

**STATE CONSTITUTIONAL LAW—EDUCATION FINANCE—
ADEQUATE AND EQUITABLE EDUCATION IS A
CONSTITUTIONAL REQUIREMENT UNDER THE KANSAS
CONSTITUTION. *GANNON v. STATE*, 319 P.3d 1196 (KAN.
2014).**

*Katherine Daniel**

I. INTRODUCTION

In *Gannon v. State*,¹ the Kansas Supreme Court was tasked with determining whether Kansas established unconstitutional, wealth-based disparities in the K–12 public education finance system. To make this determination, the court first answered whether finance litigation was a political question. After the court ascertained its authority to resolve the constitutionality of educational funding—deeming this was not a political question—it analyzed the financing system, applying the required constitutional standards of adequacy and equity. The court remanded the adequacy determination for additional fact-finding under a new adequacy standard and held that, under the equity analysis, the system created unconstitutional, inequitable wealth-based disparities. The court ordered the Kansas legislature to rectify the unconstitutionality of the system, but refrained from articulating specific instructions for the legislature to comply with and enact. This Comment will discuss the pertinent facts of *Gannon*, analyze the court’s reasoning, examine the soundness of the court’s decision compared to finance litigation on a national scale, and consider the impact of this decision on future Kansas finance litigation.

* J.D., Rutgers Law School, May 2016; B.A., Boston College, 2013. The author would like to thank her father, two sisters, and younger brother for their constant support and guidance.

1. 319 P.3d 1196 (Kan. 2014).

II. HISTORY OF EDUCATION FINANCE IN KANSAS

Similar to the majority of states, Kansas has traditionally relied upon district taxes to finance its public school system.² School finance legislation includes article VI of the Kansas Constitution,³ as well as numerous Kansas statutes, including the School District Finance and Quality Performance Act (SDFQPA) and the capital outlay levy statutes.⁴ Education funding was derived mainly from local effort and supported by state financial aid. Kansas required districts to impose a mill levy upon taxable, tangible property and, accordingly, it was expected that the majority of education funds would be generated from these local property taxes.⁵ However, the taxable property values that comprised each district varied tremendously and, consequently, some less property-wealthy districts generated lower revenue from property taxes compared to property-wealthy districts.⁶ In those instances, the State provided additional funds to less-wealthy districts through state aid measurements.⁷ Under these laws, funding for Kansas K-12 public education was determined in fixed amounts through a "base state aid per pupil" program.⁸ School districts were also permitted to generate additional funds—utilized to finance projects beyond basic education, such as a new construction project or various needed equipment for the schools—in a variety of methods.⁹ The two methods at issue in *Gannon* were imposing an additional mill levy on property in the district to fund a local option budget or imposing an additional mill levy on property to fund capital outlay expenses.¹⁰ Under both processes, less-wealthy districts qualified for, and should have received from the State, additional funds to account for differences in property wealth amongst

2. Charles Berger, Note, *Equity Without Adjudication: Kansas School Finance Reform and the 1992 School District Finance and Quality Performance Act*, 27 J.L. & EDUC. 1, 2 (1998).

3. KAN. CONST. art. VI, §§ 1-6.

4. KAN. STAT. ANN. § 72-6405 (2015) (SDFQPA); *id.* § 72-8801 (capital outlay statute). The SDFQPA sets basic state aid per pupil and then requires states to levy taxes at a uniform property tax rate to achieve a "local effort." See Berger, *supra* note 2, at 28. Then the State provides sufficient aid to districts that do not meet the basic state aid per pupil, and requires districts that raise funds beyond that basic state aid per pupil amount to remit excess funds to the state. *Id.* § 72-8801.

5. *Id.* § 72-8801 (describing the annual tax levy at a mill rate); Berger, *supra* note 2, at 28.

6. See *Gannon*, 319 P.3d at 1205.

7. *Id.*

8. *Id.* (funding provided to a district also includes variables, such as providing additional finances for some students, who require additional education resources).

9. *Id.*

10. *Id.*

the districts.¹¹ This basic funding approach was originally challenged in litigation arising from *Montoy v. State*.¹² The *Montoy* plaintiffs challenged facets of the school finance program in Kansas, and the court resolved the case in the plaintiffs' favor.¹³ The Kansas Supreme Court affirmed that the finance formula did not comport with the State's duty under the Kansas Constitution—outlined in article VI—and ordered the legislature to modify the finance scheme.¹⁴ On July 8, 2005, the court found that the legislature complied with the court order and approved the funding increase, totaling \$285 million for the 2005–2006 school year.¹⁵ Nonetheless, the court retained jurisdiction to review actions by the legislature pursuant to that matter.¹⁶ After the dismissal of the *Montoy* litigation in 2009, the legislature began to reduce educational funding in response to the national recession.¹⁷ Appropriations decreased steadily between the years of 2009 and 2012.¹⁸ Additionally, the legislature began to withhold entitlements to capital outlay aid and began to prorate entitlements to supplemental general aid.¹⁹

III. STATEMENT OF THE CASE

At issue in *Gannon* was the system established by the Kansas legislature to finance the public school system. The *Gannon* plaintiffs were four school districts and thirty-one individuals identified during proceedings as children educated in the school districts and legal guardians of the affected children.²⁰ On June 17, 2010, the plaintiffs

11. See *id.*

12. *Montoy v. State (Montoy I)*, 62 P.3d 228 (Kan. 2003); *Montoy v. State (Montoy II)*, 120 P.3d 306 (Kan. 2005); *Montoy v. State (Montoy III)*, 112 P.3d 923 (Kan. 2005); *Montoy v. State (Montoy IV)*, 138 P.3d 755 (Kan. 2006).

13. *Montoy II*, 120 P.3d at 308 (affirming that the legislature failed to meet its burden to “make suitable provision for finance” in public school financing).

14. *Id.*

15. *Montoy IV*, 138 P.3d at 759–60.

16. *Id.* at 760. In 2009, the court determined the State had substantially complied with the court's instructions and dismissed all *Montoy* litigation. *Gannon*, 319 P.3d at 1206.

