

PERSPECTIVES ON
STATE COURT LEADERSHIP

MAINTAINING INSTITUTIONAL INDEPENDENCE:

FUNDING SUSTAINABLE STATE COURTS DURING ECONOMIC CRISIS

*One in a series from the Executive Session
for State Court Leaders in the 21st Century*

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This is one in a series of papers that will be published as a result of the **Executive Session for State Court Leaders in the 21st Century**.

The Executive Sessions at the Harvard Kennedy School bring together individuals of independent standing who take joint responsibility for rethinking and improving society's responses to an issue.

Members of the Executive Session for State Court Leaders in the 21st Century over the course of three years sought to clarify the distinctive role of state court leaders in our democratic system of government and to develop and answer questions that the state courts will face in the foreseeable future. Themes addressed include principles for effective court governance, the tension between problem solving and decision making, the implications of social media for court legitimacy, how courts defend themselves from political attack, and the notion of chief justices as civic leaders. Many themes were developed by Session members into papers published in a series by the National Center for State Courts.

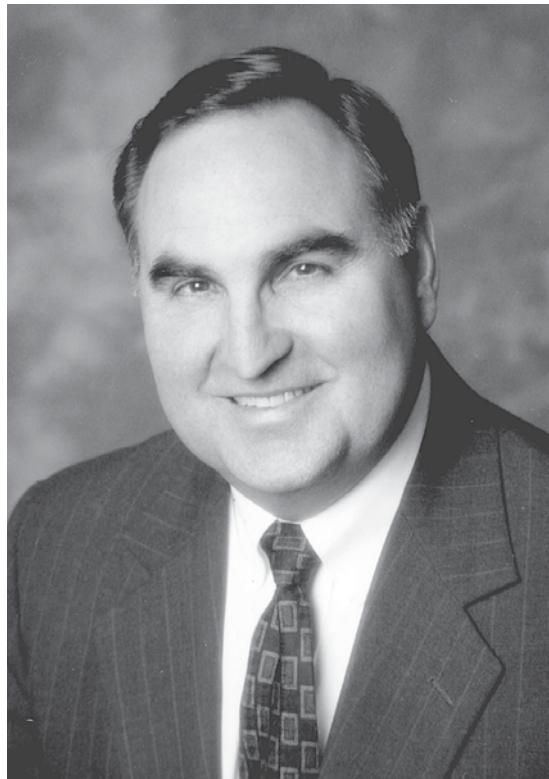
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INTRODUCTION

Sustainable funding levels are a prerequisite if state judiciaries are to dispense fair and timely justice and play their constitutionally mandated role in government. This paper argues that achieving such funding should be a priority for the legislative and executive branches, as well as the judiciary. The argument is developed through the following steps. First, the paper describes the dramatic changes state courts have experienced since the mid-twentieth century, along with the associated new responsibilities, new forms of governance, and a new reliance on state-level funding. Second, the paper explains why these changes resulted in a lack of the necessary budgetary protections for the state courts today. Third, the paper defines the concept of “sustainable funding” and differentiates it from the more traditional idea of “adequate funding.” Fourth, the paper explains how a lack of sustainable funding is a threat to the administration of justice, making it difficult for courts to reengineer court processes or to take advantage of technical advances to make them more efficient and effective. Finally, the paper ends on a positive note by offering court leaders practical guidelines on how they can persuade legislators and executive branch officials that providing the judicial branch with sustainable branch funding is a priority for all of state government.

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OUR STATE COURTS TODAY

State courts today have changed dramatically from those of the 19th century, when the legislative and executive branches only needed to fund judicial salaries, a horse, and a borrowed room. One hundred years ago, state judiciaries existed primarily as loosely

connected collections of locally funded county and municipal courts. Within those systems, courts of last resort wielded a certain degree of power as the entities responsible for interpreting state statutes and constitutions; however, they commonly lacked any administrative authority over the courts that operated below them.

The last 40-50 years have seen states implement so-called “modern court” provisions that melded state court systems with structured administrative entities, which are often led by the state’s highest court or its chief justice.¹ Modern state courts do more today than ever, and they do so in systems that have fully evolved as discrete branches of state government rather than as diffuse parts of a theoretical construct. State courts now have developed—and are administering—a growing array of specialized services that range from providing mediation and arbitration services to solving specific community problems in non-traditional adjudicatory forums such as drug courts, family courts, mental health courts, and now—in many states—veterans’ courts.

