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Judicial Independence and the State Court Funding Crisis

*David J. Barron*¹

INTRODUCTION

THE fiscal crisis is undermining the capacity of the state courts to deliver justice in a timely manner. It is doing so by leading state legislatures to slash funding for their judicial systems. In response, state court leaders and their supporters are beginning to pursue new strategies for protecting their budgets. Among the most prominent are two that point in different directions. One focuses on mounting more effective lobbying campaigns so that state courts can “win” the increasingly fierce competition that defines the legislative appropriations process.² The other focuses on finding alternative funding mechanisms so that state courts can bypass the legislative appropriations process altogether. These two strategies can overlap, and they often do. But whether they are substitutes or complements, their emergence reveals that the fiscal crisis is altering the political economy in which state court leaders and their advocates operate.

This essay focuses on the problematic incentives that this new political economy creates. It raises the concern that these incentives encourage state court leaders and their advocates to embrace fiscal solutions that pose underappreciated risks to judicial independence. In doing so, it distinguishes between two aspects of judicial independence—fiscal independence and decisional independence. The former concerns the judicial interest in making independent budgetary decisions about the resources the judicial branch needs to carry out its core constitutional functions. The latter concerns the judicial interest in making independent

¹ S. William Green Professor of Public Law, Harvard Law School. I would like to thank Jeff Amestoy, the Hon. Paul DeMuniz, Rosalyn Frierson, Jerry Frug, Mary McQueen, Chris Stone and Vicki Jackson, for their comments on earlier drafts. I am also grateful for support from the Harvard Kennedy School Executive Session on State Court Leaders in the 21st Century, Dean David Schizer at Columbia Law School, and the National Center for the State Courts. I would also like to thank Paige Austin for excellent research assistance.

² Because a majority of states’ court systems are funded primarily on the state level, this article will focus on the dynamics at work in state-level appropriations. But the argument is equally applicable to states that fund courts through local or hybrid state-local mechanisms. For a breakdown of how each state’s court systems is funded, see *State Activities Map*, NAT’L CENTER FOR ST. CTS. (Nov. 30, 2011), <http://www.ncsc.org/Information-and-Resources/Budget-Resource-Center/States-activities-map/.aspx>.

legal decisions in resolving the cases that states are given jurisdiction to decide. With this distinction in mind, the essay argues that success in solving the fiscal crisis cannot be measured solely in terms of whether state courts receive adequate funding. Attention must also be paid to whether the means used to secure such funding compromise the ability of the courts to decide impartially the cases that come before them.

This essay pursues this argument by exploring the upsurge of interest in addressing the funding crisis in constitutional terms. It shows that this constitutional talk usually focuses on protecting the fiscal independence of the judiciary, and it argues that this focus is not likely to advance the argument for greater fiscal support to any great extent. It then argues that such talk is nonetheless of interest. It prompts reflection about whether there is another aspect of judicial independence, namely decisional independence, that is unwittingly being put at risk through well-intentioned efforts to *solve* the fiscal crisis by protecting the fiscal independence of the courts. The essay concludes by using two concrete case studies—Florida’s experiment with tying state court funding to foreclosure filing fees and South Carolina’s enlistment of the business community in the campaign for more judicial funding—to examine that question. These case studies reveal that state court leaders and their advocates increasingly find themselves caught up in a budgetary process that encourages them to place the decisional independence of the judiciary at risk in hopes of securing more funding for their branch. In emphasizing the complexity of the relationship between judicial independence and the funding crisis, the essay has a simple aim. It seeks to make it less likely that those responsible for solving the funding crisis will do so in ways that, however unintentionally, undermine judicial independence in the name of standing up for it.

I. THE EMERGING CONSTITUTIONAL RESPONSE TO THE FISCAL CRISIS

Discussions of the harm caused by the crisis in state court funding tend to stress the important service that state courts provide and the way that reductions in state court funding diminish their capacity to continue providing that same level of service.³ The familiar account emphasizes a host of specific harmful effects. Existing local courthouses would have to be closed. Courts that remain open would have to reduce their hours. No new courthouses would be opened. No new judges would be added to relieve the congestion brought on by an expanding and crushing docket.

³ See AM. BAR ASS’N, CRISIS IN THE COURTS: DEFINING THE PROBLEM 5 (2011), available at http://www.americanbar.org/content/dam/aba/images/public_education/pub-ed-lawday_aba-resolution_crisiscourtsdec2011.pdf (“The Task Force has heard many accounts of the extent and results of such chronic underfunding. To cite but one state’s experience, the courts in Georgia have seen their funding shrink 25% over the last two years. . . . As a result, criminal cases now routinely take more than a year to resolve . . .”).

Innovations in the delivery of court-administered justice, whether in the form of so-called problem solving courts or technological updates to antiquated records and filing systems, would come to an end. Relatedly, funding reductions would make it impossible to provide the pay necessary to retain many of the best people serving in the system—from court administrators to judges.⁴

The resulting picture is of a state judicial system defined by delay and burdened with crumbling facilities. On top of this, the specter of a reduction in overall quality looms. There is a great risk that talented people will exit—or refuse to enter—a once prestigious line of work. Making the tragedy all the more acute is the fact that this declining system is not simply another component of an aging bureaucracy. It is a special branch of government, charged with a precious task—dispensing justice. Its decline means that individuals will be unable to get the justice they seek. To make the point, advocates tell dramatic stories of individual hardship that can result from reduced funding. There is the small business that cannot open due to legal delays, or the custody decision that goes unresolved because of a lack of judicial time to attend to it.⁵

This way of putting the case is powerful. Pitched in these terms it is also wholly unobjectionable. Backlogged, unresponsive courts are hard to square with a commitment to the rule of law or the vindication of justice. Advocates are right to force state legislators to confront the resulting contradiction between the ideals of our legal system and its reality. Still, many of those who make this argument share the sense that it fails to capture the full dimensions of the problem. One repeatedly hears from state court leaders that the judiciary is not just another “agency” of government.⁶ It is, rather, a coordinate branch, a constitutional department. It is not as if the legislature needs to defend its existence. Why, then, they ask, should the state court system?

⁴ *Id.* at 3, 5.

⁵ *Id.*; see also Sandy Adkins, *State Budget Cuts Threaten Public's Access to Courts*, NAT'L CTR. FOR ST. CTS. BACKGROUNDER (Nov. 29, 2011), <http://www.ncsc.org/Newsroom/Backgrounder/2011/Court-Budget-Cuts.aspx>; John Schwartz, *Critics Say Budget Cuts for Courts Risk Rights*, N.Y. TIMES, Nov. 26, 2011, at A18; Daniel Hall, *Reshaping the Face of Justice: The Economic Tsunami Continues*, NAT'L CENTER FOR ST. CTS. 1–2 (2011), <http://www.ncsc.org/Information-and-Resources/Budget-Resource-Center/States-activities-map/.aspx> (“For example, in small-to-medium-sized courts, staff shortages have led to errors that impact defendants by failing to cancel warrants in a timely manner, leading to wrongful arrests. . . . Large courts report that domestic-relations temporary orders and parenting-time disputes are delayed.”); William M. Welch, *Court Budget Cuts Swift Hand of Justice*, USA TODAY, Apr. 1, 2010, http://www.usatoday.com/news/nation/2010-03-31-court-cuts_N.htm (“[W]ait times are getting longer for those with civil, family, juvenile and traffic cases . . .”).

⁶ See, e.g., Rosalyn Frierson, *A New Approach to Budget Negotiation for South Carolina's Judiciary 3–4* (Oct. 1, 2010) (unpublished manuscript) (on file with author); Paul J. De Muniz, *Judicial Budgeting, The Separation of Powers, and Institutional Independence 14–17* (April 15, 2011) (unpublished manuscript) (on file with author).

In making the funding case in terms of the practical need for state courts to provide important services, state court leaders wonder if they are downplaying their constitutional status as a coordinate branch and inappropriately adopting the language of ordinary agency–speak.⁷ Time and again, state court leaders emphasize that the courts are not just another part of the bureaucracy, only to revert to standard bureaucratic tactics in the search for more funds. Their inability to rise above the routine of budgetary infighting is a source of constant frustration. Thus, as powerful as the case for more funding may be when put in practical human terms, there is a strong sense among many state court leaders that there is something problematic with having to make it at all.⁸

Perhaps for this reason, state court leaders, as well as advocates for them, have begun to show interest in a different kind of discursive framework. Rather than sticking to the numbers and laying out the statistical effect of budget cuts, and rather than emphasizing human interest stories that make these numbers come to life, they have begun to embrace a constitutional argument on behalf of their branch. This way of talking about the crisis emphasizes the constitutional pedigree of the state courts as an independent branch of government. It then identifies what is claimed to be the constitutional offense that results from disregarding the judiciary’s judgment of its own fiscal needs.⁹

The shift to the constitutional plane holds out the promise of securing for the judiciary a means of escaping from the ordinary budgetary process. The branch’s independence would be vindicated, and its bottom line would be protected. What is not to like? This stirring of interest in a constitutional claim for adequate state court funding—a claim that in some way mimics

7 I was a participant, and member of the steering committee, for the Executive Session for State Court Leaders in the 21st Century at the Harvard Kennedy School of Government. The executive session was a multi-year project that convened academics, state court administrators, state court trial judges, and state court chief justices to discuss a variety of challenges facing state courts, including those arising from the budget crisis. Throughout the executive session, participants at all levels of the state court system expressed the concern that courts were entering budget negotiations as if they were mere “agencies.”

8 *Id.*; see also Greg Rowe, *Keeping Courts Funded: Recommendations on How Courts Can Avoid the Budget Axe 1* (April 2011) (unpublished manuscript) (on file with author); De Muniz, *supra* note 6, at 1–3, 14–15, 17–18; Frierson, *supra* note 6, at 5.