17. *Gannon*, 319 P.3d at 1206; see also KRISTEN ROTTINGHAUS ET AL., KAN. DEP'T OF LABOR, 2010 KANSAS ECONOMIC REPORT vi (2010), https://www.doleta.gov/performance/results/AnnualReports/2010_economic_reports/ks_economic_report_py2010.pdf (“[T]he economy in Kansas declined dramatically in 2009 following the national economic recession . . .”).

18. *Gannon*, 319 P.3d at 1206 (detailing that cuts to the basic state aid per pupil totaled more than \$511 million for the fiscal years 2009–2012).

19. *Id.*

20. *Id.* The court also addressed issues of standing, and ultimately determined only the school districts had standing to bring their article VI claims because education

submitted notice to the State and filed suit in the Shawnee County District Court in November.²¹ A three-judge panel presided over the matter.²² The plaintiffs raised eight claims against the State, including that the State “violated the requirements of Article [VI], Section 6(b) by failing to provide a suitable education to all Kansas students, consider the actual costs of education, and distribute education funds equitably.”²³ To support this claim,

the plaintiffs alleged that the State had (1) decreased overall education funding; (2) decreased the [base student aid per pupil program]; (3) required the use of LOB funds to pay for basic educational expenses; (4) prorated supplemental general state aid; (5) withheld capital outlay state aid; and (6) underfunded special education.²⁴

Additionally, the plaintiffs alleged that the State’s failure to distribute capital outlay aid payments, beginning in year 2010, established “an inequitable, unconstitutional distribution of funds.”²⁵ Based on previous Kansas finance litigation, the court concluded that article VI of the Kansas Constitution²⁶ applied an adequacy and equity requirement to education financing.²⁷ The court held the panel did not apply the correct constitutional standard to determine whether the State violated the adequacy requirement of public education financing and remanded the issue for the panel to make additional findings.²⁸

financing does not invoke protection under the state’s equal protection law. *Id.* at 1209–16.

21. *Id.* at 1206.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 1206–07 (finding, for only this count, the panel certified a class of “[a]ll Kansas school districts that were or will be certified by the Kansas Board of Education to receive capital outlay state aid”). The plaintiffs also alleged the right to education was fundamental under the Kansas Constitution, but both the panel and court found education was not a fundamental right protected under the equal protection clause of the Kansas Constitution. *Id.* at 1207.

26. Pertinent language from article VI regarding equity and adequacy states, “The legislature shall provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools, educational institutions and related activities which may be organized and changed in such manner as may be provided by law.” KAN. CONST. art. VI, § 1. Article VI, section 6(b) provides, “The legislature shall make suitable provision for finance of the educational interests of the state. No tuition shall be charged for attendance at any public school to pupils required by law to attend such school.” *Id.* art. VI, § 6(b).

27. *Gannon*, 319 P.3d at 1233 (citing *Montoy II*, 120 P.3d 306 (Kan. 2005)).

28. *Id.* at 1204.

Nevertheless, the court held that the capital-outlay-funding method and the prorating of the supplemental general state aid payments were unconstitutional because both created wealth disparities violating the equity requirement of the Kansas Constitution.²⁹ Despite the inequities, the court affirmed the panel's ruling to not order payment of the capital outlay state aid entitled to districts for the fiscal year of 2010.³⁰

IV. THE COURT'S REASONING

The Kansas Supreme Court issued its decision on March 7, 2014.³¹ After considering issues of standing, the court began its analysis with a discussion of the relationship among the three branches of government and whether the court had the authority to decide the claims before it.³² The U.S. Supreme Court held that “[t]he nonjusticiability of a political question is primarily a function of the separation of powers.”³³ Moreover, at the outset of Kansas’s statehood, each department of government was assigned specific functions to avoid an inappropriate concentration of power in any branch.³⁴ The court found the Kansas Constitution did not commit the issue of public education finance solely to the legislature. The term “suitable” in the constitution communicates a clear intention to remove the legislature’s absolute discretion because there are potentially judicially discoverable facts and manageable standards for resolving the issue of “suitability.”³⁵ The court noted that “the people of Kansas wanted to ensure that the education of school children in their state is not entirely dependent upon political influence.”³⁶ Therefore, the court accepted its own authority to determine if actions of the legislature adhered to the constitution.

29. *Id.*

30. *Id.*

31. *Id.* at 1196.

32. *Id.* at 1208

33. *Baker v. Carr*, 369 U.S. 186, 210 (1962).

34. *Vansickle v. Shanahan*, 511 P.2d 223, 235 (Kan. 1973) (“The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law.’ . . . [Accordingly,] the separation is accomplished by the establishment of the three branches of government and the distribution of the various sovereign powers to each of them.” (quoting *Wayman v. Southard*, 23 U.S. 1, 46 (1825))).

35. The court agreed with a similar decision from the Texas Supreme Court holding that the legislature’s duty in education “is not committed unconditionally to the legislature’s discretion, but instead is accompanied by standards.” *Gannon*, 319 P.3d at 1219–29 (quoting *Edgewood Indep. Sch. Dist. v. Kirby* (*Edgewood I*), 777 S.W.2d 391, 394 (Tex. 1989)).

36. *Gannon*, 319 P.3d at 1230–31 (determining this was not solely a political question because the legislature makes the law, but the judiciary determines that the law comports with the constitutional requirements of adequacy and equity).

A. *The Court Adopted the Rose Standards to Expound the Adequacy Requirement*

In previous case law, the court had cited, with approval, the adequacy requirement that had been articulated by the Kentucky Supreme Court in *Rose v. Council for Better Education Inc.*³⁷ After the court cited Kentucky's adequacy capacities, the Kansas State Legislature responded in 1995 by amending the statutory goals to resemble the *Rose* standards of Kentucky.³⁸ The goals for student achievement included:

(1) Development of sufficient oral and written communication skills which enable students to function in a complex and rapidly changing society[;] . . .

(2) acquisition of sufficient knowledge of economic, social and political systems which enable students to understand the issues that affect the community, state and nation[;] . . .