Meanwhile, states have also made wholesale changes in the way they fund their courts by shifting fiscal responsibility for the judiciary away from local governments and placing it with state government;² 31 state court systems currently rely on state appropriations for most, if not all, of their budgets. Oregon is one such unified court system—a court system funded almost entirely by the state.

Consequently, modern state courts—and state court leaders—increasingly view themselves as operating within a system collectively devoted to their state’s constitutional purpose. In Oregon, for example, that purpose is defined by the state constitution as the administration of justice “openly and without purchase, completely and without delay[.]”³ Today, more than ever, state courts are called to pursue that particular mission—or one phrased much like it—with an enhanced sense of constitutional identity, administrative definition, and influence.

State court leaders must pursue their mission with state funding, knowing firsthand how badly the administration of justice is destabilized when

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legislatively imposed budget reductions resulting from recessionary cycles force state court functions to be routinely turned off and on. Presently, most states are facing, or will soon face, severe revenue shortfalls in their current and future fiscal year budgets, with revenue gaps predicted to last through the decade.⁴ As responsible partners in government, state courts must accept their obligation to share in the fiscal reductions necessary to balance a state's budget. However, revenue shortfalls in many states are so great that proposed cuts to judicial budgets can imperil the judiciary's constitutional responsibility to administer justice impartially, completely, and without delay.

The continued underfunding of state courts will negatively affect state judicial systems in a number of ways. For example, continued underfunding will force courts to prioritize case processing by focusing on criminal cases at the expense of civil cases. This will eventually cause severe and unacceptable delay in processing civil cases, ultimately driving many civil litigants from our courtrooms to alternatives such as arbitration, mediation, and reference (*pro tempore*) judges. This would effectively create two systems of justice: one for those who can afford alternative dispute resolution methods and one for those who cannot. Such a division undermines the important role that a state's highest court plays in regulating business and consumer interests, especially when many of today's governmental regulatory bodies routinely fail to keep pace with contemporary discovery and innovation in science and technology. Disputes over issues arising in those areas are increasingly determined in court, and they should be. Alternative dispute methods simply do not offer the kind of regulatory authority established by case law and the kind of planning and risk analysis that economic litigation facilitates for business communities throughout the states—a loss at a time when it is needed most.

A second negative effect of state courts prioritizing criminal cases over civil cases is increased difficulty in the recruitment and retention of quality lawyers to the state court bench. Not only will lawyers be deterred from judicial service by low judicial salaries, but they will also be deterred by the lack of a diverse docket of interesting and challenging work. How many talented legal minds will be interested in a judicial career in which the daily workload consists of criminal cases—mostly pleas and sentencing—and cases involving self-represented litigants?

As a result of budget reductions, most state judiciaries have emptied their cupboards, swept the spare change from under their cushions, and thinned their soup. In a speech delivered in February 2008 to the American Bar Association House of Delegates, Margaret Marshall, then Chief Justice of Supreme Judicial Court of Massachusetts and President of the Conference of Chief Justices, noted that "each year at least 95 percent of all litigation in the United States takes place in state courts" and that, as a result, "as justice in our state courts goes, so goes justice in our nation." Chief Justice Marshall continued, "our state courts are in crisis. A perfect storm of circumstances threatens much that we know, or think we know, about our American system of justice."⁵

THE JUDICIARY AS AN INSTITUTION REQUIRING BUDGETARY PROTECTIONS IS A RECENT CONCEPT

To gain some understanding of how the state courts came to be in such dire circumstances, it is helpful to examine the growth of the American judiciary in the context of the separation of powers doctrine. Of particular relevance is why, despite a rich history in this country of embracing the theory of divided government, state judiciaries are not more insulated from funding decisions made by the other two branches of government.

