2005

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EMPIRE CENTER
FOR NEW YORK STATE POLICY
A project of the Manhattan Institute for Policy Research

Policy Briefing

No. 2 • August 2005

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By David Schoenbrod

We have all read the headlines: State Supreme Court Justice Leland DeGrasse, backed by the state Court of Appeals, has ruled in the *Campaign for Fiscal Equity* case that an additional $14.8 billion must be spent on schools in New York City.

Most people assume that the New York State Legislature must come up with the money. The assumption is understandable – courts are armed with the power of contempt, which allows them to punish those who disobey their orders. The most prominent example of court enforcement against defiant official concerned school desegregation in 1950s and 60s. The massive resistance in the Southern states was overwhelmed by northern public opinion, the defendants had to comply, and their resistance is now rightly viewed as shameful.

- ✓ ***The defendant in CFE is the governor.***
- ✓ ***Only the Legislature can appropriate money.***
- ✓ ***The Legislature is not and cannot be a party to the case.***
- ✓ ***Therefore, the court's order cannot be enforced.***

Against this background, I as a lawyer would have read the headlines about the *CFE* case the way that most people read them—that the Legislature must comply. But an experience in the mid-1970s educated me otherwise. At that time, Ross Sandler[1] and I were the attorneys for the plaintiffs in a case to enforce the clean-air plan for New York City. From it issued a court order running against the governor, the mayor, and many other state and local officials, requiring them to implement this clean-air plan.[2] One of the plan's element was to institute tolls on the bridges over the Harlem and East Rivers. Ross and I came to realize that the bridge-toll requirement was unenforceable. The governor could not be held in contempt for not instituting the tolls because he lacked under state law to do so. That authority could be granted only by the state Legislature. However, the state Legislature could not be forced to grant that authority because it was not a party to the case. If we tried to join the state Legislature as a party to the case, we would not succeed because of the doctrine of legislative immunity.

Legislators are Immune

The plaintiffs in the *CFE* case face the same enforcement problem that Ross Sandler and I faced in the bridge-toll case. The governor cannot be held in contempt for not providing the money if the impediment is that the state Legislature has not appropriated the money. Under the state constitution, only the Legislature can appropriate money. The legislators cannot be made parties to the case because of legislative immunity. In other words, Justice DeGrasse and the Court of Appeals cannot enforce their order against the state Legislature.

There are cases where legislators have had to knuckle under to court orders, but none of them indicate that the courts in the *CFE* case can impose their will on the Legislature. Perhaps the most apt parallel is the New Jersey school finance equalization case[3]. The high court of New Jersey had found that there was a state constitutional requirement that school districts across the state have equal budgets on a per-pupil basis. What the court had in mind was that the districts spending less money would be raised up by the state Legislature,

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so that all districts would be more or less equal. The Legislature did not go along with this, because to come up with the extra money required imposing a state income tax and a bare majority of the state legislators were against doing so. After a prolonged period when the Legislature was not cooperating, the court ordered that the schools be closed unless and until spending was equalized. That prompted a few legislators to change their position. A state income tax was enacted in New Jersey and the order was more or less complied with.

What made the tactic arguably legitimate in New Jersey was that the right being enforced was to equal spending. One way of equalizing spending is to raise every district up to the same level. Another way of equalizing spending is to spend nothing on any pupil. The court could justify its order by pointing out that its order directly vindicated the right (although the Legislature could also do so in a more salubrious fashion).

That kind of logic would not work in the *CFE* case, because the right at issue here is to a basic education rather than equal spending. If the court in New York closes all the schools in New York State, the court denies any education to all students. The court would be violating the right at issue in the case rather than vindicating it. That would be illegitimate and would undercut the only leg the court has to stand on, the rule of law.

If the judge tried to fine or hold the state in contempt, appellate courts would end up holding the state immune.

Another case where a legislative body was made to knuckle under had to do with public housing in Yonkers. In that case, the court started to impose escalating fines on the city of Yonkers. In order to pay the fines, the city had to cut its spending, garbage was not collected, and people were being laid off. This alienated the electorate. Eventually the city council went along with the court.

Illusory Remedy

What allowed that tactic to succeed in Yonkers was that the court could levy contempt fines on the city for its disobedience. The court cannot fine the state in the *CFE* case because the state is ultimately immune. The state is titularly a party to the case. But if Justice DeGrasse tried to fine or hold the state in contempt, appellate courts would end up holding the state immune. There is a U.S. Supreme Court case from 1978[4], which shows what would happen. The state in that case was not coming up with the money to remedy constitutional violations in its prisons and the trial court made a move toward holding the state in contempt. At that point, the United States Supreme Court—a much more liberal Supreme Court than we have today—held that the state could raise the immunity issue even though it had long been a party to the case. The high court in *CFE* should hold that the state is immune rather than fining it.

Would it be shameful in *CFE* for the state Legislature to take advantage of the court's inability to force it to act? The recollection of the massive resistance episode in the South suggests that it might be. Those with a longer view of history might come to a different conclusion about whether it is shameful for officials to disregard the decision of a court. Consider the Supreme Court's decision in the *Dred Scott* case that African Americans cannot be full citizens of the United States. Abraham Lincoln, as a candidate for the U.S. Senate, said that if elected to Congress, he would oppose the *Dred Scott* decision. Stephen Douglas, his opponent in the election, said that it would be shameful to disregard the Supreme Court. Lincoln countered that if he were a named defendant in a case, he would have to obey, but as a legislator, he had his own independent responsibility to interpret the constitution and to work for what he thought was the proper interpretation of the constitution. Lincoln's point of view justifies the state Legislature in the *CFE* coming up with its own independent interpretation of the education clause of the state constitution.

Majority vs. Minority Rights

Lincoln's view makes sense today. It would not prevent a court from striking down an unconstitutional statute; it would not prevent a court from issuing an order against the governor or the mayor not to implement an unconstitutional statute; and it would not have prevented the courts from enforcing the *Brown v. Board of Education* decree. The *CFE* case is about majority rights rather than minority rights. It is a right that inheres in all the schoolchildren in the state and has potent political appeal.

Justice Degrasse's opinion does make a difference, not because the court can enforce it, but because most people seem to think that the court can enforce it. In other words, it is a political fact.

But should the court's order have any additional bearing on what the Legislature does?

Putting aside my belief that the court should not have entered this political fray in the first place, it seems to me that if we do take Lincoln seriously, then the court and the Legislature have to take a hard look at the state constitution, and think about what it is

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doing with regard to the promise that a system of education be provided. From that point of view, the court's decision that the New York City schools are inadequate is an educational fact that cannot be disputed. The Legislature should begin with the premise that the schools in New York City are not good enough. That does not mean, however, that the Legislature has to buy the rather narrow-minded, financially-focused solution that the court has imposed.

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1) Ross Sandler, coauthor of *Democracy by Decree: What Happens When Courts Run Government.*
2) *Friends of the Earth v. Carey,* 535 F. 165 (2d Cir. 1976).
3) *Robinson v. Cahill* (69 N.J. 449 (1976)).
4) *Alabama v. Pugh* (438 U.S. 781 (1978)).