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Issue Brief

Unbalanced by Design

New York State's Strong Executive Budget System

by E.J. McMahon

New York State's 2019-20 fiscal year marked the 90th anniversary of its first Executive Budget, presented by Governor Franklin D. Roosevelt in 1929. Constitutional amendments establishing the Executive Budget process had been approved by New York voters in November 1927, capping a more than decade-long bipartisan effort to bring order to what had been a shambolic and fiscally profligate legislative budget process.

The end of the Progressive Era campaign for budget reform in New York was the beginning of a long-running, sporadically litigated dispute over the extent of the governor's budget-making powers. The ink was barely dry on Roosevelt's initial executive budget submission when the Legislature began pushing back, seeking to recover some of its former ability to modify spending bills or to get around other provisions of the law.

In a series of landmark decisions over the next 75 years, state courts generally sided with the governor under Article VII of the Constitution. The Legislature's one attempt to change the constitutional budget provisions was decisively rejected by voters in 2005.

Yet complaints about the executive budget system still resonate with an emerging generation of lawmakers, issue advocates and journalists. Governor Andrew Cuomo's recent domination of the budget process has given these complaints fresh relevance.

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Critics of the executive budget system point to a fundamental imbalance between the governor and the Legislature. And they're right: when it comes to shaping the annual state budget, the executive and legislative branches are not co-equal. The budget is supposed to be balanced in financial terms—but the budget-making process decidedly is not.

This imbalance wasn't foisted on New Yorkers when they weren't looking. Nor was it invented or exacerbated by activist judges. New York has a strong-executive budget system by design. That system still functions as intended by its farsighted framers more than a century ago.

In exploiting the political advantages of his lead role in the budget process, Governor Cuomo also has pushed the envelope of his budget-making power by attempting to hard-wire some appropriations to separate proposed new laws. But he has not—not yet, at any rate—actually insisted that the Legislature adopt such language in a final budget.

The Legislature is not without recourse in the process. It can override line-item vetoes, as it did hundreds of times during Governor George Pataki's last term.

Most importantly, the constitution gives lawmakers a powerful veto of their own—the ability to unilaterally "strike out or reduce" any of the governor's appropriation line items.

This paper reviews the history and background of the executive budget law in an effort to explain how and why the deliberate imbalance of the system developed. It concludes with some proposals for improving the Legislature's effectiveness and accountability in the executive budget process without having to amend the Constitution:

- Change the start of the state fiscal year to July 1 from April 1, matching the practice in most other states and returning to the fiscal calendar that was in place when the executive budget was first established.
- Establish a nonpartisan Legislative Budget Office to provide objective analysis to all members of the Legislature and the public.
- Require the budget be balanced on a basis consistent with generally accepted accounting principles.
- Enforce the quarterly financial plan reporting requirements in existing law.

THE ROOT OF THE PROBLEM

New York's current executive budget system can be traced back to the state constitutional convention of 1915. The gathering was chaired by Elihu Root, one of the most prominent New York Republicans of his time, who had just completed a term in the U.S. Senate after serving as both secretary of state and secretary of war. The convention's finance committee was chaired by another leading Republican, Henry Stimson, a former U.S. attorney who had been secretary of war under President Taft and who later served in the cabinets of three more presidents in both parties.

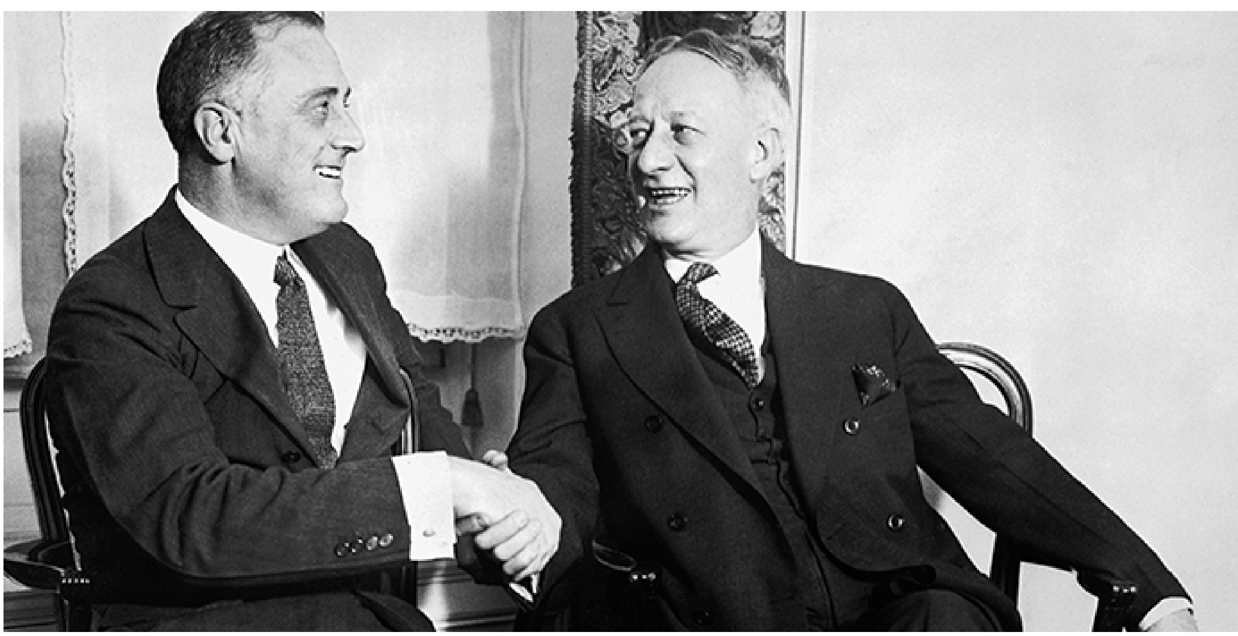
In pushing for a budget process dominated by the governor, Root and Stimson had a strong ally in the Democratic leader of the Assembly, Alfred E. Smith, whose 11 years in the Legislature had convinced him of the need for a strong executive-driven system.

