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# **MCCLEARY: POSITIVE RIGHTS, SEPARATION OF POWERS, AND TAXPAYER PROTECTIONS IN WASHINGTON’S STATE CONSTITUTION**

Kristen L. Fraser\*

## **INTRODUCTION**

When the delegates to Washington’s constitutional convention borrowed a clause from Florida’s 1868 Reconstruction constitution<sup>1</sup> to introduce Washington’s 1889 education article, they little could have guessed that the “paramount duty” would become the most expensive phrase in state fiscal history, committing future taxpayers to support state K-12 education obligations that likely exceed \$20 billion per fiscal biennium.<sup>2</sup> In the landmark *Seattle School District v. State*<sup>3</sup> case, the

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1. “It is the paramount duty of the State to make ample provision for the education of all the children residing within its borders, without distinction or preference.” FLA. CONST. of 1868 art. XII, § 1. Florida’s 1885 anti-Reconstruction constitution removed “paramount duty” and “ample” in favor of the less expansive “liberal maintenance.” FLA. CONST. OF 1885 art. XII, § 1.

2. In the 2015–2017 biennial budget, State Near-General Fund plus Opportunity Pathways (NGFS + Op Path) appropriations for K-12 education totaled \$18.156 billion. This equals 47.5% of the total appropriations of \$38.2 billion from these accounts. (The NGFS consists of the state General Fund (GFS) and the Education Legacy Trust Account, plus the Opportunity Pathways Account.) STATE OF WASHINGTON, LEGISLATIVE BUDGET NOTES: 2015–17 BIENNIUM & 2015 SUPPLEMENT 277 [hereinafter BUDGET NOTES], <http://leap.leg.wa.gov/leap/budget/lbns/2015LBN.pdf> [<https://perma.cc/UFG5-847J>]; see *infra* note 150 and accompanying text (describing nature of shortfall in state salary allocations). Estimates of the additional state funding necessary to address the shortfall in state salary allocations vary. Working from the assumption that ninety percent of actual average statewide district compensation payments to employees in the state-funded salary base is properly the state’s responsibility, the 2015 House budget chair published an estimate of an additional \$3.5 billion per biennium. Ross Hunter, *McCleary Phase II*, ROSS HUNTER (Aug. 24, 2015), <http://s485995026.onlinehome.us/2015/08/mccleary-phase-ii/> [<https://perma.cc/MW3A-MFLG>]. A bipartisan solution advocated by state senators in the 2015 legislative session also assumed a salary allocation funding gap of approximately that amount. Editorial, *Capital Gains Tax Is Best Plan to Fund Senate Bipartisan Plan on Education*, SEATTLE TIMES, Jun. 14, 2015, at A20. The *McCleary* plaintiffs suggest that the additional state funding required is \$10 billion per

Washington State Supreme Court first interpreted the “paramount duty” clause of the Washington State Constitution to create a corresponding “true” or “absolute” right on the part of the state’s school children to receive an amply funded education.<sup>4</sup> In his concurring opinion in *Seattle School District*, Justice Robert. F. Utter urged a conciliatory judicial response to the Legislature’s efforts, recommending that the Court respect the Legislature’s policy-setting processes by affirming the reforms the Legislature had enacted to respond to that lawsuit.<sup>5</sup>

In *McCleary v. State*,<sup>6</sup> the Washington State Supreme Court reaffirmed *Seattle School District*, and it initially appeared to consider Justice Utter’s earlier caution, offering deference to the Legislature’s endeavors by endorsing recently enacted legislation as a “promising reform package” which, “if fully funded,” would remedy school funding deficiencies.<sup>7</sup> But, in a crucial departure from *Seattle School District*, the *McCleary* Court retained jurisdiction to monitor legislative progress toward article IX implementation. Building on *McCleary*’s renewed and expanded positive rights jurisprudence, the Court’s subsequent enforcement actions have resulted in a confrontation<sup>8</sup> between the state’s legislative and judicial arms, a showdown in which the Court claims extraordinary authority to scrutinize the adequacy of the Legislature’s school funding decisions.<sup>9</sup>

In this two-branch game of “Chicken,”<sup>10</sup> the Court has thrice ordered

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biennium. Joseph O’Sullivan & Jim Brunner, *Court to State: Pay Up*, SEATTLE TIMES, Aug. 14, 2015, at A6.

3. *Seattle Sch. Dist. v. State*, 90 Wash. 2d 476, 585 P.2d 71 (1978).

4. *Id.* at 511–13, 585 n.13, 585 P.2d at 91–93; *see also* 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.” (emphasis added)).

5. *Seattle Sch. Dist.*, 90 Wash. 2d at 547–51, 585 P.2d at 109–19 (Utter, J., concurring).

6. *McCleary v. State*, 173 Wash. 2d 477, 269 P.3d 227 (2012).

7. *Id.* at 484, 269 P.3d at 231.

8. Such confrontations are discussed in Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991 (2007). In this definition of a “showdown,” a disagreement between branches over government ends with “ambiguous acquiescence,” a total or partial implicit concession by one branch to the views of another that creates a judicial or extra-judicial constitutional precedent. *Id.* at 997. As discussed *infra* Section II.C at notes 114–115 and accompanying text, the nearly thirty years between a 1983 superior court ruling and the initial *McCleary* ruling could be characterized as a period of such acquiescence.

9. *McCleary*, 173 Wash. 2d at 519, 268 P.3d at 249 (asking whether the state, through the Legislature, has “done enough”).

10. In game theory, Chicken provides each player with the highest payoff if it confronts while the other avoids, but mutual confrontation results in the worst outcome for both. Posner & Vermeule, *supra* note 8, at 1024.

the Legislature to provide the Court with a specific, multi-year plan for phasing in a constitutionally adequate system of school finance, and the Legislature, though it has substantially increased<sup>11</sup> school funding under the statutory plan endorsed by the Court in its original ruling, has thrice failed to provide the Court with a document dubbed a “plan.”<sup>12</sup> So far, the confrontation has escalated to an unprecedented<sup>13</sup> judicial declaration: the Legislature’s failure to legislate to the Court’s satisfaction puts the State in contempt of Court.<sup>14</sup> In August of 2015 the Court sanctioned the State for this contempt by imposing a fine of \$100,000 per day.<sup>15</sup> Looming ahead is the 2018 deadline, a due date designated by the Legislature for specific statutory reforms and by the Court for ultimate article IX compliance.

This Article is intended to bring a new institutional perspective to the state constitutional dialogue on positive rights—a viewpoint from an advocate for the branch that must enact the state’s policy and fiscal

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11. 2015 REPORT TO THE WASHINGTON STATE SUPREME COURT BY THE JOINT SELECT COMMITTEE ON ARTICLE IX LITIGATION 5–7 (July 27, 2015) [hereinafter 2015 REPORT], <http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/2015%20Report.pdf> [https://perma.cc/RBK7-9XJP] (2015–2017 state budget funding levels reflect a thirty-six percent increase since the 2012 order criticizing lack of progress).

12. Order of August 13, 2015, *McCleary*, 173 Wash. 2d 477, 269 P.3d 227, [http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/843627\\_081315McClearyorder.pdf](http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/843627_081315McClearyorder.pdf) [https://perma.cc/WN8K-6ZP7]; Order of Jan. 9, 2014, *McCleary*, 173 Wash. 2d 477, 269 P.3d 227, [http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/20140109\\_843627\\_McClearyOrder.pdf](http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/20140109_843627_McClearyOrder.pdf) [https://perma.cc/JK3V-ZN8E]; Order of June 12, 2014, *McCleary*, 173 Wash. 2d 477, 269 P.3d 227, [http://www.courts.wa.gov/content/publicUpload/supreme%20Court%20News/84362-7\\_McCleary\\_ShowCauseOrder\\_201406124.pdf](http://www.courts.wa.gov/content/publicUpload/supreme%20Court%20News/84362-7_McCleary_ShowCauseOrder_201406124.pdf) [https://perma.cc/4Y3G-RM2Z]; Order of Dec. 20, 2012, *McCleary*, 173 Wash. 2d 477, 269 P.3d 227, <http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/84362-7%20-%20McCleary.%20et%20al.%20v.%20State%2012-20-12%20order%20with%20dissent.pdf> [https://perma.cc/9XDA-2VX2].

13. The Court declared that “[w]e have no wish to be forced into . . . as some state high courts have done, holding the legislature in contempt of court.” Order of Jan. 9, 2014 at 8, *McCleary*, 173 Wash. 2d 477, 269 P.3d 227. According to the Attorney General, research uncovered no other case in which a state high court had held a state legislature in contempt. State of Washington’s Opening Brief Addressing Order to Show Cause at 10, *McCleary*, 173 Wash. 2d 477, 269 P.3d 227, [http://www.courts.wa.gov/content/publicUpload/supreme%20Court%20News/84362-7\\_McCleary\\_OpeningBrief\\_20140711.pdf](http://www.courts.wa.gov/content/publicUpload/supreme%20Court%20News/84362-7_McCleary_OpeningBrief_20140711.pdf) [https://perma.cc/K5VP-FGDM]; see also Kirk Johnson, *Governor Seeks New Taxes as a Court Order Looms*, N.Y. TIMES, Jan. 14, 2015, at A13 (noting that legal scholars could not remember another example of a state high court holding an equal branch of government in contempt); cf. *Spallone v. United States*, 493 U.S. 265, 279–80 (1990) (indicating that judicial enforcement of contempt sanctions directly upon a legislative body conflicts with legislators’ First Amendment rights as well as common-law legislative immunity).

14. Order of Sept. 11, 2014, *McCleary*, 173 Wash. 2d 477, 269 P.3d 227, <http://www.courts.wa.gov/content/PublicUpload/Supreme%20Court%20News/84362-7%20order%20-%209-11-2014.pdf> [https://perma.cc/M2XG-ML5M].

15. Order of Aug. 13, 2015, at 9–10, *McCleary*, 173 Wash. 2d 477, 269 P.3d 227.

responses to judicial interpretations of the constitution.<sup>16</sup> It will consider a specific aspect of the *McCleary* showdown:<sup>17</sup> positive rights enforcement. Judicial enforcement of positive constitutional rights qualitatively differs from other constitutional enforcement in its effect on legislative policy-setting and the public fisc, but the Court has not expressly declared any limitations on its authority to define the scope of positive rights. This Article concludes that fiscal limits in the so-called “disfavored constitution”<sup>18</sup> establish separation of powers principles that constrain the judiciary’s positive enforcement orders targeted at the political branches.

Part I of this Article summarizes two distinctive aspects of state constitutions. First, it discusses constitutional affirmative duty clauses and associated scholarship which argues that these duties create judicially enforceable positive rights. Second, it outlines fiscal restraints in the so-called “disfavored constitution.” Commentators label these obscure tax and expenditure restrictions “disfavored” not because they are any less a part of state constitutions, but because courts and scholars often deem them mere technicalities rather than statements of important constitutional norms.<sup>19</sup>

Next, Part II discusses development of Washington’s positive education right in the *Seattle School District* and *McCleary* rulings. Then Part III briefly identifies unique separation of powers risks that could arise from the *McCleary* Court’s enthusiastic embrace of positive rights theories. Given the apparent absence of jurisprudential limits, judicial enforcement of positive rights against the Legislature could create an unquenchable public fiscal obligation—an obligation beyond the control of legislators and the voters who elect them.

Part IV of this Article concludes that outer boundaries of judicial authority to enforce positive constitutional rights are already found

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16. Again, as previously noted, the author’s views are her own.

17. For additional background on *McCleary*, see Case Comment, *Education Law—Washington Supreme Court Holds Legislature in Contempt for Failing to Make Adequate Progress Toward Remedying Unconstitutional Education Funding Scheme*, 128 HARV. L. REV. 2048 (2015) (discussing *McCleary* developments through contempt order); Jessica R. Burns, Comment, *Public School Funding and McCleary v. State of Washington—A Violation of the Separation of Powers Doctrine or a Legitimate Exercise of Judicial Autonomy?*, 38 SEATTLE U.L. REV. 1437 (2014); Daniel C. Stallings, Comment, *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 (2010).

18. Richard Briffault, *The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 910 (2003).

19. *See id.*

within the constitutional text—in the “disfavored constitution.” Part IV argues that these fiscal controls are more than technical provisions—rather, they are part of the electoral bargain, declaring affirmative separation of powers principles designed to protect the people and their relationship with the government to which they delegated political power.<sup>20</sup> Under the constitutional terms of this delegation, only the people’s elected representatives have the authority to levy taxes<sup>21</sup> and to authorize the expenditure of the revenues thereby raised.<sup>22</sup> The disfavored constitution’s structural safeguards for the public fisc declare principles that stand on equal footing with other constitutional provisions. To the extent that Washington’s Constitution creates a positive education right, then these equally mandatory constitutional provisions counterbalance that right, requiring the Court to recognize textual restraints on judicial enforcement of positive rights.

## I. POSITIVE DUTIES AND “DISFAVORED” FISCAL RESTRAINTS ARE TWO DISTINCTIVE ASPECTS OF STATE CONSTITUTIONS

### A. *In State Constitutionalism, Textual Affirmative Duties Give Rise to Positive Rights Theories*

The renaissance in state constitutionalism that began in the 1970s embraced many interrelated concepts of state constitutional independence. Justice Brennan’s call to action in his influential 1977 article urged state courts to take a fresh, autonomous look at the way state constitutions could provide greater protections for civil liberties, ultimately resulting in the New Federalism movement.<sup>23</sup> In a similar

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20. “All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.” WASH. CONST. art. I, § 1.

21. “No tax shall be levied except in pursuance of law; and every law imposing a tax shall state distinctly the object of the same to which only it shall be applied.” WASH. CONST. art. VII, § 5.

22. “No moneys shall ever be paid out of the treasury of this state, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law . . . .” WASH. CONST. art. VIII, § 4. Under article VII, section 6, all state tax revenues must be deposited in the treasury. Ergo, state tax revenues may not be spent without an appropriation in law. *See* discussion *infra* Section IV.A.2.

23. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). *See generally* JAMES GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM 24–25, 36–45 (2005); G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 161–70 (1998); ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONALISM 113–33 (2009).

manner, after *San Antonio School District v. Rodriguez*<sup>24</sup> rejected higher-level scrutiny for state education rights under the federal Constitution's Equal Protection Clause,<sup>25</sup> school advocates turned to state constitutions' equal protection clauses to find stronger safeguards for educational equity, eventually persuading many state courts that the education articles of state constitutions established substantive, judicially enforceable duties to provide an adequately defined and funded education.<sup>26</sup> Finally, in a large body of academic commentary, scholars called for state court judges to emerge from the shadow of federal rationality review, recognize the inherent differences between state and federal judicial powers, and interpret state constitutions to provide "positive rights" to state taxpayer-funded services such as education, welfare, and health care.<sup>27</sup>

1. *Within the Distinctive Structure of State Constitutions, Constitutional Texts Contain Affirmative Duties*

In an important contrast to federal constitutional content and structure, state constitutions contain duty language that directs states to enact specified types of laws or provide particular services.

The federal Constitution does not confer a positive right to state government services.<sup>28</sup> Instead, the federal Constitution is a "charter of

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24. 411 U.S. 1 (1973).

25. *Id.*

26. See generally Julia A. Simon-Kerr & Robyn K. Sturm, *Justiciability and the Role of Courts in Adequacy Litigation*, 6 STAN. J.C.R. & C.L. 83, 90–95 (2010) (tracing history of "waves" in state constitutional school funding litigation).

27. E.g., Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990) (discussing the federal Constitution); 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 (1993); Helen Hershkoff, *Foreword: Positive Rights and the Evolution of State Constitutions*, 33 RUTGERS L.J. 799 (2002) [hereinafter Hershkoff, *Evolution*]; Helen Hershkoff, *Positive Rights and State Constitutions: The Limitations of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1133 n.9 (1999) (citing authorities) [hereinafter Hershkoff, *Positive Rights*]; Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001) [hereinafter Hershkoff, *Passive Virtues*]; Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 890 (1989); Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 73 ALB. L. REV. 1459 (2009). *Contra* Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857 (2001). Positive rights scholarship specific to education rights also heavily favors positive rights, with the counterarguments generally based in textualist or originalist approaches. Scott R. Bauries, *The Education Duty*, 47 WAKE FOREST L. REV. 705, 723–26 (2012) [hereinafter Bauries, *Education Duty*] (citing scholarship of Eastman and Dinan).

