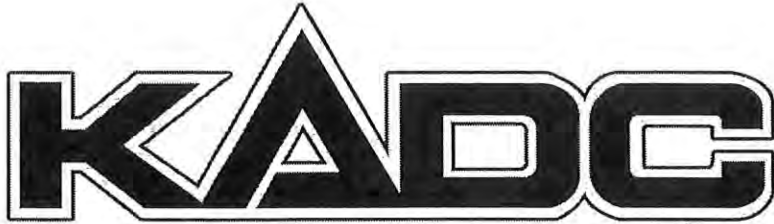

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TO:	**Joint Meeting of the House and Senate Judiciary Committees**
FROM:	**Nathan D. Leadstrom, on behalf of the Kansas Association of Defense Counsel**
DATE:	**June 15, 2016**
RE:	**OPPOSITION TO CONSTITUTIONAL AMENDMENT STRIPPING JUDICIAL REVIEW OVER ISSUES OF SCHOOL FUNDING**

> *If men were angels, no government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.*

James Madison, Federalist Paper No. 51 (1788).

Madison drives home the principle that no one is above the law, not even the government who, "[w]e, the people of Kansas," gave the power to govern.[1] Thus, in a government of law "administered by men over men," our Constitution can only be fully and effectively implemented when the laws of the state are respected by the citizenry **and** the government alike. This is a necessary step for assuring the continued vitality of our system. Stripping the judiciary of the power to interpret and apply the law irreparably destroys the system of government by placing the Legislature above the supreme law of the land set forth in the Constitution.

KADC is a state-wide organization of lawyers admitted to practice law in Kansas who devote a substantial amount of their time to the defense of civil cases and representing businesses across the state. As part of our mission, our organization advocates for the administration of justice, because our clients depend on it. For this reason, KADC has consistently spoken out in favor of the importance of the separation of powers and impartiality of the judiciary, and, to preserve the integrity and effectiveness of our justice system, it strongly opposes efforts to change that system. In this instance, KADC is opposed to any changes to the checks and balances within the Kansas Constitution that would strip the Supreme Court of its jurisdiction or authority to review legislative action for its conformity to constitutional requirements in the area of public education funding or any other right or freedom guaranteed by the Kansas Constitution. The Kansas Supreme Court properly and fairly determined the issue of public education funding in compliance with its duty under the Constitution, the Legislature needs to quit attacking the Court for its decision and perform its own duty to comply with that decision as required by the Kansas Constitution.

[1] KAN. CONST., Preamble & Bill of Rights §§ 2, 20.

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I. The Legislature cannot judge of its own compliance with the Constitution.

The written Constitution is paramount law because it emanates directly from the People.[2] The Legislature may only enact legislation in harmony with, but not in derogation, of the Constitution.[3] Otherwise, any law that can be ignored is meaningless. "If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny."[4] Thus, to be equal in the eyes of the law, no one is allowed to be a judge in his own cause and all must submit to the will of the People. It was from these simple, undeniable truths that our government was given shape to protect and preserve the will and liberty of the People.[5]

II. Separation of Powers is essential to guarantee Liberty and Justice for All.

The framers of the Kansas Constitution, modeled after the U.S. Constitution, addressed this problem by dividing power among the different branches of government (legislative, executive, and judicial). This framework for government, known as the **separation of powers**, ensures that no one person or branch is able to gain absolute power and stand above the law. Each branch of our government has some level of control or oversight over the actions of the other branches. Those three branches of government guaranteed by the Kansas Constitution each have unique powers:

- "[T]he executive power is the power to enforce the laws."[6]
- "[T]he legislative power is to make, amend, or repeal laws."[7]
- "[T]he judicial power is the power to interpret and apply the laws in actual controversies."[8]

The doctrine of the separation of powers is well-recognized as an inherent guarantee of both the Kansas and United States Constitutions.[9] The Framers "recogniz[ed] a strong need to separate legislative and judicial power."[10] Therefore, they created "a three branch system of government, relying on checks and balances, with an independent judiciary that remains a model for the rest of the world."[11] "The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."[12]

This does not mean that everyone agrees with the all of the decisions handed down by the Kansas Supreme Court. Some complain about the Court's opinions that are critical of the

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[2] *Id.*; *see also In re Tax Application of Lietz Constr. Co.*, 273 Kan. 890, 903, 47 P.3d 1275 (2002).

