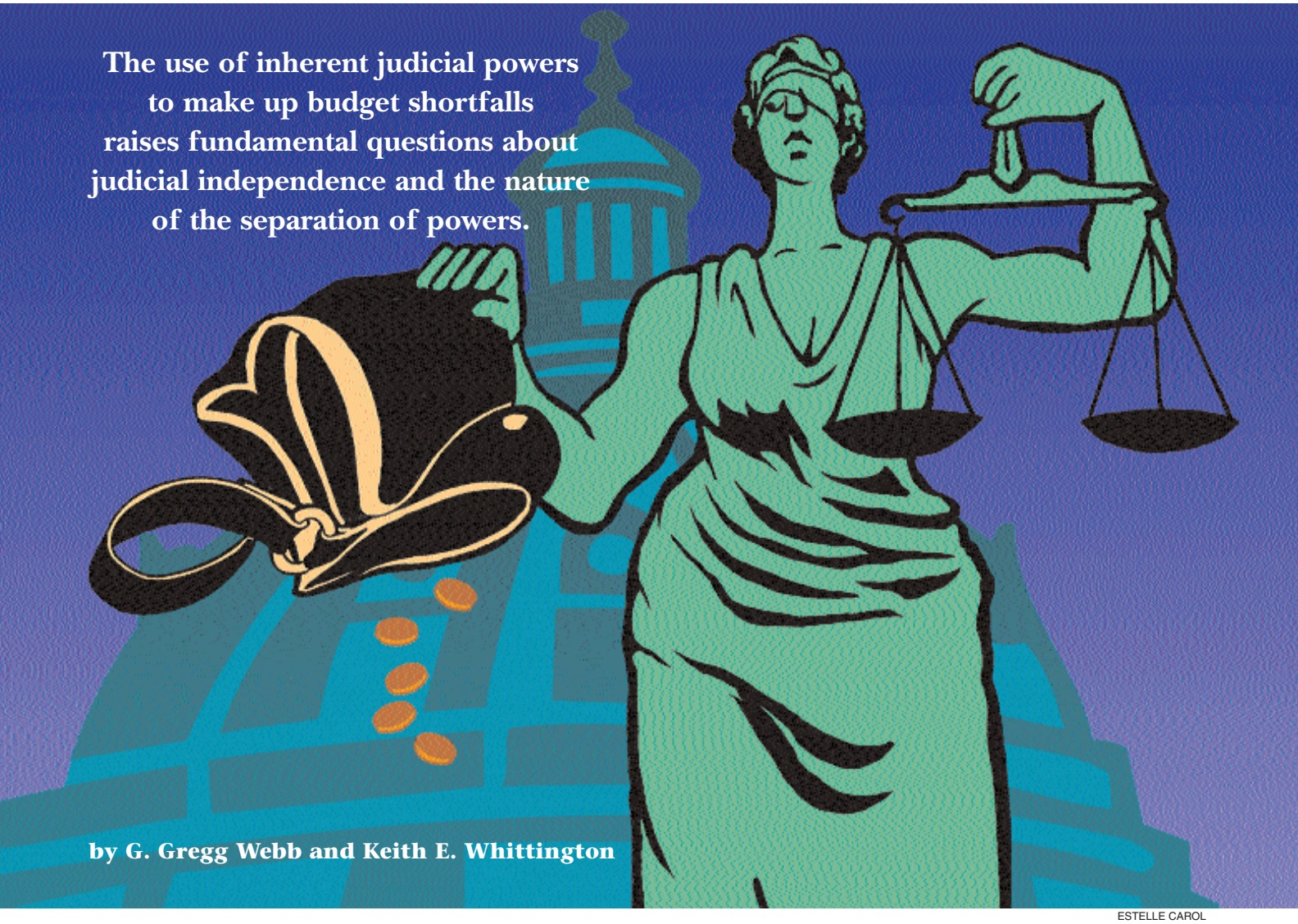
JUDICIAL INDEPENDENCE, the power of the PURSE, and inherent JUDICIAL POWERS



The use of inherent judicial powers to make up budget shortfalls raises fundamental questions about judicial independence and the nature of the separation of powers.

by G. Gregg Webb and Keith E. Whittington

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On March 14, 2002, Chief Justice Kay McFarland of the Kansas Supreme Court ordered an across-the-board increase in court fees in the state.

Money lies at the root of many conflicts between the branches of government. It is at the heart of many policy disputes—as different interests, political parties, and government officials stake out divergent priorities in the raising and spending of public funds—and creates substantial institutional tensions within any system of separated powers. In such systems, the legislature rightfully holds the "power of the purse," given the intimate connection between effective democratic representation and control over government taxation and spending. Indeed, the mother of all legislatures, the British Parliament, largely came into existence in order to expand and legitimate the flow of revenue into government coffers.

