Gunfight at the K–12 Corral: Legislative vs. Judicial Power in the Kansas School Finance Litigation

Richard E. Levy*

In Kansas, the recent school finance litigation evokes images of an old-fashioned western shootout: “The Gunfight at the K–12 Corral.” This dramatic and suspenseful showdown between two governmental heavyweights—the Kansas Legislature and the Kansas Supreme Court—kept many Kansans gripping the edges of their seats as each new episode unfolded. The plaintiffs’ challenge to the adequacy and equity of school funding in Kansas set in motion a series of actions and reactions whose repercussions have not yet been fully realized. The constitutional confrontation between the Legislature and the court began in earnest when, after various preliminary skirmishes, the Kansas Supreme Court ruled in Montoy v. State (Montoy II)\(^2\) that the Kansas school finance

---

* Professor of Law, University of Kansas School of Law. I would like to thank Ivery Goldstein, Class of 2006, for helpful research assistance; my colleagues who participated in a research workshop on this Article; and Martin Dickinson, Chris Drahozal, Randy Hearrell, Justice Fred Six, Tom Stacy, and Steve Ware, who provided helpful comments on an earlier draft. In the interest of full disclosure, readers should know that I presented testimony concerning the issues raised by school finance litigation before committees of the Kansas Legislature and discussed the case with legislators. Throughout that process, my goal was to remain objective and to provide accurate information concerning the issues. That is my goal in this Article as well. Readers will have to judge for themselves whether I have succeeded.

1. It is perhaps appropriate that one of the plaintiff school districts in the case was USD No. 443, Dodge City. Montoy v. State (Montoy II), 278 Kan. 769, 770, 102 P.3d 1160, 1162 (2005) (per curiam), withdrawn and republished with concurring opinion, 120 P.3d 306 (Kan. 2005). Wyatt Earp was an assistant marshal in Dodge City before he moved to Tombstone, Arizona, site of the famous “Gunfight at the O.K. Corral,” which was the subject of a motion picture by the same name. GUNFIGHT AT THE O.K. CORRAL (Paramount Pictures 1957). For an account of Dodge City’s colorful history, see ROBERT M. WRIGHT, DODGE CITY, THE COWBOY CAPITAL AND THE GREAT SOUTHWEST IN THE DAYS OF THE WILD INDIAN, THE BUFFALO, THE COWBOY, DANCE HALLS, GAMBLING HALLS, AND BAD MEN (2d ed. 1913), available at http://www.ku.edu/carrie/texts/carrie_books/wright/.

2. 278 Kan. 769, 102 P.3d 1160. This was the second of four Kansas Supreme Court decisions in Montoy. The first, Montoy v. State (Montoy I), 275 Kan. 145, 62 P.3d 228 (2003), reversed the lower court’s dismissal of the case. See infra notes 107-08 and accompanying text (discussing Montoy I). The third, Montoy v. State (Montoy III), 279 Kan. 817, 112 P.3d 923 (2005), concluded that the school finance bill enacted in response to Montoy II was inadequate to remedy the constitutional violations. See infra notes 134-40 and accompanying text (discussing Montoy III). Finally, while this Article was in the editorial process, the court decided Montoy v. State (Montoy
system was unconstitutional. Specifically, on January 3, 2005, the court upheld a lower court ruling that the system violated the mandates of article 6 of the Kansas Constitution, which provides that the Legislature "shall provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools," and "shall make suitable provision to finance the educational interests of the state."

Tension mounted throughout the 2005 session as the Legislature struggled to enact a new school finance bill that was both politically acceptable and sufficient to satisfy the court, eventually adopting H.B. 2247, which appropriated roughly $142 million in additional funding and made several changes to the funding formula.

The conflict escalated further when the supreme court ruled on June 3, 2005, in Montoy v. State (Montoy III), that H.B. 2247 did not satisfy the requirements of article 6. A particular source of controversy was language in the opinion specifying that a total increase of $285 million in funding must be appropriated by July 1, 2005, for the coming year. This amount, moreover, represented only one-third of the total additional funding necessary to meet the requirements of article 6. Montoy III prompted the Governor to call the Legislature back for what proved to be a very contentious special session. Many legislators thought that Montoy III violated separation-of-powers principles and invoked the Legislature’s exclusive power of appropriation, and they proposed a number of constitutional amendments to curtail the power of the courts.

---

4, No. 92,032, slip op. (Kan. July 28, 2006), which held that school finance legislation enacted during the 2006 session substantially complied with the court’s prior orders and dismissed the case. See infra notes 418-38 and accompanying text (post script discussing Montoy IV).


4. The court, however, reversed the lower court’s findings that the system violated equal protection because of its disparate impact and because it lacked a rational basis. Id. at 834, 112 P.3d at 934. For further discussion, see infra notes 217–30.

5. KAN. CONST. art. 6, §§ 1, 6(b).

6. The legislature passed House Bill 2247 on March 30, 2005, which was modified by Senate Bill 43 during the veto session. The legislation is generally referred to collectively as H.B. 2247. Montoy III, 279 Kan. at 819, 112 P.3d at 926.

7. 279 Kan. 817, 112 P.3d 923.

8. Id. at 845, 112 P.3d at 940 ("Specifically, no later than July 1, 2005, for the 2005–06 school year, the legislature shall implement a minimum increase of $285 million above the funding level for the 2004–05 school year, which includes the $142 million presently contemplated in H.B. 2247.")

9. Id. at 846, 112 P.3d at 941.


11. Two amendments would prevent the courts from reviewing suitable finance cases altogether. See H. CON. RES. 5002, 2005 SPEC. SESS. (KAN. 2005) (adding a new provision precluding the courts from exercising jurisdiction to enforce article 6); SEN. CON. RES. 1602, 2005 SPEC. SESS. (KAN. 2005) (amending article 6, § 6(b) to provide that educational finance shall be “in the manner and amount as determined solely by the legislature”). Others prevented the closing of schools. See
The stakes were high: the future of elementary and secondary education in Kansas was on the line and the outcome could determine the balance of power for years to come.

The impasse was resolved after the court issued an order to show cause why expenditure of school funding should not be enjoined, after which efforts to amend the Constitution or otherwise reject Montoy III fell short and the Legislature provided the necessary funds for the coming year. But that was just the first installment, as Montoy III contemplated more than $550 million dollars in additional funding to be provided in future years. In anticipation of this problem, H.B. 2247 directed the Division of Post Audit to conduct a cost study, which was released before the start of the 2006 legislative session and which indicated that approximately $300 to $400 million in additional funding was necessary.

As we might expect, school finance was one of the issues that dominated the 2006 legislative session. Although better than expected revenue collections made room in the budget for additional funding for schools, pressure to take action against the court persisted and competing plans for school funding divided the legislature. The Legislature eventually adopted and the Governor signed S.B. 549, a multiyear plan that provides for an increase of approximately $466 million in school


12. The court’s order can be found on its Web site at http://www.kscourts.org/ordershowcause7805.htm.

13. The report, School Districts Performance Audit Report, is posted on the Division’s Web site. It contains two different figures, one based on the cost of “inputs,” which is just more than $300 million, and the other based on “outputs,” which is close to $400 million. Kansas Div. of Post Audit, http://www.kslegislature.org/postaudit/. Informed observers suggest that these figures may underestimate the actual cost of implementing the Division’s findings. See John Milburn, School Audit Proposes Big Dollars, Shift From Rural to Urban, KAN. CITY STAR, Jan. 9, 2006, at 125, available at http://www.kansascity.com/mld/kansascity/news/local/13587523.htm (reporting that “the Legislature’s research staff noted that auditors’ totals didn’t include increases in contributions to teacher pensions or some legally mandated aid to poor districts [which] made the cost of the audit recommendations between $400 million and $470 million”).

funding. As of this writing, the plaintiffs have challenged both the adequacy and the equity of this funding, and the court has scheduled a hearing to review the bill. Thus, it remains to be seen whether the court will conclude that S.B. 549 remedies the constitutional deficiencies in school finance and what might happen if the court concludes that it does not.

The Gunfight at the K–12 Corral is a fascinating case study that illuminates the special separation-of-powers issues inherent in the recognition of “affirmative” or “positive” constitutional rights. Most constitutional rights are “negative” rights in the sense that they prohibit the government from taking action that interferes with a right that the individual already has. In contrast, article 6 arguably requires the state to provide something positive to the individual—an adequate education. The duty to provide an education, moreover, does not fall on the state generally (and thus all of its officers); rather, the constitutional text explicitly imposes that duty on the Legislature alone. While the judiciary can normally protect negative constitutional rights by ordering government officers not to do something (i.e., an injunction), judicial enforcement of article 6 appears to require that the Kansas Supreme Court make the Legislature itself properly fund the schools. Thus, the unique characteristics of the Montoy litigation present a number of distinctive and difficult constitutional issues that warrant careful examination.

My goal in this Article is to provide a comprehensive analysis of Montoy’s implications for the constitutional landscape of Kansas. Through an in-depth examination of the case, I hope to highlight the issues and offer a framework for thinking about them, in the process explaining the areas where the law is reasonably clear, pinpointing key unresolved questions, and suggesting some of the considerations that may be relevant to resolving them. The Article is divided into three parts. Part I provides essential background information and places the Montoy litigation in context by summarizing national trends in school

16. The show-cause order is available at http://www.kscourts.org/school_finance_order052206.htm. The plaintiff’s brief is available online at http://media.ljworld.com/pdf/2006/06/2006_Montoy_Brief.pdf. As noted previously, see supra note 2, the court has now issued Montoy IV, which held that S.B. 549 satisfied the court’s orders and dismissed the case.
finance litigation, the history of school finance litigation in Kansas, and the course of the Montoy case itself. Part II then offers a more detailed analysis of several sets of issues in Montoy: (1) issues concerning justiciability and whether the case is one that can properly be resolved by the courts; (2) issues raised by the merits of the case, particularly the constitutional requirements of adequacy and equity in school finance; (3) issues concerning the available and appropriate remedies for a constitutional violation of those requirements; and (4) issues raised by possible legislative responses to Montoy. Part III, the conclusion, looks toward the future of school finance in Kansas.

I. BACKGROUND

To provide context for the discussion of the issues raised by Montoy, I begin by summarizing the evolution and status of school finance litigation across the country, describing the prior school finance case law in Kansas, and providing a history of the Montoy litigation itself. This background suggests some preliminary observations about the case.

A. School Finance Litigation

School finance litigation in Kansas is part of a larger national trend. Since the seminal decision of the California Supreme Court in Serrano v. Priest,18 the vast majority of states have faced lawsuits challenging the constitutionality of their systems for funding public education, some multiple times.19 As one commentator summarized the data:


Between 1970 and 2000, state supreme courts in some thirty-six states reviewed their states' school funding schemes pursuant to charges that state policy-makers had failed to provide an equitable or adequate distribution of educational resources to children in the state. In nineteen cases during that same period, courts struck down their state's school finance policies and ordered their legislatures and governors to try again.\(^{20}\)

It appears, moreover, that the momentum for such lawsuits is building, with both the number of lawsuits and their rates of success on the rise.\(^{21}\) Commentators conventionally characterize school finance litigation as having come in two waves.\(^{22}\) The first wave focused on equity, challenging disparities in school funding as a violation of federal or state constitutional provisions requiring equal protection or state constitutional provisions on education. The second wave focused on adequacy, arguing that state funding for education was insufficient to meet state constitutional mandates to provide a minimum quality of public education. Although this description oversimplifies the pattern,\(^{23}\) it is a convenient rubric for summarizing the evolution of school finance litigation.

1. Equity

Equity-based challenges focus on unequal funding among districts, rather than whether sufficient funding has been provided to meet a

---


21. See Zirkel & Kearns-Barber, supra note 19, at 22 & n.6 (casting doubt on the claims of one advocate that plaintiffs have won “24 of 29” school funding lawsuits since 1989, but conceding that a “‘bandwagon’ trend . . . seems to be favoring the plaintiffs at least in the short range”).

22. See Koski, supra note 20, at 1080–81 n.6, 1085–86 (collecting commentary). For an early and influential article identifying the shift from equity to adequacy, see Gershon M. Ratner, *A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills*, 63 TEX. L. REV. 777 (1985). Some commentators identify three waves, dividing equity litigation into one wave based on the federal Equal Protection Clause and a second wave based on state constitutional provisions. See, e.g., William E. Thrash, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219 (1990) (identifying recent cases that will prompt a third wave). From my perspective the shift from federal to state equal protection as the basis for equity claims, which occurred at a very early stage of school finance litigation and did not mark a major change in focus, does not warrant treatment as two separate waves.

23. For example, some fairly early cases challenged the adequacy of funding, and equity issues continue to be important in school finance litigation. See Ryan & Saunders, supra note 19, at 467–68 (stating that early cases concerning adequacy and equity issues provided strong bases for each legal theory).
minimum level of educational quality. In most states, local school
districts have traditionally been responsible for a significant component
of funding for their schools, which is typically provided through local
property taxes.\footnote{See HURST ET AL., supra note 19, at 35 (compiling data on percentages of federal, state, and local funding for schools by state).} Reliance on local funding produces disparities because
some districts are wealthier than others.\footnote{Ryan & Saunders, supra note 19, at 463–64.} Wealthier (typically suburban)
districts with large tax bases can provide higher funding levels at lower
tax rates than their poorer (typically rural or inner city) counterparts. To
compound this inequality, poorer districts typically have a higher
percentage of students whose education tends to cost more because they
have disabilities, come from underprivileged backgrounds, or are
nonnative speakers of English. There is also a racial component to
funding disparities because racial minorities in this country are
disproportionately poor.\footnote{See generally James E. Ryan, Schools, Race, and Money, 109 YALE L.J. 249 (1999) (relating and comparing desegregation efforts and school finance litigation).}

The plaintiffs in the earliest school finance cases relied on the Equal
Protection Clause of the Fourteenth Amendment to challenge unequal
school funding. In these cases, as in most equal protection cases, the
critical issue was the level of scrutiny applied to the states’ reasons for
maintaining a system with funding disparities.\footnote{For a concise, general discussion of the levels of equal protection scrutiny, see ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 517–21 (2d ed. 2002). The Court also applies differing levels of scrutiny under the Due Process Clause, depending on whether the liberty interest at issue is characterized as a fundamental right. Id. at 762–63.} The baseline test for
equal protection challenges is the “rational basis test,” under which a
classification is valid unless the plaintiff can establish that it is not
rationally or reasonably related to any plausible legitimate state
purpose.\footnote{See FCC v. Beach Comm’n’s, 508 U.S. 307, 313 (1993) (holding that rational basis review is used in areas of social and economic policy when there is not a suspect class or a fundamental right).} This test is generous to the state and almost always results in
a decision upholding the challenged classification.\footnote{The Court has occasionally found that the supposedly legitimate purposes for a given law
are so implausible as to suggest that the real purpose is nothing more than animus against a politically unpopular group, which is not a legitimate purpose. See Romer v. Evans, 517 U.S. 620, 620 (1996) (invalidating an amendment to the Colorado Constitution preventing the protection of homosexual conduct based on status); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 435 (1985) (invalidating Texas statute restricting group homes for the mentally retarded); United States Dept. of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (invalidating amendment to the Food Stamp Act because preventing “hippies” from participating was not a valid interest). It has been suggested that these cases reflect the application of a more aggressive form of the rational basis test, sometimes referred to as “rational basis with bite.” See CHEMERINSKY, supra note 27, at 653. To this point, the only Justice to acknowledge that rational basis with bite may represent a distinct level of scrutiny is...}
heightened, however, if a law employs a "suspect" classification or if a
classification burdens a "fundamental right." Thus, for example, laws
employing racial classifications or classifications burdening the right to
vote are subject to "strict scrutiny" under which the state has the burden
of establishing that the classification is necessary or narrowly tailored to
meet a compelling governmental interest. Strict scrutiny nearly always
results in the invalidation of a classification.

Within this general framework, plaintiffs challenging the equity of
school finance made arguments for strict scrutiny based on both suspect
classification and fundamental rights theories. First, some U.S. Supreme
Court decisions had suggested that wealth might be a suspect
classification, and funding disparities could arguably be traced to
differences in wealth. Second, Brown v. Board of Education contains
language that might suggest education is a fundamental right.

concurring) (recognizing a "more searching form of rational basis review" when there is evidence of
a desire to harm a politically unpopular group). Montoya II may be read as applying a form of
rational basis with bite under article 6 of the Kansas Constitution. See infra notes 263–64 and
accompanying text.

30. See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (racial classifications);
Reynolds v. Sims, 377 U.S. 533 (1964) (right to vote). Some classifications, particularly gender
classifications, receive "intermediate scrutiny," which requires that the classification be substantially
related to an important governmental purpose. Craig v. Boren, 429 U.S. 190, 197 (1976). As its
name and formulation imply, intermediate scrutiny falls between the rational basis test and strict
scrutiny. Because intermediate scrutiny is not implicated in Montoya, I will not discuss it further
here.

31. See Gerald Gunther, Foreword: In Search of Evolving Doctrine on a Changing Court: A
Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972) (describing strict scrutiny as
"strict, in theory and fatal in fact"). Recently, however, the Court found that strict scrutiny had been
satisfied and upheld a law school's affirmative action admissions policy. Grutter v. Bollinger, 539

32. See generally Bullock v. Carter, 405 U.S. 134 (1972) (invalidating high filing fee for
primary elections on the ground that it barred those who could not afford it from running); Tate v.
Short, 401 U.S. 395 (1971) (invalidating criminal penalties subjecting indigents to incarceration for
inability to pay a fine); Williams v. Illinois, 399 U.S. 235 (1970) (same); Douglas v. California, 372
U.S. 353 (1963) (requiring states to provide counsel for indigent criminal defendants); Griffin v.
Illinois, 351 U.S. 12 (1956) (invalidating requirement that indigent defendants provide transcript to
appeal convictions).

33. Note, however, that because a tax base depends on aggregate wealth and because a district
may have significant industrial or commercial property, the poorest people do not necessarily live in
the poorest districts and the richest do not necessarily live in the richest. This consideration proved
to be important in San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 27–28 (1973),
where the Court reasoned that classifications based on interdistrict wealth disparities do not
constitute discrimination based on individual wealth.

34. 347 U.S. 483 (1954).

35. The Court in Brown v. Board of Education stated,

Compulsory school attendance laws and the great expenditures for education both
demonstrate our recognition of the importance of education to our democratic society. It
is required in the performance of our most basic public responsibilities, even service in
Although these theories enjoyed some initial success, in San Antonio Independent School District v. Rodriguez, a 1973 decision, the U.S. Supreme Court rejected both arguments for elevated scrutiny, holding both that wealth is not a suspect classification and that education is not a fundamental right. Applying the rational basis test, the Court then concluded that local funding was rationally related to the legitimate purpose of promoting local involvement and control of local school districts. After Rodriguez, the only way to establish that school funding disparities violate federal equal protection guarantees is to establish that these disparities were racially motivated, which is difficult to do in practice.

While Rodriguez placed virtually insurmountable hurdles in the path of school finance litigation based on the Equal Protection Clause of the U.S. Constitution, the decision left open the possibility that state courts might find the right to education to be fundamental for purposes of their state constitutions' equal protection provisions. Unlike the U.S.

the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Id. at 493.


38. See id. at 18-28 (concluding that wealth is not a suspect classification); id. at 29-39 (concluding that education is not a fundamental right).

39. Id. at 44-55.

40. Under current equal protection doctrine (which was not settled at the time of Rodriguez), classifications that are facially neutral as to race are not subject to strict scrutiny unless the plaintiffs establish that the neutral classifications were adopted for a discriminatory purpose. Washington v. Davis, 426 U.S. 229, 234 (1976). Although Washington v. Davis was decided after Rodriguez, the necessity of proving discriminatory intent was reasonably clear at the time. Racial discrimination was a potential factor in Rodriguez because racial minorities were disproportionately concentrated in poorer districts. See Rodriguez, 411 U.S. at 12 (noting that residents of the plaintiff's district, the poorest in the state, predominantly of Mexican-American descent; approximately ninety percent of the student population was Mexican American and more than six percent was African American). However, the lower court did not rely on racial discrimination as a basis for its decision, and the Supreme Court did not address it.

Constitution, such a conclusion could draw support from explicit constitutional provisions concerning education, which are contained in virtually every state constitution.\textsuperscript{42} These provisions vary considerably in their language, scope, and strength, with one prominent account dividing them into four basic groups: (1) provisions incorporating a general obligation for free public schools; (2) provisions incorporating some standard of quality, such as those that require "a thorough and efficient system" of schools; (3) provisions containing specific duties as part of a mandate for quality public schools; and (4) provisions specifying that the duty to provide an education is of particularly high (e.g., "paramount") importance.\textsuperscript{43}

In the wake of Rodriguez, equity-based school funding litigation relied on state constitutional provisions concerning education to argue that education was a fundamental right for purposes of their state’s equal protection requirement or challenged unequal school funding as a direct violation of the state constitutional provisions concerning education.\textsuperscript{44} Such equity claims achieved some success, but during the first wave of litigation, plaintiffs were successful only about one-third of the time. According to one count, “Equity suits brought between 1973 and 1989 succeeded in eight states [and] failed in fifteen.”\textsuperscript{45} Notwithstanding this relatively low winning percentage, successful suits encouraged plaintiffs

\begin{multicols}{2}

\begin{itemize}
\item\textsuperscript{43} See Ratner, supra note 22, at 815–16.
\item\textsuperscript{44} See Horton v. Meskill, 376 A.2d 359, 374 (Conn. 1977) (declaring that education is a fundamental right and that inequality in funding rendered system unconstitutional); Robinson v. Cahill, 303 A.2d 273, 294 (N.J. 1973) (holding that unequal funding as a result of local funding violated state constitution’s education provisions); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 98 (Wash. 1978) (reliance on special local tax levies did not fulfill legislature’s duty to provide an education).
\item\textsuperscript{45} Ryan & Saunders, supra note 19, at 466. Such counts, however, are inherently difficult and somewhat subjective. For example, Ryan and Saunders do not list Kansas among the states in which equity litigation either succeeded or failed during this period, notwithstanding the case of Knowles v. State Board of Education, 219 Kan. 271, 279–80, 547 P.2d 699, 704–06 (1976). In Knowles, after the district court found the system of school funding unconstitutional on equity theories, the Legislature made reforms and the district court dismissed the case as moot. The supreme court remanded the case for consideration of the law as amended. On remand (to a different district) the district court upheld the statute as amended. Unified Sch. Dist. No. 229 v. State, 256 Kan. 232, 275, 885 P.2d 1170, 1197 (1994). See also infra notes 68–74 and accompanying text (discussing Knowles). It is hard to know how to properly characterize this litigation. One might characterize this case as a loss for the plaintiffs because the system was ultimately upheld as constitutional, but at the same time, there was an initial finding of unconstitutionality that prompted legislative changes, so the case might also be seen as a victory for the plaintiffs. For other compilations and counts of school finance litigation, see sources cited supra note 19.
\end{itemize}
\end{multicols}
in other states to challenge their systems of school finance, and school funding litigation became an increasingly common phenomenon.

2. Adequacy

During the 1980s, the focus of school funding litigation began to shift, ushering in a second wave of funding litigation in which the focus was on adequacy. Adequacy claims derive solely from a state constitution’s education provisions, which in many states can be read to impose an affirmative duty upon the state’s legislature to provide an education.46 The shift to adequacy was accompanied by increasing rates of success. One compilation of cases identifies twenty states where school finance systems have been ruled unconstitutional since 1990, while the same compilation indicates that between Rodriguez and 1990 only eight states’ school finance systems suffered a similar fate.47 Ironically, there appears to be little correlation between the strength of a state’s constitutional provisions concerning education and the likelihood that plaintiffs will successfully challenge their state’s school funding system.48

The shift to adequacy reflects several factors. First, the cost of education grew dramatically as a result of inflationary forces and costly new mandates placed on school systems, such as the federal requirement that children with disabilities be provided with a free appropriate public education.49 Second, the political climate did not support major increases in school funding because the burgeoning costs of various state programs strained state resources that were reduced by tax cuts and recessionary forces.50 Third, the success of the educational

46. Article 6 of the Kansas Constitution can be read this way, as Montoy attests.
47. Zirkel & Kearns-Barber, supra note 19, at 23–25. Some states had decisions during both periods, so the total number of states where school finance systems have been declared unconstitutional at some point in time by their courts is approximately twenty-four. Id.
accountability and standards movement, which culminated in the federal No Child Left Behind Act, made it easier for plaintiffs to argue that a state’s educational system did not meet minimal standards for educational quality.