The proposed 1915 budget amendments and proposals to consolidate numerous state agencies and elective offices were packaged with unrelated constitutional amendments in a single all-or-nothing proposition, which was overwhelmingly rejected by voters in November of that year. The budget reform effort, supported by the same bipartisan coalition, was renewed with Smith's election as governor in 1918.[1]

Order from chaos

The shortcomings of New York's pre-reform budgeting system were vividly recounted in Robert Caro's *The Power Broker*:

> "… The document that was called a state budget was actually a collection of appropriations drawn up by (legislative fiscal committee) chairmen. No legislator—or any other state official—reviewed the collection, balanced one appropriation against another, cut them down to agreed-upon necessities or measured them against estimated revenue. Even after the document was formally printed, individual legislators continued to introduce their own 'private' bills, generally for pork barrel public works projects, which required public expenditures, and these, when passed, did not even appear in the 'budget.' No one bothered to add them up, so that, when the Legislature adjourned, no one could be sure how much money it had appropriated. The governor technically had the power to veto appropriations, but since state law forbade him to veto part of an appropriation item, legislators simply made sure that each debatable expenditure was lumped with one too essential to be vetoed."[2]



Governor Alfred E. Smith (right) led the campaign for a constitutional executive budget, and his successor Franklin D. Roosevelt (left) was the first governor to present one.

Despite these obstacles, Governor Smith was able to veto $5 million of the $100 million in appropriations approved by the Legislature in 1919—the equivalent of a governor striking out more than $5 billion in spending from the 2019 state operating funds budget. Smith later said he wanted to veto even more, but "with the time and force at my disposal and under the present organization of state departments and the present system, I was unable to effect greater savings without bringing serious hardship upon essential departments and activities."[3]

To revive the 1915 reform proposals, Smith appointed a "Reconstruction Commission," which in October 1919 produced a landmark report recommending consolidation of state agencies and "a budget system vesting in the Governor the full responsibility for presenting to the Legislature each year a consolidated budget containing all expenditures which in his opinion should be undertaken by the state, and a proposed plan for obtaining the necessary revenues…".[4]

Restricting the Legislature's ability to increase budget items, and blocking it from introducing any appropriation bill before acting on the governor's budget, were key reform goals recommended to Al Smith.

The commission outlined three objectives that would form the core of today's system:

- "restriction of the power of the Legislature to increase items in the budget";
- "provisions that pending action on this (budget) bill, the Legislature shall not enact any other appropriation bill expect on recommendation of the Governor"; and
- "granting to the Governor the power to veto items or parts of items."

A governor equipped with executive budget power "would stand out in the limelight of public opinion and scrutiny," the commission said. "Economy in administration, if accomplished, would redound to his credit. Waste and extravagance could be laid at his door."[5]

To many in the Legislature, this represented an unthinkable departure from traditions of limited government and legislative supremacy. However, the commission said, "those who cannot endure the medicine because it seems too strong must be content with waste, inefficiency and bungling—and steadily rising cost of government."

As for arguments that the executive budget system would turn the governor into an all-powerful "czar," the commission pointed out: "Democracy does not merely mean periodical elections. It means a government held accountable to the people between elections."[6]

The commission's recommendations led to the adoption in 1925 of a state constitutional amendment assigning all civil, administrative and executive functions of state government to no more than 20 departments, most headed by gubernatorial appointees.

The executive budget, however, needed one final push from a blue-ribbon citizens committee chaired by the most eminent New York Republican of the era—Charles Evans Hughes, the former governor, U.S. Supreme Court justice and 1916 GOP presidential candidate, who most recently had served as U.S. secretary of state and who, a few years later, would rejoin the Supreme Court as chief justice of the United States. Hughes had initiated the push for reform of the state budget system during his own gubernatorial tenure (1907-10).

Hughes' committee repeated the call for an executive budget system, stressing that it should be written into the State Constitution (as Governor Smith preferred) and not merely statutory. The necessary constitutional amendments were approved by the state's voters in November 1927. The first Executive Budget was presented in January 1929 by Smith's successor in the governor's office, Franklin D. Roosevelt.

THE CONSTITUTIONAL FIX

The system put in place by Smith and his allies in the late 1920s, lifted almost verbatim from amendments first proposed in 1915, remains fundamentally unchanged today. Clearly it is the intent of this system to make the governor the dominant, accountable, controlling player in the budget-making process.