As the very example of the birth and growth of Parliament indicates, however, control over the treasury is a powerful political weapon that can be used against other government institutions. In controlling the purse strings, the legislature can reward or punish members of the executive and judicial branches, depending on how they conduct their offices. As James Madison noted in explaining the operation of constitutional checks and balances, "the legislative department alone has access to the pockets of the people."[1]

An effective power of the purse gives the legislature a powerful trump card when disagreements arise between it and the other branches of government, one that is so potent that it can threaten judicial independence. To limit this threat, the American founders wrote into the U.S. Constitution the guarantee that salaries of judges shall not be diminished during their time in office. (Although such a guarantee is common in American state constitutions and endorsed by the United Nations, worldwide it is one of the least-used constitutional provisions for securing judicial independence.[2]) Though important to preserving the independence of individual judges to make controversial decisions, the guarantee of undiminished salaries remains fairly marginal to the central conflicts between courts and legislatures over money and the ability of the judiciary to serve as an effective and independent branch of government. In extreme cases, judges may be denied such basics as an office, an adequate supply of paper, and an up-to-date compendium of statutes.[3] Fortunately, American judges are rarely faced with such deprivation, but the adequacy of resources provided by legislatures to handle judicial business continues to be a contentious issue—especially in the states.

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1. THE FEDERALIST NO. 48, at 310 (James Madison) (Clinton Rossiter, ed., New York: New American Library, 1961).

2. Linda Camp Keith, *Judicial independence and human rights protection around the world*, 85 JUDICATURE 195, 198 (2002).

3. *See, e.g.*, Jennifer A. Widner, BUILDING THE RULE OF LAW 68, 217, 219 (New York: W.W. Norton, 2001).

A new challenge is emerging in this recurrent struggle between legislatures and judiciaries over resources. During the past three decades, administrative and budget authority over state judicial systems have been concentrated in state supreme courts. As a consequence, tough budgeting decisions increasingly invite direct confrontations between the heads of the legislative and judicial branches of state governments. The possibility of a constitutional standoff now looms in the states as centralized judicial administrations combine their institutional muscle with the doctrine of inherent judicial powers to secure their own funding when state legislatures are either unable or unwilling to authorize adequate appropriations. This convergence of contemporary bureaucratic and fiscal reality with fundamental constitutional principle threatens to dilute traditional notions of the legislative power of the purse.

Kansas has recently provided a glimpse of this possibility. On March 14, 2002, Chief Justice Kay McFarland of the Kansas Supreme Court ordered an across-the-board increase in court fees in the state. This "emergency surcharge" was aimed at making up a $3.5 million shortfall in the judiciary's fiscal year 2003 budget, which was itself dwarfed by the state's broader projected deficit of $680 million for that fiscal year. The supreme court order establishing the surcharge relied upon the judiciary's "inherent power to do that which is necessary to enable it to perform its mandated duties." In an accompanying press release, Chief Justice McFarland explained that, "while there are things the people of Kansas may have to give up in these trying fiscal times, justice cannot and must not be one of them."[4]

This innovative use of inherent judicial powers raises fundamental questions about judicial independence and the nature of the separation of powers. This article examines how states reached this point and raises some questions about the path ahead. It begins by reviewing the doctrine of inherent judicial power, its development over time, and its connection with the centralization of judicial administration. It then takes a closer look at events in Kansas and the broader constitutional questions they raised. It closes with some cautionary notes on the use of such tools to improve the conditions of the judicial branch.

The expanding doctrine

The doctrine of inherent judicial power licenses the courts to take necessary actions to fulfill their constitutional functions, even when those actions are not specifically authorized by either constitutional text or legislative statute. Inherent judicial power operates as an implicit "necessary and proper" clause to the establishment of the judiciary as an independent and equal branch of government. In its most minimal guise, the doctrine empowers judges to control and manage their own courtrooms—for example, by punishing contempt of court, excluding photographers from the courtroom, or appointing counsel for criminal defendants. In its more muscular form, the doctrine authorizes judges to protect themselves and their functions from the neglect or interference of the other branches of government. It thus operates both as an implication and guarantor of judicial independence.

It is in this more muscular form, as a positive safeguard of judicial independence, that the inherent power doctrine has been extended to budgetary matters. This budgetary power developed, however, from relatively modest efforts at courtroom management. When a trial judge ordered that a jury be sequestered during a murder trial and the county commissioners refused to pay for the jurors' lodgings, the Pennsylvania Supreme Court explained in 1838 that the judge had the authority to draw directly on the public purse to cover such "contingent expenses of the court" and provide for "emergencies" that require "the prompt and efficient action of the court" without the usual deliberation and consent of the relevant legislative body.[5]

Similarly, state supreme courts have backed judges who have claimed the authority to set the salaries of courthouse personnel or who have ordered other institutions to provide, or to provide funding for, temporary facilities for holding court after the regular courthouse was condemned, the operation of a courthouse elevator, chairs and carpeting for a courtroom, and courthouse air conditioning.[6]

