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The Challenge of Funding State Courts in Tough Fiscal Times

Michael L. Buenger

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

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

It has been described as the worst state fiscal crisis since the end of World War II, with officials from across the country likening it to a “perfect storm,” “the Incredible Hulk of budget deficits,” and a “problem of historic proportions.”³ Beginning in 2001, almost every state experienced a deep fiscal crisis that placed funding of critical services in jeopardy and rendered many previously hallowed programs subject to draconian cuts, if not outright elimination. The fiscal crisis was particularly traumatic for court systems receiving all or a significant portion of their funding directly from state governments.

In response to the fiscal crisis, courts curtailed operating hours, laid off employees, closed courthouses, eliminated funding for education programs, curtailed technology development, and abolished what were once thought to be inviolate, even sacrosanct programs.⁴ In some cases, state courts turned to local governments—who were facing their own budgetary problems⁵—in an effort to “backfill” the reduction in state funds. In recent years, as state governments have replaced traditional local funding with state funding, the fate of the courts has become closely tied to the fiscal and political well-being of the state. Courts are being forced to compete for funding against more politically popular state services, such as education and public safety, or against seemingly out of control mandatory expenses, such as health care—often without much success.

It would be easy to chalk the current fiscal crisis in the courts purely to state financing problems. Yet the financial crisis facing many state judiciaries is not simply a problem of cash flow or reduced revenues, and to paint it as such puts a far too simplistic spin on the matter. To be sure, a significant part of the crisis is rooted in economic factors. But to understand the true breadth of the problem, one must take account of the political factors affecting state court budgets.

The crisis is defined by considerations that reflect not only money, but also the expanding influence of state judiciaries, offsetting concerns in some circles with “judicial activism,” and a seemingly growing and fundamental misunderstanding regarding the status and role of the courts in governing the nation.

Donald L. Horowitz aptly described the current environment, which contrasts sharply with practices in England:

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

Footnotes

1. THE FEDERALIST No. 78 (Alexander Hamilton).
2. Kateri Walsh, Oregon State Bar Ass’n, *quoted in, Courts’ Cash Crunch*, April 2003 ABA JOURNAL at 17 (April 2003).
3. Jason White, *Govs Scramble for Soundbites to Decry Budget Crisis—Red-Ink Blues*, Montana Associated Technology Roundtables, available at <http://www.matr.net/article-6290.html> (last visited October 4, 2004).
4. The Oregon judiciary was arguably the most seriously affected and was required to furlough employees and implement a delay and no action plan for several case types. The Missouri judiciary lost upward of 60% of its judicial education budget and 54% of its general revenue funding for court technologies.
5. In *Pennington County v. South Dakota Unified Judicial System*, 641

N.W.2d 127 (S.D., 2002), the county sued the state arguing that a state law mandating that counties provide free space to the “court” did not extend to related programs such as the court’s probation office. The county sought to relocate that office and charge the state rent in an effort to recoup some of the costs associated with providing state courts space in county courthouses. The county lost on appeal with the state supreme court determining that where the state commands a county to provide space for a court and its operations, the county, as a political subdivision of the state, cannot contest that command in a suit against the state. Although this case did not arise in the context of cost shifting in reaction to the fiscal crisis, it does portray the ever-present tension that now exists between local and state funding obligations for the courts.

greater responsibility for making public policy than the courts of the United States.⁶

Today, perhaps more so than at another time in the nation's history, the courts are involved in policy making on such a broad range of matters that conflict with the other branches of government is inevitable and can involve budgetary considerations.

A. THE STATE FUNDING DILEMMA

A state budget is, in the truest sense, a statement of public policy more than a simple allocation of money for programs. The creation of a state budget is a continuing exercise of balancing competing public demands filtered not through logical legal principles, but through the eyes of national, regional, state, and local politics. It reflects shifting program priorities, regional concerns, economic considerations, local desires, and competing political philosophies. As such, a state budget can shift wildly from year to year, producing a “fits-and-starts” approach to public policy development as evidenced by the complete elimination of a program one year and its complete resurrection the following year. To mimic the historian Barbara Tuchman, who once observed that history is formed by personality, for good or ill a state budget is formed by those in power to form it. Thus, it reflects not only overarching policy considerations but also the personal priorities of each legislator and the governor. It is important, therefore, to appreciate that unlike a court case ensconced with procedures and restraints that seek to objectify the decisional process, no such restraints exist in the legislative process. The construction of a state budget is very much an exercise in personality, politics, and policy.

