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Supreme Court of Mississippi

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Of Money and Judicial Independence: Can Inherent Powers Protect State Courts in Tough Fiscal Times?

By Michael L. Buenger*

The complete independence of the courts of justice is peculiarly essential in a limited constitution. . . . Without this, all the reservations of particular rights or privileges would amount to nothing.1

We are looking at the dismantling of our court system; it is a very painful process.2

We're talking about things that are simply horrendous.3

Introduction

It is described as "the worst budget crisis among the states since World War II."4 State officials across the country have likened it to

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1 The Federalist No. 78, at 403 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).
4 See Jason White, Govs Scramble for Soundbites to Decry Budget Crises, STATELINE.ORG, Mar. 21, 2003, at http://www.stateline.org/stateline.org/?pa=story&sa=vshowstoryinfo&id=295396 (quoting Idaho Governor Dirk Kempthorne). Other state officials have described the looming budget crisis as the worst since the Great Depression. See Hudson, supra note 2, at 16. Governor Paul
a "Perfect Storm," "the Incredible Hulk of budget deficits," and a "problem
of historic proportions." Some estimates place the combined operating
shortfalls of the states in fiscal year 2004 at over $68.5 billion, while others
predict the more accurate figure is closer to $100 billion. California alone
faced a projected $38 billion deficit, partly contributing to the recall of its
Governor. Almost every state in the nation is reporting a long-term,
deepening fiscal crisis that jeopardizes funding of critical services and
renders many previously hallowed programs subject to draconian cuts, if
not outright elimination. The states' courts have not gone untouched.

From Maine to California, from Florida to Alaska, the mushrooming
fiscal crisis is impacting state court systems by forcing them to compete for
funding against more politically popular services such as education, health
care, and public safety, often with only marginal success. As a result,

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5 See White, supra note 4.
6 The National Conference of State Legislatures projects the $68.5 billion
figure. *State Budget Gaps Growing at Alarming Rate According to New NCSL*
*National Fiscal Report*, NCSL News (Nat'l Conf. of State Legislatures, Denver,
The Center for Budget and Policy Priorities projects the $100 billion estimate.
Nicholas Johnson et al., *States are Making Deep Budget Cuts in Response to the
Fiscal Crisis*, Center on Budget and Policy Priorities, at http://www.cbpp.org/3-19-
03sp.htm (Mar. 20, 2003); see also Council of State Gov'ts, *Emerging Issues

7 Howard Fineman & Karen Breslau, *California: State of Siege*, NEWSWEEK,
July 28, 2003, at 28 (discussing the recall of California's former governor Gray
Davis).
8 See id.
9 See William McCall, *Courts Across Nation Face Deep Budget Cuts*, SEATTLE
2003, at 1, col. 1; Seth Stern, *States Reconsider Drastic Court Cutbacks*,
10 This is not the first time a funding crisis has adversely impacted the courts.
See Employees & Judge of the Second Judicial Dist. Court v. County of Hillsdale,

The governmental funding crisis that is the backdrop for these conflicts
began in this state in the late 1960's and early 1970's. An explosion of
litigation, the creation of new courts, new judicial remedies, inflation, the
introduction of unionization into the public sector, substantial unemployment,
and public resistance to tax increases created increased competition
between the courts and units of local government for local tax revenues.
courts are curtailing operating hours, laying off employees, and terminating what were once thought to be inviolate, even sacrosanct programs. In Oregon, one of the states most seriously hit, the courts closed one day per week, furloughed employees, and implemented a "delay and no action" policy on processing certain types of cases.\textsuperscript{11} California faced cutting almost $200 million from its judiciary budget, forcing early retirements, reducing full-time jobs to three-quarter time, limiting night court, and closing courtrooms.\textsuperscript{12} Missouri faced a possible fifteen percent across-the-board reduction that would have closed courthouses and eliminated as many as one in four nonstatutory employees.\textsuperscript{13} Florida's Chief Justice spoke of drastic cuts in court personnel and operations, and called upon the state bar to lobby the legislature for adequate funding of the judiciary.\textsuperscript{14} Considering that some ninety-five percent of the nation's litigation takes place in state courts,\textsuperscript{15} the current fiscal crisis gives rise to significant

\textit{Id.}

\textsuperscript{11} See Chief Justice William P. Carson, Jr., \textit{A Message from the Chief Justice of the Oregon Supreme Court}, http://www.osbar.org/0barnews/monthly02/brac1.htm (Nov. 25, 2002). The Oregon Supreme Court, in response to drastic budget cuts, closed all appellate, tax, and circuit courts on Fridays from March 1 to June 30, 2003, and also cut staff hours by ten percent. In addition, many courts stopped hearing a wide range of cases, including small claims and non-person misdemeanors. \textit{Id.}

\textsuperscript{12} See McCarthy, \textit{supra} note 3.


In Alabama, jury trials were temporarily suspended in 2002 due to lack of funds, although emergency funds were made available to resume trials. . . . In Kansas, budget cuts forced the Supreme Court to take the unusual step under its inherent authority of imposing a $5 emergency surcharge on all case filings . . . . In Massachusetts, the judicial branch experienced a $40 million deficit in 2002, with additional cuts anticipated in 2003. The courts have lost over 1,000 employees through attrition and layoffs.

\textit{Id.}

\textsuperscript{15} According to the National Courts Statistics Project, in calendar year 2001 2,624,917 cases were filed in the federal courts compared to 92,830,355 cases filed in the state courts. \textit{BRIAN S. OSTROM ET AL., EXAMINING THE WORK OF STATE COURTS, 2002: A NATIONAL PERSPECTIVE FROM THE COURTS STATISTIC PROJECT}
constitutional, political, and policy questions, not to mention the impact it has on the judicial process and the people it serves. The crisis also reinforces Alexander Hamilton’s observation that the judiciary is arguably the weakest of the branches, if a true branch of government at all.

13 (2003). Based on these statistics, state courts filings account for ninety-nine percent of all cases filed in the courts of the United States. The almost ninety-three million cases filed in state courts in 2001 were processed through 15,555 individual state trial courts. Id. at 11.

In general, state court funding accounts for only about two to four percent of general fund expenditures in any state. In some states, the amount is even less. For example, in FY 2004 Missouri spent only 1.65% of its general fund on judicial operations, 90% of which were personnel expenses. Nevertheless, the amount spent nationwide is significant. State court expenses are estimated to be $12-$15 billion annually, not including important “justice related” expenditures such as indigent defense, an item that is usually absorbed by some other non-judiciary budget line item. See Frances Kahn Zemans, Court Funding, ABA Standing Comm. on Judicial Independence (Apr. 2003), http://www.abanet.org/jd/courtfunding/courtfunding.pdf.

In defending the creation of a separate federal judicial department Hamilton argued:

[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them. . . . It proves incontestibly that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter: I mean, so long as the judiciary remains truly distinct from both the legislative and the executive.

The Federalist No. 78, supra note 1, at 402 (Alexander Hamilton) (footnote omitted). Under Missouri’s budget laws, the state supreme court and its division are classified as “departments” for purposes of preparing and submitting a budget. See Mo. Rev. Stat. § 476.265(1)-(2) (2003).

(1) The budget for the funding of the judicial department by the state for each fiscal year shall be formulated in the same manner as provided . . . in section 33.220, RSMo, except as otherwise provided in this section.

(2) For purposes of budget procedures, the supreme court shall be considered as the head of the department. The chief judge of each district of the court of appeals with the approval of a majority of the judges of each district and the presiding judge of each circuit with the approval of a majority of the circuit and associate circuit judges of the circuit shall present their estimates for the districts and circuits, respectively, in the same manner as a division of a department of the executive branch of govern-
There is nothing like a funding crisis to raise the specter of a constitutional battle among the branches of government. In such instances, the executive and legislative branches, armed with their vast array of budgetary authority, face the judiciary, equipped solely with its status as a branch of government and its inherent right to exist at a meaningful level. The current crisis brings to the surface simmering disputes and philosophical differences that have roots as old as the Republic—disputes that center on money, but reveal once again the ever present tension implicit in the design of American government. The

Id. For an outline of the procedures state budget director and executive departments are to follow in preparation of the annual state budget, see id. § 33.220.

Alexander Hamilton once observed:

[T]he judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

THE FEDERALIST NO. 78, supra note 1, at 402 (Alexander Hamilton).

Notwithstanding his initial concern for preserving judicial independence, Thomas Jefferson became a voracious critic of the national judiciary, particularly in the aftermath of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). Jefferson viewed the Marbury decision as a usurpation of separate powers, which would lead to despotic rule by judges. Jefferson maintained this position long after the decision. In 1815, he wrote to W.H. Torrance:

The . . . question, whether the judges are invested with exclusive authority to decide on the constitutionality of a law, has been heretofore a subject of consideration with me in the exercise of official duties. Certainly there is not a word in the constitution which has given that power to them more than to the executive legislative branches.

Letter from Thomas Jefferson to W.H. Torrance (June 11, 1815), http://memory.loc.gov/cgi-bin/query/r?ammem/mtj:@field (DOCID+@lit(tj110157)). Jefferson later wrote: "My construction of the constitution is . . . that each department is truly independent of the others, and has an equal right to decide for itself what is the meaning of the constitution in the cases submitted to its action. . . ." Letter from Thomas Jefferson to Spencer Roane (Sept. 6, 1819), http://wyllie.lib.virginia.edu:8086/perl/toccer-new?id=JefLett.sgm&images=images/modeng&data=Hexts/english/modeng/parse&tag=public&part=255&division=div. His suspicion of and criticism for the judiciary never waned, as evidenced by his 1825 letter to Edward Livingston in which he wrote:

This member of the Government [the judiciary] was at first considered as
crisis also raises pressing questions concerning the value of a separate judiciary, the evolving notions of judicial independence, and the meaning and application of the courts' inherent powers. What does it mean to have a separate, independent, and coequal judiciary when that status depends upon a broad range of funding decisions defined by the priorities, politics, and power of the Legislature? Can history inform and define the breadth

the most harmless and helpless of its organs. But has proved that the power of declaring what the law is, ab libitum, by sapping and mining, slyly, and without alarm, the foundations of the Constitution, can do what open force would not dare to attempt.

Letter from Thomas Jefferson to Edward Livingston (Mar. 25, 1825), http://www.constitution.org/tj/jeff16.txt; see also Paul D. Carrington, Judicial Independence and Democratic Accountability in Highest State Courts, 61 LAW & CONTEMP. PROBS. 79 tbl.14 (1998). Jefferson's distrust of the national judiciary may have been as much politics as philosophy. Many of the members of the national judiciary during Jefferson's presidency were federalists whose views on the breadth and limits of the Constitution differed markedly from his own views. Id.

It would not be the first time that state courts have resorted to this largely self-defined concept. See infra notes 69–75. In In re Salary of the Juvenile Director, 552 P.2d 163 (Wash. 1976), the Washington Supreme Court engaged in a long, in-depth analysis of the practical, legal, and political consequences of using inherent power to compel funding authorities (in that case a county commission board) to spend money. The court concluded:

Hence, it is incumbent upon courts, when they must use their inherent power to compel funding, to do so in a manner which clearly communicates and demonstrates to the public the grounds for the court's action. This can be accomplished by imposing on the judiciary the highest burden of proof in civil cases when courts seek to exercise their inherent power in the context of court finance.

Id. at 174–75; accord Bd. of County Comm'rs v. Nineteenth Judicial Dist., 895 P.2d 545, 548 (Colo. 1995) (citing Kort v. Hufnagel, 729 P.2d 370, 373 (Colo. 1986)).

A court's inherent authority is generally limited to matters that are reasonably necessary for the proper functioning of the judiciary.... While the separation of powers doctrine prevents another branch of government from encroaching upon the judiciary, the same principle bars a court from intruding into the affairs of the legislative or executive branches.

Id.

Funding courts through the use of inherent power presents unique legal, political, and logistical problems to the courts. As one commentator observed, "[Cases involving] control over courtroom personnel, court budgets and court
and limits of judicial independence, as well as the inherent powers courts claim they need to enforce their actions and to protect themselves against impermissible intrusion by the other branches? In light of funding disputes, does the development of courts over the last half-century necessitate a different attitude towards judicial independence and inherent authority? How sweeping is the judiciary’s right to compel funding when balanced against the conterminous rights and obligations of the legislative and executive branches to determine funding priorities? What price might state judiciaries have to pay in exercising their inherent powers to compel funding? This Article explores the answers to these questions.

I. SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE: THE HISTORICAL ROOTS

Modern notions of judicial independence have important historical roots that serve to elucidate traditional ideas regarding the breadth and limits of the inherent powers of courts in America. This history also serves to moderate contemporary romantic notions of the early Founders who, far from being of one mind, faced monumental political and philosophical differences in constructing a new government, especially with regard to facilities . . . [present] courts with special problems in defining limits to their authority consistent with the prerogatives of other branches and with the judiciary’s obligation to render impartial decisions.” Jeffrey Jackson, Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers, 52 MD. L. REV. 217, 221–22 (1993) (footnotes omitted). The problems are only amplified when the dispute moves out of local courts to encompass the funding for an entire state judicial system.

22 For example, Alexander Hamilton (arguably a closet monarchist) during the Constitutional Convention advocated a limited monarchy, asserting, “[A]n executive is less dangerous to the liberties of the people when in office during life, than for seven years. It may be said this constitutes an elective monarchy!” Notes of the Secret Debates of the Federal Convention of 1787, Taken by the Late Hon. Robert Yates, Chief Justice of the State of New York, and One of the Delegates From That State to the Said Convention (June 19, 1787), http://www.yale.edu/lawweb/avalon/const/yates.htm. Hamilton also proposed that the national legislature appoint courts in each state “so as to make the State governments unnecessary to it.” He confessed, “[T]he people are gradually ripening in their opinions of government—they begin to be tired of an excess of democracy—and what even is the Virginia plan, but pork still, with a little change
the function and structure of the judiciary. At the heart of this new government was the diffusion of power expressed in the separation of powers doctrine, a doctrine whose purpose was to limit the power of government, especially the power of factions within the government.

The constitutional diffusion of government power was novel to the eighteenth century, and no more so than with regard to the creation of the American judicial model. Arguably the Founders' greatest and most innovative political invention was not the diffusion of power across branches of government (a concept largely accepted for years and evidenced in the relationship between European monarchs and national assemblies such as Parliament), but the creation of a separate judicial "department" that would over time come to play an active, independent, and integral role in governing the nation—a role beyond simply resolving its disputes. Over the years the American judiciary has come to enjoy


23 Arguably, it was not until the Supreme Court's decision in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), that the "governing" role of courts was ultimately clarified and established. Prior to this decision, Supreme Court decisions applied to the parties and had little practical effect beyond the litigants; they were not statements of public policy. Even as late as 1861 the power of courts to participate in fashioning public policy through judicial review was questioned. In his first inaugural address in 1861, Abraham Lincoln questioned the principle of judicial review, opining that while court decisions clearly applied to the parties in a case, they did not extend to establishing national policy applicable to everyone.

At the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will cease to be their own rulers . . . [having] practically resigned their Government into the hands of that eminent tribunal.


24 One author has argued that judicial review—which would only be possible with the creation of an independent judiciary—is "American constitutionalism's greatest gift to the world—an arguably greater gift than the U.S. constitutional model itself." Michael J. Glennon, The Case that Made the Court, Wilson Q., Summer 2003, at 20. James F. Simon, more pointed on the importance of Marbury v. Madison in establishing judicial independence, observes:

But although Marshall had satisfied the Republicans' short-term interests by rejecting Marbury's claim, he had purchased an enormous piece of constitutional real estate for the Court. Marbury v. Madison established the Court's authority to declare an act of Congress unconstitutional, a power that would prove to be of historic significance in securing the institution's
broader independence than perhaps any other judiciary in the history of the world. As Donald L. Horowitz observed:

The difference in the scope of judicial power in England and the United States should not be exaggerated. It is primarily a difference of emphasis. There have been periods . . . of great passivity in America. But still the difference remains. What it has meant, in the main, is that American courts have been more open to new challenges, more willing to take on new tasks. This has encouraged others to push problems their way—so much so that no courts anywhere have greater responsibility for making public policy than the courts of the United States.25

It would be a mistake, however, to assume that a truly separate and actively independent judiciary was always part of the Founders' design.26

parity with Congress. Marshall’s opinion also served notice that the Court, not the president, would be the ultimate judge of claims of executive privilege, an authority of seismic proportions.

JAMES F. SIMON, WHAT KIND OF NATION: THOMAS JEFFERSON, JOHN MARSHALL, AND THE EPIC STRUGGLE TO CREATE A UNITED STATES 187 (2002).

The importance of an independent judiciary cannot be overstated, and it has produced great strides in civil rights, checked the arbitrary actions of the coordinate branches, and acted as an effective bulwark against tyrannical majority rule. Its great contribution to America’s economic power is of equal importance. In many emerging nations, the lack of both an independent judiciary and a reliable commercial code is seen as a source of economic stagnation. See Daniel A. Farber, Rights as Signals, 31 J. LEGAL STUD. 83, 98 (2002) (arguing that protection of human rights through constitutionalism and an independent judiciary is a signal to investors of a nation’s commitment to and capacity for economic liberalization); see also Randall Peerenboom, Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People’s Republic of China, 19 BERKELEY J. INT’L L. 161 (2001).

Even within the United States today, the lack of independent tribal courts is seen as an impediment to economic development on many Indian reservations. See Richard J. Ansson, Jr. & Ladine Oravetz, Tribal Economic Development: What Challenges Lie Ahead for Tribal Nations as They Continue to Strive for Economic Diversity?, 11 KAN. J.L. & PUB. POL’Y 441 (2002).


26 See, e.g., THE PLAN OF CHARLES PINCKNEY (SOUTH CAROLINA), PRESENTED TO THE FEDERAL CONVENTION, MAY 29, 1787, http://www.yale.edu/lawweb/avalon/const/pinckney.htm [hereinafter PLAN OF CHARLES PINCKNEY]. Under Pinckney’s plan the Senate and House Delegates
Early American history does not manifestly support contemporary notions of judicial independence, particularly in a modern institutional sense. The earliest "judiciaries," institutionally speaking, were remarkably indistinguishable from other departments of government, and arguably retained very limited powers. Thus, while clearly revolutionary at the

would have the exclusive power to establish a federal judicial court and appoint judges during good behavior. Additionally, they would retain the authority to establish a court of admiralty in each state and to appoint the judges thereof. *Id.*

Even Chief Justice John Marshall, operating more out of concern for informed politics than for any adamant principle, was not entirely committed to the complete independence of the courts. Concerned that the impeachment of then Justice Samuel Chase would negatively affect the independence of the newly created federal judiciary, Marshall suggested that controversial judicial rulings should be appealed to the legislature. Marshall wrote to Chase:

I think the modem doctrine of impeachment should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than a removal of the judge who has rendered them unknowing his fault.