Such disputes have prompted state supreme courts to issue particularly high-flown paeans to judicial independence. The Indiana Supreme Court observed in the elevator case, for example:

> Courts are an integral part of the government, and entirely independent; deriving their powers directly from the constitution, in so far as such powers are not inherent in the very nature of the judiciary. A court of general jurisdiction, whether named in the constitution or established in pursuance of the provisions of the constitution, can not be directed, controlled, or impeded in its functions by any of the other departments of the government. The security of human rights and the safety of free institutions require the absolute integrity and freedom of action of courts.[7]

In explaining why county commissioners were required to pay clerical staff in the courthouse at a rate set by the judges rather than at the general rate established for comparable county employees, the Colorado Supreme Court quoted approvingly from the opinion of the trial court that the separation of powers

4. Kansas Supreme Court Order 2002 SC 13, as amended March 22, 2002 (www.kscourts.org/surcharg.htm, last accessed February 6, 2004); State of Kansas Office of Judicial Administration Press Release, March 14, 2002 (www.kscourts.org/fee-news.htm, last accessed February 6, 2004).

5. *Commissioners v. Hall*, 7 Watts 290, 291 (Pa. 1838).

6. *See, e.g., State ex rel. Schneider v. Cunningham*, 39 Mont. 165 (1909); *Wichita County v. Griffin*, 284 S.W.2d 253 (Tex. App. 1955); *Bass v. County of Saline*, 171 Neb. 538 (1960); *Ex Parte Turner*, 40 Ark. 548 (1883); *Commissioners v. Stout*, 136 Ind. 53 (1893); *State ex rel. Kitzmeyer v. Davis*, 26 Nev. 373 (1902); *Pena v. District Court*, 681 P.2d 953 (1984).

7. *Board of Commissioners v. Stout*, 136 Ind. 53, 59-60 (1893).

required that each of the three branches

> not interfere with or encroach on the authority or within the province of the other. . . . In their responsibilities and duties, the courts must have complete independence. It is not only axiomatic, it is the genius of our government that the courts must be independent, unfettered, and free from directives, influence, or interference from any extraneous source.[8]

Several features of this traditional use of inherent judicial powers are notable. The amounts at issue usually involve small contingencies rather than the central operation of the courts. The disputes usually begin with local officials. When neither the local judge nor the local fiscal authority relents in the standoff, the matter is appealed up the judicial hierarchy. These traditional fiscal battles are ultimately asymmetric proceedings between a local legislative body and a state's highest court. They become as much a matter of state and local divisions as interbranch divisions, often with state legislatures either unaffected or implicitly behind the state courts.

In such circumstances, supreme courts can serve as relatively neutral arbiters capable of providing satisfactory dispute resolution for two equally situated parties. State supreme courts, which usually have not directly benefited from traditional uses of inherent judicial power by local courts, have proven willing to reduce and void lower-court orders as well as uphold them and are capable of applying external standards and outside accountability to ensure the reasonableness of such judicial requests.[9] The potentially irresolvable conflict of two equal and coordinate branches of government, each holding fast to its respective claims of autonomy and prerogative, is thereby abated by the presence of a common judge—the state supreme court.[10]

The doctrine of inherent judicial power licenses the courts to take necessary actions to fulfill their constitutional functions.

The doctrine has been put to more ambitious use in recent years. In December 1969, the judges of the Philadelphia Court of Common Pleas submitted a budget request to the city's finance director of nearly $20 million for fiscal year 1970. The mayor ultimately recommended, and the city council approved, a budget of just under $16.5 million. When the court's request for an additional $5 million was refused, the judges ordered the city to appropriate the additional funds. In *Commonwealth ex rel. Carroll v. Tate*, the Pennsylvania Supreme Court eventually awarded the Court of Common Pleas approximately $1.4 million for what was left of the fiscal year.

In a period of general judicial assertiveness vis-à-vis other branches of government, especially in the design of equitable remedies, *Carroll* lifted the doctrine of inherent judicial power from its roots in discrete fiscal disputes over courtroom temperature and clerks' salaries and positioned it as a viable judicial recourse for obtaining multimillion-dollar appropriations and supplanting the normal budget-making process. In order to "protect itself" from the other branches, the *Carroll* court argued, "the [j]udiciary *must possess* the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer [j]ustice."[11] *Carroll* influentially held that courts were entitled to whatever funds were "reasonably necessary" for the "efficient administration of justice."

Though the court understood that the demand for limited city funds and services was increasing across the board, judicial requests were to trump all others. "The deplorable financial conditions in Philadelphia must yield to the [c]onstitutional mandate that the [j]udiciary shall be free and independent and able to provide an efficient and effective system of [j]ustice," the court reasoned—including the creation of "[n]ew programs, techniques, facilities, and expanded personnel." What was "reasonably necessary" to operate the city courts was ultimately not to be decided in the normal legislative process in the context of the overall budget, but by "[c]ourt review."[12]

Cases such as *Carroll* did not become common, however, in part because many states altered their systems of funding the judicial branch so as to minimize the local conflicts from which the doctrine had emerged. Just as *Carroll* was being handed down, members of the American Bar Association's Commission on Standards of Judicial Administration were arguing that constitutional propriety dictated

8. *Smith v. Miller*, 153 Colo. 35, 40 (1963). For similar examples, *see O'Coin's, Inc. v. Treasurer of the County of Worcester*, 362 Mass. 507 (1972); *In re Salary of Juvenile Director*, 87 Wn.2d 232 (Wash. 1976).