(3) development of students' mental and physical wellness[;] . . .

(4) development of knowledge of the fine arts to enable students to appreciate the cultural and historical heritage of others[;] . . .

37. 790 S.W.2d 186 (Ky. 1989). In *Montoy III*, for example, the court quoted an Arkansas Supreme Court decision that cited the adequacy requirements of the Kentucky Supreme Court. 112 P.3d 923, 930 (Kan. 2005) (quoting *Lake View Sch. Dist. No. 25. v. Huckabee*, 91 S.W.3d 472, 487–88 (Ark. 2004)). The Kentucky adequacy standard included seven capacities:

(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 vocations 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.

Rose, 790 S.W.2d at 212.

38. *Gannon*, 319 P.3d at 1234.

(5) training or preparation for advanced training in either academic or vocational fields so as to enable students to choose and pursue life and work intelligently[;] . . .

(6) development of sufficient levels of academic or vocation skills to enable students to compete favorable in academics and the job market[;] . . .

(7) needs of students requiring special education services.³⁹

The court acknowledged that this amendment, enacted by the legislature, was a deliberate attempt to ensure that the state education adequacy goals matched the requirements contained in article VI and resembled the *Rose* standards.⁴⁰ The court determined that the Kansas legislature may not act unilaterally to reduce the requirements in article VI.⁴¹ Therefore, to uphold the requirements of the constitution, the Kansas Supreme Court may serve as the sole arbiter to determine whether the legislature violated article IV.⁴² Previously, the court held “suitable” education financing must reflect funding that meets the constitutional requirements that “[t]he legislature shall provide for intellectual, educational, vocational, and scientific improvement by establishing and maintaining public schools.”⁴³ The court had the authority to determine whether the legislature provided a “suitable” education to satisfy the adequacy requirement according to the constitutional provisions.⁴⁴ The *Rose* standards, which the court previously enunciated, were deemed the minimum acceptable standards for the educational adequacy requirement in article VI.⁴⁵ The court clarified that the adequacy standards in *Rose* were only “met when the public education financing system provided by the legislature for grades K–12—through structure and implementation—is reasonably calculated to have all Kansas public education students meet or exceed

39. *Id.* (citing Act of April 15, 2005, ch. 152, § 6(c), 2005 Kan. Sess. Laws 1, 3 (amended 2014)).

40. *Gannon*, 319 P.3d at 1235.

41. *Id.* (acknowledging that the legislature also needed the approval of the people of Kansas to alter the state constitution).

42. *See Montoy I*, 62 P.3d 228, 235 (Kan. 2003) (affirming that the court acts as the sole arbiter in constitutional disputes and finding underfunding and inequitable distribution of finances calculated by the legislature did not comply with the requirements of the constitution).

43. *Montoy II*, 120 P.3d 306, 309 (Kan. 2005).

44. *Id.*

45. *Gannon*, 319 P.3d at 1236 (noting these standards were only the *minimal* acceptable standards).

the standards set out in *Rose* and presently codified.”⁴⁶ Therefore, this test rejected the argument that a legislature’s failure to consider actual costs condemns the educational finances as inadequate.⁴⁷ Understandably, the panel only considered financial funding decisions that rested on actual costs because the court had yet to announce the newly enforced *Rose* test.⁴⁸ Due to the court’s decision to apply the *Rose* standards, the court remanded the adequacy claim to the panel to reopen the record and make a determination in accordance with the *Rose* standards.⁴⁹ The court provided guidance to the panel, instructing that the legislature is not required to provide optimal adequacy but rather a “suitable” level of educational financing is sufficient.⁵⁰

B. The Legislature Failed to Provide the Equity Required in the Kansas Constitution

The court had also previously considered the constitutional requirement of equity in finance litigation.⁵¹ The court most clearly described what is required under equity in *Montoy IV*, when it stated, “Equity does not require the legislature to provide equal funding for each student or school district.”⁵² Furthermore, in *Montoy III*, the court determined increased wealth-based disparities between wealthy and less-affluent districts caused by statutorily mandated local property taxes produced unconstitutional inequity.⁵³ After a review of similar Texas case law, the court adopted the principles set forth by the Texas Supreme Court.⁵⁴ The Kansas Supreme Court ruled, “School districts must have reasonably equal access to substantially similar educational

46. *Id.* at 1236–37.

47. *Id.* at 1237 (determining actual costs were an appropriate factor under article IV, but they were not the sole determinative factor).

48. *Id.*

49. *Id.* (describing that other considerations should include all available resources, such as federal funding and pension funding, but with the understanding that total spending is not the “touchstone” for adequacy).

50. *Id.*

51. See *Montoy II*, 120 P.3d 306, 310 (“[E]quity with which the funds are distributed . . . [is a] critical factor[] for the legislature to consider in achieving a suitable formula for financing education.”); see also *Provance v. Shawnee Mission Unified Sch. Dist.* No. 512, 648 P.2d 710, 716 (Kan. 1982) (“The ultimate State purpose in offering a system of public schools is to provide an environment where quality education can be afforded equally to all.”).

52. 138 P.3d 755, 764 (Kan. 2006).

53. 112 P.3d 923, 937 (Kan. 2005).

54. *Gannon*, 319 P.3d at 1239 (discussing and agreeing with a series of cases—arising from the same facts—in which the Texas Supreme Court denounced inequitable local taxing schemes).

opportunity through similar tax effort.”⁵⁵ The court found that the panel correctly held that the State created unconstitutional, wealth-based disparities by eliminating all capital outlay state aid payments that districts were entitled to under the law.⁵⁶

Also before the court was the imposition of mill levies. Boards of education may impose mill levies on taxable, tangible property in their districts to fund capital improvements.⁵⁷ Districts that have lower property wealth also qualify for additional finances from the State supported “school district capital outlay state aid fund.”⁵⁸ However, the legislature failed to authorize and make payments for the fiscal year of 2010 and subsequent years.⁵⁹ The panel determined at least one district was entitled to capital outlay state aid payments and there was no evidence that the funding was no longer necessary.⁶⁰ The panel concluded that the lack of capital outlay payments distorted and exacerbated wealth-based disparities amongst the districts.⁶¹ Moreover, the panel held that elimination of capital outlay state aid payments for fiscal years 2012 and 2013 rendered all districts’ abilities to impose a mill levy, via section 72-8801, unconstitutional because it created wealth disparities.⁶² Therefore, the statutory authority that allowed the

55. *Id.*

56. *Id.*; see KAN. STAT. ANN. § 72-8814(c) (2015) (describing the capital outlay and state entitlement system).