*Letter from John Marshall to Samuel Chase (Jan. 23, 1804), reprinted in 3 ALBERT J. BEVERIDGE, THE LIFE OF JOHN MARSHALL 177 (1919).*


Namely, that church members only shall be free burgesses, and that they only shall choose magistrates and officers among themselves, to have power of transacting all the public civil affairs of this plantation; of making and repealing laws, dividing of inheritances, deciding of differences that may arise, and doing all things and businesses of like nature.

*Id; see also FUNDAMENTAL ORDERS OF 1639, ORDER 10,* http://www.yale.edu/lawweb/avalon/order.htm.

In which said General Courts shall consist the supreme power of the Commonwealth, and they only shall have power to make laws or repeal them . . . and also shall have power to call either Court or Magistrate or any other person whatsoever into question for any misdemeanor, and may for just causes displace or deal otherwise according to the nature of the offense; and also may deal in any other matter that concerns the good of this Commonwealth, except election of Magistrates, which shall be done by the whole body of Freemen.

28 See, e.g., *THE CHARTER OF FUNDAMENTAL LAWS OF WEST NEW JERSEY, AGREED UPON — 1676, CHAPTER XIX,* http://www.yale.edu/lawweb/avalon/states/nj05.htm:

That there shall be in every court, three justices or commissioners, who shall sit with the twelve men of the neighborhood, with them to hear all
time, the creation of a truly separate judiciary was the product of evolutionary thinking, informed by the philosophy of the Enlightenment and by hard-fought struggles over the structure of the new government. Not everyone agreed with the idea of creating a truly separate judiciary. The debate on the appropriate level of independence continues today. The

causes, and to assist the said twelve men in case of law; and that they the said justices shall pronounce such judgment as they shall receive from, and be directed by the said twelve men in whom only the judgment resides, and not otherwise.


[T]hat it is the power of the Governor and his Council to constitute and appoint courts in particular corporations already settled, without the General Assembly; but for the courts of sessions and assizes to be constituted and established by the Governor Council and representatives together: and that all appeals, shall be made from the assizes, to the Governor and his Council, and thence to the Lords proprietors; from whom they may appeal to the king.

Id.

29 See, e.g., THE FEDERALIST NOS. 47, 48 (James Madison).

30 For an excellent historical discussion on the tribulations of the early years of the republic, see SIMON, supra note 24.

31 Even today, the breadth and limits of judicial independence are hotly debated topics. See Mark Hamblett, Federal Judges Attack Sentencing Restrictions, N.Y. L.J., Sept. 24, 2003, at 1. The Judicial Conference of the United States voted to repeal key provisions of the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today ("PROTECT") Act of 2003, arguing the new law severely limits a trial judge's ability to depart from Sentencing Guidelines and requires reports to Congress on any federal judge who does so. Id.; see also Editorial, Dispensing Justice, WINSTON-SALEM J., Aug. 24, 2003, at 16 (criticizing Attorney General John Ashcroft's directive to U.S. Attorneys to collect data on federal judges who issue sentences that are lighter than federal guidelines suggest). This editorial argues that any attempt to compel judges to view cases "the same way prosecutors do implies an inadequate regard for the public trust in the impartiality and independence of the justice system" and "runs afoul . . . of the constitutional principle of separation of powers." Id.


Congress establishes the rules to be applied in sentencing; that is a
division between the exercise of judicial power by independent courts and the authority of the coordinate branches has never been entirely certain. Rather, the division has been a function of ebb and flow, depending on the cultural and political environment of the age in which the exercise of such power took place.

Generally speaking, two experiences framed the early debate over the status of judicial power in America: the lack of judicial independence from the Crown during colonial rule, and the lack of judicial independence from state legislatures in the very early days of the Republic. Courts in colonial America were not independent of the overarching authority of the monarch. Like so many organs of European colonial government, they existed as instruments for enforcing the policies of the home government. Colonial courts—as distinguished from courts in the “Home Country”—existed at the pleasure of the Crown as instruments of government power. These courts substantiated not only the “laws” of the British Empire but also, more importantly, the stated and unstated policies and prejudices of the monarch and Parliament, unfettered by “constitutional” restraints.
Great Britain expressed home control over colonial judges that can be described as schizophrenic; at the same time, the British, with an evolving notion of judicial independence, sought to promote the judiciary's independence from elected colonial authorities, though certainly not at the expense of home control over the activities of judges and courts. As early as 1699, authorities in Great Britain expressed concern that colonial legislatures' refusal to provide adequate pay for judges undermined the administration and quality of justice. As colonial judges became more independent, however, the pendulum swung and the Crown sought to exercise greater control. In 1761, for example, the Privy Council issued strict instructions to colonial governors prohibiting them from approving any legislative act that conditioned judicial appointments on anything other

separate and distinct from each other. The executive magistrate forms an integral part of the legislative authority. He alone has the prerogative of making treaties with foreign sovereigns, which when made, have, under certain limitations, the force of legislative acts. All the members of the judiciary department are appointed by him, can be removed by him on the address of the two houses of Parliament, and form, when he pleases to consult them, one of his constitutional councils. One branch of the legislative department, forms also a great constitutional council to the executive chief; as, on another hand, it is the sole depository of judicial power in cases of impeachment, and is invested with the supreme appellate jurisdiction in all other cases. The judges again are so far connected with the legislative department, as often to attend and participate in its deliberations, though not admitted to a legislative vote.

From these facts, by which Montesquieu was guided, it may clearly be inferred, that in saying, "there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates;" or, "if the power of judging be not separated from the legislative and executive powers he did not mean that these departments ought to have no partial agency in, or no control over the acts of each other."

Id.

Although the primary method for controlling colonial judges was regulation of appointment, tenure, and salary, the British also maintained control over the colonial legal process by providing a final appeal to the Privy Council in London. This method remains in effect today in several countries that are part of the United Kingdom. For example, the Green Party of New Zealand seeks to supplant appeals to the Privy Council with a truly independent Supreme Court that would have final say on all legal matters in that nation. Editorial, On to the Republic, OTAGO DAILY TIMES, Sept. 18, 2003, 2003 WL 63438515.

than pleasure. Thus, judicial independence for colonial courts was conditional, resting upon the good graces of the Crown, Parliament, and appointed colonial agents.

The principal method used to restrain the independent behavior of colonial judges was through control of their appointments, tenures, and salaries. Unlike judges in England, who enjoyed tenure during good behavior under the 1702 Act of Settlement, colonial judges generally served at the pleasure of the Crown. Colonial judges were dependent on the Crown and its appointed agents not only for the legal authority to act, but also at a practical level for their tenure of office and, ultimately, their

36 See id. at 681.
38 Several other methods were employed to control the colonial judiciary. For example, under the direction of the Privy Council, a system of legislative review was constructed that vested in the Council the authority to screen colonial acts for conformity to English Law. See Kaufman, supra note 35, at 679. Moreover, the British created a right of appeal to London in all cases where the dispute involved more than £300. See Burkeley N. Riggs & Tamera D. Westerberg, Judicial Independence: An Historical Perspective, 74 DENV. U. L. REV. 337, 350 (1997) (citing LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 49 (2d ed. 1985)).

AND wee doe likewise give and grant unto the said William Penn, and his heires, and to his and their Deputies and Lieutenants, full power and authoritie to appoint and establish any Judges and Justices, Magistrates and Officers whatsoever, for what Causes soever for the probates of wills, and for the granting of Administrations within the precincts aforesaid and with what Power soever, and in such forme as to the said William Penn or his heires shall seeme most convenient . . . .

Id.; see Peter M. Shane, Who May Discipline or Remove Federal Judges? A Constitutional Analysis, 142 U. PA. L. REV. 209 (1993); see also Joseph H. Smith, An Independent Judiciary: The Colonial Background, 124 U. PA. L. REV. 1104, 1111–12 (1976) ("Commissions to governors in the royal colonies were silent on the gubernatorial power to remove judges from office. It was apparently understood, however, that the removal power was possessed by implication, because at an early period the Crown issued instructions to control the circumstances of such removal."). Early disputes over control of the judiciary, and particularly judicial tenure, occurred in Pennsylvania, New York, North Carolina, and Massachusetts. See generally Kaufman, supra note 35, at 680–83.
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salaries. Under the Massachusetts Government Act of 1774, Parliament required that all judicial appointees in the Bay Colony serve at the pleasure of the Crown. The Crown's continued control of the colonies, dramatically symbolized by its control of and encroachment upon the independence of colonial judges, was met with stiff opposition. As Professors Charles Gardner Geyh and Emily Field Van Tassell observed: "The dependence of colonial courts on the English monarch was among the flashpoints that sparked the Declaration of Independence."

In the aftermath of independence, states sought to insulate the judiciary and the exercise of judicial power from the perceived ills of crown rule by severely limiting the authority of the executive to encroach upon the

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40 See Smith, supra note 39, at 1104. Smith notes that controversies surrounding judicial independence in the colonies generally centered on two points:
First, the Crown rigidly adhered to the policy that judges in the royal colonies, and even in proprietary Pennsylvania, should hold office during pleasure . . . rather than during good behavior . . . . This policy was carried out largely by royal instructions to colonial Governors, disobedience of which could result in dismissal, and by royal disallowance of colonial acts of assembly providing for judicial tenure during good behavior. Second, the ministry decided in 1772 to implement the provisions of the Townshend Revenue Act of 1767 by paying the salaries of the Superior Court judges in Massachusetts Bay. This not only made these judges independent of the popular branch of the legislature, but also, in the opinion of most patriotic colonials, provided the funds by an unconstitutional exercise of the taxing power of Parliament.

Id. (footnotes omitted).


42 One example of British intrusion on colonial judicial affairs is The Administration of Justice Act of 1774. See sources cited supra note 41. This act, among other things, placed strict controls on colonial judges' authority to act in cases concerning charges against colonial authorities involved in suppressing the insurrection or collecting revenues in the Massachusetts Bay Colony. In some circumstances the Act completely divested colonial judicial authorities of jurisdiction to try alleged criminals; in other cases the Act vested colonial governors with broad authority. See sources cited supra note 41.

43 Charles Gardner Geyh & Emily Field Van Tassell, The Independence of the Judicial Branch in the New Republic, 74 CHI.-KENT L. REV. 31, 35 (1998); see also DECLARATION OF INDEPENDENCE, paras. 10, 11 (U.S. 1776) ("He has obstructed the administration of justice, by refusing his assent to laws for establishing judiciary powers. He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.").
authority of judges, particularly with regards to such matters as appointment, tenure, and salary. One must recall that under British colonial rule, crown-appointed authorities possessed enormous power not only over the judiciary, but also over colonial assemblies. Thus, although legislatures viewed with suspicion and concern the power of the executive to interfere in the judiciary, they did not have similar reservations regarding their own power to interfere. In Delaware, for instance, the

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44 Other provisions also sought to limit both the power and influence of state governors. Term limits, for example, are not a new concept. Maryland provided in its 1776 Constitution, “That the governor shall not continue in that office longer than three years successively, nor be eligible as Governor, until the expiration of four years after he shall have been out of that office.” See MD. CONST. OF 1776, art. XXXI, http://yale.edu/lawweb/avalon/states/ma02.htm. Likewise, Georgia strictly regulated the power of the governor to grant pardons, generally leaving that matter to the consent of the state legislature. See GA. CONST. OF 1777, art. XIX, http://www.yale.edu/lawweb/avalon/states/ga02.htm. Virginia’s 1776 constitution provided, “A Governor, or chief magistrate, shall be chosen annually by joint ballot of both Houses . . . who shall not continue in that office longer than three years successively nor be eligible, until the expiration of four years after he shall have been out of that office.” See VA. CONST. OF 1776, http://www.yale.edu/lawweb/avalon/states/va05.htm.

It should be noted that before the adoption of the federal Constitution, virtually all matters were tried in state courts, with no appeal—even in cases concerning interstate and national issues—to a “federal” court. Alexander Hamilton argued for the creation of an independent federal judiciary, noting: “In unfolding the defects of the existing confederation, the utility and necessity of a federal judicature have been clearly pointed out.” FEDERALIST No. 78, supra note 1, at 401 (Alexander Hamilton). However, not all of the Founders supported the notion of creating a strong federal judiciary. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 22, at 37–49.

45 It may be asserted that legislatures generally viewed the executive with suspicion. One of the fundamental issues confronted by the Founders was the status of the executive branch. Alexander Hamilton advocated a strong executive, even a limited monarchy, while others, who feared the concentration of authority in one person, sought to weaken the executive with respect to judicial appointments. Such a view was voiced by Mr. Bedford at the convention. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 22, at 43.

46 For example, the Maryland Constitution of 1776 provided:

[T]he Chancellor and Judges ought to hold commissions during good behaviour; and the said Chancellor and Judges shall be removed for misbehaviour, on conviction in a court of law, and may be removed by the Governor, upon the address of the General Assembly; Provided, That two-
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president and general assembly, by joint ballot, appointed the three justices of the state supreme court. Moreover, the president, sitting with six other persons appointed by the legislative council and House of Assembly, sat as a court of appeals to review decisions of the supreme court. North thirds of all the members of each House concur in such address. That salaries, liberal, but not profuse, ought to be secured to the Chancellor and the Judges, during the continuance of their Commissions, in such manner, and at such times, as the Legislature shall hereafter direct, upon consideration of the circumstances of this State. No Chancellor or Judge ought to hold any other office, civil or military, or receive fees or perquisites of any kind.


Similarly, New Jersey's 1776 Constitution provided:

[T]he Judges of the Supreme Court shall continue in office for seven years: the Judges of the Inferior Court of Common Pleas in the several counties... shall continue in office for five years... and that they shall be severally appointed by the Council and Assembly... Provided always, that the said officers, severally, shall be capable of being re-appointed, at the end of the terms severally before limited; and that any of the said officers shall be liable to be dismissed, when adjudged guilty of misbehaviour, by the Council, on an impeachment of the Assembly.

N.J. CONST. OF 1776, art. XII, http://www.yale.edu/lawweb/avalon/states/nj15.htm; see also N.Y. CONST. OF 1777, http://www.yale.edu/lawweb/avalon/states/ny01.htm ("[N]ew commissions shall be issued to judges of the county courts... and to justices of the peace, once at least in every three years.").

47 DEL. CONST. OF 1776, art. XII, http://www.yale.edu/lawweb/avalon/states/de02.htm#art12 ("The president and general assembly shall by joint ballot appoint three justices of the supreme court for the State, one of whom shall be chief justice, and a judge of admiralty, and also four justices of the courts of common pleas and orphans’ courts for each county... "). The 1776 Delaware Constitution also provided that which judges had longed for under colonial rule—tenure in office during good behavior and a fixed salary. As to the salary issue, the constitution was silent on whether it was “fixed” such that it could not be altered during time in office. Id.

48 See id. art. XVII.

There shall be an appeal from the supreme court of Delaware, in matters of law and equity, to a court of seven persons, to consist of the president for the time being, who shall preside therein, and six others, to be appointed, three by the legislative council, and three by the house of assembly, who shall continue in office during good behavior, and be commissioned by the president, under the great seal; which court shall be styled the “court of appeals...”

Id.
Carolina, 49 South Carolina, 50 and Virginia 51 provided that their legislative bodies alone would nominate and appoint judges. Under the Articles of Confederation, even Congress played a role in the appointment of judges and the adjudication of disputes. 52 In some cases, the distinction between legislative power and judicial power 53 was barely discernible, if it existed

49 See N.C. CONST. OF 1776, art. XIII, http://www.yale.edu/lawweb/avalon/states/nc07.htm (“That the General Assembly shall, by joint ballot of both houses, appoint Judges of the Supreme Courts of Law and Equity, Judges of Admiralty . . . who shall be commissioned by the Governor, and hold their offices during good behavior.”).


That justices of the peace shall be nominated by the general assembly and commissioned by the president and commander-in-chief, during pleasure. They shall not be entitled to fees except on prosecutions for felony, and not acting in the magistracy, they shall not be entitled to the privileges allowed to them by law.

That all other judicial officers shall be chosen by ballot, jointly by the general assembly and legislative council, and except the judges of the court of chancery, commissioned by the president and commander-in-chief, during good behavior, but shall be removed on address of the general assembly and legislative council.

Id.

51 See VA. CONST. OF 1776, (“The two Houses of Assembly shall, by joint ballot, appoint Judges of the Supreme Court of Appeals, and General Court, Judges in Chancery, Judges of Admiralty, Secretary, and the Attorney-General, to be commissioned by the Governor, and continue in office during good behaviour.”).

52 The Articles of Confederation recognized the legislative branch as the dominant governmental force at the national level. The Articles vested in Congress the limited authority to appoint “courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of Congress shall be appointed a judge of any of the said courts.” ARTICLES OF CONFEDERATION art. IX, http://www.yale.edu/lawweb/avalon/artconf.htm. Moreover, Congress performed an adjudicatory role in that it was “the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction or any other causes whatever.” Id.

53 “Judicial power” may generally be defined as the power to adjudicate disputes according to the law and to issue binding judgments. BLACK’S LAW DICTIONARY 851 (7th ed. 1999). Additionally, in the United States, “judicial power” includes the power of the courts to take measure of and strike down legislative actions that contravene the Constitution. Chief Justice Marshall described this function as “the very essence of judicial duty.” Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803); see also United States v. Nixon, 418 U.S. 683,
at all. The Founders viewed the legislative branch as the dominant governmental force, superceding the authority of both the executive and the judiciary.

The period following the Declaration of Independence saw a continuing evolution in thinking regarding judicial independence at both the national and state levels. Although early state charters may have resolved the issue


See, e.g., N.J. CONST. OF 1776, art. IX, ("[T]he Governor and Council, (seven whereof shall be a quorum) be the Court of Appeals, in the last resort, in all clauses of law, as heretofore; and that they possess the power of granting pardons to criminals, after condemnation, in all cases of treason, felony, or other offences.").

See also DRAFT CONSTITUTION OF VIRGINIA, 1776, http://www.yale.edu/lawweb/avalon/jeffcons.htm ("The judges of the General court and of the High court of Chancery shall have session and deliberative voice, but not suffrage in the house of Senators."). Madison complained about the structure of several state governments, noting:

It is but too obvious that, in some instances, the fundamental principle under consideration has been violated by too great a mixture, and even an actual consolidation of the different powers; and that in no instance has a competent provision been made for maintaining in practice the separation delineated on paper.

THE FEDERALIST NO. 47, supra note 33, at 255 (James Madison); see also VARIANT TEXTS OF THE VIRGINIA PLAN, PRESENTED BY EDMUND RANDOLPH TO THE FEDERAL CONVENTION, MAY 29, 1787, TEXT A, http://www.yale.edu/lawweb/avalon/const/vatexta.htm [hereinafter VARIANT TEXTS]. Randolph's plan called for the creation of a national legislature that would select both the national executive and the members of the national judiciary. The plan also allowed each branch of government to originate acts, and further provided that the national executive, sitting as a council of revision with a number of the members of the national judiciary, would review and approve acts of the legislature. The various plans introduced to the Constitutional Convention evidence that, far from being a predetermined concept, the separation of powers principle was neither universally understood by the Framers nor universally agreed to. Id.

