



February 13, 2017

Senate Committee On Judiciary  
900 Court Street NE  
Salem, OR 97301  
Oregon House of Representatives

Re: Senate Bill 11  
Judicial Salaries Increase

To Whom it May Concern:

I am writing on behalf of the Board of Directors for the Oregon Association of Defense Counsel (OADC). OADC is an organization of approximately 700 lawyers in the State of Oregon, who devote a significant portion of their practice to the defense of civil litigation. The OADC supports a fair and impartial judicial branch made up of experienced lawyers, and the attendant necessity for appropriate judicial compensation.

We write to urge passage of Senate Bill 11 seeking to improve compensation for judges in this state. A fairly paid judiciary is essential to the state's ability to continue attracting highly qualified and skilled jurists. Recommended reading on this subject should include the 2014 White Paper published by the DRI entitled "The Economics of Justice" (copy attached)). The authors point out that the judiciary is the only branch of government which must rely on the legislative and executive branches for its funding. The judiciary typically requires no more than 2% to 3% of a state's annual budget to operate but, nevertheless, must always plead for those modest funds. Yet, an underfunded judicial branch can lead to a loss of human rights and a loss of access to justice.

Legislative attention to proper judicial funding should not stop with judicial salaries, but Senate Bill 11 is a good start to addressing the problem. The judicial branch is essential to the competent and effective enforcement of the rule of law. Having fair, impartial and

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# OADC

Oregon Association  
of Defense Counsel

experienced judges helps ensure the best outcomes for individuals and businesses. Judicial compensation is a reflection of the esteem in which we hold the judicial branch. Please help to see that our jurists are adequately paid so that we can continue to attract quality talent. Pass Senate Bill 11.

Thank you.

Very truly yours,



Lloyd Bernstein

LB



# The Economics of Justice

Eric J. Magnuson, Steven M. Puiszis,  
Lisa M. Agrimonti, and Nicole S. Frank





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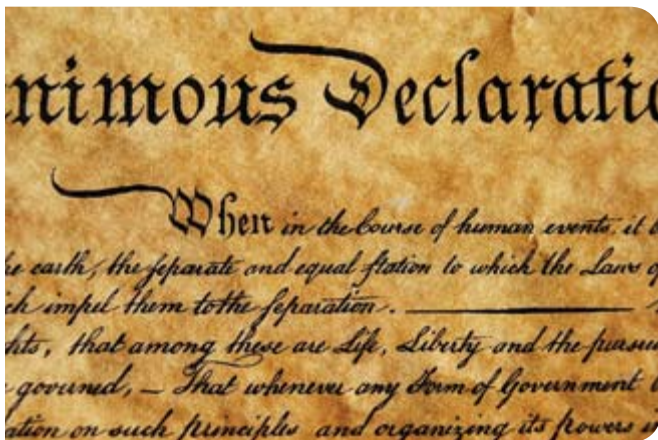
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# Executive Summary

In 1776, Thomas Jefferson decried that the king “has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.... For depriving us in many cases, of the benefits of Trial by Jury.” (Declaration of Independence, 1776).<sup>1</sup> While Jefferson and the other Framers provided for an independent federal judiciary in the Constitution, no effective way has been found to address the occasional “choke hold” that the executive and legislative branches exert on the federal and state judiciaries through control of the purse strings. The reality is that the third and co-equal branch has been reduced to a supplicant in search of funding from the two other branches of government. It does not bode well for democracy when access to the justice system can be held hostage to political debate and often loses out to the competing policies of the moment.

While much has been made of the political/philosophical ramifications of this regrettable reality and its effect on the timely administration of justice, little debate has turned on a more practical reality. That is, the economic effects of a woefully underfunded judiciary on local economies or inversely the economic benefits of a fully funded judiciary on those local economies. That exploration is the purpose of this paper.



Citizens turn to our state courts when their lives are in crisis. But after years of underfunding, many state courts are unable to timely deliver the justice our citizens seek, and to which they are entitled. The business community also relies on a functioning court system to efficiently resolve their disputes. Budget cuts in many states, however, have required court systems to lay off staff, reduce court hours, close or consolidate

courts in some instances, and give priority to criminal cases that require speedy trial rules. This has resulted in significant delays in resolving civil cases in jurisdictions where court funding has been cut.

Delayed resolution through lack of judicial funding inflicts widespread economic harm. Because of uncertainty in the outcome of a pending trial or even a trial date, for that

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<sup>1</sup> We have appended to the end of this whitepaper a list of references cited. That list contains the full citation to the materials used in preparing this paper.

matter, businesses are reluctant to add employees, expand product lines, or invest in capital equipment all of which affects the vitality of the local economy.

From an economic analysis, underfunded courts have a profound negative impact on the state economies they serve. Multiple economic studies independently demonstrate that the savings achieved through funding reductions to a state-court system are exceeded by lost tax revenues and other harmful economic impacts to a state's economy.

State court systems take up a minute percentage of a state's overall budget, typically from less than one percent to three percent. Thus, the overall savings resulting from cuts to a state's judicial branch are relatively small. Because of the courts' structural composition, however, the vast majority of a state court's budget, sometimes as high as 96 percent,<sup>2</sup> is consumed by the salaries of judges, clerks, court staff, and probation officers. Cuts to the judicial branch often result in disproportionate job losses, diminished tax revenues, and increased unemployment benefits. The relatively small savings achieved by cuts to a state's judicial branch are outweighed by direct loss of revenues.

Moreover, these budget cuts indirectly create additional social and economic problems for the state and local governments. At a time when scarce resources need to be carefully managed, the relatively small investment needed to ensure adequate funding of our state courts—a fraction of a penny for each tax dollar—can be made with no significant impact on the other needs of state and federal government. In short, adequate court funding is a smart use of the public's resources.

