EDUCATION LAW — WASHINGTON SUPREME COURT HOLDS LEGISLATURE IN CONTEMPT FOR FAILING TO MAKE ADEQUATE PROGRESS TOWARD REMEDYING UNCONSTITUTIONAL EDUCATION FUNDING SCHEME. — *McCleary v. State*, No. 84362-7 (Wash. Sept. 11, 2014) (order of contempt).

Robust positive rights contained in many state constitutions[1] give rise to a complex and weighty question: what should be the judicial role in enforcing such rights?[2] In education-adequacy suits brought to enforce state constitutional guarantees of the right to education,[3] courts differ on how to approach this question.[4] And when courts declare state education funding schemes inadequate, remedying the violation sometimes entails a decades-long interbranch face-off.[5] Recently, the Washington Supreme Court fired a warning shot in one such face-off by issuing an order holding the State in contempt for failing to make "real and measurable progress"[6] toward meeting the court's 2012

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[1] *See* Jonathan Feldman, *Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in an Era of Positive Government*, 24 RUTGERS L.J. 1057, 1057 n.2 (1993) ("A 'positive' constitutional right is one which can only be universally realized if the government acts (e.g., the right to a certain income). A 'negative' constitutional right is one which can only be realized in the absence of governmental interference (e.g., the right to speech).").

[2] *See generally* EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 67–105 (2013); Scott R. Bauries, *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, 18 GEO. MASON L. REV. 301, 316–19, 323, 353–55 (2011).

[3] "Adequacy" claims challenge a state's education system — usually its funding scheme — as violating the education clause of a state constitution. Richard Briffault, *Adding Adequacy to Equity*, *in* SCHOOL MONEY TRIALS 25, 26–27 (Martin R. West & Paul E. Peterson eds., 2007). Because the education litigation field continues to evolve, scholars have separated types of education suits into "waves." *Id.* at 25. Wave I (late 1960s–1973) consisted mostly of "equity" suits, brought under the federal Equal Protection Clause in federal courts; this wave ended in 1973 with *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). Briffault, *supra*, at 25. Wave II (1973–1989) also included equity claims, as "plaintiffs continued to focus on the interdistrict spending inequities resulting from the property tax–based system of school funding but [now] grounded their legal attack on . . . state constitutions." *Id.* Wave III (1989–present) began with a shift in litigation strategy from equity suits under state equal protection clauses to "adequacy" suits under state education clauses. *Id.* at 25–26. However, "equity" and "adequacy" claims often overlap. *See id.* at 26–27.

[4] *See* Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. 701, 746–55 (2010). A few state courts decline review entirely, *e.g.*, *Ex parte* James, 836 So. 2d 813, 818–19 (Ala. 2002), while others adjudicate merits without reaching remedies, *e.g.*, Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 484, 507–08 (Ark. 2002). But a substantial number reach both merits and remedies. *E.g.*, Montoy v. State, 112 P.3d 923, 930–31 (Kan. 2005).

[5] *See* Sonja Ralston Elder, Note, *Standing Up to Legislative Bullies: Separation of Powers, State Courts, and Educational Rights*, 57 DUKE L.J. 755, 778–80 (2007) (discussing litigation in New Jersey lasting more than thirty years).

[6] McCleary v. State, No. 84362-7 (Wash. Sept. 11, 2014) (order of contempt).

mandate in *McCleary v. State*[7] to fully fund the state's basic education program by 2018. Aggressive judicial intervention may impose complex costs, such as risking damaging the judiciary's relationship with the coordinate brances and causing short-term disruption to the education system. Yet aggressive interventions to vindicate positive education rights, such as the Washington Supreme Court's September 11 contempt order, may be worth the risk.

