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UNDERMINING THE JUDICIAL POWER OF THE STATE

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Executive Summary

If the Kansas legislature acquiesces in our Supreme Court's exercise of the power to tax, assumed in its recent school finance decisions, it will have aided and abetted the Court's self-destructive actions.

Prior to its current school finance decisions, the Kansas Supreme Court was unequivocally committed to the proposition that the judicial power of the State could never be exercised so as to directly or indirectly impose a tax in any amount.

How did today's open-ended legislative power become transformed into a judicial power? The Court simply treated the lawsuit as the equivalent of a legislative proceeding over which it was presiding. Then it accepted a part of the evidence introduced in that suit as the equivalent of a legislative enactment.

*The Court has previously said that **"The legislative power of this state is vested in the legislature and the legislature is prohibited from delegating legislative powers to nongovernmental associations or groups."***

Nevertheless, the Court has now ruled that a study made by a private company is binding upon the legislature, notwithstanding that the constitution of this state, in the Court's own words, prohibits the delegation of legislative power to private groups. This conclusion by the Court, and its order to the legislature to implement it, simply cannot be reconciled with either the Court's prior rulings that legislative power may not be delegated to private groups nor with its long-standing commitment to the principle of judicial non-interference in legislative functions.

At a time when the members of the judiciary are facing a storm of unwarranted accusations as judicial activists from the left and the right, our Supreme Court's assumption of power, constitutionally assigned solely to the legislature with respect to school financing, is most unfortunate and clearly inconsistent with the foundations of a constitutional democracy. It is devoutly to be hoped that both the Kansas legislature and our Supreme Court will honor their respective, separate constitutional obligations in a manner that will permit the Court to retain the trust, confidence and respect to which that office is entitled.



If the Kansas legislature acquiesces in our Supreme Court's exercise of the power to tax, assumed in its recent school finance decisions, it will have aided and abetted the Court's self-destructive actions. The judicial branch in our tripartite constitutional order was deliberately designed to be the least dangerous branch of government because the constitutional authority granted to it by the people of this state was limited to the exercise of *judicial* power. Throughout our history as a state and as a nation the power to tax and to appropriate money exacted from the people has been considered as a strictly *legislative* power.

Prior to its current school finance decisions, the Kansas Supreme Court was unequivocally committed to the proposition that the judicial power of the State could never be exercised so as to directly or indirectly impose a tax in any amount. In *Union Pac. Rld. Co. v. State Tax Comm.* 145 Kan. 715 at p. 728, our then Supreme Court said in the plainest language conceivable:

"It is fundamental that courts cannot be required or permitted to exercise any power or function except those of a judicial nature."

"The power to tax is a legislative power, and not in any sense judicial."

In the same case, on the same page, the Court recognized the long-standing "**principle of noninterference by the judiciary in a legislative function.**" Article 6, Section 6 (b) of the Kansas Constitution unmistakably entrusts to the legislature the power to "make *suitable* provision for finance of the educational interests of the state."

How did this open-ended legislative power become transformed into a judicial power? Through the magic of a lawsuit naming the State of Kansas as a defendant, the members of our legislature have been ordered to immediately amend their determination as to the current amount of suitable funding by an additional number of some \$142 million. How did the Court reach that amount and the further sum of \$568 million that it has warned may come in a possible future judicial order? The Court simply treated the lawsuit as the equivalent of a legislative proceeding over which it was presiding. Then it accepted a part of the evidence introduced in that suit as the equivalent of a legislative enactment.

That evidence consisted of nothing more than a study by a private company of school funding "experts" hired to assist the members of the legislature in their determination of a suitable amount to be appropriated to finance the educational interests of the state. Nothing in that study purported to discuss the total cost of the many, many other expenditures that the legislature has to consider in arriving at a suitable amount for any of them. Nor did it discuss whether the nearly one billion dollars in additional dollars suggested by the study, and ordered by the Court, should be raised by increasing taxes or by reducing funds for other government programs or by some combination thereof, nor what the effects might be upon the ability of Kansas taxpayers and the state's economy to foot the entire bill.

The Court has emphatically said that "**The legislative power of this state is vested in the legislature and the legislature is prohibited from delegating legislative powers to nongovernmental associations or groups.**" *Gumbhir v. Kansas State Board of Pharmacy*, 228 Kan. 579,585.



Nevertheless, the Court has now ruled that a study made by a private company of school finance "experts" is binding upon the legislature, notwithstanding that the constitution of this state, in the Court's own words, prohibits the delegation of legislative power to private groups. This conclusion by the Court, and its order to the legislature to implement it, simply cannot be reconciled with either the Court's prior rulings that legislative power may not be delegated to private groups nor with its long-standing commitment to the principle of non-judicial interference in legislative functions.

The retention of jurisdiction by the Court over future funding of school finance means that the Court may be engaged in supervising the exercise of legislative power not only during the current legislative session and in the following session, but most likely for years to come. Members of our House of Representatives are subject to removal from office through biannual elections. None of them are parties to this litigation, now in its sixth year, but the Court's orders are directed to them. The threat of sanctions if legislators do not cast their votes as ordered by the Court lends itself to possible additional constitutional violations that could lead to unending controversy and litigation as the Court continues to be enmeshed in legislative proceedings.

The Court's reliance upon Chief Justice Marshall's dictum in the seminal case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, that the judiciary has ultimate authority to review the constitutionality of legislation, is clearly futile. It ignores the limitations placed upon that authority in the very same case. The opinion there dealt with both the existence of the power of courts to control members of the other branches of government and the limits upon that power that courts must observe if our constitutional structure of government is to be preserved. The facts presented in *Marbury* involved the power of the Court to control acts of officers of the executive departments, but its language is, at the very least, equally applicable to the legislative branch. The Chief Justice said that "The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." Can there be even a glimmer of doubt that the power conferred by our constitution upon the State to make *suitable* provision for the funding of public schools is inherently and indisputably discretionary in nature and, therefore, has been given solely to the legislature under our constitution? Any doubt should be dispelled by simply asking what the Court would do if faced with a subsequent expert study concluding that some future legislature's determination of suitable funding is grossly excessive? Would it then order a refund to the taxpayers if a suit were filed on their behalf?

All concerned parties, the people of this State, and the members of all three branches of the government that the people created might benefit from re-reading the pertinent remarks in No. 58 of the Federalist Papers written by James Madison, the acknowledged father of our federal constitution.

"The House of Representatives cannot only refuse, but they alone can propose the supplies requisite for the support of government. They, in a word, hold the purse—that powerful instrument in which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of government."



At a time when all departments of government are under constant pressure from every imaginable special interest group to increase the tax burdens of the people of this state, and when the members of the judiciary are facing a storm of unwarranted accusations as judicial activists from the left and the right, our Supreme Court's assumption of power, constitutionally assigned solely to the legislature with respect to school financing, is most unfortunate and clearly inconsistent with the foundations of a constitutional democracy. As the looming collision over suitable school financing created by litigation proceeds, it is devoutly to be hoped that both the Kansas legislature and our Supreme Court will honor their respective, separate constitutional obligations in a manner that will permit the Court to retain the trust, confidence and respect to which that office is entitled.

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