Dissent to Order: Under the constitution, only the legislature is empowered to define and fund basic education.

No. 84362-7

J.M. JOHNSON, J. (dissenting)—It is the sworn duty of each member of this court to "take and subscribe an oath that he will support the Constitution of the United States and the Constitution of the State of Washington." WASH. CONST. art. IV, § 28. Although not specifically required by state statutory or constitutional provisions, legislators take a similar oath. *See* RCW 43.01.020. Pursuant to this oath, the legislature holds a constitutionally delegated duty specific to the funding of education. The judiciary does not.

I write separately to express concern over the impropriety—indeed unconstitutionality—of the court's expanding exercise of continuing jurisdiction over the school system, which requires control of both the legislative and executive branches.

Such unwarranted extension of judicial authority violates both the constitutional separation of powers and the explicit delegation of definitions and funding for education to the legislature. That delegation is set forth in such explicit

language of Washington Constitution article IX, section 2, that one need not be a lawyer to understand[1]:

> The legislature shall provide for a general and uniform system of public schools. The public school system shall include common schools, and such high schools, normal schools, and technical schools as may hereafter be established. But the entire revenue derived from the common school fund and the state tax for common schools shall be exclusively applied to the support of the common schools.

I earlier noted in my dissent to this court's previous December 2012 order that "'[t]he spirit of reciprocity and interdependence [in our constitution] requires that if checks by one branch undermine the operation of another branch or undermine the rule of law which all branches are committed to maintain, those checks are improper and destructive exercises of the authority.'" Order, *McCleary v. State*, No. 84362-7, at 3-4 (Wash. Dec. 20, 1012) (J.M. Johnson, J., dissenting) (first alteration in original) (quoting *In re Salary of Juvenile Director*, 87 Wn.2d 232, 243, 552 P.2d 163 (1976)).

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[1] Indeed, less than one-third of the Washington Constitution delegates were lawyers. Only 23 delegates out of 75 were lawyers. *See* Charles K. Wiggins, *The Twenty-Three Lawyer-Delegates to the Constitutional Convention*, WASH. ST. B. NEWS, Nov. 1989, at 9-14; WASH. SEC'Y OF STATE, WASHINGTON HISTORY: THE WASHINGTON STATE CONSTITUTION—1889, http://www.sos.wa.gov/history/constitution.aspx (last visited Jan. 10, 2014). Twice as many of these lawyer-delegates received their legal education by reading law in a law office as by attending law school. Wiggins, *supra,* at 9. Not one delegate ever suggested that the constitution's educational funding mechanism would be insufficient, requiring courts to step in and oversee this legislative function.

This court's expanding control of the legislature's funding of education continues to be a violation of the state's constitution. I, once again, direct this court to article IX, section 2 of our state constitution, which requires that "*[t]he legislature* shall provide for a general and uniform system of public schools." (Emphasis added.) This court's exercise of continuing jurisdiction in this case usurps what is intended to be and what expressly is a legislative function and duty. It is particularly illogical that the court purports to bind legislators—and a governor—who were not even elected at the time of the earlier order. This January 2014 order was specifically chosen to predate the newest terms of office. Order, *McCleary v. State*, No. 84362-7 (Wash. Jan. 9, 2014).

The legislature—not any court—is the body capable of gathering relevant information regarding competing state budget interests and funding each according to available resources provided from the economy and tax resources. Given this court's total lack of record concerning such other budgetary matters, it is improper that a court would retain jurisdiction in this case to control this one portion. Budgetary matters are the province of the legislature, which is equipped with mechanisms for gathering public input through elected representation and may even raise or lower funding sources. This court is not constitutionally delegated to perform such information-gathering process.

Such exercise of continuing jurisdiction would be of grave concern to the authors of the constitution given that this court's decision-making procedures are not nearly as transparent as those of the legislature. In these ongoing proceedings, there will be no public trial with an easily accessible record.[2] We have held, for example, that the Public Records Act, chapter 42.56 RCW, does not generally apply to the judiciary. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 343, 217 P.3d 1172 (2009); *accord Nast v. Michels*, 107 Wn.2d 300, 730 P.2d 54 (1986). Today's order undermines our state's separation of powers doctrine, which exists "to ensure that the fundamental functions of each branch remain inviolate." *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994).

