

Public School Funding and *McCleary v. State of Washington*—A Violation of the Separation of Powers Doctrine or a Legitimate Exercise of Judicial Autonomy?

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I. INTRODUCTION

Public school funding has been contentiously litigated throughout the United States, and the Washington Supreme Court has addressed the inadequacy of public school funding in two pivotal cases: *Seattle School District No. 1 v. State*¹ and *McCleary v. State*.² In both decisions, the Washington Supreme Court held that the State failed to provide an adequate basic education for its public school students;³ however, in its attempt to remedy the situation, the court took drastically different approaches.

In *McCleary v. State*, the focus of this Comment, the Washington Supreme Court held that the State had not met its constitutional obligation to adequately fund K–12 education, and the court ordered the legislature to fully fund the State’s basic education program by 2018.⁴ Interestingly, the court also retained jurisdiction over the case, and ordered the legislature to report annually to the court so that it could evaluate whether the legislature was making meaningful progress towards the court’s mandate.⁵ This jurisdictional retention initially caused some strife among the justices, with several denouncing the judiciary’s oversight of the legislature as a violation of the separation of powers.⁶ This Comment

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1. *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978).

2. *McCleary v. State*, 269 P.3d 227 (Wash. 2012).

3. *See id.* at 258; *Seattle Sch. Dist. No. 1*, 585 P.2d at 94–95. *See also infra* Part II.

4. *McCleary*, 269 P.3d at 231. *See infra* Part II.B.

5. *See infra* Parts II.B–C.

6. *See infra* Part II.C.2. Chief Justice Madsen originally opposed the court’s retention of jurisdiction over the *McCleary* case, and Justice James Johnson authored several dissenting opinions to orders issued by the majority following the *McCleary* decision. *See infra* Parts II.B–C. However,

argues that this alleged infringement by the court is not a violation of the separation of powers doctrine—at least not in Washington State. This Comment further delineates what steps the Washington Supreme Court may take before blatantly overstepping its constitutionally delineated bounds.

Part II of this Comment provides a detailed summary of two key Washington cases pertaining to public school funding: *Seattle School District No. 1 v. State* and *McCleary v. State*. Following the decision in *McCleary*, the Washington Supreme Court issued five orders related to the legislature's compliance, or lack thereof, with the State's constitutional mandate.⁷ These orders, and the subsequent judicial–legislative tug-of-war, are important not just because of their holdings, but also because of the long-standing debate between the court and the legislature as to the proper role of the judiciary in the educational finance arena.

Part III analyzes the separation of powers debate generated by the *McCleary* court's decision to retain jurisdiction over the case. It ultimately concludes that the court's direct oversight of the legislature is not a violation of the separation of powers doctrine, but is in line with the court's jurisprudence. The court's actions are well within its judicial authority because Washington employs a functional separation of powers doctrine that permits greater flexibility and communication between the branches of government.⁸ For sociopolitical issues of great importance—such as public school funding adequacy—public policy justifies the use of this flexible approach.

Part IV discusses the court's response to the legislature's noncompliance. Although the *McCleary* holding does not run afoul of the separation of powers, the court's enforcement of its mandate could potentially violate the separation of powers doctrine. Part V concludes.

II. BACKGROUND

The Washington State Constitution asserts that “[i]t is the paramount duty of the state to make ample provision for the education⁹ of all children residing within its borders.”¹⁰ Therefore, the State has a judicial-

Justice Johnson is no longer a Washington Supreme Court justice, and the recent contempt order was unanimously decided.

7. See *infra* Part II.C.

8. See *infra* Part III.B.

9. The trial court declined to address definitively the terms “ample,” “provision,” and “education,” opting instead to utilize these words “as guidelines for giving the Legislature the greatest possible latitude to participate in the full implementation of the constitutional mandate.” *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 93 (Wash. 1978).

10. WASH. CONST. art. IX, § 1.

ly enforceable and affirmative duty to provide for the education of all K–12 public school students.¹¹ Because the constitution asserts that this duty is “paramount,”¹² the obligation to adequately provide for Washington schoolchildren is accorded an elevated status.¹³ Examination of the Washington State Constitution reveals that the framers specified only one state function as a paramount duty within the entire document—the State’s duty to provide for the education of its resident children.¹⁴ Evidently, the Washington Constitutional Convention placed great emphasis on the education of children residing within the state’s borders.¹⁵ The following cases illustrate how the court has interpreted this paramount duty.

A. Seattle School District No. 1 v. State

In *Seattle School District No. 1 v. State*, the Washington Supreme Court held that the legislature failed to meet its constitutional obligation to adequately fund public schools.¹⁶ Prior to the decision, public schools in Seattle were forced to rely on special levy elections to supplement school funding because the legislature did not appropriate sufficient revenue to fund annual educational programs.¹⁷ This reliance on special levy elections created a precarious financial situation for public schools. Although school districts *could* receive additional funding through levy elections, “voters [were] not required to approve the request.”¹⁸ Additionally, special excess levy elections could only be brought twice annually; upon failure of the second election, the school district was forced to operate with the inadequate funds provided by the legislature.¹⁹ In 1975, after two failed special excess levy proposals, parents of children enrolled in the Seattle School District brought a civil suit alleging that the State had failed to uphold its constitutional obligation to provide for the education of its resident schoolchildren.²⁰

11. *Seattle Sch. Dist. No. 1*, 585 P.2d at 85.

12. *Id.* “‘Paramount’ is not a mere synonym of ‘important.’ Rather, it means superior in rank, above all others, chief, preeminent, supreme, and in fact dominant.” *Id.* at 91.

13. *See McCleary v. State*, 269 P.3d 227, 232 (Wash. 2012).

14. *Seattle Sch. Dist. No. 1*, 585 P.2d at 85.

15. *See id.* at 91 (“Theodore L. Stiles, a member of the 1889 constitutional convention wrote: ‘No other state has placed the common school on so high a pedestal. . . . But the convention was familiar with the history of school funds in the older states, and the attempt was made to avoid the possibility of repeating the tale of dissipation and utter loss.’”).

16. *See id.* at 99.

17. *Id.* at 77–78.

18. *Id.* at 78.

19. *Id.*

20. *Id.*

The court found that during the 1975–1976 academic year, 40% of students in Washington attended “levy loss districts.”²¹ The lack of funding forced levy loss districts to reduce teaching staff, subject offerings, and security personnel.²² Additionally, these districts had to cut the budget for fundamental teaching supplies—including textbooks.²³ This financial uncertainty created a gradual decline in public school efficacy; as one scholar noted, a “pattern of boom and bust economic swings creates havoc with educational opportunity.”²⁴

Furthermore, the court found evidence that suggested this levy system was patently prejudicial to children in low socioeconomic communities because special excess levies depend on the assessed property valuations within a particular district.²⁵ Presumably, urban communities with higher property valuation were more likely to raise sufficient funds through special excess levies than rural communities with lower property valuation.²⁶ The court thus held that the State’s duty to make ample provision for the education of resident children was not constitutionally satisfied by the authorization of special excess levy requests.²⁷ The legislature must make sufficient provision for basic education through appropriation or “dependable and regular tax source[s].”²⁸ The court held that special excess levy funds were neither.

Next, the court determined that it was the judiciary’s duty “to construe and interpret the word ‘education’ by providing broad constitutional guidelines”; however, it was the legislature’s duty “to give specific substantive content to the word [education] and to the program it deems necessary to provide that ‘education’ within the broad guidelines.”²⁹ Therefore, the court mandated that the legislature define “basic education”³⁰ and fund Washington’s basic education program—without the use

21. *Id.*

22. *Id.* at 98.

