



How far will the state Supreme Court go on McCleary?

What happens if legislators don't pass a budget that fully funds education? The justices have a few tricks up their sleeves.

By Daniel Jack Chasan

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As the Washington Legislature gets back to work, the big question is what, if anything, it will do to appease the state Supreme Court, which ruled in 2012 that it was violating the Washington constitution by not fully funding basic education. This past September, the court held the Legislature in contempt for being so slow to ante up education funds.

Here's a hint: Governor Jay Inslee's proposal to raise education funding \$1.3 billion in the next biennium, which he says would comply with *McCleary* a year early, likely won't do it — even if the Legislature comes up with the money (which Inslee did not propose a way to raise).

Tom Ahearne, lead attorney for the *McCleary* plaintiffs, says Inslee's "rhetoric is what you'd expect, no matter what his number was." Ahearne believes that fully funding the state's own idea of basic education might cost another \$5 billion each year. That's without factoring in capital costs and inflation.

This would leave Inslee's proposed budget not only a day late, but way more than a dollar short. Unfortunately, Ahearne says, "his proposal doesn't come close to doing it all."

It's a case that is as charged legally as it is politically. The even more intriguing follow-up question is what the court will do if the Legislature can't or won't come up with the cash. As much attention as the case has received politically, the legal background has been largely unexplored.

The court has given the Legislature until the close of the 2015 legislative session — which could come as early as April 26 or as late as the end of June, right before the current state budget runs out — to "purge the contempt."

And if it doesn't The court didn't say. There is no law or precedent to guide us. We're sailing off into uncharted waters.

They're uncharted in Washington, anyway. Ahearne argues that ever since *Brown v. Board of Education*, the U.S. Supreme Court's landmark school desegregation ruling of 1954, courts have been stepping in to tell elected officials how to run public schools.

Of course, not everyone sees it that way. In a reply brief to the Washington Supreme Court, the state referred to the *McCleary* plaintiffs' "tiresome contention that the Legislature — like former [Alabama segregationist] Gov. George Wallace — is obstinately refusing to meet its constitutional duty. This is not Alabama in 1963, and Plaintiffs' continuing and repeated comparison to segregationists is offensive and unproductive."

In recent years, Ahearne points out, state Supreme Courts in Kansas, New Jersey and Arizona have ruled that Legislatures have violated their state constitutions by failing to adequately fund public schools. In New Jersey, the Supreme Court has ruled on education funding a couple of dozen times over the past four decades.

Rutgers University law professor Robert Williams, an authority on state constitutional law, explains that, in general, "I would say that prior to the same-sex marriage litigation, the education funding litigation was probably the most important area of state constitutional litigation across the country."

"[It's all] really a product of this phenomenon we saw beginning in the 70s of the state courts interpreting their constitutions to be even more protective than the federal constitution," Williams explains. "The education finance litigation is a central part of this larger phenomenon that we call the new judicial federalism."

Williams notes that state and federal constitutional rulings take place in very different contexts. The federal constitution is notoriously hard to amend, and U.S. Supreme Court justices are appointed for life. Therefore, the court tends to change only glacially, and the constitutional framework tends not to change at all.

State constitutions are much easier to amend — the people of Washington have done it 98 times — and justices are subject to reappointment or re-election. He recalls that the three Iowa justices who ruled in favor of same-sex marriage were all voted out, and that in New Jersey, Gov. Chris Christie decided not to renominate a justice just to send a message. Things can change.

For those reasons, he says, state constitutional decisions are — or can be — "less permanent than U.S. constitutional rulings."

However you slice it, the Legislature hasn't made enough progress to suit the Supreme Court. Which leads us back to the question of how far the court is willing to push its constitutional powers. "That's always the question: How far would a court go?" Williams says. "What if the governor and the Legislature flipped the bird at the court?"

Under the separation of powers doctrine, the court can't tell the Legislature what to do. It can rule a law unconstitutional, but cannot make Legislators pass a new one. It can declare funding inadequate, but cannot force the Legislature to raise more revenue. Or can it?

The *McCleary* court itself implicitly addressed this issue, reiterating Chief Justice John Marshall's famous line in the landmark 1803 case of *Marbury v Madison*, which established the principle of judicial review: "it is emphatically the province and duty of the judicial department to say what the law is." The *McCleary* justices said, "This is so, we explained [in the 1978 school funding decision], 'even when that interpretation serves as a check on the activities of another branch or is contrary to the view of the constitution taken by another branch.'"

In its contempt order, the court majority suggested that because it had left the "means" and "details" of complying with the law up to the Legislature, it hadn't stepped over the line.

Not everyone was convinced. In a dissent, Justice James Johnson wrote that the order "violates both the constitutional separation of powers and the explicit [constitutional] delegation of definitions and funding to the Legislature."

Ahearne says the argument that courts shouldn't intrude on the legitimate powers of the people's elected representatives is all too familiar. "We've heard all that before. It's what southern officials used to say."