There is evidence that several Framers of the Constitution supported legislative election of both the national executive and members of the national judiciary. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 22, at 27-28; VARIANT TEXTS, supra note 54; PLAN OF CHARLES PINCKNEY, supra note 26.

It has been suggested that the Founders' conceptual commitment to judicial independence was a reaction to prior experiences under colonial rule, rather than an outgrowth of a culture that promoted judicial independence as a core governing principle. Consequently, the delegates to the Constitutional Convention lacked the
of judicial separation from the executive, they did not resolve the issue of judicial dependence upon the legislature. In 1784, for example, when a New York court struck down a legislative enactment, lawmakers attempted to remove the opinion writer from the bench. Judges in Rhode Island faced a similar crisis when they struck down a legislative act. The state legislature demanded that the judges appear and explain the grounds and authority for declaring an act unconstitutional. When several of the judges refused to appear, a motion was made to remove them from office. James Madison noted these shenanigans when he argued for a separate federal judiciary: "[In Rhode] Island the Judges who refused to execute an unconstitutional law were displaced, and others substituted, by the Legislatures who would be willing instruments of the wicked [and]

enthusiasm necessary to establish an institutionally independent branch of government. The refusal to tackle the difficult issue of the structure of the federal courts vis-à-vis state courts, and the willingness to delegate that matter to Congress, "underscores the Founders' comparatively tepid interest in plumbing the depths of the subject." Geyh & Van Tassell, supra note 43, at 53. The proposition that the Founders paid little attention to the judiciary is supported by the lack of discussion thereon during the Constitutional Convention; the notes of the Convention overwhelmingly focus on the legislative and executive branches. See NOTES OF RUFUS KING IN THE FEDERAL CONVENTION OF 1787, http://www.yale.edu/lawweb/avalon/const/king.htm; NOTES OF WILLIAM PATTERSON IN THE FEDERAL CONVENTION OF 1787, http://www.yale.edu/lawweb/avalon/const/patterson.htm; NOTES OF MAJOR WILLIAM PIERCE (GEORGIA) IN THE FEDERAL CONVENTION OF 1787, http://www.yale.edu/lawweb/avalon/const/pierce.htm.

57 See Julius Goebel, Jr., 1 History of the Supreme Court of the United States: Antecedents and Beginnings to 1801, 133–37 (1971).

58 The matter involved the case of Trevett v. Weeden, an action brought against a butcher who refused to accept paper currency for payment of a debt. See Kaufman, supra note 35, at 685. To enforce the acceptance of its paper currency, Rhode Island empowered the judiciary to act summarily, without a jury, against any person who refused payment. When the case came to trial, the defendant argued that the Rhode Island law unconstitutionally violated his fundamental right to a trial by jury. Although the court dismissed the action for want of jurisdiction, a majority of its members expressed the opinion that the act was indeed unconstitutional. This sparked a firestorm of protests from the legislature. Id. at 685 n.82.

59 Georgia's first constitution specifically provided, "Every officer of the State shall be liable to be called to account by the house of assembly." GA. CONST. OF 1777, art. XLIX, supra note 44. Whether this "accounting" to the legislature applied to the judiciary is unclear.

60 GOEBEL, supra note 57, at 137–41. The motion was withdrawn when it was pointed out that judges could only be removed for committing criminal acts. Id.
The concern that judicial power was being encroached upon by the legislature contributed, in large measure, to the delegation of that power to an entirely separate branch. Thomas Jefferson, hesitant to employ the lengthy impeachment process to remove Federalist judges from the federal bench, privately advocated amending the Constitution to provide a system in which judges could be removed by the president on majority vote of both houses of the legislature. Id. at 195.

The federal Constitution was not the first instrument to establish a tripartite government. Some early state constitutions specifically provided that governmental power would be divided among three branches. See GA. CONST. OF 1777, art. I, http://www.yale.edu/lawweb/avalon/states/ga02.htm. However, it is questionable whether the judiciary was functionally independent. For example, James Madison observed that the distribution of government powers expressed in many early state constitutions created nothing more than “parchment barriers” that did little to protect the executive and judicial branches from legislative incursions. THE FEDERALIST NO. 48, at 256 (James Madison) (George W. Carey & James McClellan eds., 2001). Madison further noted: “The salaries of judges, which the constitution expressly requires to be fixed, had been occasionally varied; and cases belonging to the judiciary department, frequently drawn within legislative cognizance and determination.” Id. at 259. Madison’s greatest fear was that an unchecked and unruly legislature would pass impotent, mutable, and unjust laws.
Jefferson, who once described the judge as nothing more than a "mere machine," complained that the legislature's assumption of executive and judicial powers rendered no opposition to "173 despots [who] would surely be as oppressive as one."

With the creation of an independent judiciary as the third branch of government, uncertainty arose concerning the breadth and limits of judicial power and the courts' inherent power. Most early constitutions, including the newly devised federal Constitution, failed to define the nature and breadth of judicial power, contributing to a long national tradition of courts defining the limits of their authority. It was not enough for judges to be insulated from political interference through fixed salary and good behavior provisions. Needing insulation from the political branches, the


63 Letter from Thomas Jefferson to Edmund Pendleton (Aug. 26, 1776), http://www.yale.edu/lawweb/avalon/jefflett/let9.htm ("Let mercy be the character of the lawgiver, but let the judge be a mere machine. The mercies of the law will be dispensed equally [and] impartially to every description of men; those of the judge, or of the executive power, will be the eccentric impulses of whimsical, capricious designing man.").

64 THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA, Query XIII (1782), http://www.yale.edu/lawweb/avalon/jeffvir.htm. During the constitutional debates, James Madison initially argued that the judiciary and executive should revise the laws together. "An association of the Judges in [the executive's] revisionary function [would] both double the advantage and diminish the danger. It [would] also enable the Judiciary Department the better to defend itself [against] Legislative encroachments." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 22, at 138 (James Madison). Madison was particularly concerned about the potential power of the legislature, noting that "[e]xperience in all the States had evinced a powerful tendency in the Legislature to absorb all power into its vortex. This was the real source of danger to the American Constitutions ..." 2 id. at 74.

65 Many of the notes of the debates at the Constitutional Convention portray the extent to which the entire notion of "judicial power" was in flux. James Madison's notes of June 4, 1787 evidence this fact. See, for example, Madison's notes on the debates over the extent to which the executive branch should be allowed to negate an act of the legislature and the extent to which the judiciary should be involved in such actions. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 22, at 96–104.

66 Even today there is considerable debate concerning the extent of a court's inherent power and the authority of the legislature both to control the exercise of such power and to undermine its use. See, e.g., Degen v. United States, 517 U.S. 820, 823 (1996) ("In many instances the inherent powers of the courts may be controlled or overridden by statute or rule."); Commonwealth v. Morris, 771 A.2d 721, 738 (Pa. 2001) ("However, exercise of inherent rights is not unlimited and can be restricted by the legislature.").
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courts relied on the notions of inherent powers and judicial review to create an “institution.”67 However, many early constitutions failed to define the nature and breadth of judicial authority, contributing to a long national tradition of courts defining the limits of their own power. Early in the nation’s history, therefore, courts began to assert their largely self-defined powers to gain control over the business of the judiciary and, more importantly, to secure the role of the judiciary in governing the nation.68

Even in the absence of particularized constitutional or statutory authority, courts assumed the inherent power to issue process,69 manage property seized under the authority of the court,70 control the records of courts,71 regulate the bar,72 punish contumacious acts,73 ensure proper court

67 See, e.g., Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 18 (1825) (“Every Court has, like every other public political body, the power necessary and proper to provide for the orderly conduct of its business.”). Chief Justice Marshall noted, however, that Congress possessed significant control over the process and procedures of the federal courts, restraining the Courts’ inherent powers. Id. at 27. But see Sibaja v. Dow Chem. Co., 757 F.2d 1215, 1218 (11th Cir. 1985) (“The doctrine [of forum non conveniens] derives from the court’s inherent power, under article III of the Constitution, to control the administration of the litigation before it and to prevent its process from becoming an instrument of abuse, injustice and oppression.”). Notwithstanding the Supreme Court’s landmark decision in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), as late as 1815 Thomas Jefferson argued that the legislature had a right and obligation to expound on the meaning of the law. Writing to W.H. Torrance, Jefferson stated,

[T]his opinion which ascribes exclusive exposition to the legislature, merits respect for its safety, there being in the body of the nation a control over them, which, if expressed by rejection on the subsequent exercise of their elective franchise, enlists public opinion against their exposition, and encourages a judge or executive on a future occasion to adhere to their former opinion.

Letter from Thomas Jefferson to W.H. Torrance, supra note 19.

68 See Marbury, 5 U.S. (1 Cranch) at 177 (“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.”); cf. William F. Ryan, Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions, 77 B.U. L. REV. 761 (1997) (arguing that courts’ inherent powers prohibit Congress from unduly restraining courts’ discretion though rules of procedure).

69 See Ex Parte Bollman, 8 U.S. (4 Cranch) 75 (1807).

70 See Place v. City of Norwich, 19 F. Cas. 792 (E.D.N.Y. 1866).

71 See Talladega Ins. Co. v. Landers, 43 Ala. 115 (1869).

72 See Beene v. State, 22 Ark. 149 (1860).

73 See State v. Morrill, 16 Ark. 384 (1855).
decorum,\textsuperscript{74} and prevent abuse of judicial process,\textsuperscript{75} these powers complemented the power of judicial review. Although inherent power was recognized, not all courts were comfortable with the notion. One member of the Ohio Supreme Court wryly observed,

Perhaps it may be thought . . . the court might make such an order by its inherent power. But this inherent power is a thing I do not well understand. It may comprehend much, it may comprehend but little. I am satisfied with the powers expressly delegated, and unwilling to assume any by implication.\textsuperscript{76}

Three important points can be gleaned from the early history of judicial power and judicial independence in America. First, it is clear that the judiciary has not always enjoyed broad "independence," especially in an institutional sense as many understand it today. Early history indicates that the judiciary was not understood as a completely autonomous and independent institution of government, and, in some quarters, may not be viewed as such even today. Early constitutions sought foremost to prevent the concentration of governmental power (including judicial power) in individuals or groups of individuals. These constitutions did not necessarily seek to sever judicial power from that of the other branches.\textsuperscript{77} Many of the early constitutions and historical documents provide evidence supporting the proposition that the judiciary was quite dependent upon the legislature and, in some cases, clearly viewed as subservient to, if distinct from, that body. Judicial power was personal not institutional; it flowed from the constitutions to individual judges as a means of deciding cases rather than governing the nation. Although early state constitutions sought to distinguish the judiciary from the executive, they did not necessarily seek to divorce the judiciary from control of the people as expressed through

\begin{footnotes}
\item[74] See Killpatrick v. Frost, 2 Grant 168 (Pa. 1859).
\item[77] See, e.g., Draft Constitution for Virginia, June 1776, http://www.yale.edu/lawweb/avalon/jeffcons.htm ("The Legislative, Executive and Judiciary offices shall be kept forever separate; no person exercising the one shall be capable of appointment to the others, or to either of them."). However, though the draft proposed complete separation of governmental power at a theoretical level, practical entanglements continued to exist within the document. See supra notes 51, 54, & 62.
\end{footnotes}
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their elected representatives in the legislature. As Professor Gordon Wood observes:

These constitutional provisions giving control of the courts and judicial tenure to the legislatures actually represented the culmination of what the colonial assemblies had been struggling for in their eighteenth-century contests with the Crown. The Revolutionaries had no intention of curtailing legislative interference in the court structure and in judicial functions, and in fact they meant to increase it.79

Second, while courts have defended the principle of inherent powers and used those powers throughout the nation's history, their use has been quite modest and restrained. This may reflect some uneasiness with this largely self-defined power. The early use of inherent power centered not on compelling needed resources (as it is increasingly used today), but on defending the fundamental powers of the courts to decide cases impartially and enforce their decisions. Early examples of the use of inherent power included preventing abuse of judicial proceedings, punishing contempt, enforcing judgments, and ensuring proper respect for court proceedings.80 The use of inherent powers, therefore, generally related to the judiciary's adjudicative role in securing the authority needed for proper adjudication,81 not necessarily its role in protecting its institutional status or budget.82 Consequently, inherent powers were most frequently used not to defend the

78 For example, during the federal Constitution ratification debates in South Carolina, Charles Cotesworth Pinckney noted that “The laws which are to regulate trials must be made by the representatives of the people chosen as this house are, and as amenable as they are for every part of their conduct.” Ryan, supra note 68, at 769.


The judiciary . . . members were left dependent on the legislative, for their subsistence in office, and some of them for their continuance in it. If therefore the legislature assumes . . . judiciary powers, no opposition is likely to be made; nor, if made, can it be effectual; because in that case they may put their proceedings into the form of an act of assembly, which will render them obligatory on the other branches. They have accordingly, in many instances, decided rights which should have been left to judiciary controversy . . . .

JEFFERSON, supra note 64, at Query XIII.

80 See supra notes 69–75.

81 See, e.g., Lyon v. M'Manus, 4 Binn. 167 (Pa. 1811).

82 See, e.g., Beall v. Ex'rs of Fox, 4 Ga. 404 (1848).
judiciary against intrusion by the coordinate branches of government, but instead to ensure the fundamental legitimacy and enforceability of court decisions on litigants and, by extension, the larger community. Many courts were clearly uncomfortable with the notion of inherent power, particularly when its use might invade the customary territory of the other branches of government. The use of inherent power to compel funding for the judiciary’s direct operations is therefore a modern use more than an historical artifact.

Finally, in the early days of the republic and throughout much of the nation’s history, concerns with judicial independence centered on decisional independence—that is, insulating the act of judgment from the machinations of the political branches, particularly the legislature. Broad decisional independence was viewed as imposing a limitation on the power of the legislature to dictate the outcome of individual cases; it provided an additional check on legislative and executive tyranny. The states sought to provide judges with needed insulation through so-called “good behavior” and “fixed compensation” provisions, which had a basis in English law and were simply “carried” into the design of American government. It was

83 See, e.g., Durham v. Lewiston, 4 Me. 140 (1826).
85 See THE FEDERALIST No. 78, supra note 1, at 402 (Alexander Hamilton). Hamilton argued that “there is no liberty, if the power of judging be not separated from the legislative and executive powers.” Id. (emphasis added) (quoting Montesquieu); see also THE FEDERALIST No. 47, supra note 33, at 251–52 (James Madison) (“[W]here the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator.” (quoting Montesquieu)).
86 THE FEDERALIST No. 78, supra note 1, at 405 (Alexander Hamilton).
If then the courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.
Id.
87 See, e.g., U.S. CONST. art. III, § 1 (“The Judges . . . shall hold their Offices during good Behavior . . . .”); ALA. CONST. art. VI, § 150 (“The justices of the supreme court, chancellors, and the judges of the circuit courts and other courts of record, except probate courts, shall, at stated times, receive for their services a compensation which shall not be diminished during their official terms . . . .”); COLO. CONST. art. VI, § 18 (“Justices and judges of courts of record shall receive
thought that these provisions alone would provide judges the freedom to
decide cases free of pressure from the political branches of government or
the public—pressure that would undermine the rule of law and the
legitimacy of court decisions.

However, the federal and various state constitutions, so deeply
concerned with a judge’s decisional independence, were largely silent on
the “institutional status” of the courts as a separate branch of government.88

such compensation as may be provided by law, which may be increased but may
not be decreased during their term of office and shall receive such pension or
retirement benefits as may be provided by law.”); MASS. CONST. Ch. III, art. I (“All
judicial officers, duly appointed, commissioned and sworn, shall hold their offices
during good behavior, excepting such concerning whom there is different provision
made in this constitution: provided nevertheless, the governor, with consent of the
council, may remove them upon the address of both houses of the legislature.”); MO. CONST. art. V, § 20 (“[N]o judge’s salary shall be diminished during his term of
office.”); OHIO CONST. § 4.06(B) (“The judges of the Supreme Court, courts of
appeals, courts of common pleas, and divisions thereof, and of all courts of record
established by law, shall, at stated times, receive, for their services such compensa-
tion as may be provided by law, which shall not be diminished during their term of
office.”); UTAH CONST. art. VIII, § 14. (“The salaries of justices and judges shall
not be diminished during their terms of office.”).

Unlike the federal constitution, state court judges generally serve for fixed
terms and are subject to removal for a broad range of offenses. See, e.g., MO.
CONST. art. V, § 24 (stipulating that judges may be removed from office when
unable to discharge their judicial duties due to permanent sickness, physical or
mental infirmity, commission of a crime, misconduct, habitual drunkenness, willful
neglect of duties, corruption, incompetence, or any other offense involving moral
turpitude or oppression in office); N.Y. CONST. art. VI, § 22 (“[A] judge or justice
[may] be admonished, censured or removed from office for cause, including, but
not limited to, misconduct in office, persistent failure to perform his or her duties,
habitual intemperance, and conduct, on or off the bench, prejudicial to the
administration of justice, or that a judge or justice be retired for mental or physical
disability preventing the proper performance of his or her judicial duties.”); S.D.
CONST. art. V, § 9 (“[T]he Supreme Court, after hearing, may censure, remove or
retire a justice or judge for action which constitutes willful misconduct in office,
willful and persistent failure to perform his duties, habitual intemperance, disability
that seriously interferes with the performance of the duties or conduct prejudicial
to the administration of justice which brings a judicial office into disrepute.”) Many
states provide for removal of judges by the state supreme court or other mechanism
short of formal impeachment. See infra note 121.

88 One relatively modern example is the 1901 Alabama Constitution, which
provided that the judicial power of the state was
vested in the senate sitting as a court of impeachment, a supreme court,
circuit courts, chancery courts, courts of probate, such courts of law and
equity inferior to the supreme court, and to consist of not more than five
members, as the legislature from time to time may establish, and such
Unlike the legislative and executive branches, which had to (and must) act "institutionally" to accomplish certain acts, judges could (and can) act without regard to the judiciary's institutional nature by concentrating on their independent (and individual) judgment. Constitutions were designed to protect this act of judgment, and largely failed to consider the corporate, institutional, or systematic structure of the judicial branch.

In the years leading up to the drafting of the federal constitution and revision of many state constitutions, it became clear that, although "good behavior" and "fixed compensation" provisions ensured some modicum of independence in the exercise of judicial duties, these provisions did not provide the judiciary with the tools necessary to prevent legislative interference in the exercise of judicial power. Jefferson, Hamilton, and Madison all expressed dismay with legislative encroachment on the judiciary." Continued encroachment upon the judiciary, combined with growing concern over "legislative tyranny," resulted in the separation of judicial power from legislative and executive power. This separation of persons as may be by law invested with powers of a judicial nature; but no court of general jurisdiction, at law or in equity, or both, shall hereafter be established in and for any one county having a population of less than twenty thousand, according to the next preceding federal census, and property assessed for taxation at a less valuation than three million five hundred thousand dollars.

 Ala. Const. of 1901, art. VI, § 139.

