



Kentucky Law Journal

Volume 100 | Issue 4

Article 5

2012

No Exit: The Financial Crisis Facing State Courts

G. Alan Tarr
Rutgers University-Camden

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

 Part of the [Courts Commons](#)

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Tarr, G. Alan (2012) "No Exit: The Financial Crisis Facing State Courts," *Kentucky Law Journal*: Vol. 100 : Iss. 4 , Article 5.
Available at: <https://uknowledge.uky.edu/klj/vol100/iss4/5>

This Symposium Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

No Exit: The Financial Crisis Facing State Courts

G. Alan Tarr¹

INTRODUCTION: THE PROBLEM

THE Great Recession has produced a severe decline in state revenues leading to massive budget shortfalls, which in fiscal years 2009, 2010, and 2011 totaled over \$530 billion.² These budget problems have in turn led to dramatic reductions in funding for state courts so that they are now experiencing a financial crisis of their own. The seriousness of this crisis is attested to by eminent jurists and legal notables alike. Former Chief Justice Margaret Marshall of Massachusetts noted that state courts are “at ‘the tipping point of dysfunction,’”³ Chief Justice Carol Hunstein of Georgia warned that “some court systems [are] on the edge of an abyss,”⁴ and Chief Justice Paul De Muniz of Oregon likened state courts today to “a dying tree that you prop up in your front yard so that the landscaping looks OK.”⁵ Responding to the crisis, in early 2011 Stephen Zack, then President of the American Bar Association, appointed an ABA Task Force to analyze the scope and effects of the financial pressures on state courts. In announcing the Task Force, Zack declared the “justice system [] in crisis” and warned that this “threatens the ability of all Americans to resolve disputes within a justice system designed to be a model for the world.”⁶ Former Alabama

1 Distinguished Professor of Political Science and Director, Center for State Constitutional Studies, Rutgers University–Camden. E-mail: tarr@camden.rutgers.edu.

2 These figures are drawn from ELIZABETH MCNICHOL, PHIL OLIFF, AND NICHOLAS JOHNSON, CENTER ON BUDGET & POLICY PRIORITIES, STATES CONTINUE TO FEEL RECESSION’S IMPACT 3 (2012), available at <http://www.cbpp.org/files/9-8-08sfp.pdf>.

3 Editorial, *State Courts at the Tipping Point*, N.Y. TIMES, Nov. 25, 2009, at A30, available at <http://www.nytimes.com/2009/11/25/opinion/25weds1.html>. Other leading jurists have also testified as to the financial problems facing state courts. See Peter Hardin, *MO Chief Justice Warns of Strains on Courts*, GAVEL GRAB (July 1, 2011), <http://www.gavelgrab.org/?p=22301>; see also Kenisha Schuster, *Judges to ABA Task Force: More Resources Needed*, GAVEL GRAB (June 22, 2011), <http://www.gavelgrab.org/?p=21881>.

4 David Rottman & Jesse Rutledge, *Facing Down a Budget Crisis, Rising Workloads, Two Judicial Elections and Living with Facebook: The State Courts in 2009*, in BOOK OF THE STATES 283, 283 (42 ed. 2010) (citation omitted).

5 Tony Mauro, *Budget Cuts are Crippling Our Nation’s Courts*, USA TODAY, May 26, 2011, at 11A, available at http://www.usatoday.com/news/opinion/forum/2011-05-26-Budget-cuts-crippling-courts_n.htm.

6 Peter Hardin, *State Court Funding ‘Crisis’ a Focus for ABA*, GAVEL GRAB (Feb. 9, 2011), <http://www.gavelgrab.org/?p=17810>.

Chief Justice Sue Bell Cobb put the situation in very practical terms: “We . . . have cut and cut and cut. There is nothing else to cut.”⁷

Examples from across the country illustrate the severity of the crisis. In Alabama funding cuts forced the “presiding judge in Jefferson County [to ask] the Birmingham Bar Foundation to give money to help pay jurors.”⁸ In New York, a \$170 million cut in the courts’ budget necessitated a reduction of one half in the hours for special weekend arraignment courts in New York City, the virtual elimination of a program to have retired judges hear backlogged cases, and the laying off of 350 court employees.⁹ In Florida, the court system required an emergency loan of \$19.5 million merely to enable it to keep operating through the end of May 2011.¹⁰ In Massachusetts, Chief Justice Roderick L. Ireland and Robert A. Mulligan, chief justice for administration and management, warned that they would have to close eleven of the state’s 101 courthouses to accommodate budget cuts.¹¹ And in California, a cut of \$350 million in operating funds and \$310 million in a court construction fund that in the past had been tapped in emergencies prompted a layoff of 200 Superior Court employees in San Francisco, leading Katherine Feinstein, the court’s presiding judge, to declare that “[t]he civil justice system in San Francisco is collapsing.”¹²

Budget data confirm how the states’ budget woes have affected state court funding. In fiscal year 2011, twenty-nine state court systems saw cuts to their budgets, with five experiencing cuts of more than twelve percent, and another seven saw no increase in their budgets to make up for cuts

7 Peter Hardin, *AL Chief Justice: ‘There Is Nothing Else to Cut’*, GAVEL GRAB (Mar. 9, 2011), <http://www.gavelgrab.org/?p=18655>.

8 Peter Hardin, *Passing the Hat to Help Jurors?*, GAVEL GRAB (June 29, 2011), <http://www.gavelgrab.org/?p=22175>.

9 Peter Hardin, *More Budget-Strapped Courts Face Delays*, GAVEL GRAB (May 17, 2011), <http://www.gavelgrab.org/?p=20792>.

10 Peter Hardin, *Loan Provides FL Court Reprieve*, GAVEL GRAB (Apr. 7, 2011), <http://www.gavelgrab.org/?p=19615>.

11 Michael Levenson & Noah Bierman, *Judges Vow to Shut 11 Courts: Decry State’s Budget, Seek Halt in Appointments*, BOS. GLOBE, July 13, 2011, at Metro 1, available at http://articles.boston.com/2011-07-13/news/29769816_1_new-judges-judges-vow-chief-justice.

12 Bob Egelko, *S.F. Courts Warn of Budget Disaster, Huge Delays*, S.F. CHRON., July 19, 2011, at A-1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/07/18/BA351KBVoG.DTL&tsp=1>.

in previous years.¹³ In 2010, court budgets were slashed in forty states.¹⁴ Again, some examples may underscore the point. Chief Justice Roderick Ireland of Massachusetts has noted that during fiscal years 2009 through 2011, the funds available for the operating costs of the state's trial court declined by \$61 million, a ten percent reduction.¹⁵ In Florida, the courts' budget for fiscal year 2010–11 was just over \$462 million, down from almost \$478 million in fiscal year 2007–08.¹⁶ According to Chief Justice Rebecca White Burch, Arizona's courts experienced budget cuts of more than \$38 million in 2009 and 2010, even as overall statewide general jurisdiction filings rose by more than 215,000 cases in 2009 alone.¹⁷ She observed that “[t]he recession has rocketed the filings in superior court civil cases up 29% in just the past fiscal year. Filings have increased 75% overall since 2005.”¹⁸

These budget cuts in turn have forced state court systems to adopt measures to reduce costs, even as they insist that the cuts jeopardize the administration of justice. Because personnel costs make up such a large proportion of state court budgets, states have focused on reducing personnel. Thus, according to data collected by the National Center for State Courts, twenty-nine states have imposed salary freezes on judicial branch employees. Sixteen states have furloughed clerical or administrative staff or have imposed reductions of pay on them. Thirty-four states have delayed in filling vacancies in clerks' offices, thirty-one in filling vacancies in judicial support positions, and twenty-six in filling judicial vacancies.¹⁹ Twenty-two states have increased fees and fines in the absence of sufficient

¹³ *Shortfalls in Court Budgets Directly Affect Public*, NAT'L CENTER FOR ST. CTS. (May 25, 2011), <http://www.ncsc.org/Newsroom/Backgrounder/2011/Court-Budgets.aspx>. It is true that not all court systems experienced a reduction in state spending. In Texas, for example, state appropriations for the judicial branch for fiscal year 2010 rose 12.03 percent. However, Texas courts rely heavily on counties for their funding, since state funding for courts made up less than one percent of state budget. OFFICE OF COURT ADMIN., ANNUAL REPORT FOR THE TEXAS JUDICIARY FISCAL YEAR 2010 3 (2010), available at <http://www.courts.state.tx.us/pubs/AR2010/AR10.pdf>.

