



**A NEVER-ENDING BATTLE OVER HOW TO FUND KANSAS STATE PUBLIC SCHOOLS. *GANNON V. STATE*, 402 P.3D 513 (KAN. 2017).**

*Wade L. Dickey\**

TABLE OF CONTENTS

I. INTRODUCTION ..... 1045

II. BACKGROUND ..... 1046

    A. *Historical Background of Education Finance in Kansas* . 1046

    B. *Procedural Background* ..... 1050

III. STATEMENT OF THE CASE ..... 1051

IV. THE MAJORITY’S REASONING ..... 1052

    A. *Majority’s Adequacy Analysis*..... 1052

    B. *Majority’s Equity Analysis*..... 1054

V. SUBSEQUENT HISTORY ..... 1056

VI. AUTHOR’S ANALYSIS ..... 1059

    A. *Kansas Supreme Court’s Role in the Checks and Balance System* ..... 1060

    B. *Adequacy and Equity Determinations* ..... 1062

    C. *Finally a Potential Resolution*..... 1064

VII. CONCLUSION ..... 1066

I. INTRODUCTION

In *Gannon v. State (Gannon V)*<sup>1</sup>, the Kansas Supreme Court asserted itself in the political minefield of educational finance in the state of Kansas.<sup>2</sup> The Kansas Supreme Court perceived its duty, as the highest

\* Rutgers University School of Law, J.D. candidate May 2020.

1. 402 P.3d 513 (Kan. 2017).

2. See Hunter Woodall & Katy Bergan, *Kansas Supreme Court Rules New School Finance Formula is Unconstitutional*, KAN. CITY STAR: GOV’T & POL. (Oct. 2, 2017, 2:21 PM), <https://www.kansascity.com/news/politics-government/article176606731.html>. *Gannon v. State* had developed over the course of four prior cases before the court. See generally *Gannon v. State (Gannon I)*, 319 P.3d 1196 (Kan. 2014); *Gannon v. State (Gannon II)*, 368 P.3d 1024 (Kan. 2016); *Gannon v. State (Gannon III)*, 372 P.3d 1181 (Kan. 2016); *Gannon v. State (Gannon IV)*, 390 P.3d 461 (Kan. 2017).

court in the state, to determine whether the legislature realized its constitutional obligation to Kansas students.<sup>3</sup> The checks and balances system in Kansas guided the supreme court in deciding whether the legislature's new statute provided suitable funding for education and whether the state had created unconstitutional, wealth-based disparities among districts.<sup>4</sup> The court applied the adequacy and equity standards embedded in article VI, section 6 of the Kansas Constitution.<sup>5</sup> The court held that Senate Bill 19 was unconstitutional under both the equity and adequacy grounds.<sup>6</sup> The court then ordered the state to enact legislation that would come into compliance with the constitution; it retained jurisdiction over the state's appeal and stayed the issuance of a mandate until June 30, 2018.<sup>7</sup> This Comment will analyze *Gannon V* in detail. The analysis will include: the pertinent facts, the procedural history of the ongoing stalemate, the court's holding and reasoning, subsequent history, and the potential impact of the decision on educational finance litigation as well as the checks and balances system in Kansas.

## II. BACKGROUND

### A. *Historical Background of Education Finance in Kansas*

School financing is a power placed solely in the hands of state governments.<sup>8</sup> Nearly every state has amended its constitution to include a finance provision for public education<sup>9</sup> and seen ample litigation challenging its legislature's efforts to effectuate these provisions.<sup>10</sup> Kansas's school financing system is guided by article VI, section 6 of the Kansas Constitution.<sup>11</sup> Article VI, section 6 imposes a duty on the

---

3. See *Gannon V*, 402 P.3d at 536 (citing *Gannon I*, 319 P.3d at 1196).

4. *Id.*

5. *Id.* at 518; KAN. CONST. art. VI, § 6(b) (imposing a duty on the legislature to "make suitable provision for finance of the educational interests of the state.").

6. *Gannon V*, 402 P.3d at 518.

7. *Id.* at 553–54.

8. The Supreme Court of the United States held that school financing and equality is not a right guaranteed by the United States Constitution. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 44, 54–55 (1973). Notably, the Court addressed federalism dangers associated with the federal government stepping into the realm of regulating state educational funding. *Id.*; see also Jeffery Sutton, *San Antonio Independent School District v. Rodriguez and its Aftermath*, 94 VA. L. REV. 1963, 1969–70, 1977 (2008).

9. See Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1158 n.64 (1995) (listing the school finance provisions in each state constitution).

10. See generally ROBERT F. WILLIAMS & LAWRENCE FRIEDMAN, *STATE CONSTITUTIONAL LAW: CASES AND MATERIALS* 1009–48 (5th ed. 2015).

11. KAN. CONST. art. VI, § 6.

## 2020] FUNDING KANSAS STATE PUBLIC SCHOOLS 1047

legislature to “make suitable provision for finance of the educational interests of the State.”<sup>12</sup> The Kansas courts have interpreted article VI, section 6 to contain requirements of adequacy and equitability.<sup>13</sup> And the court has taken up the role of determining whether these school finance statutes are constitutional.<sup>14</sup>

The adequacy and equity requirements are the two battlegrounds where the school districts and the State have fought the war of constitutionality in school financing cases. The court honed two tests to determine whether the statute meets the requirements for adequacy and equity.<sup>15</sup>

First, the court created a threshold determination for determining whether the statute was adequate under article VI, section 6(b). The court explained that: “[a]rticle 6, § 6(b) contained minimum standards of adequacy which are met when the 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 the standards set out in *Rose*.”<sup>16</sup> The *Rose* court held that:

[A]... system of education must have as its goal to provide each and every child with at least the seven following 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)

---

12. *Id.*

13. See Michael Heise, *Schoolhouses, Courthouses, and Statehouses: Education Finance, Constitutional Structure, and the Separation of Powers Doctrine*, 33 LAND & WATER L. REV. 281, 291–93 (1998); Alexandra Rose, *For the Kids: A Place for Equity in Kansas School Finance Litigation*, 63 U. KAN. L. REV. 1205, 1215–18 (2015); Katherine Daniel, Comment, *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), 68 RUTGERS U. L. REV. 1603, 1603 (2016).

14. The court states: “the constitutionality of the various configurations ultimately created by the legislature that express or promote that policy is a question solely for this court.” *Gannon V*, 402 P.3d 513, 536 (Kan. 2017). “[O]ur Kansas Constitution clearly leaves to the legislature the myriad of choices available to perform its constitutional duty; but when the question becomes whether the legislature has actually performed its duty, that most basic question is left to the courts to answer under our system of checks and balances.” *Id.* (quoting *Gannon I*, 319 P.3d 1196, 1226 (Kan. 2014)).

