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# Catalytic Courts and Enforcement of Constitutional Education Funding Provisions

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# CATALYTIC COURTS AND ENFORCEMENT OF CONSTITUTIONAL EDUCATION FUNDING PROVISIONS

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TABLE OF CONTENTS



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## I. ABSTRACT

It is well-recognized that it is easier for judges to enforce constitutional "negative rights" provisions than positive social and economic rights. This article focuses on the challenges of enforcing one specific positive right: the constitutional right of children to attend adequately funded schools. Our article tests on-the-ground judicial implementation of education funding provisions against the general theoretical framework of judicial interaction with the political branches developed by Katharine Young. We analyze how, in multi-year, multi-decision litigation, constitutional court judges in the three jurisdictions we studied actively experimented with the challenging task of forcing, or enticing, reluctant legislative and executive branches into spending more on education—often against the backdrop of potential political retaliation. Focusing principally on Indonesia and the American states of Washington and Kansas, we found Young's model helpful in describing how judges shifted their tactical and rhetorical approaches among "peremptory," "managerial," "experimentalist," "conversational" and "deferential" modes of review. Our study confirms Varun Gauri's and Daniel M. Brinks' observation that "judges . . . craft their opinions with an eye on the likelihood of compliance . . . , the political reaction and its effect on the standing of the judiciary." These and other social scientists help explain why it is so difficult for courts to push the political branches to act, particularly when action requires higher taxes or a redirection of existing funds. We conclude that a court's approach to judicial review of legislative and executive actions (or inaction) depends on the judiciary's institutional strength, the remedies sought, and the specific political context within which the judicial review occurs. The three courts we studied were catalysts in contentious, multi-year education finance cases that were ultimately successful, in significant part, because of the strong support for judicial action from civil society groups and the media.

## II. INTRODUCTION

Social and economic rights are imbedded in constitutions worldwide. But legal theorists and empirical researchers—to say nothing of politicians—have observed that enforcement of these "positive rights" to government action on health, education, housing, economic security, and other social goals can be problematic. This article focuses on one positive constitutional right: the right of children to attend adequately funded schools. The goal of our study is to test on-the-ground judicial implementation of education funding provisions against a

general theoretical framework developed by Katharine Young,[1] and we also apply the empirical findings in studies edited by Varun Gauri and Daniel M. Brinks[2] and by Malcolm Langford, Cesar Rodriguez-Garavito, and Julieta Rossi.[3] Young's framework and the above empirical studies suggest that when faced with the task of enforcing positive rights provisions that cost taxpayer dollars, constitutional courts operate in several distinct modalities. Judges use different tactical and rhetorical approaches depending on their institutional strength, their specific political context, and the remedies being sought. In the words of Gauri and Brinks, "judges . . . craft their opinions with an eye on the likelihood of compliance . . . , the political reaction and its effect on the standing of the judiciary. . . ."[4] Recent scholarship has also emphasized the importance of the catalytic role of the judiciary, emphasizing that the judicial branch is most successful in implementing positive constitutional rights when court decisions reinforce sociopolitical factors that independently pressure the executive and legislative branches to act.[5]

We examined the experience of three jurisdictions with judicial enforcement of pre-college education rights, looking in depth at judicial enforcement of constitutional requirements for school funding in Indonesia and in and the American states of Washington and Kansas. We conclude that the model developed by Young is of great value in describing court actions and judicial interplay with other governmental branches. Specifically, we found the three constitutional courts we studied actively shifted back and forth among Young's stances as they searched for ways to successfully entice, shame, or force recalcitrant legislators and executives to act. At the same time, the work of social scientists Gauri and Brinks; and Langford, Rodriguez-Garavito, and Rossi; is more useful for predicting when a constitutional court will be a successful catalyst in the political process of increasing school funding.

In this article, we review recent theoretical literature and empirical studies that attempt to describe how constitutional courts[6] enforce justiciable positive rights,

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[1] *See* Katharine G. Young, *A Typology of Economic and Social Rights Adjudication: Exploring the Catalytic Function of Judicial Review*, 8 INT'L J. CONST. L. 385 (2010); KATHARINE G. YOUNG, CONSTITUTING ECONOMIC AND SOCIAL RIGHTS (Oxford U. Press 2012).

[2] *See* VARUN GAURI AND DANIEL M. BRINKS, COURTING SOCIAL JUSTICE: JUDICIAL ENFORCEMENT OF SOCIAL AND ECONOMIC RIGHTS IN THE DEVELOPING WORLD 1, 1–38 (Cambridge U. Press 2008).

[3] *See* SOCIAL RIGHTS JUDGMENTS AND THE POLITICS OF COMPLIANCE (Malcolm Langford, Cesar Rodriguez-Garavito & Julieta Rossi, eds., Cambridge U. Press 2017) [hereinafter LANGFORD].

[4] GAURI & BRINKS, *supra* note 2, at 4.

[5] *See, e.g.*, CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE 197 (U. Chicago Press 1998) (noting that "[t]he basic lesson of this study is that rights are not gifts: they are won through concerted collective action arising from both a vibrant civil society and public subsidy").

[6] In this article, when we use the term "constitutional courts," we mean both appellate courts that are formally vested with authority to interpret or apply constitutional provisions, as

focusing particularly on Young's theory as an analytical paradigm for our observations. Next, we detail specific instances of this type of judicial enforcement in the three jurisdictions of Indonesia, Washington, and Kansas—a civil law country and two common law states. The frameworks we apply help explain how constitutional courts that are thousands of miles from one another, with different judicial selection systems, different legal traditions, and different political circumstances, nevertheless address school finance controversies in remarkably similar ways. Although enforcement of positive rights can be a lengthy and often arduous process, strategic maneuvering by judges can result in substantial results. Each of the constitutional courts we studied moved among the modes Young identifies, experimenting with different enforcement approaches in an attempt to discover what worked best in their specific contexts. Consistent with the social scientists' theories, we found that despite legislative foot-dragging, these courts played a catalytic role in forcing school funding onto the politicians' front burners while education interest groups and the media successfully pushed the lawmakers from other directions.

## III. CONCEPTUALIZING POSITIVE RIGHTS ENFORCEMENT

A 2014 study by Courtney Jung, Ran Hirschl, and Evan Rosevear[7] observed that, of 195 national constitutions in the world, 90% contain at least one economic and social right,[8] and 158 of those documents (70%) include at least one expressly justiciable economic and social right.[9] There is substantial academic literature devoted to constitutional education rights around the world,[10] including

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well as other high courts (e.g., "supreme courts") that routinely construe or enforce constitutions.

[7] *See* Courtney Jung, Ran Hirschl & Evan Rosevear, *Economic and Social Rights in National Constitutions*, 62 AM. J. OF COMP. L. 1043, 1050 (2014). *See also* SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW 3 (Malcolm Langford, ed., Cambridge U. Press 2008). The authors outline a collection of studies that covers almost two thousand decisions on positive rights from twenty-nine jurisdictions.

[8] Jung, *supra* note 7 at 1053.

[9] *Id.*

[10] *See, e.g.*, Flavia Pivesan, *Brazil: Impact and Challenges of Social Rights in the Courts*, *in* SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW 182, 188–89 (Malcolm Langford, ed., Cambridge Univ. Press, 2008); Fernando Basch, *Argentina: Enforcing a Legal Victory for University Access to Education* (Case Study, Int'l Budget P'ship, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2926507 (last visited July 8, 2019); *Education*, *in* CONSTITUTIONAL LAW OF SOUTH AFRICA (Stu Woolman & Michael Bishop, eds., 2d ed., Juta, 2014) §§ 57.1–57.2, 57-1–57-42; THE CONSTITUTION IN THE CLASSROOM: LAW AND EDUCATION IN SOUTH AFRICA 1994–2008 (Stu Woolman & Brahm Fleisch, eds., Pretoria U. L. Press, 2009); Cameron McConnachie & Chris McConnachie, *Concretising the Right to a Basic Education*, 129 S. AFRICAN L. J. 554 (2012); *Strategic Litigation*

in the United States.[11] As an empirical matter, these provisions tend to appear more frequently in civil law countries.[12] However, Emily Zackin has documented the strong social and economic rights tradition at the state constitutional level in the United States,[13] and, together with Mila Versteeg, has demonstrated that American's national constitution is an oddity in its lack of positive rights as compared with other national constitutions around the globe.[14] Justiciability and judicial enforcement are quintessential for the practical implementation of these social and economic rights. Over the course of the past decade, there has been an increase in theoretical and empirical studies of court implementation of positive rights, providing fodder for a robust study of their actualization in jurisdictions where such rights are constitutionally guaranteed.[15]

In the introduction to their 2017 study, social scientists Langford, Rodriguez-Garavito, and Rossi provide an excellent way of organizing the wide variety of judicial approaches.[16] They describe four clusters of systemic variables: *legal variables* like the nature and wording of a positive right; the types of litigants seeking enforcement; the available remedies; and the judicial culture and traditions of the jurisdiction; *political variables* like the ability and willingness of governments to implement court rulings; the relationships between the branches of government; the level of government involved; and whether a defendant is a

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*Impacts: Equal Access to Quality Education*, Open Society Justice Initiative (2017), *available at*: https://www.justiceinitiative.org/publications/strategic-litigation-impacts-equal-access-quality-education [https://perma.cc/Q8WZ-848W] (last visited July 8, 2019) (discussing Brazil, India, and South Africa); Bivitri Susanti, *The Implementation of the Rights to Health Care and Education in Indonesia*, in GAURI & BRINKS, *supra* note 2, at 224.

[11] There is a massive and growing corpus of academic literature on school funding cases in the United States. *See, e.g.*, Cathy Albisa & Amanda Shanor, *United States: Education Rights and the Parameters of the Possible*, *in* Langford, Rodriguez-Garavito & Rossi, *supra* note 3, at 255; Paula Lundberg, *State Courts and School Funding: A Fifty-State Analysis*, 63 ALB. L. REV. 1101 (2000); William S. Koski, *Beyond Dollars? The Promises and Pitfalls of the Next Generation of Educational Rights Litigation*, 117 COL. L. REV. 1897 (2017); 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 (2010).

[12] Jung, Hirschl & Rosevear, *supra* note 7 at 1057–59.

[13] EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 2 (Princeton U. Press 2013).

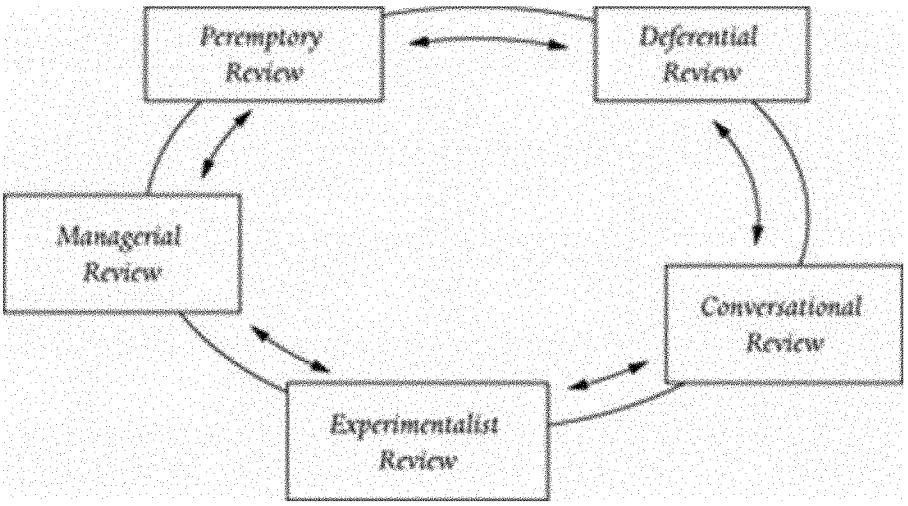
[14] Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHICAGO L. REV. 1641 (2014). *See also* David Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762, 850 (2012) (suggesting that the U.S. Constitution is "becoming increasingly atypical by global standards" as other countries draft or redraft their constitutions in ways that do not follow the American model).

[15] *See, e.g.*, Kent Roach, *The Challenges of Crafting Remedies for Violations of Socio-economic Rights*, *in* SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW 46 (Malcolm Langford ed., 2008); GAURI & BRINKS, *supra* note 2; LANGFORD, *supra* note 3; INT'L COMM. OF JURISTS, COURTS AND THE LEGAL ENFORCEMENT OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS: COMPARATIVE EXPERIENCES OF JUSTICIABILITY (2008).