89 The idea of courts as separate government entities existed prior to the adoption of the Constitution. As early as 1776, John Adams advocated in his writings on the Virginia Constitution for an independent judiciary "so it may be a check upon both [the executive and legislative branches]." Geyh & Van Tassell, supra note 43, at 36. He did not, however, win the debate. Id.; Goebel, supra note 57, at 9.

90 See supra notes 61, 64.

91 Hamilton further observed:

This simple view of the matter suggests several important consequences. It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves, that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter: I mean, so long as the judiciary remains truly distinct from both the legislature and the executive. For I agree that "there is no liberty, if the power of judging be not separated from the legislative and executive powers." And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its
judicial power is the hallmark of American government; that judges enjoy tenure during good behavior and have fixed compensation are merely conceptual holdovers from the British judicial tradition.

It must be emphasized, however, that early efforts to separate judicial power from that of the other branches did not de facto give rise to an "institutional" court system as it is understood today. The early focus of separating judicial power remained on ensuring that the act of judgment could be exercised impartially and independently of the coordinate branches of government. Constitutions of the era, therefore, were generally silent on the institutional structure and status of the courts; the matter was frequently left to the determination of the legislature or the courts. 92 Consequently, unlike the legislature, which from its very early stages possessed an institutional structure and status, 93 the judiciary's status and union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter . . . .

THE FEDERALIST No. 78, supra note 1, at 402–03 (Alexander Hamilton) (quoting Montesquieu). Thomas Jefferson expressed like concern with the potential for legislative tyranny when he wrote:

All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. 173 despots would surely be as oppressive as one.

JEFFERSON, supra note 64, at Query XIII. But see supra note 19 (noting that, in letters, Jefferson expresses suspicion of the judiciary).

92 Even today many state constitutions vest the state legislature with the power to establish new courts (which in limited circumstances implies the power to disestablish them), to determine the divisions of the trial and intermediate appellate courts, and to establish the number of judgeships within the state. Thus the structure of state and federal courts remains a matter squarely within the purview of the legislature. This tradition of legislative control over the structure of courts is rooted in debates at the Constitutional Convention. For example, at the federal level, the authority of Congress to establish courts was as much a matter of political compromise as one of structural thinking. Vesting Congress with constitutional authority to establish federal courts was meant to assuage Anti-Federalist concerns "that a national judiciary would usurp the role of the state courts." Geyh & Van Tassell, supra note 43, at 45.

93 For example, from early on many state constitutions provided that the legislature alone was the judge of its elections and the qualifications of its members and this tradition continues today. See, e.g., DEL. CONST. art. II, § 8; FLA. CONST. art. III, § 2; KY. CONST. § 38; MINN. CONST. art. IV, § 6. For a discussion on the meaning of such constitutional provisions, see McIntyre v. Wick, 558 N.W.2d 347, 351 n.1 (S.D. 1996) (construing S.D. CONST. art. III, § 9). In addition, state
structure were largely undefined and dependent upon the imprimatur and affirmative assent of the legislature. Notwithstanding early moves to separate judicial power from legislative and executive power, there was clearly no intention to create a completely autonomous judicial department in the modern institutional sense. Contrary to the assertions of Jefferson, the Framers did not create three branches of government existing independently of one another. Rather, they created a government in which constitutions generally give the state legislature the exclusive authority to determine the rules governing proceedings within the body. See, e.g., MINN. CONST. art. IV, § 7 ("Each house may determine the rules of its proceedings, sit upon its own adjournment, punish its members for disorderly behavior, and with the concurrence of two-thirds expel a member; but no member shall be expelled a second time for the same offense.").

Notwithstanding the grounding of state court jurisdiction directly in constitutions, discussed infra note 157, many state legislatures continue to possess significant power over the structure of state court systems. See, e.g., ALA. CONST. art. VI, § 145; CAL. CONST. art. VI, §§ 22 & 23; CONN. CONST. art. V, § 1; KAN. CONST. art. 3, § 6; R.I. CONST. art. X, § 1; see also infra notes 131–36.

See Ryan, supra note 68. But see N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 60 (1982) (superseded by statute as stated in In re Grabill Corp., 967 F.2d 1152 (7th Cir. 1992)). Justice Brennan wrote "[O]ur Constitution unambiguously enunciates a fundamental principle—that the 'judicial Power of the United States' must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence." Marathon, 458 U.S. 60; cf. Riggs & Westerberg, supra note 38, at 337 (noting that, despite a tradition of judicial autonomy in the U.S., "unpopular [recent] decisions have led to calls for greater political control over the judiciary"). Yet even today, the institutional independence that Justice Brennan declared remains largely vague, undefined, and grounded in the notion that the courts enjoy institutional independence as an extension of a judge's decisional independence, which is protected by tenure and compensation provisions.

See supra note 19.

As the Founders understood the concept of separation of powers, the doctrine operated on two distinct levels. First, there was a division of governmental authority between the states and the national government, with the former retaining the power not specifically given to the latter. Second, the authority confined to each level of the government was then further diffused across three separate and co-equal departments, each capable of checking the actions of the other branches through the unique powers confined to it. See THE FEDERALIST NO. 51, at 270 (James Madison) (George W. Carey & James McClellan eds., 2001).

In a single republic, all the power surrendered by the people, is submitted
the three branches possess separate but interdependent powers, in which judicial interdependence is most prominent.\textsuperscript{98}

Accordingly, modern concepts of the judiciary's institutional independence—which embraces the broad, self-governing independence that exists apart from the act of independent judgment—are the result of a long evolutionary process, not the product of universal acceptance present at the foundation of the Republic.\textsuperscript{99} The Framers did not reject a dependent
judiciary; they rejected a judiciary whose power—that is, the act of judgment—was dangerously subject to unwarranted intrusions by the executive and legislative branches, particularly with regards to the decisional process. To the extent that the other branches could influence the individual act of judgment, judges could neither perform any meaningful role in the system of checks and balances nor prevent tyranny by limiting the concentration of power in individuals or small groups. Then, as now, however, the legislature exercises dramatic control over the judiciary and judicial process. Today the judiciary must be cognizant of this reality because reliance on an unqualified view of its independence may convey an illusion of institutional separateness that is not supported by the historical record. Thus, while early history supports the perception

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Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 707–08 (1995) ("[T]he federal judiciary has been expressly confined to the exercise of the traditional judicial function of case adjudication. Unless limited in this manner, the largely unrepresentative and unaccountable federal judiciary could threaten the fundamental principle of representationalism by usurping the policymaking power the legislative and executive branches traditionally exercise." (footnote omitted)).

100 Even Alexander Hamilton recognized the dependency of the judiciary, contending that its legitimacy rested upon the effectuation of judicial decisions by the executive branch. See *The Federalist No. 78* (Alexander Hamilton).


102 See, e.g., Willy v. Coastal Corp., 503 U.S. 131, 136 (1992) ("From almost the founding days of this country, it has been firmly established that Congress . . . may enact laws regulating the conduct of . . . courts . . . ." (footnote omitted)); Hanna v. Plumer, 380 U.S. 460, 472 (1965) ("[T]he constitutional provision for a federal court system . . . carries with it the congressional power to make rules governing the practice and pleading in those courts . . . ."); United States v. New Bedford Bridge, 27 F. Cas. 91, 105 (D.C. Mass. 1847) ("[T]he federal courts derive their judicial power immediately from the constitution, but the political truth is, that the disposal of the judicial power, except in a few specified instances, belongs to congress. If congress has given the power to this court, we possess it, not otherwise . . . ." (quoting Turner v. Bank of N. America, 4 U.S. (4 Dall.) 9 (1799))).

103 James Madison recognized the interdependency of the branches under the federal Constitution. In *The Federalist No. 47*, *supra* note 33, at 251, he wrote: [Montesquieu's] meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted.

If we look to the state constitutions, we find that, notwithstanding the emphatic and, in some instances, unqualified terms in which this axiom has been laid down,
that courts possessed inherent power to compel certain actions, the extent of that power as understood today is not a matter that can be resolved easily or exclusively by looking to the historical record.\footnote{104}

II. CHANGING PARADIGMS—COURTS IN THE MODERN AGE

Whether a state legislature may be compelled to fund judicial operations is complicated, both legally and politically.\footnote{105} Two factors have added new complexity to the issue in recent years: (1) the evolution of large state-funded judicial systems, which handle complex matters requiring a broad range of court annexed services;\footnote{106} and (2) the emergence of the administratively powerful state supreme courts, which wield broad supervisory authority and administrative control over the judiciary as an institution. These developments have given rise to a more polished perspective on judicial independence, which in turn has changed the substantive and budgetary landscapes in which the judiciary and legislature interact. Consequently, although a historical inquiry does not conclusively

\footnote{104} Even today the federal courts, unlike their state counterparts, remain largely dependent on the legislature for a wide variety of powers, notwithstanding claims of broad inherent powers. See Robert J. Pushaw, Jr., \textit{The Inherent Powers of Federal Courts and the Structural Constitution}, 86 Iowa L. Rev. 735 (2001). Arguably, state court judges have a greater claim to “inherent” authority given that many state constitutions specifically create the structure of the judiciary and its jurisdiction, thus depriving the legislature of this authority.

\footnote{105} In order to compel a legislative body to fund judicial operations, courts must make policy decisions concerning the use of limited public funds—decisions traditionally in the province of the legislature. Yet the judiciary has no power to tax or to appropriate money from the treasury. See \textit{In re Alamance County Court Facilities}, 405 S.E.2d 125, 130 (N.C. 1991).

\footnote{106} The last forty years have seen an explosion not only in the amount of litigation but also in the amount of law courts apply. Beginning in the 1950s and accelerating through the 1960s, courts were confronted with a wide range of new legal remedies and causes of action for which little if any “judge made” law existed. There existed, for example, no long historical jurisprudence for housing law, welfare law, environmental law, natural resource management, school desegregation, or medical ethics. Taken singularly, the actions of courts in these areas represent no great departure from the traditional notion of judges and courts deciding cases; however, taken in their totality, they radically shaped the exercise of judicial power and compelled a sharp departure from what some view as the traditional judicial function.
vindicate the use of inherent powers to compel funding, modern developments support the existence of this practice, and may also justify it in very limited circumstances.

A. Modern Court Systems

To appreciate the complexity of the current funding crisis and the inherent power of courts to address this crisis, it is necessary to understand the changing role of the judiciary and the rise of state courts as modern governmental institutions. Courts—be they federal or state—have historically enjoyed very limited institutional independence in the sense of charting their "corporate" destinies. Before the latter half of the twentieth century, most state judges were locally elected officials, courts

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107 For an excellent discussion on the limited institutional independence of the federal courts in regards to rulemaking, see Ryan, supra note 68. Ryan notes, "What's more, and what is often overlooked, is that the state ratification conventions, The Federalist, and the original version of the Process Act of 1789 contain potent evidence that several influential Framers and those adopting our Constitution also considered procedural rulemaking a legislative function." Id. at 767.

108 The election of state court judges has drawn some concern recently. For instance, in 2003 the South Dakota legislature adopted a resolution placing on the ballot for the next general election a measure that would end the process of electing trial judges and adopt the "Missouri plan" currently in place for appellate judges in the state. 2003 S.D. LAWS HJR 1003. Judicial elections and the impact of fund raising on judicial decisions are topics of great interest to the American Bar Association ("ABA"). The ABA recently noted,

They [state judicial systems] are being jeopardized by the corrosive effect of money on judicial election campaigns . . . .

Such developments threaten to poison public trust and confidence in the courts by fostering a series of perceived improprieties: that judges are less than independent and impartial, that justice is for sale, and that justice is available only to the wealthy and powerful or to political and racial majorities.

ABA, JUSTICE IN JEOPARDY: REPORT OF THE ABA COMMISSION ON THE 21ST CENTURY JUDICIARY 1 (2003). During the 2004 Legislative Session, the Missouri House of Representatives introduced a resolution calling for the repeal of merit-selection and elimination of the "Missouri non-partisan court plan." The resolution would replace merit selection with popular partisan election of all judges in the state. See H.J.R. 50, 92d Gen. Assemb. 2d Reg. Sess. (Mo. 2004). It is generally thought that this measure was intended to express the Legislature's displeasure with several court decisions.
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(particularly trial courts) were funded almost entirely by local governments, and the judiciary was viewed largely as an amalgamation of diffused institutions, based mainly on a county or circuit model. Consequently, local judges enjoyed independence from the coordinate branches of government as well as from other judges and the judicial institution as a whole. A state supreme court, generally the only court funded entirely from the state treasury, possessed little, if any, supervisory or administrative authority over lower courts, and likewise possessed little formal rulemaking authority with regard to process and procedure. The authority that a state supreme court exercised over lower courts was generally confined to various writs and remedial actions, such as mandamus and prohibition, or to the error-correcting appellate process. There was

109 For one example of the evolution in court funding during the last half of the twentieth century towards state funding, see ALA. CODE § 12-17-1 (2003).
110 Judicial individualism was even present at the beginnings of the federal judiciary, and particularly in the Supreme Court. Prior to Marbury v. Madison, it was traditional for each Supreme Court justice to write his own opinion of the case. As Michael J. Glennon observed, “Before his [John Marshall’s] appointment by President Adams in 1801, the Court’s six members wrote separate opinions, limiting the Court’s potential institutional strength. Marshall changed that. He encouraged his colleagues to speak with one voice.” Glennon, supra note 24, at 22.
111 Even today some state legislatures fund only one court—the state supreme court. In Ohio, for example, the legislature funds judges’ salaries, but county government finances the operational expenses of both the courts of appeals and the courts of common pleas. See OHIO REV. CODE ANN. § 2501.18, .181 (Anderson 2004). By contrast, the state bears the full cost of operating the state supreme court. See id. § 2503.05, .10.
112 This was most certainly true at the federal level. In Harrison v. Nixon, 34 (9 Pet.) U.S. 483, 530 (1835) (footnotes omitted), the Supreme Court asserted:

There is no power so dangerous as that which can be traced to no definite or authoritative source, or which is exercised without a reference to some fixed principles; it is in the nature of that which is assumed by any department of government, to be capable of no other limitation than such as it may choose to prescribe to itself; while that which is conferred by the constitution or statutes, is defined, limited and regulated in its exercise to the cases specified, and in the mode prescribed. Such are the appellate powers of the circuit and supreme courts of the United States; they are of limited jurisdiction—necessarily incompetent to act by any prerogative or inherent power; as the creatures of the judiciary act, they are not at liberty to exercise any power over the proceedings of inferior courts, by any general supervisory power, such as has been assumed by the king’s bench and house of lords. Their supervision is only by writ of error, or appeal, and such writs as congress have authorised them to use; so that in whatever case
virtually no administrative control and very little institutional identity. Unlike the other branches of government, whose members had to act collectively and institutionally to fulfill their constitutional duties, the judiciary executed its constitutional duties through individual judges and individual courts. It is questionable whether the judiciary possessed any “institutional” identity akin to that retained by the legislative and executive branches.

This diffusion of judicial power—both structurally and geographically—created a culture in which the judiciary’s primary actors (judges) could act with finality without seeking bipartisan approval or institutional consensus. In the truest sense, the system was designed to promote the adjudicative independence of judges—not necessarily the institutional independence of the judicial branch. This was particularly true in trial courts level where, unlike in appellate courts, judges operated as individual and independent actors controlling not only the decisional process but also, in many circumstances, the attendant administrative structure that supported that process. Individual independence was generally prized over institutional autonomy; the judiciary enjoyed its independence as a function and byproduct of each member’s exercise of individual independence. Judicial institutional autonomy, therefore, flowed from the independence each judge enjoyed under a constitution, and not necessarily because of the judiciary’s institutional standing vis-à-vis the other branches. Matters were complicated by the geographical and structural diffusion of judicial power across various levels of courts in

they act as an appellate court, it is by special authority, and can exercise no other than what is appropriately appellate, as contradistinguished from original jurisdiction.

Some may argue that, at least at the appellate level, courts need to build consensus for their decisions just as the legislature does. To some extent this may be true. However, even at the appellate level, judges enjoy much greater independence than their legislative counterparts. Although appellate courts must publish “majority decisions” that decide the case, dissenting opinions are common. Thus, unlike the legislative process, in which the majority can act with finality and the minority position is largely forgotten in the process, majority and dissenting court opinions are preserved for history: particular judges may hold their positions for years notwithstanding the position of a majority of court members. Justices Thurgood Marshall and William Brennan routinely dissented in cases affirming the death penalty to preserve their opposition to capital punishment. See, e.g., Autry v. Estelle, 464 U.S. 1, 3 (1983) (Brennan, J., dissenting) (“I continue to adhere to my niew that the death penalty is in all circumstances cruel and unusual punish-ment.”).
multiple locations. There arose not only an apparent tension between the judiciary and the coordinate branches resulting from the constitutional design of the government, but also an inherent tension within the judiciary because its structure promoted individual independence over institutional identity.

In many states, relationships within the judiciary and among the judiciary and the coordinate branches of government slowly began changing in the 1940s. The change was most dramatically evidenced by the adoption of so-called "modern court" provisions. Before the adoption of

14 Unlike the federal Constitution, many state constitutions changed considerably in the latter half of the twentieth century, and now reflect so-called "modern court" provisions. In general, these constitutional provisions give the state supreme courts significant rulemaking and superintending authority over the judicial branch. There is no constitutional counterpart in the federal Constitution. For example, the Missouri Constitution provides, "The supreme court shall have general superintending control over all courts and tribunals... Supervisory authority over all courts is vested in the supreme court which may make appropriate delegations of this power." MO. CONST. art. V, § 4. also provides the rulemaking authority of the Missouri Supreme Court. Likewise, the South Dakota Constitution provides,

The Supreme Court shall have general superintending powers over all courts and may make rules of practice and procedure and rules governing the administration of all courts. The Supreme Court by rule shall govern terms of courts, admission to the bar, and discipline of members of the bar.

These rules may be changed by the Legislature.
S.D. CONST. art. V, § 12; see also ALASKA CONST. art. IV, § 15 ("The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house."); COLO. CONST. art. VI, § 2(1) ("The supreme court, except as otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be coextensive with the state, and shall have a general superintending control over all inferior courts, under such regulations and limitations as may be prescribed by law."); FLA. CONST. art. V, § 2(a) ("The supreme court shall adopt rules for the practice and procedure in all courts including the time for seeking appellate review [and] the administrative supervision of all courts... "); IDAHO CONST. art. V, § 2 ("The courts shall constitute a unified and integrated judicial system for administration and supervision by the Supreme Court."); ILL. CONST. art. 6, § 16 ("General administrative and supervisory authority over all courts is vested in the Supreme Court and shall be exercised by the Chief Justice in accordance with its rules."); IOWA CONST. art. V, § 4 ("The supreme court shall... exercise a supervisory and administrative control over all
these provisions, most state courts operated with little regard for the systematic and institutional structure of the judiciary. Moreover, state legislatures paid little attention to the administrative structure of the courts or the associated costs of running them because very few courts were funded directly from the state treasury. It should be noted, however, that notwithstanding the changes of the last half-century, the American judiciary continues to function along the lines of individual adjudicatory independence. What has changed is the degree to which the institutional identity of the judiciary has eclipsed the functional independence of individual judges, particularly on nondecisional, administrative matters such as the budget.

