USING INHERENT JUDICIAL POWER IN A STATE-LEVEL BUDGET DISPUTE

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ABSTRACT

State courts are in financial crisis. Since the mid-1990s, state legislatures have allowed funding for their judicial systems to stagnate or dwindle. With diminished resources, state courts have struggled to provide adequate access to justice and dispute resolution. The solution to this crisis may lie in the doctrine of inherent judicial power. Courts have historically used inherent power to request additional funds from local legislative bodies for discrete expenditures. The use of inherent power to challenge the overall sufficiency of a judicial budget, however, has proven troubling. Under the current formulation of the inherent-power doctrine, a state court contesting the adequacy of a statewide judicial budget runs into two problems. First, by invoking its inherent power to compel additional funding, the court may usurp the appropriation power of the legislature. Second, state courts threaten their own legitimacy by taking a portion of the state budget out of the political process.

In response to these problems, this Note proposes a reformulation of the inherent-power doctrine. Specifically, state courts should invoke inherent power against a legislature only under a standard of absolute necessity to perform the duties required by federal and state constitutional law. This new standard limits the use of inherent power to situations that threaten the judiciary's ability to perform its constitutionally mandated functions. By cabining the permitted uses of inherent power, the standard respects the separation of powers and preserves the judiciary's public legitimacy.

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INTRODUCTION

On June 29, 2011, Chief Justice Sue Bell Cobb resigned from the Alabama Supreme Court, four-and-a-half years into her six-year term.[1] Among the reasons she offered for leaving office was the Alabama Legislature's "alarming reduction in funding" for the state's court system.[2] She noted that over the past ten years the legislature forced the court system to spend $66.3 million to meet new statutory demands while providing less than one third of that amount in additional funds.[3] Cobb's resignation was not the first time that she had publicly bemoaned the legislature's failure to fund the courts adequately. In April of that year she predicted "delays across the spectrum" after she drastically reduced the amount of time during which the state would conduct jury trials, closed all courthouses in the state to the public on Fridays, and fired hundreds of court employees.[4] After learning in May of a proposed budget that would cut an additional 8 percent from the judicial system, Cobb held a press conference asking voters to hold the legislature accountable for the cuts, contending that the "trial courts [could not] operate" on the reduced funds.[5] She also mentioned that the supreme court was considering suing the legislature to prevent the new round of budget reductions.[6] "That certainly would not be my preference," Cobb said of a potential lawsuit, "[but] we're not ruling that out."[7]

The financial condition of Alabama's judicial system is not unique. Since the mid-1990s, even during times of economic prosperity, state legislatures around the country have allowed funding for their judicial systems to stagnate or dwindle.[8] The recession that

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1. Press Release, Ala. Supreme Court, Statement of Chief Justice Sue Bell Cobb 1 (June 29, 2011), http://www.alacourt.gov/PR/Press%20Release%20ChiefJusticeCobbtoResign.pdf.

2. *Id.*

3. *Id.*

4. Bob Lowry, *Court Offices Set To Close Fridays*, HUNTSVILLE TIMES (Ala.), Apr. 13, 2011, at A3.

5. Dana Beyerle, *Alabama Chief Justice Says Lawsuit Possible over Court Funding*, TUSCALOOSA NEWS (May 18, 2011, 3:30 AM), http://www.tuscaloosanews.com/article/20110518/news/110519718.

6. Chief Justice Cobb also noted that the Alabama Supreme Court must uninamously make any decision to sue the legislature for additional funding. *Alabama Chief Justice Warns of Potential Court Fight; Legislature's Funding Plan Too Little for Courts*, AL.COM, (May 17, 2011, 12:40 PM), http://blog.al.com/wire/2011/05/alabama_chief_justice_warns_of.html.

7. Beyerle, *supra* note 5.

8. ABA TASKFORCE ON PRESERVATION OF THE JUSTICE SYS., CRISIS IN THE COURTS: DEFINING THE PROBLEM, REPORT TO THE HOUSE OF DELEGATES, RESOLUTION, at 2 (2011),

began in 2007, however, threatened to cause unprecedented damage to state court systems. As state revenues fell, legislatures looked to courts for additional savings. From 2008 to 2011, legislatures in most states cut judiciary spending by 10 to 15 percent.[9] The result was a dramatic reduction in court services. Including Alabama, at least fourteen states have reduced the hours and days that their courts are open to the public.[10] Litigants and defendants face lengthy delays before appearing on a court docket. Criminal cases in some states may take more than a year to clear,[11] and civil cases fare much worse.[12] State courts, which handle 95 percent of all litigation in the United States,[13] are struggling to provide the critical adjudicatory services that make up an effective justice system. As the chief justice of the Massachusetts Supreme Judicial Court put it, state courts are at "the tipping point of dysfunction."[14]

The gravity of the state-court funding crisis calls for an appropriately strong solution. The nation relies on courts, especially state courts, to safeguard rights, support an efficient economy, and provide a buffer from overreach by the political branches.[15] These political branches, often viewing the judiciary as "merely another government program" rather than a coequal branch of government,[16] have allowed court funding to wither to levels that threaten the judiciary's ability to perform its constitutionally mandated duties.

Had Chief Justice Cobb convinced the Alabama Supreme Court to move forward with a suit against the Alabama Legislature, she would have pursued a particularly intriguing legal option: invoking the court's inherent power. Inherent powers are those not specifically enumerated in the governing constitution, but which each branch of government must possess to maintain the ability to execute its

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available at http://www.americanbar.org/content/dam/aba/images/public_education/pub-ed-lawday_abaresolution_crisiscourtsdec2011.pdf.

9. *Id.* at 2.

10. *Id.* at 5.

11. *Id.* at 3–4.

12. *Id.* at 3.

13. Richard Y. Schauffler & Matthew Kleiman, *State Courts and the Budget Crisis: Rethinking Court Services*, *in* 42 THE BOOK OF THE STATES 2010, at 289, 289 (Council of State Govt's eds., 2010).

14. Margaret H. Marshall, Chief Justice, Supreme Judicial Court of Mass., Benjamin N. Cardozo Lecture: At the Tipping Point: State Courts and the Balance of Power 6 (Nov. 10, 2009), *available at* http://www.abcny.org/pdf/Cardozo_post_final.pdf.

15. *See infra* text accompanying notes 65–67.

16. Maron v. Silver, 925 N.E.2d 899, 915 (N.Y. 2010).

duties.[17] State courts have claimed certain inherent powers for most of their existence, generally to accomplish internal housekeeping tasks and to enforce judgments.[18] In the midtwentieth century, courts began using the doctrine of inherent power to compel additional funding from legislative bodies. In most cases the funds were relatively insignificant and for discrete expenditures. In a few instances, however, courts used their inherent power for a broader purpose—to challenge the overall sufficiency of a judicial budget.[19] Rather than demand payment for a particular budget item, these courts invoked their inherent power to demand greater general judicial appropriations.

This Note evaluates this latter form of inherent power. Because of the rise of consolidated judicial systems—in which a central authority allocates funding for the entire state court system—modern disputes over the sufficiency of court budgets will likely take place at the state level, rather than within cities or counties.[20] These disputes pit a legislature, which passes a meager judicial budget, against the state supreme court, which deems the budget insufficient to fulfill its constitutionally mandated duties. Courts that find themselves in this situation may wish to take Chief Justice Cobb's suggestion and sue their legislature, hoping to invoke the judiciary's inherent power to compel additional, adequate funding.

Though this maneuver may sound attractive, scholars have harshly criticized the doctrine of inherent power when used by a state supreme court to compel funds from a coequal legislature.[21] These critics have raised two principal objections. First, when a supreme court orders additional judicial funding, it usurps the appropriation power vested in the legislature. Second, an inherent-power order of this type moves a portion of the state budget outside the political arena. In bypassing the political process, courts threaten their public support and popular legitimacy. These two problems, scholars have

17. *See* Jeffrey Jackson, *Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers*, 52 MD. L. REV. 217, 223–27 (1993) ("[T]he powers of each branch of government are not exhaustively listed in state constitutions.").

18. *See infra* Part II.A.

19. *See infra* Part II.A. This Note discusses two such instances: *Commonwealth ex rel. Carroll v. Tate*, 274 A.2d 193, 199 (Pa. 1971), and the New York dispute between Chief Judge Sol Wachtler and Governor Mario Cuomo.

20. *See infra* text accompanying notes 117–124.

21. *See infra* Part II.B.

concluded, make inherent power inappropriate in a state-level funding dispute.

This Note seeks to counter this conclusion. Inherent power can and should be a potential weapon in the fight against diminishing judicial funding. But to prove useful in the state-court funding crisis, the inherent-power doctrine needs modification. To that end, this Note proposes a new standard for courts seeking to compel additional judicial funding from a legislature: absolute necessity to perform the duties required by federal and state constitutional law. This formulation, call it *constitutional absolute necessity*, improves on past standards by limiting the potential disputes that would sanction the use of inherent power and by grounding the use of inherent power in the judicial branch's constitutional duties. These two limitations safeguard courts' legitimacy and lessen the chance that courts will usurp the legislature's appropriation power.

Constitutional absolute necessity builds on articulations of inherent power provided by two state supreme court cases from the 1990s, *Hosford v. State*[22] and *Folsom v. Wynn*.[23] These two cases approached inherent judicial power from different angles. *Hosford* viewed the invocation of inherent power as a distasteful enterprise, yet one that courts must entertain—on limited occasions—to maintain their integrity.[24] To cabin the power effectively, the court in *Hosford* demanded that courts find additional funding to be "absolutely necessary" before issuing a funding order against a legislative body.[25] By contrast, *Wynn* imagined a viable use of inherent power to challenge the overall sufficiency of a state budget.[26] To the *Wynn* court, the judicial branch has the obligation to protect itself against debilitating encroachments of legislative defunding.[27] *Wynn* does, however, provide a definite limit to inherent power's use. Courts employing the doctrine of inherent power must identify a

22. Hosford v. State, 525 So. 2d 789 (Miss. 1988).

23. Folsom v. Wynn, 631 So. 2d 890 (Ala. 1993) (per curiam).

24. *Hosford*, 525 So. 2d at 797–98.

25. *Id.* at 798.

26. *See Wynn*, 631 So. 2d at 900 ("At a constitutional minimum . . . the Judicial Branch of government must be funded sufficiently to fulfill the duties required of it by the Constitution.").

27. *See id.* at 899 ("If the judicial system is to be a truly co-equal and independent branch answerable only to the sovereign—the people—[then] it must have the power to maintain itself under exigent circumstances." (quoting Morgan Cnty. Comm'n v. Powell, 293 So. 2d 830, 847 (Ala. 1974) (Heflin, C.J., dissenting))).

specific constitutional deficiency produced by meager judicial-system funding.[28]

Neither case alone describes inherent power in a manner that both limits the potential for judges to abuse the doctrine and retains the doctrine's viability in the context of a state-level budget dispute. *Hosford* did not imagine inherent judicial power outside of the county-court setting, and its absolute-necessity standard—without more—does not remove the doctrine from the realm of a judge's self-interest.[29] *Wynn* continued to rely on a threshold for judicial action that has proven insufficient to meet the tasks of modern judicial budgeting, namely, the reasonable-necessity standard.[30] Merging the insights of both cases, however, produces a synergistic result. An inherent-power doctrine that reserves the power only for absolutely necessary situations *and* requires a specific constitutional violation will provide judicial systems a useful legal avenue for protecting the critical services that courts provide.

