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Funding the Judicial Department at a Level the Supreme Judicial Court Deems "Essential to Its Existence and Functioning as a Court" Is Required by Doctrines of Comity and Duties Imposed by Maine's Constitution

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MAINE’S CONSTITUTION

Orlando E. Delogu

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Orlando E. Delogu^{**}

I. INTRODUCTION

This Article develops ideas and arguments relative to judicial funding initially advanced by this Author in two op-ed pieces previously published in the *Maine Lawyers Review*.¹ Beyond elaborating and more carefully documenting (with footnote references) points previously made, this Article undertakes to lay out the judicial department’s unique status as one of three co-equal and coordinate branches of Maine’s governmental structure. It is this status that separates the judicial department from all of the other agencies of state government.²

The Article further argues that this status gives rise to a duty on the part of the legislative and executive departments to fund the judicial arm of our governmental structure at that level deemed necessary by the Supreme Judicial Court of Maine, also known as the Law Court, to carry out its constitutional duties. The discharge of this legislative-executive duty both recognizes the judiciary’s co-equal status in our structure of government, and enables the judiciary to, in fact, discharge its constitutional duties. Conversely, a failure by the legislative-executive departments to fund the judicial department at the level the court deems necessary leaves the judicial department beholden, and subservient to, the other two departments, and prevents the judiciary from fully meeting its constitutional duties. These are not conditions contemplated, or permitted, by Maine’s Constitution.

II. THE JUDICIAL DEPARTMENT

The Maine Constitution is the most fundamental document fashioned by the people of Maine. It lays out the rights of citizens and the structure of our government. The preamble states: “We the people of Maine . . . do agree to form

* Board of Overseers of the Bar v. Lee, 422 A.2d 998, 1002 (Me. 1980).

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1. See Orlando E. Delogu, *Maine’s Court System Not Just Another State Agency Seeking Funding*, ME. LAWYERS REV., Mar. 9, 2009, at 19; Orlando E. Delogu, *The Judicial Branch: Not Just Another Agency*, ME. LAWYERS REV., Oct. 23, 2008, at 21.

2. This point was fully recognized by Maine’s highest court in *Board of Overseers of the Bar v. Lee*, a case that unsuccessfully challenged registration fees imposed by the court on members of the bar. In discussing separation of powers, the court in a footnote cautioned: “Where our constitution refers to the three great departments of government, the reader must be careful to distinguish them from the ‘departments’ or agencies which may from time to time be created within the executive department.” *Lee*, 422 A.2d at 1002, n.6.

ourselves into a free and independent State, by the style and title of the State of Maine, and do ordain and establish the following Constitution for the government of the same.”³ Article III, section 1 of Maine’s Constitution states: “The powers of this government shall be divided into three distinct departments, the legislative, executive and judicial.”⁴ Articles IV, V, and VI of the Maine Constitution go on to lay out in detail the rights, powers, and duties of each of these branches of government.⁵ Nothing in the preamble or in the whole of Maine’s Constitution suggests (or even hints) that any one of these branches is ascendant over, or lesser than, either of the other two. On the contrary, a long line of scholars and Maine cases see the three branches as separate, independent, necessary, and co-equal. One such case, *Ex parte Davis*,⁶ after reviewing the founding documents and principles of our government, and citing a number of relevant scholarly sources,⁷ stated:

With a view to these principles, which are so essential to the government of a free people, the framers of the constitution of this State provided therein that the powers of the government shall be divided into three distinct departments: the legislative, executive and judicial.

. . . .

“The first was to pass laws, the second to approve and execute them, and the third to expound and enforce them.”⁸

. . . .

Each of the three departments being independent, as a consequence, are severally supreme within their legitimate and appropriate sphere of action. All are limited by the constitution.⁹

A more recent case, *Board of Overseers of the Bar v. Lee*,¹⁰ tersely characterized “[e]ach of the three great departments” [as] being independent and co-equal.”¹¹ The Law Court earlier had begun its reasoning by stating:

3. ME. CONST. pmbi.

4. ME. CONST. art. III, § 1.

5. These “departments” are today commonly referred to as “branches” of government.

6. 41 Me. 38 (1856). This case turned on separation of powers principles—a sitting justice of the Law Court sought to challenge his removal from office by executive and legislative department actions. His challenge was unsuccessful.

7. Among the scholars cited were Montesquieu, Kent, Story, Paley, Rawle, and Tocqueville. *Id.* at 51-53. All, in one way or another, suggested that the three branches of government were essential, independent of one another, and of necessity co-equals in protecting both the state and the liberty interests of the people. *Id.* A full reading of these scholarly excerpts underscores not only the “independent and co-equal” point being made, but the significance these scholars (and by inference Maine’s highest court) attached to a fully independent judicial branch.

8. This sentence in the *Davis* opinion quotes former United States Supreme Court Justice Story’s Commentaries on the Constitution. See 3 STORY’S COM. ON CONST., § 1584.

9. *Ex Parte Davis*, 41 Me. 38, 53 (1856) (internal citations omitted).

10. *Lee*, 422 A.2d at 998. It is worth noting that the *Board of Overseers* case approvingly cites *Davis*. *Id.* at 1002.

11. *Id.* at 1002.

An analysis of the problem presented by this appeal [whether judicially imposed bar fees were permissible] must begin with recognition that at the foundation of our form of government there are three co-equal branches; and that our form of government, at the state as well as the federal level, embraces the doctrine of the separation of powers.¹²

Having laid out these constitutionally derived fundamental principles, the Law Court then undertakes to give meaning and scope to the bare words—what does “independent and co-equal” mean? What unique and individual powers necessarily lay within the Judicial Branch—the branch that was the focus of the court’s attention in this case? The court states:

From this concept of separation of powers there is derived *the inherent power of the Supreme Judicial Court*. It is a fundamental principle of constitutional law that each department in our tri-partite scheme has, without any express grant, *the inherent right to accomplish all objects necessarily within the orbit of that department* when not expressly allocated to, or limited by the existence of a similar power in, one of the other departments. *The inherent power of the Supreme Judicial Court, therefore, arises from the very fact that it is a court and connotes that which is essential to its existence and functioning as a court.*¹³

The importance of this language, the choice of words, the recognition of an inherent power or right in the Supreme Judicial Court “to accomplish all objects necessarily within the orbit of that department”¹⁴ cannot be overstated. The unanimous reasoning of the *Lee* Court seems to support the fundamental premise of this Article—that funding the judicial system at the level deemed necessary by the Law Court is a constitutional duty.