The seminal decision finding an adequacy-based violation is the Kentucky Supreme Court’s decision in *Rose v. Council for Better Education, Inc.* The Kentucky Constitution requires the legislature to “provide for an efficient system of common schools throughout the state.” Focusing on the meaning of the term “efficient,” the court reviewed the history of this provision, judicial precedents, and expert opinions before concluding that the provision imposed on the Kentucky Legislature a duty to establish, maintain, and monitor “a system of common schools that provides an equal opportunity for children to have an adequate education.” In particular, the court summarized the duties imposed under the principle of an efficient system of public education as encompassing the following factors:

1) The establishment, maintenance and funding of common schools in Kentucky is the sole responsibility of the General Assembly.
2) Common schools shall be free to all.
3) Common schools shall be available to all Kentucky children.
4) Common schools shall be substantially uniform throughout the state.
5) Common schools shall provide equal educational opportunities to all Kentucky children, regardless of place of residence or economic circumstances.
6) Common schools shall be monitored by the General Assembly to assure that they are operated with no waste, no duplication, no mismanagement, and with no political influence.
7) The premise for the existence of common schools is that all children in Kentucky have a constitutional right to an adequate education.
8) The General Assembly shall provide funding which is sufficient to provide each child in Kentucky an adequate education.

shortfalls).
52. 790 S.W.2d 186 (Ky. 1989). Although *Rose* has been more influential, earlier adequacy-based decisions include *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978), and *Pauley v. Kelly*, 255 S.E.2d 859 (W.Va. 1979), which are discussed in *Rose*. See *Rose*, 790 S.W.2d at 209–10.
53. KY. CONST. § 183.
54. *Rose*, 790 S.W.2d at 205–11.
55. *Id.* at 211.
9) An adequate education is one which has as its goal the development of...seven capacities recited previously.\footnote{56}

The capacities mentioned by the court were distilled from expert opinion and reflected the ultimate goals of an adequate education, as understood by the court:

(i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.\footnote{57}

\textit{Rose} was soon followed by courts in other states, which held that their respective school finance systems violated constitutional requirements of adequacy.\footnote{58}

Constitutional requirements of adequacy differ from requirements of equity in a critical respect: they impose a duty of minimum support for education. Equity requirements are concerned with relative levels of funding among districts but say nothing about what those levels must be in absolute terms. In contrast, a requirement of adequacy requires sufficient funding to meet some minimum standard of educational quality, even if the precise correlation between expenditures and educational quality remains a subject of dispute. Defining levels of adequacy requires that courts become involved in determining educational policies—the goals and the methods of delivering education—in a way that equity litigation does not. Likewise, fashioning remedies for violations of adequacy requirements is more problematic

\footnote{56. \textit{Id.} at 212--13.}
\footnote{57. \textit{Id.} at 212.}
because legislatures may be reluctant to provide sufficient funding and because judicial enforcement of remedies against the legislature presents practical difficulties and raises serious separation-of-powers concerns. Thus, the constitutional conflict arising from Montoy is by no means unique to Kansas, as other states, too, have experienced conflict between their legislative and judicial branches as a result of adequacy-based school finance litigation. 59

B. Previous Kansas Cases

The history of school finance litigation in Kansas reflects the broader national pattern. Montoy was not the first case in Kansas to challenge the constitutionality of the state’s funding for public schools. In three earlier cases, lower court decisions led to legislative action substantially altering the school finance system, but did not produce a definitive supreme court decision authoritatively construing the Kansas Constitution’s school finance provisions. 60 The final product of this give and take was the School District Finance and Quality Performance Act (SDFQPA), 61 which established the current system of school finance. In 1994, the Kansas Supreme Court upheld the SDFQPA in Unified School District No. 229 v. State (USD 229). 62 USD 229, however, left open the possibility that subsequent developments might alter this result and provided little guidance as to how to resolve the issues in such an eventuality.

59. See infra notes 335–47 and accompanying text (discussing remedial problems in other states). In Arkansas, for example, the state Legislature’s failure to fund schools at a level sufficient to meet constitutional standards identified by the state supreme court eventually led to the appointment of special masters, whose involvement with the Legislature helped initially to produce a positive response. But once the masters were no longer in place, the Legislature did not carry out all the components of the plan that had satisfied the masters and the court, and the court responded by reappointing the special masters. The court recently approved the masters’ report, which found constitutional deficiencies, but the court declined to direct the Legislature to increase funding. Lake View Sch. Dist. No. 25 v. Huckabee, No. 01-836, 2005 WL 3436660 (Ark. Dec. 15, 2005).


1. Lower Court Cases

The three lower court decisions followed similar patterns. An initial decision by a lower court ruled the school finance law unconstitutional or cast serious doubt on its constitutionality. The Legislature responded by changing the school finance law. The legislative response ended the case.

The first case reflecting this pattern is *Caldwell v. State*, which was decided before *Rodriguez* and which ruled that the system in place at that time was unconstitutional on an equal protection theory. Because funding was based on local taxation and state aid was insufficient to offset interdistrict disparities, the court concluded that the "educational system of the child" [was] "essentially the function of, and dependent on, the wealth of the district in which the child resides." The Legislature responded by adopting the Kansas School District Equalization Act, which addressed the deficiencies identified by the district court in *Caldwell* and which the district court upheld.

The ink was barely dry on the School District Equalization Act, however, when it was challenged in *Knowles v. State Board of Education*. After a trial, the district court declared the statute unconstitutional on the ground that it provided unequal benefits to school districts and imposed unequal burdens on taxpayers without any rational basis. The trial court, however, took judicial notice that the Legislature was in session and delayed the effective date of an injunction against further distribution of funds under the act to allow time for the Legislature to correct the deficiencies in the law. When the Legislature amended the School District Equalization Act, the district court dismissed the case as moot, and the plaintiffs appealed to the Kansas

---

65. *Id.* (quoting *Caldwell*, No. 50616, slip op.). The same statement from *Caldwell* is quoted in USD 229, 256 Kan. at 242, 885 P.2d at 1177.
67. See Berger, supra note 64, at 11 (discussing enactment of the SDEA and subsequent approval of the SDEA by the district court judge presiding over *Caldwell*).
69. *Id.* at 272–73, 547 P.2d at 700–01.
70. *Id.* at 273, 547 P.2d at 701.
Supreme Court.71 The supreme court ruled that the district court had erred in dismissing the case as moot, reasoning that "[t]he right of persons to challenge the constitutional effect of a law upon their persons or property should not be aborted everytime the law is amended by the legislature."72 Nonetheless, the supreme court did not rule on the amended school finance law, but instead remanded the case to the district court for hearings and factual findings concerning the actual distribution of funds under the amended law.73 On remand, the case was transferred to the Kansas District Court for Shawnee County, which in 1981 upheld the amended school finance law.74

About ten years later, in Mock v. State,75 a new group of plaintiffs challenged the state’s school finance law as unconstitutional on various grounds. Judge Terry Bullock presided over the case and held hearings to "identify and decide the essential questions of law in advance of trial."76 In the influential opinion that resulted, Judge Bullock interpreted article 6 of the Kansas Constitution as imposing on the Legislature a constitutional duty (and creating a correlative right for children in Kansas) to an equal educational opportunity and to an adequate education.77 These determinations prompted the Legislature to adopt the SDFQPA,78 which generally adhered to the guidelines suggested by Judge Bullock’s opinion.79 This new legislation (as subsequently amended), created the current system of school finance at issue in Montoy.80

Several points are worth noting in relation to Caldwell, Knowles, and Mock. First, although none of these cases resulted in a definitive interpretation of article 6 of the Kansas Constitution by the Kansas Supreme Court, the trial courts in all three cases interpreted the relevant

71. Id. at 274, 547 P.2d at 702.
72. Id. at 280, 547 P.2d at 706.
73. Id., 547 P.2d at 706.
76. See Kissam, supra note 60, at 489 (reprinting the trial court opinion in Mock).
77. See id. at 499–502 (reprinting the trial courts’ opinion in Mock).
79. See Kissam, supra note 60, at 474 ("Judge Bullock’s opinion deserves the respect it has been given by [then] Kansas Governor Joan Finney and the Kansas Legislature, who in the Spring of 1992 enacted a new public school financing law that responds to and in general follows the guidelines of this decision.").
80. See infra note 106–08 and accompanying text. Some of these amendments were critical in Montoy I.
constitutional provisions to impose significant constitutional duties on the Legislature in relation to school finance. Second, in all three cases, the Legislature responded to the trial court rulings by amending the school finance laws, rather than seeking a definitive ruling by the Kansas Supreme Court. Conversely, the lower courts accepted this legislative response as a good-faith effort to solve constitutional problems. The cases thus represent an ongoing dialogue between the courts and the Legislature in which the Legislature accepted the guidance of the courts regarding its duty to provide suitable finance for education and worked to fulfill it. Third, the cases also reflect inherent difficulties in making suitable provisions to finance the educational interests of the state, which involve complex budgeting considerations, specialized judgments concerning educational policy, and hard choices about competing demands on limited state resources. Although new legislation was initially upheld in Caldwell, it was invalidated in Knowles, and the legislation upheld in Knowles was invalidated in Mock.

Fourth, the evolution of the cases is consistent with the larger national pattern of school finance litigation. In Caldwell, a 1972 decision, the trial court relied exclusively on equal protection. In 1975, the Knowles trial court found the law unconstitutional because it provided "unequal benefits" to some districts, imposed an "unequal burden" on taxpayers, and funded poorer districts at a level that was insufficient "to enable the plaintiffs to provide a fundamental education for the students . . . on a rationally equal basis with students of other school districts."81 This language focuses on equity but also contains hints of an adequacy theory. By the early 1990s, the district court in Mock expressly concluded that article 6 imposed a minimum requirement of adequacy, citing the Kentucky Supreme Court's decision in Rose v. Council for Better Education as an example.82


82. See Kissam, supra note 60 at 502 (reprinting trial court opinion in Mock, which cited Rose v. Council for Better Education, 790 S.W.2d 186 (Ky. 1990)). The plaintiffs in Mock, however, apparently agreed that, at the time of the litigation, schools were adequately funded. See id. ("In the case at bar, the question of what that 'minimum' or 'basic' level is will not be reached as all parties to these cases have agreed that if present funding levels are equitably divided . . . no question of minimal adequacy (suitability) exists to be presented at this time.").
2. **USD 229**

The Kansas Supreme Court first reached the merits of a school finance case in *Unified School District No. 229 v. State*, a 1994 decision that upheld the SDFQPA. Under the system of school finance established by the SDFQPA, the funding available to school districts depended on three factors: base state aid per pupil, "weights" designed to account for special costs to the district, and the local option budget. Base state aid per pupil, originally set at $3600, is multiplied by the adjusted or weighted enrollment. Weighted enrollment is determined by taking the actual number of students enrolled in a district and increasing it based on various factors, or weights, prescribed in the SDFQPA. Most of these weights relate to students whose educations entail extra costs, including weights for bilingual education, vocational education, at-risk children, students who require transportation, and students in new facilities. One weight of particular significance is the weight for low enrollment, which provides extra funding to districts where especially small enrollments require fixed costs to be spread over a smaller number of students. The local option budget (LOB) allows districts to impose local taxes to provide additional funding, and, at the time of USD 229, it was capped at twenty-five percent of state aid. The plaintiffs in USD 229 raised a variety of constitutional objections, all of which were rejected by the court; this discussion will focus on the court's conclusion that the SDFQPA did not violate either article 6 of the Kansas Constitution or the Equal Protection Clause of the federal constitution.

With respect to article 6, the Kansas Supreme Court simply approved and reprinted the trial court's reasoning in its entirety. After reviewing cases from other states, the trial court had concluded that the term

84. Id. at 244–47, 885 P.2d at 1178–80.
85. Id. at 244, 885 P.2d at 1178.
86. Id.
87. Id.
88. See id. at 245, 885 P.2d at 1179 (discussing low enrollment weighting).
89. Id.
90. The court also rejected the plaintiffs' contentions that (1) the law impermissibly infringed on local school board authority, id. at 251–53, 885 P.2d at 1182–83; (2) the law violated the single subject rule of the state constitution, id. at 268–70, 885 P.2d at 1193–94; (3) the law's recapture provisions diverting funds from wealthy to poor districts constituted a taking, id. at 270–75, 885 P.2d at 1194–96; and (4) the law was nonuniform in violation of article 2, § 17 of the Kansas Constitution, id. at 272–75, 885 P.2d at 1196–97.
91. Id. at 254–59, 885 P.2d at 1183–87.
“suitable” in article 6 was “most comparable” to the requirements of “adequacy” found in some states’ constitutions, including Kentucky’s. The trial court then cited the list of goals for an adequate education identified in Rose and noted that the SDFQPA enumerated a substantially similar set of goals. The trial court ultimately found that “all schools in Kansas are able to meet such a standard,” rejecting as speculative the argument that the SDFQPA would eventually lead to inadequate funding. The trial court, however, cautioned that “the issue of suitability is not stagnant” as previous school finance legislation had been upheld when initially adopted, but “underfunding and inequitable distribution of finances [led] to judicial determination that the legislation no longer complied with constitutional provisions.”

The Kansas Supreme Court also rejected an equal protection challenge under § 1 of the Kansas Constitution’s Bill of Rights, which the court stated was “given the same construction” as its federal counterpart. The court began its analysis by affirming the trial court’s conclusion that, because education is not a fundamental right, the rational basis test was the appropriate standard of review. After emphasizing that the test is deferential and that school finance necessarily involves complex and difficult line drawing, the court concluded simply that “we find there is a rational basis for each such provision without further discussion except for the low enrollment weighting factor.” In regard to low enrollment weighting, the court noted that it accounted for the most funds of any weight and that it was distributed differently than other weights insofar as it applied to all the students in the district, not just specified students who met the criteria for the weight in question. Nonetheless, the court reasoned, “common sense” indicated that there was a rational basis for low enrollment weighting because of higher per-pupil overhead costs, and the particular lines drawn for the size of the

92. Id. at 256–58, 885 P.2d at 1184–85.
93. Id. at 257–58, 885 P.2d at 1185–86.
94. Id., 885 P.2d at 1186 (internal quotation marks omitted).
95. Id. at 258, 885 P.2d at 1186 (internal quotation marks omitted). Thus, the trial court held only that the SDFQPA was constitutional “at the present time.” Id., 885 P.2d at 1187 (internal quotation marks omitted).
96. Id. at 259, 885 P.2d at 1187.
97. Id. at 259–63, 885 P.2d at 1187–92 (citing San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1, 37 (1973)).
98. Id. at 263–66, 885 P.2d at 1190–92.
99. Id. at 266, 885 P.2d at 1192.
100. Id., 885 P.2d at 1192.
district did not fail the rational basis test simply because (according to expert testimony) they were not justified by educational objectives.\(^{101}\)

**USD 229** marked a significant stage in school finance in the state. After several rounds of litigation and legislative efforts to devise a constitutional system of school finance, **USD 229** was an authoritative decision approving the basic structure of school finance under the SDFQPA as constitutionally acceptable. Moreover, the decision seemed to establish basic principles that would govern any future challenges. Of particular relevance is **USD 229**'s recognition that the requirement of suitable finance for the educational interests of the state includes an obligation to fund an adequate education that reflects certain basic goals. Nonetheless, the court also emphasized that “suitability does not imply any objective, quantifiable standard against which schools can be measured,” but rather involves “value judgments” that are not properly made by courts.\(^{102}\) The court also made clear that, for purposes of equal protection analysis, education is not a fundamental right and the rational basis test applies to disparities in funding between districts. Although the SDFQPA and **USD 229** seemed to resolve constitutional issues surrounding school finance,\(^{103}\) the trial court’s admonition proved prophetic; it was not long before the SDFQPA was back before the courts in **Montoy**, this time with far different results.

3. The **Montoy** Litigation

In 1999, a new group of plaintiffs filed suit in the Shawnee County District Court challenging the constitutionality of SDFQPA on both equity and adequacy grounds. Specifically, the plaintiffs advanced three key arguments: (1) that unequal funding to school districts had a disparate impact on certain groups of children, such as at-risk students, so as to violate equal protection; (2) that funding disparities across districts lacked any rational basis; and (3) that the funding system violated the requirements of article 6 because it did not provide an adequate education for all Kansas children. The case, captioned **Montoy v. State**, followed a long and twisting path to the Kansas Supreme Court’s controversial order in **Montoy III** and its aftermath. This section summarizes the history of the litigation without attempting to analyze the issues in any detail.

\(^{101}\) *Id.* at 266–68, 885 P.2d at 1192–93.
\(^{102}\) *Id.* at 287, 885 P.2d at 1185.
\(^{103}\) See Berger, *supra* note 64, at 41, 44–45 (praising the nonjudicial resolution of school finance but warning of the risk of backsliding).
a. District Court

The case came before Judge Terry Bullock of the Shawnee County District Court, who had also handled the Mock litigation.\textsuperscript{104} Initially, Judge Bullock dismissed the case sua sponte on various grounds.\textsuperscript{105} Of relevance for this discussion is his conclusion that the case was controlled by USD 229.\textsuperscript{106} On appeal the Kansas Supreme Court disagreed, and in Montoy I it reversed and remanded the case for further proceedings.\textsuperscript{107} Quoting USD 229's admonition that the "issue of suitability is not stagnant," the supreme court concluded that, viewing the facts most favorably for the plaintiffs, "this case is sufficiently removed in time from our decision in USD 229 so as to preclude summary application of USD 229 to dispose of the plaintiffs' claims."\textsuperscript{108}

On remand, the district court made preliminary rulings of law based on its earlier opinion in Mock\textsuperscript{109} and, after taking voluminous evidence during an eight-day trial, concluded that the SDFQPA was unconstitutional.\textsuperscript{110} The court made lengthy findings of fact and conclusions of law regarding material changes in the landscape of school finance. First, amendments to the statute removed the list of education goals and eliminated a committee charged with monitoring the administration of school finance, as a result of which there was no longer any assurance that funding of individual districts was sufficient to provide a suitable education.\textsuperscript{111} Second, changes to the system of weights and removal of limits on the local option budget exacerbated disparities between districts, so that at the time of trial the per-pupil disparity between the districts with the lowest and highest funding exceeded three-hundred percent.\textsuperscript{112} Third, the overall level of funding had fallen far below that which was necessary to provide a suitable

\textsuperscript{105} Id. at 154, 62 P.3d at 235.
\textsuperscript{106} Id. at 151-53, 62 P.3d at 233-34.
\textsuperscript{107} Id. at 156, 62 P.3d at 236.
\textsuperscript{108} Id. at 153, 62 P.3d at 234 (internal quotation marks omitted).
\textsuperscript{111} See id. at *2-3.
\textsuperscript{112} See id. at *33, 37.
education for each student in Kansas.\textsuperscript{113} Finally, the court found that the disparities and deficiencies in school finance adversely affected the most vulnerable children: racial minorities and bilingual students, students with disabilities, and students from impoverished backgrounds.\textsuperscript{114} Based on these findings, the court concluded that the school finance system was unconstitutional on three distinct grounds:

a. It fail[ed] to equitably distribute resources among children equally entitled by the Constitution to a suitable education or in the alternative to provide a rational basis premised in differing costs for any differential;

b. It fail[ed] to provide adequate total resources to provide all Kansas children with a suitable education (as that term has been defined by both this Court and the Legislature itself); and

c. It dramatically and adversely impact[ed] the learning and educational performance of the most vulnerable and/or protected Kansas children.\textsuperscript{115}

Nonetheless, the court elected to withhold its final order and judgment until July of 2004 to avoid disrupting the school year and to give the Legislature, whose session would begin in January, time to address the problems identified by the court.

Although the state sought to appeal, the trial court’s decision was not a “final,” appealable decision because there was no remedial order yet. Under the statute then in effect, an interlocutory appeal would be permissible only if the judge whose decision was being appealed certified that (1) the decision concerned a controlling question of law; (2) a substantial ground for difference of opinion existed; and (3) immediate appeal would materially advance the termination of the litigation.\textsuperscript{116} Judge Bullock, however, denied certification in a strongly worded opinion.\textsuperscript{117}

\begin{footnotes}
\textsuperscript{113} See id. at *7. The court relied heavily on the only evidence in the record regarding the cost of fully funding the schools to meet accreditation standards, which was a consultant study concluding that an additional $853 million was needed. Id. at *39. This study would become infamous within the halls of the Legislature.
\textsuperscript{114} Id. at *40.
\textsuperscript{115} Id. at *49.
\textsuperscript{116} KAN. STAT. ANN. § 60-2102(b) (1986) (current version at § 60-2102(c) (2005)).
\end{footnotes}
b. Kansas Supreme Court

In contrast to Caldwell, Knowles and Mock, the Legislature did not respond to the district court's ruling by reviewing the school finance law and attempting to remedy the constitutional deficiencies identified by the trial court.\footnote{This may have been because this decision would require a substantial increase in total school funding, while the prior cases had focused on how the available funds were being distributed. The prospect of substantially increasing school funding was a daunting one for the Legislature, which (like legislatures in many other states) had recently cut taxes during an economic boom when revenues were plentiful, only to be confronted with severe shortfalls when the economy worsened. See supra note 50 and accompanying text.} Although a number of bills were proposed providing for additional funding, none came close to the amount that Judge Bullock had indicated would be necessary, and none passed, despite considerable political maneuvering.\footnote{See Montoy v. State, No. 99-C-1738, 2004 WL 1094555, *3–5 (Kan. Dist. Ct. Shawnee County May 11, 2004) (summarizing this maneuvering).} Meanwhile, many legislators were sharply critical of Judge Bullock’s decision and legislation was adopted permitting an immediate appeal to the Kansas Supreme Court.\footnote{KAN. STAT. ANN. § 60-2102(b) states, the appellate jurisdiction of the supreme court may be invoked by appeal as a matter of right from a preliminary or final decision in which a statute of this state has been held unconstitutional as a violation of Article 6 of the Kansas Constitution. Any appeal filed pursuant to this subsection shall be filed within 30 days of the date the preliminary or final decision is filed or within 30 days of the effective date of this act, whichever is later. The provisions of this subsection shall expire on July 1, 2006. Former Kansas Statutes Annotated section 60-2102(b) became § 60-2102(c). Section 60-2102(b) has since been amended to reflect a special procedure for school finance litigation adopted in 2005, under which a three-judge district court would be convened to hear future challenges under article 6 of the Kansas Constitution. Ch. 194, 2005 Kan. Sess. Laws, §§ 22, 24.} Following the close of the session, Judge Bullock enjoined the expenditure of funds pursuant to the SDFPQA,\footnote{Montoy, 2004 WL 1094555, at *11.} although that order was stayed by the supreme court pending resolution of the appeal.\footnote{Order for Motion to Stay, Montoy v. State, No. 92,032, (Kan. May 12, 2004), http://www.kscourts.org/schoolfinanceorder20040519.pdf.}\footnote{Montoy v. State (Montoy II), 278 Kan. 769, 102 P.3d 1160 (2005) (per curiam), withdrawn and republished with concurring opinion, 120 P.3d 306 (Kan. 2005).} The appeal to the Kansas Supreme Court produced a definitive resolution of the constitutional issues, but perhaps not the one anticipated by the Legislature.

In January of 2005, the Kansas Supreme Court issued its per curiam opinion in Montoy II, which held the SDFPQA, as amended and applied, unconstitutional.\footnote{Montoy v. State (Montoy II), 278 Kan. 769, 102 P.3d 1160 (2005) (per curiam), withdrawn and republished with concurring opinion, 120 P.3d 306 (Kan. 2005).} The court disagreed with Judge Bullock’s conclusion that the funding disparities violated equal protection, whether because of the lack of a rational basis to support them or because of their disparate
impact on minorities and other groups, but it agreed that the law violated article 6 of the Kansas Constitution. The supreme court determined that there was substantial competent evidence to support the findings of the trial court in its ultimate conclusion that the Legislature had failed to make suitable provision for educational finance. The court’s analysis focused primarily on the adequacy of finance, which it linked to the language of article 6, section 1 of the Kansas Constitution that directs the Legislature to establish and maintain public schools to “provide for intellectual, educational, vocational and scientific improvement.” The court reasoned that the Legislature itself had established the measure of educational adequacy through the incorporation of performance levels and standards into the SDFQPA and that the only evidence indicating the level of funding necessary to meet these standards was a study by educational consultants (known as the Augenblick and Myers study), which the Legislature itself had commissioned. The court also noted the lower court’s finding that the financing formula was not based on the actual costs of education, but rather on prior funding levels and political compromise, which “distorted” various weighting factors. As a result, the court cautioned that increased funding would not be enough: “The equity with which the funds are distributed and the actual costs of education, including appropriate levels of administrative costs, are critical factors for the legislature to consider in achieving a suitable formula for financing education.”