Today however, this issue flies under the radar of the public, and in many instances is ignored by the leaders of other branches of state government. A 2013 national poll conducted by the DRI Center for Law and Public Policy on our civil justice system revealed that only 40 percent of those polled felt that our state courts were underfunded. (DRI National Poll on the Civil Justice System, 2013). A similar percentage expressed the view that state courts were adequately funded, while another 20 percent of those polled had no opinion on the issue. (*Id.*) The sad reality facing America is that many of our state court systems are so poorly funded that they are at a tipping point of dysfunction. We hope that this whitepaper

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<sup>2</sup> Kansas Judicial Branch, 2013 at p. 9 (“Employee salaries comprise approximately 96% of the Judicial Branch all funds budget.”).

will help to educate both the public and leaders of state and local governments that many of our state-court systems are woefully underfunded to the extent that justice may end up being rationed.

Our state courts impact the lives of virtually every citizen in America. They are not simply another governmental agency with projects that can be pushed into the next fiscal year. As Chief Justice Roberts explained in his 2013 Year-End Report:

The impact of the sequester was more significant on the courts than elsewhere in the government, because virtually all of their core functions are constitutionally and statutorily required. Unlike Executive Branch agencies, the courts do not have discretionary programs they can eliminate or postpone in response to budget cuts. The courts must resolve all criminal, civil, and bankruptcy cases that fall within their jurisdiction, often under tight time constraints.

(Roberts, 2013).

It is not an understatement to say that American democracy is built on our court systems. To protect our democracy and contribute to the well-being of local economies, it is critical that our courts remain independent and adequately funded. Thus, this whitepaper will document the evidence that our court systems are woefully underfunded; explore the impact of underfunded courts on American society; and explain the urgent need for both the public and governmental leaders to recognize the value of a fully funded justice system, and restore adequate funding to the judicial branch.



# The First Purpose of Government: Upholding the Rule of Law

No matter how fair a law may be, if it cannot be enforced, it becomes meaningless. Our state courts are constitutionally charged with upholding the rule of law and providing citizens with equal access to justice. The fairness of our laws is rendered meaningless if our courts lack the necessary resources to enforce them.

The essence of American democracy is premised on a clear separation of powers between the judicial, executive and legislative branches of government. Indeed, Alexander Hamilton in *The Federalist Papers* No. 78 observed, “there is no liberty, if the power of judging be not separated from the legislative and executive branches.” As the Supreme Court has observed:

The Framers of our Government knew that the most precious of liberties could remain secure only if they created a structure of Government based on a permanent separation of powers. Indeed, the Framers devoted almost the whole of their attention at the Constitutional Convention to the creation of a secure and enduring structure for the new Government. It remains one of the most vital functions of this Court to police with care the separation of the governing powers.

*Pub. Citizen v. United States Dep’t of Justice*, 491 U.S. 440, 468 (1989) (internal citations omitted). A court’s mission, as part of an independent branch of government, is to administer justice equally to all and protect the rights and liberties guaranteed by the state or federal Constitution and laws.

Enforcing the rule of law requires resources, generally in the form of human capital, which requires adequate funding. However, by constitutional design, the judiciary is the “least dangerous” branch of government because it has been granted “no influence over either the sword or the purse.” (*The Federalist* No. 78). Neither the U.S. Constitution, nor state constitutions address the level of funding the judicial branch should receive, nor how the adequacy of that funding should be determined. Rather, funding is left in each instance to the executive and legislative branches of state government. Thus, state courts “are at the mercy of other branches of government when it comes to funding.” (Interview Lippman, 2013). While our courts “are an independent branch of government by constitutional design, [they] are also, in so many ways, interdependent, including with respect to [their] budget[s].” (*Id.*).

# Fully Funded vs. Underfunded: A Penny or Less

Our state court systems—even when fully funded—do not consume much of a state’s overall budget. In fact “many states fund their courts at less than 1 percent” and “not a single state in America spends more than 4 percent of its annual budget on its judiciary.” (Gildea & Tews, 2012, p. 10 (quoting Edwin Meese III & Robinson III, William T., 2012)). As a result: “The proportion of state and local budgets represented by even a fully funded court system is quite small—in the range of 1 to 2 percent.” (ABA Task Force on Preservation of the Justice System Rep. (“ABA Task Force”), 2011; *see also* DRI, WFOF in 2011 (“Despite the broad services provided by our state court systems, they typically receive only one to three percent of a state’s budget.”)). At the federal level, “for each citizen’s tax dollar, only two-tenths of one penny go toward funding the entire third branch of government.” (Roberts, 2012; *see also* Hogan, 2010 (same)).

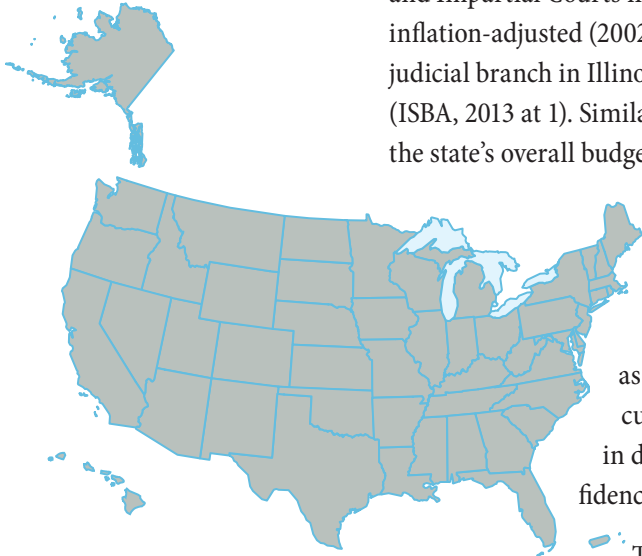


Nonetheless, state court systems around the country are experiencing an underfunding crisis as budget cuts continue. Because the judicial branch comprises such a small portion of a state government’s overall budget, cuts to the judicial branch result in little savings for state governments, but trigger significant governmental, social, and economic costs.