¹⁴ Richard Y. Schauffter & Matthew Kleiman, *State Courts and the Budget Crisis: Rethinking Court Services*, in BOOK OF THE STATES 289, 289 (42 ed. 2010).

¹⁵ *Testimony before Joint Ways and Means Committee Before the H. Comm. on Ways & Means*, 2011 Leg., 187th Sess. 1 (Mass. 2011) (statement of C.J. Robert L. Ireland), available at <http://www.mass.gov/courts/fy2012-spina-testimony.pdf>.

¹⁶ SUPREME COURT OF FLA., FLORIDA STATE COURTS: 2009–2010 ANNUAL REPORT 7 (2010), available at http://www.flcourts.org/gen_public/pubs/bin/annual_report0910.pdf.

¹⁷ Rebecca White Burch, Chief Justice of Az. Supreme Court, 2010 State of the Judiciary (Mar. 17, 2010), available at <http://www.azcourts.gov/portals/51/2010StateoftheJudiciary.pdf>.

¹⁸ *Id.*

¹⁹ *Cost Saving Measures by State*, NAT'L CENTER FOR ST. CTS., http://www.ncsc.org/Information-and-Resources/-/media/Files/PDF/Information%20and%20Resources/Budget%20Resource%20Center/Cost%20Saving%20Measures%2012_10%20corrected%20version.ashx (last visited Feb. 21, 2012).

tax revenues to support the administration of justice.²⁰ States have also resorted to closing courts on some days in order to reduce costs.²¹

As Chief Justice Burch's comments indicated, the reduction in resources has occurred during a period in which demands on state courts have been increasing. Data collected by the National Center for State Courts document that court caseloads have steadily increased in recent years, without a corresponding increase in the number of judges to hear those cases.²² In fact, in some states the financial crisis has led to a reduction in the number of judges. In Virginia, for example, a hiring freeze imposed by the General Assembly left eighteen judgeships unfilled in the 2009–10 fiscal year, with the potential for as many as fifty vacant by June 30, 2012.²³

Just when it seems the tale of woe could not get any worse, this Article suggests that the current crisis is not an anomaly, that there is no constitutional or legal (as opposed to political) solution to the financial problems facing state courts, that what economic recovery does occur is likely to be slow at best, and that there may be no light at the end of the tunnel because states may be facing "a permanent retrenchment."²⁴ Let me explain my gloomy prognosis.

I. COURTS IN FINANCIAL DISTRESS: THE NEVER-ENDING STORY

For those who have been involved with state courts for a long time, the quotes by Chief Justices Kaye, DeMuniz, Cobb, and Burch should

²⁰ *Id.* It should be noted that those states that have instituted personnel cuts in the judicial branch have not singled out the courts for unusual burdens: they have instituted cuts in the state workforce more generally. For a listing of states implementing workforce cuts, see NICHOLAS JOHNSON, PHIL OLIFF, & ERICA WILLIAMS, CTR. ON BUDGET & POLICY PRIORITIES, AN UPDATE ON STATE BUDGET CUTS: AT LEAST 46 STATES HAVE IMPOSED CUTS THAT HURT VULNERABLE RESIDENTS AND CAUSE JOB LOSS 7–8 (2011), available at <http://www.cbpp.org/cms/index.cfm?fa=view&cid=1214>.

²¹ Indeed, one of the first items one sees on the website for Washington courts is a listing of the dates on which various courts will be closed. *Court Closures*, WASH. CTS., <http://www.courts.wa.gov/index.cfm?fa=home.courtClosures> (last visited Feb. 23, 2012).

²² Total incoming cases to state courts increased twelve percent from 1999 to 2008, with an increase of civil cases from 2007 to 2008 of seven percent (1.3 million cases) largely as a result of the Great Recession. See R. LAFOUNTAIN ET AL., NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 COURT CASELOADS 19 (2010), available at http://www.ncsconline.org/d_research/csp/2008_files/EWSC-2008-Online%20Version%20v2.pdf.

²³ Peter Hardin, *VA Belt-Tightening to Create Judge Shortage?*, GAVEL GRAB (May 3, 2010) <http://www.gavelgrab.org/?p=10359>.

²⁴ Raymond Scheppach, an economist with the National Governors Association, uses this term to indicate that, given the dire economic situation that most states are facing, state may be entering a period of permanent decline. Stephen C. Fehr, *Recession Could Reshape State Governments in Lasting Ways*, in THE PEW CTR. ON THE STATES, STATE OF THE STATES 2010: HOW THE RECESSION MIGHT CHANGE STATES 1, 2 (2010), available at http://www.pewcenteronthesates.org/uploadedFiles/State_of_the_States_2010.pdf.

sound familiar, because they echo expressions of concern and alarm from previous eras. Indeed, there seldom has been a period when the judiciary and the legal profession have not thought state courts underfunded. As Carl Baar observed in 1975: “[j]udges, court administrators, members of the bar, and the general public often criticize as inadequate the level of funding for judicial services.”²⁵ Even earlier, as part of the movement for court unification, reformers sought a shift from local to state financing of the courts. Although this reform was sometimes promoted as ensuring equitable funding for trial courts in all parts of the state, equally important to reformers was the overall level of funding.²⁶ The assumption was that in comparison with local governments, state governments had a broader tax base and therefore were more able to provide the support the judiciary needed.²⁷

However, the gradual and incomplete shift toward greater state responsibility for funding the courts apparently did not solve the problem. In 2003 Roger Warren, then the Director of the National Center for State Courts, warned that “[t]he state judiciaries are facing their greatest financial challenge since World War II.”²⁸ A year earlier the Institute for Court Management had recommended minimum funding standards to guard against retaliatory budget cuts and to ensure that the judiciary’s core functions were not sacrificed in times of financial exigency.²⁹ The American Bar Association’s Commission on the Twenty-First Century Judiciary echoed this sentiment in 2003, hoping (rather wistfully) that such standards would “assist legislatures in assessing whether and how deeply the judiciary’s budget can be cut without impairing the courts’ capacity to render fair and impartial justice” and thereby prevent excessive cuts.³⁰ What is striking about these concerns is that they were voiced during a period of state budgetary expansion, quite unlike the current era.³¹

25 CARL BAAR, *SEPARATE BUT SUBSERVIENT: COURT BUDGETING IN THE AMERICAN STATES* 1 (1975). Baar also noted the typical response to such expressions of concern: “officials responsible for raising and appropriating taxpayers’ money respond that while the courts are deserving of public support, they must compete with other public agencies for scarce public resources.” *Id.*

26 LARRY BERKSON & SUSAN CARBON, *COURT UNIFICATION: HISTORY, POLITICS AND IMPLEMENTATION* 40–41 (1978).

27 *Id.* at 40.