Just as Judge Bullock had done the previous year, the Kansas Supreme Court elected to delay any remedial order to permit legislative action that would correct the constitutional deficiencies. The Legislature was more responsive to the supreme court decision than to the lower court order and, notwithstanding some difficulties, it adopted two interrelated bills, commonly referred to as H.B. 2247, which provided approximately $142 million in additional funding for schools,

124. Id. at 771, 102 P.3d 1160, 1162-63. Regarding the rational basis test, the court stated simply and without elaboration that “all of the funding differentials as provided by the SDFQPA are rationally related to a legitimate legislative purpose.” Id., 102 P.3d at 1162. The court reasoned further that disparate impact did not trigger strict scrutiny in the absence of proof of intentional discrimination. Id., 102 P.3d at 1163.
125. Id., 102 P.3d at 1163.
126. Id., 102 P.3d at 1163.
127. Id. at 773, 102 P.3d at 1163–64 (quoting KAN. CONST. art. 6, § 1) (emphasis added by the court).
128. Id. at 774, 102 P.3d at 1164.
129. Id. at 775, 102 P.3d at 1164.
130. Id. at 774–75, 102 P.3d at 1165.
made some changes to the weighting factors in the SDFQPA, and expanded the LOB.\textsuperscript{131} After H.B. 2247 became law, the court directed the parties to brief its constitutionality and set the case for argument.\textsuperscript{132} Meanwhile, the Legislature sought permission for specified members of the Kansas Senate and House to appear before the court, which the court denied.\textsuperscript{133}

On June 3, 2005, the supreme court issued a supplemental opinion, \textit{Montoy III},\textsuperscript{134} in which it concluded that H.B. 2247 failed to remedy the constitutional defects identified in \textit{Montoy II}. As an initial matter, the court rejected the state’s argument that HB 2247 was not properly before the court and that the case should be remanded for a trial on its constitutionality, as well as the state’s related contention that H.B. 2247 should be presumed constitutional.\textsuperscript{135} Instead, the court reasoned, the defendants bore the burden of establishing that H.B. 2247 satisfied the court’s remedial order.\textsuperscript{136} The court then reviewed the changes wrought by H.B. 2247, emphasizing that none of these changes were based on legislative consideration of the actual costs of providing an education.\textsuperscript{137} As a result, the total funding provided by H.B. 2247 fell short of the amount needed and its changes to the weighting factors and LOB worsened the inequities in the system.\textsuperscript{138} Thus, the court specified that “no later than July 1, 2005, for the 2005–06 school year, the legislature shall implement a minimum increase of $285 million above the funding level for the 2004–05 school year,” an amount which represented one-third of the total amount needed to satisfy the Augenblick and Myers study recommendations.\textsuperscript{139} The court indicated further that the study recommendations would have to be fully funded unless a Legislative Post Audit study provided for in H.B. 2247 was conducted in a manner that focused on the actual cost of providing an education and indicated a different figure for that cost.\textsuperscript{140}

\textsuperscript{132} \textit{Id.} at 820, 112 P.3d at 926.
\textsuperscript{133} Order for Motion to Appear, Montoy v. State, No. 92,032 (Kan. May 2, 2005), http://www.kscourts.org/school_finance_order050205.pdf. The court indicated, however, that the movants could seek leave to file amicus curiae briefs.
\textsuperscript{134} Montoy III, 279 Kan. 817, 112 P.3d 923.
\textsuperscript{135} \textit{Id.} at 822–24, 112 P.3d at 927–29.
\textsuperscript{136} \textit{Id.} at 823, 112 P.3d at 928.
\textsuperscript{137} \textit{Id.} at 830–39, 112 P.3d at 932–37.
\textsuperscript{138} \textit{Id.} at 839, 112 P.3d at 937.
\textsuperscript{139} \textit{Id.} at 844, 112 P.3d at 940.
\textsuperscript{140} \textit{Id.} at 846, 112 P.3d at 941. Earlier in the opinion, the court identified a number of deficiencies in the study as provided for in the statute. \textit{Id.} at 840–43, 112 P.3d at 937–39.
Following the court’s decision in *Montoy III*, the Governor called the Legislature back for a special session devoted to school finance. During the session, many legislators (and the Attorney General) sharply criticized the court’s decision. Of particular concern was the court’s statement that the Legislature “shall” provide a specified dollar amount, which opponents of the court’s decision regarded as a usurpation of the Legislature’s exclusive authority to make appropriations.\footnote{See infra notes 302–21 and accompanying text (discussing this criticism of *Montoy III*).} Various constitutional amendments were proposed in response, including amendments that would prohibit the courts from ordering or redirecting appropriations, prevent judicial enforcement of school funding provisions in the Constitution, and change the manner of selecting judges.\footnote{See infra notes 359–96 and accompanying text (discussing amendments and their implications).} Some legislative leaders indicated that they would not address the funding issues until a constitutional amendment was approved for submission to the voters.\footnote{See infra notes 320–27 and accompanying text (discussing legislative impasse during special session).} The Attorney General suggested that it might be possible to distribute funds early so as to prevent the court from closing the schools.\footnote{See infra notes 354–55 and accompanying text (discussing Attorney General’s actions in response to *Montoy III*).}

Emotions were running high as the special session dragged on into July—past the court’s deadline—and the Legislature appeared to be at an impasse.\footnote{See infra notes 320–27 and accompanying text (discussing impasse).} The state requested an extension, which was denied,\footnote{Order Denying State of Kansas’ Motion for Extension, Montoy v. State, No. 92,032 (Kan. June 1, 2005), http://www.kscourts.org/kscases/supct/2005/20050701/92032.htm.} and on July 2, 2005, the court entered an order directing the parties to appear on July 8, 2005, to show cause why the court should not enjoin the expenditure of funds pursuant to the SDFPQA.\footnote{Order to Appear and Show Cause, Montoy v. State, No. 92, 032 (Kan. June 2, 2005), http://www.kscourts.org/orders/showcause7205.htm.} The Legislature recessed for the July 4 holiday with no solution in sight. When legislators returned from the recess, however, the logjam had broken. By the time of the show-cause hearing, a funding proposal that met the minimum amount indicated by the court (S.B. 3) was approved,\footnote{S.B. 3, Spec. Sess. (Kan. 2005).} and efforts to amend the Constitution fell short.\footnote{See infra notes 359–96 and accompanying text (discussing the special session and efforts to amend the constitution).} At the show-cause hearing, the court concluded that the Legislature had satisfied the
mandate of Montoy III for the coming year, but retained jurisdiction in light of the need for further action in the following legislative session.\textsuperscript{150}

After the court upheld S.B. 3, the immediate crisis was resolved, but since Montoy III indicated that over $550 million in additional funding was still necessary, the issues were sure to resurface when the Legislature considered school funding for the 2006–07 school year. Before the start of the 2006 legislative session, the Division of Legislative Post Audit completed the study commissioned by H.B. 2247, concluding that a substantial infusion of additional funding was still necessary, although the figure appeared to be somewhat less than that contemplated by the Augenblick and Myers study.\textsuperscript{151} Although perhaps less focused and confrontational, the 2006 session replayed many of the same issues of the special session from the previous summer. Improvement in the budgetary outlook eased pressures somewhat by making some funding increases possible without raising taxes.\textsuperscript{152} Constitutional amendments were reintroduced but did not pass.\textsuperscript{153} Various school finance plans were proposed, but for much of the session none received sufficient support in both houses to gain approval.\textsuperscript{154} In the end, the Legislature adopted and the Governor signed S.B. 549, a plan to increase spending to schools by $466 million over three years.\textsuperscript{155} Whether this plan will meet the constitutional requirements identified by the court, however, remains to be seen.\textsuperscript{156}


\textsuperscript{151} See supra note 13 and accompanying text. In Montoy III, the court discussed this study and indicated that its relevance would depend on whether it considered the actual costs of providing an education that met the standards set by the Legislature. Montoy v. State (Montoy III), 279 Kan. 817, 840–42, 112 P.3d 923, 937–39 (2005).

\textsuperscript{152} See supra note 14 and accompanying text; infra note 412 and accompanying text.


\textsuperscript{154} See supra note 14 and accompanying text.


\textsuperscript{156} See supra note 16 and accompanying text (discussing hearing on plaintiffs' motion to show cause). As discussed further, infra notes 418–38 and accompanying text, while this Article was in the editorial process, the court held that S.B. 549 substantially complied with its prior orders and
4. Montoy in Context

Viewed in the context of school finance litigation across the country and the particular history of school finance litigation in Kansas, several aspects of Montoy stand out. First, Montoy is part of a broader national trend in which school finance litigation has been increasingly successful and has often touched off conflict between the legislative and judicial branches of a state. Second, Montoy reflects the evolution from equity to adequacy in school finance litigation that has taken place nationally. This evolution is attributable to a variety of factors, but one worth noting is the movement toward standards and accountability for schools. Even as legislatures have attempted to hold schools accountable by establishing performance standards and imposing testing requirements to monitor progress toward the standards, they have created a set of standards to which they themselves can be held accountable—standards that can be used to measure the adequacy of funding. This was true in Montoy, where the Kansas Supreme Court relied on accreditation standards prescribed by the Legislature to set the level of quality and an expert study commissioned by the Legislature to determine what funding would be necessary to attain it.

A third distinctive feature of Montoy is the legislative response, which differed markedly from that of earlier school finance litigation in Kansas. It is certainly tempting to attribute this difference in response to the emergence of adequacy as a requirement of suitability. The lower court decisions in Caldwell, Knowles, and Mock focused on equity and required the Legislature to alter the method of allocating funding for schools, but did not require the Legislature to provide increased funding. In contrast, Montoy focused on adequacy and indicated that the Legislature would have to provide substantial additional funding for the public schools. Given the limited resources available to the state and the political aversion to tax increases, it is hardly surprising that this aspect of Montoy provoked the most heated legislative reaction.

II. Montoy Issues

The central conflict in Montoy is a clash between two essential separation-of-powers principles. On the one hand, the power to legislate, including the power to make educational policy for the state and to dismissed the case. This decision, however, did not definitively resolve the constitutionality of S.B. 549.
determine the level of taxation and spending necessary to support public schools, is vested in the Legislature, a representative and deliberative body. On the other hand, it is the duty of the courts to interpret and apply the law to resolve cases within their jurisdiction, and that duty includes the duty to interpret and apply the Constitution, which as superior law is binding on all levels of government, including the Legislature. This central conflict manifests itself in a host of interesting issues, not all of which were discussed in the published opinions of the courts involved in the case. For purposes of discussion, I have grouped these issues into four categories: justiciability, substantive issues, remedial issues, and possible legislative responses.

A. Justiciability

In general terms, the power of courts to declare laws unconstitutional derives from their jurisdiction to resolve cases and controversies.\(^{157}\) Under the well-known logic of *Marbury v. Madison*,\(^ {158}\) the courts’ duty to interpret and apply the law to resolve cases and controversies within their jurisdiction includes the duty to declare a law invalid if it conflicts with the Constitution, which is superior law. This was the source of the Kansas Supreme Court’s authority in *Montoy* to declare the SDFQPA unconstitutional. The very rationale for judicial review, however, implies certain inherent limits on the judicial power, which are collectively referred to as justiciability requirements. Justiciability requirements include the political question doctrine and the requirement that a dispute represent a concrete case or controversy susceptible to judicial resolution. Several justiciability issues lurked beneath the surface in *Montoy*. First, some state courts have held that school finance presents a nonjusticiable political question,\(^ {159}\) and it might be argued that

\(^{157}\) The U.S. Constitution provides,

The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2, cl. 1 (emphasis added).

\(^{158}\) 5 U.S. (1 Cranch) 137 (1803).

\(^{159}\) See *Ex parte James*, 836 So. 2d 813 (Ala. 2002) (dismissing school finance cases as nonjusticiable because any order would require the courts to invade the province of the legislature); Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178 (Ill. 1996) (holding that constitutional standard
the Kansas Supreme Court should have done the same. Second, one might ask whether the case was presented to the courts in a justiciable form, insofar as the Legislature, which has the exclusive power to appropriate funds for the schools, was not a party. In addition, the special statute providing for immediate appeal of the trial court's order raises some interesting questions of its own.

1. The Political Question Doctrine

Under the political question doctrine, courts cannot decide cases whose resolution is, as a matter of separation of powers, political rather than legal. The doctrine originated as a product of the federal Constitution, but it has been adopted and followed in most states, including Kansas. The leading exposition of the doctrine is Baker v. Carr, in which the U.S. Supreme Court explained that the doctrine applied to particular questions whose resolution is, under separation-of-powers principles, confided in the political branches of government. In particular, the Court indicated that the doctrine applied when one of six factors is present:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly of nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the

---

of "high quality" education presented a political question but addressing other challenges to school funding on the merits); Hoke County Bd. of Educ. v. State, 599 S.E.2d 365 (N.C. 2004) (holding that age for attending school was a political question and not properly included in school finance remedial order); Marrero ex rel. Tabalas v. Commonwealth, 739 A.2d 110 (Pa. 1999) (holding that adequacy challenge presented a political question); see generally Meira Schulman Feinziger, Annotation, Procedural Issues Concerning Public School Funding Cases, 115 A.L.R. 5th 563 (2004) (collecting cases on various procedural issues, including justiciability).


161. 369 U.S. 186 (1962) (holding that equal protection challenge to state apportionment statute did not present a nonjusticiable political question).
potentiality of embarrassment from multifarious pronouncements by various departments on one question.\textsuperscript{162}

In practice, the application of Baker outside of the foreign relations realm has emphasized the first two factors—the presence of a "textually demonstrable constitutional commitment" and the lack of "judicially discoverable and manageable standards."\textsuperscript{163} The Kansas Supreme Court in Montoy did not directly address the political question doctrine, although its treatment of the issues on the merits would seem to preclude application of the doctrine. Insofar as Montoy involved a challenge based on the equity of funding, judicial review is well established and the argument for application of the doctrine is weak. This discussion will therefore focus on whether the adequacy of school funding presents a nonjusticiable political question.

One argument for applying the political question doctrine in Montoy is that article 6 of the Kansas Constitution is a textually demonstrable commitment of school funding to the Legislature. Certainly, the text of this provision places the responsibility for school finance squarely on the shoulders of the Legislature, and only the Legislature: article 6, section 1, directs that "[t]he legislature shall provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools,"\textsuperscript{164} and article 6, section 6(b) provides that "[t]he legislature shall make suitable provision for finance of the educational interests of the state."\textsuperscript{165} In Marrero ex rel. Tabalas v. Commonwealth,\textsuperscript{166} for example, the Pennsylvania Supreme Court relied on similar language in the Pennsylvania Constitution\textsuperscript{167} to affirm the dismissal of an adequacy challenge on political question grounds, reasoning in part that the issue was textually committed to the Legislature.\textsuperscript{168} Nonetheless, the text of article 6 speaks in mandatory terms that imply a constitutional duty. Ordinarily, when the term "shall" is used in a legal document, it is construed as mandatory and judicially

\textsuperscript{162} Id. at 217.

\textsuperscript{163} See Nixon v. United States, 506 U.S. 224 (1993) (concluding that the constitutionality of a senate rule allowing a senate committee rather than the entire senate to hear impeachment proceedings was nonjusticiable); Powell v. McCormack, 395 U.S. 486 (1969) (finding a textual commitment in article I, § 5 to limit congressional judgment of member qualifications).

\textsuperscript{164} KAN. CONST. art. 6, § 1 (emphasis added).

\textsuperscript{165} KAN. CONST. art. 6, § 6(b) (emphasis added).

\textsuperscript{166} 739 A.2d 110 (Pa. 1999).

\textsuperscript{167} Pa. CONST. art. III, § 14 ("The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth.").

\textsuperscript{168} 739 A.2d at 112–14.
enforceable. Typically, textual commitment cases involve language that vests exclusive power in the political branches or that implies discretionary judgment rather than a legal duty.\footnote{169} Even when the federal Constitution explicitly vests exclusive authority in Congress, the U.S. Supreme Court has held that the judiciary has the constitutional responsibility to determine the scope of that authority.\footnote{170}

It is perhaps more persuasive to argue that “suitable provision for finance” does not represent a judicially discoverable and manageable standard of adequacy.\footnote{171} Although courts are comfortable evaluating equity claims, which are amenable to traditional equal protection type analysis under which differences in funding must be justified by their relationship to legitimate state interests, the determination of adequacy involves an entirely different inquiry. It requires courts to determine a minimum level of funding necessary to meet constitutional requirements and involves the enforcement of an affirmative duty on the Legislature. This kind of inquiry, which involves difficult policy judgments about both the goals and methods of education and competing claims on limited state resources, is not one that ordinarily falls within the province of the courts. Indeed, as observed in USD 229, “suitability does not imply any objective, quantifiable education standard against which schools can be measured by a court. Rather, value judgments must be made.”\footnote{172} Even in Montoy, the court did not develop its own constitutionally based standards, but rather relied on the Legislature’s own standards to define the level of performance for which funding must be provided.\footnote{173} Nonetheless, the standards identified by the Kentucky Supreme Court in Rose, which are quoted above, have been cited with approval in a number of decisions.\footnote{174} Given that many courts have identified standards, it is hard to say that there is a lack of judicially discoverable and manageable standards.\footnote{175}

\footnotetext{169}{Some of the amendments proposed during the special legislative session would amend the language of article 6 to make clear that the requirement of suitable finance is not judicially enforceable. See infra notes 386–90 and accompanying text (discussing the amendments).}

\footnotetext{170}{See Powell v. McCormack, 395 U.S. 486 (1969) (holding that a provision declaring that the House of Representatives shall be the “sole judge” of the qualifications of its members did not permit the House to impose qualifications beyond those listed in the Constitution).}

\footnotetext{171}{This issue is closely related to the substantive question whether article 6 creates judicially enforceable rights. See infra notes 233–46 and accompanying text.}


\footnotetext{173}{Indeed, the question arises as to what would happen if there were no performance standards or if the Legislature lowered them to reduce the level of funding needed to meet them. See infra notes 281–83 and accompanying text.}

\footnotetext{174}{Supra note 58 and accompanying text.}

\footnotetext{175}{Consider, by comparison, the ongoing struggle within the U.S. Supreme Court over...
The other four strands of the political question doctrine are generally considered "prudential" and reflect the importance of courts not overstepping the limits of their competence so as to interfere with matters within the expertise and judgment of the other branches. At the federal level, these strands apply most frequently to foreign relations matters. At the state level, analogous concerns arguably arise in connection with school finance. Education is a subject about which courts have no particular expertise and appropriations decisions require a delicate balancing of priorities that is beyond judicial competence. As the tension of the special session attests, moreover, the remedial phase of adequacy litigation may threaten a direct confrontation with the Legislature. Similar concerns led the Alabama Supreme Court, in *Ex parte James*, to change course midstream—having initially addressed school funding litigation on the merits, the court eventually changed its views and dismissed the case as nonjusticiable during the remedial phase.

Notwithstanding the possible arguments for the application of the political question doctrine, on balance they do not clearly compel that result. Enforcing an adequacy requirement presents significant difficulties and may place the judiciary in conflict with the other branches of government, but the Legislature’s duty to “make suitable provision for finance” of the schools is phrased in mandatory terms that engage the courts’ duty to apply the Constitution as superior law. Thus, the majority of courts to consider it have rejected the argument that school finance presents a nonjusticiable political question. The political gerrymandering. Notwithstanding nearly twenty years of fruitless effort to develop accepted standards for evaluating such claims, a majority of the court is still unprepared to declare that there is a lack of judicially discoverable and manageable standards so as to make the political question doctrine applicable. *See Vieth v. Jubelirer*, 541 U.S. 267 (2004) (failing to garner a majority to agree that there can be no judicially discoverable and manageable standards for political gerrymandering claims); *see also* League of United Latin Am. Citizens v. Perry, 126 S.Ct. 2594 (2006) (upholding Texas redistricting plan against political gerrymandering challenge); *Cox v. Larios*, 542 U.S. 947 (2004) (affirming without opinion lower court decision invalidating reapportionment on political gerrymandering grounds).

176. 836 So. 2d 813, 815 (Ala. 2002) (dismissing school finance cases as nonjusticiable because any order would require the courts to invade the province of the Alabama Legislature).

Supreme Court in *Montoy* signaled its likely rejection of any political question argument as well. First, the court offered an extended discussion of its obligation to enforce constitutional provisions, which is incompatible with any conclusion that the case presented political rather than legal questions.\(^{178}\) More fundamentally, the court’s reasoning necessarily incorporated conclusions that are inconsistent with the application of the political question doctrine. First, the court regarded the language of article 6 as imposing a mandatory constitutional duty on the Legislature, which forecloses the conclusion that it is a textual commitment of unreviewable discretion to the legislative branch. Second, the court accepted the trial court’s findings and used the statutory and regulatory performance standards as standards for determining suitability of finance, and this reasoning demonstrates that the court thought there were judicially discoverable and manageable standards.

2. Proper Case

Courts do not have a general power to interpret constitutions or pronounce on the validity of laws; they have the power to decide cases and controversies. In general terms, a case or controversy involves a concrete legal dispute between adverse parties in which the court resolves disputed facts and applies the law to determine the respective rights of the parties and to order remedies for any violation of rights. If there is not a proper case or controversy—such as when the plaintiff lacks standing or the issues have become moot—there is no jurisdiction and no basis for the exercise of judicial power.\(^{179}\) There is no explicit case or controversy provision in the Kansas Constitution, but the courts have relied on separation of powers and implicit understandings of the judicial power to apply case or controversy doctrines under Kansas law.\(^{180}\) Thus, for example, the Kansas Supreme Court has repeatedly

---


\(^{179}\) Although some school finance cases present standing or mootness issues, such issues are not evident in *Montoy*. See generally *Ferziger*, supra note 159 (collecting cases on various procedural issues, including standing).

stated that "[i]t is the duty of the courts to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles which cannot affect the matters in issue before the court." It is not entirely clear, however, whether the case or controversy requirement in Kansas is a constitutional requirement or merely a matter of prudential self-restraint.

Assuming these pronouncements do reflect constitutional requirements, the question arises in the Montoy cases whether the Kansas Supreme Court can enter a judgment that can be carried into effect that will remedy the constitutional violation. The named defendants in the case were the state, the Governor, the Chair of the State Board of Education, and the Commissioner of the Department of Education. If funding for public schools is inadequate, none of these officials has the legal authority to provide additional funding. Only the Legislature can appropriate funds for schools and impose taxes if they are necessary to make those funds available, and the Legislature was not a party to the case. If a suit is filed against the wrong defendant—one who cannot provide the requested relief—there would arguably be no case or

v. Bd. of County Comm’rs, 258 Kan. 622, 628, 907 P.2d 127, 131 (1995) (holding that parties may not settle a case and by preserving their rights to appeal seek an advisory opinion).

181. Miller, 267 Kan. at 262, 978 P.2d at 933 (emphasis added); Kimberlin, 238 Kan. at 301, 710 P.2d at 684–85 (emphasis added).


183. Normally, of course, the proper approach in an action to challenge the constitutionality of a statute is to sue the officials charged with enforcing it and seek to prevent them from doing so, as the plaintiffs did in Montoy. It would ordinarily be improper to sue the Legislature for adopting an unconstitutional statute, and that body would likely be immune in state court in any event. Conversely, legislatures and legislators do not ordinarily participate in litigation for purposes of defending statutes they have enacted. Again, that role falls to the executive branch officials charged with enforcing the law. Legislators have standing in some cases to challenge measures that infringe upon their rights and privileges as legislators, see Raines v. Byrd, 521 U.S. 811, 820–30 (1997) (holding that individual legislators lacked standing to challenge the federal Line Item Veto Act), and they have also been parties in reapportionment cases. See, e.g., Sixty-Seventh Minn. State Senate v. Beens, 406 U.S. 187 (1972) (intervention by state senate); Lucas v. Forty-Fourth Gen. Assembly of Colo., 377 U.S. 713 (1964) (involving General Assembly as defendant in its official capacity in suit in federal court for injunctive relief).

184. See Order for Motion to Appear, Montoy v. State, No. 92,032 (Kan. May 2, 2005), available at http://www.kscourts.org/school_finance_order050205.pdf (This Court, having considered the motions of the Legislative Coordinating Council and the above-named members of the House of Representatives, denies permission for members of the Legislature who are not named parties to the litigation to orally argue on May 11, 2005." (emphasis added)). In light of legislative immunity and separation of powers, it is not entirely certain that the plaintiffs could have made the Legislature a party had they sought to do so. See infra notes 303–15 and accompanying text.
controversy.\textsuperscript{185} It is true that in \textit{Montoy} the court could declare the SDFPQA unconstitutional and enjoin the defendants from distribution of funds under it, as it threatened to do in its July show-cause order, but that remedy itself provides no “relief” to the plaintiffs,\textsuperscript{186} who were seeking additional funding, not closure of the schools.

In this regard, there is a difference between equity-based suits and adequacy-based suits. In an equity-based suit, to the extent that appropriated funds have not been earmarked, courts can normally direct executive branch officials who are parties to the lawsuit to reallocate the funds so as to cure the iniquities.\textsuperscript{187} Even if that is not possible, enjoining all expenditures cures the iniquities; all students are treated the same because none is receiving any state-funded education. Of course, the plaintiffs in an equity suit do not want this result, but in a perverse way the result does end the constitutional violation by eliminating unequal treatment.\textsuperscript{188} In contrast, shutting down the schools does not itself in any way cure an unconstitutionally inadequate funding system; indeed, it temporarily denies students any public education. There does not appear to have been any order that the court in \textit{Montoy} could issue to a party, compliance with which would itself cure the constitutional violation. On the whole, while this sort of reasoning has some force, courts can declare that school finance statutes are unconstitutional and enjoin enforcement of those statutes, relying on the Legislature to perform its constitutional duty.

Most courts consider this possible course of action sufficient to create a case or controversy. Thus, for example, similar arguments were rejected in \textit{Serrano v. Priest},\textsuperscript{189} on appeal from a trial court decision finding that the state’s system of school finance violated equal protection.\textsuperscript{190} Relying on a procedural rule (not the case or controversy

\textsuperscript{185} \textit{See} City of Hutchinson ex rel. Human Relations Comm’n v. Kansas State Employment Serv., 213 Kan. 399, 517 P.2d 117 (1973) (dismissing case filed against individual officers of agency where plaintiff sought relief from state agency and agency was not named as a party); cf. Lujan v. Defenders of Wildlife, 504 U.S. 555, 568 (1992) (reasoning that the plaintiffs lacked standing in part because “the agencies funding the [challenged] projects were not parties to the case [and] the District Court could accord relief only against the Secretary [of the Interior],” whose actions would not necessarily bind the funding agencies).

\textsuperscript{186} \textit{See infra} notes 328–34 and accompanying text (discussing the issues surrounding closure of schools as a remedy for inadequate funding).

\textsuperscript{187} \textit{See infra} notes 369–84 and accompanying text (discussing implications of constitutional amendment that would prohibit courts or executive officials from redirecting funds).

\textsuperscript{188} \textit{See} Palmer v. Thompson, 403 U.S. 217 (1971) (holding that there was no violation of equal protection when a city closed its public swimming pool rather than integrate it because both whites and people of color were denied its use).


\textsuperscript{190} An earlier California Supreme Court decision in the case, \textit{Serrano v. Priest}, 487 P.2d 1241
requirement), the defendants argued that the trial court lacked jurisdiction because "the operative and directory provisions' of the judgment 'are addressed solely to the Legislative and Governor,' and that the parties defendant in the action lack all power to bring about the relief sought by plaintiffs and awarded by the trial court."\textsuperscript{191} The California Supreme Court, however, disagreed with this characterization of the trial court's orders, and reasoned that it was proper in cases involving a challenge to the constitutionality of legislation to sue the officials responsible for implementing the legislation and seek relief in the form of a declaration of unconstitutionality and an injunction against the enforcement of the unconstitutional statute.\textsuperscript{192} The course of the Montoy litigation makes reasonably clear that the Kansas Supreme Court, like the California Supreme Court, believed that the proper form of the suit was one for declaratory and injunctive relief against the state officials implementing the school finance law.\textsuperscript{193}

3. The Special Appeal Statute

A final issue in Montoy that relates to jurisdiction, justiciability, and judicial power is the statute adopted in the 2004 legislative session providing for immediate appeal of the trial court's decision in Montoy. As discussed previously, the Legislature's desire to have the Kansas Supreme Court decide the case before taking any action stands in contrast to prior school finance cases in which the Legislature opted to address lower court decisions before they were resolved on appeal.\textsuperscript{194} Although the constitutionality of the special appeals statute is not in doubt,\textsuperscript{195} it nonetheless raises two interesting issues: (1) the extent to which the case or controversy requirement in Kansas constrains the Legislature's authority to provide for jurisdiction and (2) when (if ever) legislative action with respect to ongoing litigation violates separation of powers by encroaching on the judicial power.