III. THE SCOPE OF THE COURT’S INHERENT POWER

Though the concept of “inherent power” was articulated by the Supreme Judicial Court in a case that challenged the permissibility of bar fees, it is clear that the scope of this power was not seen by the court as limited to this purpose alone. The court makes clear that its inherent power enables it “to define and regulate the practice of law . . . to regulate the conduct of attorneys as officers of the court.”¹⁵ The court sees this entire range of activity as falling “naturally and logically”¹⁶ within the purview of the Judicial Branch. No express grant of constitutional or legislative authority is needed—the inherent power of the Judicial Branch clothes the court with all the power it needs to effectuate whatever regulatory measures it deems necessary and appropriate to regulate the bar and thereby to insure the proper functioning of the judicial system.

More importantly, given the issues this Article would address, the court in *Lee* signals a further dimension of the judiciary’s inherent power by its approving citation of a then recent opinion of the Maine Attorney General (AG) dealing with

12. *Id.* at 1001.

13. *Id.* at 1002 (emphasis added).

14. *Id.*

15. *Id.*

16. *Lee*, 422 A.2d at 1002.

emergency funding for the Superior Court.¹⁷ The question before the AG was whether the governor and council could allocate monies in the state's contingent account to cover operating expenses of the Superior Court that were expected to exceed amounts legislatively allocated for the fiscal year.¹⁸ The AG noted that the condition existed in several counties, and further noted, "the practical problems and disruption which lack of funds [and presumably court closures] would create."¹⁹ The AG's opinion found that funding these budgetary shortfalls by use of state contingency funds was both appropriate and necessary. The AG's reasoning, embraced by the court in *Lee* bears close attention:

[T]he necessity for continued funding of the Superior Court is clearly defined when one considers that the court is an integral part of the State Judiciary, one of the three coordinate branches of government under the Maine Constitution. The Legislature approves the county budget, which includes the Superior Court, and if this court had to close its doors due to lack of funds, it would be as if the Legislature could thus close the courts at will. This result would be a direct challenge to the independence of the judiciary and for this reason *it is widely held that courts have an inherent power to order payment of reasonable amounts necessary to perform the judicial function.*²⁰

The AG's opinion concluded by noting that any limitation on county commissioners over-spending line categories in legislatively approved budgets is inapplicable in these circumstances: "The reason for this distinction lies in the unique nature of the Court as an integral part of the State Judiciary, previously discussed. Continued funding of the Court has constitutional ramifications extending beyond the statutory limitation placed upon the commissioners."²¹

It is worth noting that both the AG's opinion and the court's opinion in *Lee* cite (approvingly) a then recent American Law Reports Annotation by Gary D. Spivey, "Inherent Power of Court to Compel Appropriation or Expenditure of Funds for Judicial Purposes."²² The ALR Annotation contains literally hundreds of case,²³ law review, and treatise references to the inherent power of the judicial department. The general summary of the annotation and the tone of many of these references are strikingly similar:

17. *Id.* at 1002, n.9 (quoting Opinion of the Att'y Gen. (Sept. 30, 1975)) (on file with author) [hereinafter "Opinion of the Att'y Gen."].

18. Opinion of the Att'y Gen, *supra* note 17, at 1.

19. *Id.* at 2.

20. *Id.* (citations omitted and emphasis added). Though not stated in the AG's opinion, it seems clear that the proposed action of the governor and council was triggered by a request, presumably from the Law Court, for those additional funds needed to keep the Superior Courts of several counties operating to the end of the then current fiscal year. In short, even though the court possessed inherent power it could have exercised, it chose instead, (exercising an appropriate "comity") to initially "request," rather than "order," a coordinate branch of government (here the executive) to take those actions the court deemed necessary. This provided time enough to decide whether to exercise inherent power, when and if, the coordinate branch refuses to honor such a "request."

21. *Id.* at 3.

22. See Gary D. Spivey, *Inherent Power of Court To Compel Appropriation or Expenditure of Funds for Judicial Purposes*, 59 A.L.R. 3d. 569 (1974) [hereinafter "Spivey Annotation"].

23. The time frame of this body of case law extends from the early 1800s to the present. The most recent pocket part contains cases from the 1980s, 1990s, and the twenty-first century.

Courts which have addressed themselves to the presently considered question generally have upheld the inherent authority of the courts to compel payment of those expenses necessarily incurred by such courts in the discharge of their duties.

....

*Such power has been deemed essential to preserve the independence of the judiciary.*²⁴

The ALR Annotation goes on to note that:

It has been said that such *inherent power is not unlimited*, but rather, extends only to those expenses reasonably necessary for the proper functioning and administration of the court, *and must be exercised responsibly in the spirit of mutual cooperation among the various branches of government.*²⁵

Nevertheless, the cases generally take the view that the ultimate inherent power of the courts to compel the payment of their reasonably necessary expenses cannot be defeated by statute. *A contrary view . . . would be to concede to the legislature the power by hostile legislation to destroy the judicial branch.*²⁶

Though the use of a legislature's fiscal power to limit (or diminish) the judicial branch as a whole, thus rendering it less than a co-equal branch of government, was not contemplated at the time our national constitution was being debated, the authors of the *Federalist Papers* (Hamilton, Madison, and Jay) did see that the independence of judges required protection from the possibility of economic coercion by the legislative arm of government—thus the language of Article III, Section 1 of the United States Constitution (what has come to be called the “Compensation Clause”) required that federal judges “receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”²⁷ In arguing for this provision, Hamilton, in *Federalist* No. 79, wrote that:

24. Spivey Annotation, *supra* note 22, at 574-75 (emphasis added).

25. This caveat seems imminently reasonable on its face; there is a risk, however, that the judicial branch, aware that it is often referred to as the “weakest branch,” *see infra* notes 39 and 70, and of its inherent limitations will be unduly deferential to legislative-executive branch pressures to moderate funding requests to meet fiscal constraints of the moment. A recent example of deference that extended to compromising rights to counsel is found in *State ex rel Metropolitan Public Defender Services Inc. v. Courtney and Minnis*, 64 P.3d 1138 (Or. 2003). Here plaintiffs (in a writ of mandamus) importuned the court to exercise its inherent power to challenge legislative cut-backs in the judicial budget; the court acknowledged it had such power; it acknowledged a lengthy range of settings in which counsel would no longer be available; but bowing to the asserted fiscal constraints facing the legislative-executive branches, and asserting that “core functions of the judicial branch” are not yet compromised, the court denied plaintiffs’ writ. *Id.* The case is troubling at many levels: too much deference to legislative-executive pressures; the assertion that core functions of the judicial branch are not compromised by a failure to provide counsel to criminal defendants is not credible; also not credible is the naive assumption that when the fiscal exigency eases, judicial funding needs will be more fully met. Experience in Maine (and one suspects in Oregon and many other states) suggests that fiscal exigency at state governmental levels has become a way of life. It cannot become the basis for treating a coordinate branch of government, a branch with constitutional duties that must be honored, as though it were little more than another agency of government scrapping for scarce state dollars.