28 *State Courts Facing Greatest Budget Crisis since World War II*, 6 CENTER COURT, no. 3 (Nat’l Ctr. for State Courts, Williamsburg, Va.) Summer 2003, available at http://www.ncsconline.org/D_Comm/Projects/CenterCourt/CtrCtVol6-3/BudgetCrisis.htm.

29 RICK S. RAGER, INST. FOR COURT MGMT., *COURTS AND THE PUBLIC INTEREST: A CALL FOR SUSTAINABLE RESOURCES* 12–13, 21–24 (2002).

30 AM. BAR ASS’N COMM’N ON THE 21ST CENTURY JUDICIARY, *JUSTICE IN JEOPARDY* 83 (2003).

31 For data revealing a consistent increase in state revenues during this era, \$1.097 billion in 2002, \$1.296 billion in 2003, \$1.587 billion in 2004, and \$1.642 billion in 2005, see *State Government Finances*, U.S. CENSUS BUREAU, http://www.census.gov/govs/state/historical_data.html (last visited Feb. 17, 2012).

Comprehensive data on state court budgets have never been collected, so one cannot document the courts' financial difficulties over time. As a poor substitute, one can look at salary data, because the major item in state judicial budgets is salaries.³² Court advocates have long argued that state judicial salaries are insufficient, that "there is a point below which salaries may not fall without discouraging the best and the brightest from seeking judicial office."³³ These arguments have fallen on deaf ears. From 2003 to 2007, the average annual percentage change in salaries for state judges, at both appellate and trial levels, was 3.24 percent, and the average annual rate of inflation was 2.89 percent.³⁴ In 2008–09, with the beginning of the economic downturn, the average annual increase in judicial salaries was 1.67 percent, and the average annual rate of inflation was 1.75 percent.³⁵ In 2010, the average increase in judicial salaries was 0.63 percent, while the rate of inflation was 1.62 percent.³⁶ Thus, judicial salaries in good times and bad have largely tracked the rate of inflation, without any real increase in purchasing power. Or, put differently, they have never reached the levels that court advocates believe necessary to attract the sort of judges needed for a well-functioning court system.

II. DO STATE CONSTITUTIONS OFFER A SOLUTION?

If state courts have been unable to persuade state legislatures appropriating funds and governors wielding item vetoes to provide what they believe is adequate funding, do they have any legal recourse for compelling funding adequate for them to carry out their responsibilities? It may be that there are specific provisions within state constitutions on which courts might rely to secure funding. Alternatively, state courts may be able to claim an inherent power to "protect themselves and their functions from the neglect or interference of the other branches of government."³⁷

32 There are no firm data supporting this point other than the testimony of those familiar with state court systems. For example, Chief Justice Lawton R. Nuss of Kansas estimated that ninety-seven percent of budget went towards salaries. Lawton R. Nuss, Chief Justice of Kan. Supreme Court, State of the Judiciary 4 (Feb. 15, 2011), *available at* <http://www.kscourts.org/Court-Administration/State-of-Judiciary/State-of-Judiciary-2011.pdf>.

33 AM. BAR ASS'N COMM'N ON THE 21ST CENTURY JUDICIARY, *supra* note 30, at 85.

34 Nat'l Ctr. for State Courts, *Judicial Salaries at a Glance*, SURV. JUD. SALARIES, Jan. 1, 2011, at 1, 1, *available at* http://www.ncsc.org/~media/Files/PDF/Information%20and%20Resources/JUDICIAL_ONLINE_2011.ashx [hereinafter *Judicial Salaries at a Glance*]. For data on inflation rates in the United States, see *Historical Inflation Rates: 1914–2011*, COIN NEWS, <http://www.usinflationcalculator.com/inflation/historical-inflation-rates/> [hereinafter *Historical Inflation Rates*].

35 *Judicial Salaries at a Glance*, *supra* note 34; *Historical Inflation Rates*, *supra* note 34.

36 *Judicial Salaries at a Glance*, *supra* note 34; *Historical Inflation Rates*, *supra* note 34.

37 G. Gregg Webb & Keith E. Whittington, *Judicial Independence, the Power of the Purse, and Inherent Judicial Powers: The Use of Inherent Judicial Powers to Make up Budget Shortfalls Raises*

A. Constitutional Claims

Several state constitutions contain provisions that might on first inspection offer a basis for challenging cuts to judicial budgets. Perhaps the most obvious is the Alabama Constitution's mandate that "[a]dequate and reasonable financing for the entire unified judicial system shall be provided."³⁸ More common are guarantees of a right-to-a-remedy for injuries, which arguably could be invoked if state courts were unable to hear civil cases in a timely fashion because of inadequate funding. Kentucky's provision is typical: "[a]ll courts shall be open and every person for an injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and right and justice administered without sale, denial or delay."³⁹ Altogether, thirty-seven states have such right-to-a-remedy provisions in their declarations of rights.⁴⁰

However, state courts have not been able to use these constitutional provisions to increase their funding or stave off budget cuts, because governors and legislators have concluded that such provisions did not prohibit them from cutting court budgets. Indeed, the states with such provisions have been among those that with the most severely slashed state court budgets, as noted in our prior discussion of cuts in Alabama, Florida, Massachusetts, and Oregon. Furthermore, suits have rarely been filed under these provisions to reverse cuts in state court budgets. In 2010 a group in New Hampshire, relying on right-to-a-remedy language in the state constitution, did challenge such budget cuts, seeking restoration of four million dollars in funding.⁴¹ However, the trial court dismissed the plaintiffs' petition "[b]ecause [it] fails to state a justiciable cause of action,"⁴² as it was impossible to draw from the constitutional text "general formulae and timetables capable of defining a general duty."⁴³ In reaching this conclusion, the court distinguished the case from *Commonwealth v. Tate*, a Pennsylvania case that likewise involved a claim for system-wide relief,

Fundamental Questions about Judicial Independence and the Nature of the Separation of Powers, 88 JUDICATURE 12, 14 (2004).

38 ALA. CONST. art. VI, § 149.

39 KY. CONST. § 14.

40 For a listing of state right-to-a-remedy provisions, see JENNIFER FRIESEN, 1 STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES § 6-2(a) n.11 (3d ed. 2000). For discussion of these guarantees, see *id.* at ch.6; David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1203-18 (1992).

41 Peter Hardin, *Lawsuit Filed over NH Budget Cuts*, GAVEL GRAB (Sept. 29, 2010), <http://www.gavelgrab.org/?p=14157>.

42 *Baxter v. New Hampshire*, 217-2010-CV-00683, at 1 (N.H. Super. Ct. 2010), available at <http://doj.nh.gov/media-center/press-releases/2010/documents/20101101-baxter.pdf>.