This Note proceeds in three parts. Part I describes the state-court funding crisis. Part II recounts the history of inherent power in state courts—from the early days of courts' internal housekeeping to the highly publicized dispute between Governor Mario Cuomo and Chief Judge Sol Wachtler of New York in 1991—and then describes how scholars have criticized the use of inherent power in a funding dispute between a legislature and a state supreme court. Part III responds to the current shortcomings of the inherent-power doctrine by proposing, analyzing, and applying a new standard: absolute necessity to perform the duties required by federal and state constitutional law.

I. THE STATE-COURT FUNDING CRISIS

Inadequate funding has brought many state court systems to a place of crisis, or as one state chief justice put it, "the edge of an abyss."[31] This Part will provide some facts about the state-court

28. *Id.* at 896–99; *see also infra* text accompanying notes 198–218.

29. *See infra* Part III.A–B.

30. For a discussion of the history of this standard, see *infra* Part II.A. For a discussion of the problems with this standard, see *infra* Part II.B.

31. Carol Hunstein, Chief Justice, Supreme Court of Ga., 2010 State of the Judiciary Address 5 (Mar. 16, 2010); *see also* Jim Galloway, *Georgia Chief Justice: Court Systems on "Edge of an Abyss*," ATLANTA J.-CONST. BLOG (Mar. 16, 2010, 11:57 AM), http://blogs.ajc.com/political-insider-jim-galloway/2010/03/16/georgia-chief-justice-court-systems-on-edge-of-an-abyss (describing the Chief Justice's address as "focus[ing] solely and squarely on the ever-shrinking 1 percent of the state budget that the court system runs on").

budget crisis and briefly address their implications. Since the beginning of the economic downturn in late 2007, legislatures have increasingly cut judiciary funding in an effort to shore up state finances. From 2008 to 2011, courts in most states saw their budgets reduced by 10 to 15 percent.[32] Thirty-two states saw reductions in 2010,[33] and forty-two faced cuts in 2011.[34] The cuts show no sign of abating.[35] In early 2011, the New York State Assembly eliminated $170 million, about 8.5 percent, of the state judiciary's funds.[36] The budget for California's court system was $350 million smaller for fiscal year 2012 than it was in fiscal year 2011, representing an 8.6 percent reduction in trial-court funding and a 9.7 percent cut in appellate-court funds.[37] Other states share similar stories, seeing significant percentages of their court budgets cut from year to year.[38] These cuts occur even though they are unlikely to have a significant impact on the financial health of a state: court systems consume only 1 to 2 percent of state spending.[39]

Court business requires very little capital expenditure: almost all court spending goes to personnel.[40] Consequently, from 2010 to 2011, fourteen states laid off employees, sixteen furloughed clerical staff

32. ABA TASKFORCE ON PRESERVATION OF THE JUSTICE SYS., *supra* note 8, at 2.

33. Adam Skaggs & Maria da Silva, Op-Ed., *The Cost of Justice: Severe Budget Cuts Are Threatening Americans' Access to the Courts*, L.A. TIMES, July 8, 2011, at A13.

34. Wm. T. (Bill) Robinson III, *Access to Courts a Fight Worth Fighting*, 22 N.C. LAW., Feb. 2012, at 7, 7.

35. One might argue that the facts presented in this Part represent a temporary abandonment of state courts caused by the 2007 recession. Yet trends counsel otherwise. Legislatures have regularly cut judicial budgets in varying economic conditions since the mid-1990s. ABA TASKFORCE ON PRESERVATION OF THE JUSTICE SYS., *supra* note 8, at 2. Plus, the factors that led to state-budget shortfalls during the recession still exist. Housing markets in many areas have yet to recover, a situation that limits statewide revenues. PHIL OLIFF, CHRIS MAI & VINCENT PALACIOS, CTR. ON BUDGET & POLICY PRIORITIES, STATES CONTINUE TO FEEL RECESSION'S IMPACT 4 (2012), http://www.cbpp.org/files/2-8-08sfp.pdf. Demographic changes over the next fifteen years will also negatively impact tax receipts. Schauffler & Kleiman, *supra* note 13, at 289. Of course, legislatures could raise taxes to increase overall revenue, which would reduce the severity of their conflicts with judicial branches. But that is a whole other conversation.

36. William Glaberson, *Cuts Could Stall Sluggish Courts at Every Turn*, N.Y. TIMES, May 16, 2011, at A1.

37. Maura Dolan, *Judges Dissent on State Cuts*, L.A. TIMES, July 23, 2011, at AA1. Court officials in California predict at least a 15 percent cut in 2013's budget. *Id.*

38. Georgia, Maine, Nevada, Oklahoma, and Oregon saw reductions of 10 percent or more in 2011. Glaberson, *supra* note 36. North Carolina's judiciary lost 20 percent of its funding from 2009 to 2012. Martin H. Brinkley, *The President's Perspective*, 22 N.C. LAW., Feb. 2012, at 5, 6.

39. ABA TASKFORCE ON PRESERVATION OF THE JUSTICE SYS., *supra* note 8, at 1.

40. *Id.* at 4.

(thus reducing their pay), and nine furloughed judges.[41] Some of these personnel reductions represent large portions of the courts' workforces. Iowa lost 9.3 percent of its court staff in 2010.[42] The Alabama judicial system fired over 20 percent of its employees in 2010 and 2011.[43] San Francisco County, California, laid off 40 percent of its staff in 2011.[44]

As legislatures slashed judicial budgets, the services demanded of state courts increased. In 2008, state courts throughout the country received 106 million new cases, the most recorded up to that point,[45] and a 12 percent increase in case volume over ten years.[46] Civil cases have been the greatest driver of the increase, ballooning by 29 percent over that time period.[47] Between 2007 and 2008 alone, the number of civil filings rose 7 percent.[48] Some states have seen dramatically larger increases than the nation as a whole. For example, Georgia's court filings grew almost 43 percent from 2000 to 2008.[49] New York's rose 30 percent between 1999 and 2011.[50] Florida saw its caseload balloon 64 percent from 1996 to 2006.[51] All three of these

41. *Id.* at 5.

42. IOWA JUDICIAL BRANCH, JUSTICE IN THE BALANCE: THE IMPACT OF BUDGET CUTS ON JUSTICE 11–12 (2010), *available at* http://www.iowacourts.gov/wfData/files/StateofJudiciary/JusticeInTheBalanceJan2010.pdf.

43. *See* Lowry, *supra* note 4 (reporting that the court system laid off 120 people in 2010 and 150 in 2011, out of a workforce of about 2500); Eric Velasco, *A Month's Notice for 1/3 of Court Employees*, BIRMINGHAM NEWS, Aug. 1, 2011, at A1 (noting the elimination of an additional 255 workers on October 1, 2011).

44. Maura Dolan & Victoria Kim, *Budget Cuts To Worsen Court Delays*, L.A. TIMES, July 20, 2011, at A1.

45. ROBERT C. LAFOUNTAIN ET AL., NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 19 (2010), *available at* http://www.courtstatistics.org/Other-Pages/~/media/Microsites/Files/CSP/EWSC-2008-Online.ashx.

46. *Id.*

47. *Id.*

48. *Id.*

49. WASH. ECON. GRP., THE ECONOMIC IMPACTS ON THE GEORGIA ECONOMY OF DELAYS IN GEORGIA'S STATE COURTS DUE TO RECENT REDUCTIONS IN FUNDING FOR THE JUDICIAL SYSTEM 6 (2011).

50. *The Judicial System: The Feeblest Branch*, ECONOMIST, Oct. 1, 2011, at 31.

51. *See* WASH. ECON. GRP., THE ECONOMIC IMPACTS OF DELAYS IN CIVIL TRIALS IN FLORIDA'S STATE COURTS DUE TO UNDER-FUNDING 3 (2009), *available at* http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/1C1C563F8CAFFC2C8525753E005573FF/$FILE/WashingtonGroup.pdf (reporting that the number of cases filed increased from 2.5 million per year to 4.1 million per year over that period).

states have faced severe judicial-budget cuts.[52] As the amount of work has risen, courts are struggling to keep up. Most states cannot clear matters as fast as they receive them,[53] meaning that the nation's courts are accruing a growing backlog of open cases.[54]

Staffing reductions and increased demand have led to significant delays in court proceedings. With fewer trial hours and less staff, cases of all kinds face long waits to come before a judge. But because constitutional protections for defendants force states to prioritize criminal trials,[55] the long delays caused by reduced funds primarily affect civil cases. California's experience illustrates the impact. In San Francisco County, cuts led the presiding judge to estimate that a newly filed lawsuit will take five years to go to trial, and an uncontested divorce will take at least a year.[56] In San Diego County, a child custody evaluation takes up to sixteen weeks, up from about four.[57] Even contesting a traffic citation, a relatively routine procedure, may take nine months.[58] The presiding judge of Los Angeles County Superior Court commented that the lack of staff in California courts will "[leave] litigants with no expectation of relief or resolution of their cases for extended periods of time."[59] California is by no means alone in reducing access to civil proceedings. New Hampshire postponed jury trials for eighteen to twenty-four months.[60] One judicial circuit in Georgia simply suspended every civil trial.[61]

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52. *See id.* at 4–5 (documenting budget cuts in Florida); WASH. ECON. GRP., *supra* note 49, at 3 (documenting budget cuts in Georgia); Glaberson, *supra* note 36 (documenting budget cuts in New York).

53. *See* LAFOUNTAIN ET AL., *supra* note 45, at 29 ("Of the 28 unified and general jurisdiction courts . . . only 7 have achieved [case clearance rates] at or above 100 percent.").

54. In October 2008, Florida alone had a backlog of 338,000 civil cases. WASH. ECON. GRP., *supra* note 51, at 1.

55. *See, e.g.*, Hunstein, *supra* note 31, at 5 ("Due to the speedy trial requirement in criminal cases, some judges have been forced to put civil cases on hold."). Even with the constitutional protections of a speedy trial, criminal proceedings face long delays. Fulton County, Georgia, which contains most of Atlanta, had 183 murder cases waiting to be tried in early 2010, half of which were more than a year old. *Id.* After a reduction in weekend court hours, New York City faces the prospect of releasing people who are charged with crimes because the system cannot provide an arraignment hearing within twenty-four hours of arrest. Glaberson, *supra* note 36.

56. *The Judicial System: The Feeblest Branch*, *supra* note 50, at 31.

57. Dolan & Kim, *supra* note 44.

58. *Id.*

59. *Id.*

60. *As States Cut Court Budgets, Who Pays the Price?* (NPR radio broadcast Oct. 4, 2011), *available at* http://www.npr.org/templates/story/story.php?storyId=141043681.

61. Bill Rankin, *Budget Cuts Take Toll on Georgia Courts*, ATLANTA J.-CONST., Feb. 10, 2011, at B2.

The state-court funding crisis is beginning to have deep impacts on the nation. Some of the effects are economic. For example, studies suggest that court delays could cost Florida's economy $17.4 billion annually[62] and eliminate up to 7000 high-wage jobs in Georgia.[63] The more troubling effect of the funding crisis is the reduced access to justice and dispute resolution. Courts provide what the legislature and the executive cannot: protection *from* the political process. Courts protect rights that popular government may ignore.[64] Commenting on the structure of the U.S. Constitution, Alexander Hamilton noted the tendency of the political branches to make rash decisions that bring "serious oppressions of the minor party in the community."[65] According to Hamilton, courts are "requisite to guard the Constitution and the rights of individuals from the effects of those ill humors."[66] Thus, the barriers placed on court access by budget cuts are not simple inconveniences; they are threats to the liberty of American citizens. If the judiciary loses its ability to effectively defend rights, it cannot serve the protective function that the founders intended. Foreseeing the ease with which the other branches could undermine the judiciary, Hamilton warned that "all possible care is requisite to enable it to defend itself against their attacks."[67]

As Hamilton recognized, the American system of government depends on a judiciary strong enough to check the excesses of the other branches. Because state courts handle most litigation in the United States, the nation cannot respect this separation-of-powers principle without maintaining effective and independent state courts. Thus, the funding crisis described within this Part demands an

62. WASH. ECON. GRP., *supra* note 51, at 16.

63. WASH. ECON. GRP., *supra* note 49, at 1.

64. *See* THE FEDERALIST NO. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("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.").