26. Spivey Annotation, *supra* note 22, at 575.

27. U.S. CONST. art. III, § 1.

“nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . In the general course of human nature, a power over a man’s subsistence amounts to a power over his will.”²⁸

The logic of this reasoning (though couched in the narrower issue of judicial salaries) would seem to apply with equal or greater force to broader legislative enactments that diminish, or impinge upon, the judicial branch as a whole through the stratagem of under-funding it. Whether these enactments are undertaken mischievously or wilfully (with an eye to circumscribing the judicial branch), or arise out of mere inattention, or alleged fiscal necessity, seems irrelevant. All such enactments to some degree rob the judicial branch of the power to fully discharge its constitutional responsibilities, and thus render the judiciary a less than co-equal branch of government. A recognition of, and a means of avoiding, this reality has given rise to (and undergirds) the “inherent power” doctrine.

Recognition of this doctrine and the phrase itself—“inherent power”—can be found in the early case law of almost all jurisdictions. For example, in *State ex rel Kitzmeyer v. Davis*,²⁹ a case in which a state purchasing board claimed authority to accept or reject all judicial purchasing requests, the Nevada Supreme Court’s request for necessary courtroom furnishings was rejected. The court then ordered the purchases be made and the bill for same presented to the state for payment. The state treasurer refused payment and a suit followed. The court in a *per curiam* opinion noted:

To assume that the legislature did confer any such absolute power upon the board is to assume that the legislature possesses unlimited power of legislation in that matter—that it could by hostile legislation destroy the judicial department of the government of this state. In the absence of [express] statutory authority given to the court . . . there exists, as we believe, *the inherent power in the court*, growing out of and necessary to the exercise of its constitutional jurisdiction, to make the order.

. . . .

This doctrine is not new, but has been recognized and acted upon by the courts of other states, and we have been unable to find any authority which holds to the contrary.³⁰

The *Kitzmeyer* Court went on to cite earlier cases from Indiana and Wisconsin, *Board v. Stout*³¹ and *In re Janitor of Supreme Court*,³² respectively, which fully support the court’s reasoning and recognition of the inherent power doctrine, including the express use of this term of art. In all of these cases the exercise of

28. See THE FEDERALIST No. 73 (Alexander Hamilton) (applying similar reasoning to similar protections to the compensation of the President). See also CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES AND INTERPRETATION 630-32 (Johnny H. Killian, George A. Costello & Kenneth R. Thomas eds., 2004) (containing an analysis of cases interpreting and applying the Compensation Clause through the year 2002).

29. 68 P. 689 (Nev. 1902).

30. *Id.* at 690-91 (emphasis added).

31. 35 N.E. 683 (Ind. 1893).

32. In the Matter of the Appointment and Removal of the Janitor of the Supreme Court, 35 Wis. 410 (1874).

this inherent power (though sometimes arising in homely, seemingly trivial, situations) was seen as necessary to protect the integrity of the judicial system, the status of the court as a constitutionally fashioned co-equal branch of government.

The *Stout* Court noted:

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. The security of human rights and the safety of free institutions require the absolute integrity and freedom of action of courts.³³

With respect to the hiring of personnel incidental to, and deemed necessary to the court's functioning, the Wisconsin court in *In re Janitor* noted:

*It is a power inherent in every court of record, and especially courts of last resort, to appoint such assistants; and the court itself is to judge of the necessity. This principle is well settled and familiar, and the power so essential to the expedition and proper conducting of judicial business, that it may be looked upon as very doubtful whether the court can be deprived of it.*³⁴

More modern cases make clear that the "inherent power" doctrine is alive and well and from time to time may need to be exercised.³⁵ One such case, *O'Coins Inc. v. Treasurer of County of Worcester*,³⁶ resolved by Massachusetts' highest court, lays out in some detail the history and necessity for the doctrine. The court notes:

It is axiomatic that, as an independent department of government, the judiciary must have adequate and sufficient resources to ensure the proper operation of the courts. It would be illogical to interpret the Constitution as creating a judicial department with awesome powers over the life, liberty, and property of every citizen while, at the same time, denying to the judges authority to determine the basic needs of their courts as to equipment, facilities and supporting personnel. Such authority must be vested in the judiciary if the courts are to provide justice, and the people are to be secure in their rights, under the Constitution.

We hold, therefore, that among the inherent powers possessed by every judge is the power to protect his court from impairment resulting from inadequate facilities or a lack of supplies or supporting personnel. To correct such an impairment, a judge may, even in the absence of a clearly applicable statute, obtain the required goods or services by appropriate means, including arranging himself for their purchase and ordering the responsible executive official to make payment.

It is not essential that there have been a prior appropriation to cover the expenditure. Where an obligation is thus legally incurred, it is the duty of the State, or one of its political subdivisions, to make payment. . . . The view that there must be checks and balances between the departments of government is not contrary. It was certainly never intended that any one department, through the exercise of its acknowledged powers, should be able to prevent another department

33. 35 N.E. at 685.

34. 35 Wis. at 419 (emphasis added).

35. See generally Spivey Annotation, *supra* note 22, at 582-83 and accompanying case citations.

36. 287 N.E.2d 608 (Mass. 1972).

from fulfilling its responsibilities to the people under the Constitution. The principles expressed today are recognized not only in Massachusetts but throughout the nation.³⁷

IV. INHERENT LIMITS OF THE JUDICIAL BRANCH, AND OF THE DOCTRINE OF INHERENT POWER

When a court (in a spirit of “comity”) stops short of exercising its inherent power, and merely requests³⁸ of the legislative-executive branches, a type, or level, of funding for activities it (the court) deems necessary, it butts up against an inherent limitation on the powers of the judicial branch. If the request is denied or significantly reduced (courses of conduct the judicial branch obviously feels are inimical to the discharge of its constitutional duties), it may urge, cajole, or strengthen the justifications for the funding being sought. But in the final analysis, the judicial branch has no recourse. The judicial branch has no power to compel the legislative-executive branches to accede to the court’s request.³⁹ In short, courts do not legislate or execute the law.

The denial of a court’s funding request creates a dilemma—an uncomfortable impasse between the coordinate branches will be very evident. More importantly, some degree of hardship within the judicial system will almost certainly be felt—

37. *Id.* at 611-12 (emphasis added and citations omitted). In the same vein, see *Judges for Third Judicial Circuit v. County of Wayne*, 190 N.W.2d 228, 230 (Mich. 1971).