43 *Id.* at 8.

noting that *Tate* involved a claim of inherent judicial powers, not a suit by citizens of the state.⁴⁴

The court's distinction between suits by citizens and claims of inherent judicial powers points to another potential basis for securing funds. The doctrine of inherent powers holds that courts possess "all powers reasonably required to enable a court to perform efficiently its judicial functions" – a sort of unwritten necessary and proper clause for state courts – from which it follows that they "have the inherent power to incur and order paid all expenses reasonably necessary to the efficient operation of the court or to performance of its judicial functions."⁴⁵ Although scholars have traced the roots of this doctrine to England, its full flowering as an authority to mandate legislative action occurred in the American states. This began in the nineteenth century, where the earliest cases established "the inherent power to provide and require payment for food and lodging of jurors."⁴⁶ As these early cases illustrate, the doctrine of inherent powers was chiefly invoked by state trial courts when they clashed with local funding authorities, such as county boards of commissioners, and typically the amounts at issue in these cases were small.⁴⁷

The constitutional justification for the inherent powers doctrine derives from the very act of creating state courts and vesting them with the judicial power. Basically, the claim is that "[i]f a state constitution requires that a given court exercise jurisdiction in certain cases, and funding authorities provide appropriations too small to hire and reimburse adequate support personnel to process the cases, the fiscal authorities may be ordered to do so."⁴⁸ This claim of inherent powers is controversial because it collides with the constitutional claim of legislators, whether state or local, to the power of the purse. For example, in *Webster City Board of Supervisors v. Flattery*, the Iowa Supreme Court ruled that ordering a county to hire an investigator for the county attorney's office was an intrusion on the legislative branch's power to appropriate money and was therefore an

44 *Id.* at 8–9 (citing *Commonwealth v. Tate*, 274 A.2d 193 (Pa. 1971)).

45 JIM R. CARRIGAN, NAT'L COLL. OF THE STATE JUDICIARY, INHERENT POWERS OF THE COURTS 2 (1973). As an Indiana court put it: "Courts are an integral part of the government, and entirely independent, deriving their powers directly from the constitution, in so far as such powers are not inherent in the very nature of the judiciary. A court of general jurisdiction, whether named in the constitution or established in pursuance of the provisions of the constitution, cannot be directed, controlled, or impeded in its functions by any of the other departments of the government." *Bd. of Comm'rs of Vigo Cnty. v. Stout*, 35 N.E. 683, 685 (Ind. 1893).

46 CARRIGAN, *supra* note 45, at 19.

47 *See, e.g.*, *Smith v. Miller*, 384 P.2d 738 (Colo. 1963); *Judges for the Third Judicial Cir. v. Cnty. of Wayne*, 190 N.W.2d 228 (Mich. 1971); and *Pena v. Dist. Court of Second Judicial Dist.*, 681 P.2d 953 (Colo. 1984).

48 Carl Baar, *Judicial Activism in State Courts: The Inherent-Powers Doctrine*, in *STATE SUPREME COURTS: POLICYMAKERS IN THE FEDERAL SYSTEM* 129, 131 (Mary Cornelia Porter & G. Alan Tarr, eds. 1982).

improper and unconstitutional assertion of an inherent power.⁴⁹ With the shift to state funding of the courts, the stakes have been raised considerably, transforming the inherent powers doctrine from a vehicle to resolve local disputes into “a viable judicial recourse for obtaining multimillion-dollar appropriations and supplanting the normal budget-making process” and from a mechanism to fill specific budgetary gaps into a means to expand the judiciary’s overall resources.⁵⁰

How effective such efforts will be remains to be seen. In a confrontation in New York in 1991, Chief Judge Sol Wachtler filed suit, challenging the governor’s recommendation of a ten percent reduction in the Chief Judge’s requested judicial budget and the legislature’s failure to appropriate the full amount that he had requested.⁵¹ However, prior to the case being argued, the parties reached a settlement in which the New York courts accepted only a minimal increase in funding from what the legislature had initially appropriated.⁵² In Kansas in 2002, Chief Justice Kay McFarland enjoyed greater success.⁵³ She invoked the inherent-powers doctrine in ordering an “emergency surcharge” on existing court fees that would be available only for judicial expenditures, and, in relying on court-generated revenue, she avoided a confrontation with both the governor and the legislature, which had failed to provide what she deemed adequate support.⁵⁴

Obviously, it is hard to draw conclusions about the future potential of the inherent powers doctrine from these two cases. In addition, it must be borne in mind that there may be political costs to challenging a funding authority by invoking the inherent powers doctrine, as such a challenge—whether successful or not—may create long-term antagonism against the courts.

B. State Constitutional Constraints

There are serious obstacles confronting legal challenges that aim to restore funding for state courts. As noted, perhaps the most obvious is the well-established understanding that only the legislature, the people’s representatives, has the power to appropriate funds and conversely that the judiciary has neither the sword nor the purse.⁵⁵ Some state constitutions

49 *Webster City Bd. of Supervisors v. Flattery*, 268 N.W.2d 869, 873–74 (Iowa 1978).

50 *Webb & Whittington*, *supra* note 37, at 15.

51 Our account of the New York controversy relies on *Webb & Whittington*, *supra* note 37, at 16.

52 *Id.*

53 Our account of the Kansas controversy relies on *Webb & Whittington*, *supra* note 37, at 18–19.

54 *Id.*

55 See THE FEDERALIST NO. 78 (Alexander Hamilton) (noting that the judiciary “has no influence over either the sword or the purse; no direction either of the strength or of the

make this understanding explicit. For example, the Vermont Constitution mandates that “[n]o money shall be drawn out of the Treasury, unless first appropriated by act of legislation,”⁵⁶ and the Florida Constitution confirms that “[t]he judiciary shall have no power to fix appropriations.”⁵⁷ But even in the absence of such provisions, it is well understood that courts’ authority to compel spending violates the normal order of things.

Beyond that, state constitutions typically include extensive and detailed provisions relating to taxing, spending, and borrowing that, taken altogether, serve to give “priority to taxpayers over service recipients,” thereby making it difficult to put forward claims for special consideration for the courts.⁵⁸ In addition, several state constitutions direct the uses to which tax revenues can be put, either by dedicating the revenues from certain tax sources to particular purposes or by prioritizing among various purposes for which funds can be expended. California, for example, mandates that “[m]oney collected under any state law relating to the protection or propagation of fish and game shall be used for activities relating thereto.”⁵⁹ It also has amended its constitution to require that public funds be dedicated to guaranteeing small class size for students in public schools.⁶⁰ Thus, by express constitutional language, it has identified claimants who have higher priority than do the courts for the distribution of state funds. Other states with analogous provisions have likewise indicated constitutionally what claimants and activities are their highest priorities, and often these do not include the courts.

State courts also cannot expect state governments to borrow the funds necessary to meet the needs of the courts because state constitutions impose significant restrictions on state borrowing. These constitutions not only limit the level of state indebtedness but also require special procedures, typically either a supermajority in the legislature or approval by voters in a referendum or both, before the state can incur debt. State governments have often found these debt limitation requirements unduly restrictive – or at least inconvenient – and have devised various mechanisms to evade them,

wealth of the society; and can take no active resolution whatever”); see also THE FEDERALIST No. 48 (James Madison) (affirming that “the legislative department alone has access to the pockets of the people”).

⁵⁶ VT. CONST. ch. 2, § 27.

⁵⁷ FLA. CONST. art. V, § 14, ¶ d.

⁵⁸ Richard Briffault, *Foreward: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 909 (2003) [hereinafter Briffault, *Disfavored Constitution*]; see also Richard Briffault, *State and Local Finance*, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM 211 (G. Alan Tarr & Robert F. Williams, eds. 2006) [hereinafter Briffault, *State and Local Finance*]. Our discussion relies on the informative overviews in these accounts of the state provisions that lead to taxpayer prioritization.

⁵⁹ CAL. CONST. art. 16, § 9.

⁶⁰ CAL. CONST. art. 16, § 8.5(a)(1).

including revenue bonds, lease–financing arrangements, and subject–to–appropriation debt. Indeed, it is estimated that roughly three–quarters of current state debt is not subject to state constitutional limitations.⁶¹ State courts have for the most part endorsed these evasions, emphasizing the letter rather than the spirit of the constitutional restrictions on debt.⁶² Nonetheless, borrowing by the states is largely for capital projects, so it is unlikely that they will incur debt to underwrite overburdened courts' operational expenses.