The governor's budget authority is laid out in Article VII Sections 1 through 6 of the state Constitution (see Appendix for full text). The first two sections are non-controversial table-setters, requiring the governor to assemble departmental budget requests, to present a budget ("a complete plan of expenditures … and all monies and revenues estimated to be available therefor") by certain dates early each year.

While the governor has a line-item veto, Section 4 of Article VII also gives the Legislature what amounts to its own veto—the ability to 'strike out or reduce' the governor's items, in bills that can then become law without his signature.

Section 3 describes the governor's responsibility for submitting budget bills and his ability to "amend or supplement" his bills within 30 days of submission, and his ability, with the consent of the Legislature, to submit budget amendments or "supplemental bills" after the budget has been adopted. Budget bills are a unique category of legislation, introduced automatically without legislative sponsorship.

The next three sections of Article VII are the hard core of the executive budget system—and have been the focus of most legal controversies over the years.

Section 4 prevents the Legislature from altering appropriations language "except to strike out or reduce items therein." It further provides that, once passed, appropriation bills become law without further action by the governor—except that both the legislative and judiciary budget "and separate items added to the governor's bills by the Legislature" are subject to the governor's approval or veto.

Section 5 restricts the Legislature's ability to appropriate money before the governor's executive budget bills have been "finally acted upon." Section 6 includes the crucial "anti-rider" clause, which stipulates that the provisions of the governor's appropriations bills must be "specifically" related to "some particular appropriation" in those bills.

As long as the Legislature doesn't attempt to alter appropriations bill language, it can add separate line items for any purpose—and if the governor vetoes these items, the Legislature can override his vetoes. In addition, the Legislature has its *own* veto, in the form of its Section 4 power to "strike out or reduce items" in an Executive Budget appropriation bill before the bill is passed.

Although veto overrides are hardly unheard of—there were hundreds in Pataki's last term—the Legislature historically hasn't pursued counter-budget strategies based on its power to strike or reduce the governor's proposed spending.

Instead, for most of the 75 years following the establishment of the current system, legislators attempted to circumvent the Article VII restrictions on their ability to supplement or rewrite the governor's budget bills.

Early disputes

Within weeks of Roosevelt's Executive Budget submission in early 1929, the Republican majorities in the Senate and Assembly sought to test the new constitutional provisions by amending a budget bill clause giving the governor sole authority to "segregate" lump sum appropriations to newly formed state agencies. In the resulting *People v. Tremaine* case, the Court of Appeals ruled in favor of the governor and said the Legislature could not amend the budget by designating its fiscal committee chairman to play a role divvying up the lump sums. Importantly, the Court also said the Legislature could not attempt to circumvent the governor's veto power by attaching "other items" to the bill.[7]

Ten years later, a second case, also entitled *People v. Tremaine**, emerged from the Republican-dominated Legislature's attempt to substitute its own single-purpose appropriations bill for the itemized appropriations in the 1939-40 Executive Budget submitted by Governor Herbert Lehman, a Democrat. The court again ruled for the governor, closely paraphrasing the language of Article VII, Section 4:

> "…[T]he Legislature may not alter an appropriation bill by striking out the Governor's items and replacing them for the same purpose in different form … It may, however, *add* items of appropriation, provided such additions are stated separately and distinctly from the *original* items of the bill and refer each to a single object or purpose. The items thus proposed by the Legislature are to be *additions,* not merely substitutions. These words have been carefully chosen. The added items must be for something other than the items stricken out." [8] [emphasis in original]

For years thereafter, the Legislature attempted to get around the constitutional restrictions by inserting new or revised implementing language into appropriation bills, sometimes with the governor's tacit acquiescence. But this maneuver was definitively barred by the 1993 Court of Appeals decision in the case of *New York State Bankers Association v. Wetzler*,[9] which was prompted by the Legislature's addition of a bank audit fee to appropriations language in Governor Mario Cuomo's 1990-91 budget bill. The Court said the change had violated the "unambiguous" constitutional clause forbidding any alteration of the governor's appropriations. This further clarified and strengthened the governor's power (although, ironically, Cuomo himself had not objected to the added fee language).

* The defendant in both cases was State Comptroller Morris Tremaine.

The latest landmark ruling by the Court of Appeals stemmed from two of Governor George Pataki's second-term budgets.[10]

The first, *Silver v. Pataki*, arose when the Legislature followed up its adoption of the governor's 1998-99 appropriation bills by enacting single-purpose, non-appropriation Article VII language bills changing the purposes for which the money could be spent. (For example, a $180 million appropriation for a prison in Franklin County was modified by a separate Article VII language bill dictating the types of inmate activities the facility would have to accommodate.) Pataki vetoed 55 such provisions that he claimed had unconstitutionally altered his appropriations. Assembly Speaker Sheldon Silver filed suit to contest the vetoes.

The second case, *Pataki v. Assembly*, stemmed from Pataki's 2001-02 budget bills, which among other things incorporated all of his proposed changes to the local school aid formula in appropriations language, rather than following the previous practice of putting formula changes in a non-appropriations budget bill. Pataki also sought to appropriate money for the State Museum and Library, both under the control of the Education Department and Board of Regents, through a new Office of Cultural Affairs whose creation was proposed in a separate Article VII language bill.