65. *Id.* at 469.

66. *Id.*

67. *Id.* at 465–66. The discussion of the federal judiciary in *Federalist No. 78* does not necessarily oblige states to create a similarly independent judiciary. At the time of the adoption of the U.S. Constitution, most state constitutions reflected the view that the legislature, as the representative of the people, should dominate the other branches of government. G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329, 334 (2003). Throughout the nineteenth century, however, states found themselves suffering from legislative excess. *Id.* As of 1998, forty state constitutions explicitly stated a separation-of-powers requirement, an expression of judicial independence not found in the U.S. Constitution. *Id.* at 337.

immediate and effective solution. As the remainder of this Note argues, the doctrine of inherent power provides a viable legal avenue for combatting the problem.

II. THE HISTORY AND COMPLICATIONS OF INHERENT JUDICIAL POWER

Before proposing a new standard, this Note provides some background on the doctrine of inherent power. Inherent power began as a means of internal judicial housekeeping and grew into a method to secure discrete resources from local governments. In addition, a small number of courts have attempted to use the doctrine to make a wholesale challenge to the sufficiency of a state judicial budget. This latter broad use of inherent power exposed the problematic potential of employing inherent power in a state-level budget dispute—at least as the doctrine is currently formulated. Inherent power could too easily serve as a tool for the judiciary to usurp the legislative authority to appropriate state funds. Courts that assume legislative power threaten their own legitimacy by taking part of the budgeting process beyond public debate.

A. Brief History of Inherent Judicial Power

The first uses of inherent power had nothing to do with money. Early state constitutions, though establishing the judiciary as a third branch of government, did not fully define the scope of the courts' power.[68] In order to protect their ability to resolve disputes from the influence of the political branches, courts developed mechanisms to enforce judgments.[69] These included the power to issue process, to control records of the court, to punish contempt, to ensure court decorum, to regulate the bar, and to control seized property.[70] These powers are "inherent" because they derive not from express authority, but from the need for courts to maintain their integrity as adjudicators of disputes.[71] Inherent power can be understood as an

68. Michael L. Buenger, *Of Money and Judicial Independence: Can Inherent Powers Protect State Courts in Tough Fiscal Times?*, 92 KY. L.J. 979, 1000–01 (2004).

69. *Id.*

70. *Id.* at 1001–02 & nn.69–75 (providing case law citations for the listed examples).

71. G. Gregg Webb & Keith E. Whittington, *Judicial Independence, the Power of the Purse, and Inherent Judicial Powers*, 88 JUDICATURE 12, 14 (2004); *see also* Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 15 (1825) ("Every Court has, like every other public political body, the power necessary and proper to provide for the orderly conduct of its business.").

"implicit necessary and proper clause," which extends courts' legitimate scope beyond what is specifically enumerated in constitutions and statutes.[72]

From these efforts to regulate internal housekeeping, courts' use of inherent power developed during the twentieth century into a doctrine robust enough to demand additional funds from the other branches of government. These demands, however, were typically modest and for specific expenditures that a court deemed necessary to conduct business.[73] Some examples will illustrate. The Massachusetts Supreme Judicial Court, in *O'Coin's, Inc. v. Treasurer of Worcester*,[74] required a county treasurer to release $86 for a tape recorder and tapes, which a county court bought to record court proceedings when a stenographer was not available.[75] In *Grimsley v. Twiggs County*[76] the Supreme Court of Georgia held that a superior court judge could compel its county commissioners to pay for extra clerical help.[77] The North Carolina Supreme Court, in *In re Alamance County Court Facilities*,[78] even required a county to provide a new courthouse facility because the existing one was deemed "grossly inadequate, being in the large either obsolete, poorly designed, or nonexistent."[79] A common thread among these cases, and others like

72. Webb & Whittington, *supra* note 71, at 14 (internal quotation marks omitted).

73. *See id.* (listing specific expenditures, including "temporary facilities for holding court . . . [,] the operation of a courthouse elevator, chairs and carpeting for a courtroom, and courthouse air conditioning").

74. O'Coin's, Inc. v. Treasurer of Worcester, 287 N.E.2d 608 (Mass. 1972).

75. *Id.* at 610–11.

76. Grimsley v. Twiggs Cnty., 292 S.E.2d 675 (Ga. 1982).

77. *Id.* at 678.

78. *In re* Alamance Cnty. Court Facilities, 405 S.E.2d 125 (N.C. 1991).

79. *Id.* at 127 (quoting the trial court's order) (internal quotation marks omitted). Similarly, the Mississippi Supreme Court upheld an inherent-power order requiring a county to fix a longstanding noise problem in which trucks passing an adjacent highway drowned out courtroom testimony. Hosford v. State, 525 So. 2d 789, 795–96, 798 (Miss. 1988).

them,[80] was a dispute between a city or county court and the local government body that funded it.[81]

Nonetheless, state supreme courts have used these local disputes to craft a theoretically powerful doctrine of inherent power. These decisions extrapolate the power to compel funds from the basic structure of American constitutional government, namely the doctrine of separation of powers. *O'Coin's* provides an example of such reasoning. In demanding payment for a tape recorder, the Supreme Judicial Court of Massachusetts held "that a judge may bind a county contractually for expenses reasonably necessary for the operation of his court."[82] The court grounded its explanation in the state constitution: "Under our Constitution, the courts of the Commonwealth constitute a separate and independent department of government entrusted with the exclusive power of interpreting the laws."[83] Judicial independence, as a part of the tripartite system, protects "every natural right of free men."[84] Judges cannot maintain their independence, however, if the system denies them the "authority to determine the basic needs of their courts as to equipment, facilities and supporting personnel."[85] That authority is essential "if the courts are to provide justice, and the people are to be secure in their rights."[86] The unwillingness of Worcester County to buy a tape recorder was, thus, an affront to judicial independence and

80. *See, e.g.*, Smith v. Miller, 384 P.2d 738, 742 (Colo. 1963) (allowing a state district court to set the salaries of its staff against the objection of the county commission unless the compensation decisions were "wholly unreasonable, capricious and arbitrary"); Noble Cnty. Council v. State *ex rel.* Fifer, 125 N.E.2d 709, 717 (Ind. 1955) (upholding a county court's power to hire and fix the salary of an employee, "[u]nless [it] has abused its discretion"); Vondy v. Comm'rs Court, 620 S.W.2d 104, 108 (Tex. 1981) (ordering a county to set a "reasonable salary" for a constable); State *ex rel.* Reynolds v. Cnty. Court, 105 N.W.2d 876, 885 (Wis. 1960) (finding that a county court "had the jurisdiction to institute on its own motion the proceedings to determine the question of the necessity for air conditioning," valued at $250).

81. Webb & Whittington, *supra* note 71, at 15.

82. O'Coin's, Inc. v. Treasurer of Worcester, 287 N.E.2d 608, 611 (Mass. 1972) (footnote omitted).

83. *Id.* Other courts have further grounded their separation-of-powers argument in the structure of the U.S. Constitution. *See, e.g.*, Jorgensen v. Blagojevich, 811 N.E.2d 652, 660 (Ill. 2004) ("Like the federal government on which it is modeled, the government of the State of Illinois is divided into three equal branches . . . . This provision embodies the doctrine of separation of powers which has been a hallmark of American government . . . .").

84. *O'Coin's*, 287 N.E.2d at 611.

85. *Id.* at 612.

86. *Id.*

a violation of the constitutional structure of government.[87] *O'Coin's* noted that its separation-of-powers reasoning is "recognized not only in Massachusetts but throughout the nation."[88]

Even though state supreme courts often cast the unwillingness of a local government to pay for a court expense as an insidious affront to judicial independence,[89] courts have recognized that using inherent power comes with potential dangers—even in local disputes of relatively low magnitude. Courts are aware that the act of compelling funds is *itself* arguably a violation of the separation-of-powers doctrine; that is, a judicial tribunal is interfering with a legislative body's authority to appropriate tax revenue.[90] Responding to this concern, courts frequently insist that they are invoking inherent power with reluctance.[91] Accordingly, the inherent-power doctrine has evolved to include a number of restraints on the power's use. First, courts have limited the circumstances under which a court may compel funds.[92] Most states demand that judges attempt and fail to procure funding through the normal channels before invoking inherent power.[93] Some require that a judge seeking to compel funds receive prior approval from a court administrator or the state supreme court.[94] Second, courts have established standards for evaluating inherent-power requests.[95] The majority of states demand that compelled "expenditures are 'reasonably necessary' for the

87. *See id.* at 616 ("It is clear to us, however, that a county treasurer has no discretion in the payment of legally incurred obligations.").

88. *Id.* at 612.

89. *See* Webb & Whittington, *supra* note 71, at 14 ("Such disputes have prompted state supreme courts to issue particularly high-flown paeans to judicial independence.").

90. *See, e.g.*, *In re* Salary of Juvenile Dir., 552 P.2d 163, 169 (Wash. 1976) ("[E]ven in enforcing the separation of powers, courts must intervene in the operation of other branches."). For an extended discussion of this concern, see *infra* Part II.B.

91. *See, e.g.*, Grimsley v. Twiggs Cnty., 292 S.E.2d 675, 677 (Ga. 1982) ("The inherent power of the court must be carefully preserved, but also cautiously used.").

92. *See* Howard B. Glaser, Wachtler v. Cuomo*: The Limits of Inherent Power*, 14 PACE L. REV. 111, 118 (1994) ("[T]he courts placed a series of self-imposed limitations on the exercise of inherent powers."); *see also* Jackson, *supra* note 17, at 227 ("Reviewing courts have imposed or identified several restraints on the inherent powers of courts. Included among these restraints are procedural protections for funding authorities who challenge judicial authority . . . .").

93. Jackson, *supra* note 17, at 227–28; *see also, e.g.*, State *ex rel.* Hillis v. Sullivan, 137 P. 392, 395 (Mont. 1913) ("[W]hen . . . the established methods cannot or do not instantly meet, then and not until then does occasion arise for the exercise of the inherent power.").

94. *See* Glaser, *supra* note 92, at 118; *see also, e.g.*, MASS. SUP. JUD. CT. R. 1:05(1) (requiring written approval by an appropriate judicial officer).

95. Jackson, *supra* note 17, at 233.

effective (and perhaps efficient) administration of justice."[96] Others have erected higher bars to inherent power:[97] "clear necessity,"[98] a "compelling need essential to the orderly administration of the court,"[99] and "absolute necessity."[100]

Once courts established the theoretical foundation for using inherent power to order relatively minor funding from local governments, using the doctrine more broadly proved irresistible.[101] Two events symbolized the transformation of inherent power into a doctrine powerful enough to impact statewide budgets. First, the Pennsylvania Supreme Court in *Commonwealth ex rel. Carroll v. Tate*[102] used the doctrine to contest the general sufficiency of a court-system budget.[103] Second, Sol Wachtler, chief judge of the New York Court of Appeals, made an unsuccessful attempt to force the state's governor and legislature to increase spending on New York's judicial branch.[104]

Carroll involved a dispute over the budget for the Philadelphia Court of Common Pleas.[105] In December 1969, the local court submitted a budget request to the city, which rejected the request and reduced the court's appropriations.[106] When the city council refused to modify its decision, the judges of the court sued the city.[107] The

96. *Id.*

97. A few state supreme courts, however, have set the bar lower than reasonable necessity, permitting a court to act on its own initiative to spend funds. *See, e.g.*, Smith v. Miller, 384 P.2d 738, 742 (Colo. 1963) (allowing a court to set a salary schedule subject to reversal only when the County Board could establish that the schedule was "wholly unreasonable, capricious and arbitrary").