Notably, underfunding state justice systems also raises serious constitutional issues as underfunded courts struggle to perform their constitutional duties. Citizens are denied access to the courts and access to justice. In some cases, criminal defendants are denied their right to a speedy trial, resulting in the dismissal of charges. (Gildea & Tews, 2012 (citing *State v. Colbert*, No. A10-55, 2011 WL 67785, at \*6 (Minn. Ct. App. Jan. 11, 2011) (reversing conviction for speedy trial violation)). More fundamentally, however, the failure of the executive and legislative branches to adequately fund a state court system poses a significant constitutional threat to the very structure of American government. To adequately fund our state court systems requires only a little additional funding, but that modest investment will deliver manifold benefits.

# National Trend to Underfund State Courts

State courts are the cornerstone to justice in America. Funding cuts to state courts have a particularly negative impact on our nation's legal system because they handle the vast majority of legal business—"more than 95 percent of all civil and criminal litigation." (DRI, WFOF in 2011 p. 61<sup>1</sup>; *see also* Interview Lippman, 2013). Despite the important role that state courts play, the trend in judicial funding since 2008, or in some cases, over the last decade, has been flat or declining nationally. (*See* Greenberg & McGovern, 2012). For instance, a 2013 Report by the Illinois State Bar Association's Special Committee on Fair and Impartial Courts illustrates that appropriations to Illinois state courts have declined in inflation-adjusted (2002) dollars by 22 percent.<sup>2</sup> (ISBA, 2013). The budget allocation for the judicial branch in Illinois as an overall percentage is now "barely one-half of one percent." (ISBA, 2013 at 1). Similarly in Georgia, the judicial branch comprises a mere 0.89 percent of the state's overall budget. (ABA Task Force, 2011, at 3).



Professor Irwin Chemerinsky, of the University of California Irvine School of Law, noted that in 2011, 42 states had cut judicial funding (Chemerinsky, 2011, citing NCSC). He cautioned that the decline in judicial funding will slowly erode services over time as staff are laid off, or not replaced. The most visible impact of budget cuts is the reduction of court services. Reduced court services results in delayed or denied justice which leads to a growing loss of public confidence and trust in our courts.

The *Sacramento Bee* recently reported that the Los Angeles County Court closed eight court houses and eliminated 511 jobs to address an \$85 million deficit. Overall, one in five court jobs was eliminated due to funding shortages (The Associated Press, "Budget cuts lead," 2013).<sup>3</sup>

<sup>1</sup> Citing Editorial, State Courts at the Tipping Point, N.Y. Times, Nov. 24 2009, at A30, *available at* [http://www.nytimes.com/2009/11/25/opinion/25weds1.html?\\_r=1](http://www.nytimes.com/2009/11/25/opinion/25weds1.html?_r=1).

<sup>2</sup> "The percentage drop in the courts' allocation in real dollar terms was calculated:  $[\$307,788,700 - \$238,570,587] / \$307,788,700 = 0.22489 = 22\%$ " (ISBA, 2013).

<sup>3</sup> *See also* Koseff (noting that "California faces a 'civil rights crisis' because of years of underfunding for the judicial branch").



The California Trial Courts Presiding Judges Advisory Committee undertook a comprehensive evaluation of the impacts of those cuts throughout the state through a survey of 1,560 judges and 260 commissioners in 48 counties. (Goode, 2013). Contra Costa County Superior Court Presiding Judge Barry Goode described cuts in court services ranging from closed court houses to reduced service hours and staff. As a

result of reduced service capacity, the survey also found significant delays and backlogs in processing times for various services including court closures and trial delays. (*Id.*). Indeed, in recent years, California has closed 114 courtrooms, 22 courthouses, reduced hours of operation at 30 courts, and had furloughs as long as 58 days. (Robert, 2013).

In June 2013, the Los Angeles Superior Court announced its plan “to eliminate 511 more positions” resulting in 177 people losing their jobs, 139 getting demoted, and an additional 223 people getting reassigned. (Robert, 2013). As the largest justice system in the nation, the impact of budget shortfalls is quickly identified in California. But smaller states are suffering as well and beginning to document the adverse impacts.