15. See *Id.* at 518.

16. *Gannon V*, 402 P.3d at 524 (citing *Gannon I*, 319 P.3d at 1196).

sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.<sup>17</sup>

The *Rose* test has since been codified by the legislature.<sup>18</sup> The state had the burden of showing that its legislation complied with the adequacy requirements identified in *Gannon IV*.<sup>19</sup>

Second, the court articulated a test for measuring equity under article VI which requires that “[s]chool districts must have reasonably equal access to substantially similar educational opportunity through similar tax effort.”<sup>20</sup> The equity test is not a fixed or precise standard; the court stated it was not measured under a “zero-tolerance test or other mathematically precise standard.”<sup>21</sup> Like the adequacy test, the burden to show that the statute is equitable is on the state.<sup>22</sup> The state “[bore] the burden of establishing such compliance and explaining its rationales for the choices made to achieve it.”<sup>23</sup>

The Kansas Legislature has enacted three relevant statutes over the past two decades: the School District Finance and Quality Performance Act (“SDFQPA”),<sup>24</sup> the Classroom Learning Assuring Student Success Act (“CLASS”),<sup>25</sup> and Senate Bill 19—in particular, the Kansas School

---

17. *Id.* (quoting *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989)).

18. KAN. STAT. ANN. § 72-3218(c) (2014) (originally enacted as § 72-1127).

19. *Gannon V*, 402 P.3d at 523 (citations omitted).

20. *Id.* at 540 (“[E]quity [is] not necessarily the equivalent of equality.”) (quoting *Gannon II*, 368 P.3d 1024, 1043 (Kan. 2016)).

21. *Id.* (quoting *Gannon II*, 368 P.3d 1024, 1043 (Kan. 2016)). The court was differentiating the equity requirement from the equal protection clause argument, which it rejected in *Gannon I*. See *Gannon I*, 319 P.3d at 1215. See generally Heise, *supra* note 9, at 1154–57 (discussing the evolution and dissolution of the equal protection clause in school finance litigation).

22. *Gannon V*, 402 P.3d at 540 (“So the State bears the burden to establish S.B. 19’s constitutionality in all respects, and no presumption of constitutionality attaches to this remedial legislation.”).

23. *Id.* at 523.

24. School District Finance and Quality Performance Act, ch. 197, 2006 Kan. Sess. Laws 1457, *invalidated by Gannon I*, 319 P.3d 1196 (Kan. 2014), *repealed by* ch. 4, 2015 Kan. Sess. Laws 131.

25. Classroom Learning Assuring Student Success Act (CLASS), ch. 4, 2015 Kan. Sess. Laws 34, *invalidated by Gannon IV*, 390 P.3d 461 (Kan. 2017), *repealed by* ch. 57, 2018 Kan. Sess. Laws 364.

## 2020] FUNDING KANSAS STATE PUBLIC SCHOOLS 1049

Equity and Enhancement Act (“KSEEA”).<sup>26</sup> Senate Bill 19, the statute at issue in *Gannon V*, was drafted in the image of SDFQPA.<sup>27</sup> SDFQPA, the predecessor of CLASS and Senate Bill 19, established a funding formula and mechanism for school districts. This formula created a “base state aid per pupil” (“BSAPP”), which was a relatively fixed amount of funding per student.<sup>28</sup> Funds for the BSAPP were raised from two sources: local effort and state financial aid.<sup>29</sup> Local effort consisted of property taxes fund from a statutorily required mill levy.<sup>30</sup> Each district collected a wide variety of funding from the mill levy due to the variety of property values across the state.<sup>31</sup> In an effort to bridge that gap, the state provided additional funds to less wealthy districts through state financial aid.<sup>32</sup> The statute allowed for school districts to access additional funds in multiple ways. First, the district could impose an additional mill levy on its district to fund a local option budget (“LOB”), but this amount was capped at the amount of the district’s state financial aid.<sup>33</sup> To maintain equality, the less wealthy districts could apply for supplemental general state aid.<sup>34</sup> Second, a local board could impose an additional levy in its district to fund capital outlay expenses.<sup>35</sup> The less wealthy districts could also receive from the state, “school district capital outlay state aid.”<sup>36</sup> This structure was modified by the legislation in response to the holdings by the Kansas Supreme Court in *Montoy v. State*.<sup>37</sup> But SDFQPA’s overall

---

26. S.B. 19, 2017 Leg., 95th Sess. (Kan. 2017), *invalidated by Gannon V*, 402 P.3d 513 (Kan. 2017).

27. *Gannon V*, 402 P.3d at 521–22 (“The centerpiece of S.B. 19 is the new Kansas School Equity and Enhancement Act (KSEEA) . . . . The KSEEA contains the same basic finance formula and revenue streams as the SDFQPA.”).

28. *Id.* at 519. This number was relatively fixed because it was adjusted for students that are special needs, bilingual, or at-risk and others. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* These funds have a lower equalization point than the 100 percent equalization point provided for BSAPP. *Id.* at 544.

35. *Id.*

36. *Id.* at 519. Capital outlay funds have a lower equalization point than even the LOB funds. *Id.* at 545.

37. The Kansas Supreme Court had held that funding provided by SDFQPA was inadequate. *Montoy v. State (Montoy II)*, 120 P.3d 306, 310 (Kan. 2005) (per curiam); *Montoy v. State (Montoy III)*, 112 P.3d 923, 937 (Kan. 2005) (per curiam); *Montoy v. State (Montoy IV)*, 138 P.3d 755, 764 (Kan. 2006) (per curiam). This series of decisions followed an initial remand for the district court to consider plaintiffs’ concerns. *Montoy v. State (Montoy I)*, 62 P.3d 228, 235 (Kan. 2003).

system was the basis for Senate Bill 19's basic finance formula and relevance streams.<sup>38</sup>

*B. Procedural Background*

In *Montoy IV*, the court held that the State's school financing plan was constitutional, but mistakenly assumed the State would follow the school financing plan.<sup>39</sup> Almost three years after *Montoy IV* was dismissed, the State began to make cuts to educational financing due to the economic recession.<sup>40</sup> In response to the funding cuts, the plaintiffs in this case filed a suit in 2010.<sup>41</sup> In *Gannon v. State*, the district court held that the legislature underfunded K–12 public schools between fiscal years 2009–12 and violated the equity requirement.<sup>42</sup> On appeal, the supreme court affirmed in part, holding that the law was inequitable.<sup>43</sup> Additionally, the court remanded the adequacy issue to the lower court and instructed the panel to make the adequacy determination using the *Rose*-based test.<sup>44</sup>

The legislature enacted CLASS in 2015 as a direct response to the court's directives.<sup>45</sup> Plaintiffs again appealed to the supreme court, contesting the legislation on equity and adequacy grounds.<sup>46</sup> The court later addressed the equity issue, and after multiple opinions and orders, the legislature and the court were able to cure the constitutional inequities.<sup>47</sup> About a year later, the court addressed the remaining issue of inadequacies and held that CLASS's educational financing system was inadequate in structure and implementation.<sup>48</sup>

The legislature then went back to the drawing board and drafted and passed Senate Bill 19.<sup>49</sup> Senate Bill 19 "include[d] appropriations, several revenue raising features, and a formula for distributing money."<sup>50</sup> The focal point of Senate Bill 19 was the KSEEA, which established an

---

38. *Gannon V*, 402 P.3d at 522.

