between the General Assembly and the Governor than currently exists in the absence of such a statute.").

IV. ILLINOIS

Illinois has operated without a state budget for two years as the Democrat controlled General Assembly remains at odds with the Republican Governor.¹²⁵ The stopgap measures that have been implemented since the start of the budget impasse have served to act as an unofficial default budget provision, and serve as guides to what a default budget provision may look like in the future.

A. THE ILLINOIS BUDGETING PROCESS

Illinois has had four Constitutions, enacted respectively in 1818, 1848, 1870, and 1970, with each attempting to create a perfect cornerstone for the state while simultaneously adjusting provisions for policy concerns of the day and the powers of those in office.¹²⁶ At the 1969 Constitutional Convention, the state's budget implementation procedures were not considered to be a divisive issue.¹²⁷

As for budget creation and implementation, Article VIII Section Two of the Illinois Constitution requires the Governor to prepare and submit to the legislature a budget every year for the state.¹²⁸ The proposed budget must include the estimated balance of funds available for appropriation at the beginning of the fiscal year, and also the expected receipts and planned expenditures for the year, requiring the proposed expenditures do not exceed the estimated funds available for the fiscal year.¹²⁹ The next step under article VIII section 2 of the Constitution is that the General Assembly actually make appropriations for all expenditures of the public funds by the state, and that those appropriations for a fiscal year would not exceed funds estimated by the General Assembly for the fiscal year.¹³⁰ In this manner, it was considered that the state of Illinois would have an annual balanced budget under the 1970 Constitution.¹³¹ According to historians, while the Finance Article of the proposed constitution was revolutionary, there was no real opposition at the convention.¹³² Instead, the convention was more focused upon taxation and debt, as the delegates dealt with whether or not to eliminate the personal property

125. Amanda Vinicky, *'Grand Bargain' on Budget Hits Grand Thud*, CHI. TONIGHT (Mar. 1, 2017, 8:47 PM), <http://chicagotonight.wttw.com/2017/03/01/grand-bargain-budget-hits-grand-thud>.

126. See generally ANN M. LOUSIN, *THE ILLINOIS STATE CONSTITUTION* (Oxford Univ. Press ed. 2011).

127. *Id.* at 34.

128. ILL. CONST. art. VIII, § 2(a).

129. ILL. CONST. art. VIII, § 2(a).

130. ILL. CONST. art. VIII, § 2(b).

131. LOUSIN, *supra* note 126, at 34.

132. LOUSIN, *supra* note 126, at 34.

tax as part of state revenues.¹³³ Thus the actual constitutional provisions of the State budgeting process are relatively straight forward, and have been subsequently supplemented by statute as to times and provisions included in the budget the governor submits to the legislature.¹³⁴ Under statute the Governor must include provisions on whether there will be budget surpluses or deficits each year.¹³⁵ Despite the numerous provisions about what must be presented to the Legislature, there is no rule dealing with the absence of a budget.

Article VIII section 2 of the Illinois Constitution has been interpreted by the First District Appellate Court of Illinois to preempt the governor and other state officials from refusing to spend funds appropriated by the General Assembly.¹³⁶ However, the First District's decision was overturned by the Illinois Supreme Court on mootness grounds on appeal which makes the question of impoundment yet to be determined.¹³⁷

B. COURT ORDERS AND STOP GAP BUDGETS

In the absence of a continuing appropriation rule or any other default budget procedures, Illinois has implemented several measures that could be argued to be doing the job of a default budget rule. Illinois has made do with a continuing appropriation court order¹³⁸ and a stop-gap budget¹³⁹ to keep the state running, becoming essentially a tailored non-punitive default budget rule.¹⁴⁰ In 2015, to ensure that individuals employed by the state would be paid despite the absence of a budget, several state employee unions filed a lawsuit against the State of Illinois¹⁴¹ and then-Comptroller Leslie Geissler-Munger seeking warrants to compel the Comptroller to issue Union members paychecks.¹⁴² The Comptroller took the position that all state employees should be paid, and that she was unable to issue paychecks without a court

133. LOUSIN, *supra* note 126, at 34.

134. See ILL. CONST. art. VIII, § 2; 15 ILL. COMP. STAT. ANN. 20/50 (West, Westlaw through P.A. 99-983 of the 2016 Reg. Sess.).

135. 15 ILL. COMP. STAT. ANN. 20/50-10 (West, Westlaw through P.A. 99-983 of the 2016 Reg. Sess.).

