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The complete independence of the courts of justice is peculiarly essential in a limited constitution.

—Alexander Hamilton*

The recurrent fiscal crises that confront state and local governments exert serious budgetary pressure on the courts.[1] Although the judiciary consumes a very small proportion of public resources,[2] an expanding judicial workload[3] and lagging appropriations[4] have significantly impaired the operation of many court systems.[5]

Inadequate funding poses a potentially grave threat to the independence of the judiciary and to the private law rights of individual citizens. Courts have responded to this potential threat by developing the doctrine of inherent power to compel appropriations from the other branches of government.[6] This theory has evolved from some earlier cases, which invoked the courts' inherent power to justify compelling appropriations for specified judicial needs, into a broader and more frequently invoked assertion of judicial auton-

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* THE FEDERALIST No. 78, at 524 (J. Cooke ed. 1961).

1. *See, e.g.*, Dolan, *Justice Delayed — As Funds Grow Short, Courts Around the U.S. Must Appeal for Relief*, Wall St. J., Feb. 11, 1983, at A1, col. 1.

2. In 1965-1966, for example, the judiciary received 1% of the federal budget, 6% of state budgets, and 6.3% of county budgets. Saari, *Open Doors to Justice: An Overview of Financing in America*, JUDICATURE, May 1967, at 296.

3. *See* C. MANNING, JUDGESHIP CRITERIA (1973); Lawson & Gletne, *Cutback Management in the Judicial Branch: Controlling Costs Without Courting Disaster*, 7 JUST. SYS. J. 44 (1982).

4. *See, e.g.*, Brennan, *Judicial Fiscal Independence*, 23 U. FLA. L. REV. 277, 280 (1971); Lawson & Gletne, *supra* note 3, at 44; Dolan, *supra* note 1.

5. The very number of inherent power cases, *see* notes 7-8 and 11 *infra*, suggests the scope of the problem. A fiscal crisis can severely retard the functioning of a judicial system:

> The effect of all this upon the moral [*sic*] of the court is obvious. Employees do not know from day-to-day whether they have their jobs. The court is unable to implement docket control methods to decrease our backlog, and probation services are threatened, as are family counseling services. The Friend of the Court staff is so depleted that it cannot properly handle its important functions. Judicial efficiency is threatened by the loss of secretaries. Only three law clerks are available for the entire court. In short, this crisis has had and will have a devastating effect upon the delivery of proper judicial services.

Gilmore, *The Day the Detroit Courts Ran Out of Money*, 19 JUDGES J. 36, 39 (1980).

6. These cases typically involve city and county governments, charged by state legislation with at least a portion of the responsibility for funding the courts. *See* C. BAAR, SEPARATE BUT SUBSERVIENT: COURT BUDGETING IN AMERICA 6-7 (1975). At present, 27 states have assumed responsibility for financing the state courts. *See* Tobin, *Managing the Shift to State Court Financing*, 7 JUST. SYS. J. 70 (1982).

This Note necessarily adopts general terminology to discuss issues common to the state court systems. "Legislature" or legislative branch" refers to the elected authority from whom the court seeks additional funding; the "constitution" refers to the state constitution.

omy.[7] The doctrine has become well accepted in the cases,[8] but has generated an extensive body of primarily critical commentary.[9]

Litigation results when the legislative branch contests the inherent power order. Because judicial compulsion of legislative action must derive from constitutional authority,[10] and because of the practical and doctrinal challenges such litigation presents, many courts have struggled to resolve these cases in a principled fashion.[11] This Note defends the inherent power doctrine, but argues that current judicial approaches to its application have failed to confront

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7. For earlier cases, see, e.g., State *ex rel.* Hillis v. Sullivan, 48 Mont. 320, 137 P. 392 (1913); State *ex rel.* Kitzmeyer v. Davis, 26 Nev. 373, 68 P.2d 689 (1902) (per curiam); Moynahan v. City of New York, 205 N.Y. 181, 98 N.E. 482 (1912); *In re* Janitor of Supreme Court, 35 Wis. 410 (1874).

8. Only the Supreme Court of Alabama has explicitly rejected the doctrine. *See* Morgan County Commn. v. Powell, 292 Ala. 300, 293 So. 2d 830 (1974). A few other courts have avoided the issue by resting a result on statutory grounds. *See* Young v. Board of County Commnrs., 9 Nev. 52, 530 P.2d 1203 (1975).