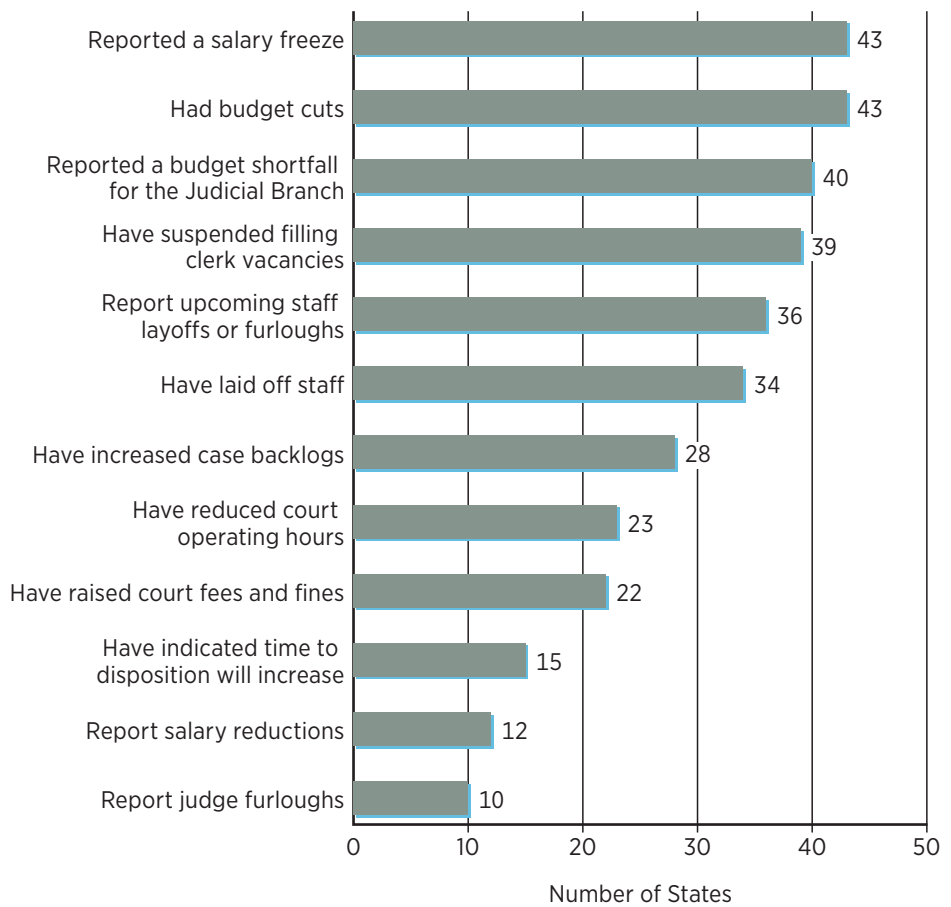
For example, states like Illinois are reporting the impact of cuts over the last dozen years, which the Administrative Office of the Illinois Courts reports has resulted in:

- delayed or unfilled long-term, non-judicial vacancies;
- graded positions filled at the minimum salary;
- imposed moratorium on merit and performance pay increases;
- encouraged use of videoconferencing to reduce travel expenses; and
- delayed technology purchases and upgrades.

(ISBA, 2013). Alabama courts are now closed on Fridays to save costs; Michigan cut as many as 49 judgeships through retirement and attrition; the Chief Judge of the Supreme

Court of Kansas announced a potential need to close all courts for as long as seven weeks; and courts in Iowa operate with staff levels at 12 percent below the staffing standard. (Voice America Radio Show, 2013). The chart below depicts the debilitating impact of budget shortfalls on state courts nationwide. (*Id.*)

### State Court Actions 2009–2012



As may be expected, these ongoing cuts will ultimately lead to the significant loss of public confidence in the judiciary as courts do less justice less well in a less timely fashion.



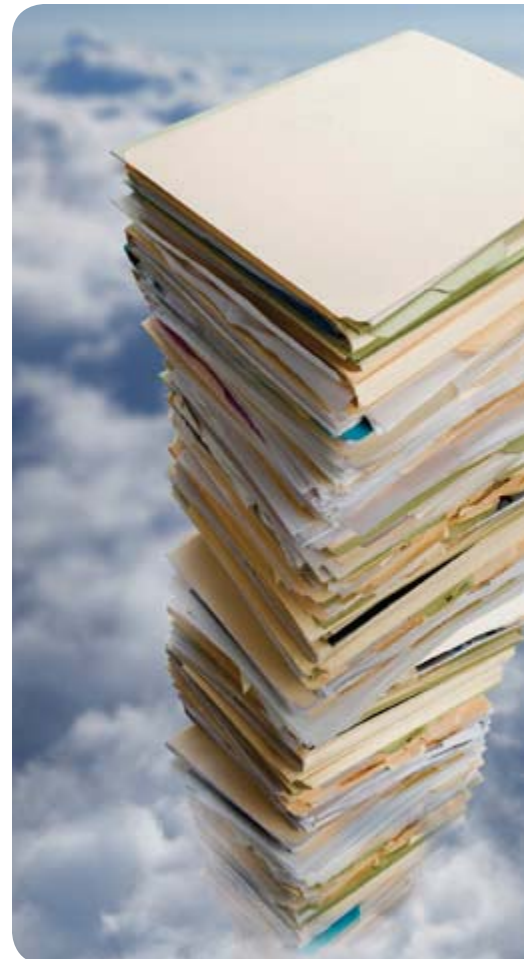
# Impacts of an Underfunded Justice System

## Why Cuts Quickly Injure the Courts

Much has been written on the cost of the American criminal justice system, but the broader economic impacts of funding cuts to the judicial branch have been overlooked or inadequately documented, making a precise cost-benefit analysis difficult. In today's age of sequestration, budget cuts, and falling government revenue, no one seriously questions that both federal and state court systems are facing significant economic challenges. (Rutledge & Brandenburg, 2013). The unique demands and restraints that are placed on our state courts make trimming their budgets difficult. Chief Justice John Roberts noted this challenge in his 2013 Year-End Report when he explained that courts are constitutionally mandated to resolve civil disputes that citizens bring to court as well as the criminal cases filed by prosecutors, and that prolonged shortfalls in judicial funding will result "in the delay or denial of justice for the people the courts serve." (Roberts 2013).

Courts have heavy responsibilities to those they serve and little ability to trim their budgets in a manner that does not affect capacity to provide those constitutionally mandated services, all during a time when case filings, especially bankruptcies and foreclosures, are *increasing*. (Gibbons, 2011 at 3 "Overall, the [federal] Judiciary's workload is at or near record levels in most filing categories.").

Courts across the country have responded to the diminished resources with a remarkable effort to streamline, modernize, and digitize the judicial process. (ABA Task Force, 2011, at 12–13) (discussing the many forms that enhanced use of technology, which courts have taken in recent years to "reengineer" to process for increased efficiency)). However, at the end of the day, justice is a human process. Cases



need to be decided by judges, and litigants, whether civil or criminal, deserve to see justice first-hand. Simply put, our system of justice and our courts depend on public trust and confidence to function effectively, and when justice becomes remote or unavailable, that trust and confidence suffers greatly.