The Legislature responded by deleting the language it deemed unconstitutional in the education appropriations and other areas. Repeating their 1998 approach, the legislative majorities also struck entire appropriations proposed by the governor, and enacted their own bills appropriating identical amounts for similar purposes subject to different conditions and restrictions. This time, with *Silver v. Pataki* already pending, it was the governor who filed suit.

The two cases were jointly decided by the Court of Appeals in December 2004, with a 5-2 majority of the judges agreeing to hold for the governor in both cases. Within the majority, there was broad agreement with Judge Robert

Smith's opinion that, in both budgets, the Legislature had "altered the Governor's appropriation bills in ways not permitted by the Constitution."

But *Pataki v. Assembly* raised an additional, more challenging question that reduced the five-judge majority to a three-judge plurality: how far might a governor go in using appropriations language to write new laws not strictly related to the budget? Smith described this as "in theory, a troublesome issue, for … the Governor's power to originate appropriations bills is susceptible to abuse."[11] He continued:

> "A Governor could insert into what he labeled 'appropriation bills,' and thus could purport to shield by the no-alteration clause, legislation whose effect is not really budgetary. A few hypothetical questions may illustrate the point: Could a Governor raise a mandatory retirement age for firefighters, by making the higher age a condition of appropriations to fire departments? Could a Governor insert into an appropriation bill for state construction projects a provision that Labor Law §240 (the scaffold law) would be inapplicable? Could an appropriation bill provide that workers in certain state-financed activities were free to engage in conduct the Penal Law would otherwise prohibit? ***Each of these proposals seems to go beyond the legitimate purpose of an appropriation bill."*** [12] [emphasis added]

Pataki's lawyers had argued that the anti-rider clause of Article VII, Section 6, was the only limit on the content of an appropriation bill. Smith, however, called this "a less than satisfactory answer, because it is quite possible to write legislation that plainly does not belong in an appropriation bill, and yet 'relates specifically to' and is 'limited in its operation to,' an appropriation."[13]

Judge Albert Rosenblatt wrote a concurrence, joined by one other judge, agreeing with Smith that Pataki's 2001-02 budget passed constitutional muster, but also arguing that the court should have created a clearer judicial "test" to decide when an item of appropriation crosses into non-budgetary legislating.[14] This was a question Judge Smith and the court's plurality preferred to "leave for another day."[15]

A lengthy dissenting opinion by then-Chief Judge Judith Kaye, joined by Judge Carmen Ciparick, strongly disagreed with Smith's rationale in both cases. Judge Kaye said the governor had "overstepped the line that separates his budget-making responsibility from the Legislature's law-making responsibility, setting an unacceptable model for the future."[16]

Even as these cases were winding their way through the courts, the Legislature was demon-

The New York State Court of Appeals courtoom in Albany strating just how much power it could wield under Article VII as traditionally interpreted. In 2003, Senate Republicans and Assembly Democrats joined forces to override 116 Pataki vetoes of added spending, tax increases, and a new provision refinancing and dedicating state taxes to pay off New York City's remaining 1970s fiscal crisis debt. These changes added billions of dollars to the budget.

The new language of Article VII bills

To a far greater extent than any of his predecessors, Governor Andrew Cuomo has included non-budget items, including such major policy changes as a statewide $15 minimum wage, in his non-appropriation budget bills. In 2019-20, the governor went further than ever, packing virtually his entire 2019 legislative agenda into the initial Executive Budget bill package.

To a far greater extent than his predecessors, Governor Cuomo has packed his non-appropriation, Article VII language bills with proposed policy changes not strictly related to the budget.

Among the more than 80 non-budgetary provisions in the five main Article VII language bills were such disparate items as grand jury reform, legalization of recreational marijuana use, a ban on plastic bags, expanded abortion rights, and a permanent cap on property tax levies.

A few of those proposals, such as the abortion law, had already been embraced by legislative majorities and were passed soon after the budget was presented. Many were deleted from the one-house budget legislation issued by the Senate and Assembly in March. In the end, dozens of Cuomo's non-budget program priorities were enacted with the budget.

Echoing Chief Judge Kaye's dissent, critics of *Pataki v. Assembly* have claimed the ruling cleared the way for governors to rewrite all manner of state laws through budget appropriations. But the plurality opinion in *Pataki v. Assembly* did not say the governor could use appropriations language to write new laws unrelated to the budget.

Rather, the opinion upheld the plain meaning of the no-alteration clause of Article VII, Section 4. As noted above, even a hypothetical clause suspending the scaffold law on state construction projects (which would, after all, achieve the budget goal of reducing project costs) was among Judge Smith's examples of language "going beyond the legitimate purpose of an appropriation bill."

As a legislative negotiating strategy, governors have always been free to use the budget as leverage to seek legislative approval of policies proposed outside the budget. But there remains a question of whether Cuomo is empowered to *impose* the non-budgetary policy changes included in his budget packages.

The Legislature remains free to reject, rewrite or supplement non-appropriations bill provisions, as long as the effect is not to alter appropriations language. However, starting with the first budget of his second term, Cuomo has floated a new budget-writing tactic that threatens to significantly narrow the Legislature's options while significantly expanding the governor's own power.