Economically, the late 1990s saw an explosion in state revenues with a corresponding explosion in state spending. According to the National Conference of State Legislators, state spending from 1991 to 2001 grew 88%, or an average of 6.57% annually, largely in response to increased revenues.⁷ During this time, Medicaid expenditures increased 149%, education 90%, corrections 99%, and other health and welfare costs 39%.⁸ There appeared to be little appreciation that the bubble would eventually bust because the “new economy” had put an end to inflation, deflation, and all other aspects of the economic cycle.

Of course, that belief ended with shocking swiftness beginning in late 2000. State governments were faced with the

results of overextending state budgets in the late 1990s and shifting federal spending mandates. Health care and education costs, largely formula driven, were growing at a rate far in excess of the ability of states to generate the revenue to cover them. Tough sentencing policies led to ever increasing corrections costs in response to the expanding inmate population. As result, today the five largest functional areas of most state budgets are generally education, Medicaid, corrections, health and mental health, and social support programs, in some cases consuming as much as 85% of a state budget.⁹

Much of the spending was mandated by the federal government or the result of policy decisions given little long-term fiscal consideration when adopted. Consequently, states were left with relatively little money to actually “run” the remainder of state government, including the courts. As the mandated expenses continued to outpace revenue growth, budget writers looked to the remainder of state government—generally viewed as discretionary obligations—to fill the gaps, causing further reductions in funding for “needed” but not “necessary” programs.

In Missouri, for example, the amount of money spent on the judiciary as a percentage of overall state spending has decreased over the last 20 years, notwithstanding an increase in real dollars spent.¹⁰ The increase in real dollars generally reflects a shift to state funding for programs and personnel historically paid by the counties. Little money has been made available to underwrite new programs or expand existing programs. From an economics perspective, this is important history because while some states faced declining revenues in the 2001-2003 period, the greater culprit was out-of-control mandatory spending that far outpaced the ability (or willingness) of state legislatures to generate needed money.

The impact on the courts was noticeable. In Oregon, one of the most seriously hit of the states, the courts closed one day per week, furloughed employees, and implemented a “delay and no action” policy on processing certain types of cases.¹¹

Today, . . . the courts are involved in policy making on such a broad range of matters that conflict with the other branches of government is inevitable

6. DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 3 (1977).

7. Ronald K. Snell, Corina Eckl, & Graham Williams, *State Spending in the 1990s*, National Conference of State Legislators (July 14, 2003), available at <http://www.ncsl.org/programs/fiscal/stspend90s.htm> (last visited October 4, 2004).

8. *Id.* For example, overall Medicaid expenditures for Utah increased from approximately \$600 million in FY 1996 to almost \$1.5 billion in FY 2005. See State of Utah Budget Summary, FY 2005, available at <http://www.governor.state.ut.us/gopb/fy2005budgetsummary.pdf> (last visited October 4, 2004).

9. Under Ohio's biennium FY2004 – FY2005 budget, education (elementary, secondary and higher), Medicaid, other health and human services, public safety (not including judiciary), and tax relief consume 96.7% of the general revenue fund.

10. For example, in FY 1983 Missouri spent 1.8% of the state general

revenue fund on court operations. In FY 2004, the state will spend 1.65% of the general revenue fund on the judiciary, notwithstanding an almost \$120 million increase in the judiciary's budget over 20 years.

11. See generally American Bar Ass'n, *State Court Funding Crisis, Selected State and Local Resources: Oregon*, available at http://www.abanet.org/jd/court/funding/resources_statelocal3.htm l#38 (last visited October 4, 2004). The Oregon Supreme Court in response to drastic budget cuts closed all appellate, tax, and circuit courts on Fridays from March 1 to June 30, 2003, and cut staff hours by 10%. In addition, in some areas of the state the courts stopped hearing a wide range of cases including small claims, nonperson misdemeanors, violations, probate, many civil cases and non-person felony cases.