98. Rose v. Palm Beach Cnty., 361 So. 2d 135, 138 (Fla. 1978).

99. Grimsley v. Twiggs Cnty., 292 S.E.2d 675, 677 (Ga. 1982).

100. Hosford v. State, 525 So. 2d 789, 798 (Miss. 1988).

101. Though merely compelling $86 from a county treasurer to purchase a tape recorder, *O'Coin's* predicted broader use of inherent power, noting that "[n]othing stated herein should be taken to mean that the Commonwealth may not be bound in the same manner [as a county]." O'Coin's, Inc. v. Treasurer of Worcester, 287 N.E.2d 608, 611 n.2 (Mass. 1972).

102. Commonwealth *ex rel.* Carroll v. Tate, 274 A.2d 193 (Pa. 1971).

103. *See id.* at 194–95 (recounting the petitioning court's request for a budget increase). Though it represents an expansion of inherent power beyond the scope articulated in the cases discussed previously, *Carroll* actually predates many of them.

104. *See* Glaser, *supra* note 92, at 122 ("Prior to *Wachtler v. Cuomo*, there were no significant inherent power conflicts between coequal state branches of government.").

105. *Carroll*, 274 A.2d at 194–95. The Court of Common Pleas is the trial-level county court for both civil and criminal cases. *Common Pleas Court*, UNIFIED JUDICIAL SYS. OF PA., http://www.pacourts.us/courts/courts-of-common-pleas (last visited Mar. 7, 2013).

106. *Carroll*, 274 A.2d at 194–95.

107. *Id.* at 195.

Pennsylvania Supreme Court upheld a resulting order demanding an additional $2,458,000 for the budget of the Court of Common Pleas.[108] Though recognizing that governing requires the "harmonious cooperation between the three independent Branches,"[109] the supreme court announced that when this cooperation breaks down, a court can compel "reasonable and necessary [additional funds] to carry out its mandated responsibilities."[110] The supreme court explicitly rejected the contention that the city's failing finances should be factored into the reasonability of the local court budget, declaring that "the deplorable financial conditions in Philadelphia must yield to the Constitutional mandate that the Judiciary shall be free and independent and able to provide an efficient and effective system of Justice."[111]

The aggrieved court in *Carroll* presented a fundamentally different request than courts in other inherent-power cases.[112] Those cases identified a particular resource that the court deemed indispensable to court business.[113] By contrast, the Court of Common Pleas in *Carroll* determined that the city council's appropriation of inadequate funds *itself* was sufficient to trigger inherent power.[114] The only thing the court asked for was more money.[115] Thus, the decision in *Carroll* represented a potential direct threat to legislative appropriation power. As some observers noted, the case prescribed a method by which courts could use inherent power to circumvent their funding authority's budget process.[116]

At the time of *Carroll* and in the years following, state courts underwent dramatic shifts in funding and organization, shifts that held great import for the use of inherent power. Until the 1940s state trial courts operated independently of each other and were primarily

108. *Id.* at 199–200. A state appellate judge, whom the Pennsylvania Supreme Court specifically designated to hear the case, issued this order against the city. *Id.* at 195.

109. *Id.* at 197.

110. *Id.*

111. *Id.* at 199.

112. *See* Glaser, *supra* note 92, at 116 ("[*Carroll*] marked an expansion of the inherent powers doctrine into broader fiscal matters than in previous cases.").

113. *See supra* notes 73–80.

114. *Carroll*, 274 A.2d at 194.

115. *Id.* at 195.

116. *See* Glaser, *supra* note 92, at 117 & n.35 (citing commentators who made such an observation about *Carroll*).

funded by local governments.[117] The state legislature held little influence over either lower courts' budgets or their administration.[118] The second half of the twentieth century saw a move toward unified judicial systems.[119] The particular ways that states unified their systems varied,[120] but some trends emerged. First, unified systems tend to have a powerful state supreme court, which is given "significant rulemaking and superintending authority over the judicial branch."[121] Second, unified judicial systems often operate under a single budget approved by the legislature.[122] The move to unitary systems made local inherent-power disputes less common, as courts now appealed to the state supreme court for funding rather than, for example, to a county commission.[123] At the same time, unifying judicial systems pushed conflicts over sufficient judicial budgets from the local level to the state level, increasing the potential for an inherent-power showdown between a state supreme court and a state legislature.[124]

Such a showdown occurred in New York in 1991. By then the state's courts were operating under a unified system with a single budget.[125] The chief judge of the New York Court of Appeals, Sol Wachtler, submitted a budget to Governor Mario Cuomo requesting an 8 percent increase in judicial spending over the previous year.[126] Cuomo, in the "largest package of spending cuts in New York State's history," responded by recommending that the legislature, instead, reduce the judicial budget by 2.8 percent.[127] Wachtler did not react

117. *See* Buenger, *supra* note 68, at 1013 ("A state supreme court [was] generally the only court funded entirely from the state treasury . . . .").

118. *See id.* at 1016 ("[S]tate 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.").

119. *See* Henry O. Lawson, *State Court System Unification*, 31 AM. U. L. REV. 273, 278 (1982) (reporting that by 1979, twenty-two states had moved to centralized court funding and several others were considering doing so).

120. For a discussion of the complexities of court unification, see generally Victor E. Flango & David B. Rottman, Research Note, *Measuring Trial Court Consolidation*, 16 JUST. SYS. J., no. 1, 1992, at 65; Lawson, *supra* note 119.

121. Buenger, *supra* note 68, at 1015 n.114.

122. *Id.* at 1017.

123. Glaser, *supra* note 92, at 121.

124. *Id.*

125. *Id.* at 121 n.50.

126. *Id.* at 124.

127. Sam Howe Verhovek, *Cuomo Proposing Steep Budget Cuts and Tax Increases*, N.Y. TIMES, Feb. 1, 1991, at A1.

well. In a public speech, he noted that other states had used inherent power to increase judicial budgets and added, "As far as I'm concerned, that's an unconstitutional budget."[128] In September 1991, Chief Judge Wachtler filed a lawsuit against Cuomo, claiming that the governor, in coordination with the legislature, had not allocated adequate funds to the state judiciary.[129] In addition, to demonstrate the financial condition of the courts, Wachtler fired five-hundred court workers.[130] He also stepped boldly into a feud with Cuomo. The two jabbed at each other in the papers,[131] and eventually Cuomo filed a countersuit to remove the dispute to federal court.[132]

The conflict ended when Chief Judge Wachtler and Governor Cuomo settled the lawsuit days before the start of merit arguments.[133] The chief judge did not receive any of the additional court funding he declared constitutionally necessary; the governor merely pledged not to reduce the judicial budget below 1991 levels.[134] The feud did manage, however, to demonstrate the potential messiness of a state-level battle over the constitutionality of court funding. Both Chief Judge Wachtler and Governor Cuomo received scorn for their behavior during the dispute.[135] In addition, Chief Judge Wachtler may have failed to convince the public of the merits of his inherent-power

128. Elizabeth Kolbert, *Wachtler Says Cuomo Cut Judiciary Funds Unconstitutionally*, N.Y. TIMES, Apr. 11, 1991, at B5. The budget procedure in New York requires the governor to pass on the judiciary's budget request to the legislature "without revision but with such recommendations as the governor may deem proper." N.Y. CONST. art. VII, § 1. Cuomo did so, but in a separate "financial plan," proposed a budget for the judicial system that was 10 percent lower than the judiciary's request. Kolbert, *supra*. Wachtler argued that this maneuver was unconstitutional. *Id.* Notwithstanding this technical quarrel, the chief judge's fundamental complaint was about the inadequacy of the judicial budget. *See* Glaser, *supra* note 92, at 127 ("[T]he Chief Judge . . . suggest[ed] that the 'enormity' of the cuts would justify legal action." (quoting Gary Spencer, *Legislature Appropriates $899 Million for Judiciary*, N.Y. L.J., June 4, 1991, at 1)).

129. *See* Glaser, *supra* note 92, at 128 (describing the case).

130. *Id.* at 128.

131. *See id.* at 128–34 (recounting the public-relations battle between the two men).

132. *Id.* at 130. After initially filing his notice of removal in the Eastern District of New York, Governor Cuomo refiled his case in the Northern District of New York upon that court's issuing "an order directing the parties to respond to its sua sponte consideration of jurisdiction." Wachtler v. Cuomo, No. 91-CV-1235, 1991 WL 249892, at *1 (N.D.N.Y. Nov. 21, 1991).

133. *Id.* at 135.

134. Gary Spencer, *Wachtler, Cuomo Settle Funding Suit*, 207 N.Y. L.J., Jan. 17, 1992, at 1.

135. *See, e.g.*, Kevin Sack, *Cuomo Challenges His Chief Judge's Lawsuit*, N.Y. TIMES, Oct. 8, 1991, at B1 ("Is it not time now . . . to withdraw from what will become a public spectacle with no benefit to the people whom both the talented Governor and the learned Chief Judge so desperately want to serve?" (quoting Judge Jack B. Weinstein of the Eastern District of New York) (internal quotation marks omitted)).

claim. An editorial in the *New York Times* commented that the chief judge had "escalate[d] an unseemly feud into a constitutional crisis" and declared the legal issues in the case "beside the point."[136]

B. Inherent Judicial Power's Two Big Problems

In the Wachtler/Cuomo dispute, the doctrine of inherent power proved a failure. One side made a political decision about the size of the judiciary budget. The other side made a legal judgment that the same budget was too meager. Both the governor and the court of appeals are the pinnacles of coequal branches of state government, so they found themselves at a constitutional stalemate. Neither legal precedent nor political tradition provided a resolution to their dilemma. The New York confrontation was not inherent power's first big defeat, however. Despite a victory in *Carroll*—the case that defined the now-dominant reasonable necessity standard—the Philadelphia Court of Common Pleas never actually received any of the additional funding ordered by the Pennsylvania Supreme Court.[137]

Why has inherent judicial power proved unimpressive in state-level disputes? Few would dispute that judiciaries, like other branches of government, have some level of authority to effectuate their constitutionally required functions.[138] Yet in its most pressing hour—a budget dispute between two branches of state government—inherent power has fallen short of its promise. Rather than harness the sacred tenant of judicial independence to combat the folly of shortsighted legislatures, inherent power has exposed itself as no more than mere words.

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136. Editorial, *Wachtler v. Cuomo = Two Losers*, N.Y. TIMES, Sept. 27, 1991, at A28. The chief judge held press conferences and released public statements to draw attention to his protest against the governor. Glaser, *supra* note 92, at 128–29; Verhovek, *supra* note 127. The failure of his inherent-power requests thus suggests that he was unable to sway public opinion in his direction.

137. *In re* Salary of Juvenile Dir., 552 P.2d 163, 174 n.6 (Wash. 1976) ("[T]he Philadelphia Court of Common Pleas has never received any of the $1,365,555 awarded by the court in *Commonwealth ex rel. Carroll v. Tate* . . . ."). In addition, the *Juvenile Director* court noted that the county involved in *Judges for the Third Judicial Circuit v. Wayne County*, 190 N.W.2d 228 (Mich. 1971), had ignored the Michigan Supreme Court's determination that circuit courts had the inherent power to require the county to compensate circuit court employees, *Juvenile Dir.*, 552 P.2d at 174 n.6.