9. This was obviously not true in the relatively few instances in which the state supreme court has itself been the initiator of the inherent judicial power claim, such as when the Wisconsin Supreme Court squared off against the state superintendent of public property over who had the authority to appoint and remove the court's janitor. *In re Janitor of the Supreme Court*, 35 Wis. 410 (1874).

10. On the "logic of the triad in conflict resolution," see Martin Shapiro, COURTS (Chicago: Univ. of Chicago Press, 1981). On the fundamental risk of interbranch conflict in a system of separated powers, see Keith E. Whittington, *Yet Another Constitutional Crisis?*, 43 WM. AND MARY L. REV. 2093 (2002).

11. *Commonwealth ex rel. Carroll v. Tate*, 442 Pa. 45, 52 (1971). *See also* William Scott Ferguson, *Judicial Financial Autonomy and Inherent Power*, 57 CORNELL L. REV. 975 (1972); Jeffrey Jackson, *Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers*, 52 MD. L. REV. 217 (1993).

12. *Id.* at 56, 57.

that the "judiciary will always be subordinate to the legislature on significant matters of finance. It is for the legislature to determine which 'essential services' the government will provide and to decide the judiciary's share of the common financial shortage."[13] The better solution, they urged, was unitary budgeting, which would link administration and budgeting and allow for more centralized and efficient management of judicial expenditures.

This recommendation was widely accepted, and many state judiciaries shifted away from relying on local funding sources, such as county commissioners, in favor of consolidated budgets approved by state legislatures. Pointing to budget conflicts between county governments and local courts such as the one that gave rise to *Carroll*, the Pennsylvania Supreme Court even ordered the state legislature to take over funding of the state judiciary, though the state has taken few steps to comply with that order, partly out of concern over the tax implications.[14] At the same time, state courts were given greater spending flexibility through lump-sum budgets rather than detailed, itemized budgets—allowing judges to buy their own carpeting without specific legislative approval. The growth of the inherent judicial power doctrine, however, created a "remote danger" that the judicial system might "try to secure its appropriations by mandamus," to the likely "discredit" and embarrassment of both branches.[15] This potential consequence suggested to some that the shift to unitary budgeting would render the inherent judicial powers doctrine "legally and politically impotent."[16]

The New York standoff

The "remote danger" was realized and the constitutional and institutional implications of these developments were made particularly evident in a 1991 funding dispute in the state of New York. In submitting his budget to the legislature, Governor Mario Cuomo recommended a 10 percent cut from Chief Judge Sol Wachtler's $966.4 million request for the state judiciary. As legislators and the governor negotiated, the chief judge told the press, "as far as I'm concerned, that's an unconstitutional budget," because the governor had not passed on the judiciary's full budget request.[17] The legislature eventually compromised with an appropriation of $889.3 million for the judicial branch—more than the governor's recommendation but substantially less than the chief judge's request.

Chief Judge Wachtler reacted to the legislature's action by filing a lawsuit in state court claiming that the judicial branch was entitled to the full amount of its request based on its inherent power to compel funds for its maintenance. Governor Cuomo countered by filing a federal lawsuit seeking to dismiss the chief judge's suit, thereby preventing any change to the legislature's version of the judicial budget. The federal district court demurred. After substantial public and political maneuvering, the chief judge largely relented and a settlement was reached that provided for only a very modest increase, restoring the judicial budget to 1990 levels, just days before the state case was set for argument.[18]

Despite its inglorious end, *Wachtler v. Cuomo* represents an important turn in the development of inherent judicial power in the budget context. Of course, *Wachtler* involved amounts far exceeding anything previously contemplated in such cases. By involving nearly 9 percent of the consolidated budget of the entire state judiciary, the chief judge was no longer seeking to fill specific gaps in the judiciary's budget but rather to provide for the judiciary's general finances. Perhaps more ominously, absent federal intervention, the combination of unitary budgeting and the assertion of inherent judicial power left no place for the disputing institutions to go. The constitutional equality of the three coordinate branches of New York's state government replaced the institutional inequality present in earlier inherent judicial power disputes. Unlike even the *Carroll* situation, all state courts were implicated in the New York suit, as the governor and the press were quick to point out.[19] Constitutional deadlock and informal compromise were the only available options.