In an effort to create revenue without raising taxes, state legislatures turned to court cases as fee-generation tools.

California faced cutting almost \$200 million from its judiciary budget, forcing early retirements, reducing full-time jobs to three-quarter time, limiting night court, and closing courtrooms.¹² Missouri faced a possible 15% across-the-board reduction that would have closed courthouses and eliminated as many as one in every four non-statutory employees.¹³ And Florida's chief

justice spoke of drastic cuts in court personnel and operations, and called upon the state bar to lobby the legislature on behalf of adequate funding for the judiciary.¹⁴

The problem with managing judicial budgets during this period was exacerbated by the fact that so much of a state's courts budget is heavily laden with personnel costs. With a few exceptions, most states split court funding obligations between state and county governments, with the former covering the bulk of personnel costs and the latter covering the bulk of operational costs. What this has meant in the main is that cuts to state judicial budgets frequently result in staff reductions, particularly at the trial court level, which tends to be the bulk of the budget.¹⁵ Adding to the difficulty is that a significant dollar portion of the personnel costs in a state's courts budget are judicial and other statutory salaries not subject to reduction. Thus, where a 5% across-the-board reduction in an executive department's budget may be absorbed through operational restructuring or pro-rata staff reductions, a like cut to the judiciary's budget can result in significant staff reductions.

In an effort to create revenue without raising taxes, state legislatures turned to court cases as fee-generation tools. Groups impacted by the budget crisis likewise lobbied state legislatures to impose new fees on court cases to fund particular and special programs—many of which have nothing to do with the administration of justice much less underwriting the costs of the courts. During the 2004 legislative session, for

example, the Missouri General Assembly introduced bills that would have increased court fees to fund a law enforcement officers' annuity, promote child advocacy centers, institute gang resistance education, underwrite sheriffs' prisoner costs, and expand DNA laboratories. Although not all of these fees passed, the aggregate increase could have added as much as \$50 to certain court cases.

The confluence of these economic factors forces a singularly important question: How does the state judiciary (at all levels) maintain access to the courts and its decisional independence when its evolving institutional independence is now so tied to resources that are in competition with the politics and spending priorities of the legislative and executive branches of government? The spending cuts and fee increases for justice services leave one wondering whether the judiciary and justice system are no longer viewed as a general obligation of government, but rather as just another fee-based operation, open primarily to those who can afford the service.

B. A CHANGING PARADIGM?

Even before the current fiscal crisis, courts around the nation struggled to obtain the resources needed to maintain operations and underwrite the costs of ever-expanding programs. Thus, funding problems for courts are not new. As far back as 1838, one court was forced to exercise inherent power to compel the expenditure of funds for judicial operations related to the case determination.¹⁶ The present crisis, therefore, simply underscores what many court officials have known for years: funding of the judiciary has always been a tenuous adventure. In recent years, however, the number and intensity of court funding disputes has seemingly increased, forced by the dramatic increase in the judiciary's responsibilities, its exploding caseloads, the reach of its decisions, and the costs associated with running large state judicial systems. Unlike early funding disputes, today's disputes center more on the institutional needs of the judiciary rather than the resources needed to resolve a particular case.

For much of the nation's history courts—be they federal or state—enjoyed only limited institutional status or influence as

12. See generally American Bar Ass'n, State Court Funding Crisis, Selected State and Local Resources: California, available at http://www.abanet.org/jd/courtfunding/resources_statelocal3.htm#38 (last visited October 4, 2004). See also *State Budget Woes Hit Courts Hard*, April 2003 CALIF. B. J. at 1.

13. *Budget Cuts Could Delay Court Cases*, COLUMBIA (MO.) DAILY TRIBUNE, April 22, 2003.

14. *Florida Not Alone in Funding Woes*, TALLAHASSEE (FLA.) DEMOCRAT, April 30, 2003. See also New Hampshire Bar Ass'n, State Budget Plan to Further Cut Court Services (May 2, 2003). In Alabama, jury trials were temporarily suspended in 2002 due to lack of funds, although emergency funds were made available to resume trials. In Massachusetts, the judicial branch experienced a \$40 million deficit in 2002, with additional cuts anticipated in 2003. The courts have lost over 1,000 employees through attrition and layoffs. In Kansas, budget cuts forced the Supreme Court to take the unusual step under its inherent authority of imposing a \$5 emergency surcharge on all case filings. See American Bar Ass'n, Summary of Issues and ABA Policies, State Court Funding Crisis

at <http://www.abanet.org/jd/courtfunding/issues.html> (last visited October 4, 2004).