\textsuperscript{191} See supra note 18 and accompanying text (discussing the impact of the Serrano decision).
\textsuperscript{192} Id. at 941–42.
\textsuperscript{193} See supra note 147 and accompanying text (discussing the show-cause order in Montoy); infra notes 328–30 and accompanying text (same).
\textsuperscript{194} See supra notes 63–82 and accompanying text.
\textsuperscript{195} See Gleason v. Samaritan Home, 260 Kan. 970, 983, 926 P.2d 1349, 1359–60 (1996) (indicating that the Legislature has the power to grant, limit, and withdraw appellate jurisdiction).
Both of these issues arise because the statute provided for the consideration of an appeal from a district court decision that was not final. Normally, a decision cannot be appealed until the lower court has made a final decision.\textsuperscript{196} The finality requirement prevents premature and unnecessary appeals that prolong litigation and interfere with the operations of the lower court.\textsuperscript{197} Although the requirement is a statutory one and there are a number of statutory exceptions,\textsuperscript{198} it is also an inherent aspect of the relationship between lower courts and appellate courts that may have separation-of-powers implications if statutory provisions depart too dramatically from the general principle. Under the U.S. Constitution, for example, Article III specifies certain cases in which the jurisdiction of the Supreme Court is original and Congress may not add to this list.\textsuperscript{199} If Congress were to provide for the immediate “appeal” to the Supreme Court of a case that had barely begun, the Court’s jurisdiction would arguably not be appellate at all, but rather original. Article 3 of the Kansas Constitution specifies that the Kansas Supreme Court has original jurisdiction in certain categories of proceedings “and such appellate jurisdiction as may be provided by law,”\textsuperscript{200} but I found no Kansas cases addressing whether this provision limits the authority of the legislature to bring other cases within the Kansas Supreme Court’s original jurisdiction.

It might also be argued that under extreme circumstances, nonfinal appeals are not “ripe” for review and thus do not present a case or controversy.\textsuperscript{201} If, for example, a statute provided for appeal of a case before there had been any decision or factual hearings, perhaps there would be no case that is ripe for purposes of appellate jurisdiction. The special appeals statute in Montoy is by no means such an extreme case


\textsuperscript{197} Id.

\textsuperscript{198} Exceptions include the certification process described above. See supra notes 116–17 and accompanying text.

\textsuperscript{199} U.S. CONST. art. III, § 2, cl. 2. See also Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174–76 (1803) (holding that Congress may not bring any other cases within the original jurisdiction of the Supreme Court).

\textsuperscript{200} KAN. CONST. art. 3, § 3.

\textsuperscript{201} The connection between finality and ripeness is very close in the administrative law context, where the lack of a final agency decision ordinarily means that an administrative decision is not ripe for review. See RICHARD J. PIERCE, JR., SIDNEY A. SHAPIRO & PAUL R. VERKUIJL, ADMINISTRATIVE LAW AND PROCESS 190 (4th ed. 2004) (“In some cases, the final agency action requirement may have a constitutional component, since there is no ‘case’ or ‘controversy’ within the court’s decisionmaking power under Article III until the agency has taken actions sufficient to create ‘concrete adverseness’ between it and the party seeking review.”).
because the lower court had made all the critical findings of fact and had even entered a final order by the time the appeal was actually heard, but the statute invites consideration of whether the Kansas Legislature might require the Kansas courts to resolve disputes that are not cases or controversies by, for example, providing for a process whereby the Legislature (or lower courts) could certify constitutional questions to the Kansas Supreme Court to obtain an advisory opinion.  

Interestingly enough, this question has not been definitively resolved under Kansas law. Under the U.S. Constitution's case or controversy requirement, it is clear that Congress could not constitutionally provide for Article III courts to exercise jurisdiction over matters that are not cases or controversies. As noted previously, in the absence of express constitutional provisions requiring a case or controversy, the status in Kansas of such doctrines as standing, ripeness, and mootness remains unclear. No case of which I am aware invalidates a statute conferring jurisdiction on Kansas courts on the ground that it violates the case or controversy requirement, but one case that may be instructive is *Spencer v. Aetna Life & Casualty Insurance Co.* which involved the certification to the Kansas Supreme Court of a state law question arising in the course of a diversity case in federal court. After stating that the courts may not constitutionally render advisory opinions, the court in *Spencer* concluded without elaboration that the certified "question arises from an actual case and controversy and although presented as a question of law, it neither violates the case or controversy requirement nor the separation-of-powers doctrine on advisory opinions." This language

202. Some state courts have issued advisory opinions in school finance cases pursuant to specific state constitutional provisions permitting them. See Advisory Opinion to the Attorney Gen. re Requirement for Adequate Pub. Educ. Funding, 703 So. 2d 446 (Fla. 1997) (issuing advisory opinion on proposed constitutional amendment pursuant to article IV, § 10 and article V, § 3(b)(10) of the Florida Constitution); *In re Request for Advisory Opinion on Constitutionality of 1986 PA 281, 422 N.W.2d 186 (Mich. 1988)* (issuing advisory opinion regarding specific questions raised by state senate and governor pursuant to article III, § 8 of the Michigan Constitution). The Kansas Constitution, however, contains no explicit provisions for issuance of advisory opinions.

203. For example, while Congress may by statute create rights, injury to which is sufficient to confer standing, it may not confer standing on persons who have not suffered an "injury in fact." See, e.g., *Lujan v. Defenders of Wildlife, 504 U.S. 555, 576-78 (1992)* (holding that citizen suit provision of the Endangered Species Act could not confer standing based on procedural violations alone).

204. See supra notes 179–82 and accompanying text (discussing standing, ripeness and mootness).


206. See KAN. STAT. ANN. § 60-3201 (authorizing certification).

207. 227 Kan. at 915, 611 P.2d at 151.
would seem to imply that the statute would have been unconstitutional if
the certified question were not tied to an actual case or controversy.

Although the court in *Spencer* concluded that there was no violation
of the case or controversy requirement, the resolution of a certified
question would almost certainly violate the federal case or controversy
requirement. A court that resolves a certified question does not have
jurisdiction over the entire case and cannot resolve it with finality, which
makes its resolution of that question an advisory opinion. Thus, *Spencer*
also implies that the Kansas Supreme Court construes the rule
against advisory opinions less strictly than its federal counterparts do.
More specifically, it suggests that steps taken by the Legislature to
expedite the Kansas Supreme Court’s resolution of issues presented in an
actual case or controversy are unlikely to violate the case or controversy
requirement.

A related but distinct question is whether the Legislature’s action in
respect to particular litigation might improperly interfere with the
judicial power. This issue typically arises in connection with legislation
eliminating jurisdiction over pending cases, most notoriously in *Ex parte
McCordle*, a Civil War-era case in which the U.S. Supreme Court
dismissed an appeal because an Act of Congress adopted after the Court
had taken up the case eliminated the statutory basis for jurisdiction.
Notwithstanding *McCordle*, the Court has held that Congress may not
direct outcomes in particular cases or re-open decisions after the
judgments have become final. Provisions stripping a court of
jurisdiction, directing it to make particular decisions, or reopening final
judgments present a direct challenge to the judicial power. It is less clear
how a provision requiring a court to hear a case would challenge its
power. Nonetheless, in an extreme situation, it might. The jurisdiction
and powers of courts are largely creatures of statute, but it is also well

---

reopened certain final decisions dismissing securities law claims on statute of limitations grounds);
*Hayburn’s Case*, 2 U.S. (2 Dall.) 409 (1792) (collecting circuit court decisions of several justices
invalidating veterans benefit statute under which court decisions awarding benefits could be
reviewed and set aside by the Secretary of War).

209. Some other states have explicit constitutional provisions permitting responses to certified

210. *74 U.S. 506 (1869).*

pardons given to southern sympathizers are conclusive proof of collaboration so as to require
forfeiture of property and directing courts rule accordingly).

212. *See Plaut*, 514 U.S. 211 (invalidating provisions lengthening the statute of limitations for
securities violations, enacted in response to a Supreme Court decision, to the extent they reopened
cases dismissed under prior limitations period that had become final judgments).
understood that certain basic powers, such as the power of contempt or judicial immunity, are inherent in the courts themselves. The powers to manage their dockets and determine whether cases are within their assigned jurisdiction are important elements of courts' inherent powers. Thus, in some circumstances, forcing a court to hear a case might sufficiently interfere with those powers to raise separation-of-powers questions.\footnote{213}

The specific statutory jurisdiction provision adopted in Montoy falls well within the outer bounds of constitutional legislative control over the jurisdiction of the courts and in that sense does not raise any serious constitutional questions. Nonetheless, the Legislature's direct involvement in the ordinary jurisdictional progression of a pending case invites consideration of whether there are any potential limitations on such involvement and what they might be. These questions are interesting, but ultimately far less significant than the practical result of the statutory provision for an immediate appeal: it accelerated the ultimate showdown between the Legislature and the supreme court.

\textit{B. Substantive Issues}

As the foregoing discussion suggests, justiciability issues might have prevented the courts from addressing the merits of the constitutional challenge to the SDFQPA, but it is hardly surprising they did not. The Kansas courts had addressed the merits in previous school finance cases and so have the courts in most other states. On the merits, the case raises a number of interesting issues under both equal protection and article 6. These issues are framed by the district court's findings of fact and conclusions of law and the Kansas Supreme Court's treatment of the district court's analysis. In a nutshell, the district court found the SDFQPA unconstitutional on three grounds: (1) it provided for inequitable distribution of resources without a rational basis for funding disparities; (2) it failed to provide adequate resources for all Kansas children to have a suitable education; and (3) it adversely impacted the most vulnerable children (disparate impact).\footnote{214} While the Kansas Supreme Court affirmed the district court's ultimate conclusion that the

\footnote{213. For example, a statute that required the Kansas Supreme Court to exercise original jurisdiction over a school finance case requiring an extensive and lengthy trial might interfere with the court's ability to perform its other essential functions and might force it to exercise functions for which it is poorly suited.}

SDFQPA was unconstitutional on both adequacy and equity grounds, it rejected the trial court’s reliance on equal protection and instead grounded its decision exclusively on article 6.215

1. Equal Protection

The Kansas Supreme Court disposed of both equal protection rationales without much discussion.216 First, with respect to the lack of a rational basis for funding disparities, the court agreed that the rational basis test was the correct test to apply under equal protection, but concluded that the trial court “misapplied” it.217 As to the disparate impact ground, the Kansas Supreme Court correctly reasoned that disparate impact does not establish an equal protection violation without proof of discriminatory intent.218 Both of these conclusions are consistent with settled law, but they nonetheless raise some interesting questions that warrant further discussion.

Although it held the trial court had misapplied the rational basis test, the Kansas Supreme Court did not explain what the trial court did wrong or discuss its own application of the test. As it had done in USD 229, the court simply stated its conclusion that “all of the funding differentials as provided by the SDFQPA are rationally related to a legitimate legislative purpose.”219 Although it is unclear exactly what the Kansas Supreme Court was thinking, two potential errors emerge from the trial court’s statement that the SDFPQA fails “to provide a rational basis premised in differing costs for any [funding] differential.”220 First, under the rational basis test, the burden of proof rests on the party challenging the legislation to prove that there is no rational basis for it.221 Second, under the rational basis test, a law is constitutional if it is reasonably related to any plausible, legitimate purpose, including purposes that appear

215. Montoy v. State (Montoy II), 278 Kan. 769, 771, 102 P.3d 1160, 1162–63 (2005) (per curiam), withdrawn and republished with concurring opinion, 120 P.3d 306 (Kan. 2005). One by-product of relying exclusively on article 6 is that there is no federal question and therefore no basis for seeking review by the U.S. Supreme Court.
216. Id.
217. Id.
218. Id.
219. Id.
221. See FCC v. Beach Commc’ns, Inc., 508 U.S. 307, 315 (1993) (reasoning that under the rational basis test, a party challenging a law must “negate every conceivable basis that might support it”).
nowhere in the statute or its legislative history. Thus, the trial court
would appear to be in error by requiring the state to prove a relationship
to a particular purpose—the cost of providing an education.

There is, however, at least one U.S. Supreme Court decision that
would support the trial court’s requirement that funding be related to the
costs of providing an education. In *Allegheny Pittsburgh Coal Co. v.
Webster County*, the Supreme Court invalidated a system of reliance
on the last sale price to value property for tax purposes because it was
not rationally related to the particular purpose of determining the value
of the property.224 The Court reasoned that because the state’s
constitution and laws mandated that the goal of tax assessment was to
determine the current market value of property, any method of taxation
actually employed must be reasonably related to that purpose.225 By
analogy, one might argue that article 6 of the Kansas Constitution limits
the permissible basis for school finance classifications to purposes
related to the costs of providing an adequate education.226 Indeed,
although the Kansas Supreme Court implicitly rejected this kind of
reasoning as a matter of equal protection, its application of article 6 of
the Kansas Constitution appears to have adopted precisely this
approach—differences in funding must be related to costs. This issue
will be discussed in further detail below;227 for present purposes the key
point is that this difference in approach may signal a distinction in the
analysis of equity claims under equal protection and article 6. Whereas
Judge Bullock read *USD 229* as having “adopted the ‘rational basis’ test
for examining challenges to ‘equity’ of whatever type,”228 the Kansas
Supreme Court in *Montoy* may have indicated that equity claims under

---

222. *Id.*


224. *Id.* at 344–46.

225. Thus, for example, the Court expressly left open the question whether other justifications
might support a similar valuation system that had recently been adopted in California, which was not
constrained by a similar constitutional requirement. *Id.* at 344 n.4. The Court later upheld the
California system in *Nordlinger v. Hahn*, 505 U.S. 1 (1992), reasoning that it was rationally related
to the purposes of not taxing unrealized gains and promoting neighborhood stability. The Court in
*Nordlinger* distinguished *Allegheny Pittsburgh Coal* in part because “the West Virginia
‘Constitution and laws provide that all property of the kind held by petitioners shall be taxed at a rate
uniform throughout the State according to its estimated market value,’ while in California the Court
found ‘no suggestion’ that ‘the State may have adopted a different system in practice from that
specified by statute.’” *Id.* at 16.

226. This assumes that the term “suitable provision for finance” means that finances must be
related to costs.

227. See infra notes 261–66 and accompanying text (discussing the relationship between
finances and costs).

equal protection receive a more deferential form of rational basis scrutiny than similar claims under article 6.

Regarding the disparate impact ground, the Kansas Supreme Court correctly observed that disparate impact, standing alone, did not establish an equal protection violation. In light of this point, there were several problems with the trial court’s reasoning. First, equal protection violations generally require purposeful discrimination, so that disparate impact does not establish a violation absent proof of discriminatory intent. For example, in a race discrimination case in which a facially neutral statute (one that does not employ an explicit racial classification) is challenged based on disparate impact, the plaintiff must prove discriminatory intent; i.e., that the neutral classification was adopted because of its disparate impact. In Montoy there was no finding and no evidence that differences in funding were motivated by racially discriminatory intent. Second, even if discriminatory intent can be proven, it will only require strict scrutiny if it relates to a classification that would be "suspect" under equal protection doctrine. Racial classifications are suspect, but disability, poverty, and not speaking English as a native language are not.\(^{229}\) Third, even if intent to discriminate on the basis of a suspect classification is established, the classification may still be valid if it satisfies the appropriate level of scrutiny.\(^{230}\) Although the failure to satisfy strict scrutiny would follow automatically from the trial court’s conclusion that the funding differentials failed the rational basis test, complete application of the constitutional framework would require the trial court to engage in some discussion of this issue.

2. Article 6

The Kansas Supreme Court’s resolution of the equal protection issues in Montoy is significant primarily because it means that article 6 is the exclusive basis for the court’s decision invalidating the SDFQPA.\(^{231}\)


\(^{230}\) For example, if a law school adopted a facially neutral admissions policy that disproportionately favored minorities, proving an intent to favor minorities would trigger strict scrutiny, but the policy might survive strict scrutiny as a valid affirmative action plan under Grutter v. Bollinger, 539 U.S. 306 (2003).

\(^{231}\) At a practical level, because the court relied exclusively on article 6, there was no federal question providing a basis for review by the U.S. Supreme Court. In addition, an equal protection rationale might set a precedent that could be extended to other essential government services.
In this, the court followed the lead of many other state courts which have de-emphasized equal protection as a basis for school finance decisions and instead focused on the education provisions of their respective constitutions. Nonetheless, equal protection analysis is familiar terrain with a well-established framework, while reliance on article 6 forced the court into less fullycharted territory. Prior Kansas decisions had established some basic principles concerning article 6, but Montoy presented the court with a number of difficult issues, including whether article 6 creates any judicially enforceable individual rights; what the content of those rights is; and what level of scrutiny applies when reviewing legislative action to implement article 6. Understanding these issues is critical to understanding the implications of Montoy for the future of educational finance in Kansas.

The initial question is whether article 6 creates any judicially enforceable constitutional rights at all. On this point, the law was well settled and Montoy did not establish anything new. Throughout the history of school finance litigation in Kansas, courts have consistently assumed that article 6 imposed a judicially enforceable requirement to establish and maintain public schools, even if that requirement was understood in a minimalistic sense. The Kansas Supreme Court itself recognized such rights in both Knowles and USD 229. In Knowles, the court remanded the case for further consideration of the plaintiffs’ article 6 claims, which would have been unnecessary if article 6 created no rights. And in USD 229, the Kansas Supreme Court approvingly quoted the trial court’s statement that article 6 imposed minimum requirements of adequacy, although it noted that there was no dispute on the facts of the case as to the adequacy of funding if appropriated funds were distributed more equitably. Nonetheless, none of the cases actually applied the right to require additional legislative funding.

Thus, notwithstanding this precedent, some critics of the Montoy decision have argued that article 6 does not create any judicially

---

232. See supra notes 46–59 and accompanying text (discussing history of school finance litigation).

233. While early cases focused on equal protection challenges, article 6 was frequently cited as a source of equity requirements and no court suggested that article 6 was completely unenforceable. See supra notes 63–82 and accompanying text.

234. Knowles v. State Bd. of Educ., 219 Kan. 271, 547 P.2d 699 (1976). See also supra notes 68–74 and accompanying text (discussing Knowles). If article 6 created no rights, the proper course for the court would have been to affirm the trial court’s dismissal on other grounds—although the trial court was wrong to dismiss on mootness grounds, dismissal would have been proper for failure to state a claim.

enforceable rights, and there is a plausible basis in the text for such an argument. Most constitutional rights are phrased as "rights" to be protected from government encroachment. In contrast, the relevant provisions of article 6 do not refer to any "right to education" that must be respected or preserved by government. Instead, article 6 speaks in terms of duties imposed upon the Legislature. Article 6, section 1 provides that "[t]he legislature shall provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools." Article 6, section 6 provides that "[t]he legislature shall make suitable provision for finance of the educational interests of the state." These provisions impose a duty on the Legislature, but it is not so clear that they create any right to an education.

Looking at article 6 as a whole, and in light of its history, one might instead understand article 6 as reflecting a much more general political obligation to create schools that is owed to the state as a whole. The benefits sought from education are not phrased in terms of the "improvement" of particular students, but rather as generic improvement. This phrasing is consistent with a policy judgment, expressed in constitutional terms, that public schools are an essential function of the state because the state as a whole benefits from a well-educated citizenry. While that benefit is felt most immediately and directly by students and their families, there are broader societal benefits in terms of establishing the foundation for functioning democratic institutions, promoting a strong economy, and other advantages that a well-educated population brings. Indeed, article 6, section 6(b) speaks of "the educational interests of the state," not the educational rights of students. From this perspective, one might argue that the duty to provide public schools is owed by the Legislature to the state as a whole, rather than to individual students or districts.

Most courts, however, have interpreted their analogous constitutional provisions as creating judicially enforceable constitutional rights. These

---

236. See, e.g., KAN. CONST., Bill of Rights, arts. 1–20.
237. KAN. CONST., art. 6, § 1.
238. KAN. CONST., art. 6, § 6(b). Section 6(b) continues, "No tuition shall be charged for attendance at any public school to pupils required by law to attend such school, except such fees or supplemental charges as may be authorized by law." Id. This language is more easily read as creating a right, but that right would be a freedom from being "charged tuition" rather than a particular level of funding.
239. Id. (emphasis added).
240. See, e.g., Fair Sch. Fin. Council of Okla., Inc. v. State, 746 P.2d 1135, 1149 (Okla. 1987) (stating that relevant constitution provisions "merely mandate actions by the Legislature to establish and maintain a system of free public schools. They do not on their face guarantee equal expenditures per pupil.").
interpretations rest on a "Hohfeldian" conception of rights and duties. Hohfeld postulated that duties and rights are opposing sides of a single, legal relationship; i.e., the recognition of a legal duty in A implies a corresponding right in B, and vice versa. 241 Thus, if the Legislature has a duty to provide schools and fund them, it follows that someone has a right to those schools. 242 And because the purpose of schools is to provide an education, it follows that the duty to provide schools implies that students have a right to be educated in them. This conclusion is reinforced by the fact that article 6, section 6(b) expressly prohibits the imposition of tuition for pupils required to attend public schools, which would seem to imply a right to attend them free of charge. That other citizens benefit from the public schools, moreover, is not inconsistent with the recognition that students have a right to attend public schools that provide some minimum standard of education.

More fundamentally, it is the courts’ duty to interpret and apply the law and, when state statutes conflict with the Kansas Constitution, courts must apply the constitution as superior law. Insofar as article 6 contains mandatory language ("shall"), it seems to create a constitutional duty that the courts are bound to enforce. If article 6 were completely lacking in judicially enforceable content, there would arguably be little point in creating a mandatory constitutional duty to establish and maintain public schools and make suitable provision for their finance. 243 Of course, the


242. See Seattle School District No. 1 v. State, which held, By imposing upon the State a Paramount duty to make ample provision for the education of all children residing within the State’s borders, the constitution has created a “duty” that is supreme, preeminent or dominant. Flowing from this constitutionally imposed “duty” is its jural correlative, a correspondent “right” permitting control of another’s conduct. Therefore, all children residing within the borders of the State possess a “right,” arising from the constitutionally imposed “duty” of the State, to have the State make ample provision for their education. Further, since the “duty” is characterized as Paramount the correlative “right” has equal stature.

585 P.2d 71, 91 (Wash. 1978) (internal citations omitted). See also McDuffy v. Sec’y of Executive Office of Educ., 615 N.E.2d 516, 527 n.23 (Mass. 1993) (citing Seattle School District and Hohfeld to support the proposition that “if ‘legislatures and magistrates’ have a constitutional duty to educate, then members of the Commonwealth have a correlative constitutional right to be educated”).

243. As a counter example, however, the Guaranty Clause of the U.S. Constitution provides that “[t]he United States shall guarantee to every state in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.” U.S. CONST. art. IV, § 4. These guarantees are phrased in mandatory terms that seem to create a constitutional duty, yet the Guaranty Clause is for the most part judicially unenforceable, although some Guaranty Clause claims may be justiciable. See New York v. United States, 505 U.S. 144, 184–85 (1992)
Legislature is cognizant of its constitutional duties even if those duties are not judicially enforceable, and constitutional norms need not be enforceable through the invalidation of legislative acts to have meaning.\textsuperscript{244} In practice, although some state courts have declined to interpret the education provisions of their constitutions as creating judicially enforceable rights to a particular level of education,\textsuperscript{245} the majority of courts have found that their states’ respective constitutional provisions concerning education create some judicially enforceable rights, and the view of the Kansas courts falls well within the mainstream of precedent in this area.\textsuperscript{246}

Ultimately, concluding that article 6 creates some judicially enforceable rights does not tell us precisely what the content of those rights are, and that is the next essential issue on the merits in Montoy. Because the right to education derives from a Hohfeldian reading of the duties imposed by article 6, the content of the right depends on the content of the duty. The plain language of article 6 clearly creates two specific duties: (1) to “establish[] and maintain[] public schools” and (2) to “make suitable provision for finance of the educational interests of the state.”\textsuperscript{247} The court in Montoy indicated that the duty to establish and maintain schools was linked to the objective of “intellectual, educational, vocational and scientific improvement,” which implies that education must be designed to “improve” the abilities of those educated in these

\begin{footnotes}
\item[245] For e.g., Coal. for Adequacy and Fairness in Sch. Funding, Inc. v. Chiles, 680 So. 2d 400, 406–07 (Fla. 1996) (declining to permit the “judiciary to usurp the exercise of appropriations power allocated exclusively to the Legislature”); Lewis E. v. Spagnolo, 710 N.E.2d 798, 802–06 (Ill. 1999) (courts cannot properly measure the quality of education being provided); see also Danson v. Casey, 399 A.2d 360, 365–67 (Pa. 1979) (rejecting contention that state constitutional provisions “guarantee . . . a constitutionally mandated minimum level of educational services, provided to the children of all other districts”).
\item[246] See generally supra notes 18–59 and accompanying text (providing an overview of school finance litigation nationwide).
\item[247] Kan. Const. art. 6, §§ 1, 6(b).
\end{footnotes}
areas. More significantly, the court’s analysis indicates that the duty to make suitable provision for finance implies a duty to provide adequate funding to meet educational objectives and to allocate funding equitably among districts according to the costs of educating their students. Unfortunately, the court did not offer much explanation of the source of those requirements or how it derived them from article 6.

Critics of Montoy argue that the provisions of article 6 require the Legislature to fund a system of public schools, but leave the content of the education provided and the level of funding to the discretion of the Legislature. Put differently, they argue that it is entirely up to the Legislature to determine what system of finance is “suitable” under article 6, section 6(b). Ultimately, this issue turns on whether the word “suitable” confers unreviewable legislative discretion over school finance. “Suitable” is an open-ended word that implies significant discretion, but it nonetheless has a core meaning of “fitting, proper, appropriate, or satisfactory.” Obviously, when it comes to school finance, a wide range of choices might be considered fitting, proper, appropriate, or satisfactory, and it is clear that the authority to determine what system of finance is suitable belongs in the first instance to the Legislature. Nonetheless, it is equally clear that at some point funding can be so inadequate or so inequitable that it cannot possibly be considered suitable. If, for example, the Legislature appropriated one dollar (or some other patently inadequate amount) to finance the public schools, it could hardly be claimed that it had made a suitable provision for finance. Likewise, even if the total appropriation for schools is ample, a system of finance that allocated the entire amount to half of the school districts in the state while leaving the other half with none could not be considered a suitable provision for finance. Of course, the Legislature would never adopt either of these extreme cases, but the point is that the ordinary understanding of the term “suitable” encompasses minimum requirements of adequacy and equity.


249. The court principally focused on adequacy, id. at 771–75, 102 P.3d at 1162–85, but it also observed that in addition to increased funding, “[t]he equity with which the funds are distributed and the actual costs of education, including appropriate levels of administrative costs, are critical factors for the legislature to consider in achieving a suitable formula for financing education.” Id. at 775, 102 P.3d at 1165.