28. *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989) (noting that Fourteenth Amendment duties arise only where the state has first restrained an individual, which is

negative liberties”<sup>29</sup> or a “series of governmental ‘thou shalt nots,’”<sup>30</sup> intended to shield individuals against government conduct without obligating the government to provide any particular services or protections to individuals.<sup>31</sup> This characterization of the federal Bill of Rights as a charter *against* government is confirmed by doctrinal principles that limit federal courts’ ability to decide and enforce disputes that focus on government’s resource allocation decisions.<sup>32</sup>

In contrast, a state constitution may establish a different, more intimate relationship<sup>33</sup> between the government and its citizens. Structurally, state constitutions function as a limitation of the otherwise plenary power of state legislatures, whose law-making power is restricted only by the state and federal constitutions.<sup>34</sup> Unlike Congress, when enacting laws, state legislatures need not point to a textual *grant* of power to legislate on a particular topic. Instead, they may pass any law not constitutionally forbidden.

Even so, state constitutions frequently contain provisions authorizing, exhorting, or even directing state legislatures to adopt laws on particular topics.<sup>35</sup> Education duty clauses are found in all state constitutions,<sup>36</sup> and state constitutions may also direct state governments to provide other

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the liberty protected by the Due Process Clause); *San Antonio*, 411 U.S. 1 (holding education not a fundamental right under the Fourteenth Amendment). *See generally* Usman, *supra* note 27, at 1460–61.

29. *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1989).

30. Neuborne, *supra* note 27, at 890.

31. *E.g.*, *DeShaney*, 489 U.S. at 196 (noting the “Due Process Clauses generally confer no affirmative right to governmental aid”).

32. *See generally* Hershkoff, *Passive Virtues*, *supra* note 27, at 1876–83 (discussing the federal “case or controversy” requirement, political question doctrine, and other limitations).

33. *Cf.* Hershkoff, *Evolution*, *supra* note 27, at 802 (arguing for state constitutional amendments “to create right of social citizenship that contemplates broad reciprocal bonds between the state and the individual”).

34. *See* TARR, *supra* note 23, at 7–9; WILLIAMS, *supra* note 23, at 249–54. Within this structure, courts have nonetheless found inherent powers within the judicial branch. *See In re Salary of Juvenile Dir.*, 87 Wash. 2d 232, 245–46, 552 P.2d 163, 170–72 (1976) (listing “inherent” powers of judiciary); *see also* discussion of *Juvenile Director infra* notes 225–228 and accompanying text; WILLIAMS, *supra* note 23, at 296 (explaining that claims of inherent powers in the respective branches raise important but largely academic questions of political theory).

35. TARR, *supra* note 23, at 8–9; *see also* Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on Constitution-Making in the American West*, 25 RUTGERS L.J. 945, 967–71 (1994) (discussing “constitutional legislation” and the role of directory clauses); John Dinan, *The Meaning of State Constitutional Education Clauses: Evidence from the Constitutional Convention Debates*, 70 ALB. L. REV. 947 (2007) (classifying education clauses).

36. Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 311 n.5 (1991).



public services, such as support for their poor.<sup>37</sup> For example, Washington's Constitution contains not only an education duty, but also a directive to "foster and support" institutions for the mentally ill, developmentally disabled, and deaf, blind, or otherwise disabled youth.<sup>38</sup> Given the structure of state constitutions, affirmative "duty" language stands out, because directory provisions are "inherently contrary to the concept of a state constitution."<sup>39</sup> State governments exercise all governmental powers that remain after their constitutions' restraints, so it is "theoretically unnecessary to spell out such residual powers."<sup>40</sup>

If these types of constitutional provisions are structurally superfluous, then why might state constitutional drafters have included them? Some drafters may have viewed them as policy statements not amenable to judicial enforcement. Thomas Cooley, the godfather of late nineteenth century state constitutionalism, generally cautioned against viewing constitutional text as directory rather than mandatory, but he drew a qualitative difference between self-executing provisions and "moral" requirements addressed to the legislature.<sup>41</sup> He explained that no provision of a constitution is merely advisory, but some requirements are "incapable of compulsory enforcement."<sup>42</sup> Although their "purpose may be to establish rights or impose duties, they do not in and of themselves constitute a *sufficient rule* by means of which such right may be protected or such duty enforced."<sup>43</sup> For this reason, the provision may be mandatory to the legislature, but "back of it there lies no authority to

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37. *E.g.*, Usman, *supra* note 27, at 1465–76 (listing possible types of positive rights).

38. See Philip A. Talmadge, *The Myth of Property Absolutism and Modern Government: The Interaction of Police Power and Property Rights*, 75 WASH. L. REV. 857, 872–76 (2000) [hereinafter Talmadge, *Property Absolutism*] (listing constitutional duties of state government intended to regulate social and commercial interaction of state and citizens).

39. Fritz, *supra* note 35, at 970–71.

40. *Id.*

41. THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 93 (5th ed. 1883) (discussing mandatory versus directory); *id.* at 98–99 (noting where legislation is necessary to implement a constitutional duty, the "requirement has only a moral force"). The treatise written by Judge Cooley, one of the most influential constitutional authorities of his day, was well known to the Territorial Supreme Court and in all likelihood known to the delegates of the Washington constitutional convention. Territorial Justices John P. Hoyt and George Turner, who cited Cooley during their tenure on the court, later served as delegates to the convention, with Hoyt elected president. See *Harland v. Territory*, 3 Wash. Terr. 131, 145–46, 13 P. 453, 458 (1887) (citing COOLEY, *supra*); *Maynard v. Hill*, 2 Wash. Terr. 321, 326, 5 P. 717, 718 (1884) (citing COOLEY, *supra*); *Maynard v. Valentine*, 2 Wash. Terr. 3, 9, 3 P. 195, 196 (1880) ("Especially valuable we have found the observations of . . . Judge Cooley, in his work on Constitutional Limitations."). The author would like to thank Pam Loginsky for calling this history to her attention.

42. COOLEY, *supra* note 41, at 98.

43. *Id.* at 99 (emphasis added).

enforce the command.”<sup>44</sup>

Similarly, Theodore Stiles, a delegate to the Washington State constitutional convention and later a Washington State Supreme Court justice, opined a quarter-century after statehood that notwithstanding the mandatory character of each clause, some of the constitution’s promising provisions depend for operation upon action by the Legislature.<sup>45</sup> Professor John Dinan, in his study of education clause debates at state constitutional conventions, argues that these clauses include obligatory language, but they “were not drafted for the purpose of enabling judicial scrutiny of legislative judgments regarding school financing.”<sup>46</sup> Alternatively, constitutional drafters, including those in the nineteenth century West, might have intended to protect state legislation by affirming, particularly against *Lochner*-esque challenges, that the legislature had not only the power but an obligation to enact particular policies.<sup>47</sup>

## 2. *Scholars Argue That Textual Affirmative Duties Give Rise to Positive Constitutional Rights*

In a large body of scholarship, commentators argue that state constitutions include duty provisions for the express purpose of vesting judicially enforceable positive constitutional rights in individuals.<sup>48</sup> Just

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44. *Id.* at 99; see also Mark Tushnet, *Social Welfare Rights and Forms of Judicial Review*, 82 TEX. L. REV. 1895, 1909 (2004) (noting alternate institutional mechanisms exist by which rights may be enforced).

45. Theodore L. Stiles, *The Constitution of the State and Its Effects Upon Public Interests*, 4 WASH. HIST. Q. 281, 286 (1913). *Seattle School District v. State* used Stiles’ observation to confirm the Legislature’s education funding failings. 90 Wash. 2d 476, 511, 585 P.2d 71 90, 91 (1978).

46. Dinan, *supra* note 35, at 949; see also John C. Eastman, *When Did Education Become a Civil Right? An Assessment of State Constitutional Provisions for Education 1776–1900*, 42 AM. J. LEGAL HIST. 1 (1998) (describing originalist approach to education clause interpretation).

47. Fritz, *supra* note 35, at 970–71; see also TARR, *supra* note 23, at 8–9, (explaining that grants of power may lead to negative implications); *id.* at 148–150 (Progressive-era constitutional duty language); John Dinan, *Court-Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983, 993 (2007) (noting state constitutional amendments to address *Lochner*); Talmadge, *Property Absolutism*, *supra* note 38, at 872–76 (listing constitutional duties of state government intended to regulate social and commercial interaction of state and citizens). *But cf.* JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 123–30 (2006) (explaining that constitutional efforts to address *Lochner* took the form of efforts to limit judicial review).

48. See, e.g., Hershkoff, *Positive Rights*, *supra* note 27, at 1138; Usman, *supra* note 27, at 1464–76; see also *supra* note 26 (citing authorities); *cf.* TARR, *supra* note 23, at 147–50 (describing use of state constitutions to address positive rights and economic well-being). “While there is no apparent societal move toward recognizing positive constitutional rights, law reviews seem overwhelmingly in favor of such recognition.” Cross, *supra* note 27 at 859, 860 n.12 (citing Hershkoff, *Positive Rights*, *supra* note 27, at 1133 n.9). Needless to say, legal scholars are not in the business of

as the New Federalism movement encouraged state courts to step out from the shadow of the United States Supreme Court in interpreting civil liberties protections, positive rights advocates comprehensively argue that fundamental differences between state and federal constitutions justify judicial recognition and enforcement of positive state constitutional rights.<sup>49</sup>

To demonstrate that constitutional affirmative duties establish corresponding positive rights, theorists have cited the writings of legal philosopher Wesley Hohfeld.<sup>50</sup> Hohfeld is best known for developing an analytical framework to explain legal rights, a structure that characterizes “rights” based on different types of paired relationships.<sup>51</sup> In a Hohfeldian analysis, an affirmative duty to provide necessarily correlates to an affirmative right to receive—the Hohfeldian binary framework cannot conceive of a duty without such a corresponding right.<sup>52</sup> For that reason, positive rights scholarship argues that constitutional “duty” language must create corresponding positive rights.

What, then, is a positive constitutional right, and how does it differ from a “negative” right?

The distinction between positive and negative rights is an intuitive one: One category is a right to be free *from* government, while the other is a right to command government action. A positive right is a claim to something . . . while a negative right is a right that something not be done to one.<sup>53</sup>

Stated differently, “if there was no government in existence, would the right be automatically fulfilled?”<sup>54</sup> Admittedly, if there is no government, there are no “legal” rights, a status potentially characterized as “[s]tatelessness spells rightlessness.”<sup>55</sup> But the absence of a state

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balancing state budgets.

49. Hershkoff, *Positive Rights*, *supra* note 27, at 1170–91; *see also* Hershkoff, *Passive Virtues*, *supra* note 27 at 1888–90.

50. Scott R. Bauries, *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, 18 GEO. MASON L. REV. 301, 304–10 (2011) [hereinafter Bauries, *Conceptual Convergence*]; *see also* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30–31 (1913).

51. *See* Bauries, *Conceptual Convergence*, *supra* note 50, at 306–26 (summarizing Hohfeld’s rights in the context of school finance litigation).

52. *Id.* at 316 (“None of the other Hohfeldian relationships map cleanly on the right to receive an entitled action, service, or set of resources.”).

53. Cross, *supra* note 27, at 864. This definition is suggested by Professor Cross, a rare positive rights skeptic.

54. *Id.* at 866.

55. *Id.* (citing STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS* 19 (1999)).

means that one is by definition free from intrusive state action “done to one.”

Rights established by the federal Constitution are negative in nature. True, federal constitutional rights frequently require the state to provide publicly funded services to individuals<sup>56</sup>—services that could be characterized as “a claim to something.” For example, the federal Constitution requires states to provide counsel to the accused,<sup>57</sup> adequate facilities for prisoners,<sup>58</sup> and “minimally adequate care and treatment” for involuntarily confined persons such as those with mental illness.<sup>59</sup> However, federal constitutional rights are not truly positive rights, because the state’s constitutional duty is predicated on the initial state action “done to” the individual. If the state declines to undertake the initial state action, it may avoid the duty to provide the associated services.

In contrast, positive rights impose a qualitatively different type of duty on government: “Positive rights do not restrain government action: they require it.”<sup>60</sup> If a constitutional affirmative duty creates a corresponding positive right, such as education or subsistence, *only* the government can fulfill the right, and it *must* do so. Without regard to any legislation or state-initiated action, the mere presence within the state of an individual who possesses a positive constitutional right triggers a state duty to provide publicly funded services. Simply put, in positive rights advocacy such a right imposes an unavoidable duty on the state and its taxpayers to support the program as mandated and defined by the judicial interpretation of the constitution.

*B. The “Disfavored Constitution” Establishes Taxpayer Protections in the Form of Fiscal Restrictions on the State*

Just as positive duties are distinctive characteristics of state constitutions, so are fiscal restraints.<sup>61</sup> In another form of contrast to the federal Constitution, state constitutions consistently give extensive consideration to state and local taxing, spending, and borrowing. These public fiscal controls “seek to protect taxpayers by limiting the activities

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56. Tushnet, *supra* note 44, at 1896 (noting budget implications).

57. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

58. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

59. *Youngberg v. Romeo*, 457 U.S. 307, 319 (1982).

60. *McCleary v. State*, 173 Wash. 2d 477, 519 269 P.3d 227, 248 (2012) (citing Hershkoff, *Positive Rights*, *supra* note 27, at 1137).

61. Briffault, *supra* note 18, at 908.

and costs of government.”<sup>62</sup>

Commentators use the term “disfavored constitution”<sup>63</sup> to describe fiscal restrictions not because these provisions are any less a part of state constitutions, but because they are a distinctly un-sexy aspect of state constitutionalism, especially when compared to the civil liberties of the New Federalism or the state-funded services of positive rights scholarship. The disfavored constitution is of little interest to academics and advocates, and of far more interest to the practitioners who facilitate the day-to-day operations of state governments.

Further, fiscal limits are also disfavored by courts, which often read them as mere technical provisions rather than as statements of important constitutional norms.<sup>64</sup>

First, courts tend to treat fiscal limits not as issues of fundamental rights—like speech, religion, or privacy—or as matters fundamental to government structure—like separation of powers, bicameralism, or federalism—but rather as ordinary legislation. . . . Second, the state courts often appear quite sympathetic to the goals of the programs that would be curbed by the fiscal limits.<sup>65</sup>

As set forth in more detail at *infra* Section IV.A, by reserving taxing and spending authorities to the legislative branch, the fiscal restrictions of the disfavored constitution also operate as separation of powers requirements.

## II. THE BASIS FOR A POSITIVE RIGHT TO EDUCATION IN THE WASHINGTON STATE CONSTITUTION

The “paramount duty” clause of the Washington Constitution’s

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62. *Id.* at 908; *see also* TARR, *supra* note 23, at 21 (explaining that finance and taxation provisions are common features of state constitutions); WILLIAMS, *supra* note 23, at 28 (state constitutions contain long articles on taxation and finance, “two of the most important functions of any government”); *cf.* James Gray Pope, *An Approach to State Constitutional Interpretation*, 24 RUTGERS L.J. 985, 985 (1993) (state constitutional text “obsesses in excruciating detail over pecuniary matters”).

63. Briffault, *supra* note 18, at 910.

64. *Id.* at 910.

65. *Id.* at 939–41. Regarding the latter point, Briffault’s characterization of judicial sympathy applies specifically in the context of fiscal limits that attempt to restrict financial projects of the “modern activist state”—roads, convention centers, etc., and of the risks of *too much* judicial deference to the political branches, rather than not enough. But his point applies either way—whether potential infringement comes from the legislature or from the courts, fiscal restrictions in state constitutions are meaningful expressions of the relationship that the voters intended to have among themselves, their elected representatives, and the public fisc.

education article has resulted in two remarkable decisions from the Washington State Supreme Court. In *Seattle School District* and *McCleary*, the Court has twice ruled that article IX, section 1 imposes an affirmative duty on the State that creates its Hohfeldian “jural correlative”—a positive right on the part of the state’s children to have the State define and amply fund a program of basic education. *McCleary* took a further step by retaining jurisdiction over the case to monitor legislative implementation, culminating in an unprecedented contempt ruling against the State over the Legislature’s failure to legislate to the Court’s satisfaction.

A. *Washington’s Unique Education Clause Declares a “Paramount Duty”*

Affirmatively stated<sup>66</sup> education clauses are consistent features of state constitutions, appearing in the constitutional texts of all fifty states.<sup>67</sup> But article IX, section 1 of the Washington State Constitution contains singular terminology<sup>68</sup>: “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.”<sup>69</sup>

Washington’s Constitution is unique in declaring that “ample provision” for education is “*the* paramount duty of the state.”<sup>70</sup> In textual

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66. Bauries, *Education Duty*, *supra* note 27, at 719.