Fiscal autonomy in Kansas

The recent economic downturn and attendant budgetary pressures in many of the states have given renewed significance to these doctrinal and institutional developments. Recent fiscal relations between the judicial and legislative branches in Kansas parallel the conditions in Philadelphia and New York that led to their respective inherent-power showdowns. As in Pennsylvania and New York, the Kansas courts have faced serious financial neglect at the hands of their legislative peers. A government-wide funding crunch in Kansas in 2002 brought the situation between the two branches to a head, with fiscal and political stakes comparable to those raised in New York. The Kansas courts, however, adopted an innovative political strategy that proved more successful than that of their predecessors in New York—but that raises its own constitutional difficulties.

Developments in judicial administration and budgeting in Kansas during the past 30 years mirror national trends, including the adoption of state funding of the judiciary through unitary budgeting and the consolidation of administrative responsibility for the state's judicial branch in its supreme court. In 1972, the state's voters ratified a constitutional amendment making the legislature responsible for funding all

13. Geoffrey C. Hazard, Jr., Martin B. McNamara, and Irwin F. Sentilles III, *Court Finance and Unitary Budgeting*, 81 YALE L.J. 1286, 1292 (1972).

14. *County of Allegheny v. Commonwealth*, 517 Pa. 65 (1987); *Pennsylvania State Association of County Commissioners v. Commonwealth*, 545 Pa. 324 (1996).

15. Hazard et al., *supra* n. 13, at 1300.

16. Carl Baar, *The Scope and Limits of Court Reform*, 5 JUST. SYS. J. 274, 281 (1980).

17. Elizabeth Kolbert, *Wachtler Says Cuomo Cut Judiciary Funds Unconstitutionally*, N.Y. Times, April 11, 1991, at B5.

18. For an overview of the case, see Howard B. Glaser, *Wachtler v. Cuomo: The Limits of Inherent Power*, 14 PACE L. REV. 111, 122-135 (1994).

19. *Id.* at 130.

Kansas courts. Five years later, the legislature exercised some of that authority by placing all district courts under the administrative purview of the state supreme court and shifting financing of all court system personnel to the state. (The state has not yet assumed all non-salary operating expenses for the judiciary from the counties.) Since 1978, the judicial branch has been required to submit its budget to the executive branch Division of the Budget, which then produces a single state budget that is submitted to the legislature and becomes the basis for legislative deliberations.

The Kansas Court broke new ground by invoking its inherent power in order to raise its own revenue rather than to mandate appropriations from the legislature.

Judicial complaints of inadequate funding by the state legislature have been common for years. In the years leading up to the 2002 confrontation, the executive routinely reduced the judiciary's requested budget when compiling the state budget to submit to the legislature, imposing hiring freezes on the judiciary in eight of the ten years prior to 2002. (While case filings rose 54.6 percent between 1987 and 1999, the number of judges increased only 5.5 percent and nonjudicial employees only 9 percent during the same period.[20]) Insufficient funding in the regular budget led to a recurrent pattern of annual judicial service cutbacks, salary reductions and furloughs for nonjudicial employees, and supplemental appropriations from the legislature to carry the courts through each fiscal year. In fiscal year 2001, the legislature's initial appropriations left a shortfall in the judiciary's "maintenance budget" (the amount needed to maintain salaries and wages of existing employees) of $1.2 million; in fiscal year 2002, the shortfall increased to approximately $2 million.[21]

The Kansas judiciary invoked its inherent judicial power in the midst of the budget process for fiscal year 2003. In spite of the judiciary's expressed concerns about the shortfalls of previous years, the legislature cut the 2003 maintenance budget by $3.5 million. The state was projecting an overall revenue shortfall of $680 million, rendering any substantial improvement in the judicial budget unlikely. Instead, legislators urged Chief Justice McFarland to seek "innovative means of securing the necessary funding." On March 8, 2002, the chief justice responded by ordering an "emergency surcharge" on existing court fees to be paid into an emergency fund separate from the state treasury and available "only for [j]udicial [b]ranch expenditures" approved by the chief justice.[22]

The chief justice followed form in justifying this exercise of inherent judicial powers. In an earlier 2002 State of the Judiciary message, she reviewed the courts' recent fiscal woes and concluded, "The simple truth is the [j]udicial [b]ranch cannot perform its constitutional and statutory duties with such a shortfall in funding," even though the "courts are the last bulwark of freedom as guaranteed by the Bill of Rights . . . [and a] fully functioning court system is essential to the American way of life." Though "there are things the people of Kansas may have to give up in this fiscal crisis, justice cannot and must not be one of them."[23]

This message also included a renewed call for a change in budget procedures so that the judiciary could submit its budget request directly to the legislature without executive intermediation. The chief justice's justification for this proposal echoed Chief Judge Wachtler's arguments in New York and similarly laid the implicit foundation for autonomous judicial action. A direct budget submission was necessary "to safeguard [the judiciary's] constitutional position from invasion by the [e]xecutive [b]ranch," and though the legislature ultimately made the appropriations, the chief justice blamed the executive branch Division of the Budget for "many of the funding problems the [j]udicial [b]ranch faces each year" by making "drastic cuts before [the judiciary's budget request] is even seen by the [l]egislature." Indeed, given the thoroughness of the judiciary's own budget review process, which ensures that "every request is necessary," and the lack of "expertise . . . as to judicial operations and needs" in the executive branch, "all cuts made [were] arbitrary because there [were] no reasonable cuts left to be made."[24]