57. *Id.* § 72-8801; *id.* § 72-8804(a) (listing improvements “including: (1) [a]cquisition of computer software; (2) acquisition of performance uniforms; (3) housing and boarding pupils enrolled in an area vocational school operated under the board of education; (4) architectural expenses; (5) acquisition of building sites; (6) undertaking and maintenance of asbestos control projects; (7) acquisition of school buses; and (8) acquisition of other fixed assets”).

58. See *id.* § 72-8814. These additional funds are calculated every fiscal year by multiplying the amount the district receives in levy taxes by the district’s state aid percentage. *Id.* § 72-8814(b). The state aid percentage is determined by calculating the median assessed valuation per pupil and rounding that number to the nearest \$1000. *Id.* For every \$1000 a district’s assessed valuation per pupil is above the median, the state aid is decreased by 1%. *Id.* And, for every \$1000 a district’s assessed valuation per pupil is below the median, the state aid is increased by 1%. *Id.* The state aid computation is 25%. *Id.* No aid percentage may exceed 100%. *Id.*

59. *Gannon*, 319 P.3d at 1240–41 (accordingly, for the fiscal years 2012, 2013, and 2014, the legislature made a specific appropriation of \$0 for capital outlay aid and amended section 72-8814(c) to prohibit transfers “from the state general fund to the school district capital outlay state aid fund during the fiscal years ending June 30, 2013, June 30, 2014, June 30, 2015, or June 30, 2016”).

60. *Id.* at 1241. For example, School District No. 259 was entitled to \$4.3 million in 2012, but it did not receive those funds. *Id.*

61. *Id.*

62. *Id.* (finding districts that had never relied on state aid would now be forced to rely on funds other than levy taxes to finance education in their districts).

levying of local tangible property taxes by *any* district was unconstitutional.

The court began its analysis of the state capital outlay payments by discussing the legislature's involvement and redesign of the school financing structure. Self-admittedly, the legislature acknowledged inequity in the state's school financing system in 2005 and enacted legislation to amend inequity in school financing.⁶³ The panel determined that, although the need for equalization still existed, the legislature stopped making equalization payments in 2010.⁶⁴ The court affirmed the panel's reasonable, competent inferences regarding the ongoing need of the funds.⁶⁵ Wealth-based disparities are proscribed in Kansas education funding, and the court determined the most appropriate manner to measure disparities in school financing under article IV required an examination of whether "[s]chool districts . . . have reasonably equal access to substantially similar educational opportunity through similar tax effort."⁶⁶ The action of the legislature to withhold funds rendered the operation of the capital outlay system unconstitutional.⁶⁷ The court determined the unconstitutionality could be remedied by the legislature in a variety of ways.⁶⁸ The court also found the panel correctly held that the State created unconstitutional, wealth-based disparities by prorating and reducing all supplemental general state aid payments, which certain schools districts were entitled to receive under statutory guidelines.⁶⁹ The State permitted a board to adopt a local option budget to receive additional funding through more mill levy taxes.⁷⁰ The State provided supplemental funds for any district that adopted a local option budget but had a property

63. KAN. STAT. ANN. § 72-8814 (2015). The panel found that levy tax revenue varied tremendously throughout the districts. *Gannon*, 319 P.3d at 1241. For example, one mill raised approximately \$18,000 in Galena, Kansas and another raised over \$350,000 in Burlington, Kansas. *Id.*; see also *Hawley v. Kan. Dep't of Agric.*, 132 P.3d 870, 888–89 (Kan. 2006) (determining the legislature would not have enacted legislation to address the issue if there was no issue to be resolved, because that would require rendering "unreasonable results" in statutory construction).

64. *Gannon*, 319 P.3d at 1242.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 1243 (declining to fashion a specific method for the legislature to rectify the unconstitutionality).

69. *Id.*

70. See KAN. STAT. ANN. § 72-6431 (2015) (mandate of taxable tangible property); *id.* § 72-6433(a)(2) (augmenting through additional funding). The local option budget must not exceed 33% of the district's financial state aid entitlement. *Id.* § 72-6433(a)(1).

valuation per pupil under the state assessed valuation per pupil.⁷¹ The legislature determined, in instances where the amount of appropriations were unavailable, the funds would be dispersed, prorated among the districts in proportion to the amount each district was entitled to receive.⁷² According to findings by the panel, entitlement payments were prorated to 89.5% in 2010, 91.7% in 2011, and 86.1% in 2012.⁷³ The panel, applying the actual cost standard, found that the State had failed to show a cost-based justification for the proration, and, therefore, the action was unconstitutional.⁷⁴ The court observed that the legislature had acknowledged certain inequity in the school financing system and attempted to rectify those discrepancies.⁷⁵ This legislation was enacted because inequities are inherent in local option budget funding.⁷⁶ The court found that the panel made a reasonable inference that the proration reflects a choice by the legislature based arbitrarily on the amount of funds they desired to make available.⁷⁷ Furthermore, the panel considered particular instances of supplemental aid loss that was substantiated in the record.⁷⁸ The court acknowledged that the panel only made specific findings concerning financial loss, and the panel did not consider facts regarding actual effects, such as reduction in student achievement.⁷⁹ Regardless of the actual effects, the panel found the proration of supplemental general state aid disproportionately impacted poorer districts while insulating more-wealthy districts from the effects of reduced financing.⁸⁰ The court

71. See *id.* § 72-6434(a)(3) (calculating the amount of the assessed valuation per pupil at 81.2%).

72. *Id.* § 72-6434(b).