15. For example, over 70% of Missouri's state judicial budget is for funding personnel in the circuit courts. Less than 10% of the overall budget is dedicated to operations.

16. For example, in *Commissioners v. Hall*, 7 Watts 290, 291 (Pa. 1838), a Pennsylvania court held, "When a deficiency of public accommodation induces an expenditure, it must be at the public charge, for it is as much a part of the contingent expenses of the court, as is the price of the fire wood and candles consumed in the court room." See also *County Comm'rs of Allegany Co. v. County Comm'rs of Howard Co.*, 57 Md. 393 (1882) (county from which prisoner came is required to pay costs related to the jury); *Stowell v. Jackson Co. Sup'rs.*, 57 Mich. 31, 34 (1885) (in criminal cases the power of the court to keep prisoner in custody binds the county to pay for the maintenance); *Carpenter v. County of Dane*, 9 Wis. 274 (1859) (in meritorious cases court has obligation to appoint counsel and county has obligation to pay).

a separate branch of government. The modern concept of the judiciary's institutional independence, which now embraces broad, self-governing authority, is a relatively new development resulting from a long, evolutionary process.¹⁷ This fact is exhibited by the lack of any institutional structure provided by early state constitutions or even the federal constitution. In many states, like the federal government, the institutional structure and status of the courts was a function of the legislature, not a direct product of a constitution. This was particularly true with regards to the internal management and governance of the courts.

This began changing in the latter half of the twentieth century as state judiciaries emerged with a more robust institutional identity. At the state level, the evolving institutional independence of the courts is evidenced in the language of many "modern" judicial articles. Unlike the federal Constitution and many early state constitutions, which anchored much of the judiciary's institutional structure in the legislature, modern state constitutions now generally place this responsibility directly in the judiciary or in extra-legislative bodies. The revision of judicial articles over the last 50 years illustrates the shift from relying on the legislature for the institutional structure and authority of courts toward anchoring such matters directly in the constitution and the judiciary itself. For example, in many states, the legislature no longer controls such critical matters as creating trial courts, establishing jurisdiction and venue, controlling the selection and removal of judges, or even setting salaries. Arguably, over the last half-century, the power of the legislature to control the fundamental structure of courts has greatly diminished while the "institutional" influence of the judiciary has grown, both constitutionally and socially. The development of modern judicial institutions and the evolving role of the judiciary in governing American society provide ample opportunity for conflicts with those holding more traditionally focused beliefs concerning the role of courts.

As a result of structural changes—not only in governance but also in the growing influence of courts and the explosion of programs directly under the judiciary's control—state courts have attained an institutional standing not previously enjoyed or recognized by the coordinate branches of government. This growing "institutionalizing" of the courts, combined with the complexity and costs of running large judicial systems, have arguably altered traditional relationships within the judiciary and between the courts and the coordinate branches.

The role of state courts is no longer limited to adjudication. Essential to the modern judiciary is providing a wide range of

services that result from the act of judgment, but also sit apart from that act at an operational and budgetary level. Beginning in the 1950s and accelerating through the 1960s, courts have been confronted with a wide range of new legal remedies for which little if any "judge made" law has existed.¹⁸ Taken singularly, the actions of courts in these areas represent no great departure from the traditional notion of judges and courts deciding cases. However, taken in their totality, these emerging areas of specialty law have radically reshaped the exercise of judicial power, the breadth of its application beyond the confines of a single case, and have, arguably, compelled a departure from more traditional judicial functions. This has created a climate ripe for conflicts over the breadth and limits of the judiciary's institutional independence and its funding needs. The centralization of authority and superintending power in state supreme courts has complicated the matter, in that a single controversial decision can impact the entire judiciary's state-funded budget, not just that of the court issuing the decision.