At the heart of the separation of powers doctrine is a mistrust of human nature.⁶ Montesquieu, who is

widely credited with first articulating the divided government theory,⁷ wrote, “[w]hen the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty.”⁸

The solution, according to John Locke and James Harrington, was to divide government into different branches.⁹ However, those early models of government did not include a judicial branch.¹⁰ Montesquieu, Locke, and Harrington all conceptualized tripartite divisions of power, yet none of the three philosophers posited that the judiciary should be a co-equal branch of government.¹¹

The judiciary, however, gained new prominence under the U.S. Constitution. Given their experience with British rule, the framers embraced the same fear of power as the philosophers who preceded them. “Ambition must be made to counteract ambition,” James Madison wrote in the Federalist Number 51.¹²

Yet, while the framers opined that the judiciary should be a co-equal branch of government,¹³ they did not view the judiciary as an institution and thus did not design protections with such a model in mind.¹⁴ The motivation to protect the judiciary derived from two main phenomena.¹⁵ First, the framers were concerned about judicial independence because colonial judges were under direct control of the King and had no salary protection.¹⁶ Second, the framers were concerned with the power that state legislatures had over their respective judiciaries, especially after a series of events that prompted Madison to remark, “[in Rhode] Island the Judges who refused to execute an

unconstitutional law were displaced, and others substituted, by the Legislatures who would be willing instruments of the wicked [and] arbitrary plans of their masters.”¹⁷ Madison subsequently lobbied for the judiciary to be a co-equal branch of government¹⁸ and was joined by Patrick Henry and John Marshall, who also pushed for an independent judiciary that would be an able guard against the extra-constitutional actions of other branches of government.¹⁹

More recently, Michael Buenger, former president of the Conference of State Court Administrators, offered this apt summary: “The Framers...rejected a judiciary whose...judgment—was dangerously subject to unwarranted intrusions by the executive and legislative branches, particularly with regards to the decisional process.”²⁰ To protect the decisional process, the framers placed two relevant clauses in the U.S. Constitution: the Good Behavior Clause, which provided for the lifetime appointment of federal judges during good behavior; and the Compensation Clause, which keeps judicial salaries from being reduced.²¹ Hamilton highlighted the importance of judicial salary protections, contending that “[n]ext to permanency in office, nothing can contribute more to the independence of judges than a fixed provision for their support....a power over a man’s subsistence amounts to a power over his will.”²²

At that time, however, the majority of state judiciaries were composed of locally elected judges that were funded by local municipalities.²³ State legislatures generally paid little attention to the administrative structure of judiciaries because state trial courts were often not funded from state treasuries²⁴ and trial courts largely controlled their own administrative structures.²⁵ In the absence of an *institution* to safeguard, the framers of the state and federal constitutions did not seek to fortify the institutional independence of the judiciary by building in structural protections designed to maintain the independence of the judicial branch against a variety of incursions by the other branches, including protecting judicial budgets.²⁶

In the last two centuries, the structure of state judiciaries also has changed. State judiciaries are no longer composed of an attenuated collection of individual

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judges. Rather, today's state court systems are largely administered by the state supreme courts, which in a growing number of states exercise administrative control over the entire judicial branch.²⁷ Reviews are mixed as to whether "unified" court systems, actually produce positive or negative results.²⁸ Nevertheless, one thing is clear: as state courts systems have consolidated and unified, they have transformed into institutions with their own identities.²⁹

One additional observation should be made relating to the structure of state government and the effect on judicial branch funding. In many states, the legislature has not only underfunded the courts for years, it has also underfunded itself by denying legislators the kind of staff and research support necessary to facilitate the mastery of state government complexities that create a foundation for setting informed public policy. As a result, it is difficult for citizen legislators to gain a thorough understanding of the operations and budgets of executive branch agencies or those of the judicial branch. In charting a course of budget reductions in recessionary times, legislators tend to rely heavily on recommendations from the permanent unelected staff of the legislative budget office. Unfortunately, that approach often results in budget recommendations that treat the judicial branch as just one of many "agencies" slated to receive across-the-board budget cuts. Over-reliance in many states on fiscal staff to create a formula approach raises the risk that policy decisions made by state legislators no longer drive state budgets; instead the budget recommendations of unelected staff end up driving the public policy of the state. This fiscal office approach may balance the budget in an easily explainable manner; however, that office neither has, nor takes, responsibility in the end, for the severe policy repercussions and consequences of following that course of action.

The judicial branch is, of course, not an agency like a state's corrections, human services, or highway department. Those agencies, when faced with across-the-board cuts that represent a fixed percentage of their budgets, can choose not to pursue capital improvements or other tangible projects in order to meet their required budget reductions. In most states, however, 85 percent or more of the judicial branch budget is personnel costs, and—for important

constitutional reasons relating to the separation of powers doctrine—judicial compensation generally cannot be reduced, so the reductions fall more heavily on the remaining operations budget. As a result, wholesale budget cuts tend to have a disproportionate and, in some cases, crippling effect on a state's judicial branch, ignoring the role that courts play as the hub of the wheel for legal actions by all government players and the economy.