73. *Gannon*, 319 P.3d at 1244 (finding the legislature initially alleged that the funds were prorated in response to the national economic recession, but the record later revealed the funds were prorated in accordance with a legislative decision to greatly reduce general fund revenue).

74. *Id.*

75. See KAN. STAT. ANN. § 72-6434 (identifying the purpose of this statute was to authorize the distribution of supplemental general state aid to augment funds); see also *Montoy IV*, 138 P.3d 755, 760–61 (Kan. 2006) (noting supplemental state aid is designed to equalize educational financing between affluent and less-wealthy districts).

76. *Gannon*, 319 P.3d at 1246.

77. *Id.* at 1245 (finding there was nothing in the record to show that this funding gap was eliminated or lessened by another means).

78. *Id.* In the Wichita district, proration caused the district to be responsible for an additional \$6,087,297 worth of funding. *Id.* The district of Hutchinson lost \$736,135 worth of funding from the State, the district of Dodge City lost \$1,422,457 worth of funding from the State, and the district of Kansas City lost \$4,078,906 worth of funding from the State. *Id.*

79. *Id.*

80. *Id.* For example, the Galena and Burlington school districts were similarly sized, but Burlington adopted a local option budget to generate \$2,117,246 without any general

determined, although the panel used a “zero-tolerance” policy for wealth disparities, under the test of the court, the actions by the legislature were still unconstitutional because they created an unreasonable disparate level due to the proration of supplemental general aid starting in 2010.⁸¹ The court suggested these constitutional infirmities could be resolved with changes in legislation.⁸² Additionally, the court upheld the panel’s findings that plaintiffs were not entitled to capital outlay equalization payments not made for fiscal year 2010.⁸³

V. ANALYSIS AND IMPLICATIONS

The Kansas Supreme Court correctly interpreted the Kansas Constitution to require adequate and equitable⁸⁴ K–12 public education financing. Overall, the court’s decision was consistent with the patterns of education finance throughout the United States. Moreover, the court’s reasoning was significantly influenced by the litigation strategy of the plaintiffs. Adequacy refers to a state’s affirmative duty to provide an education—or provide educational funding—and equity is the right to an education based on principles of equality.⁸⁵ Adequacy and equity reflect different constitutional provisions and produce different judicial remedies, but when used together, provide litigants with an effective means to navigate the impediments that typically occur in educational finance litigation.⁸⁶ A series of litigation strategies—regarded as waves—have comprised educational finance litigation. Equity

aid, while Galena was only able to adopt a local option budget of \$1.5 million and lost \$172,576 in supplemental payment, which consequently increased their tax responsibility by that lost aid amount. *Id.* at 1246.

81. *Id.*; see also *Montoy III*, 112 P.3d 923, 934 (Kan. 2005) (finding that the legislature’s actions in 2005 were unconstitutional because it failed to provide equalization aid for a specified portion of the district’s local operating budget).

82. *Gannon*, 319 P.3d at 1247.

83. *Id.* at 1247–50. Plaintiffs sought an order for \$22 million in 2010 capital outlay payments entitled to the districts, but the legislature acted within its authority to allot capital outlay funds. *Id.*; see also KAN. STAT. ANN. §§ 75-3701(6), 75-3722 (2015) (indicating that the secretary has broad authority to implement an allotment plan if there are insufficient funds to cover appropriations).

84. These concepts are often difficult to differentiate, but the simplest way to describe both terms articulates that adequacy is the minimum amount of money needed to fund the districts and equity is the “fairness” principle based on the realization that some districts may need increased funding to serve its students. *Equity vs Adequacy*, INTERCULTURAL DEV. RES. ASS’N, http://www.idra.org/Education_Policy.htm/Fair_Funding_for_the_Common_Good/Equity_vs_Adequacy/ (last visited Oct. 12, 2016).

85. Derrick Darby & Richard E. Levy, *Slaying the Inequality Villain in School Finance: Is the Right to Education the Silver Bullet?*, 20 KAN. J.L. & PUB. POL’Y 351, 365 (2011).

86. *Id.*

considerations represented the second wave of litigation, which began in 1973 with *Robinson v. Cahill* and ended in 1989, and adequacy litigation represented the third and most current wave, which started in 1989.⁸⁷ Both waves predominately focused on educational clauses found within state constitutions.⁸⁸ Although “waves” suggests that equity could no longer serve as an effective tool for litigants, equity may still function as a formidable instrument to navigate invalid educational finance structures. The plaintiffs in *Gannon* used a “synergistic,” hybrid litigation strategy, comprising of adequacy and equity standards, to invalidate the actions of the Kansas legislature.⁸⁹

A. *The Kansas Supreme Court Has the Authority to Rule on the Constitutionality of Education Finance*

The court’s substantive analysis began with a comprehensive discussion of justiciability. The justiciability doctrine ensures that judicial actions do not invade a political question and, thus, reinforces the prominent American governmental doctrine of “separation of powers.”⁹⁰ In *San Antonio Independent School District v. Rodriguez*, the Supreme Court of the United States noted that elected officials are often in the position best suited to rectify and address issues of educational policy, and held education was not a fundamental right under the federal Equal Protection Clause.⁹¹ Although *Rodriguez* appeared to preclude litigation due to justiciability concerns, the New Jersey Supreme Court’s decision in *Robinson v. Cahill* “gave substance to the idea of using state constitution as a vehicle for school finance

87. See Michael Heise, *State Constitutions, School Finance Litigation, and the “Third Wave”*: *From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1152–62, 1152 n.13 (1995) (citing *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973)).

88. *Id.* at 1152. Although adequacy and equity represent different approaches to litigation, when courts invalidate finance systems under either approach, the courts generally assume “increases in educational funding will increase equal educational opportunity,” and “invalidate school funding systems that result in per-pupil spending differences influence educational spending.” *Id.* at 1166.

89. Erin E. Buzuvis, Note, “A” for Effort: *Evaluating Recent State Education Reform in Response to Judicial Demands for Equity and Adequacy*, 86 CORNELL L. REV. 644, 656–57 (2001) (arguing that hybrid claims, which are brought under an adequacy and equity analysis, typically generate the most successful litigants).