[16] LANGFORD ET AL., *supra* note 3, at 14–15.

state or non-state actor; *socio-economic variables* like wealth and wealth disparity; social inequality; ethnic divisions; and public attitudes; and *civil society variables* including the relationship between litigants, lawyers, and civil society coalitions; as well as access to litigation funding.[17]

In her work, Katharine Young zeroes in on the variety of styles and approaches that constitutional courts apply in interacting with the executive and legislative branches when those courts attempt to enforce positive rights guarantees. In her 2012 book, Professor Young describes five stances used by courts in social and economic rights cases. She notes that these stances should not be thought of in terms of strengths and weaknesses because judicial power is inherently "multi-dimensional" and interactive.[18]




Young describes these modes of judicial review as follows:

- *Deferential Review*, where "the court assumes that greater decision-making authority is placed on the elected branches in interpreting economic and social rights and in determining the obligations that arise."
- *Conversational Review*, in which "the court is instead reliant on the ability of an interbranch dialogue to resolve the determination of rights."
- *Experimentalist Review*, "whereby the court seeks to involve the relevant stakeholders—government,

[17] *Id.*

[18] YOUNG, *supra* note 1, at 142 fig. 5.1.

> parties, and other interested groups—in solving the problem which obstructs a provisional benchmark of the right."
>
> - *Managerial review*, which "occurs when the court assumes a direct responsibility for interpreting the substantive contours of the right and supervising its protection with strict timelines and detailed plans."
> - *Peremptory Review*, "when the court registers its superiority in interpreting the rights, and in commanding and controlling an immediate response."[19]

Young's characteristically erudite book details each of these approaches and provides examples of their use in various countries.[20] She emphasizes the highly contextual nature of judicial responses to positive rights cases and demonstrates how the judicial approaches not only vary among jurisdictions but within individual courts themselves. A specific constitutional court might assume one or more stances in a single case, or shift modes based on the efficacy of its interaction with the other branches of government. Young observes that effective courts have a keen awareness of their political capital in these cases, and that judges apply that capital differently in different systems and under different circumstances.[21] One of the most effective concepts she uses is that of a "catalytic court . . . one that sees itself in productive interaction with other political and legal actors."[22] A catalytic court is successful at variously triggering, nudging, guiding, controlling, or mandating change that is already in process.[23] Young further elaborates on her model, suggesting three overarching "role conceptions" that courts adopt: the "Detached Court" that emphasizes the deferential and conversational approaches; the "Engaged Court" that focuses on conversational and experimentalist review; and the "Supremacist Court" that takes a more managerial or peremptory stance.[24] Her chart depicting these concepts follows:

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[19] *Id.* at 142.

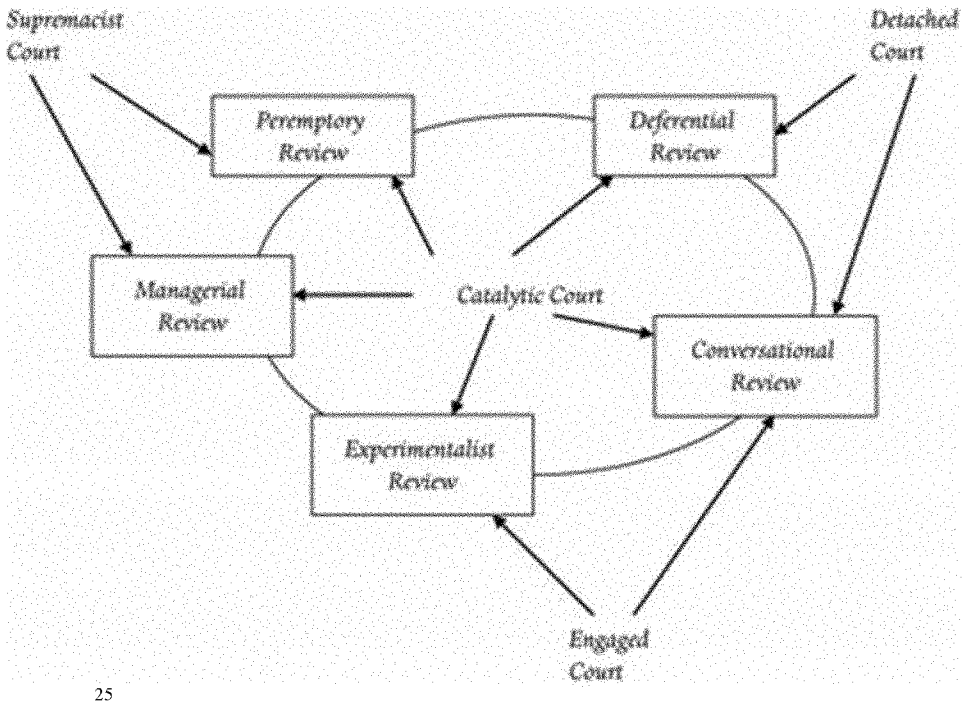
[20] *See generally id.* at 143–66 (explaining the approaches toward judicial review and providing examples that typify each approach in praxis).

[21] *Id.* at 172.

[22] *Id.*

[23] *Id.* at 173–74.

[24] YOUNG, *supra* note 1, at 194 fig. 7.1.

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Young's book applies these concepts in detail to the implementation of social and economic rights in South Africa (the catalytic approach),[26] Colombia (the judicial supremacy approach),[27] India (the "engaged court" approach),[28] and the United Kingdom (the detachment approach).[29] She demonstrates how, in choosing and applying their stances, courts strategically interact with other key players in government and in civil society.[30]

The empirical work of Gauri and Brinks[31] complements the theories and research of Katharine Young, and Langford, Rodriguez-Garavito, and Rossi.[32] Gauri and Brinks focus on social and economic rights litigation in developing countries, and their book documents how courts actively interact with the political branches with an eye towards effective results. They write that "judges . . . craft their opinions with an eye on the likelihood of compliance . . . , the political reaction and its effect on the standing of the judiciary . . . , and the existence of

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25 YOUNG, *supra* note 1, at 194.
26 *Id.* at 176.
27 *Id.* at 197.
28 *Id.* at 203–04.
29 *Id.* at 206.
30 *Id.* at 195–96.
31 GAURI & BRINKS, *supra* note 2.
32 LANGFORD ET AL., *supra* note 3.

a strong litigant who can engage in follow up or bring new cases."[33] Gauri and Brinks contend that courts address more positive rights claims when the litigants are "well-organized and well-funded" and that courts are "more effective when working within, rather than against, the dominant currents in the political and policy environments."[34] Based on their research and that of other authors in their book, they conclude that courts acting in this manner "remain pro-majoritarian actors" and are "more effective when they act well within the political mainstream and with substantial support from other political actors."[35]

This article endeavors to detail how constitutional courts acted and interacted in three jurisdictions with respect to a single category of positive rights—constitutional rights to adequate funding of pre-college education. The three jurisdictions on which we focus, Indonesia, Washington, and Kansas, all have provisions either written or interpreted as "strong rights" that the courts consider judicially enforceable. We observed all three courts shifting their tactical approaches as they encountered executive and legislative resistance, sometimes acting deferentially, sometimes engaging in a "conversation," and at other times taking "strong court" positions, including "peremptory" actions. As predicted by Gauri and Brinks, as well as by Langford, Rodriguez-Garavito, and Rossi, we found that the courts played a catalytic role, with the ultimate success of school funding litigation dependent on action by civil society groups, the media, and supporters within the legislative and executive branches. The problem was real. The political capital to fix the problem was present. The only thing needed in each instance was a *catalyst*. This is precisely what the courts functioned to do.

## IV. INDONESIA

Each branch of government appoints three of the nine justices on Indonesia's Constitutional Court.[36] Members must be 55 years old, are appointed to five-year terms with a maximum of fifteen years total, and must retire at 70 years

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[33] GAURI & BRINKS, *supra* note 2, at 4.

[34] *Id.* at 25–26.

[35] *Id.* at 28.

[36] STEFANUS HENDRIANTO, LAW AND POLITICS OF CONSTITUTIONAL COURTS: INDONESIA AND THE SEARCH FOR JUDICIAL HEROES 55 (Routledge, 2018).

of age.[37] The Court selects its Chief Justice.[38] The Constitutional Court reviews statutes for their constitutionality, settles disputes between state institutions, settles general election disputes, decides on the dissolution of political parties, and decides if grounds for impeachment exist.[39] Statutory challenges are brought before the Court by citizens individually or public interest groups.[40] The Court can declare a law unconstitutional and void, but it cannot dictate revisions to the national legislature.[41] A separate Supreme Court hears appeals from the general court system.[42]

The drafters of Indonesia's 1999–2002 constitutional amendments provided for a number of social and economic rights and the Constitutional Court has addressed many of these provisions in litigation brought since 2003.[43] Article 31 (4), the education funding provision with which this article is concerned, includes a very specific directive that "the state shall prioritize the educational budget by allocating at least twenty percent of the state revenues and expenditures budget and of the regional revenues and expenditures budget in order to meet the needs for organizing national education."[44] While this is a strong provision that lends itself readily to enforcement, we found that in six cases the Court interpreted, applied, and enforced that provision in a variety of ways, taking most of the available stances that Young describes.

We analyzed six education funding decisions of Indonesia's Constitutional Court between 2005 and 2008, all brought under the provision requiring the state

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[37] *Id.* at 56 (citing The Constitutional Court Act of 24/2003, art. 22, amended by the Constitutional Court Act of 8/2011 and further updated by The Constitutional Court Act of 7/2020). *See also*, UNDANG-UNDANG DASAR NEGARA REPUBLIK INDONESIA TAHUN [CONSTITUTION] 1945, art. 24C(3). The 2020 adjustments to the statute lengthened terms and further insulated Constitutional Court justices from removal by elected officials.

[38] UNDANG-UNDANG DASAR NEGARA REPUBLIK INDONESIA TAHUN [CONSTITUTION] 1945, art. 24(c)(4) (Indon.). The Constitutional Court Law has limited the terms of the Chief Justice and Deputy Chief Justice to two-and-a-half years. The Constitutional Court Act of 24/2003, Art. 4(3) (Indon.). HENDRIANTO, LAW AND POLITICS, *supra* note 36, at 56.

[39] UNDANG-UNDANG DASAR NEGARA REPUBLIK INDONESIA TAHUN [CONSTITUTION] 1945, art. 24(c)(1) (Indon.). Of these five responsibilities, the new court has dealt mainly with judicial review and settling general election disputes.

[40] The Constitutional Court Act of 24/2003, Art. 51, *amended by* The Constitutional Court Act of 8/2011 (Indon.).

[41] The Majelis Permusyarwaratan Rakyat, or People's Consultative Assembly ("MPR") is comprised of two houses: the dominant Dewan Perwakilan Rakyat or People's Representative Council ("DPR"), equivalent to a house of representatives, and the Regional Representative Council (Dewan Perwakilan Daerah or "DPD"), a "senate" with more limited powers that represents regional interests.

[42] UNDANG-UNDANG DASAR NEGARA REPUBLIK INDONESIA TAHUN [CONSTITUTION] 1945, art. 31(4) (Indon.).

[43] A list of many of the Constitutional Court's decisions is available at HENDRIANTO, LAW AND POLITICS, *supra* note 36, at xii–xv.

[44] UNDANG-UNDANG DASAR NEGARA REPUBLIK INDONESIA TAHUN [CONSTITUTION] 1945, art. 31(4) (Indon.).

to prioritize twenty percent of its budget for education.[45] The push for meeting the constitutional funding mandate was backed by established teachers' and civil society groups such as the Indonesian Teachers Association (PGRI) and Nahdlatul Ulama, the largest Muslim association in Indonesia (PB NU).[46] The first judicial review of the new right to education funding was brought by teachers and education activists in *Education Funding I*.[47] They questioned the constitutionality of the legislative act elucidating and implementing the education funding provision of the National Education Law.[48] That statute proposed to gradually increase the pre-university portion of the state and local education budgets to the required twenty percent.[49] The Court in a split decision ruled that "the 1945 Constitution had expressly determined that an education budget of a minimum 20% must be prioritized in national and regional budgets, and that could not be put aside by legislation."[50] They further stressed that "the implementation of this provision [Article 31 (4)] should not be delayed."[51] In its ruling, the Court declared that because the National Education System Act was inconsistent with the Constitution, it did not have legally binding force.[52] Three Justices[53] dissented, stating that "the word 'incrementally' in Article 49 of the statute should not be seen as contradicting Article 31 (4) of the Constitution."[54] The majority in *Education Funding I* reflected a strong judicial approach that typifies Young's "peremptory review." She describes the model as "closer to the conventional static model of judicial review that invites either the striking down of legislation or the upholding of it."[55] That is precisely what the

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[45] There had been at least seven petitions submitted based on Art. 31 (4) of the 1945 Constitution. *See* VERI JUNAIDI, ET AL., THIRTEEN YEARS OF THE CONSTITUTIONAL COURT'S WORK IN JUDICIAL REVIEW 28 (2016).