136. *W. Side Org. Health Servs. Corp. v. Thompson*, 391 N.E.2d 392 (Ill. App. Ct. 1979), *rev'd on other grounds*, 404 N.E.2d 208 (Ill. 1980).

137. See *W. Side Org. Health Servs. Corp. v. Thompson*, 404 N.E.2d 208, 210-11 (Ill. 1980).

138. *Am. Fed'n of State v. State*, 2015 IL App (5th) 150277-U.

139. S.B. 2047, 99th Gen. Assemb. (Ill. 2016).

140. See generally Ayres & Gertner, *supra* note 13.

141. *Am. Fed'n of State*, 2015 IL App (5th) 150277-U, ¶ 4. *But cf.* *State v. Am. Fed'n of State*, 2016 IL 118422, 51 N.E.3d 738.

142. *Am. Fed'n of State*, 2015 IL App (5th) 150277-U, ¶¶ 2-4.

order compelling her office to issue those paychecks.¹⁴³ The trial court entered a temporary restraining order that directed the Comptroller to continue to pay State employees at the regular amount of pay.¹⁴⁴

Illinois Attorney General Lisa Madigan appealed the temporary restraining order, arguing that the trial court lacked jurisdiction, that the trial court abused its discretion as a Cook County court entered a conflicting order, the requirements of a temporary restraining order were not met, and that the court committed reversible error by allowing the Comptroller to be represented by lawyers other than the Illinois Attorney General.¹⁴⁵ The Comptroller filed an emergency motion to dismiss the appeal, arguing that the Attorney General and the Comptroller had differing views on the temporary restraining order, and the Attorney General had no authority to bring the matter on behalf of the Comptroller.¹⁴⁶ The Fifth District Appellate Court held that the Attorney General had the authority to pursue the appeal as the State's chief legal officer, dismissing the Comptroller's motion.¹⁴⁷ The Court also noted that "[t]here is 'no clear-cut definitive answer' to the issue of the proper procedure to follow when a public official disagrees with the attorney whose statutory duty it is to represent the official"¹⁴⁸ and that courts "have approved the appointment of independent counsel as a solution to this problem."¹⁴⁹

Dealing with the remaining claims, the Fifth District went on to hold that the trial court had jurisdiction and that it was appropriate for the St. Clair County trial court to rule on the matter despite a conflicting Cook County ruling.¹⁵⁰ Further, the Fifth District found that State employees possess "a protectable right, will suffer irreparable harm without the injunction, and have no adequate remedy at law"¹⁵¹ as State employees cannot be expected to bring multiple lawsuits to protect their rights as the budget crisis drags on.¹⁵² The Court noted that the Attorney General had not argued that the State did not have the funds to pay State employees, but rather that the State would be harmed by paying employee salaries before an appropriation bill had passed.¹⁵³ The Fifth District disagreed, saying that to adhere to the State's

143. *Id.* at ¶ 2.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Am. Fed'n of State*, 2015 IL App (5th) 150277-U, ¶ 15.

148. *Id.* at ¶ 37 (quoting *Suburban Cook Cty. Reg'l Office of Educ. v. Cook Cty. Bd.*, 667 N.E.2d 1064 (Ill. App. Ct. 1996)).

149. *Id.* at ¶ 37 (citing first *People ex rel. Sklodowski v. State*, 642 N.E.2d 1180 (Ill. 1994); then citing *Suburban Cook Cty. Reg'l Office of Educ. v. Cook Cty. Bd.*, 667 N.E.2d 1064 (Ill. App. Ct. 1996)).

150. *Id.* at ¶ 19-33.

151. *Id.* at ¶ 21.

152. *Am. Fed'n of State*, 2015 IL App (5th) 150277-U, ¶ 21.

153. *Id.* at ¶ 35.

position and wait for an appropriations bill would harm State employees' families and "would likely impose significant burdens on the State as well. . . . Further, if the budget impasse continues indefinitely and the Comptroller is not allowed to issue paychecks, the State may become unable to provide crucial governmental services."¹⁵⁴ The Fifth District held that there was no abuse in discretion in entering the temporary restraining order, but since it is an emergency measure of limited duration, and the temporary restraining order at issue had no expiration date, and remanded the matter to the trial court with instructions to set a date for a hearing on a preliminary injunction.¹⁵⁵ Later, the temporary restraining order was converted to a preliminary injunction on August 13, 2015.¹⁵⁶