Just how little room the judiciary has in its budget is underscored by the overwhelming portion of funds that go to human resources. Personnel expenses constitute the lion's share of a state's judicial branch's budget—as much as 95 percent in Iowa. (Iowa Judicial Branch, 2010). Because the judicial branch requires predominantly human resources to function,<sup>1</sup> there are limited alternatives to dealing with budget cuts other than reducing staff or salary. It is understandable why state courts have resorted to closing courthouses on certain days of the week, suspending jury trials, and enduring layoffs, furloughs, and hiring freezes in the face of budget shortfalls. (Gildea & Tews, 2012). However, each of these actions reduces efficiency of our court systems and increases the time it takes to resolve disputes.

The justice system is more significantly affected by budget cuts when compared to other branches of state government. For instance, in the 2010 Iowa study, there were at least twenty state agencies that weathered budget cuts without any layoffs. (Iowa Judicial Branch, 2010). However, the Iowa “Judicial Branch laid off more employees, cut more jobs, and required more unpaid leave than most state offices and departments, including the regents.” (*Id.* (quoting Chief Justice Marsha Ternus of the Iowa Supreme Court). While the judicial branch in Iowa employed only four percent of the entire state's government workforce, Iowa's across the board budget cuts resulted in the judicial branch losing nearly half—49 percent—of all the state government positions that were trimmed due to that budget cut. (ABA Task Force, 2011, at 5)).

### **Delayed Justice Is Denied Justice: The Human Impact of Underfunded Courts**

Courts deliver justice to the citizens of our states—taxpayers and voters. People turn to courts when they are facing some of the most important and challenging times of their

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<sup>1</sup> To deliver justice and meet its constitutionally mandated obligations, courts need not only judges, but also people to support judges such as clerks of court, court administrators, juvenile court officers, court attendants, law clerks, court reporters, or sometimes, magistrate judges, security officers, and interpreters. (*See, e.g.*, Iowa Judicial Branch, 2010).



lives—when they are facing divorce, bankruptcy, seeking protective orders, suing a business partner, enduring home foreclosures, or even defending their own liberty. But when the judicial branch is underfunded, courts’ resources shrink and delays increase. As Chief Justice Cantil-Sakauye noted regarding California’s court system, “[w]e face astonishing and harmful delays in urgent family matters, in business contracts, wrongful termination, discrimination cases, personal injury cases across the board.” (Koseff).

Delays due to underfunded courts impact the people courts serve in a variety of ways. Naturally, reduced funding restricts the courts’ ability to dispose of civil matters in a timely manner. Indeed, not long ago in Sacramento, Judge Steve White told the *New York Times*: “people are bringing lawn chairs to the court because of the long wait for civil services.” (Robinson III, 2011). In Utah, the average age of pending cases is up 84 days over the past two years. (Micronomics, 2012). Imagine waiting months for a court to finalize an uncontested divorce or resolve a parenting dispute.

In addition to causing delays in civil cases, underfunding the judicial branch triggers other economic and societal issues in the criminal context. Probation is a low-cost alternative to incarceration, but in many states, the salaries of probation officers are a part of judicial branch’s budget. Funding cuts place the jobs of probation officers on the chopping block, and thereby increase the risk to public safety when fewer officers are available to work with those placed on supervised release. Additionally, individuals who are ultimately found guilty of a crime, but who can afford bail, remain out of custody for a longer period of time while awaiting trial as a result of the underfunding of our court systems. By contrast, those who are innocent, but cannot afford bail are held in custody longer. These scenarios of delayed justice due to underfunded courts expose social costs and places public safety at greater risk, in addition to wasted taxpayer dollars reflected in larger jail populations.

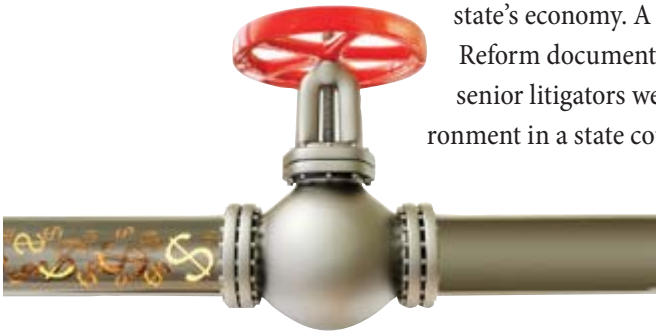
Court delays are even affecting lawyers’ civil litigation strategies. Judges in Los Angeles are discouraging parties from filing demurrers because those motions further delay an action. (Coe, 2013).

In addition, there are other, hidden costs resulting from delayed justice that impair a government’s treasury. Because cuts to the judicial branch inevitably result in layoffs, there is an immediate harm to the local and state economy in the form of lost tax dollars from

those workers, and a loss of other economic activity they would produce. (ABA Task Force, 2011, at 5–6) (“[T]he reduction in state expenditures for properly functioning courts even harms the state treasury itself” because “directly lost salaries and indirectly lost business opportunities—result in corresponding tax losses”). Moreover, delays in civil case dispositions create additional economic losses because litigants cannot invest or otherwise use their resources as they might if the dispute were resolved. (*Id.*) In exchange for all these costs, taxpayers do not receive any benefit, but instead face other adverse economic and societal impacts.