In issuing the "emergency surcharge" order, the chief justice did not provide elaborate authority for her action—the order itself made clear that the court relied on its inherent power. The review of the budget situation in the order and the chief justice's other statements implicitly established the grounds for meeting the "reasonable necessity" standard outlined in earlier inherent judicial power cases. The

20. STATE OF THE JUDICIARY: ANNUAL REPORT OF THE CHIEF JUSTICE OF THE KANSAS SUPREME COURT 2 (2002) (www.kscourts.org/2002soj.pdf, last accessed February 8, 2004).

21. Chief Justice Kay McFarland, Judicial Branch Budget Issues: Testimony before the Senate Ways and Means Committee, February 7, 2002 (www.kscourts.org/budgetmf.htm, last accessed February 8, 2004).

22. Kansas Judicial Branch Fiscal Year 2003 Emergency Surcharge, 2002 SC 13 (as amended March 22, 2002) (www.kscourts.org/surcharg.htm, last accessed February 8, 2004).

23. *Supra* n. 20, at 10 (emphasis omitted), 15, 16.

24. *Id.* at 12.

Kansas Supreme Court had itself asserted more than a century before, "It can hardly be supposed that the action of the supreme court may be thwarted, impeded or embarrassed by the unwarranted intermeddling of others without any power in the supreme court to prevent it."[25]

Breaking new ground

In turning to the inherent power doctrine to resolve its budget dispute with the state executive and legislature, the Kansas courts followed in the footsteps of the New York courts from a decade before. The Kansas Court, however, broke new ground by invoking its inherent power in order to raise its own revenue rather than to mandate appropriations from the legislature. This unprecedented step created distinctive constitutional and political repercussions.

Although inherent power had been used to compel legislatures to provide judicially needed resources, judges had previously drawn a bright line between such actions and the raising of revenue. The Michigan Supreme Court, for example, used the taxation example to show why traditional uses of inherent judicial power did not create separation-of-powers problems: "This broad power to assess and declare the needs of administering justice does not usurp the fiscal authority of the legislative department. The courts do not levy taxes, or appropriate public monies. Those things must be done by the legislative bodies."[26]

In another prominent inherent power case, the Pennsylvania Supreme Court had similarly asserted that "[c]ontrol of state *finances* rests with the legislature. . . . The function of the judiciary to administer justice does not include the power to levy taxes in order to defray the necessary expenses in connection therewith. It is the legislature which must supply such funds."[27]

On the other hand, in 1990 a majority of the justices of the U.S. Supreme Court blurred the line in the context of equitable remedies, recognizing that taxation by judicial order was an "extraordinary event" that potentially could fall within judicial power, leading four justices to object in a concurring opinion that it is "not one of the inherent powers of the court to levy and collect taxes."[28]

The Kansas Supreme Court's "emergency surcharge" steers a careful revenue-raising course. As the Kansas attorney general noted in his opinion supporting the court's power, the surcharge is characterized as neither "a docket fee . . . service or operational charge" nor "a tax . . . deposited into the state general fund," both of which are circumscribed by constitutional and statutory provisions.[29] By withholding the collected funds from the state treasury, the court appears to want to avoid running afoul of the state constitutional requirement that "[n]o money shall be drawn from the treasury except in pursuance of a specific appropriation made by law."[30]

The Kansas judiciary does have some limited statutory authority to set docket fees. However, this would not seem to include the emergency surcharge, unless the statute is "read in light of the inherent authority possessed by the supreme court to take such action as is necessary to maintain its independence as a co-equal branch of government," as the attorney general suggested.[31] The chief justice herself has only ever pointed to the abstract inherent judicial power as the authority for her actions, not any legal context specific to Kansas. The Kansas court's order gives previously uncontemplated meaning to the concept of judicial fiscal independence.

Political implications

The political implications of the court's move are equally groundbreaking. As *Wachtler v. Cuomo* demonstrated, a state judiciary's effort to compel a state legislature to fully fund its budget request invites intransigence and puts the two co-equal branches at loggerheads. The very political and financial calculus that would lead a legislature to underfund the courts in the first place would also lead it to resist judicial efforts to claim a larger share of the state budget and crowd out other constituencies. While courts have been successful in claiming inherent judicial power to order (usually local) institutions to make discrete expenditures, they were notably unsuccessful in their one effort to trump the state legislative budget process.

The Kansas court has effectively sought the same outcome—to mandate its preferred judicial budget—but by means that do not impinge on the legislature's ability to satisfy favored interests in its budgeting. Elected officials clearly risk paying a political price when either raising taxes or denying appropriations. The Kansas court absolved the legislature of facing either option by raising revenue on its own.

