

# THE CURRENT STATE OF SCHOOL FINANCE IN KANSAS: THE KANSAS LEGISLATURE'S OCCASIONAL NEGATIVE APPROACH TO ITS POSITIVE CONSTITUTIONAL DUTY

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*An investment in knowledge always pays the best interest.*

Benjamin Franklin

## I. INTRODUCTION

In 1966, the people of Kansas were offered the opportunity to have their voice heard. The Kansas Legislature presented to its people an amendment to Article 6, Section 6 of the Kansas Constitution that would require the Kansas Legislature to “make suitable provision for finance of the educational interests

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of the state.” The new provision would *require* governmental action, while most constitutional provisions *prohibit* action. The people of Kansas decided to take advantage of their opportunity to make their voice heard and amend the Constitution to require suitable funding. Since the adoption of this constitutional language, Kansas students, parents, and school districts have had to fight the Kansas Legislature, informally and in court actions, to receive equitable and adequate funding. Over the years, Kansas courts have repeatedly found that the Kansas Legislature has failed to adequately provide proper funding to its children. Despite years of court orders and opportunities for the legislature to perform its constitutional duty, that failure continues to this day, when over half of Kansas students are not testing proficient in the basic skills of reading and math.<sup>1</sup>

Kansas and its courts must take appropriate measures to ensure that all Kansas public school students receive the education demanded by the state constitution. Kansas students deserve more than what they have recently received: a few years’ worth of a constitutionally-appropriate education nestled in between court cases and cost studies. The obvious answer, as supported by all of the evidence available, is that *more money* is needed to fund education at a constitutional level.<sup>2</sup> The Kansas Supreme Court’s most recent decision in *Gannon v. State* provides Kansas with a final opportunity to fully fund its school finance formula with an amount of money that will appropriately fund a constitutional education. Any action short of this represents a derogation of the constitution that the legislators have sworn to uphold.

This article will discuss the positive duty required by Article 6 of the Kansas Constitution; review the history of school finance litigation in Kansas; and explore the future of education and options available to the Kansas Supreme Court if the Kansas Legislature fails to comply with the most recent order.<sup>3</sup>

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1. Angela Deines, *Kansas Students Performance on State Reading and Math Tests Stay Flat, Other Data Measures Up*, TOPEKA CAP.-J. (Oct. 17, 2017, 1:39 PM), <http://www.cjonline.com/news/state-government/education/2017-10-17/kansas-students-performance-state-reading-and-math-tests> [<https://perma.cc/33YV-EHRG>]. For 2017, in math, 65.82% of students are performing below or just meeting grade level. *Id.* For 2017, In English and language arts, 61.77% of students are performing below or just meeting grade level. *Id.* These students require “significant or additional learning supports” and are not considered ready for college. *Id.*

2. See generally AUGENBLICK & MYERS, INC., CALCULATION OF THE COST OF A SUITABLE EDUCATION IN KANSAS IN 2000-2001 USING TWO DIFFERENT ANALYTIC APPROACHES (2002), <http://cdm16884.contentdm.oclc.org/cdm/ref/collection/p16884coll57/id/0/> [<https://perma.cc/NH4U-VFYV>] (report prepared for the Legislative Coordinating Council); WESTED, ESTIMATING THE COSTS ASSOCIATED WITH REACHING STUDENT ACHIEVEMENT EXPECTATIONS FOR KANSAS PUBLIC EDUCATION STUDENTS (2018), <https://kasb.org/wp-content/uploads/2018/02/KSHSHearing022318.pdf> [<https://perma.cc/JBV9-VLL2>] (report prepared for the Kansas Legislature).

3. *Gannon v. State* (*Gannon V*), 402 P.3d 513 (Kan. 2017).

## II. THE KANSAS CONSTITUTION CREATES A POSITIVE DUTY REGARDING SCHOOL FUNDING

Article 6, Section 6(b) of the Kansas Constitution places a positive duty on the Kansas Legislature. Article 6, Section 6(b) states “[t]he legislature shall make suitable provision for finance of the educational interests of the state.”<sup>4</sup> The section’s use of the word “shall” creates a mandatory duty that requires action on the part of the Kansas Legislature.<sup>5</sup> While rare, affirmative constitutional obligations are not a novel concept, especially in the context of State Constitutions.<sup>6</sup>

### A. *Positive Duties v. Negative Rights*

One of the most important considerations in constitutional interpretation is distinguishing duties from prohibitions. The differences in the language used to craft a constitutional provision can create an affirmative duty requiring action by a branch of the government or a negative prohibition restricting the government from governing in a certain manner.<sup>7</sup> On one hand, an affirmative duty instructs the government to perform a certain task or achieve an obligation. On the other hand, a negative prohibition limits governmental action.

The conventional approach to constitutional interpretation views the Federal Constitution as a compilation of “negative rights.”<sup>8</sup> Negative rights provide a citizen a right by preventing the government from infringing on the individual’s freedom.<sup>9</sup> To enforce a negative right, an individual may rely on the constitution to restrict or impinge the government from infringing on his or her rights.<sup>10</sup> The approach draws on the rationale that during the development of the constitution, the founding fathers feared governmental oppression more than governmental inaction. As Judge Richard Posner put it, “[t]he men who framed the original Constitution and the Fourteenth Amendment were worried about government’s oppressing the citizenry rather than about its failing to provide adequate social services.”<sup>11</sup>

Most courts and scholars recognize that constitutions, especially state constitutions, provide positive duties.<sup>12</sup> A positive duty places an obligation on the government to act in a certain manner.<sup>13</sup> These positive duties create

4. KAN. CONST. art. VI, § 6(b).

5. *Gannon v. State*, 319 P.3d 1196, 1221 (Kan. 2014) (stating that the plain language of art. VI § 6(b) “reflects the assignment of mandatory constitutional duties to the Kansas Legislature . . .”).