67. McUsic, *supra* note 36, at 311 n.5.

68. Recent constitutional amendments and new constitutions contain comparatively strong education language. See FLA. CONST. art. IX, § 1 (amended 2002) (“a paramount duty to make *adequate* provision” (emphasis added)); GA. CONST. art. VIII, § 1 (amended 1983) (“a primary obligation” to make *adequate* provision (emphasis added)); ILL. CONST. art. X, § 1 (amended 1970) (educational development a “fundamental goal”; state must provide a “high quality” education). None of these states finds a positive right to education. See *infra* note 76 (citing cases).

69. Washington’s historical record offers no insight into why the framers of our constitution included this extraordinary clause. The working draft constitution proposed to the delegates by W. Lair Hill recommended a “thorough and efficient” schools clause based on the 1870 constitution of Illinois. W. LAIR HILL, A CONSTITUTION ADAPTED TO THE COMING STATE 64 (1889) <http://lib.law.washington.edu/waconst/Sources/Hill%20Constitution.pdf> [<https://perma.cc/7D9R-HBFB>]; see JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, 1889, at v-vi (1999) [hereinafter JOURNAL] (mentioning the influence of Hill’s constitutional draft); ILL. CONST. of 1870 art. VIII, § 1. The “paramount duty” clause inspired no debate, and discussion of the educational article at the constitutional convention focused on the need to protect the federal educational endowment from mismanagement. JOURNAL, *supra*, at 276–78, 685–88. See generally L.K. Beale, Comment, *Charter Schools, Common Schools & the Washington State Constitution*, 72 WASH. L. REV. 535 (1997) (describing history of schools in Washington).

70. Compare WASH. CONST. art. IX, § 3 (emphasis added), with *supra* note 68 (providing other high-duty text examples).

analyses that rank the verbal intensity of states' education finance clauses, commentators classify Washington's text as a "silver bullet,"<sup>71</sup> or "high duty,"<sup>72</sup> and they place the Washington State Supreme Court as among "the most liberal leaning courts" on this issue.<sup>73</sup>

State constitutional education clauses have resulted in "waves" of litigation.<sup>74</sup> Notably, litigation outcomes in the various states do not necessarily correlate with the verbal strength of the respective constitutional texts.<sup>75</sup> Courts in states with "high duty" clauses have refused to find fundamental or otherwise judicially enforceable rights, while states with mild, generic language have experienced active judicial enforcement of education clauses.<sup>76</sup>

In Washington's education jurisprudence, however, an exceptional text receives an exceptional interpretation. *Seattle School District* is a "third wave" decision—one based on arguments that the constitutional language imposes a substantive standard for education quality and funding. *McCleary* is a "fourth wave" ruling—one in which advocates sought to re-litigate previous victories after perceived state regression.<sup>77</sup>

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71. William S. Koski, *Of Fuzzy Standards and Institutional Constraints: A Reexamination of the Jurisprudential History of Educational Finance Reform Litigation*, SANTA CLARA L. REV. 1185, 1245 (2003).

72. William E. Thro, *School Finance Reform, A New Approach to State Constitutional Analysis in School Finance Litigation*, 14 J.L. & POL. 525, 540 n.40 (1998); Dinan, *supra* note 35, at 929 n.13.

73. Amanda Marra, *State Constitutional Law—Thorough and Efficient Education—The Right to a Thorough and Efficient System of Education Trumps the Power of the Appropriations Clause in New Jersey*, 43 RUTGERS L.J. 771, 795 (2013). These "liberal" courts are more likely to be found in liberal states. 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, 716–17 [hereinafter Bauries, *Judicial Review*] (describing political factors associated with education litigation outcomes).

74. For discussion of the various waves, see generally Bauries, *Education Duty*, *supra* note 27, at 726–30; Simon-Kerr & Sturm, *supra* note 26, at 89–95.

75. Dinan, *supra* note 35, at 929–30 ("[D]isembodied parsing of constitutional terminology may be of limited or no value."); Bauries, *Judicial Review*, *supra* note 73, at 712–15 (surveying studies; no clear relation between constitutional language and outcome).

76. Thro, *supra* note 72, at 541; *see also supra* note 68 (providing constitutional texts); McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981) (holding textual "primary obligation" did not oblige the State to equalize opportunities between districts); Blasé v. State, 302 N.E.2d 46, 49 (Ill. 1973) (declaring that 1970 clause states a purpose or goal, not a legislative obligation). Arguably, it is harmful to state constitutionalism that so many state judicial rulings distill diverse education texts into a homogenized educational right. Scott R. Bauries, *A Common Law Constitutionalism for the Right to Education*, 48 GA. L. REV. 949, 988 (2014) [hereinafter Bauries, *Right to Education*]; Bauries, *Conceptual Convergence*, *supra* note 50, at 303–04.

77. *See generally* Simon-Kerr & Sturm, *supra* note 26, at 84–86 (discussing recent failed lawsuits, including first-impression and second-round adequacy cases, in 2005–2008).

Although these last-wave lawsuits have generally failed to persuade state high courts that judicial intervention is required or appropriate,<sup>78</sup> Washington, as always, is a special case. In both rulings, the Washington State Supreme Court used the power of judicial interpretation to find that Washington's unique text creates a positive right vested in the state's schoolchildren.

*B. Seattle School District: Article IX Creates a True, Absolute Right*

Although *McCleary's* 2012 positive rights ruling triggered an unprecedented confrontation between the state Legislature and judiciary, the holding did not spring forth fully armed from the Court's collective brow. On the contrary, *McCleary* is entirely rooted in its 1978 predecessor, *Seattle School District*, differing primarily in its express embrace of positive rights scholarship and then in its subsequent judicial enforcement.<sup>79</sup>

The landmark *Seattle School District* case held that the "paramount duty" clause of article IX, section 1 establishes a mandate on the State that requires, as a first priority, fully sufficient funds for a "general and uniform system of public schools."<sup>80</sup> This right is unique in the nation.<sup>81</sup> The Washington State Supreme Court was the first state high court to address educational adequacy in the absolute sense, and the *Seattle School District* opinion is "the most lengthy and comprehensive analysis of the question of state constitutional education rights found among all

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78. In most cases, these last-wave suits have failed to persuade state high courts that judicial intervention is required or appropriate. *Id.*, *supra* note 26, at 84–86 (citing cases from Massachusetts, Kentucky, New York, South Carolina, Arizona, Alaska, and Nebraska). More recent examples include *Dwyer v. State*, 357 P. 3d 185, 193 (Colo. 2015) (holding that state *cuts* to school funding did not violate constitutional education funding requirements), *Lobato v. State*, 304 P.3d 1132, 1137 (Colo. 2013) (holding that funding formulae were valid as "rationally related" to constitutional objective), and *Davis v. State*, 804 N.W.2d 618 (S.D. 2011) (rejecting claim due to failure of proof). *Contra* *Gannon v. State*, 319 P.3d 1196 (Kan. 2014) (still pending amidst multiple appeals and remands); *Abbott v. Burke*, 20 A.3d 1018 (N.J. 2011). *Abbott* is discussed in Marra, *supra* note 73.

79. For a discussion of the legal developments that culminated in the *Seattle School District* ruling, see Koski, *supra* note 71, at 1245–49. See also *Northshore Sch. Dist. v. Kinnear*, 84 Wash. 2d 685, 530 P.2d 178 (1974) (rejecting an earlier article IX challenge).

80. *Seattle Sch. Dist. v. State*, 90 Wash. 2d 476, 518, 585 P.2d 71 90, 95 (1978).

81. See Bauries, *Education Duty*, *supra* note 27, at 723–24 (noting only Washington has taken correlativity analysis this far); Bauries, *Right to Education*, *supra* note 76, at 999 n.224 (noting only the Washington State Supreme Court has ventured into Hohfeldian analysis). *But see* Bauries, *Education Duty*, *supra* note 27, 66at 737–39 (characterizing *Seattle School District* as finding legislative duty and not positive individual entitlement).



school finance cases.”<sup>82</sup>

In *Seattle School District*, the Court began by emphasizing the judicial branch’s primacy in constitutional interpretation, citing *Marbury v. Madison*’s<sup>83</sup> axiom that it “is emphatically the province and duty of the judicial department to say what the law is.”<sup>84</sup> Anticipating arguments that the constitution vests policy and fiscal powers in the democratically elected branches, making the matter a political question, the Court explained that once the Court determines that the dispute requires constitutional interpretation, there is no separation of powers issue, and “the matter is strictly one of judicial discretion.”<sup>85</sup>

Having resolved the primacy issue, the Washington State Supreme Court then turned its interpretive focus to the precise text of article IX, section 1. *Seattle School District* used the Court’s power of interpretation to transform a single word of constitutional text into an expansive, paragraphs-long meditation about the role of public education. The constitutional term “education” embraces far more than “mere reading, writing and arithmetic.” Instead, the Court declared that the State must prepare its children to participate in both the political and economic marketplaces—otherwise, the right to an amply funded education “would be hollow indeed.”<sup>86</sup>

Next, the Court considered the term “paramount.” The “framers declared only once in the entire document that a specified function was the State’s paramount duty,” and nothing shows that article IX, section 1 was a mere preamble<sup>87</sup> or otherwise had secondary status.<sup>88</sup> The Journal does not show any intent that the clause is a mere preamble because the Journal does not say *anything* about the paramount duty clause. The delegates’ reasons for borrowing the clause from the 1868 Florida

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82. Bauries, *Conceptual Convergence*, *supra* note 50, at 338–39.

83. 5 U.S. 137 (1803).

84. *Seattle Sch. Dist.*, 90 Wash. 2d at 496, 585 P.2d at 83 (quoting *United States v. Nixon*, 418 U.S. 683, 703 (1974) (quoting *Marbury*, 5 U.S. at 176)).

85. *Id.* at 504–05, 585 P.2d at 88 (quoting *Baker v. Carr*, 396 U.S. 186, 211 (1962)). In other words, in a separation of powers dispute involving the judicial branch, judicial interpretational authority means that the branch whose actions are alleged to breach separation of powers has the authority to decide whether its actions in fact have that effect.

86. *Id.* at 517–18, 585 P.2d at 94.

87. Notwithstanding the caption “preamble” on article IX, section 1, under article I, section 29, all provisions of the Washington Constitution are mandatory. *Id.* at 500, 585 P.2d at 85. The original constitution did not contain part or section headers, so nothing in its text designated article IX, section 1 as a preamble. *Id.* at 499, 585 P.2d at 85.

88. *Id.* at 510, 585 P.2d at 91.

Constitution are not stated in the Journal.<sup>89</sup> Further, by definition, only one function may be “paramount,” so it is not surprising that the framers used the term only once.

To conclude that article IX, section 1 created a “social, economic and educational duty as distinguished from a mere policy or moral obligation,” the *Seattle School District* Court again cited the observations of Theodore Stiles: “No other state has placed the common school on so high a pedestal.”<sup>90</sup> However, the Court did not analyze Stiles’ full statement, which optimistically expresses the view that federally granted state school lands would be sold to provide the Permanent Common School Fund with an irreducible endowment “of \$25,000,000, an endowment greater than that of any other educational system now existing.”<sup>91</sup> The delegates’ lofty goals for the Permanent Fund collapse when faced with modern K-12 funding demands: in the 2013–2015 biennium, revenue sources related to the endowment equal about one percent of total state K-12 operating appropriations.<sup>92</sup>

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89. JOURNAL, *supra* note 69, at 685–91 (discussing education article). Due to a shortfall in the congressional appropriation for the convention, the shorthand notes were never transcribed, so the Journal contains only an abstract of motions and votes. *Id.* at vi–vii.

90. *Seattle School District*, 90 Wash. 2d at 510–11, 585 P.2d at 90–91 (citing Stiles, *supra* note 45, at 284).

91. Stiles, *supra* note 45, at 284; *see* WASH. CONST. of 1889 art. IX, § 3. Stiles may have based his expectation of a generous school endowment on a belief that after statehood not only would the state sell the federally granted state-owned lands, but the federal government would also sell federally owned lands within the state. Per the Enabling Act, the state receives five percent of federal sale proceeds. *See* Donald J. Kochan, *Public Lands and the Federal Government’s Compact-Based “Duty to Dispose”: A Case Study of Utah’s H.B. 148—The Transfer of Public Lands Act*, 2013 BYU L. REV. 1133 (arguing framers of western state constitutions understood enabling legislation as federal government’s promise to sell federal lands after statehood).

92. A comparison of revenues related to the statehood-era land endowment and state expenditures for K-12 shows that the former is only about 1.1% of the latter. There are two main types of state revenues attributable to the federal land endowment: timber revenues from state school lands and interest earnings of the Permanent Common School Fund. WASH. CONST. art. IX § 3, *amended by* WASH. CONST. amend XLIII; *see also* WASH. REV. CODE § 28A.515 (2014 & Supp. 2015). Under Amendment 43, which was ratified in 1966, both types of revenue are deposited in the Common School Construction Fund (CSCF), from which they may be appropriated only for common school construction. The CSCF also receives rental and other earnings, which are likewise restricted. WASH. REV. CODE § 28A.515.320 (2014 & Supp. 2015). At statehood, only interest and rental earnings would have been available for appropriation to schools, because timber revenues were deposited in the principal of the Permanent Common School Fund (then designated the “Common School Fund”). WASH. CONST. of 1889 art. IX, § 3.

Even though the endowment-related revenues now may be used only for school construction and not school operations, a comparison of those revenues to state expenditures for school operations shows how modern school funding requirements vastly exceed the endowment revenues on which the delegates might have relied. (The present calculation is based on actual CSCF revenues and state NGFS + Op expenditures for the 2013–2015 biennium, because full revenue estimates for the 2015–2017 biennium are not published yet.) Specifically, in the 2013–

But most significantly, the *Seattle School District* Court considered the constitutional term “duty,” and it used the judiciary’s interpretational authority to turn the lead of *duty* into the gold of a true or absolute *right*. By imposing a paramount duty, the constitution simultaneously established that duty’s “jural correlative,” a corresponding paramount right on the part of the state’s children to have the State make ample provision for their education.<sup>93</sup>

In a lengthy and abstract footnote, the Court relied on Hohfeld to explain the theoretical basis of this “jural correlative” right.<sup>94</sup> The Court embraced Hohfeld’s distinction between “absolute” rights, which correspond only to an unavoidable duty, and other so-called rights, which are really liberties or immunities that may be impaired upon a judicially cognizable reason.<sup>95</sup> Most significantly, the Court explained that the right corresponding to the paramount duty clause is a “true ‘right’ (or absolute).”<sup>96</sup>

The Court’s theory-dense justification demonstrates an independent state constitutionalism struggling to emerge from the strictures of constitutional interpretation based on federal Fourteenth Amendment terminology.<sup>97</sup> The discussion repudiates the idea that state constitutional

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2015 fiscal biennium, the Permanent Common School Fund earned \$16.9 million in interest; this amount is deposited into the CSCF. *Estimated and Actual State Revenue Source Reports*, WASH. ST. REVENUE, <http://fiscal.wa.gov/Revenue.aspx> [<https://perma.cc/3ULM-RXDG>] (last visited Jan. 19, 2016) (select dropdown menu next to “Biennium” and select “2013-15 Biennium,” select dropdown menu next to “List” and select “Common School Construction Account,” select “View Report” to retrieve the data, click the plus sign next to “Public Schools,” click the plus sign next to “Special Appropriations” to open all the data). In 2013–2015, revenues to the CSCF from timber, rentals, and other sources totaled \$156.6 million. *Id.* Total CSCF revenues for 2013–2015 were thus \$173.4 million. *Id.* (the data at [fiscal.wa.gov](http://fiscal.wa.gov) treat debt service payable from the CSCF as a revenue reduction rather than an expenditure, so for purposes of this analysis the amount attributable to debt service payments is added back in as revenue. *Id.*) In contrast, the state’s total actual NGFS + Op expenditures for K-12 in the 2013–2015 biennium were \$15.3 billion. 2015 REPORT, *supra* note 11, at 7, 38–39. This means that that in 2013–2015, CSCF revenues equal 1.1% of state K-12 operating expenditures. In the 2015–2017 biennium, due to the significant increase in state K-12 spending, see *supra* note 11, this percentage is likely to be even smaller.

93. *Seattle Sch. Dist.*, 90 Wash.2d at 511–12, 585 P.2d at 91.