Additionally, fewer and fewer state legislatures today have a large cohort of lawyers among their membership, men and women familiar with the importance of maintaining an adequately funded judiciary. Instead, most legislators have had little or no contact with the court system in their state. In many ways, legislators today tend to reflect the attitudes and perceptions of the general public, who, lacking knowledge of the courts, are often upset by court decisions compelled by the law because segments of the media have portrayed those decisions as exercises in "judicial activism" or attempts at frustrating the people's will.

MODERN COURTS REQUIRE SUSTAINABLE FUNDING

It is often said publicly that court systems need to be funded at an "adequate" level to carry out their responsibilities in a timely and constitutional manner, ensuring that they are open and accessible and can administer justice completely and without delay. Yet "adequate" funding is usually defined at the barest,

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For a court system to meaningfully provide due process and timely justice as intended and deserved in our democracy, it must be able to do more than provide lip service in meeting the bare minimums of a mechanical process.

most basic level. Can a court dispense due process in disposing of the cases before it in a manner that passes minimum constitutional or statutory muster? The dollars necessary to meet even this low threshold are simply not guaranteed in these difficult financial times. Courts are closed, court services are sharply curtailed or eliminated, court dockets are severely backlogged, and people suffer without recourse or justice.³⁰

Infusing the minimum level of dollars into our courts to fund a minimum level of functioning is like keeping a dying tree propped up in a yard so the landscaping will still look “normal” to passersby: it is little more than a pretense. The cornerstone of democracy—the rule of law—cannot survive with this meager mindset as its standard. A definition of an “adequate” level of funding for the courts must recognize both the duty of the court system to provide justice without delay, and additionally, it must encompass the responsibility of sustaining a viable separate and equal branch of government—the judicial branch.

For a court system to meaningfully provide due process and timely justice as intended and deserved in our democracy, it must be able to do more than provide lip service in meeting the bare minimums of a mechanical process. State courts must be funded, supported, and shaped so that they can deliver the best outcomes for justice as required by the type of case, the matter at hand, or the people appearing before it. In other words, the judicial branch of government must be funded at a sustainable level.

“Sustainable” means having enough funding to not just dispense justice daily, but to do so as a separate and equal branch of government that has meaningful resources to manage, analyze, develop, and plan for implementing both short-term and long-term activities and strategies for supporting its role today, while ensuring quality performance and improvement for the future. To do so, the judicial branch of state government must be able to:

- Attract and retain a high level of quality candidates to serve as judges;
- Attract and retain a quality workforce;
- Plan and provide efficient and effective administration of justice in both an infrastructure and adjudicative capacity; and
- Provide access and timely justice consistent with founding constitutional principles in a manner that is responsive to the people and the society whose rights the judicial branch is designed and designated to protect.

An adequate budget for the judicial branch can be defined as one that allows our courts to provide access and meaningful—not just mechanical—due process every day.

SUSTAINABLE FUNDING IS REQUIRED FOR COURTS TO LEVERAGE TECHNOLOGY AND REENGINEER THEMSELVES

This is not easy to achieve. Meaningful, significant, and permanent advancements in the quality, timeliness, and accessibility of court services, while using fewer resources, requires planning and investment in the overall technology infrastructure of a state court system. Ideally, a unified court system can accomplish

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this on a statewide basis, providing even greater opportunities for leveraging resources and services.

Meaningfully addressing the problems of insufficient funding for the courts must involve both short- and long-term solutions using investments in technology. The public now is used to and expects instant access to information, facts, and data from their smart phones. No less is expected from the courts by a population that uses this technology every day and has little patience or time for what is still considered the “court norm”—reams of paper, pens, and manual searches for missing paper files or delayed entry of judgments. Courts must be funded so that they can move quickly to adopt technological opportunities to support and improve their work processes. Failure to provide the funding to do so has the potential to cast the courts into irrelevancy with upcoming generations.

In the short term, anything that provides the public or court staff with easy access to frequently asked questions and web pages—and hence reduces repetitive telephone calls or foot traffic—for readily available information (e.g., court location and hours, daily court dockets, and frequently used forms) should become the norm. Any software program that reduces the manual entry—especially the repetitive manual entry—of data by court clerks saves time and resources and reduces error.