90. *Baker v. Carr*, 369 U.S. 186, 217 (1962) (“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 . . .”).

91. 411 U.S. 1, 42, 98 (1973) (noting that courts often lack the expertise to interfere with informed state or local actions concerning education policy because it represents a myriad of economic, social, and philosophical issues).

reform.”⁹² Similar to *Robinson*, the Kansas Supreme Court’s reliance on constitutional language in article IV of the Kansas Constitution avoided a conflict with the political question doctrine.⁹³ The Kansas Supreme Court’s ultimate decision balanced the court’s right to decide the constitutionality of the case with the fears of disregarding expressed governmental boundaries expressed in *Rodriguez*. The court determined the method enacted by the legislature was unconstitutional but stopped short of advising the legislature on how to align the financing system with the constitutional mandates of adequacy and equity. This hesitancy to direct the legislature on budgeting matters was consistent with the Kansas Supreme Court’s tradition of granting “broad deference to the legislature.”⁹⁴ However, this type of “binding advisory opinion,” which strikes down the education financing scheme on adequate or equity grounds, often leads to a back-and-forth between the courts and legislatures.⁹⁵ For example, the *Montoy* litigation was an unrelenting back-and-forth between the judicial system and the Kansas Legislature.⁹⁶ Arguably, this process of education finance reform may not result in the most efficient method to addressing inadequate and inequitable educational financing because it requires years of trial and error legislating coupled with costly legal proceedings. Furthermore, budgeting crises have continued to plague Kansas, and the governor recently responded in January 2015 by cutting funding for public schools and higher education by \$44.5 million dollars.⁹⁷ Further compounding the problem, as of February 2015, the State had yet to

92. William E. Thro, Note, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1653–55 (1989). The New Jersey Supreme Court relied on a state education clause mandating “thorough and efficient system of free public schools for the instruction of all the children in the State.” *Id.* (citing N.J. CONST. art. VIII, § 4, para. 1); see also Heise, *supra* note 87, at 1159–60. Alternatively, some states have previously relied on equal protection clauses in their state constitutions to address and correct inequality in education. Buzuvis, *supra* note 89, at 652. These states include: Wyoming, Connecticut, Arkansas, Alabama, North Dakota, and Vermont. *Id.*

93. *Gannon v. State*, 319 P.3d 1196, 1233 (Kan. 2014).

94. See Berger, *supra* note 2, at 39 (acknowledging the judicial system’s reluctance to interject in matters of enormous practical and political complexity, such as expenditures of public funds for education).

95. George D. Brown, *Binding Advisory Opinions: A Federal Courts Perspective on the State School Finance Decisions*, 35 B.C. L. REV. 543, 545–46 (1994).

96. Darby & Levy, *supra* note 85, at 364–65 (referring to the *Montoy* litigation as a long-fought battle comprised of a “firestorm of controversy” and “tense moments”).

97. John Eligon, *Education is the Newest Target of Kansas Budget Cuts*, N.Y. TIMES (Feb. 11, 2015), http://www.nytimes.com/2015/02/12/us/politics/education-is-newest-target-of-kansas-budget-cuts.html?_r=1.

pay capital expenses required under the school funding formula.⁹⁸ As Kansas continues to attempt to reconcile budget deficits, school financing will remain vulnerable to continued litigation.⁹⁹ This neglect leads to students suffering, while politicians and courts embark on a lengthy battle between constitutionality and practicality.

B. The Kansas Constitution Contains an Adequacy Standard

In accordance with other states, the court correctly determined that the *Rose* standards are the minimum standards for educational adequacy.¹⁰⁰ Under an adequacy approach, the goal is to simply combat an absolute deprivation of the constitutionally mandated educational requirements.¹⁰¹ Thus, once a threshold level of capacities and resources is reached, the court should forego analyzing the disparities in educational resources and opportunities amongst the districts.¹⁰² An adequacy approach to school finance is simpler because the effort is to define minimum standards and requires less “logistical, theoretical, and political difficulties.”¹⁰³ Furthermore, adequacy considerations cohere with the educational standards movement, which identifies, develops, and implements educational standards.¹⁰⁴ Under the *Rose* education standards, adequacy includes identifying “specific, though abstract, capacities and skills that all children should receive from public education to serve both the state’s and the students’ individual interests and then order the legislature to provide the resources that would permit children to obtain those capacities and resources.”¹⁰⁵ Other courts have emulated this type of adequacy consideration and determined that this analysis focuses substantially on the personal development of each student.¹⁰⁶ The *Rose* factors provide the legislature

98. *Id.*

99. The fundamental problem with a non-adjudicative model is the danger for political regression caused by the legislature-eroding progress in financing. See Berger, *supra* note 2, at 44.

100. See *supra* Section IV.A.

101. Darby & Levy, *supra* note 85, at 366.

102. See *id.* But see, e.g., *Abbott v. Burke*, 575 A.2d 359, 408–10 (N.J. 1990) (acknowledging special needs students may need additional funds to meet the constitutional adequacy standards).

103. Heise, *supra* note 87, at 1175.

104. *Id.* at 1175–76.

105. William S. Koski & Rob Reich, *When “Adequate” Isn’t: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 562–63 (2006).