94. *Id.* at 513 n.13, 585 P.2d at 93 n.13 (citing WESLEY N. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* 47 (Walter W. Cook ed., 1964); see also Hohfeld, *supra* note 50, at 30–31.

95. *Seattle Sch. Dist.*, 90 Wash. 2d at 513 n.13, 585 P.2d at 93 n.13.

96. *Id.*

97. This reasoning represents an early version of Hershkoff’s rejection of the limits of rationality review. See Hershkoff, *Positive Rights*, *supra* note 27, at 1153–56. Much of this portion of *Seattle School District* is drawn from Justice Stafford’s dissent in the failed 1974 article IX case *Northshore School District v. Kinneer*, which expressly argued against borrowing federal rationality terminology and in favor of analysis based solely on the state constitution. 84 Wash. 2d 685, 752–56, 530 P.2d 178, 214–17 (1974) (Stafford, J., dissenting).

analysis should replicate the sliding federal scale, “sizing constitutional rights like eggs and governmental interests like olives, from medium to jumbo.”<sup>98</sup> In so doing, the Court correctly focused on the state text rather than importing federal rationality analysis.

But, having appropriately turned to the state text, the Court then failed to appropriately scrutinize its wording.<sup>99</sup> Rather than analyzing the meaning of the term “duty” in light of the constitutional text, structure, and history, the Court instead focused on “paramount,” borrowing Hohfeld’s abstractions to find a positive legal *right* in a text that declares only a *duty*. It is hard to say whether this is the result of too much judicial imagination, by assuming that Hohfeld’s analysis could be applied to state constitutional interpretation, or too little, by failing to recognize that there are more things in state constitutions than are dreamt of in Hohfeld’s binary philosophy.<sup>100</sup> The Court did not consider whether constitutional drafters may have intended to create affirmative state duties without creating corresponding Hohfeldian claim-rights.<sup>101</sup> Because Hohfeldian analysis assumes that “rights” are judicially enforceable, it obscures the possibility of other constitutional mechanisms (such as legislative action) to satisfy the affirmative duty.<sup>102</sup> Particularly when considered in light of Cooley’s cautions about duties that may be given meaning only by the Legislature,<sup>103</sup> only through the alchemy of judicial interpretation does the framers’ textual choice to establish a *duty*, even a paramount duty, create the “jural correlative” of a personal “absolute” right.

Having transmuted a duty into a right, the Court explained that it, not the Legislature, has the final word on interpreting the scope—and consequently the cost—of the right’s implementation. Again, the Court relied on *Marbury* and judicial primacy in constitutional

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98. Hans Linde, *State Constitutions Are Not Common Law: Comments on Gardner’s Failed Discourse*, 27 RUTGERS L.J. 927, 953 (1993).

99. Cf. *Malyon v. Pierce County*, 131 Wash. 2d 779, 799 n.31, 935 P.2d 1272, 1281 n.31 (1997) (“Appropriate constitutional analysis begins with the text and, for most purposes, should end there as well.”).

100. See Tushnet, *supra* note 44, at 1909 (noting constitutional rights may be enforced by non-judicial means). Hohfeld’s framework was developed for private law, but constitutional law does not necessarily involve the simple, dualistic relationship structure of common-law relations such as torts or contracts. Bauries, *Conceptual Convergence*, *supra* note 50, at 309.

101. Bauries, *Conceptual Convergence*, *supra* note 50, at 325 (concluding education duties may be read to create such rights, but the conclusion is not inevitable); see also Dinan, *supra* note 35, 939; Eastman, *supra* note 46 (discussing originalist approach to education clause interpretation).

102. Tushnet, *supra* note 44, at 1909.

103. See COOLEY, *supra* note 41; see also *infra* Section III.B.2 (discussing separation of powers risks of enforcing undefined provisions).

interpretation.<sup>104</sup> It conceded that the administrative and organizational details of the public schools fall within the Legislature's province under the "general and uniform" clause's express vesting of that authority in the legislative branch, but ultimately the Court, as arbiter of constitutional meaning, determines whether the Legislature has acted pursuant to the article IX, and whether it has done so constitutionally.<sup>105</sup>

Notwithstanding the breadth of the rights the majority had found in the constitutional text, the *Seattle School District* Court engaged in "remedial abstention,"<sup>106</sup> stopping short of ordering the Legislature to enact any particular scheme of funding legislation. The Court had "great faith" in the Legislature's ability to define and fund a program of basic education.<sup>107</sup> Not only did it give the State additional time to come into compliance, but it expressly declined to retain jurisdiction over the case, making this one of the few points on which the high Court overruled the well-regarded trial court decision. According to *Seattle School District*, retained jurisdiction was "inconsistent with the assumption that the legislature will comply with the judgment and its constitutional duties."<sup>108</sup>

Notably, Justice Utter declined to sign on to the full scope of the Court's rights analysis. Though he agreed with the majority that article IX, section 1 "guarantees a right of education to the state's children," he would have invalidated the system of local levy financing without going on to hold that the constitution mandates provision of a "specific 'basic education.'"<sup>109</sup> Turning the meaning of "education" into constitutional doctrine "deprives the people of this state of a continuing legislative and political dialogue on what constitutes a proper education."<sup>110</sup> Because the Legislature had acted "responsibly and exhaustively through its own uniquely constituted fact-finding and opinion-gathering processes," he urged restraint and a limited holding.<sup>111</sup>

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104. *Seattle Sch. Dist. v. State*, 90 Wash. 2d 476, 496–97, 502–07, 585 P.2d 71, 83–84, 86–89 (1978).

105. *Id.* at 518, 585 P.2d at 95.

106. Bauries, *Judicial Review*, *supra* note 73, at 724–25 (maintaining judicial legitimacy by adjudicating merits but avoiding injunctive remedial orders).

107. *Seattle Sch. Dist.*, 90 Wash. 2d at 537, 585 P.2d at 104.

108. *Id.* at 538, 585 P.2d at 105.

109. *Id.* at 546–47, 585 P.2d at 109 (Utter, J., concurring).

110. *Id.* at 547, 585 P.2d at 109.

111. *Id.* at 551, 585 P.2d at 112.

C. *McCleary: A Generation Later, the Positive Right Is Reaffirmed and Expanded*

Even before the *Seattle School District* Court ruled on appeal in 1978, the Legislature had responded to the January 1977 trial court ruling<sup>112</sup> with comprehensive school funding legislation.<sup>113</sup> This proof of constitutional good faith, together with the Washington State Supreme Court's refusal to oversee the legislative process, allowed the Legislature and the Court to reach a détente of “ambiguous acquiescence”<sup>114</sup> for the next thirty-plus years.<sup>115</sup> In the intervening period, the Legislature engaged in a large number of studies and enacted various education reforms,<sup>116</sup> and the Court ruled on challenges to specific aspects of school funding,<sup>117</sup> but in none of these cases was the Court required to re-analyze *Seattle School District's* “true” or “absolute” right to education.<sup>118</sup>

Filed on January 11, 2007, almost forty years to the day after the trial court ruling in *Seattle School District*, the *McCleary* suit asked the court to revisit the positive rights it had recognized in the earlier leading case.<sup>119</sup> As *McCleary* moved toward trial, the Legislature continued to study proposals for school funding reform through the 2007–2008 work of the Basic Education Finance Task Force. In 2009, before the

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112. *Seattle Sch. Dist. v. State*, No. 53950 (Thurston Cty. Super. Ct. Jan 14, 1977).

113. 1977 Wash. Sess. Laws 1606.

114. Posner & Vermeule, *supra* note 8, at 1017 (“[A]mbiguous acquiescence reflects a point midway between the extremes of showdown and acquiescence.”).

115. A short confrontation occurred in the recession of the early 1980s, in which legislative budget cuts resulted in subsequent legislative acquiescence to their prohibition in Judge Doran's 1983 ruling known as *Seattle School District II*. See *McCleary v. State*, 173 Wash. 2d 477, 489–90, 540–41, 269 P.3d 227, 234, 258–59 (2012) (discussing *Seattle School District II* facts and trial court ruling).

116. See *id.* at 490–501, 269 P.3d 234–41 (summarizing studies and legislation).

117. *Sch. Dist. Alliance v. State*, 170 Wash. 2d 599, 244 P.3d 1 (2010) (rejecting claim that special education funding formula violated constitution); *Fed. Way Sch. Dist. v. State*, 167 Wash. 2d 514, 219 P.3d 941 (2009) (holding variations in “minutiae” of funding formulas did not conflict with “general and uniform” requirement); *Brown v. State*, 155 Wash. 2d 254, 119 P.3d 341 (2005) (deciding reduction in funding on statutory grounds); *McGowan v. State*, 148 Wash. 2d 278, 293–94, 60 P.3d 67, 74–75 (2002) (invalidating declaration that salary increases for teachers outside the basic education program were part of the state's article IX obligation); *Tunstall v. State*, 141 Wash. 2d 201, 5 P.3d 691 (2000) (holding the State satisfied duty to provide education to youth in Department of Corrections facilities).

118. *Seattle Sch. Dist. v. State*, 90 Wash. 2d 476, 511–13, 513 n.13, 585 P.2d 71, 91–93, 92 n.13 (1978).

119. Petition for Declaratory Judgment, *McCleary v. State*, No. 07-2-02323-2 SEA (King Cty. Super. Ct. Jan. 11, 2007); see also *Seattle Sch. Dist. v. State*, No. 53950 (Thurston Cty. Super. Ct. Jan 14, 1977).

*McCleary* trial court's ruling, the Legislature enacted ESHB 2261, which among other reforms included a framework for substantial revision of the state's K-12 funding methodology.<sup>120</sup> The following year, in SHB 2776, the Legislature provided details for the new formula, revising foundational state allocations under a new "prototypical school" model and specifying a phase-in schedule for particular new enhancements to the funding formula, such as all-day kindergarten and class size reductions in grades K-3, with final implementation of these reforms due in 2018.<sup>121</sup> The new funding formulas took effect in 2011, during the depths of the Great Recession, and the 2011–2013 budget made only slight progress toward funding the new formula enhancements.<sup>122</sup> Going into the 2012 legislative session, the state fiscal condition was so dire that Governor Christine Gregoire's proposed supplemental budget recommended cutting four days from the 180-day state-funded school year.<sup>123</sup> On January 5, 2012, a month after the close of a special legislative session to enact further budget cuts and just days before the opening of the 2012 regular legislative session, the Washington State Supreme Court published its *McCleary* ruling.<sup>124</sup>

Written by Justice Stephens on behalf of a unanimous Court,<sup>125</sup> *McCleary* reaffirmed and expanded upon two key aspects of *Seattle School District*. First, the Court underscored its earlier ruling on the primacy of the judicial branch in constitutional interpretation. In a brief concession, the Court acknowledged Justice Utter's reminder that the Legislature's "uniquely constituted fact-finding and opinion gathering processes provide the best forum" for determining the particulars of education funding formulas.<sup>126</sup> For that reason, the Court declared it will not specify the details of staffing ratios, salaries, and similar costs, but it

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120. 2010 Wash. Sess. Laws 1860 (SHB 2776); 2009 Wash. Sess. Laws 3331 (ESHB 2261); see *infra* note 152 (explaining due dates in legislation).

121. 2010 Wash. Sess. Laws 1860.

122. See REPORT TO THE WASHINGTON STATE SUPREME COURT BY THE JOINT SELECT COMMITTEE ON ARTICLE IX LITIGATION 24–28 (2012) [hereinafter 2012 REPORT] (describing budget situation, state K-12 expenditures).

123. See *id.* at 29.

124. The decision was published on January 5th. *McCleary v. State*, 173 Wash. 2d 477, 269 P.3d 227 (2012). Regular sessions of the legislature begin on the second Monday in January. WASH. REV. CODE § 44.04.010 (2015).

125. Justices Madsen and James Johnson dissented on the decision to retain jurisdiction. *McCleary*, 173 Wash. 2d at 547–48, 269 P.3d at 262–63 (Madsen, J., dissenting in part) (arguing that lack of ascertainable standards, as well as deference to legislative function, weigh against retaining jurisdiction).

126. *McCleary*, 173 Wash. 2d at 517, 269 P.3d at 247 (majority opinion) (citing *Seattle Sch. Dist. v. State*, 90 Wash. 2d 476, 551, 585 P.2d at 71 (Utter, J., concurring)).

held the judiciary retains full authority to interpret the constitutional term “education” by providing broad guidelines and by testing legislative enactments against those judicially defined standards.<sup>127</sup>

The second aspect of *Seattle School District* on which *McCleary* elaborated is the “relationship between the State’s *obligation* to provide an education and the corresponding *right* of Washington children to receive an education.”<sup>128</sup> Expanding on *Seattle School District*’s Hohfeld footnote and citing to leading positive rights scholarship, Justice Stephens concluded that positive rights demand that the Court view the constitution in a qualitatively different light. The distinction between positive and negative constitutional rights is significant, she explained, because in a negative rights analysis, the judicial inquiry is whether the legislative or executive branches have overstepped constitutional restraints.<sup>129</sup> In contrast, “[p]ositive constitutional rights do not restrain government action: they require it.”<sup>130</sup> For this reason, when confronted with a positive rights claim, the Court must use a judicial test more stringent than a mere rational basis review: the Court asks whether the State has “done enough”—“whether the state action achieves or is reasonably likely to achieve the constitutionally prescribed end.”<sup>131</sup>

Applying this new higher standard, the Court invalidated the Legislature’s K-12 funding formulas. In rejecting the state’s former<sup>132</sup> funding scheme, *McCleary* explained that those formulas generated insufficient state funding, so the resulting state allocations failed to align with district costs of implementing the state’s program, thereby forcing school districts to depend on local levies to support the basic education program.<sup>133</sup> Reliance on levies to support the cost of the state’s program was a shortfall directly in conflict with *Seattle School District*’s prohibition on using levies for basic education.<sup>134</sup> Ultimately the Court concluded that “[s]ubstantial evidence confirms that the state’s funding system neither achieved nor was reasonably likely to achieve the

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127. *Id.* at 516–19, 269 P.3d at 246–48.

128. *Id.* at 518, 269 P.3d at 247 (emphasis in original).

129. *Id.* at 519, 269 P.3d at 248 (citations and internal quotations omitted).

130. *Id.*

131. *Id.*

132. Due to the timing of their enactment in 2009 and 2010 respectively, the funding reforms of ESHB 2261 and SHB 2776 were not squarely before the court, so the court invalidated the state’s *prior* funding formulas.

133. *McCleary*, 173 Wash. 2d at 532–39, 269 P.3d at 254–58.

134. *Id.* at 539, 269 P.3d at 258.



constitutionally prescribed ends under Article IX, section 1.”<sup>135</sup>

*D. Judicial Oversight in McCleary: Deference Followed by Demands*

In contrast to the *Seattle School District* Court, the *McCleary* Court chose to retain jurisdiction over the case. The Court declared that it had the “benefit of seeing the wheels turn” under the funding reforms of ESHB 2261.<sup>136</sup> But, given the scant progress toward implementation of these reforms in the 2011–2013 budget, the “court cannot idly stand by as the legislature makes unfulfilled promises for reform.”<sup>137</sup>

Notwithstanding the Court’s sweeping statements about positive rights and judicial primacy in constitutional interpretation, and notwithstanding the rather perfunctory nods toward the legislative role, the initial *McCleary* ruling contains a pattern of subtle deference to the legislative scheme.

First, in defining the education right, the Court established one safeguard against an unlimited state obligation by rejecting an individual right to a particular educational outcome. It is an “inescapable truth that certain factors critical to a student’s achievement are simply outside the state’s control.”<sup>138</sup> For that reason, article IX required the State to provide an opportunity to obtain the education described by the Court and in statute, but the positive right does not include a right to a guaranteed educational outcome.<sup>139</sup>

Next, the Court endorsed the Legislature’s enactment of ESHB 2261, indicating that its “promising reform package” would, “if fully funded, . . . remedy deficiencies in the K-12 funding system.”<sup>140</sup> In other words, the Court’s initially chosen remedy was implementation of the plan already adopted by the Legislature.<sup>141</sup> Similarly, the compliance

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135. *Id.*

136. *Id.* at 543, 269 P.3d at 260.

137. *Id.* at 543, 545, 269 P.3d at 260, 261.

138. *Id.* at 525, 269 P.3d at 251.