It should be noted that Attorney General Lisa Madigan filed a Petition to Intervene and a Motion to Present Additional Authority and to Dissolve Preliminary Injunction, asking that the injunction be terminated as of February 28, 2017.¹⁵⁷ The Attorney General argues in the motion that the Court's order "has removed any imperative for the Executive and Legislative branches to fulfill their basic constitutional obligations and resolve their budget impasse."¹⁵⁸ Instead, the Attorney General says that both branches depended on the court order to continue operating, as Public Act 99-0524, also known as the stopgap budget, did not appropriate any money for state employee salaries.¹⁵⁹ As explanation for moving forward with this motion after almost two years, the Attorney General points to the Illinois Supreme Court's ruling in *State v. Am. Fed'n of State*, 2016 IL 118422, which held that state employee wages are "always contingent on legislative funding"¹⁶⁰ and that the wage increase at issue negotiated under the collective bargaining agreement was subject to an appropriations bill from the General Assembly.¹⁶¹ Although the majority stated that its decision applied only to the contract before the court and did not create uncertainty as to the State's obligations under its contracts,¹⁶² the Attorney General uses the decision as the first

154. *Id.* at ¶ 36.

155. *Id.* at ¶ 39.

156. Motion to Present Additional Authority & to Dissolve Preliminary Injunction at 4, *Am. Fed'n of State v. Rauner*, No. 15 CH 475 (Ill. Cir. Ct. 2015), https://drive.google.com/file/d/0B_n6YwzWTgysVWRiOVotZ3I4TW8/view.

157. *AG Lisa Madigan Files Motion to Stop Paying State Employees Without Budget*, ABC 7 NEWS (Jan. 26, 2017), <http://abc7chicago.com/news/ag-lisa-madigan-files-motion-to-stop-paying-state-employees-without-budget/1723203/>.

158. Motion to Present Additional Authority & to Dissolve Preliminary Injunction at 2, *Am. Fed'n of State v. Rauner*, No. 15 CH 475 (Ill. Cir. Ct. 2015), https://drive.google.com/file/d/0B_n6YwzWTgysVWRiOVotZ3I4TW8/view.

159. *Id.*

160. *State v. State v. Am. Fed'n of State*, 2016 IL 118422, ¶ 52, 51 N.E.3d 738, 749.

161. *Id.* at ¶ 56.

162. *Id.* at ¶ 54.

argument in her Motion to Dissolve the Preliminary Injunction.¹⁶³ However, St. Clair County Circuit Court Judge Robert LeChien rejected Attorney General Madigan's Motion to Rescind the Order in February 2017, and state employees continue to be paid.¹⁶⁴

The other piece of directed funding that kept the state limping through 2016 is the stopgap budget¹⁶⁵ that permitted public schools to open in the fall, continued road construction projects, and paid down debts to social service agencies.¹⁶⁶ The bill was criticized as draining Illinois's rainy day fund,¹⁶⁷ and as being out of balance with the expected revenues.¹⁶⁸ Unanimously passed in the Senate,¹⁶⁹ and almost unanimously passed in the House of Representatives,¹⁷⁰ the stopgap budget expired on December 31, 2016, and once again Illinois was left without a budget.¹⁷¹ It should be noted that there are other continuing appropriations under Illinois statute that are not subject to appropriations by the state budget, like pension payments,¹⁷² bonds and debt,¹⁷³ guarantees on loans to farmers, agribusinesses, and veteran-owned

163. Motion to Present Additional Authority & to Dissolve Preliminary Injunction, *supra* note 156, at 6.

164. Sue Britt, *Update-1 Judge Orders Illinois to Continue to Pay State Workers*, REUTERS (Feb. 16, 2017, 5:43 PM), <http://www.reuters.com/article/illinois-budget-idUSL1N1G1251>.

165. S.B. 2047, 99th Gen. Assemb. (Ill. 2016).

166. Monique Garcia et al., *Rauner Signs Stopgap Budget, School Funding Bill – But Relief From Stalemate Proves Temporary*, CHI. TRIB. (June 30, 2016, 8:54 PM), <http://www.chicagotribune.com/news/local/politics/ct-illinois-budget-impasse-madigan-rauner-met-0701-20160630-story.html>.

167. Sara Burnett, *Illinois Drains State's Savings Account Due to Budget Crisis*, ST. LOUIS POST-DISPATCH (Aug. 14, 2016), http://www.stltoday.com/news/local/illinois/illinois-drains-state-s-savings-account-due-to-budget-crisis/article_fdbe456b-fc18-5c24-81d7-d95e38448a0a.html.