[46] Putusan Landmark Mahkamah Konstitusi 2003–2007 [Landmark Decisions of the Constitutional Court] 197–98 (2017). Support for increased pre-college education funding came early from establishment entities and individuals, such as Rector Suyanto of Yogyakarta State University (UNY). Anggaran Pendidikan Tidak Sesuai Dengan UUD [Budget for Education is Not in Line with the Constitution], NU ONLINE (Jan. 10, 2004), https://www.nu.or.id/post/read/1110/alokasi-anggaran-pendidikan-tidak-sesuai-dengan-uu.

[47] Decision of the Constitutional Court No. 011/PUU-III/2005, https://perma.cc/V568-VW2Y. The labels attached to various cases in this article are simply a matter of convenience. The cases discussed were provided with different sobriquets in other studies. *See, e.g.*, HENDRIANTO, *supra* note 36, 114–16; Andy Omara, Protecting Economic and Social Rights in a Constitutionally Strong Form of Judicial Review: The Case of Constitutional Review by the Indonesian Constitutional Court (2017) (unpublished Ph.D. dissertation, University of Washington) (on file with Gallagher Law Library, University of Washington).

[48] Act on National Education System 20/2003 (Indon.).

[49] Decision of the Constitutional Court No. 011/PUU-III/2005, *supra* note 47, p. 101.

[50] *Id.*

[51] *Id.*

[52] *Id.* at 102–03.

[53] Justice Natabaya, Justice Achmad Roestandi, and Justice Soedarsono, *id.* at 103.

[54] *Id.* at 105.

[55] YOUNG, CONSTITUTING ECONOMIC AND SOCIAL RIGHTS, *supra* note 1 at 162.

Indonesian court did in *Education Funding I*: it not only declared that Article 49 (1) of the Education Funding Act was inconsistent with the Constitution, but went further by declaring the law void.[56] The ruling invited no "dialogue" with the legislative branch; nor did it elaborate on how lawmakers should implement its result. This was a powerful mode of judicial decision-making, relying on the "the 1945 Constitution *expressis verbis*" mandating the minimum twenty percent.[57] The immediate effect of this ruling was that the Article 49 (1) of the National Education System Act could not be implemented as written. This apparently meant the government was required to fulfill the twenty percent budget for education at once, but that did not happen. The government responded by increasing the education budget to six percent in the next annual budget,[58] a far cry from the mandated twenty percent.

The government's minimal response to *Education Funding I* triggered another petition from teachers and activists. They challenged the constitutionality of the legislature's budget action in *Education Funding II*,[59] arguing that the lawmakers' response was nowhere close to the constitutionally required minimum. The government countered that it had to consider the budgetary needs for other public services.[60] In another split decision, the Court ruled that the updated budget law was inconsistent with the Constitution.[61] This time, however, the Court did not declare the law legally void. The majority instead attempted to be more strategic. It considered the practical consequences of invalidating the budget and acknowledged that increasing the budgetary allocation for education meant reducing the allocation for other sectors, thereby creating a situation rife with "legal uncertainty."[62]

The Court's ruling in this second education case reflected a weaker form of judicial review based on the justices' recognition that a direct order to the coordinate branches had fallen flat. Instead, the Court declared that the statute was inconsistent with the Constitution but declined to invalidate the law.[63] The Court was trying a more "conversational" approach, attempting to engage the legislative branch and giving lawmakers the opportunity to adjust the law. In this more

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[56] Decision of the Constitutional Court No. 011/PUU-III/2005, https://perma.cc/V568-VW2Y.

[57] UNDANG-UNDANG DASAR NEGARA REPUBLIK INDONESIA TAHUN [CONSTITUTION] 1945, art. 31(4) (Indon.).

[58] Law 36/2004 increased the budget for education to six percent of the total. Law 36/2004 on the 2005 State Budget.

[59] Decision of Constitutional Court No. 12/PUU-III/2005, *available at*: [https://perma.cc/N96S-QA8A] (Indonesian original).

[60] *Id.* at 38.

[61] *Id.* at 61.

[62] *Id.* at 62.

[63] Decision of Constitutional Court No. 12/PUU-III/2005.

politically sensitive ruling, the court did not set a deadline or demand a plan.[64] Effectively, the Court's decision bounced the ball back into the legislature's court.

Indonesia's lawmakers responded by nudging the budget allocation from 6% to 9.1% in its 2006 appropriation bill—a 50% increase but still far less than the constitutionally mandated minimum.[65] In response, teachers and other civic action groups once again challenged the 2006 budget law as unconstitutional (*Education Funding III*).[66] In another split decision, the Court ruled for the petitioners, confirming that the allocation of 9.1% for education was not in line with Article 31 (4).[67] The majority held that the government should transfer surplus amounts in the state budget to the education budget.[68] The Court was now experimenting from the bench—trying something different to push the executive and legislature forward after prior attempts had failed to catalyze change. In Stefanus Hendrianto's words, "the Court refused to declare the Budget Law 2006 unconstitutional but instead issued a directive for the Executive to do something to fulfill its constitutional mandate."[69] This declaration could be viewed as an "experimentalist" strategy, putting pressure on the parties (or at least one of them) to come up with a solution.[70] But the Court's approach this time around is best understood as a manifestation of Young's "managerial" mode: the Court was directing a specific solution by advising a specific remedy, in this case the movement of funds from the government's surplus into the budget for education spending.[71]

Both the legislature and the executive ignored the Court's directive to move

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[64] Applying Philip Bobbitt's paradigm, the Indonesian Court in *Education Funding II* could be said to have suddenly shifted to a more "prudential" approach, weighing the relative advantages and disadvantages of invalidating the law in a broader political and economic context. PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 12 (Blackwell, 1991).

[65] Law 13/2005.

[66] Decision of the Constitutional Court No. 026/PUU-III/2005, *available at*: [https://perma.cc/HB57-3NCN] (Indonesian original).

[67] *Id.*

[68] *Id.* at 86. Two justices concurred (Palguna and Soedarsono), and two dissented (Roestandi and Natabaya). The two concurring Justices took the position that only lecturers and teachers were appropriate petitioners. One of the dissenters, Justice Roestandi, contended that the current budget for education, which was less than 20 percent, did not necessarily mean that it was inconsistent with the constitution. He suggested that the current budget for education should be left in place and that it "could be increased in the next annual budget." The other dissenter, Justice Natabaya, wrote that the budget law was a special law that did not directly bind the public at large. As a result, the petitioners did not have legal standing to file this petition to the court. *Id.* at 97–98.

[69] HENDRIANTO, LAW AND POLITICS, *supra* note 36, at 114–15.

[70] YOUNG, CONSTITUTING ECONOMIC AND SOCIAL RIGHTS (2012), *supra* note 1, at 150. Decision of the Constitutional Court No. 026/PUU-III/2005 (Indon.), *supra* note 66, at 86.

[71] YOUNG, CONSTITUTING ECONOMIC AND SOCIAL RIGHTS (2012), *supra* note 1, at 155.

surplus funds to education spending,[72] and this inaction precipitated in a 2006 petition challenging the education allocation in Indonesia's 2007 state budget, which had increased the allotment for schools only to 11.8%.[73] This time around, in *Education Funding IV*,[74] the Court unanimously declared the 2007 budget unconstitutional, holding that the 20% mandate must be fulfilled immediately.[75] However, the Court deferred invalidating the entire budget law, proposing instead that the legislature could adjust the appropriation to bring it in line with constitutional requirements.[76] With *Education Funding IV*, we witnessed Indonesia's Constitutional Court trying again to persuade lawmakers to "do the right thing," recognizing the judiciary's limited powers over coordinate branches.[77] The Court was also receiving pushback from the executive branch, which expressed concern about the trade-offs between education and other key government services.[78] The Court ratcheted down from Young's "peremptory" and "managerial" modes to a combination of the "experimentalist" and "conversational" approaches.[79] The Court did not order action, as it might have done in the two "supremacist" modes, but rather pointed out the failings of the elected branches and asked them to devise a solution thereto.

In 2007, the Court received another similar case. There, a number of educational professionals challenged Article 49 (1) of Law 20/2003 in the National Education System (*Education Funding V*).[80] In this case, the majority held that "Article 31 Paragraph (4) of the 1945 Constitution does not explain in detail everything included in the scope of the education budget of twenty percent

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[72] HENDRIANTO, LAW AND POLITICS, *supra* note 36, at 115.

[73] Decision of the Constitutional Court No. 26/PUU-IV/2006, available at: [https://www.mkri.id/public/content/persidangan/putusan/putusan_sidang_Putusan026PUU-IV06ttgAPBN2007tgl010507.pdf] (Indonesian original).

[74] Decision of the Constitutional Court 026/PUU-IV/2006, *available at*: [https://perma.cc/8CWM-N5JE] (Indonesian original).

[75] *Id.* at 93, 95.

[76] *Id.* at 94. (Translation by HENDRIANTO, LAW AND POLITICS, *supra* note 36, at 115.)

[77] HENDRIANTO, *supra* note 36, at 115.

[78] KOMPAS DAILY NEWS, June 9, 2006, p. 12. "Vice President Jusuf Kalla stated that the fulfillment of a 20 percent budget for education is a dilemma for the government. He further explains, 'Teacher salaries will likely increase but there will be no sufficient budget for road maintenance, and teachers cannot get decent health service, and the police and army cannot property maintain law and order. That is the consequence if we fulfill 20 percent at once today.'"

[79] *See* YOUNG, *supra* note 1, at 147, 150.

[80] Mahkamah Konstitusi Republik Indonesia [Constitutional Court] 2007, NO. 24/PUU-V/2007, https://mkri.id/public/content/persidangan/putusan/putusan_sidang_eng_Putusan%2024-PUU-V-2007%20_Eng_.pdf. *See also* Omara, *supra* note 47, at 160 (labeling this case "National Education System II" because it was a challenge to the education statute generally rather than the budget); HENDRIANTO, *supra* note 36, at 115 (referring to the decision as "National Education Budget IV.").

. . . ."[81] The Court declared that "educators' salaries must be fully considered in the preparation of the education budget."[82] The majority observed that the government failed to implement the Court's earlier education funding directives and predicted that "there would be a continuous violation if the Court consistently applied the same rules, i.e. excluding the educator salary, in calculating the budget for education."[83] But instead of consistently excluding the educators' salaries as a component of the education budget, the Court acted strategically by granting the petition and explicitly including teachers' salaries as one of the education budget items.[84] After this move, the majority stated quite frankly that "there was no reason for the government to delay its constitutional duty to achieve 20 percent budget for education. Justice delayed, justice denied."[85]

In *Education Funding V*, the Court acted strategically to narrow the gap between the twenty percent constitutional requirement and the adopted budgetary allocation for education. It considered the government's difficulty in fulfilling the twenty percent appropriation requirement and the possibility of continued violations. The judges set the groundwork for a somewhat more deferential mode of jurisprudence, while attempting to cover their doctrinal tracks by declaring the inviolability of the Constitution's twenty percent mandate. In this decision, we see the Court taking a prudential approach, balancing the political and economic consequences of its rulings, and weighing the costs and benefits of its decision in a broader political and economic context.

In one important respect, the combination of lobbying, repeated litigation, and the Court's various attempts to strategically develop an effective approach finally proved fruitful. The 2008 budget law provided 15.6% for education[86]—a distinct increase from the 6% appropriated just four years before.[87] But 15.6% still falls short of 20%, and the difference led to yet another round of litigation, this time apparently resulting in the downfall of the highly respected Chief Justice, Jimly Asshiddiqie.[88] In this sixth petition, the Indonesian Teacher Association (PGRI) challenged the constitutionality of the 2008 national budget (*Education Funding*

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[81] Mahkamah Konstitusi Republik Indonesia [Constitutional Court] 2007, No. 24/PUU-V/2007, [3.16.4] https://mkri.id/public/content/persidangan/putusan/putusan_sidang_eng_Putusan%2024-PUU-V-2007%20_Eng_.pdf.

[82] *Id.* at [3.16.8].

[83] *Id.* at [3.16.9].

[84] *Id.*

[85] *Id.*

[86] Law 45/2007 on the 2008 National Budget (Anggaran Pendapatan dan Belanja Negara) Art. 1 (33), (36) (Indon.) and General elucidation of Law 45/2007. Law 45/2007 excludes teachers' salaries in calculating budget for education.