Perhaps the greatest impact brought by the modern institutionalization of the judiciary is an alteration of how courts view themselves. The judiciary is increasingly confronted with a seemingly irreconcilable cultural difference between its traditional "adjudicatory" independence, which tends to be personal to judges, and a broad "institutional" independence, which involves notions of collective purpose with its attendant budgetary and political consequences. Rather than existing as an almost voluntary

inferior judicial tribunals throughout the state."; MD. CONST. art. IV, § 18(a) ("The Court of Appeals from time to time shall adopt rules and regulations concerning the practice and procedure in and the administration of the appellate courts and in the other courts of this State, which shall have the force of law until rescinded, changed or modified by the Court of Appeals or otherwise by law."); MONT. CONST. art. VII, § 2(2) ("[The supreme court] has general supervisory control over all other courts."); OHIO CONST. art. IV, § 5(A)(1) ("In addition to all other powers vested by this article in the supreme court, the supreme court shall have general superintending power over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the supreme court.").


See generally CONFERENCE OF STATE COURT ADM'RS, JUDICIAL GOVERNANCE, supra note 98.
association, the judicial branch has been pressured toward a new interconnectedness by the consolidation of administrative control and funding. The current budget crisis has only served to highlight the need for an institutional response. This evolution has occurred at a moment in history when the role of state courts is expanding rapidly. State judiciaries, therefore, have emerged during the last half-century with a more robust institutional identity and definition due to their growing influence, their consolidation of power at the state level, and the explosion of programs directly under their control. With the consolidation of control came the recognition that the fate of one arm of the courts rested with the fate of all arms of the courts. A voluntary association of independent actors could not protect the broader interests of the judiciary as an autonomous institution of government, particularly in responding to incursions by the Legislature.

Most modern court provisions generally possess three characteristics. First, these provisions vest state supreme courts with broad rulemaking authority over process and procedure, authority that in most cases is subject to some form of legislative oversight. Second, these provisions give state supreme courts extensive superintending, supervisory, and administrative authority over the day-to-day operations of courts in the state, including, in some cases, a unified judicial budget. Finally, these provisions frequently

118 The creation in some states of "judicial councils" to advise the supreme court and legislature on the needs and operations of the judiciary often goes unrecognized. These councils are usually comprised of judicial officers, administrators, and citizens. See, e.g., ALASKA CONST. art. IV, §§ 8 & 9; CAL. CONST. art. VI, § 6; UTAH CONST. art. VIII, § 12.

119 See, e.g., ALASKA CONST. art. IV, § 16; HAW. CONST., art. VI, § 7; MONT. CONST. art. VII, § 2; OHIO CONST. art. IV, § 5(B). Unlike state supreme courts operating under modern court provisions that vest constitutional authority for rulemaking in the courts, the federal courts' authority to promulgate rules flows from Congress. Congress has from its very first session asserted authority over practice and procedure in the federal courts, as evidenced by the Process Act of 1789. Throughout the nation's history Congress has delegated some aspects of its rulemaking authority to the federal courts, and does so today though the Rules Enabling Act, 28 U.S.C. § 2072 (2004). Nevertheless, Congress retains ultimate authority over federal court process and procedure.

120 See, e.g., MD. CONST. art. IV, § 18(b)(1); N.J. CONST. art. VI, § II(3); N.D. CONST. art. VI, § 3; OHIO CONST. art. IV, § 5; S.D. CONST. art. V, § 11. Compare MICH. CONST. OF 1835, art. VI, § 1 (vesting judicial power in one Supreme Court and such other courts as legislature may establish), with MICH. CONST. art. VI, § 4 (vesting judicial power in one court of justice comprised of the Supreme Court, court of appeals, circuit court, probate court, and courts of limited jurisdiction as
created an alternative approach for dealing with judicial disciplinary matters by removing the traditional process of legislative impeachment and replacing it with independent commissions and state supreme court control. With the advent of modern court administration, the creation of specialized dockets, the explosive use of courts to resolve pressing social issues, and the expansion of alternative judicial remedies, state judiciaries were transformed from a disjointed group of locally elected judges into an institution that not only rendered decisions but also provided a wide range of judicial services, often at the behest of state legislatures and Congress.

As a result of the structural changes over the last half-century, state judiciaries have attained an institutional standing not previously enjoyed or recognized by the coordinate branches of government. The growing institutionalization of the courts, combined with the complexity and costs of running large judicial systems, has given rise to broader claims of institutional independence, particularly at the state level. These same
changes also altered traditional relationships within the judiciary and among the judiciary and the coordinate branches, especially the legislature. These altered relationships have created a climate ripe for conflicts over the breadth and limits of the judiciary's institutional independence and its auxiliary authority to determine funding needs.\textsuperscript{124}

The current debate on the level of the judiciary's independence, therefore, has much less to do with history than with the evolving and expanding role of state courts in American society. With abortion,\textsuperscript{125} euthanasia,\textsuperscript{126} environmental issues,\textsuperscript{127} election controversies,\textsuperscript{128} and even the legislative process itself,\textsuperscript{129} state judiciaries have become the fora for

\begin{itemize}
\item An example of the expanding role of courts can be seen in the creation of so-called "specialty courts," "problem solving courts," and "therapeutic courts." Such courts place the judiciary in a non-traditional role, focused not only on making decisions and rendering judgments, but also on addressing underlying causes of inappropriate behavior. \textit{See Conference of State Court Adm'rs, Position Paper on Therapeutic Courts 1} (1999), http://cosca.ncsc.dni.us/PositionPapers/therapeuticcourts.pdf; \textit{see also} Conference of State Court Adm'rs, Judicial Governance, \textit{supra} note 98 ("Courts handling family cases, much like a hospital trauma center, need to be structured to respond to families in crisis. In family cases the role of the judge—and therefore the court system—as adjudicator is compatible with being a convener, mediator, facilitator, service provider, and case manager.").
\item \textit{See, e.g.}, State v. Planned Parenthood, 35 P.3d 30 (Alaska 2001).
\item \textit{See, e.g.}, \textit{In re Guardianship of Browning}, 568 So. 2d 4 (Fla. 1990).
\item \textit{See, e.g.}, Bulk Terminals Co. v. EPA, 357 N.E.2d 430 (Ill. 1976); San Joaquin Raptor/Wildlife Rescue Ctr. v. County of Stanislaus, 32 Cal. Rptr. 704 (Cal. Ct. App. 1994).
\item \textit{See, e.g.}, Thorsness v. Daschle, 285 N.W.2d 590 (S.D. 1979).
\item Two limitations placed on the legislative process formed a frequently overlooked but highly critical development in state constitutional reforms. First, states adopted so-called "single subject" provisions in their constitutions that prevent legislatures from enacting large multi-subject omnibus bills. \textit{See, e.g.}, Idaho Const. art. III, § 16 ("Every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title; but if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be embraced in the title."); Mo. Const. art. III, § 23 ("No bill shall contain more than one subject which shall be expressed in its title . . . ."); S.D. Const. art. III, § 21 ("No law shall embrace more than one subject, which shall be expressed in its title.") For an interpretation of Missouri's limitation, see Hammerschmidt v. Boone County, 877 S.W.2d 98, 100 (Mo. 1994). Second, several state constitutions now provide
\end{itemize}
some of the most vexing political and social issues of our time. Unlike the past, state courts are finding themselves at the center of, and not the periphery of, many divisive political maelstroms. The shift to state funding of the courts has complicated the debate regarding independence because today’s budgets and the availability of resources have as much to do with the judiciary’s independence as does its constitutional standing or jurisprudential history. It must be noted, however, that even with the adoption of modern court provisions and the development of modern judicial institutions, state courts clearly are not the sole masters of their destiny. In particular, the legislative branch continues to exercise broad direction over the courts by controlling such wide-ranging matters as jurisdiction, substantive procedures, the creation and structure of the

limitations on “legislating through appropriations.” See, e.g., S.D. Const. art. XII, § 2

“The general appropriation bill shall embrace nothing but appropriations for ordinary expenses of the executive, legislative and judicial departments of the state, the current expenses of state institutions, interest on the public debt, and for common schools. All other appropriations shall be made by separate bills, each embracing but one object, and shall require a two-thirds vote of all the members of each branch of the Legislature.”

For an interpretation of the South Dakota provision, see S.D. Educ. Ass’n ex rel. Roberts v. Barnett, 582 N.W.2d 386 (S.D. 1998); see also People ex rel. Fulton v. O’Ryan, 204 P. 86 (Colo. 1922). These provisions and their interpretations demonstrate that, unlike the federal judiciary, which is generally outside the scope of the internal working of Congress, several state judiciaries are involved in the internal workings of their legislatures in a very concrete manner. This point of contention between the respective branches will only be further inflamed as the subjects for judicial review become more divisive.

130 See, e.g., Gore v. Harris, 773 So. 2d 524 (Fla. 2000).
131 From a historical budgetary perspective, for most of the nation’s history, state courts were locally funded institutions. This changed in the latter half of the twentieth century as more states assumed responsibility for funding the judiciary. The effect of the long history of local funding was to hide the overall costs of operating state courts because of the diversified funding base. See supra notes 107–10 and accompanying text.
132 See, e.g., Ariz. Rev. Stat. §§ 12-120.21, 12-123 (2003); Idaho Code § 1-705 (Michie 2003); see also N.Y. Const. art. VI, § 30 ("The legislature shall have the same power to alter and regulate the jurisdiction and proceedings in law and in equity that it has heretofore exercised.").
courts, the promulgation of court rules, and even the subject matter of court rules. Indeed, the development of modern judicial institutions and the evolving role of the judiciary in governing American society seems, at times, to conflict with historical and traditional understandings of interbranch relations.

B. Emerging Perspective on Judicial Independence

The structural changes to state judiciaries over the last fifty years have given rise to a more refined perspective on judicial independence, which greatly influences the use of judicial power to compel funding. Modern concepts of "judicial independence" embrace two complementary and intertwining views on the role of courts. At the most basic and traditional level, courts in America possess adjudicative independence, or the right of individual judges, without unwarranted intrusion from the other branches, to hear and decide cases according to the rule of law and to enforce their decisions. The term "adjudicative independence" embraces the traditional notion of decisional independence, which is more personal and

134 See, e.g., HAW. CONST. art. VI, § 1; MICH. CONST. art. VI, § 1; MINN. CONST. art. VI, § 2; N.D. CONST. art. VI, § 1; OHIO CONST. art. IV, § 1.

135 See, e.g., ARIZ. REV. STAT. § 12-102(B) (2003); MO. REV. STAT. § 477.005, .405 (2003). In Washington state, the legislature even controls the attire of judges. See WASH. REV. CODE § 2.04.110 (2003) ("Each of the justices of the supreme court, judges of the court of appeals, and the judges of the superior courts shall in open court during the presentation of causes, before them, appear in and wear gowns, made of black silk, of the usual style of judicial gowns.").

136 See, e.g., MO. CONST. art. V, § 5 ("The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal.").

137 See, e.g., id. ("Any rule may be annulled or amended in whole or in part by a law limited to the purpose."); S.D. CONST. art. V, § 12

"The Supreme Court shall have general superintending powers over all courts and may make rules of practice and procedure and rules governing the administration of all courts. The Supreme Court by rule shall govern terms of courts, admission to the bar, and discipline of members of the bar. These rules may be changed by the Legislature."


139 See Reinhold, 677 P.2d at 1339–40 (holding the right of the judiciary to be free from interference by the other branches, and hence its inherent power, is found in the state constitution).
individual than it is collective and institutional. In this context, inherent power flows from the customary nature of judicial authority: the power and obligation of judges to hear and resolve disputes. That a court has the inherent power to enforce its orders is assumed because the absence of such power would render the act of "judging" meaningless and devoid of final effect. How a judge exercises this aspect of his or her inherent power may be constrained by the constitution and, to a limited extent, by appropriate legislation and judicial precedent. The judiciary's inherent power "covers powers thought essential to the existence, dignity, and functions of the court because it is a court."

Archibald Cox once described the purpose of "judicial independence" as follows:

To my mind the idea of judicial independence implies: (1) that judges shall decide lawsuits free from any outside pressure: personal, economic, or political, including any fear of reprisal; (2) that the courts' decisions shall be final in all cases except as changed by general, prospective legislation, and final upon constitutional questions except as changed by constitutional amendment; and (3) that there shall be no tampering with the organization or jurisdiction of the courts for the purposes of controlling their decisions upon constitutional questions.

Archibald Cox, The Independence of the Judiciary: History and Purpose, 21 DAYTON L. REV. 565, 566 (1996). Cox implies that the institution of the courts is open to tampering when its decisions rest on anything other than constitutional principles.

See In re Clerk of Lyon County Courts' Compensation, 241 N.W.2d 781, 784 (Minn. 1976) ("Inherent judicial power governs that which is essential to the existence, dignity, and function of a court because it is a court.").

For example, while courts possess the inherent power of contempt as a means of enforcing orders and controlling proceedings, the specific use of that power is, in some circumstances, controlled by legislation. See IND. CODE ANN. § 34-47-3-1 (Michie 2004); MONT. CODE ANN. § 3-1-501 (2003); MO. REV. STAT. § 476.110 (2003); N.C. GEN. STAT. § 5A-12 (2003); OHIO REV. CODE ANN. § 2705.01 (Anderson 2003); NEV. REV. STAT. § 22.010 (2003); OKLA. STAT. tit. 21, § 567 (2003); TEX. GOV'T CODE ANN. § 21.002 (Vernon 2004).

FELIX F. STUMPF, INHERENT POWERS OF THE COURTS, SWORD AND SHIELD OF THE JUDICIARY 3 (1994). See also In re Integration of the Nebraska Bar Ass'n, 275 N.W. 265, 267 (Neb. 1937) ("The term 'inherent powers of the judiciary' means that which is essential to the existence, dignity and functions of the court from the very fact that it is a court."); In re Alamance County Court Facilities, 405 S.E.2d 125, 129 (N.C. 1991) ("[A] court's inherent power is its 'authority to do all things that are reasonably necessary for the proper administration of justice.'") (quoting Beard v. State Bar, 357 S.E.2d 694, 696 (N.D. 1987)); Winters v. City
This aspect of inherent power is generally litigation-oriented because it involves the judiciary's traditional and most publicly recognized responsibility: to hear and resolve disputes and to enforce its decision.\textsuperscript{144} As noted in \textit{Bi-Rite Package, Inc. v. Ninth Judicial District Court}, "[t]here is also an inherent power that is described as necessary to the efficient functioning and prompt and just disposition of litigation and business of the court."\textsuperscript{145} Examples of this inherent power include, inter alia, controlling courtroom behavior,\textsuperscript{146} ensuring that a court has adequate facilities for conducting court,\textsuperscript{147} hiring sufficient personnel to carry out the business of the court,\textsuperscript{148} managing dockets,\textsuperscript{149} controlling discovery,\textsuperscript{150} appointing and
paying for court experts, and compelling payment of witness fees. The judiciary’s inherent authority is required to effectuate the wide range of activities constitutionally demanded for the prompt and effective disposition of litigation and the practical administration of justice.

Second, and more unique to the American judiciary, courts possess a “constitutional independence” that embraces a still-developing concept of broad institutional independence parallel to, but beyond, the scope of an individual judge’s more limited adjudicatory independence. This is an independence that flows to the courts directly from the constitutional structure of the government; it is institutional and anchored in the separation-of-powers doctrine. It does not involve an individual judge’s adjudicatory independence but rather the ability of the third branch to fulfill its separate constitutional functions, particularly its “checking” function on the actions of the other branches through judicial review. Whereas adjudicative independence is arguably limited in scope to those matters involved in the administration of cases, the judiciary’s constitutional independence embraces the far-reaching issue of the courts’ role in governing the nation.

This aspect of judicial independence is most unique to American government because, through its constitutional independence, the judiciary exercises broader governing authority than any other nation’s court system. The judiciary’s “constitutional independence” centers on the
ability of the courts to pass on the constitutional legitimacy of government actions as an indispensable part of the adjudicatory process. The inherent power associated with the judiciary’s constitutional independence is a necessary element in the system of checks and balances, which ensures the relevancy of the judiciary within that system.\textsuperscript{156} Today, compared to their vested by the Constitution; it would neither remain dormant, nor would it expire, though the Legislative power had never passed a law to authorize certain processes to assert such jurisdiction. . . . “The judicial power is abstract or relative; in the former character, the court, for itself, declares the law and distributes justice; in the latter, it superintends and controls the conduct of other tribunals by a prohibitory or mandatory interposition. This superintending authority has been deposited in the Supreme Court by the Federal Constitution, and it becomes a duty to exercise it upon every proper occasion.”

\textit{Id. See also Ex parte Ward, 540 So. 2d 1350, 1351 (Ala. 1988)} (“This Court has the inherent authority to promulgate and implement rules binding on inferior courts as to which we are charged with superintendence and control. This authority is rooted in our constitution . . . .” (citation omitted)); Mongan v. Pima County Superior Court, 715 P.2d 739, 742 (Ariz. 1986) (Feldman, J., dissenting) (“We have both explicit constitutional power and inherent authority to supervise procedures in the courts of this state.”); State v. Lester, 38 S.W.3d 313, 316 (Ark. 2001) (“The Arkansas Constitution confers upon the courts the inherent authority to promulgate rules of procedure.”); \textit{In re Shay, 117 P. 442, 446 (Cal. 1911)} (Angellotti, J., dissenting) (“It may freely be admitted that this court and the other courts which are established by the constitution have the inherent authority, under the constitution and independent of statute, to prevent interference with the exercise of the powers confided to them, and the enforcement of their orders, judgments, and decrees, and that such authority cannot be taken away or unreasonably restricted by the legislature.”); State v. Barrett, 534 A.2d 219, 223 (Conn. 1987) (“[T]his court has the inherent authority to interpret the state constitution in the context of specific cases.”); Fulton County v. Woodside, 149 S.E.2d 140, 146 (Ga. 1966) (“[T]he constitution has vested all the judicial power in the courts of the State, and . . . neither the Legislature nor a judge, nor the judges of a superior court have authority to limit or expand the jurisdiction and authority of a superior court.”); State v. Monfort, 723 N.E.2d 407, 411 (Ind. 2000) (“[I]t has been held in a variety of contexts that the legislature cannot interfere with the discharge of judicial duties, or attempt to control judicial functions, or otherwise dictate how the judiciary conducts its order of business.”).

\textsuperscript{156} As observed in \textit{Cohen v. State}, 720 N.E.2d 850, 854 (N.Y. 1999) (citation omitted): “The courts are vested with a unique role and review power over the constitutionality of legislation which includes being the final arbiter of true separation of powers disputes.”
adjudicatory independence, the courts’ constitutional (and therefore institutional) independence is increasingly important and should determine whether intrusions by the coordinate branches into the judiciary, monetary or otherwise, are permissible.