168. Garcia et al., *supra* note 166.

169. S.B. 2047, 99th Gen. Assemb. (Ill. 2016).

170. *Id.*

171. Doug Finke, *Illinois Enters 2017 With No State Budget*, ST. J. REG., <http://www.sj-r.com/news/20161231/illinois-enters-2017-with-no-state-budget> (last updated Dec. 31, 2016, 7:49 PM).

172. 40 ILL. COMP. STAT. ANN. 15/1 (West, Westlaw through P.A. 99-983 of the 2016 Reg. Sess.).

173. 30 ILL. COMP. STAT. ANN. 440/8 (West, Westlaw through P.A. 99-983 of the 2016 Reg. Sess.); 30 ILL. COMP. STAT. ANN. 355/13 (West, Westlaw through P.A. 99-983 of the 2016 Reg. Sess.).

small businesses¹⁷⁴ and revolving loan programs for ambulances,¹⁷⁵ fire stations,¹⁷⁶ and fire trucks.¹⁷⁷ Together with the court order, these measures have acted as default appropriations that have kept the state operational.

Punitive measures against the members of the legislature have been limited to the late issuance of members' paychecks by Former Comptroller Leslie Geissler-Munger.¹⁷⁸ This means that Illinois legislators have not received payment for salary since June of 2016,¹⁷⁹ despite Article IV Section 11 of the Illinois Constitution providing that legislators "shall receive a salary and allowances as provided by law, but changes in the salary of a member shall not take effect during the term for which he has been elected."¹⁸⁰ Further, in 2014, the majority leaders ensured that legislator and judges pay would be a continuing appropriation under Public Act 98-0682,¹⁸¹ meaning legislator salaries would be paid with or without the passage of a state budget. These measures taken together provide that statutorily, legislators must be paid whether the General Assembly passes a budget or not.

The Illinois Supreme Court has weighed in in the past on attempted changes to state employee salaries in *Jorgensen v. Blagojevich*.¹⁸² The issue in *Jorgensen* involved a class action by Illinois judges against Governor Blagojevich to determine if the Governor and General Assembly violated the Illinois Constitution by not implementing cost of living adjustments (COLAs) to judicial salaries.¹⁸³ The Supreme Court invoked the separation of

174. 30 ILL. COMP. STAT. ANN. 355/13 (West, Westlaw through P.A. 99-983 of the 2016 Reg. Sess.); 20 ILL. COMP. STAT. ANN. 3501/830-35 (West, Westlaw through P.A. 99-983 of the 2016 Reg. Sess.); 20 ILL. COMP. STAT. ANN. 3501/830-45 (West, Westlaw through P.A. 99-983 of the 2016 Reg. Sess.); 20 ILL. COMP. STAT. ANN. 3501/835-20 (West, Westlaw through P.A. 99-983 of the 2016 Reg. Sess.).

175. 20 ILL. COMP. STAT. ANN. 3501/825-85 (West, Westlaw through P.A. 99-983 of the 2016 Reg. Sess.).

176. 20 ILL. COMP. STAT. ANN. 3501/825-81 (West, Westlaw through P.A. 99-983 of the 2016 Reg. Sess.).

177. 20 ILL. COMP. STAT. ANN. 3501/825-80 (West, Westlaw through P.A. 99-983 of the 2016 Reg. Sess.).

178. Kim Geiger & Monique Garcia, *Comptroller Says Illinois Lawmakers Will Have to Get in a Long Line to Get Paid*, CHI. TRIB. (April 18, 2016, 6:58 AM), <http://www.chicagotribune.com/news/local/politics/ct-illinois-comptroller-lawmaker-paychecks-met-0418-20160417-story.html>.

179. Complaint for a Declaratory Judgment and Writ of Mandamus at 2, *People ex rel. Welch v. Munger*, No. 2016-CH-15642 (Ill. Cir. Ct. Dec. 2, 2016), https://www.scribd.com/document/333039895/Illinois-legislators-pay-lawsuit#from_embed; see also Stefano Esposito & Tina Sfondeles, *Democratic Legislators Sue State Over Not Getting Paid*, CHI. SUN TIMES (Dec. 2, 2016, 7:32 PM), <http://chicago.suntimes.com/politics/group-of-illinois-legislators-sue-state-over-not-getting-paid/>.