23. *Id.*

24. Michael A. Rebell, *Safeguarding the Right to a Sound Basic Education in Times of Fiscal Constraint*, 75 ALB. L. REV. 1855, 1861 (2012).

25. *Seattle Sch. Dist. No. 1*, 585 P.2d at 98–99.

26. *See id.*

27. *Id.* at 99.

28. *Id.*

29. *Id.* at 95.

30. *Id.* The State had not previously defined basic education; therefore, the trial court relied on three ad hoc definitions of basic education, ultimately concluding that state funding was insufficient to satisfy any one of the three proposed definitions. *McCleary v. State*, 269 P.3d 227, 232 (Wash. 2012) (discussing *Seattle Sch. Dist. No. 1*, 585 P.2d at 71). The Washington Supreme Court did provide a broad guideline of what constituted education, stating that education “must prepare our children to participate intelligently and effectively in our open political system to ensure that system’s survival. It must prepare them to exercise their First Amendment freedoms both as sources and

of special excess levies³¹—no later than July 1, 1981.³² The court, however, did not direct the legislature as to how it should accomplish these directives, stating, “While the Legislature must *act* pursuant to the constitutional mandate to discharge its duty, the general authority to select the *means* of discharging that duty should be left to the Legislature.”³³

Finally, the Washington Supreme Court overturned the trial court’s decision to retain jurisdiction, finding it “inconsistent with the assumption that the Legislature will comply with the judgment and its constitutional duties.”³⁴ The court stated that it had “every confidence [that] the Legislature will comply fully with the duty mandated by [the constitution].”³⁵ Despite the court’s confidence in the legislature’s efforts, thirty years after *Seattle School District No. 1*, the Washington Supreme Court once again held that the State had failed to adequately fund basic education.³⁶ After a second failure, however, the court was unwilling to place its blind faith in the legislature once again.

B. McCleary v. State

In *McCleary v. State*, parents of schoolchildren in the Seattle School District again challenged the adequacy of public school funding.³⁷ The Washington Supreme Court found that after *Seattle School District No. 1* was decided, the legislature had defined basic education as mandated.³⁸ However, the funding allocated by the legislature did not correlate with the actual cost of providing students with the “education” advanced by the legislature.³⁹ Consequently, during the thirty-some years following *Seattle School District No. 1*, Washington school districts in-

receivers of information; and, it must prepare them to be able to inquire, to study, to evaluate and to gain maturity and understanding.” *Seattle Sch. Dist. No. 1*, 585 P.2d at 94 (citations omitted).

31. *Seattle Sch. Dist. No. 1*, 585 P.2d at 98–99. Although the court held that schools must not be forced to rely on levies in order to fund basic education, the court expressly indicated that levies might be brought to fund enrichment programs that go beyond basic education. *Id.*

32. *Id.* at 105.

33. *Id.* at 96.

34. *Id.* at 105.

35. *Id.*

36. *See* *McCleary v. State*, 269 P.3d 227, 261 (Wash. 2012).

37. *Id.* at 230.

38. ESHB 2261 redefined basic education by outlining educational standards in terms of: (1) an instructional program of basic education, (2) an institutional program for detained juveniles, and (3) student transportation, in addition to providing instruction regarding standardized testing, highly capable programs, remediation, transitional bilingual education, and special education programs. *See id.* at 241–42. Furthermore, ESHB 2261 added voluntary full-day kindergarten to the basic education program. *Id.*

39. *Id.* at 253–54.

creasingly relied on levies to supplement state funding⁴⁰—an eerily reminiscent cycle.

In *McCleary*, the State argued that the basic education program was fully funded according to the Basic Education Act, which stated that “education shall be considered to be fully funded by those amounts of dollars appropriated by the legislature.”⁴¹ As the court noted, however, this provision essentially “allow[ed] the State to maintain the appearance” of a fully funded basic education program, when in actuality the program was grossly underfunded.⁴² Levy funds were once again used to support basic education in an attempt to “fill the gap” between state appropriations and the actual cost of providing basic education.⁴³ In a stern pronouncement, the court reiterated that “[r]eliance on levy funding to finance basic education was unconstitutional 30 years ago in *Seattle School District*, and it is unconstitutional now.”⁴⁴ The court held once again that the State could not rely on local excess levies or federal funding to meet its constitutional obligation to provide ample provision for the education of schoolchildren.⁴⁵

After *McCleary* was filed in the trial court, the State initiated a comprehensive review of K–12 funding, and before trial was concluded, the legislature passed ESHB 2261.⁴⁶ ESHB 2261 defines the resources and offerings that the legislature believes are necessary to give all students the opportunity to meet state educational standards.⁴⁷ The legislature intended to fully implement the reforms in ESHB 2261 no later than 2018.⁴⁸ However, the legislature failed to adequately fund ESHB 2261.⁴⁹ Although substantial evidence showed that state allocations had fallen short of the actual cost of implementing the basic education program,⁵⁰ the court was encouraged by the intent of ESHB 2261, stating that it was a “promising reform program.”⁵¹

The court noted that because the duty to provide ample education for public school students was imposed upon the State, as opposed to the

40. *Id.*

41. *Id.* at 254.

42. *Id.*

43. *Id.* at 258.

44. *Id.*

45. *See id.* at 257–58, 261.

46. *Id.* at 241.

47. *Id.* at 241–43.

48. *Id.* at 243.

49. *Id.*

50. *Id.*

51. *Id.* at 260.

legislature only,⁵² the constitution expressly contemplated shared powers among the three coordinate branches in deciding public education matters.⁵³ However, although the legislative, executive, and judicial branches share the responsibility to provide an ample education for resident students, the judiciary alone is responsible for interpreting constitutional provisions, as it is “emphatically the province and duty of the judicial department to say what the law is.”⁵⁴ This is true “even when that interpretation serves as a check on the activities of another branch or is contrary to the view of the constitution taken by another branch.”⁵⁵

Additionally, the court observed that article IX, section 1 of the Washington State Constitution confers on resident schoolchildren a “positive constitutional right to an amply funded education.”⁵⁶ A positive constitutional right is realized only when the government *acts*, as opposed to a negative constitutional right, “which can only be realized in the *absence* of governmental interference.”⁵⁷ Thus, analysis of a negative constitutional right asks whether the legislature or executive has “overstepped its authority under the constitution,” whereas analysis of a positive constitutional right asks “whether the State has done enough.”⁵⁸ Furthermore, positive constitutional rights are those that “the State cannot ‘invade[] or impair[],’” as opposed to negative constitutional rights, which can be impaired “upon showing a compelling state interest.”⁵⁹

In the past, positive constitutional rights were often deemed unenforceable, nonjusticiable political questions, and judicial enforcement of these rights would usually constitute a violation of the separation of powers doctrine.⁶⁰ However, state courts have increasingly regarded the-

52. “It is the paramount duty of the state to make ample provision for the education of all children residing within its borders” WASH. CONST. art. IX, § 1.

53. See *McCleary*, 269 P.3d at 246–47.

54. *Id.* at 246 (quoting *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 83 (Wash. 1978) (language originally from *Marbury v. Madison*)) (internal quotation marks omitted).

55. *Id.* (quoting *Seattle Sch. Dist. No. 1*, 585 P.2d at 83) (internal quotation marks omitted).

56. *McCleary*, 269 P.3d at 231.