An integrated technology approach allows planning that can incorporate the major components of

electronic filing and payment, electronic document and case management, person-based data, video conferencing, wireless connectivity, and a robust web-based presence. In its most expansive applications, it can make staff support and judicial resources available to lawyers and the public on a regional or statewide basis, reducing delay and backlogs. Even a fraction of that capacity, however, would enable courts to reengineer the delivery of court services to provide more complete information in real-time, offer immediate self-service opportunity unhampered by “business hours” or staff availability, and provide options that are not restricted by physical location or geography. It will also create a “common language” for a court system’s clientele, providing broader access and consistent processes. Whether it is a centralized system for payment or information, or it enables a judge from elsewhere in the state to be immediately available for an emergency hearing, technology investments are the only meaningful way to do both “more” and “better” work with fewer resources. The lawyers practicing in the states have an obligation to help provide leadership and support for their court systems and these technological improvement initiatives.

While an integrated technology approach to court business will allow courts to update the delivery of court services in significant ways, it is but the tool shed for the house itself, the house that needs an overall blueprint to guide its “repair” or “remodeling” effort. The term for that blueprint has most commonly been referred to as “reengineering.” Numerous state executive branches, and now several state judiciaries, are involved in this effort, actively questioning the what, why, where, and how of the functions they perform, while searching for better ways to deliver quality services with fewer resources, given the long-term recovery predicted for state economies.³¹ Reengineering is less about what can be “cut” and more about answering the question of how to reshape and reform how courts do their work.

The reengineering blueprint must have well-defined underlying foundational elements that articulate the courts’ mission, its institutional values, its internal governance structure, and a vision with a strategic plan for improvement. In Oregon, the Court Reengineering and Efficiencies Workgroup, dubbed

“CREW,” has adopted guiding principles for recommending reengineering proposals. Such proposals must:

- Promote convenience for litigants;
- Reduce cost and complexity of judicial processes;
- Maintain or improve access to justice; and
- Improve case predictability.

Oregon’s current court reengineering efforts are not only examining how technology can remove current physical barriers; but on a more radical scale, they are examining how to break outmoded barriers created by precedential institutional structures, such as boundaries for venue and jurisdiction, the conduct of judicial business, internal communication, case assignment, and case management. For example, although Oregon has 14 prisons located throughout the state, all prisoner post-conviction litigation has been centralized and is now administered by the State Court Administrator’s office in Salem. Every stage of the proceedings is done electronically and video technology has nearly eliminated the need to transport a prisoner to a courthouse. Centralization and the leveraging of technology in the post-conviction proceedings has saved millions of dollars in paper, postage, transportation, security, and indigent legal fees.

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THE LEGISLATIVE AND EXECUTIVE BRANCHES SHOULD MAKE STATE COURT FUNDING A HIGH PRIORITY

Despite the ongoing economic crisis, state legislative and executive branches should give judicial branch funding the same priority afforded the education of our children, the health of our families, and the public safety of our communities for two related reasons.

First, courts should have funding priority so that they can ensure constitutionally mandated levels of justice. No state court system should be placed in the same situation as the State of New Hampshire, where a group of unrelated litigants sued the legislature to restore funding to the courts so they can get their individual cases decided in a timely manner.³² Although courts have inherent, constitutionally derived power to compel certain actions by the legislature, state legislatures should not put the judicial branch in the position of having to decide for itself whether it has been funded at constitutionally adequate levels. That situation is an invitation to constitutional chaos and can easily be avoided.

Second, courts should have funding priority because courts stand at the intersection of each and every important social, political, and economic issue in each and every state. In human services, for example, no child removed from his or her home by the state is placed in foster care or returned home without a court’s permission, and courts oversee appointment of guardians and conservators for those unable to fully care for themselves.

In public safety, every day, courts protect victims of stalking and domestic violence, turn lives around in drug courts, and enforce the rights of crime victims and criminal defendants as they adjudicate criminal matters.

In the economic sphere, courts enforce economic and property rights every day as they establish legal authority to collect debts, interpret contracts, and regulate transactions between businesses and consumers.

In the end, it should never be a question of how much justice can a state afford. Providing justice completely and without delay is necessarily the constitutional policy of every state, and the elected leadership of every state should be committed to providing a budget sufficient to carry out that constitutional mandate.