Pushing the envelope

Among the 30-day amendments to his 2015-16 budget bills, Cuomo inserted the full text of his proposed ethics reform package into appropriations for the state comptroller's office. He separately added clauses linking state Education Department and school aid appropriations to the enactment of the teacher evaluation provisions of his non-appropriations Article VII bills.

This language, a red flag for legislators, was removed from the 2015-16 budget bills before

their adoption. However, Cuomo revived the approach in connection with several proposed appropriations in his original 2019-20 Executive Budget bills. An example was this paragraph attached to the $3.69 million appropriation for the enforcement program of the state Board of Elections:

> Notwithstanding any other provision of law, funds from this appropriation shall not be used or spent unless the legislature has enacted the chapter or chapters of law identical to the legislation amending the election law, in relation to establishing contribution limits and a public campaign financing system; to amend the state finance law, in relation to establishing the New York state campaign finance fund; and to amend the tax law, in relation to establishing a New York state campaign finance fund checkoff submitted by the governor pursuant to article VII of the New York constitution.[17]

A similar clause was attached to a portion of the Division of Housing and Community Renewal (HCR) appropriation, tying funding for HCR's rent regulation unit to enactment of Cuomo's non-appropriation bill language encompassing Cuomo's proposed "Rent Regulation Act of 2019."[18] In the governor's Capital Projects budget bill, billions of dollars in appropriations and re-appropriations for the Metropolitan Transportation Authority (MTA) were conditioned on approval of Cuomo's proposed Article VII non-appropriations bill provision creating a congestion tolling program in New York City.[19]

These provisions, like those inserted in the 2015-16 budget bills, would go beyond Albany's tradition of leaving unsettled appropriation details to be fleshed out "pursuant to a chapter"—post-budget legislation negotiated by the governor and the Legislature.

In his FY 2020 budget deal with the Legislature, the governor once again stepped back from the brink of a potential constitutional dispute. The campaign finance and rent regulation provisions were removed from the final appropriations bill, and those issues were left to be settled later in the legislative session. While a different version of the congestion tolling proposal was enacted with the budget, the provision linking it to the MTA's state funding was also removed from the appropriations bill.

What if, in a future Executive Budget submission, Cuomo revives this tactic and then insists on enacting such language in a final appropriations bill? The Legislature could respond by striking out the constitutionally questionable appropriations and force the governor to negotiate. Or, it could enact the appropriations but not the Article VII language bill provisions to which they refer. Either approach is likely to lead to fresh litigation. If that happens, Cuomo's case would appear to be weaker than his Republican predecessor's in the early 2000s.

In the 2001-02 budget that gave rise to *Pataki v. Silver*, the governor's disputed insertion of the entire school aid formula into his appropriations language was, as Smith wrote, designed "to determine how much of the state's money goes to each school district—almost as purely a budgetary question as can be imagined."[20] By contrast, Cuomo's proposed campaign finance and rent regulation reform had political and economic effects reaching far beyond the annual expenditures of two minor state agencies. His congestion tolling proposal likewise had ramifications not limited to the capital funding needs of the MTA.

Given the far-reaching effects of the governor's proposals in all three cases, a strong argument can be made that Cuomo's linkage language would violate the anti-rider clause of Article VII, Section 6.

The Legislature strikes back

For an almost unbroken period of 25 years prior to 2011, New York State's budget was not enacted before the start of the April fiscal year. In some years, the final deal was not reached until several months past the March 31 deadline. Unlike some other states and the federal government, New York State never experienced an actual government shutdown due to its failure to enact a timely budget, since Governors Mario Cuomo and George Pataki routinely submitted temporary budget extender bills to meet payrolls while negotiations dragged on.

While the budget delays created some cash-flow stress for local governments dependent on state aid payments, they had little noticeable impact on the vast majority of New Yorkers. But the chronic lateness fed the impression of terminal gridlock and dysfunction in Albany, adding to the negative financial factors holding down the state's credit rating.

Senate and Assembly leaders in both parties chafed at the governor's control of the extender process under Article VII, Section 5, which restricts the Legislature's ability to appropriate money before the governor's Executive Budget has been "finally acted upon." Their annoyance, and Albany's obsession with late budgets, was reflected in their 2005 proposal to amend Article VII.[21]

Key provisions of the Legislature's proposal, including a supporting statute, would have:

- automatically imposed a contingency budget whenever the Legislature failed to act on the governor's budget bills before the start of a new fiscal year;
- given the Legislature unrestricted authority to amend the contingency budget in a single multipurpose bill;
- changed the start of the fiscal year, from April 1 to May 1; and
- required the annual state budget to include school aid appropriations for two years.

The constitutional change would have marked a fundamental shift of power in the state Capitol. For the first time since the late 1920s, the Legislature would ultimately have gained the upper hand in budget disputes with the governor. The result would have been less fiscal discipline, higher spending and higher taxes—all without improving the efficiency, transparency or accountability of the state's much-criticized budget process. As former Governor Hugh L. Carey said at a 2005 Empire Center conference, this was "a power grab *and* a purse grab."[22]

The proposed changes, submitted to voters as Proposition One, were supported by legislative majority leaders but opposed by Pataki as well as then-Attorney General Eliot Spitzer, then preparing his own run for governor.

In the Nov. 8, 2005, general election, voters statewide rejected Proposition One by a nearly 2-1 margin.