The saga of Washington's education funding debate stretches back at least four decades. *Seattle School District No. 1 v. State*,[8] an early challenge to Washington's practice of relying on fluctuating local coffers to fund its state education system, required the legislature to define the contours of "basic education" and provide for a stable revenue source to fund it.[9] While that litigation was pending, the legislature enacted the Basic Education Act of 1977,[10] which defined "basic education" and created a complex funding formula that entitled each school district to a certain amount of money, depending on factors such as student enrollment and staff salaries.[11] In the late 1980s and early 1990s, Washington attempted to increase the rigor of its basic education program but did not update its funding formula accordingly.[12] Beginning in 2005, the state performed a costing-out study — a comprehensive analysis designed to ascertain the actual costs to the state of providing all students with an adequate education — that revealed funding shortcomings, but the legislature still did not enact any significant reforms.[13]

The *McCleary* litigation began in 2007 when parents Mathew and Stephanie McCleary and Robert and Patty Venema[14] petitioned for a declaratory judgment that the State, by inadequately funding education, had failed to fulfill its duty under Article IX, section 1 of the Washington state constitution.[15] Following a bench trial, Judge Erlick

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[7] 269 P.3d 227 (Wash. 2012).

[8] 585 P.2d 71 (Wash. 1978).

[9] *Id.* at 76–77, 95–98.

[10] 1977 Wash. Sess. Laws 1606 (codified as amended in scattered sections of WASH. REV. CODE ch. 28A).

[11] *Id.* § 4, 1977 Wash. Sess. Laws at 1608–09 (codified as amended at WASH. REV. CODE § 28A.150.250 (2014)); *id.* § 5, 1977 Wash. Sess. Laws at 1609–11 (codified as amended at WASH. REV. CODE § 28A.150.260).

[12] *McCleary*, 269 P.3d at 234–36.

[13] *Id.* at 239–40.

[14] The Network for Excellence in Washington Schools (NEWS) was also a party to the suit. NEWS is a nonprofit corporation comprised of education organizations, school districts, and other community groups. Amended Petition for Declaratory Judgment Enforcing Our Constitution at 3, McCleary v. State, No. 07-2-02323-2 SEA, 2010 WL 9073395 (Wash. Super. Ct. Feb. 24, 2010), 2007 WL 6849502.

[15] *See id.* at 19–21; WASH. CONST. art. IX, § 1 ("It 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.").

rendered judgment for the plaintiffs and ordered the legislature to conduct a new cost study.[16] The case was then appealed to the state's highest court where, writing for the majority, Justice Stephens affirmed except as to the remedy.[17]

Turning its attention first to the nature and content of the education duty, the court affirmed two key principles from *Seattle School District No. 1*: first, that Article IX, section 1 "contemplates a sharing of powers and responsibilities among all three branches,"[18] which thus requires a cooperative approach among the branches to determine what constitutes a constitutionally adequate "education"; and second, that the judiciary's review of the legislature's efforts to fulfill its Article IX duty is structured through a positive rights framework, which asks not whether the legislature has foregone some prohibited action, but rather whether it "has done enough."[19] Recognizing the legislature's discretion to provide "specific substantive content to the word ['education']"[20] and also to design a system for delivering that education,[21] the court nonetheless made clear that it would closely scrutinize the state's efforts to deliver the "basic education program" it designed and that changes to the funding scheme must be based on legitimate policy rationales rather than reasons of "fiscal crisis or mere expediency."[22]

Having described the legislature's Article IX duty, the court held that the legislature had failed to adequately fund its basic education program. The court documented a lack of correlation between state funding formulas and the level of resources actually necessary to meet the education standards in place; massive budget shortfalls for teacher

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[16] *See McCleary*, 269 P.3d at 245. During the course of the litigation, the state legislature enacted two funding reform measures, Act of May 19, 2009, 2009 Wash. Sess. Laws 3331, which redefined the state basic education program and funding formula, and Act of Mar. 29, 2010, 2010 Wash. Sess. Laws 1860, which enacted the new formula. For an overview of Washington's school finance policies, see OFFICE OF SUPERINTENDENT OF PUB. INSTRUCTION, ORGANIZATION AND FINANCING OF WASHINGTON PUBLIC SCHOOLS (2013), http://www.k12.wa.us/safs/pub/org/13/Final%20Edition%202013.pdf [http://perma.cc/BD94-CUNP].

[17] *McCleary*, 269 P.3d at 261. Justices Charles Johnson, Chambers, Owens, Fairhurst, Wiggins, and Alexander joined in the opinion. Justice González did not participate.