[3] *State, ex rel., v. Board of Education*, 212 Kan. 482, 488, 511 P.2d 705 (1973).

[4] *United States v. United Mine Workers*, 330 U.S. 258, 312 (1947) (Frankfurter, J., concurring) ("There can be no free society without law administered through an independent judiciary.").

[5] *See* Alexander Hamilton, Federalist Paper No. 78 (1788) (quoting Montesquieu, Spirit of Laws, Vol. I, p. 181) ("'[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers.'").

[6] *State ex rel Stephen v. Kansas House of Representatives*, 236 Kan. 45, 59, 687 P.2d 622 (1984); KAN. CONST., art. 1 § 3.

[7] *State ex rel Stephen*, 236 Kan. at 59; KAN. CONST., art. 2 § 1.

[8] *State ex rel Stephen*, 236 Kan. at 59; KAN. CONST., art. 3 § 1.

[9] Natalie Haag, *Separation of Powers: Is There Cause For Concern?*, 82 J. Kan. B.A. 30 (March 2013); *see Miller v. Johnson*, 295 Kan. 636, 670, 289 P.3d 1098 (2012); *Van Sickle v. Shanahan,* 212 Kan. 426, 447, 511 P.2d 223 (1973) ("[T]he doctrine of separation of powers is an inherent and integral element of the republican form of government....").

[10] Kurt Kuhn, *Judicial Remedies and the Constitutional Balancing Act*, 32 The Advoc. (Texas) 55 (Fall 2005).

[11] *Id.*

[12] *Buckley v. Valeo*, 424 U.S. 1, 122 (1976).

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Legislature's decisions. But the tension between the legislature and the courts is intentional and is as old as the United States, when Chief Justice Marshall wrote the opinion in *Marbury v. Madison*[13] in 1803.

III. Judicial Review is inseparable from the Rule of Law to ensure Justice for All.

The rule of law is the foundation of our "republican form of government" in exercise of the respective powers of our three branches of government.[14] It places the judiciary in the weakest position with the very important but limited duty to administer the justice system in the exercise of the state's judicial power of interpreting and applying the law to concrete disputes.[15] The judicial power has long been recognized to include the **power of judicial review** to declare executive or legislative actions as unconstitutional which is the "very essence of judicial duty."[16] Our Founding Fathers understood this principle as the bedrock for our system without which the written Constitution had no power.[17]

Judicial review of legislative and executive actions is what distinguishes the rule of law from majority rule[18] and acts as a shield against the arbitrary exercise of power by those in control of government unbound by any law. In majority rule, legal statutes are understood as simply the devices of the rulers, who are free to alter their substance at any time without restraint. For Constitutional law to function, by contrast, even the legislators and administrators of the law must be subject to its provisions.[19] With everyone equal in the eyes of the law, the promise of Justice for All is guaranteed and shielded from attack by every-changing majority or mob rule opinions.

Ensuring that democracy, liberty and justice were not hollow promises, our Framers created a form of government aimed at avoiding the concentration of power in a single authority. They made the Judiciary an institution "not under the thumb of other branches of Government."[20] James Madison, while introducing in Congress the amendments that became the Bill of Rights, eloquently noted that the Judiciary "will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights."[21] Alexander Hamilton argued in Federalist No. 78 that "there is no liberty, if the power of judging be not separated from the legislative and executive powers.... The complete independence of the courts

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[13] 1 Cranch 137 (1803). There, the Court explained: "So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; *the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty*." 1 Cranch at 178 (emphasis added).

[14] U.S. CONST., art. IV § 4.

[15] *See* KAN. CONST. art III, § 1; *see also* Alexander Hamilton, Federalist Paper No. 78 (1788) (describing the judiciary as "the weakest of the three departments of power … and [as such] all possible care is requisite to enable it to defend itself against their [executive and legislative] attacks.").

[16] *Marbury v. Madison*, 5 U.S. 137, 178 (1803).