[87] *See supra* note 65 and accompanying text.

[88] *See infra* notes 89-92 and accompanying text.

*VI*).[89] The Court's opinion recounted its prior rulings on the issue since 2005[90] and noted that lawmakers had repeatedly ignored judicial declarations about the Constitution's mandate, stating that:

> [T]he Court has given enough time for the lawmakers to establish a law that guarantee the fulfillment of budget for education as mandated by the Constitution. Therefore, for the sake of upholding the Constitution as the highest law . . . the Court must declare that the 2008 Law on National Budget was inconsistent with the Constitution.[91]

The opinion found the lawmakers responsible for these repeated constitutional violations and demanded that the 2009 budget allocate sufficient funds to the nation's education system to meet the full constitutional requirement.[92] But the Court, clearly recognizing the practical realities implicated, allowed the underfunded 2008 budget to stand until the 2009 national budget cycle took effect.[93] The Court then warned that it would invalidate the entirety of the national budget if the 2009 budget proposal failed to meet the constitutional requirement for education funding.[94] What we witnessed here was the Court's frustration with its earlier approaches, which were partly—but not sufficiently—successful at causing the legislative and executive branches to comply with a rather explicit positive right in Indonesia's Constitution. In this sixth case, the Court shifted away from Young's deferential and conversational modes toward a more managerial approach. At the same time, we surmise that the justices likely believed that by leaving the 2008 budget in place and handing the solution to legislators, the judiciary was being sufficiently pragmatic and cooperative.

The results of *Education Funding VI* were mixed. The good news was that the 2009 national budget finally reflected a twenty percent allocation to education—with the accomplishment of the constitutional mandate assisted by including teachers' salaries in the calculation. The not so good news, at least from the standpoint of Chief Justice Asshiddiqie and his supporters, was that President Susilo Bambang Yudhoyono appointed new justices,[95] who in turn caused Asshiddiqie's removal as Chief Justice. Asshiddiqie, who soon resigned from the

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[89] Mahkamah Konstitusi Republik Indonesia [MKRI] [Constitutional Court of the Republic of Indonesia] 13/PUU-VI/2008, https://perma.cc/4ABK-TMJ4.

[90] The four rulings are Court Decision No. 12/PUU-III/2005, *supra* note 59; Court Decision No. 026/PUU-III/2005 *supra* note 66; Court Decision No. 026/PUU-IV/2006, *supra* note 74; and Court Decision No. 24/PUU-V/2007, *supra* note 80.

[91] MKRI 13/PUU-VI/2008, *supra* note 89 at 100.

[92] MKRI 13/PUU-VI/2008, *supra* note 89 at 101.

[93] *Id.* at 101.

[94] *Id.* at 100–01.

[95] HENDRIANTO, LAW AND POLITICS, *supra* note 36, at 157.

Court altogether,[96] suspected that the change in Court composition and superintendence was engineered in reprisal for his leadership in the strongly worded *Education Funding VI* opinion.[97] In Hendrianto's analysis, the "Court had restrained itself in the previous [budget] cases, but in the end, Asshiddiqie failed to make a prudential judgment and initiated unnecessary confrontation with the government."[98]

In multiple education funding cases, the Indonesian Constitutional Court recognized its catalytic role and ardently searched for the "right" strategy to push the coordinate branches into constitutional compliance. We witnessed the Indonesian court trying virtually all of the available modes that Young described, experimenting with each one and hoping for a successful result. However, insofar as each approach prompted a different reaction from the coordinate branches of the Indonesian government, it is difficult to definitively conclude which judicial stance worked "best."

Despite no shortage of setbacks, the litigants and the Court kept pushing, and the legislative and executive branches gradually came into compliance (or at least "good enough" compliance). This implementation of a positive right mandate within a half dozen years is impressive. At the same time, the result was costly in another way—a significant shake-up in Indonesia's Constitutional Court had substantial collateral impacts in other cases.[99] The institutional tension between the court on the one hand and the executive and legislative branches on the other appears to have been a direct result of the fact that fully funding pre-college education costs money—*a lot* of money. Although the executive and legislative branches gradually increased school funding in substantial amounts, some were resentful of being pressured so directly by the judiciary, and this had serious repercussions for the Constitutional Court.[100]

## V. WASHINGTON STATE

A distinctive feature of American state constitutionalism is that many state constitutions are interpreted by elected judges.[101] In most states, judges are either directly elected, or appointed but then required to stand either for reelection

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[96] *Id.* at 159.

[97] *Id.* at 115–16, 157–58.

[98] *Id.*

[99] The impact of Asshiddiqie's removal as Chief Justice and his subsequent resignation from the Court comprises a major portion of Hendrianto's book. *See* HENDRIANTO, *supra* note 36, at 105. It is also reflected in Omara's analysis of later changes in the Court's mode of judicial behavior and analysis. *See* Omara, *supra* note 47.

[100] *See*, notes 60 and 78, and accompanying text.

[101] G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 122 (1998).

or for voter approval in a "retention election."[102] As discussed below, this feature of America's state judicial selection puts pressure on judges when they make constitutional rulings disliked by certain political actors or groups.[103]

Washington State is typical in having an elected State Supreme Court.[104] Like many American state courts, Washington's Supreme Court does not hesitate to strike down statutes it finds violative of constitutional provisions.[105] But Washington's constitutional school funding cases encountered considerably more difficulties in implementation, bringing "the court into protracted conflict with other branches and with organized political groups."[106]

Washington State has one of the strongest constitutional mandates for pre-college ("K-12") education in the United States. Eleven states require the provision of a "thorough and efficient" system of public schools,[107] and several others mandate a "general and uniform system" of public schools.[108] Washington's robust 1889 constitution provides far more substance, with Article IX, Section 1 noting that "[i]t is the paramount duty of the state to make *ample provision* for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex."[109] The explicit nature of Washington's constitutional language, designating "ample provision for . . . education" as the "*paramount* duty" of the state, is a distinguishing factor in Washington's education funding caselaw. In other jurisdictions, litigation in the 1970s

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[102] For state-by-state summaries of judicial selection, see *Methods of Judicial Selection*, NAT'L CTR. FOR ST. CTS., http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= [https://perma.cc/G7HG-5FT4] (last visited April 4, 2019). Only a dozen American states appoint their highest appellate courts with no electoral participation.

[103] *See infra* notes 158 and 214–215 and accompanying text.

[104] WASH. CONST. art. IV, §3.

[105] *See, e.g.*, Dearle v. Frazier, 173 P. 35 (Wash. 1918) (noting that "[t]o give credit in public schools for study of historical, biographical, narrative, and literary features of Bible pursued under sectarian agents is to give credit for sectarian teaching and influence contrary to Const. art. 9, § 4."); Culliton v. Chase, 25 P.2d 81 (Wash. 1933) (holding "graduated income tax statute . . . unconstitutional" because "[i]ncome is 'property' within Constitution requiring uniform taxation, and tax on income is tax on property and is not 'excise tax.'"); State *ex rel.* Washington Toll Bridge Authority v. Yelle, 200 P.2d 467 (Wash. 1948) (adhering to the principle that "[l]aws enacted in violation of constitutional provision that no bill should contain more than one subject, which should be expressed in title, will be declared void."); Sofie v. Fibreboard Corp., 771 P.2d 711 (Wash. 1989) (holding that "[s]tatute placing limit on noneconomic damages recoverable by personal injury or wrongful death plaintiff violates state constitutional right to trial by jury").

[106] Cornell W. Clayton & Gerry Alexander, *Washington's Constitution: The Politics of State Constitutional Interpretation*, *in* GOVERNING THE EVERGREEN STATE: POLITICAL LIFE IN WASHINGTON 147 (Cornell W. Clayton et al. eds., Wash. St. Univ. Press ed. 2018).

[107] *See* Molly A. Hunter, *State Constitution Education Clause Language*, EDUCATION JUSTICE (Jan. 2011), http://www.edlawcenter.org/assets/files/pdfs/State%20Constitution%20Education%20Clause%20Language.pdf.

[108] *Id.*

[109] WASH. CONST. art. IX, §§ 1 & 2 (emphasis added).

and 1980s relied on Equal Protection claims under the 14th Amendment[110] and on arguments that school finance systems did not meet individual state constitutional mandates for "adequate," "thorough," or "efficient" education.[111] Nationwide, American education finance litigation since the late 1980s has focused on the perceived "adequacy" of school funding under state constitutional requirements.[112] But Washington's distinctive "paramount duty" provision generated an atypically strong directive in the Washington Supreme Court's 1978 case, *Seattle School District v. State*.[113]

*Seattle School District* resulted from two failed attempts by Seattle's school district to obtain local voter approval of a special tax levy for the fiscal year 1975–1976.[114] Upon review of the case, the Court first underscored its "ultimate power to interpret, construe and enforce" the state constitution.[115] It then held that despite the state's argument to the contrary, Article IX, Section 1 of Washington's constitution was a mandatory, "judicially enforceable affirmative duty,"[116] a duty that was "supreme, preeminent or dominant."[117] The opinion held that education funding could not rely on local tax revenues,[118] but instead the state government was obligated to amply provide for basic education costs through "dependable and regular tax sources."[119]

In *Seattle School District*, Washington's Supreme Court firmly asserted its authority to define the constitutional positive right to ample education funding and to broadly outline the appropriate legislative response, exhibiting aspects of Young's "supremacist" judicial approach. But the court backed away from supervising the legislature. Instead it took what Young might label an "experimentalist" tack, leaving to the lawmakers the responsibility of solving the problem. In other words, the Court exhibited tough talk but deferred the solution to the legislators. This judicial tactic was perhaps due to the vehemence of the state's argument that school funding was at root a political question, coupled with the Washington court's inexperience with enforcing a strong positive rights provision. The Washington legislature did proceed to develop a clear definition of "basic education" and substantially increased state funding. The legislators had

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110 Simon-Kerr & Sturm, *supra* note 11, at 90–92; Koski, *supra* note 11, at 1902–03; Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 125–26 (1995).

111 Simon-Kerr & Sturm, *supra* note 11, at 92–94.

112 Koski, *supra* note 11, at 1904–05.

113 Seattle Sch. Dist. v. State, 585 P.2d 71 (Wash. 1978).

114 *Id.* at 78.

115 *Id.* at 83.

116 *Id.* at 85–87, 91 (in his majority opinion, Justice Stafford expressly referred to and applied American legal philosopher Wesley Hohfeld's conception of duties and correlative rights).

117 *Id.* at 91.

118 *Id.* at 99.

119 Seattle Sch. Dist. v. State, 585 P.2d at 97.

already defined basic education and revised local school funding in 1977,[120] after the superior court ruling in *Seattle School District* but before the state supreme court's decision.[121] The legislators increased funding for public schools over the ensuing years, but increases were by no means consistent, due in part to a failure on the legislature's part to account for inflation.[122]

Washington's basic educational model was adjusted over the years.[123] Pushed by educators, education lobbying groups, the press, and the public,[124] the legislature and a Commission on Student Learning it created in 1993[125] developed more precise academic benchmarks[126] and statewide assessment tests.[127] The legislature also sponsored studies to determine the financial costs of bringing Washington students into compliance with those requirements, particularly with respect to the "Washington Learns" project mandated in 2005.[128] The Washington Learns report outlined specific actions to enable the bulk of Washington students to attain a level of academic preparedness for competition

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[120] Washington Basic Education Act of 1977, ch. 359, 1977 Wash. Sess. Laws 1606.

[121] Daniel Stallings, *Washington State's Duty to Fund K-12 Schools: Where the Legislature Went Wrong and What it Should Do to Meet its Constitutional Obligation*, 85 WASH. L. REV. 575, 584 (2010). The 1977 enactment of the Basic Education Act seems to have had little impact on the court. However, Justice Utter, in his concurrence, stated that the court's approach to enforcement should be limited "due to the vigor with which the legislature addressed its responsibility through the school finance legislation of 1977." Seattle Sch. Dist. v. State, 585 P.2d at 109–10.

[122] Following the *Seattle School District* decision, Washington's biennial state budgets for K-12 education increased in double-digit percentages from the 1979–1981 through the 1991-1993 biennia. It then dropped to single digit increases in the biennia between 1993-1995 and 2003-2005, then edging up again for two biennia (perhaps in response to the *McCleary* litigation). McCleary v. State of Wash., 173 Wash. 2d 477, 269 P.3d 227 (2012). In the 2009–2011 biennium it declined precipitately, dropping by 2.6% in the 2009-2011 biennium when compared with the previous biennium. *Omnibus Operating Budgets 1979-81 Through 2019-21* (Legislative Evaluation & Accountability Program Committee, June 6, 2019), *available at* https://perma.cc/KUT9-EJRJ.