39. See *Gannon v. State (Gannon VII)*, 443 P.3d 294, 296 (Kan. 2019) (per curiam).

40. See *id.* at 520.

41. *Id.* at 517.

42. *Gannon V*, 402 P.3d at 521; *Gannon v. State*, No. 10C1569, 2013 WL 146092, at \*82 (Kan. Dist. Ct. Jan. 10, 2013).

43. *Gannon I*, 319 P.3d 1196, 1204, 1243 (Kan. 2014) (holding that that state law created wealth-based disparities by eliminating all capital outlay aid payments).

44. *Id.* at 1237–38. The test itself was derived from *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989).

45. *Gannon V*, 402 P.3d at 521.

46. *Id.* at 518.

47. *Gannon v. State*, No. 113,267, 2016 Kan. LEXIS 314, at \*1–2 (Kan. June 28, 2016).

48. *Gannon IV*, 390 P.3d 461, 468–69 (Kan. 2017).

49. *Gannon V*, 402 P.3d at 521.

50. *Id.*

## 2020] FUNDING KANSAS STATE PUBLIC SCHOOLS 1051

education funding formula for the school districts in the state.<sup>51</sup> Senate Bill 19 also amended certain statutes, but most importantly, it amended the capital outlay provisions.<sup>52</sup>

## III. STATEMENT OF THE CASE

At issue in *Gannon V* was the constitutionality of Senate Bill 19, a state law enacted by the legislature creating a system for school financing. The plaintiffs in this case were the school districts in Kansas that lost funding due to reductions in base state aid per pupil.<sup>53</sup> Plaintiffs asserted that Senate Bill 19, the successor of CLASS, failed to meet the adequacy and equity requirement in article VI, section 6 of the Kansas Constitution.<sup>54</sup>

Plaintiffs' adequacy argument included two general points. First, the plaintiffs asserted that Senate Bill 19's structure was unconstitutional because future legislative bodies might refuse to raise the "base aid for student excellence" ("BASE aid") amount to calculate for inflation.<sup>55</sup> Additionally, plaintiffs argued that the legislature did not appropriate full funding to statutory entitlements.<sup>56</sup> Second, plaintiffs claimed that Senate Bill 19's implementation did not meet the adequacy requirements because the State failed to "show[] its work" to demonstrate the adequacy of the overall funding.<sup>57</sup> Moreover, plaintiffs argued that the state did not properly address the at-risk funding provisions' inadequacies.<sup>58</sup>

Plaintiffs' equity concerns were four-fold in this case. Plaintiffs claimed that the state failed to meet its burden necessary for Senate Bill 19 to satisfy the equity requirement.<sup>59</sup> Plaintiffs asserted that Senate Bill 19 failed to address inequalities, and even created some by:

- Expanding the purposes for which capital outlay funds may be used;
- Reinstating a protest petition and election process relating to efforts to increase a school district's LOB authority;

---

51. *Id.* at 521–22. "[KSEEA] utilize[d] a funding system in which some of the money used to fund basic operating expenses come from the 'total foundation aid' calculation." *Id.* at 522.

52. *Id.* at 521–22.

53. *Id.* at 521.

54. *Id.* at 522, 540.

55. *Id.* at 522, 524. BASE aid is a "fixed amount of funding per student." *Id.*

56. *Id.* at 524–25. The three statutory entitlements were: "(1) special education aid, (2) the professional development program, and (3) the mentor teacher program." *Id.*

57. *Id.* at 525.

58. *Id.* at 524–25.

59. *Id.* at 540.

- Basing the LOB equalization formula on each preceding year's LOB rather than the current year's; and
- Allowing some districts to receive at-risk funding for 10% of their enrollment even if that number exceeds the number of students actually meeting the criteria for such funding that applies to all other districts.<sup>60</sup>

The supreme court dove into each issue methodically, assessing the merits of both the state and the plaintiffs' points. The court particularly scrutinized the state's arguments because the state, not the plaintiffs, was required to meet its burden of showing that Senate Bill 19 complied with *Gannon IV's* adequate and equitable findings.<sup>61</sup> Ultimately, the Kansas Supreme Court held that the state failed to meet its burden because it did not show that Senate Bill 19 met the constitutional standard of equity and adequacy.<sup>62</sup>

#### IV. THE MAJORITY'S REASONING

##### A. *Majority's Adequacy Analysis*

In *Gannon V*, the court applied a bifurcated standard of review.<sup>63</sup> Therefore, "[i]nsofar as any of the panel's factual findings [were] in dispute, the court applie[d] a substantial competent evidence standard."<sup>64</sup> However, the court was unlimited in its review of the panel's conclusions of law.<sup>65</sup>

The *Gannon V* court first addressed and rejected the plaintiffs' arguments pertaining to the adequacy of Senate Bill 19's structure. First, the *Gannon V* court rejected the plaintiffs' concerns that BASE funding will not be calculated in accordance with inflation by future legislative bodies.<sup>66</sup> The court rejected this argument because it relied too heavily on assumptions and contingencies.<sup>67</sup> The court would not deem Senate Bill 19 unsound based on something that could only possibly come to fruition, no matter how likely.<sup>68</sup>

---

60. *Id.*

61. *Id.*

62. *Id.* at 550–52.

63. *Id.* at 523.

64. *Id.* ("Substantial evidence is such legal and relevant evidence as a reasonable person might accept as sufficient to support a conclusion.")

65. *Id.*

66. *Id.* at 524.

67. *Id.*

68. *Id.* Offhandedly, the *Gannon V* court acknowledged that past occurrences created a strong possibility that the legislature would fail to factor in an inflation adjustment factor when allocating funds if state revenue fell short. *Id.* ("Recent history lends some credence



## 2020] FUNDING KANSAS STATE PUBLIC SCHOOLS 1053

Second, the *Gannon V* court denied the plaintiffs' structural inadequacy argument that the legislation's failure to appropriate full funding to three statutory entitlements made Senate Bill 19 structurally unsound.<sup>69</sup> Out of the three statutory entitlements, the court only looked more in-depth at the special education fund.<sup>70</sup> The court reasoned that the special education provision in Senate Bill 19 did not implicate the adequacy of the structure because the plain language did not limit funding to the amount actually appropriated.<sup>71</sup> The *Gannon V* court deflected the argument that reductions to this funding could cannibalize other funding to cover the state and federal special education requirements.<sup>72</sup> The court concluded that structure of Senate Bill 19 was not made inadequate by the underfunding of special education aid.<sup>73</sup>

Next, the *Gannon V* court held that Senate Bill 19 was inadequate because the state failed to demonstrate that Senate Bill 19's implementation met the adequacy requirements of the Kansas Constitution.<sup>74</sup> The court reasoned that the state did not meet the adequacy requirement because it failed to "show[] its work."<sup>75</sup> The state left holes in its mathematical reasoning for certain determinations in the formula that dictated overall funding to every school district.<sup>76</sup> The lack of specificities undermined the persuasive value of the state's school funding system in Senate Bill 19.<sup>77</sup> It was also noted that the state wrongfully measured the success of students by determining whether the school districts "exceed[ed] their expected performances by the greatest levels;" the court asserted that the standard for success should have been

---

to plaintiffs' arguments"). But the court still rejected the argument because there was too much uncertainty and too many contingencies at its foundation. *Id.*

69. *Id.* at 524–25.