138. *See, e.g.*, Jackson, *supra* note 17, at 223 ("An overly expansive reading of constitutional texts is not required to suggest that the three branches of state government, in furtherance of their constitutionally mandated responsibilities, must have authority to . . . [do acts] beyond those explicitly stated in the constitutional texts.").

In the decade after the Wachtler/Cuomo incident, commentators pondered inherent power's insufficiencies.[139] They found two major problems with the doctrine.[140] One, by compelling funds, a supreme court threatens to usurp the appropriation power properly placed in the state legislature. Two, using a judicial order to requisition funds takes a portion of the state budget out of the political process. Circumventing the public will and the give-and-take of the state budget procedure threatens to undermine the legitimacy of the courts. Both of these problems result from the lack of judicial discipline provided by the dominant inherent-power standard, reasonable necessity.

1. *Inherent Power Encroaches on Legislative Appropriation Authority.* State supreme courts have argued that by failing to provide adequate appropriations to the judicial branch, legislatures have overstepped their constitutional bounds.[141] Yet a court order demanding additional funding from a legislature also smacks of constitutional wayfaring. In the context of a state-level budget dispute, inherent power contains the potential to usurp the legislature's power to spend state revenues as it finds appropriate.[142] If uncabined, inherent power becomes, in effect, a secondary appropriations process. In its most abusive form, the doctrine provides a judicial veto over a portion of state budget. As Professor

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139. Although this Note focuses on commentaries produced after the Wachtler/Cuomo dispute and the rise of the unified judicial branch, it is worth noting that earlier writers recognized the difficulties of using inherent power in a state-level dispute. Most notable is a 1972 article by Professor Geoffrey Hazard and two law-student colleagues in which the authors wrote:

> A judicial requisition of funds . . . is in essence a judicial arrogation of discretion conferred, for better or worse, on the popularly-elected branches of government. Indeed, the virtue of [inherent power]—that it takes the problem of maintaining an adequate court system out of the realm of public debate and political commitment—may also be viewed as an essential vice. No important function of government can be maintained over the long run without public debate . . . .

Geoffrey C. Hazard, Jr., Martin B. McNamara & Irwin F. Sentilles, III, *Court Finance and Unitary Budgeting*, 81 YALE L.J. 1286, 1289–90 (1972) (footnote omitted).

140. At least one state supreme court has recognized these two problems as well. *See Juvenile Dir.*, 552 P.2d at 169 ("[E]ven in enforcing the separation of powers, courts must intervene in the operation of other branches."); *id.* at 173 ("By in effect initiating and trying its own lawsuits, the judiciary's image of impartiality and the concomitant willingness of the public to accept its decisions as those of a fair and disinterested tribunal may be severely damaged.").

141. *See, e.g.*, Chiles v. Children A, B, C, D, E, & F, 589 So. 2d 260, 269 (Fla. 1991) ("[A]ny substantial reductions of the judicial budget can raise constitutional concerns of the highest order.").

142. Glaser, *supra* note 92, at 137.

Jeffrey Jackson notes, courts are particularly inept at evaluating the appropriateness of appropriations.[143] Inherent-power decisions often fail to consider the financial condition of the funding bodies from which they compel funds.[144] Even when a court tries to do so, however, it may find itself "incapable of the task."[145] The judicial process does not seek the same ends as the political process. Courts articulate rules and limits, whereas legislative bodies balance and compromise. Defining a constitutionally demanded level of reasonably necessary funding is "antithetical to a political process in which priorities are negotiated rather than divined."[146]

By contrast, Howard Glaser describes inherent power as a species of checks and balances which is properly employed to preserve the independence of one branch of government from invasion by another.[147] Inherent power can only be a defensive weapon. When the judiciary's use of inherent power "diminishes the rights and powers of a coordinate and equal branch," the power "ceases to act as a check on the other branches and begins to encroach on their dominion."[148] Decreasing the power of another branch is a line of demarcation over which inherent power cannot rightly cross, argues Glaser. When a state supreme court demands that the state fund the judiciary in excess of what the legislature has deemed adequate, the court has stolen the appropriation power of the legislature, "upsetting the fundamental alignment of the branches."[149] For this reason, Glaser deems the use of inherent power in a state-level budget dispute to be "untenable."[150]

2. *Inherent Power Diminishes the Legitimacy of the Judiciary.* Broad uses of inherent power may also imperil the judiciary's public legitimacy. When a court demands additional funding from a legislature, it becomes an explicitly political actor. Budgeting state

143. Jackson, *supra* note 17, at 243.

144. *Id.* at 242.

145. *Id.* at 243.

146. *Id.*

147. Glaser, *supra* note 92, at 136–37. Howard Glaser was a Special Assistant to Governor Mario Cuomo during his administration. *Id.* at 111. He joined Governor Andrew Cuomo's administration as an aide to the governor and New York's Director of State Operations. Danny Hakim, *Cuomo Fires Emergency Office Chief for Misusing Workers in Hurricane*, N.Y. TIMES, Nov. 8, 2012, at A15.

148. Glaser, *supra* note 92, at 137.

149. *Id.* at 138.

150. *Id.* at 113.

revenues is subject to popular pressure. By contrast, judicial decisionmaking is, at least in theory, insulated from politics.[151] But when a court wades into a debate about state funding priorities, whatever supposedly disinterested decision it renders becomes a political issue.[152] In addition, courts diminish their legitimacy by removing a portion of the state budget from public debate.[153] The budget process gives the public, through its representatives, a voice in the distribution of public resources.[154] Courts do not express the will of the people, at least in the direct manner that legislatures do. Thus, a court's use of inherent power may frustrate public input into state spending, and the people may trust the courts less as a result.[155]

3. *The Cause of the Deficiencies: the Reasonable-Necessity Standard.* The two major problems created by the use of inherent power in a state-level budget dispute are, in large part, a result of the shortcomings of the reasonable-necessity standard. The standard does not provide a meaningful distinction between a court's protection of the constitutional prerogatives of the judicial branch and a court's substitution of its spending priorities for those of the legislature.[156] This standard can easily serve as a mechanism for a court to put constitutional imprimatur on a self-interested decision. Glaser uses New York as an illustrative example of this problem. He notes that in consolidated judicial systems with a central administration, state supreme courts oversee the court budget and, in some cases, make requests directly of the legislature.[157] Thus, any level of funding that

151. *See* Sam J. Ervin, Jr., *Separation of Powers: Judicial Independence*, 35 LAW & CONTEMP. PROBS. 108, 127 (1970) ("[The founding fathers] realized that individual liberty is best protected by an independent judiciary composed of judges who are subject to the Constitution alone.").

152. As Professor Jackson notes, judicial independence, the supposed end of inherent power, "entails a judiciary free from popular attitudes." Jackson, *supra* note 17, at 243.

153. *See* Buenger, *supra* note 68, at 1047 ("The judiciary must be cognizant of this uncomfortable fact [that it is a secondary player in the budget process] lest it risk misreading the public support so critical in legitimizing acts of government.").

154. Michael Buenger calls this process a "constitutionally protected exercise in balancing competing public demands." *Id.* at 1045.

155. Inherent power may also damage courts' future prospects for additional funding by "reduc[ing] the likelihood of public debate on the issue of the adequacy of court funding." Jackson, *supra* note 17, at 248.

156. *See* Glaser, *supra* note 92, at 139–40 ("The reasonable and necessary standard is thus no help as a device to screen out improper uses of inherent powers.").

157. *See id.* at 121 ("[T]he introduction of lump-sum budget gave judges and court administrators greater flexibility . . . ."); *id.* at 122 (describing the process by which the New York chief judge makes a budget request of the governor).

the supreme court finds necessary for the judicial system is, by definition, reasonable; otherwise, the supreme court would not have requested it.[158] Glaser concludes that, rather than providing a limit, a constitutional standard of reasonable necessity serves to make "every budget request [by a court system] into one which would provide grounds for an exercise of inherent power."[159]

The reasonable-necessity standard rests on the principle of judicial independence.[160] Yet the standard, as it has been applied, reflects an inexact understanding of that concept. Courts demonstrate independence in two ways. First, judges decide cases free from the influence of the other branches of government, a quality one commentator has labeled "adjudicative independence."[161] Adjudicative independence is an accepted foundation of American government.[162] Uses of inherent power typical of earlier periods, such as those that regulated courtroom decorum and enforced judgments, fostered adjudicative independence to protect the right of judges to effectuate impartial, binding decisions. Even after the Wachtler/Cuomo dispute, inherent power in the service of adjudicative independence has maintained broad scholarly support.[163]

Post-*Carroll*, however, courts have used inherent power to protect a broader kind of judicial independence—a "constitutional independence"[164] that protects the entire judiciary from the influence of the political branches. As demonstrated by the cases discussed in the previous Section, courts have proffered the principle of constitutional independence to demand funds in support of smooth judicial-branch operations—first on a courtroom-by-courtroom basis

158. *Id.* at 140.

159. *Id.*

160. *See supra* notes 82–88 and accompanying text.

161. Buenger, *supra* note 68, at 1021.

162. Protecting the adjudicative independence of the judiciary is one of the purposes of the Good Behavior Clause of the U.S. Constitution. THE FEDERALIST NO. 78, *supra* note 64, at 465.

163. *See* Buenger, *supra* note 68, at 1021 ("At the most basic and traditional level, courts in America possess adjudicative independence . . . ."); Glaser, *supra* note 92, at 150 ("[The doctrine of inherent power] serves as a useful tool for local courts to protect themselves from becoming overly subservient to local politicians."); Webb & Whittington, *supra* note 71, at 45 ("The inherent judicial power doctrine was developed to be a defensive weapon to protect judges from subversion or obstruction by other officials.").

164. Buenger, *supra* note 68, at 1024; *cf.* Webb & Whittington, *supra* note 71, at 45 (describing adjudicative independence as the whole of "judicial independence" and labeling constitutional independence "judicial effectiveness").

and then on behalf of entire judicial systems.[165] Given the checks-and-balances system of American government, inherent power aimed at constitutional independence appears "harder to justify."[166] Legislatures have a powerful check against courts; they set judicial-system budgets. Courts' uses of inherent power to increase constitutional independence—especially those that baldly demand more money—have the potential to diminish the legislature's constitutional responsibility to guard the public purse.[167] The reasonable-necessity standard does not provide a principled method for cordoning uses of inherent power that diminish the power of the legislature from those that threaten the state constitution.[168] The standard too easily permits judges to style their political disagreements with the legislature as constitutional insufficiencies.

If the reasonable-necessity standard cannot adequately guide courts in a state-level budget dispute, what remains of the doctrine of inherent judicial power? Commentators have offered various answers.[169] At one extreme, Howard Glaser posits no scenario in which inherent power functions appropriately at the state level.[170] Gregg Webb and Professor Keith Whittington are equally pessimistic about the doctrine's potential, allowing for its use only in the rare situation in which judges can no longer adjudicate free from political influence.[171] Michael Buenger, former State Court Administrator for

165. *See supra* Part II.A.

166. *See* Webb & Whittington, *supra* note 71, at 45 (distinguishing attempts to influence judicial decisions from mere competition for scarce resources).

167. *See* Glaser, *supra* note 92, at 138 (noting that such use of inherent power "would redress the injury to the judiciary only by upsetting the fundamental alignment of the branches").

168. *Id.* at 140; *see also* Webb & Whittington, *supra* note 71, at 45 (describing the Kansas chief justice's plan to raise revenue independently of the legislature as "corrosive of the state's vital constitutional balance").

169. In addition to the authors discussed in this Section, Professor Orlando E. Delogu discusses the doctrine of comity as a means to resolve budget battles between state supreme courts and legislatures. *See generally* Orlando E. Delogu, *Funding the Judicial Department at a Level the Supreme Judicial Court Deems "Essential to Its Existence and Functioning as a Court" Is Required by Doctrines of Comity and Duties Imposed by Maine's Constitution*, 62 ME. L. REV. 453, 464–70 (2010).