[18] *Id.* at 246.

[19] *Id.* at 248. The court's analysis referred to the positive rights framework outlined by Professor Helen Hershkoff. *See id.* (citing Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1137 (1999)).

[20] *Id.* at 250 (alteration in original) (quoting Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 95 (Wash. 1978)) (internal quotation mark omitted).

[21] *Id.* at 251–52.

[22] *Id.* at 252. The court declined, however, to require more, noting that "[n]othing in Article IX, section 1 requires the State to guarantee educational outcomes," only the "'opportunity' for successful student achievement." *Id.* at 251.

salaries and classroom supplies; and overreliance on local levies to correct for these pervasive deficits.[23]

Turning to the "elusive" remedies question,[24] the court vacated the lower court's order for a cost study[25] but decided to retain jurisdiction to monitor the legislature's implementation of funding reforms.[26] Acknowledging the "delicate balancing of powers and responsibilities among coordinate branches of government,"[27] the court recalled lessons learned from past education clause challenges. In *Seattle School District No. 1*'s remedial phase, the court declined to grant the trial judge continuing jurisdiction to monitor implementation; the legislature failed to comply with the court's judgment; another round of litigation ensued; and ultimately, the trial judge did create and monitor an enforcement plan.[28] Gesturing toward that face-off, the court in *McCleary* refused to defer to the legislature's promise to fully fund reform legislation by 2018, stating: "This court cannot idly stand by as the legislature makes unfulfilled promises for reform."[29] Instead, the court ordered judicial monitoring of the reforms through the 2018 deadline.[30]

Soon after the judgment, the court began issuing orders to enforce and monitor compliance. A July 18, 2012, order required the legislature to submit periodic reports to the court showing "real and measurable progress toward achieving full compliance" with the 2012 judgment.[31] Finding insufficient progress by the year's end, the court issued a second order on December 20, 2012, requiring the State to submit a plan detailing each step toward the 2018 deadline.[32] On January 9, 2014, the court issued a third order, this one chastising the legislature for its failure to appropriate sufficient funds to make "mean-

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[23] *Id.* at 253–58.

[24] *Id.* at 258.

[25] *Id.* at 259. The court rejected the trial court's suggested remedy of ordering a cost study because "[o]rdering the legislature to do yet another cost study crosses the line from ensuring compliance with Article IX, section 1 into dictating the precise means by which the State must discharge its duty." *Id.*

[26] *Id.* at 261.

[27] *Id.* at 258.

[28] *Id.* at 258–59.

[29] *Id.* at 261.

[30] *Id.* Chief Justice Madsen filed an opinion concurring in part and dissenting in part. *Id.* at 262 (Madsen, C.J., concurring in part and dissenting in part). She was joined by Justice James Johnson.

[31] McCleary v. State, No. 84362-7, at 3 (Wash. July 18, 2012) (order).

[32] *McCleary*, No. 84362-7, at 2–3 (Dec. 20, 2012) (order). Justice James Johnson dissented from the order on separation of powers grounds, arguing that the legislature should not have the "court's orders held to its head," *McCleary*, No. 84362-7, at 3 (Dec. 20, 2012) (dissent to order), and should be allowed to exercise its "comparative advantage at identifying policy goals and implementing them," *id.* at 4. In his view, the court should not assess the merits of the legislature's benchmarks or the contents of its planned reforms. *Id.* at 7–8.

ingful" progress toward the 2018 deadline, and insisting that the State "demonstrate, through immediate, concrete action, that it is making real and measurable progress, not simply promises."[33] The legislature failed to comply with the January 9, 2014, order by failing to establish timelines for a plan to fund basic education by the 2017–2018 school year, and in June 2014, the court required the State to appear and show cause why it should not be held in contempt.[34]

Following a hearing, Chief Justice Madsen issued a unanimous order holding the legislature in contempt on September 11, 2014.[35] Chief Justice Madsen admonished: "These orders are not advisory or designed only to get the legislature's 'attention'; the court expects them to be obeyed even though they are directed to a coordinate branch of government. When the orders are not followed, contempt is the lawful and proper means of enforcement . . . ."[36] But the court withheld immediate sanctions, stating that, "[i]n the interest of comity and continuing dialogue between the branches of government," it would accept the State's assurance of compliance by the end of the 2015 legislative session.[37] However, warned the court, if the legislature did not comply by the end of the 2015 session, sanctions or other remedial measures would issue.[38]