6. Jenna MacNaughton, Comment, *Positive Rights in Constitutional Law: No Need to Graft, Best Not to Prune*, 3 U. PA. J. CONST. L. 750, 750 (2001).

7. Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2273 (1990).

8. MacNaughton, *supra* note 6.

9. See Bandes, *supra* note 7, at 2272.

10. *Id.* at 2272–73.

11. *DeShaney v. Winnebago Cty. Dep’t. of Soc. Servs.*, 812 F.2d 298, 301 (7th Cir. 1987).

12. See MacNaughton, *supra* note 6, at 752.

13. See Bandes, *supra* note 7, at 2272.

enforceable affirmative rights vested in individuals.<sup>14</sup> An affirmative right allows a citizen to compel the government to comply with the duty set forth by the constitutional provision.<sup>15</sup> As a general matter, state constitutions provide many more explicit positive duties than the Federal Constitution.<sup>16</sup> Language mandating action, such as “shall,” indicates that a provision establishes a positive duty.

### ***B. Affirmative Constitutional Obligations in Education***

While the Federal Constitution contains many more negative rights, state constitutions generally create more affirmative obligations.<sup>17</sup> In the context of education, The United States Supreme Court has found that education is not a fundamental right. However, forty-nine state constitutions contain some form of a positive duty imposed on their governments regarding education.<sup>18</sup>

The United States Supreme Court has considered whether the Fourteenth Amendment of the Federal Constitution protected education as a fundamental right.<sup>19</sup> In *San Antonio Independent School District v. Rodriguez*, the Supreme Court declined to recognize education as fundamental right.<sup>20</sup> In its decision, the Court quoted heavily from its previous holding in *Brown v. Board of Education* denoting the importance of education. The Court stated that “education is perhaps the most important function of state and local governments.”<sup>21</sup> However, the Court clarified that the measure for determining a fundamental right did not rest in the importance of the right, but instead whether the Federal Constitution explicitly or implicitly protected the right.<sup>22</sup>

Despite the United States Supreme Court’s interpretation of the Federal Constitution, nearly every state constitution provides some form of protection and obligation for education.<sup>23</sup> By providing affirmative duties, most state constitutions not only recognize the right of education, but also allow for judicial review if the state fails to adequately provide that right.<sup>24</sup> This concept has been explored by many courts and scholars. Essentially, where a state constitution provides an affirmative duty, that duty, in turn, creates an enforceable right to the duty provided.<sup>25</sup> In the context of education, an affirmative duty vests an

14. *Id.*

15. *Id.*

16. Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 73 ALB. L. REV. 1459, 1464–65 (2010).

17. *Id.* at 1464.

18. Alana Klein, *Judging As Nudging: New Governance Approaches for The Enforcement of Constitutional Social and Economic Rights*, 39 COLUM. HUM. RTS. L. REV. 351, 392 n.157 (2008) (“The Mississippi state Constitution is the only one not to contain a positive education clause.”).

19. See generally *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (considering whether the Fourteenth Amendment protected education as a fundamental right).

20. *Id.* at 37.

21. *Id.*

22. *Id.* at 31.

23. Klein, *supra* note 18.

24. *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 91–92 (Wash. 1978)

25. See Usman, *supra* note 16, at 1533.

enforceable right in children, school districts, or both.<sup>26</sup> That constitutionally granted right to education forms the basis of nearly every case in school finance litigation.<sup>27</sup>

### ***C. The Positive Duty in Article 6 of the Kansas Constitution***

In *U.S.D. No. 229 v. State*, the Kansas Supreme Court recognized that the language of Section 6(b) places a broad affirmative duty on the Kansas Legislature.<sup>28</sup> The Court held that the language of Article 6, Section 6, approved by the people of Kansas in 1966, “specifically placed the ‘suitable financing’ responsibility with the legislature.”<sup>29</sup> Through the use of the word “suitable,” the provision not only provided a mandated duty, but qualified that the mandated funding must also be suitable. In other words, not only must the Kansas Legislature provide financing for the educational interest of the state, but that financing must also be suitable.

The importance of Kansas’s constitutional amendment extends beyond the positive duty Article 6, Section 6 places on the Kansas Legislature. While a positive duty generally creates an affirmative right, a plaintiff would be left without recourse if a court could not review the Legislature’s provision of education in the state of Kansas. Therefore, the ability of Kansas Courts to review the Kansas Legislature’s actions in the arena of education is equally as important as the creation of the positive duty. The Kansas Supreme Court has recognized that the judiciary’s role “is to determine whether the State has provided ‘suitable financing.’”<sup>30</sup> Essentially, Article 6, Section 6(b) places a positive duty on the Kansas Legislature and creates an affirmative right for Kansas children and school districts. However, the provision goes even further by providing the Kansas judiciary the role to review the Kansas Legislature’s compliance, or lack thereof, with its constitutional duty.

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26. See Joshua E. Weishart, *Reconstituting The Right To Education*, 67 ALA. L. REV. 915, 938 (2016) (“[P]rimary right to education might exist by operation of the education clause in the state constitution . . .”).

27. *Id.* at 944.

28. *Unified Sch. Dist. No. 229 v. State*, 885 P.2d 1170, 1182 (Kan. 1994).

29. *Id.*

30. *Gannon v. State*, 319 P.3d 1196, 1225 (Kan. 2014).