### **Adverse Economic Impacts and Induced Effects of Underfunded Courts**

The irony in cutting the funding to our state-court justice systems is that those attempts to save money during economic downturns are not only ineffective, but also handicap the state’s economy. A 2012 survey conducted by the U.S. Chamber Institute for Legal Reform documents that adverse impact. In that survey, 1,125 general counsel or senior litigators were asked: “How likely would you say it is that the litigation environment in a state could affect an important business decision at your company such as where to locate or do business? Would you say very likely, somewhat likely, or very unlikely?” (U.S. Chamber Institute, 2012, at 6). In response, 70 percent said that a state’s litigation environment was either very likely or somewhat likely to affect an important business decision. (*Id.*) The delays and other service-related repercussions from the underfunding crisis translate not only to lower performing economies stemming from increased litigation costs to existing local business, but also result in the cost of lost opportunities for further economic development as businesses turn away from states with underfunded justice systems.



### ***Four Studies Quantify Adverse Economic Impact***

Several studies have independently quantified the impact of reduced judicial funding on the state and local economy. While taking different approaches in their economic models, these studies each quantified losses in the hundreds of millions annually to the state economies resulting from the underfunding of the states’ court systems. Three studies found significant adverse economic impacts involving direct, indirect, and induced effects that

resulted from reductions in court funding, which in turn led to longer case processing times. The fourth study focused primarily on a lost investment model and similarly found significant adverse economic impacts. Two of these studies were authored by the Washington Economics Group, Inc. (WEG)—the first for the Florida Bar in 2009, and the second was for the Georgia State Bar two years later in 2011. Micronomics, Inc. authored the third study, which evaluated funding cutbacks of the Los Angeles Superior Court in Los Angeles County as well as a fourth evaluation of the Los Angeles County court system relying in part on information obtained from a survey of 42 states by the National Center for State Courts (Micronomics, 2009).

### **WEG's Studies in Florida and Georgia**

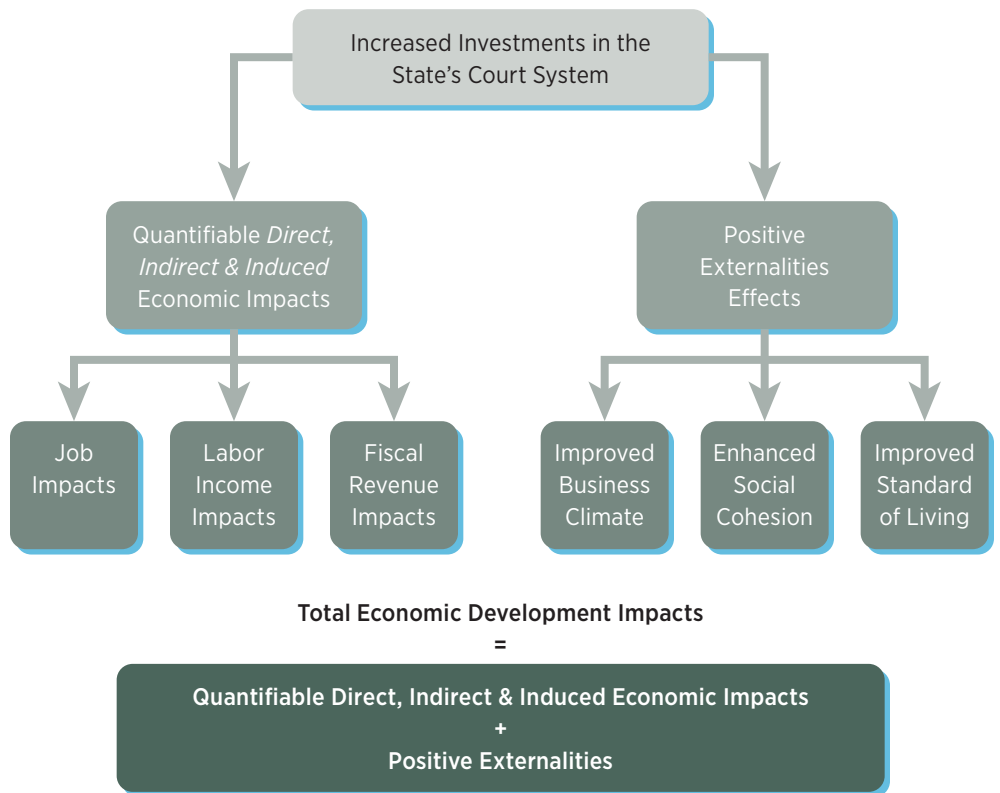
The WEG studies examined the total economic impact of reduced funding by examining 1) direct effects on production resulting from increased demand; 2) indirect effects of the production changes for backward-linked industries caused by the increased demand in the directly impacted industry; and 3) induced effects representing changes in regional household spending caused by household income generated from the direct and indirect effects (WEG 2009; WEG 2011).

In the 2009 Florida Study, WEG noted that funding for Florida's state courts had declined annually since FY 2004–2005 in terms of inflation adjusted dollars, at the same time real property/mortgage foreclosures and the state's population were on the rise. WEG concluded that the backlog of real property/mortgage foreclosure cases caused by the underfunding of the Florida court system resulted in a \$9.9 billion loss annually to the state's economy in direct costs, and an additional \$7.2 billion in indirect and induced costs to the state's economy. WEG offered a best practice recommendation that funding be adequate for constitutional responsibilities, stable, and equitable through the court system (WEG, 2009).

In a 2011 Georgia study, WEG reached similar conclusions, but on a smaller scale, basing its economic analysis on three years of declines in funding and a review of civil and domestic relations cases (WEG, 2011). Between 2003 and 2008, there was an 8 percent increase in Superior Court judges and a 24 percent climb in caseload. WEG concluded: “The inadequate funding levels of the State's Court System have had adverse impacts not only to the statewide economy, but have also resulted in unquantifiable adverse effects on business and professional activities throughout the State—thereby negatively impacting the

business climate of Georgia” (WEG, 2011). WEG opined that funding reductions resulted in direct, indirect and induced economic impacts on the state of between \$337 million and \$802 million annually. (WEG, 2011; Fulton County Sup. Ct., 2012).