The Judiciary *must possess* the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer Justice, if it is to be in reality a co-equal, independent branch of our Government. This principle has long been recognized, not only in this Commonwealth but also throughout our Nation.

Id. at 230 (emphasis in original) (quoting *Commw. ex rel Carroll v. Tate*, 274 A.2d 193, 97 (Pa. 1971)); *State ex rel Anderson v. St. Louis County*, 421 S.W.2d 249, 25 (Mo. 1967); *McCorkle v. J. of Super. Ct. of Chatham County*, 392 S.E.2d 707 (Ga. 1990); *In the Matter of the Salary of the Juvenile Dir.*, 552 P.2d 163, 170-71 (Wash. 1976) (“It is axiomatic that, as an independent department of government, the judiciary must have adequate and sufficient resources to ensure the proper operation of the courts.”). See generally, Jeffery Jackson, *Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers*, 52 MD. L. REV. 217 (1992).

38. See Opinion of the Att’y Gen., *supra* notes 17-20 and accompanying text. See also R. TOBIN, *CREATING THE JUDICIAL BRANCH: THE UNFINISHED REFORM* 16-18 (1999).

39. This fact was recognized more than two centuries ago by Alexander Hamilton. See THE FEDERALIST No. 78 (Alexander Hamilton). Hamilton noted:

Whoever attentively considers the different departments of power must perceive, that in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary on the contrary has no influence over either the sword or the purse. . . . It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power.

Id.

some portion of the public's legal needs will not be met. But there is no quick fix the court can unilaterally impose to secure the ends (the funding) it deems necessary.

If the gravity of the situation suggests that the court must do more—it may up the constitutional ante by exercising its inherent power.⁴⁰ The court at this point may either order the legislative-executive arms to provide the necessary funds, or it may undertake on its own motion to expend funds to meet the judicial need.⁴¹ In either or both of these settings, however, the inherent limits on judicial power (noted above) remain. The court may fashion its order, but it has no way of enforcing the order. It may expend funds it deems necessary to carry out the judicial function (imposing a debt on the state) but it has no way of compelling that the debt be discharged—it has no purse of its own. And though the term “compel” arises from time to time in judicial holdings, courts have no real power to “compel” the legislative-executive arms of government to do, or not to do, a specific act—appropriate the money, pay the bill.⁴²

To summarize, courts may ask for necessary funds; they can exercise their inherent power; and they can strike down unconstitutional actions by the legislative-executive branches of government. In such settings they can articulate a remedial course of conduct that ought to be followed, that ought to be undertaken by these coordinate branches. But that is as far as they may go. Courts do not legislate; they have no independent capacity to enforce remedial orders, to raise money, to authorize the expenditure of funds, or to pay bills—not even those bills

40. Very few cases have pushed the inherent power doctrine to the point of ordering a state legislature-executive to fund judicial needs at a level (and in a manner) determined by the judicial department. One such case is *County of Allegheny v. Commw.*, 534 A.2d 760 (Pa. 1987). In this case, a divided court held that county funding of the judicial system was unconstitutional and directed the state legislature-executive to fashion a statewide alternative. The majority noted: “The authority of this Court to direct payment of funds necessary for the funding of the judicial system does not intrude upon the legislative power of appropriation, but is merely an exercise of this Court’s inherent power to preserve itself as a coordinate branch of government.” *Id.* at 765. But the court understood that it had no power to itself fashion such a system. The court concluded by noting:

However, because this order entails that present statutory funding for the judicial system is now void as offending the constitutional mandate for a unified system, we stay our judgment to afford the General Assembly an opportunity to enact appropriate funding legislation consistent with this holding. Until this is done, the prior system of county funding shall remain in place.

Id. A last footnote stated:

Our approach to the problem of maintaining a constitutionally flawed system until another system can be implemented is borrowed from the United States Supreme Court in *Northern Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). In that case the [Supreme] Court held that although the legislative grant of authority to bankruptcy judges was unconstitutional, the holding was to be applied prospectively only and was stayed in order to afford Congress an opportunity to address the problem created by its statute.

Id. at 765, n.3.

41. The latter alternative is presented in *Kitzmeyer*, 68 P. at 689, and related cases. See *supra* notes 29-37 and accompanying text.

42. See *County of Wayne*, 190 N.W.2d at 228, *supra* note 37. The term “compel” in this holding is used advisedly—nothing more is possible. The court may lay out its view of the appropriate course of conduct (perhaps even a constitutionally necessary course)—a course it would have the legislative-executive arms of government follow, but it has no literal power to “compel.”

arising from the court's exercise of its inherent power.⁴³

To be sure, when courts exercise their inherent power, or strike down constitutionally impermissible legislative-executive action, or direct action they believe is constitutionally required, the courts are clearly fulfilling essential constitutional duties.⁴⁴ But if in the course of these actions, an impasse with one or both of the other coordinate branches of government arises, the weaknesses, the inherent limitations of the judicial branch are painfully evident. The only course open to the judicial branch is to rely on moral persuasion, on the judiciary's status as a coordinate, a co-equal arm of government. It must not shrink from using these limited powers, from vigorously asserting their moral authority to effectuate the end being sought. Indeed, the court has a constitutional duty to so act. But if the legislative-executive branches will not do what they ought to do, and the impasse noted above emerges full-blown, it is they (not the judicial branch) that have violated constitutional duties—it is they who must ultimately answer to the people.

In other words, once the highest court of a jurisdiction (having no legislative or executive powers of its own) has put a funding request forward, exercised its inherent power, stated the law, fashioned an order, and laid out a constitutionally required remedial course of conduct, it is entitled (at this point) to assume that the legislative-executive branches will acquiesce to the judicial pronouncement, and resolve the underlying dispute by exercising their constitutional powers in a manner that carries out the directives the court has fashioned.⁴⁵ If that acquiescence, and concomitant legislative-executive action, is forthcoming, that is the end of the matter.⁴⁶ If, however, there is non-acquiescence—assumed

43. The Supreme Judicial Court of Maine, speaking of the three departments (legislative, executive, and judicial) fashioned by Maine's Constitution, stated: "And it is provided that no person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others." *Davis*, 41 Me. at 53. *See also Lee*, 422 A.2d at 1002, n.8, wherein the court, after discussing judicial powers which may not be impeded or interfered with by the legislative or executive departments, stated: "Conversely, the judicial department may not interfere with the exercise of power by the executive or legislative departments within its own constitutional sphere."