Finally, most state constitutions require that states maintain a balanced operating budget.⁶³ They also regulate the process of budget formation: in some states, the constitution requires an extraordinary majority to pass a budget, and, in the vast majority of states, the constitution gives the governor an item veto to eliminate appropriations or reduce their amount. In recent years, some states have introduced further spending restrictions, including limiting spending to a percentage of total personal income or population of the state or limiting the rate of spending or revenue increase to the rate of growth of the state economy.⁶⁴ Others have required that new or increased taxes be adopted by a legislative supermajority or be subject to popular approval via referendum.⁶⁵ These recent restrictions, usually the product of constitutional initiatives, reflect a popular distrust of state government and a preference for a limited public sector that is in tension with popular support for various public benefits. They also reveal skepticism that the power to defeat faithless legislators when they seek reelection is itself sufficient to discipline state government.⁶⁶ Some research suggests that

61 Briffault, *State and Local Finance*, *supra* note 58, at 221.

62 See Briffault, *Disfavored Constitution*, *supra* note 58, at 915–27.

63 See RICHARD BRIFFAULT, *BALANCING ACTS: THE REALITY BEHIND STATE BALANCED BUDGET REQUIREMENTS* 9 (1996) [hereinafter BRIFFAULT, *BALANCING ACTS*]; James M. Poterba, *Balanced–Budget Rules: Budget Institutions and Fiscal Policy in the U.S. States*, 86 AM. ECON. REV. 395, 395–96 (1996). State requirements of a balanced budget may mean balancing over either a one–year or a two–year period, depending upon whether the state has a one–year budgeting cycle (twenty–nine states) or a two–year cycle (twenty–one states). States do not always adhere to these legal requirements—for example, California ran budget deficits for five out of seven years at the end of the 1980s and the start of the 1990s. See BRIFFAULT, *BALANCING ACTS*, *supra*, at 16. For more general information on the subject, see Jeffrey I. Chapman, *California: The Enduring Crisis*, in *THE FISCAL CRISIS OF THE STATES: LESSONS FOR THE FUTURE* 104 (Steven D. Gold ed.) (1995).

64 BRIFFAULT, *BALANCING ACTS*, *supra* note 63, at 56. For detailed information on budget processes in the various states, see NAT'L ASSOC. OF STATE BUDGET OFFICES, *BUDGET PROCESSES IN THE STATES* (2008), available at <http://nasbo.org/LinkClick.aspx?fileticket=AaAKTnjgucg=&tabid=80>.

65 Representative provisions include: ALASKA CONST. art. IX, § 16; ARIZ. CONST. art. IX, § 17(3); COLO. CONST. art. X, § 20(7); CONN. CONST. art. III, § 18(b); DEL. CONST. art. VIII, § 6(b); FLA. CONST. art. VII, § 1(e); HAW. CONST. art. VII, § 9; LA. CONST. art. VII, § 10(C); S.C. CONST. art. X, § 7; WASH. CONST. art. VII, § 2(a).

66 See G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 157–61 (1998).

these new tax and expenditure limits have succeeded in limiting taxes and restraining the growth of state expenditures.⁶⁷ For current purposes, what is important is that the balanced-budget and other fiscal requirements likewise stand as barriers to additional court funding.

III. THE PROSPECTS FOR COURT FUNDING

A. *The State of State Finances*

State court funding depends in part on the financial health of the states, so the current and future prospects for state revenues are important, as are the likelihood of federal transfer payments. For more than half a century, the states have relied on the sales tax and the personal income tax as their primary vehicles for own-source financing, with the income tax accounting for 33.7 percent of total state tax revenues and the sales tax and gross receipts tax accounting for 32.6 percent in 2010.⁶⁸ The states also generate funds from taxes on motor fuel, from license fees, and from corporation net income taxes, totaling 29.6 percent of revenues in 2010.⁶⁹ Finally, gambling revenue has played an important role in state finances, representing 2.1 to 2.5 percent of states' own-source revenues each year from 1998 through 2007.⁷⁰

What is striking about these revenue sources is that they are cyclical, in that the revenues they generate tend to vary with fluctuations in the national economy.⁷¹ During good times, these state taxes capture growth in the economy. The income tax's progressive rate structure ensures that state income tax collections grow faster than state economies: that is, there is more than a one percent growth in tax collections for every one percent of growth in the tax base. In addition, sales tax revenues rise with increases in consumption, and prosperity encourages greater consumer spending. Even

⁶⁷ See John Matsusaka, *Fiscal Effects of the Voter Initiative: Evidence from the Last 30 Years*, 30 J. POL. ECON., no. 3, 1995, available at <http://www.iandrinstitute.org/New%20IRI%20Website%20Info/I&R%20Research%20and%20History/I&R%20Studies/Fiscal%20Effects%20of%20the%20Voter%20Initiative%20Last%2030,%20Matsusaka.pdf>

⁶⁸ Melissa Baybrooks, Julio Ruiz, & Elizabeth Accetta, *State Government Tax Collections Summary Report: 2010*, U.S. CENSUS BUREAU 2 (Mar. 2011), <http://www2.census.gov/govs/statetax/2010stcreport.pdf>.

⁶⁹ *Id.* at 3 fig.1.

⁷⁰ LUCY DADAYAN, NINO GIGUASHVILI, & ROBERT B. WARD, THE NELSON A. ROCKEFELLER INST. OF GOV'T, FROM A BONANZA TO A BLUE CHIP? GAMBLING REVENUE TO THE STATES 10 (2008), available at www.rockinst.org/pdf/government_finance/2008-6-19-from_bonanza_to_blue_chip_gambling_revenue_to_the_states.pdf.

⁷¹ The implications of the cyclical character of state tax systems are explored in David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544 (2005).

state revenues from non-tax sources such as gambling respond positively to economic gains.⁷²

Yet if state revenues increase faster than economic growth during good times, they also tend to decline faster during economic contractions. Income tax revenues respond to economic cycles because of the progressive character of the tax, and sales tax revenues decline because spending drops when income drops and spending on items covered by the sales tax declines even more. Because state sales taxes tend to exclude non-discretionary items such as food from the tax base and instead primarily tax discretionary spending, they are all the more susceptible to changes in the business cycle.⁷³

Given the cyclical character of the states' own-source revenues, it is hardly surprising that the Great Recession dramatically reduced those revenues.⁷⁴ The recession's effect was immediate: during the second quarter of 2009, for example, state tax collections "showed a record drop of 16.6 percent, the second consecutive quarter in which revenues fell more sharply than during any previous period on record."⁷⁵ Its effect was also sustained: altogether, during the fiscal years 2009, 2010, and 2011, the states' budget shortfalls totaled over \$430 billion.⁷⁶ To counteract fiscal shortfalls in the states and stimulate the American economy, Congress in February 2009 enacted the American Recovery and Reinvestment Act (ARRA),⁷⁷ which included roughly \$140 billion in fiscal relief for state governments, enough to close about forty percent of the budget gaps in the states. Indeed, during the first quarter of 2009, the federal government became for the first time the largest single source of revenue for state and

72 See LUCY DADAYAN & ROBERT B. WARD, THE NELSON A. ROCKEFELLER INST. OF GOV'T, FOR THE FIRST TIME, A SMALLER JACKPOT: TRENDS IN STATE REVENUES FROM GAMBLING 2–3 (2009), available at www.rockinst.org/pdf/government_finance/2009-09-21-No_More_Jackpot.pdf.