70. *Id.* at 525. The *Gannon V* court rejected the arguments regarding structural underfunding of the professional development program and the mentor teacher program because they held that neither statute guaranteed their funding and the statutes do not relate to structure. *Id.*

71. *Id.*

72. *Id.* The *Gannon V* court deflected the plaintiffs' argument and rejected its analogy to the prorated appropriations of supplemental general state aid which the court had previously deemed unconstitutional, instead redirecting this argument to the issue of whether overall funding was adequate. *See id.*

73. *Id.*

74. *Id.*

75. *Id.* The court previously stated in prior bouts between the two parties that the state would help its cause if it "show[ed] its work." *Id.* The court wanted the state to "show[] its work" in how the statute came into compliance with any of the issues the court raised in *Gannon IV*. *Id.* at 525 (citing *Gannon III*, 372 P.3d 1181, 1188 (Kan. 2016)).

76. The *Gannon V* court pointed out that "the State does not identify the performance results it used from any of the districts . . . . Nor does it identify the year, or years, from which its data was taken—or the sources." *Id.* at 526.

77. *Id.* at 527.

measured by students' high test performances.<sup>78</sup> Given these faults, the state failed to establish a valid figure through its calculations to establish that Senate Bill 19 was adequate under the *Rose*-based test.<sup>79</sup>

*B. Majority's Equity Analysis*

The *Gannon V* court reasoned that Senate Bill 19 was inequitable because the statute created or exacerbated wealth-based disparities.<sup>80</sup> The court looked into four specific provisions of the school funding bill to make this determination.<sup>81</sup> In assessing the equality of Senate Bill 19's capital outlay provision, the court used its previous holding in *Gannon III* as guidance.<sup>82</sup> The court focused in on its previous holding regarding three differences between the LOBs and capital outlay budgets. The three differences were in flexibility,<sup>83</sup> size,<sup>84</sup> and reliance.<sup>85</sup> Senate Bill 19 implicated these three factors by allowing the expansion of the use and size of capital outlay funds.<sup>86</sup> The *Gannon V* court reasoned that the much lower equalization point for the capital outlay budgets placed less wealthy districts at an extreme disadvantage by expanding the use and size of these generally limited-use funds beyond traditionally educational functions.<sup>87</sup>

Next, the *Gannon V* court held that the protest-petition process in Senate Bill 19 created wealth-based inequalities.<sup>88</sup> The court heavily relied on the findings of fact by the lower court, specifically the finding of a correlation between a district's wealth and its ability to gain voter

---

78. *Id.* at 530. The court essentially reasoned that the state's determination of success was incorrect. The court felt that this skewed the state's calculations and, in effect, impacted the calculations and the adequacy of the school funding system under Senate Bill 19. *Id.*

79. *Id.* at 531.

80. *Id.* at 550–51.

81. *Id.* at 543–44.

82. *Id.* at 543. Exactly as in this case, in *Gannon III* the court dealt with the piece of legislation passed in response to the court's previous holding. *Id.*

83. *Id.* While both funds have intended purposes, the LOBs have a larger range and flexibility of uses. *Id.*

84. *Id.* (quoting *Gannon III*, 372 P.3d 1181, 1192 (Kan. 2016)) (“We specifically observed that statewide the LOB tax rate is ‘much larger and the dollars involved are much greater . . . .’”).

85. *Id.* (quoting *Gannon III*, 372 P.3d at 1192) (“[W]e observed that the overall reliance on LOB funding was much greater. Where some districts did not even levy taxes for capital outlay, ‘districts now are required to rely more heavily on their LOB funds to perform their basic functions.’”).

86. *Id.* at 544.

87. *Id.*

88. *Id.* at 549–50.

## 2020] FUNDING KANSAS STATE PUBLIC SCHOOLS 1055

approval of a board resolution that was certain to raise mill levies.<sup>89</sup> They also used the history of LOB elections to support their holding.<sup>90</sup>

Moreover, the *Gannon V* court analogized Senate Bill 19's election-protest process to a prospective mill levy cap that was struck down on equity grounds in *Montoy III*.<sup>91</sup> Applying the same rationale as in *Montoy III*, the *Gannon V* court found this provision violated article VI on equity grounds.<sup>92</sup>

The *Gannon V* court held that Senate Bill 19's change in the supplemental general state aid calculation formula violated the equity analysis because it used the same formula employed in SDFQPA.<sup>93</sup> The provision at issue was a lookback provision that looked at a school district's LOB percentage from the previous year to calculate supplemental general state aid for the upcoming year.<sup>94</sup> The lookback provision would have allowed the state to avoid adding significant funds to the state supplemental aid.<sup>95</sup> The *Gannon V* court paralleled this lookback provision to the withholding of funds from school district appropriations seen in *Gannon I*.<sup>96</sup> The court applied the legal principles established in *Gannon I* and held that the lookback provision was unconstitutional.<sup>97</sup>

Lastly, the *Gannon V* court held that Senate Bill 19's at-risk funding was inequitable because it adds a floor for the free meals proxy.<sup>98</sup> The court paralleled this issue with *Montoy III*, where a cost-of-living

---

89. *Id.* at 548–49.

90. *Id.*; see also *id.* at 545–47.

91. *Id.* at 549. In *Montoy III*, the legislature removed the cap on capital outlay and later reinstated, but the statute had a grandfather provision for mill levies that exceeded the cap. See *Montoy III*, 112 P.3d 923, 936 (Kan. 2005) (per curiam).

92. *Gannon V*, 402 P.3d at 549.

93. *Id.* at 521. SDFQPA was previously struck down on adequacy grounds and replaced by CLASS, but Senate Bill 19 was reviving the system used by the unconstitutional statute. *Id.*; see *Gannon IV*, 390 P.3d 461, 461 (Kan. 2017). However, the court had earlier held that for a temporary period the constitutional inequities were remedied by the legislative response after *Gannon I*. See *Gannon v. State*, No. 113,267, 2016 Kan. LEXIS 314, at \*2 (Kan. June 28, 2016).

94. *Gannon V*, 402 P.3d at 549.

95. See *id.* (calculating the amount the state avoided putting into state supplemental aid per year because of the lookback provision).