An otherwise unanimous body of decision has upheld the existence of inherent power to compel appropriations. *See, e.g.*, Deddens v. Cochise County, 113 Ariz. 75, 546 P.2d 811 (1976); Millholen v. Riley, 211 Cal. 29, 293 P. 69 (1930); Wadlow v. Kanaly, 182 Colo. 115, 511 P.2d 484 (1973); People *ex rel.* Conn v. Randolph, 35 Ill. 2d 24, 219 N.E.2d 337 (1966); McAfee v. State *ex rel.* Stodola, 258 Ind. 677, 284 N.E.2d 778 (1972); Webster County Bd. of Supervisors v. Flattery, 268 N.W.2d 869 (Iowa 1978); Jefferson County *ex rel.* Grauman v. Jefferson County Fiscal Court, 301 Ky. 405, 192 S.W.2d 185 (1946); O'Coin's, Inc. v. Treasurer of the County of Worcester, 362 Mass. 507, 287 N.E.2d 608 (1972); Wayne Circuit Judges v. Wayne County, 383 Mich. 10, 172 N.W.2d 436 (1969) (Black, J., concurring), *revd. on rehearing per curiam*, 386 Mich 1, 190 N.W.2d 228 (1970) (per curiam), *cert. denied,* 405 U.S. 923 (1972); State *ex rel.* Weinstein v. St. Louis County, 451 S.W.2d 99 (Mo. 1970) (per curiam); Board of Commrs. v. Eleventh Judicial Dist. Court, 182 Mont. 463, 597 P.2d 728 (1979); Azbarea v. North Las Vegas, 95 Nev. 109, 590 P.2d 161 (1979); State v. Rush, 46 N.J. 399, 217 A.2d 441 (1966); *In re* Board of Commrs., 4 N.C. App. 626, 167 S.E.2d 488 (1969); State *ex rel.* Lorig v. Board of Commrs., 52 Ohio St. 2d 70, 369 N.E.2d 1046 (1977) (per curiam); Commonwealth *ex rel.* Carroll v. Tate, 442 Pa. 45, 274 A.2d 193 (1971), *cert. denied*, 402 U.S. 974 (1971); Commissioners Court v. Martin, 471 S.W.2d 100, 110 (Tex. Civ. App. 1971) (dicta); Zylstra v. Piva, 85 Wash. 2d 743, 539 P.2d 823 (1975); Annot., 59 A.L.R.3d 569 (1974).

9. *See* Brennan, *supra* note 4; Bukowski, *Inherent Power of the Court — A New Direction?*, 54 WIS. B. BULL. 22 (1981); Burke, *The Inherent Power of the Courts*, 57 JUDICATURE 247 (1974); Carrigan, *Inherent Powers and Finance,* 7 TRIAL 22 (1971); Note, *Judicial Financial Autonomy and Inherent Power*, 57 CORNELL L. REV. 975 (1972); *Constitutional Law: The Inherent Power of the Courts to Appropriate Money for "Reasonably Necessary" Expenditures,* 55 MARQ. L. REV. 392 (1972); Comment, *Inherent Power and Administrative Court Reform,* 58 MARQ. L. REV. 133 (1974); Comment, *Courts — Judge's Power to Bind Contractually County Treasury for Courtroom Necessities*, 7 SUFFOLK U. L. REV. 1136 (1972); Comment, *State Court Assertion of Power to Determine and Demand Its Own Budget*, 120 U. PA. L. REV. 1187 (1972); Comment, *Court Finance and Unitary Budgeting,* 81 YALE L.J. 1236 (1972).

10. The legislature, of course, has power to appropriate as it pleases unless constrained by the higher law of the Constitution. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 49 (1803). This is especially important because the legislature's appropriations power itself derives from the Constitution.

11. *See, e.g.*, O'Coin's, Inc. v. Treasurer of the County of Worcester, 362 Mass. 507, 287 N.E.2d 608 (1972); Wayne Circuit Judges v. Wayne County, 386 Mich. 1, 190 N.W.2d 228 (1971), *cert. denied,* 405 U.S. 923 (1972); State *ex rel.* Weinstein v. St. Louis County, 451 S.W.2d 99 (Mo. 1970) (per curiam); Commonwealth *ex rel.* Carroll v. Tate, 442 Pa. 45, 274 A.2d 193 (Pa. 1971), *cert. denied,* 402 U.S. 974 (1970). This selection fairly represents the leading cases.

squarely the central issues raised by inherent power orders. The Note advocates an alternative procedure for defining the legitimate scope of judicial authority to compel appropriations on its own behalf. Part I examines the constitutional basis of the doctrine, and concludes that although constitutional considerations justify the inherent power doctrine, they also require that the courts closely link the assertion of the doctrine to the constitutional imperatives that justify it. Part II examines the court's current approach to the review of inherent power orders, and argues that current procedures bear no rational relation to confining inherent power within its legitimate boundaries. Part III, therefore, proposes an alternative procedure to address directly, and overcome to the extent possible, the constitutional, political, and practical problems created by assertions of judicial power to compel appropriations.

I. Constitutional Justifications for Inherent Judicial Power To Compel Appropriations

A. *Separation of Powers*

The federal and state constitutions embody a system of separation of powers.[12] Constitutional separation of powers among legislative, executive, and judicial branches depends on two related concepts. The first is functional differentiation: no branch may usurp a function properly belonging to another.[13] The second is

12. *See* U.S. Const. art. I, § 1, art. II, § 1, art. III, § 1. The separation of powers concept enjoyed the enthusiastic support of the Framers. *See, e.g.,* The Federalist No. 48, at 332 (J. Madison) (J. Cook ed. 1961); The Federalist No. 51, at 347 (J. Madison) (J. Cooke ed. 1961). The Framers traced the idea to Montesquieu, but it derived from a more ancient heritage. *See* Aristotle's Politics, Book IV, ch. 14, at 154 (B. Jowett trans. 2d ed. 1931); J. Locke, Treatise of Civil Government and Letter Concerning Toleration 97-99 (Sherman ed. 1937); 1 B. de Montisquieu, The Spirit of the Laws, Book XI, ch. 6, at 152 (T. Nugent trans. 1823). *See generally* Ervin, *Separation of Powers: Judicial Independence,* 35 Law & Contemp. Prob. 108 (1970); Fairlie, *The Separation of Powers*, 21 Mich. L. Rev. 393 (1922); Sharp, *The Classical American Doctrine of "Separation of Powers,"* 2 U. Chi. L. Rev. 385 (1935).