**Comprehensive Economic Development Impacts of Investing in the State of Georgia Court System**



The authors concluded “an adequately funded and efficient court system increases the State’s ability to attract and expand industries, improves access to legal services for residents, reduces costs to the State from inefficiency, and also improves the quality of Georgia communities” (WEG, 2009).

### **Micronomics Group Studies Estimate Losses in the Billions**

WEG's studies do not stand alone. In 2009 and 2012, the Micronomics Group prepared additional studies to evaluate the impact of court funding cuts. The 2009 study focused on the County of Los Angeles (Micronomics, 2009). The Los Angeles Superior Court budget was set to accommodate deficits between \$79 million and \$140 million through 2012 to 2013. Weinstein & Porter determined that the cutbacks would prompt courtroom closures, operating capacity reductions and lost court days, which Micronomics in turn concluded would cause the following economic impacts:

- \$13 billion in lost business activity due to reduced use of legal services;
- \$15 billion in economic losses caused by litigation uncertainty;
- \$30 billion in lost revenue to the county and state and 150,000 in job losses; and
- \$1.6 billion in lost local and state taxes.

(Micronomics, 2009).

Micronomics undertook a follow-up study in 2012, building on its Los Angeles County work and focusing on the direct impact of judicial budget cuts based on the National Center for State Courts' survey of 42 states (Micronomics, 2012). Using a proxy it developed for calculating the economic loss associated with delays in civil case processing, Micronomics concluded that proposed funding cuts would cause "estimated losses of \$52.2 billion from increased uncertainty on the part of litigants," excluding the direct losses from job cuts in firms and the courts and related economic output. (Micronomics, 2012).

A 2012 RAND assessment similarly noted the financial crisis and "subsequent erosion in state budgets has placed stress on court mechanisms at the same time that particular kinds of litigation, such as disputes over foreclosure, seem to have increased" (Greenberg, 2012).

# Economic Theory: Judiciary as Catalyst to Economic Development

Other studies have also concluded that the difference between a high-performing economy and a lower-performing economy is rooted in a functional judicial system. Richard E. Messick, international consultant formerly with the World Bank, examined the economic impact of a fully funded justice system. (Messick, 1999). In particular, he reviewed how Oliver Williamson, a World Bank Economist, distinguished economies based on the society's ability to enforce contractual obligations through its judiciary.

A “high-performance economy” is one that is characterized by a significant number of long-term contracts—just the type of business relationship that is unlikely to thrive in the absence of a well-functioning judicial system. When the judiciary is unable to enforce contract obligations, a disproportionately large number of transactions take place in the spot market, where there is less opportunity for breaching contracts. Or, alternatively, firms circumvent the judicial system altogether by vertical and conglomerate integration, turning arms-length transactions into intrafirm ones. In either case, argues Williamson, the results are higher transaction costs and a “low-performance economy.”

(Messick, 1999 (Williamson 1995)). In his 1999 article, *Judicial Reform and Economic Development: A Survey of the Issues*, Messick noted the widely held belief that judicial reform for developing countries will result in enhanced economic performance (Messick, 1999 (citing Sherwood, 1995)). Among Messick's identified hypotheses is the judiciary's effect on enabling exchanges between private parties, or enforcing contracts. (Messick, 1999).

In a 1997 World Bank survey of 3,600 firms in 69 countries, unpredictability of the judiciary presented a significant problem “in their business operations” (Messick, 1999 (citing World Bank, 1997)). Enforcement of contracts is essential for economic growth (Messick, 2005). When entrepreneurs have confidence contractual obligations will be met, specialization and the resulting increase in growth and productivity can occur. (Messick, 2005). The most important public means of contract enforcement is the court system, “[n]ot

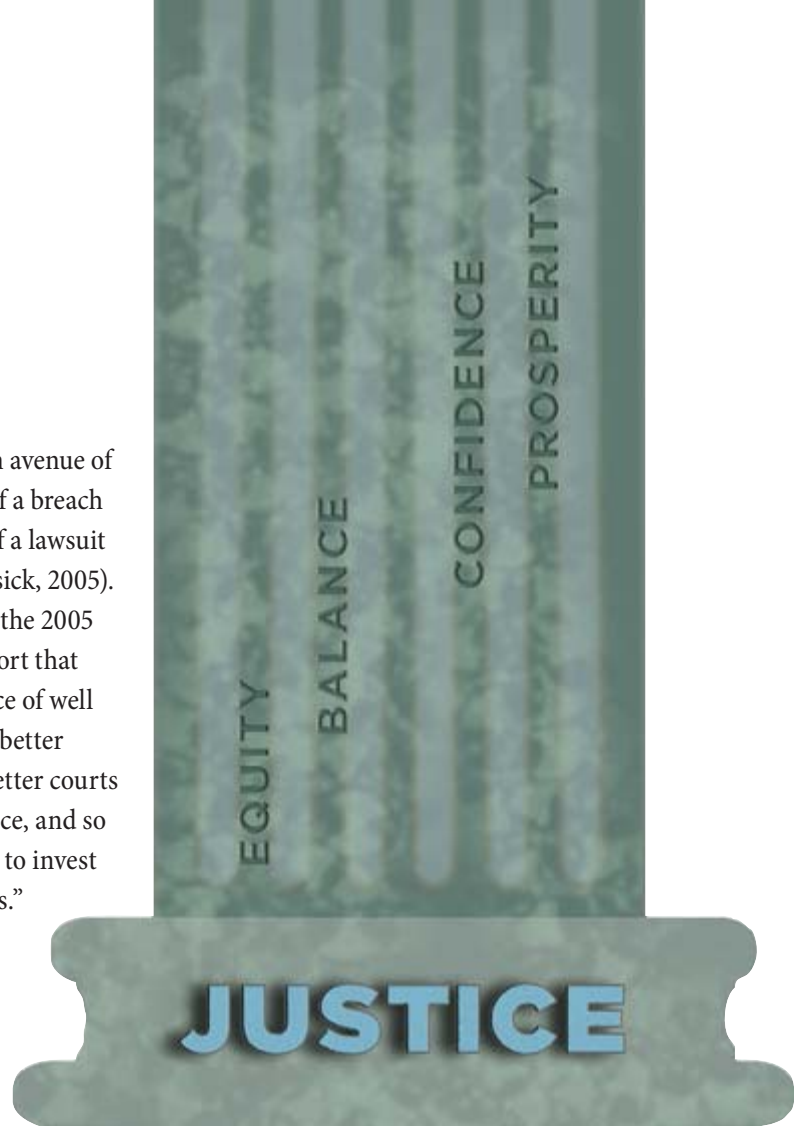
A state's litigation environment affects important business decisions.