The court’s per curiam opinion focused primarily on adequacy and in analyzing this issue it confronted an inherent problem with adequacy claims—identifying a yardstick against which to measure the adequacy of schools and school funding. In most individual rights cases, because the right is one of protection against government interference with an interest that the individual already has, the violation can be measured by examining the impact of government action on the ability to exercise the protected right. The right to education, however, is something that must be provided by the government in the first instance, and a denial of that right therefore must be measured against some constitutionally based standard of an adequate education. While article 6, section 1, refers to “intellectual, educational, vocational and scientific improvement,” that standard is too vague to provide a meaningful reference against which to measure the Legislature’s performance of its constitutional duty. Nor does it provide much of a foundation from which courts could develop constitutionally based educational standards to use as a yardstick for measuring the adequacy of finance.

The Kansas Supreme Court in Montoy II finessed this problem by relying on the Legislature’s own standards, which were reflected in statutory provisions concerning district accreditation. These provisions required the State Board of Education to adopt school performance accreditation standards based on “improvement in performance and high academic standards [that were] measurable” and also required that performance levels must reflect “academic excellence.” These provisions essentially defined the objectives of the public school system set by the Legislature and thus defined the content of the education that must be provided by the state. The next step was to determine what level of funding was necessary to meet those standards, which is where the infamous Augenblick and Myers study came in. That study was commissioned by the Legislature to

252. 278 Kan. 769, 773–74, 102 P.3d 1160, 1163–64.
253. Id. at 773, 102 P.3d at 1164 (citing Kan. Stat. Ann. § 72-6439(a) & (c)).
254. Nonetheless, these provisions are less detailed than the original SDFQPA, which contained specific statutory objectives for education in the state. These standards, which figured in the Kansas Supreme Court’s decision in USD 229, see supra note 93 and accompanying text, were later removed. Their removal from the statute was one of the factors that prompted the Kansas Supreme Court to conclude in Montoy I that the constitutionality of the current version of the SDFQPA was not controlled by USD 229. See supra notes 104–08 and accompanying text.
255. An implicit premise here is that there is some correlation between the level of funding and the quality of education, an issue about which there is no consensus. See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42–43 & n.86 (1973) (observing that “[o]ne of the major sources of controversy concerns the extent to which there is a demonstrable correlation between educational expenditures and the quality of education” and collecting authorities). Indeed, differences in view
determine the cost of achieving the performance accreditation standards, and it was the only evidence in the record concerning projected cost of an adequate education.\textsuperscript{256} It thus became, in effect, the constitutionally mandated level of funding. As the supreme court read the study, it was clear that the SDFQPA did not provide a level of funding sufficient to enable large- and middle-size school districts with significant enrollments of low-income, minority, disabled, and non-English-speaking students to meet performance accreditation standards. This established a violation of the requirement of suitable provision for finance.

The court’s analysis did not clearly separate adequacy and equity issues, because the adequacy claims focused on the needs of particular districts and these districts also claimed that funding disparities were inequitable. Nonetheless, the court made clear that it was concerned not only with the adequacy of overall funding, but also with the manner in which funding was distributed.\textsuperscript{257} In particular, it emphasized the district court’s finding that “the financing formula was not based upon actual costs to educate children but was instead based on former spending levels and political compromise,” which “distorted” the weighting factors.\textsuperscript{258} In discussing the remedy, the court also cautioned that “increased funding may not in and of itself make the financing formula constitutionally suitable, [because t]he equity with which the funds are distributed and the actual costs of education . . . are critical factors for the legislature to consider.”\textsuperscript{259}

\textsuperscript{256} See Montoy v. State (Montoy III), 279 Kan. 817, 823, 112 P.3d 923, 932 (2005). The court also reasoned in Montoy II that the use of the local option budget to provide for essential educational expenses as opposed to “extras” was further evidence of inadequate funding. 278 Kan. at 774, 102 P.3d at 1164.

\textsuperscript{257} See id. at 774–75, 102 P.3d at 1164–65.

\textsuperscript{258} Id. at 774, 102 P.3d at 1164.

\textsuperscript{259} Id. at 775, 102 P.3d at 1165.
Two aspects of the equity analysis are worth noting. First, it appears that equity would not be satisfied by equal funding for all students. The court’s analysis in Montoy assumes that equity demands higher funding for students whose attainment of educational goals is more costly, such as students who are poor, are members of disadvantaged minority groups, have disabilities, or do not speak English as a native language. Indeed, the funding formula did provide more funding to districts for such students, but this extra funding was insufficient to satisfy the demands of equity. Second, it is unclear whether students or districts can make an equity claim when their schools receive adequate funding, even if other districts receive much more. The essence of the equity claim in Montoy was that funding disparities left some districts with insufficient resources to provide a constitutionally adequate education. If those districts did receive sufficient resources, it is unclear whether article 6 precludes other districts from getting more than they need.

Although the per curiam opinion in Montoy makes clear that article 6 requires both adequate funding and an equitable distribution of funds, it is not very explicit about the framework for analyzing adequacy and equity claims. Nonetheless, a core principle appears to underlie the court’s analysis: the requirement of a “suitable provision for finance” means that the system of finance must allocate resources based on the actual costs of providing an education. The problem with both the level of funding and the weighting provisions was that they bore no relation to actual costs. The Augenblick and Myers study provided evidence of what the actual costs of providing an education were, using the Legislature’s own performance standards to define the content of that education. The Legislature did not explain its refusal to follow the study and the state did not offer any other evidence of cost. Nor was any legislative history presented to the court that might have suggested the Legislature was acting on some other assessment of costs, whether in setting the base state aid per pupil or establishing the weights for

260. Id. at 774, 102 P.3d at 1164; see also Montoy v. State (Montoy III), 279 Kan. 817, 831–33, 112 P.3d 923, 933–34 (2005) (discussing inadequacies of weighting factors). An interesting point here is that one might argue that the level of performance established as goals for an education should be defined differently for students who are hard to educate, particularly those with cognitive disabilities. But educational policy demanded by both federal and state law measures the performance of schools according to their ability to educate all children to the same basic standards. See supra notes 156–57 and accompanying text (discussing the irony that the Legislature is being held accountable to the same standards it has imposed on schools).

261. Of course, one could certainly argue that providing too much money to schools—much more than they need—is not a suitable provision for finance of the educational interests of the state. It is not clear who would have standing to raise such a claim. Note also that even if article 6 would not preclude such distributions of resources, equal protection might.
adjusting it for various factors. Indeed, the court in Montoy III criticized the Legislature’s failure to grasp this essential principle, emphasizing that, in adopting H.B. 2247, the Legislature did not focus on the actual costs of providing an education but rather on determining how much additional funding was politically feasible.262

Perhaps the best way to understand this principle is as a specialized form of rational basis review that is akin to what many observers call “rational basis with bite.”263 Ordinarily, a law subject to the rational basis test is constitutional if there is any plausible legitimate purpose to sustain it, whether or not that purpose was the actual purpose of the Legislature. In contrast, Montoy requires that funding decisions must be related to the actual cost of providing an education, and the court appears to have examined the legislative record for evidence that the Legislature actually considered costs. In other words, the only legitimate purpose on which funding decisions can be made is the actual cost of providing an education, and the Legislature must adopt a funding system that is rationally related to cost. The potential significance of this limitation can easily be illustrated on the facts of Montoy. Under the ordinary rational basis test, even if the Augenblick and Myers study correctly represents the costs of providing an education, the failure to meet its funding recommendations could be defended as reasonably related to a variety of other legitimate state interests, such as the need to use limited resources to meet the state’s other obligations to its citizens. Likewise, providing disproportionately high amounts to low-enrollment districts might be defended as reasonably related to goals other than the cost of education, such as preserving rural Kansas communities. Under the most


263. Actual purpose review is one component of rational basis with bite, as most famously articulated by Gerald Gunther. Gunther, supra note 31, at 20–22. The most frequent manifestation of rational basis with bite is in the context of equal protection, under which the Court has at times relied on a poor fit between a law and its supposedly legitimate purposes to infer that the law was actually intended to serve an illegitimate purpose. This kind of scrutiny appears to be most applicable when there is a suspicion of animus toward an unpopular group whose membership is defined by a classification that is not suspect. See Lawrence v. Texas, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring). But rational basis with bite may also require statutes to be justified in terms of a constitutionally mandated purpose. See supra notes 223–25 and accompanying text (discussing Allegheny Pittsburgh Coal Co. v. Webster County). For a general discussion of rational basis with bite, see Richard H. Fallon, Jr., Some Confusions About Due Process, Judicial Review, and Constitutional Remedies, 93 COLUM. L. REV. 309, 315–17 (1993); Robert C. Farrell, Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans, 32 IND. L. REV. 357, 361 (1999); Robert Jerome Glennon, Taxation and Equal Protection, 58 GEO. WASH. L. REV. 261, 281–82 (1990); Suzanne B. Goldberg, Equality Without Tiers, 77 S. CAL. L. REV. 481, 554 (2004); Peter S. Smith, The Demise of Three-Tier Review: Has the United States Supreme Court Adopted a "Sliding Scale" Approach Toward Equal Protection Jurisprudence?, 23 J. CONTEMP. L. 475, 493 (1997).
deferential form of rational basis scrutiny, the court in Montoy would consider whether the SDFQPA was reasonably related to these or other plausible legitimate purposes—whether or not the legislative record shows that those purposes were actually considered by the Legislature.264

Notwithstanding the court’s repeated references to actual costs, however, Montoy may not completely foreclose other justifications for school funding decisions. The court’s analysis indicated that it believed the Legislature did not consider costs at all, but rather relied solely on “historic levels of funding” and “political compromise.” Thus, the case could be read narrowly as holding only that (1) the Legislature must consider actual costs and (2) that historic funding levels and political compromise, standing alone, are not a rational basis for school funding decisions. From this perspective, it is unclear what the result would be if there were a clear record indicating that the Legislature considered the costs of providing an education and made a thoughtful decision that other considerations justified providing something less than full funding or allocating funds on some basis other than cost. Even if Montoy is read in this manner, however, it is clear that the starting point for the system of finance must be actual cost, and this is a departure from the most deferential form of rational basis scrutiny. If this conclusion is correct, it has both practical and doctrinal implications.

Practically, it means that the Legislature must monitor costs and adjust the funding formula to ensure that funding levels and weighting factors reflect those costs. This is an ongoing responsibility; it will not disappear even if the Montoy litigation is resolved, because failure to consider actual costs when determining funding levels in future years would provide a ground for a new round of school finance litigation. To the extent that the state continues to rely on a funding formula to produce block grants to districts, the base funding per pupil and the weighting factors used to make adjustments must be defensible in terms of actual costs. Thus, not only will it be necessary for the Legislature to incorporate information and analysis concerning actual costs into its process for adopting school finance legislation, it must also ensure that there is a good legislative record to establish that the Legislature has considered the actual cost of providing an education.265 It may be desirable in the long run to move away from a formula-based system of

264. See supra notes 219–28 and accompanying text (discussing possible errors in the district court’s application of the rational basis test).

265. See also infra notes 415–16 and accompanying text (discussing future of school finance in the state).
block grants to individual districts and toward a system of cost-based budgeting.

Doctrinally, the court's analysis clearly separates article 6 from equal protection. Judge Bullock opined in Montoy that the same rational basis test applies under both article 6 and equal protection, a conclusion that appeared to be correct in light of USD 229. But the Kansas Supreme Court in Montoy held simultaneously that (1) the rational basis test had been met for both federal and state equal protection purposes and (2) there was a violation of article 6. These results are only reconcilable if a different test applies under equal protection than under article 6. Put simply, however the type of scrutiny in Montoy is described, it cannot be the same rational basis scrutiny that applies under equal protection. Thus, whereas prior decisions had tended to merge the analysis of equal protection and article 6, Montoy separates them and establishes a distinctive set of requirements that flow exclusively from article 6.

3. Justice Beier's Concurrence

Although the per curiam opinion filed in January of 2005 remains the opinion of the court, in September of 2005 (after the special legislative session) three Justices indicated that they believed, contrary to the holding of USD 229, that education is a fundamental right. Justice Beier authored an extensive opinion, joined by Justice Davis, addressing the issue, and Justice Luckert filed a brief opinion in which she agreed with Justice Beier's reasoning. Insofar as Justice Beier's concurrence represents the views of only three justices, it is not controlling. Nonetheless, it does shed further light on the thinking of those justices, and it may influence the analysis of future school finance cases, even if the precise implications of its reasoning remain unclear.

266. See supra note 228 and accompanying text (quoting district court opinion).
267. Montoy v. State (Montoy II), 120 P.3d 306, 311 n.1 (Kan. 2005). Montoy II was filed in January and published at 278 Kan. 769, 102 P.3d 1160 (2005). The concurrences were filed on September 9, 2005, at which point the court withdrew and republished the original per curiam opinion together with the concurrences. Only the Pacific Reporter cite is currently available for the republished opinions.
268. Montoy II, 120 P.3d at 311-18 (Beier, J., concurring).
269. Id. at 318 (Luckert, J., concurring).
270. While this Article was in the editorial process, Justice Rosen joined the court. In his Montoy IV concurrence, Justice Rosen endorsed the view that education is a fundamental right under the state's Constitution, see infra note 426, bringing the total of Justices taking this view to four. Thus, a majority of Justices in Montoy agreed that education is a fundamental right under the Kansas constitution.
Justice Beier offered a number of justifications for concluding that education is a fundamental right. After extensively reviewing cases from other jurisdictions addressing the question whether education is a fundamental right, she endorsed the conclusion in both USD 229 and Montoy that the appropriate standard for "review for school finance legislation, as opposed to outright denial of the right to an education" is the rational basis test.271 But, she continued, "I am not comfortable reasoning backward from that conclusion to say there is no fundamental right to education under our Kansas Constitution."272 Approaching the issue as a matter of first principles, Justice Beier relied on the text of article 6, the location of article 6 within the structure of the Constitution, the history of the constitutional treatment of education, and the economic and political importance of education to support the conclusion that it is a fundamental right.273 Nonetheless, Justice Beier distinguished between the denial of the right to education and school finance measures, indicating that the rational basis test remained the correct level of scrutiny for school finance laws unless "inequities in a school financing system become so egregious that they actually or functionally deny the fundamental right to education to a segment of otherwise similarly situated students."274Among other grounds, rational basis review was appropriate because unlike "natural" rights, the right to education is a product of the social order and requires affirmative acts by government to sustain it.275

The implications of this analysis are not entirely clear. As a doctrinal matter, characterizing a right as a fundamental right is relevant to equal protection analysis as a reason for elevating the level of scrutiny. Because Justice Beier determined that the rational basis test should apply to school finance laws unless there was a denial of the fundamental right to education, calling education a fundamental right does not alter the

271. Id. at 314–15 (Beier, J., concurring).
272. Id. at 315.
273. Id. at 315–17.
274. Id. at 317.
275. Justice Beier stated,

First, the exercise—indeed, the existence—of an individual's fundamental right to education under the Kansas Constitution is unavoidably dependent at least in part on societal and governmental philosophy and action. Unlike, for example, the right to free speech or the right to privacy, which are inherent in the humanity of any individual and thus cannot be infringed by the government, the right to education is at least in part a function of the way in which our society and other societies of the world have chosen to order and govern themselves and to prepare citizens for full political and economic participation.

Id. at 317–18 (citations omitted).
analysis much. It is important to bear in mind that the per curiam opinion found no violation of equal protection and apparently applied the rational basis test in its most deferential form. Thus, Justice Beier does not appear to be arguing that "rational basis with bite" should apply to school finance laws in equal protection cases, although her analysis might support such a result. And strict scrutiny would apparently apply to school finance laws that deny some students the right to education, but the denial of the right to education would by definition violate article 6 and strictly scrutinizing under equal protection would not add much.  

Justice Beier's opinion might also be read as addressing whether the right to an education is a fundamental right for purposes of applying article 6, but it is unclear whether that question has any legal significance. If a right applies by virtue of an explicit constitutional provision independently of either due process or equal protection (where the characterization of the right determines the level of scrutiny), it is unclear why it matters whether the right is called fundamental. The requirements of the right should be determined by reference to the constitutional provision itself, not the equal protection or due process framework. Perhaps, however, the level of scrutiny to apply under explicit textual rights could depend in some measure on whether those rights are fundamental. From this perspective, Justice Beier's arguments for treating education as a fundamental right, while applying the rational basis test, make a powerful case for applying rational basis with bite under article 6, and support the reading of Montoy, suggested above, as adopting a form of rational basis with bite.

---

276. Under *San Antonio Independent School District v. Rodriguez*, the recognition of education as a fundamental right for purposes of equal protection analysis would only apply under the state constitution. *See supra* notes 37-41 and accompanying text (discussing *San Antonio's* rejection of similar arguments as a matter of federal equal protection doctrine). Thus, any violation of this fundamental right cannot be redressed pursuant to federal civil rights statutes, which confer important advantages on plaintiffs such as the availability of federal courts and the possibility of recovering attorneys' fees. See 42 U.S.C. §§ 1983, 1988 (1994) (civil rights statutes).

277. Thus, for example, provisions of the U.S. Constitution's Bill of Rights are applied against the states only if the rights at issue are sufficiently fundamental to be incorporated into the Due Process Clause of the Fourteenth Amendment. But even those rights that are not, such as the Seventh Amendment right to a civil jury, apply to the federal government directly. For a detailed discussion of the modern scope of the right to a civil jury, see generally ELLEN E. SWARD, THE DECLINE OF THE CIVIL JURY (2001). In a similar way, if article 6 creates a right to education, that right limits the Legislature directly and without regard to how education is viewed for purposes of equal protection or due process analysis.

278. Insofar as the mandatory language of article 6, its placement in the overall structure of the Constitution, the history of the state's constitutional treatment of education, and the economic and political importance of education support the conclusion that the right is fundamental, they also support the conclusion that the requirement of suitable provision for finance requires something more than minimal rational basis scrutiny. At the same time, the arguments against strict scrutiny
C. Remedial Issues

Once it has been determined that the method of school finance is unconstitutional, the question becomes what judicial remedy is available to rectify the constitutional violation. While the issues surrounding justiciability and the merits in Montoy are important and interesting, it is with respect to the remedy that the most direct and dramatic separation-of-powers problems arise. For a number of reasons, fashioning an appropriate remedy for a violation of the duty to provide an adequate education is particularly difficult, and the courts in other states have struggled with the remedial phase of school finance litigation.\(^ {279}\) A direct order to the Legislature may not be possible and is certainly very difficult to enforce in practice, enjoining expenditures and closing the schools is not an attractive option, and other alternatives do not appear to be much better.

1. The Remedy Problem

Determining the appropriate remedy is more problematic under article 6 than in most individual rights cases for several reasons. To begin with, it is not so easy to define what is necessary to cure the violation. As noted previously, unlike most “negative” rights—to be free of government intrusion—there is no easily constitutionally defined baseline against which to measure the “positive” right to an adequate education.\(^ {280}\) While courts are competent to define legal rights by interpreting constitutions and laws, they are poorly equipped to make educational policy by determining the content of an adequate education or designing a system of funding to enable the schools to provide that education. The Montoy court tried to avoid this problem by relying on the Legislature’s own statutory definitions of a suitable education and on the Augenblick and Myers study, but this approach may create problems in the future, as the court’s cautionary discussion of the Legislative Post Audit study suggests.\(^ {281}\) One possible legislative response would simply

---

\(^{279}\) See infra notes 335–47 and accompanying text (discussing remedy cases).

\(^{280}\) See supra notes 250–56 and accompanying text (discussing this problem in connection with determining whether there has been a violation).

\(^{281}\) See Montoy v. State (Montoy III), 279 Kan. 817, 840–43, 112 P.3d 923, 937–939 (2005) (discussing various deficiencies in the Legislative Post Audit study as provided for by H.B. 2247, and concluding that to be valid “the post audit study must incorporate the consideration of outputs and Board statutory and regulatory standards, in addition to statutorily mandated elements of
be to lower the statutory standards for a suitable education, and thereby reduce the level of funding necessary to meet them. The court in Montoy II may have been thinking of such a possibility when it highlighted its earlier statement in Montoy I that "accreditation standards may not always adequately define a suitable education."\(^{282}\) Should the Legislature lower the standards, the court could be confronted with this problem and forced to establish a constitutional definition.\(^{283}\) Even if a constitutional standard can be ascertained, there is still the problem of establishing what it would cost to attain it, a matter on which there is bound to be considerable disagreement.\(^{284}\)

This discussion suggests a second major problem in devising a remedy. Because education is an affirmative right, the violation cannot be remedied simply by striking down the statute or enjoining enforcement of the law—ultimately the only remedy for inadequate funding is additional funding. But the duty and responsibility to provide funding, both in general and in the specific context of article 6, rests squarely on the Legislature and cannot be fulfilled by any other body.\(^{285}\) In the ordinary constitutional rights case, if a statute is unconstitutional, an injunctive remedy can be directed toward the officials responsible for enforcing the law; the Legislature need not be involved. If the violation of rights requires compensation, it can usually be satisfied out of an agency's discretionary funds without a specific legislative appropriation.\(^{286}\) This is not the case with school finance, however, because the level of additional funding far exceeds any funds subject to agency discretion.\(^{287}\)

---


\(^{283}\) If so, it seems likely that the court might adopt the standards adopted in Rose v. Council for Better Education, Inc., 790 S.W.2d 186 (Ky. 1989), which it cited favorably in USD 229. See supra notes 52–57 and accompanying text (discussing Rose) and supra notes 83–103 and accompanying text (discussing USD 229).

\(^{284}\) See supra note 255 (discussing debate over relationship between expenditures and educational quality).

\(^{285}\) See Kan. Const. art. 2, § 24 ("No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law."); art. 6, § 1 ("The legislature shall provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools . . . .") (emphasis added); art. 6, § 6(b) ("The legislature shall make suitable provision for finance of the educational interests of the state.") (emphasis added).

\(^{286}\) See infra notes 369–70 and accompanying text (discussing issue in the context of S.C.R. 1603).

\(^{287}\) One possibility might be for the court to redirect funds within the school budget to cure the equity problems. See, e.g., Board of Educ., Levittown Union Free Sch. Dist., Nassau County v. Nyquist, 408 N.Y.S.2d 606, 612 (N.Y. Sup. 1978) (indicating that plaintiffs' requested relief included a request "that the judgment redirect state funds to school districts on an interim basis if the
In light of these difficulties, it is hardly surprising that both the trial court and the Kansas Supreme Court delayed their respective remedial orders to give the Legislature an opportunity to respond.\textsuperscript{288} Other states have followed the same approach, at times with success.\textsuperscript{289} But if the Legislature does not respond or if the legislative response is insufficient to cure the constitutional violation, what can the courts do next? This is the problem that confronted the Kansas Supreme Court in \textit{Montoy III} after it determined that the legislative response to \textit{Montoy II} was inadequate.

2. Ordering Additional Appropriations?

In the spring 2005 session, the Legislature responded to the \textit{Montoy II} decision by adopting H.B. 2247, which provided more than $140 million in additional funding for schools and made some changes to the funding formula.\textsuperscript{290} In April, the Kansas Supreme Court scheduled a hearing and requested the parties to address various aspects of the revised school finance formula, noting specifically that it was "[o]f special concern to the court... whether the actual cost of providing a suitable education was considered as to each of these components and the financing formula as a whole, and whether House Bill 2247 exacerbates and/or creates funding disparities among the districts."\textsuperscript{291} The hearing was held in early May, and on June 6, 2005, the court issued \textit{Montoy III},\textsuperscript{292} a supplemental opinion, in which it ruled that H.B. 2247 was inadequate.\textsuperscript{293} The court reviewed changes to the Base State Aid per
Pupil and various weighting factors, observing that these changes were not based on the actual costs of providing an education and to some extent exacerbated rather than alleviated funding inequities.294 Viewing the formula as a whole, the court concluded that “although H.B. 2247 does provide a significant funding increase, it falls short of providing constitutionally adequate funding for public education.”295 More fundamentally, “the legislature did not consider what it costs to provide a constitutionally adequate education, nor the inequities created and worsened by H.B. 2247.”296

Emphasizing that any delay in improving education would necessarily harm children,297 the court refused to further delay its remedial action pending the results of the Post Audit Study commissioned by H.B. 2247, and it rejected the State Board of Education’s suggestion that the additional funding be taken as a good faith, temporary solution sufficient to delay further judicial action for another year.298 Relying on the Augenblick and Myers study, which remained the only evidence in the record on the costs of a suitable education, the court stated that “additional funding must be made available for the 2005–06 school year to assist in meeting the school districts’ immediate needs.”299 It then concluded that $285 million—roughly one third of the total amount necessary according to the Augenblick and Myers study and double the amount provided by the Legislature—was required for the coming school year.300 This amount, moreover, was merely the first installment; unless a credible Post Audit study provided evidence of a different actual cost of education, the entire amount from the Augenblick and Myers study would be due in coming years.301

---

294. Id. at 830–38, 112 P.3d at 932–36.
295. Id. at 839, 112 P.3d at 937.
296. Id., 112 P.3d at 937.
297. See id. at 844–45, 112 P.3d at 940 (declaring that “we cannot continue to ask current Kansas students to ‘be patient.’ The time for their education is now.”).
298. Id., 112 P.3d at 940.
299. Id. at 845, 112 P.3d at 940.
300. Id., 112 P.3d at 940.
301. Id. at 846, 112 P.3d at 941.
Many in the Legislature interpreted the Montoy III opinion as an order directing the Legislature to appropriate a specific amount ($285 million) by a specific date. Such a reading might draw support from language of the opinion stating that “no later than July 1, 2005, for the 2005–06 school year, the legislature shall implement a minimum increase of $285 million above the funding level for the 2004–05 school year.”\textsuperscript{302} It was this perception of Montoy III that provoked the most heated response from legislators. Indeed, a direct order to the Legislature to appropriate a specific sum would raise a number of serious problems.