139. *Id.* at 525–26, 269 P.3d at 251; *see also* *Tunstall v. Bergeson*, 141 Wash. 2d 201, 236, 5 P.3d 691, 709–10 (2000) (Talmadge, J., concurring) (“Individual children, their parents, and local school districts each have standing to compel the Legislature to implement this constitutional mandate. But the courts cannot prescribe an individual right to a specific form of education.”). *Compare id.*, with *Bauries, Right to Education*, *supra* note 76, at 995–1006 (arguing for constitutional education right to develop through “common law” of individually adjudicated cases).

140. *McCleary*, 173 Wash. 2d at 484, 269 P.3d at 231; *see also id.* at 543–46, 269 P.3d at 260–61 (retaining jurisdiction to monitor implementation of ESHB 2261 reforms and article IX compliance generally).

141. *See Bauries, Judicial Review*, *supra* note 73, at 725–26 (discussing Thro’s proposal that courts should adopt education funding standards from coordinate branches where possible).

date the Court selected was 2018—the final implementation date indicated by the Legislature in ESHB 2261 and SHB 2776. However, nothing in the ruling expressly confined the article IX right to the program and services defined by the Legislature, leaving ample room for the Court to obligate the State to provide judicially defined services.

Despite these encouraging signs that the Court would monitor, rather than dictate, legislative implementation of the ESHB 2261 reforms, the Court quickly showed its impatience with the Legislature. In the summer of 2012, the Court agreed to exercise its oversight by receiving an annual progress report submitted by the State, and the Legislature established a joint select committee to communicate with the Court via these reports.<sup>142</sup> But, evidently expecting that a ruling handed down the week before a supplemental budget legislative session would trigger major institutional reforms in sixty days, the Court soon criticized legislative inaction.<sup>143</sup> As predicted by the original dissent, in December 2012 the Court directed that the Legislature enact or otherwise provide the Court with annual, interim benchmarks against which the Court could gauge legislative progress toward full implementation.<sup>144</sup> Even so, viewed in the most deferential light, the Court's first request for a "plan" expressed the Court's intent to respect the legislature's authority to establish guideposts for incremental implementation steps. In effect, the Court initially importuned the Legislature to provide the judicial branch with benchmarks so that the Court would not have to invent them or derive them from other sources.<sup>145</sup>

In January 2014, notwithstanding the 2013–2015 biennial budget's investment of nearly \$1 billion in new state K-12 funding, the Court issued another order that not only called for an annual plan but also appeared to broaden the supervisory scope.<sup>146</sup> In the 2014 supplemental

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142. Order of July 18, 2012, *McCleary*, 173 Wash. 2d 477, 269 P.3d 227, <http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/mcclearyOrder.pdf> [<https://perma.cc/222L-AV8Q>]; H. Con. Res. 4410, 62d Leg., Reg. Sess. (Wash. 2012). The order also permitted the plaintiffs to respond to the state's report.

143. See Order of Dec. 20, 2012, *McCleary*, 173 Wash. 2d 477, 269 P.3d 227.

144. See *id.* Justice James Johnson dissented from the order. Dissent to Order of Dec. 20, 2012, *McCleary*, 173 Wash. 2d 477, 269 P.3d 227 (Johnson, J., dissenting). Compare *id.*, with *McCleary*, 173 Wash. 2d at 547–50, 269 P.3d at 262–63 (Madsen, J., dissenting in part) (stating supervision will be unhelpful or obstructive without benchmarks).

145. Cf. Order of Jan. 9, 2014 at 5, 9, *McCleary*, 173 Wash. 2d 477, 269 P.3d 227 (looking to executive budget requests and other proposals not enacted by the Legislature to gauge progress).

146. *Id.* at 5. Compare *id.* at 6 (objecting to suspension of school employee-cost-of-living adjustments, court declares that "nothing could be more basic than adequate pay"), with *McGowan v. State*, 148 Wash. 2d 278, 293–94, 60 P.3d 67, 74–75 (2002) (noting such adjustments are not part of basic education).

budget, the Legislature enacted an additional \$58 million in K-12 formula funding, along with substantive policy implementation of basic education enhancements to graduation requirements and course credits, but it did not pass a “plan” as required by the Court.<sup>147</sup> In September of 2014, after this second failure, the Court ruled that the Legislature’s apparent inaction constituted contempt of Court, though it held sanctions in abeyance until after the close of the 2015 session.<sup>148</sup>

Given the contempt ruling, the legal and political stakes were high as the Legislature began its 2015 regular session. The 2015 session was the longest on record, entailing three special sessions that lasted well into July. Throughout the prolonged budget debates, the two chambers generally agreed on funding the phase-in steps of the statutory formula enhancements.<sup>149</sup> However, the bodies struggled to achieve consensus on a solution to the structural<sup>150</sup> compensation shortfall, in which insufficient state salary allocations cause school districts to supplement state salary funding with local levy revenue in violation of *Seattle School District*. Although the Legislature did not resolve this debate during the 2015 session, nor did it pass a “plan,” on the eve of the fiscal new year the chambers enacted a budget that provided \$1.3 billion in new state funding for K-12, a nineteen percent increase over the previous biennium and a thirty-six percent increase since the Court’s order of December 2012 decried the lack of progress.<sup>151</sup> This funding

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147. See 2014 REPORT TO THE WASHINGTON STATE SUPREME COURT BY THE JOINT SELECT COMMITTEE ON ARTICLE IX LITIGATION 15–24, 27 (describing formula and policy changes but acknowledging that the Legislature had not enacted an implementation “plan”).

148. See Order of Sept. 11, 2014, *McCleary*, 173 Wash. 2d 477, 269 P.3d 227.

149. Compare S.S.B. 6050, 64th Leg., 1st Spec. Sess. (Wash. 2016) (initial Senate 2015-17 operating budget proposal), with E.S.H.B. 1106, 64th Leg., Reg. Sess. (Wash. 2016) (initial House 2015–2017 operating budget proposal).

150. From a state perspective, the compensation problem identified by the court is structural (state salary allocations to districts are insufficient to hire and retain) rather than absolute (total salaries offered by districts are insufficient to do so). The state’s data indicate that the total salaries teachers actually receive (state allocations plus local supplements) provide market-rate compensation comparable to similar professions, such as certified public accountants. JOHN BOESENBERG ET AL., QUALITY EDUCATION COUNCIL, COMPENSATION TECHNICAL WORKING GROUP FINAL REPORT 111 (2012), <http://www.k12.wa.us/Compensation/CompTechWorkGroupReport/CompTechWorkGroup.pdf> [<https://perma.cc/Y6W8-K82G>] (market comparability studies of Dr. Lori Taylor). This means that the constitutional problem with salary funding is not market inadequacy of total salaries; it is that a portion of salaries for the state’s program is paid from school district taxpayers’ pockets (in the form of school district levies) rather than those of the state taxpayers. *Seattle School District* held, and *McCleary* confirmed, that the State may not cause school districts to rely on local levies to support the State’s program. *McCleary* 173 Wash. 2d at 537–39, 269 P.3d at 257–58.

151. 2015 REPORT, *supra* note 11, at 5–7 (describing state education spending increases but acknowledging that the Legislature had not enacted an implementation “plan”).

implemented the formula enhancements of SHB 2776 in compliance with the respective due dates enacted in that bill.<sup>152</sup>

Notwithstanding the Legislature's funding increases and compliance with its own statutory schedule, in August of 2015 the Court declared that the Legislature's actions failed to purge contempt, and as of this writing the Court has ordered sanctions against the State of \$100,000 per day until the Legislature provides the Court with a plan.<sup>153</sup> This order states that the plan must include not merely a list of reforms or a schedule for implementation, but apparently also must address the fiscal means—the State must “fully explain *how* it will achieve the required goals.”<sup>154</sup>

### III. JUDICIAL ENFORCEMENT OF POSITIVE RIGHTS POSES SEPARATION OF POWERS RISKS

The State's efforts to move toward full compliance with *McCleary* and article IX will involve complex fiscal analysis and legislative drafting, as well as difficult political compromise. On top of these near-term legislative challenges, the broader issue of judicially enforceable positive rights poses substantial difficulties in constitutional practice. This Part will briefly discuss the separation of powers risks of the apparently unbounded positive rights enforced in *McCleary*.

*McCleary* initially called for a dialogic approach, claiming that judicial oversight to monitor the legislative response would have “the benefit of fostering dialogue and cooperation between coordinate branches of state government in facilitating the constitutionally required reforms.”<sup>155</sup> A risk of dialogic enforcement, however, is that it fails to

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152. *Id.* at 3–4. All elements of SHB 2776's formula enhancements were fully implemented in the 2015–2017 biennial budget, except for one remaining increment of K-3 class size reduction, which must be implemented by the 2017–2018 school year. WASH. REV. CODE § 28A.150.260(4)(b) (2014 & Supp. 2015); 2015 REPORT, *supra* note 11, at 9. In 2014, the Legislature implemented ESHB 2261's changes to instructional hours (school year 2015–2016) and graduation credits (beginning with the class of 2019, i.e., school year 2015–2016). WASH. REV. CODE § 28A.150.220 (2014 & Supp. 2015). The Legislature has not specified a due date in statute for as-yet unquantified reforms to compensation and levies. *See* 2009 Wash. Sess. Laws 3331, 3332 (“The legislature intends that the redefined program of basic education and funding for the program be fully implemented by 2018.”); *id.* at 3331, 3369–71 (declaring intent to enhance salary allocations with no date specified); *id.* at 3331, 3356–57 (declaring intent to revise levies with no date specified); *see also* WASH. REV. CODE § 84.52.0531 (2014 & Supp. 2015) (causing current school levy lids to expire in 2018, creating a “cliff” by which Legislature must address levy reform).

153. Order of Aug. 13, 2015 at 8, *McCleary*, 173 Wash. 2d 477, 269 P.3d 227.

154. *Id.*

155. *McCleary*, 173 Wash. 2d at 546, 269 P.3d at 261.

account for the “the elephant in the room”—separation of powers in state constitutions.<sup>156</sup> Washington lacks an express textual separation of powers requirement, but nonetheless it has both a vigorous separation of powers doctrine<sup>157</sup> and express provisions that vest fiscal controls solely in the legislative branch.<sup>158</sup>

The *McCleary* Court acknowledged the separation of powers difficulties in a positive rights analysis, but easily resolved the dilemma in favor of the judicial branch. Positive rights “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,” but judicial primacy in constitutional interpretation trumps any counterarguments.<sup>159</sup>

Even so, because of the qualitatively different nature of positive constitutional rights, judicial enforcement of these rights in the form of orders to co-equal branches poses separation of powers risks not found in other forms of constitutional enforcement. First, the absence of state jurisdictional constraints on judicial actions creates the risk of the “perceived imperative to decide,” inviting the courts to intrude into policy decisions for which they are institutionally ill-suited. Second, if the court defines a constitutional term to include a particular constellation of affirmative services, the legislative branch is left without a check on that definition, impairing its ability to make policy and fiscal decisions for the state. Third, the dialogue of constitutional enforcement must not convert judicial primacy in constitutional interpretation to judicial supremacy in governing, lest it vitiate the Legislature’s status as a co-equal branch.

A. *Separation of Powers Risks Arise from the “Perceived Imperative to Decide”*

When reviewing a case that is rooted in both politics and the state

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156. Bauries, *Judicial Review*, *supra* note 73, at 739–40; *see id.* at 728–35 (questioning assumptions of positive rights scholars due to their “dismissive” belief that the separation of powers doctrine does not affect adjudication).

157. *See, e.g.*, *State v. Rice*, 174 Wash. 2d 885, 900–01, 279 P.3d 849 (2013) (citing recent cases); *Carrick v. Locke*, 125 Wash. 2d 129, 134 n.1, 882 P.2d 173, 177 n.1 (1994) (explaining that federal separation of powers doctrine does not control interpretation of state constitution); *In re Salary of Juvenile Dir.*, 87 Wash. 2d 232, 552 P.2d 163 (1978) (discussing history of doctrine).

158. *See infra* Section IV.A.

159. *McCleary*, 173 Wash. 2d at 520, 269 P.3d at 248. *Compare id.*, with *Seattle Sch. Dist. v. State*, 90 Wash. 2d 476, 512, 585 P.2d 71, 92 (1978) (explaining that article IX duty imposed on the state as a polity, not on any one of the three branches).

constitution, state court judges must confront the “perceived imperative to decide.”<sup>160</sup> This apparent mandate invites a judicial belief that all politico-legal disputes are amenable to a courthouse resolution—that a constitutional ruling can solve complex problems of public policy and resource allocation. Stated differently, if one’s only tool is a hammer, every problem looks like a nail.<sup>161</sup> As described by Phil Talmadge, who served both as a state senator and later as a Washington State Supreme Court justice, “[w]hat has emerged too often is a cowboy judiciary riding roughshod over separation of powers in its zeal to save every damsel in distress and right every wrong.”<sup>162</sup>

The perceived imperative to decide arises from the absence of jurisdictional limits on the authority of state courts. Principles of judicial restraint in state courts are jurisprudential rather than jurisdictional.<sup>163</sup> This means the political question doctrine and related theories of restraint are not a per se bar to judicial consideration of essentially political disputes such as legislative resource allocation decisions. For that reason, the court is not obligated to make a threshold jurisdictional determination of whether the constitution textually commits a matter to one of the other branches.<sup>164</sup> Positive rights advocates specifically argue that the absence of jurisdictional limits on state courts should embolden judges to enforce positive rights.<sup>165</sup>

Contributing to the perceived imperative to decide is the experience of state court judges in affirmatively making law as common-law jurists.<sup>166</sup> To the extent judges have a law-making role in adjudicating

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160. Philip A. Talmadge, *Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems*, 22 SEATTLE U.L. REV. 695, 710 (1999) [hereinafter Talmadge, *Limits of Power*].

161. ABRAHAM H. MASLOW, *THE PSYCHOLOGY OF SCIENCE* 15 (1966).

162. Talmadge, *Limits of Power*, *supra* note 160, at 695–96 (condemning judicial activism of both the left and the right).

163. Hershkoff, *Passive Virtues*, *supra* note 27, at 1833–75 (distinguishing state court justiciability from article III jurisdictional doctrines); Hershkoff, *Positive Rights*, *supra* note 27, at 1155–69 (distinguishing a state constitutional positive rights analysis from federal rationality review). Compare *id.*, with Talmadge, *Limits of Power*, *supra* note 160, at 708–11 (contrasting state and federal court doctrines of restraint).

164. Talmadge, *Limits of Power*, *supra* note 160, at 710. In contrast are cases involving the Washington State Supreme Court’s narrow original jurisdiction in mandamus. See, e.g., *Brown v. Owen*, 165 Wash. 2d 706, 718, 206 P.3d 310, 316 (2009) (no original jurisdiction in mandamus due to separation of powers concerns “similar to” the federal political question doctrine).

165. Hershkoff, *Positive Rights*, *supra* note 27, at 1156–67 (contrasting state court adjudication of positive rights with Article III political question doctrine).

166. Usman, *supra* note 27, at 1527–28. Compare *id.*, with Talmadge, *Limits of Power*, *supra* note 160, at 699 (describing the power of common law as individualized decision-making, given that legislatures cannot anticipate all factual circumstances).

common-law cases, they are comfortable testing out their theories against a background of court-made precedent.<sup>167</sup> This risk is reinforced by judges who are “doctrinally oriented toward the individualized, non-general decision-making that the common law offers.”<sup>168</sup> But state constitutions are not common law.<sup>169</sup> Constitutional interpretation is document-based, a fundamentally different task. It involves not only interpretation of individual words and sections, but the balancing of particular rights, duties, or terminology against the background of the entire constitutional text and structure. Moreover, constitutional interpretation of an affirmative duty applies not only to the facts of the case at bar, but throughout the entire state until reversed by a constitutional amendment or subsequent judicial decision.

Any skepticism about the court’s ability to solve persistent policy and political debates with constitutional rulings inevitably raises a question: having chosen to elevate education to a constitutional duty, are the voters not entitled to the benefit of their “constitutional bargain”?<sup>170</sup> In this view, the judiciary is not a participant in an inter-branch power struggle, but rather is the neutral arbiter of the people’s compact with the state.<sup>171</sup> The analogy of Odysseus and the sirens is sometimes used to characterize the nature of this compact<sup>172</sup>: when sailing past the sirens’ isle, Odysseus wishes to hear their song without succumbing to their fatal allure, so he directs his sailors to stop their ears with wax and bind him to the ship’s mast while ignoring any pleas he might make for release.<sup>173</sup> In other words, if a society feared that the siren song of

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167. As makers of common law, judges not only adjudicate but also create and abolish common-law causes of action. Compare *Wyman v. Wallace*, 94 Wash. 2d 99, 615 P.2d 452 (1980) (abolishing the common-law tort of alienation of affections), with *Ueland v. Pengo Hydra-Pull Corp.*, 103 Wash. 2d 131, 690 P.2d 190 (1984) (recognizing a new common cause of action for loss of parental consortium). Compare *id.*, with WASH. REV. CODE § 4.04.010 (2014 & Supp. 2015) (establishing common law as rule of decision to the extent that it is not inconsistent with the state constitution or statutes, or with the conditions of society in the state).