96. *Id.* at 550. In *Gannon I*, the court dealt with an issue where the legislature failed to appropriate any money to equalize capital outlay expenditures. *Id.* The court concluded, “the inequity resulting from the withholding of all the capital outlay equalization funding fails our test, *i.e.*, nonpayment creates—or perhaps returns the qualifying districts to—an unreasonable, wealth-based inequity.” *Id.* (citing *Gannon I*, 319 P.3d 1196, 1196 (Kan. 2014)).

97. *Id.*

98. *Id.* at 551. The *Gannon V* court calculated that only two districts would benefit from this provision because of the ten percent floor. *Id.*

weighting was held unconstitutional.<sup>99</sup> The court found that, like in *Montoy III*, Senate Bill 19's provision violated the equity provision because it is a wealth-based weighting.<sup>100</sup>

The majority held that the court would retain jurisdiction over the state's appeal and stay the issuance of a decision until June 30, 2018 to allow the state legislature to remedy the system's infirmities with the guidance of the court's opinion.<sup>101</sup> Justice Johnson, Justice Biles, and Justice Rosen concurred in part and dissented in part.<sup>102</sup> Justice Johnson agreed with the majority's holding pertaining to the adequacy and equity requirements but disagreed with how long the court afforded the state to enact remedial legislation.<sup>103</sup> Justice Biles also agreed with the holding and reasoning on the unconstitutionality of Senate Bill 19, and that a June 30, 2018 deadline was reasonable to meet the adequacy requirements, but he felt that the court should have required the legislature to remedy the inequitable features immediately so that the features could "be operational during the 2017–18 school year."<sup>104</sup>

#### V. SUBSEQUENT HISTORY

Since the decision reached in *Gannon V*, the Kansas Legislature has made two attempts at remedying both the adequacy and equity infirmities. The legislature passed the 2018 Substitute for Senate Bill 423 ("Senate Bill 423") and the 2018 House Substitute for Senate Bill 61 ("Senate Bill 61").<sup>105</sup> In *Gannon VI*, the court held that the state had fixed the equity issues articulated in the previous ruling and successfully created a system that passed the equity standard.<sup>106</sup> However, the court also held that the state had failed to meet the adequacy requirement prescribed in article VI.<sup>107</sup>

The *Gannon VI* court reasoned that the remedial statute resolved four areas in which the state's burden for equity was not previously met in *Gannon V*.<sup>108</sup> The court reviewed the four provisions formerly deemed inequitable and found that each one no longer created a lack of

---

99. *Id.* at 552 (citing *Montoy III*, 112 P.3d 923, 923 (Kan. 2005)).

100. The *Gannon V* court recognized that reduction in funding might have been a de minimus issue if the overall system was adequate. *See id.* at 551–52. However, because the overall system was inadequate, the court found that this provision is inequitable. *See id.*

101. *Id.* at 554.

102. *Id.* at 554–55.

103. *Id.* at 554 (Johnson, J., concurring and dissenting).

104. *Id.* at 555 (Biles, J., concurring and dissenting).

105. *Gannon v. State (Gannon VI)*, 420 P.3d 477, 480 (Kan. 2018).

106. *Id.* at 481.

107. *Id.* at 480.

108. *Id.* at 491–92, 494.

## 2020] FUNDING KANSAS STATE PUBLIC SCHOOLS 1057

reasonably equal access to substantially similar educational opportunity.<sup>109</sup>

However, the *Gannon VI* court reasoned that the remedial legislation was inadequate under article VI because it failed to reach the “*Montoy* safe harbor” equivalent to SDFQPA’s formula<sup>110</sup> for two reasons: “(1) [t]he legislation failed to adjust two years of funding for inflation through the approaching 2018–19 school year” and “(2) [it] fail[ed] to adjust for inflation until the memo’s calculated principal sum . . . [wa]s paid in full, e.g., approximately five years.”<sup>111</sup> The court reasoned that these inflation discrepancies created a significant adequacy issue because they reduced the funding allocated to each student and the court had previously established that “money makes a difference in public education.”<sup>112</sup>

Similar to *Gannon V*, the court retained jurisdiction and stayed the issuance of a mandate until June 30, 2019 or until further court order.<sup>113</sup> The court gave the legislature one year to remedy the constitutional adequacy issues in the school financing system.<sup>114</sup> As evidenced by the prior five *Gannon* cases, the legislative branch has been unable to create a system that amounts to the standard in the constitution, and it remains to be seen if the legislative branch can meet that relatively high standard.

Following the *Gannon VI* decision, the Kansas Legislature passed Senate Bill 16 to remedy the inflation issues that the court pointed to when deeming Senate Bills 423 and 61 unconstitutional under the adequacy prong.<sup>115</sup> Senate Bill 16, passed in 2019, attempted “to cover inflation with additional funding and thus complete [the legislature’s] safe harbor remediation plan.”<sup>116</sup> The bill was signed by Governor Kelly on April 6, 2019.<sup>117</sup> The state then submitted the updated bill to the Kansas Supreme Court for review.<sup>118</sup>

In a per curiam opinion, the *Gannon VII* court held that the state showed its proposed remedy for the adequacy requirements complied

---

109. *Id.* at 494.

110. *Id.* at 487–89. In short, in *Montoy IV*, the court had found that the formula created in SDFQPA was constitutionally adequate. *Id.* Therefore, the state in *Gannon VI* labeled this as the “*Montoy* safe harbor” plan because it was a formula already deemed constitutional, thus a formula that would be accepted by the *Gannon VI* court. *Id.*

111. *Id.* at 480–81. The court also discussed additional adequacy concerns, such as the state’s treatment of virtual school state aid. *Id.* at 481.

112. *Id.* at 490 (quoting *Gannon V*, 402 P.3d 513, 535 (Kan. 2017)).

113. *Id.* at 481, 495.

114. *Id.* at 495.

115. *Gannon v. State (Gannon VII)*, 443 P.3d 294, 298 (Kan. 2019).

116. *Id.* at 298.

117. *Id.*

118. *Id.*

with the court's mandate in *Gannon VI*.<sup>119</sup> First, the court assessed whether "the State has met its burden to explain its treatment of virtual state aid in its funding calculations."<sup>120</sup> The state asserted that it properly explained the virtual state aid by citing a March 27, 2019 memo from the Kansas Legislative Research Development "explain[ing] that virtual state aid operated within the funding formula before 2015 and so would have been included as a weighting within the formula during SY 2009–10."<sup>121</sup> The plaintiffs, without any specific analysis, "contend[ed] the State ha[d] failed to justify reducing the total amount necessary to fund inflation by the amount of virtual state aid."<sup>122</sup> The court accepted the state's explanation and held that the state met its burden.<sup>123</sup>

Next, the court addressed whether "[Senate Bill] 16 provide[d] enough additional funding to account for the previously identified inflation problems and to reach substantial compliance with [its] *Gannon VI* mandate."<sup>124</sup> The court first looked at the BASE aid amount increased by the legislature in its 2017 and 2018 sessions.<sup>125</sup> In 2018, the state increased the base state aid amount under Senate Bill 61 to bring the school funding to adequate levels under the *Montoy* safe harbor plan.<sup>126</sup> The court found that Senate Bill 16 attempted to account for inflation "by increasing the specific [BASE] aid figure for each of the remaining four years of the remediation plan—SY 2019–20 through SY 2022–23."<sup>127</sup> The annual increase in the BASE aid in each of the three final years of the remediation process is approximately \$90 million more than the increases under Senate Bill 61 for the same years.<sup>128</sup> The state argued that these annual increases adequately addressed the inflation concerns expressed in *Gannon VI*.<sup>129</sup> However, the plaintiffs countered that although the new figures accounted for the inflation issues, "S.B. 16

---

119. *Id.* at 295–96.