Many state constitutions express the concept explicitly. *See, e.g.,* La. Const. art. II., §§ 1-2:

> Section 1. The powers of government of the state are divided into three separate branches: legislative, executive, and judicial.
>
> Section 2. Except as otherwise provided by this constitution, no one of these branches, nor any person holding office in one of them, shall exercise power belonging to either of the others.

Such provisions invariably fail, however, to indicate the precise powers that "belong" to each branch. They thus beg the question whether the appropriations power can, in extreme cases, "belong" to the judiciary.

13. This differentiation cannot be absolute. To operate properly, and to perform their functions fully, each branch must engage in some activities constitutionally within the province of the other branches. For instance, both the courts and the legislature must engage in some executive or administrative activities in performing their constitutional functions, and the executive and the judiciary must exercise some legislative power in making rules to govern the internal functioning of their branches. These activities are necessary to the ability of each branch to perform its functions, and are thus incidental powers each branch possesses. *See* C.

checks and balances: no branch should have the power to direct the course of government policy unchecked by the other branches.[14]

Constitutional power over taxing and spending lies with the legislature, and, to the extent of the veto power, the executive.[15] Nevertheless, the exercise of the appropriations power may offend the separation of powers in either of two ways. First, if the legislative appropriations decision effectively disposes of matters before the judiciary, the spending power will have swallowed the judicial power entirely. In such a situation, the legislature has usurped a judicial function, thereby offending the foundation of separate governmental departments.[16]

Second, below a certain level of financial support, the judiciary may lose the ability to check the other branches of government effectively. In rare instances, the very existence of the judicial branch may become endangered, risking the complete collapse of the tripartite structure.[17] More commonly, dependence on the legislature for the means of operation may threaten the independence of the courts.[18] Judicial sensitivity to the appropriations problem might

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BAAR, *supra* note 6, at 155; J. CARRIGAN, INHERENT POWERS OF THE COURTS 2-3 (1973); *see also In re* Salaries for Probation Officers, 58 N.J. 422, 425, 278 A.2d 417, 418 (1971) ("But the doctrine of the separation of powers was never intended to create and certainly never did create, utterly exclusive spheres of competence. The compartmentalization of governmental powers among the executive, legislative and judicial branches has never been watertight.").

14. This aspect of the doctrine appears consistently in the statements of the Framers of the United States Constitution. *See, e.g.*, THE FEDERALIST No. 51 (J. Madison).

15. In *In re* Juvenile Director, 87 Wash. 2d 232, 552 P.2d 163 (1976), the Supreme Court of Washington described the "awkward position of courts in the governmental budgeting process":

> No authority rests in the judiciary to appropriate funds, as a legislative body does, nor to exercise the power of the veto as a bargaining device, as may the executive. In most states, its only means of direct participation in the budgeting process is by intervention, in the form of litigation, to compel the payment of funds for the court system.

87 Wash. 2d at 237, 552 P.2d at 166.

16. In Municipal Court Bloodgood, 137 Cal. App. 3d 29, 186 Cal. Rptr. 807 (1982), the state accounting office identified the following consequences of a new austerity budget on the courts:

(1) Consolidation of all municipal court districts;
(2) Virtual elimination of civil calendars;
(3) Elimination of small claims court cases;
(4) Cutbacks on the criminal misdemeanor calendar;
(5) The closure of 22 separate courthouses; and
(6) The resulting violation of several provisions of the Code of Civil Procedure, Penal Code, and Constitutional guarantees of due process.

137 Cal. App. 3d at 36-37, 186 Cal. Rptr. at 810. If an appropriations decision results in the "elimination of civil calendars," or identifiable violation of state law, fiscal pressure rather than legal judgment has decided the cases.

17. *See, e.g.*, notes 5 & 16 *supra*.

18. The risk was prominent among the concerns of the revolutionary generation. *See* THE FEDERALIST No. 51, at 348-49 (J. Madison) (J. Cooke ed. 1961):

> It is equally evident that the members of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the Legislature in this particular, their independence in every other would be merely nominal.

weaken the scrutiny applied to legislation of dubious constitutionality, or tempt the courts to favor the legislature over the executive in cases of inter-branch dispute.[19] Finally, even if the courts continue to function, at least nominally, and do not respond to any perceptions of legislative pressure, the judiciary may lose its ability to police the application of the law, thereby abrogating a judicial function to the executive.[20]

B. *Limits to the Inherent Power Analysis*

The tripartite structure of government established by the constitution provides a persuasive initial argument for the courts' current approach.[21] But two related objections disturb the case for judicial power to compel appropriation. First, and fundamentally, does not the assignment of appropriations power to the judges itself offend the separation of powers? Second, and unavoidably, what are the limits of this inherent power?

Modern courts do not discount this possibility. *See, e.g.,* Carlson v. State *ex rel.* Stodola, 247 Ind. 631, 633-34, 220 N.E.2d 532, 533-34 (1966):

> It is axiomatic that the courts must be independent and must not be subject to the whim of either the executive or legislative departments. The security of human rights and the safety of free institutions require freedom of action on the part of the court. Courts from time immemorial have been the refuge of those who have been aggrieved and oppressed by official and arbitrary actions under the guise of governmental authority. It is the protector of those oppressed by unwarranted official acts under the assumption of authority. Our sense of justice tells us that a court is not free if it is under financial pressure, whether it be from a city council or other legislative body, in the consideration of the rights of some individual who is affected by some alleged autocratic or unauthorized official action of such a body. One who controls the purse strings can control how tightly those purse strings are drawn, and the very existence of a dependent. Justice, as well as the security of human rights and the safety of free institutions requires freedom of action of courts in hearing cases of those aggrieved by official actions, to their injury.