180. ILL. CONST. art IV, § 11.

181. 2014 Ill. Laws 1591.

182. See *Jorgensen v. Blagojevich*, 811 N.E.2d 652 (Ill. 2004).

183. *Id.* at 654.

powers doctrine of the Illinois Constitution,¹⁸⁴ as the court stated “[f]or checks and balances to work properly in protecting individual liberty, each of the three branches of government must be kept free from the control or coercive influence of the other branches.”¹⁸⁵ The court then went on to find that even in an emergency, reducing judicial salaries was disallowed as “any departure from the law is impermissible unless justification for that departure is found within the law itself. Exigent circumstances are not enough. ‘Neither the legislature nor any executive or judicial officer may disregard the provisions of the constitution even in case of a great emergency.’”¹⁸⁶

Former Comptroller, current Deputy Governor, Leslie Geissler-Munger acknowledged that her plan to move legislator paychecks to the bottom of the heap of unpaid bills in the state was “pocketbook political pressure.”¹⁸⁷ Yet this method may have been somewhat effective in getting the legislature’s attention, as it prompted six State Representatives to file a Complaint for Declaratory Judgment and Writ of Mandamus asking the court to find the Comptroller has a nondiscretionary duty to pay monthly salaries to the Illinois General Assembly.¹⁸⁸

V. PROBLEMS WITH DEFAULT RULES

Default rules present their own set of challenges, as by their very nature they can have implications on negotiation, can cause a continuation of the issues that were the catalyst for their necessity, and can be argued to supplant natural legislative authority in the distribution of funds.

A. DEFAULT RULES AND NEGOTIATION

Another conceptualization of a default rule in government is as a Best Alternative to a Negotiated Agreement (BATNA), as formulated by Roger Fisher and William Ury of the Harvard Negotiation Project.¹⁸⁹ Fisher and Ury note that when parties negotiate under the premise of a “bottom line,” the bottom line limits the benefits of learned information during negotiation, as “by definition, a bottom line is a position that is not to be changed. To that extent you have shut your ears, deciding in advance that nothing the other

184. ILL. CONST. art. II, § 1.

185. *Blagojevich*, 811 N.E.2d at 660.

186. *Id.* at 663 (quoting *People ex rel. Lyle v. City of Chicago*, 195 N.E. 451, 453 (Ill. 1935)).

187. Geiger & Garcia, *supra* note 178.

188. Complaint for a Declaratory Judgment and Writ of Mandamus, *supra* note 179, at 2; *see also* Esposito & Sfondeles, *supra* note 179.

189. ROGER FISHER, WILLIAM URY & BRUCE PATTON, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 101-08 (3d ed. 2011).

party says could cause you to raise or lower that bottom line.”¹⁹⁰ This prevents creative solutions that would “reconcile differing interests in a way more advantageous for both you and them.”¹⁹¹ Bottom line negotiations lead to trench warfare that may prevent the acceptance of a bad deal, but can also prevent a wise agreement.¹⁹²

Instead, a BATNA is the alternative “results that you can obtain without negotiating *That* is the standard against which any proposed agreement should be measured.”¹⁹³ By knowing the consequences that will occur in the event of a failure in negotiations, the parties are better prepared in the event it does happen.¹⁹⁴ Ury and Fisher point out that “the relative negotiating power of two parties depends primarily upon how attractive to each is the option of not reaching an agreement.”¹⁹⁵ In ordinary appropriations settings,

the absence of a default rule for budgets usually functions as a strong form of penalty-default rule However, the absence of a default budget can function as a *distorted* penalty-default rule when only one party is highly averse to negotiation failure, because the default outcome penalizes only that party. The threat of government shutdowns gives significant leverage to holdouts.¹⁹⁶

Essentially, a government shutdown is not necessarily an adverse event to the entirety of the legislature like it may be for the public. The default rules can cure this by not allowing holdouts to have as much leverage in a negotiation that must take place and have a successful outcome.¹⁹⁷

The problems that arise are the bargainers who “[r]ealize the potential of alternatives to agreement.”¹⁹⁸ In the evaluation of all sides’ alternatives, a party may consider all negotiated possibilities to be inferior to an alternative course of conduct that does not involve negotiation.¹⁹⁹ Therefore, the problem in drafting a budget is that a party becomes reluctant to negotiate if the default budget rule already accomplishes their objectives without needing to

190. *Id.* at 100.