Meanwhile, *Pataki v. Assembly* had little visible impact on the governor's continuing rocky relationship with the Legislature. Pataki briefly invoked the decision in connection with the last budget of his tenure 2006, when he vetoed and challenged the constitutionality of several legislative changes to his budget as violating the no-alteration clause. But the governor and the legislature soon resolved these differences, much of the disputed spending was restored, and the disputed bill language revised to the governor's satisfaction in an amended budget bill.[23]

Paterson's piecemeal strategy for breaking a late-budget deadlock in 2010 depended on the backing of the 30-member Senate GOP minority, which assured the Democratic governor his budget vetoes could not be overridden.

The next significant exercise of gubernatorial control over the budget came in 2010, under Governor David Paterson. Like his predecessors, Paterson had sent the Legislature temporary extender bills once the state had gone two weeks into the fiscal year without adopting a final budget. But when the Senate and Assembly refused to budge on spending demands far beyond what Paterson thought the state could afford, the lame-duck governor began to force-feed them large chunks of the full annual budget bills. The budget effectively had been enacted in this piecemeal fashion by the end of June.

Paterson's strategy succeeded because the then-30-member Republican minority conference in the 62-member Senate was in the Democratic governor's corner, assuring him of more than enough votes to block a veto override.[24] In July, after the regular session had ended, Paterson vetoed 6,681 budget items, including $419 million in added aid to public schools and nearly $200 million in pork-barrel grants. While the Legislature had to return to Albany in August to approve a revenue bill, Paterson's vetoes went unchallenged.

When Cuomo took office a few months later, Paterson's strategy was fresh in legislators' minds (and Republicans had regained a narrow Senate majority). Armed with a mandate to control spending and a determination to bring order to the process, the new governor ultimately was able to steer the enactment of four straight on-time budgets in his first term.*

Self-inflicted "extortion"

A new twist in New York's 2019-20 budget process was the unprecedented linkage between "timely" passage of the budget and a legislative pay raise—a condition imposed by a committee on compensation created by the Legislature in 2018 as part of the 2018-19 budget.[25] The governor's added ability to pressure lawmakers into a budget deal was compared by one member, not unreasonably, to "extortion."[26] But the Legislature itself set the stage for this situation by delegating the salary issue to the compensation committee.

The Legislature passed up an opportunity to permanently veto the resulting committee report and recommendations at the end of 2018. Even now, the entire compensation scheme—as well as the 1998 law temporarily withholding legislators' pay when a budget is late—could be repealed by the Legislature at any time.

In fact, short of closing a budget deal on the governor's terms before April 1, the Constitution gave the Legislature other avenues for passing a timely budget while giving the governor an incentive to return to negotiations on disputed items. For example, lawmakers could have selectively deleted all or most of the proposed appropriations for the Empire State De-

* Since 2015, four of five budget adoption votes have been completed after April 1, but no later than April 10.

velopment Corp., which administers economic development programs largely controlled by and closely identified with the governor. It could also have deleted his constitutionally questionable appropriations for the Board of Elections, HCR and the MTA capital budget.

In the short term, given the priorities of the large new Senate Democratic majority and the Democratic super-majority in the Assembly, a successful legislative budget counter-strategy is more likely to produce budgets exceeding Governor Cuomo's preferred spending limits. But weakening the constitutional underpinnings of New York's executive budget system would yield far more spending and debt regardless of the Legislature's political composition. Al Smith and the other Progressive Era framers of the executive budget system aimed to promote economy and efficiency in government, and preserving Article VII is the best way to achieve it.

Ready reforms

Constitutional questions aside, a handful of statutory reforms—and one behavioral change—would give lawmakers more time to consider and deliberate on the Executive Budget, provide them and the public with more information, and subject both the Legislature and the governor to a higher standard of financial accountability.

1. Move the fiscal year start to July 1. This would match the existing schedule in 46 states and the City of New York. It would restore the state fiscal calendar in effect during New York's first 15 years under the executive budget system, allowing more time for legislative analyis and consideration of a budget that the Constitution requires the governor to submit between mid-January and Feb. 1.

In the past, legislators and governors have resisted shifting the fiscal year to July 1 out of concern that a budget process stretching nearly to the end of the legislative session would overshadow other issues. But it's not as if that hasn't already has happened; it was the case more often than not between 1985 and 2010.

A three-month shift in the fiscal year, including an early June adoption—would create cash-flow management issues for local governments and school districts, but these issues would not be insurmountable and could be addressed during a transition period to the new fiscal year.

Extending the budget process through most of the session also would eliminate Governor Cuomo's main rationale for packing his program items into Article VII budget bills, and it would allow the budget to be finalized after the final settlement on personal income tax receipts in mid-April.

2. Establish a Legislative Budget Office. The Legislature allocates funds to four separate fiscal committee staffs, answerable to the respective party leaders of the Democratic and Republican conferences in each house. The fiscal staffs have been respected over the years for the professionalism and the caliber of their work, but much of it is needlessly duplicative.