[123] Stallings, *supra* note 121, at 586–87.

[124] Telephone interview with Ross Hunter, Secretary of the Washington State Department of Children, Youth, and Families and former legislator (July 17, 2019).

[125] Basic Education Act of 1993, 1993 Wash. Sess. Laws 1293 (Ch. 336 §202(1)).

[126] Stallings, *Washington State's Duty*, *supra* note 121, at 585. These "Essential Academic Learning Requirements," or EALRs, were mandated by the Basic Education Act of 1993, 1993 Wash. Sess. Laws 1293 (Ch. 336 §202(3)(a)).

[127] The Basic Education Act of 1993 also charged the Commission on Student Learning to develop an updated assessment system. Basic Education Act of 1993, 1993 Wash. Sess. Laws 1293 (Ch. 336 §202(3)(b)). These "Washington Assessments of Student Learning, or WASL's, were adjusted in the "Academic Achievement and Accountability Statute," 1999 Wash. Sess. Laws 2142 (Ch. 388).

[128] The Comprehensive Education Study Steering Committee, popularly known as "Washington Learns," was created by 2005 Wash. Sess. Laws 2277 (Ch. 496 §2).

in the modern knowledge and skills marketplace.[129] Legislative sponsors of the study were fully aware that it might create the basis for new school funding litigation.[130] In order to propel the state to move more swiftly in increasing its school funding allocations, *Mathew McCleary et al. v. State of Washington* was filed in January 2007 by parents, children, education advocacy groups, the teachers' union, and a coalition of public school districts.[131] At the time, the 2007 legislature was already engaged in education system reforms.[132] However, the primary action that year was the creation of yet another committee, the Basic Education Finance Task Force, to develop a comprehensive formula to finance the programs recommended by Washington Learns.[133] The Task Force's 2009 report detailed the specific changes in education programing, staffing, and funding required to achieve the goals the legislature and its various commissions had set earlier for the state's education system.[134] The legislature responded by adopting a significant education reform bill redefining "basic education" and detailing minimum instructional offerings[135] but it fell short of funding those reforms.[136] This provided additional ammunition to the *McCleary* petitioners.[137]

The *McCleary* petitioners contended that, notwithstanding the legislature's repeated adoption of education standards and goals, the funding continued to fall short of the state's paramount constitutional duty "to make ample provision for the education of all children."[138] In their petition, the *McCleary* plaintiffs raised issues concerning the constitutional meaning of "ample" funding and the word "education;" whether the state was complying with its legal duty as framed by these requirements; and what the courts ought to do to enforce that duty.[139] The trial court found that the state was out of compliance with its constitutional duty, and, relying heavily on the legislature's own actions to establish minimum instructional offerings and funding allocations, held that state funding was "not

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[129] Wash. Learns, *World-class, Learner-focused, Seamless Education*, Report of the Comprehensive Education Study Steering Committee (Nov. 2006), https://ofm.wa.gov/sites/default/files/public/legacy/reports/WALearnsFinalReport.pdf (last visited Aug. 17, 2019).

[130] Interview with Ross Hunter, *supra* note 124.

[131] Petition for Declaratory Judgment Enforcing Our Constitution, Matthew *ex rel.* Kelsey v. Washington, No. 07-2-02323-2 SEA, (Wash. Super. Ct. King Cty. Jan. 11, 2007), https://perma.cc/PSH6-85UP.

[132] 2007 Wash. Sess. Laws 1826.

[133] 2007 Wash. Sess. Laws 1823.

[134] *Joint Task Force on Basic Education Finance*, FINAL REPORT OF THE JOINT TASK FORCE ON BASIC EDUCATION FINANCE (Jan. 14, 2009), http://leg.wa.gov/JointCommittees/Archive/BEF/Documents/FinalReport.pdf.

[135] Sec. 104(1), 2009 Wash. Sess. Laws 3331 (Ch. 548) (also known by its bill number, ESHB 2261).

[136] McCleary v. State of Wash., 173 Wash. 2d 477, 269 P.3d 227, 242 (2012).

[137] Interview with Ross Hunter, *supra* note 124.

[138] WASH. CONST. art. IX, § 1.

[139] *McCleary*, *supra* note 136, at 244–45.

ample," "not stable," and "not dependable."[140]

The Washington Supreme Court substantially upheld the trial court's decision. The Court's opinion, written by Justice Debra Stephens, engaged in a self-conscious discussion of positive and negative rights.[141] She wrote that the "distinction between positive and negative constitutional rights is important because it informs the proper orientation for determining whether the State has complied with its . . . duty in the present case."[142] Justice Stephens quoted New York University Law Professor Helen Hershkoff,[143] observing that while with negative rights the court's inquiry would be whether the state had overstepped its bounds, with positive constitutional rights, a court "must ask whether the state action achieves or is reasonably likely to achieve 'the constitutionally prescribed end.'"[144] Stephens' opinion then warned that cases under the education clause "have always proved difficult. If nothing else, they test the limits of judicial restraint and discretion by requiring the court to take a more active stance in ensuring that the State complies with its affirmative constitutional duty."[145] The opinion held that the legislature, through its commissions, studies, standards, and various statutes, had identified the resources needed to give all students an opportunity to meet those standards.[146] "Yet substantial evidence shows that state allocations have consistently fallen short of the actual cost of implementing the basic education program."[147] The Court ruled that the state had failed in its constitutional duty to "make ample provision" for educating its children.[148] The Court noted that the responsibility for devising the means of discharging the constitutional duty is best left with the legislature,[149] but declined to entirely defer to the lawmakers, recognizing the danger that the legislature had already failed to meet this responsibility and may continue to fall short of the full fulfillment of its duties.[150] Accordingly, the state supreme court retained jurisdiction for oversight purposes, asked for "dialogue and cooperation between coordinate branches of state government" in developing a funding reform program, and called upon the parties to prepare detailed proposals on how the state should go about meeting the constitutional mandate.[151]

The Washington State Supreme Court thus positioned itself to engage in

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[140] *Id.* at 269.

[141] *Id.*

[142] *Id.*

[143] *Id.* at 245 (citing to Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1137 (1999)).

[144] *Id.*

[145] *Id.*

[146] *Id.* at 240–44, 254–57.

[147] *Id.* at 257.

[148] *Id.* at 258.

[149] *Id.* at 245.

[150] *Id.* at 261.

[151] *Id.*

what Young would call a "conversationalist" or "experimentalist" process with the legislature and the executive, looking for a give-and-take that would lead to an effective and substantial school funding program. But as it turned out, that conversation would continue for six and a half years, involving seven rounds of legislative action (or inaction), report-filing with the court, written and oral arguments, and nine major court orders. Limited by its institutional customs, the Court found that it could "converse" with the state only through questions at oral arguments and subsequent judicial orders, and the inability of lawmakers to engage in negotiations with the state judges frustrated members of the legislature.[152] By all accounts, the process of enforcing the state's constitutional mandate proved far more onerous than the Court had initially anticipated.

The fundamental problem the Washington Supreme Court encountered in enforcing the *McCleary* decision was that the state legislature responded slowly, in substantial part because of lawmakers' unwillingness or inability to raise taxes. During most of the period between the initial *McCleary* judgment on January 5, 2012, and the court's final order on June 7, 2018, the legislature was under divided political control, with the House of Representatives led by Democrats and the Senate dominated by a Republican-led coalition.[153] To the surprise of no one, the two houses found it difficult to agree on funding solutions. Republicans were reluctant to raise taxes, and Democrats were loath to cut programs.[154] Some Republican legislators retaliated against the Court, disinviting the Chief Justice from giving her customary "State of the Judiciary" address[155] and threatening to reduce the Court's size.[156] When in 2014 the Court held the state in contempt for failure to act expeditiously, and then in 2015 added a $100,000 per day penalty to spur legislative action, nineteen members of the

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[152] Interview with Washington Supreme Court Justice Barbara Madsen in Tacoma, Wash. (June 24, 2019); Interview with Washington State Senator David Frockt in Seattle, Wash. (June 25, 2019); Interview with Washington State Senator Jamie Pedersen in Seattle, Wash. (July 8, 2019); Interview with Ross Hunter, Secretary of the Washington State Department of Children, Youth, and Families and former legislator, in Seattle, Wash. (July 17, 2019); Interview with Washington Supreme Court Justice Debra Stephens in Olympia, Wash. (July 18, 2019); Interview with Washington Supreme Court Justice Charles Johnson in Olympia, Wash. (August 14, 2019).

[153] *Party Control of Washington State Government*, BALLOTPEDIA, *available at* https://ballotpedia.org/Party_control_of_Washington_state_government [https://perma.cc/G4LE-BP5F] (last visited May 15, 2019).

[154] Interview with Washington State Senator David Frockt in Seattle, Wash. (June 25, 2019).

[155] Interviews, *supra* note 152; *See also*, Joseph O'Sullivan, *Lawmakers Nix the Session's State of the Judiciary Speech*, SEATTLE TIMES, Dec. 29, 2014, *available at* http://blogs.seattletimes.com/politicsnorthwest/2014/12/29/lawmakers-nix-the-sessions-state-of-the-judiciary-speech/ (last visited July 10, 2019).

[156] *Legislative Assaults on State Courts—2019*, BRENNAN CENTER FOR JUSTICE, Feb. 11, 2019, *available at* https://www.brennancenter.org/analysis/legislative-assaults-state-courts-2019_[https://perma.cc/8J64-C52T] (last visited July 9, 2019).

Senate Republican-controlled majority caucus collectively declared "[t]his extraordinary order presents a clear threat to our state legislature as an institution," violated the state and federal constitutions, and threatened a challenge under the federal "republican-form-of-government" clause.[157] The following year there was a vigorous conservative challenge to three sitting justices, based primarily on their rulings in *McCleary* and other school funding cases. Notwithstanding the conservative barrage, all three judges received solid support from the electorate, materially strengthening the Court's hand going forward.[158]

The back-and-forth between the legislature and the Court continued year after year, with the legislature resisting a complete solution, yet gradually increasing funding under pressure from the judiciary and the public at large. During this process, the court earnestly (and impatiently) searched for a way to enforce its orders, quizzing the parties about possible measures such as invalidating some or all tax exemptions, or invalidating the entire operating budget.[159] This tug-of-war between the judiciary and the legislature lasted more than six years, with the state's education budget slowly increasing until the process finally concluded on June 7, 2018. In 2017, the legislature finally enacted a budget that substantially increased school funding. On June 7, 2018, the Court finally declared the case done, announced that the state had finally "complied with the Court's orders to fully implement its statutory program of basic education," terminated jurisdiction, and lifted the contempt sanctions it had previously imposed in 2015.[160] The plaintiffs and their supporters from the teachers' union and civic groups were not entirely satisfied, arguing that the funding still fell short of the need and that the tax levy burdens had been unfairly distributed

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[157] Senator Mike Padden, *Open Letter from members of the Majority Coalition Caucus* (Aug. 21, 2015), https://perma.cc/5SHB-JLVU (Letter from Senator Mike Padden and eighteen senate Republican colleagues), available at: https://perma.cc/5SHB-JLVU. Ironically, as the *McCleary* litigation drew to a close, Republican legislators were quite willing to take credit for the large infusion of new funds into the school system. *See, e.g.*, http://johnbraun.src.wastateleg.org/wp-content/uploads/sites/16/2017/10/Economic-Sense-K-12-Funding-Infusion.pdf [https://perma.cc/F9WX-JUSN] (last visited July 11, 2019). Twenty-two Senate Democrats responded: "Whether or not we agree with the approach that the Court has taken, we all agree that our focus should be on improving our public schools now, not wasting taxpayer dollars on litigation to delay or avoid that duty." Senator Jamie Pederson, Legislative Plan for Education Funding, (Sep. 10, 2015), https://perma.cc/Q9G9-G8K8 (Letter from Senator Jamie Pedersen and 21 senate Democratic colleagues), *available at* https://perma.cc/Q9G9-G8K8.

[158] *Washington Supreme Court Elections, 2016*, BALLOTPEDIA, *available at* https://ballotpedia.org/Washington_Supreme_Court_elections,_2016 [https://perma.cc/JY95-TS8F] (last visited July 9, 2019).

[159] *See infra* note 158 and accompanying test.