170. *See* Glaser, *supra* note 92, at 150 ("[W]hen unitary financing and lump-sum budgeting replace a fragmented process of line-item appropriations, the doctrine of inherent powers outlives its usefulness.").

171. *See* Webb & Whittington, *supra* note 71, at 45 ("The use of inherent judicial powers . . . may be most justified in [situations in which legislatures attempt to influence judicial decisions], which fortunately are rare. A less extreme, but more common, threat to judicial

the Supreme Court of Missouri, would limit inherent power to cases in which both the adjudicative and constitutional independence of the courts are threatened.[172] He seems more inclined than Webb and Whittington to argue that such a case could arise in a fiscal and political climate in which legislatures are eager to cut court funding.[173]

Unfortunately, all of these responses to inherent power's limitations effectively remove the doctrine from the judiciary's quiver. The conditions under which a state supreme court can wield inherent power acceptably, if they exist at all, would address only a narrow subset of insufficient judicial budgets, ones that interfere with judges' ability to render an impartial judgment.

The inherent judicial power to compel funds should have greater vitality. The doctrine is grounded in the separation of powers expressed in the state and federal constitutions.[174] The limitations of inherent power, rather than demand that courts scrap the doctrine, suggest that inherent power requires further refinement to be relevant in a state-level dispute. The true difficulty of inherent-power controversies lies in determining the line between a level of judicial funding that violates constitutional demands and one that violates only the preferences of the state supreme court. The reasonable-necessity standard proves little help in illuminating this distinction. Courts will naturally conflate their own preferences with constitutional reasonableness. Without a higher threshold than reasonable necessity, inherent power drifts into the realm of judicial legislation. But amending the inherent-power doctrine to minimize its

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independence arises from the competition for limited resources. . . . In such situations, the use of inherent judicial powers may be harder to justify.").

172. *See* Buenger, *supra* note 68, at 1048 ("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.").

173. *Compare* Buenger, *supra* note 68, at 1048 ("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 . . . ."), *with* Webb & Whittington, *supra* note 71, at 45 ("The rhetoric of judicial independence accompanying earlier uses of inherent judicial power harkened back to a pure theory of separation of powers, in which each branch was left free to exercise its own functions without encroachment from the others, but the judicial dependence on the legislature for its financing was a reflection of checks and balances that necessarily impinged on this separation of powers.").

174. Cases on inherent power from across the nation agree that the structure of American tripartite government gives courts the power to compel funds. *See* Folsom v. Wynn, 631 So. 2d 890, 899 (Ala. 1993) (per curiam) (providing a partial list of such cases).

harmful effects is possible. In the next Part, this Note will offer a recipe for doing so.

III. A HIGHER STANDARD: ABSOLUTE NECESSITY TO PERFORM THE DUTIES REQUIRED BY FEDERAL AND STATE CONSTITUTIONAL LAW

This Part proposes a standard for using inherent power in state-level budget disputes. The proposed standard is more stringent than the reasonable-necessity standard articulated in most jurisdictions. By adopting the new standard, state courts can reserve the use of inherent power for critical situations, thus limiting the potential for the doctrine to threaten judicial independence and the legislature's appropriation power.

Specifically, courts should adopt a standard of absolute necessity to perform the duties required by federal and state constitutional law—or constitutional absolute necessity, for short. At least one commentator has expressed his preference for an absolute-necessity standard, but he took his discussion no further.[175] This Note will build on that suggestion and argue that an absolute-necessity test, combined with a requirement that courts identify a particular constitutional violation resulting from insufficient funding, addresses the problems of inherent power discussed in the last Part while preserving the power as a viable option for courts that are in financial peril. The proposed standard reserves inherent power for situations that truly threaten a judicial system's ability to function. By limiting inherent power's scope and grounding the doctrine in state constitutions, courts can avoid diminishing the legislature's appropriation power and can preserve the judiciary's public legitimacy.[176]

This Note moves past the reasonable-necessity standard adopted by a majority of states, but it does not create its new, heightened standard from nothing. The standard of constitutional absolute necessity combines the concepts of two existing inherent-power cases,

175. Jackson, *supra* note 17, at 244. Professor Jackson suggests that an absolute-necessity standard would be "more manageable" because "a court could order funding only when necessary to preserve its existence." *Id.*

176. Gregg Webb and Professor Keith Whittington offer a similar suggestion: "The requirement of a finding that the states have actually violated constitutional provisions for maintaining a functioning judicial system may also set a higher and more publicly sustainable threshold for judicial action than does the reasonable necessity standard . . . ." Webb & Whittington, *supra* note 71, at 45. But, like Professor Jackson, they say no more.

Hosford and *Wynn*. These cases control in their respective states, but their perspectives on inherent power have spread no further. Both of these cases address the problem of judicial discretion by limiting the scope of the inherent-power doctrine—*Hosford* by adopting "absolute necessity"[177] and *Wynn* by requiring a constitutional imperative.[178] Though the guidelines of either case on their own are insufficient to address the current shortcomings of inherent power, mixing the principles of *Hosford* and *Wynn* provides a solid template for a new approach.

A. The Foundations of the Standard: Hosford *and* Wynn

Hosford involved a county courthouse situated along the main street of a Mississippi timber town.[179] The courthouse contained neither air conditioning nor fans, so its windows remained open during court proceedings.[180] The noise of passing trucks made witness testimony inaudible.[181] The presiding judge stopped Billy Hosford's trial twenty-five to thirty times in six or seven hours to allow traffic to subside.[182] Hosford asked for a mistrial because of the distracting noise.[183] The judge denied the motion,[184] but during the hearing he noted that he had repeatedly asked county officials to fix the noise problem.[185] He also discovered that one juror confessed to reading witness's lips and another admitted that he missed portions of trial testimony.[186] In open court, the judge implored the state supreme court to decide whether he could invoke inherent power to remedy the situation.[187]

The Mississippi Supreme Court held that the trial judge in fact possessed the authority to invoke inherent power against his county.[188] But in doing so, the supreme court warned that the doctrine should not circumvent the budget process: "Of course, courts very largely are

177. Hosford v. State, 525 So. 2d 789, 798 (Miss. 1988).
178. *Wynn*, 631 So. 2d at 900.
179. *Hosford*, 525 So. 2d. at 795.
180. *Id.*
181. *Id.* at 794, 796.
182. *Id.* at 796.
183. *Id.* at 794.
184. *Id.* at 794–95.
185. *Id.* at 796.
186. *Id.* at 795.
187. *Id.* at 796.
188. *Id.* at 798.

supplicants of the Legislative branch. . . . And, it is not what judges individually or collectively think they should receive which controls, but what the Legislature in its wisdom decides."[189] The legislature's discretion, however, "does not cover quite all the spectrum."[190] When "the Legislative branch fails in its constitutional mandate to furnish the absolute essentials required for the operation of an independent and effective court, then no court affected thereby should fail to act."[191] Though holding that the county had fallen short of its constitutional burden, the court reiterated its uneasiness with inherent power, calling its use "tortuous, distasteful, but at times absolutely necessary."[192] In particular, the court worried that using inherent power threatened the public's perception of the judiciary's impartiality. A court's disinterest is "responsible for the respect and confidence which people have in their judges."[193] Facing the prospect of usurping legislative power and diminishing the public's trust in the judiciary is "a situation no judge would wish upon himself," so he must proceed "[c]autiously, yet firmly."[194]

Although *Hosford* expertly articulated the balance between legislative appropriation and inherent judicial power, the Mississippi Supreme Court addressed only a dispute between a local judge and a county commission. The case does not provide a general articulation of the conditions under which a state legislature "fails in its constitutional mandate to furnish the absolute essentials."[195] For that, this Note turns to *Wynn*, an Alabama case.

Wynn involved a general challenge to Alabama's judicial budget,[196] so the case gave the court leeway to discuss the specifics of a constitutional floor to statewide judicial funding. In *Wynn* a circuit judge filed suit against Alabama's governor, claiming that judicial-branch funding reductions, as part of statewide pro rata budget cuts authorized by statute, were unconstitutional.[197] The Alabama Supreme Court declared that the legislature, via statute, "cannot

189. *Id.* at 797.

190. *Id.* at 798.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. Folsom v. Wynn, 631 So. 2d 890, 891–92 (Ala. 1993) (per curiam).

197. *Id.* The governor invoked ALA. CODE § 41-4-90, which permits across-the-board funding cuts to all state agencies to avoid deficit spending.

constitutionally . . . reduce appropriations to the Judicial Branch below that level necessary for the Judicial Branch to perform the duties required of it under Federal and State constitutional law."[198]

The *Wynn* court's key innovation is the word "duties." Unlike other inherent-power articulations, the one given in *Wynn* begins its inquiry in the provisions of the governing constitution, rather than in concepts more prone to judicial malleability, such as "administration of Justice"[199] or "proper operation of the courts."[200] A court searching for a failed duty may not base its decision to compel funds solely on the abstract idea of constitutional independence.[201] Concerns that legislative appropriations may threaten the coequal status of the judiciary cannot alone justify the use of inherent power against a legislature by a state supreme court.

Requiring a litigating court to demonstrate an inability to perform a constitutionally mandated duty, however, is an exercise of another sort. The court must find a failure to perform a function that neither the legislature nor the courts themselves can abrogate. In other words, when the federal or state constitution imposes a particular duty, the courts have no choice but to perform that duty, and the legislature has no choice but to fund the courts sufficiently in their performance of that duty.[202] The frustrations and political posturing of judges and courts become less important; instead, the inherent-power challenge focuses on the mandated performance of state government. Of course, even under a standard that looks for unmet constitutional responsibilities, courts must make

198. *Id.* at 895. In another articulation of this standard, the *Wynn* court wrote that the legislature could not reduce judicial appropriations "below what is adequate and reasonable for the judiciary to perform its constitutionally mandated duties." *Id.* at 896. The "adequate and reasonable" language is pulled directly from the Alabama Constitution, which requires that "[a]dequate and reasonable appropriations shall be made by the legislature for the entire unified judicial system." ALA. CONST. art. VI, § 149, *as amended by* ALA. CONST. amend. 328. Thus, Alabama, by constitutional provision, has established a lower constitutional barrier to the use of inherent power than this Note proposes.

199. *See* Commonwealth *ex rel.* Carroll v. Tate, 274 A.2d 193, 197 (Pa. 1971); *see also* Alamance Cnty. Court Facilities, 405 S.E.2d 125, 132 (N.C. 1991) ("[A] court may invoke its inherent power to do what is reasonably necessary for 'the orderly and efficient exercise of the administration of justice.'" (quoting Beard v. N.C. State Bar, 357 S.E.2d 694, 696 (N.C. 1987))).

200. O'Coin's, Inc. v. Treasurer of Worcester, 287 N.E.2d 608, 612 (Mass. 1972).

201. *See supra* text accompanying notes 164–168.

202. *See Wynn*, 631 So. 2d at 896 ("This principle, that constitutional directions, first from the United States Constitution and then from the Constitution of Alabama, take precedence over legislative proscriptions and affect how those proscriptions apply, is critical to the constitutional application of § 41–4–90.").

uncomfortable evaluations of their own operational sufficiency and potentially divisive interpretations of governing documents.[203] Constitutional absolute necessity does not leave courts above claims of self-interest, as no inherent-power standard can. However, by moving the focus of inquiry from judges to constitutions, the proposed standard diminishes the possibility that a court will substitute its preferences for constitutional requirements.