### III. HISTORY OF SCHOOL FINANCE LITIGATION IN KANSAS

Just six years after amending Article 6 of the Kansas constitution, Kansas saw its first school finance lawsuit.<sup>31</sup> In *Caldwell v. State*,<sup>32</sup> a Johnson County District Court ruled that Kansas's public education funding system violated the Equal Protection Clause of the Kansas constitution.<sup>33</sup> While the *Caldwell* decision focused primarily on the Equal Protection clause, the history of school finance litigation demonstrates that the courts have shifted from analyzing school funding under the Equal Protection Clause to analyzing the adequacy and equity requirements under Article 6.

#### A. Early Litigation: Setting the Stage

In response to the *Caldwell* holding, the Kansas Legislature passed the 1973 School District Equalization Act ("SDEA").<sup>34</sup> In the early nineties, forty-two Kansas school districts, along with parents and students, challenged the constitutionality of the SDEA.<sup>35</sup> In *Mock v. State*,<sup>36</sup> the plaintiffs argued that smaller districts received more money per pupil than larger districts.<sup>37</sup> Before the case reached trial, the Honorable Terry Bullock released an opinion concluding that Article 6 created a constitutional duty requiring the legislature to provide an adequate education.<sup>38</sup> Judge Bullock's opinion indicated his preliminary conclusion that the SDEA violated the constitutional duties of adequacy and equity. However, to allow the Kansas Legislature to remedy the issue, the district court postponed the trial.<sup>39</sup>

In response to the opinion, the Kansas Legislature passed the School District Finance Quality and Performance Act ("SDFQPA").<sup>40</sup> Under the SDFQPA, the funding system consisted of a Base State Aid Per Pupil ("BSAPP") that provided a fixed amount of funding per student.<sup>41</sup> To account for special needs students, or students that require more resources to succeed, the SDFQPA also implemented a weighting system.<sup>42</sup> The SDFQPA relied on

31. ALAN RUPE & W. JOHN ROBB, A QUALITY EDUCATION FOR EVERY CHILD: STORIES FROM THE LAWYERS ON THE FRONT LINES 294 (David Long ed., 2009).

32. *Caldwell v. State*, No. 50616, slip op. (Kan. Dist. Ct. Johnson Cty. Aug. 30, 1972); see also TAMERA LAWRENCE & NICK MYERS, KAN. OFFICE OF REVISOR OF STATUTES, SCHOOL FINANCE LITIGATION: GANNON V. STATE 7 (2017), [http://underthedomeks.org/wp-content/uploads/2017/12/Gannon-PP\\_InterimCommittee\\_12-4-17\\_FINAL.pdf](http://underthedomeks.org/wp-content/uploads/2017/12/Gannon-PP_InterimCommittee_12-4-17_FINAL.pdf) [<https://perma.cc/JHU6-KKLU>].

33. RUPE & ROBB, *supra* note 31.

34. Alexandra Rose, Comment, *A Place for Equity in Kansas School Finance Litigation*, 63 KAN. L. REV. 1205, 1214 (2015).

35. RUPE & ROBB, *supra* note 31.

36. *Mock v. State*, No. 91-CV-1009, slip op. (Kan. Dist. Ct. Shawnee Cty. Oct. 14, 1991).

37. RUPE & ROBB, *supra* note 31.

38. *Id.*; Richard E. Levy, *Gunfight at the K-12 Corral: Legislative vs. Judicial Power in the Kansas School Finance Litigation*, 54 KAN. L. REV. 1021, 1036 (2006).

39. RUPE & ROBB, *supra* note 31, at 295.

40. *See id.*; see also Levy, *supra* note 38.

41. *See Gannon v. State*, 319 P.3d 1196, 1204–05 (Kan. 2014).

42. *See id.* at 1205.

two sources to fund the BSAPP: local aid and state aid.<sup>43</sup> The system required each school district to impose a mill levy<sup>44</sup> to determine the local aid contribution.<sup>45</sup> If the local aid surpassed the BSAPP, the SDFQPA required the additional funds to be sent to the State.<sup>46</sup> If the local aid fell short of the set BSAPP, state aid filled the gap to bring the school district to the BSAPP level.<sup>47</sup> In addition to the SDFQPA, the Kansas legislature also created a statutory provision that allowed school districts to impose an additional mill levy for capital outlay projects.<sup>48</sup> Similar to the SDFQPA, this statutory provision also provided state resources for less wealthy districts.<sup>49</sup>

In *Unified School District No. 229 v. State of Kansas*<sup>50</sup>, a group of plaintiffs argued that the SDFQPA resulted in less money to larger districts.<sup>51</sup> The Shawnee County District Court agreed, holding that the legislature did not have a rational educational reason for disparities between large and small districts.<sup>52</sup> On appeal, the Kansas Supreme Court reversed the district court's finding.<sup>53</sup> The Court held that Article 6, Section 6 placed the responsibility to provide "suitable financing" of education with the legislature.<sup>54</sup> The court further reasoned that "plain common sense" provided the rational basis for the differences in funding.<sup>55</sup> Accordingly, the Court found that the Act's disparities did not render the Act unconstitutional.<sup>56</sup> Throughout the opinion, the Court noted the Kansas Legislature's effort to cure the issues of the SDEA and the Kansas Legislature's concern for its impact on education.<sup>57</sup> But, the Court did not foreclose the possibility of future judicial review.<sup>58</sup> The Kansas Supreme Court's holding set the stage for the next challenge of Kansas's school finance system in the *Montoy* litigation.

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43. *See id.*

44. A mill levy is a tax that is applied to real property. Mill levies "represent the dollars per \$1,000 of all assessed property in a given taxing district necessary to satisfy the district's budgetary needs." Gage A. Rohlfs, Note, *Kansas Property Tax Appeals: An Adversarial System Without Adversaries*, 49 WASHBURN L.J. 871, 878 (2010).