[160] Supreme Court Order at 4, McCleary, et al. v. State of Washington, No. 84362-7 (Wash. June 7, 2018).

among school districts within the state.[161] Some legislators viewed the 2018 school funding mechanism as somewhat ad hoc and observed that capital funding and special education issues had not been fully resolved.[162] Nevertheless, the Court's members concluded that they had pushed hard enough, given that between 2012 and 2019, the legislature had more than doubled the state's budget for K–12 funding from $13.5 billion to $27.3 billion per biennium.[163]

The *McCleary* process—however long, contentious, and messy it may have been—can be regarded as a success in enforcing positive rights. It took a substantial time, resources, and political capital and saw no shortage of political headaches. But ultimately the Court's steady pressure—cajoling lawmakers, shaming them, speculating in orders about potential Draconian measures to seize public funds or shut the schools but always exercising restraint—turned out to be effective. The Court's members understood that there were practical limits to judicial orders, with the danger that legislators would choose to ignore the court's dictates. But the judiciary's approach was aided substantially by consistent support from the media and various civil society groups; by influential legislators who wanted to carry out the Court's orders; and by the simple fact that when challenged at the polls for enforcing the state constitution's education funding provision, the challenged incumbents all received public backing.[164] In this regard, the Washington court was supremely catalytic. It deftly toggled back and forth among the approaches depicted by Katharine Young, exhibiting both conversational and managerial characteristics, and constantly experimented. Young characterizes the experimentalist approach as being one in which the court involves the stakeholders (the government, the parties, and other interested groups) in solving the problem.[165] Washington's justices were definitely

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[161] Interview with Washington State Senator David Frockt in Seattle, Wash. (June 25, 2019); Interview with Washington State Senator Jamie Pedersen in Seattle, Wash. (July 8, 2019); Neal Morton, *We're Screwed.' Some School Districts Feel like Losers in New School-Funding Scheme*, SEATTLE TIMES (Feb. 2, 2018), *available at* https://www.courts.wa.gov/content/publicupload/eclips/2018%2002%2002%20We%20re%20screwed%20Some%20school%20districts%20feel%20like%20losers%20in%20new%20school%20funding%20scheme.pdf [https://perma.cc/6K8A-MTA9] (last visited July 11, 2019).

[162] Interviews, *Id.* The 2019 legislature took measures to relieve the financial stress on some of the districts that had been caused by the 2018 adjustments to the school levy and funding mechanisms. *See*, Joseph O'Sullivan, *Washington Lawmakers Struck Deal on Schools and Property-Tax Levies; Here's How it Pencils Out*, SEATTLE TIMES (April 30, 2019), *available at* https://www.seattletimes.com/seattle-news/politics/washington-legislature-passes-a-new-two-year-state-budget-and-other-key-bills-in-last-minute-frenzy/ [https://perma.cc/PB4W-DW4J] (last visited July 10, 2019).

[163] Those amounts are in nominal dollars. *Omnibus Operating Budgets 1979-81 through 2019-21*, *supra* note 122. As detailed in that document, in constant dollars, the state budget for K-12 schools from 2012 to 2019 increased by fifty percent. *See also*, Table 4, below, "Education Funding Increases During Litigation."

[164] *See supra* note 158 and accompanying text.

[165] *See supra* note 19 and accompanying text.

experimentalist when searching for an appropriate remedy for the chronic legislative inaction with which they were confronted. Indeed, one legislator described the Court's behavior as "schizophrenic."[166] After each legislative session, the Court requested briefings from the parties as well as amicus briefs and asked for guidance in oral arguments where the justices grilled the parties about the range of enforcement options.[167] While this likely was an "experimentalist" quest for suggestions on the scope of the court's enforcement powers, it served to heighten pressure on legislators to act. Once the court had decided how to proceed with respect to the latest update from the legislature, it would act managerially. But all the while it asserted that it was actually being deferential and reiterated that specific solutions were up to the lawmakers or that the legislature and the commissions it created had already determined what it would take to "amply fund" basic education statewide. As reflected in the *McCleary* decision,[168] oral arguments, and myriad judicial orders, the state justices were intensely cognizant of the pitfalls in enforcing a positive rights provision that costs substantial taxpayer dollars. But this awareness helped them gradually develop a strategy of restraint with pressure that was eventually successful. Nevertheless, by slowly but surely increasing the pressure applied from the bench, the judiciary was ultimately able to catalyze progress.

## VI. KANSAS

The Kansas Constitution's education funding language differs from Washington State's in a number of ways.[169] However, the broad trajectory of Kansas school funding litigation resembles Washington's experience, featuring a similar multi-year ping pong match between the state's supreme court and legislature. The lengthy and tense interaction between the judicial and other branches has been carefully documented by University of Kansas Law Professor Richard

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166 Interview with State Senator Jamie Pedersen, in Seattle, Wash. (July 8, 2019).

167 Video recordings of the oral arguments before the Washington State Supreme Court in the *McCleary* case are available at https://www.tvw.org/archives/?term=mccleary+oral+argument&search-archives=1#page-1 and https://www.courts.wa.gov/appellate_trial_courts/SupremeCourt/?fa=supremecourt.McCleary_Education (which also includes links to court filings in the case. (Last visited July 10, 2019). Although in oral arguments Washington's justices prodded petitioners' counsel to choose one or another recommended specific sanctions against the state (*e.g.*, closing the schools, prohibiting non-school expenditures, or blocking tax exemptions) the petitioners avoided opting for any particular approach for fear that the court might reject it—resulting in less of "an *in terrorem* threat hanging over the legislature's head." Public Presentation by Thomas Ahearne, lead counsel for the *McCleary* petitioners, University of Washington College of Education in Seattle, Washington (October 14, 2019).

168 *See supra* notes 139–44 and accompanying text.

169 *See supra* note 109 and *infra* note 176 and accompanying text.

E. Levy and others.[170]

Kansas selects justices through a merit selection process.[171] Each time a vacancy occurs, a nonpartisan commission nominates three potential appointees for the governor, who selects one of them.[172] The appointee must stand for voter approval at the next general election, and if retained, that justice is subject to periodic retention elections.[173] Because Kansas historically has been Republican in its political leanings,[174] the Kansas supreme court has been conservative in its outlook—though moderately so.[175] As discussed below, the Kansas Supreme Court, in two clusters of cases over more than fifteen years, worked conscientiously to enforce the state constitution's education funding provision. In its efforts, the Court encountered sharp resistance and barely veiled threats from some legislators. Nevertheless, the justices, spurred on by a strong showing of support from the media and the public at large, steadily pushed lawmakers toward action on issues of school funding.

The aforementioned litigation involved two key positive rights allocations in the state's constitution. Article 6, Section 1 requires that the legislature "shall provide for intellectual, educational, vocational and scientific improvement" by establishing and maintaining public schools. Article 6, Section 6(b) provides that: "[t]he legislature shall make suitable provision for finance of the education interests of the state."[176] That "suitable provision" language was at the core of

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[170] Richard E. Levy, *Gunfight at the K-12 Corral: Legislative vs. Judicial Power in the Kansas School Finance Litigation*, 54 U. KAN. L. REV. 1021 (2006); Richard E. Levy, *The War of Judicial Independence: Letters from the Kansas Front*, 65 U. KAN. L. REV. 725 (2017); Richard E. Levy, Update on Judicial Independence in Kansas (CLE at KU Law materials, May 18-19, 2017), *available at* https://law.ku.edu/sites/law.ku.edu/files/docs/recent-developments/2017/levy-materials.pdf_[https://perma.cc/ENJ8-RRQZ] (last visited July 11, 2019); John Robb, Alan Rupe & Jessica Skladzien, *The Current State of School Finance in Kansas: The Kansas Legislature's Occasional Negative Approach to its Positive Constitutional Duty*, 27-SUM KAN. J. L. & PUB. POL'Y 329 (2018); Robert Hoeven, *Kansas Public School Funding: Problems and Possible Solutions*, 87 UMKC L. REV. 411 (2019).

[171] Kan. Const. Art. 3, §5(a).

[172] *Id.*

[173] Kan. Const. Art.3, §5(c).

[174] Francis Heller and Paul D. Schumaker, *The Kansas Constitution: Conservative Politics Through Republican Dominance*, *in* GEORGE E. CONNOR AND CHRISTOPHER W. HAMMONS, THE CONSTITUTIONALISM OF AMERICAN STATES 490 (U. OF MISSOURI PRESS, 2008).

[175] *See*, Ballotpedia, *Political Outlook of State Supreme Court Justices, 2012*, available at https://ballotpedia.org/Political_outlook_of_state_supreme_court_justices,_2012 [https://perma.cc/RKK9-NVDL] (last visited June 5, 2019). Despite the use of a "nonpartisan" judicial selection process, "persons identified with the Democratic party do not enter the procedure when the ultimate choice is to be made by a Republican governor, and vice versa. Judicial selection has thus not been depoliticized . . . ." FRANCIS H. HELLER, THE KANSAS STATE CONSTITUTION 82 (OXFORD UNIV. PRESS, 2011).

[176] KAN. CONST. Art 2, §6(b).

the multi-year litigation to adequately fund Kansas schools.[177]

Kansas school-funding litigation stretches back to 1991, when a district court ruled that the state's funding system fell short of the constitutional mandates of adequacy and equity. [178] The court then postponed proceedings to enable the legislature to act. In 1992, legislators reorganized the state's school funding system by adopting the School District Finance and Quality Performance Act (frequently referred to by the less than ideal acronym "SDFQPA").[179] Eight years later, consultants John Augenblick and John Meyers, commissioned by the state legislature, found Kansas was $800 million short of the amount needed for an adequate education system (the "A&M Study").[180]

The A&M Study was soon followed by the *Montoy* litigation, consisting of four state supreme court decisions between 2003 to 2006.[181] *Montoy I*, in 2003, held that school funding lay with the legislature. However, after a trial on remand, the district court ruled that Kansas's school funding system violated constitutional guarantees. The second, third, and fourth *Montoy* decisions followed in rapid succession, reacting to legislative attempts to address the Supreme Court's holdings that state funding was insufficient.[182] At one point, when *Montoy III's* court deadline for an additional $148 million appropriation passed without legislative compliance, the court set a hearing to determine if the entire Kansas school system should be closed.[183] Emotions were running high, but the legislature blinked and approved the funds.[184] After another legislatively commissioned study led to $466 million in increased funding over three years, the 2006 case *Montoy IV* found that the increased appropriation substantially complied with constitutional requirements.[185]

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[177] Part of the Kansas school funding litigation involved equal protection arguments. This article focuses solely on the positive Kansas constitution's "suitable provision for finance" requirement.

[178] A still-earlier Kansas school funding case was *Caldwell v. State*, in which a Johnson County District Court judge southwest of Kansas City held that the education funding systems violated the state's equal protection clause. This led the legislature in 1973 to adopt the School District Equalization Act. Robb, et al., *supra* note 170, at 334.

[179] Ch. 280, 1992 Kan. Sess. Laws 1691. *See* Levy, *Gunfight at the K-12 Corral*, *supra* note 170, at 1034.

[180] Robb et al., *The Current State of School Finance*, *supra* note 170, at 336.

[181] Montoy v. State (*Montoy I*), 62 P.3d 228 (Kan. 2003); Montoy v. State (*Montoy II*), 102 P.3d 1160 (Kan. 2005), *republished with concurrence* 120 P.3d 306 (2005); Montoy v. State (*Montoy III*), 112 P.3d 923 (Kan. 2005); Montoy v. State (*Montoy IV*), 138 P.3d 755 (Kan. 2006).

[182] *See* Table 3 *infra*.

[183] Robb et al., *The Current State of School Finance*, *supra* note 170, at 337; Levy, *Gunfight at the K-12 Corral*, *supra* note 170, at 1046.

[184] Levy, *Gunfight at the K-12 Corral*, *supra* note 170, at 1046–47.

[185] *Montoy IV*, *supra* note 181, 138 P.3d at 763–66. Kansas K-12 education expenditures from state, federal and local sources in the years preceding and during the *Montoy* litigation

Richard E. Levy has artfully described how the *Montoy* saga and the Court's interactions with lawmakers involved "a clash between two essential separation-of-powers principles," involving the legislature's power to set educational policy and control taxes on the one hand, and the duty of the courts to interpret and apply the law on the other.[186] Although the judiciary relied on the legislature's own standards and definitions in reaching its conclusions,[187] many lawmakers felt the court was usurping their power to oversee and manage the school system[188] and responded with unsuccessful proposals to amend the Kansas constitution to trim the Supreme Court's authority to direct the legislature to make appropriations.[189]

The *Montoy* litigation closed with judicial acceptance of the legislature's progress in boosting school funding. To this end, Richard Levy observed in a footnote that the title of his article—which included an allusion to the historic gunfight at the OK Corral—was somewhat misplaced because everyone was still standing at the end of the heated litigation.[190] But as it turned out, the gunfight was not over at all; within four short years the guns would resume their blazing once more.