First, as noted previously, the Legislature was not a party in Montoy and legislators had been denied the opportunity to appear and address the court at the show-cause hearing.\textsuperscript{303} Ordinarily, courts do not have jurisdiction to issue remedial orders directed to persons or entities who are not parties to the proceedings. Even if the Kansas Supreme Court had jurisdiction to issue such an order, doing so without providing the party subject to the order an opportunity to be heard violates fundamental notions of fairness. These problems might be avoided by treating the Legislature as a party because it is one of the three principal branches of the state government, and the state was a party. This possibility raises some fascinating questions about who is the state, what components of government are encompassed by a suit against the state, and when, if ever, legislatures have a distinct legal capacity.\textsuperscript{304} Ultimately, however, it is foreclosed by the Kansas Supreme Court’s decision denying the legislative requests to address the court at the show-cause hearing on the ground that those making the request were not parties.\textsuperscript{305}

A second problem is that legislative immunity may prevent the court from issuing or enforcing an order against the Legislature. Under the Speech and Debate Clause of the Kansas Constitution,\textsuperscript{306} legislators

\begin{footnotes}
\footnotetext[302]{Id. at 845, 112 P.3d at 940 (emphasis added).}
\footnotetext[303]{See supra note 133 and accompanying text.}
\footnotetext[304]{See State ex. rel. Stephan v. Kan. House of Rep., 236 Kan. 45, 50, 687 P.2d 622, 628 (1984) (“As a branch of government created by the Constitution which is represented by its own counsel and intercedes and participates in litigation before the courts of this state, it only stands to reason that the legislature as a body comprises a legal entity which is subject to service of process in an original proceeding before this court challenging its actions.”).}
\footnotetext[305]{Some of the requests came from individual legislators, who might not be regarded as parties even if the Legislature as a whole were a party. But the court also denied the request of Norman Furse, Revisor of Statutes, in his capacity as counsel for the Legislative Coordinating Council (which represents the Legislature when it is not in session). School Finance Order (May 2, 2005), http://www.kscourts.org/school_finance_order050205.pdf.}
\footnotetext[306]{Art. 2, § 22 (“For any speech, written document or debate in either house, the members shall not be questioned elsewhere.”).}
\end{footnotes}
enjoy broad immunity with respect to legislative acts.\textsuperscript{307} Although one might attempt to distinguish the Legislature as an entity from individual legislators,\textsuperscript{308} under \textit{State ex. rel. Stephan v. Kansas House of Representatives}, legislative immunity extends to the Legislature as a collective body.\textsuperscript{309} And while sovereign immunity does not prevent actions for declaratory or injunctive relief,\textsuperscript{310} legislative immunity apparently does insofar as \textit{State ex rel. Stephan} applied legislative immunity to a quo warranto action seeking only a determination of constitutionality.\textsuperscript{311} Even if an order might issue against the Legislature, moreover, it is unclear how it could be enforced. The normal means of enforcing court orders is through contempt sanctions.\textsuperscript{312} Yet it would clearly violate the Speech or Debate Clause to sanction a legislator or legislators through contempt for particular votes on a bill.\textsuperscript{313} Indeed, for a court to force a legislator to cast a vote in any particular manner would likely violate separation of powers even without an immunity provision.\textsuperscript{314} In light of such considerations, courts in other states’


\textsuperscript{308} \textit{See Spallone v. United States}, 493 U.S. 265, 279 (1990):

Sanctions directed against the city for failure to take actions such as those required by the consent decree coerc[e]e the city legislators and, of course, restrict the freedom of those legislators to act in accordance with their current view of the city’s best interests. But we believe there are significant differences between the two types of fines. The imposition of sanctions on individual legislators is designed to cause them to vote, not with a view to the interest of their constituents or of the city, but with a view solely to their own personal interests.

\textsuperscript{309} 236 Kan. at 57, 687 P.2d at 633 ("[W]here an action is brought against the legislature as a whole for enacting a law in its official capacity, the legislature is immune from suit the same as if the lawsuit was directed against individual legislators"). \textit{See also} \textit{Lincoln Party v. Gen. Assembly}, 682 A.2d 1326, 1333 (Pa. Commw. Ct. 1996) (dismissing action against state general assembly in part on legislative immunity grounds). \textit{But see} \textit{Rose v. Council for Better Educ.}, 790 S.W.2d 186, 204-05 (Ky. 1989) (holding that legislature had been made party to a school finance case by service of process on legislative leaders). Some courts have recognized an exception to permit a governor to sue the Legislature. \textit{See} \textit{Romer v. Colorado Gen. Assembly}, 810 P.2d 215, 224 (Colo. 1991) (discussing cases allowing a governor to sue the Legislature).


\textsuperscript{311} 236 Kan. at 51, 54, 687 P.2d at 629, 631.

\textsuperscript{312} \textit{E.g.}, \textit{Spallone v. United States}, 493 U.S. 265, 276 (1990).

\textsuperscript{313} In Ohio, one justice addressed calls from some citizens to issue contempt sanctions against legislators directly, emphasizing that it was not a practical remedy because the court lacked any enforcement power. \textit{DeRolph v. State}, 754 N.E.2d 1184, 1211 (Ohio 2001) (Douglas, J., concurring). Interestingly, the justice did not mention legislative immunity or separation of powers as a barrier to its issuance.

\textsuperscript{314} \textit{See} \textit{Dade County Classroom Teachers Ass’n, Inc. v. Legislature}, 269 So. 2d 684, 686 (Fla. 1972) (stating that “it is too well settled to need any citation of authority that the judiciary cannot
school finance cases have declined to issue orders directly to their legislatures, often indicating that it would be improper for them to do so.\textsuperscript{315}

A third problem relates to whether a judicial order to appropriate funds for schools usurps the legislative power generally and the appropriations power in particular.\textsuperscript{316} Only the Legislature can enact laws, and under article 2, section 24 of the Kansas Constitution, "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law." This provision leaves no doubt that the Legislature and only the Legislature has the power of appropriation.\textsuperscript{317} A judicial order directed to the Legislature to appropriate a specific amount on or before a specific date arguably constitutes the judicial exercise of the Legislature's appropriations power.\textsuperscript{318} If the Legislature complies

\begin{flushright}
\textit{compel the Legislature to exercise a purely legislative prerogative"}; LIMITS v. President of The Senate, 604 N.E.2d 1307, 1310 (Mass. 1992) (stating that "a judicial remedy is not available whenever a joint session fails to perform a duty that the Constitution assigns to it"); see generally Annotation, Mandamus to Members or Officer of Legislature, 136 A.L.R. 677 (1942) (observing that it is "well settled that a court will not issue the writ of mandamus to compel a state legislature or an officer of such legislature to exercise their legislative functions or to perform duties involving the exercise of discretion").
\end{flushright}

\textsuperscript{315} See, e.g., Lake View Sch. Dist. No. 25 v. Huckabee, No. 01-836, 2005 WL 3436660 (Ark. Dec. 15, 2005) (approving special masters' report finding constitutional deficiencies, but declining to direct the legislature to increase funding); Rose v. Council for Better Educ., 790 S.W.2d 186, 214–15 (Ky. 1989) (holding that it was proper for the trial court to declare that funding was inadequate and to indicate that more would be required but not to retain jurisdiction to supervise subsequent legislative action); see generally infra notes 335–347 and accompanying text (discussing remedial approaches in other states).

\textsuperscript{316} See, e.g., Rose, 790 S.W.2d at 203–04 (holding that it was improper for the trial court to order legislative leaders to introduce legislation); Bismarck Pub. Sch. Dist. No. 1 v. State, 511 N.W.2d 247, 263 (N.D. 1994) (holding that the state system of school finance was unconstitutional but concluding that "the district court erred in mandating specific actions to be taken by the Governor, the Superintendent of Public Instruction, and the Legislative Assembly and its leaders, . . . [because] in view of the separate powers entrusted to the three coordinate branches of government, it is not the usual function of the judiciary to supervise the legislative process in that manner"). But see Abbott v. Burke, 693 A.2d 417, 421 (N.J. 1997) (ordering the state to provide additional funding for some school districts).

\textsuperscript{317} Of course, other parts of government make decisions that have the force of law, but an administrative regulation or judicial decision is not a "law" in the sense that term is used in article 2, section 24.

\textsuperscript{318} In Panhandle Eastern Pipe Line Co. v. Fadely, the Kansas Supreme Court held that article 2, section 24 prevented a lower court from ordering the Director of Revenue to refund taxes that had been paid into the treasury, even though the taxpayer was legally entitled to the refund. 189 Kan. 283, 287, 369 P.2d 356, 360 (1962). Critics of the Court's Montoy III order argued that it was inconsistent with Panhandle, but the cases are distinguishable. In Panhandle, the lower court quite literally ordered money to be taken from the treasury without an appropriation, a direct violation of the explicit text of section 24. In Montoy, even if the court's decision is read as ordering the Legislature to exercise its appropriations power in a particular way, such an order does not order anyone to take money from the treasury without a valid appropriation. Nonetheless, insofar as Panhandle seems to imply that the lower court was simply without power to afford any remedy, it would arguably foreclose an order to the Legislature to appropriate money for the refund in question.
with the order, the letter of section 24 has been followed—a law has been enacted appropriating additional funds for schools—but the spirit of section 24 may well have been violated. Instead of having the expenditure of funds (and ultimately the taxes necessary) for state government determined by the most politically accountable branch of government, the Legislature (subject to gubernatorial veto), it is being determined by the courts, which are the least politically accountable branch.\(^{319}\)

For many legislators and other prominent officials,\(^ {320}\) *Montoy III*'s apparent order to the Legislature to appropriate a specified amount was an egregious violation of the separation-of-powers doctrine that called for a strong legislative response, such as a constitutional amendment reasserting the Legislature's exclusive power of appropriation.\(^ {321}\) Although the Senate acted rather quickly during the special session to adopt both school funding legislation and a proposed constitutional amendment, deliberations in the House reached an impasse. Some legislators insisted that a constitutional amendment must be approved for submission to voters before school finance legislation would be brought to the floor for consideration.\(^ {322}\) Supporters of an amendment had sufficient sway to prevent consideration of funding legislation, but they

---

\(^{319}\) There is little relevant precedent on the power of courts to order appropriations. In *Missouri v. Jenkins*, the U.S. Supreme Court indicated that the federal courts have power to order states to raise taxes so as to fund school desegregation plans, but overturned the lower court's order to that effect on the ground that other remedies should have been pursued first. 515 U.S. 70, 90 (1995). There is a critical difference, however, between federal and state courts entering an order to a state legislature. The issue in *Jenkins* was one of federalism rather than state separation of powers principles. While both doctrines might constrain the ability of courts to order state legislatures to raise taxes, those constraints arise from different provisions in different constitutions. One area where the power to order appropriations has been asserted by state courts is in relation to funding for the courts themselves, as to which "courts universally agree that the judiciary possesses inherent power as a function of being a separate branch of government and that this power extends to compelling necessary funding." Michael L. Buenger, *Of Money & Judicial Independence: Can Inherent Powers Protect State Courts in Tough Fiscal Times?*, 92 Ky. L.J. 979, 1035–36 (2003–04). Many of these cases deal with local units of government and all recognize that compelling funding is permissible only in extreme cases. *See id.* (passim).

\(^{320}\) See, e.g., Minutes of the House Federal and State Affairs Committee, June 28, 2005, available at http://www.kslegislature.org/committeeminutes/05-06/house/hfedst/HseFedS06282005.pdf (providing discussion of the *Montoy* decision); *see generally infra* notes 348–55 and accompanying text (discussing legislative support for resistance or constitutional amendments in response to *Montoy III*).

\(^{321}\) *See infra* notes 360–64 and accompanying text (describing Senate Concurrent Resolution 1603, which would amend article 2, section 24 to reinforce the principle that the appropriations power belongs exclusively to the Legislature).

\(^{322}\) *See Chris Moon, House Rejects Plans: Conservative GOP Members Say They Won't Proceed Without Amendment Proposal*, TOPEKA CAPITAL-JOURNAL, June 27, 2005, at A2 ("Some Republicans said they wouldn't vote for new money for schools until the Legislature's powers were clarified."). *available at http://legislature.cjonline.com/stories/062705/leg_houserejects.shtml."
lacked the necessary two-thirds vote for approving a constitutional amendment. The special session dragged on, the July 1 deadline for action set by Montoy III arrived without new funding legislation, and a train wreck appeared inevitable when the Kansas Supreme Court refused to extend the deadline and then issued an order to show cause why the court should not enjoin expenditures under the SDFQPA, thereby closing the schools. Meanwhile, the Legislature took a break for a long weekend over the July 4 holiday. It is hard to say what exactly happened, but when legislators returned from the long weekend, the mood had shifted and the impasse was quickly resolved. Legislation was passed providing the additional funding required by the court, constitutional amendments were narrowly defeated, and the session was adjourned. Shortly thereafter, the supreme court accepted the new legislation as sufficient for the coming school year.

3. Enjoining Expenditures Under the SDFQPA

One factor that may have influenced the mood of the Legislature is the Kansas Supreme Court’s show-cause order, which indicated that the remedy for the Legislature’s failure to act would be “an ORDER enjoining the expenditure and distribution of any funds for the operation of Kansas schools pending the Legislature’s compliance with this Court’s June ruling regarding minimum funding increases for the 2005-06 school year.” The show-cause order also stated that the court had chosen this remedy because it was “a traditional judicial remedy [that] therefore clearly respects the separation of powers between the legislative and judicial branches.” The order did two things that may have affected the legislative response. First, the order avoided a direct

323. Id; see generally infra notes 339–96 and accompanying text (discussing amendments proposed during the 2005 special session).
327. See Court OKs Plan; Schools to Open, LAWRENCE JOURNAL-WORLD, July 9, 2005, at 1B, available at http://www2.ljworld.com/news/2005/jul/09/court_oks_plan_schools_open/kansas_legislature (noting that the Kansas Supreme Court had accepted new legislation as sufficient for the subsequent school year).
329. Id.
separation-of-powers confrontation. It did not threaten any action against the Legislature, it made clear that Montoy III was not intended as a direct order to the Legislature, and it even contained language acknowledging separation-of-powers limits on the court. Second, the order specified that the consequence of failure to appropriate funds would be the closure of the schools. While this was always a possibility as the end game if the matter could not be resolved,330 until the show-cause order no one was entirely sure what the court would do. Once it became clear that closing the schools was the next step, it also became clear that this was not a politically acceptable alternative for the Legislature.

While the Legislature’s response made it unnecessary for the court to enter an order closing the schools, the issues raised by this remedy remain and could resurface. Both the district court and the Kansas Supreme Court, along with courts in other states,331 apparently regard the closing of schools as the most appropriate remedy for the Legislature’s failure to fully fund the schools, but I am not so sure. It is certainly an odd remedy for the constitutional inadequacy of school funding to shut down the schools altogether, which would appear to be an even more serious, albeit temporary, denial of the right to an education. Insofar as the language of article 6 imposes the duty to fund schools only on the Legislature, it may be impossible for the courts (or the executive) to violate it, but this would arguably be a case where the cure was worse than the disease. It is true that the Legislature preferred ultimately to provide additional funding, so the threat of closing the schools had its desired effect, but that may not always be the case. The critical point is that if the Legislature had not responded and the court had been forced to


331. The threat of closing the schools also figured prominently in Texas school finance litigation. See Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 399 (Tex. 1989) (setting a deadline for legislative action and indicating that expenditures for schools would be enjoined at that point). Following its initial decision, the Texas Supreme Court subsequently held that the legislation enacted in response was inadequate, but extended the deadline. Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d 491, 499 (Tex. 1991). Subsequent legislation was upheld in Edgewood Independent School District v. Meno, 917 S.W.2d 717, 750 (Tex. 1995), but the school finance system was back before the court again in Neely v. West Orange-Cove Consolidated Independent School District, which found no violation of the state constitution’s education provisions, but held that the school finance system violated a constitutional ban on state property taxes by forcing districts to tax at a specific level. 176 S.W.3d 746, 754 (Tex. 2005).
follow through on its threat, closing the schools would not in fact remedy the violation.\footnote{332 \textsuperscript{332} Perhaps this is why I have not encountered any school finance case in which the court has actually closed the schools, even when the threat to do so was explicit. \textit{See supra} note 331 (discussing history of litigation in Texas, where the state supreme court also threatened to enjoin funding for schools).}

In other contexts where courts have held that additional expenditures are necessary to remedy constitutional violations, there has typically been an alternative judicial remedy that, however politically unacceptable, would actually remedy the violation.\footnote{333 \textsuperscript{333} When there is an equal protection violation because one group receives lesser public services than another, the violation can be cured by bringing the group receiving greater services down to the level of the other group. For an extreme example, see \textit{Palmer v. Thompson}, 403 U.S. 217, 219 (1971) (upholding municipality’s decision to close public swimming pool rather than allow it to be racially integrated).} Consider, for example, the roughly analogous problem of litigation concerning prison conditions, in which overcrowding or other constitutional violations may require the additional expenditure of funds. Aside from contempt sanctions against prison officials (who cannot make appropriations anyway), there is an alternative remedy within the power of courts and prison officials that would cure the violation—releasing prisoners (or closing the prisons altogether).\footnote{334 \textsuperscript{334} \textit{See, e.g.}, \textit{Crain v. Bordenkircher}, 342 S.E.2d 422, 448 n.17 (W.Va. 1986) (indicating that possible remedies for prison overcrowding include the closure of facilities and ordering the release of prisoners); \textit{see also} \textit{Marsh v. Barry}, 705 F. Supp. 12, 18 (D.D.C. 1988) (“This Court believes that judicially-imposed population ceilings are superior to damages actions as remedies for prison overcrowding.”); \textit{see generally} Pamela M. Rosenblatt, \textit{Note, The Dilemma of Overcrowding in the Nation’s Prisons: What are Constitutional Conditions and What Can Be Done?}, 8 N.Y.L. SCH. J. HUM. RTS. 489, 512–16 (1991) (discussing various judicial remedies for prison overcrowding).} Thus, while courts in prison cases may threaten such action primarily to “persuade” the Legislature to appropriate additional funds, if forced to carry out the threat, the courts would be curing the constitutional violation. This would not appear to be true for school finance cases.

If closing the schools is not a valid remedy, the threat of closing the schools might not avoid the separation-of-powers problems associated with ordering the Legislature to make appropriations. While the remedy is directed toward school officials, it leaves the Legislature little choice and is in that sense coercive. This kind of coercive threat would be more readily defensible if closing schools actually cured the violation (like the prison example), because the choice presented to the Legislature is to cure the constitutional violation itself or the courts will. Such a choice is surely legitimate. But if closing the schools does not cure the constitutional violation, the choice presented to the Legislature may not be a legitimate one. Ultimately, these sorts of concerns have not, to my
knowledge, been discussed in any of the cases, and ordering the closure of schools is uniformly treated as a proper, if undesirable, remedy.

4. Alternative Remedies

If orders against the Legislature are unavailable and closing the schools is problematic, the question becomes whether there might be other alternatives that are both consistent with the separation-of-powers doctrine and effective at redressing the constitutional violation. Although there has been a great deal of school finance litigation in which a number of courts have found constitutional violations, no clear alternative remedy has emerged as both appropriate and effective. In some cases, a prompt legislative response has essentially resolved the case, \(^{335}\) at least for the time being. \(^{336}\) In many others, the remedial phase of school finance litigation has dragged on for years and resulted in multiple trips to the state supreme court. \(^{337}\) Cases that appear to have been resolved resurface. \(^{338}\) Sometimes, courts have simply given up. \(^{339}\)

\(^{335}\) This appears to have been the case, for example, in Kentucky, where the courts have apparently accepted the legislative response to *Rose*. See Bd. of Educ. v. Bushee, 889 S.W.2d 809, 811, 816 (Ky. 1994) (interpreting education reform act); see also Roosevelt Elementary Sch. Dist. No. 66 v. State, 74 P.3d 258, 259–60, 268 (Az. Ct. App. 2003) (discussing earlier litigation in the state and upholding resulting legislation); Hancock v. Comm’r of Educ., 822 N.E.2d 1134, 1152–53 (Mass. 2005) (holding that the legislature had satisfied the constitutional mandate through fundamental reform of educational finance and ongoing funding commitment in wake of earlier decision finding prior system of local funding unconstitutional).

\(^{336}\) In *Bismarck Public School District No. 1 v. State*, for example, the court declared the state’s school finance law unconstitutional but did not fashion a remedy or retain jurisdiction. 511 N.W.2d 247, 263 (N.D. 1994). The court indicated that a declaratory judgment would be available to challenge the legislative response. *Id.* The North Dakota legislature then revised the school finance law and that response was apparently satisfactory for some time, but a new set of plaintiffs filed suit in 2003. As of this writing, settlement between the plaintiffs and the governor awaits legislative action. Agreement to Stay Litigation, Williston Pub. Sch. Dist. No. 1 v. State, No. 03-C-507 (N.D. Dist. Ct. 2006), available at http://www.governor.state.nd.us/media/news-releases/2006/01/docs/20060110b.pdf; Press Release, Governor’s Office, Hoeven: Schools, State Propose Education Funding Plan to Resolve Suit (Jan. 10, 2006), available at http://www.governor.state.nd.us/media/news-releases/2006/01/060110.html.

\(^{337}\) See, e.g., Claremont Sch. Dist. v. Governor, 794 A.2d 744, 760–61 (N.H. 2002) (discussing nine-year procedural history of school finance litigation in New Hampshire but "remain[ing] hopeful that the legislative and executive branches will continue to work to satisfy their constitutional duty to ensure the delivery of a constitutionally adequate education to the public school students of this State"); Abbott *ex rel.* Abbott v. Burke, 889 A.2d 1063, 1064–65 (N.J. 2005) (granting plaintiffs’ request for remedial relief in part in litigation that has spanned several decades); DeRolph v. State, 780 N.E.2d 529, 529–30 (Ohio 2002) (discussing procedural history of litigation in Ohio).

\(^{338}\) In Arkansas, for example, after the Arkansas General Assembly adopted a multi-year funding plan in response to the appointment of two special masters, the Arkansas Supreme Court dismissed the case, echoing the masters’ praise for the work of the Assembly. Lake View Sch. Dist. No. 25 v. Huckabee, 358 Ark. 137 (2004), *mandate recalled by* No. 01-836, 2005 WL 1358308 (Ark. Jan. 9, 2005). A year later, however, the court was forced to recall its mandate and reappoint
In view of the underlying difficulties of fashioning an appropriate judicial remedy, the most common course of action for courts has been to declare the system of school finance unconstitutional and afford the legislature an opportunity to fix the problem without specifying what the consequence of failing to do so might be. Courts opting for this kind of response typically retain jurisdiction, but not always.340 This is

the masters when the Assembly backtracked from its earlier commitment. 2005 WL 1358308. The masters' second report indicated that the state's school finance system remained unconstitutional and the Arkansas Supreme Court agreed, but nonetheless declined to order legislative action. Lake View Sch. Dist. v. Huckabee, No. 01-836, 2005 WL 3436660 (Ark. Dec. 15, 2005) ("While we recognize that failures in the process due to noncompliance with Act 57 and Act 108 are evident, this court does not direct the General Assembly to appropriate a specific increase in foundation or categorized funding amounts, as requested by the Rogers School District."). A similar pattern occurred in Tennessee, where the court provisionally upheld the legislative response to its earlier decision invalidating the school finance system pending action on teacher salaries, but later determined that teacher salary provisions adopted were inadequate and rendered the system unconstitutional. Tenn. Small Sch. Sys. v. McWherter, 91 S.W.3d 232, 233-34 (Tenn. 2002).

339. See Ex parte James, 836 So. 2d 813, 819 (Ala. 2002) (dismissing on its own motion and after appellate jurisdiction had expired school finance cases as nonjusticiable because any order would require the courts to invade the province of the legislature). To some observers, the court also appears to have given up in Ohio. See, e.g., Anne M. Haynes, Note, Tension in the Judicial-Legislative Relationship: DeRolph v. State, 32 U. Tol. L. Rev. 611, 649 (2001) (arguing that "the legislature has learned that if they hold out long enough the court will surrender to practicality and the legislature will have its way (like a child having a temper tantrum who outfoxes the parent)"). Although its most recent decision in the DeRolph litigation declared that the legislative response to its earlier decision holding the school finance system was inadequate and that the system remained in need of a fundamental restructuring, the Ohio Supreme Court dismissed the case. DeRolph, 780 N.E.2d at 530-31. When the plaintiffs subsequently sought remedial measures from the trial court, the supreme court issued a writ of prohibition, essentially preventing any further judicial oversight in the case. State ex rel. State v. Lewis, 789 N.E.2d 195, 197-200, 203 (Ohio 2003) (discussing history of school finance litigation in Ohio and issuing writ of prohibition to trial court against taking further action inconsistent with Supreme court mandate). See generally Larry J. Obhof, DeRolph v. State and Ohio's Long Road to an Adequate Education, 2005 BYU Educ. & L.J. 83 (discussing history of school finance litigation in Ohio). Some observers attribute this result to a change in composition of the Ohio Supreme Court after judicial elections. See Molly A. Hunter, State by State Litigation Summary for Ohio, ACCESS, May 10, 2004, http://www.schoolfunding.info/statess/oh/lit_oh.php3 ("In 2003, after the legislature rejected the governor's proposed tax increase for education, plaintiffs asked the Superior Court for a compliance conference on DeRolph. The state asked the state supreme court to prohibit such action. The court, which had changed due to judicial elections, did so, thus ending the case."); see also Obhof, supra, at 172 (suggesting that the decision to end the case "could have been the result of battles fatigue" but noting that it was also "possible . . . that the decision had something to do with the changing majority following the 2002 elections").

340. See, e.g., Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1360 (N.H. 1997) (holding system of school finance unconstitutional but permitting continued operation under it to allow time for legislative action); Bismarck Pub. Sch. Dist. No. 1 v. State, 511 N.W.2d 247, 263 (N.D. 1994) (declining to retain jurisdiction because of availability of declaratory judgment to challenge legislative response to decision); DeRolph v. State, 677 N.E.2d 733, 747 (Ohio 1997) (declaring school finance system unconstitutional and delaying effect of decision but declining to instruct the legislature on what statute to enact); Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 156 (Tenn. 1993) (declaring school finance system unconstitutional and retaining jurisdiction); Brigham v. State, 692 A.2d 384, 398 (Vt. 1997) (declaring school finance system unconstitutional and retaining jurisdiction); see also State v. Campbell County Sch. Dist., 32 P.3d 325, 337 (Wyo. 2001) (finding constitutional violation but not specifying remedy).
essentially the approach the Kansas Supreme Court took in *Montoy II*, which declared the SDFOPA unconstitutional, but deferred remedial action to afford the legislature the opportunity to fix the problem.\textsuperscript{341} What fails to emerge from the cases is any consistent or effective course of action if the legislative response is insufficient to cure the constitutional defects. Courts typically send the matter back to the Legislature, usually accompanied by more specific instructions or more pointed exhortations for compliance. In practice, as the foregoing discussion suggests, the effectiveness of judicial remedies in school finance cases may have more to do with the willingness of those involved to seek cooperative solutions than with the particular form of the remedy.\textsuperscript{342}

One possible alternative is the appointment of special masters, which has figured prominently in the Arkansas litigation.\textsuperscript{343} It is unclear precisely what the appointment of a master adds to the remedial process, because a master appointed by the courts derives his or her powers from the courts and cannot do anything that the courts themselves could not do. Thus, for example, if the courts cannot raise taxes or appropriate funds neither can a special master. Although a master can study the needs of schools, propose particular statutory responses to problems, and more closely monitor compliance, he or she ultimately confronts the same remedial limits as the courts. Nonetheless, the appointment of special masters in Arkansas appears to have produced results, at least initially. In 2004 the Arkansas Supreme Court appointed two special masters as a result of frustration with the failure of the state to respond to its decision declaring that funding for schools was constitutionally inadequate and the appointment was followed by immediate results.\textsuperscript{344} Conversely, once the court was satisfied and the masters were no longer in place, there apparently was legislative backsliding that necessitated reappointment of masters.\textsuperscript{345} Whether the reappointment of the masters will be effective remains to be seen, as the court has approved the

\textsuperscript{341} See supra note 130 and accompanying text.