[17] *See* Alexander Hamilton, Federalist Paper No. 78 (1788) ("[W]henever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.").

[18] The Founding Fathers understood majority rule, left unchecked, has "ever been found incompatible with personal security or the rights of property." James Madison, Federalist Papers No. 10 (1787).

[19] *See* Alexander Hamilton, Federalist Paper No. 78 (1788) (quoting Montesquieu, Spirit of Laws, Vol. I, p. 181) ("'[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers.'"); *see also United States v. United Mine Workers*, 330 U.S. 258, 312 (1947) (Frankfurter, J., concurring) ("There can be no free society without law administered through an independent judiciary.").

[20] Hon. Ruth Bader Ginsburg, Judicial Independence: The Situation of the U.S. Federal Judiciary, 85 NEB. L. REV. 1 (2006).

[21] James Madison, Address to the House of Representatives (June 8, 1789), in THE MIND OF THE FOUNDER 224 (Marvin Meyers ed., 1973).

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of justice is ... essential...."[22] As Hamilton explained, if the legislature judged the validity of its own laws, then its members would substitute their will for the will of the people:

> It is not ... to be supposed that the constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.[23]

It is clear, then, that the Framers called on the Judiciary to patrol the Constitution's legal boundaries to preserve the rule of law. This was not because judges were believed to be wiser or smarter than those in the government's other branches; but, rather, the Framers believed allowing the other branches to police themselves was far too dangerous. The executive, with the sole power to decide whether executive orders complied with the Constitution could become despotic; while the legislature, carrying out of the will of the voters, would seldom turn down popular statutes that cross the Constitution's legal boundaries.[24]

Thus, judicial review of legislative action forms an important foundation of both federal and state constitutional jurisprudence—and of the institutional resentment sometimes felt by American legislatures toward the judiciary. This tension existed when Kansans adopted our Constitution and subsequent amendments. Our state's citizens knew the Supreme Court would engage in review of legislation, and they chose to maintain this essential check upon legislative power to prevent and protect the will of the People. Disputes between the branches of government do not constitute a reason to amend the Constitution or to go in search of ways around judicial decisions, those disputes exist by design.

IV. Judges decide cases based on the Law and the Constitution; Legislators make decisions based on public opinion.

The impetus for the suggestion to amend the Constitution is the Supreme Court's decision in *Gannon* requiring additional funding of public schools to comply with constitutional requirements. Some complain that the Court's decisions on this issue do not reflect current public feelings; yet resistance to the sometimes fickle winds of public opinion in service of the rule of law is the touchstone of American courts. Kansas Supreme Court decisions holding the Legislature accountable to the will of the People as expressed in the Constitution should be encouraged not attacked. Without judicial independence to make decisions free from public or legislative opinion, the system breaks down in favor of majority rule that is often contrary to the rights guaranteed in the Constitution. Those in the majority view today were often the people in the minority only yesterday and are likely to find themselves there again in the future. However, judicial independence weathers these storms of public opinion protecting the rights, freedoms and will of the People – both in the majority and in the minority – at all times.

"The truth is … the danger is not, that the judges will be too firm in resisting public opinion, and in defence of private rights or public liberties; but that they will be too ready to yield themselves to the passions, and politics, and prejudices of the day."[25] Only judicial independence to interpret and apply the Constitution as written to ensure the will of the People remains intact will

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[22] 3 THE FEDERALIST No. 78, at 502 (Alexander Hamilton) (Edward Mead Earle ed.). (Without judicial independence, Hamilton argued, "all the reservations of particular rights or privileges would amount to nothing.").

[23] 4 THE ESSENTIAL FEDERALIST AND ANTI-FEDERALIST PAPERS 285 (Alexander Hamilton) (David Wooton, ed., 2003).

[24] STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 6-11, 215 (2010).

[25] Story, Joseph, *Commentaries on the Constitution of the United States*, vol. III, p. 476 (1833).

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protect against this. Some assert that a court is "liberal" or "activist" when it strikes down legislation or decides a case against another branch of government. This position ignores the reality that the courts do not choose the fights, they only decide the cases that the citizens of this State bring before it seeking to protect their individual rights and guaranteed freedoms. It ignores that the elected representatives of the people also have an obligation to comply with the Constitution which will be enforced in a court of law.

