

REMARKS OF

JUDGE TERRY L. BULLOCK

NINTH ANNUAL QUALITY EDUCATION CONFERENCE

WASHINGTON, D.C.

May 8, 2009

The Constitution, The Legal System and The Schools

My connection to school finance issues came about quite by accident. One day in 1991, I was having lunch with my Chief Judge and he confided to me that he was planning to retire soon and that he had a case that would likely last longer than his remaining tenure. He asked if I would accept the case now so there would not be a change of judge in the middle of the litigation. Of course, I said, "of course." That's how I was assigned Mr. Rupp's first school finance case, known as Mock v. Kansas, a case claiming school finance funds in Kansas were inequitably divided among the students of the State.

Soon after I accepted the assignment, I mentioned the case casually in passing to a realtor friend of mine. It turned out that he often had the occasion to spend some time waiting in the Register of Deeds office in our Courthouse. The next day that very thing happened and, to kill a little time, he picked up a copy of the publication known as "Governing." In that publication was an article about the nation-wide school finance problem. Remembering our brief conversation, he brought it to me. In that article, I read of states that had been in school finance litigation for over 20 years and whose school finance problems were worse than when the litigation began. I also learned that my case, like all school finance cases, involved all three branches of government, every inch of Kansas land (because of the school tax system), every Kansas school child and their family, a gigantic sum of money and every prickly emotion known to humankind. I promptly sent a thank you note to our Chief Judge for his kind referral of this matter to me!

Upon reading this article, it occurred to me that this kind of protracted and expensive litigation would not be good for Kansas and that the money spent on such a case could be better

used for helping the children in our schools. So I asked the lawyers if they minded if I tried to get the case settled. They smiled broadly and said, "You just go right ahead and do that."

Undaunted, I sent a copy of the "Governing" article to the Governor, the Speaker of the House and the President of the Senate. In a cover letter, I asked them to read the article and to let me know if they wanted the tragedies described in the article to happen to Kansas? Or should we talk? The Governor sent her Education Secretary to see me, one Mr. Hernandez. He said, "When I played sports in high school, I could not even eat in some of the restaurants the team stopped at after our games. You don't have to tell me about inequitable treatment. We're on board." A few days later, the Speaker of the House and the President of the Senate came to see me. They said, "Jawboning won't work, we've tried that. Perhaps if you gave us an opinion on what the constitution requires, that might break the existing impasse to change."

So the lawyers briefed the issues and I prepared the opinion the Legislative leaders wanted. Then the Governor, both houses of the Legislature and the State School Board agreed to come to a "meeting" where 1) my opinion would be delivered, 2) the legislature would offer presentations by experts on how school finance problems were being dealt with in other states and 3) where they could then all meet and decide if they wanted to amend the statutes before our case proceeded. The other choice for them, of course, was to let our case proceed and let the chips fall where they may.

Suddenly it occurred to me that my courtroom would not hold all those people. So I called the Chief Justice of the Supreme Court and told him of my dilemma. He said, "Great idea! Use our courtroom." Accordingly, on the day established I opened court in the Supreme Court courtroom from the center chair of the Chief Justice and the Chief Justice appeared at the podium below to welcome the guests. In his introduction he indicated what a good idea he thought this meeting was and then excused himself, because, as he said, if the meeting didn't work, he and the Supreme Court would undoubtedly have to deal with the matter. I then orally delivered my opinion in which it was made clear that our present school funding statutes would not pass constitutional muster. Next, the Legislative leaders introduced their experts to discuss options for dealing with the issue and then it was lunchtime. I dismissed the session with an invitation for the four groups (Governor, House, Senate and State School Board) to convene in a separate meeting room after lunch and to discuss and decide whether they wished to amend the statutes or just let our case proceed. As I look back on it, I now realize that I didn't have any authority to compel such a meeting, but after lunch everyone came back and met. By four o'clock in the afternoon, the leaders came to me with the decision that they wished to amend the statutes before I considered the constitutional issues.

After much heated debate during the next six months (including the attempt of seven western Kansas counties to succeed from the state), the statutes were eventually amended and court and counsel determined the new statutes were "close enough" to pass muster and the case was dismissed. We were all rather proud of ourselves. In fact, I think we believed we had solved the school finance problem for all time.

Well, as I'm sure you already know, school finance problems are never "solved for all time." In fact, it took just about a decade for the Legislature to pretty much return the school finance system to its previous condition.