After *Montoy*, two things happened that caused school funding cuts and renewed litigation. First, the "Great Recession" of 2007–2009 drastically reduced government revenues nationwide—an unfortunate phenomenon from which Kansas was by no means immune.[191] Second, conservative Republicans defeated moderates in the 2010 and 2012 state primaries and a conservative Governor was elected.[192] Legislative cuts to the education budget resulted in a 2.61% decrease in per pupil funding from all sources in the 2009–2010 school year when compared with the prior year.[193] The next year saw much of the same, as per pupil funding was once again slashed.[194] This resulted in *Gannon v. State*, filed in November 2010 by a group of school districts, their students, and their guardians.[195]

The *Gannon* case was referred to a panel of three trial judges, as required

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are available in a report, *State Totals All USDS*, available from the Kansas State Dept. of Educ., Div. Fiscal & Admin. Services, KSDE Data Central, https://perma.cc/2JDD-LKF6.

[186] Levy, *Gunfight at the K-12 Corral*, *supra* note 170, at 1048–49.

[187] *Id.* at 1070, 1078.

[188] *Id.* at 1082, 1084

[189] *Id.* at 1085–86, 1093–97.

[190] *Id.* at 1095, footnote 358.

[191] *See* History.com Eds., *Great Recession* (Oct. 11, 2019), https://www.history.com/topics/21st-century/recession.

[192] Levy, *The War of Judicial Independence*, *supra* note 170 at 730–31.

[193] Kansas State Dept. of Educ., Div. Fiscal & Admin. Services, KSDE Data Central, *State Totals All USDS*, https://datacentral.ksde.org/school_finance_reports.aspx (last visited June 28, 2019); 2008–2009 to 2017–2018 Report *available at*: https://perma.cc/6SW2-9PUA.

[194] *Id.*

[195] Robb et al., *The Current State of School Finance*, *supra* note 170, at 337.

by a Kansas statute on school funding litigation.[196] Following a marathon, sixteen-day trial, the panel held that the state was violating the Article VI funding requirements.[197] Upon review, the Kansas Supreme Court affirmed the lower court's ruling. Responding to the state's argument that the level of school funding was a non-justiciable political question, the opinion discussed at length the fundamental duties of the judicial branch. It noted that the majority of state courts had held the constitutionality of school funding was justiciable, and went on to emphasize that "our Kansas Constitution clearly leaves to the legislature the myriad of choices available to perform its constitutional duty; but when the question becomes whether the legislature has actually performed its duty, that most basic question is left to the courts to answer under our system of checks and balances."[198]

Turning to the merits of the case, the Court explicitly adopted Kentucky's factors from the 1989 case *Rose v. Council for Better Education, Inc.*[199] for evaluating the constitutional adequacy of K–12 financing.[200] After adopting the factors articulated by *Rose*, the Court sent the "adequacy" portion of the case back to the district court for further evaluation in light of the newly endorsed criteria.[201] The court also found that the legislature had violated the "equitable education" requirement of the state constitution because of the disparities between rich and poor districts,[202] and ordered the legislature to address the equity issue

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[196] Ch. 194, 2005 Kan. Sess. Laws, codified at Kan. Stat. Ann. §72-5633 (2017).

[197] Luke Gannon and Grace Gannon by their Next Friends and Guardians, et al., Shawnee Co. Dist. Ct. Case No. 10C1569 (Jan. 10, 2013), https://perma.cc/JBP8-J8DJ.

[198] *Gannon I*, 319 P.3d at 1226.

[199] Rose v. Council for Better Education, Inc., 790 S.W.2d 186 (Ky.1989).

[200] *Gannon I,* 319 P.3d at 1236–37. In recounting the "Rose factors," the *Gannon I* court quoted the Kentucky supreme court as follows:

> [A]n efficient system of education must have as its goal to provide each and every child with at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.
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> Rose v. Council for Better Education, Inc., 170 S.W.2d 186, 212 (Ky. 1989).

[201] *Gannon I,* 319 P.3d at 1237.

[202] *Gannon I*, 319 P.3d at 1243.

no later than July 1, 2014.[203]

What followed was five years of back-and-forth institutional dialogue and action between the Kansas Supreme Court and the coordinate branches of government. The sequence of events differed from Indonesia's and Washington's experience in its details, though many of the same basic themes were clearly observable. In this regard, it is truly striking how similar the big-picture story was in each jurisdiction: court decisions requiring increased school funding were followed by legislative action that fell short of the constitutional requirement. The inter-branch tension was even stronger in Kansas than in Indonesia or Washington. Some legislators complained vociferously that their authority was being usurped by the judiciary.[204] In 2015, a conservative legislature and governor froze the state's commitment of funds to local districts and backtracked on school levy equalization actions taken in 2014 with lower court approval.[205] Legislators adopted a new "block grant" system for state aid to districts. But in February 2016, the Court rejected that approach in *Gannon II*, where the Court was forced to explain to lawmakers that the school funding requirements originated with the people, whose will was expressed in a constitution that courts were bound to enforce.[206] The opinion also emphasized that the judiciary not only had the power declare a law unconstitutional, but also "the inherent power to enforce our holdings."[207] Nevertheless, the court stayed action to provide the legislature with an opportunity to correct the deficiencies.

The legislature responded by restoring the earlier formula for state capital aid and new equalization assistance.[208] But on May 27, 2016, the Court quickly ruled in *Gannon III*[209] that although the legislature had made some progress in the capital funding area, certain inequities were accentuated and the legislation had still failed to comply with the *Gannon I* order.[210] The Court stayed the issuance of a mandate until June 30, 2016, to provide lawmakers with another opportunity to "to craft a constitutionally suitable solution."[211] Lawmakers in a special session provided additional equalization funds, and the state and *Gannon* plaintiffs stipulated that the constitutional equity issues were resolved. The Court promptly approved that agreement, leaving the adequacy issues for later resolution.[212]

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[203] *Gannon I*, 319 P.3d at 1250–52.

[204] Hoeven, *supra* note 170, at 420–21.

[205] These events are detailed in *Gannon II*, 368 P.3d 1024, 1032–35 (Kan. 2016). S*ee also* Hoeven, *Kansas Public School Funding*, *supra* note 170, at 420–21.

[206] *Gannon II*, 368 P.3d at 1057.

[207] *Id.*

[208] Ch. 45, 2016 Kan. Sess. Laws.

[209] 372 P.3d 1181.

[210] *Gannon III*, 372 P.3d at 1197–98.

[211] *Gannon III*, 372. P.3d at 1204.

[212] Robb et al., *The Current State of School Finance*, *supra* note 170, at 340.

The firm stance of the judiciary in the first *Gannon* cases highlighted the tension between the Kansas Supreme Court and many political actors.[213] This led to a frontal attack on the Court, as a number of conservative groups challenged the retention of four out of five justices in the November 2016 election.[214] However, a coalition of moderate Republicans, Democrats, businesses, and pro-school groups backed the Court, and all the justices were retained with solid voter support.[215] This strong showing for the justices echoed Washington's judicial election results the same year and provided important institutional capital for the Kansas Supreme Court as it moved into the next rounds of *Gannon*.[216]

The March 2017 case, *Gannon IV*,[217] focused on the issue of funding adequacy, holding that the most recent group of legislative changes were only "minimally responsive."[218] In June of that year, the legislature responded with the "Kansas School Equity and Enhancement Act" (KSEEA) aimed at comprehensively changing the school funding system.[219] The same legislature also changed the state's income tax structure to increase revenue available for critical needs, including school operations.[220] In October, the Kansas Supreme Court responded with *Gannon V*,[221] holding that the KSEEA exacerbated wealth-based disparities among school districts[222] and contributed to the further entrenchment of school underfunding.[223] Nevertheless, the Court stayed its mandate through June 30, 2018 in order to enable the legislature to adjust the state's funding mechanisms.[224] This process was repeated again the following year with some progress; the 2018 legislature increased funding based on a new cost study.[225] In *Gannon VI*,[226] the Court complemented lawmakers on the improvement and determined that the equity issues were finally resolved.[227] However, the justices informed legislators that additional timely financial adjustments were necessary

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213 Levy, *The War of Judicial Independence*, *supra* note 170, at 735.

214 Ballotpedia, Kansas Supreme Court Elections, 2016, https://ballotpedia.org/Kansas_Supreme_Court_elections,_2016 [https://perma.cc/2B2Q-Z5FK] (last visited July 1, 2019).

215 *Id.*

216 Telephone Interview with Richard E. Levy, J.B. Smith Distinguished Professor of Constitutional Law, University of Kansas School of Law (Sept. 26, 2018).

217 *Gannon IV*, 390 P.3d 461 (Kan. 2017).

218 *Gannon IV*, 390 P. 3d at 468, 488.

219 Ch. 95, 2017 Kan. Sess. Laws 908. *See also*, Hoeven, *Kansas Public School Funding*, *supra* note 170, at 424–27.

220 Ch. 84, 2017 Kan. Sess. Laws 823.

221 *Gannon V*, 402 P.3d 513 (Kan. 2017).

222 *Gannon V*, 402 P.3d at 549.

223 *Gannon V*, 402 P.3d at 539.

224 *Gannon V*, 402 P.3d at 518.

225 Hoeven, *Kansas Public School Funding*, *supra* note 170 at 428–29.

226 *Gannon VI*, 420 P.3d 477 (2018).

227 *Gannon VI*, 420 P.3d at 494.

to satisfy the constitution's adequacy requirements.[228]

As we saw in the Washington judicial elections discussed earlier, the 2016 Kansas retention election results had strengthened the Court's hand in the push for final resolution of the *Gannon* cases. The 2018 election similarly helped propel a final financial resolution. That year, voters opted for Democratic Governor Laura Kelly, whose election campaign stressed the need to resolve school funding litigation and comply with the Kansas Supreme Court's requirements.[229] Despite resistance from house Republicans, Governor Kelly worked with a bipartisan coalition of senators to push through a funding package meant to finally end the *Gannon* saga.[230] After an oral argument in which the justices expressed their frustration with the seemingly interminable litigation,[231] *Gannon VII*, issued in June 2019, found the state to be in substantial compliance with the state constitution's adequacy requirements.[232] The Court retained jurisdiction "to ensure continued implementation of the scheduled funding."[233]

In attempting to achieve legislative compliance with its constitutional decisions on school funding, the Kansas Supreme Court faced the same challenges as the courts in Indonesia and Washington. Applying Young's typology, the Kansas justices leaned toward a "managerial" approach, defining the character of the constitutional right and setting timelines for legislative implementation. At the same time, the Court would suggest potential measures in its consideration to enforce compliance, before backing off and allowing the legislature more time to voluntarily comply—knowing that the legislators now had the alternative of judicially enforced compliance in the back of their mind. Richard E. Levy's view is that the Court gradually improved its tactical skills, moving from an approach that Young would characterize as a peremptory approach in *Montoy*, to what we might view as a managerial stance in the *Gannon* cases.[234] In *Gannon*, the court often referred to legislatively-sponsored cost studies and emphasized less absolute expenditure levels, allowing for good faith attempts at

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[228] *Gannon VI*, 420 P.3d at 485.

[229] Stephen Koranda, *Relieved to Have a School Funding Plan, Kansas Lawmakers Await the Court*, KCUR 89.3 RADIO, April 5, 2019, https://www.kcur.org/post/relieved-have-school-funding-plan-kansas-lawmakers-await-court#stream/0 [https://perma.cc/KFD7-Z8Z2] (last visited July 1, 2019).

[230] *Id. See also*, Jonathan Shorman, *Kansas Gov. Kelly and House GOP Clash on School Funding as Deadline Approaches*, WICHITA EAGLE (Mar. 26, 2019), https://www.kansas.com/news/politics-government/article228377219.html [https://perma.cc/Q3U3-KBU2] (last visited July 1, 2019).

[231] Stephen Koranda & Celia Llopis-Jepsen, *Can We End the School Litigation Now? That and More Questions from the Kansas Supreme Court*, KCUR 89.3 Radio, May 9, 2019, https://www.kcur.org/post/can-we-end-school-litigation-now-and-more-questions-kansas-supreme-court#stream/0 [https://perma.cc/G4SJ-9CLA] (last visited July 1, 2019).