Courts that aggressively intervene when state legislatures deny students a constitutionally guaranteed adequate education clearly impose costs on the political process. Yet the court's September 11 contempt order may end up proving to be worth the risk. Particularly in states that subscribe to Washington's principles of judicial-legislative cooperation, courts should not shy away from closely monitoring a legislature's efforts to guarantee positive education rights, and should be willing to use such tactics as contempt orders.

The Washington Supreme Court has long recognized the power to work cooperatively with the legislature in vindicating the constitutional right to education.[39] *McCleary* made clear that the judicial role in that project is twofold: first, the court draws a baseline to ensure that the legislature has "done enough" to fulfill its constitutional duty; and

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[33] *McCleary*, No. 84362-7, at 8 (Jan. 9, 2014) (order). Justice James Johnson again dissented, raising separation of powers concerns similar to those he had raised in his December 20, 2012, dissent. *See McCleary*, No. 84362-7 (Jan. 9, 2014) (dissent to order).

[34] *McCleary*, No. 84362-7 (June 12, 2014) (order to show cause).

[35] *McCleary*, No. 84362-7 (Sept. 11, 2014) (order of contempt) ("[C]ontempt is the means by which a court enforces compliance with its lawful orders when they are not followed." *Id.* at 3.). For a history of the contempt power, see Ronald Goldfarb, *The History of the Contempt Power*, 1961 WASH. U. L.Q. 1.

[36] *McCleary*, No. 84362-7, at 3 (Sept. 11, 2014) (order of contempt).

[37] *Id.* at 4.

[38] *Id.*

[39] *See, e.g.*, Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 86–87 (Wash. 1978).

second, once the legislature has defined the specifics of its duty through education policies, the court enforces the legislature's self-drawn standards. The court's approach thus stands as a modest judicial principle: a legislature must keep its promises regarding constitutional duties. This judicial posture toward legislative discretion is unlike the federal separation of powers scheme, in which constitutional grants of legislative or executive discretion weigh heavily if not absolutely in favor of judicial forbearance.[40] For Washington's education clause jurisprudence, the opposite is true. Standing "idly by" even at the remedy stage would "abdicate the court's own duty."[41] Accordingly, each "unfulfilled promise" by the legislature in the *McCleary* litigation[42] prompted further mistrust from its Article IX partner, and thus appropriately triggered increasingly aggressive judicial enforcement.

This cooperative approach is particularly effective in that it respects and draws on the institutional competencies of the respective branches in actualizing the right to education. For instance, it is not clear that the judiciary has the expertise or ability to get into the details of complex education funding issues. Scholars have argued that "courts are ill-equipped to solve . . . 'polycentric problems'" — problems that cannot be resolved without "solving, or at least taking into account, multiple interrelated problems at the same time."[43] Budgets are one example of polycentric problems because an increase in education spending means a cut somewhere else. And in Washington — which in 2012 spent forty-four percent of its near-general fund on education, more than on any other category of spending — this problem is palpable, and the court has no technical resources to assess particular tradeoffs.[44] To put the point differently, as Justice James Johnson pointed out in his dissent to the January 9, 2014, order, the court "simply do[es] not have enough information to know whether the legis-

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[40] *Cf.* Nixon v. United States, 506 U.S. 224, 232 (1993) (affirming dismissal for lack of justiciability after finding the Constitution conferred upon Congress "unreviewable" authority to interpret the Impeachment Clause); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 166 (1803) (asserting that the judiciary has "no power to control [Executive] discretion").

[41] *McCleary*, No. 84362-7, at 4 (Sept. 11, 2014) (order of contempt) (internal quotation mark omitted).

[42] *See id.* (quoting McCleary v. State, 269 P.3d 227, 261 (Wash. 2012)).