The greatest difficulty in adopting *Wynn*'s articulation of inherent power is determining the scope of constitutionally mandated duties. The *Wynn* court, though professing that its enumeration was not exhaustive, offered an extensive discussion of what the federal and Alabama constitutions require of the state judicial system.[204] Under the U.S. Constitution, courts must guarantee individual rights, such as freedom from "unreasonable search and seizure" based on "'stale' or untimely information, execution, or judicial review" and due process for "obtaining and confronting witnesses, rights against self-incrimination, and a *speedy* public trial before a jury."[205] As noted in Part I, however, ensuring these federal criminal protections has shifted the brunt of funding deficits to civil proceedings,[206] about which the U.S. Constitution says little.[207] Using the Alabama Constitution, however, *Wynn* went further. Under that document, residents have a "guaranteed right to a forum for the enforcement of his or her contracts,"[208] "a right to prosecute a civil cause,"[209] and "a right to a jury trial" in civil cases.[210] Thus, appealing to its state constitution, *Wynn* contemplated a court's use of inherent power to

203. *See id.* at 900 ("This Court recognizes, however, that . . . as a part of government, the Judiciary must cooperate in every way possible with the Legislature as it performs its difficult task of allocating limited resources.").

204. *Id.* at 897.

205. *Id.*

206. *See supra* notes 55–61 and accompanying text.

207. *See, e.g.*, Los Angeles Cnty. Bar Ass'n v. Eu, 979 F.2d 697, 706 (9th Cir. 1992) (finding "no basis in the Constitution for a rigid right to resolution of all civil claims within . . . a time frame"); *see also* David Hittner & Kathleen Weisz Osman, *Federal Civil Trial Delays: A Constitutional Dilemma?*, 31. S. TEX. L. REV. 341, 354 (1990) ("The difficulty that a court will face in determining at what point [civil] delays become unconstitutional . . . raises the concern that a court will consider the question nonjusticiable.").

208. *Id.* at 898 (citing ALA. CONST. art. I, § 22).

209. *Id.* (citing ALA. CONST. art. I, § 10).

210. *Id.* (citing ALA. CONST. art. I, § 11).

guarantee the provision of the basic adjudicative services expected of the judicial system.[211]

In addition to the explicitly enumerated requirements of the federal and Alabama Constitutions, *Wynn* reasoned that duties imposed on the courts by statute qualify as constitutional mandates.[212] The court cited examples of resource-consuming obligations imposed on the judicial branch by both Congress and the Alabama Legislature.[213] Though *Wynn* did not spend space justifying its extension of required constitutional duties to include statutory obligations, the court was right to approve such an extension. Just as the legislature may use its appropriation power to craft the judicial budget, so too may the legislature use its plenary legislative power to demand particular behaviors of courts.[214] Complying with directives of Congress and the state legislature is thus an expression of adherence to the constitutional structure of government.[215]

Wynn added one further degree to the scope of required duties. The decision argued that if the federal and Alabama constitutions require the courts to perform certain functions, then those constitutions by extension must require the "allocation of sufficient resources for administration and complete delivery [of those services]."[216] Specifically, this allocation includes the "costs of administrative support" and overhead expenditures such as "utility service, postage, publication expenses . . . [and] communications services."[217] The addition of associated administrative costs to the

211. *Wynn* used the Alabama Constitution and supporting case law to elaborate the scope of its constitutional mandate. *Wynn*, 631 So. 2d at 898. *Wynn*'s reasoning applies to other states, though the resulting set of required duties will differ depending on the requirements of those states' constitutions.

212. *Id.* at 897–98 & n.4.

213. Federal law demands that state courts hold bond hearings within seventy-two hours for suspects arrested with a warrant and requires state courts to meet other federal requirements to maintain federal funding. *Id.* at 897 & n.4. State law requires courts, for example, to present juvenile court records before the tenth day of the month, file divorce reports with the state board of health within the first five days of the month, and transmit court records to appellate courts within specified time limits. *Id.* at 897.

214. *See* Buenger, *supra* note 68, at 1007 n.92 ("[T]he structure of state and federal courts remains a matter squarely within the purview of the legislature.").

215. Upholding statutory mandates has become a point of increased concern. Even as they have reduced judicial budgets, state legislatures have required courts to perform an ever-growing number of social-service functions. ABA TASKFORCE ON PRESERVATION OF THE JUSTICE SYS., *supra* note 8, at 2.

216. *Wynn*, 631 So. 2d at 897.

217. *Id.* at 896.

definition of mandated constitutional duties serves to broaden the effectiveness of *Wynn*'s inherent-power standard. Administrative costs are the battleground of the state-court budget crisis: rather than cease performance of a mandated judicial duty, judicial systems tend to reduce overhead costs, generally by decreasing their workforces.[218] At some level, these overhead reductions make provision of a constitutionally required service so cumbersome that its exercise is meaningless. An inherent-power standard that includes administrative costs greatly increases the ability of the doctrine to remedy a situation in which a court provides nominal, but inadequate, mandated services.

B. Advantages of the Proposed Standard

The inherent-power standard this Note proposes—absolute necessity to perform the duties required under federal and state constitutional law—provides several advantages over the current reasonable-necessity standard. The higher standard addresses the interbranch balance and public-legitimacy issues precipitated by the reasonable-necessity standard,[219] but it leaves courts' inherent power robust enough to prove a useful tool in state-level budget disputes.

Importantly, constitutional absolute necessity addresses the shortcomings of inherent power discussed in Part II.B—its potential both to usurp the appropriation power of the legislature and to diminish the legitimacy of the judiciary. The standard does so primarily by reducing the potential pool of disputes for which inherent power can provide a solution. Any supreme court that compels funds from a legislature is subject to accusations of upsetting interbranch balance for its own self-interest, no matter what standard it employs.[220] However, by refusing to consider inherent power an appropriate response to funding disagreements that do not meet the narrow criteria within the standard of constitutional absolute necessity, courts may speak with authority and legitimacy to those disagreements that do. First, by pointing to a constitutionally mandated duty that the judicial system absolutely cannot perform

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218. *See* ABA TASKFORCE ON PRESERVATION OF THE JUSTICE SYS., *supra* note 8, at 2–3 (describing how decreased judicial budgets have demanded immediate workforce reductions).

219. *See supra* notes 156–168 and accompanying text.

220. *See, e.g.*, Hosford v. State, 525 So. 2d 789, 798 (Miss. 1988) (articulating an "absolute necessity" standard and warning that "the darkest cloud which can be cast upon a judge's honor is suspicion that he has a personal interest in a case").

without additional funding, a court's use of inherent power will look less like a circumvention of the legislature's appropriation power and more like a disinterested interpretation of the constitution. Second, because the use of inherent power would require the protection of a specific constitutional duty, the public is more likely to approve of its use. The American public broadly accepts the idea that constitutions form the foundation of our legal system.[221] If a judicial system can justifiably argue that a legislative budget prevents it from providing a constitutionally required public service, the effort may very well win the support of the people.

In addition, the proposed standard would limit the breadth of an inherent-power remedy. One of the strongest critiques of *Carroll*, the case that birthed the reasonable-necessity standard,[222] was the extent to which the court significantly restructured Philadelphia's judicial budget.[223] Such heavy-handed remodeling of the city's appropriations appeared to observers as an end-run around a disappointing budgeting outcome.[224] Constitutional absolute necessity, by contrast, requires courts to identify specific unmet duties. As a consequence, a court adopting this standard may use its inherent power to remedy only specific constitutional violations that justify the use of inherent power. In other words, the court may ask the legislature only for additional resources sufficient to successfully perform the duties it deems unfulfilled—but no more. A supreme court's interference with a legislature's appropriation will remain discrete and limited.

The standard of constitutional absolute necessity further improves current doctrine by implicitly demanding that judiciaries

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221. *See* Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1812 (2005) ("[I]t should suffice to say that the Constitution is the document and set of amendments thereto that are broadly accepted as the written expression of the foundational commitments of the United States as a political community . . . ."); Humphrey Taylor, *What We Love and Hate About America*, HARRIS INTERACTIVE (June 8, 2010), http://www.harrisinteractive.com/vault/HI-Harris-Poll-Love-Hate-About-America-2010-06-08.pdf (reporting that 70 percent of 2503 Americans polled in May 2010 viewed the U.S. Constitution favorably).

222. *See* Commonwealth *ex rel.* Carroll v. Tate, 274 A.2d 193, 199 (Pa. 1971) ("[T]he burden is on the Court to establish that the money it requests is reasonably necessary for 'the efficient administration of justice.'" (quoting Leahey v. Farrell, 66 A.2d 577, 580 (Pa. 1949))).

223. *See, e.g.*, Glaser, *supra* note 92, at 116 ("[*Carroll*] marked an expansion of the inherent powers doctrine into broader fiscal matters than in previous cases. Substantial budget items for an entire municipal court system were in dispute . . . .").

224. *See id.* at 117 ("In the wake of [*Carroll*], commentators predicted (with varying degrees of approval) that courts . . . had found a tool by which they could circumvent the budget process.").

both prioritize constitutional responsibilities and use their resources efficiently before compelling funds through inherent power. Under the standard, a court hearing an inherent-power request in a state-level budget dispute must decide when the meagerness of a *general* judicial budget renders a court incapable of rendering a *specific* constitutionally required duty. The inquiry requires finding some causation between the two. In states with consolidated court funding, the judiciary has the flexibility to allocate its resources among its different components.[225] Courts should not use inherent power, under a rule of constitutional absolute necessity, to compel funding for programs to which they refuse to direct their already allocated money. Judicial systems must show that their total budget, utilized efficiently, leaves some constitutionally mandated duties unfeasible. This is a high bar, and an exact line between sufficient and insufficient funding will always be murky and fact-specific. But as state-court funding continues to decrease, and as judiciaries cut back more and more services, drawing a connection between unmet constitutional mandates and an insufficient general judicial budget may prove easier.[226]

C. Responding to Possible Concerns with Constitutional Absolute Necessity

Even if the legal standard constraining inherent power is raised from reasonable to absolute necessity, one might doubt the practical effect of the heightened standard. An objector might ask two related questions. First, does an absolute-necessity standard constrain judicial discretion any more than a reasonable-necessity standard? Judges who are willing to threaten the legitimacy of the courts to demand more funding from the legislature may be equally willing to invoke inherent power no matter the standard required. They are already convinced of the dire condition of the courts.[227] Second, does requiring absolute necessity adequately distinguish scenarios that permit the use of inherent power from those that do not? Absolute necessity, like reasonable necessity, defies a clear definition. Judges,

225. Hazard et al., *supra* note 139, at 1293–94; *see also* ROBERT W. TOBIN, NAT'L CTR. FOR STATE COURTS, FUNDING THE STATE COURTS: ISSUES AND APPROACHES 60 tbl.4 (1996), *available at* http://cdm16501.contentdm.oclc.org/cdm/ref/collection/financial/id/5 (describing the features of different types of centralized control of judicial budgets).

226. For an application of the proposed standard to a factual situation, see *infra* Part III.D.

227. *See supra* Part I.

who have a personal interest in the outcome of a court-funding dispute, are in a poor position to provide the substance of the terms.