See also Smith v. Miller, 153 Colo. 35, 40, 384 P.2d 738, 741 (1963) ("the courts must be independent, unfettered, and free from directives, influence, or interference from any extraneous source").

19. *See* note 18 *supra*. This effect may operate either directly, or more subtly, as chronic judicial dependence results in attracting those least distrustful of and most deferential to, the legislator.

20. The judges must pass upon search warrant requests, supervise the conduct of grand jury investigations, and conduct supression hearings. At a given extremity of fiscal pressure, these tasks are performed, if at all, in only a cursory fashion, leaving executive officials essentially free of judicial oversight.

21. A court might also ground an inherent power order on fourteenth amendment due process or its state constitutional counterpart, although no court appears to have taken this route. Superficial adjudication caused by underfunding might offend procedural due process standards by disposing of "life, liberty, or property" without a *meaningful* hearing. Alternatively, a court might deem access to a functioning judicial system an historically protected interest "fundamental" to the "concepts of ordered liberty," thus qualifying for substantive due process protections.

This argument largely duplicates the separation of powers claim. To fulfill its constitutional *function*, the courts must have sufficient funds to adjudicate the cases brought before them. At the point where the courts, due to fiscal pressure, cease deciding cases according to the reasoned elaboration of the law (the core of either due process claim), they have ceased also to be courts. *See* notes 25-28 *infra* and accompanying text.

To be sure, inherent power necessarily confers on the judiciary some of the legislature's appropriations power.[22] But the alternative permits the constitutional eclipse of the judicial branch. In resolving this dilemma, persuasive reasons justify favoring inherent power over limitless legislative discretion.

First, the relative constitutional risks support inherent power. An inadequate legislative appropriation risks the autonomy, and perhaps the functional existence, of the judicial department. By contrast, even a grossly excessive judicially ordered expenditure will do little to diminish the power of the legislature.[23] Increasing the judicial share of the local budget from, say, five to seven percent exerts relatively little impact on the appropriations power. Still less might such an increase threaten the autonomy or existence of the legislative or executive departments. But it may mean the difference between a court system that is capable of administering justice and one that is not.

Second, the institutional role of the judiciary offers two reasons to entrust it with inherent power. First, the judicial function is to declare the rights of the parties according to the law.[24] Judicial method resolves disputes not by weighing the returns to the judges, or by following individual intuition, but by exercising judgment derived from accepted value premises.[25] In the inherent power context, the issue is whether a particular appropriations statute offends the constitutional separation of powers. *Marbury* resolved this issue at

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22. This is neither surprising nor unprecedented:

> It is the imperfection of human institutions which gives rise to our notion of inherent power. It is simply impossible for a judge to do nothing but judge; a legislator to do nothing but legislate; a governor to do nothing but execute the laws. The proper exercise of each of these three great powers of government necessarily includes some ancillary inherent capacity to do things which are normally done by the other departments.

Wayne Circuit Judges v. Wayne County, 383 Mich. 10, 20-21, 172 N.W.2d 436, 440 (1969), *revd. on rehearing per curiam,* 386 Mich. 1, 190 N.W.2d 228 (1971), *cert. denied,* 405 U.S. 923 (1972).

The Supreme Court has not hesitated to compel legislative appropriations in other contexts when the Constitution so required. *See, e.g.,* Shapiro v. Thompson, 394 U.S. 618 (1969) (welfare residency test violates equal protection); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel for indigents in felony prosecutions).

23. *See* note 2 *supra* and accompanying text (courts consume small percentage of public resources).

24. This was the view of the Framers. *See* THE FEDERALIST No. 78 (A. Hamilton); Marbury v. Madison, 5 U.S. (1 Cranch) 49 (1803). This corresponds with the duties of the other branches: the legislature establishes subconstitutional law; the executive enforces it. The judiciary interprets and applies the law when litigants dispute its meaning in a particular case.

25. *See* C. PERELMAN, JUSTICE, LAW, AND ARGUMENT (1980); Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 517 (1981) ("Judicial review insures that the most fundamental issues of political morality will finally be set out and debated as issues of principle and not simply issues of political power, a transformation that cannot succeed, in any case not fully, within the legislature itself."). Even without any accepted connection between positive law and social values, judges will attempt to follow the law, if only to preserve their authority. *See* H. HART, THE CONCEPT OF LAW 142-43 (1962).

the dawn of the republic.[26] Insofar as "it is emphatically the province and duty of the judicial department to say what the law is," and insofar as the constitution is law, the responsibility for resolving the conflict between the statute and the constitution lies exclusively with the judiciary.[27] The virtues of judicial review may be arguable, but the institution's existence is now practically secure, and reserves to the judiciary the final authority for constitutional interpretation.[28]

But, it might be objected, a case in which the judicial branch has an important stake differs significantly from the ordinary case of judicial review. The objection is unfounded in light of the contemporary critique of judicial review in general.[29] Every case of judicial review directly involves the scope of judicial power. To point to inherent power cases as presenting a special issue of bias assumes that the temptation of power reaches its maximum force at the lowest ebb of power, that judges will more likely deviate from a fair interpretation of the constitution to secure a few dollars for probation officers than to constitutionalize passionate opinions about racial equality,[30] economic liberty,[31] or abortion.[32] In short, every constitutional case necessarily implies concomitant reduction or expansion in judicial power. The case for judicial review has prevailed despite this element of judicial interest in constitutional controversies. Judicial temptation does not distinguish the inherent powers situation.