[232] *Gannon VII*, 443 P.3d 294 (Kan. June 14, 2019).

[233] *Id.*

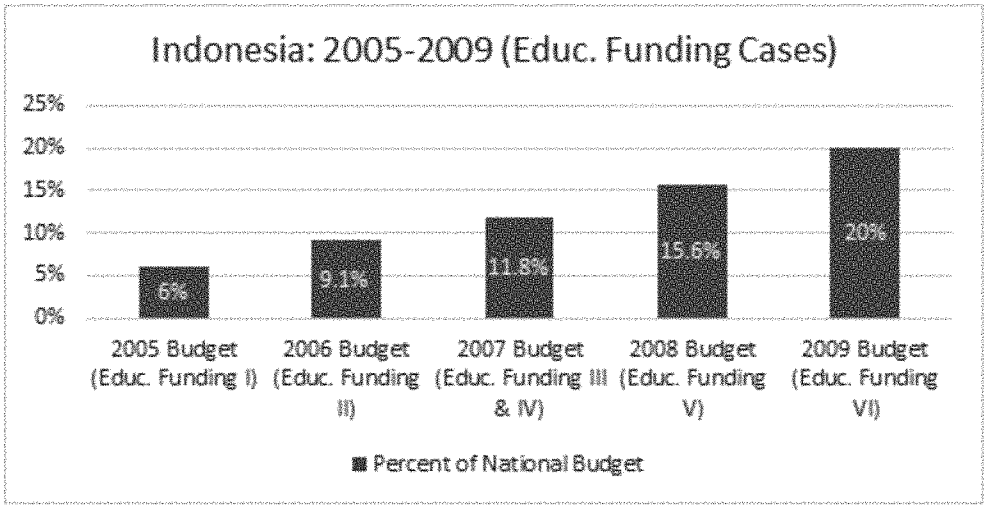
[234] Levy interview, *supra* note 216.

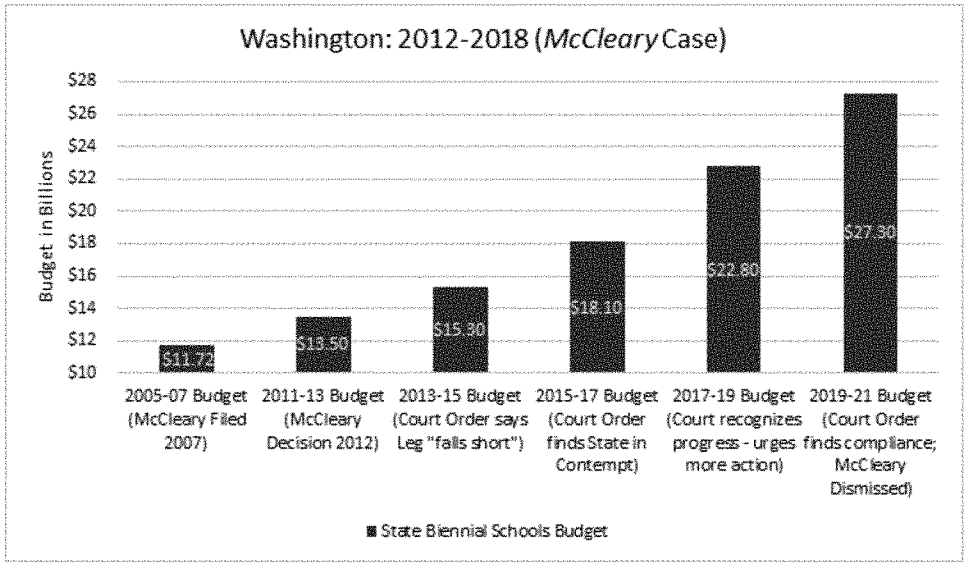
resolution of the issue by the legislative branch. Even after the 2016 election victories, the Kansas Supreme Court continued to prod the legislature—doing so firmly but without engaging in a peremptory approach that might result in stiffened and counterproductive legislative resistance.

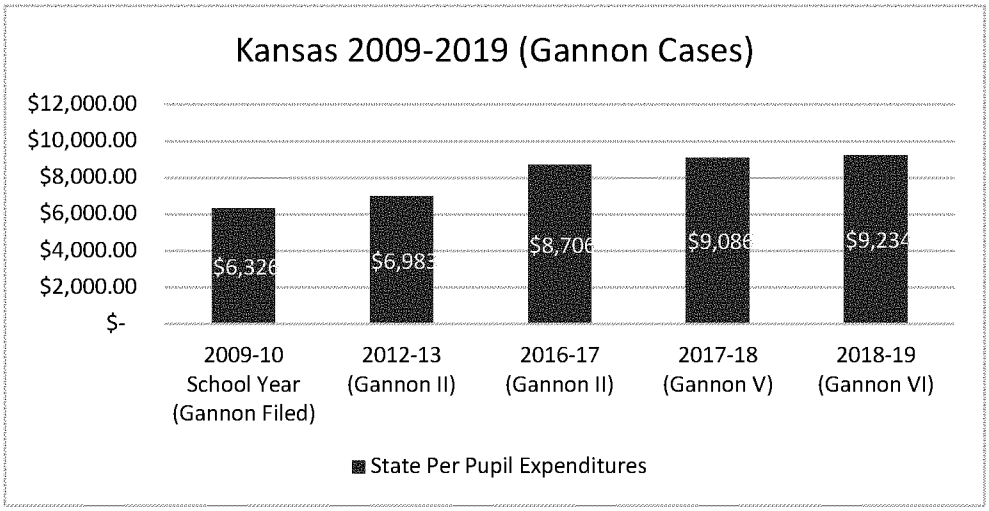
## VII. OBERVATIONS AND CONCLUSIONS

In each of the three jurisdictions examined—Indonesia, Washington State, and Kansas—constitutional positive rights provisions were the basis of lengthy but successful litigation that substantially increased governmental funding of pre-college education. The tables below depict the gradual but substantial increase in school funding over the course of the observed court cases.

**Education Funding Increases During Litigation**






Perhaps the most noteworthy adjective to stress with regard to the above increases is *gradual*. Significant increases in state resources for education were achieved, but in each jurisdiction, executive and legislative actors did not jump to attention and immediately implement constitutional court rulings. As the judges in these cases were acutely aware, there was a "delicate balancing of powers and responsibilities among coordinate branches of government,"[235] and

[235] Opinion of the Court by Debra Stephens, J., in Mathew McCleary et al., v. State of Washington, 173 Wn.2d 477, 540, 269 P.3d 227, 258 (2012). *See supra* notes 141–50 and accompanying text.

there was certainly no guarantee the political actors would follow judicial directives.

Through the course of the examined litigation, the justices in these jurisdictions tried most of the approaches Young's work describes.[236] Young's typologies are useful in depicting the ways courts act when addressing positive rights enforcement. In her book, she describes what she sees as the predominant characteristics of the national courts she studied: a "catalytic" South African court, a "supremacist" bench in Columbia, an "engaged" Indian court, and a tendency towards "detachment" in the United Kingdom.[237] She also observes that judicial power is multidimensional and interactive,[238] and this squares with our observations. We observed the Indonesian, Washington, and Kansas courts toggling back and forth between stances and modes. These courts would start out with one approach. Then, when legislators either ignored or responded slowly to the initial juridical modality, the courts would try something else—on occasion openly querying the parties about the content and limits of a court's enforcement powers.[239] Gradually the coordinate branches increased school budgets to levels that satisfied the reviewing courts. In part a testimony to the finitude of human perseverance in continued litigation, the courts and legislatures eventually tired of the endless litigative process and were willing to declare the school funding issued "solved" when the increases were sufficient enough.

Based on the right-to-education-funding cases we studied, we found that Katharine Young's model is most helpful in *describing* multiple modes of constitutional court behavior in a politicized environment in which, regardless of judicial selection method, the justices were subject to removal either by the executive or by the voters. But the social scientists are especially helpful in *explaining* the ultimate success of these positive rights cases. Gauri and Brinks are right that judges "craft their opinions with an eye on the likelihood of compliance . . . , the political reaction and its effect on the standing of the judiciary."[240] Further, the legal, political, socioeconomic, and civil society variables described by Langford, Rodriguez-Garavito, and Rossi help explain the interactions when the judicial branch interfaces with its coordinate branches in positive rights situations.[241] As to the germane legal variables, the strong language of the relevant rights provisions was quite significant. In terms of political and social variables, the Indonesian legislature was constrained by limited resources, while the two American legislatures were constrained first by a recession and then by a simple

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[236] *See supra* notes 18–25 and accompanying text.

[237] *See supra* notes 26–29 and accompanying text (discussing the four types of court modalities).

[238] *See supra* note 18 and accompanying text (describing the exercise of judicial power as "multidimensional" and "interactive").

[239] *See, e.g.*, *supra* note 167 and accompanying text (describing the prodding of petitioners by the Washington Supreme Court in a case involving sanctions against the state).

[240] GAURI & BRINKS, *supra* note 2 at 4.

[241] *See* LANGFORD ET AL, *supra* note 3 and text accompanying *supra* notes 16–17.

unwillingness to raise taxes. Likewise, the civil society variables were not unimportant: in all three jurisdictions the petitioners were backed financially and politically by education advocacy groups and unions, and the cases would likely not have succeeded without that crucial support. This was especially true in Washington and Kansas, where this increased support urged sympathetic legislators to collaborate strategically across party lines and with the case petitioners.

Notwithstanding the political, social, and economic variables that affect judicial decision-making, the fact remains that most judges are not politicians. Whether judges come from a civil law or common law background, their culture is a *legal* rather than a *political* culture. While certainly interconnected, the respective milieus of jurists and politicians are by no means the same. Judges focus on one case after another, considering and responding to technical legal arguments raised by the parties and issuing decisions based on legal doctrines. They are accustomed to making decisions, issuing rulings, and having their orders followed. When faced with strong, explicit education rights provisions (as in Indonesia and Washington State) or a moderately strong provision reinforced by a robust corpus of legal doctrine (as in Kansas, relying in large part on their endorsement of Kentucky law), their institutional and cultural background impels them to behave as judges, not politicians. This lays the groundwork for interbranch tension. Based on his study of the Kansas school finance cases, Richard E. Levy has observed that "there is an inherent cultural clash between courts and legislators: lawmakers are politicians and are looking for what is do-able and expedient, while courts apply principled deductive reasoning based on constitutional norms, reasoning that leads to conclusions about actions that the judges expect to be carried out."[242]

The *legal* variables described by Langford, Rodriguez-Garavito, and Rossi are the ones with the most salience for judges: the wording of the constitutional language; the arguments presented by litigants; the traditions of a jurisdiction's specific judicial culture; and the available remedies.[243] Needless to say, the *practicable* remedies are often difficult for judges to discern, particularly when the vindication of a particular positive right requires the expenditure of money that is perennially in short supply. Education is expensive. Substantial increases in school funding require either increased tax revenue or cuts to other government programs. Elected officials are uncomfortable raising taxes and they cannot rely on their economies to consistently generate more revenue without rate increases. Of course, judges neither desire nor are well-equipped to make policy trade-offs. They are most comfortable operating in their natural, legalistic, deductive reasoning track, and that approach is not suited to the give-and-take of governing by compromise. In the jurisdictions and cases observed for this paper, each constitutional court concentrated on legal reasoning and explanations in formal

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[242] Levy interview, *supra* note 216.

[243] *See* LANGFORD ET AL., SOCIAL RIGHTS JUDGMENTS, *supra* note 3 and text accompanying notes 16–17 (defining the four groups of variables of offering examples of each in praxis).

opinions, while keeping an eye on the practicalities of enforcement and implementation. Members of the Washington Supreme Court have observed that as judges, they are *reactive*, responding to actions and solutions proposed by the parties; in the *McCleary* case the court acted cautiously and methodically because the plaintiffs did not propose drastic judicial actions and because the State gradually responded.[244]

It is fair to say that in all three of the jurisdictions studied, the constitutional courts were "catalytic" as Young uses the term. The constitutional school funding cases in Indonesia, Washington, and Kansas were all launched by teachers' unions and education organizations, groups that could simultaneously support lawsuits and lobby legislatures to promote compliance with court rulings. Those efforts were complemented by support from the media and, in the cases of Washington and Kansas, by voters at the polls. Consistent with the social scientists' theories, we found that despite legislative foot-dragging, these catalytic courts forced education funding to remain at the top of the legislative agenda while education interest groups and the media successfully pushed the lawmakers to find the money so they could eventually comply with the court orders.

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[244] *See* Interviews with Washington Supreme Court Justices, *supra* note 152.