Accordingly, Alan Rupe and his able sidekick, John Robb, filed their second Kansas school finance case. This time they alleged three constitutional violations:

1) that the per pupil expenditures were once again inequitably distributed among the school children of the State;

2) that the total amount spent by the State on our schools was inadequate, even if it were equitably distributed; and

3) that the State's most vulnerable children, the impoverished, those with special needs, those whose race was in the minority and those with limited or no English proficiency were being denied the equal protection of the law. In this claim, they alleged that these vulnerable children were uniquely damaged to a greater degree by the inequities and inadequacies of a funding system which favored rural districts, while the children at risk were clustered in the cities.

Upon reviewing the claims, my first thought was, "I know how to do this. Let's have another "meeting." Unfortunately, the leaders of the Legislature had changed and the new leadership would have nothing of it. Thus, the case known as Montoy began.

In my opinion, before discussing Montoy, a little review of some basic legal history is in order. As we were all taught in school, the American legal/judicial system is directly descended from the British. In fact, the American Revolution, from the legal perspective, is quite fascinating. We had a war, threw off the yoke of the oppressor, kicked out the crazy King, and what do you think we did the next morning? We adopted the entire British legal system, complete with all its traditions and laws! England had the class of the league in legal systems at the time, and it is to our founder's credit that they knew it and adopted it. But for today, the point is, our system is essentially the common law system which we inherited from the Motherland.

Let's just take a minute to review the fundamentals. To be very basic, common law means, of course, a body of law built up one case at a time over many, many years. Coupled with that tradition is our rule of stare decisis (which means we follow precedent when we have it). But let's be clear, these are rules developed by Judges in cases as they arise, day in and day out. We also have statutes enacted by the Legislature which also prescribe rules which we follow when we have them; an occurrence which I estimate happens in less than 1/2 of our cases. Let me repeat that. On an average day in Court we have hard, controlling authority for less than half of our important legal decisions. Think about it. If the law is clear, you don't need to file the case. In other words, when everyone knows the answer, there is no need for litigation. Accordingly, the cases that typically get filed and make their way to judgment, are the ones for which there are no real answers yet.

I might pause here a moment to comment on the recent use of the term "activist judges," usually defined as judges who "make it up as they go," rather than following existing law. Well,

ladies and gentlemen, for several centuries that is precisely what we have been and are still REQUIRED to do. We have no choice, we are required to decide every case, whether there is a statute of the Legislature, a case by a previous court or nothing at all to follow. Thus, when we are faced with a decision with no statute and no precedent . . . what do we do? We decide it anyway, consistent with our legal history and values. How would you like to come to court with your dispute and have the judge say: "Get out of here! We don't have a statute on that yet!" Of course, a higher court can change our decision (although if it does, that decision itself becomes the rule) and the Legislature can pass a law which is different. But when it's over, the rule settled on becomes the law for that case and the future. And think about the alternative. If the Court can't resolve all of societies legal disputes, the other choice is to regress once again to the "shoot out at sundown" on front street.

[And while I'm at it, I keep hearing the terms "unelected, unaccountable judges" bandied about by some. Well, for their information, I was nominated by a non-partisan commission established by our Constitution for that purpose, I was then appointed by the governor and each four years thereafter, for over three decades, the public voted to retain me in the general election. Everything I did as a judge and every decision I made was done in full public view. The Court of Appeals and the Supreme Court of both the State and Federal systems could overturn any of my decisions in an appropriate case and there was a Commission on Judicial Qualifications which could defrock me if I did anything "unjudicial." Unelected? Unaccountable? How many of you have that kind of oversight and supervision?]

But I have digressed. We were speaking of the English common law tradition. To that English tradition, America has contributed the notion of the Constitution. Rather than subscribe to the old European notion that Kings ruled by divine right, our founders held that our Creator endowed each of us with the ability to govern ourselves and that the authority to govern came not from God, but from the consent of the governed --- that is, you and me.

Based on this premise, we set up two LIMITED governments: State and Federal; and prescribed in our Constitutions the limited powers we granted to each and also enumerated those powers that we expressly denied to those governments (the Bill of Rights comes to mind as an example). Thus, our Constitutions, both State and Federal, are the fundamental law of our land - - which even the government (perhaps I should say especially the government) is required to obey. The Constitution expresses the will of the people - - - the source of all power in our democracy. And in our system, it is the Courts, the third, but equal branch of government, which decides in all cases if laws are broken, especially those contained in our Constitutions.

That said, we should also note that there is very little in anyone's Constitution. The U.S. Constitution is written on four hand-written pages! And so it is with the Kansas Constitution.

