

Activist courts yield poor results

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The Tribune editorial titled "If not courts, who enforces constitution?" raises a legitimate question. When the Supreme Court declares a state program to be unconstitutional, should it try to force a solution on the Legislature or should it identify the constitutional infirmity and give the Legislature leeway to address the problem? I believe the Idaho Constitution's separation of powers requires a conservative, rather than an activist, approach.

The Supreme Court made five separate decisions in the school funding case. In its decision in 1993, the court allowed the plaintiff school districts to proceed with their suit and held that the court would decide what constitutes a thorough system of public, free schools. After that decision, the Legislature took several actions to improve the public school system, such as increasing the public school appropriation and directing the State Board of Education to develop new rules regarding the thoroughness requirement. In the second decision in 1996, the Supreme Court directed the lower court to address the question of whether the funding system met the Legislature's obligation under the Constitution to provide a thorough system of public education.

In the third decision, in 1998, the court upheld the rules adopted by the education board relating to the thoroughness requirement. The court also ruled that "a safe environment conducive to learning is inherently part of a thorough system of public, free common schools." The lower court was directed to determine whether the Legislature had provided a means to fund school facilities that provided such an environment. The lower court held a trial in 2000, and ruled in 2001 that the Legislature's system of school funding was violative of the Constitution. In the fourth round, in 2004, the court struck down legislation passed in the previous year imposing various restrictions on lawsuits related to school funding. I was on the court by that time and concurred in the decision.

In December 2005, the court issued the fifth and last decision, holding the Legislature's school funding program to be unconstitutional, despite a number of improvements made by the Legislature in calendar year 2000. In that last decision, the court suggested a number of approaches for the Legislature to consider to fix the problem but none of those approaches was mandated. To do so would have violated our constitutional separation of powers because the Idaho Constitution gives the Legislature the duty "to establish and maintain a general, uniform and thorough system of public, free common schools."

In his interview with the editorial board of the Idaho Statesman (which can be accessed on that paper's website), Judge John Bradbury stated that rather than taking the Supreme Court's approach, he would have sent the case back to the district court to determine how much money was required in order to fix the defective school buildings (a state estimate placed the amount at between \$700 million and \$1 billion), that he would then have mandated the Legislature to come up with the money and, if it did not make the necessary appropriation, he would hold the Legislature in contempt of court. This is activist approach that would have taken longer to resolve the matter and have produced a constitutional confrontation between the court and the Legislature.

The approach taken by the court worked. Four months after the fifth decision, the Legislature passed House Bill 743, the School Facilities Improvement Act, designed specifically to meet the Legislature's responsibility to provide a school funding program meeting the constitutional requirement. That legislation went into effect on July 1, 2006. The Legislature followed up during an August 2006 special session with passage of House Bill 1, the Property Tax Relief Act, which relieved property taxpayers of the primary responsibility for maintenance of school facilities and placed the burden on state general funds through a 1 percent increase in the sales tax. The voters approved this fix in an advisory vote in the 2006 general election by a 72.4 percent vote. This addressed the main problem identified by the court in earlier decisions - the reliance on the property tax to fund school facilities and the difficulty imposed by that system on poor school districts.

Had the court followed the activist approach, the solution would have required additional litigation in district court and, perhaps, a constitutional confrontation. The court observed the separation of powers with its constitutional approach and got the desired results. Activism is not the best answer.

Burdick is seeking re-election to the Idaho Supreme Court.