168. Talmadge, *Limits of Power*, *supra* note 160, at 695.

169. Linde, *supra* note 98, at 952 (“In the course of deciding the merits, some opinions ignore the essential difference between constitutional law and common law: A constitutional issue presupposes that someone else has made a law.”).

170. Usman, *supra* note 27, at 1517.

171. Whether the *McCleary* Court is acting as a mere neutral arbiter of the constitution is in the eye of the beholder. Certainly by using the threat of contempt and later contempt sanctions to compel not ultimate constitutional compliance but rather submission of the court-ordered “plan,” the Court has staked the dignity and credibility of the judicial branch on its ability to coerce the Legislature.

172. See Todd E. Pettys, *Popular Constitutionalism and Relaxing the Dead Hand: Can the People Be Trusted?*, 86 WASH. U.L. REV. 313, 324–27 (2008) (criticizing the Odysseus analogy).

173. HOMER, *THE ODYSSEY* 273 (Robert Fagles trans., 1996) (“[I]f you plead, commanding your

transitory legislative or voter majorities could result in failure to satisfy a core value expressed in the constitution, the voters could codify their “pre-commitments” in a higher level of law not subject to reinterpretation by a mere temporary political agreement.<sup>174</sup> In this scenario, of course, the judiciary ultimately determines the meaning of this pre-commitment. Or, as framed by the *McCleary* Court: “We cannot abdicate our judicial duty to interpret and construe” the constitution.<sup>175</sup>

This perceived imperative to define the constitution’s education rights in the form of a judicial ruling disregards other aspects of the voters’ electoral bargain in the constitutional text. The constitution expressly vests in the legislative and executive branches the responsibility for defining and operating the state’s education system.<sup>176</sup> As noted by Phil Talmadge, constitutionalizing K-12 funding and administration by placing it beyond the control of these democratically elected state officers leaves education under the control of a branch that is “ill-equipped to annex such a duty.”<sup>177</sup> More broadly, as discussed *infra* Section IV.A, the “disfavored” constitution establishes substantive separation of powers protections that vest state fiscal decisions solely in the legislature. Finally, whatever the merits the “Odysseus” approach might have for interpreting *restraints* on state government, judicial interpretation of constitutional terms in a positive rights context poses a different issue.

### B. *Positive Rights Pose Qualitatively Unique Separation of Powers Dilemmas*

A positive constitutional right is very different than other legal rights to state-funded services. From *Marbury* to *Seattle School District*, judicial primacy in interpreting constitutional text means that the court has the ultimate ability to define constitutional terms. This power has

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men to set you free, then they must lash you faster, rope on rope.”).

174. *Pettys*, *supra* note 172, at 324–27.

175. *McCleary v. State*, 173 Wash. 2d 477, 520, 169 P.3d 227, 246 (2012) (quoting *Seattle Sch. Dist. v. State*, 90 Wash. 2d 476, 506, 585 P.2d 71, 88 (1978)). *Compare id.*, with *Seattle Sch. Dist.*, 90 Wash. 2d at 512, 585 P.2d at 92 (explaining that duty is imposed on the State as a polity, not on any one of the three branches).

176. *McCleary*, 173 Wash. 2d at 516–17, 169 P.3d at 247; *see also* WASH. CONST. art. IX, § 2 (“The legislature shall provide for a general and uniform system of public schools.”); WASH. CONST. art. III, § 22 (“The superintendent of public instruction shall have supervision over all matters pertaining to public schools.”).

177. *Tunstall v. Bergeson*, 141 Wash. 2d 201, 237, 5 P.3d 691, 710 (2000) (Talmadge, J., concurring).



two consequences. First, when the court uses this primacy to define positive rights, it deprives the Legislature of its ability to make policy and fiscal choices about the constitutional subject. Second, it could hijack the legislative process, compelling the Legislature to legislate prospectively to the court's standards rather than testing enacted legislation against constitutional requirements.

1. *Positive Rights Interpretation Is Unlike Other Forms of Judicial Rights Adjudication*

In the course of state policy-setting, legislatures frequently create positive *statutory* rights to public programs and services, but the legislature retains the ability to revise or repeal its creations.<sup>178</sup> Once the legislature has enacted such a statute, the judiciary may order agencies to provide services to individuals as a matter of statutory entitlement,<sup>179</sup> but crucially—as a matter of separation of powers—the court will not order the legislature to make an appropriation for a statutory program.<sup>180</sup> It is a “legislative fact of life” that the legislature may create “laudable programs” but fail to fund them adequately: “the decision to create a program as well as whether and to what extent to fund it is strictly a legislative prerogative.”<sup>181</sup>

Likewise, when the courts enforce negative constitutional rights against the branch that allocates public resources, the legislature still retains a choice. The choice may be largely theoretical, but it still exists. For example, though it may be politically difficult to cut services to persons with mental illness, if the state does not want to fund costs the judiciary determines are needed to comply with Fourteenth Amendment standards, the state may change involuntary commitment statutes,

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178. Cross, *supra* note 27, at 861 (describing the notion of statutory positive rights as “utterly unexceptionable”); see also *Farm Bureau Fed’n v. Gregoire*, 162 Wash. 2d 284, 301–02, 174 P.3d 1142, 1150 (2007) (citing Kristen L. Fraser, *Method, Procedure, Means, and Manner: Washington’s Law of Law-Making*, 39 GONZ. L. REV. 447, 478 (2003–2004) (explaining plenary legislative power means that one legislature may amend the work of a prior legislature).

179. *Wash. State Coal. for the Homeless v. Dep’t of Soc. & Health Serv.*, 133 Wash. 2d 894, 923–95, 949 P.2d 1291, 1306–07 (1997). Compare *id.*, with Talmadge, *Limits of Power*, *supra* note 160, at 730 (criticizing *Homeless* as a “very troubling” ruling that puts court in the middle of a societal dispute about resource distribution).

180. *Pannell v. Thompson*, 91 Wash. 2d 591, 599, 589 P.2d 1235, 1240 (1979) (noting a possible exception if creation of a program is constitutionally required); see also Talmadge, *Limits of Power*, *supra* note 160, at 729–30 (discussing separation of powers basis for *Pannell* line of decisions).

181. *Pannell*, 91 Wash. 2d at 599, 589 P.2d at 1240; see also *Farm Bureau Fed’n*, 162 Wash. 2d at 301–02, 174 P.3d at 1150. Compare *id.*, with *McCleary*, 173 Wash. 2d at 526–27, 269 P.3d at 251–52 (declaring that court may interpret Article IX to limit legislature’s ability to reduce offerings in the basic education program).

reprioritize executive branch commitment efforts, or repeal its commitment statutes entirely.<sup>182</sup>

In contrast to statutory positive rights, and in contrast to “negative” constitutional rights, positive constitutional rights leverage the judicial branch’s interpretative power to compel the legislative branch to create and fund public programs as defined by the court. Where the court defines a positive right, the state has no choice<sup>183</sup>: the judicial branch has final say in defining the program.<sup>184</sup> Under this analytical regime, absent a constitutional amendment, the duty of the state—and its taxpayers—to fund that definition is absolute.

## 2. *Only the Legislature Can Provide Meaningful Definitions of Positive Rights*

From the single constitutional word “education,” the *Seattle School District* Court developed a multi-paragraph description of the constitutional education objective. But, this necessarily vague definition could not, on its own, translate into the multiplicity of complex formulae by which the Legislature allocates state K-12 funding to school districts based on districts’ and students’ needs.<sup>185</sup> As Cooley puts it, because the texts of constitutional affirmative duties in themselves do not provide a “sufficient rule” for determining the scope of right or duty, “supplemental legislation must be had.”<sup>186</sup>

The constitutional duty and its judicially created corresponding right lack meaning and coherence unless defined and rendered operative in statutory policies enacted by the people’s representatives. For this reason, the legislature has an intended constitutional role in defining how the state implements its duty.

The *Seattle School District* and *McCleary* Courts imposed judicial definitions of constitutional terms such as “education” and “ample,” but *Seattle School District* wholly deferred to legislation to implement and

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182. *But see infra* Section III.B.3 notes 197–199 and accompanying text (discussing how under the “foster and support” clause, the State may have a positive duty to operate mental health facilities).

183. *Cf.* Tushnet, *supra* note 44, at 1897 (describing democratic concern that positive rights enforcement requires courts to displace legislative judgments on a large scale).

184. *McCleary*, 173 Wash. 2d at 516, 269 P.3d at 246–47 (endorsing *Seattle School District*’s judicial definition of “education”); *id.* at 526–27, 269 P.3d 251–52 (holding that the legislature’s education definition is not set “in constitutional stone” but the Court may impose limits on future legislatures’ ability to amend statutory program of education).

185. *See* WASH. REV. CODE § 28A.150.220–.260 (2014 & Supp. 2015) (defining mandatory program offerings and establishing general apportionment formulas).

186. COOLEY, *supra* note 41, at 98–99.

give life to these terms, and *McCleary* initially did so, endorsing enacted legislative reforms. In the absence of a ruling that relates the judicial definition to legislative enactments, positive constitutional rights are unmoored from the statutes that are constitutionally and practically needed to implement them. When constitutional duties are stated so broadly as to be inchoate absent implementing legislation, they cannot be uprooted from their bases in the text of a foundational document to become free-floating judicial mandates on the taxpayer.

### 3. *Positive Rights Enforcement Risks Commandeering the Legislative Process*

Continued judicial oversight poses the risk that the judicial power of constitutional interpretation will be used to compel the Legislature to enact particular policy and appropriation laws. If the *McCleary* Court had confined its enforcement activities to overseeing incremental implementation of scheduled statutory reforms, retained jurisdiction would pose less of a risk to legislative policy-making. But the Court's orders have evolved from a request for interim benchmarks to insistence on a comprehensive plan to "fully comply with article IX" by achieving "full funding of all elements of basic education," whatever the Court believes that to mean.<sup>187</sup> Each order introduces a judicial demand for the Legislature to address a new aspect of K-12 funding, from cost-of-living adjustments<sup>188</sup> to capital construction<sup>189</sup> funding to, in one possible interpretation, new taxes.<sup>190</sup>

In the case of positive rights, where the judicial branch is asking in the abstract whether the state has "done enough" rather than "done too much,"<sup>191</sup> the court could use its interpretation of the constitutional text

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187. Order of Aug. 13, 2015 at 1, 8, *McCleary*, 173 Wash. 2d 477, 269 P.3d 227.

188. See *supra* note 146.

189. Order of Aug. 13, 2015 at 7, *McCleary*, 173 Wash. 2d 477, 269 P.3d 227. Although the trial court's order briefly declared that state facilities funding was inadequate, the 2012 *McCleary* ruling did not address the state's capital funding formulas, much less invalidate them the way it did the pre-ESHB 2261 operating formulas. *McCleary v. State*, No. 07-2-02323-2 SEA at 55 (King Cty. Super. Ct. Feb. 4, 2010). For school construction, the constitution prescribes a plan of shared responsibility between the State and school districts, which the State has implemented through the School Construction Assistance Program. See WASH. CONST. art. VII, § 1 (school district capital levies and construction bond levies); *id.* art. VIII, § 1(e) (state guarantee of school district debt); *id.* art. VIII, § 6 (school district debt limits for construction); *id.* art. IX, § 3 (Common School Construction Fund); WASH. REV. CODE § 28A.525.162-.166 (2014 & Supp. 2015).

190. Order of Aug. 13, 2015 at 8, *McCleary*, 173 Wash. 2d 477, 269 P.3d 227 (requiring the State to explain "not only what it expects to achieve . . . but to fully explain *how* it will achieve the required goals" (emphasis in original)).

191. *McCleary*, 173 Wash. 2d, at 518-19, 269 P.3d at 248 (citing Hershkoff, *Positive Rights*,

to order the state and its taxpayers to create and pay for a variety of programs. Bypassing the legislative process of policy-setting and resource allocation, judicial enforcement of the education right could remove a large portion of the budget from legislative control. As Phil Talmadge cautions, the Court must avoid characterizing education rights as “absolute,” because doing so arrogates to the judiciary total responsibility for operating the state’s education system.<sup>192</sup>

In education litigation in other states, concern about the judiciary’s ability to turn constitutional text into workable funding standards has either changed liability decisions or stayed enforcement.<sup>193</sup> In particular, second-generation cases such as *McCleary* pose enforcement challenges for courts that have already found strong positive rights.<sup>194</sup> In second-round cases, the court confronts not legislative abdication, but instead an active legislative branch with its own evolving vision of adequacy, so the court must parse the adequacy of a comprehensive legislative response rather than direct the legislature to fill a statutory vacuum. As school conditions and the elusive constitutional standard converge, breach becomes more difficult to establish.<sup>195</sup> Further, some scholars express doubt that funding alone can change schools, “contending that the solution lies not in more money, but in measures such as increased accountability, better management, and the flexibility to fire failing teachers.”<sup>196</sup> If the court ventures further into education litigation, it could be asked to impose these types of standards by judicial fiat.

Finally, education is not the only state duty that the judicial branch could transform into a positive right, creating the risk that a still larger portion of the state budget could be subject to judicial definition and more stringent constitutional scrutiny. For example, constitutional provisions such as the “foster and support”<sup>197</sup> clause of article XIII could

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*supra* note 27, at 1137).

192. *Tunstall v. Bergeson*, 141 Wash. 2d 201, 237, 5 P.3d 691, 710 (2000) (Talmadge, J., concurring).

193. Simon-Kerr & Sturm, *supra* note 26, at 100 (citing the example of Massachusetts, where “[f]orced to choose between an aggressive remedial stance and abdication of any role in adjudicating the education right,” the court bowed out by refusing to find breach).

194. *Id.* at 97–111.

195. *Id.* at 102–03.

196. *Id.* at 96–97 (citing authorities). Compare *id.*, with *McCleary*, 173 Wash. 2d at 539–40, 269 P.3d at 258 (stating that “fundamental reforms are needed . . . Pouring more money into an outmoded system will not succeed,” statements which in this author’s opinion are frequently misinterpreted as a statement from the *McCleary* Court that these types of management reforms are required for *McCleary* compliance).

197. WASH. CONST. art XIII, § 1; see also Adam Sherman & Hugh Spitzer, *Washington’s Mandate: The Constitutional Obligation to Fund Post-Secondary Education*, 89 WASH. L. REV.

be interpreted to establish state duties and corresponding Hohfeldian rights. Although the education right may be “paramount” among these duties, if the courts recognize other positive constitutional rights, they will be different only in degree, not in kind.<sup>198</sup> Subjecting state expenditures for these purposes to the “has the state done enough?” positive rights analysis would make over two-thirds of the state budget subject to *McCleary*-level scrutiny.<sup>199</sup>

C. *Primacy in Constitutional Interpretation Does Not Alter the Co-Equal Status of the State Branches*

Judicial enforcement of positive rights against the democratic branches impairs the constitutionally established co-equal status of the three departments. This risk arises because judicial primacy in constitutional interpretation is not judicial supremacy in governing.

Positive rights advocates insist that state courts must “rise to the challenge” and adjudicate positive rights cases despite possible judicial difficulty in developing manageable standards and policy expertise.<sup>200</sup> Admittedly, these types of exhortations have a basis in Washington’s text: as *Seattle School District* explained, the article IX duty is imposed on the State as a polity, not merely on the legislative branch.<sup>201</sup> But the real leverage sought by positive rights advocates in pursuit of their preferred policies comes from the finality of the judicial branch’s interpretation of a constitutional provision. In general, positive rights scholarship strives to qualitatively distinguish state court powers from those exercised by federal courts. But, advocates for positive rights must necessarily rely on state courts to assert primacy in constitutional interpretation, just as the *Marbury* Court asserted federal interpretational primacy over Congress, and the *Cooper* Court over the states.<sup>202</sup> Similarly, in *Seattle School District* and *McCleary*, state courts declare the finality of their authority to interpret the constitution. But an

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ONLINE 15, 32–33 (2014) (arguing that the “foster and support” clause establishes a duty to support state higher education institutions).