[43] Scott R. Bauries, *A Common Law Constitutionalism for the Right to Education*, 48 GA. L. REV. 949, 961 (2014) (quoting Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 371 (1978)). For a discussion of various national constitutional approaches to judicial review of polycentric problems, see Helen Hershkoff & Stephen Loffredo, *Tough Times and Weak Review: The 2008 Economic Meltdown and Enforcement of Socio-Economic Rights in U.S. State Courts*, *in* ECONOMIC AND SOCIAL RIGHTS AFTER THE GLOBAL FINANCIAL CRISIS 234, 240–43 (Aoife Nolan ed., 2014).

[44] *See* SENATE WAYS & MEANS COMM., A CITIZEN'S GUIDE TO WASHINGTON STATE K-12 FINANCE 13 (2012), http://leg.wa.gov/Senate/Committees/WM/Documents/K12%20Guide%202012%20FINAL5.pdf [http://perma.cc/G8L2-TAZD].

lature's outlined progress is adequate," as "[t]he workings of a state involve many interconnected parts," and it is "unhelpful to view one piece in isolation, when other state matters have evolved."[45] Recognizing its relative lack of expertise, the court has refrained from mandating particular expenditures and even held back from dictating another cost study in issuing its 2012 *McCleary* ruling for the very reason that doing so "crosses the line from ensuring compliance with Article IX, section 1 into dictating the precise means by which the State must discharge its duty."[46] Thus the court's cooperative approach does not attempt to act legislatively, but rather allocates duties according to institutional ability with the intent of "foster[ing] cooperation."[47]

But contempt is a powerful move that lies properly within the court's competencies. Contempt orders aim to "compensate injured parties, coerce reluctant defendants and witnesses, and punish defiant individuals" with sanctions, such as fines or imprisonment.[48] Washington has historically recognized a robust contempt power.[49] Yet while at least a few states have issued contempt orders against state officials, or have recognized the power to do so,[50] the state of Washington had never extended the contempt power against legislators.[51] Lacking contempt-power precedent suggesting that this move was clearly within the court's competence, or likely to be successful in achieving compliance, the court relied on practical, policy-based arguments, pinning its reasoning to the imminent crisis of underfunding education in juxtaposition to the ongoing refusal of the legislative branch to enact reforms. In other words, the court eschewed a discussion of the appropriateness of contempt to the education context in favor of a discussion about the importance of holding the legislature to its promises by any and all means.

And certainly, this bold new move risks defiance or apathy from the legislature. In the federal context, the paradigmatic example of the predicament courts face when state actors disobey court orders is what

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[45] *See McCleary*, No. 84362-7, at 4 (Jan. 9, 2014) (dissent to order).

[46] *McCleary*, 269 P.3d at 259.

[47] *McCleary*, No. 84362-7, at 2 (Dec. 20, 2012) (order).

[48] Margit Livingston, *Disobedience and Contempt*, 75 WASH. L. REV. 345, 345 (2000).

[49] *See* WASH. REV. CODE § 7.21.020 (2014) ("A judge or commissioner of the supreme court, the court of appeals, or the superior court . . . may impose a sanction of contempt of court under this chapter."); Moreman v. Butcher, 891 P.2d 725, 729 (Wash. 1995) ("Washington policy has long been that courts have the authority to coerce compliance with lawful court decisions and process by imposition of appropriate sanctions."); Keller v. Keller, 323 P.2d 231, 235 (Wash. 1958) (recognizing the court's "inherent" contempt power as "*at least equal to* [its] statutory contempt powers").

[50] *See, e.g.*, James Drew, *Contempt-of-Court Threat Hangs over School-Funding Case*, THE BLADE (Toledo), June 10, 2001, http://www.toledoblade.com/State/2001/06/10/Contempt-of-court-threat-hangs-over-school-funding-case.html [http://perma.cc/ZU8T-697K].