57. Jonathan Feldman, *Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in an Era of Positive Government*, 24 RUTGERS L.J. 1057, 1057 n.2 (1993) (emphasis added) (citing Susan F. Appleton, *Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to Fundamental-Rights Analysis and to the Welfare-Rights Thesis*, 81 COLUM. L. REV. 721, 734–43 (1981)). An example of a negative right would be the right to free speech, while a positive right would be the right to income. *Id.* at 1072. See also Burt Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 883 n.12 (1989).

58. Feldman, *supra* note 57, at 1058–59.

59. *McCleary*, 269 P.3d at 248 (quoting *Seattle Sch. Dist. No. 1*, 585 P.2d at 92 n.13).

60. Feldman, *supra* note 57, at 1058–59.

se positive constitutional rights as capable of judicial interpretation.⁶¹ In *McCleary*, the court found that the positive constitutional right to an adequate education is capable of judicial interpretation and that “federal limits on judicial review . . . are inappropriate.”⁶² Based on these considerations, a majority of the court determined that it was necessary to retain jurisdiction over the case to ensure that the State fulfilled its paramount duty to provide for the education of all Washington public school students.⁶³ The majority emphasized that by retaining jurisdiction, an appropriate balance between the judicial and legislative functions could be obtained. As such, the court rightly deferred the *means* for implementing the State’s constitutional requirements under article IX, section 1 to the legislature, while ensuring that the court was able to directly monitor proposed remedies.⁶⁴

Although the court expressed some hesitation in its decision to retain jurisdiction, it was ultimately unwilling to risk another thirty-year cycle of failed basic education programs. It stated, “This court cannot idly stand by as the legislature makes unfulfilled promises for reform.”⁶⁵ The court recognized the troubling economic situation faced by the State (and the nation as a whole) and determined that it did not want to take a wait-and-see approach to the legislative reforms passed while *McCleary* was awaiting appeal.⁶⁶ The court also emphasized the positive aspects of retaining jurisdiction, namely promoting cooperation between the branches of government and fostering dialogue throughout the implementation of necessary reforms.⁶⁷ While recognizing the complexity of the forthcoming issues, the court refused to “throw up its hands and offer no remedy at all.”⁶⁸ Therefore, the court held:

The State has failed to meet its duty under article IX, section 1 by consistently providing school districts with a level of resources that falls short of the actual costs of the basic education program. The legislature recently enacted sweeping reforms to remedy the deficiencies in the funding system, and it is currently making progress toward phasing in those reforms. We defer to the legislature’s chosen means of discharging its article IX, section 1 duty, but the judi-

61. *Id.*

62. *McCleary*, 269 P.3d at 248.

63. *Id.* at 231.

64. *Id.* at 261.

65. *Id.*

66. *Id.* at 260.

67. *Id.* at 261.

68. *Id.*

ciary will retain jurisdiction over the case to help ensure progress in the State's plan to fully implement education reforms by 2018.⁶⁹

Not all of the justices approved of the majority's decision to retain jurisdiction. Chief Justice Madsen agreed that the State had failed to meet its duty to adequately fund basic education under the Washington State Constitution, but she maintained that the legislature was responsible for implementing the court's mandate.⁷⁰ As a result, it was the court's duty to exercise judicial restraint.⁷¹

Chief Justice Madsen argued that the precedent set in *Seattle School District No. 1* supported judicial restraint because the court had previously deferred to the legislature on how to implement the law regarding public school funding.⁷² Additionally, the adoption of specific standards and guidelines for state funding, including funding for basic education, had historically been a job for the legislative branch, not the judiciary.⁷³ Finally, Chief Justice Madsen reiterated that the legislature had recently enacted what the majority itself considered "promising reform." Consequently, she contended that the judiciary should exercise restraint and permit the legislature to implement the statutory reforms set forth in ESHB 2261, without scrutinizing every minute step.⁷⁴

C. The Aftermath of the McCleary Decision: Reports by the Joint Select Committee

The court retained jurisdiction over the *McCleary* case and established a protocol requiring the legislature to report directly to the court by filing periodic reports—through the Legislative Joint Select Committee on Article IX Litigation⁷⁵—at the conclusion of each legislative session from 2013 through 2018.⁷⁶ These reports allow the court to both

69. *Id.*

70. *Id.* at 262 (Madsen, C.J., concurring and dissenting).

71. *Id.*

72. *Id.*

73. *Id.* at 263.

74. *Id.*

75. In order to respond to the court's request, a bipartisan coalition of legislative leaders introduced House Concurrent Resolution 4410, which established the Joint Select Committee on Article IX Litigation. One of the purposes of the committee is to "provide a point of contact for the Legislature to communicate with the Court . . ." JOINT SELECT COMM. ON ARTICLE IX LITIG., REPORT TO THE WASHINGTON STATE SUPREME COURT 4 (2013), available at <http://leg.wa.gov/JointCommittees/AIXLJSC/Documents/ArticleIX2013Report-ReceivedByCourt.pdf>.

76. Order of July 18, 2012 at 2, *McCleary v. State*, 269 P.3d 227 (2012) (No. 84362-7) [hereinafter *McCleary Order of July 18, 2012*], available at <http://www.courts.wa.gov/content/public>

actively monitor the legislature's implementation of the reforms set out in ESHB 2261 and evaluate whether the legislature's actions "show real and measureable progress toward achieving full compliance with article IX, section I by 2018."⁷⁷ The plaintiffs are also provided an opportunity to file written comments addressing—and criticizing—the legislature's self-reported implementation of reforms and progress.⁷⁸ The court does not measure the legislature's actions against full constitutional compliance with the *McCleary* holding; rather, the State is required to "demonstrate steady progress according to the schedule anticipated by the enactment of the . . . reforms in ESHB 2261."⁷⁹

1. Washington Supreme Court Order of December 20, 2012

The State filed its first mandated report by the Joint Select Committee on Article IX Litigation on September 17, 2012.⁸⁰ In response, the court filed an order on December 20, 2012, holding that the legislature had failed to meet the articulable standards required by the *McCleary* decision.⁸¹ In a scathing opinion, the court noted that the committee had done little more than summarize the court's holding in *McCleary*: the committee's report provided no indication of how the legislature intended to comply with the court's mandate.⁸² The court also noted that since the passage of ESHB 2261 in 2009, significant cuts had been made to education funding throughout Washington—some of which had been partially restored but were still below the level that the court held to be "constitutionally inadequate" in *McCleary*.⁸³

The court was unsatisfied with the legislature's efforts overall and emphasized that "[s]teady progress requires forward movement. Slowing the pace of funding cuts is necessary, but it does not equate to forward

Upload/Supreme%20Court%20News/mcclearyOrder.pdf (determining that the reports must be filed after "each legislative session from 2013 through 2018, within 60 days after the final biennial or supplemental operating budget is signed by the governor").

77. *Id.* at 3.

78. *Id.* at 2.

79. *Id.* at 3.

80. See generally JOINT SELECT COMM. ON ARTICLE IX LITIG., REPORT TO THE WASHINGTON STATE SUPREME COURT (2012) [hereinafter JOINT SELECT COMM., 2012 REPORT], available at <http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/mcclearyStateFiling.pdf>.

81. Order of Dec. 20, 2012 at 1, *McCleary v. State*, 269 P.3d 227 (2012) (No. 84362-7) [hereinafter *McCleary Order of Dec. 20, 2012*], available at <http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/84362-7%20-%20McCleary,%20et%20al.%20v.%20State%2012-20-12%20order%20with%20dissent.pdf>.