9 See Christine Durham, Chief Justice, Utah Supreme Court, *Remarks at the University of Kentucky Symposium on Underfunding of State Courts: Autonomy, Access and Accountability* (Sep. 23, 2011), available at <http://www.abanow.org/2011/09/autonomy-access-and-accountability-sparks-debate-at-kentucky-court-crisis-symposium-part-1/>; De Muniz, *supra* note 6, at 5; see also Erwin Chemerinsky, Dean, Univ. of Cal. Irvine Sch. of Law, *Keynote Address at the University of Kentucky Symposium on Underfunding of State Courts* (Sep. 23, 2011), available at <http://www.abanow.org/2011/09/opening-remarks-to-the-symposium-on-court-underfunding-pt-2>. For a prominent example of a state court judicial leader putting this argument into practice, see *Complaint* at 25–31, *Kaye v. Silver*, No. 2008–400763 (N.Y. Sup. Ct. filed Apr. 10, 2008), 2008 WL 7702434.

the state constitutional claim for adequate public school funding—is evident from the submissions to this symposium.¹⁰ But what should one make of this constitutional talk? Is there a legally enforceable constitutional limitation on the legislature’s ability to curtail judicial functions through budget cuts? And if there is, are judicial leaders and their advocates well-advised to advance it?

It is by delving into these questions that one can begin to see the complexity of the relationship between the funding crisis and state court judicial independence. There is an assumption in much of the constitutional analysis that it is the loss of funds that is threatening judicial independence, and thus that a focus on the need to protect the independence of the judiciary will reinforce the argument for more money. But a deeper examination of the nature of the relationship between the fiscal crisis and judicial independence reveals a paradox. Some of the most attractive seeming solutions to that very fiscal crisis may do as much to undermine judicial independence as to protect it.

II. THE LIMITS OF THE CONSTITUTIONAL RESPONSE TO THE FISCAL CRISIS

The tangible harmful effects of reduced funding underlie the felt sense of crisis in the state courts. And it is that crisis that has in turn spurred interest in constitutional arguments that would enable the judiciary to fend off further cuts. The kind of constitutional argument that would help, therefore, is one that would do something to protect the budgetary bottom line of the state courts. So understood, the constitutional claim is worth making only if it would be fiscally advantageous to make it. There is little point in pursuing a point of constitutional principle in the name of protecting the judiciary’s finances if doing so would make it *less* likely the state courts would receive even the amount of funding they would get if they cooperated with their appropriators.

So, is there a constitutional claim that would yield such a fiscal benefit by forcing the state legislature to honor it? One can point to shards of text and prior precedents to fashion such a claim, at least as against certain extreme forms of fiscal interference.¹¹ At the extreme, such a constitutional

¹⁰ See, e.g., Erwin Chemerinsky, *Symposium on State Court Funding: Keynote Address*, 100 Ky. L.J. 743 (2012); William T. (Bill) Robinson III, *Foreword: Restoring Luster to the Palladium of Freedom*, 100 Ky. L.J. 729, 733–34 (2012); G. Alan Tarr, *No Exit: The Financial Crisis Facing State Courts*, 100 Ky. L.J. 785, 790–96 (2012).

¹¹ See Complaint at 25–31, *Kaye*, No. 2008–400763 (N.Y. Sup. Ct. filed Apr. 10, 2008), 2008 WL 7702434 (alleging legislature’s failure to raise New York state judges’ salaries for ten years was violation of the judicial compensation clause and separation of powers under New York Constitution); Orlando E. Delogu, *Funding the Judicial Department at a Level the Supreme Judicial Court Deems “Essential to Its Existence and Functioning as a Court” Is Required by Doctrines of Comity and Duties Imposed by Maine’s Constitution*, 62 ME. L. REV. 453, 467 (2010) (arguing that multiple clauses of the Maine constitution establish a duty upon elected officials to provide

claim (if backed up by a lawsuit) may have purchase against especially draconian budgetary cuts. And the more severe those cuts are, the more plausible it becomes to think such a claim would be successful. In that respect, the constitutional turn may ultimately yield a fiscal benefit. It at least begins the work of developing a legal claim that may prove useful in some circumstances. But there is no need to pursue the analysis of the merits of such a constitutional claim more fully here. However strong such a claim may prove to be in certain circumstances, it seems clear that, in general, it would be fiscally *counterproductive* to rely upon a constitutional claim to fiscal independence as a means of securing the state court funding that the current fiscal crisis puts at risk.

One reason is that any such constitutional claim is necessarily dependent on a judgment about the minimum level of state court funding the state (or federal?) constitution requires. That judgment can be made, however, only by determining what the constitutionally adequate minimum level of judicial service provision is. That is, quite obviously, a hugely contestable issue. It is also one that is not likely to be resolved in a manner that will redound to the judiciary's fiscal benefit. That is because, however serious the crisis in funding may seem at present, there is still reason to fear that the constitutional floor for such funding would be quite low. After all, the constitutional floor for adequate service provision is likely to be rooted in a rather stripped down vision of the judiciary's essential or core constitutional function. The pursuit of a constitutional claim, therefore, may only encourage the public and the legislature to focus on the need to fund state court services through the prism of a constitutional minimum rather than an aspirational maximum. That development would hardly advance the judiciary's fiscal interests. Consider that state courts have a powerful case to make about their need for additional funding, whether to permit them to update update technology or to expand services through specialized courts. It is doubtful, though, that such improvement plans could really be grounded in a constitutional imperative. Even worse, the assertion of a legal claim aimed at protecting the core constitutional functions of the courts might not only fail to succeed in litigation. The assertion of such a claim could even undermine a legislative strategy aimed at securing funds for innovations in judicial management and the delivery of court services. The constitutional claim might inadvertently draw attention to the chief function of the judiciary (deciding cases) and thus raise the question

"those funds the Law Court deems necessary to maintain the integrity of the judicial branch as a coordinate, co-equal branch of state government serving Maine's citizens"); Daniel W. Halston, *The Meaning of the Massachusetts "Open Courts" Clause and Its Relevance to the Current Court Crisis*, 88 Mass. L. R. 122, 129 (2004) ("Citizens who are denied or delayed justice because of a mismanagement, misallocation or lack of funding of judicial resources may have redress under Article 11 [of the Massachusetts Constitution].").

whether such cutting-edge improvement plans are truly constitutionally necessary? In other words, they could begin to look like a luxury.

There is a further reason to be skeptical that an actual constitutional challenge would be fiscally beneficial. It is one thing to engage with the legislature in the ordinary to and fro of budget negotiations and to assert the judicial branch's constitutional status in the course of doing so. Such a rhetorical approach may assist the judicial branch's position in negotiations. It is another thing entirely, however, to provoke a direct legal clash with the branch of government that is traditionally responsible for appropriating the funds on which the judiciary depends. To be sure, the specter of constitutional litigation brought by judges, before judges, may help shape budgetary negotiations. It may even help tilt those talks in the judiciary's favor by warning legislators against provoking a confrontation that could end up in a courtroom, with a judge presiding. It seems unlikely, however, that the threat of constitutional litigation, or, worse, the fact of it, could actually yield a viable and sustainable means of securing more judicial funding.

In the end, no matter how courts would rule in cases asserting the legislature's constitutional obligation to provide a certain level of funding to the state courts, the legislature still would actually need to make the funds available for the courts to benefit. Will the legislature do so even if ordered by the courts? And what if the legislature will not, or what if it will comply only in the most grudging of ways? The prospect of state courts actually taking control of the budgeting process, and diverting funds otherwise aimed at other social programs so that the courts may use them is not an appealing one—even, one suspects, to judges themselves. The friction that could build up between the judiciary and the legislative branch along the way, moreover, would not be helpful in the actual legislative negotiations over budgeting that will necessarily continue to take place. Indeed, the resulting tension could do long-term damage to the judiciary in future rounds of budgeting.

Constitutional concerns also have recently been raised about another budgetary practice that impacts the state courts.¹² These concerns relate to the judiciary's practice in some states of including its budget request in the overall budget request that the executive branch submits to the legislature.¹³ Here, too, the constitutional objection arises from a sense that this practice

¹² See De Muniz, *supra* note 6, at 3–5.

¹³ *Id.* at 9 (“[In Oregon,] [t]he judicial branch request is incorporated into the Governor’s budget, but not without a certain amount of executive branch manipulation that, in the extreme, can both negatively impact the judiciary and exceed the constitutional limits of executive branch power.”); see also CARL BAAR, *SEPARATE BUT SUBSERVIENT: COURT BUDGETING IN THE AMERICAN STATES* 25–59 (1975) (detailing means by which executive branches of government “in almost every state” participate in processing judicial budget requests).

is not only fiscally disadvantageous, but also constitutionally troublesome.¹⁴ This objection does sound more directly in a defense of the judicial branch's constitutional independence, independent of its immediate fiscal interests, than does the constitutional argument for adequate state court funding. The claim is not that the legislature has a constitutional obligation to honor the judiciary's budget request. It is merely that the judiciary should not be subordinated to the executive in making that very request. Thus, the focus is more squarely on finding a legal basis for insulating the judiciary from second-guessing by a coordinate branch—this time the executive branch—than is the case with the quest for a certain, legally enforceable minimum funding level.

Still it is the risk that the executive will refuse to put forward the entirety of the judicial funding request that ultimately motivates the new interest in objecting to the practice of going through the executive in the first place. And so, here, too, it is a worry about the negative fiscal impact of an alleged infringement of judicial independence that lurks in the background. But would that fiscal concern be meaningfully addressed by asserting the judiciary's independent right to submit its budget request separately?