Separation of powers wasn't the only ground on which some people argued that the Washington court should at least delay its ruling on contempt. An array of interested

parties chimed in. Five former governors submitted a friend of the court brief urging the court to defer a contempt hearing until after the 2015 Legislature had a chance to act on its own. Several non-profits warned about taking money away from programs that helped children in other ways. A tax reform group argued for more revenue. Republican legislative leaders basically said the court should mind its own business.

Courts and legislators have reached impasses over school funding in other states. In Kansas, where conservative Republican Governor Sam Brownback has drawn national attention for tax cuts and resulting cuts in services, the state Supreme Court has told the Legislature to make up the difference in funding between poor districts and rich ones. (This actually represented a step back from a lower court ruling that the Legislature had to come up with more money across the board.) Though some politicians complained that the court was over-reaching, the court insisted not only on its power, but also its duty to make sure the Kansas constitution was carried out. It was not, the justices wrote, "at liberty to surrender, ignore or waive this duty."

New Jersey's Supreme Court also insisted on its power to make legislators obey the law. The state argued that its constitution's appropriations clause gave only the Legislature the power to make funding decisions. The court held that, under the circumstances, the clause raised "no bar to judicial enforcement" and ordered the state to come up with another \$500 million for the coming fiscal year.

When legislators have huffed and puffed in other states, Ahearne explains, courts have merely insisted on their powers to declare laws unconstitutional and have warned that unless there's enough money to pay for schools, they will simply throw out all the states' school laws, bringing school systems to a grinding halt. That has not been an attractive prospect.

Williams explains that the New Jersey court once shut state schools down — albeit in the summer — "and the Legislature jumped." In theory, he says, the court could try a variety of things, although there are very few precedents anywhere. In Massachusetts, where the issue was state funding of elections, the court sent marshals out to seize state property and started selling it. They could even order legislators arrested, although "nobody wants it to come to that," Williams says.

Still, Ahearne concedes that in no other state has a court addressed funding for an entire public school system. (In Kansas, Arizona and New Jersey, courts have ruled on funding for discrete parts of the system or discreet groups of schools.) Washington is the only state whose constitution says: "It is the paramount duty of the state to make ample provision for the education of all children residing within its borders."

The Washington Supreme Court has so far used the Legislature's own education standards for what must be fully funded by 2018. On one hand, it has not told the state that it must come up to the 2018 level all at once. On the other, it has told the state that it can't wait until the last minute; it must make steady progress over the next few years. It has not specified what will suffice before 2018.

Will the state do as the constitution says? Or will it redefine its obligations? "I expect them to try to reduce the promises they've made," Ahearne says. "I would expect them to dumb down academic standards, would expect them to play accounting games."

One possible game they might try is the so-called "levy swap". The state could increase the property tax and send the extra money to local school districts. The districts would then reduce their special levies by that amount. The schools would get no more money, but the taxpayers wouldn't have to pay any more and, on paper, the state would increase school funding.

The court has made it clear that the Legislature can still decide what constitutes a basic education. However, it has also said that the Legislature doesn't have *carte blanche* to

define basic education down. Lawmakers would need a rationale. "[T]he Legislature may not eliminate an offering from the basic education program for reasons unrelated to educational policy," the court said. "Rather, the Legislature must show that a program it once considered central to providing basic education no longer serves the same educational purpose or should be replaced with a superior program or offering."

Whether or not Washington's legislators try a little sleight of hand, on the day after the session ends, the state is supposed to tell the court either that it has purged the contempt order or that it has not.

If it has not, it will be expected to cite the reasons why it shouldn't be sanctioned. Or, very likely, it may do all of the above: Argue that it has purged the contempt, but that if the court disagrees, it shouldn't be sanctioned. The plaintiffs will presumably file a response saying that they disagree. That will be Act One.

The court may postpone a decision on sanctions until the end of Act Two: Sixty days after the budget is signed, the state must tell the court why the budget complies with the ruling, as it has done for the past several years. Then, as has also been done in the past, the plaintiffs will have 30 days to argue that the budget actually doesn't comply. That all means the court may not make any decision until next fall.

With a state Senate — and an electorate — that doesn't much cotton to new taxes, making progress will be difficult at best. Still, in New Jersey, Arizona and Kansas, Ahearne argues, "the legislators had to realize they had to do something that a majority of the people didn't like. They had to do something they did not want to do." In that case, raising the cash to pay for schools was the lesser of the political evils.

"The more unpleasant thing was having schools closed."

In Washington, Ahearne says, "I think the supremes are going to have to do something bold." He doesn't know what that will be, but he does recall that at one hearing, "Justice [Charles] Johnson threw out the idea that . . . if you don't have enough money, we'll just strike down all the tax exemptions." Clearly, he says, it's unconstitutional to give away money in the form of a tax exemption in place of amply funding schools.

Faced with Legislatures that have ignored constitutional obligations, state courts have basically insisted that no one is above the law — or, to be cynical, no one but the judiciary is above the law. Arguably, they have overreached. They have certainly practiced "judicial activism" — but there's a lot of that going around. And, arguably, that's just the way the system is designed to work.

"These state officials have taken an oath of office to uphold the state constitution," Williams says, and, like it or not, "the truth is that the state constitution is what the court says it is."

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