198. See Hershkoff, *Evolution of State Constitutions*, *supra* note 27, at 817–18 (recognizing risks of failing to constitutionalize all types of need).

199. See BUDGET NOTES, *supra* note 2, at 157, 163, 276, 305, 331, 351 (summarizing state 2015–2017 appropriations for purposes potentially subject to article XIII, plus constitutionally protected debt service, which is three percent of the NGFS + Op budget).

200. Hershkoff, *Positive Rights*, *supra* note 27, at 1182.

201. *Seattle Sch. Dist. v. State*, 90 Wash. 2d 476 512, 585 P.2d 71, 91–92 (1978).

202. *Cooper v. Aaron*, 358 U.S. 1 (1958) (stating under *Marbury* and the Supremacy Clause, state governments are bound by federal courts’ interpretation of the federal Constitution).

important distinction remains: at the state court level, the alchemy of positive rights interpretation does not convert judicial primacy in interpretation into judicial supremacy in governing.<sup>203</sup>

To compel compliance with the federal Constitution, federal courts are entitled to wield the power of the federal Supremacy Clause against recalcitrant state actors.<sup>204</sup> State courts have no such lever against state legislatures, which are co-equal branches. Primacy in the authority to interpret the constitution does not create a corresponding power of enforcement. Unlike the federal government enforcing the supremacy of the federal Constitution over the states, the Washington State Supreme Court is acting against a co-equal branch.

Recognition of this concern does not rely on denial of the Court's interpretational primacy. As explained by *Seattle School District*, the Court's lack of "physical power" to enforce its orders does not affect its duty to issue them; "the legality of judicial orders should not be confused with the legal consequence of their breach."<sup>205</sup> But positive rights do not change the recognized judicial function of "saying what the law is" into a new ability to tell the Legislature "what the law must be."

In the absence of express constraining principles, the Court's new positive rights jurisprudence impairs the Legislature's status as a co-equal branch. In the case of negative rights, it is less likely that the Court will intrude on legislative policy-setting and resource allocation, because the State always has the option of ceasing the violative conduct. But in the case of positive rights, the Court is not restraining the democratic branches with a "thou shalt not" or a "thou shalt not unless." Rather, the Court is affirmatively specifying the delivery of publicly funded services, and short of a constitutional amendment, the Legislature has no

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203. Education finance scholarship gives short shrift to concerns over the propriety of judicial review. Bauries, *Judicial Review*, *supra* note 73, at 707.

204. In the case of confrontation among the co-equal branches of federal government, the United States Supreme Court retains primacy in constitutional interpretation. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728 (2003) ("[I]t falls to this Court, not Congress, to define the substance of constitutional guarantees."). Certainly the Court may be asked to adjudicate constitutional questions with vast fiscal consequences. *See, e.g., Nat'l Fed'n of Indep. Bus. v. Sebelius*, \_\_\_U.S.\_\_\_, 132 S. Ct 2566 (2012) (upholding federal Affordable Care Act). But, the Court may not tell Congress, a co-equal branch, that it *must* enact legislation to fund, e.g., health care or education programs. The absence of positive rights in the federal Constitution, together with federal principles of judicial abstention such as the political question doctrine, mean that only Congress resolves resource allocation questions.

205. *Seattle Sch. Dist.*, 90 Wash. 2d at 507, 585 P.2d at 89 (citing *Nixon v. Sirica*, 487 F.2d 700, 711–12 (D.C. Cir. 1973)).

check on this judicial affirmative definition.<sup>206</sup> Further, under the new positive rights analysis, notwithstanding the political aspects of the case, the Legislature and its enactments receive even *less* protection, because the Court now holds implementing legislation to a higher judicial standard.<sup>207</sup> This leaves the Legislature without a corresponding check on the judicial branch's authority to compel expenditures in furtherance of a positive right. Regardless of what the Legislature enacts to implement the constitution, the Court can always say "Article IX requires more."

#### IV. THE "DISFAVORED CONSTITUTION" COUNTERBALANCES POSITIVE RIGHTS

By combining judicial primacy in constitutional interpretation with a positive right, *McCleary* created a court-defined state funding obligation without any expressly delineated jurisprudential boundaries. Though the original *McCleary* ruling recognized the delicate balance of power among the branches in positive rights implementation, the opinion and its subsequent enforcement orders do not set out any clear doctrinal limits on the Court's ability to obligate the taxpayers to fund positive rights. Absent counterbalancing constitutional strictures, the Legislature, and the taxpayers from whom the Legislature must extract the state's fiscal resources, have only two options: fund the education right as defined by the Court, or amend the constitution.

The Legislature's repeated failure to enact the judicially ordered "plan," together with the approach of the legislatively and judicially imposed 2018 deadline, will force the Court to determine whether there are any outer limits to its authority to enforce positive rights against legislative paralysis, intransigence, or outright defiance. To find these limiting principles, the Court need look no further than the text of the constitution itself.

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206. Cf. MONT. CONST. art. XII, § 3(3) (amended 1988). After *Butte Cmty. Union v. Lewis* applied higher scrutiny to classification in welfare legislation, the citizens amended the Montana Constitution in 1988 to change "[t]he legislature shall provide such economic assistance" to "may provide." *In re T.W.*, 126 P.3d 491, 495 & n.3 (Mont. 2005) (emphasis in original) (quoting MT. CONST. art. 12, § 3).

207. *McCleary v. State*, 173 Wash. 2d, 477, 519, 269 P.3d 227, 248 (2012); see also *supra* Section II.C, notes 131–135 and accompanying text.

A. *The “Disfavored Constitution” Establishes Protections for the Public Fisc by Reserving Taxation and Expenditure Authority to the Legislature*

Limitations on judicial enforcement of positive rights are already found within the constitutional text—in the so-called “disfavored constitution.”<sup>208</sup> By expressly vesting the taxing and spending powers of the state solely in the legislative branch, the fiscal restrictions of the disfavored constitution protect the legislature’s institutional powers. The constitutional damage risked by potential judicial arrogation of the legislative powers of taxation and spending affects not only the legislative branch’s prerogatives, but also the substantive protections afforded to the treasury and the taxpayers by the state constitution.

Within Washington’s disfavored constitution, article VII of the Washington State Constitution establishes strictures on state taxation, and article VIII governs debt and expenditures. More particularly, article VII, section 5, and article VIII, section 4 provide respectively that taxes and expenditures of treasury funds must be enacted in law.<sup>209</sup> Each of these sections further establishes specificity requirements—taxes must state an object, and appropriations must state a readily discernable amount and may not endure past the fiscal biennium.<sup>210</sup>

These provisions function as more than mere restraints on the legislature. True—the specificity conditions operate as traditional restrictions on the legislative process, requiring the legislature to enact tax and spending laws in a particular way. But more importantly, the statements that taxes and appropriations may be made only pursuant to law are affirmations that the power to levy taxes and the power to spend the revenues thereby collected are vested only in the peoples’ democratically elected representatives—to the exclusion of other branches. To the extent that enforcement of positive rights could conflict with these exclusive grants of authority, it is the Court’s obligation to harmonize, rather than override, these protective portions of the

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208. *See supra* Section I.B (discussing the disfavored constitution).

209. WASH. CONST. art. VII, § 5 (“No tax shall be levied except in pursuance of law; and every law imposing a tax shall state distinctly the object of the same to which only it shall be applied.”); *id.* art. VIII, § 4 (“No moneys shall ever be paid out of the treasury of this state, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law; nor unless such payment be made within one calendar month after the end of the next ensuing fiscal biennium, and every such law making a new appropriation, or continuing or reviving an appropriation, shall distinctly specify the sum appropriated, and the object to which it is to be applied, and it shall not be sufficient for such law to refer to any other law to fix such sum.”).

210. WASH. CONST. art. VII, § 5; *id.* art. VIII, § 4.



constitution.

1. *The Legislature Has Sole Authority over Taxation*

Under article VII, section 5, “no tax shall be levied except in pursuance of law; and every law imposing a tax shall state distinctly the object of the same to which only it shall be applied.”<sup>211</sup> Though buried in the disfavored constitution, this section has a long pedigree as a shield for taxpayers through protection of the prerogatives of their elected representatives. As a condition of the ascension of William and Mary, Parliament insisted that the English Bill of Rights prohibit taxation by royal prerogative: “levying Money for or to the Use of the Crowne, by pretence of Prerogative, without Grant of Parlyament, for longer time, or in other manner then the same is or shall be granted, is Illegal.”<sup>212</sup>

Similar restrictions appear before nationhood in the earliest state constitutions. John Adams’ eloquent Massachusetts State Constitution of 1780 led the way toward the tripartite, balanced government that the Union would eventually adopt.<sup>213</sup> As originally ratified, and to this day, the Massachusetts Constitution declares that no tax may be levied “without the consent of the people, or their representatives in the legislature.”<sup>214</sup> Likewise, taxpayer protections are reflected in the United States Constitution, which declares that “All bills for raising revenue shall originate in the House of Representatives,” which at nationhood was the federal chamber directly elected by the voters.<sup>215</sup>

Keeping this legacy in mind, article VII, section 5 is not a mere technicality but an assurance that “Taxes can be voted only by the people’s representatives.”<sup>216</sup> “It is elementary that the power of taxation, subject to constitutional limitations, rests solely in the legislature.”<sup>217</sup> As Cooley explained in 1883, the taxing power is inherent in the legislature of each state, and security against the abuse of this power is found in the structure of government itself: “In imposing a tax, the legislature acts

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211. WASH. CONST. art. VII, § 5.

212. English Bill of Rights, 1689 (1 W&M., 2d Sess., c.2).

213. See WILLIAMS, *supra* note 23, at 50–53 (describing Adams’ view of balanced government).

214. MASS. CONST. of 1780 art. XXIII; see also PA. CONST. of 1776, § 41 (requiring that any tax be authorized in law).

215. U.S. CONST. art. I, § 7.

216. COOLEY, *supra* note 41, at 641 (“It is, moreover, essential to valid taxation that the taxing officers be able to show legislative authority for the burden they assume to impose in every instance.”).

217. *Larson v. Seattle Popular Monorail Auth.*, 156 Wash. 2d 752, 770, 131 P.3d 892, 901 (2006) (quoting *State ex rel. Tacoma Sch. Dist.*, 176 Wash. 689, 690, 30 P.2d 638, 639 (1934)).

upon its constituents.”<sup>218</sup> Suggestions that the Court has authority to enforce positive rights by nullifying tax exemptions, levying new taxes, or specifying the uses of tax revenues directly conflict with this constitutional principle.<sup>219</sup> In its Order of August 2015, the *McCleary* Court briefly but expressly recognized this distribution of powers, acknowledging that the Court lacks the authority to enact legislation, appropriate state funding, or levy taxes.<sup>220</sup> As in the case of judicial “impoundment” of unspecified state revenues pursuant to the August 2015 contempt sanctions, the judicial distinction between saying “what the law is” and enforcing that law may be a very fine one.<sup>221</sup> But the difficulty in drawing the precise line does not negate the mandatory character of disfavored constitution as a limiting principle on the Court’s ability to enforce positive rights.

## 2. *The Legislature Has Sole Authority over Appropriations*

Under article VIII, section 4, “No moneys shall ever be paid out of the treasury of this state, or any of its funds, or any of the funds under its management, except in pursuance of an appropriation by law.” Per article VII, section 6, state tax revenues must be deposited in the state treasury. This means that the Legislature has the exclusive power of deciding whether, when, and for what purpose the state’s public moneys may leave the treasury, and also that the procedural law-making protections of constitutional majority, bicameralism, and presentment are necessary to spend all state tax revenues. As with the taxing provision, the requirement that appropriations be enacted in law is rooted in the English Bill of Rights’ prohibition on arrogating moneys for the use of the crown.<sup>222</sup> The legislation requirement necessarily excludes the judicial branch from the process of enacting appropriations or otherwise authorizing expenditures.<sup>223</sup>

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218. *Id.* at 593–94.

219. *E.g.*, Plaintiffs’ Motion for a Timely 2016 Briefing Schedule at 13–15, *McCleary v. State*, 173 Wash. 2d, 477, 269 P.3d 227 (2012), <http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20News/843627McClearyPlaintiffsMotionforTimely2016BriefingSchedule.pdf> [<https://perma.cc/EJ3D-2E3T>] (asking the court to invalidate tax exemption statutes as a contempt sanction).

220. Order of Aug. 13, 2015 at 8, *McCleary*, 173 Wash. 2d 477, 269 P.3d 227.

221. *See supra* Section III.B.1, notes 178–181 and accompanying text (discussing potentially fine distinction between ordering an appropriation and ordering an agency to provide a service).

222. English Bill of Rights, 1689 (1 W&M., 2d Sess., c.2).

223. “Whether such a [court-appointed special master] could take money out of the treasury would be a really significant constitutional question on the separation of powers” according to former Washington State Supreme Court Justice Phil Talmadge. Andrew Garber, *How Will State*

The legislature's duty to provide essential funding for the other branches of government must be acknowledged as a noteworthy but limited exception to this general rule. In *In re Salary of Juvenile Director*,<sup>224</sup> the Court used a structural separation of powers analysis to find the Court has an inherent but constrained power to compel appropriations necessary to "ensure its own survival"<sup>225</sup> upon "clear, cogent, and convincing proof."<sup>226</sup> Significantly, *Juvenile Director* did not analyze the text, purpose, or history of article VIII, section 4 in the broader context of constitutional protections for tax revenues.<sup>227</sup> But *Juvenile Director* addresses only the judiciary's ability to function within the constitutional structure as an independent branch, and under article VIII, section 4, it gives the Court no authority to order expenditures for other types of state programs, constitutionally required or not.<sup>228</sup>

### 3. *The Disfavored Constitution Establishes a Principle of Contemporaneous Government*

Article VIII, section 4, establishes a principle of contemporaneous government, a concept that limits the usefulness of the Court's repeated calls for a legislative "plan."

Specifically, this section provides that appropriations must be made within a month of the close of the next ensuing biennium, i.e., the biennium that begins after the adjournment of the legislative session in odd numbered years.<sup>229</sup> This means that appropriations lapse (expire) at the end of the fiscal biennium for which they are made, so each elected Legislature appropriates roughly for the period for which it sits. The delegates at the state constitutional convention established this limited

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*Supreme Court React If Lawmakers Hold Back on School Funding?*, SEATTLE TIMES, Jan. 24, 2014 at B7.

224. 87 Wash. 2d 232, 552 P.2d 163 (1976).

225. *Id.* at 245, 552 P.2d at 171..

226. *Id.* at 251, 552 P.2d at 174. In *Seattle School District*, the State argued based on *Juvenile Director* that a higher burden of proof should apply to the education duty. The Court dismissed this distinction: "Here, unlike *Juvenile Director*, the financial needs of the judiciary vis-à-vis the Legislature are not at issue. Rather, we are concerned with legislative compliance with a specific constitutional mandate." *Seattle Sch. Dist. v. State*, 90 Wash. 2d 476, 528, 585 P.2d 71, 100 (1978).

227. *See Juvenile Dir.*, 87 Wash. 2d at 242–43, 552 P.2d at 169 (citing WASH. CONST. art. VIII, § 4 only in passing).

228. *Seattle Sch. Dist.*, 90 Wash. 2d at 528, 585 P.2d at 100.

229. At statehood, regular sessions of the Legislature were held biennially beginning in January of odd-numbered years, with a two-year budget adopted for the period following adjournment. WASH. CONST. of 1889, art. II, § 12.

duration for appropriations because California had exceeded its debt limit by authorizing appropriations for future biennia.<sup>230</sup>

When combined with the broader constitutional principles that legislative power is plenary and any Legislature may amend the work of a prior Legislature,<sup>231</sup> article VIII, section 4 affirms that the people are governed by the legislators they elected, not by dead hands of prior legislators. Although the Court has declared that the Legislature may not revise its basic education statutes for mere pecuniary reasons,<sup>232</sup> no Legislature may definitively declare that any “plan” commits a future Legislature to follow any particular set of standards, formulas, or revenue policies, and no Legislature may “pre-enact” the appropriations needed to give future life to the “plan.” Stated differently, talk is cheap—whiskey costs money. The real question is whether the sitting Legislature has enacted the appropriations to implement its enacted statutes.