Even those who have raised constitutional concerns with the practice of submitting state judicial budget requests to the governor recognize there is a practical concern with using the state constitution as a sword in this context.¹⁵ Consider what is likely to happen if the state judiciary refuses on constitutional grounds to follow an established judicial practice of wrapping the courts' budget request in the governor's. By making the point of constitutional principle, the judiciary will risk antagonizing the executive branch in the ensuing budgetary competition. And for what gain? Nothing prevents the governor from publicly (or privately) advising the legislature of his own concerns about the amount of funding the judiciary has requested, even if the judicial request is sent over separately. Because it may well be the state court leader's ability to enlist the governor as an ally in those budget negotiations that may best protect the judiciary's appropriations interests, it is hard to see why that state court leader should find much appeal in the pursuit of a less cooperative approach to judicial-executive relations concerning budgeting. Again, the logic of separation of powers—to which state court leaders are increasingly inclined to appeal as a refuge from the muck and mire of inter-agency fiscal haggling—is a poor match with the judiciary's interest in securing as large a share of a diminishing fiscal pie as is possible.

Constitutional defenses of judicial independence do, of course, rest on something more than a desire to protect the judiciary's fiscal health. They

¹⁴ See De Muniz, *supra* note 6, at 11–12 (“[M]any state judicial budgets today are subject to a degree of executive branch control never contemplated by the state’s constitution . . .”).

¹⁵ *Id.* at 12.

owe their appeal in part to their defense of the branch's dignity. They are not unlike the argument the Supreme Court invoked on behalf of the dignity of the states in recognizing state sovereign immunity as constitutionally inviolable.¹⁶ But under the pressure of serious fiscal calamity, it is not likely that legislative appropriators will be much impressed by airy appeals to the dignity of the judicial system. More likely, they will be interested in learning, in practical and human terms, what would be wrong with cutting this or that line out of the state judiciary's budget request. For that reason, the courts likely will find themselves, for all the huffing and puffing about their constitutional status, once again in the weeds, trying to make their case for more funding than the education department, the transportation department or any number of executive agencies. After all, the states that invoked their dignity in the sovereign immunity cases were not asking for anything affirmative from the legislature. They were merely seeking to have the courts protect them from the imposition of judicial orders. By contrast, the judicial branch would be appealing to its dignity in order to coerce a different branch to provide resources to it. The affirmative nature of the claim makes it much less likely to succeed, as is generally the case in a constitutional system like ours, in which negative liberty claims have always been better received in court than positive liberty ones.

But even worse than the fact that such a claim may fail to persuade in litigation, is the possibility that it may prove to have a negative influence on the legislative appropriations process. Assertions of constitutional prerogative may taint the judiciary's budget request in the eyes of many legislators. It may make the request seem less like the product of a careful assessment of what efficient operations require than the result of an entitled institution's refusal to engage in the hard work tough fiscal times demand.¹⁷

Of course, rhetorical references to constitutional independence may aid the judiciary's negotiating position in marginal respects. After all the United States is famous for not taking a policy argument seriously unless it can be linked to some constitutional imperative. Casting the judiciary's funding needs in constitutional terms may thus serve useful ends. Predicting whether such an argument will do more rhetorical harm than good is difficult, and it is perhaps impossible to make a generalized judgment given the diverse political circumstances prevailing in various states. It is not likely, however, that such an argument will do much more than help

¹⁶ See *Alden v. Maine*, 527 U.S. 706, 715 (1999) ("The States thus retain 'a residuary and inviolable sovereignty.' They are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty." (citation omitted)); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996) ("The Eleventh Amendment does not exist solely in order to 'preven[t] federal-court judgments that must be paid out of a State's treasury' . . . it also serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" (citations omitted)).

¹⁷ See *Rowe*, *supra* note 8, at 3.

rhetorically. It certainly is not likely to provide an enforceable means of escaping the intense budgetary competition that so many state court leaders find concerning. Indeed, those closest to the budget negotiating process sometimes even counsel court advocates not to rely on appeals to the judicial branch's special constitutional status at all, precisely because the marginal upside of doing so is understood to be so small relative to the downside risk.¹⁸

The emergence of this constitutional talk is, however, a noteworthy development even if though it is not a rhetorical framing that is all that likely to be successful. Such talk gives voice to an intuitively powerful sense that there is something constitutionally problematic with the current state of state court budgeting, and that the defect with the current budgetary process goes beyond the reduced level of state court funding that it yields. There is something constitutionally problematic, such talk reminds us, with the very process by which state court leaders are required to make the case that their branch deserves more. But just what is the nature of that constitutional concern? Why is it wrong, as a matter of our constitutional structure, to force state courts to make their case for more funding through the same budgetary process that virtually every other provider of government services must engage in? And, if there is something wrong with forcing them to do so, is it something that can be cured simply by ensuring that courts emerge from that process adequately funded?

III. THE CONFLICT BETWEEN FISCAL AND DECISIONAL INDEPENDENCE

There is reason to think that the answer to the last question might be, "No." The preservation of the constitutional independence of the judiciary surely depends upon more than the protection of its right to make autonomous judgments about the resources it needs to carry out its constitutional responsibilities. And the preservation of such independence surely also depends upon more than ensuring that the state courts are well-funded. There is more to the constitutional independence of the courts than the judiciary's interest in maintaining what might usefully be called *fiscal* independence. There is another aspect to the concept of judicial independence that is no less important. It concerns the judiciary's interest in deciding individual cases, or classes of cases, on the legal merits and free from outside pressure. It is the idea that the state courts come to each case impartially and with no externally-imposed reason for favoring a particular outcome. This aspect of judicial independence might usefully be called the judicial interest in maintaining *decisional* independence.

The interest in decisional independence finds its clearest expression in Article III of the Constitution, which ensures the federal court system

¹⁸ *Id.*

is staffed by judges who enjoy life tenure and whose salaries cannot be diminished.¹⁹ Alone among constitutional officers, judges enjoy this insulation from political supervision in carrying out their basic task of resolving cases and controversies.²⁰ The same idea, however, also undergirds the state court system, even though the means of selecting state court judges varies and, in many states, requires that they stand for election.²¹

The desire to protect decisional independence explains why judicial elections for state court judges continue to provoke concern.²² It also explains why the trend is towards a merit-based selection system.²³ The same concern explains why high profile judicial recall efforts, as well as attempts to “punish” state judges for their decisions, elicit such consistent concern from the bar.²⁴ The desire to preserve the decisional independence of the state courts also helps explain the recent Supreme Court decision imposing due process limitations on the West Virginia Supreme Court’s

19 U.S. CONST. art. III, § 1.

20 U.S. CONST. art. III, § 2, cl. 1.

21 See JED SHUGERMAN, *THE PEOPLE’S COURTS: PURSUING JUDICIAL INDEPENDENCE IN AMERICA* 57–83 (forthcoming 2012).

22 See, e.g., Bert Brandenburg & Roy A. Schotland, *Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns*, 21 GEO. J. LEGAL ETHICS 1229 (2008); Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 726 (1995); Paul J. De Muniz, *Eroding the Public’s Confidence in Judicial Impartiality: First Amendment Federal Jurisprudence and Special Interest Financing of Judicial Campaigns*, 67 ALB. L. REV. 763 (2004).

23 Paul D. Carrington, *Public Funding of Judicial Campaigns: The North Carolina Experience and the Activism of the Supreme Court*, 89 N.C. L. REV. 1965, 1978–79 (2011) (describing gradual adoption by over thirty states of some form of “merit selection” for judges on highest state courts or intermediate courts of appeal); Brandenburg & Schotland, *supra* note 22, at 1246.

24 See, e.g., Sandra Day O’Connor, Former Supreme Court Justice, *The Essentials and Expendables of the Missouri Plan*, Address to University of Missouri Law School Symposium: Mulling Over the Missouri Plan (Feb. 27, 2009), in 74 MO. L. REV. 479, 486 (2009) (“[A]t the very least [merit selection systems] have done a great deal to eliminate politics from the decision about whether or not to *retain* judges. That alone is a pretty strong advantage over the open–election system.” (emphasis in original)); Margaret H. Marshall, *The Promise of Neutrality: Reflections on Judicial Independence*, HUM. RTS., Winter 2009, at 3, 4, available at http://www.americanbar.org/content/dam/aba/publishing/human_rights_magazine/irr_hr_winter09_PDF_PromiseOfNeutrality.authcheckdam.pdf (“[T]he pressures to politicize the judiciary are most severe in those states that employ a retention system, whether elective or appointive.”); Maura Dolan, *Rejection of Iowa Judges Over Gay Marriage Raises Fears of Political Influence*, L.A. TIMES, Nov. 5, 2010, <http://articles.latimes.com/print/2010/nov/05/local/la-me-gay-justice-20101105> (quoting California Chief Justice Ronald George as saying the Iowa recall illustrated that “[t]he election of judges is not necessarily the best way to select them” (internal quotation marks omitted)); O’Connor: *Keep Iowa Judge System*, OMAHA WORLD–HERALD, Sept. 8, 2010, <http://www.omaha.com/article/20100908/NEWS97/709099977> (speaking to the Iowa Bar Association before the recall vote, O’Connor argued “[t]he judges should not be subject to retaliation” and said expensive judicial elections have “eroded the faith of many of our citizens in the judicial system”).

recusal rules.²⁵ The court imposed constitutional limits on judges sitting in cases who may have been influenced by campaign contributions from the parties to such cases.²⁶ And, of course, the instinct to protect decisional independence is reflected in the combination of doctrines and traditional practices that together cast suspicion upon legislative attempts to dictate the outcome of a pending case.²⁷

A concern with protecting decisional independence would not lead one to take aim *solely* at the reduced funds state courts receive to do their work, even though the crisis is reducing them. Nor would it cause one to focus only on the ways the budget process offends the courts' dignity, even though it may be offending it. Such a concern would instead provoke one to challenge the budget process brought on by the fiscal crisis insofar as it forces the judiciary to seek out, and then accept, funding solutions that compromise its ability to decide cases impartially.