191. *Id.* at 101.

192. *Id.*

193. FISHER ET AL., *supra* note 189, at 102.

194. *Id.* at 104.

195. FISHER ET AL., *supra* note 189, at 106.

196. Louk & Gamage, *supra* note 4, at 198-99 (emphasis in original).

197. Louk & Gamage, *supra* note 4, at 199.

198. David A. Lax & James K. Sebenius, *The Power of Alternatives or the Limits to Negotiation*, 1 NEGOT. J. 163, 166 (1985).

199. *Id.* at 169.

negotiate.²⁰⁰ However, the experiences in Wisconsin and Rhode Island may serve as a rebuttal against this argument, that despite a continuing appropriation at the contemporaneous level of funding, both states continue to pass budget bills despite the existence of their default budget rules.²⁰¹ The fact that a lack of a budget rule has not prompted the Illinois legislature to act any faster is a corollary to this argument, though Attorney General Madigan has argued continuing state employee salaries has impeded legislative progress.²⁰² However, the judicial decisions supporting the injunction identify a policy in the state²⁰³ and the most recent failure in passing a grand compromise of a budget was related to positional bargaining and the precarious nature of the negotiated agreement.²⁰⁴ The division between the parties may be exacerbated by a default budget rule, but the benefits of a default rule would still prevent many of the consequences of the failure in negotiations and thereby the consequences of the budget impasse.

To combat a reluctant opposing party, the better course may be finding a better way to negotiate. Fisher and Ury point out that when convincing the other side of the merits of your side in principled negotiation fails, then the party has one of two options, either sidestep and deflect any attacks on your position or involve a third party to refocus the parties on the goals of negotiation.²⁰⁵ By sidestepping and deflecting attacks on your position, the party looks behind motives, invites criticism, and recasts attacks on its position as attacks on the problem, using silence as a means of pressure.²⁰⁶ In the event that this method also fails, then a third party is called in to refocus the parties by drafting an agreement no person's ego is committed to, and the authors suggest "a natural third party may be a participant whose interests on this issue lie more in effecting an agreement than in affecting the particular terms."²⁰⁷ That negotiation results in a successfully passed budget which will explicitly benefit the citizens of the state more than either the default rule or the government shutdown should be the goal of the legislature, but default rules offer a backup where human frailties result in positional bargaining. As in Wisconsin, the default rule can even act as an agreement that no one has

200. SULLIVAN, *supra* note 10, at 15; *see also* Jessica Tollestrup, *Automatic Continuing Resolutions: Background and Overview of Recent Proposals*, CONG. RES. SERV. 9-10 (Aug. 20, 2015), <https://fas.org/sgp/crs/misc/R41948.pdf>.

201. SULLIVAN, *supra* note 10.

202. *See AG Lisa Madigan Files Motion to Stop Paying State Employees Without Budget*, *supra* note 157; *Motion to Present Additional Authority & to Dissolve Preliminary Injunction*, *supra* note 156, at 2.

203. *See* Am. Fed'n of State v. State, 2015 IL App (5th) 150277-U; *see also* Jorgensen v. Blagojevich, 811 N.E.2d 652 (Ill. 2004).

204. Vinicky, *supra* note 125.

205. FISHER ET AL., *supra* note 189, at 109-10.

206. FISHER ET AL., *supra* note 189, at 111-14.

207. FISHER ET AL., *supra* note 189, at 117-19.

agreed to, but can be changed according to the parties' desires during its implementation, as expenditures already incurred offset the appropriations eventually passed.²⁰⁸ Finally, the enactment of punitive default rules exemplified in New York and California may offer encouragement to stubborn holdouts.²⁰⁹

B. ENGRAINING BUDGET IMBALANCES

Default budget rules can take shape in numerous ways, and as exhibited by the Wisconsin statute²¹⁰ and the Rhode Island statute,²¹¹ can continue funding at current levels regardless of the fiscal condition of the state. However, default rules can also take the shape of funding programs at the current rate, permitting entitlement programs to increase or decrease in cost.²¹² A default rule can also fund at the current operating level, which provides the amount required to maintain the program's activity level from the prior year but also leaves entitlement programs to increase or decrease in cost.²¹³ Alternatively, the budget default rule can provide for restrictive budgeting, which appropriates only a percentage of the prior fiscal year's operating budget to the new fiscal year's budget.²¹⁴ The scope of all these provisions can affect the amounts appropriated by the default rule, and in that way may serve to continue increasing a deficit or imbalance regardless of whether it is in the best interest of the state, especially if an impasse lasts as long as it has in Illinois.²¹⁵