\textsuperscript{342} See generally Koski, supra note 20 (comparing and contrasting outcomes of school finance litigation in Ohio and Wisconsin).


\textsuperscript{344} Lake View Sch. Dist. No. 25, 2004 WL 1406270.

masters' finding that the system is in violation of the constitution, but declined to order specific additional funds.\textsuperscript{346}

Perhaps the appointment of a master is effective because it provides more concrete guidance and ongoing oversight regarding what is necessary to satisfy constitutional requirements. The New York Court of Appeals suggested as much in defending its order that the state determine the "actual cost" of providing a sound education to students in New York City and ensure that every school in the city has sufficient resources to provide one:

\begin{quote}
[T]he remedy is hardly extraordinary or unprecedented. It is, rather, an effort to learn from our national experience and fashion an outcome that will address the constitutional violation instead of inviting decades of litigation. A case in point is the experience of our neighbor, the New Jersey Supreme Court, which in its landmark education decision 30 years ago simply specified the constitutional deficiencies, beginning more than a dozen trips to the court, a process that led over time to more focused directives by that court. In other jurisdictions, the process has generated considerably less litigation, possibly because courts there initially offered more detailed remedial directions, as we do. We do not share the dissent's belief that in New York any constitutional ruling adverse to the present scheme will inevitably be met with the kind of sustained legislative resistance that may have occurred elsewhere.\textsuperscript{347}
\end{quote}

The experience in \textit{Montoy} might be read as supporting this assessment. In \textit{Montoy II}, the Kansas Supreme Court was relatively vague about what the Legislature needed to do and the result was legislation that did not satisfy the court. In \textit{Montoy III}, however, the court was much more specific and, although the decision provoked a strong negative reaction in some quarters, the resulting legislation satisfied the court, at least for the time being. Nonetheless, specific judicial orders may create problems, including a hostile legislative reaction and the risk that the courts will box themselves into a corner if specific orders leave little or no room for compromise.

It seems that the most important lesson to be learned from the experience of other states is that the remedial phase of school finance litigation is likely to be protracted and to involve considerable back and

\textsuperscript{346} Lake View Sch. Dist. No. 25 v. Huckabee, No. 01-836, 2005 WL 3436660 (Ark. Dec. 15, 2005) ("While we recognize that failures in the process due to noncompliance with Act 57 and Act 108 are evident, this court does not direct the General Assembly to appropriate a specific increase in foundation or categorized funding amounts, as requested by the Rogers School District.").

forth between the courts and the Legislature. Constitutional analysis tends to demand perfect solutions based upon immutable principles; the legislative process tends to produce compromise solutions based on pragmatic politics. Thus, the political realities of the legislative process, including a widespread reluctance to raise taxes, do not mesh easily with the remedial imperative for a system of school finance that is not constitutionally suitable because of inadequate funding and inequitable allocations. In the end, school finance litigation has often led to improvements in adequacy and equity for school funding, but the path has seldom been an easy one.

D. Legislative Responses

As the foregoing discussion suggests, a final set of issues arising in connection with Montoy concerns possible legislative responses. One possible response, advocated by some in the heated reaction to Montoy III, is legislative resistance through defiance or evasion. Another is to amend the Kansas Constitution to correct what the Legislature regards as the court’s constitutional errors, and a number of amendments were proposed during the special session and reintroduced in the 2006 session,\(^\text{348}\) including amendments to reinforce the appropriations power,\(^\text{349}\) to eliminate or curtail the courts’ power to enforce article 6,\(^\text{350}\)

---

\(^{348}\) During the interim between the special session and the 2006 session, the Special Committee on Judiciary considered House Concurrent Resolution 5003 and Senate Concurrent Resolution 1603 from the special session, both of which address the appropriations power. Minutes of the Special Committee on the Judiciary, Sept. 15, 2005, available at http://www.kslegislaturl.org/committeeminutes/05-06/interim_joint/special/spJudiciary0915162005.pdf. Although the committee did not recommend the adoption of any constitutional amendment, its report reached the following conclusion: “The Special Committee on Judiciary believes that a constitutional confrontation is looming between the Legislative and Judicial branches of state government. The Committee recommends that the appropriate committees of the 2006 Legislature continue to study the constitutional issue of separation of powers and the appropriation of state funds.” STAFF OF S. COMM. ON THE JUDICIARY REPORTS OF THE SPECIAL COMMITTEE ON JUDICIARY TO THE 2006 KANSAS LEGISLATURE 28 (Comm. Print 2005), available at http://skyways.lib.ks.us/kansas/ksleg/KLRD/2005CommRpts/judiciary.pdf.


\(^{350}\) Two amendments would prevent the courts from reviewing suitable finance cases altogether. See H. R. Con. Res. 5002, 2005 Spec. Sess. (Kan. 2005) (adding a new provision precluding the courts from exercising jurisdiction to enforce article 6); S. Con. Res. 1602, 2005 Spec. Sess. (Kan. 2005) (amending article 6, section 6(b) to provide that educational finance shall be “in the manner and amount as determined solely by the legislature”). Others prevented the closing of schools. See H. R. Con. Res. 5005, 2005 Spec. Sess. (Kan. 2005) (adding a proviso to article 6, section 6(b) that would prevent the courts from closing schools as a remedy for a violation of the suitable finance requirement); H. R. Con. Res. 5004, 2005 Spec. Sess. (Kan. 2005) (same). See also H.R. Con. Res. 5026, 2006 Leg. (Kan. 2006) (proposing amendment to article 6); S. Con. Res. 1615,
and to alter the method of judicial selection. Finally, it is worth considering whether other alternatives are available to the Legislature that might assert and preserve legislative prerogatives or improve the chances that school finance legislation will be upheld.

1. Defiance or Evasion

Some of the most vocal critics of Montoy III advocated legislative resistance to the court’s order, either in the form of defiance or evasion. This stance evokes a comment often attributed to President Andrew Jackson, in response to a Supreme Court decision with which he disagreed: “John Marshall has made his decision, now let him enforce it.” For example, a news account reported that a legislator who advocated defiance had stated that “rather than heeding the court’s decision, he would gladly go to jail.” One official who took a leading role in advising those involved on how to resist the order was Attorney General Phill Kline, who met with legislators to discuss strategies, testified in favor of constitutional amendments, and met with the State Board of Education to suggest that it might prevent the closure of schools by certifying an entire year’s funding.

Those advocating resistance did so in the firm belief that such a response was justified because the Kansas Supreme Court had

2006 Leg. (Kan. 2006) (proposing amendment to article 6).
352. II CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 219 (1923).
354. See Chris Moon, Kline: Blunt High Court, TOPEKA CAPITAL-JOURNAL, June 16, 2005, at 1A. Attorney General Kline also supported House Concurrent Resolution 5003, a proposed constitutional amendment to strengthen the appropriations power. See Minutes of the House Fed. and State Affairs Comm., June 28, 2005, available at http://www.kslegislature.org/committeeminutes/05-06/house/hfedst/HseFedSt05282005.pdf. For further discussion of these constitutional amendments, see infra notes 359–96 and accompanying text.
355. See Special Meeting Minutes of the Kansas State Board of Education, July 5, 2005, available at http://www.ksde.org/commitiss/july_05_5_05_special_min.htm. The idea was that if districts could draw directly on the treasury rather than receive monthly certifications from the Board, the moneys would be beyond the reach of the court.
overstepped the bounds of judicial authority and invaded the province of the Legislature. Some response may well be in order. Nonetheless, the state is fortunate that the Legislature did not choose to follow the path of most resistance. Even if the Court may have overstepped its bounds and invaded the province of the Legislature, outright defiance or deliberate evasion by the Legislature sets a bad precedent for the rule of law.\footnote{Indeed, the plaintiff’s attorney in Montoy, hardly an unbiased source, remarked at the irony of the Attorney General advising the Legislature on how to evade the decision of a court. See Ranney, supra note 353.} However difficult the circumstances occasioned by the court’s decisions in Montoy, legislative defiance or evasion would only encourage others who dislike judicial decisions to evade them.

A second problem with defiance or evasion is that it would more likely heighten tensions than resolve the issues. The Kansas Supreme Court would surely regard such action as a provocation and respond aggressively to it. While legislators might contend that the court itself was responsible for initiating the conflict through its decision in Montoy III, legislative resistance and defiance would push the two branches toward the brink of all-out war. Such a war would not only damage both the Legislature and the supreme court, but also many innocent bystanders.\footnote{Most obviously, if the end result is the closure of schools, the state’s children would be harmed, as well as their teachers and other employees of the schools. Other potential harms are less obvious, but nonetheless significant. What should school officials do, for example, if they are subject to conflicting orders from the Kansas Supreme Court and the Legislature?} Indeed, both the Legislature and the supreme court are to be commended for resolving the matter, at least temporarily, without allowing the situation to deteriorate to that point.\footnote{In that sense, my allusion to the “Gunfight at the OK Corral” is misplaced. Unlike the Earps and the Clantons, the Montoy litigation is now over and everyone is still standing. See infra notes 418-38 (discussing Montoy IV).}

2. Constitutional Amendments

Although outright defiance or evasion is undesirable, one can certainly appreciate why the Legislature might believe some sort of response was necessary, both to address the possibility of future orders in Montoy or later school finance litigation and to avoid setting a precedent for the assertion of judicial power to direct legislative appropriations.\footnote{This issue might arise in other contexts. In other states, for example, courts have ordered additional funding for the judicial branch, reasoning that the Legislature’s failure to adequately fund the courts violated the separation of powers. See generally Buenger, supra note 319 (discussing the judiciary’s power to provide funds for the continued operation of courts).} A number of Montoy critics in the Legislature advocated constitutional
amendments and several resolutions proposing constitutional amendments received extended consideration and nearly passed. To this point, none of the proposals received sufficient support in either the special session or the 2006 session to be placed on the ballot for public approval, but they are still out there, and could gain further traction if tensions between the Legislature and the court heat up again.

The amendment receiving the most attention was Senate Concurrent Resolution 1603 (S.C.R. 1603) and its House counterpart, House Concurrent Resolution 5003 (H.C.R. 5003), which addressed the appropriations power provision, article 2, section 24. The amendment incorporated new language with three distinct components. First, it provided that “[t]he executive and judicial branches shall have no authority to direct the legislative branch to make any appropriation of money.” Second, it provided that the executive and judicial branches shall have no authority “to redirect the expenditure of funds appropriated by law,” with an exception for federal constitutional requirements. Third, it provided that upon adoption of the Amendment, “[a]ny existing order directing the legislative branch to make an appropriation of money shall be unenforceable.”

The language denying the executive and judicial branches the authority to direct the Legislature to make an appropriation makes explicit a proposition that is arguably implicit in the separation-of-powers doctrine and in current language requiring an “appropriation made by law.” In Panhandle Eastern Pipe Line Co. v. Fadely, for example, the Kansas Supreme Court held that article 2, section 24 of the


361. This discussion is adapted from written testimony I submitted to the Special Committee on Judiciary in September 2005.


363. Id.

364. Id.


Kansas Constitution prevented a lower court from ordering the Director of Revenue to refund taxes that had been paid into the treasury, even though the taxpayer was legally entitled to the refund. The amendment’s language apparently responds to the reading of Montoy III as ordering the Legislature to make a specific appropriation by a specific date and would certainly prevent such an action in the future, but the court in Montoy III did not order the Legislature to appropriate funds, as its later actions make clear. Arguably, the threat to close down the schools if the Legislature does not appropriate a specific dollar amount is tantamount to a direct order to make an appropriation. Indeed, every order from a court is essentially a threat to take some action if the party subject to the order does not comply. But it is not clear that this language in the amendment would prevent the court from following the course it did in Montoy.

The second part of the amendment denies to the executive and the judiciary any power to redirect appropriations that have been made by the Legislature. Depending on its interpretation and application, this provision could have a significant impact—one that would be felt far beyond the arena of school finance—on the manner in which judgments against the state are satisfied. Although Montoy III is distinctive because it appeared to impose a duty to appropriate directly on the Legislature, there are many circumstances when the State of Kansas may be held liable for monetary compensation or may be subject to judicial orders that require the expenditure of funds. In such cases, it is my understanding that the award is usually paid out of the agency’s available funds. The question would be whether this kind of payment constitutes “redirecting” an appropriation in violation of the amendment. If so, then the amendment could have the effect of requiring legislative appropriations to satisfy judgments against the state or state agencies.

367. Id. at 287, 369 P.2d at 360. As noted previously, Montoy differs from Panhandle because the Kansas Supreme Court did not require money to be taken from the treasury without an appropriation. See supra note 318.
368. See supra notes 328–30 and accompanying text.
369. Examples of this would include “inverse condemnation” actions in which a landowner establishes that government action has “taken” his or her property and that he or she is entitled to “just compensation” for the taking, personal injury actions against the state pursuant to the Kansas Tort Claims Act, or actions for unpaid compensation by state employees.
370. There is surprisingly little clear information available on this point.
371. A system in which every person who wins a judgment against the state must obtain a specific appropriation from the Legislature to satisfy that judgment could raise significant constitutional issues at the federal level. In some circumstances, it is the failure of the state to provide a remedy that creates a federal constitutional violation. In those situations, the failure of the Legislature to act could convert state law claims into federal civil rights claims.
This requirement might be satisfied through a general appropriation from which funds to satisfy judgments may be drawn or by specific remedial appropriations for particular agencies or even particular judgments. It is more likely, however, that the Kansas courts would follow the lead of other states to conclude that agencies may satisfy judgments using appropriated funds from budgetary items that are sufficiently related to the judgment. On the other hand, redirecting funds from one recipient to another or from a statutorily specified use would likely be prohibited.

The case of Butt v. State\(^\text{372}\) is illustrative. In that case the California Supreme Court held that the state had a duty to step in and provide funding for a school district that had announced it was going to shut down six weeks early because it had run out of funds. The state supreme court affirmed portions of a lower court order requiring the state to expend funds, but it reversed those portions of the order directing that the moneys be taken from unused funds in a particular program in another district.\(^\text{373}\) Directing that funds be take from programs and districts for which they had been appropriated violated the California Constitution’s Appropriations Clause,\(^\text{374}\) which is very similar to current article 2, section 24, of the Kansas Constitution. On the other hand, the California Supreme Court indicated that courts could order the necessary funds from general operating expenses and catchall budget items.\(^\text{375}\)

Two other cases are also helpful. First, in State ex rel. Condon v. Hodges,\(^\text{376}\) the South Carolina Supreme Court held that the governor could not have funds that had been appropriated to colleges and universities taken from an escrow account and returned to the state’s general revenue fund. South Carolina’s Constitution does not contain any provision analogous to article 2, section 24, but the court relied on general separation-of-powers principles and reasoned that “there is no provision in the South Carolina Constitution which provides that the members of the executive branch have the ability to transfer funds from those to whom the General Assembly has appropriated money.”\(^\text{377}\) Second, in Gribben v. Kirk,\(^\text{378}\) the West Virginia Supreme Court upheld a writ of mandamus directing the state controller to disburse treasury funds so as to satisfy a judgment awarding overtime pay to state troopers, even

\(^{372}\) 842 P.2d 1240, 1264 (Cal. 1992).
\(^{373}\) Id. at 1260–63.
\(^{374}\) CAL. CONST. art. XVI, § 7.
\(^{375}\) Butt, 842 P.2d at 1260–63.
\(^{376}\) 562 S.E.2d 623 (S.C. 2002).
\(^{377}\) Id. at 630.
\(^{378}\) 466 S.E.2d 147 (W. Va. 1995).
though the state constitution provided that "[n]o money shall be drawn from the treasury but in pursuance of an appropriation made by law, and on a warrant issued thereon by the auditor; nor shall any money or fund be taken for any other purpose than that for which it has been or may be appropriated or provided." The court reasoned that the legislature had already made an appropriation for personal services and that the appropriation included a requirement that the funds be expended in accordance with the law, which required the overtime payments.

These cases suggest that the extent to which courts and executive agencies can or should be allowed to "redirect" appropriated funds so as to satisfy judgments is a difficult problem that the language of the proposed amendment does not necessarily resolve. The question would remain what constitutes the "redirection" of funds. It seems likely that the amendment would prohibit the use of funds appropriated for a specific purpose or a specific entity from being used for any other purpose or entity. On the other hand, an agency probably could satisfy a judgment, or be required by a court to do so, using funds appropriated to the agency, provided that the appropriation is sufficiently broad or the judgment sufficiently related to the appropriation so as to justify the conclusion that payment is within the scope of the appropriation. In such a case, the funds have not been redirected. It is hard to say, however, just where that line would be drawn and what impact it would have on the current practice of state agencies in satisfying judgments.

A final point about the ban on redirecting appropriations relates to the exception for federal constitutional requirements. This exception was probably included to blunt objections that a complete ban on ordering appropriations might violate the federal Constitution. Ironically, however, the exception arguably confirms the power of Kansas courts to order appropriations as a remedy for violations of the federal Constitution when it is not so clear that they would otherwise have such a power. It is clear that federal courts have the power, in extreme cases, to order state governments to provide additional funding as a remedy for

379. W. VA. CONST. art. X, § 3 (emphasis added).
380. Gribben, 466 S.E.2d at 158–59. The West Virginia Supreme Court has also ordered full payment of state pensions, reasoning that "once the legislature establishes a pension program, it must find a way to pay the pensions to all employees who have substantial reliance interests." Booth v. Sims, 456 S.E.2d 167 (W. Va. 1995).
381. Indeed, it is ironic that in Condon, where there was no express provision concerning the appropriations power, the court refused to let the Governor transfer appropriated funds, but in Gribben, where the constitution contained language much like that for which proponents of S.C.R. 1603 and H.C.R. 5003 advocate, the court upheld an order directing that funds be taken from the treasury to satisfy overtime obligations of the state. Gribben, 466 S.E.2d at 161.
violations of the federal Constitution. But state courts are constrained
by state constitutions' separation-of-powers provisions (even when
applying federal law) in a way that federal courts are not. Assume for
purposes of illustration that there was a federal right to an adequate
education at issue in Montoy. Upon finding a violation, it is not clear
that the Supremacy Clause of the U.S. Constitution would permit the
Kansas courts to order an appropriation if the Kansas Constitution denies
that power to the courts. The inability of the courts to order increased
funding would only place the state in violation of the federal Constitution
if and when the Legislature failed to heed the courts' findings and fund
the schools adequately.

The third component of the amendment declares that any existing
order directing the Legislature to make an appropriation would be
"unenforceable." This language appears to be directed specifically at the
Supreme Court's order in Montoy III. Because the Legislature already
appropriated sufficient funds to satisfy the Kansas Supreme Court, this
provision might have no immediate impact. If, however, the Kansas
Supreme Court were to issue similar orders in the course of the ongoing
litigation before the adoption of the amendment, it could have the effect
of making those orders unenforceable. But, as discussed above, it is not
entirely clear whether Montoy III actually directs the Legislature to make
an appropriation; if it does not, this language might not have any impact
even if there were another Montoy III-like decision. As the court's
show-cause order indicates, the action that it would have taken in the
absence of a sufficient appropriation would have been to enjoin the
expenditure of appropriated funds. If a similar order arises, and the
threatened injunction is seen as the "enforcement" of an order "directing"
an appropriation, it would be precluded. But if the court simply declared
the statute appropriating funds and providing for their allocation to be

382. See Missouri v. Jenkins, 515 U.S. 70, 75 (1995) (indicating that federal courts have power
to order taxes to fund remedial measures in a school desegregation case, but only as a last resort, and
remaning to the district court to seek other alternatives).

the Governor could not bind the state to a gaming compact with Native American Tribes, as required
by federal law, without the consent of the Legislature).

384. This issue may be seen as a problem of when the unconstitutional action is "taken" for
purposes of defining a violation of a federal right. From the external perspective of federal law the
state is a sovereign entity and it is the final outcome of the state's governmental process that
determines the action of the state. This analysis is roughly analogous to the situation in international
law, where if a federal statute violates international law, the courts would still enforce the statute,
with the result being that the United States is in violation of international law and subject to remedial
action through the international system. See Restatement (Third) of Foreign Relations Law §
unconstitutional and enjoined its enforcement, this provision would have no effect.\textsuperscript{385}

Ultimately, reinforcing the appropriations power is a response to something that Montoy III did not do, and it does not address the underlying problems posed by the Montoy litigation. It leaves the key components of the court’s analysis intact—its holding that the level of funding and the funding formula for schools are constitutionally inadequate. Nor would it prevent the court from enjoining the expenditure of funds for schools, as foreshadowed by the court’s “show-cause” order of July 2, 2005. If the amendment were adopted, the court would continue to review the constitutional adequacy of school finance and, if it concluded that the system was constitutionally deficient, it still would have to fashion some remedy for the deficiency. Whether a particular combination of findings and remedies would amount to a directive to the Legislature to make an appropriation in violation of this provision would likely be a matter of degree.

Other proposed amendments are designed to prevent or limit judicial enforcement of article 6. Thus, for example, House Concurrent Resolution 5002 (H.C.R. 5002) would add a new section 11 to article 6 under which:

\begin{quote}
The courts of the state of Kansas shall have no jurisdiction to review the financing of public education or the distribution of education expenditures in the state, or to apply section 6 of article 6 of this constitution. Determining the structure and level of educational finance is a power exclusively reserved to the elected representatives of the people of Kansas and the governor.\textsuperscript{386}
\end{quote}

Senate Concurrent Resolution 1602 (S.C.R. 1602) would have a similar effect by amending article 6, section 6(b) to read, “The legislature shall provide for finance of the educational interests of the state in the manner and amount as determined solely by the legislature.”\textsuperscript{387} Other proposed

\begin{footnotesize}
\begin{enumerate}
\item[385.] An additional issue is whether there is a constitutional problem with nullifying an order in an existing case. As a matter of state constitutional law there would be none because it is a constitutional amendment. But if a judicial order created vested legal rights in the plaintiffs, there might be a federal due process issue to the extent that the amendment retroactively destroys a vested right. The argument for such a result is not especially strong, but it remains a possibility.
\item[386.] H.C.R. 5002 was considered by the House Committee of the Whole during the special session, but passed over and retained a place on the calendar. \textit{See} Kansas House, House Journal 16 (June 24, 2005), \textit{available at} http://www.kslegislature.org/Journals/2005specials/hj0624.pdf.
\item[387.] This language would surely be sufficient to constitute a “textually demonstrable commitment” to the Legislature for purposes of the political question doctrine, \textit{supra} notes 160–70 and accompanying text, or otherwise make clear that article 6 does not create a judicially enforceable right to an adequate education. S.C.R. 1602 was referred to the Senate Committee on the Judiciary,
\end{enumerate}
\end{footnotesize}
amendments would simply prevent the courts from closing the schools as a remedy for an article 6 violation.\footnote{S.}{S.}

These amendments to make article 6 unenforceable, unlike the appropriations power amendments, are directed toward the root cause of the conflict between the courts and the Legislature in Montoy—the construction of article 6 as imposing a judicially enforceable duty on the Legislature to fund schools adequately.\footnote{S.} They also have the virtue of taking this critical issue directly to the voters. The essential effect of Montoy is that funding for schools must take precedence over every other spending priority of the state, but that is not an implausible reading of article 6. By elevating funding for education to constitutional status and phrasing it in mandatory terms, article 6 makes suitably funded schools a constitutional priority. If this constitutional priority is unworkable or undesirable, then a constitutional amendment is a proper response, perhaps the only proper response. Thus, while I am not sure I would support such an amendment on the merits, the presentation of such an amendment to the people is surely an appropriate reaction to the decision in Montoy and would avoid some of the problematic effects of the appropriations power amendment.

Amendments to prevent the closing of schools are somewhat more problematic in my view, even though they are more limited in scope and

\footnote{S.}{S. See Kansas Senate, Senate Journal 12 (June 22, 2005), available at http://www.kslegislature.org/Journals/2005special/sj02222.pdf, where it was considered along with S.C.R. 1603. The committee did not advance S.C.R. 1602 to the Senate Floor. See Minutes of the Senate Judiciary Committee 13, June 24, 2005 available at http://www.kslegislature.org/committeeminutes/05-06/senate/sjudiciary/SnJud06242005.pdf.}


389. It is unclear why these amendments received less attention than amending the appropriations power, but the answer may have to do with the political implications. See Minutes of the Senate Judiciary Committee 14–15, June 24, 2005, available at http://www.kslegislature.org/committeeminutes/05-06/senate/sjudiciary/SnJud06242005.pdf (discussing political implications of these amendments). First, it is important to bear in mind that during the special session many legislators operated under the assumption that Montoy III constituted an order to the Legislature to appropriate a specified sum by a specified date and they regarded such an action as a particularly egregious violation of separation of powers. Second, the appropriations power amendment focuses on the court and attacks the court's activism, without targeting the public schools. By way of contrast, an amendment to article 6 preventing the courts from enforcing it more readily be characterized as an attack on the schools.
effect. These amendments simply take away one possible remedy from the courts, which would still have the constitutional responsibility to interpret, apply, and enforce article 6. The courts would be forced to do so, however, without what appears to be the most powerful weapon currently at their disposal—even if that weapon raises questions of its own.\textsuperscript{390} Without the threat of school closure, struggles over the remedial phases could become prolonged battles like those in some other states. Such battles damage both the Legislature and the judiciary as institutions, and, more importantly, create prolonged uncertainty for schools and the children they educate. Of course, the remedy of closing the schools, if actually implemented, could create even more severe problems for schools and children.