On first glance, it may not seem as if the fiscal crisis results in a budget process that is having this adverse effect on decisional independence. Legislators certainly did not invent the funding crisis in order to punish judges for making unpopular decisions. Nor is there evidence that state legislatures are using the crisis to force state courts to decide certain cases in certain ways if they wish to be treated well in the final budget talks. Indeed, far from singling courts out for special treatment, state legislatures seem instead to be subjecting the judiciary to across-the-board funding cuts that apply equally to ordinary agencies of the government. However much that blunderbuss approach may reflect great disrespect for the institutional independence of the judiciary, it can hardly be equated with politically motivated impeachment proceedings, high profile recall campaigns, or substantive jurisdiction stripping laws. It is a neutral attempt to save money, not a targeted effort to bend future judicial outcomes to political will. For that reason, it may seem to pose more of a threat to the judiciary's fiscal independence than to its decisional independence.

And yet, there are troubling indications the crisis *is* placing the judiciary's decisional independence at risk. The threat arises from the entirely understandable way in which state court leaders and their advocates are responding to the intensified fiscal competition the fiscal crisis sparked. The ways in which this risk arises are subtle, and the threat to decisional independence that is involved is admittedly indirect. But that does not make the threat to judicial independence insignificant.

There has always been a competitive element to state court budgeting. It would be naïve to think that the pre-crisis budgeting process posed no risk to the judiciary's decisional independence. As with any "agency" of

²⁵ Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 887 (2009).

²⁶ *Id.*

²⁷ See Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 227 (1995).

government that is dependent upon appropriations, there is the potential that state courts will also be mindful of how those controlling the purse strings will judge their work. That courts might perceive there to be a fiscal benefit to compromising their decisional independence in order to curry favor with the legislature under a general appropriations system cannot be ruled out. That system itself may be sufficiently politicized as to encourage a state court system to assign certain judges to handle certain categories of cases known to be of interest to powerful legislators, or to promulgate rules of procedure that favor case outcomes to the liking of those same representatives. But although there is no crisp evidence of the phenomenon, it is certainly the case that the fiscal crisis makes this risk far more acute. That is because the crisis has, by all accounts, made the intergovernmental competition for favorable funding treatment far more intense for the simple reason that funds are scarcer. Under the weight of the fiscal pressure, state courts are no longer viewed as a special branch of government that is entitled to a fair amount of deference in the appropriations process. Court leaders cannot sit back, therefore, and assume their request will be taken seriously and likely granted, with only modest tweaks here or there. Because courts are increasingly treated as if they are but one more claimant on the public fisc, and one more target for cuts by legislatures desperate to find ways to offset declining revenues, they must adjust their approach. They must now engage fully in the fiscal competition if they are to win a meaningful share of state funds.²⁸ And the more the budgetary dynamic encourages state courts to adopt that more aggressive approach, the more risk there is that, at the margins, they will take steps that could make them more appealing candidates for legislative largesse but that would compromise their decisional independence.

State courts leaders (and their advocates) have responded in two important ways to these dynamics, neither of which is, by design, aimed at compromising the decisional independence of the state courts, even though that is their potential consequence. First, they have pursued funding solutions that would exempt courts from the annual budgeting process (in hopes of exempting themselves from the very competitive process just described), and second, they have begun mounting full-fledged legislative campaigns that publicly enlist powerful interest groups as allies in that process (in hopes of winning a fiscal competition in which they can no longer simply expect to do well).²⁹ These strategies are well-intentioned and are even sometimes quite effective in (at least temporarily) addressing the harm to the judiciary's fiscal independence that would follow from a severe funding reduction. And, it must be emphasized, neither approach

²⁸ See De Muniz, *supra* note 6, at 14–15; Rowe, *supra* note 8, at 2–3.

²⁹ See discussion *infra* Part IV (describing judicial budgeting experiences in Florida and South Carolina).

is directly at odds with the value of judicial impartiality. But they are potentially problematic approaches nonetheless.

They each have the worrisome effect of putting the decisional independence of the state courts at greater risk than it would be under the pre-crisis, general appropriations budgeting process, in which norms of deference to the judicial branch's unique role prevailed. These alternative approaches tie the continued financial health of the state court system to discrete funding structures that will predictably be implicated by future legal challenges. They also align the judiciary's budgetary success with the continued political support of identifiable interest groups regularly appearing before the courts. As a price for solving the funding crisis, therefore, the judiciary necessarily acquires a stake—or, at least, the appearance of having a stake—in resolving future cases in a manner that will preserve rather than upend the fiscal solution the state courts have embraced in response to the crisis. Those future cases, moreover, involve private litigants who may have interests opposed to the judiciary's newfound prominent fiscal allies, or who may be harmed by the governmental operations that must be carried out if the new off-budget funding stream for the courts is to meet its target.³⁰ The visible nature of that fiscal stake, moreover, has its own potentially corrosive effect on the reputation of the judiciary over time.

In consequence, what seem like “solutions” to the funding crisis, and thus effective means of protecting an independent judiciary from the budgetary axe, are not just solutions. They are also sources of conflicts of interest between the judiciary's obligation to resolve disputes on the legal merits and its interest in preserving its funding – conflicts that, for all its present defects, the more deferential appropriations process on which the judiciary historically relied did not present. The threat to judicial independence involved does not easily translate into an articulable (and thus litigable) constitutional claim that would assist the judiciary in securing more funds. And far from aiding state courts in their pursuit of fending off budget cuts, articulating this threat seems only to narrow the kinds of creative fiscal solutions that state court leaders and their advocates should feel good about pursuing.

In this respect, a focus on the crisis' harmful impact on the decisional, rather than the fiscal independence of the judiciary demonstrates just how acute the fiscal crisis is more than it offers an attractive way of solving it. But that is precisely why it is important to attend to it. Doing so will enable, and hopefully prompt, state court leaders and their advocates to better appreciate the constitutional concerns that are raised by some seemingly appealing strategies for managing a budgetary process that the fiscal crisis increasingly encourages them to adopt. At present, their incentives run in the opposite direction.

³⁰ See discussion *infra* Part IV.

IV. TWO CASE STUDIES OF THE CONFLICT OVER JUDICIAL INDEPENDENCE

To see how the state courts' quest for fiscal success in the legislature can prove hazardous to the judiciary's reputation for independence, it is useful to consider two stories in some detail. The first comes from Florida, and it involves a state judiciary's attempt to opt out of the appropriations process altogether.³¹ The story has become a well-known cautionary tale because the fiscal experiment left the judiciary with even less fiscal security than it had when it began. But that is not the reason to focus on it for present purposes. The story also bears on the decisional independence of the state courts and how it can be put at risk. There was little focus on that effect of the shift away from the courts' reliance upon general appropriations either in the failed aftermath of the establishment of a dedicated funding stream—in this case, one overwhelmingly comprised of foreclosure filings fees—or in the run up to its adoption. But a focus on that effect is critical. The Florida story raises concerns that go well beyond the fact that, as it happened, foreclosure filing fees turned out to be a most unreliable source of revenue and thus that the dedicated funding stream proved illusory. And those concerns speak directly to the ways in which the fiscal crisis can encourage state court leaders to endorse "solutions" that erode their decisional independence.

The second story comes from South Carolina. It concerns a political campaign effectively waged by that state court, and its fearless chief justice.³² Here, the story is often pointed to as a success because, through the effective enlistment of the business community, attention was at last focused on the needs of the state judiciary in ways that seemed unthinkable at the start of the campaign. But, by reviewing this episode with an eye on that campaign's effects on the judiciary's decisional independence, one sees reason for concern. The prominent alliance between the judiciary and a single interest group, here the business community, was strategically wise as a political matter. That alliance, however, raises some troubling questions about its potential effect on the judiciary's reputation for impartiality.

31 See REVENUE STABILIZATION WORKGROUP, STABILIZING REVENUES FOR THE STATE COURTS SYSTEM AND CLERKS OF COURT: RECOMMENDATIONS OF THE REVENUE STABILIZATION WORKGROUP 7 (2011), available at http://www.flcourts.org/gen_public/funding/bin/RevenueStabilizationReport.pdf [hereinafter REVENUE STABILIZATION WORKGROUP].

32 See Frierson, *supra* note 6.

A. Florida

Florida's courts relied on the general appropriations process for virtually all of its revenue until 2009.³³ As the state's fiscal situation darkened, interest grew in finding ways of securing what seemed to be a more stable funding stream. The legislature itself saw the advantages of such a shift. It had the potential to free up funds at a time when revenue shortfalls were looming.³⁴ The judiciary also saw great promise in a fiscal solution that would free the courts from their historic reliance on a conventional appropriations process.³⁵ The courts were increasingly losing ground in that realm. A dedicated funding stream seemed a way out of a political process in which the courts were not faring well.

At a special legislative session in January of 2009, the Florida legislature created the State Courts Revenue Trust Fund (SCRTF).³⁶ That fund established a dedicated fund for state courts primarily made up of court filing fees and fines.³⁷ Then-Chief Justice Peggy Quince championed this change, as did other judicial branch leaders and the Florida Bar Association.³⁸ In the spring of 2009, with the foreclosure and state budget crises spreading, the legislature decided to subsidize the SCRTF further

33 FLA. STATE COURTS, 2009–2010 ANNUAL REPORT 6–7 (2010) [hereinafter FLORIDA 2010 ANNUAL REPORT], available at http://www.flcourts.org/gen_public/pubs/bin/annual_report0910.pdf.