Chief Justice McFarland was well-positioned to take the initiative. In Kansas, the justices of the supreme court are chosen by merit selection and subject to periodic, non-competitive retention elections. Since that system was instituted, no justice has ever come close to losing a retention election, and McFarland herself had served on the high court for a quarter century. Although the governor's proposed fiscal year 2003 budget had fallen short of the judiciary's request, the courts were largely exempt from the deep cuts imposed by the governor and the legislature across the rest of the state government. Additional funding for the courts was included in separate budget items that were packaged with several proposed tax increases. More politically salient, and far more expensive,

25. *Chicago, Kansas, and Western Railroad Company v. Commissioners of Chase County*, 42 Kan. 223, 225 (1889).

26. *Wayne Circuit Judges v. Wayne County*, 383 Mich. 10, 22 (1969).

27. *Leahey v. Farrell*, 362 Pa. 52, 56 (1949).

28. *Missouri v. Jenkins*, 495 U.S. 33, 51 (1990); *Id.* at 74 (Kennedy concurring, quoting *Heine v. Levee Commissioners*, 86 U.S. 655, 661 (1873)).

29. Kansas Attorney General Opinion No. 2002-17, 2 (www.kscourts.org/ksag/opinions/2002/2002-017.htm, last accessed February 8, 2004).

30. KAN. CONST. art. II, § 24.

31. K.S.A. § 60-2001 (2002); Kansas Attorney General Opinion No. 2002-17, 7. The court itself made no reference to this statute.

32. *Supra* n. 4.

causes than the needs of the court were featured in the legislative struggle over this tax package. Ultimately, the package was rejected by a coalition of dissident conservative Republicans, who had taken a "no new taxes" pledge, and nearly all the Democrats, who accused the Republican majority of fiscal mismanagement and a reliance on regressive tax schemes.

Legislative support

It is unsurprising, then, that legislators generally responded with enthusiasm to the Kansas court's initiative, since it freed them of any responsibility for the political fallout from making an unhappy fiscal choice regarding the judiciary. Far from challenging the judiciary's assertion of authority, as Governor Cuomo had done in New York, the other branches encouraged the court to move forward and sought to bolster its authority. As noted, the attorney general issued an opinion backing the court's innovative use of inherent judicial powers. The chief justice, in ordering the surcharge, reported that "the legislative leadership in both houses and on both sides of the political aisle . . . showed understanding of and concern for the crisis facing the [j]udicial [b]ranch" and had "expressed [support] for the [j]udicial [b]ranch to seek innovative means of securing the necessary funding."[32]

In earlier committee hearings on the judicial budget, one senator suggested, "Why don't you just sue the heck out of us?" The chief justice responded, "Suing won't get you anything soon."[33] The chair of the Senate Ways and Means Committee indicated that the courts would have the first claim to any new revenue, but noted that if "we don't have it, we can't put it in."[34] After the court order imposing the emergency surcharge was issued, the Kansas Senate Judiciary Committee chair exclaimed, "I'm glad to see the courts take some action to meet their financial needs," and declared that the court had the power to do whatever "the court believes it has the power to do."[35] The House Speaker simply announced that the legislators' hands were tied: "Who are we going to appeal to? The supreme court?"[36] And the governor gave the chief justice "high marks" and praised her for taking "bold steps when necessary."[37]

Well-placed policy makers had sent clear signals to the chief justice that they were substantively supportive of her budget stance, and they backed judicial authority when she took an initiative that required no politically costly response from them. Indeed, the Kansas court's turn to judicial user fees is in keeping with broader tendencies in state court budgeting to emphasize court-generated revenues. While such tendencies have raised concerns on the judicial side that legislatures may come to rely on such court fees and give less support to the courts from general tax revenues, it has traditionally been understood that the decision to turn to such revenue streams was by its nature a legislative one.[38]

The inherent judicial power doctrine was developed to be a defensive weapon to protect judges from subversion or obstruction by other officials.

Beyond Kansas

Few courts would be tempted to follow the lead of Judge Wachtler of New York and run headlong into a political struggle with the legislative and executive branches, though his actions followed naturally from the historic development of the inherent judicial powers doctrine when combined with unitary budgeting. Chief Justice McFarland has found what might prove to be a more tempting path, one that is constitutionally bolder but politically less hazardous. Indeed, the "emergency stopgap measure" was so politically successful that it was extended into the next fiscal year. When the Kansas legislature again failed to fully fund the court's budget request, the chief justice reported that the judicial branch "was urged by many legislators to extend the emergency surcharge," though the legislature itself did not take steps to authorize by statute or legislate directly the new court fees.[39] (The executive and legislature did accept the court's proposal to allow the judiciary to submit its budget requests directly to the legislature.)