ACHIEVING SUSTAINED FUNDING FOR STATE COURTS

The reality that judicial leaders must understand is that state budgets are inherently political declarations. There are no right or wrong answers in a budget; instead, legislatures must balance competing public demands in setting the state's public policy. It is, therefore, not beyond the pale to suggest that the measures most effective in affecting political artifacts such as budgets are, themselves, often political ones. In this context, the term "politics" does not refer to its colloquial meanings; e.g., the backroom machinations of self-serving oligarchs or their operatives. According to Black's Law Dictionary—and as used here—"politics" is better used to describe the "art or practice of administering public affairs." Viewed in that light, the "good" administration of a state judiciary is, in fact, "good" politics in that it can help facilitate "good" budget outcomes for state courts.

Good budget outcomes occur when the other branches of government and the public have confidence and trust in the judicial branch. Creating and maintaining that respect and confidence in the judiciary requires that the judicial branch be viewed as a prudent manager of its resources; a responsive, responsible, timely, and excellent producer of the work it is assigned to do; and an entity committed to ensuring the public's access to impartial courts.

There must be ongoing contact between the judicial branch and the legislature, and not just during the legislative session. The two branches can be in constant communication in a variety of ways. Over the last 5 years, Oregon's judiciary has worked to create

a shared perception with legislative leadership that intergovernmental collaboration is the most effective problem-solving model for state government. As a result of regular meetings, legislative leaders have come to understand the need for an open and accessible court system and understand where budget lines need to be drawn in order to maintain such a system. In the process, the legislature's primary question with regard to the judiciary was transformed from "What can we cut?" into "What can we fund?"

Forging strong alliances in the legislative budget process is also a key element in producing good budget results. One way in which the Oregon judicial branch has pursued that goal is by presenting itself as a working resource for state legislators—helping state legislators explore different policy and law-making goals in interim work groups convened by the judiciary but at the request of legislative leaders. The process is an informal one that usually begins when one or more legislators ask the judiciary for aid in understanding or developing a particular policy area. The Oregon Supreme Court's Chief Justice then acts as a "convener," assembling a group that shares common expertise to meet with the legislators and discuss their areas of concern.

As important as allies in state government are and will continue to be, there is yet another entity in the legislative process whose support the judicial branch must actively seek to cultivate: the public. The current state court funding crisis is the result of many things. There is, however, one injuriously overlooked factor that underlies all others: the judiciary occupies no conversational presence on the public radar. "The

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silence is deafening,” according to John R. Broderick Jr.³³ The court funding crisis is “not being talked about around the dinner tables of America.”³⁴ That silence goes far beyond any scarcity of civic education, political leverage, or funding. It is more widespread than that. And that lack of public awareness and support for the judiciary as an equal branch of government must change.

Effective and enduring access to legislative purse strings requires broad and lasting public support. So far, however, while many recently minted strategies place deserved and welcome emphasis on public outreach, communication, and education, those strategies do not contemplate the creation of *enduring* public stakeholder involvement. Because the present funding crisis is chronic, escalating, and constitutionally charged, it will not be solved by an ad hoc, crisis-by-crisis type of public buy-in. Public *awareness* alone will not be enough; the goal must be public *relations*.

The critical distinction between public *awareness* and public *relations* is the difference between merely disseminating information and becoming a partner in the understanding and incorporation of information. Accomplishing the latter will depend on how the judiciary chooses to identify itself and conduct its affairs, and to what extent those notions will pervade the everyday public conscious. When the public is able to anchor buy-in to an institutional presence instead of a single issue, doors and minds likely will open toward understanding the judiciary’s crucial role, the gravity of what is at stake, and the necessity for changes that will facilitate sustainable court funding.

The need to lead by example may never be greater. Courts must open the door, extend the hand, recognize the current cramped and conflicting socioeconomic demands on citizens, and then seek to address these demands. That will not be accomplished through the courts projecting a sense of importance or expecting owed loyalty, but by establishing a steady presence that is worthy of respect and relative importance among *the citizens’ concerns*.³⁵ That is the essence of buy-in. And that will come from public *relations*.

State court systems should be committed to creating, implementing, and promoting a management model designed, among other things, to strengthen ties between the state’s citizens and the courts that serve them.