73 Super, *supra* note 71, at 2631–32.

74 For a more detailed discussion of the consequences of the current recession on state governments, see G. Alan Tarr, *The Global Financial Crisis: A View from the American States*, in FEDERATIONS AND THE GLOBAL ECONOMIC CRISIS: IMPACTS AND RESPONSES (John Kincaid, G. Alan Tarr, & Sonja Walti eds.) (forthcoming 2013).

75 These data are drawn from reports of the U.S. Bureau of the Census, discussed in LUCY DADAYAN AND DONALD J. BOYD, THE NELSON A. ROCKEFELLER INST. OF GOV'T, STATE TAX REVENUES SHOW RECORD DROP, FOR SECOND CONSECUTIVE QUARTER 1 (2009), available at www.rockinst.org/pdf/government_finance/state_revenue_report/2009-10-15-SRR_77.pdf. For detailed state-by-state data, see BEN HUSCH, NAT'L GOVERNORS ASSOC. & NAT'L ASSOC. OF STATE BUDGET OFFICERS, THE FISCAL SURVEY OF STATES (December 2009), available at <http://www.nasbo.org/sites/default/files/ffall2009.pdf>.

76 McNICHOL ET AL., *supra* note 2, at 3 fig. 2.

77 Pub. L. No. 111–5, 123 Stat. 115. This Act followed other legislation aimed at economic recovery enacted in 2008 during the Bush Administration, including the Economic Stimulus Act of 2008, Pub. L. No. 110–185, 122 Stat. 613; and the Emergency Economic Stabilization Act of 2008, Pub. L. No. 110–343, 122 Stat. 3765.

local governments.⁷⁸ However, this was only a stop-gap measure and did not promise long-term relief.

B. Should One Be Optimistic or Pessimistic about the Future?

If the problems state courts are experiencing are merely a product of the budget woes currently afflicting the states, one can be optimistic that the end of the Great Recession and a change in state budgetary fortunes will solve those problems. The end of the recession will generate additional tax revenues, and an appropriate percentage of those funds will be passed on to state courts, thus alleviating their budget problems. Recent data indicate that state tax revenues have started to rise, with increases in revenues from taxes on sales and personal income posting modest increases in the fourth quarter of 2010 and the first quarter of 2011.⁷⁹ Moreover, even the current sluggish recovery, reflected in unemployment rates at more than eight percent, has not prevented a rise in state revenues. Furthermore,

[i]f, as in past recessions, the incomes of the wealthy recover faster than those of low- and middle- income individuals and families, this would mitigate somewhat the effect of a sluggish job market on tax receipts, especially in states with progressive income taxes.⁸⁰

However, the case for pessimism about the states' financial prospects is even stronger. Even with the modest increase in tax collections, as of the third quarter of 2011, state revenues remained roughly seven percent below pre-recession levels.⁸¹ Moreover, a survey of forty-two states found that they projected more than \$103 billion in budget shortfalls for fiscal year 2012 that would have to be filled, so the budget difficulties the states have encountered are continuing, with no future bail-out by the federal government on the horizon.⁸² Even more important, although the current recession has aggravated the situation, the states' current budget woes are indicative of more fundamental problems that are likely to continue even after the recession has eased. Thus a GAO report written before the Great Recession warned that "in the absence of policy changes, large

⁷⁸ Alan Greenblatt, *Where the Crisis Began, Governments Pass Creative Law and Desperate Measures*, 8 *FEDERATIONS*, Sept.–Oct. 2009 at 5, 5.

⁷⁹ *National Totals of State Tax Revenue, By Type of Tax*, U.S. CENSUS BUREAU <http://www2.census.gov/govs/ntax/2011/q3t2.pdf> (last visited Mar. 18, 2012). For discussion of the states' rising revenues and their implications, see Lucy Dadayan, *Robust Revenue Gains Continue in First Quarter and Early Second Quarter: But Weak Property Tax Drives Local Governments' Collections Down for Second Consecutive Quarter*, STATE REVENUE REPORT, July 2011, at 1, 3–16, available at http://www.rockinst.org/pdf/government_finance/state_revenue_report/2011-07-14-SRR_84.pdf.

⁸⁰ McNICHOL ET AL., *supra* note 2, at 5.

⁸¹ *Id.* at 1

⁸² *Id.* at 4–6.

and recurring fiscal challenges for the state and local sector will begin to emerge within a decade.⁸³ These fundamental problems relate to current sources of state funding, to the prospect of reduced federal support, and to increasing costs for state services and shared programs such as Medicaid. If states will continue to be financially strapped even after the recession, then the funding problems facing state courts may be permanent, not temporary.

C. State Revenue Prospects

1. The Sales Tax.—Currently forty-five states impose a sales tax, which is the most productive source of state revenues. States differ in their sales tax rates, ranging from a rate of 2.9 percent in Colorado to seven percent in Mississippi, New Jersey, Rhode Island, and Tennessee.⁸⁴ They also differ somewhat in the transactions that they tax. For example, whereas Hawaii, New Mexico, and South Dakota tax services as well as goods, most states do not. Finally, the states differ in the range of goods that they exempt from the sales tax. For example, about two-thirds of the states do not tax groceries, and none tax prescription drugs.⁸⁵

As the Great Recession eases, one can expect sales tax revenues to rise. Nonetheless, there are several reasons for concern about the long-term prospects for sales tax revenues. One factor is the trend over time in the states toward exempting various goods and transactions from the sales tax, often in response to pressures from interested groups. In the past, states have been able to compensate for this narrowing of their tax base by increasing their sales tax rates. Thus, whereas in 1970 twenty-four states had tax rates of four percent or lower and only one state's rate was as high as six percent, by 2008 twenty-one states had sales tax rates of six percent or higher. However, one suspects that continued rate increases are unlikely to be politically viable.

Another factor reducing sales tax revenues is that over the past few decades, the percentage of personal income used for purchases on which sales tax is paid has declined, due to changing patterns of consumption.⁸⁶ One change has involved a shift in expenditures from goods, which are subject to the sales tax, to services, which in most states are not. As one commentator noted,

83 U.S. GOV'T ACCOUNTABILITY OFFICE, STATE AND LOCAL GOVERNMENTS: GROWING FISCAL CHALLENGES WILL EMERGE DURING THE NEXT 10 YEARS (2008), available at <http://www.gao.gov/htext/do8317.html>.

84 California has a sales tax of 7.25 percent, but that includes a statewide local tax of one percent. Data on tax rates and exemptions in the various states are available at *State Comparisons*, FED'N TAX ADMINS. (Jan. 1, 2012), http://www.taxadmin.org/fta/rate/tax_stru.html.

85 *See id.*

86 RONALD SNELL, NAT'L CONFERENCE OF STATE LEGISLATURES, NEW REALITIES IN STATE FINANCE 32 (2004).

[t]he general sales tax is ill-suited to an economy where personal consumption has shifted from goods to services and where the prices of goods tend to be stable while prices for services rise, with the result that the state sales tax base tends to decline as a share of personal consumption. These processes undermine the notion of the general sales tax as a tax on consumption.⁸⁷

Expenditures for health care have been a particular culprit here.