82. See *id.* at 1–2.

83. *Id.* at 2.

progress; constitutional compliance will never be achieved by making modest funding restorations to spending cuts.”⁸⁴ However, the court reiterated, “It continues to be the court’s intention to foster cooperation and defer to the legislature’s chosen plan to achieve constitutional compliance. But, there must in fact be a plan.”⁸⁵ Implicit in this statement was the court’s thinly veiled threat of court-imposed sanctions if the legislature was unable or unwilling to comply with the judicial mandate. The court ordered the legislature to submit a report at the end of the 2013 legislative session setting forth the legislature’s plan—in sufficient detail to allow progress to be measured in all areas of education identified in ESHB 2261—in accordance with the mandate to fully fund basic education by the year 2018.⁸⁶

Justice James M. Johnson dissented in the order, asserting that the court violated the separation of powers doctrine.⁸⁷ According to Justice Johnson, the legislature is *solely* responsible for educational funding because, under the Washington State Constitution, “[t]he legislature shall provide for a general and uniform system of public schools.”⁸⁸ Therefore, by regulating the proposed assessments and rejections of the legislature’s plan to fully fund basic education, the court has, in Justice Johnson’s opinion, dictated the precise means by which the legislature must act—a violation of the separation of powers.⁸⁹ Justice Johnson also noted that the courts are generally unsuited to remedy policy judgments like those confronted in *McCleary*, and as such, the court should presume that the legislature will continue to act in good faith while implementing the educational reforms set forth in ESHB 2261.⁹⁰

2. Washington Supreme Court Order of January 9, 2014

Following the State’s second report to the Washington Supreme Court by the Joint Select Committee on Article IX Litigation, the court held that the State had taken “meaningful steps” towards amply funding basic education.⁹¹ According to the State’s calculations, a total of \$982

84. *Id.*

85. *Id.* (internal citation omitted).

86. *Id.* at 2–3.

87. Dissent to Order of Dec. 20, 2012 at 1, *McCleary v. State*, 269 P.3d 227 (2012) (No. 84362-7) [hereinafter Dissent to Order of Dec. 20, 2012], available at <http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/84362-7%20-%20McCleary,%20et%20al.%20v.%20State%2012-20-12%20order%20with%20dissent.pdf>.

88. *Id.* at 5 (alteration in original) (citing WASH. CONST. art. IX, § 2).

89. *Id.* at 4–5.

90. *Id.* at 5–6.

91. Order of Jan. 9, 2014 at 2–3, *McCleary v. State*, 269 P.3d 227 (2012) (No. 84362-7) [hereinafter *McCleary Order of Jan. 9, 2014*], available at <http://www.courts.wa.gov/content/>

million was allocated to K–12 basic education for the 2013–2015 biennium.⁹² This translated into a 6.7% increase over the prior “constitutionally inadequate” level of funding.⁹³ The court held that the increased operating budget was “undeniably an improvement” and that “implementing education reform has become a higher priority for the State, as even a casual observer of the 2013 legislative session could not fail to appreciate.”⁹⁴

However, the court also found that these improvements were not sufficient to conclude that the State had made adequate progress towards achieving full constitutional compliance.⁹⁵ Consequently, the court determined that although the “State’s Report demonstrates that it understands what progress looks like, and . . . it has taken some steps toward fulfilling its constitutional mandate[,]”⁹⁶ the State was still not on target to satisfy its constitutional obligations by 2018.⁹⁷

Once again, the court ordered the legislature to submit a complete plan for fully implementing its basic education program, this time by April 30, 2014.⁹⁸ The plan was required to include a “phase-in schedule” for full funding of all components of basic education set forth in ESHB 2261.⁹⁹ Although this imposed an additional obligation upon the legislature, the court noted:

The need for immediate action could not be more apparent. Conversely, failing to act would send a strong message about the State’s good faith commitment toward fulfilling its constitutional promise. This court also made a promise to the school children of Washington: We will not “idly stand by as the legislature makes unfulfilled promises for reform.” Our decision in this case remains fully subject to judicial enforcement.¹⁰⁰

Justice Johnson again dissented, vehemently opposing the “impropriety—indeed unconstitutionality—of the court’s expanding exercise of

publicUpload/Supreme%20Court%20News/20140109_843627_McClearyOrder.pdf (“[U]nlike in 2012, meaningful steps were taken in the 2013 legislative session to address the constitutional imperative of amply providing for basic education.”).

92. *Id.* at 2.

93. *Id.*

94. *Id.* at 3.

95. *See id.* at 6–7.

96. *Id.* at 6.

97. *Id.*

98. *Id.* at 8.

99. *Id.*

100. *Id.* (internal citation omitted).

continuing jurisdiction”¹⁰¹ He further asserted that even if the legislature was in violation of the constitution, the judiciary simply does not possess an adequate enforcement mechanism to compel the legislature to act.¹⁰² Justice Johnson noted,

Because we would be fashioning a tool that has not been constitutionally delegated to us, we are left with far too many unanswered questions concerning this makeshift authority. It is unclear if we should hold specific legislators in contempt or the legislative body as a whole. . . . Because the body of legislators changes over time, and indeed has changed since the first opinion, it is uncertain which legislators and which time frame should be held accountable.

. . . .

. . . . We are not—and should not be acting as—managers of the state coffers.¹⁰³

Justice Johnson concluded, “These uncertainties undoubtedly indicate that we are in territory far unsuitable for the judicial hand as defined in our constitution”¹⁰⁴

3. Washington Supreme Court Order to Show Cause Dated June 12, 2014

The Joint Select Committee filed its supplementary report by the deadline mandated.¹⁰⁵ In the court’s response, dated June 12, 2014, it aptly noted that although the legislature “relates what the State urges to be significant progress,” the report “candidly admits that ‘[t]he Legislature did not enact additional timelines in 2014 to implement the program of basic education as directed by the Court’”¹⁰⁶ Further, the legislature admitted that “there was no political agreement reached either among the political caucuses or between the legislative chambers on

101. Dissent to Order of Jan. 9, 2014 at 1, *McCleary v. State*, 269 P.3d 227 (2012) (No. 84362-7), available at https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/20140113_843627_McClearyDissentToOrder.pdf.

102. *Id.* at 6.

103. *Id.* at 6, 8.

104. *Id.* at 7.

105. See generally JOINT SELECT COMM. ON ARTICLE IX LITIG., REPORT TO THE WASHINGTON STATE SUPREME COURT (2014) [hereinafter JOINT SELECT COMM., 2014 REPORT], available at <http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/84362-7%20-%20Third%20report%20adopted%20by%20Comm.pdf>.

106. Order to Show Cause at 2, *McCleary v. State*, 269 P.3d 227 (2012) (No. 84362-7) [hereinafter *McCleary Order to Show Cause*], available at http://www.courts.wa.gov/content/publicUpload/supreme%20Court%20News/84362-7_McCleary_ShowCauseOrder_201406124.pdf (quoting JOINT SELECT COMM., 2014 REPORT, *supra* note 105, at 27).

what the full implementation plan should look like”¹⁰⁷ The legislature also offered no evidence to suggest that there would be an agreement on implementation at the next legislative session.¹⁰⁸ Despite these failures, the Joint Select Committee’s report asked the court to acknowledge that 2015 was the “most critical” year for the legislature in its effort to meet the judicial mandate and develop a plan to implement a fully funded basic education program.¹⁰⁹ In effect, the legislature asked for more time despite the fact that 2018 is rapidly approaching and a plan to fully fund education has not yet been established. As a result, the court issued an order directing the State to show cause as to why it should not be held in contempt for violating the January 2014 order, and why, if found in contempt, sanctions or other relief should not be granted.¹¹⁰