That today's actions are a violation of the separation of powers is further illustrated by the majority's difficulty in evaluating the progress made by the legislature. We simply do not have enough information to know whether the legislature's outlined progress is adequate. The workings of a state involve many interconnected parts. It is unhelpful to view one piece in isolation, when other state matters have evolved. Washington's economy is an ever-changing entity, with new

[2] Article I, section 10 of the Washington State Constitution requires that justice be administered openly. However, this court often conducts its affairs behind closed doors, not subject to the eyes of public scrutiny.

issues (such as Boeing's recently concluded union contract) transforming our economic calculus near daily. The state of plaintiffs' schools has undoubtedly vastly changed since the case went to trial in August 2009. Several cycles of budgets and test scores have likewise come and gone.

For example, when this case went to trial, Carter McCleary was a 10-year-old 5th grader at Chimacum Elementary School. Clerk's Papers at 2651. During the 2009-2010 school year, 84% of 5th graders at Chimacum Elementary met the standard in reading, 42% met the standard in math, and 30.9% met the standard in science.[3] During the 2012-2013 school year, 65.6% of 5th graders at Chimacum Elementary met the standard in reading, 65.6% met the standard in math, and 76.6% met the standard in science.[4] Clearly these scores have changed dramatically, both for better and for worse. This illustrates two points. First, the state of educational opportunities in various areas is ever-changing, comprising many moving parts. The legislature is best-suited to conduct hearings to understand and analyze the changes in such budgetary matters over time. Second, the legislature, with its committee

[3] OFFICE OF SUPERINTENDENT OF PUB. INSTRUCTION, WASHINGTON STATE REPORT CARD, http://reportcard.ospi.k12.wa.us/summary.aspx?groupLevel=District&schoolId=934&reportLevel=School&orgLinkId=934&yrs=2009-10&year=2009-10 (last visited Jan. 10, 2014).
[4] OFFICE OF SUPERINTENDENT OF PUB. INSTRUCTION, WASHINGTON STATE REPORT CARD, http://reportcard.ospi.k12.wa.us/summary.aspx?groupLevel=District&schoolId=934&reportLevel=School&orgLinkId=934&yrs=2012-13&year=2012-13 (last visited Jan. 10, 2014).

process, is best-suited to consider such fluctuations in test scores and determine if its new funding model is resulting in better educational opportunities and outcomes.[5]

Even if we were to determine that the legislature is in temporary violation of full funding, the founders presciently left us without a tool to punish such a short term violation. It has been suggested in filings that we may hold the legislature in contempt for taking too few steps toward full funding. Such action would be untenable. Because we would be fashioning a tool that has not been constitutionally delegated to us, we are left with far too many unanswered questions concerning this makeshift authority. It is unclear if we should hold specific legislators in contempt or the legislative body as a whole. The governor, who prepares the entire budget, and the superintendent of public instruction, who administers education, are other suggested targets. Because the body of legislators changes over time, and indeed has changed since the first opinion, it is uncertain which legislators and which time frame should be held accountable. Finally, it is unclear what the appropriate punishment would be for elected officials working in good faith to discharge their constitutional duty. Should we fine or imprison them?

[5] I continue to object to the idea that more money thrown at a potentially broken system will result in better student opportunities and outcomes. *See* Order, *supra*, at 4 n.4 (J.M. Johnson, J., dissenting).

It has also been suggested that we could order the legislature to withhold all educational funding (or all funding) until the system is fully funded. This severe remedy would be inimical to the legislature fulfilling its paramount duty. Washingtonians would starve and go without necessary services. The children (and schools) with the fewest resources would be hurt the most by such an aggressive approach. Like holding the legislature in contempt, ordering the withholding of funds is clearly impossible as an enforcement mechanism. These uncertainties undoubtedly indicate that we are in territory far unsuitable for the judicial hand as defined in our constitution under article IV.

As a wiser court did in *Seattle School Dist. No. 1 of King County v. State*, 90 Wn.2d 476, 484, 585 P.2d 71 (1978), we should have declined to retain jurisdiction in this case. In *Seattle School District*, we did so because we were "confident the Legislature [would] comply fully with its constitutionally mandated duty." *Id.* at 484. I continue to be confident in both the good faith of the legislators and our system of separation of powers.

I also agree with Chief Justice Madsen's expression in this case that "[w]e have done our job; now we must defer to the legislature for implementation." *McCleary v. State*, 173 Wn.2d 477, 548, 269 P.3d 227 (2012) (Madsen, C.J., concurring/dissenting). Today's order illustrates that continuing jurisdiction is an

ill-fitting method of managing this state's educational funding. Even in light of the legislature's improved educational funding, we are unqualified to assess the progress made or the legislature's chances of achieving full funding by 2018. Put simply, the founders did not intend for this court to act in such a role and, more importantly, prohibited exercise of such self-granted power. With zero information regarding other financial constraints and plans for future budgets, it is impossible for us to evaluate the legislature's progress. We are not—and should not be acting as—managers of the state coffers.