Thus, the current debate on judicial independence and court funding has little to do with historical considerations from the 18th century and more to do with the expanding role of courts in governing American society today. In short, it has never been entirely clear where the divide lies between the exercise of judicial power by independent courts and the authority of the coordinate branches to both define and contain that independence, through substantive law and budgetary manipulation. Rather, the divide has been a function of ebb and flow, depending in large measure on the cultural and political environment of the particular age in which the exercise of such power took place. The current age is no different, though arguably more complicated given today's pressing public policy issues. One cannot underestimate the significance of fundamental differences on the emerging role of the courts as a factor impacting the funding debate.

Additionally, while courts may see themselves as the weakest of the branches of government, others may tend to view modern courts as possessing extraordinary power due in large measure to the zero-sum nature of the judicial process. Where

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17. During the Constitution Convention, for example, James Madison appealed for the creation of a separate federal judiciary arguing, "[I]n Rhode Island the Judges who refused to execute an unconstitutional law were displaced, and others substituted, by the Legislatures who would be willing instruments of the wicked and arbitrary plans of their masters." RECORDS OF THE FEDERAL CONVENTION OF 1787. See also Notes of Rufus King in the Federal Convention of 1787 (June 4, 1787) available at <http://www.yale.edu/lawweb/avalon/const/king.htm#june4> (last visited October 4, 2004). Thomas Jefferson complained that the

legislature's assumption of executive and judicial powers rendered no opposition to "173 despots" who "would surely be as oppressive as one." Thomas Jefferson, Notes on the State of Virginia, Query XIII at 4 (1782), available at <http://www.yale.edu/lawweb/avalon/jeffvir.htm> (last visited October 4, 2004).

18. For example, there is no long jurisprudential history for housing law, welfare law, environmental law, natural resource management, school desegregation, or medical ethics.

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the political branches must negotiate solutions through a consensus building exercise largely defined by democratic principles, the judicial process forces courts to render “final judgments” in disputed cases; in effect, to declare winners and losers ostensibly without the nuance of politics.

The judicial process inevitably leads to perceived winners and losers. The typical

question before a judge is whether one party has a right and the other party a duty, with the court generally rendering a decision supported by predefined legal principles on disputed issues of fact or law. While one may contest this proposition, arguing that court decisions are decidedly an exercise in balancing interests, the judicial process encourages—indeed demands—that courts resolve disputes, including those implicating public policy, on the narrowest of grounds and with a much higher degree of finality than the legislative process allows. By contrast, the typical questions confronting a legislature or executive bureaucracy are what is the better public policy and what are the full breadth of alternatives available to resolve a problem. Narrow principles of legal analysis have little value in this context. Thus, where Americans generally look to the legislative process to protect broad public interests (a function of negotiation and compromise), they generally look to the judicial process to protect private interests (a function of declaration and finality). These starkly different ways of defining and resolving public policy problems necessarily impact the internal workings and cultures of three branches of government. Individual court decisions with broad public impact, consequently, can be seen as providing policy direction that is out of touch with the political world and its underlying democratic values, not to mention overarching budgetary considerations.

C. IS THERE AN APPROPRIATE RESPONSE?

In difficult budget times, courts may be tempted to rest on a belief that the legislature has an unbounded obligation to provide the resources reasonably necessary for the efficient administration of justice through the separate, coequal judicial branch of government. While it is true that the legislature has an obligation to fund the courts at an appropriate level,¹⁹ practically achieving this goal is an entirely different matter. Courts have no formal role in the budget process. The idea of courts “ordering” the expenditure of public funds for their own operations—as if rendering a final judgment—is at odds with the give and take of the legislative process, whose primary actors

balance, sometimes inequitably, competing and amorphous interests in shaping public policy through the budget.²⁰

Therefore, while courts may be tempted to exercise inherent powers to compel needed funding, the long-term consequences to such an action can be significant. As the Washington Supreme Court observed, “By its nature, litigation based on inherent judicial power to finance its own functions ignores the political allocation of available monetary resources by representatives of the people elected in a carefully monitored process.”²¹ The unreasoned assertion of inherent power by the judiciary to demand funding can be a threat to the image of and public support for the courts. Such actions may threaten, rather than strengthen, judicial independence, by conveying an image of courts that comports more with political power plays and not the exercise of reasoned judgment. The legislature and other groups whose interests are adversely affected by such court action can legitimately respond with political sanctions, including threats of impeachment, tighter control over judicial selection, and opposition to the individuals who initiate budgetary intervention. The exercise of inherent power in the context of a budget fight should always be viewed as a weapon of last resort. Alternative, less drastic, and more permanent solutions to problems of court finance must be pursued.