44. *See generally* THE FEDERALIST No. 78 (Alexander Hamilton) ("The complete independence of the courts of justice is peculiarly essential in a limited constitution Limitations . . . can be preserved in practice no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void.").

45. *See supra* note 40. In the two cases cited, *County of Allegheny*, 534 A.2d at 760 (involving judicial exercise of its inherent power), and *N. Pipeline*, 458 U.S. 50 (1982) (involving the striking down of provisions in the Bankruptcy Act), the scenario laid out in the above text was followed. Provisions of existing law were found to be unconstitutional, a remedial course of conduct was articulated, the constitutional duty of the legislative and executive branches was made clear—but then (in these and in all similar cases) the court must defer. It can go no further. It is free to assume there will be acquiescence (by the legislative-executive branches), to the course the court has laid out—but it cannot be assured that this will be the case, and it cannot intrude on the powers of the other coordinate branches. Therein lies both the dilemma and the inherent limitation of the judicial branch in a governmental structure of three equal and coordinate branches each of which is constrained by separation of powers principles.

46. *See e.g.* *Baker v. Carr*, 369 U.S. 186 (1962). After long resistance, the U.S. Supreme Court, in this Tennessee case, held that the issue of legislative reapportionment was justiciable. Once this impediment was removed, the principle of one person, one vote emerged. *See also Gray v. Sanders*, 372 U.S. 368 (1963). At state and federal levels of government, these cases were readily accepted. Rather quickly, by the late 1960s, the Congress of the United States and almost all state legislative-executive

legislative-executive action are delayed, watered down, or not forthcoming at all—that is, if the court’s pronouncements are met with a greater or lesser degree of passive resistance on the part of the legislative-executive branches, we face the impasse already noted.

The significance of the dilemma, the constitutional impasse, is heightened if the highest court in a jurisdiction has purported to use its inherent power to meet pressing judicial needs and if the underlying constitutional issue is one of high profile. In these settings the moral authority of the court, indeed, the rule of law itself is both affronted and, to some degree, compromised by the legislative-executive branch’s failure to do what the court has said ought to be done. Inevitably, these will be trying times for the coordinate branches of government and the larger society.⁴⁷

V. A ROBUST APPLICATION OF THE DOCTRINE OF COMITY IS A WAY OUT OF THE DILEMMA

It is not possible in this Article to fully trace the historical roots of the doctrine

departments had reapportioned themselves utilizing the principles of *Gray*. The judicial department had stated the law—legislative-executive branches acquiesced. Another famous example of executive department “acquiescence” involved the federal courts, President Nixon, and what came to be called the “Watergate tapes.” *United States v. Nixon*, 418 U.S. 683 (1974). Judge Sirica ordered the tapes be produced, the President claimed executive privilege, and Sirica’s view that the privilege was qualified was sustained by the Supreme Court. *See id.* President Nixon promptly complied with the court’s order, and the tapes were produced in late July, 1974. *Id.* The tapes proved to be extraordinarily damaging to the president and others in the executive department, and two weeks later on August, 8, 1974, the president resigned from office. *Id.*

47. *See generally*, *Brown v. Board of Education*, 347 U.S. 483 (1954); *Brown v. Board of Education*, 349 U.S. 294 (1955). The Court’s holding, striking down “separate but equal” and ordering the integration of public schools, met strong, persistent, and vocal resistance in many states. Forty years after *Brown*, state and local legislative-executive intransigence persisted. In fact, even today one cannot say the schools are fully integrated. *See also* *S. Burlington County N.A.A.C.P. v. Twp. of Mount Laurel*, 336 A.2d 713 (N.J. 1975); *S. Burlington County N.A.A.C.P. v. Twp. of Mount Laurel*, 456 A.2d 390 (N.J. 1983) [Mt. Laurel II]. Here, the court’s holding struck down widespread exclusionary zoning practices in New Jersey townships and ordered that every municipality must by its land use regulations make a variety and choice of housing realistically possible. This order was met with strong passive resistance in many of the offending communities; the state’s highest court strengthened its remedial orders; the fact that state level legislative-executive support for the court’s ruling was slow to emerge strengthened the hand of those inclined to non-acquiescence. Over a twenty-year period, the tug of war persisted—several later *Mt. Laurel* cases were brought; a rich body of literature examining the limits of judicial power, questions of acquiescence, passive resistance, and impasse between the coordinate branches has emerged. *See* Paula Franzese, *Mount Laurel III: The New Jersey Supreme Court’s Judicious Retreat*, 18 SETON HALL L. REV. 30 (1988); Jerome G. Rose, *Waning Judicial Legitimacy: The Price of Judicial Promulgation of Urban Policy*, 20 URB. LAW. 801 (1988). *See also* *Claremont Sch. Dist. v. Gov.*, 635 A.2d 1375 (N.H. 1993); *Claremont Sch. Dist. v. Gov.*, 703 A.2d 1353 (N.H. 1997). *Claremont* related litigation continues to the present. *See* *Londonderry Sch. Dist. v. State*, 958 A.2d 930 (N.H. 2008). The court’s original holding made clear that the state had a constitutional duty to provide an adequate education to every educable child and to guarantee adequate funding for same. *Claremont II* struck down the then existing school financing system as unconstitutional; subsequent litigations found the state’s fiscal responses inadequate. But legislative-executive resistance to the court’s holdings and orders is palpable and continuing—two constitutional amendments have been proposed that would withdraw the court’s jurisdiction over school funding issues. They have not been enacted, but the moral authority of the court, and a respect for the rule of law, suffers.

of comity. Suffice it to say that its earliest applications arose in Europe during the seventeenth century and tended to focus on commercial relationships between nations.⁴⁸ In our own country one of the earliest jurist-scholars who examined and expanded the emerging principles of comity was Justice Joseph Story.⁴⁹ He saw the comity doctrine as a tool facilitating the resolution of conflicts not only among nations who have a more or less equal status and a need to resolve common problems, but as a tool capable of resolving similar problems arising between states, between states and territories, and between federal courts and state courts.⁵⁰

In the ensuing years, comity doctrines have been applied not only to an expanding range of commerce related problems between nations and between states in our own nation, but to the enforcement of a widening range of judgments of courts in foreign countries or in another state. A quick look at the most recent American Law Reports index⁵¹ under the general heading “comity” makes clear that as the world’s populations grow, as global and national economies become more intertwined, the application of comity principles to solve common problems and achieve shared goals has continued to expand.