Illinois's fiscal health is rather poor according to Thomas Walstrum, a business economist writing for the Federal Reserve Bank of Chicago.²¹⁶ According to Walstrum's analysis, Illinois was a relatively low-expenditure, low-revenue state; but starting in the mid-1990s, Illinois began spending a greater percentage of its revenues than the average of U.S. states.²¹⁷ Further, Walstrum notes that the budget has overspent its revenues since the mid-1980s, making the concept of a balanced budget a fiction while the state has

208. LANG & SWAIN, *supra* note 60, at 6-7; *see also*, *Wisconsin Budget Toolkit*, *supra* note 58.

209. CAL. CONST. art. IV, § 12; N.Y. LEGIS. LAW § 5 (West, Westlaw through L.2017, Ch. 1-23).

210. WIS. STAT. ANN. § 20.002(1) (West, Westlaw through 2017 Act 6).

211. 35 R.I. GEN. LAWS ANN. § 35-3-19 (West, Westlaw through Chapter 542 of the Jan. 2016 Sess.).

212. SULLIVAN, *supra* note 10, at 5.

213. SULLIVAN, *supra* note 10, at 5.

214. SULLIVAN, *supra* note 10, at 5.

215. SULLIVAN, *supra* note 10, at 9-10.

216. Walstrum, *supra* note 7.

217. Walstrum, *supra* note 7.

accumulated debt.²¹⁸ The overspending largely came from the change in pension liabilities as well as employee-retirement, with some spending occurring at a general debt level.²¹⁹ With this in mind, Walstrum concludes that the legislature was able to make such moves in spending by underfunding certain projects and delaying paying off bills, making the current crisis simply the conclusion of twenty years of poor fiscal performance.²²⁰ This has all happened despite the numerous provisions involving a balanced budget,²²¹ not least among those is the Illinois Constitution provision that states that appropriations made by the General Assembly cannot exceed the estimated available funds.²²²

The construction of the default rule becomes a key factor in the determination of whether it will be a successful alternative to a negotiated budget, and whether it serves to reinforce the holdouts noted above that would rather allow the continuation of the default rule rather than continue negotiations.²²³ The default measures that have been enacted this far have funded primary education at full year funding levels, and several other spending categories at fifty percent funding from the full Fiscal Year 2015 budget.²²⁴ A restrictive budgeting rule that fully funds primary education and funds higher education and those other spending categories at fifty percent would maintain the status quo that has been worked out during this impasse. However, maintaining the status quo by fully funding all state spending may not be the wisest course, as the University of Illinois Fiscal Futures Project has projected that continuing spending at fully funded Fiscal Year 2015 levels without changes in tax incomes or reductions in spending can lead to an annual budget deficit of more than \$20 billion by 2027.²²⁵ Instead, it has recommended a combination of austerity measures and tax increases that are part of a plan that is spread out over a number of years to correct Illinois's fiscal health.²²⁶ Therefore, a default budget rule that continues appropriations at a reduced or limited level may serve the best interests by serving as an impetus to the negotiating holdouts without doing further long-term damage to the state by digging a deeper hole.

218. Walstrum, *supra* note 7.

219. Walstrum, *supra* note 7.

220. Walstrum, *supra* note 7.

221. *See supra* Section IV. A.

222. ILL. CONST. art. VIII, § 2.

223. *See Louk & Gamage, supra* note 4, at 241.

224. Dye & Merriman, *supra* note 7.

225. Dye & Merriman, *supra* note 7, at 5.

226. Dye & Merriman, *supra* note 7, at 15.

C. SUPPLANTING LEGISLATIVE AUTHORITY

Constitutional law and accounting can be perceived as strange bedfellows, especially in comparison to enumerated rights like life, liberty, and the pursuit of happiness.²²⁷ However, the Illinois Constitution makes explicit that the power to tax resides solely with the General Assembly, and that it shall “not be surrendered, suspended, or contracted away.”²²⁸ An argument may be made that a default rule takes the power to decide the fiscal future of the state away from legislature, where it was intended to be, transferring it instead to the individual executive agencies’ internal decisions about how to spend a continuing appropriation.²²⁹ The Illinois Supreme Court’s interpretation in *Jorgensen v. Blagojevich* that reiterated the importance and supremacy of the separation of powers doctrine would tend to aid this perceived problem in a default rule.²³⁰

To rebut the argument, a default rule would need to be interpreted to continue the allocation of power that the legislature had already awarded to the agency, defining the outer limit of that power, or alternatively, specifically enumerate what the money would be appropriated for, like employee salaries.²³¹ Since both judges and legislators are protected by the Illinois Constitution with respect to their salaries, and Illinois legislators have added the additional protection of statutory provisions, a default budget rule that provides for state employee salaries would ideally be promulgated in an amendment to the Illinois Constitution.