At the state level, the evolving institutional independence of the courts is evidenced in the language of many judicial articles. Unlike the federal Constitution in which matters such as pay, jurisdiction, and removal from office are purely a function of Congress, state constitutions now generally deprive legislatures of these tools to control state courts. The revision of judicial articles over the last fifty years illustrates the shift from relying on the legislature for the institutional structure and authority of courts, towards anchoring such matters directly in the constitution and the body of the judiciary itself. For example, in several states, legislatures no longer control such critical matters as creating trial courts, establishing jurisdiction and venue, controlling the selection and removal of judges,

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157 For example, in most states the creation of trial courts and the definition of their jurisdiction flow directly from the constitution, not from any act of the legislature. See, e.g., ALASKA CONST. art. IV, § 3; ARIZ. CONST. art. VI, § 14; ARK. CONST. art. VII, § 11; CAL. CONST. art. VI, § 10; COLO. CONST. art. VI, § 9; MINN. CONST. art. VI, § 3; UTAH CONST. art. VIII, § 5. But see KAN. CONST. art. III, § 6(b) (“The district courts shall have such jurisdiction in their respective districts as may be provided by law.”); VT. CONST. ch. II, § 31 (“The jurisdiction of geographical and functional divisions shall be as provided by law or by judicial rules not inconsistent with law.”). As for tenure in office, the Arizona Constitution, like many states, provides that, “No change made by the legislature in the number of justices or judges shall work the removal of any justice or judge from office. The salary of any justice or judge shall not be reduced during the term of office for which he was elected or appointed.” ARIZ. CONST. art. VI, § 33.

158 State constitutions have limited the legislative branch in many other significant ways. For example, Missouri’s constitution contains a healthy list of limits on the power of the General Assembly, many of which serve to restrain the General Assembly’s spending powers and its ability to increase taxes absent a constitutional amendment. See MO. CONST. art. III, § 36.

159 Compare ARIZ. CONST. art. VI (2003) (allowing courts to be established as provided “by law”), with ME. CONST. art. VI, § 1 (2003) (vesting legislature with authority to establish inferior courts). Arizona may leave room for the judiciary itself to create trial courts.

160 In many states criminal venue is established by the constitution, not necessarily legislative enactment. See, e.g., ALA. CONST. art. I, § 6; MO. CONST. art. I, § 18(a). Likewise, jurisdiction of both trial and appellate courts is a function of the constitution, not legislation. See, e.g., ALA. CONST. art. VI, § 6.04–.06; MO.
or even setting salaries. Arguably over the last half-century the power of the legislature to control the fundamental structure of courts has greatly diminished while the influence of the institution of the judiciary has grown significantly, both in state constitutions and in public perception. Although state legislatures continue to be a very powerful influence, in reality the budget has now become their greatest weapon in disputes with the judiciary; constitutional changes have reduced or eliminated the power of other intrusive tactics.

The distinction between a judge's individual adjudicatory independence and the judiciary's institutional independence may seem arcane, academic, concocted, or even irrelevant—an attempt to categorize, rationalize, and reconcile actions of courts that have no seeming basis in statutory or case law. Yet the distinction is important and growing more so. A judge's adjudicatory independence includes that inherent power necessary to manage and control the administration of justice. With this form of independence, the judiciary's inherent power is a sword to compel litigants—including government litigants—to take actions or refrain from taking actions that are inconsistent with court decisions. The judiciary's institutional independence, however, embraces far more basic principles of governance in the United States, extending to the structure of government, its philosophical basis, and the authority and resources necessary for the judiciary to defend itself against dangerous incursions by the political

CONST. art. V, §§ 3, 14.

161 Many states have created a judicial discipline or qualification commission to oversee the selection and removal of judges. See, e.g., ARIZ. CONST. art. 6.1, § 4(A); FLA. CONST. art. V, § 12; MO. CONST. art. V, § 24. Particularly regarding judicial discipline, several state constitutions have been amended to provide that the state supreme court is responsible for the removal of a judge for cause. Compare GA. CONST. of 1868, art. V, § 9 (providing for removal by governor), with GA. CONST. art. VI, §§ 7, 97 (vesting power to remove judges in a Judicial Qualifications Commission consisting of two judges, three bar members, and two citizens.

162 See, e.g., MO. CONST. art. XIII, § 3. This provision vests the setting of certain salaries, including those of judges, in a citizens' commission. Under its terms, the legislature can accept or reject the recommendations of the commission but not alter its recommendations. See Weinstock v. Holden, 995 S.W.2d 411, 414 (Mo. 1999).

163 One court has held that inherent powers are not "adjudicatory" in nature but "non-adjudicatory. It does not deal with justiciable matters. It relates to the administration of the business of the Court." Wayne Circuit Judges v. Wayne County, 172 N.W.2d 436, 440 (Mich. 1969). Yet with rare exception, the exercise of inherent powers has been more directly related to the adjudicatory needs of judges than to any other factor.
branches, incursions that would otherwise undermine the system of checks and balances.\textsuperscript{164} Under this broader model of independence, the judiciary’s inherent powers are a shield by which it can defend a distinct and separate institution involved in the nation’s governing process and thus may include the power to compel needed resources. Accordingly, in the budget context, the judiciary’s institutional independence becomes a critical point of departure from traditional notions of adjudicatory independence because the legislature may legitimately control some aspects of the judicial administration and those matters touching upon the process of adjudication.\textsuperscript{165} The legislature cannot, however, control the institutional purpose and standing of the courts without endangering the very premise of the government’s structure—a careful division and balancing of fundamental powers. The matter has become more complex in recent years as the institution of the judiciary has grown to include a broad range of critical services and programs that support and enforce the act of judgment.\textsuperscript{166} Consequently, preserving institutional independence may be the most important consideration in managing a budgetary relationship with a state legislature.

III. CONSIDERATIONS IN COMPELLING FUNDING AT THE STATE LEVEL

The last fifty years have witnessed not only the development of modern state judicial institutions, but also a movement away from local funding of

\textsuperscript{164} See Commonwealth ex rel. Carroll v. Tate, 274 A.2d 193, 197 (Penn. 1971) (holding that judiciary as a co-equal branch of government possesses powers co-equal with its functions, including the power to defend itself from the attack of the political branches).

\textsuperscript{165} See First Justice of the Bristol Div. of Juvenile Court Dep’t v. Clerk-Magistrate of the Bristol Div. of Juvenile Court Dep’t, 780 N.E.2d 908 (Mass. 2003) (holding that although legislature is constitutionally forbidden from exercising judicial power, that prohibition runs only to the core function of the judiciary and does not prohibit the legislature from controlling certain court personnel procedures); see also McCulloch v. Glendening, 701 A.2d 99 (Md. 1997) (holding that provision authorizing governor to enter into collective bargaining negotiations on behalf of all state employees, including court employees, did not violate separation of powers). But see Passaic County Probation Officers’ Ass’n v. County of Passaic, 374 A.2d 449 (N.J. 1977) (finding that state constitution mandates giving supreme court authority to prescribe rules governing court administration transcends any legislative enactments governing public employees who are an integral part of the court system).

\textsuperscript{166} For example, in many states, function of juvenile probation is placed under the authority of the courts and is not a function of an executive agency. See, e.g., ALA. CODE § 12-5A-7 (2003). In other states, both adult and juvenile probation is a function of the judiciary. See, e.g., ARIZ. REV. STAT. § 12-251 (2003).
courts—particularly trial courts—toward a system in which the state funds a significant part, if not all, of court operating budgets. California is the most recent example of this funding shift, but certainly not the first or only example.\textsuperscript{167} State legislatures have watched the judiciary’s budget grow significantly while state financial resources have simultaneously dwindled.\textsuperscript{168} In reality, the cost of operating the courts has probably not grown any faster than the costs of operating the rest of state government, once one factors in the increased responsibilities that legislatures have given the courts. Rather, in many cases, the costs have simply shifted from local to state funding.\textsuperscript{169} Nevertheless, there exists the perception that the judiciary’s budget has become a much larger portion of state expenditures and, therefore, a larger target in tough financial times or when courts buck prevailing political trends on an issue.

\subsection*{A. Limitations on the Legislature}

Courts have long recognized that state legislatures possess very broad powers to appropriate money and place conditions and limits on the expenditure of public funds.\textsuperscript{170} Consequently, in monetary disputes, courts

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\textsuperscript{168} In truth, budgets of various state judiciaries have grown remarkably over the last twenty years, but only in terms of real dollars spent, not necessarily in terms of the percentage of state budget spent on the judiciary. A significant reason for the growth, as noted earlier, has been the shift to state funding and away from county and local funding. However, it would be misleading to conclude that state judiciary budgets are growing out of control. For example, in fiscal year 2004 the state of Missouri will spend less on the judiciary as a percentage of both overall and general revenue state spending than it did in fiscal year 1984. \textsc{Mo. Office of StateCourts Adm'r, Percentage Change in Historical Funding, State and Judiciary} (2003).

\textsuperscript{169} For example, effective July 1, 1999, Missouri state government agreed to absorb the costs of all juvenile officers in the state’s multi-county circuits. \textsc{See Mo. Rev. Stat.} § 211.393 (2003). This action in effect shifted the costs of operating a large part of the state’s juvenile probation system from the counties to the state.

\textsuperscript{170} \textsc{See, e.g.}, Etowah County Comm’n v. Hayes, 569 So. 2d 397, 399 (Ala. 1990) (“In testing the absolutism of the authority of the legislative branch to appropriate operational funds for the executive branch, the judicial branch ... [cannot] substitute its judgment for that of the legislature and thus usurp the plenary power of that branch.”); \textsc{State v. Fairbanks N. Star Borough}, 736 P.2d 1140
have historically deferred to a legislature's appropriation decisions, going so far as to hold that even the legislature itself cannot delegate critical spending matters to another branch of government. There are certain powers so fundamental to the purposes and functions of a branch of government that they cannot be delegated, even if that branch desires to do so. Indeed, the power of appropriations is one of the most fundamental powers of the legislature and clearly its most potent weapon against the other branches.

Yet, every power that a branch of government enjoys—whether explicit, implicit, or inherent—is unquestionably constrained by the separation of powers doctrine. No branch of government, consistent with this most fundamental constitutional principle, can exercise its assigned power in such a manner as to undermine, subjugate, or destroy a coordinate branch of government. The legislature's plenary power of appropriation, therefore, is a contradiction in terms; it may be extraordinarily broad but it

(Alaska 1987) (statute purportedly giving governor sweeping power to reduce budget without any legislative guidance is unconstitutional delegation of legislative power); Cal. State Employees' Ass'n v. State, 32 Cal. App. 3d 103 (1973) (the power of appropriation resides exclusively in the legislature); Chiles v. Children A, B, C, D, E, & F, 589 So. 2d 260 (Fla. 1991) (legislative power and responsibility to set fiscal priorities through appropriations is abandoned when the power to reduce, nullify, or change those priorities is given to the total discretion of another branch of government); Davis v. Moon, 289 P.2d 614 (Idaho 1955) (the power of the legislature as to the creation of indebtedness, or the expenditure of state funds, or making appropriations, is plenary, except as limited by the state constitution); City of Camden v. Byrne, 411 A.2d 462 (N.J. 1980) (governor has significant role in state budgeting process although the power to expend and appropriate monies from the state treasury is reserved exclusively to the legislature); State ex rel. Schwartz v. Johnson, 907 P.2d 1001, 1002 (N.M. 1995) (absent proper delegation of authority from legislature, "executive branch is precluded from exercising any control over the expenditure of appropriated money in a manner that would affect the legislature's choice of purpose"); Saxton v. Carey, 378 N.E.2d 95 (N.Y. 1978) (degree of budget itemization is a matter calling for the exercise of judgment and discretion by the Governor and Legislature in implementing the budgetary process and is beyond the courts' power of review); Dist. Judges of the 188th Judicial Dist. v. County Judge, 657 S.W.2d 908, 909–10 (Tex. Ct. App. 1983).

171 For example, in General Assembly v. Lamm, 738 P.2d 1156 (Colo. 1987), the Colorado Supreme Court held that the Governor could not transfer funds between executive departments, even though authorized to do so by statute, because the statute creating such power violated the legislature's plenary power over appropriations.
is not unlimited, even in the absence of any precise limitations. As for the judiciary, courts exist by constitutional design, not through legislative or executive grace. While subject to legislative authority in many contexts, courts are not subservient to the legislature. The legislature cannot use its appropriation authority to impede the judiciary from exercising the powers assigned to it any more than the legislature can use its appropriation authority to eliminate the office of governor or so impede the exercise of gubernatorial power through misappropriation as to render the executive branch impotent in its relationship with the legislature. Stated simply, a state legislature cannot appropriate another branch of government out of business.

Several courts have observed, however, that the judiciary must be exceedingly careful in using its inherent powers, lest it be accused of

172 See, e.g., Moore v. Love, 107 S.W.2d 982, 983 (Tenn. 1936) ("[T]he power of the legislative over the judicial branch of the government must conform to the limitations expressed in the Constitution. It should be noted that the Constitution does not reserve to the Legislature all right to deal with any other branch of the government with certain exceptions, but there is an express prohibition of any branch of the government exercising any power properly belonging to another branch except in the cases expressly directed or permitted by the Constitution itself."); Dist. Judges of the 188th Judicial Dist., 657 S.W.2d at 909 ("For this separation of powers principle to operate effectively as intended, there must be a reasonable and proper exercise of power by each branch and a harmonious cooperation among the three. The judiciary is especially vulnerable to a breakdown of this cooperation, because it depends entirely upon the legislative and executive branches for its funding and for the practical enforcement of its decrees, and it has little effective recourse when those branches are derelict in their duties toward it. When, therefore, the necessary spirit of cooperation fails the judiciary must resort to its inherent power to insure that it will have the means to discharge its responsibilities.").

173 See State ex rel. Hovey v. Noble, 21 N.E. 244, 247 (Ind. 1889)
"[I]n America, a Legislature is a Legislature and nothing more. The same instrument which creates it creates also the executive, Governor and the judges. They hold by a title as good as its own. If the Legislature should pass a law depriving the Governor of an executive function conferred by the Constitution, that law would be void. If the Legislature attempted to interfere with the jurisdiction of the courts, their action would be even more palpably illegal and ineffectual."); Commonwealth ex rel. Carroll v. Tate, 274 A.2d 193, 199 (Pa. 1971) ("Unless the legislature can be compelled by the courts to provide the money which is reasonably necessary for the proper administration of the Courts, our entire Judicial system could be extirpated, and by the Legislature could make a mockery of our form of Government . . . ").
invading the province of the legislature and thereby risk undermining public support. 174 While the legislature cannot abolish a constitutionally created court, either explicitly or by withholding the funds necessary for its operations, 175 the judiciary cannot ignore the legislature’s broad power to appropriate resources, its authority to make decisions associated with the allocation of limited public dollars, or its political standing with the electorate. 176 The question, therefore, is not whether the legislature has an obligation to fund the judiciary, but rather at what constitutionally appropriate level. 177

B. Application of Inherent Powers to Funding Disputes

Funding disputes between courts and legislative bodies are not new. Although exceedingly rare, courts as far back as 1838 exercised inherent power to compel the expenditure of funds for judicial operations related to the determination of cases. 178 In 1838, for example, the Pennsylvania Supreme Court held in Commissioners v. Hall that a court could compel the county commission to pay the public accommodations for a sequestered jury, finding that “[w]hen a deficiency of public accommodation induces an expenditure, it must be at the public charge, for it is as much a part of

174 See, e.g., In re Salary of the Juvenile Dir., 552 P.2d 163, 170 (Wash. 1976) (noting that checks by one branch must not “undermine the operation of another branch”).
175 See Wayne Circuit Judges v. Wayne County, 190 N.W.2d 228, 231 (Mich. 1971).
177 One interesting question that such a funding dispute would present is how a legal action to enforce a state court funding demand would proceed. Who would be the proper party and subject of any court order? It is unlikely that a court would order the state legislature to appropriate needed funds. Such an approach would set-up a confrontation of constitutional proportions by subjecting the legislature to the contempt power of the courts. Moreover, it is unlikely that a state legislature would gladly accept a court order. Thus, a more plausible scenario is that the state courts would continue to spend money notwithstanding appropriation limits. Once the appropriation limits were exceeded, the court would order the state treasurer to continue paying the judiciary’s bills. The state treasurer would be subjected to the contempt powers of the court even though the continued payment of bills without appropriation authority may itself cause the treasurer to violate the law. Nevertheless, this approach would avoid a direct confrontation with the Legislature.
178 Comm’rs v. Hall, 7 Watts 290 (Pa. 1838).
the contingent expenses of the court, as is the price of the fire wood and

179 candles consumed in the courtroom."' Such disputes have erupted in the past and most assuredly will erupt with greater frequency in the future, particularly as judicial budgets grow at a time when state resources are dwindling. There is no consensus on how to handle funding disputes. Although courts universally champion the proposition that the judiciary possesses the inherent power to compel needed funding, courts are hardly consistent in the application of this principle. Case law indicates that most state courts, particularly those at the appellate level, only reluctantly approve the use of inherent power to compel funding.180

In recent years the number and intensity of court funding disputes has seemingly increased, forced by the dramatic increase in state judiciaries' costs, their responsibilities, their exploding caseloads, and the reach of their decisions. Unlike early funding disputes, today's disputes center more on the institutional needs of the judiciary than on the resources needed to resolve a particular case. In response to these budget disputes, courts have tried a panoply of remedies, including the use of ex parte orders181 and writs of mandamus182 to command a legislative body to pay the expenses of a court. Yet even with the increase in the number and intensity of funding disputes, it is difficult to identify a single legal approach as the standard for settling such disputes. Despite the lack of agreement on the legal principles, several generalizations can be gleaned from the case law. A word of caution, however, is needed. Notwithstanding the growth in state support

179 Id. at 291; State ex rel. Hovey v. Noble, 21 N.E. 244 (Ind. 1889); County Comm'rs of Allegany County v. County Comm'rs of Howard County, 57 Md. 393 (1882) (holding that county in which cases originated is required to pay all cost related to the jury); Stowell v. Bd. of Supervisors for Jackson County, 23 N.W. 557, 558 (Mich. 1885) ("[I]n criminal cases the power of the court to keep [jurors] in custody, and to bind the county to pay for their maintenance, is established by several cases, and is believed to have been done without dispute heretofore in this State."); Carpenter v. County of Dane, 9 Wis. 274 (1859) (holding that in meritorious cases, court has obligation to appoint counsel and county has obligation to pay). But cf. Kelley v. Andrew County, 43 Mo. 338 (1869) (holding that counsel appointed to represent the indigent are not employees of the county and thus cannot demand compensation from the county). For a more general discussion on the power of courts to compel funding for judicial purposes, see Gary D. Spivey, Annotation, Inherent Power of Court to Compel Appropriation or Expenditure of Funds for Judicial Purposes, 59 A.L.R.3d 569 (1974).