First and foremost, courts are public institutions and should, therefore, see themselves as accountable to the public for the use of its resources. There has been a tendency in some quarters to wrap judicial administration and funding in a mantle of independence that is more appropriately directed to insulating individual judges and insulating individual judgment. Without a doubt, the hallmark of the American justice system has been the individual and impartial act of judgment—judgment generally free from the influence of unwarranted political coercion and intervention from the other branches of government. Yet the individual independence that judges enjoy cannot be a mechanism for holding the institution of the judiciary unaccountable for its use of resources. To the extent that the institution strives to set itself apart from considerations for accountability, it invites higher scrutiny and great intrusion. “Credibility grows when judicial budget priorities are consistent from year to year, when courts take steps to measure and report on their management performance, when courts demonstrate sound fiscal management over time, and when the judiciary routinely demonstrates how individual courts and programs have used resources wisely and in accordance with sound fiscal practices.”²² In short, courts must see themselves as institutionally accountable to the public if they reasonably expect to compete for scarce public dollars in an increasingly competitive environment.

Second, there certainly has been serious erosion in the public’s understanding of the role of courts, a lack of understanding that spills into the appropriations process. Legislators who

19. The current standard in many states for the exercise of “inherent power” to compel funding is “reasonably necessary.” See, e.g., *State ex rel. Wilke, Judge v. Hamilton County Bd. of Comm’rs*, 734 N.E.2d 811 (Ohio 2000).

20. As observed in *In re Salary of Juvenile Director*, 552 P.2d 163, 173 (Wash. 1976), “The judiciary is isolated from the opinion gather-

ing techniques of public hearings as well as removed from politically sensitive, proportionately elected representatives.”

21. *Id.* at 172.

22. Conference of State Court Administrators, *State Judicial Branch Budgets in Times of Fiscal Crisis*, 19 COURT MANAGER 27, 28 (2004).

describe courts as mere “agencies” of government or who perpetuate disrespect for the judiciary only exacerbate difficult funding decisions. There is a need for the judiciary to become more engaged in the education of the legislature and the citizenry. People fear what they do not understand and few people understand the courts. Courts play an active role in governing the nation, not simply resolving its disputes. The public needs to understand this role, and courts have an affirmative obligation through appropriate outreach to increase this understanding.

Finally, much as been made of finding alternative funding mechanisms for the judiciary to wean its dependence on state general revenues and provide greater insulation from potential budgetary blackmail. Such mechanisms should be discussed and explored, whether they involve a dedicated tax base, percentage set-asides, or mandated spending levels. In exploring alternative funding mechanisms, however, courts must be careful not to contribute to a “theme park” mentality whereby both access to and funding of the courts becomes overly dependent on fees. James Madison once observed, “Justice is the end of government. It is the end of civil society. It ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit.”²³ As the “end of government,” the justice system and the courts must be viewed as a general obligation of government, indeed one of its most fundamental obligations. When legislatures and the courts themselves turn to fee-based structures to replace general funding obligations, the image of courts as a cornerstone of democratic government is substantially eroded.

Funding of the state judiciary has always been a tenuous activity and is even more so today. There are many and varied reasons for the funding challenges state judiciaries face, some of which are beyond the control of courts and some of which are clearly the results of judicial action or inaction. In today’s world, courts must balance the interests of individual judgment with institutional standing; in effect, to preserve a long and fruitful heritage of individual and impartial judgment at a time when institutional concerns are of growing importance. It is important to appreciate that political complaints today about the judiciary are not wrapped in the language of an individual judge, but rather in language of “the courts.” Only by preserving the individual act of judgment within the emerging institutional status of the judiciary can courts can preserve their important role in governance.



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23. THE FEDERALIST No. 51 (James Madison).

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