120. *Id.* at 298, 300.

121. *Id.* at 300.

122. *Id.*

123. *Id.*

124. *Id.* at 298, 300–04.

125. *Id.* at 301–02.

126. *Id.* at 301.

127. *Id.* at 302.

128. *Id.* at 301–02 ("We stated that '[s]atisfactory adjustments would result in a higher amount of principal, i.e., more than the \$522 million the memo calculates as yet owed to the school districts.'") (citation omitted).

129. *Id.* at 302.

## 2020] FUNDING KANSAS STATE PUBLIC SCHOOLS 1059

fail[ed] to actually provide . . . ‘new money’<sup>130</sup> needed to reach the *Montoy* safe harbor.”<sup>131</sup>

The court refused to label the remedial money and held that the state satisfactorily complied with the *Gannon VI* mandate.<sup>132</sup> The court did not require the exact nature of accounting for years of inflation but found the remedial procedure “substantially” compliant.<sup>133</sup> The court pointed to the legislative record to demonstrate that the increases in the remedial calculations were made for the sole purpose of providing for inflation.<sup>134</sup>

Although the court found the state to be in compliance with the adequacy standard in section 6(b) of the Kansas Constitution, the court granted the plaintiffs’ request that it retain jurisdiction until all planned funding has been phased in successfully.<sup>135</sup> The plaintiffs convincingly pointed to *Montoy IV* as historical evidence that the state has reversed course on a constitutional school funding plan before it was completely phased in.<sup>136</sup> The court also remarked that the plaintiffs could have “point[ed] to the state’s long-term failure to adequately fund education.”<sup>137</sup> Therefore, the court retained jurisdiction to ensure the implementation of Senate Bill 16.<sup>138</sup>

## VI. AUTHOR’S ANALYSIS

The *Gannon V* court correctly held that Senate Bill 19 violated the equity and adequacy provisions in the Kansas Constitution. Public education is a right guaranteed to every child in Kansas and the legislature has a constitutional duty to ensure through funding that Kansas children are receiving equitable and adequate education. As the *Gannon V* court pointed out, funding is essential because there is a correlation between the amount of money spent per pupil and the students’ performance.<sup>139</sup> For both the legislature and the judiciary, the overarching goal was to increase student performance.

---

130. *Gannon VI*, 420 P.3d 477, 483–84 (Kan. 2018) (defining new money as “the first time a new dollar enters the funding system.”).

131. *Gannon VII*, 443 P.3d at 302.

132. *Id.* at 303.

133. *Id.* at 303–04. The *Gannon VII* court took the calculations provided by the state as “good faith estimates.” *Id.* at 303.

134. *Id.* at 303–04.

135. *Id.* at 304.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Gannon V*, 402 P.3d 513, 528 (Kan. 2017) (citing *Gannon IV*, 390 P.3d 461 (Kan. 2017)) (“Most on point here, the panel found that historically Kansas student achievement actually declined as funding decreased—a finding we affirmed as supported by substantial

*A. Kansas Supreme Court's Role in the Checks and Balance System*

In *Gannon V*, the Kansas courts continued to take jurisdiction over school finance cases and acted as a check on the state legislature. As prescribed in article VI of the Kansas Constitution, the legislature had broad plenary power to enact a school financing system,<sup>140</sup> but the courts played a crucial governmental role in scrutinizing the school finance systems crafted by the state legislature. The state courts became the only battleground for these cases due to the United States Supreme Court's ruling in 1973.<sup>141</sup> In response to the ruling in *San Antonio*, the state courts arose as the state legislatures' major institutional check. The Kansas courts specifically have relied on article VI as guidance for establishing the standards for school financing systems.<sup>142</sup>

The *Gannon V* court perceived its role within the checks and balances system to be ensuring that the legislature created a school financing act that achieved the goals set out in the constitution. In *Gannon I*, the court quoted *Marbury v. Madison*, stating: "an act of the Legislature repugnant to the constitution is void."<sup>143</sup> Since 2014, the *Gannon V* court has filed five decisions rejecting the legislature's proposed school finance bills on either equity or adequacy grounds. The court, within the checks and balances system, has repeatedly attempted to work with the legislature to create a school financing system that was both equitable and adequate.<sup>144</sup>

The court refused to go beyond its intended role as the check on the legislature. This was evident in the court's refusal to give specific values

---

competent evidence."); see also Kevin Carey & Elizabeth A. Harris, *It Turns Out Spending More Probability Does Improve Education*, N.Y. TIMES (Dec. 12, 2016), <https://www.nytimes.com/2016/12/12/nyregion/it-turns-out-spending-more-probably-does-improve-education.html>.

140. KAN. CONST. art. VI, § 6(b).

141. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 42–44 (1973).

142. See also Heise, *supra* note 9, at 1158 n.64 (listing where each state education clause is in each state constitution).

143. *Gannon I*, 319 P.3d 1196, 1235 (Kan. 2014) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). In *Gannon I*, the court stated, "our Kansas Constitution clearly leaves to the legislature the myriad of choices available to perform its constitutional duty; but when the question becomes whether the legislature has actually performed its duty, that most basic question is left to the courts to answer under our system of checks and balances." *Id.* at 1226.

144. See Amy L. Moore, *When Enough Isn't Enough: Qualitative and Quantitative Assessments of Adequate Education in State Constitutions by State Supreme Courts*, 41 TOL. L. REV. 545, 567 (2010) ("State courts seem to want a definition [of adequacy] that stops short of legislating for their governments, but that gives some guidance [to] those same governmental systems. However, it is unclear how the courts could provide more guidance without overstepping their bounds.").



## 2020] FUNDING KANSAS STATE PUBLIC SCHOOLS 1061

that would have allowed for the state to come into compliance with adequacy. The court rightfully declined to take this liberty because in doing so it would have “exalt[ed] funding over other constitutional considerations such as equity and structure.”<sup>145</sup> Moreover, the court might have compromised its role as a check on the legislature and stepped into the domain of the legislative decision makers.

However, in *Gannon VII*,<sup>146</sup> the court did not fall into the same trap it fell into in *Montoy IV* when the *Montoy IV* court allowed the legislature to implement the accepted school financing plan without some form of oversight.<sup>147</sup> The court approved the state’s timely adjustments in Senate Bill 16 and deemed the statute constitutional, finding that the financial adjustments made by the state legislature were sufficient to meet the adequacy prong of section 6(b). But the court retained jurisdiction to ensure the state properly implemented the school financing bill as the public officials drew it up. By retaining jurisdiction, the Kansas Supreme Court is holding the state’s feet to fire, in order to ensure the state puts its money where its mouth is.