The shortcomings of the current system are illustrated by the spotty implementation of Legislative Law provisions requiring that, before voting on the governor's budget bills, the Assembly and Senate must give their members a "comprehensive, cumulative" report detailing revisions to the Executive Budget and the impact on general funds and state funds spending, along with an estimated impact of changes on local governments and the state workforce. In practice, these requirements have not been fully met. At best, these reports have been inconsistent and incomplete. They rarely are made public, even after budget votes.

A bill[28] introduced by Sen. Liz Krueger, D-Manhattan, chair of the Finance Committee, would combine existing appropriations for legislative fiscal committees into a single nonpartisan Legislative Budget Office (LBO), modeled on the Congressional Budget Office. Its mission would be "to provide budget, economic and policy analysis for the residents of the state and its elected officials" and "to increase the legislature's understanding of the budget and how it affects New Yorkers." Similar joint nonpartisan committees exist in California and in New Jersey, among other states.

3. Go with GAAP. The Constitution requires the governor to propose a balanced budget, and the 2007 Budget Reform Act requires the Legislature to adopt one. But by statute, New York's financial plans are calculated on a cash basis, which recognizes receipts when money is received and disbursements when money is paid out. This accounting standard makes it easier to manipulate the budget's perceived fiscal integrity and sustainability by, for example, rolling one year's expenditures into the next, or vice versa.

A better standard for budgeting would be the "modified accrual" method consistent with Generally Accepted Accounting Principles (GAAP), which requires revenues to be recognized when actually earned, and expenditures to be recognized when a liability is incurred. The standard was imposed on New York City

during the mid-1970s financial crisis as a way to minimize the kind of accounting gimmicks that had helped drive the city into virtual bankruptcy.

Since the early 1980s, the governor's financial plan reports have included alternative summary tables prepared on a GAAP basis—which, in contrast to the state's "balanced" status on a cash basis, estimates a $2.1 billion all funds operating deficit as of 2019-20.[29] (The difference relates primarily to differences in the timing of spending and revenues, and use of reserves, as counted by the two methods.)

A primary reason for the adoption of the executive budget system was the framers' view that the Legislature was chronically averse to accountability and prone to fiscal irresponsibility. A move to GAAP would demonstrate that the Legislature is willing to hold itself—and the governor—to a higher standard than now applies.

4. Enforce quarterly financial plan deadlines. Under Section 23.4 of the state Finance Law, the governor is required to submit a financial plan update to the comptroller and the chairs of the legislative fiscal committees "within thirty days of the close of the quarter to which it shall pertain." Since the third quarter ends around the time of the Executive Budget's preparation, and the fourth quarter ends with the fiscal year, the practical effect of the provision is to require reports to be issued on July 30 (the first quarter update) and Oct. 30 (the mid-year update).

While his first quarter updates have been timely, Governor Cuomo has failed to honor the mid-year update deadline for eight consecutive years, during which the release dates of that report have ranged from Nov. 6 to Nov. 29. The governor and Legislature have also begun to ignore the "quick start" provisions of the 2007 budget reform law, including a Nov. 5 deadline for issuing reports on receipts and disbursements, and the Nov. 15 deadline for holding a joint public meeting to go over the estimates.

Quarterly financial plan updates, especially the mid-year report, are important disclosure documents. A Legislature that aspires to play a more meaningful role in the budget process should at a minimum insist on having timely access to information required by law—and meet its own obligations in the bargain.

CONCLUSION

Albany's checkered history of excessive spending, debt and taxation is proof enough that the executive budget system isn't perfect. The worst budget outcomes of the last half-century have overwhelmed constitutional mechanisms designed to promote fiscal restraint. But politics, not constitutional flaws, are ultimately to blame for the most frequently criticized aspects of New York's budget process today.

To paraphrase Winston Churchill's aphorism about democracy, the executive budget system might be called the worst form of budget-making—except all the others that have been tried here from time to time.