only because they are an avenue of last resort in the event of a breach but because the threat of a lawsuit can deter breach.” (Messick, 2005). Messick also referenced the 2005 Word Development Report that affirmed the “importance of well performing courts for a better investment climate... Better courts reduce the risks firms face, and so increase the willingness to invest more in their enterprises.” (Messick, 2005).

The U.S. Chamber Institute 2012 study supports these economic conclusions as it found that a state’s

litigation environment affects important business decisions. (U.S. Chamber Institute, 2012, p. 6) (only 10 percent of survey responses indicated that the litigation environment was “very unlikely” to affect an important business decision)). With so much documented support that a fully funded state-court system improves economic development and underfunded justice systems contribute to a low-performing economy, our attention must turn to change. All stakeholders in our state-courts system must grow the constituency of supporters of adequately funded state court systems.



# Actions Already Taken to Address the Underfunding Crisis

Various bar associations and the National Center for States Courts (NCSC) have sounded the alarm, expressing the concern that further reductions in funding threatens the ability of the courts to perform their constitutional functions. The American Bar Association (ABA), DRI, and the American Association for Justice have similarly expressed grave concern in the context of the 2013 sequestration noting that state courts have “endured years of withering cuts despite overwhelming caseloads” (DRI, 2013). They jointly warned “budget cuts through sequestration will impinge access to justice at the state and federal levels and put court petitioners, staff and judges in harm’s way” (DRI, 2013). The ABA has spoken out about the threats that cuts to the judicial system pose to our democratic government and even formed the ABA Task Force on Preservation of the Justice System.



The efforts have not ended there. In 2011, Californians were encouraged to participate in hearings on the civil justice crisis held in major cities across the state. (Selbin & Steinbach, 2011). These hearings were modeled after a similar effort in New York. (*Id.*). But these efforts have not resulted in much progress. (See State Bar of Calif. *et al.* Findings & Recommendations, 2012). Legislators have the ability to restore funding to the states’ justice systems by appropriating funds at a level that not only allows courts to meet their constitutional obligations, but also enables economic growth. The time for this investment in our states’ justice systems is now.

# Legislative and Executive Branches Must Choose to Invest in the Justice System

By neglecting to fund their state justice systems, the legislative and executive branches will continue to harm and eventually disable the third and co-equal branch of state government. “We have to understand that underfunding our court system has long-term, negative consequences and could wind up costing us much more than we would ever save financially in the short term.” (Cooper, 2013).

By the same token, in deciding to fund the justice system properly, the legislative and executive branches have the ability to restore the judicial branch to its optimal state, improve efficiency, shorten length of time to disposition, save significant annual economic losses to their states, and pave the way for economic growth. The judicial branch cannot force this change of heart in its two partner branches of government on its own—rest assured it has tried.

In the spring of 2008, Chief Justice Judith S. Kaye filed suit in the Supreme Court of New York against New York state legislators and the governor on behalf of New York’s state judiciary, claiming that the nine-year freeze on judicial pay violated New York’s constitution. *Kaye v. Silver, et al.*, No. 400763/08 (Sup. Ct., NY County, 2008); *see also Larabee v. Governor of the State of New York*, 65 A.D.3d 74, 77 (N.Y. App. Div. 1st Dep’t 2009); *Maron v. Silver*, 58 A.D.3d 102 (N.Y. App. Div. 3d Dep’t 2008). The theory was that by failing to adequately compensate the state supreme court judges and other judges, Governor David A. Paterson and the legislature violated separation of powers and independence of the judiciary. But while “[t]he intersection of the separation of powers and judicial compensation has a lengthy history,” the legislature, in truth, makes decisions about appropriating funds for judicial compensation and the judicial branch in general. (*See Larabee*, 65 A.D.3d at 99). The decision rests with the other branches. Committees may make recommendations to the legislature but the legislators must agree and decide to adequately fund the judicial branch.

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# Conclusion

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The role of the judicial branch cannot go overlooked or undervalued. The cost is simply too great. Federal and state governments are premised upon the framework of three fully functioning branches of government. An adequately funded judiciary would only require a penny more per dollar, or in some cases, a fraction of a penny per dollar, from tax dollars. Any savings to a state government from cuts to the justice system are insignificant compared to a government's overall financial set-backs and create other, hidden costs—both social and economic. By contrast, the impact of funding cuts on the judicial branch is drastic and undermines a court's ability to fulfill its constitutional duties.

The judicial branch has a massive impact on the success of government, social cohesion, and economic stability. A fully funded justice system offers business consumers a better investment climate, deterred breach of contract, and enforcement of private contracts, and an efficient disposition of matters. The case is overwhelming that the first priority of government in times of shortage should be a strong, effective, and adequately funded justice system.

The first priority of government in times of shortage should be a strong, effective, and adequately funded justice system.

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