State court systems should be committed to creating, implementing, and promoting a management model designed, among other things, to strengthen ties between the state’s citizens and the courts that serve them. The model’s working premise is that state courts, together with the rights that they enforce, belong to the people. As such, the public should be able to expect the following from the judicial branch of government:

- **Courts are accessible.** Courts should
 - (1) be open and available for public use every business day to process all types of cases, and (2) provide services that make the courts relatively easy to use.
- **Courts function transparently.** Courts should develop and follow procedures that are clear.
- **Courts are accountable.** Judges should be responsible and responsive to the citizens they serve, and judicial metrics should be in place to measure their performance in that regard.
- **Courts are engaged with the public they serve.** Judges should be visible and involved in their respective communities outside the courtroom.

With these public expectations met, the state courts can effectively make the case for the imperative of providing sustainable state court budgets.

CONCLUSION

The task at hand is clear. The public must have a day-to-day awareness and working knowledge of the judicial branch. From there, public buy-in must be earned. Recent creative efforts point encouragingly in the right direction. The State of California produced a YouTube video announcement that explains the current funding crisis and why judicial funding matters.³⁶ The Massachusetts Bar Association commandeered billboards along stretches of heavily travelled interstate highways that raise awareness of underfunded courts and encourage motorists to contact their legislators about increasing funding.³⁷ Even Sesame Street rolled out a segment featuring U.S. Supreme Court Justice Sonia Sotomayor settling a dispute between Baby Bear and Goldilocks.³⁸

Numerous ongoing programs deserve continued support. Justice Sandra Day O'Connor's iCivics program, a fun, user-friendly tool to teach youth about the government, belongs in every elementary classroom.³⁹ The webcasting of state supreme court arguments is a tool of yet untapped potential. In addition, efforts to personalize the judiciary *outside* of court confines should be vigorously encouraged, including Kansas' You Be the Judge program⁴⁰ and the American Bar Association Least Understood Branch program.⁴¹

However, until such programs are commonplace, as courts do increasingly more with less and budgets ratchet downward, even the most ingenious reengineering will be no more effective than rearranging deck chairs on the Titanic.

The public must have a day-to-day awareness and working knowledge of the judicial branch.

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² Id. at 1017.

³ OR. CONST., art I, § 10.

⁴ ST. OF OR. LEGIS. FISCAL OFF., ANALYSIS OF THE 2011-2013 LEGISLATIVELY ADOPTED BUDGET, SEVENTY-SIXTH OREGON LEGISLATIVE ASSEMBLY, at 387 (Sept. 21, 2011), <http://www.leg.state.or.us/comm/lfo/2011-13%20LAB.pdf>; Press Release, Michael Yuen, Chief Executive Officer, Superior Court of California, County of San Francisco, The San Francisco Superior Court Notifies the AOC of Reduced Clerks' Hours, Closure of 25 Courtrooms Effective October 3, 2011, (August 3, 2011), <http://www.sfsuperiorcourt.org/sites/default/files/pdfs/ClerksHoursFIN.pdf>; *Foreclosure Crisis Has Affected Florida's Courts on Multiple Levels*, FULL COURT PRESS (St. Ct. Sys. of Fla.), Summer 2011, at 3, http://www.flcourts.org/gen_public/pubs/bin/fcp_summerII.pdf. Florida's courts were funded primarily by the general budget at the start of the 2008 recession. As foreclosures increased due to the housing market collapse, funding sources began to dwindle, leading to a 12 percent reduction in court system's budget and the elimination of 290.5 positions between 2007 and 2009. In order to find an alternate funding source, in 2009 Florida lawmakers created the "State Courts Revenue Trust Fund," subsidized primarily by mortgage filling fees. *Foreclosure Crisis* at 4.

⁵ Margaret H. Marshall, Massachusetts Chief Justice, Remarks to the American Bar Association House of Delegates 2 (Feb. 16, 2009), available at http://www.abanow.org/wordpress/wp-content/files_flutter/1248455089_20_1_1_7_Upload_File.pdf

⁶ Edward H. Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 373-374 (1976).

⁷ Philip B. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 MICH. L. REV. 592, 595 (1986).

⁸ Levi, *supra* note 6 at 373-374 (citing MONTESQUIEU, THE SPIRIT OF THE LAWS, 38 GREAT BOOKS OF THE WESTERN WORLD 70 (Hutchins ed. 1952)).

⁹ Kurland, *supra* note 7, at 595.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 598 (citing THE FEDERALIST No. 51 at 347-48 (J. Madison) (J. Cooke ed 1961)).

¹³ Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 671 (1980).

¹⁴ Buenger, *supra* note 1 at 979, 1000-02, 1005.