More to the point, judges do not "make law"; they apply it, they interpret it, and they make judgments between conflicting laws. But they do not make law in the sense of legislation. What judges do is far removed from both the process and the effect of legislation. Legislators pick the issues; courts do not pick the cases they decide. Legislators deal with abstract policies rather than concrete cases. Judges make decisions in the context of actual facts, and their decisions are constrained in part by the arguments and record before the court in a given case, and are subject to being distinguished in later cases with different facts. Further, court cases are laden with procedural histories, jurisdictional complexities, and doctrinal precedents that shape and constrain their judicial task. Finally, unlike judges, legislators are expected to abide by their constituents' wills. Judges are accountable to the law and required to uphold the Constitution.

As the Supreme Court explained even before the current school funding amendment was adopted by the People of Kansas in the 1960s:

> It is sometimes said that courts assume a power to overrule or control the action of the people's elected representative in the legislature. That is a misconception.... The judiciary interprets, explains and applies the law to controversies concerning rights, wrongs, duties and obligations arising under the law and has imposed upon it the obligation of interpreting the Constitution and of safeguarding the basic rights reserved thereby to the people. In this sphere of responsibility courts have no power to overturn a law enacted by the legislature within constitutional limitations, even though the law may be unwise, impolitic or unjust. The remedy in such a case lies with the people.'[26]

Furthermore, when reviewing legislation, the Court gives great deference to the legislature as the elected representatives of the People and, therefore, "[a] statute will not be declared unconstitutional unless its infringement on the superior law of the constitution is clear beyond substantial doubt."[27] In performing this duty, courts guard against substituting their views on economic or social policy for those of the legislature and are only concerned with the legislative power to enact statutes, not with the wisdom behind those enactments.[28] "When a legislative act is appropriately challenged as not conforming to a constitutional mandate, the function of the court is to lay the constitutional provision invoked beside the challenged statute and decide whether the latter squares with the former—that is to say, the function of the court is merely to ascertain and declare whether legislation was enacted in accordance with or in contravention of the constitution—and not to approve or condemn the underlying policy."[29]

V. Once the Supreme Court performs its duty to review legislation under the Constitution, the Legislature must perform its duty to comply with the

[26] *Harris v. Shanahan*, 192 Kan. 183, 206–07, 387 P.2d 771 (1963).
[27] *Samsel v. Wheeler Transport Services, Inc.*, 246 Kan. 336, Syl. ¶ 3, 789 P.2d 541 (1990).
[28] *Id.*
[29] *Samsel*, 246 Kan. at 348-49.

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decision.

Our history is replete with courts making difficult decisions in trying times. In a piece of our own State's history, the U.S. Supreme Court was required to decide in *Brown v. Board of Education* that the doctrine of separate but equal violated equal protection. At the time, that decision was extremely controversial and several states threatened to disobey the Court's decision including open defiance with court orders to comply with that decision. Yet, a fellow Kansan, President Eisenhower speaking from the Oval Office told the Nation that once a court reaches a decision, it **must** be followed:

> Proper and sensible observance of the law then demanded the respectful obedience which the nation has a right to expect from all its people....
>
> The very basis of our individual rights and freedoms rests upon the certainty that the President and the Executive Branch of Government will support and insure the carrying out of the decisions of the Federal Courts, even, when necessary with all the means at the President's command.
>
> Unless the President did so, anarchy would result.
>
> The interest of the nation in the proper fulfillment of the law's requirements cannot yield to opposition and demonstrations by some few persons.
>
> Mob rule cannot be allowed to override the decisions of our courts.
>
> ...
>
> A foundation of our American way of life is our national respect for law.[30]

KADC strongly urges all Representatives and Senators to reject any changes to the Kansas Constitution that would strip the jurisdiction or power of judicial review from the Supreme Court to review legislative action that may be found contrary to any right or freedom guaranteed under the Kansas Constitution.

[30] President Eisenhower's Address to the Nation, September 24, 1957, available at https://www.eisenhower.archives.gov/research/online_documents/civil_rights_little_rock/1957_09_24_Press_Release.pdf

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