106. See *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 212 (Ky. 1989) (laying out seven “capacities” necessary for an adequate education); *McDuffy v. Sec’y of Educ.*, 615 N.E.2d 516, 554–55 (Mass. 1993); *Hoke Cty. Bd. of Educ. v. State*, 599 S.E.2d 365, 381 (N.C. 2004); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1359 (N.H. 1997);

with guidance, but cease prior to judicial advocacy.¹⁰⁷ This grants the legislature flexibility to design programs that meet these standards while also permitting them to consider the capabilities and resources of the State and districts. The Kansas legislature relied on the Kentucky standards, which were articulated in *Rose*, as a “starting point” for constructing the language of the SDFQPA.¹⁰⁸ In *Rose*, the Supreme Court of Kentucky held that the Kentucky Constitution required the establishment of common schools that provided an adequate education for all children.¹⁰⁹ Furthermore, the *Rose* definition of adequacy was similar to the goals that had been enunciated by the Kansas legislature for Kansas’s schools.¹¹⁰ The court’s decision aligned itself with the Kentucky Supreme Court, but ultimately the court unerringly remanded the issue for the panel to conduct further investigation.¹¹¹ On remand, the three-judge panel determined the public education financing system was not reasonably calculated to meet or exceed the *Rose* factors.¹¹² The panel issued a declaratory judgment, but did not include specific instructions on how to remedy the inadequacy.¹¹³ Rather, the panel concluded the case should not be dismissed until the panel decided the legislature made “appropriate and necessary judgments” to adequately fund K–12 public schools.¹¹⁴ Like the drawn-out battle in the *Montoy* cases, it should be expected that Kansas’s educational financing for K–12 public schools will remain in the crosshairs of the duel between the judiciary and the legislature.

Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 333 (N.Y. 2003); Abbeville Cty. Sch. Dist. v. State, 515 S.E.2d 535, 541–42 (S.C. 1999).

107. Amy L. Moore, *When Enough Isn’t Enough: Qualitative and Quantitative Assessments of Adequate Education in State Constitutions by State Supreme Courts*, 41 U. TOL. L. REV. 545, 567–68 (2010).

108. See Berger, *supra* note 2, at 31. Kansas also included more provisions, such as staff professional development and instructional leadership. *Id.*

109. *Rose*, 790 S.W.2d at 211; see also KY. CONST. § 183 (“The General Assembly shall . . . provide for an efficient system of common schools . . .”).

110. Compare KAN. STAT. ANN. § 72-1127(c) (2015) (borrowing significant organization and language from *Rose*), with *Rose*, 790 S.W.2d at 212.

111. Gannon v. State, 319 P.3d 1196, 1251–52 (Kan. 2014).

112. KAN. LEGISLATIVE RESEARCH DEP’T, THREE-JUDGE PANEL DECISION ON ADEQUACY IN GANNON V. STATE ON REMAND FROM THE KANSAS COURT 1 (2014), <http://www.usd378.org/DocumentCenter/Home/View/6788>.

113. *Id.*

114. *Id.* It was estimated that the legislature would spend approximately \$515 million to comply with the original 2013 order by the panel. *School Finance Case: Gannon v. Kansas*, LJWORLD.COM, <http://www2.ljworld.com/schoolfinance/> (last visited Oct. 12, 2016).

C. *The Kansas Constitution Contains an Equity Standard*

Equity litigation represents the second wave of litigation and has had varied levels of success throughout the states.¹¹⁵ The litigation results varied between states mostly because constitutional equity provisions differed in the states—although the language was somewhat similar.¹¹⁶ Additionally, equity litigation makes it difficult to distinguish school finance from other areas of education, such as school buildings and curricula.¹¹⁷ Therefore, equity experienced numerous practical problems that encouraged litigants to look to other theories to base their rationales.¹¹⁸ Despite the challenges promulgated from an equity analysis, the court upheld the plaintiffs' equity argument in *Gannon*.¹¹⁹

The inequitable nature of educational funding resides in the reliance on local property taxes for financing.¹²⁰ In Kansas, the school district capital outlay state aid fund allows levying districts with lower property wealth to qualify for additional funds in order to eliminate wealth-based disparities.¹²¹ Therefore, the lack of payment towards these funds created wealth-based disparities and rendered any attempt by a wealthy district to levy property taxes for capital outlay unconstitutional because the fund would not subsidize the differences

115. See *Shoftstall v. Hollins*, 515 P.2d 590, 591–92 (Ariz. 1973) (noting the disparities created by the financing system based on district's wealth were constitutional); *Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1005, 1011 (Colo. 1982) (limiting financing based on district's tax base was constitutional); *Thompson v. Engelking*, 537 P.2d 635, 636 (Idaho 1975) (finding a finance system that relied on disparate taxes constitutional); *Robinson v. Cahill*, 303 A.2d 273, 295 (N.J. 1973) (explaining that the per-pupil spending disparities did not meet the state constitution's "thorough and efficient" requirement).

116. In *Robinson*, the New Jersey Supreme Court considered the language "thorough and efficient," and found the legislature's actions unconstitutional. 303 A.2d at 285, 295 (citing N.J. CONST. art. VIII, § 4, para. 1). However, in *Olsen v. State*, the Oregon Supreme Court considered the language "uniform and general" and found the per-pupil spending disparities constitutional. 554 P.2d 139, 140, 149 (Or. 1976); cf. Richard E. Levy, *Gunfight at the K-12 Corral: Legislative vs. Judicial Power in the Kansas School Finance Litigation*, 54 U. KAN. L. REV. 1021, 1030–31 (2006) (estimating that plaintiffs in second-wave cases "were successful only about one-third of the time," but noting these cases "encouraged plaintiffs in other states to challenge their systems of school finance").

117. Heise, *supra* note 87, at 1162. Additionally, "[a]ttempting to equalize funding across districts did not directly address the educational needs of disadvantaged students, who entered the schoolhouse door already on unequal footing." Joshua E. Weishart, *Transcending Equality Versus Adequacy*, 66 STAN. L. REV. 477, 503 (2014).

118. Weishart, *supra* note 117, at 503.

119. *Gannon v. State*, 319 P.3d 1196, 1204 (Kan. 2014).

120. Michael A. Rebell, *Safeguarding the Right to a Sound Basic Education in Times of Fiscal Constraint*, 75 ALB. L. REV. 1855, 1868 (2012).