180 See discussion infra at pp. 1038–39.


for the courts, many court-funding disputes continue to revolve around state courts' compelling units of local government (generally counties or municipalities) to fund trial court operations, often as required by state law.\textsuperscript{183} Such disputes are not strictly inherent power disputes.\textsuperscript{184} The underlying court action to compel expenditures usually has some imprimatur of statutory or constitutional authority.\textsuperscript{185} Moreover, counties and municipalities, as political subdivisions of the state, do not enjoy constitutional or pragmatic equality with state courts, which exercise the sovereign authority of the state.\textsuperscript{186}

These local funding dispute cases provide important insight into some general principles concerning the use of inherent powers to compel funding. Unfortunately, they do not recognize the complexity of the interbranch relationships at the state level or the particularly thorny political relationships involved in interbranch matters. These cases thus prove useful but hardly conclusive in resolving the very prickly issue of compelling state funding in disputes between equal branches. Moreover, it is questionable, absent exceedingly extraordinary circumstances, whether a state court could compel a state legislature to exercise its legislative

\textsuperscript{183} See, e.g., \textsc{ALA. CODE} \textsection 11-12-15 (2003); \textsc{ARIZ. REV. STAT.} \textsection 12-130 (2003); \textsc{FLA. STAT.} ch. 29.008 (2003); \textsc{GA. CODE ANN.} \textsection 15-6-24 (2003); \textsc{MO. REV. STAT.} \textsection 476.270 (2003); \textsc{OHIO REV. CODE ANN.} \textsection 307.01 (West 2003); \textsc{TEX. GOV'T CODE ANN.} \textsection 24.954 (Vernon 2003).

\textsuperscript{184} See McDonald v. Campbell, 821 P.2d 139, 144 (Ariz. 1991) (Holohan, C.J., concurring).


\textsuperscript{186} See Pennington County v. S.D. Unified Judicial Sys., 641 N.W.2d 127, 130, 132 (S.D. 2002) ("The states have created local government entities such as counties, townships and cities to do the states' work at the local level. These subordinate arms of the State have only that authority specifically given by the state legislature. . . . Counties are merely subdivisions of the state created by the state to conveniently carry out the state's governmental functions as the state's agents. As agents, counties cannot contest the actions of their principal, the state."). At least one state has attempted to resolve local court funding matters through means other than the traditional judicial process. Missouri has implemented a Judicial Finance Commission comprised of judges and county commissioners, which sits in review of court funding disputes and issue findings and conclusions. See \textsc{MO. REV. STAT.} \textsection 477.600 (2003). An appeal may then be taken to the state supreme court. The intent of the commission, however, is to mediate funding disputes short of formal judicial intervention.
powers to appropriate monies for judicial operations without violating the separation of powers doctrine. The only case directly relevant to this issue is *Wachtler v. Cuomo*. This case involved a dispute between then Chief Judge Wachtler of the New York Court of Appeals and Governor Mario Cuomo over the latter’s decision to cut the judiciary’s budget request. The case marks one of the first substantial uses of the doctrine of inherent powers against a coequal branch of government. The case was settled and therefore provided no final judicial determination to aid in analyzing the application of constitutional law standards to similar disputes.

The first proposition to emerge from the case law is this: courts universally agree that the judiciary possesses inherent power as a function of being a separate branch of government and that this power extends to...

187 Virtually all state constitutions place appropriation authority strictly in the state legislature. See, e.g., ARIZ. CONST. art. 4.2, § 20; COLO. CONST. art. V, § 32; FLA. CONST. art. III, §§ 12, 19; MINN. CONST. art. IV, § 18. Thus, one possible scenario for compelling funding of state court operations would be for the judiciary to bypass the legislature and go directly to the state treasury. Practically speaking, it would be difficult to foresee how a state court—even a state supreme court—could enforce a legal action compelling the state legislature to adopt a certain budget for the judiciary. To do so would arguably place appropriation authority and responsibility in the judiciary, a blatant invasion of legislative power by the courts and violation of the separation of powers doctrine. As noted earlier, see supra note 177, the most likely means of compelling funding would be a direct confrontation of the courts with the state treasurer. The judiciary would spend its budget and then order the state treasurer to continue to cover its expenses even in the absence of an appropriation. This scenario may have its own difficulties, in that several states require appropriation for all expenditures from the state treasury. See, e.g., MINN. CONST. art. XI, § 1 (“No money shall be paid out of the treasury of this state except in pursuance of an appropriation by law.”); WIS. CONST. art. VIII, § 2 (“No money shall be paid out of the treasury except in pursuance of an appropriation by law.”). But see generally Kan. Att’y Gen. Op. No. 02-17 (Mar. 26, 2002), discussed infra at note 196.


189 See Howard B. Glaser, *Wachtler v. Cuomo: The Limits of Inherent Power*, 14 PACE L. REV. 111 (1994). A similar case arose in Connecticut regarding whether state funding of the judiciary was adequate and whether the lack of funding was hampering the adjudication of litigants’ rights. While affirming the principle of inherent judicial powers, the Connecticut Supreme Court affirmed a dismissal of the suit as nonjusticable. See Pellegrino v. O’Neill, 480 A.2d 476, 482 (Conn. 1984).
compelling necessary funding. As noted in *In re Alamance County Court Facilities*, a court's inherent power inheres in its status as one of the three separate, coordinate branches of the government: "For over a century this Court has recognized such powers as being plenary within the judicial branch—neither limited by our constitution nor subject to abridgement by the legislature." Many state courts have espoused this principle and embraced it as a justification for compelling funding for needed operations. Rather than limiting a court's inherent power, the constitution and design of government actually promote and protect that power.

Second, the inaction of a legislative body may itself justify the use of inherent powers to compel funding. For example, in *Beard v. North Carolina State Bar*, the North Carolina Supreme Court held that its order establishing a Client Security Fund was a constitutional exercise of inherent power, which did not rest upon any required action by the legislature. That same court relied upon the *Beard* decision when it ruled in *In re Alamance County Facilities*, that "when inaction by those exercising legislative authority threatens fiscally to undermine the integrity of the judiciary, a court may invoke its inherent power to do what is reasonably necessary." A court, therefore, need not have affirmative denial of a

190 See Morgan County Comm'n v. Powell, 293 So. 2d 830 (Ala. 1974); Sholes v. Sholes, 760 N.E.2d 156, 164 (Ind. 2001), superseded by statute as stated in Sims v. Ivens, 774 N.E.2d 1015 (Ind. Ct. App. 2002); Rose v. Palm Beach County, 361 So. 2d 135 (Fla. 1978); Becker v. Barthelemy, 495 So. 2d 1316 (La. 1986); State ex rel. Farley v. Spaulding, 507 S.E.2d 376 (W. Va. 1998).
191 In re Alamance County Court Facilities, 405 S.E.2d 125, 129 (N.C. 1991).
192 See, e.g., O'Coins, Inc. v. Treasurer of County, 287 N.E.2d 608 (Mass. 1972) (holding that, even apart from statutory provisions, judge may bind county and order payment for essential services despite absence of prior appropriation to cover the expenses).
194 Id. ("The inherent power of the Court has not been limited by our constitution. To the contrary, the constitution protects such power. The General Assembly has no authority to deprive the judicial department 'of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government . . . '" (quoting N.C. CONST. art. IV, § 1)).
195 Alamance, 405 S.E.2d at 131; see also In re Order on Prosecution of Criminal Appeals, 561 So. 2d 1130, 1133 (Fla. 1990) (citing Rose v. Palm Beach County, 361 So. 2d 135, 137 (Fla. 1978))

"The doctrine of inherent judicial power as it relates to the practice of compelling the expenditure of funds by the executive and legislative branches of government has developed as a way of responding to inaction or inadequate action that amounts to a threat to the courts' ability to make
request for funding; silence is sufficient to justify the exercise of inherent power to compel funding for reasonably necessary expenditures.196

Third, the use of inherent power to compel funding is subject to the requirement that courts may use the power to compel only what is reasonably necessary for the administration of justice.197 Of course, what is reasonably necessary is subject to wide interpretation and artful characterization.198 Historically, most judicial funding disputes arise between local courts and local legislative bodies, generally over resources effective their jurisdiction.

cf. N.Y. County Lawyers' Ass'n v. State, 192 Misc. 2d 424, 436 (N.Y. Sup. Ct. 2002) ("Accordingly, when legislative appropriations prove insufficient and legislative inaction obstructs the judiciary's ability to function, the judiciary has the inherent authority to bring the deficient state statute into compliance with the Constitution by order of a mandatory preliminary injunction.").

Rather than compelling funding, the Kansas Supreme Court exercised its inherent power to impose a series of emergency surcharges remedying a $3.5 million reduction of the judiciary's budget. See Kansas Judicial Branch Fiscal Year 2003 Emergency Surcharge, 2002 SC 13 (Mar. 22, 2002). Not only did the supreme court order the application of the surcharges, but it also directed the state treasurer to create a special fund within the treasury and to deposit receipts of all emergency surcharges in that fund for the exclusive use of the judicial branch. For a more thorough legal analysis of the action, see Kan. Atty. Gen. Op. No. 02-17 (Mar. 26, 2002). The Kansas Attorney General opined, in part:

The authority of the Kansas Supreme Court, through the Chief Justice, to impose a surcharge on court costs arises from the Kansas Constitution and various Kansas statutes, all read in light of the inherent authority possessed by the Supreme Court to take such action as is necessary to maintain its independence as a co-equal branch of government and insure that it is adequately funded to perform its mandated functions. Before this power may be exercised, in order that legislative and executive branch authority is properly considered, the Court must make a finding that peculiar circumstances exist requiring such an extraordinary measure.

Id. at 4.

197 See Bd. of County Comm'rs v. Nineteenth Judicial Dist., 895 P.2d 545 (Colo. 1995); Smith v. Miller, 384 P.2d 738 (Colo. 1963); In re DeKalb County Courthouse Fire Sprinkler Sys., 454 S.E.2d 126 (Ga. 1995); see also Becker v. Barthelemy, 495 So. 2d 1316 (La. 1986) (holding that a court asserting inherent powers must demonstrate that its objective is reasonably necessary to a judicial function (Dennis, J., dissenting)); Commonwealth ex rel. Carroll v. Tate, 274 A.2d 193, 199 (Pa. 1971) ("The court does not have unlimited power to obtain from the City whatever sums it would like or believe it needs for its proper functioning or adequate administration. Its wants and needs must be proved by it to be 'reasonably necessary' for its proper functioning and administration . . .").

198 For a general discussion on the use of inherent powers to compel reasonably necessary expenses, see Spivey, supra note 179.
that are needed for a court to fulfill its adjudicative responsibilities. For example, in *State ex rel. Wilke v. Hamilton County Board of Commissioners*, a state judge ordered a county commission to fund a probate court. When the commission refused, the judge sought and obtained a writ of mandamus. The Ohio Supreme Court, issuing the writ, held, “Common pleas courts and their divisions possess inherent authority to order funding that is reasonable and necessary to the court’s *administration of its business*.”

Fourth, in determining what is reasonably necessary, appellate courts have generally been reluctant to sanction the use of inherent power except upon some proof by the court that the funds sought directly related to the clear administration of justice. One court has held that there must be a direct nexus between the funding request and the resulting impairment to the operations of the courts. At the core of the reluctance toward a more elastic definition is the fear that, just as the judiciary opposes encroachment upon its authority, so too courts must resist the temptation to encroach upon legislative authority, particularly budgetary authority. Courts must...

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200 *Wilke*, 734 N.E.2d at 818 (emphasis added).
202 See id. at 647

“Where the preconditions to the exercise by the judiciary of its inherent power are otherwise present, it becomes necessary to focus on the nexus between the funding sought and the resulting impairment to judicial administration. . . . [A]n expenditure which is ‘reasonably necessary’ for constitutional purposes is one absent which the judiciary will be unable ‘to carry out its mandated responsibilities, and its powers and duties to administer Justice.’”

Virtually all courts have held that the standard for compelling funding is whether the proposed expenditure is reasonably necessary to the judiciary’s fulfilling its constitutional duties. Few courts have ventured to provide a definition of “reasonably necessary.” Notwithstanding near universal acceptance of the standard, courts differ on who has the burden of proving whether the expense is reasonably necessary. Some courts hold that the burden rests with the judiciary, while others hold that the legislature bears the burden of demonstrating that the funding request is not reasonably necessary. *Compare In re Salary of the Juvenile Dir.*, 552 P.2d 163 (Wash. 1976) (finding burden rests in the judiciary), with *Wilke*, 734 N.E.2d at 811 (holding that legislature bears the burden of showing expense unreasonable).

203 *Pena v. Dist. Court of the Second Judicial Dist.*, 681 P.2d 953, 956 (Colo. 1984) (holding that the “separation of powers doctrine imposes upon the judiciary a proscription against interfering with the executive or legislative branches as well as a duty to perform its . . . obligations with complete independence”).
respect the authority of the legislative branch to set policy through the use of its appropriation authority, and must, unless faced with exigent circumstances, avoid the use of inherent powers to countermand legislative funding decisions.\textsuperscript{204} It is clear that even in relatively minor disputes, courts are ambivalent about the use of inherent powers to compel funding. As the Washington Supreme Court noted:

By its nature, litigation based on inherent judicial power to finance its own functions ignores the political allocation of available monetary resources by representatives of the people elected in a carefully monitored process . . . . The unreasoned assertion of [courts'] power to determine and demand their [courts'] own budget is a threat to the image of and public support for the courts. In addition, such actions may threaten, rather than strengthen, judicial independence since involvement in the budgetary process imposes upon the courts at least partial responsibility for increased taxes and diminished funding for other public services.\textsuperscript{205}

Finally, while some courts opine that the inherent power to compel funding also means that the court alone can determine its needs,\textsuperscript{206} other

\textsuperscript{204} Some courts have implicitly questioned the “reasonably necessary” standard in local funding disputes, imposing a much higher burden on the court itself. In Butte-Silver Bow Local Government v. Olsen, 743 P.2d 564, 566 (Mont. 1987), the Montana Supreme Court held, “Inherent judicial power to compel funding in Montana should only be used when an emergency arises or when the established methods for providing funding have failed.” (citing State ex rel. Hillis v. Sullivan, 137 P. 392 (Mont. 1913)).

\textsuperscript{205} Salary of the Juvenile Dir., 552 P.2d at 172–73.

\textsuperscript{206} In Wilke, 734 N.E.2d at 811, the Ohio Supreme Court struck down as unconstitutional a statute mandating that a probate judge who disagrees with a local body’s funding decision must file a mandamus action in the court of appeals. The Supreme Court held that the statute, OHIO REV. CODE ANN. § 2101.11(B)(2) (West 2003), unconstitutionally restricted the Supreme Court’s authority to issues writs of mandamus under its original jurisdiction. “Based on these constitutional provisions, R.C. 2101.11(B) is unconstitutional because it prevents a probate court judge dissatisfied with the amount appropriated for the probate court from invoking the original jurisdiction of this court in mandamus. Instead, it relegates an aggrieved probate judge to a mandamus action in the court of appeals.” Wilke, 734 N.E.2d at 817; accord People ex rel. Bier v. Scholz, 394 N.E.2d 1157, 1160 (Ill. 1979) (“[T]he judiciary has inherent power to determine what funds are reasonably necessary for its efficient and effective operation and the power to compel the payment of those funds . . . .”); In re Court Reorganization Plan, 391 A.2d 1255, 1262 (N.J. Super. Ct. App. Div. 1978)
courts have taken a far more conservative view of the use of inherent powers in this context.\textsuperscript{207} The more conservative view subjects the use of inherent power to certain evidentiary restrictions including the reasonableness of the demand, the availability of funds, and whether a legislative funding body's refusal to appropriate money actually impairs the operations of the court.\textsuperscript{208} The use of inherent power to compel funds can be viewed as antidemocratic, not only creating a potentially volatile situation vis-à-vis the legislature, but also impugning the judiciary's credibility in the eyes of the public.\textsuperscript{209} As the Washington Supreme Court noted, "No authority rests in the judiciary to appropriate funds..."\textsuperscript{210} The exercise of inherent powers to compel funding must take place only under the most egregious of circumstances, and even then only after all reasonable efforts have been made to secure funding through traditional channels.\textsuperscript{211}

In summary, the case law suggests that courts universally defend the principle of inherent power as inseparable from the independence of the judiciary, both as an adjudicatory body and a constitutional institution of government. Yet the case law also reveals that courts are hesitant, even ambivalent, regarding the concept's application in the budget context. Although courts clearly possess inherent powers, it is difficult at times to reconcile the use of those powers with the independent powers and prerogatives of the other branches. If courts have no appropriation authority and recognize that such authority is clearly lodged in the legislature, on what basis may they invoke inherent powers without simultaneously creating a climate in which the coordinate branches use their own inherent powers to interfere with the prerogatives of the judiciary?

\textsuperscript{207} See Salary of the Juvenile Dir., 552 P.2d at 163.
\textsuperscript{208} See, e.g., id. at 175.
\textsuperscript{209} Id. at 173.
\textsuperscript{210} Id. at 166.
\textsuperscript{211} See Butte-Silver Bow Local Gov't v. Olsen, 743 P.2d 564, 566 (Mont. 1987) ("Inherent judicial power to compel funding in Montana should only be used when an emergency arises or when the established methods for providing funding have failed.").
Absent specific statutory or constitutional provisions, two grounds generally support the principle that courts may use inherent power to compel funding. First, based upon the judiciary’s adjudicatory responsibilities, courts may compel funding when the legislature’s failure to provide needed resources restricts access to courts or reduces judicial appropriations to the point at which courts can no longer fulfill their constitutional obligation of deciding cases. Due process has no substantive meaning if funding problems close courts to the public. The use of inherent power in this context rests, in large measure, upon the judiciary’s adjudicatory independence—the court’s obligation to be open and to render expeditious and effective justice free from unwarranted interference by the coordinate branches of government. This is the traditional foundation of most court funding decisions. Legislatures do, however, possess considerable authority to control the “administration of justice,” especially through statutory changes that eliminate the courts’ legal basis for demanding funds.212

Second, and more abstract, the judiciary’s constitutional independence, grounded in the separation of powers doctrine, requires the legislature to fund items reasonably necessary to ensure the courts’ viability and effectiveness as a governing institution. State constitutions create a series of interdependent powers by vesting the particulars of that interdependency in three branches of government. The constitutional structure of government ensures that no one branch can exercise its independent powers with finality absent the implicit or explicit consent of the other branches. Thus, through judicial review, the courts impose a restraint on the actions

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212 For example, under federal welfare reform provisions states were required to centralize child support systems. Congress concluded that a centralized system would provide greater expedience and efficiency in ensuring support payments reached custodial parents. See 42 U.S.C. § 654(3) (2003). In many states, this change resulted in the shifting of all child support payment adjudications from the judiciary to an executive branch agency. See, e.g., GA. CODE ANN. § 19-6-33.1(c) (2002); MO. REV. STAT. § 454.530 (2002). In effect, the change eliminated a traditional function of the judiciary, thus precluding any demands for funds to administer this aspect of the courts’ business. Some courts have found aspects of this delegation of traditional judiciary authority over family law matters to executive branch officials unconstitutional. See Holmberg v. Holmberg, 588 N.W.2d 720, 724 (Minn. 1999) (finding that “[f]amily dissolution remedies . . . rely on the district court’s inherent equitable powers”); Seubert v. Seubert, 13 P.3d 365, 374 (Mont. 2000) (striking a statute granting an agency “judicial power” to enforce child support orders). Other courts have upheld similar changes, including those that allow administrative agencies to modify court-ordered support. See State ex rel. Hilburn v. Staeden, 91 S.W.3d 607, 609 (Mo. 2002); Morgan County Dep’t of Human Res. v. B.W.J., 723 So. 2d 689, 693 (Ala. Civ. App. 1998).
of the legislative and executive branches. As Alexander Hamilton observed, "It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority."