It contains the rough outline of government: the Legislative, the Executive and the Judicial. AND a whole chapter on Education. In other words, from the time of statehood and before, our founders placed educating our children at the very top of our priorities for government and enshrined that sacred obligation in the Constitution itself. All but one State has similar provisions. The single exception is South Carolina, which repealed theirs after the decision in Brown v. Board of Education.

This bird's-eye view of about a thousand years of legal history, brings us, finally, to the Montoy case, which was randomly assigned to me by a computer.

In this case, as I mentioned earlier, several school districts and a number of school children claimed that the Legislature was not fulfilling its duty under the Kansas Constitution to provide funding for a suitable education for those children; that such funds as were provided were not equitably distributed (i.e., some kids got a whole lot and others very little) and that, because of these deficiencies, our most vulnerable children (the poor, the minorities, the disabled and those with limited English) were being hurt the most, a violation of the equal protection guarantees of both the Kansas and United States Constitutions.

Mr. Rupe, Mr. Robb and their worthy adversaries tried the case to the Court and I found that the following facts (true as of the time of trial) were proved:

The State of Kansas then spent \$3,617,441,890 per year on K-12 education (that figure combines funds from all state sources: state general funds, local property taxes, local sales taxes and any other revenue source).

To this sum was added Federal grants of \$250,428,582, for a grand total of \$3,867,870,472. This sum is more than half of the entire revenues of the State of Kansas.

For these funds there was and is no budget. No school or school district in our State has ever been asked to submit a "bottom up" budget to request or justify what that school thinks it costs to provide a suitable education for its students. In fact, one Legislator testified that they had never asked the schools what funds they needed to provide an adequate education for the children because they did not want to know.

In Kansas, school funds are appropriated by the Legislature each year in a lump sum and divided among the state's 303 school districts for use by its 1,500 schools in educating its

445,000 children. The division of the funds is accomplished by means of a formula contained in state statutes passed by the Legislature. The school districts then take the money allotted them and make a "spending budget" as to how they will spend those funds . . . spend I say, as any left over funds are confiscated at the end of the year and an equal sum deducted from that school's allotment next year. There was, therefore, a disincentive to save.

By this formula, the school district in Liberal, KS received \$5,655.95 per pupil (the low) and the school district called Nes Tre La Go received \$16,968.49 per pupil (the high), with all the other districts in between. This differential, in excess of 300 percent, was not based upon differing costs to educate the children in those districts, but upon political considerations. One senator described it as a "political auction."

Because there was some concern on the part of the Legislature about what a suitable education (as required by the Kansas Constitution) would actually cost, a study was commissioned by the Legislature to determine that amount. In enacting legislation to authorize the study, the Legislature found as a fact in the law they enacted, that the study was needed to address current inadequacies and inequities in the funding statutes, the very claims made by the children in my case. Let me repeat that. The plaintiff school children claimed the school funding system was inadequate and inequitable. The Legislature, on behalf of the defendant State, passed a law finding those claims to be true. As a result of those findings, a well-regarded team of experts (Augenblick and Meyers) was hired to undertake this study. Meyers, by the way, is a Kansan and a former member of our Legislature who actually served as an expert at the request of the Legislature in our first Mock case over a decade earlier.

The first thing the experts did was to ask the Legislature to define "suitable." They said, you define suitable and we'll cost it out for you. So the Legislature did define it in additional statutes they passed. The experts then, in consultation with Kansas educators, spent the next year preparing their study of the actual cost of providing a suitable education for Kansas students, as defined by the Legislature itself. The result was that the funds furnished were \$853 million short. And this study did not include such big ticket items as: all transportation costs, all food costs, all capital outlay funds (building and maintaining buildings and equipment) and adult education. And we haven't mentioned inflation. When this report of this study was received by the Legislature, one can imagine an audible gasp just before the report was quickly filed in a bottom drawer of a file case somewhere. But Mr. Rupe and Mr. Robb found it and brought it to Court.

In fact, the Augenblick and Meyers report was the only evidence produced at trial concerning the cost of a suitable education in Kansas and no one attacked the study's authenticity

or reliability. In fact, when asked if there was anything else the Court could consider, the Commissioner of Education, a defendant, answered indeed there was nothing.

With respect to whether this Kansas school funding inequity and inadequacy injured vulnerable children more, the evidence was also stark and clear. Every expert who testified agreed that the poor, the minorities, those with disabilities and those with limited or no English skills are more expensive to educate. It was also clear that those categories of children are clumped in the larger cities of Kansas. Because the funding formula generally favored small schools, the fact was that the schools with the most expensive students received the least funds. One school superintendent testified that the school finance system was "upside down."