In all of these settings the common denominator is the co-equal (or nearly so) status of the separate entities applying comity principles, their common need to address shared problems, or problems that transcend the boundaries of their separateness. Also at work are principles of mutual respect, courtesy, deference, convenience, the need to maintain good working relations with entities over which one has no direct control. Comity principles also reflect a felt need, a duty, to more efficiently provide and maximize both public and private interests within and served by these separate political entities.

All of this suggests that the doctrine of comity is ideally suited to resolving the previously noted impasses between the judicial branch and the other two coordinate branches of our government. The three branches are co-equals, and bound by separation of powers principles. At the same time the judicial branch in Maine, and in all other states, possesses inherent power to preserve its status, its integrity, its ability to discharge constitutional duties, to fully function as a co-equal. But (as noted) no judicial branch has the power to compel the legislative-executive branches to comply with either well-documented budget requests, or the fiscal demands which the exercise of the court’s inherent power may require.

In short, given the fact that there is no constitutional language spelling out

48. One of the earliest European scholars to address comity issues was a Dutch jurist and law professor Ulrich Huber. See Ernest G. Lorenzen, *Huber’s De Conflictu Legum*, 13 ILL. L. REV. 375 (1918-1919). See also Joel R. Paul, *The Transformation of International Comity*, 71 LAW & CONTEMP. PROBS. 19 (2008).

49. See JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1834); Ernest G. Lorenzen, *Story’s Commentaries on the Conflict of Laws—One Hundred Years After*, 48 HARV. L. REV. 15 (1934-35); Nadelmann, *Joseph Story’s Contribution to American Conflict of Laws: A Comment*, 5 AMER. J. OF LEGAL HIST. 230 (1961).

50. It seems clear that doctrines such as “abstention” and “reciprocity” have their roots in principles of comity.

51. See A.L.R. Index, Complete Series (2008) under the general heading “comity,” which lists twenty-three areas of activity where principles of comity have been expanded to facilitate the transactional needs of parties in an expanding array of nations; the index provides citations to ALR published commentaries in each of these areas of activity.

legislative- executive duties when constitutional impasses of the type noted arise, it is only a robust application of doctrines of comity that can, and should, energize these coordinate branches of our governmental structure to take those actions (the funding of budget demands) that the judicial branch has found to be constitutionally necessary.

One may ask—does comity rise to the level of duty? A first quick answer would seem to be, no. Historically, comity was said to be rooted in discretion—co-equal governments, each seen as sovereign in their own right, presiding over separate territories, can not bind one another. But nothing prevented them from acting in ways that were mutually beneficial, solved common problems, and increased public and private benefits in each jurisdiction.

Over time, these exercises of comity between nations gave rise to a wide (and widening) body of customary law in international trade, commerce, and judicial dispute resolution. These customary practices not only have a high degree of enforceability in their own right, but in many instances they have led to the development of treaties, which today number in the thousands. Clearly, these latter documents are intended to impose duties; they are enforceable in courts of law. In sum, comity in some settings has moved from a mere discretionary act, a courtesy, to something much closer to—if it is not in fact—a duty.⁵²

Within our own country a similar evolving of comity doctrines can be seen. What may have begun as mere courtesies between states, between state and federal judiciaries, between courts within the same judicial system has in some instances been elevated to a constitutional duty by provisions in the U.S. Constitution such as the Commerce Clause⁵³ and the Privileges and Immunities Clause.⁵⁴ Beyond these obvious examples, an evolving concept of comity has given rise to countless reciprocity agreements and statutes—the latter surely do confer rights and impose duties.⁵⁵ Even in settings where some discretion is sought to be retained, abstention doctrines, for example, we see court rules intended to narrow that discretion.⁵⁶

In other words, comity principles are perhaps best seen as an evolving continuum; they may begin as, or spring from, merely discretionary acts, beneficial courtesies extended by one nation to another, by one state to another, or by one co-

52. See *Hilton v. Guyot*, 159 U.S. 113 (1895). In this case a foreign national was in a U.S. court seeking to enforce a French court's judgment against a U.S. national; that he did not succeed is unimportant for our purposes. *Id.* What is important is Justice Gray's recognition of the evolving status of comity, where he noted:

Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Id. at 163-4.

53. See U.S. CONST. art. I, § 8, cl. 3.

54. See U.S. CONST., amend. XIV, § 1, cl. 2.

55. See, e.g., ME. REV. STAT. ANN., General Index (2008), which under the general heading "Reciprocity" lists some sixty separate statutory provisions establishing reciprocity agreements (between the several states) covering a wide range of registration, licensure, and tax obligation requirements.

56. See, e.g., 28 U.S.C. § 1334 (2009).

equal branch or agency of government to another. But they can, and often do, ripen into customary laws, treaties, reciprocity agreements and statutes, all of which suggest a level of enforceability and duty. At the most robust end of this comity continuum what may have begun as a discretionary, or an economically driven exercise of comity by and between colonies (later to become states) evolved into constitutionally imposed duties. The Privileges and Immunities and the Commerce Clause examples, previously noted, bear out this fact.

Given these realities, let us turn our attention to the application of comity principles by and between the coordinate branches of Maine state government. There can be little doubt that these three branches are constitutional co-equals. And in settings where the Law Court has declared an act of the legislative-executive branch to be unconstitutional and has fashioned an appropriate remedial order, there is no provision in the Maine Constitution expressly binding the legislative-executive branches to carry out the court's order. Nor is there constitutional language expressly binding the legislative-executive branches to honor budget requests of the judicial branch, even if the status of such a request is characterized by the Law Court as an exercise of its inherent power. Indeed, separation of powers principles suggest that there cannot be an express power in any one of the coordinate branches to order another (or both) of the other branches to do, or forego from doing, a specific act.⁵⁷ These factors would suggest that as between Maine's coordinate branches of government the legislative-executive power to act or not act, to delay, or to only partially carry out any judicial branch order or funding request tendered by the Law Court is governed by little more than the historical discretionary rules of comity.