In asserting principles to justify courts’ ordering additional state funding, one must examine not only the legal basis of the assertion, but also the principles governing the propriety of the action. The case law makes clear that courts must be funded at a reasonably necessary level, understanding that “reasonably necessary” is a term of art. In compelling a state to pay additional costs, courts may be required to engage in an intensive fact-based analysis of each item of the request, assessing whether the courts’ adjudicatory and constitutional independence will be impaired if the funds are not provided. This analysis may be critical in vindicating the judiciary’s action to the public. What is legally justified bears political consequence, particularly in the context of a funding crisis. It is wise, therefore, to consider not only what is legally justified but also what is politically feasible.

C. Politics, Perception, and a Clash of Cultures: Some Final Observations

While courts may often see themselves as the weakest of the branches of government, others tend to view them as possessing extraordinary power. This perception may result in part from the zero-sum nature of the judicial process. While the political branches must negotiate solutions through a consensus-building process defined by democratic principles, the judicial process forces courts to render “final judgments,” declaring winners and losers ostensibly without the nuances of politics. Although

213 THE FEDERALIST NO. 78, supra note 1, at 404 (Alexander Hamilton).
214 Cf. Webster County Bd. of Supervisors v. Flattery, 268 N.W.2d 869, 877 (Iowa 1978) (“The confidence and trust of the public and the bar depend on the efficient, competent administration of justice secured through adequate funding of courts”).
216 See United States v. Morrison, 529 U.S. 598, 649 (2000) (“Hence, ‘conflicts of economic interest . . . are wisely left under our system to resolution by Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination. And with the wisdom, workability,
individual members of the judiciary might contest this proposition, arguing that court decisions are decidedly an exercise of balancing interests, the fact remains that the judicial process inevitably yields winners and losers.\textsuperscript{217} The typical question before a judge is whether one party has a right and the other party a duty, with the court rendering a decision supported by predefined legal principles on disputed issues of fact or law.\textsuperscript{218} The judicial fairness, of the plan of regulation we have nothing to do.’’’ (quoting Wickard v. Filburn, 317 U.S. 111, 129 (1942))); Voices for Choices v. Ill. Bell Tel. Co., 339 F.3d 542, 544–45 (7th Cir. 2003).

The legislative process is democratic, and so legislators have an entirely legitimate interest in determining how interest groups and influential constituents view a proposed statute. . . . The judicial process, in contrast, though ‘political’ in a sense when judges are asked to decide cases that conventional legal materials . . . leave undetermined, . . . is not democratic in the sense of basing decision on the voting or campaign-financing power of constituents and interest groups.

Christian Sci. Reading Room Jointly Maintained v. City of San Francisco, 807 F.2d 1466, 1475 (9th Cir. 1986) (“Nor is the equal protection clause a warrant for eliminating the legislative practice of compromise and vote trading. Whereas compromise and vote trading have no place in the judicial process, they are an expected and necessary aspect of the legislative process.”); Luke K. Cooperrider, The Rule of Law and the Judicial Process, 59 MICH. L. REV. 501, 505 (1961).

\textsuperscript{217} Arguing for the democratic nature of the judicial process, Donald L. Horowitz has observed:

The courts are more democratically accountable, through a variety of formal and informal mechanisms, than they have been accused of being. Equally important, the other branches are in many ways less democratically accountable than they in turn were said to be by those who emphasized the special disabilities under which judges labor.

HOROWITZ, supra note 25, at 18; see also Jed Rubenfeld, The Two World Orders, WILSON Q., Autumn 2003, at 27

“Claims about ‘American realism’ are often exaggerated, but there is undoubtedly in the United States a greater understanding than in Europe that all law, including judge-made law (i.e., judicial decisions), and even judge-made constitutional law, is a political product. From an American point of view, if the law is to be democratic, the law and the courts that interpret it must retain strong connections to the nation’s democratic political system.”

\textsuperscript{218} The judicial process is guided not only by statutes and stare decisis, but also by such self-imposed restraints as justiciability doctrines, which generally ensure that courts consider only narrowly defined disputes, and that they render equally narrowly defined decisions. By contrast, the legislative process is significantly
process encourages, indeed demands, that courts resolve disputes, including those implicating public policy, on the narrowest grounds and with a much greater finality than the legislative process allows. By contrast, the typical legislature or executive bureaucracy addresses broad issues of public policy, assessing the range of alternatives available to resolve a problem. Narrow principles of legal analysis have little value in this context. While Americans generally look to the legislative process to protect broad public interests (a function of negotiation and compromise), they generally look to the judicial process to protect private interests (a function of declaration and finality). These are starkly different ways of defining and resolving public policy problems, and necessarily impact the internal workings and cultures of the various branches of government.

Court decisions with broad public impact, consequently, can be seen as undermining democratic political values, not to mention overarching budgetary considerations. Courts themselves acknowledge the limited value of the judicial process in resolving many broad public policy issues. This fundamental difference in the processes used to resolve more expansive, not only in what problems it confronts but also in the process for resolving those problems.


But persuading one's fellow citizens is one thing, and imposing one's views in absence of democratic majority will is something else. What Texas has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new "constitutional right" by a Court that is impatient of democratic change.

Id.

See generally HOROWITZ, supra note 25, at 256.

People v. Korman, 47 Misc. 2d 945, 947 (N.Y. Crim. Ct. 1965) ("The judicial process through which courts alone act is a most finely finished instrument for the solution of questions of law between litigants. But as to questions of policy the judicial process is a very limited instrument as to notice and opportunity to be heard, or as to hearing or considering other than the two sides to the litigation, though that policy issue may have great multiplicity of sides and interested parties."). Roscoe Pound held a quite different position, arguing that the judicial process, unlike the legislative process, produced public policy that came from concrete experience, not prophecy. Pound wrote:

Judicial finding of law has a real advantage in competition with legislation in that it works with concrete cases and generalizes only after a long course of trial and error in the effort to work out a practicable principle. Legislation, when more than declaratory, when it does more than restate authoritatively what judicial experience has indicated, involves the difficulties and
public policy issues cannot be underestimated as a source of misunderstanding and tension between the branches—even on budget matters. The idea of courts' "ordering" the expenditure of public funds for their operations—as if they were rendering a final judgment in a disputed case—is at odds with the give-and-take of the legislative process, whose primary actors must balance competing and often amorphous interests and demands in shaping public policy.

Moreover, in the budget context, the judiciary must recognize that the state legislature's power over appropriations involves more than simply bankrolling government operations. Beyond a simple allocation for programs, a state budget is a statement of public policy. The budget is a constitutionally protected exercise in balancing competing public demands through the prism of national, regional, state, and local politics. From the legislature's perspective, there is no truly right or wrong answer, no zero-sum decision, because each exercise of the legislature's power—particularly its budgetary power—results from different political perspectives compelling, however inartfully, a consensus approach to setting public policy. The bargaining process of the legislature neither complements nor contradicts the decisional process of the courts; they are simply two entirely different methodologies used to solve problems—sometimes the same problem. The different approaches do, however, present a challenge to judicial, legislative, and executive branch leaders in understanding one another's cultures and working out compromises on the judiciary's budget. Demanding resources because they are reasonably necessary to secure the judiciary's adjudicative and constitutional roles may hold little persuasive value for the public or a

perils of prophecy.

ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 45 (1938).

222 See Barnes v. Kline, 759 F.2d 21, 26 (D.C. Cir. 1984) (“It is also indisputable that in matters involving another branch of the government, the courts must be especially wary of overstepping their proper role, for ‘repeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either.’” (quoting United States v. Richardson, 418 U.S. 166, 188 (1974))).

223 As observed in In re Salary of the Juvenile Director, 552 P.2d 163, 173 (Wash. 1976), “The judiciary is isolated from the opinion gathering technique of public hearings as well as removed from politically sensitive, proportionately elected representatives.”

224 Simpson v. Mun. Court, 14 Cal. App. 3d 591, 598 (1971) (“The analogy to courthouse picketing is imperfect, because the judicial process repels the intervention of external opinion while the legislative process stands in need of it.”).
coordinate branch, given there is scarcely an agency of government that cannot make a similar claim with reference to its public obligations.\textsuperscript{225}

It is axiomatic, therefore, that the judiciary does not possess a large hammer in budget battles with the legislature.\textsuperscript{226} Short of invoking inherent power, courts lie at the mercy of the legislature’s goodwill and its hoped-for commitment to adequate funding for the justice system.\textsuperscript{227} But all must

\textsuperscript{225} Many executive departments are also constitutional and therefore may similarly not be subject to elimination by statutory action or fiscal misappropriation. \textit{See} FLA. CONST. art. IV, §§ 11 & 12 (establishing Departments of Veterans Affairs and Elderly Affairs). Unlike the federal Constitution, most state constitutions provide for separately elected constitutional officers, such as attorney general, auditor, comptroller, treasurer, and secretary of state. While these positions are generally classified as “executive” because of the nature of their functions, they, like state courts, exist by constitutional rather than statutory mandate. Funding cuts that would effectively eliminate these offices would likewise appear unconstitutional.

\textsuperscript{226} Most state constitutions require the judiciary to submit its budget to the governor just as any other state body, except the legislature, would. While this may be done for practical reasons, the effect is to create an impression that the judiciary is not truly a coordinate branch of government; that it sits at the same level as an executive department or independent agency. This budgeting process gives the governor the opportunity to reduce the judiciary’s budget before the legislature begins its mark-up. \textit{See}, \textit{e.g.}, ME. REV. STAT. ANN. tit. 5, § 1664 (West 2003) (permitting the governor to modify the budget request prepared by the judiciary before submitting it to the legislature). Even in those states where the governor must submit the judiciary’s budget directly to the legislature without alteration, governors take the opportunity to offer comments that can have a positive or negative effect. One exception to this principle can be found in West Virginia. Under that state’s constitution, the legislature cannot decrease any budget item related to the judiciary. \textit{W. Va. Const.} art. VI, § 51(5); \textit{see} State \textit{ex rel.} Bagley \textit{v. Blankenship}, 246 S.E.2d 99, 109 (W. Va. 1978).

\textsuperscript{227} The judiciary is the only branch of government that does not participate in the formulation of a budget. In most states, the judiciary is treated as just another agency of state government: like many executive branch agencies, it is required to submit its budget directly to the governor. Thus, while the legislative and executive branches of government have a seat at the budget table, the judiciary remains outside the process, forced to compete with many other demands and treated in most instances not as a branch of government but rather as a mere agency of government. Thus, as noted in \textit{Anderson County Quarterly Court v. Judges of 28th Judicial Circuit}, 579 S.W.2d 875, 878–79 (1978),

“To offset their politically disadvantageous position and to insure the orderly and efficient operation of their functions, the
realize that state and federal funding decisions are clearly political and most assuredly shift with the changing political landscape, the party in power, and the public's constantly changing mind. Court decisions—particularly unpopular decisions—can have political ramifications far beyond the control of courts and can clearly affect the budget allocated to the judiciary. The centralization of authority and superintending power in state supreme courts has complicated the matter, in that a single controversial decision can impact the entire judiciary's state-funded budget, not just that of the court issuing the decision. At best, state courts can be said to be the second among equals, and at most, on a par with many executive departments when it comes to the budget. The judiciary must be cognizant of this uncomfortable fact lest it risk misreading the public support so critical in legitimizing acts of government.

The use of inherent power to compel funding at the state level must, therefore, rest on more than solely the judiciary's limited constitutional

courts, in recent years, have been more willing to utilize their inherent powers. . . . But, however broad and justifiable the use of inherent powers may be, it is not a license for unwarranted flexing of the judicial power."228


229 See, e.g., supra note 17.

230 See John C. Taggart, *Judicial Power—The Inherent Power of the Courts to Compel Funding for Their Own Needs*—In re Juvenile Director, 53 WASH. L. REV. 331, 336 (1978) ("Because the public is the final arbiter of disputes between the branches, it is necessary that the public find acceptable the exercise of this inherent power if it is to have any long term usefulness.").
obligation to hear cases. This is not to suggest that the judiciary's adjudicatory responsibilities are unimportant. Rather, it is to suggest that in a one-on-one confrontation between coordinate branches of government, considerations far beyond funding a new court, a few additional employees, or a new computer system, come into play. The funding sought by the judiciary should be that level reasonably necessary to ensure the existence of the judiciary as both a government mechanism for resolving disputes and, equally important, a separate branch of government exercising different but coequal governing powers with the legislative and executive branches. The latter basis is important because legislatures routinely alter the landscape in which courts operate. Nonetheless, a legislature cannot—either through substantive law or budgetary blackmail—eradicate the judiciary's independence as a key ingredient in governing the nation.

The use of inherent power to compel a state legislature to fund courts should be examined in light of both the judiciary's core constitutional role and the need to resolve cases. At the state level, the use of inherent power to compel funding would appear justified when a legislature's exercise of its plenary authority over the budget interferes with the courts' ability to exercise their adjudicatory function and undermines the judiciary's constitutional status as an effective coequal institution of government. An assertion of judicial authority that fails to articulate both principles not only misses a critical constitutional mark, but also risks undermining public support for the courts. The exercise of inherent power in the context of defending the judiciary's constitutional status promotes the principle of separation of powers and makes clear that in the United States, the judiciary is an active participant in governing the nation, not merely an umpire deciding private disputes.

IV. CONCLUSION

In an age of modern judicial institutions, courts do more than arbitrate disputes. Through legislative action—and at times legislative inaction—courts are evolving into protectors and purveyors of state and national policy.\footnote{See, e.g., State ex rel. Simmons v. Roper, 112 S.W.3d 397 (Mo. 2003), cert. granted, 2004 U.S. LEXIS 836 (Jan. 26, 2004) (holding that the U.S. Supreme Court would find execution of juveniles unconstitutional as abridging evolving notions of decency).} The function of the courts is expanding as the legislative and executive branches, the traditional policy-making bodies, appear increasingly paralyzed by the polemical debates and deep philosophical
divides so prevalent today.\textsuperscript{232} Although courts clearly do not legislate in the traditional sense as some might suggest, they have always and will continue to participate in setting public policy through their decisions and the programs created to support those decisions.\textsuperscript{233} Thus, it is difficult to distinguish the "core" functions of the judiciary from the breadth of other services it delivers to the public. Jefferson's description of judges as "mere machines"\textsuperscript{234} is no more applicable today than it was 250 years ago. The inevitable policymaking role of judges is a refreshing statement about the constant evolution of American government, but also a ripe opportunity for conflict with the other branches over the breadth and limits of judicial authority.

Consequently, where the line lies between appropriate and overreaching use of inherent power to compel certain actions may well be defined less by law and history than by political reality and the evolving role of courts in exercising their governing authority. The judiciary must, therefore, be wise and restrained in the exercise of inherent powers. Although courts have the inherent power to compel funding, the impact of exercising that authority may have wide-ranging ramifications, affecting not only the relationship between the judiciary and the other branches, but also the judiciary's legitimacy in the eyes of the public. Clearly, the roles and responsibilities of the courts have grown over the last fifty years, and too often without the corresponding resources needed to meet new challenges. The legislature must take note of this fact lest the points of contention grow rather than recede. But courts must also recognize that exercising inherent powers in a funding dispute carries with it political and budgetary consequences.

It is beyond dispute that courts have the power to compel funding at a state and local level. The question, therefore, is not whether courts can exercise this power, but rather when they should do so. The nation's

\textsuperscript{232} The perceived sluggishness of the legislative process may contribute to the use of the judiciary as a forum for resolving many public policy questions, partly because the judicial process compels a "final" resolution within a relatively reasonable timeframe.

\textsuperscript{233} See, e.g., \textit{In re Opinions of the Justices to the Senate}, 802 N.E.2d 565 (Mass. 2004) (holding that a bill proposing to prohibit same-sex couples from marrying, but allowing them to form civil unions, violates the equal protection clause of the state constitution); \textit{Goodridge v. Dep't of Pub. Health}, 798 N.E.2d 941 (Mass. 2003) (finding same-sex marriages protected under Massachusetts state constitution and giving state legislature six months to enact legislation effectuating the decision).

\textsuperscript{234} Letter from Thomas Jefferson to Edmund Pendleton, \textit{supra} note 63.
jurisprudence in this area will most likely continue to evolve in a haphazard fashion, perhaps reflecting everyone's lack of comfort with the notion. As several courts have observed, it should be used only in the gravest of circumstances. While in the end the judiciary possesses the ultimate legal recourse, the courts must recognize that the political branches possess a highly potent political response given their more direct connection to the populace. Courts must be attentive to this stark reality in exercising inherent powers lest they compromise not only their adjudicatory independence, but also the public support so critical to maintaining the institutional independence and vibrancy of the third branch of government.

235 See, e.g., Clark v. Dussault, 878 P.2d 239, 243 (Mont. 1994) (holding that courts may use inherent power to compel funding only when established methods have failed or an emergency arises).

236 The legislature is not the only state government body possessing significant political power which the courts must recognize. In a recent dispute in Illinois, the state supreme court issued an order to the state comptroller to increase judicial salaries per statute notwithstanding a gubernatorial veto of appropriations to fund the increases. The comptroller refused to comply with the supreme court's order, stating, "The Supreme Court is trying to direct an executive officer by administrative order instead of through an open court process . . . . I dispute their ability to act in such a unilateral fashion." Press Release, Daniel W. Hynes, Illinois Comptroller, Hynes Disputes Supreme Court Order on Judicial Pay Raises (July 25, 2003). Comptroller Hayes received significant support from the governor in defending against the state supreme court's order. See Gov. Asks Judges to Drop Pay Raise Lawsuit, N.W. IND. TIMES, Aug. 5, 2003. The court did not proceed with contempt proceedings and subsequently vacated its order. The court did allow two suits by individual judges to proceed, which resulted in an order to fund the pay increases. That order was, however, stayed by the appeals court. See Appellate Panel Upholds Freeze on Judges' Pay, BEACON NEWS, Dec. 17, 2003. Notwithstanding the outcome of those lawsuits, the case does demonstrate the political difficulty courts face in ordering state officials to spend unappropriated resources on behalf of the judiciary, particularly when that expenditure is viewed as being motivated purely by self-interest. The lack of popular support for such action not only undercuts the court's ability to effectuate specific spending orders, but also compromises the credibility of the courts.