45. *See Gannon*, 319 P.3d at 1204–05.

46. *See id.* at 1205.

47. *See id.*

48. *See id.*

49. *See id.*

50. *Unified Sch. Dist. No. 229 v. State*, 885 P.2d 1170 (Kan. 1994).

51. RUPE & ROBB, *supra* note 31.

52. *Id.* at 295.

53. *Unified Sch. Dist.*, 885 P.2d at 1193, 1197.

54. *Id.* at 1182–83.

55. *Id.* at 1192.

56. *Id.* at 1192–93.

57. *See generally Unified Sch. Dist.*, 885 P.2d 1170 (noting the Legislature's effort to remedy the issues of the SDEA).

58. *See* RUPE & ROBB, *supra* note 31, at 295.

**B. *Montoy v. State***<sup>59</sup>

In 1999, a new set of school districts, parents, and students again challenged the constitutionality of the SDFQPA. The *Montoy* plaintiffs articulated three main arguments: (1) that the SDFQPA violated the Equal Protection Clause because of its disparate impact on certain groups of students; (2) that the Kansas Legislature did not have a rational basis for funding disparities; and (3) that the Kansas Legislature failed to provide an adequate education as required by Article 6, Section 6.<sup>60</sup> The case was set to be heard by Judge Bullock. Just days before the scheduled trial, Judge Bullock released an opinion dismissing the case; relying on *USD 229*, he held that the adequacy and equity of education fell to the Kansas Legislature and not to the courts.<sup>61</sup>

On appeal, the plaintiffs argued that the district court's dismissal was procedurally improper. The Kansas Supreme Court agreed.<sup>62</sup> The Court reversed and remanded the case.<sup>63</sup> While on appeal, the Kansas Legislature commissioned a study to determine the actual cost of providing a "suitable education."<sup>64</sup> Two renowned school finance experts, John Augenblick and John Myers, performed the study ("the A&M Study"). The A&M Study found that, adjusting for inflation, Kansas fell about \$800 million short of providing an adequate education.<sup>65</sup>

In 2003, the *Montoy* case proceeded to trial. Following the trial, Judge Bullock found that the SDFQPA blatantly violated Article 6 and the Equal Protection Clause.<sup>66</sup> Judge Bullock did not enter a final order and – once again – allowed the Kansas Legislature an opportunity to fix the problems.

Despite Judge Bullock's instructions, the Kansas Legislature refused to pass a new school finance system and allowed its 2004 legislative session to close. Judge Bullock responded on May 11, 2004, by closing all Kansas public schools until the Kansas Legislature remedied the constitutional flaws of the SDFQPA.<sup>67</sup> The Kansas Legislature responded by implementing special legislation to allow the State to appeal the order.<sup>68</sup> On appeal, the Kansas Supreme Court initially suspended the district court order, allowing schools to remain open.<sup>69</sup>

After hearing the appeal, the Kansas Supreme Court entered an opinion that agreed with Judge Bullock. It held that the Kansas Legislature failed to comply

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59. *Montoy v. State*, 112 P.3d 923 (Kan. 2005).

60. Levy, *supra* note 38, at 1040.

61. *See Montoy v. State*, 62 P.3d 228, 233 (Kan. 2003).

62. *See generally Montoy*, 62 P.3d 228 (reversing the district court and remanding the case).

63. *See id.* at 236.

64. RUPE & ROBB, *supra* note 31, at 297.

65. *See AUGENBLICK & MYERS, INC.*, *supra* note 2, at ES-5.

66. *See Montoy v. State*, No. 99-C-1738, 2003 WL 22902963, at \*49 (Kan. Dist. Ct. Shawnee Cty. Dec. 2, 2003).

67. RUPE & ROBB, *supra* note 31, at 299.

68. *Id.*

69. *Id.*

with both its adequacy and equity duties.<sup>70</sup> The Court provided the Kansas Legislature roughly ninety days to bring school funding into constitutional compliance.<sup>71</sup> In addition, the Court specifically instructed the Kansas Legislature to consider the actual costs of funding an education in creating a remedy.<sup>72</sup> The Court retained jurisdiction to ensure the Kansas Legislature complied.<sup>73</sup>

Following the Supreme Court's ruling, The Kansas Legislature approved an increase of \$142 million for school finance.<sup>74</sup> The increase did not consider the results of the A&M Study, falling well short of its \$800 million findings. After reviewing the new legislation, the Court found the \$142 million fell short of bringing the SDFQPA into constitutional compliance.<sup>75</sup> The Court held that the Kansas Legislature needed to increase funding by an additional \$143 million before July 1, 2005.<sup>76</sup>

Following the Supreme Court's decision, The Kansas Legislature refused to comply with the order. When the July 1, 2005, deadline passed, the Kansas Supreme Court set a hearing for July 8, 2005, to determine if Kansas Schools should be closed. On July 6, 2005, the Kansas Legislature appropriated an additional \$148 million to be used by the schools.<sup>77</sup> The Court found that the increase complied with its ruling, but retained jurisdiction. The Court then ordered the State to perform a new study to indicate whether it had indeed provided an adequate level of funding.<sup>78</sup>

In 2006, a new study was conducted. It determined that \$470 million was still needed to provide every student an adequate education.<sup>79</sup> In response, Kansas Governor Kathleen Sebelius signed Senate Bill 549.<sup>80</sup> The bill added \$466 million to the funding scheme to be distributed over three years.<sup>81</sup> On July 28, 2006, the Kansas Supreme Court held that the Kansas Legislature had substantially complied with its order.<sup>82</sup> The Court dismissed the appeal and

70. *Montoy v. State*, 120 P.3d 306, 308 (Kan. 2005).