Related to the normative method of judicial decisionmaking is the sheer political weakness of the courts:

> Whoever attentively considers the different departments of power must perceive, that in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the

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26. 5 U.S. (1 Cranch) 49 (1803).

27. "Insofar as constitutional interpretation and adjudication of controversies are concerned, it is for the judicial department to determine whether any department has exceeded its constitutional functions." Webster County Bd. of Supervisors v. Flattery, 268 N.W.2d 869, 873 (Iowa 1978).

28. Judicial review now rests not only on *Marbury*, or the arguments in THE FEDERALIST No. 78 (A. Hamilton), but "also on the visible, active, and long-continued acquiescence of Congress in the Court's performance of this function." C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 71 (1969). Whatever the status of federal-state relations, that same acquiesence characterizes the approach of most state legislatures to judicial review by state courts.

29. *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST at 63-69 (1980) (judges usurp majority power whenever they wield constitutional authority based on perceptions of "fundamental rights").

30. *Cf.* Brown v. Board of Educ., 347 U.S 483 (1954); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

31. *Cf.* Lochner v. New York, 198 U.S. 45 (1905).

32. *Cf.* Roe v. Wade, 410 U.S. 113 (1973); Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973).

> community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.[33]

From the perspective of *realpolitik*, the judiciary offers the safest repository for the extraordinary authority inherent in the choice between the powers to compel a legislative appropriation or cripple another branch of government. Moreover, only through the conferral of some such power can the judiciary gain a card to play in the effort to resolve a funding dispute without litigation.[34]

Finally, these institutional aspects of the judicial function will contribute to the responsible exercise of the inherent power. The courts' most critical resource is their perceived legitimacy, a legitimacy directly implicated by inherent power orders. The judiciary has every incentive to preserve its perceived legitimacy by invoking the inherent power doctrine only when constitutionally required.[35]

These institutional factors weigh heavily on behalf of resolving the inherent power dilemma in favor of the judiciary. But this does not justify the inference, drawn by too many courts, that the inherent power extends to the "reasonable" costs of court administration.[36]

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33. THE FEDERALIST No. 78, at 522-23 (A. Hamilton) (J. Cooke ed. 1961).

34. Judicial weakness also tends to deflect the argument that, even if the doctrine of inherent power does not usurp legislative authority, it may remove an important check on judicial power. *See* Comment, *State Court Assertion of Power to Determine and Demand its Own Budget*, 120 U. PA. L. REV. 1187, 1196 (1972). This argument assumes that judicial power is both dangerous and unchecked but for financial constraints. But, while all political power is dangerous, judicial power offers *less* of a risk than legislative power. Moreover, the selective process, whether elective, appointive, or mixed, offers an important check short of removal from office.

Finally, the notion that the risks of judicial power justify manipulation of the court budget is simply misconceived. The judiciary, unlike the executive, has no role in the budget process. *See* note 15 *supra*. Such a "check" against judicial activity, which can succeed only by bending judicial interpretation of the law closer to the desires of the legislature, contradicts the very nature of the judicial function. *See* notes 24-27 *supra* and accompanying text. Thus, in contrast to the appointment process, the budgetary check is an *illegitimate* check on judicial authority.

35. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) ("The Court's authority—possessed of neither the purse nor the sword — ultimately rests on sustained public confidence in its moral sanction.").

36. *See* O'Coin's, Inc. v. Treasurer of the County of Worcester, 362 Mass. 507, 510, 287 N.E.2d 608, 612 (1972) (inherent power protects courts "from impairment"); State *ex rel.* Weinstein v. St. Louis County, 451 S.W.2d 99, 102 (Mo. 1970) (per curiam) (Court has inherent power to hire "reasonably necessary" employees); Commonwealth *ex rel.* Carroll v. Tate, 44 Pa. 45, 57, 274 A.2d 193, 199 (Court must prove appropriation is " 'reasonably necessary' for its proper functioning and administration"), *cert. denied*, 402 U.S. 974 (1971); McAfee v. State *ex rel.* Stodola, 258 Ind. 677, 682, 284 N.E.2d 778, 782 (1972) (judges must limit their requests to those things reasonably necessary in the operation of their courts and to refrain

Any compelled appropriation in excess of the constitutionally required minimum offends the legislature's appropriations power, betraying rather than fulfilling the separation of powers concept which justifies inherent power in the first instance. This discussion implies, then, that a court invoking the inherent power must (a) link each aspect of its order to a constitutionally required judicial function, and (b) offer objective findings of fact and conclusions of law in support of the constitutional connection.

Many courts, of course, have expressed sensitivity to the limits of inherent power and the need for legitimacy in its application. Part II explores the current judicial approach to containing inherent power.

II. Judicial Treatment of the Inherent Power Doctrine

A. *The Burden of Proof Approach*

While the practical and theoretical problems created by the inherent power doctrine have not led most courts to reject it,[37] some courts have sought means to avert or mitigate these dangers. A few courts have imposed exhaustion of remedies requirements[38] or made approval of a superior authority within the court system a prerequisite to a funding order.[39] Many courts, however, have relied primarily on assigning the burden of proof, with varying evidentiary standards, to the court attempting to obtain the funds.[40]

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from any extravagant, arbitrary or unwarranted expenditures"). This standard reflects the predominant approach.