[51] State of Washington's Reply at 14–15, *McCleary*, 269 P.3d 227 (No. 84362-7).

happened in the wake of *Brown v. Board of Education*.[52] Facing a decade of Southern resistance to the U.S. Supreme Court's mandate to desegregate all public schools, district courts were forced to create increasingly complex structural injunctions to rein in recalcitrant state actors.[53] The stakes in such protracted interbranch face-offs are high: a court risks that its "own legitimacy [will] be impaired if it issue[s] an order that no one respect[s]."[54]

If Washington's legislature were so to call the state supreme court's bluff, it would push the court ever closer to imposing costly sanctions. The court has made clear that it will take some such measures if need be.[55] However, the experiences of other state courts that have issued stronger threats and sanctions in response to legislative resistance suggest that even if Washington is able to obtain compliance, the costs may be heavy. For example, in efforts to enforce compliance with its 1996 order in *Roosevelt Elementary School District No. 66 v. Bishop*,[56] the Arizona Supreme Court found the state's education funding scheme insufficient and affirmed a lower-court order that would close all schools until the legislature equalized capital spending.[57] After the legislature acted to prevent the closure, again the court ruled the legislation insufficient, and set a sixty-day deadline for reform until the shutdown would occur.[58] Although Arizona avoided shutdown, it may have been able to do so only because it was an election year.[59] That so great an educational impact required such a unique confluence of political forces suggests that courts threatening legislatures with extreme sanctions may be playing a dangerous game of chicken. While these bold moves may have worked in particular budget cycles, such strong-

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[52] 347 U.S. 483 (1954).

[53] R. Shep Melnick, *Taking Remedies Seriously: Can Courts Control Public Schools?*, *in* FROM SCHOOLHOUSE TO COURTHOUSE 17, 25 (Joshua M. Dunn & Martin R. West eds., 2009) ("As tricks and evasions multiplied, so, too, did the length and intrusiveness of judicial orders.").

[54] MARTHA MINOW, IN *BROWN*'S WAKE 18 (2010).

[55] For examples of sanctions that the court might consider, see Plaintiff/Respondents' 2013 Post-Budget Filing at 45–46, *McCleary*, 269 P.3d 227 (No. 84362-7) (citing examples of remedies imposed in education litigation in other states). Remedial sanction options include:

> [I]mpos[ing] monetary or other contempt sanctions against the governmental body or elected officials; prohibit[ing] expenditures on certain *other* matters until the court's constitutional ruling is complied with; order[ing] the legislature to pass legislation to fund specific amounts or remedies; prohibit[ing] the State from limiting an education program to less than all eligible students in a given grade level; order[ing] the sale of State property to fund constitutional compliance; invalidat[ing] education funding cuts to the budget; and prohibit[ing] *any* funding of an unconstitutional education system.

Id. (footnotes omitted).

[56] 877 P.2d 806 (Ariz. 1994).

[57] John Dinan, *School Finance Litigation: The Third Wave Recedes*, *in* FROM SCHOOLHOUSE TO COURTHOUSE, *supra* note 53, at 96, 104.

[58] *Id.*

[59] *See* Timothy M. Hogan, *Arizona School Finance: A Primer on Strategy and Enforcement*, 83 NEB. L. REV. 869, 878 (2005).

arming not only damages the judiciary's relationship with its coordinate branches but also risks substantially damaging the educational opportunities of all the children of a state without certainty that reforms will create changes significant enough to outweigh such costs. In Kansas, for instance, a round of litigation in the mid-2000s resulted in the state supreme court threatening to shut down the public schools, to which the legislature eventually responded by enacting the court-ordered funding levels.[60] But the state is once again embroiled in litigation after a lower court's December 2014 ruling that current education funding levels violate the state constitution.[61]

But here it appears that legislative apathy toward the contempt order has not yet pushed the court to increase the pressure by imposing sanctions. And what's more, the political branches in Washington have so far evinced a willingness to work together cooperatively, suggesting that the contempt order is a useful prod. Legislators have signaled little opposition to the court's action,[62] and the Governor has accepted if not endorsed the court's decree.[63] What this means is that first, there is potential for compliance without serious opposition. And second, given the positive, albeit long and fraught, track record of judicial intervention in other states, there is a fair chance of ultimate success in forcing the legislature to enact reforms, which suggests that the Washington court may have made a wise choice.[64]

To be sure, only time will reveal whether the decision advances useful objectives, such as chastening lawmakers to act prior to the court's ultimate deadline and obviating a decades-long back-and-forth

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[60] Dinan, *supra* note 57, at 104.