This is further evidence that the court did not overstep its role as a judicial check on the legislature because it did not advise the legislature on how to implement an adequate and equitable school financing plan. It was only acting in its role as a judicial check on the state legislative and executive branches to implement the accepted plan as laid out before the court. The court acknowledged that, due to future inflation, the numbers provided by the state in Senate Bill 16 were “good faith estimates” and it wanted to make sure the legislature, the governor, and the Kansas State Department of Education provided the funding they promised to the court.<sup>148</sup> The court toed the line between judicial and legislative actions, but it did not step over that line by prescribing a test to meet the constitutional standard; the court only wished to review the bill’s implementation.

---

145. *Gannon V*, 402 P.3d 513, 552 (Kan. 2017).

146. 443 P.3d 294, 296 (Kan. 2019).

147. *Id.* (“Before the State fully implemented the financial solution we accepted in *Montoy IV*, however, it started making significant cuts to education funding in school year (SY) 2008-09 (fiscal year 2009).”).

148. The *Gannon VII* court stated, “[w]hile the plaintiffs submit an alternative calculation [for inflation], the adequacy test ‘rejects any litmus test that relies on specific funding levels to reach constitutional compliance.’ And we did not order specific levels or even prescribe a particular method for how to calculate any levels.” *Id.* at 303–04 (quoting *Gannon IV*, 390 P.3d 461, 502 (Kan. 2017)).

*B. Adequacy and Equity Determinations*

In *Gannon V*, the court properly applied the adequacy and equity standards. Neither party argued the parameters of the standards because both in the *Montoy* and *Gannon* line of opinions, the court stood firm on the adequacy and equity requirements prescribed in article VI, section 6(b).<sup>149</sup> Moreover, the *Gannon V* court correctly applied the burden which required the state to show its compliance with the decision in *Gannon IV*.

The court's adequacy determination found that Senate Bill 19 violated article VI, section 6(b) of the Kansas Constitution. The adequacy standard used the *Rose*-based requirement as a threshold to determine whether the school funding system was adequate. The state failed to meet the burden of compliance. However, the adequacy determination was worrisome because it relied on an unproven inference.<sup>150</sup>

The adequacy standard relied heavily on the assumption that money equals better school performance. In turn, this assumption led to the court's inference that increased funding would lead to more students meeting the seven capacities laid out in *Rose* and required by the adequacy standard.<sup>151</sup> This was not an unrealistic assumption or even a stretch of the imagination, but the court should have allocated more time to discussing how money provides access and availability to school programs which facilitate a school district's ability to meet their goals. This inference should have been discussed, rather than alluded to in passing, because financing might not have been the only factor that could have caused a decline in academic performance.<sup>152</sup> Determining the constitutionality of a school financing system based solely on academic performance could exacerbate this ongoing battle with no end in sight, because it could lead to a situation where the spending could be adequate

---

149. The Kansas Supreme Court has consistently applied the adequacy and equity rule. See, e.g., *Gannon I*, 319 P.3d 1196, 1233 (Kan. 2014) (applying the seven characteristics listed in *Rose* as the minimum standard); *Gannon III*, 372 P.3d 1181, 1189 (Kan. 2016) (quoting *Gannon I*, 319 P.3d at 1239) ("School districts must have reasonably equal access to substantially similar educational opportunity through similar tax effort.").

150. See Heise, *supra* note 9, at 1166 ("It is unclear whether additional educational resources lead to additional student achievement.").

151. Moore, *supra* note 144, at 570 ("Even though the Supreme Court correctly found . . . that the correlation between money and better education was, at best, contentious according to education experts, funding issues in state supreme courts did not dissipate with this conclusion."); see also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42–43 (1973). Moore's Article further asserts that "state governments do not seem to understand that funding is not the sole source of educational failings." Moore, *supra* note 144, at 570.

152. For example, the legislature's lack oversight or institutional standards could have led to a decline of academic performance across the state.

## 2020] FUNDING KANSAS STATE PUBLIC SCHOOLS 1063

but performance standards could still fail to meet the adequacy threshold.

There are four states that acknowledge the importance of funding, but also recognize that public schools can be generously funded and still fail to meet constitutional requirements for adequacy.<sup>153</sup> So, the court in *Gannon V* was right when it discussed the connection, but it should be careful about making the blanket assumption that increased funding equates to increased performance standards.

Justice Biles' minority opinion discussed how increased funding alone will not improve the student achievement issue.<sup>154</sup> As Justice Biles stated in his concurring and dissenting opinion, "[t]he student achievement issues that the district court found are related to funding [and] are most likely not going to improve just by adding money to the system."<sup>155</sup> Student achievement issues lie at the heart of Senate Bill 19's inadequacies, and Justice Biles recognized that funding might not be the only solution to this overarching issue. However, he felt that placing the burden to show compliance would act as a way for the state to show how the system it devised would fix the performance standard issue.<sup>156</sup>

On its face, the equity requirement also relied very heavily on the same general assumption that money leads to increased performance standards. However, the equity standard might not be hindered by the same troubles because it prescribes that: "[s]chool districts must have reasonably equal access to substantially similar educational opportunity through similar tax effort."<sup>157</sup> Equity is different from adequacy because it measures access, not how that access translates in terms of performance.<sup>158</sup>

Moreover, in *Gannon VI* and *Gannon VII*, the Kansas Supreme Court implicitly reiterated its reliance on the assumption that increasing the amount of money would make a school financing system equitable and adequate. The court accepted the state's remedial legislation because it injected substantially more money into the school financing bill in an

---

153. Moore, *supra* note 144, at 570 (pointing to North Dakota, Arkansas, Ohio, and New Jersey as states recognizing "that funding is not magic for an ailing system, but is necessary and perhaps should be accompanied by accountability for districts.").

154. *Gannon V*, 402 P.3d 513, 558 (Kan. 2017) (Biles, J., concurring and dissenting).

155. *Id.*

156. *Id.*

157. *Id.* at 540 (majority opinion) (quoting *Gannon I*, 319 P.3d 1196, 1239 (Kan. 2014)).

158. See Carmel Martin et al., *A Quality Approach to School Funding: Lessons Learned from School Finance Litigation*, CTR. FOR AM. PROGRESS 2 (Nov. 13, 2018), [https://cdn.americanprogress.org/content/uploads/2018/11/08042733/LessonsLearned\\_SchoolFunding-report-4.pdf](https://cdn.americanprogress.org/content/uploads/2018/11/08042733/LessonsLearned_SchoolFunding-report-4.pdf).

attempt to remedy the school funding cuts in 2009.<sup>159</sup> But the court should have assured that the increase of funds was actually being used for programs and resources proven to advance academic performance across the state.