4. Washington Supreme Court Order in Response to September 3, 2014, Show Cause Hearing

On September 11, 2014, following the show cause hearing a week earlier, the court unanimously held the State in contempt for failure to submit “a complete plan for fully implementing its program of basic education for each school year between now and the 2017–2018 school year.”¹¹¹ Although the State admitted that it did not comply with the court’s January 2014 order, it urged the court to give the legislature one more opportunity to develop and enact a plan to fully fund K–12 public education by 2018.¹¹²

Although the court found the legislature in contempt, it also held “[s]anctions and other remedial measures . . . in abeyance to allow the State the opportunity to comply with the court’s order during the 2015 legislative session.”¹¹³ The court stated that “[i]f by adjournment of the 2015 legislative session the State has not purged the contempt by com-

107. JOINT SELECT COMM., 2014 REPORT, *supra* note 105, at 27. The short 60-day session ended without lawmakers coming to an agreement on a plan. John Higgins, *Court Hears Arguments in McCleary School-Funding Case; Watch Coverage Replay*, SEATTLE TIMES (Sept. 2, 2014, 5:00 AM), <http://blogs.seattletimes.com/educationlab/2014/09/02/historic-mccleary-school-funding-hearing-coming-wednesday/>.

108. McCleary Order to Show Cause, *supra* note 106, at 3.

109. JOINT SELECT COMM., 2014 REPORT, *supra* note 105, at 33.

110. McCleary Order to Show Cause, *supra* note 106, at 3–4.

111. Order of Sept. 11, 2014 at 4, *McCleary v. State*, 269 P.3d 227 (2012) (No. 84362-7) [hereinafter *McCleary Order of Sept. 11, 2014*], available at <http://www.courts.wa.gov/content/PublicUpload/Supreme%20Court%20News/84362-7%20order%20-%2009-11-2014.pdf>. Pursuant to the January 9, 2014, order, the State was required to include a “phase-in schedule for fully funding each of the components of basic education.” *McCleary Order of Jan. 9, 2014*, *supra* note 91, at 8.

112. *McCleary Order of Sept. 11, 2014*, *supra* note 111, at 2.

113. *Id.* at 4–5.

plying with the court's order, the court will reconvene to impose sanctions and other remedial measures as necessary."¹¹⁴ Additionally, the court provided that should the legislature fail to comply with the court's order by the adjournment of the 2015 session, the State must file "a memorandum explaining why sanctions or other remedial measures should not be imposed."¹¹⁵ Thus, the court has given the legislature yet another attempt to fund Washington public schools with yet another opportunity to explain if it again fails.

III. CRITIQUE

School funding litigation often blurs the traditional roles of the judicial and legislative branches because "[l]itigation over educational adequacy . . . places the judiciary in the position of rendering value judgments as to legislative appropriation levels . . . and this requirement raises significant separation of powers concerns."¹¹⁶ This blurred line between the judicial and legislative functions of state governments raises concerns that courts are determining issues based on policy considerations more appropriately within the confines of the legislature—not the judiciary.¹¹⁷

A. *Nationwide Public School Funding Litigation*

Because the U.S. Supreme Court has stated that education is not a fundamental right under the U.S. Constitution,¹¹⁸ the ultimate forum for challenging a state's educational program is the state's highest court.¹¹⁹ Therefore, "state courts provide the only judicial recourse for plaintiffs seeking . . . adequate funding for public education."¹²⁰ As of December 2014, only five states had avoided litigation challenging the constitution-

114. *Id.* at 5.

115. *Id.*

116. Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. 701, 704 (2010).

117. *See id.* at 705–06.

118. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973). The United States Supreme Court found that education was not among the basic fundamental rights protected under the Constitution either explicitly or implicitly, and thus was not subject to strict judicial scrutiny. *Id.* at 37–39. Because education "presents a myriad of 'intractable economic, social, and even philosophical problems[,]'" the Court felt that the imposition of "inflexible constitutional restraints" would inhibit the ability of state legislatures to respond to complex problems confronted in educational reform. *Id.* at 42–43 (citation omitted).

119. *See Rebell*, *supra* note 24, at 1865.

120. Justin Abbasi, *Adequate Education in Washington State: Money, Rights, and Power* 3 (Dec. 29, 2014) (unpublished paper) (on file with author).

ality of public school funding,¹²¹ and educational adequacy litigation was pending in eleven states.¹²² From 1989 to 2014, courts in twenty-two states issued decisions either affirming or enforcing the rights of students to an adequate basic education, while fourteen state courts awarded state defendant victories.¹²³ Most of the state courts that returned verdicts in favor of state defendants did so on the ground that public school funding is a legislative concern and is nonjusticiable.¹²⁴

Although the early 1990s saw an overwhelming amount of school funding litigation, courts have recently rejected such litigation in an attempt to broaden the demarcation between the judiciary and the legislature.¹²⁵ Between 1989 and 2005, school funding litigation plaintiffs won more than 75% of cases; however, in recent years, the scale has tipped heavily towards legislative deference (ultimately amounting to a victory for the state defendant).¹²⁶ For example,

[S]ince 2005, adequacy plaintiffs [have] struggled to surmount the courts' unease with adjudicating these cases. Plaintiffs' adequacy claims were dismissed before ever reaching trial in nine of the nineteen decisions handed down between 2005 and 2008. By contrast, only five courts had refused to hear adequacy claims in the preceding sixteen years.¹²⁷

121. NAT'L EDUC. ACCESS NETWORK, LITIGATIONS CHALLENGING CONSTITUTIONALITY OF K-12 FUNDING IN THE 50 STATES (2014), available at <http://schoolfunding.info/wp-content/uploads/2011/07/Litigations-Challenging-Constitutionality-of-K-12-Funding10.pdf>. The five states that have never had a constitutional challenge to K-12 funding are Delaware, Hawaii, Iowa, Nevada, and Utah. *Id.*

122. *Education Adequacy Liability Decisions Since 1989*, NAT'L EDUC. ACCESS NETWORK (2014), <http://schoolfunding.info/wp-content/uploads/2011/07/School-Funding-Adequacy-Decisions-by-Outcome-.pdf>.

123. *Id.*

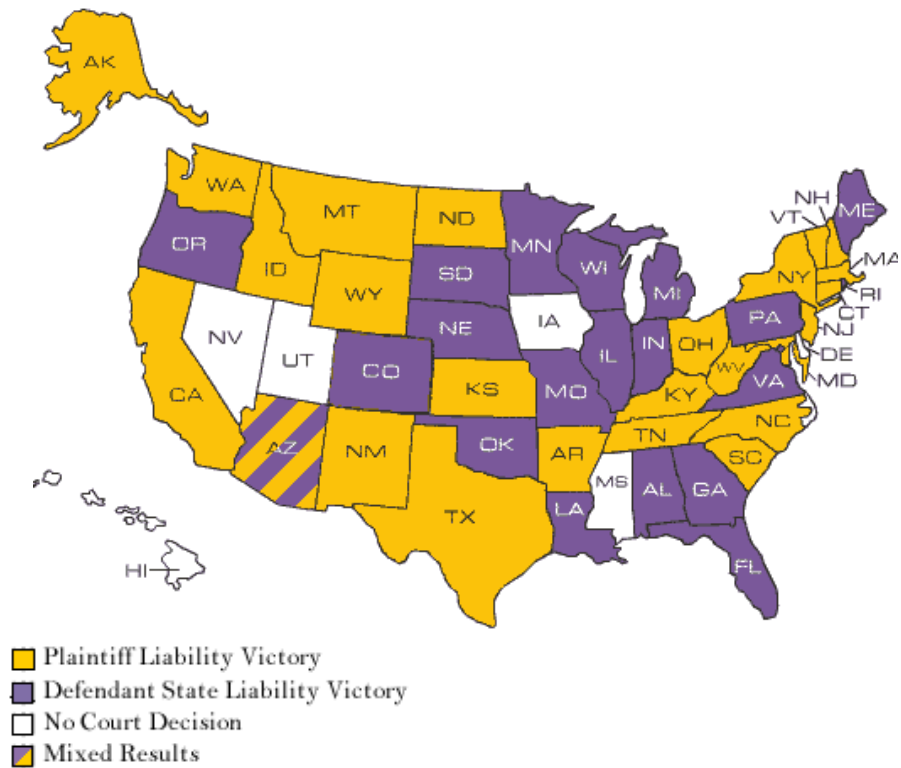
124. See Bauries, *supra* note 116, at 746. Before the merits of the plaintiff's case can be heard by the court, the plaintiff must first survive a motion to dismiss by the defendant that school funding is a legislative function and is thus nonjusticiable; the plaintiff must effectively argue that the state's constitution provides individuals the right to "adjudicate educational adequacy." Vinay Harpalani, Note, *Maintaining Educational Adequacy in Times of Recession: Judicial Review of State Education Budget Cuts*, 85 N.Y.U. L. REV. 258, 259-60 (2010).