But this line of reasoning ignores some important provisions of Maine's Constitution—provisions that impose, at least by implication, substantive duties on those who hold legislative, executive, or judicial office in Maine. For example, Article IX, Section 1 states that:

Every person elected or appointed to either of the places or offices provided in this constitution . . . shall . . . take and subscribe the following oath: 'I, . . . do swear/affirm, that I will support the Constitution of the United States *and of this State* . . . that I will faithfully discharge, to the best of my abilities, *the duties incumbent on me* as . . . according to the Constitution and laws of the State. So help me God.'⁵⁸

It seems clear that those holding legislative-executive-judicial office in Maine must swear not only that they will uphold the state constitution—a constitution that clearly accords the judicial branch full, co-equal status with the legislative and executive branches, but that they will discharge the duties incumbent on them which the constitution or the laws of the state impose. Surely this discharge of duty includes carrying out remedial Law Court orders arising out of settings where an act, or omission, of the legislative-executive branch has been held by the judicial branch to violate the constitution. And, as surely, it includes providing those funds the Law Court deems necessary to maintain the integrity of the judicial branch as a coordinate, co-equal branch of state government serving Maine's citizens. The fact that these funds are necessary to enable the judicial branch to carry out the full

57. See generally *Davis*, 41 Me. at 53-54. See also *supra* note 43-47.

58. ME. CONST. art. IX, § 1 (emphasis added).

range of its constitutional duties, functions, and responsibilities only heightens the funding duty of the legislative-executive branches of Maine's governmental structure.⁵⁹ In short, there is no discretion in the constitutionally imposed oath of office. The oath imposes duties on all three of the coordinate branches.⁶⁰ But in the settings noted above quite specific duties are imposed on Maine's legislative-executive branches.

A second, separate constitutional provision states that "[t]he Legislature . . . shall have full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this state, *not repugnant to this Constitution*, nor to that of the United States."⁶¹

Legislative tempering with a remedial order of the Law Court (an order arising out of an act, or omission, of the legislature declared unconstitutional) would seem on its face to be "repugnant to this Constitution." In the same vein, passage of a judicial appropriations measure that fails to "preserve the independence of the judiciary,"⁶² that prevents the judicial branch from carrying out the full range of its constitutional functions and responsibilities as determined by the Law Court and that fails to recognize the judiciary's status as a co-equal branch of Maine government also seems, on its face, to be "repugnant to this Constitution."⁶³

A third provision of the Maine Constitution directs the executive branch as follows: "He [the Governor] shall take care that the laws be faithfully executed."⁶⁴ The fundamental law of the state is, of course, embodied in the Maine Constitution. It is this enactment of the people that created our governmental structure, the three coordinate branches of state government, "independent and co-equal."⁶⁵ And it is this document that directs the executive branch to faithfully execute the law. We see then that it is the Governor's duty to facilitate the full carrying out of remedial orders of the Law Court. And, whether tendered by request or an exercise of the court's inherent power, it is the governor's duty to see to it that those budgetary needs deemed essential by the Law Court are met.⁶⁶ There is no slack in the above

59. Whether a necessary judicial budget is presented in the form of a "request" or as an exercise of the Law Court's "inherent power" seems irrelevant. Either, or both, impose a duty on the legislative-executive branches.

60. The duties of the judicial branch are discussed shortly. *See infra* notes 67-70 and accompanying text.

61. ME. CONST. art. IV, § 1 (emphasis added).

62. *See supra* notes 22-26 and accompanying text.

63. The fact that Maine's current judicial appropriations process reduces the Law Court to little more than a supplicant for the funds it deems necessary to maintain the judicial branch also seems "repugnant" to the letter and spirit of the Maine Constitution. As noted in the March 9, 2006, *Maine Lawyers Review*, *see supra* note 1, Maine's current budgeting process does not subject either legislative or executive branch appropriation requests to a level of policy judgment, scrutiny, justification, or indignity that the judicial branch budget endures—nor should these branches of government be subject to so demeaning a process. But the comity that the legislative-executive branches extend to one another in Maine's budgeting process must be extended to the judicial branch—anything less is constitutionally inappropriate.

64. ME. CONST. art. V, § 12.

65. *See Davis*, 41 Me. at 38.

66. *See Folsom v. Wynn*, 631 So.2d 890 (Ala. 1993). A full reading of this case seems useful for several reasons. First, it makes clear that the judicial branch is uniquely different from all other agencies of state government. Second, it clearly holds that even in times of severe fiscal exigency, the

cited constitutional language allowing for gubernatorial exercise of discretionary rules of comity—an unequivocal duty is imposed. A duty (one fears) that is not fully grasped—a duty that has not been fully met in recent years.

Finally, it seems useful to return to the oath of office, the first of the constitutional provisions noted above. In Maine, all constitutionally ordained persons, whether elected or appointed, must take this oath before entering office. Obviously, the oath intends to bind members of the judicial branch not just members of the legislative-executive branches of Maine state government. It should also be noted that nothing in the oath suggests that coordinate branch members are bound only by the discretionary rules of comity. On the contrary, as noted above, the oath imposes duties, albeit implied, on members of all three of the coordinate branches.

The duties imposed on the judicial branch begin with its recognition of the fact that it is a co-equal, coordinate branch of Maine state government. The duty extends to preserving the integrity and independence of the judicial branch. This in turn requires the fashioning of an integrated and efficient judicial system, the laying out of judicial needs that fully protect the rule of law, meets all constitutional and statutorily imposed duties, and protects the rights and property of all Maine citizens. Beyond merely an articulation of these needs,⁶⁷ the judicial branch, speaking through the Law Court and the chief justice, has a duty to fashion (annually or bi-annually, as state budgeting procedures require) a judicial budget, a funding request, that fully meets the needs and duties outlined above.⁶⁸ This is

legislature may not authorize, and the governor may not carry out across the board (pro-rata) appropriations reductions, including the judicial branch, without separately considering whether the reductions will impair constitutionally imposed duties of the judicial branch. Further, the case holds that it is the judicial branch (speaking through the chief justice) that must determine the scope of these duties and the fiscal requirements necessary to meet them. Finally, this case carefully examines earlier case law within the jurisdiction, and cites case law from a wide number of other jurisdictions, that support its holding.

67. The preparation of a thorough lawyer's brief (and supporting documents) laying out judicial needs, and/or the delivery by the chief justice of a Maine State of the Judiciary speech to a joint session of the legislature, are useful steps. So, too, is ongoing participation by judicial representatives/staff in legislative committee budgeting and appropriations processes.