121. *Gannon*, 319 P.3d at 1240.

between the districts.¹²² Naturally, some districts will be wealthier—specifically, more property-rich—than other districts, and this will generate discrepancies in how much revenue each district can generate.¹²³ The equity theory focuses on closing these per-pupil spending gaps in education.¹²⁴ If these gaps are not closed, then it is probable students in less-wealthy districts will receive an unequal education to those in wealthier districts because funding will vary demonstrably. The court determined the test for equity was that “[s]chool districts must have reasonably equal access to substantially similar educational opportunity through similar tax effort,” but “equity need not meet precise equality standards.”¹²⁵ The decision by the Kansas Supreme Court was supported by, and similar to, another series of school finance litigation from Texas. In *Edgewood Independent School District v. Kirby*, the Texas Supreme Court grappled with a finance plan that had school districts¹²⁶ provide 50% of the total education cost, but there were “glaring disparities” in the abilities of the districts to raise property taxes because the taxable property varied greatly amongst the districts.¹²⁷ The court concluded that “[c]hildren who live in poor districts and children who live in rich districts must be afforded a substantially equal opportunity to have access to educational funds . . . for a general diffusion of knowledge statewide.”¹²⁸ “The underlying message of *Edgewood I* was that a district’s resources should reflect that district’s tax effort, not that district’s property wealth.”¹²⁹

Districts—and the students that reside in those districts—should not receive punishment for collecting less in taxes because the district is indiscriminately located in areas of less property wealth. *Edgewood I*

122. *Id.* at 1241.

123. Heise, *supra* note 87, at 1151–52.

124. Michael Heise, *Equal Education Opportunity Hollow Victories, and the Demise of School Finance Equity Theory: An Empirical Perspective and Alternative Explanation*, 32 GA. L. REV. 543, 577 (1998).

125. *Gannon*, 319 P.3d at 1239.

126. The *Edgewood* plaintiffs chose to present an equity case to the court because the 700-to-1 ratio of property wealth between the richest and poorest districts lent itself to an equity suit. 777 S.W.2d 391, 392 (Tex. 1989). The plaintiffs also acknowledged this case had adequacy arguments as well, but chose not to litigate those claims. J. Steven Farr & Mark Trachtenberg, *The Edgewood Drama: An Epic Quest for Education Equity*, 17 YALE L. & POLY REV. 607, 644–45 (1999).

127. *Edgewood I*, 777 S.W.2d at 392 (finding less wealthy districts were taxing higher to make up for the decreased amount of taxable property).

128. *Id.* at 397.

129. Farr & Trachtenberg, *supra* note 126, at 638; see *Edgewood I*, 777 S.W.2d at 399 (deeming the school finance system unconstitutional but not instructing the legislature as to the specifics of the appropriate legislation to correct the unconstitutionality).

forced the Texas legislature to reinvent the education finance system, but the court offered minimal guidance on how to do so; this eventually led to an injunction closing Texas schools until a corrective plan was determined.¹³⁰ Within a year-and-a-half of the passage of a new plan, districts were back in the Texas Supreme Court challenging unequal enrichment of educational funding.¹³¹ Likewise, because the Kansas Supreme Court failed to mandate specific instructions for the Kansas legislature to follow while addressing the constitutionality of the law, this issue will most likely remain in flux and spark strife between the judiciary and the legislature.¹³² This type of judicial action and responsive legislating appears to be the only way to preserve and respect the justiciability doctrine.¹³³ Nationally, however, public school students, especially those in less-wealthy districts, will continue to suffer from inequity in education financing.¹³⁴ Although both these cases have resulted and will continue to result in prolonged and tedious litigation, both cases rightly stand for the idea that children in areas of less property wealth should receive an equal education—free from glaring disparities when compared to other peers throughout the state.¹³⁵

130. Farr & Trachtenberg, *supra* note 126, at 638; see *Edgewood I*, 777 S.W.2d at 399 (noting that the closure of the school system occurred in June and, therefore, students were mostly unaffected by the injunction).

131. See *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491, 495 (Tex. 1991); Farr & Trachtenberg, *supra* note 126, at 650.

132. Additionally, the court found the wealth-based disparities created by prorating and reducing all supplemental general state aid were unconstitutional because the panel made several findings of fact that the State had failed to show a cost-based justification for its actions. *Gannon v. State*, 319 P.3d 1196, 1244–46 (Kan. 2014).

133. In February 2016, the Kansas Supreme Court ruled the State's new funding law did not meet equitability standards, but yet again gave the legislature another chance to try to create a lawful system. Abigail Beckman, *KS Supreme Court Rules State Has Not Funded Education Equitably*, KMUW (Feb. 11, 2016), <http://kmuw.org/post/ks-supreme-court-rules-state-has-not-funded-education-equitably>. If there is not a lawful policy by June 30, 2016, the schools in Kansas would cease to operate. *Id.* Again, the only persons truly punished in this unending back and forth would be the students of Kansas, who lack equitable education.

134. Emma Brown, *In 23 States, Richer School Districts Get More Funding than Poorer Districts*, WASH. POST (Mar. 12, 2015), <https://www.washingtonpost.com/news/local/wp/2015/03/12/in-23-states-richer-school-districts-get-more-local-funding-than-poorer-districts/> (finding that in twenty-three states, richer students receive more local funding than the students in poor districts—notably, Kansas is not one of those states).

135. *School Spending Increases Linked to Better Outcomes for Students*, PHENND (June 9, 2014), <http://phennd.org/update/school-spending-increases-linked-to-better-outcomes-for-poor-students/> (finding “that in districts that substantially increased education spending as the result of court orders, low-income children were significantly more likely to graduate from high school, earn livable wages, and avoid poverty in adulthood” (citing C. Kirabo Jackson et al., *The Effect of School Finance Reforms on the*

IV. CONCLUSION

In *Gannon*, the Kansas Supreme Court held the Kansas Constitution required the legislature to implement an educational financing system that was adequate and equitable. The court's decision was firmly in line with similar decisions in Kentucky and Texas. Furthermore, the court followed long-held Kansas legal precedent by refusing to mandate a system for the legislature to follow to enact laws in accordance with the constitutional requirements set forth in article VI of the Kansas Constitution. It is unclear when this education finance turmoil will end in Kansas, but educators, students, parents and guardians, the judiciary, and the legislature should prepare themselves for an unremitting struggle for adequate and equitable education in K-12 public schools.