The increasing ease of ordering goods and services from out-of-state sellers, who are not required to collect sales tax, has also reduced revenues. This threat predated the advent of the internet—for example, mail-order goods typically were not subject to state sales taxes—but the rise in electronic commerce has aggravated the problem.⁸⁸ As more goods and services are purchased via the internet, the states have faced severe declines in sales tax revenues, because Congress has forbidden the states from taxing those transactions. In 1998 Congress enacted the Internet Tax Freedom Act, which prohibited a broad range of state taxes on internet transactions, and it has since extended the ban on state taxes of such transactions until 2014.⁸⁹ According to one estimate, the inability to tax internet transactions cost the states \$7,726.3 million in tax revenues in 2007, and as e-commerce expands, these losses will rise.⁹⁰ Indeed, one commentator referred to the rise of e-commerce as “something like the global warming of state finance.”⁹¹

2. *The Personal Income Tax.*—Forty-one states impose personal income taxes, and two others impose taxes on dividend and interest income, making it the second most productive source of state revenues.⁹² The income tax’s progressive rate structure ensures that state income tax collections grow

87 *Id.* at 11.

88 On electronic commerce and the future of state taxation, see Walter Hellerstein, *Electronic Commerce and the Future of State Taxation*, in *THE FUTURE OF STATE TAXATION* 207 (David Brunori, ed. 1998); SNELL, *supra* note 86, at ch. 4; MICHAEL MAZEROV, *CTR. ON BUDGET & POLICY PRIORITIES, EXPANDING SALES TAXATION OF SERVICES: OPTIONS AND ISSUES* (2003), available at www.cbpp.org/3-24-03sfp.pdf.

89 The Internet Tax Freedom Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998), and the Internet Tax NonDiscrimination Act, Pub. L. No. 108-435, 118 Stat. 2615 (2004), amended to extend the ban to 2014 in 2008. On state efforts to respond to this, see JOHN D. NUGENT, *SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING* 99-109 (2009).

90 Donald Bruce, William F. Fox, & LeAnn Luna, *State and Local Government Sales Tax Revenue Losses from Electronic Commerce* 7-8 (2009), www.icsc.org/srch/government/briefs/200904_salestax.pdf.

91 Brian Galle, *Designing Interstate Institutions: The Example of the Streamlined Sales and Use Tax Agreement (“SSUTA”)*, 40 U.C. DAVIS L. REV. 1381, 1386 (2007).

92 SNELL, *supra* note 86, at 44; see also David Brunori, *State Personal Income Taxation in the Twenty-First Century*, in *THE FUTURE OF STATE TAXATION* 191, 191 (David Brunori ed., 1998) (stating that the personal income tax account for roughly a third of state tax revenues and that the state sales tax is the only comparable source of revenue).

faster than state economies,⁹³ but long-term prospects for revenues from state income taxes are likewise a concern. One change with important implications has been the trend in the states to granting tax benefits to residents who are more than sixty-five years of age, partially as a result of successful lobbying by the American Association of Retired Persons (AARP) and similar groups. Thus, twenty-seven states now exempt all Social Security income from taxation, and thirty-four of the forty-one states with broad income taxes exempt some or all public pension income or provide a broader income exclusion for the elderly.⁹⁴ As the population ages, these exemptions are likely to significantly reduce state tax collections.

3. *Federal Transfer Payments to States.*—Transfer payments from the federal government are a crucial supplement to own-source revenues. These funds typically come to the states in the form of block, categorical, or program grants and are then passed on to individuals in the form of services or cash payments.⁹⁵ As noted, in 2009 Congress enacted the ARRA, which provided almost \$140 billion in financial relief to cushion the impact of the financial crisis on state governments.⁹⁶ However, this infusion of federal funds has been largely exhausted: it will provide only \$7 billion to alleviate the states' financial distress in fiscal year 2012, so states will have to rely on spending cuts and own-source revenues to combat budget shortfalls.⁹⁷

Beyond that, given the federal government's need to put its own financial house in order, federal transfer payments to the states are likely to be severely reduced for the foreseeable future. The federal government has committed to reducing spending by two trillion dollars over the next decade, and although the precise effects these deficit-reduction efforts are likely to have on state finances remains unclear, they can be expected to be significant.⁹⁸ Some states are already bracing for those effects and seeking to institute further spending cuts to deal with the expected loss of federal assistance. Thus in August 2011, Governor Paul LePage of Maine ordered state agencies to identify ways to cut \$100 million in spending in anticipation of losing federal funding because of the deficit reduction law.⁹⁹

93 SNELL, *supra* note 86, at 44.

94 *Id.* at 47.

95 NUGENT, *supra* note 89, at 41.

96 *See supra* notes 77–78 and accompanying text.

97 McNICHOL ET AL., *supra* note 2.

98 John Gramlich & Melissa Maynard, *For States, Debt Deal Is Short on Details*, STATELINE.ORG (Aug. 2, 2011), <http://stateline.org/live/details/story?contentId=591325>; Adam Nagourney & Michael Cooper, *States and Cities Brace for Less Federal Money*, N.Y. TIMES, Aug. 1, 2011, http://www.nytimes.com/2011/08/02/us/02states.html?_r=1&ref=todayspaper.

99 Mal Leary, *LePage Orders State Agencies to Find \$100 Million in Cuts*, BANGOR DAILY NEWS, Aug. 4, 2011, <http://bangordailynews.com/2011/08/04/politics/lepage-orders-state-agencies-to-find-100-million-in-cuts/>.

It seems unlikely that state courts will be spared from the budget-cutting states will be forced to undertake.

D. Demands on the States

Even should state revenues increase with the easing of the recession, there is no guarantee that a substantial portion of those funds will be used to redress the needs of the courts. Rather, given the severe fiscal pressures on the states over the next few decades, state courts may find their needs will not have a high priority. A couple examples may serve to highlight the likely competition for funding and the potential for state courts to be shortchanged in that competition.

The escalation of medical costs and increased enrollment in state health-care programs will place enormous demands on state budgets. The primary concern is Medicaid, a means-tested health program that serves about fifty-one million people.¹⁰⁰ States share responsibility for Medicaid with the federal government, contributing more than thirty percent of program funding—in fiscal year 2009 the state share amounted to more than \$123 billion.¹⁰¹ During the first years of the global financial crisis, ARRA provided assistance to states enabling them to deal with increased demands under Medicaid, with funding of more than \$74 billion in fiscal years 2009 and 2010.¹⁰² But, as noted, ARRA provided only temporary relief, and in coming years states must confront without federal assistance growing costs from both the increasing number of people relying on Medicaid and the rise in healthcare costs. The enactment of the Patient Protection and Affordable Care Act (PPACA) in 2010 will further increase budget pressures.¹⁰³ It is estimated that the Act's extension of Medicaid coverage to those with incomes of 133 percent of the federal poverty level will lead to a 27.4 percent increase in Medicaid enrollments by 2019, and some of these increased costs will be borne by the states.¹⁰⁴ Put

100 Henry J. Kaiser Family Found., Kaiser Comm'n on Medicaid and the Uninsured, *Medicaid Enrollment: December 2010 Data Snapshot 1* (2011), <http://www.kff.org/medicaid/upload/8050-04.pdf>.

101 Henry J. Kaiser Family Found., *Federal and State Share of Medicaid Spending, FY2009*, STATEHEALTHFACTS.ORG, <http://www.statehealthfacts.org/comparetable.jsp?ind=636&cat=4&sub=47&yr=90&typ=4> (last visited Feb. 26, 2012).

102 U.S. Dep't of Health & Human Services, *State and Territories Medicaid Program Awards*, HHS.GOV/RECOVERY, <http://www.hhs.gov/recovery/statefundsmap-text.html> (last visited Feb. 23, 2012).