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ENDNOTES

[1] "The Executive Budget in New York State: A Half-Century Perspective," Division of the Budget, 1981, p. 16.
[2] Robert Caro, *The Power Broker: Robert Moses and the Fall of New York* (New York: Alfred E. Knopf, 1974), pp 96-97.
[3] "Report of the Reconstruction Commission to Governor Alfred E. Smith on Retrenchment and Reorganization in State Government," submitted Oct. 10, 1919. Introductory Statement by the Governor, p. iii.
[4] Ibid. 11.
[5] Ibid. 11-12.
[6] Ibid. 12.
[7] *People v. Tremaine*, 252 N.Y. 27, 168 N.E. 817 (1929), at 39-40.
[8] *People v. Tremaine*, 281 N.Y. 1, 21 N.E.2d 891 (1939) at 10-11.
[9] *New York State Bankers Association v. Wetzler*, 81 N.Y.2d 98 (N.Y. 1993).
[10] *Pataki v New York State Assembly*, 2004 NY Slip Op 09320 [4 NY3d 75] December 16, 2004. A video of the arguments befre the Court of Appeals is posted at https://www.nycourts.gov/ctapps/news/Pataki-vNYSAssembly.html.
[11] Ibid. at 12.
[12] Ibid.
[13] Ibid.
[14] Ibid. at 21.
[15] Ibid. at 18.
[16] Ibid. at 23.
[17] IFY 2020 Executive Budget, State Operations Appropriations Bill, S.1500, p. 134.
[18] FY 2020 Executive Budget State Operations Bill, S.1500, p. 415.
[19] FY 2020 Executive Budget Capital Projects Bill, Appropriations Bill, S.1504, pp. 422-424.
[20] *Pataki*, op. cit., at 16.
[21] The Legislature in the spring of 2005 also gave first passage to a different constitutional amendment, embodied in S. 3195 of 2005, which was much more narrowly designed to address the issues raised in both *Bankers* and *Pataki v. Assembly* by adding a clause to Article VII Section 4 providing that appropriations "shall be consistent with and constrained by the provisions of existing state law at the time of submission." That proposal never received second passage from both houses of a subsequently elected Legislature, and thus never was submitted in a referendum.
[22] See https://www.empirecenter.org/publications/power-grab-and-purse-grab-the-problem-with-nys-prop-one/.
[23] For example, Pataki had proposed a flat $400 School Tax Relief (STAR) property tax rebate to homeowners in school districts that agreed to restrain spending growth. The Legislature struck Pataki's proposal and replaced it with a larger appropriation for rebates that would vary based on home value, with no link to spending growth. With Pataki's agreement, as amended, the Legislature's version was ultimately implemented.
[24] Using the same budget powers, Governor Mario Cuomo might successfully have pursued a similar strategy during the fiscally strained early 1990s. His June 1991 veto of hundreds of items totaling $1 billion in budget bills passed by legislative majorities received a pledge of support from the Assembly Republican minority, which then had enough members to block an override in the lower house. This brought the legislative majorities back to the table; within three weeks, a deal had been struck on terms acceptable to Cuomo.
[25] Ch. 59 of the Laws of 2018, Part HHH.
[26] "Assemblyman says Cuomo's using pay-raise 'extortion' to pass budget," *New York Post*, March 3, 2019.
[27] The constitutionality of the compensation committee provision is being challenged in a lawsuit (*Delgado v. State*) filed on behalf of three taxpayers and an Assembly member by the Government Justice Center, an independent non-profit legal center whose board of directors includes the executive director of the Empire Center.
[28] S.3287/A.1835
[29] Division of the Budget, FY 2020 Enacted Budget Financial Plan, T-257. https://www.budget.ny.gov/pubs/archive/fy20/enac/fy20fp-en.pdf.

Appendix

New York State Constitution
Article VII, Sections 1-6

[Estimates by departments, the legislature and the judiciary of needed appropriations; hearings]
§1. For the preparation of the budget, the head of each department of state government, except the legislature and judiciary, shall furnish the governor such estimates and information in such form and at such times as the governor may require, copies of which shall forthwith be furnished to the appropriate committees of the legislature. The governor shall hold hearings thereon at which the governor may require the attendance of heads of departments and their subordinates. Designated representatives of such committees shall be entitled to attend the hearings thereon and to make inquiry concerning any part thereof.
Itemized estimates of the financial needs of the legislature, certified by the presiding officer of each house, and of the judiciary, approved by the court of appeals and certified by the chief judge of the court of appeals, shall be transmitted to the governor not later than the first day of December in each year for inclusion in the budget without revision but with such recommendations as the governor may deem proper. Copies of the itemized estimates of the financial needs of the judiciary also shall forthwith be transmitted to the appropriate committees of the legislature.

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

[Budget bills; appearances before legislature]
§3. At the time of submitting the budget to the legislature the governor shall submit a bill or bills containing all the proposed appropriations and reappropriations included in the budget and the proposed legislation, if any, recommended therein. The governor may at any time within thirty days thereafter and, with the consent of the legislature, at any time before the adjournment thereof, amend or supplement the budget and submit amendments to any bills submitted by him or her or submit supplemental bills. The governor and the heads of departments shall have the right, and it shall be the duty of the heads of departments when requested by either house of the legislature or an appropriate committee thereof, to appear and be heard in respect to the budget during the consideration thereof, and to answer inquiries relevant thereto. The procedure for such appearances and inquiries shall be provided by law.

[Action on budget bills by legislature; effect thereof]
§4. The legislature may not alter an appropriation bill submitted by the governor except to strike out or reduce items therein, but it may add thereto items of appropriation provided that such additions are stated separately and distinctly from the original items of the bill and refer each to a single object or purpose. None of the restrictions of this section, however, shall apply to appropriations for the legislature or judiciary.
Such an appropriation bill shall when passed by both houses be a law immediately without further action by the governor, except that appropriations for the legislature and judiciary and separate items added to the governor's bills by the legislature shall be subject to approval of the governor as provided in section 7 of article IV.

[Restrictions on consideration of other appropriations]
§5. Neither house of the legislature shall consider any other bill making an appropriation until all the appropriation bills submitted by the governor shall have been finally acted on by both houses, except on message from the governor certifying to the necessity of the immediate passage of such a bill.

[Restrictions on content of appropriation bills]
§6. Except for appropriations contained in the bills submitted by the governor and in a supplemental appropriation bill for the support of government, no appropriations shall be made except by separate bills each for a single object or purpose. All such bills and such supplemental appropriation bill shall be subject to the governor's approval as provided in section 7 of article IV.
No provision shall be embraced in any appropriation bill submitted by the governor or in such supplemental appropriation bill unless it relates specifically to some particular appropriation in the bill, and any such provision shall be limited in its operation to such appropriation.