*C. Finally a Potential Resolution*

Justice Johnson's opinion concurring in part and dissenting in part disagreed with the majority's opinion because the majority afforded the legislature over eight months to enact remedial legislation for Senate Bill 19, all the while leaving school funding in Kansas in limbo.<sup>160</sup>

Since 2014, the legislature has been unable to meet the threshold articulated by the court to create a system that is equitable and adequate. So, even with the *Gannon V* decision, the legislature was no closer to creating a system that was constitutional under article VI. However, as *Gannon VI* and *Gannon VII* demonstrated, the legislature was eventually able to draft a remedial plan which sufficiently fixed the equitable and adequacy infirmities at issue. The court acknowledged that the calculations for the funding amounts were "good faith estimates,"<sup>161</sup> which provides a lot of latitude for the state during the implementation process to change course.<sup>162</sup> However, the court, referencing "the State's long-term failure to adequately fund education," wanted to keep a watchful eye on the implementation process.<sup>163</sup>

The *Gannon V* court seemed reluctant to overstep into the domain of the legislature, which was understandable since the legislature had broad power to create the school financing legislation. However, the legislature continuously failed to enact legislation that met the standards clearly articulated by the court. Therefore, the school financing issue remained unresolved because the state was unable to overcome political barriers to meet the constitutional standards<sup>164</sup> and because the court

---

159. Senate Bill 16 increased funding by \$363 million over a four-year period. *Gannon VII*, 443 P.3d 294, 302 (Kan. 2019).

160. *Gannon V*, 402 P.3d at 554 (Johnson, J., dissenting).

161. *Gannon VII*, 443 P.3d at 303.

162. The state made significant cuts in 2009, likely due to the 2008 Recession, and as this plan is being implemented, COVID-19 is affecting the lives of every American and pushing the U.S. economy to the brink of another recession. See generally Josh Mitchell, *State Shutdowns Have Taken at Least a Quarter of U.S. Economy Offline*, WALL ST. J., (Apr. 5, 2020, 4:14 PM), <https://www.wsj.com/articles/state-coronavirus-shutdowns-have-taken-29-of-u-s-economy-offline-11586079001>.

163. *Gannon VII*, 443 P.3d at 304.

164. School finance litigation has been a political battle between the judiciary and the legislature. The GOP has been critical of the court's holdings, releasing a statement saying that "[a]s promised, Senate Republicans remain committed to providing every Kansas student with an exceptional education, however, raising taxes to fund this unrealistic

## 2020] FUNDING KANSAS STATE PUBLIC SCHOOLS 1065

refused to put pressure on the legislature or offer clear guidance. The *Gannon V* court needed to be more assertive with their ruling to really urge the legislature to remedy the ongoing constitutional issues with the legislation. By giving the legislature so much time, the court was stalling the resolution to the school financing dilemma.

While the *Gannon VI* and *Gannon VII* court held that the state's remedial plans were adequate under Senate Bills 16, 423, and 61, the court still recognized that its ruling would not be the end of the road for this school financing saga. The court was not shy about stepping closer into the domain of its separate but equal counterparts when it retained jurisdiction while the state implemented remedial legislation. In *Gannon VII*, the court pointed to the school financing cuts in 2009 to indicate that the legislature has changed course before.<sup>165</sup> The court took steps to ensure that the implementation went as the state planned by referencing its "inherent power to enforce [its] holdings."<sup>166</sup> In doing so, the court showed that it was willing to exercise enforcement powers over the legislative branch and the executive branch to hold both branches' feet to the fire.<sup>167</sup> The court took a more active role to ensure the school financing bill was implemented properly. The court rose up to end this ongoing dispute between the judiciary and the legislature surrounding Kansas's school financing. The supreme court stretched its powers to ensure that students across the state received adequate and equitable school financing provided for in the Kansas Constitution. The judiciary led the proverbial horse to the water, but it cannot force the horse to drink.

---

demand is not going to happen." Hunter Woodall & Katy Bergan, *Kansas Supreme Court Rules New School Finance Formula is Unconstitutional*, KAN. CITY STAR (Oct. 2, 2017, 9:13 AM), <https://www.kansascity.com/news/politics-government/article176606731.html>. The debate centered on the issue of taxes because the majority of school funding comes from state and local tax levies. *Id.* Therefore, the Republicans loathed to increase their constituencies' taxes to fund public schools. *Id.*

165. *Gannon VII*, 443 P.3d at 304 ("As support, [plaintiffs] specifically cite a legislative attempt to reclaim educational funds this session and the state's reversal of course after *Montoy IV* was concluded but before the (full) funding approved there was phased in."). The court also added support to the plaintiffs' argument for retaining jurisdiction by pointing to "the State's long-term failure to adequately fund education." *Id.*

166. *Id.* (quoting *Gannon II*, 368 P.3d 1024, 1058–59 (Kan. 2016) (citing *Kjellander v. Kjellander*, 132 P. 1170, 1171 (Kan. 1913))).

167. See Jonathan Shorman & Lara Korte, *Kansas Lawmakers Advance School Funding Bill Despite Last-Minute Objections*, KAN. CITY STAR (Mar. 8, 2019, 1:33 PM), <https://www.kansascity.com/news/politics-government/article227208049.html> ("If the Supreme Court keeps control of the case, the court could keep 'our feet to the fire' in future years.").

## VII. CONCLUSION

In *Gannon v. State*, the Kansas Supreme Court held its ground and took jurisdiction over the school finance litigation.<sup>168</sup> Although the court relied heavily on the assumption that increased funding leads to increased student performance, it correctly implemented the adequacy threshold and the equity standard.<sup>169</sup> The court methodically employed both the adequacy and equity standards to deem Senate Bill 19 unconstitutional. The court's decision triggered the state to return to the Kansas Supreme Court twice more in *Gannon VI* and *Gannon VII*. In *Gannon VI* the state was able to correct the violations of the equity standard. And almost a year later in *Gannon VII*, the state was able to satisfy the adequacy requirements. However, the *Gannon VII* court retained jurisdiction through the implementation process due to its justifiable distrust of the legislature. But by retaining jurisdiction, the court finally provided the much-needed pressure on the legislature to implement a constitutional school financing plan in Kansas.<sup>170</sup>

This case and its progeny illuminated the protections state constitutions afford citizens in the absence of federal constitutional rights and demonstrated the state court's role in overseeing the effectuation of state constitutional rights. However, it also showed the failures in the contentious nature between the state legislature and the state judiciary, as well as how the Kansas children and educational system could continue to suffer because of the disconnect.

---

168. See *supra* Section VI.A.

169. See *supra* Section VI.B.

170. One of the major complaints about the court's holding in *Gannon V* was that the court perpetuated the issue by affording the legislature so much time to improve the inadequate and inequitable portions of Senate Bill 19. See, e.g., *Gannon V*, 402 P.3d 513, 554 (Kan. 2017) (Johnson, J., concurring and dissenting).