103 Patient Protection and Affordable Care Act, P.L. 111-148 (2010). *But see CBO's Analysis of the Major Health Care Legislation Enacted in March 2010 Before the Subcomm. on Health Comm. on Energy and Commerce U.S. H.R.* (2011) (statement of Douglas W. Elmendorf, Director, Congressional Budget Office), *available at* <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/121xx/doc12119/03-30-healthcarelegislation.pdf>.

104 Henry J. Kaiser Family Found., *Medicaid Expansion to 133% of Federal Poverty Level*

simply, health-related costs pose the greatest fiscal challenge facing state governments, and increasing state revenues may have to be diverted to meet that challenge.

Another funding priority for state governments will have to be pensions and health-related costs for retired state employees. Some states have in the past balanced their budgets in part by inducing public employee unions to accept lower wage increases with the promise of future benefits payments, and the effects of this short-term gimmick are now being felt. States have also neglected to fully fund their pension obligations and set aside sufficient funds for future healthcare costs. The Great Recession has further aggravated the situation, because state pension obligations have been tied to stock market investments, and the decline in stock prices has meant that these obligations are significantly underfunded. Indeed, in fiscal year 2009 the nation's pension plans suffered a median 19.1 percent drop in their assets' market value.¹⁰⁵ As a result, according to the Pew Center on the States, "the gap between the promises states made for employees' retirement benefits and the money they set aside to pay for them grew to at least \$1.26 trillion in fiscal year 2009, resulting in a twenty-six percent increase in one year."¹⁰⁶ The severity of the financial problems facing the states can be seen by looking at the states' obligations and the funds available to meet those obligations. As of fiscal year 2009, states had a total liability of \$638 billion for retiree health benefits but had put aside only about \$31 billion—less than five percent of the total cost.¹⁰⁷ The states' pension systems were also significantly underfunded—at less than seventy-eight percent of obligations in fiscal year 2009.¹⁰⁸

In sum, fiscal pressures on the states—tied to increasing healthcare expenditures, to looming pension obligations to public employees, and to an erosion of the state tax base—continue to pose long-term challenges to the fiscal health of the states.¹⁰⁹ And financially strapped state governments are likely to mean financially strapped state courts.

(FPL): *Estimated Increase in Enrollment and Spending Relative to Baseline by 2019*, STATEHEALTHFACTS.ORG, <http://www.statehealthfacts.org/comparereport.jsp?rep=68&cat=4> (last visited Feb. 23, 2012).

¹⁰⁵ KEITH BRAINARD, PUBLIC FUND SURVEY, SUMMARY OF FINDINGS FOR FY2009 9 (2010), available at www.publicfundsurvey.org/publicfundsurvey/pdfs/Summary%20of%20Findings%20FY09.pdf.

¹⁰⁶ THE PEW CTR. ON THE STATES, THE WIDENING GAP: THE GREAT RECESSION'S IMPACT ON STATE PENSION AND RETIREE HEALTH CARE COSTS I (2011), available at http://www.pewcenteronthestates.org/uploadedFiles/Pew_pensions_retiree_benefits.pdf.

¹⁰⁷ *Id.* at 5.

¹⁰⁸ *Id.* at 2–3.

¹⁰⁹ For a discussion of these challenges, together with supporting data and projections, see U.S. GOV'T ACCOUNTABILITY OFFICE, STATE AND LOCAL GOVERNMENTS: GROWING FISCAL CHALLENGES WILL EMERGE DURING THE NEXT 10 YEARS (2008), available at www.gao.gov/new.items/do8317.pdf.

CONCLUSION: THE FUTURE

As former Chief Justice Judith Kaye has observed, “[p]lainly, state courts today need money but they also need more than money. They need ideas.”¹¹⁰ From this perspective, the perilous position of state courts may encourage creative thinking—as the old saying goes, every challenge is also an opportunity. State courts had better hope that this is true, for they are likely to continue to face the daunting challenge of providing more justice with less money. In the area of capital expenses, courts may find it useful to emulate approaches pioneered by other governmental entities. A good example is California’s Administrative Office of the Courts entering into a public–private partnership to reduce the cost of constructing a new courthouse in Long Beach.¹¹¹

In controlling operational expenses, technology may supply part of the answer.¹¹² For example, according to a recent Pennsylvania Supreme Court study, courts’ use of video conferencing technology is saving the state more than \$21 million annually.¹¹³ Certainly there are other opportunities for innovative approaches to delivering court services and for creative rethinking of the administration of justice. However, one must tread cautiously so that cost savings do not come at the expense of the quality of justice. Thus, as Anne Poulin has noted with regard to video conferencing, “the criminal justice system should at least determine what negative impact occurs and then assess whether that shifts the balance of advantage against the use of videoconferencing.”¹¹⁴ This holds true for other innovations as well.

One must also acknowledge that these solutions are more likely to be implemented in the long term than the short term. For one thing, it is hard to innovate on the run, when one is scrambling merely to meet current demands. As Dall Forsythe, the former budget director of New York, once observed:

¹¹⁰ Judith S. Kaye, *Constructive State Court Intervention: Turning Crisis into Opportunity*, in THE BOOK OF THE STATES 2010 295, 295 (2010).

¹¹¹ Press Release, Long Beach City Gov’t, City Announces New Downtown Long Beach Courthouse to Move Forward Public–Private Partnership Approved by State of California (Sept. 2, 2008), <http://www.longbeach.gov/civica/press/display.asp?layout=4&Entry=2087>.

¹¹² The use of technology to ensure access to justice, even in the face of diminishing resources, is becoming increasingly common. See generally NAT. CTR. FOR STATE COURTS, FUTURE TRENDS IN STATE COURTS 2011 (Carol R. Flango et al. eds., 2011) (providing an overview of the impact of technology and social media on court access), available at http://www.ncsc.org/-/media/Files/PDF/Information%20and%20Resources/TRENDS_book2011.ashx.

¹¹³ Patty Tascarella, *Video Conferencing Saves PA Courts \$21M*, PITTSBURGH BUS. TIMES, June 7, 2011, <http://www.bizjournals.com/pittsburgh/news/2011/06/07/video-conferencing-saves-pa-courts-21m.html#ixzz1OmzRzt16>.

¹¹⁴ Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1161 (2004).

Logic might suggest that an environment of scarcity would intensify efforts to provide services through more efficient, customer-oriented models. However, the record of the last few years provides little support for this hypothesis. More typically, tight budgets in state and local governments seem to lead to disruption, which drives out innovation and undercuts efforts to reorient service delivery.¹¹⁵

Even when promising new approaches are proposed, often they take years to fully implement. For example, the New Hampshire Judicial Branch Innovation Commission offered proposals designed to increase productivity by twenty-five percent, but this would only occur over a ten-year period.¹¹⁶

Yet ultimately state courts have no choice—new cost-saving approaches to service delivery are a necessity, not an option. If the analysis of this article is correct, state courts cannot expect an infusion of funds even when the Great Recession is over, because states are facing unprecedented demands and structural difficulties that will make it difficult to generate the resources necessary to meet those demands. The most likely prospect for state courts, as for other elements of state government, is a prolonged period of retrenchment. One might devoutly wish it were not so, but that is a wish that will not come true.

¹¹⁵ Steven D. Gold, *State Fiscal Problems and Policies*, in *FISCAL CRISIS OF THE STATES* 6, 34 (Steven D. Gold ed., 1995).

¹¹⁶ N.H. JUDICIAL BRANCH INNOVATION COMM'N, REPORT OF THE JUDICIAL BRANCH INNOVATION COMMISSION 5–7 (2011), available at <http://www.courts.state.nh.us/cio/innovation-comm/FinalReport.pdf>.