34 In January, 2009, the legislature was able to cut \$15.9 million in general revenue funding for the state courts, because funds from the new trust fund made up nearly \$11 million of that. PEGGY A. QUINCE, THE JUDICIAL BRANCH OF GOV'T, SPECIAL SESSION A, 2009: A SUMMARY OF BUDGET REDUCTIONS (SB2A), INCREASED PENALTIES (SB12A), AND THE CREATION OF THE STATE COURTS REVENUE TRUST FUND (SB14A) at 2 (2009), available at http://www.flcourts.org/gen_public/funding/bin/SpecialSessionUpdate.pdf.

35 FLORIDA 2010 ANNUAL REPORT, *supra* note 33, at 6 (“On the whole, branch leaders agree that the trust fund is a boon for the judicial branch: fueled by a portion of the filing fees and fines that the clerks take in for the courts, the trust fund ensures the court system a stable funding source that is able to support most court operations.”); QUINCE, *supra* note 34, at 2 (“More good news came with the Legislature’s decision to create a new State Courts Revenue Trust Fund, the first step in implementing the courts’ plan for stabilizing court funding. It was through this fund that the courts were shielded from deeper cuts.”).

36 FLA. STAT. § 29.22 (2011) (“The State Courts Revenue Trust Fund is created within the state courts system. Moneys credited to the trust fund shall be used for the purpose of funding the activities of the state courts system.”); *see also* 2009 Fla. Sess. Law Serv. Ch. 2009–7 (West) (providing text of bill passed by Florida legislature during Special ‘A’ Session).

37 FLORIDA 2010 ANNUAL REPORT, *supra* note 33, at 7.

38 *Id.* at 6; QUINCE, *supra* note 34, at 2; Jesse H. Diner, *Reflections on My Year as Bar President*, FLA. B.J., June 2010, at 4, 4 (Florida’s outgoing Bar Association president describes “the success story of how we were able to accomplish a more stable funding source for the courts, as last year the legislature redirected millions of dollars in filing fees and funds to the state courts’ revenue trust fund – and how this was particularly crucial with the astronomical foreclosure cases flooding into our courts.”).

by raising foreclosure filing fees.³⁹ Foreclosure filing fees became the lifeblood of the state judiciary in Florida. By 2010–2011, ninety percent of state courts' funding came from the SCRTE,⁴⁰ and at the peak, foreclosure filing fees provided seventy–nine percent of the courts' revenue.⁴¹

Less than a year later, though, foreclosure filings plummeted.⁴² One key reason was that lenders imposed a temporary moratorium on foreclosures, partly in response to the worsening housing crisis.⁴³ In addition, a delay resulted in an estimated 140,000 foreclosure cases due to the closure of the law firm of David King, Broward County's so-called foreclosure king.⁴⁴ According to the state courts' annual report, foreclosure filings dropped from 30,000 to below 9,000 monthly.⁴⁵ In the 2010–2011 fiscal year, revenue estimates for foreclosure filing fees had to be revised downward from \$432 to \$272.9 million, resulting in a \$108 million deficit.⁴⁶ In total, the court system needed almost \$54 million from other funds to stay afloat in 2010–2011.⁴⁷ In addition to seeking multiple emergency loans from the governor,⁴⁸ the judiciary survived on supplemental appropriations from the legislature.

In response, efforts have been made to refine the trust fund system and devise a more stable revenue base for the courts.⁴⁹ A special report from the court system itself—mandated by the legislature and conducted under the auspices of the current chief justice—attempts to set out a new path forward.⁵⁰ But that new path, at its core, constitutes a return to the old one,

39 FLA. STATE COURTS, 2010–2011 ANNUAL REPORT 7 (2011) [hereinafter FLORIDA 2011 ANNUAL REPORT], available at http://www.flcourts.org/gen_public/pubs/bin/annual_report1011.pdf.

40 FLORIDA 2010 ANNUAL REPORT, *supra* note 33, at 6.

41 FLORIDA 2011 ANNUAL REPORT, *supra* note 39, at 7.

42 REVENUE STABILIZATION WORKGROUP, *supra* note 31, at 23.

43 John Kennedy, *State's Recovery Hits Potholes*, PALM BEACH POST, Oct. 5, 2011, at A1 (“The decline [in foreclosures] has several sources, including the moratorium on foreclosures that lenders set last fall under federal pressure.”).

44 *Id.*

45 FLORIDA 2011 ANNUAL REPORT, *supra* note 39, at 8.

46 Editorial, *Courts Shouldn't Have to Beg*, ST. PETERSBURG TIMES, Oct. 7, 2011, at 10A.

47 REVENUE STABILIZATION WORKGROUP, *supra* note 31, at 7.

48 Editorial, *supra* note 46.

49 For instance, Chief Justice Canady appointed a Revenue Stabilization Workgroup, comprised of six judges and six clerks, to study the problem. He also wrote in his introduction to the state courts' 2010–2011 annual report: “[I]n the past year, this branch has prioritized developing a stable source of funding for Florida's courts.” FLORIDA 2011 ANNUAL REPORT, *supra* note 39, at 1; *see also id.* at 9. (“Stabilizing court funding remains my highest priority,” emphasizes Chief Justice Canady, and the governor has indicated that a stable funding source for the courts is a priority for him as well.”).

50 The Revenue Stabilization Workgroup was comprised of six Florida judges and six clerks of the court; the workgroup's report, entitled *Stabilizing Revenue for the State Courts System and Clerks of the Court*, was published on November 1, 2011. REVENUE STABILIZATION

however flawed it may be. The report is insistent that revenue stabilization should not be achieved by further increasing filing fees—whether or not doing so would generate a stable revenue stream. Instead, the report calls for a return to general appropriations funding for the core functions of the court system.

The report premises this conclusion largely on the Florida Constitution's recognition of an individual constitutional right of access to the courts, and its judgment that further hiking the fees, which are already among the highest in the nation,⁵¹ would be in tension with that state constitutional right.⁵² The report explains that

[T]he balance between what the state must pay as a general obligation of government and what the users should pay in order to access their court system should be carefully aligned so Florida citizens are always assured of their constitutional right of access to the courts without sale, denial, or delay.⁵³

The report does not, of course, adjudicate the constitutional issue regarding the right of court access and how increased fees might infringe it. But it does treat the decision to shift towards fee-based funding as more than just a fiscal issue. It treats it as an issue that implicates the constitutional obligation of the courts to remain open. The report is thus interestingly attentive to the ways in which the fiscal crisis may tempt those searching for court funds to opt for funding “solutions” that work only if one takes a position on an underlying legal issue that does not directly pertain to the constitutional status of the courts. Here, that legal issue would concern the right of court access. In this way, the report implicitly acknowledges that the fiscal crisis, insofar as it creates incentives for a shift to a fee-based system, necessarily puts pressure on the decisional independence of the judiciary. If the state courts have worked hard to craft a legislative compromise that makes them heavily dependent on high court filing fees, they are necessarily compromised when confronting a constitutional challenge to the constitutionality of imposing those very fees on individuals seeking access to the courts.

But the tension the report implicitly identifies between decisional and fiscal independence is not restricted to the special case of extremely high filing fees. It arises even in cases in which a filing fee is not so high that it would interfere with a state constitutional right of court access. Consider the foreclosure filing fee on which the courts became so dependent. Even if set at a rate that could not be said to infringe the constitutional right of court

WORKGROUP, *supra* note 31, at 8.

⁵¹ *Id.* at 37. At nearly \$2000, the foreclosure filing fee has been called “cost-prohibitive” for many people fighting to save their homes. Janet Zink, *No Court Foreclosures?*, ST. PETERSBURG TIMES, Sept. 21, 2011, at 1A.

⁵² REVENUE STABILIZATION WORKGROUP, *supra* note 31, at 10.

⁵³ *Id.* at 5.

access, it would still potentially compromise the decisional independence of the judiciary on a range of matters.

A judiciary heavily dependent on such fees would at least risk seeming to have a stake in the outcome of legal challenges that would make the collection of such fees harder. After all, the lenders' moratorium on foreclosures almost brought the judicial system to a halt in Florida.⁵⁴ It is not beyond imagination to think that the state judicial system itself might have confronted legal challenges to the foreclosure process that could have sought orders imposing effective moratoriums. Indeed, the Supreme Judicial Court of Massachusetts's recent ruling on the potential invalidity of a mass of titles, due to banks' failure to properly record the titles' conveyance to third-party investors,⁵⁵ would have quite evident impacts on the foreclosure filings that could then be made. In a state like Florida, such a ruling would not only strike terror in the hearts of the holders of suddenly legally ineffective mortgages. It could necessarily also be a cause of concern for the judges themselves. They would, in so ruling, be severely constricting the stream of funds on which their court system depends.

That is just one example of the kind of conflict that could arise.⁵⁶ Florida is one of only twenty states that require judicial proceedings to complete a foreclosure.⁵⁷ Two Republican legislators authored a bill to create non-judicial foreclosure procedures in 2010, known as the Homeowner Relief and Housing Recovery Act.⁵⁸ The House version died in committee in April of 2010,⁵⁹ but may come up again in the 2012 legislative session.

54 Katie Sanders, *Courts Get \$45.6M State Loan*, ST. PETERSBURG TIMES, Oct. 13, 2011, at 3B; Jan Pudlow, *Courts and Clerks Work to Keep the Doors Open*, FL. BAR NEWS, Mar. 15, 2011, available at <http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/8c9f13012b96736985256aa900624829/dff82f506270a548525784900711342!OpenDocument> (quoting various members of judiciary saying that due to the drop in foreclosure filings, the SCRTF would run out of money by the end of March, 2011 and without an emergency loan from the governor, "that means closing the doors").