[61] *See* Gannon v. State, No. 2010cv1569, slip op. at 110–11, 114–15 (Kan. Dist. Ct. Dec. 30, 2014); John Eligon, *School Cash Insufficient in Kansas, Court Finds*, N.Y. TIMES, Dec. 30, 2014, http://www.nytimes.com/2014/12/31/us/school-cash-insufficient-in-kansas-court-finds-.html.

[62] *See* Joseph O'Sullivan, *Supreme Court Finds Legislature in Contempt on Education Funding*, SEATTLE TIMES: POL. NORTHWEST (Sept. 11, 2014, 9:44 AM), http://blogs.seattletimes.com/politicsnorthwest/2014/09/11/supreme-court-finds-legislature-in-contempt-on-education-funding [http://perma.cc/YMN4-DKCL].

[63] *See* Austin Jenkins, *Inslee Scolds Legislature on School Funding but Cautions Court on Sanctions*, KPLU.ORG (Sept. 4, 2014), http://www.kplu.org/post/inslee-scolds-legislature-school-funding-cautions-court-sanctions [http://perma.cc/R6L7-39KR] (implying Governor Inslee's acceptance of court's anticipated contempt order but noting his caution against premature sanctions); Kyle Stokes, *Governor's Ed. Agenda Aims to Meet McCleary Sooner, Only Partially Funds Class Size Vote*, KPLU.ORG (Dec. 15, 2014), http://www.kplu.org/post/governors-ed-agenda-aims-meet-mccleary-sooner-only-partially-funds-class-size-vote [http://perma.cc/76LZ-J4PC].

[64] *See* Dinan, *supra* note 57, at 104 ("[O]verall, courts have been successful in compelling enactment of reform legislation even in the face of significant political opposition"). One scholar has argued that such courts merely provide "cover" to politicians who avoid the political costs of making tough budgetary decisions by claiming their hands are tied by the court. *See* Frederick M. Hess, *Adequacy Judgments and School Reform*, *in* SCHOOL MONEY TRIALS, *supra* note 3, at 159, 168.

like those seen between other states' legislatures and courts,[65] or whether instead it amounts to nothing more than a dangerous interbranch power play that harms the state's schoolchildren. The risk comes from the fact that schools are unlike other areas of government control, such as the criminal justice system, where courts have successfully used stronger enforcement measures to protect defendant rights, in that schools "do not rely on courts for accomplishing their daily tasks."[66] Judges in education cases are required then to "do more than offer plaintiffs a defensive shield; they must find a way to reach inside these organizations to change their policies, structures, and incentives."[67] Such judicial aggressiveness can be risky.

Ultimately, the Washington Supreme Court seems cognizant of these delicate concerns. At the same time, the court — having seen decades of litigation, legislative inaction, and poor student achievement — has expressly acknowledged that when adjudicating a positive constitutional right, judicial silence does violence to that right.[68] Where education is an affirmative right protected as a paramount duty by a legislature through a cooperative project with the judiciary, aggressive judicial intervention is not always overstepping. Rather, as here, intervention may be a legitimate strategic move — one with the aim of obtaining compliance not through judicial policymaking but through enforcing legislative promises.[69] Accordingly, states with similar principles of strong education rights and cooperative legislative-judicial oversight of the definition of the right to education should see Washington's move as likely worth its risks.

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[65] *See* Elder, *supra* note 5, at 777–81 (discussing Ohio's and New Jersey's decades-long battles over education funding adequacy).

[66] Melnick, *supra* note 53, at 20.

[67] *Id.*

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

[69] *See* Hershkoff & Loffredo, *supra* note 43 (describing the Washington Supreme Court's approach to education rights as recognizing the legislature as a "collaborative partner" in upholding an education right that is not "fixed or static," *id.* at 247, and arguing that the benefit of the court's approach is "inter-branch dialogue coupled with judicial enforcement[, which] serve[s] to protect and enhance programmatic content that the legislature ha[s] devised," *id.* at 249).