71. *Id.* at 311.

72. *See id.* at 310 (“This failure to do any cost analysis distorted the low enrollment, special education, vocational, bilingual education, and the at-risk student weighting factors.”).

73. *Id.* at 310.

74. RUPE & ROBB, *supra* note 31, at 299.

75. *Montoy v. State*, 112 P.3d 923, 940 (Kan. 2005).

76. *See id.*

77. Scott Rothschild, *Sebelius Signs School Bill*, LAWRENCE J.-WORLD (July 21, 2005), [http://www2.ljworld.com/news/2005/jul/21/sebelius\\_signs\\_school\\_bill/](http://www2.ljworld.com/news/2005/jul/21/sebelius_signs_school_bill/) [https://perma.cc/8VNA-8ANM].

78. *Montoy v. State*, 112 P.3d 923, 939 (Kan. 2005).

79. RUPE & ROBB, *supra* note 31, at 301.

80. *Montoy v. State*, 138 P.3d 755, 760 (2006)

81. Claire O'Brien, *School Budget Cuts Could Reopen Montoy v. Kansas Case*, *Attorney Says*, LEAVENWORTH TIMES (Apr. 30, 2009), <http://www.leavenworthtimes.com/x407215279/School-budget-cuts-could-reopen-Montoy-v-Kansas-case-attorney-says> [https://perma.cc/C7LX-CP5C].

82. *Montoy v. State*, 138 P.3d 755, 766 (Kan. 2006).

remanded with instructions to dismiss the case.<sup>83</sup>

### C. *Gannon v. State*

Following the final *Montoy* decision, the only task left for the Kansas Legislature was to follow through on Senate Bill 549. However, the Kansas Legislature's commitment to funding education proved short-lived.<sup>84</sup> Between 2009 and 2011, the Kansas Legislature cut funding to education by over \$500 million annually. In response, in 2010, the *Montoy* plaintiffs filed a motion to reopen *Montoy*.<sup>85</sup> The Kansas Supreme Court denied the motion.<sup>86</sup> In November 2010, a new group of plaintiffs filed a new lawsuit—*Gannon v. State of Kansas*.<sup>87</sup>

In 2012, a three-judge district court panel heard the trial for *Gannon*. The panel unanimously found the Kansas school funding system violated the constitution.<sup>88</sup> The 16 day trial stretched over a period of four weeks.<sup>89</sup> During the course of that trial, 44 witnesses testified and 662 exhibits were introduced into evidence.<sup>90</sup> There are 3,672 pages of trial transcripts and at least 18,727 pages of exhibits.<sup>91</sup> The Kansas Legislature immediately appealed the decision.<sup>92</sup>

#### 1. *Gannon I: Adequacy, Equity, and The Rose Standard*

On March 7, 2014, the Kansas Supreme Court issued its first opinion in *Gannon*.<sup>93</sup> The 110 page opinion first addressed whether the plaintiffs had standing to assert the claims. The Court determined that the school districts had standing to continue forward with the claims.<sup>94</sup> The Court then moved on to discuss the adequacy challenge. In 1989, the Kentucky Supreme Court developed a seven factor test for determining adequacy often called the “*Rose*” factors.<sup>95</sup> While the Kansas Supreme Court had previously discussed those factors, it had never officially adopted the test.<sup>96</sup> It did so in *Gannon I*.<sup>97</sup>

Under the *Rose* test, the court considers the following factors to determine whether education funding is constitutionally adequate: (1) sufficient oral and

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83. *See id.*

84. *See O'Brien, supra* note 81.

85. *See* Katie Stockstill, *Kansas Supreme Court Denies Petition to Reopen Case*, DODGE CITY GLOBE (Feb. 12, 2010), <http://www.dodgeglobe.com/article/20100212/NEWS/302129934> [<https://perma.cc/2V9C-YMHC>].

86. *See id.*

87. *See generally* *Gannon v. State (Gannon I)*, 319 P.3d 1196 (Kan. 2014).

88. *School Finance Litigation*, SOMMERS, ROBB & ROBB, [http://www.robblaw.com/html/school\\_finance.html](http://www.robblaw.com/html/school_finance.html) [<https://perma.cc/V4CD-4HNN>].

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *See generally* *Gannon v. State (Gannon I)*, 319 P.3d 1196 (Kan. 2014).

94. *See id.* at 1215.

95. *See* *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 212 (Ky. 1989).

96. *See Gannon I*, 319 P.3d at 1236.

97. *Id.*

written communication skills to enable students to function in a complex and rapidly changing civilization; (2) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (3) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (4) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (5) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (6) 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 (7) 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.<sup>98</sup>

In its opinion, the Kansas Supreme Court officially adopted the *Rose* factors.<sup>99</sup> In addition to the Court officially adopting the *Rose* standard, the Kansas Legislature had also previously codified the *Rose* factors.<sup>100</sup> The Court remanded the adequacy issue and instructed the district court to use the *Rose* factors to determine if the adequacy had been met.<sup>101</sup> The Court also discussed whether the Kansas Legislature had provided an equitable education as required by Article 6, Section 6. The Court agreed with the district court's holding that the Kansas Legislature failed to provide an equitable education.<sup>102</sup> The Court specifically noted that the State "established unreasonable, wealth-based disparities."<sup>103</sup> The Court gave the Legislature until July 1, 2014 to fix the equity issues.<sup>104</sup>

## 2. *Gannon* Litigation: Equity

After the Kansas Supreme Court issued its opinion in *Gannon I*, Kansas Governor Sam Brownback signed H.B. 2506 into law.<sup>105</sup> The bill purported to solve the equity issues identified by the district court and the Supreme Court.<sup>106</sup> The district court held an equity hearing and initially determined that the State had complied with the equity component<sup>107</sup>. However, on March 25, 2015, Governor Brownback signed House Substitute for Senate Bill 7 ("SB 7").<sup>108</sup> The bill removed some of the equalization funding adopted in H.B. 2506, and moved

98. *See id.* at 1252.