Kansas was hardly alone in its fiscal struggles—state courts elsewhere have been facing similar pressures in recent years. A special district judge in Oklahoma used his unofficial website to publicize the "Kansas 'surcharge' solution" and urged his colleagues to follow McFarland's "fiscal leadership," although the chief justice of the Oklahoma Supreme Court declined to take such unilat-

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33. Quoted in John Hanna, *Chief Justice Says Tight Funding Will Mean Court Closings*, Associated Press Newswires, February 7, 2002.

34. John Hanna, *Panel Provides Money for Courts Now but Only Sympathy after July 1*, Associated Press Newswires, February 22, 2002.

35. John Hanna, *Supreme Court's Budget Order Alters Balance of Power in Government*, Associated Press Newswires, March 18, 2002.

36. John Hanna, *Supreme Court Goes around Legislature to Solve Budget Problems*, Associated Press Newswires, March 14, 2002.

37. John Hanna, *Chief Justice Faces Retention after Dealing with Budget*, Associated Press Newswires, September 4, 2002.

38. David Bresnick, *Revenue Generation by the Courts*, in Steven W. Hays and Cole Blease Graham, Jr., eds., HANDBOOK OF COURT ADMINISTRATION AND MANAGEMENT 355-365 (New York: Marcel Decker, 1993); James W. Douglas and Roger E. Hartley, *The Politics of Court Budgeting in the States: Is Judicial Independence Threatened by the Budgetary Process?* 63 PUB. ADMIN. REV. 441, 450-451 (2003).

39. 2003 SC 51 (www.kscourts.org/surcharg2004.pdf, last accessed February 8, 2004).

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eral action.[40] Budget battles in Illinois led to an initial standoff, followed by more extended litigation, over judicial pay.[41] State courts, often spared the budget ax in the past, have recently had to deal with significant cuts; the events in Kansas could easily recur.[42]

The American system of separation of powers runs the inherent risk of gridlock. While this is a danger, it can also be regarded as a virtue. By denying any single branch of government the power to act unilaterally, this constitutional framework requires government officials to win the cooperation of others in order to take effective action.

The inherent judicial power doctrine was developed to be a defensive weapon to protect judges from subversion or obstruction by other officials. It has not traditionally been used to place the courts on an independent financial footing or to shelter them from the regular budgetary process. 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.

The situation in Kansas can be placed on a scale of possible budgetary conflicts between courts and legislatures. The gravest fiscal threats to judicial independence may come when governors and legislatures use budgetary tools to attempt to influence judicial decisions. The use of inherent judicial powers as a safeguard to judicial independence may be most justified in such cases, which fortunately are rare. A less extreme, but more common, threat to judicial independence arises from the competition for limited resources. Chronic budget scarcity, such as arose in Kansas, may pose less of a threat to judicial independence per se than to judicial effectiveness. In such situations, the use of inherent judicial powers may be harder to justify.

To the extent that such fiscal starvation impinges on positive constitutional obligations that a state maintain an effective system of justice, school finance litigation may provide the more appropriate model for judicial action. When finding that states have failed to provide functioning educational systems as required by their constitutions, courts have mandated that legislatures fix the problem but have generally avoided specifying the ultimate solution. In that model, courts have played an important role in holding legislators' feet to the fire to meet their constitutional responsibilities, but have left the problem of how best to raise and distribute adequate revenue to the legislature. Such a process tends to be slow and incremental, but it arguably preserves the respective constitutional responsibilities of the various branches of government while maintaining legislative accountability for budgeting. 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 of inherent judicial power cases such as *Carroll*.

The boldness of the rhetoric accompanying traditional invocations of inherent judicial power has been tempered *sub silencio* by the modesty of its practical claims and its effective submission to the checks and balances of the judicial hierarchy and state political institutions. Although relatively small in fiscal terms and understandable in a political context, the innovation in Kansas of using the power to independently raise revenue to fund judicial expenses threatens to undo those historic checks on judicial power. After the Illinois justices ordered the government to pay state judges the salary increases that had been vetoed by the governor, the state comptroller remarked, "I wouldn't say that this is a constitutional crisis. But it is a constitutional clash."[43] Precisely by avoiding an institutional clash, the "Kansas solution" is all the more corrosive of the state's vital constitutional balance. ⚖

40. Oklahoma Family Law Information (www.pryorok.org/legal, accessed July 1, 2003, post later removed); *Jurists Feeling the Pinch of Budget Cuts*, Associated Press Newswires, February 2, 2003.

41. Daniel C. Vock, *High Court to Decide Judicial Pay Raise Issue*, Chi. Daily L. Bull., January 15, 2004.

42. Budget battles also gave rise to the highly unusual order by the Nevada Supreme Court that the legislature raise taxes under simple-majority rule, despite a state constitutional requirement of a two-thirds majority. *Guinn v. Legislature*, 71 P.3d 1269 (Nev. 2003).

43. Monica Davey, *Justices in Illinois Order Increases in Their Salaries*, N.Y. Times, July 29, 2003, at A12.

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