As to whether the school funding inadequacies and inequities affected student performance, the test scores were also stark, alarming and revealing. Although Kansas students ON AVERAGE do well on standardized tests, when those results are DISAGGREGATED, the following is revealed:

83.7% of African American students,

81.1% of Hispanic students,

64.1% of Native American students,

79.8% of disabled students,

87.1% of LEP students, and

77.5% of poor students, are FAILING 10th grade math, for example.

Other scores in other grades and subjects are slightly better, but tragically similar.

This is called the "achievement gap," which the Superintendent of Schools in Wichita (our largest school district) called "stunning," and the Commissioner of Education said would "take your breath away."

And these results do not include the drop-outs. In Dodge City, for example, 65% of Hispanic males drop out . . . give up on the process altogether. They are not in the statistics I mentioned. And Dodge City has a 74% minority student population. They have a new name for it: majority minority.

Some argued that money doesn't matter; that these terrible results are unrelated to spending. But the "boots on the ground" people, the teachers, the principals and the Board members did not agree. In fact, a telling experiment was done in Dodge City. They got a federal grant, doubled the teachers, cut the classes in half and brought in special training for

teachers. They raised their reading proficiency in one school term from 44 to 70! And this in a district which has 74% minority, 67% poverty, 13% disabled, 47% ESL and 25% LEP.

Those same teachers testified that their lack of resources required them to "teach to the middle" (not able to help advanced or slow learners) and led to "social promotions" (where those who do not really qualify are passed to the next grade anyway).

Those teachers and superintendents looked me in the eye and said, "We know how to do it. We just lack the resources." I believed them.

Based on this essentially uncontested evidence (virtually all the evidence came from the defendant's own books and records) I had no choice but to hold that the Constitution was not being obeyed. To be respectful of the other branches of government, I delayed my final decision for an entire legislative session to allow time for the matter to be corrected. Instead, the Legislature chose not to address the issue. So I did what judges always do: the funding statutes, being unconstitutional and void, were enjoined from further use. At this point the case was appealed to our Supreme Court, which ultimately concurred. And on this record what else could they do? They then directed that the Legislature immediately fund at least 1/3 of the amount their own study showed was needed (as calculated under their own definition of a suitable education), that next year a study be done to confirm the current actual costs of a suitable education and whatever those costs are, that they be supplied.

This result, in my judgment, was rational, measured, respectful, exquisitely judicial, and, if anything, restrained and conservative. The Court did not write a new funding law of it's own. It did not take over the schools. It did not appoint an education czar (as some states have done). It simply said: Legislature do YOUR job. If that doesn't respect the separation of powers, I don't know what would.

The major contributions of the Montoy case to legal history are two: 1) it establishes once and for all that all funds provided for schools by all governmental subdivisions and entities are "state funds," and as such, must all be aggregated and equalized as to every child; and 2) it establishes once and for all that the amount of funds required by the Constitution to be suitable or adequate, is the actual cost of providing a suitable education. Both of these concepts can be legally determined, free of parochial political considerations. In other words, henceforth, all differentials in funding must be based on the actual cost of educating any particular category of child and the actual cost of an adequate education for all of the children is required by the Constitution to be provided by the Legislature.

There has been talk in recent years of amending our Constitution to deprive the Courts of the authority to enforce their orders. If such an amendment were to pass, the Court will become nothing more than a toothless debating society and our whole concept of limited constitutional

government . . . where especially the government has to obey your constitution, will be lost. Before the public falls for that, I hope they will stop and think: next time it might be me or my children or my grandchildren who need the Court's protection in enforcing our most basic of legal values. There has also been discussion of amending the Constitution to require political approval of judges of at least some courts. In that regard, remember that an independent judiciary is the rock bottom of our system of law which guarantees our basic rights and freedoms. If we are not to have an independent judiciary, what is the alternative? A dependent one? And dependent upon whom? As I have said to my students for years, if you can't afford to buy a judge, then you had better support a system where no one else can either! When I became judge over 30 years ago I took a solemn oath on the scriptures to preserve, protect and defend our constitution. Now I am retired. In the days ahead, it looks like it is going to be your turn.

My opinions: www.shawneecourt.org

Supreme Court opinions: www.kscourts.org

Where the \$\$ went: www.ksrevenue.org