68. This Article assumes throughout that a determination of "needs" does not encompass fine furniture, opulence, the trappings of office, or judicial pay that leads the nation. And a respect for Maine's fiscal realities would certainly allow for the spacing out, over a reasonable time frame, of judicial capital improvement needs. But the failure of many Maine court facilities (for more than twenty years) to meet the requirements of the Americans with Disabilities Act, the failure to provide (for an even longer period of time) adequate mechanisms to meet the legal needs of Maine's poor, and the failure to provide adequate staff and equipment to insure courtroom safety is troubling. These (and related) budgetary shortfalls raise questions as to whether judicial branch fiscal needs, and the judicial branch's duty to assert these needs, are currently being met. See Richard L. Connor, *Legal Defense Too Vital To Risk Funding Shortfall*, PORTLAND PRESS HERALD, Oct. 6, 2009, at A10; Trevor Maxwell, *Budget Crisis Forces Cuts in Court Security*, ME. SUNDAY TELEGRAM, Feb. 15, 2009, at A5. The point being made has been recognized by others. Brett Baber, past president of the Maine Bar Association, recently stated:

We as a bar need to make the case for funding what the Constitution requires: an adequately financed judiciary and a system of competent indigent defense. As a society, we can survive a few potholes in the road, but we cannot endure for long if the rule of law collapses. Justice may be more abstract than potholes, but its value to our society cannot be undersold.

what the constitutional oath means when it binds each member of the judicial branch to “faithfully discharge” “to the best of [ones] abilities” the incumbent duties of the office.⁶⁹ Anything less would not be a “faithful discharge” of the judicial duty and would leave the judicial branch subservient to, inferior to, the other two constitutional branches in our state governmental structure. This (as noted) is not a position contemplated by the Maine Constitution; nor was it contemplated by the drafters of the U. S. Constitution in defining the relationship between the coordinate branches at the federal level of government.⁷⁰

VI. CONCLUSION

It seems clear that at the federal level of government, and at the level of Maine state government, both the U.S. and Maine Constitutions create a governmental structure presided over by three co-equal, coordinate branches—the legislative, the executive, and the judicial. It also seems clear that of the three branches, the judicial branch is least able to protect its co-equal status. Having no independent power to effectuate its remedial orders or to meet its budgetary needs, it is indeed “the weakest of the three departments of power.”⁷¹

But weakness does not mean impotence. The judicial branch has a constitutional status, a moral authority, an inherent power, a duty to speak up, whether the issue involves the carrying out of a court’s remedial order or the funding of a judicial budget that meets essential needs.⁷² The assertion of this

Brett Baber, *Improving Access to Justice: A Laudable Goal for the M.S.B.A.*, 23 ME. B. J. 191, 192 (2008). A similar theme was echoed over a decade ago by then president of the Maine Bar Association Denis Mahar:

The Judicial Department was underfunded before the rest of the state government began having budget and revenue problems. For the past six or seven years, the judiciary has been effectively making do with less and less. Through the hard work of the judges and staff, the judicial department has been able to function, but now appears to be stretched to the limits of its ability to function effectively.

Denis L. Mahar, *President’s Page*, 11 ME. B. J. 73 (1996).

69. See *supra* notes 13-21 and accompanying text.

70. See *supra* note 39. Hamilton in *Federalist* No. 78, speaking of the three branches of government at the federal level, characterized the judicial department as the “least dangerous” and at another point as “the weakest of the three departments of power,” but he does not use terms such as “inferior” to, or “subservient” to, the legislative-executive branches. *Id.* At another point in *Federalist* No. 78, Hamilton took pains to note that the judiciary’s power to declare acts of the legislature unconstitutional does not make them “superior” to the legislative branch. *Id.* The whole tone of Hamilton’s writing in No. 78 and throughout the *Federalist Papers* underscores the equality, the separate but interdependent status, of the three branches. See *id.* The same could be said of the relationship between the three branches of government in Maine.

71. See *supra* note 39.

72. These judicial duties, as well as the inherent limitations of the judicial branch have long been recognized. See Myron T. Steele, *Judicial Independence*, 18 WIDENER. L. J. 299 (2009). Chief Justice Steele of the Delaware Supreme Court put it succinctly: “Judges cannot self-execute their decisions.” *Id.* at 301. He notes, with misgivings, that the legislative- executive branches may choose whether they will enforce judicial decisions. *Id.* He then notes that “[t]he budget process constitutes an even more insidious threat to judicial institutional independence.” *Id.* He is alarmed by (and openly critical of) the erosion of judicial independence caused by legislative-executive branch cut-backs of judicial budgets in Delaware and across the nation. See generally John Mangalanzo, *Court Budget Woes Continue*, available at <http://www.thehawkeye.com/print/layoffs-021909> (last visited Mar. 25, 2010) (detailing

status, the exercise of this moral authority, the use of inherent power, the need to speak up are all heightened at those times when situations of impasse—conflict between the legislative-executive arms of government and the judicial branch—arise. At these times, more so than any other, the judicial branch must assume its full stature. It must not shrink from its constitutionally imposed duties. It may be necessary for the Law Court to point out the duties imposed by Maine’s Constitution on the legislative and executive branches of our government.⁷³

All of this can be done with civility—with what this Article has characterized as a “robust application of comity.” But see this concept of comity accurately: it is a comity that under Maine’s Constitution is tantamount to (if it is not in fact) a series of duties imposed on all three of the coordinate branches of our government—implied duties to be sure, but duties nonetheless.

Iowa’s problems arising from budget cuts); Alfred P. Carlton, Jr., *State Court Funding Crisis Online Toolkit*, A.B.A., available at <http://www.abanet.org/jd/court/funding/home.html> (last visited Mar. 25, 2010) (outlining the American Bar Association’s response to widespread funding cutbacks of state judicial systems). See generally, Michael A. Cicconetti, Michael L. Buenger, Lawrence G. Meyers & Robert Wessels, *Is Judicial Independence a Casualty in State and Local Budget Battles?*, 41: 3-4 CT. REV. 10 (2005); Frank Broccolina & Richard Zorza, *Ensuring Access to Justice in Tough Economic Times*, 92 JUDICATURE 124 (2008-09).

73. Undue deference to legislative-executive branch assertions of fiscal exigency must be resisted. See *supra* note 25. A more ominous assertion, i.e., that having the “power of the purse,” legislative/executive branches also have the power to define the constitutional scope and powers of the judicial branch, must also be resisted. See e.g. *Judiciary Seeks Exclusion From Line-item Veto*, THE THIRD BRANCH, Feb. 1995, <http://www.uscourts.gov/ttb/february/linettb.html> (last visited Mar. 25, 2010); Greg Land, *Judge Confronts State over Nichols Funding*, N. ASSOC. OF CRIM. DEF. LAW., Oct. 11, 2007, <http://www.nacdl.org/public.nsf/defenseupdates/georgia119> (last visited Mar. 25, 2010); Edward H. Pappas, *Judicial Independence in Crisis (Part 1)*, MICH. B. J., May 2009, at 18. The legislative-executive branch reasoning noted in the above cited pieces would over time eviscerate the independence and co-equal status of the judiciary. It is all too common, but it is simply not the law. Maine case law (and case law throughout the nation) makes clear that the judicial branch (speaking through the state’s highest court and the chief justice) must determine the scope of its constitutional duties, and what is “essential to its existence and functioning as a court,” including its funding needs.