99. *See id.*

100. *See* KAN. STAT. ANN. § 72-1127 (2018).

101. *See Gannon I*, 319 P.3d at 1252.

102. *See id.* at 1251.

103. *Id.*

104. *See id.* at 1252.

105. Bryan Lowry, *Brownback Signs School Finance Bill*, WICHITA EAGLE, (Aug. 8, 2014), <http://www.kansas.com/news/politics-government/article1140755.html> [https://perma.cc/N3KZ-MS9C].

106. *Id.*

107. *See Gannon v. State (Gannon II)*, 368 P.3d 1024, 1029 (Kan. 2016).

108. Dion Lefler, *Kansas Education Official: No District Gets More Money from Block Grant*, WICHITA EAGLE, (May 8, 2015), <http://www.kansas.com/news/politics-government/article20517021.html> [https://perma.cc/Q3ZA-7SKM].

the school finance system to a block grant system.<sup>109</sup> The district court held another equity hearing and found that SB 7 failed to comply with the Supreme Court's equity holding in *Gannon I*.<sup>110</sup> The State appealed.<sup>111</sup>

On February 11, 2016, the Supreme Court ruled that SB 7 failed to meet the equity requirement.<sup>112</sup> The holding meant that if the Kansas Legislature did not remedy the issue by June 30, 2016, Kansas would not have a public education funding scheme in place to fund its schools.<sup>113</sup> The Court retained jurisdiction to determine if the Kansas Legislature's new law complied with the constitutional requirement.<sup>114</sup> In response, Governor Brownback signed Senate Substitute for H.B. 2655 ("HB 2655") into law on April 8, 2016.

*Gannon* headed back to the Kansas Supreme Court for a third time to determine if HB 2655 solved the equity issues identified in *Gannon II*.<sup>115</sup> The Court again found that the Kansas Legislature failed to fix the equity issue, specifically as it related to how the State equalized local money raised under the Local Option Budget provisions.<sup>116</sup> The Court reiterated its June 30 deadline, noting that if the Kansas Legislature failed to pass a constitutional system, schools would be forced to close due to a lack of funding.<sup>117</sup> On June 27, 2016, Governor Brownback signed Senate Substitute for H.B. 2001 ("HB 2001") into law which provided nearly \$30 million to fund local aid equalization.<sup>118</sup> The State and the Plaintiffs filed a Joint Stipulation of Constitutionality Equitable Compliance agreeing the equity issues had been resolved.<sup>119</sup> One day later, the Kansas Supreme Court held that HB 2001 met the equity requirement.<sup>120</sup> While the equity issue had been resolved, at least temporarily, the Court still had not resolved the adequacy issues.

### 3. *Gannon*: Adequacy

In *Gannon I*, the Kansas Supreme Court remanded the adequacy issue to the district court to determine if the Kansas Legislature had met the *Rose* factors for adequacy.<sup>121</sup> Following the State's adoption of SB 7, the district court found that SB 7 failed to provide an adequate education.<sup>122</sup> The Kansas Legislature appealed the decision.<sup>123</sup> While the Kansas Supreme Court considered the equity issue, the adequacy issue remained unaddressed.<sup>124</sup> During that time, the

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109. *Id.*

110. *See Gannon II*, 368 P.3d at 1029.

111. *Id.*

112. *See generally id.*

113. *See id.* at 1061–62.

114. *See id.* at 1063.

115. *See generally Gannon v. State (Gannon III)*, 372 P.3d 1181 (Kan. 2016).

116. *See id.* at 1198.

117. *Id.* at 1204.

118. *See Gannon v. State*, No. 113,267, 2016 Kan. LEXIS 314, at \*1 (Kan. June 28, 2016).

119. *Id.* at \*1–2.

120. *Id.* at \*3.

121. *Gannon v. State (Gannon I)*, 319 P.3d 1196, 1251 (Kan. 2014).

122. *See Gannon v. State (Gannon III)*, 368 P.3d 1024, 1029 (Kan. 2016).

123. *Id.*

124. *See id.*

State made more cuts to education funding.<sup>125</sup> The Supreme Court indicated it would schedule oral arguments for the adequacy issue.<sup>126</sup>

On March 2, 2017, the Kansas Supreme Court issued its first opinion on adequacy since *Gannon I*.<sup>127</sup> The Kansas Supreme Court affirmed the district court's holding and found that the State failed to meet the adequacy requirement.<sup>128</sup> The Court concluded that "the state's public education financing system, through its structure and implementation, is not reasonably calculated to have all Kansas public education students meet or exceed the minimum constitutional standards of adequacy."<sup>129</sup> The Court gave the State until June 30, 2017 to demonstrate it remedied the adequacy issue.<sup>130</sup>

On June 28, 2017, Governor Brownback signed SB 19, which provided an additional \$293 million in adequacy funding. Following the signing of SB 19, the Kansas Supreme Court held oral arguments regarding the adequacy requirement and SB 19. On October 2, 2017, the Kansas Supreme Court held that SB19 still did not meet the adequacy requirement.<sup>131</sup> Specifically, the State failed to show that to met its burden in demonstrating its compliance.<sup>132</sup> In addition, the State relied on a study that fell well below all of the other studies performed in Kansas.<sup>133</sup> The Kansas Supreme Court stayed its mandate until June 30, 2018, and scheduled oral arguments for May 22, 2018, to consider adequacy and any remaining constitutional issues.<sup>134</sup>