Unfortunately, the "reasonable necessity" standard divorces the scope of an inherent power order from the constitutional doctrine justifying judicial exercise of the spending power. Constitutional separation of power principles either require a specific expenditure or they do not. What the trial judge believes to be "reasonably necessary" to the effective functioning of his court bears no inherent relation to the requirements of the constitution. Similarly, "impairment" of a court's functioning is irrelevant because the prior, unimpaired functioning of the court may have been more or less than the constitution required.

It might be objected that no certain line is possible in defining the minimum constitutional level of judicial functioning. But judges draw this line implicitly each time they invoke the inherent power doctrine, for that doctrine can extend no further than the minimum constitutionally required judicial presence. *See* Leahey v. Farrell, 362 Pa. 52, 57, 66 A.2d 577, 579 (1949) ("Control of state *finances* rests with the legislature, subject only to constitutional limitations . . . .") (emphasis in original).

37. *See* note 8 *supra*.

38. *See* O'Coin's, Inc. v. Treasurer of the County of Worcester, 362 Mass. 507, 516, 287 N.E.2d 608, 615 (1972); State *ex rel.* Weinstein v. St. Louis County, 451 S.W.2d 99, 102 (Mo. 1970) (per curiam); *In re* Juvenile Director, 87 Wash. 2d 232, 250, 552 P.2d 163, 173 (1976).

39. *See* O'Coin's, Inc. v. Treasurer of the County of Worcester, 362 Mass. 507, 516, 287 N.E.2d 608, 615 (1972); Wayne Circuit Judges v. Wayne County, 386 Mich. 1, 9, 190 N.W.2d 228, 242 (1971), *cert. denied,* 405 U.S. 923 (1972); *see also* Burke, *The Inherent Powers of the Courts*, 57 Judicature 247 (1974) (a highly favorable analysis of the procedure in Massachusetts); Connors, *Inherent Power of the Courts — Management Tool or Rhetorical Weapon?*, 1 Just. Sys. J. 63 (1974) (favorable discussion of *O'Coin's*).

40. *See, e.g.,* Beckert v. Warren, 497 Pa. 137, 154-56, 439 A.2d 638, 647-48 (1981); Commonwealth *ex rel.* Carroll v. Tate, 442 Pa. 45, 55, 274 A.2d 193, 199, *cert. denied,* 402 U.S. 974 (1971); *In re* Juvenile Director, 87 Wash. 2d 232, 250-51, 552 P.2d 163, 173-74 (1976).

This allocation of the burden of proof arguably exerts an important restraining influence on the courts in several ways. First, a heavy burden of proof may discourage the exercise of inherent power in the first instance, limiting the doctrine's use to extreme cases of judicial necessity,[41] where the case for the doctrine is strongest and public understanding of the need to divert scarce funds is more easily achieved.[42] Second, allocating the burden to the courts tends to counteract the legislature's disadvantage of having to argue in a judicial, and possibly biased, forum.[43] The reviewing court need not weigh the relative merits of the cases of the legislature and the lower court, but can focus exclusively on whether the court exercising inherent power has met its burden of proof.[44] Third, the burden of proof approach offers the rhetorical advantage of presenting the public with a judicial claim upheld after resolving doubtful issues in favor of the legislature.[45]

B. *Defects in the Burden of Proof Approach*

Part I concluded that constitutional principles justify inherent power to compel appropriations, provided that a constitutional basis exists for each aspect of the order and that the court acts legitimately in reaching its decision.[46] The current burden of proof approach does little to further either criterion.

1. *Constitutional Basis*

Relying on the burden of proof to contain judicial power in the inherent power context obscures the fundamental question at issue in these cases, that is, what level of judicial functioning does the constitution require?[47] Instead of addressing this question directly, the courts' approach treats as a matter of evidence and proof what is ultimately a question of law.[48] Rarely will a geniune dispute exist as

41. *See In re* Juvenile Director, 87 Wash. 2d 232, 249-51, 552 P.2d 163, 173-74 (1976).

42. *See In re* Juvenile Director, 87 Wash. 2d at 251, 552 P.2d at 172.

43. *See* Beckert v. Warren, 497 Pa. 137, 155-56, 439 A.2d 638, 648 (1981).

44. *See* Beckert v. Warren, 497 Pa. 137, 155, 439 A.39 at 648.

45. *See In re* Juvenile Director, 87 Wash. 2d at 251-52, 552 P.2d at 174-75.

46. *See* note 36 *supra* and accompanying text.

47. The reluctance to face this question is understandable. The difficulty of drawing a clear line between constitutionally necessary and constitutionally unnecessary appropriations, however, is not diminished by side-stepping the issue. If anything, focusing on artificial analyses increases the likelihood of inaccurately resolving this central question by ensuring that the courts avoid seriously considering it. A failure to face squarely this question is merely an unprincipled way to resolve the issue — it does not succeed in making the issue go away. *See* note 36 *supra*.

48. The burden of proof means very little when the facts are not disputed. The court must then resolve the legal issue, however difficult, not with reference to a standard of proof, but according to its best understanding of the law. A difficult legal issue, for example, does not preclude summary judgment if the facts are not in issue. *See* Sagers v. Yellow Freight Sys.,

to what judicial services an additional fixed amount of money can buy.[49] Rather, the dispute turns on whether the undeniable increment of services attributable to the funding forced by court order is necessary to the constitutional functioning of the judicial branch.