55 U.S. Bank Nat'l Ass'n v. Ibanez, 941 N.E.2d 40, 53 (Mass. 2011); see also Bevilacqua v. Rodriguez, 955 N.E.2d 884, 893 (Mass. 2011). Justices in Massachusetts may confront the issue of foreclosures again, as Massachusetts's Attorney General recently filed a suit against five major banks over the use of robo-signing and other "unfair and deceptive" foreclosure practices. Complaint at 27, 28, 50–53, Massachusetts v. Bank of Am., No. 11–4363 (Mass. filed Dec. 1, 2011), available at <http://www.mass.gov/ago/news-and-updates/press-releases/2011/five-national-banks-sued-by-ag-coakley.html>.

56 For instance, it is possible that the courts' dependency on filing fees, and resulting pressure to affirm foreclosures, could raise due process concerns. *Tumey v. Ohio*, 273 U.S. 510, 533 (1927) (finding a violation of due process where the mayor acting as judge in a case knew that a conviction would benefit his village financially).

57 Kimberly Miller, *Courts Seek to Speed up Foreclosures*, PALM BEACH POST, Mar. 18, 2010, at 1A.

58 Homeowner Relief & Housing Recovery Act, H.B. 1523, 2010 H.R. Reg. Sess. (Fla. 2010), available at <http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=44346> (last visited Jan. 24, 2011).

59 Kimberly Miller, *Banks Fail in Bid to Bypass Court*, PALM BEACH POST, Apr. 13, 2010, at

Proponents argue the courts have created a massive foreclosure backlog that is preventing economic recovery.⁶⁰ Opponents of the measure argue that at the least any reform should include a waiver of the fee for homesteaded property owners fighting foreclosure.⁶¹ Interpretations of that legislation, as well as constitutional challenges to it, present the same type of dilemma for any court system that has chosen to make such fees its overwhelmingly primary funding source.

Or consider the concern that, with its huge backlog of foreclosure proceedings, Florida courts are reportedly dispatching many homeowners' claims in under a minute.⁶² The *Wall Street Journal* has called this Florida's "rocket docket," with some judges hearing 1,000 cases a day in 2009.⁶³ From June, 2010 to August, 2011, the courts handled 201,185 backlogged cases, leaving 260,815 outstanding.⁶⁴ What incentives do the courts have to slow down such rocket dockets if they have voluntarily redesigned the fiscal system for funding the courts in a way that contemplates the speedy processing of those very matters?

Florida's experience is instructive, then, for reasons that go beyond the lesson it teaches about the potential volatility of dedicated funding streams. It is worth recalling that the general appropriations system—which the court system's special commission is now celebrating as the key to stabilizing the court's revenue base—was itself volatile. Indeed, it was that very volatility that led to the search for a dedicated funding source. So the problem in Florida, if there is one, cannot solely be that the fees chosen were the wrong ones. In tight fiscal times, it is not obvious that there is solace to be found in any funding stream, including perhaps most especially appropriations from general revenues.

Rather, the Florida experience shows how the understandable desire to protect against volatility in the general appropriations process can give state court leaders and their advocates distorted incentives. A search for the holy grail of the stable funding base, independent of political vicissitudes and immune to economic fluctuations, led the Florida courts to embrace a "solution" that threatened to compromise their decisional independence. The chosen solution challenged their ability—and the appearance that

4B, available at <http://www.palmbeachpost.com/money/real-estate/nonjudicial-foreclosure-bill-dies-in-house-committee-556397.html>.

60 Kimberly Miller, *Court's "Cry for Help": Time to Overhaul Foreclosure Process?*, PALM BEACH POST, May 23, 2011, at 1A.

61 Zink, *supra* note 51.

62 Michael Corkery, *A Florida Court's "Rocket Docket" Blasts Through Foreclosure Cases*, WALL ST. J., Feb. 18, 2009, at A1, available at <http://online.wsj.com/article/SB123491755140004565.html>.

63 *Id.*

64 Kimberly Miller, *Fla. Foreclosure Backlog Shrinks 43% in a Year*, PALM BEACH POST, Aug. 19, 2011, at 1A, available at <http://www.palmbeachpost.com/money/foreclosures/florida-foreclosure-backlog-shrinks-43-in-a-year-1760197.html>.

they would have the ability—to impartially assess the meaning of the constitutional right of access to the Florida courts. That same solution also jeopardized their decisional independence in confronting those cases that would challenge the speed and ease with which Florida law permits homes to be foreclosed—an issue of public policy that became of paramount importance to the state’s population and to Florida’s economic future. Florida’s experience, then, offers a vivid illustration of how the search for fiscal independence for the state courts can end up compromising decisional independence in ways that are easy to overlook—and that, unfortunately, often are.

In other fields of regulation, potential conflicts like these are the subject of continuous concern. The decision to make the Food and Drug Administration dependent upon the filing fees of those it regulates was well understood to pose a serious threat to its capacity to render independent judgment.⁶⁵ The fact that ratings agencies live off of the fees paid by the companies they rate for fiscal soundness is a notorious example of the ways in which regulators become compromised by the funding sources on which they rely.⁶⁶ Conversely, the decision to exempt the Consumer Financial Protection Bureau from the ordinary appropriations process, and to tie its funding to fees collected by a distinct agency, the Federal Reserve, the regulatory powers of which it was assuming,⁶⁷ was intended to maximize the decisional independence of that new agency.⁶⁸ State court leaders and their advocates, no less than the legislators who negotiate funding solutions with

⁶⁵ See, e.g., Merrill Goozner, *Conflicts of Interest in the Drug Industry’s Relationship with the Government*, 35 HOFSTRA L. REV. 737, 739–40 (2006). The author points out that since the passage of the Prescription Drug User Fee Act of 1992, user fees have grown to provide a fifth of FDA funds, *id.* at 739, and argues that user fee acts are a “structural conflict of interest” that the FDA must resolve “if the agency is going to once again become the gold standard for federal regulatory agencies.” *Id.* at 740.

⁶⁶ Aline Darbellay & Frank Partnoy, *Credit Rating Agencies Under the Dodd–Frank Act*, 30 NO. 12 BANKING & FIN. SERVICES POL’Y REP. 1, 3 (2011) (explaining that under the issuer–pay model, leading rating agencies “compromised their standards in order to capture higher fees from increasingly complex deals”).

⁶⁷ Dodd–Frank Wall Street Reform and Consumer Protection Act § 1017, 12 U.S.C. § 5497(a)(1) (2010) (“Each year (or quarter of such year) . . . the Board of Governors shall transfer to the Bureau from the combined earnings of the Federal Reserve System, the amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau under Federal consumer financial law . . .”).

⁶⁸ The Consumer Financial Protection Bureau’s independent source of funding, *id.*, remains one of the most politically contentious aspects of its establishment. See, e.g., Letter from Rush Holt, Barney Frank & Brad Miller, U.S. Reps., U.S. H.R., to Colleagues in U.S. H.R., (Feb. 2011), available at http://holt.house.gov/index.php?option=com_content&task=view&id=771&Itemid=114. The letter objects to Republican attempts to limit funding for the CFPB, *id.*, and notes that in 2010, “Congress agreed that in order for this new financial watchdog to be effective, it must be independent and adequately funded. By deriving its operating budget from the Federal Reserve, it would be insulated from the types of partisan fights on Capitol Hill in which we find ourselves today.” *Id.*

them, need to recognize that a similar dynamic relationship exists between the mechanisms of court funding and court decision making. It should not be assumed that the courts are so distinct that their own reputation for impartial judgment—even assuming their unshakable capacity to exercise it—will not suffer from fiscal arrangements that work only if the legal interests of certain classes of private litigants are systematically rejected.

Florida seems to have—if only implicitly—internalized this lesson. Its court system is now on record as opposing a return to a fee based funding system because of its adverse impact on a state constitutional right that the courts themselves would be charged with vindicating.⁶⁹ But the court system came to this judgment in circumstances in which the fiscal solution that compromised the state court system's decisional independence proved to be no solution at all. The question is whether the general appropriations process would have seemed as preferable if the foreclosure filing fees had continued to roll in.

B. South Carolina

Faced with a fiscal crisis of its own, South Carolina's judiciary, too, went in search of fees.⁷⁰ The search began in earnest following the 2009–2010 legislative session.⁷¹ The judiciary had endured the largest percentage budget cut of any court system in the nation, losing more than 40 percent of its general revenue in a less than two-year period.⁷² The House Ways and Means Committee was proposing yet further cuts.⁷³ As a solution, long-time Chief Justice Jean Toal backed a bill that would have increased the state court civil filing fee.⁷⁴ But she did more than express support for it. Convinced the judiciary was not likely to fare well in the general appropriations process for the foreseeable future, and that the state legislature was not taking the need for funds as seriously as she believed it should, she decided to mount a full fledged lobbying campaign for more fees.⁷⁵

Doing so required Chief Justice Toal to take on a much more public role within the legislative process. Key to her effort was the decision to

69 REVENUE STABILIZATION WORKGROUP, *supra* note 31, at 3.

70 Frierson, *supra* note 6, at 2.

71 *Id.* at 1.

72 *Id.*

73 *Id.*

74 Fred Horlbeck, *Filing Fees Touted as South Carolina Budget Salve*, S.C. LAW. WKLY., Apr. 5, 2010 (reporting that the legislator who sponsored the bill to raise filing fees said Chief Justice Toal “proposed the language of H. 4595 and that he filed the bill at her request”); *see also* Press Release, Chief Justice Jean H. Toal, S.C. Supreme Court, (May 12, 2010) [hereinafter Toal Press Release], *available at* <http://sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=654> (expressing Chief Justice Toal's support for overriding the gubernatorial veto of H. 3161).