#### IV. WHERE ARE WE NOW AND WHAT DO WE DO GOING FORWARD?

On October 2, 2017, the Kansas Supreme Court gave the State one final opportunity to comply with its constitutionally mandated duties. As the Court put it, "we will not allow ourselves to be placed in the position of being complicit actors in the continuing deprivation of a constitutionally adequate and equitable education owed to hundreds of thousands of Kansas school children."<sup>135</sup> While the ideal solution would simply be for the State to comply with the Court's order, the State has shown a willingness to defy the Court in the past coupled with a commitment by the Kansas Legislature to not impose tax increases. Should the Kansas Legislature opt to continue defying the Court, the Court does have

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125. See Mara Rose Williams, *Amid Cuts, Local School Districts Seek Help from the Kansas Extraordinary Need Fund*, KAN. CITY STAR, (Aug. 16, 2015), <http://www.kansascity.com/news/politics-government/article31256765.html> [<https://perma.cc/4X55-C5MQ>].

126. *Id.*

127. *Gannon v. State (Gannon IV)*, 390 P.3d 461 (Kan. 2017).

128. *Id.* at 468.

129. *Id.* at 469.

130. *Id.*

131. *Gannon v. State (Gannon V)*, 402 P.3d 513 (Kan. 2017).

132. *Id.* at 532.

133. See *id.* at 532–36 (finding the LPA study to be an outlier compared to all other studies).

134. *Id.* at 553.

135. *Id.*

several remedies available to enforce compliance.<sup>136</sup>

### *A. Complying with Constitutional Duties*

The easiest route to solving the issues with Kansas's school finance system would be for the State to simply comply with its constitutional duties. This may be difficult to do without increasing state revenue. The Kansas Legislature has access to numerous studies and other data that show the cost for providing an adequate education, and all of them indicate that more funding is needed. The State's influx of funding for public education in response to *Montoy* demonstrates that it has the ability to determine what is adequate and provide the resources. However, the State must follow through on its commitment and identify additional sources of revenue, which it failed to do following the dismissal of the *Montoy* litigation.

In *Gannon IV*, the Kansas Supreme Court held "that the Kansas public education financing system was unconstitutional—when only 75% of all public school K-12 students were at grade level or above in the basic skills of both math and reading, and a significant group of harder-to-educate students were being left even further behind because of inadequate funding."<sup>137</sup> The Court continued that "student proficiency levels were not only low but also appeared to have steadily regressed after the 2011-2012 school year through 2015-2016."<sup>138</sup>

Kansas' 2016-17 assessment results confirm the Court's observation. According to 2016-17 assessment results, 58% of all Kansas students are non-proficient in reading and 67% of all students are non-proficient in math.<sup>139</sup> These results show that the impact was much worse on economically-disadvantaged students and minority students.<sup>140</sup> For economically-disadvantaged students, 72.3% are not proficient in reading and 80.2% are not proficient in math.<sup>141</sup> Similarly, 79% of African-American students are not proficient in reading and 86.8% of African-American students are not proficient in math.<sup>142</sup> These numbers clearly demonstrate that Kansas' student achievement levels have only decreased since the Court ruled that Kansas was inadequately funding education.

Following the Kansas Supreme Court's latest opinion, the Kansas Senate hired Dr. Lori Taylor, a school finance expert, to perform a study to determine the cost of an adequate education.<sup>143</sup> The Taylor study was strikingly similar to

136. For a discussion regarding various remedies the Kansas Supreme Court could consider, see *infra* Section IV.B.

137. *Gannon V*, 402 P.3d at 534 (citing *Gannon v. State (Gannon IV)*, 390 P.3d 461, 496–98 (Kan. 2017)).

138. *Id.*

139. U.S. DEP'T OF EDUC., REVISED STATE TEMPLATE FOR THE CONSOLIDATED STATE PLAN 15 (2018), [http://www.ksde.org/Portals/0/ECSETS/ESEA/KSconsolidatedstateplan01182018\\_Approved.pdf](http://www.ksde.org/Portals/0/ECSETS/ESEA/KSconsolidatedstateplan01182018_Approved.pdf) [<https://perma.cc/A3VH-QWHK>].

140. *Id.*

141. *Id.*

142. *Id.*

143. Tim Carpenter, *Kansas GOP Making Moves to Prepare for April Vote on K-12*

previous studies and estimated that education funding should increase by an amount between \$1.8 billion and \$2.1 billion to meet the constitutional standards.<sup>144</sup> The study set forth two scenarios. The first scenario would aim to increase student achievement in math and reading so that 90% of students were performing at grade level and to increase the graduation rate to 95%. Taylor estimated to fund that scenario would require the State to increase funding by \$1.786 billion.<sup>145</sup> The second scenario would aim to increase performance so that 60% of students were demonstrating “college preparedness” in math and science and would also increase the graduation rate to 95%. Taylor estimated that, to reach those education goals, the State would need to increase education spending by \$2.067 billion.<sup>146</sup>

On April 17, 2018, Governor Jeff Colyer signed a bill into law that would increase school funding by \$632 million over five years (“House Substitute for Senate Bill No. 423” or “S.B. 423”).<sup>147</sup> However due to errors in the bill, \$80 million of that funding would be unavailable to Kansas school districts. Therefore, the Kansas Supreme Court altered briefing deadlines to allow the State time to fix the error.<sup>148</sup> On April 28, 2018, the House of Representatives passed House Substitute for Senate Bill 61 (SB 61), which would amend correct the error.<sup>149</sup> The Senate adopted that bill on April 30, 2018.<sup>150</sup> Governor Colyer has indicated that he intends to sign the bill.<sup>151</sup> The amount, while a significant increase, still falls short of every recommendation as to what it would actually cost to ensure constitutional compliance.