If taken literally, the burden of proof requirement would amount to an entirely illusory limit on judicial power, for the factual consequences of a given level of appropriations are susceptible to objective, conclusive proof. Conversely, if reviewing courts translate the rhetorical force of the burden of proof standard into an implied judgment that the constitution approves minimal levels of judicial functioning, the inherent power doctrine may do very little to protect the autonomy of the courts. In short, the burden of proof approach bears no rational relation to the fundamental issue of whether or not specific appropriations are necessary to the minimum constitutionally permissible judicial presence.

2. *Legitimacy*

A close analysis of the burden of proof approach also reveals that it offers little in the way of legitimate decisionmaking. If the reviewing court in fact harbors a pro-judicial bias, this favoritism will express itself as easily in the conclusion that the lower court "met its burden" as in a finding that the lower court persuasively linked specific judicial functions threatened by low appropriation to the constitutional requirement of an independent judiciary. Indeed, couching the inquiry in terms clearly unrelated to the issue can, once understood, only contribute to the belief that the judiciary is exercising guile and not judgment.[50]

Given that the current focus on the burden of proof offers at best a misguided limit on the inherent power doctrine, Part III advances several procedures to improve the doctrine's practical application.

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529 F.2d 721, 728 n.13 (5th Cir. 1976). Thus, if both parties agreed that a given appropriation would not suffice to provide, say, a court stenographer, it would be unusual for a court to hold that the court below had introduced "clear and convincing proof" that stenographic records of judicial proceedings are essential to the constitutional functioning of the courts. Given its relative unimportance, the burden of proof in inherent power cases should rest with whatever party would otherwise bear it in an analogous civil case. Emphasizing this issue in inherent power cases serves only to divert attention from the underlying constitutional dispute.

49. None of the cases cited in note 8, *supra*, for example, involved any issue as to how the denial of the appropriations sought by the judiciary would affect the services offered by courts.

50. *Cf.* Westen, *The Meaning of Equality in Law, Science, Math, and Morals: A Reply*, 81 MICH. L. REV. 604, 661-63 (1983) (Constitutional analysis should address underlying value judgments, rather than speak in a rhetorical code).

III. Improved Approaches To Implementing the Inherent Power Doctrine

A. *Issuance of an Inherent Power Order*

Some jurisdictions have adopted common-sense procedures for the initial determination by a lower court that only an inherent power order can provide constitutionally necessary funds. First, exhaustion of established legislative procedures to obtain desired funds should precede any court order.[51] Second, the judge considering an order should obtain the written approval of the chief judge of his or her court,[52] who should inform both the legislature and the state supreme court of the possibility that an order may issue.[53] This procedure offers an initial check on the first judge's determination and informs the legislature specifically of the court's concern. Nor should such a procedure consume much time; excessive delays can do serious damage to the court system while an inherent power order waits in limbo.[54]

Once these preconditions to an order are fulfilled, and the initial judge resolves that an order remains necessary, the judge should issue the inherent power order. The order should set forth specific findings of fact, identifying the judicial functions that will be foregone absent specific increments of funding. The order should also include specific conclusions of law, indicating why each appropriation ordered is required, either independently or in combination with other aspects of the order, by the constitution.[55]

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51. This requirement now seems well accepted. *See* Annot., 59 A.L.R.3d 569, 586 (1974).

52. *See* O'Coin's, Inc. v. Treasurer of the County of Worcester, 362 Mass. 507, 516, 287 N.E.2d 608, 615 (1972).

53. The Michigan Supreme Court requires both notice and prior approval by the State Court Administrator before an inherent power order may issue. *See* Wayne Circuit Judges v. Wayne County, 386 Mich. 1, 9, 190 N.W.2d 228, 242 (1971), *cert. denied*, 405 U.S. 923 (1972).

54. *See* C. Baar, *supra* note 6, at 147 ("A plaintiff court may not seek enforcement of a money judgement [*sic*], since the appellate court decision may come so late in the fiscal year of the original suit that the award could not be expended before the beginning of a new fiscal year.").

55. Judge Adams adopted a similar approach in his separate opinion in *Wayne Judges*:

> I would use the inherent power of the courts only in those cases where it is essential to assure the continued existence or basic functioning of the courts. The test I would apply would be the ability of a court to operate as a court, not whether the court can operate more conveniently or expeditiously if it has some additional means to carry out its functions. For example, a court stenographer is essential for the proper functioning of a court of record. If one were not provided, a court of record under its inherent power could supply one and compel the payment of an adequate salary.
>
> I cannot agree, however, that the law clerks, probationary officers or a judicial assistant are so essential to the operation of the circuit court of Wayne county as to be a proper case for invoking the doctrine of inherent power of the courts. I agree that the courts would operate more efficiently if the judges were provided with law clerks, if the judges had adequate probation services, and if the court had a judicial assistant. In the case of probation officers, I would concede that the question is indeed a close one. But a line must be drawn and, as I have indicated, I would draw it narrowly. I am convinced that the courts will continue to function even if they are not provided with these services. The

One possibility for framing such an order, which deserves favorable consideration, is the appointment of a special master or referee to come to preliminary findings of fact.[56] The master should be approved by both parties and command professional expertise in the needs of judicial administration. Such an independent fact-finder should initially evaluate the consequences of granting or denying the desired funding. This would include an analysis of the court's workload and comparative efficiency. The fact-finder should also enter findings on how the court will compare, in specific judicial functions, with courts in other jurisdictions, on the alternative assumptions that the desired funds are or are not available.[57]

B. *Advantages of the Proposed Procedures*

1. *Constitutional Accuracy*

In contrast to current approaches, these procedures would focus the reviewing court's concern directly on the difficult question of what judicial functions are constitutionally indispensable. This would enable appellate courts to develop a body of case law articu-

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cost is not insignificant—at least $200,000 per year. Consequently, this case involves a direct confrontation between the inherent judicial power of the courts and the legislative power to make appropriations. One or the other must give. Under our theory of government, the legislature or a subordinate legislative body has the power to appropriate for all branches of government. Both the executive and judicial branches are required to present their fiscal needs to the legislative branch for consideration by that branch and allocation of available funds to all three branches of government based upon a legislative decision. This is the process that should be followed here.