VI. WHAT A DEFAULT BUDGET RULE MAY LOOK LIKE FOR ILLINOIS

Any default rule Illinois may pass in the future is likely to incorporate provisions that have arisen during this budget impasse. Specifically, two legislators have introduced bills that reacted to the possibility of Attorney General Madigan succeeding in causing an end to state employee salaries being paid.²³² One bill provides only for a set amount of money to ensure payment through the end of the year that only goes as far as the court order.²³³ The other, sponsored by House Republican Avery Bourne, provides for a “continuing appropriation for each State agency to meet personnel expenditures

227. ILL. CONST. art. I, § 1.

228. ILL. CONST. art. IX, § 1.

229. SULLIVAN, *supra* note 10, at 9-10.

230. *Jorgensen v. Blagojevich*, 811 N.E.2d 652, 660 (Ill. 2004).

231. See Louk & Gamage, *supra* note 4; Doug Finke, *Lawmakers Draft Plans to Keep State Workers’ Pay Flowing*, ST. J. REG., <http://www.sj-r.com/news/20170202/lawmakers-draft-plans-to-keep-state-workers-pay-flowing> (last updated Feb. 2, 2017, 10:00 PM).

232. Finke, *supra* note 231.

233. H.B. 1798, 100th Gen. Assemb. (Ill. 2017).

for each payroll period during which appropriations for personnel expenditures have not been made available to that State agency.”²³⁴ The proposed provision is similar to that used to provide for legislator salaries in the event of a budget impasse.²³⁵

Incorporating the status quo is important to garner enough support for a provision to pass the legislature, as the provisions of both proposed House Bills only go so far as to continue paying what a court as a third party has already deemed to be non-negotiable.²³⁶ Thus, a default budget rule that would be likely to pass in Illinois is likely to cover the salaries of state employees, but is unlikely to fix appropriations levels for agencies and programs to continue operations.

A riskier option that may not pass for a default budget rule in Illinois in the event that the legislature fails to pass a budget involves state employee salaries and a regressive appropriation that allots certain amounts for funding at a reduced percentage on the prior fiscal year for certain agency programs. Such a rule lacks the simplicity of Wisconsin’s statute,²³⁷ but would have the effect of not necessarily increasing Illinois’s backlog of bills and fiscal instability.²³⁸

It’s unlikely given the Illinois Constitution’s provisions,²³⁹ state law,²⁴⁰ and Supreme Court interpretation²⁴¹ that any default rule will include a penalty default like New York’s²⁴² or California’s²⁴³ that withholds legislator pay. However, alternative penalty defaults could be considered, such as leadership term limits in the General Assembly in the event that a budget is not passed, or another alternative that encourages legislators to negotiate and compromise.

VII. CONCLUSION

Government budget negotiations are uniquely situated, in that their existence is necessary, involve a great amount of power, and, in the event of failed negotiations, have no backup to keep government operations running. Default budget rules that continue appropriations or act as a penalty default rule can offer states a degree of stability even in uncertain negotiations. The

234. H.B. 2803, 100th Gen. Assemb. (Ill. 2017).

235. Finke, *supra* note 231.

236. Am. Fed’n of State v. State, 2015 IL App (5th) 150277-U; *see also* Finke, *supra* note 231.

237. WIS. STAT. ANN. § 20.002(1) (West, Westlaw through 2017 Act 6).

238. *See* Dye & Merriman, *supra* note 7.

239. ILL. CONST. art IV, § 11.

240. 2014 Ill. Laws 1591.

241. *See* Jorgensen v. Blagojevich, 811 N.E.2d 652 (Ill. 2004).

242. N.Y. LEGIS. LAW § 5 (West, Westlaw through L.2017, Ch. 1-23).

243. CAL. CONST. art. IV, § 12.

key is a rule that looks ahead to meet the goal of ensuring security for state's citizens over the strategizing of politicians.