Both of these questions recall an objection shared by Howard Glaser and Professor Jackson: that regardless of the legal definition involved, courts may not determine the budget of the judiciary—a political task outside the legitimate scope and competency of courts.[228] Increasing the standard from reasonable to absolute necessity may raise the bar, but according to Glaser and Professor Jackson, the heightened language cannot justify what is essentially a self-interested and unprincipled distinction between necessary and unnecessary funding. Moreover, what constitutes absolute necessity could vary widely. For example, sitting supreme court judges may find two law clerks and a robust judicial administration office absolutely necessary to perform their constitutional duties.[229] By contrast, a state legislator steadfastly committed to lowering taxes may contend that the judiciary can claim no absolute necessity for additional funding as long as the courts are functioning at some minimal level, even "if it means having trials outdoors under trees."[230]

Within some limits, these objections have merit. Absolute necessity, like reasonable necessity, allows too wide a domain for the subjectivity of judges. But this Note does not propose adoption of the absolute-necessity standard in isolation. Courts must also find that, without additional funds, the judicial system will fail to meet a constitutionally mandated duty. A court invoking inherent power under the constitutional absolute-necessity standard must point to a potential judicial deficiency *and* ground that deficiency in either the federal or state constitution. The proposed standard forces judges through the process of comparing the conditions of their judicial system with the particular requirements of their state constitution. The standard demands an objective inquiry. Moreover, even if judges issuing inherent-power orders under constitutional absolute necessity might have reached the same result under the reasonable-necessity standard, the new standard forces them to ground their decision in

228. *See supra* Part II.B.1.

229. *Cf.* Judges for the Third Judicial Circuit v. Wayne Cnty., 190 N.W.2d 228 (Mich. 1971).

230. Bob Johnson, *Alabama Chief Justice Race: Moore, Graddick Challenge Malone*, MONTGOMERY ADVERTISER, Mar. 11, 2012, at 5A. Roy Moore—who as of February 2013 serves as the chief justice of the Alabama Supreme Court—was reported to have made this comment about the potential for a minimally functioning judicial system during a campaign event. *Id.* Although he is not a legislator, he made his comment while speaking to voters. This comment represents a potential perspective on court funding, albeit an extreme one.

constitutional law, not in their own judgment. By mixing an increased threshold of need with a focused constitutional inquiry, the new test—as a whole—limits judicial discretion.

Still, even if the new standard proposed in this Note usefully narrows the field of factual situations sufficient to justify the use of inherent power against a legislature, state supreme courts will continue to face the possibility that legislatures will fail to comply with their funding orders. A dispute between a supreme court and a legislature is a fight between the highest body in two branches of state government. There is no other authority to mediate between the two parties.[231] Though the supreme court has the authority to articulate the scope and meaning of state law, it is powerless to enforce its decision.[232] Indeed, a legislature's refusal to comply with an inherent-power order is not without precedent. In *In re Salary of Juvenile Director*[233] the Washington Supreme Court, though recognizing the doctrine of inherent power, refused to invoke the power against one of the state's counties.[234] The court remarked that "in circumstances where courts have been unable to build a convincing case, compliance with their financing orders has been problematic."[235] To support its proposition, the court noted that the Philadelphia Court of Common Pleas never received any of the money ordered in *Carroll* and that a Michigan county ignored its state's supreme court's demand for additional funds to hire law clerks and a judicial assistant.[236]

Undoubtedly, a state supreme court that invokes inherent power runs the risk of screaming at an audience that refuses to listen. Our diffuse, tripartite system of government ensures that no standard of inherent judicial power can remove that possibility. And to be sure, courts must take care to avoid an unheeded inherent-power order.

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231. *Cf.* Coleman v. Thompson, 501 U.S. 722, 729 (1991) ("[T]his Court has no power to review a state law determination that is sufficient to support the judgment . . . ."); Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 626 (1875) ("The State courts are the appropriate tribunals, as this court has repeatedly held, for the decision of questions arising under their local law, whether statutory or otherwise."). Under the proposed standard, a state supreme court could invoke inherent power to remedy a federal constitutional deficiency in the state judicial system. In this case, the U.S. Supreme Court might gain jurisdiction over an appeal.

232. *See* Jorgensen v. Blagojevich, 811 N.E.2d 652, 660 (Ill. 2004) ("[The judicial branch] has no treasury. It possesses no power to impose or collect taxes. It commands no militia.").

233. *In re* Salary of Juvenile Dir., 552 P.2d 163 (Wash. 1976).

234. *Id.* at 175.

235. *Id.* at 174.

236. *Id.* at 174 n.6 (discussing Commonwealth *ex rel.* Carroll v. Tate, 274 A.2d 193 (Pa. 1971); and Judges for the Third Judicial Circuit v. Wayne Cnty., 190 N.W.2d 228 (Mich. 1971)).

The judiciary depends on the strength of its words; an ignored court is a weak court. Adopting the standard of constitutional absolute necessity, however, lessens the chance that a legislature will turn a deaf ear. The proposed standard reserves the use of inherent power for absolutely necessary situations and demands that a court invoking the power justify its decision by pointing to an unmet constitutional duty. With these safeguards, an order from a state supreme court should possess the legitimacy necessary to prod the legislature to obey it.[237]

D. Briefly Imagining the New Standard in Practice

The standard proposed in this Part will limit the permissible scenarios under which state courts may invoke inherent power to compel funds to maintain their constitutional independence. This limitation serves to preserve the power's legitimacy by rationing its use. But will a rationed form of inherent power adequately meet the challenges presented by the state-funding crisis? In other words, are cutbacks in court funding actually preventing state courts from performing any constitutionally required duties? If so, how might the new inherent-power standard remedy such a problem?

Applying the standard of constitutional absolute necessity to the state-court funding crisis described in Part I will help answer these questions. In early 2011, the New York State Assembly passed a budget that reduced funding for the judiciary by $170 million.[238] The New York State Bar conducted a study to determine the effects of the budget cuts across the state.[239] The study found a general reduction in courthouse access, which resulted in delays and increased costs to litigants.[240] One court service, however, found itself particularly devastated by the budget reductions: small-claims courts. In response

237. While *Wynn* was on appeal, the Alabama Legislature appropriated additional funds for the judicial branch, making the governor's lack of consideration of its financial condition moot. Folsom v. Wynn, 631 So. 2d 890, 902 (Ala. 1993). If evidence existed to show that the lawsuit influenced the legislature's decision to increase judicial funding, *Wynn* would stand as a model application of a court's use of inherent power: a court declares funding insufficient, and in response the *legislature*, rather than the court, remedies the problem.

238. Act of Mar. 25, 2011, ch. 52, 2011 N.Y. Laws 107; N.Y. STATE, ENACTED BUDGET: FINANCIAL PLAN FOR FISCAL YEAR 2012, at 9.

239. N.Y. STATE BAR ASS'N, REPORT OF THE EXECUTIVE COMMITTEE ON THE IMPACT OF RECENT BUDGET CUTS IN NEW YORK STATE COURT FUNDING 7 (2012), *available at* http://www.nysba.org/AM/Template.cfm?Section=Home&Template=/CM/ContentDisplay.cfm&ContentID=62096.

240. *Id.* at 9.

to the legislative cuts, the Eleventh Judicial District (Queens County) eliminated three quarters of its nighttime small-claims operations.[241] As a result, litigants wishing to pursue their claims on the night-court docket faced a six-month wait.[242]

The standard this Note proposes—absolute necessity to perform the duties required by federal and state constitutional law—would allow a court to invoke inherent power to remedy this situation. Under the New York Constitution, the legislature has the power to "alter and regulate the jurisdiction and proceedings in law and in equity" of the judicial branch.[243] The state assembly used this power when it defined the purpose and scope of New York City's small-claims court as part of the New York City Civil Court Act.[244] According to that statute, the procedures of small-claims courts "shall constitute a simple, informal and inexpensive procedure for the prompt determination of [small] claims."[245] Constitutional absolute necessity, as illuminated by *Wynn*, indicates that duties imposed on court systems by legislation stand in as constitutional mandates.[246] The New York State Assembly created the small-claims court to provide a simple and prompt method of dispute resolution. Waiting six months for access to small-claims resolution is neither simple nor prompt. Thus, at least in this particular domain, the New York courts are unable to fulfill a constitutionally mandated duty.

This example brings up a broader observation about the proposed standard. To justify a claim of inherent power under the proposed standard, any additional funding must be absolutely necessary. The operational condition of the New York judicial system strongly indicates that the Eleventh Judicial District cannot allocate any more resources to its small-claims courts. The system has already, among other measures, closed courthouse doors early,[247] reduced experienced staff,[248] limited library resources for pro se litigants,[249]

241. *Id.* app. at K2.

242. *Id.* Pro se litigants are often unable to miss work to attend court in the daytime. *Id.* In addition, the value of the disputes in small-claims courts will often make missing work economically prohibitive.

243. N.Y. CONST. art. 6, § 30.

244. N.Y. CITY CIV. CT. ACT § 1802 (McKinney 1989).

245. *Id.*

246. *See supra* notes 212–215 and accompanying text.

247. N.Y. STATE BAR ASS'N, *supra* note 239, at 13; *see also id.* app. at K1 (describing the reduced hours in the Eleventh Judicial District).

248. *Id.* at 11.

eliminated pro bono coordinators,[250] and reduced the size of jury pools to unsustainable levels.[251] These measures make clear that the New York judiciary can find little space to create greater savings or efficiencies. To remedy its small-claims-court deficiency, therefore, it must have more money.

Judiciaries have adapted to budget reductions primarily by reducing the availability of court services, not by eliminating those services altogether.[252] In other words, state courts have worked diligently to respond to legislative budget cuts in ways that do not abrogate their constitutional duties. Constitutional absolute necessity, therefore, will perform its remedial task at the margins. States prioritize their court services. When the coffers are empty, judicial systems eliminate or reduce services at the bottom of the priority list. As judicial budgets continue to shrink, the cuts will, at some point, imperil services seen as imperative. In New York, judicial-budget cuts prevented access to small claims court. Inherent power should allow the New York judiciary to demand more money to fix that problem. As the funding crisis in New York festers and grows, the courts may be forced to eliminate additional constitutionally mandated services. When this happens, the standard of constitutional absolute necessity will provide further legal remedies.

CONCLUSION

Judicial resources have withered during the last two decades. Though courts make up only a small portion of most state budgets, in tough financial times courts have lost significant percentages of their funding. Legislatures often treat judicial systems as a politically costless harvest of budget cuts. As their funding decreases, however, courts struggle to provide the adjudicative services necessary for the smooth functioning of the nation's legal system and economy. Many state judicial systems approach a point of fiscal crisis. Though not political actors, courts should not fail to respond adequately to this threat.

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249. *Id.* at 14.

250. *Id.* at 15.

251. *See id.* at 16 ("[A]ttorneys' challenges for cause are not receiving adequate consideration due to concerns that there are not enough potential jurors to allow for dismissals.").

252. *See supra* notes 40–61 and accompanying text.

Invoking inherent judicial power to compel funds against a legislature can prove a viable tactic to combat inadequate judicial funding. But an inherent-power dispute between a state legislature and a state supreme court presents a quandary. What should happen when the branch of state government authorized to levy taxes and appropriate spending provides a coequal branch of government too little money to operate? On the one hand, the legislature is the voice of the people, and it has the right to allocate funding according to political will. On the other hand, the state supreme court is the voice of the state constitution, and even the legislature cannot stand above the state's governing document. Though there is no clear path out of this dilemma, both branches involved in a funding dispute must respect the integrity of the other. For this reason, courts need the doctrine of inherent power. They must have a tool to voice their conclusion that the legislature has violated the state constitution by allocating too little money to the judiciary. But inherent power must remain cabined. Judges may not apply the doctrine simply to disagree with legislative budget choices.

As this Note has argued, adding further protections to the currently articulated doctrine of inherent power strikes a balance between these two concerns. Under a standard of absolute necessity to perform the duties required by federal and state constitutional law, courts may use inherent power in limited circumstances and with particular restraints. Admittedly, the precise contours of the standard remain undefined. Each state must employ the standard in its own situation, given the particular mandates provided by its own constitutional law. But by adopting the standard of constitutional absolute necessity, a state judiciary may effectively challenge its legislature while continuing to respect its rightful authority.