75 Frierson, *supra* note 6, at 4.

forge an overt alliance between the judiciary and the business community.⁷⁶ That previously dormant tie became strikingly visible. At one level, the alliance simply expanded the constituency for the courts, extending its reach beyond trial lawyers prominent in the support of increased judicial funding. Indeed, in August, 2010, the new president of the plaintiffs' group South Carolina Association for Justice, Mark Joye, announced that protecting funding would require coordination with the business allies.⁷⁷ A personal injury lawyer himself, Joye told the *South Carolina Lawyers' Weekly*, "[T]he association wants to coordinate efforts with business groups, lawyer organizations and corporations to teach the General Assembly about the problem," and he added that "[y]ou will see this year affiliations that you might normally never see."⁷⁸

Still, it was clear that the reason for reaching out to the business community went beyond a desire to show the judiciary was not associated only with those interests then supporting it and thus to facilitate a more general appeal on behalf of the court system. The reason to solicit business community support was also more affirmative. The chief justice saw value, as a matter of shrewd budget politics, in beginning to associate the business community's interests with that of the state courts. As the campaign to convince the legislature to support the bill intensified, Toal met with the general counsel of the Boeing Corporation, himself a former Fourth Circuit judge. He then began to make the case that a strong court system was critical in Boeing's decision to come to South Carolina in the first place.⁷⁹ The chief justice similarly made visits to a number of different business leaders to make the case that a well-funded court system held distinct benefits for the business community, and the in-state BMW representative, who chaired the South Carolina Manufacturers' alliance, invited Chief Justice Toal to give the keynote address at its winter meeting.⁸⁰

Interestingly, the alliance that Toal forged faced resistance from lawmakers who claimed to be concerned that the proposed funding bill—by hiking filing fees—did not comport with the constitutional function of the courts.⁸¹ As much as Toal and her supporters emphasized the threat that the judiciary faced from severe underfunding, legislators expressed concern that a shift to fees would produce a two-tiered system of justice based on ability to pay.⁸² But ultimately, Toal and her allies saw no more viable funding mechanism—and certainly none that would potentially put

⁷⁶ See generally Frierson, *supra* note 6.

⁷⁷ Fred Horlbeck, *New Leader of S.C. Association for Justice Mark C. Joye to Push for Judicial Funding*, S.C. LAWYERS WKLY., Aug. 16, 2010.

⁷⁸ *Id.*

⁷⁹ Frierson, *supra* note 6, at 1–2.

⁸⁰ *Id.* at 2.

⁸¹ *Id.* at 4.

⁸² *Id.* at 5.

the court on a stable revenue footing that would spare it from the kind of devastating legislative cuts it had just recently endured.⁸³ In the end, the fee bill passed, only to be vetoed by the governor.⁸⁴ In his veto message, Governor Sanford explained that he believed “there is something fundamentally wrong when the Judiciary must depend on increased fees on the courts’ users for its existence.”⁸⁵ Toal and her allies continued to press the legislature to override the veto,⁸⁶ but the effort failed when an override vote fell short.⁸⁷

Still, the lobbying paid off. The campaign produced widespread appreciation for the fiscal peril the courts faced, as well as for the special constitutional role the courts play—a role that could no longer be conceived of just another service that users could be made to pay for on an as needed basis. Thus, as much as Toal and her fellow advocates for the state courts were willing to compromise on that point, as they saw no alternative that could keep the courts funded, the executive and legislative branches’ refusal to do so proved beneficial. In the wake of the failed veto override, budget reallocations were made and general funds totaling more than \$20 million were appropriated to the judicial branch in part to make up for the rejection of the fee hike.

The South Carolina story is, in important respects, certainly one of successful judicial leadership. An energetic, motivated state court chief justice took on a political system that had shown little interest in funding the state courts. Through her imaginative and even unprecedented politicking, she managed to change the terms of political debate and achieve an important budgetary victory for her branch’s fiscal independence. But from the perspective of the judiciary’s decisional independence, the story is a less than completely happy one. The price of the victory was not trivial. Along the way, the courts became invested in the support of a new funding scheme that would have essentially pretermitted the viability of right-of-access challenges to it. And the judiciary had become visibly aligned with the business community. It had begun to overtly organize its legislative appeal around an account of the way the state court system could assist economic development.

83 *Id.*; see also Paul Tharp, *Bill to Raise Court Fees Clears South Carolina House, Senate, S.C. LAWYERS WKLY.*, May 10, 2010 (“The viability of our judicial system depends on the fee bill,’ Chief Justice Jean Hoefer Toal told Lawyers Weekly. ‘The courts would be in extreme dire straits without these funds.’”); Toal Press Release, *supra* note 74.

84 Frierson, *supra* note 6, at 5.

85 Frierson, *supra* note 6, at 5.

86 Toal Press Release, *supra* note 74 (“It is imperative that the Governor’s veto be overridden and that H. 3161 be approved for the two year period to avoid the impending perilous funding crisis of the Judicial Branch.”).

87 *SC House Upholds Governors Veto of Court Fee Increases*, ASSOCIATED PRESS (May 13, 2010, 5:00 PM), <http://www.carolinalive.com/news/story.aspx?id=456714#.Tx8AYSMzLnk>.

Indeed, on January 27, 2011, Toal made her annual presentation to the Ways and Means Committee.⁸⁸ Unlike the prior year, her presentation began with a slide emphasizing the courts' economic importance:

Ability of the Judicial Branch to fairly and timely resolve disputes is a highly important consideration in economic development

- South Carolina Business Courts
- Significant consideration in Boeing coming to South Carolina.⁸⁹

And on March 2, 2011, in her annual State of the Judiciary address, Toal told the full legislature that:

[t]he business community rallied to the side of the Judicial Branch last year as you seriously debated Judicial funding. Their message was clear. The ability of a state court system to fairly and timely resolve disputes is a highly important consideration in attracting new businesses to South Carolina. When court funding was in peril, Boeing representatives publicly stepped forward to emphasize that a stable court system and such innovations as the business court docket were key considerations in Boeing's decision to make a major investment in South Carolina.⁹⁰

In doing so, Chief Justice Toal appears to have been the only chief justice to single out a particular company for praise in her state of the judiciary speech.⁹¹

There is no violation of any canon of ethics in her having done so. Nor, in light of her reputation, is there any basis for suggesting in any way that her overt invocation of the business community's interests and its support for her funding request compromised her ability to decide cases fairly. The concern is more diffuse. It is that the judiciary's overt political campaign on behalf of more funding had tied it too tightly to the business community. A column in the state's leading newspaper well articulated the potential problem.⁹² Acknowledging Chief Justice's Toal's heroic efforts on behalf

88 Jean Hofer Toal, Chief Justice, S.C. Supreme Court, Presentation to South Carolina House Ways and Means Sub-Committee (Jan. 27, 2011), *available at* <http://sccourts.org/whatsnew/displaywhatsnew.cfm?indexID=705>.

89 *Id.*

90 Jean Hoffer Toal, Chief Justice, S.C. Supreme Court, Address to Joint Session of the South Carolina General Assembly: State of the Judiciary 2011 (March 2, 2011), *available at* <http://www.judicial.state.sc.us/whatsnew/HTMLfiles/SOJ2011text.pdf>.

91 The National Center for State Courts maintains an archive of State of the Judiciary speeches by year. *Interbranch Relations: State Links*, NAT'L CENTER FOR STATE COURTS, <http://www.ncsc.org/Topics/Court-Management/Interbranch-Relations/State-Links.aspx> (last visited Feb. 3, 2012).

92 Cindi Ross Scöppe, Op-Ed., *How the Legislature Compromises Our Courts*, THE STATE,

of her branch, the column expressed deep concern with the emergence of a political economy that all but forced her, in order to make a case against dramatic cutbacks, to tie herself (and her branch) so tightly to the business community's interests and to the support of a single named company. The chief justice "inadvertently revealed how the Legislature's disrespect compromises our judiciary," the column concluded.⁹³ "What's worrisome is the ethical position it puts the court in when one of those court-friendly businesses finds itself in a dispute before the court. How confident would you feel about getting a fair hearing if you were on the other side of that lawsuit?"⁹⁴

That question must be kept in mind by legislators who might be inclined to think that such a plea from the judicial branch should become the norm if funds are to be made available. It should also be kept in mind by judicial leaders and their supporters as they think about the kinds of lobbying campaigns that they should be putting together when confronted with a recalcitrant legislature.

More generally, it is worth noting that the South Carolina story is not altogether unique. It may even become—absent recognition of the troubling precedent it creates—a template for how budget negotiations over judicial funding may proceed in the future. Already, there are efforts to reframe the judicial demand for funding in terms that frame the court system's function in expressly economic terms.⁹⁵ State court systems have sought out economic consulting firms to prepare economic analyses to demonstrate that a poorly funded court system can undermine economic growth in the state. As Georgia would do in 2011,⁹⁶ the Florida Bar in 2008

Mar. 10, 2011.