125. See Julia A. Simon-Kerr & Robynn K. Sturm, *Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education*, 6 STAN. J. C.R. & C.L. 83, 84 (2010).

126. *Id.* at 85.

127. *Id.*

Figure 1: Map of School Funding Litigation Outcomes¹²⁸



B. Washington Public School Funding Litigation and the Separation of Powers Doctrine

Despite the State’s argument that retaining jurisdiction was a clear violation of the separation of powers doctrine and an unwarranted intrusion on the legislature, analysis of Washington State jurisprudence reveals that the court’s decision to retain jurisdiction was not a violation of the separation of powers doctrine for several reasons. First, it is the judiciary’s duty to interpret the constitution and ultimately determine whether the legislature has complied with its constitutional obligations.¹²⁹ Se-

128. NAT’L EDUC. ACCESS NETWORK, <http://www.schoolfunding.info> (last visited Feb. 2, 2015) (reproduced on homepage).

129. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). This principle has been strongly opposed: “The doctrine of judicial review that the courts have the sole and final say in interpreting the Constitution on behalf of all three branches of government has been subject to serious

cond, under a functional approach to the separation of powers doctrine—as opposed to a traditional, formal separation of powers doctrine—state judiciaries possess great flexibility when reviewing the actions of coordinate branches of government.¹³⁰

In *Seattle School District No. 1*, the court summarily dismissed the argument that adequacy school funding claims were nonjusticiable.¹³¹ The court held that because article IX, section 1 of the constitution required interpretation before the extent of the State's duty to provide for the education of its resident students could be determined, there was no separation of powers issue.¹³² Additionally, although the court has previously articulated a justiciability test, it has not hesitated to disregard this test when confronted with an issue of “great public interest.”¹³³ Finally, the Washington Supreme Court utilizes an expansive exception to mootness, which permits cases of “continuing and substantial public interest” to be brought even if the court cannot provide the relief sought by the party or even provide effective relief of a general nature.¹³⁴ Therefore, although *McCleary* would likely have been rejected by a federal court as a nonjusticiable political question, the Washington Supreme Court elected to hear the case because it presented an ongoing issue of public importance.

Further, in Washington, courts have the “sole and final say in interpreting the Constitution on behalf of all three branches of government”¹³⁵ Although the court unquestionably held that it was well within its judicial authority to interpret the constitutional provisions at issue in *McCleary*, it attempted to placate the legislature by acknowledging that the determination of whether an action of the executive or legislative branch exceeds its authority is “a delicate exercise in constitutional interpretation”¹³⁶ The court also noted that each branch of government is required to “take . . . account” of the other branches' powers; no branch of government is “intended to operate with absolute independence.”¹³⁷ Obviously, the extent to which each branch of government

analysis and criticism by scholars, jurists, and others for almost two hundred years.” H.R. 2060, 55th Leg., Reg. Sess. § 3(2) (Wash. 1997).

130. See Feldman, *supra* note 57, at 1087–88.

131. See *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 80–84 (Wash. 1978).

132. *Id.* at 88–89.

133. See Philip A. Talmadge, *Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems*, 22 SEATTLE U. L. REV. 695, 717–18 (1999).

134. *Id.* at 719.

135. *Id.* at 702.

136. *Seattle Sch. Dist. No. 1*, 585 P.2d at 84.

137. *Id.* at 88.

played an equal role in the determination of the *McCleary* case is subject to debate.

Finally, a more flexible approach to the separation of powers doctrine, commonly called a “functional approach,” is utilized in Washington.¹³⁸ There is no formal separation of powers provision in the Washington Constitution, and the courts have traditionally viewed the separation of powers doctrine as “grounded in flexibility and practicality” without broad demarcation “beyond which one branch may not tread.”¹³⁹ The lack of a formal doctrine does not mean that there is no division between the three branches of government; rather, “one branch will violate [the] separation of powers if its activity ‘threatens the independence or integrity or invades the prerogatives of another’” branch.¹⁴⁰

By contrast, the formal separation of powers doctrine emphasizes sharp division between the three branches of government and reinforces the view that each branch should be free from the influence of the others.¹⁴¹ Under this approach, the powers and functions of the different branches of government are not flexible, but rigid, and do not shift in response to historical and political concerns and conditions.¹⁴²

In *McCleary*, the court has seemingly adopted a functional approach.¹⁴³ A functional view of the separation of powers doctrine “emphasizes efficiency of function rather than strict separation.”¹⁴⁴ This approach provides for more flexible judicial review than the formal separation of powers doctrine.¹⁴⁵ According to some, this approach is also more likely to result in higher standards of judicial review.¹⁴⁶ As an illustration:

The functional approach aims to allocate the tasks of government to those organs most likely to perform them well and recognizes that the allocation of power between branches of government must remain somewhat fluid in order to respond to changing political conditions. Rather than creating bright lines between the workings of the different branches of government, a functional view of separation of powers stress[es] the ambiguities of the distribution powers

138. Talmadge, *supra* note 133, at 712.

139. *Id.*

140. Abbasi, *supra* note 120, at 14 (quoting *Zylstra v. Piva*, 539 P.2d 823, 827 (Wash. 1975)).

141. See Harpalani, *supra* note 124, at 264.

142. *Id.*

143. Abbasi, *supra* note 120, at 15 (functionalist approach evidenced by the court’s retention of jurisdiction and requirement of yearly updates by the legislature).

144. Harpalani, *supra* note 124, at 264.

145. *Id.* at 261.