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*Constitutional Amendment*, TOPEKA CAP.-J. (Dec. 29, 2017, 12:24 PM), <http://www.cjonline.com/state-government/news/education/2017-12-29/kansas-gop-making-moves-prepare-april-vote-k-12> [<https://perma.cc/4PM5-TZVD>].

144. WESTED, *supra* note 2, at 69 tbl.16. Plaintiffs in the *Gannon* lawsuit do not suggest that the two scenarios described in the Taylor study would necessarily comply with the Court’s definition of “adequacy,” but agree that the funding increases recommended in the study closely align with other estimates in the record. Opening Brief of Plaintiffs/Appellees Regarding Unconstitutionality of Substitute for Senate Bill No. 423, As Amended, *Gannon v. State*, NO. 113,267 (Kan. May 7, 2018).

145. *Id.*

146. *Id.*

147. Hunter Woodall, ‘A Very Strong Bill’: Gov. Colyer Signs off on School Finance Plan, KAN. CITY STAR (Apr. 17, 2018, 2:49 PM), <http://www.kansascity.com/news/politics-government/article209118529.html> [<https://perma.cc/XJV4-HV72>].

148. Tim Carpenter, *Kansas Supreme Court Alters Deadline for School Finance Filing so Kansas Legislature Can Fix \$80M Flaw*, TOPEKA CAP.-J. (Apr. 25, 2018, 5:47 PM), <http://www.cjonline.com/news/20180425/kansas-supreme-court-alters-deadline-for-school-finance-filing-so-kansas-legislature-can-fix-80m-flaw> [<https://perma.cc/WLG5-CPCL>].

149. Tim Carpenter, *School Finance Fix Sent to Colyer*, GARDEN CITY TELEGRAM (Apr. 30, 2018, 6:41 PM), <http://www.gctelegram.com/news/20180430/school-finance-fix-sent-to-colyer> [<https://perma.cc/3U6H-HVHU>].

150. *Id.*

151. *Id.*

## **B. Judicial Remedies**

The State's defiance in the face of court orders raises legitimate questions regarding the State's effort to adequately fund schools. However, the Court made clear in its latest opinion that it will not be complicit in the legislature's failure to comply with its constitutional duties.<sup>152</sup> If the Court determines that the State's latest effort fails to pass constitutional muster, it has the power to enforce its order with a number of different remedies.

To this point, the Kansas Supreme Court has primarily retained jurisdiction of the *Gannon* litigation to ensure compliance. While the remedy allows the Court to monitor the State's compliance, it does not provide much of hook to ensure the State complies. However, the Court also has relied on allowing Kansas schools to close to enforce the State's compliance. This remedy has also seen success in obtaining temporary compliance from the State. However, this remedy allows the state to implement a constitutional funding plan to avoid school closures, and then not fully follow through on its promise.

Other state supreme courts that have considered school finance have also explored other remedies to ensure students are provided an adequate and equitable education. In 2014, the Washington State Supreme Court identified a number of remedies in a show cause order to the State regarding school finance.<sup>153</sup> Among the remedies identified were: (1) impose a daily \$100,000 penalty against the legislature until it meets its constitutional mandate; (2) impose monetary contempt sanctions against legislative branch officials; (3) prohibit government expenditures on matters unrelated to public school funding until the State complies with the court's constitutional ruling; and (4) order the sale of state property to fund constitutional compliance. While the Kansas Supreme Court has not discussed these specific remedies, they all would serve the purpose of ensuring compliance with the Court's Order. Other courts, outside the context of education, have also considered sanctions against the State's attorneys or specific legislators who fail to enact legislation as well as holding the State's attorneys in contempt.<sup>154</sup> However, if the State simply complies with its constitutional duty, the Court need not be placed in a position to issue any remedy at all.

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152. *Gannon v. State (Gannon V)*, 402 P.3d 513, 553 (Kan. 2017) (“[W]e will not allow ourselves to be placed in the position of being complicit actors in the continuing deprivation of a constitutionally adequate and equitable education owed to hundreds of thousands of Kansas school children.”).

153. *See generally* Order to Show Cause, *McCleary v. State*, No. 84362-7 (Wash. June 12, 2014), [http://www.courts.wa.gov/appellate\\_trial\\_courts/SupremeCourt/?fa=supremecourt.McCleary\\_Education](http://www.courts.wa.gov/appellate_trial_courts/SupremeCourt/?fa=supremecourt.McCleary_Education) [<https://perma.cc/J4QR-L4LR>] (listing potential remedies identified by the Plaintiff). The Court did not decide whether the remedies identified were appropriate. *Id.*

154. *Spallone v. United States*, 493 U.S. 265, 281 (1990) (Brennan, J., dissenting) (considering specific legislator sanctions); *United States v. Cutler*, 58 F.3d 825, 837 (2d Cir. 1995) (holding attorneys in contempt); *United States v. Dubon-Otero*, 98 F. Supp. 2d 187, 192 (D. P.R. 2000) (attorney sanctions).

## **V. CONCLUSION**

The Kansas Legislature has been provided yet another opportunity to resolve the constitutional inadequacies of its school finance system. Over half of Kansas students are not testing proficient in the basic skills of reading and math. Kansas students rely on the State to provide an adequate and equitable education for their future. The evidence has clearly indicated that additional money is needed. By providing an adequate and equitable education for Kansas students now, Kansas can provide a brighter future for its children. To ensure that happens, Kansas and its courts must take appropriate positive measures to ensure that all Kansas public school students receive the education demanded by the state constitution.