383 Mich. 10, 43-44, 172 N.W.2d 436, 450 (1969) (Adams, J., concurring in part, dissenting in part), *revd. on rehg. per curiam,* 386 Mich. 1, 190 N.W.2d 228 (1971), *cert. denied,* 405 U.S. 923 (1972). Other judges might reasonably decide that a court cannot "operate as a court" without extensive research assistance. But only by casting the issue in these terms can such issues be thoughtfully addressed. Only such a forthright approach to the question of what funds the constitution requires can maintain the necessary link between the courts inherent power and the constitutional principles from which that power derives.

56. *See, e.g.,* CAL. CIV. PROC. CODE §§ 638-645.1 (West 1976 & Supp. 1983); N.Y. CIVIL PRAC. LAW §§ 4301, 4311-4321 (McKinney 1963 & Supp. 1982); FLA. R. CIV. P. 1.490.

57. An increasing body of analysis of judicial funding and court management has come into existence in recent years. Financing studies of the courts of several states have been made. *See* Hoffman, *Court Financing: An Overview and Assessment*, 7 JUST. SYS. J. 6 (1982). These studies can be used to compare the level of funding in other jurisdictions with the level of funding provided to the court invoking the inherent power; they can also be used to compare caseloads. Some attempts at developing techniques to measure workload are being made, *see* H. LAWSON & B. GLETNE, WORKLOAD MEASURES IN THE COURT (1980). A variety of other articles on the administrative management of state trial courts are available. *See, e.g.,* C. MANNING, JUDGESHIP CRITERIA: STANDARDS FOR EVALUATING THE NEED FOR ADDITIONAL JUDGESHIPS (1973); L. BERKSON, S. HAYS, & S. CARBON, MANAGING THE STATE COURTS (1977); H. LAWSON & B. GLETNE, FISCAL ADMINISTRATION IN STATE-FUNDED COURTS (1981); R. TOBIN, FINANCIAL MANAGEMENT (Trial Court Management Series 1979); R. TOBIN, PERSONNEL MANAGEMENT (Trial Court Management Series 1979). With reference to courthouse facilities, see INSTITUTE OF CONTINUING LEGAL EDUCATION, EMERGING TRENDS IN COURTHOUSE PLANNING, DESIGN, ADMINISTRATION, AND FUNDING (1975). The ABA Commission on Standards of Judicial Administration, STANDARDS RELATING TO TRIAL COURTS (1976), provides guidance on levels of trial court performance.

lating the minimum content of a constitutionally viable judicial branch. The difficulty of the enterprise does not counsel against undertaking it; appellate courts are uniquely qualified to render such constitutional judgments,[58] and judicial experience in other areas no less subtle or challenging confirms that workable standards are not impossible to formulate.[59] In any event, such an approach offers the best chance for preserving judicial autonomy with the least usurpation of legitimate legislative functions. In a world of imperfect institutions, achieving the best chance for the best outcome is not an inconsequential achievement.

2. *Legitimacy*

Delegating fact-finding responsibility to an impartial expert reduces the possibility of distorted decisionmaking due to judicial bias.[60] Such a procedure also enhances the legitimacy of the resulting review by forcing the court to confront the constitutional consequences of stipulated variations in judicial functioning. Surely addressing the real question, however difficult, reflects a deeper fidelity to the ideal of judicial method than the artificially confident resolution of an irrelevant question. By treating the issue as one of constitutional interpretation rather than of trial court discretion, appellate courts will not only cast the controversy in the terms of its ultimate issues; they will also confirm that the inherent power controversy calls for the kind of judgments they alone are most qualified to make.

CONCLUSION

Legislative power over appropriations can threaten the institutional autonomy of the judicial branch. This possibility fully justifies a limited grant of inherent power to the courts, based on the constitutional provision for an independent judiciary. Consistent recognition that this power extends no further than the constitutional mandate which justifies it, and that the same principle of separation of powers is affirmatively offended by a further extension of judicial appropriations power, can ensure the principled and effective imple-

58. *See* note 27 *supra*.

59. The courts must draw many such lines in the course of constitutional adjudication. When a court-appointed attorney fails to provide an indigent defendant *effective* assistance of counsel; when a government interest becomes "compelling"; or when a government classification becomes suspect, do not present fundamentally easier questions. But society charges the judges to do the best they can with such issues, in light of judgment and experience, rather than leaving such controversies to political resolution because of their moral difficulty. *See* Dworkin, *supra* note 25, at 516-18.

60. A master's report will, typically, be subject to the objections of the parties, which the court must then resolve. But obtaining an independent assessment in the first instance minimizes the chance that the courts will exaggerate their needs.

mentation of the doctrine. The failure to recognize this limit by continuing to disguise the ultimate issue can only erode both the constitutional system of separation of powers and the public's respect for judicial legitimacy.