A final set of amendments would alter the means of appointing appellate judges in the state. Currently, court of appeals judges and supreme court justices are appointed using a "merit" system under which a nominating commission selects three candidates from a pool of applicants and the Governor names one of those three to the court.\textsuperscript{391} Once appointed, judges and justices stand periodically for retention elections,\textsuperscript{392} at which it is normally very hard to unseat a sitting judge or justice. House Concurrent Resolution 5001 (H.C.R. 5001) would provide for nonpartisan judicial elections of supreme court justices,\textsuperscript{393} while Senate Concurrent Resolution 1606 (S.C.R. 1606) would provide for Senate confirmation.\textsuperscript{394} The argument in favor of both amendments is that they would make judges more accountable and that this would help to curtail judicial activism. These amendments are not driven by \textit{Montoy} alone, but rather reflect the broader criticism of "activist" courts.

The essential problem with these proposals is that courts are independent for a reason, and increasing political accountability in their selection may not improve their decision-making.\textsuperscript{395} The more highly

\textsuperscript{390} See \textit{supra} notes 331–34 and accompanying text.
\textsuperscript{392} American Judicature Society, \textit{supra} note 391.
\textsuperscript{393} Although H.C.R. 5001 was among the first amendments proposed in the special session and was referred to the Committee of the Whole, it did not receive much consideration during the special session. See \textit{JANET E. JONES, HOUSE JOURNAL PROCEEDINGS OF THE HOUSE OF REPRESENTATIVES OF THE LEGISLATURE OF THE STATE OF KANSAS, 2005 Spec. Sess.,} at 6 (daily ed. June 22, 2005) (detailing the minutes involving introduction of H.C.R. 5001 and referral to Committee of the Whole).
\textsuperscript{394} S. Con. Res. 1606, 2005 Spec. Sess. (Kan. 2005). It is not difficult to imagine why the two versions differ.
\textsuperscript{395} The Special Committee on Judiciary considered these proposals during the interim and ultimately decided not to make any recommendation. \textit{STAFF OF S. COMM. ON THE JUDICIARY, \textit{supra} note 348,} at 8.
politicized the means of selecting justices becomes, the more likely it is that decisions will be driven by political and ideological considerations, rather than the law. More fundamentally, if courts are to protect the rights of individuals when they are most in need of protection, political independence is a must. Even those who oppose activist courts may complain when courts fail to step in to protect rights they consider to be fundamental.\footnote{396} Although a full discussion of the issues raised by these proposals is beyond the scope of this Article, it is worth noting here that the court in Montoy consisted of justices appointed at various times by governors of both parties and that their decisions over the years reflect divergent political ideologies. But both Montoy II and Montoy III were unanimous decisions, suggesting that the decisions were not driven by the political ideology of the justices. If so, increased political accountability in the appointment process is hardly likely to improve the neutrality of the court.

3. Alternatives

While amending the Kansas Constitution in response to Montoy is consistent with the rule of law in a way that defiance or evasion is not, it is also a weighty undertaking that may have profound and unintended effects that go far beyond the specifics of Montoy. It is therefore appropriate to consider what alternative responses might be available to the Legislature to protect legislative prerogatives and avoid setting an adverse separation-of-powers precedent while maximizing the prospects that school finance legislation will be upheld by the court. Two possibilities come to mind.

One possibility would be for the Legislature to state its position clearly and emphatically in the form of a concurrent resolution. A concurrent resolution asserting the Legislature’s view on appropriations and the separation of powers was introduced in the House during the special session, but apparently did not receive much consideration.\footnote{397} A

\footnote{396. For example, many of those who criticize the courts as activist have been critical of the U.S. Supreme Court’s decision in \textit{Kelo v. City of New London}, 125 S. Ct. 2655 (2005), which upheld the exercise of eminent domain to acquire land for private development because promoting economic development is a sufficient public use. Invalidating the use of eminent domain in such cases, however, would be activist in the sense that the court would be asserting authority to invalidate decisions made by politically accountable institutions. \textit{See generally} Richard E. Levy & Robert L. Glickman, \textit{Judicial Activism and Restraint in the Supreme Court’s Environmental Law Decisions}, 42 VAND. L. REV. 343, 348–52 (1989) (distinguishing between policy and institutional activism).}

\footnote{397. H.R. Con. Res. 5007, 2005 Spec. Sess. (Kan. 2005) (reaffirming exclusive constitutional appropriations authority for the Legislature, declaring that the court lacked power to order an
simple resolution rejecting the Augenblick and Myers study\textsuperscript{398} was introduced in the Senate and considered by the Ways and Means Committee, but received no action by the Senate.\textsuperscript{399} One resolution that did pass, however, was House Resolution 6007 (H.R. 6007),\textsuperscript{400} a simple resolution covering virtually every point of disagreement the Legislature had with \textit{Montoy II} and \textit{Montoy III}.\textsuperscript{401} Such resolutions do not have the binding force of law, but they do constitute formal statements of the Legislature as a body and are promulgated in a form of which the courts can take cognizance.\textsuperscript{402} As such, they are a way of asserting legislative positions for the record that might have an impact in \textit{Montoy} itself or at least in future cases attempting to glean historical precedents from \textit{Montoy}. Depending on the wording and content of such a resolution, moreover, it may help the court to understand the Legislature’s concerns without escalating the conflict.

A second possibility to increase the likelihood that courts will uphold school finance legislation in the future is to create a more complete legislative record in support of the legislation. As I suggested earlier, \textit{Montoy} sends a clear message that the Legislature must consider actual costs when constructing the system of school finance and determining funding levels.\textsuperscript{403} This does not mean that the Legislature is bound to provide the funding amounts suggested by the Augenblick and Myers study or even the Legislative Post Audit Study. It does mean that the Legislature must consider that information and, if it chooses not to fund at the levels the experts say are necessary, the Legislature must have a sound reason for so choosing, preferably a reasoned explanation of why the Legislature is rejecting some components of the study’s cost figures as inaccurate.\textsuperscript{404} Creating a legislative record to support such conclusions would certainly increase the chances that the court would uphold school finance legislation.

\textsuperscript{398} appropriation, and declaring that the appropriation of additional funds did not represent acceptance of such authority). H.C.R. 5007 was introduced and referred to the committee of the whole at the close of the session. JONES, \textit{supra} note 393, at 115–16 (July 6, 2005).


\textsuperscript{400} Id. at 38 (daily ed. June 26, 2005).

\textsuperscript{401} See id. (stating H.R. 6007 was in response to \textit{Montoy}).

\textsuperscript{402} Because H.R. 6007 is a simple resolution that represents only the views of the House of Representatives, it does not represent the position of the Legislature as a whole, and has less force than a concurrent resolution.

\textsuperscript{403} See \textit{supra} notes 261–65 and accompanying text (discussing role of actual cost in the court’s analysis).

\textsuperscript{404} For example, the Legislature might rely on testimony or other evidence to reject a study’s conclusions about class size or about the need for special programs for particular groups of students.
This alternative would require some changes to the legislative practice. First, given the press of legislative business, it is hard to study carefully the complex data, information, and issues surrounding the costs of education. Second, the Kansas Legislature does not normally produce formal reports or statements to accompany legislation and explain its provisions. This is a practice that the Legislature might wish to consider changing, at least in respect to school finance legislation. During the special session, for example, when I testified before the House Federal and State Affairs Committee, some legislators remarked that the court’s analysis of H.B. 2247 demonstrated that the court did not understand the bill. This problem might have been avoided had there been a formal legislative report explaining its operation.

III. CONCLUSION: THE FUTURE OF SCHOOL FINANCE IN KANSAS

The final chapter of the “Gunfight at the K-12 Corral” is yet to be written. If the Kansas Supreme Court rejects S.B. 549, it is likely that an even more contentious special session will follow, and outright defiance or the adoption of proposed constitutional amendments is increasingly possible or even likely. And there are potential problems with the bill. First, even if the total amount contemplated approximates the figure identified in the Post Audit Study, the bill will phase in over several years, during which time the cost of education will surely increase. Thus, it is unclear whether the funding provided by S.B. 549 will be “adequate” for purposes of article 6. Moreover, although the plan was attractive because it could be implemented in the first year without any tax increases or new sources of revenue, it is unclear whether funding will be

405. The Legislative Research Department prepares Supplemental Notes and Conference Committee Briefs that accompany most bills. These documents contain useful summaries of the bills, but also contain disclaimers that they do not “express legislative intent.”

406. This kind of explanation of provisions is commonly included at the federal level in House and Senate reports issued by Congress and in model or uniform laws prepared by experts. In Kansas, the Judicial Council also prepares comments to accompany proposed legislation. See, e.g., JUVENILE OFFENDER/CHILD IN NEED OF CARE ADVISORY COMM., REVISED KANSAS CODE FOR CARE OF CHILDREN (Nov. 5, 2004), available at http://www.kscourts.org/council/cinc_code_new05.pdf.

available and forthcoming in later years.\footnote{Thus, even if the court upholds the three-year plan in S.B. 549 as adequate, experience in other states suggests that the Legislature may be less inclined to carry out the plan in future years if the immediate threat of judicial action is removed. The most pointed example of this would be Arkansas, where the court was originally satisfied with a multi-year legislative school finance plan and terminated the jurisdiction of special masters, only to later recall its mandate and reappoint the masters after the legislature failed to deliver. See supra notes 343–46 and accompanying text (discussing the most recent developments in the Arkansas school finance litigation).} Equally important, the bill may not have sufficiently addressed the equity issues identified by the court, insofar as many weights remain unchanged and the actual cost basis for them remain unclear.\footnote{The plaintiffs' brief for the show-cause hearing on S.B. 549 argues that that the weighting factors still do not reflect actual costs and are therefore unconstitutional. The brief is available at http://media.ljworld.com/pdf/2006/06/2006_Montoy_Brief.pdf. See also Jim Sullinger, School Fund Plan Falls Short, Expert Says, KANSAS CITY STAR, Mar. 2, 2006, at B2, available at http://www.kansascity.com/mld/kansascity/news/local/13994956.htm (discussing analysis of an earlier plan and suggesting it did not meet high-poverty districts' needs).}

But even if the court accepts S.B. 549 and the Montoy litigation is successfully resolved, school finance will not remain static. USD 229 upheld the SDFQPA, but that did not permanently resolve constitutional questions regarding school finance. Montoy indicates, moreover, that ongoing legislative efforts to monitor and respond to changes in the actual costs of providing a suitable education will be necessary to avoid future problems. More fundamentally, while the “Gunfight at the K-12 Corral” has not to this point escalated to all-out war between the Legislature and the Kansas Supreme Court, the basic tension between the legislative power of appropriation and the judicial power to interpret and apply article 6 has not been resolved.

One underlying issue that complicates finding long-term solutions to school funding is the treatment of small, rural school districts, which currently receive considerable additional funding under the weight for low-enrollment districts. These districts may need to be consolidated to free up funds for urban districts with high proportions of at-risk students.\footnote{See Jim Sullinger & David Klepper, Kansas School Funding Could Lead to Rural, Urban Split, KANSAS CITY STAR, Jan. 10, 2006, at B1, available at http://www.kansascity.com/mld/kansascity/news/local/13588572.htm (discussing possible tensions between rural and urban lawmakers).} Because there is considerable political support for maintaining small, rural districts, which are seen by many as essential to the preservation of small, rural communities, such steps would likely face considerable opposition. Yet to maintain the current levels of support for small, rural districts and still provide sufficient resources for other districts that are being underfunded may be impossible without a tax increase or some other source of additional revenue.\footnote{See id. (discussing need for additional support for at-risk urban students, but noting that...}
At the present time, the political climate does not appear to permit tax increases, so other additional revenues may be essential. So far, an improving economic picture has led to increased revenues from existing taxes, permitting the Legislature to provide the first installments of the additional resources required under Montoy without raising taxes. But absent an unforeseen economic boom, the limits of this tactic are rapidly approaching, especially because the other fiscal obligations of the state continue to grow as well. One possibility that has been suggested is to expand casino gambling in the state to provide added revenues. This alternative could lead to a coalition between supporters of expanded casino gambling and supporters of increased funding for schools.

In addition to the immediate challenges presented by the remedial phase of Montoy, the case also indicates that fundamental changes in the Legislature’s approach to school finance may be necessary. First, in both Montoy II and Montoy III, the court expressed disapproval of the school funding formula because the formula did not reflect the actual cost of providing an education. This reasoning implies that the Legislature must either do a better job of considering actual cost or a better job of documenting its consideration of actual costs. Thus, some changes in the legislative process may be in order to generate a record of actual costs and legislative deliberations pertaining to them. Second, some consideration might be given to changing the basic system adopted by the SDFQPA. This system relies on a formula to approximate the actual cost to a district of educating its students. In constitutional terms, this system of school finance is only as “suitable” as the formula, which must accurately reflect actual costs. To retain its constitutionality, then, the formula will require constant tweaking based on current cost information. In the long run, it might be simpler, more cost-effective, and ultimately more constitutional to base funding on cost-based budgeting that proceeds from the district level through the Board of Education, to the Legislature.

lawmakers must first approve extra money).


414. Once again proving the truth of the maxim that politics makes strange bedfellows.

415. For example, the Legislature might provide for annual post audit reports, hold extensive hearings during the interim session, and prepare more comprehensive reports on school finance legislation.

416. Colorado is an example of a state using the budgetary approach to school funding. See
In view of these factors, it seems unavoidable that the Legislature and the Kansas Supreme Court will again square off over school finance, for the fundamental separation-of-powers conflict remains. In respect to this underlying conflict, there is one important difference between the “Gunfight at the K–12 Corral” and the traditional western—the good guys and the bad guys do not wear white and black hats to help us tell them apart. There is far more moral ambiguity in the school finance conflict because both the Legislature and the Kansas Supreme Court are acting in accordance with their respective constitutional imperatives. The justices are trying to fulfill their constitutional duty, while many in the Legislature believe the court’s actions are invasive of the constitutional responsibilities of the Legislature. This conflict is, in my view, as much a matter of constitutional design as a matter of personality, politics, and ideology.417

Indeed, the essential purpose of constitutionalizing a right is to prevent that right from being overridden by political majorities. The people of Kansas have constitutionalized a duty to provide, and suitably finance, a system of free public schools. The constitutional status of this duty matters most precisely at those moments when the politics of the day conflict with it. And judicial enforcement of constitutional mandates matters most precisely at those moments in history when it is most politically unpopular. Thus, the conflict between the Legislature and the Kansas Supreme Court is by no means limited to the arena of school finance, even if the recognition of an affirmative right to education exacerbates the inherent tension.

For that reason, we can all hope that the “Gunfight at the K–12 Corral” differs from traditional westerns in another way. In the traditional western, the conflict is resolved when one side (the good guys) defeats the other (the bad guys). When the smoke finally clears in Montoy, we must hope that both the Legislature and the Kansas Supreme Court are left standing.

POST SCRIPT

On July 28, 2006, while this Article was in the final stages of the editorial process, the Kansas Supreme Court handed down its fourth and

417. This is not to say that personalities, politics, and ideology have not fueled the conflict or heightened its intensity, or that these factors will not affect how the issues are ultimately resolved.
apparently final decision in the Montoy case. In an unprecedented move reflecting the unique importance of the case, Chief Justice McFarland made a separate statement to the press and public at the time the decision was announced.

In Montoy IV, the court ruled by a four-to-two margin that the Legislature had substantially complied with the court’s prior remedial orders, and dismissed the case. Justice Rosen, who had joined the court after Montoy III, agreed that the Legislature had substantially complied with the court’s orders, but disagreed with some of the reasoning in the court’s per curiam opinion, and wrote a separate concurrence. Justice Beier, joined by Justice Luckert, concurred in part and dissented in part. They agreed with the majority that S.B. 549 should be implemented for the coming school year, but would remand the case to the district court for further proceedings to determine its constitutionality.

After an extensive review of the history of the litigation, the per curiam opinion described S.B. 549 as having “materially and fundamentally changed the way K–12 [education] is funded in this state.” Changes wrought by S.B. 549 included (1) the addition of two new weights for at-risk students (“high-density at-risk weighting” and “nonproficient at-risk weighting”); (2) increased flexibility in using money from various at-risk weights interchangeably; (3) increased equalization and redirection of the local option budget (LOB); and (4) increases in base state aid per pupil, the existing weight for at risk students, and the special education excess cost reimbursement.

In light of these changes, the state argued that the case should be dismissed because the changes in the law rendered it moot (an argument the court rejected in Montoy III) and because the supreme court lacked

---

420. Justice Nuss did not participate. See Montoy IV, slip op. at 24.
421. Id. at 24–31 (Rosen, J., concurring). At the outset of his opinion, Justice Rosen indicated that “[e]very child in Kansas has a fundamental right to an education guaranteed by the Kansas Constitution,” agreeing with Justices Beier, Davis, and Luckert on this point. Id. at 24. This means that a majority of the court’s current justices has now endorsed this proposition, which must be considered good law. As discussed in the body of this Article, however, it is not entirely clear how this might affect the analysis. See supra notes 267–78 and accompanying text (discussing this issue in connection with Justice Beier’s concurrence in Montoy II).
422. Montoy IV, slip op. at 31–34 (Beier, J., dissenting).
423. Id. at 10 (per curiam opinion).
424. Id. at 10–13.
the necessary fact-finding tools to evaluate S.B. 549. In response to these arguments, the opinion stated, "The sole issue now before this court is whether the legislation passed in 2005 and S.B. 549 comply with the previous orders of this court. If they do then our inquiry ends and this case must be dismissed. A constitutional challenge of S.B. 549 must wait for another day."\textsuperscript{425} Thus, the opinion drew a critical distinction between the question of S.B. 549's compliance with the court's remedial orders and the question of its compliance with the constitutional requirement of a suitable provision for financing the education interests of the state.\textsuperscript{426}

The central holding of \textit{Montoy IV} was that the Legislature had substantially complied with the court's remedial orders. In those orders, the court had expressed concern that the funding formula failed to provide adequate funding for middle- and large-size districts with a high percentage of minority, at-risk, or special education students, and the Legislature responded by providing for more than $750 million dollars in increased funding, much of which was directed at increased funding for the identified student groups.\textsuperscript{427} The court had also expressed concern that the high level of low enrollment weighting was inequitable, and the Legislature responded by reducing the relative importance of low enrollment weighting.\textsuperscript{428} Finally, the court had expressed concern about wealth-based disparities as a result of the LOB, and the Legislature responded by expanding eligibility for state aid to equalize the LOB.\textsuperscript{429}

More fundamentally, the opinion concluded that in making these changes, the Legislature had taken actual costs into account by considering the Legislative Post Audit study. Although the study could not be treated as evidence of the actual cost of providing an education

\textsuperscript{425} \textit{Id.} at 14.

\textsuperscript{426} On this point, Justice Rosen agreed with the per curiam opinion, but Justices Beier and Luckert did not. \textit{See id.} at 25 (Rosen, J., concurring) ("I concur in the majority's conclusion that S.B. 549 (L. 2006, ch. 197) complies with this court's prior orders and order to dismiss this case."). In her dissent, Justice Beier reasoned that "our earlier opinions and orders in this case consistently and correctly equated compliance with this court's directives to adherence to the legislature's constitutional mandate." \textit{Id.} at 32 (Beier, J., dissenting). From this perspective, S.B. 549 would comply with the court's orders only if it provides suitable funding. Justice Beier reasoned further that this determination can be made only after remand for further proceedings and, if necessary, a trial. \textit{Id.} at 33–34.

\textsuperscript{427} \textit{See id.} at 17–18 (per curiam opinion).

\textsuperscript{428} \textit{See id.} at 18–19.

\textsuperscript{429} \textit{See id.} at 19. Justice Rosen disagreed with the majority's reliance on state aid to equalize the LOB because the resulting state aid depends upon the local district deciding to tax itself. \textit{Id.} at 28–30 (Rosen, J., concurring). Thus, "if equalizing LOB state aid would be necessary to fund a district's basic educational costs, and a district or its voters choose not to adopt LOB funding in full or in part, the legislature has not met its constitutional duty to those children in that district." \textit{Id.} at 28.
without being properly admitted as part of the trial record, it was part of
the legislative history and was the focus of much discussion and debate
during deliberations on school finance that eventually led to the adoption
of S.B. 549.\textsuperscript{430} This attention to the study showed that the Legislature
had considered actual costs,\textsuperscript{431} even though S.B. 549 did not follow the
Post Audit study's recommendations.

The plaintiffs' contention was that the court should treat the study as
evidence of actual costs, so that the Legislature's failure to follow it
rendered S.B. 549 inadequate. The court's approach leaves this
argument open in a subsequent case challenging S.B. 549, assuming the
study is properly admitted into evidence at trial. Nonetheless, the
majority made clear that the requirement for the Legislature to consider
actual costs did not mean it was "bound to adopt, as suitable funding, the
'actual costs' as determined by A & M and LPA studies," even if it could
not ignore them.\textsuperscript{432}

Finally, the opinion explained that the changes in the school funding
formula since the court's ruling in \textit{Montoy II}, particularly as a result of
S.B. 549, had fundamentally altered the school funding formula so that
the extensive record created in the trial court was no longer relevant.
Thus, a new record was necessary. While the court might have
remanded the case to the district court for the creation of such a record,
as the dissenters wanted to do, the majority offered two reasons why it
chose instead to dismiss the case. First, the court referred to a concurring
opinion made by Chief Justice Moyer of the Ohio Supreme Court in one
of the \textit{DeRolph} decisions, in which he observed that states where school
finance cases have been remanded to the trial court "'have had the most
difficulty' producing a satisfactory plan."\textsuperscript{433} Second, the majority
reasoned that because S.B. 549 was a three-year plan, "it may take some
time" before its full impact could be assessed.\textsuperscript{434}

\textit{Montoy IV} has a number of important implications. Most obviously,
it means that the Gunfight at the K–12 Corral is over, for the time being
at least. With the end of the \textit{Montoy} litigation, the immediate source of
conflict between the Legislature and the Kansas Supreme Court has been
removed. For those of us who feared that escalating tensions between

\textsuperscript{430} \textit{See id.} at 16–17 (per curiam opinion).
\textsuperscript{431} \textit{Id.} at 19 ("We also find that the LPA Cost Study Analysis was considered by the legislature
in making the decisions that underlie formula changes in S.B. 549 and, thus, the legislature was
responsive to our prior orders to consider actual costs.").
\textsuperscript{432} \textit{Id.} at 20.
\textsuperscript{433} \textit{Id.} at 22–23 (quoting \textit{DeRolph} v. \textit{State}, 678 N.E.2d 886, 888 (Ohio 1997) (Moyer, C.J.,
concurring in part and dissenting in part)).
\textsuperscript{434} \textit{Id.} at 23-24.
the Legislature and the Kansas Supreme Court might cause serious, long-
term damage to the constitutional structure of government, this result
must come as something of a relief. Of course, lingering resentments
may yet cause problems, especially if a new round of school finance
litigation renews the conflict.

Constitutional purists on either end of the spectrum on school
finance litigation are unlikely to be completely satisfied. Although the
court’s critics are presumably pleased that the case is over, they will
remain unhappy with the court’s prior decisions and with the prospect
that a new lawsuit could be filed at any time. Proponents of school
funding may take some satisfaction in procureing roughly three quarters
of a billion dollars in additional funding and improvements in the
funding formula, but are unhappy that the Legislature has not fully
funded either the Augenblick and Myers or Legislative Post Audit
studies and that some inequities arguably remain in the formula.
Notwithstanding the imperfections of the result in *Montoy IV*, the court
may have had no other choice. Experience in other states suggests that
remedial orders in school finance cases are difficult to articulate and
even more difficult to enforce; they do not produce the prompt
compliance that courts expect in other contexts.435 The cases typically
fall into one of two categories. In some cases the court decides, at some
point in time, that the Legislature has done enough and dismisses the
case, typically backtracking a bit from earlier remedial orders issued
along the way. In others, the litigation continues with no end in sight.

The dismissal of this case, however, does not mean that school
finance litigation in the state is over or even that S.B. 549 will pass
constitutional muster. As we have seen in previous Kansas cases, new
school funding formulas that satisfy courts in one case may be
challenged in later cases, often with some success.436 Because *Montoy
IV* did not decide the constitutionality of S.B. 549, we might expect that,
sooner rather than later, a new challenge to the constitutionality of school
finance will be brought. The *Montoy* opinions now provide essential
guidance as to future school finance legislation and litigation. They tell
us that the starting point for school finance must be a consideration of
actual cost. *Montoy IV*, however, seems to support the suggestion in the
body of this article that while the Legislature must consider actual costs
and may not base funding solely on historic levels and political

435. *See supra* notes 335–47 and accompanying text (discussing remedial approaches in other
states).

436. *See supra* notes 60–102 and accompanying text (discussing history of school finance
litigation in the state).
compromise, it may not be constitutionally required to fully fund actual costs of achieving educational standards if there are valid reasons not to do so.\textsuperscript{437} In other words, the requirement that the Legislature consider actual costs may be a requirement of process rather than a substantive requirement that the Legislature fully fund a particular cost study.

The adequacy and equity of funding will nonetheless be evaluated by the courts in terms of actual costs, and departures from actual costs must at a minimum bear a special burden of justification. Thus, as discussed earlier in the Article, the post-\textit{Montoy} world of school funding in Kansas may require some changes in the legislative process through which school funding decisions are made.\textsuperscript{438} First, it is essential that information about actual costs be generated on an ongoing basis and made available for consideration during legislative deliberations. Second, it will be increasingly important to document in the legislative record how this cost information was considered and its role in setting the amount and allocation of school funding. Finally, when the Legislature rejects cost estimates or departs from actual costs, it should make clear its reasons for doing so. Such steps are likely not only to create a legislative record to help the Legislature fend off future school funding challenges, but also to improve the deliberative process and produce better school finance laws. Perhaps we can all agree that a better process for adopting school finance laws would be a good thing.

\textsuperscript{437} See supra notes 252–66 and accompanying text (discussing treatment of actual cost in \textit{Montoy II} & \textit{III}).

\textsuperscript{438} See supra notes 403–06 and accompanying text (making a similar point).