146. *Id.* at 266.

and embrace[s] flexible principles governing what authority each branch of government can properly exercise.¹⁴⁷

State constitutions often provide for direct judicial review of the legislature; thus, the judiciary frequently plays a heightened role in state governments.¹⁴⁸ Additionally, institutional concerns that support more formal separation of powers are often not present in the state context, as state courts are more likely to have direct political accountability due to the election of state judges.¹⁴⁹ Finally, state governments are often inherently flexible due to the broad plenary power possessed by state legislatures, as opposed to the federal legislative branch, whose powers are specifically enumerated in the U.S. Constitution.¹⁵⁰

Although a functional approach to the separation of powers provides more flexibility than a formal approach, there are still clearly demarcated lines that the judiciary may not cross. For example, the “determination of specific remedies and the allocation of funds . . . [are] legislative or executive functions.”¹⁵¹ However, the court has the capacity to determine whether these specific remedies or allocations are constitutional.¹⁵² Thus, although the judiciary is the ultimate interpreter of the constitution and is responsible for setting constitutional standards, it is unable to implement potentially effective remedies or allocate requisite funds because these are traditionally legislative duties.¹⁵³ In public school funding cases, this creates a cycle within which the same (or substantially similar) claims are repeatedly brought before the judiciary: the judiciary declares the legislature’s remedial action unconstitutional, and the legislature attempts to design an appropriate remedy, which the court subsequently declares unconstitutional as well.¹⁵⁴ This oscillation between the legislature and the judiciary—in which the legislature enforces a remedy in response to a judicial mandate and the court then holds the remedy unconstitutional, requiring the legislature to return to the drawing board—often results in expensive and protracted litigation where no effective remedy is implemented and the state’s educational system ultimately remains broken.¹⁵⁵

147. *Id.* at 264–65 (alteration in original) (footnote omitted) (internal quotation marks omitted).

148. Feldman, *supra* note 57, at 1066–67.

149. Harpalani, *supra* note 124, at 266–67.

150. *Id.*

151. *Id.* at 260–61.

152. *See id.* at 261.

153. *Id.* at 260–61.

154. *See id.* at 261.

155. *See id.*

By retaining jurisdiction and requiring that the legislature report directly to the court, the State and the court are able to maintain an open dialogue about the constitutionality of the legislature's proposed remedies without resorting to continuous litigation. The court's functional approach to the separation of powers permits the judicial, legislative, and executive branches to engage in a system of allocation that focuses less on what specific "roles" each branch *should* take and instead permits the government to work together to achieve a desirable result for the state as a whole.

IV. PROPOSAL

Under a functional separation of powers doctrine, the judiciary has the authority to uphold positive constitutional rights and order the legislature's compliance; however, there are still critical concerns as to how the court can remedy the legislature's noncompliance. One of the most problematic aspects of sociopolitical litigation is the inherent difficulty in fashioning and enforcing suitable remedies.¹⁵⁶ Additionally, the negative implications of judicial activism can potentially outweigh the benefits sought in public school funding cases, especially where the ultimate goals are unattainable.¹⁵⁷

The *McCleary* court is currently in a difficult position. Ultimately, it must wait and see if the legislature will purge the contempt order by the adjournment of the 2015 legislative session. If the legislature does not move swiftly to purge the contempt order, the legitimacy of all three branches of government could be undermined. The court has indicated that should the legislature fail to purge the contempt order, it will act quickly; if the State fails to agree on a plan by the session's last day, it must provide a written explanation to the court the very next day.¹⁵⁸ Of course, at this point, the judiciary will have to enforce a remedy. However, what is an appropriate remedy?

Plaintiffs in the *McCleary* case have proposed a number of potential remedies including: (1) imposing monetary contempt sanctions against legislative branch officials; (2) prohibiting government expenditures on matters unrelated to public school funding until the State complies with the court's constitutional ruling; (3) ordering the legislature to pass legislation funding specific amounts; (4) prohibiting the State from limiting educational programs to less than all eligible students in a given grade

156. See Talmadge, *supra* note 133, at 698.

157. For example, the ultimate goal of an "adequate" public school education may be unattainable if the state legislature does not possess funds sufficient to remedy the constitutional violation.

158. *McCleary* Order of Sept. 11, 2014, *supra* note 111, at 5.

level; (5) ordering the sale of state property to fund constitutional compliance; and (6) issuing a writ of mandamus to compel performance.¹⁵⁹

State courts that have upheld constitutional challenges to adequate public school funding have faced difficulty in their attempts to enforce a feasible remedy. For example, in *DeRolph v. State*,¹⁶⁰ the Ohio Supreme Court ruled in favor of the plaintiff school districts three times, holding that Ohio had failed to provide a “thorough and efficient” system of education in violation of the state constitution.¹⁶¹ However, the court did not impose consequences when the legislature repeatedly failed to sufficiently increase education funding.¹⁶² In December 2002, the court decided that it would no longer retain jurisdiction.¹⁶³

Other state courts have threatened injunction in order to coerce legislative compliance with educational funding mandates. Illustratively, in *Robinson v. Cahill*,¹⁶⁴ the New Jersey Supreme Court issued an injunction prohibiting officials from spending funds in support of public schools until the legislature met its constitutional mandate to provide a “thorough and efficient” education for public school students.¹⁶⁵ The court subsequently ordered the closure of public schools over the summer after the legislature failed to sufficiently increase educational funding.¹⁶⁶ After an eight-day closure, the legislature adopted a state income tax.¹⁶⁷

Similarly, in 2005, the Kansas Supreme Court ordered the legislature to increase funding for K–12 education, and the court set a deadline after which all public schools would be shut down if funding was not provided.¹⁶⁸ In response, the legislature complied and approved the addi-

159. Plaintiff/Respondents’ 2012 Post-Budget Filing at 42–43, *McCleary v. State*, 269 P.3d 227 (2012) (No. 84362-7), available at <https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/McClearyPostBudgetFiling2012.pdf>.

160. See generally *DeRolph v. State*, 780 N.E.2d 529 (Ohio 2002); *DeRolph v. State*, 754 N.E.2d 1184 (Ohio 2001); *DeRolph v. State*, 728 N.E.2d 993 (Ohio 2000); *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997).

161. *DeRolph*, 780 N.E.2d at 529 (summarizing the litigation).

162. See Shadya Yazback, Note, *School Financing in Ohio Yesterday, Today and Tomorrow: Searching for a “Thorough and Efficient” System of Public Schools*, 57 CASE W. RES. L. REV. 671, 675–76, 679, 683, 684–85 (2007).

163. *DeRolph*, 780 N.E.2d at 537.

164. *Robinson v. Cahill*, 287 A.2d 187 (N.J. Super. Ct. Law Div. 1972).

165. *Id.* at 192, 217; see also Abbasi, *supra* note 120, at 16.

166. Donna Gordon Blankinship, *Legislature in Contempt over Education Funding*, ASSOCIATED PRESS (Sept. 11, 2014, 8:32 PM), <http://www.king5.com/story/news/local/olympia/2014/09/11/legislature-washington-supreme-court-education/15447555/>.

167. *Id.*

168. John Higgins, *Washington’s Pending Showdown on School Funding: Legislature vs. Supreme Court*, SEATTLE TIMES (Feb. 14, 2015, 8:27 PM), http://old.seattletimes.com/html/education/2025702421_mcclearystatecomparsionsxml.html.

tional funding before the court's deadline.¹⁶⁹ Unfortunately, these measures appear to have been only temporary solutions, as both Kansas and New Jersey have faced subsequent educational funding litigation.¹⁷⁰

Similar to the approach taken in New Jersey and Kansas, the *McCleary* plaintiffs suggested that Washington public schools be shut down until the legislature complies with the court's mandate. Closing all public schools until the legislature appropriates additional funding is a risky venture that "assumes no education is preferable to the education students . . . are currently receiving."¹⁷¹ In New Jersey, public schools were only closed for a short period before the legislature responded, and in Kansas schools were never closed. However, if the court ordered public schools in Washington to close and the legislature did not increase funding, "it is [the] schoolchildren who [would be] harmed most directly."¹⁷²

The efficacy and constitutionality of several remedies proposed by the plaintiffs in *McCleary* are debatable. First, courts have traditionally hesitated to impose, or even threaten to impose, budgetary allocations.¹⁷³ This is understandable considering that legislatures have traditionally had exclusive control over appropriations and budgetary allocations.¹⁷⁴ This is true in Washington; the Washington State Constitution "places the authority for appropriation of funds exclusively in the legislature."¹⁷⁵

Thus, ordering the legislature to pass legislation funding specific amounts would likely infringe on the legislature's plenary power of taxation and violate the separation of powers. Directing the legislature to fund specific amounts for education could also "upset the 'appropriate balance' between deference to the Legislature 'to determine the precise means for discharging its article IX, section 1 duty.'"¹⁷⁶ In both *Seattle School District No. 1* and *McCleary*, the court explicitly deferred to the legislature in determining the means by which the legislature would

169. *Id.*

170. *See id.*; *New Jersey*, NAT'L EDUC. ACCESS NETWORK, http://www.schoolfunding.info/states/nj/lit_nj.php3 (last updated Mar. 2011).