¹⁵ *Id.* at 990.

¹⁶ *Id.* at 990, 992-93.

¹⁷ RECORDS OF THE FEDERAL CONVENTION OF 1787 at 2:27 (July 17, 1787) available at http://press-pubs.uchicago.edu/founders/documents/a6_2s5.html.

¹⁸ *Id.*

¹⁹ Kaufman, *supra* note 13 at 687 n.98.

²⁰ Buenger, *supra* note 14, at 1009-10.

²¹ Jeffrey Jackson, *Judicial Independence, Adequate Court Funding and Inherent Judicial Powers*, 52 MD. L. REV. 217, 225-26 (1993).

²² *Id.* (citing THE FEDERALIST No. 79 at 531 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

²³ Buenger, *supra*, note 14, at 1012-13.

²⁴ *Id.* at 1016.

²⁵ *Id.* at 1014.

²⁶ The establishment of the judicial branch as an independent and co-equal branch of government was the invention of John Adams and first appears in the Massachusetts's constitution of 1780. See Benjamin Kaplan, *Introduction: An Address*, in THE HISTORY OF THE LAW OF MASSACHUSETTS: THE SUPREME JUDICIAL COURT 1692-1992 (Russell K. Osgood ed., 1992).

²⁷ Buenger, *supra* note 14, 1017-18.

²⁸ John K. Hudzik & Alan Carlson, *State Funding of Trial Courts: What We Know Now*, 43 JUDGES' J. 11, 12-13 (2004).

²⁹ Buenger, *supra* note 14, at 1018.

³⁰ Stephen C. Fehr, *Recession Could Reshape State Governments in Lasting Ways*, in STATE OF THE STATES 2010: HOW THE RECESSION MIGHT CHANGE STATES 1, 2 (Diane Fancher et al. eds., 2010).

³¹ See Michael Hammer, *Reengineering Work: Don't Automate, Obliterate*, HARV. BUS. REV., July–Aug. 1990, at 104, 107 (explaining that reengineering business processes differs from merely rearranging them, because reengineering requires discarding all assumptions about a company's operations, including those that have been fundamental to the company's operations since its inception).

³² Sheri Qualters, *New Hampshire Lawyers Sue State Over Court Budget Cuts and Delays*, NAT'L L.J. (ONLINE) (Sept. 28, 2010) (on file with the *New York University Law Review*).

³³ James Podgers, *In Defense of the Courts: Symposium Finds No Easy Way to Fund Courts*, A.B.A. J. (Nov. 1, 2011) (quoting John R. Broderick Jr.), http://www.abajournal.com/magazine/article/in_defense_of_the_courts_symposium_finds_no_easy_way_to_fund_courts/.

³⁴ *Id.*

³⁵ A statement often heard is that “the judicial branch is weak politically because it does not have

constituency.” That statement simply is wrong. Whereas constituencies can fracture along party lines with respect to legislative and executive branch loyalties, the judicial branch does not fracture its support in that way. The judicial branch actually has the richest potential consistency among the other branches. To state otherwise is to disenfranchise the very resource on which the nature of the judiciary depends.

³⁶ *Up for Justice*, YouTube (Jan. 12, 2012), <http://www.youtube.com/watch?v=yzhErnUBxyQ>.

³⁷ Chris Reidy, *MBA Billboard Ads Urge Voters to Support More Funding for the State's Court System*, BOSTON GLOBE, Jan. 17, 2012, <http://www.boston.com/2012/01/17/mbamba/pNBYuoQ3jvEeO3Oz-824vzI/story.html>.

³⁸ *Justice Sonia Sotomayor: The Justice Hears a Case*, SESAME STREET (Updated Feb. 3, 2012), <http://www.youtube.com/watch?v=FizspmIJbAw>.

³⁹ iCivics. <http://www.icivics.org/> (last visited Dec. 29, 2011).

⁴⁰ You Be the Judge,-The United States Supreme Court in Review, Outreach to Student and Adult Audiences, <http://www.americanbar.org/content/dam/aba/migrated/divisions/Judicial/PublicDocuments/YBJarticle.authcheckdam.pdf> (last visited Apr. 30, 2013).

⁴¹ A. B. A. *The Least Understood Branch Project*, http://www.americanbar.org/groups/justice_center/judicial_independence/resources/resource_kit_on_fair_impartial_courts_lub.html (last visited Dec. 27, 2011).

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