93 *Id.*

94 *Id.*

95 See Mark Cady, Chief Justice, Iowa Supreme Court, Address to a Joint Session of the Iowa General Assembly: State of the Judiciary 2012, at 1–2 (Jan. 11, 2012), available at <http://www.iowacourts.gov/wfdata/files/StateofJudiciary2012/Webspeech.pdf> (describing World Bank and U.S. Chamber of Commerce studies proving that "[a] strong court system can play an important role, if not become the real catalyst, in achieving economic prosperity in Iowa"); Randall T. Shepard, Chief Justice, Ind. Supreme Court, Address to Joint Session of the Indiana General Assembly: State of the Judiciary (Jan. 11, 2012), available at www.in.gov/judiciary/supreme/files/soj-2012.pdf (lauding Indiana's courts for not being "a barrier to economic development," unlike "states where businesses shy away because of the litigation climate"); Editorial, *Healthy Courts Are a Must for Iowa: Chief Justice is Persuasive in Request for Resources*, DES MOINES REG., Jan. 11, 2012, <http://www.desmoinesregister.com/article/20120112/OPINION03/301120027/0/CONTACTS07/?odyssey=nav|head> ("Iowa Chief Justice Mark Cady made an unusual pitch to the General Assembly for why lawmakers should support healthy courts in this state: It's good for business. That was a smart tactic . . .").

96 THE WASH. ECON. GRP., THE ECONOMIC IMPACTS ON THE GEORGIA ECONOMY OF DELAYS IN GEORGIA'S STATE COURTS DUE TO RECENT REDUCTIONS IN FUNDING FOR THE JUDICIAL SYSTEM (Dec. 23, 2010), available at <http://www.gabar.org/public/pdf/news/2011%20Georgia%20Bar%20Economic%20Impacts>.

commissioned a report from the Washington Economics Group on the economic impact of court funding cuts, which documented the “adverse economic impacts” of cuts to the state courts.⁹⁷ By calculating time and opportunities foregone by court officials as well as businesses due to court delays, the report estimated that “120,219 permanent jobs for Florida’s residents are adversely impacted by civil case delays resulting from inadequate funding for Florida’s courts.”⁹⁸ In addition to lost wages, the report calculated that the loss in business revenue from civil court case delays would “adversely impact” \$9.8 billion in GDP⁹⁹ and \$17.4 billion in gross economic output for Florida annually.¹⁰⁰ Neither the Florida nor the Georgia report by the Washington Economics Group projects losses to a specific company, but in estimating the impact of delays generally across industry, the Florida report stated the biggest impact would be on “Knowledge-Based Services.”¹⁰¹

This kind of economic argument may well have force, but it is important to consider the jurisprudential context that such a reframing of the case for fiscally independent courts establish. These reframings suggest that a state court funding request is powerful to the extent that the state court system is enhancing the economic climate within the state, or boosting gross domestic product. They even go so far as to emphasize the particular benefit courts seem to be providing to specified business sectors—such as the knowledge-based industries.

Of course, such appeals do not promise any particular decisional outcomes. They usually rely on general language that could be read to suggest it is the timeliness of the judiciary’s resolution of business disputes, more than the substantive manner in which such suits are resolved, that is of economic significance. But is that a plausible account? Surely the substance of a given judicial system’s decisions can have economic impacts. There is a whole school of legal analysis devoted to that very premise.

And so the concern is that these kinds of framings of the case for more judicial funding—aimed at protecting the fiscal independence of the judiciary—will constrain, even if only subtly, the judiciary’s own approach to the myriad cases in which they may confront legal challenges that, if vindicated, would impose costs on the business community generally or specific business sectors in particular. And even if courts do not—as they should not—have their eye on their own case for funding in resolving such cases, the concern about appearances is not trivial. One need only think of trade secrets cases, or disputes about the meaning of non compete contracts,

97 THE WASH. ECON. GRP., *THE ECONOMIC IMPACTS OF DELAYS IN CIVIL TRIALS IN FLORIDA’S STATE COURTS DUE TO UNDER-FUNDING OF COURT SYSTEM 15* (2009).

98 *Id.* at 10.

99 *Id.* at 13.

100 *Id.* at 14.

101 *Id.* at 13.

or those involving the validity of mandatory arbitration contracts to see that the judiciary should be concerned with associating itself too closely with arguments that they need funding because they perform a function that will be “good” for business.

Relatedly, there is the concern that such reframings could lead state judicial leaders to begin to organize the judiciary in terms that will be perceived as business friendly, perhaps by devoting resources—scarce though they are—to creating specialized dockets and tribunals aimed at placing business disputes at the front of what are now lengthy case lines. As mentioned, some form of specialized business courts or dedicated business or commercial dockets exist in approximately nineteen states.¹⁰²

The South Carolina story, like the Florida story is a complicated one. In each, the judiciary confronted severe cuts to its operations by legislatures strapped due to their more general fiscal crises. Like any effective agency in-fighter, the “agency” leaders sought to find an effective means of moving the legislature to come to its aid. Politics seemed to suggest that certain kinds of appeals—in the present climate—would be more effective than others. And they also led the judicial leaders in each instance to see the advantages of funding proposals that would seemingly create “new” money—in the form of fees—that would enable the legislature to both keep general appropriations low and avoid imposing taxes. These were understandable—even creative—decisions by leaders confronting true crises. But it is important to also see that they involved more than simple efforts to advance and protect judicial independence. Because of the political economy that had emerged in the wake of fiscal crisis, such efforts were not costless to the judiciary—and its independence—even though they were, at points, successful in finding ways of persuading legislatures to spare the courts’ operating cuts that would have been quite severe. A strategy for securing funds in tight fiscal times is not a failure, in other words, only insofar as it fails to identify and establish a stable off-budget stream of dollars for the courts. Nor is it a success only insofar as it does identify such a stream. And the judicial system does not emerge stronger and more independent so long as it leaves a budgetary session with more funds on hand at the end than it seemed likely to obtain at the beginning. That kind of dollar-based, bottom-line assessment fails to account for the special constitutional role that courts play, not only in resolving disputes

102 See Lee Applebaum, *Some Observations on Modern Business Courts and the Bar’s Role in their Development* 5–8 (2009) (unpublished manuscript presented to ABA Business Bar Leaders Conference), available at <http://www.ncsc.org/Topics/Specialty-Courts/Business-Specialty-Courts/Resource-Guide.aspx> (listing nineteen states with business courts, business calendars or specialized business dockets); Amy G. Doehring, *Specialized Courts Continue to Take Hold*, ABA LITIG. NEWS (Aug. 14, 2009), http://apps.americanbar.org/litigation/litigation-news/top_stories/specialized-courts-complex-litigation.html (“More than 15 states now have implemented, or are currently considering, some type of court dedicated to resolving business cases or cases involving complex litigation.”).

efficiently, but also free from the suspicion that their own interest in maintaining a healthy budget is motivating the substance of its opinions.

CONCLUSION

Simply put, sometimes you can lose by winning. Leaders of our state courts have an obligation to be attentive to that possibility. And state legislators have an obligation to avoid placing them in a position that encourages them to win in such a compromising fashion. None of this is to say state courts enjoy some inherent right to operate inefficiently. Nor is it to say that the kind of fiscal politicking that the current crisis-inspired fiscal competition encourages state court leaders to engage in bears no resemblance to the kind of politicking that preceded it. No state court system is an island, immune to political forces and realities, and no effective state court leader has ever been able to act as if it is. But it is to say that state court leaders and legislators, in confronting tough budget choices, must recognize that the amount of harm the current funding crisis causes is not solely a function of the amount of money the state courts ultimately get. The mechanisms we use to fund our courts matter as much as the amount of funding that we give them, and thus the crisis will hardly have been solved if the price for keeping our state courts well-funded has been to diminish their reputation for impartiality.

To be sure, the potential harm to decisional independence that funding “solutions” may inflict is not likely to show up immediately or directly. It is a harm that will manifest itself over time in a loss of public confidence in the judiciary’s impartiality, or in a gradual shift in the court’s jurisprudential approach to cases that implicate the fiscal strategies they have pursued that give rise to such conflicts. For that reason, the real adverse effect will not be evident until some time has passed. But by that time, the lasting harm to the judiciary’s decisional independence may already have been done. Attending to this potential threat now, therefore, is critical so that legislators engaged in upcoming budget negotiations, as well as state court leaders and advocates focused on emerging from those negotiations with judicial funding intact, appreciate the stakes. The more they do, the more they will be attuned to the tradeoffs they may be making between the judiciary’s fiscal and decisional independence, *both* of which have been put at risk by the current funding crisis.

The political economy that creates the risk to judicial independence, of course, is not one to which state court leaders are uniquely subject. The fiscal crisis in the states—like the budget pressures experienced at all levels and sectors of government—poses dilemmas for public officials seeking fiscal independence across the board. But the general appeal of funding mechanisms that free public officials from the vicissitudes of the traditional appropriations process poses special concerns when judicial officials begin to succumb to it. And so, too, the trend towards positioning state courts

as business development assets should be concerning to those interested in preserving the courts' independent reputation, notwithstanding that trend's evident value as a political strategy come budget time.

Tradeoffs between decisional independence and fiscal independence that might seem acceptable in many contexts are necessarily more concerning when judicial leaders are forced to make them as a routine matter. It is possible, even familiar, to acknowledge the realist insight that one of the ways a governmental agency's mission is defined is through the means used to fund that agency. A standard observation, for example, is that an agency's enforcement power is not simply a product of the scope of its delegated regulatory power. It is also a function of the resources that have been appropriated to permit it to exercise that delegated power. For that reason, a decision to compromise an agency's decisional independence to ensure that the agency maintains a secure revenue stream may properly be understood to reflect a legislative policy decision that accommodates fiscal realities. But surely a different calculus is appropriate for the judicial branch. Its constitutionally assigned mission depends upon its decisional independence. The kind of tradeoffs that agencies generally may be forced to make in tight economic times, then, are not ones that we should be content to have our judges make. And yet, the evidence suggests that, absent a special solicitude among appropriators for the judiciary, it is precisely such tradeoffs that judicial leaders may come to believe that they, too, must make in order to survive. If so, the fiscal crisis's damage will have been done however well funded our courts may be.