171. State of Washington's Opening Brief Addressing Order to Show Cause at 28, *McCleary v. State*, 269 P.3d 227 (2012) (No. 84362-7) [hereinafter State's Brief Addressing Order], available at https://www.courts.wa.gov/content/publicUpload/supreme%20Court%20News/84362-7_McCleary_OpeningBrief_20140711.pdf.

172. *Id.* at 29.

173. *See* Simon-Kerr & Sturm, *supra* note 125, at 89.

174. *See* Talmadge, *supra* note 133, at 729 (quoting *Hillis v. State*, Dep't of Ecology, 932 P.2d 139, 147-48 (Wash. 1997)).

175. Abbasi, *supra* note 120, at 13 n.61.

176. State's Brief Addressing Order, *supra* note 171, at 19 (quoting *McCleary v. State*, 269 P.3d 227, 261 (Wash. 2012)).

comply with the court's mandate.¹⁷⁷ It is inadvisable for the court to abandon this principle of legislative deference at this stage in the litigation. Similarly, the diversion of existing funds to public school education would necessitate the redirection of funds from other programs. This would likely come at the expense of higher education, human services, or both.¹⁷⁸ The court has said "[it] would hardly relish being the cause of distress to people in need or students in [the state's] universities and colleges."¹⁷⁹

Second, in response to the plaintiffs' suggestion that the court order the sale of state property, the State noted that the plaintiffs offered no examples of any state property that could be sold.¹⁸⁰ Further, the sale of state property would hardly be considered a "dependable and regular revenue source" from which to fund basic education.¹⁸¹

Third, the imposition of monetary sanctions on individual legislators could potentially be more harmful than helpful because sanctions could logistically "coerce[] the vote of legislators."¹⁸² Furthermore, a fine imposed on the State is theoretically more harmful to schoolchildren than the original suit is beneficial because it would diminish the "funds available to finance compliance with the Court's remedial order."¹⁸³

Finally, although the court does have the authority to issue writs of mandamus, the writ is not frequently used to control the legislature and is justified only as an extraordinary remedy.¹⁸⁴ Additionally, "writs of mandamus must be directed at an 'inferior tribunal, corporation, board or person.' The legislature is separate and equal, not inferior to the Court."¹⁸⁵ Thus, it seems that all of the plaintiffs' proposed remedies are insufficient and unlikely to bring about a fully funded public education system in Washington.

In short, Washington is in uncharted territory. The Washington Supreme Court has never before held the legislature in contempt for failure

177. See *McCleary*, 269 P.3d at 261; *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 105 (Wash. 1978) (electing not to retain jurisdiction over the parties).

178. See JOINT SELECT COMM., 2012 REPORT, *supra* note 80, at 22–24; see also PHILIP A. TALMADGE, WASH. POLICY CTR., LEGAL ANALYSIS: CONSTITUTIONAL IMPLICATIONS OF WASHINGTON SUPREME COURT'S REMEDY IN *MCCLEARY V. STATE* 11 (2014), available at <http://www.washingtonpolicy.org/sites/default/files/Talmadge-LegalAnalysisMcCleary2.pdf>.

179. TALMADGE, *supra* note 178, at 11.

180. State's Brief Addressing Order, *supra* note 171, at 28.

181. *Id.* (quoting *Seattle School Dist. No. 1*, 585 P.2d at 79).

182. *Id.* at 27.

183. *Id.*

184. Dissent to Order of Dec. 20, 2012, *supra* note 87, at 2.

185. *Id.* at 2–3 (quoting WASH. REV. CODE § 7.16.160 (2014)).

to obey a court order.¹⁸⁶ Many legislators are dissatisfied, to say the least, with the recent contempt order.¹⁸⁷ Consequently, the legislature could strike back at the court. The legislature could reduce the size of the supreme court, fail to fund judicial services, or propose a constitutional amendment “to give the Legislature the exclusive authority to define the courts’ jurisdiction or remedial authority.”¹⁸⁸ Furthermore, if the court does overstep its bounds, it is unlikely the *McCleary* case will be appealable to the U.S. Supreme Court.¹⁸⁹ At that point, the governor of Washington will have to either enforce or abstain from enforcing the court’s order.¹⁹⁰

Although the court unquestionably has the authority to enforce its own contempt orders “through its inherent, and broad, contempt powers,”¹⁹¹ if the court imposes sanctions against the legislature for failure to purge the contempt order, it will be difficult to avoid overstepping traditional, judicial bounds. However, although the judiciary arguably risks damage to its “impartial” reputation by engaging in “judicial activism,” there is little the court can do after it has ordered the legislature to comply with a judicial mandate.¹⁹² Even scholars who maintain that judicial involvement in sociopolitical controversies is unwarranted often concede that once the judiciary has inserted itself into the controversy, and is subsequently faced with noncompliance on the part of the legislature, there is often no alternative but for the judiciary to subsequently “act as a legislative body” in fashioning a remedy.¹⁹³ Ultimately, the citizens of Washington will determine which governmental branches, if any, acted outside their constitutional authority.

V. CONCLUSION

In *McCleary*, the Washington judiciary embraced an active role in the determination of educational funding adequacy. The court determined that the best method to guarantee legislative compliance was to

186. Joseph O’Sullivan, *Contempt Ruling Ups Ante in Fight to Fund Public Schools*, SEATTLE TIMES (Sept. 12, 2014, 8:52 PM), <http://www.seattletimes.com/seattle-news/contempt-ruling-ups-ante-in-fight-to-fund-public-schools/>.

187. State’s Brief Addressing Order, *supra* note 171, at 2–6; *see also* TALMADGE, *supra* note 178, at 11.

188. TALMADGE, *supra* note 178, at 11–12.

189. *McCleary* does not involve a federal question (the case involves an issue that is governed by the state constitution) and the parties are not diverse.

190. *See* Abbasi, *supra* note 120, at 16 (“Courts rely on the executive branch to implement orders; an uncooperative governor can render judicial decisions essentially worthless.”).

191. *See* TALMADGE, *supra* note 178, at 9.

192. *See* Talmadge, *supra* note 133, at 695–96, 731.

193. *Id.* at 726.

retain jurisdiction over the matter—enabling the judicial and legislative branches to engage in open communication while ensuring that the judicial mandate is met. Although the courts do not frequently retain jurisdiction over cases, this procedure does not violate the separation of powers doctrine in Washington because Washington has historically utilized a functional approach to the separation of powers. However, the court is in a perilous predicament because it has very few practical enforcement methods that may be employed in the event the legislature fails to comply with the court's ultimate mandate. If the legislature fails to meet its constitutional obligations, it is likely the judiciary will have to violate its own constitutional obligations in order to compel the legislature's compliance—a direct violation of the separation of powers.