*B. The Disfavored Constitution’s Taxpayer Protections Are a Part of the “Electoral Bargain”*

If state courts wish to accept the expansive aspects of state constitutionalism, such as the New Federalism and positive rights, they must acknowledge the constraints of the disfavored constitution as requirements of equal stature.<sup>233</sup> Even “as they impose affirmative duties on their government, state constitutions are also marked by limited-government, taxpayer-protective principles that are entirely absent from the Federal Constitution.”<sup>234</sup>

Positive rights advocates correctly argue that analysis of positive rights should not import federal concepts that are extraneous to state constitutions, such as rationality-level review or the political question

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230. JOURNAL, *supra* note 69, at 673–75; *see also* S.F. Gas Co. v. Brickwedel, 62 Cal. 641, 642 (1882) (holding article XI, section 18 of the California Constitution prohibited municipalities from paying liabilities incurred in one year with revenues of a later year absent the 2/3 voter approval constitutionally necessary to incur debt). In comparison, the modern Washington constitutional debt limit in article VIII, section 1 requires a supermajority legislative vote to bind future Legislatures by creating debt. WASH. CONST. art VIII, § 1(i) (amended 1972).

231. Farm Bureau Fed’n v. Gregoire, 162 Wash. 2d 284, 301–02, 174 P.3d 1142, 1150 (2007) (citing Kristen L. Fraser, *Method, Procedure, Means, and Manner: Washington’s Law of Law-Making*, 39 GONZ. L. REV. 447, 478 (2003–2004)).

232. McCleary v. State, 173 Wash. 2d 477, 526–27, 269 P.3d 227 (2012) (holding that elements of the basic education program are not “etched in constitutional stone,” but the Legislature may not eliminate or reduce program offering without an educational reason).

233. Briffault, *supra* note 18, at 956.

234. *Id.*

doctrine.<sup>235</sup> Using state tax and spending restrictions as a restraint on judicial positive rights enforcement flows naturally from the bargain that the state constitution strikes with the people in its own text. The disfavored constitution provides the judiciary with the ability to give meaning to affirmative duties in state constitutions while acknowledging that the very text of state constitutions contains outer boundaries on the court's ability to define and enforce positive rights.

1. *The Disfavored Constitution Is Substantive and Mandatory*

The paramount duty may be paramount among constitutional provisions that establish rights or duties, but the judiciary is obligated to harmonize its interpretation of this duty, and enforcement thereunder of its jural correlative right, with the structural provisions of the constitution that place the state fisc under the authority of the voters' representatives.

Positive rights commentators argue courts must enforce positive rights so "the electorate should be given the benefit of their constitutional bargain."<sup>236</sup> Further, as the *Seattle School District* and *McCleary* Courts point out, only one provision of the constitution declares itself to be "paramount." At the same time, positive rights are only one part of the "electoral bargain." Just as article IX constitutionalizes a state education duty, the disfavored constitution constitutionalizes a norm of taxpayer protection.<sup>237</sup>

To begin, all provisions of the constitution are equally mandatory.<sup>238</sup> The constitutional text declares the education duty to be "paramount" among state activities, but this text does not make other provisions structurally subordinate, and it does not overwrite the equally mandatory provisions that vest taxing and spending authority solely in the Legislature.

Moreover, "structural" provisions of state constitutions may nonetheless declare protective principles that that receive judicial enforcement. For example, Washington's Constitution does not contain an express textual separation of powers clause, but the division of state government into three branches is nonetheless a crucial protection for

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235. *E.g.*, Herskhoff, *Positive Rights*, *supra* note 27, at 1156–67 (contrasting state court adjudication of positive rights with article III political question doctrine).

236. Usman, *supra* note 27, at 1517. *Compare id.*, with Tushnet, *supra* note 44, at 1915 (coupling strong right with weak remedies may create cynicism about the constitution).

237. Briffault, *supra* note 18, at 909.

238. WASH. CONST. art. I, § 29.

individual liberties.<sup>239</sup> Similarly, though not expressly framed as a “rights” provision, the disfavored constitution provides important protection for the public fisc and for the people’s relationship with their elected representatives. Further, *McCleary* itself demonstrates that not all constitutional rights are found in constitutional articles denominated “Declaration of Rights.” The tax and spending restrictions in the disfavored constitution place in the constitutional text the people’s right to have state fiscal policy determined by their elected representatives.

More broadly, when considering the electoral bargain, a constitutional analysis of positive rights enforcement must consider the *source* of the government’s powers and duties—the political power that is inherent in the people and is bestowed on government only by their consent.<sup>240</sup> Under the covenant by which the voters delegated their political power to state government, the people were assured that their elected representatives would control state taxation and expenditures. Though some positive rights advocates contend that elected state court judges enjoy a democratic imprimatur that justifies a greater role for them in public resource allocation decisions,<sup>241</sup> Washington courts have rejected the notion that state court judges play a “representative” role in state government.<sup>242</sup> For these reasons, judicial branch enforcement of positive rights must respect the constitutional vesting of fiscal authority in officials who are elected to represent their constituents.

Evidence that the electoral bargain of the disfavored constitution creates taxpayer protections is found in flexible doctrines of taxpayer standing in state courts. In contrast to stringent standing requirements in federal court, Washington and other state courts generally grant broad taxpayer standing to enforce constitutional protections for the public fisc.<sup>243</sup> These decisions reveal “an appreciation of the role that taxpayer

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239. *E.g.*, *State v. Rice*, 174 Wash. 2d 885, 900–01, 279 P.3d 849, 857 (2013) (discussing how the tripartite division and system of checks protects individual rights in the criminal justice system).

240. WASH. CONST. art. I, § 1.

241. Hershkoff, *Positive Rights*, *supra* note 27, at 1157–58; *see also* Hershkoff, *Passive Virtues*, *supra* note 27, at 1887 (claiming elected judges “carry a democratic portfolio”); Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1156 (1993) (“[State court judges’] institutional position can be thought of as intermediate between that of federal judges and that of elected representatives.”). However, Hershkoff acknowledged that election does not turn “black-robed judges into representative decisionmakers.” Hershkoff, *Positive Rights*, *supra* note 27, at 1158.

242. *Eugster v. State*, 171 Wash. 2d 839, 259 P.3d 146 (2011) (holding judiciary’s role is distinct from legislative branch due to obligations of impartiality and independence; election of judges does not make them like legislative or administrative elected officials whose core duties are to speak for and carry out their constituents’ interests).

243. Joshua G. Urquhart, *Disfavored Constitution, Passive Virtues? Linking State Constitutional*

suits play in correcting government transgressions.”<sup>244</sup> Notably, flexible taxpayer standing is an important link between positive rights advocacy and the disfavored constitution, where this standing is used to enforce state constitutions’ “positive rights and regulatory norms,” including constitutional restrictions on taxes, debt, and expenditures.<sup>245</sup>

2. *Nevada’s Interpretational Misstep Demonstrates the Duty to Harmonize Education Rights and the Disfavored Constitution*

Because of its disfavored status of state fiscal protections, courts may be tempted to use interpretational techniques that allow “rights” provisions to eclipse mere “structural” provisions. Nevada’s failed interpretational experiment underscores the need for Washington to employ the interpretational technique mandated by article I, section 29’s statement that all provisions are mandatory.

After a brief flirtation with allowing “substantive” constitutional duties to trump “procedural” fiscal provisions, Nevada quickly reversed its position and conceded judicial interpretation requires the State to read its constitution as a whole, with each provision harmonized. In *Guinn v. Legislature*,<sup>246</sup> the Nevada Supreme Court faced “legislative paralysis” over the votes needed to pass a school appropriations bill and supporting revenue legislation, given a fairly new voter-initiated constitutional amendment that required a two-thirds legislative vote to increase taxes.<sup>247</sup> The *Guinn* Court concluded that when “a procedural requirement that is general in nature prevents funding for a basic, substantive right, the procedure must yield,” and the supermajority provision could not be used to avoid other constitutional duties.<sup>248</sup> But

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*Fiscal Limitations and Permissive Taxpayer Standing Doctrines*, 81 FORDHAM L. REV. 1263, 1290–91 (2012).

244. *Friends of N. Spokane Parks v. Spokane*, 184 Wash. App. 105, 116–20, 336 P.3d 632, 638 (Ct. App. 2014) (discussing taxpayer standing at length, distinguishing *Greater Harbor*, and citing Urquhart, *supra* note 243). Compare *id.*, with *Greater Harbor 2000 v. City of Seattle*, 132 Wash. 2d 267, 281, 37 P.2d 1082, 1090 (1997) (requiring greater showing for taxpayer standing to challenge discretionary decision).

245. Hershkoff, *Passive Virtues*, *supra* note 27, at 1889–90; Urquhart, *supra* note 243, at 1290–91.

246. *Guinn v. Legislature (Guinn II)*, 76 P.3d 22 (Nev. 2003). *Guinn II* denied a rehearing of *Guinn v. Legislature (Guinn I)*, 71 P.3d 1269 (Nev. 2003). Eventually, *Guinn II* was overruled by *Nevadans for Nevada v. Beers*, 142 P.3d 339 (Nev. 2006). The *Guinn* Court assumed that the Nevada Constitution imposed a “mandate” to fund public education. *Guinn II*, 76 P.3d at 31 (citing constitutional provisions).

247. *Guinn II*, 76 P.3d at 29.

248. *Guinn I*, 71 P.3d at 1275; *Guinn II*, 76 P.2d 32–33. Cf. Hans Linde, *What Is a Constitution, What Is Not, and Why Does It Matter?*, 87 OR. L. REV. 717, 728 (2008) (noting if constitution

just a few years later, Nevada retreated from this interpretational position, rejecting *Guinn*'s artificial substantive/procedural distinction and declaring that the constitution "should be read as a whole, so as to give effect to and harmonize each provision."<sup>249</sup>

3. *Positive Rights Must Be Balanced with the Disfavored Constitution's Democratic Protections for Taxpayers*

Considered in light of the disfavored constitution, the Washington State Supreme Court's new jurisprudence must address how positive rights create an unavoidable burden for the taxpayer. If a court fails to enforce a positive right in a foundational document, then arguably that document loses its primacy, undermining respect for the rule of law.<sup>250</sup> At the same time, if the Court takes an enforcement approach that conflicts with other constitutional provisions, it likewise undermines the value of the constitution.

This tension hearkens back to the Odysseus analogy: to what higher values did the voters bind themselves, and subsequent generations, when they ratified the constitution?<sup>251</sup>

The paramount duty declares an important constitutional norm of educational opportunities for children, but the taxing and spending provisions of state constitutions also declare important norms of separation of powers, popular representation, and taxpayer protection. Even if the ratifying voters intended the paramount duty clause to create judicially enforceable positive rights, these same voters did not delegate budgeting and taxing authority to the judicial branch. Using positive rights enforcement to compel expenditures defined by the judiciary rather than the Legislature conflicts with the disfavored constitution.

Ultimately, the people define the resources that are available to state government. It is the most fundamental aspect of popular constitutionalism. They may do so directly through voter-initiated measures that cut state taxes<sup>252</sup> or increase state budget obligations.<sup>253</sup>

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places both expenditures and revenue policies beyond the control of a legislative majority, state cannot function as a republican government).

249. *Beers*, 142 P.2d at 348.

250. *Usman*, *supra* note 27, at 1530–32.

251. Odysseus' directive to his sailors did not affect his son Telemachus, for example, or any future generations home in Ithaca. *See Pettys*, *supra* note 172, at 325 ("Those who ratified the Constitution elected to try to bind not only themselves, but future generations who were not even parties to the deliberations, as well.").

252. *See* 2011 Wash. Sess. Laws 141 (repealing tax increases enacted the previous legislative session).



They may do so indirectly through the legislatures they choose and the guidance they provide to those representatives. In turn, these manifestations of the people's political power shape the programs funded by the state in the budget that the legislature must balance among a host of competing priorities. Collectively, the people get what they pay for.

Under the Odysseus analogy, the Court in fulfilling its interpretational task must adhere to the people's highest values as expressed in the constitution, rather than to the will of a transitory legislative or popular majority as expressed in any particular budget, bill, or ballot measure.<sup>254</sup> But when the Court, through positive rights interpretation, constitutionalizes a portion of the state budget, it is also imposing an unavoidable tax burden on the people, constitutionally dedicating an unspecified revenue stream to support the right as defined by the Court. If the right is defined judicially rather than through "supplemental legislation," the voters are deprived of a say in how the State establishes and allocates their tax contributions. Notwithstanding the voters' policy and fiscal preferences as expressed in their votes for legislators or ballot measures, the Court is telling the people that their judicially defined highest values require billions of dollars in new taxes or in cuts to other state programs. To illustrate the scope of the legislature's dilemma, the budget could eliminate state funding for the entire state higher education system and still lack sufficient resources to correct the structural salary shortfall identified in *McCleary*.<sup>255</sup> Notwithstanding the priorities of the voters and their representatives, the paramount duty clause could consume all the resources available to government for its other constitutionally required tasks, from operation of the constitutional state offices to other possible positive duties,<sup>256</sup> as well as essential but not constitutionally specified programs for public peace, health, and safety. Given that all constitutional provisions are equally mandatory, and that all provisions are part of the electoral bargain ratified by the people, orders in furtherance of the paramount duty do not trump the reservation of taxing and spending authority to the legislative branch.

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253. See 2015 Wash. Sess. Laws 11 (requiring the State to fund additional school staff as part of the basic education program).

254. See Pettys, *supra* note 172, (discussing Odysseus analogy).

255. Total state NGFS + Op appropriations in the 2015–2017 budget for state higher education institutions and financial aid are \$3.525 billion, or 9.2 percent of total NGFS + Op appropriations—about the same amount as one of the lower estimates of the salary shortfall. BUDGET NOTES, *supra* note 2, at 305; see *supra* note 2 (describing shortfall estimates).

256. See Talmadge, *Property Absolutism*, *supra* note 38, at 872–76 (listing other possible positive duties).

## CONCLUSION

In *Seattle School District*, the Court pledged the State to a unique positive rights interpretation of the paramount duty clause, but it avoided the dilemmas of enforcement against the political branches. Now, in *McCleary*, the Court has reaffirmed its commitment to a positive education right, but it has ventured into the “Stygian swamp”<sup>257</sup> of positive rights enforcement against a co-equal branch of state government, the only branch to which the people delegated the political authority to levy taxes and to spend the revenue raised thereby. From the perspective of the state fisc, judicially enforceable positive rights pose unique risks to separation of powers due to the lack of constitutional checks to counterbalance the scope of the judicial branch’s interpretation.

The judicially and statutorily imposed 2018 deadline is approaching. The Court declared that the Legislature’s failure to provide the judicially requested “plan” constitutes sanctionable contempt of court. Under SHB 2776, the Legislature has funded its statutorily defined education enhancements in compliance with their respective statutory due dates.<sup>258</sup> Admittedly, the Legislature has not yet corrected the structural shortfall in state salary allocations, but again, the deadline for funding reform has not yet elapsed.

If the Court fails to enforce a positive right in the foundational document, then arguably that document loses its primacy, undermining respect for the rule of law and for the Court as a branch.<sup>259</sup> Yet the same result occurs if the Court enforces the document selectively, failing to acknowledge that the delegation of political power in the constitution itself establishes outer bounds for judicial enforcement of other constitutional provisions. The disfavored constitution protects both the Legislature’s fiscal powers and the people’s right to have these decisions made solely by their elected representatives. The disfavored status of the fiscal constitution among academics and the judiciary “may be helpful in reminding us of the need for modesty” in assuming that state constitutions are a force for judicially defined independent constitutional

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257. *Neb. Coal. for Ed. Equity & Adequacy v. Heineman*, 731 N.W.2d 164, 183 (Neb. 2007) (rejecting school funding challenge to avoid “the thickets that can entrap a court that takes on the duties of a legislature”).

258. *See supra* note 152 (discussing statutory due dates and implementation steps taken in 2015–2017).

259. *Usman, supra* note 27, at 1530–32; *see also* Tushnet, *supra* note 44, at 1915 (describing risk that lack of alignment between strength of right and remedy may create cynicism about constitution).

norms.<sup>260</sup>

An approach that balances positive duties with restrictions in the disfavored constitution results in greater fealty to the foundational document's textual and structural protection for the relationship between the people and their government. Or, stated differently, "I'm not saying it doesn't mean *anything*. All I am saying is why does it have to mean *everything*?"<sup>261</sup>

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260. Briffault, *supra* note 18, at 957.

261. *WHEN HARRY MET SALLY* (Columbia Pictures 1989). Compare *id.*, with Tushnet, *supra* note 44, at 1898 ("Nonjusticiable rights need not be legally irrelevant.").