The final case involving a district court ruling that spurred the Legislature to timely reform was *Mock v. State*.[16] Judge Terry Bullock, who was to eventually issue the district court opinion in *Montoy*, was the presiding judge in *Mock*. In the case, Judge Bullock issued an "influential opinion" which "interpreted article 6 of the Kansas Constitution as imposing on the Legislature a constitutional duty (and creating a correlative right for children in Kansas) to an equal educational opportunity and to an adequate education."[17] This decision spurred the Legislature to introduce vast school finance reform by enacting the SDFQPA (the financing system at issue in *U.S.D. 229* and *Montoy*).[18]

During the nearly two decades spanning these three district court cases, the Supreme Court had never reviewed a school finance case on its merits, having only once remanded a case for procedural reasons. This pattern abruptly ended in 1994, however, when the Supreme Court took up an appeal of the Shawnee County district court opinion in *U.S.D. 229 v. State*.[19] The case involved claims that the SDFQPA violated both the equal protection clause and the "suitability" clause of the Kansas Constitution. The district court opinion authored by then Judge Marla Luckert rejected the "adequacy" claim, holding that all schools currently met the "adequacy" standard as defined by the statute.[20] The district court did, however, strike down one aspect of the statute—the "low enrollment weight"—as an equal protection violation.[21] On appeal, the Supreme Court upheld the entire statute, including the low enrollment weight, thus affirming the district court opinion in part, and reversing it in part.[22]

By issuing the first definitive judicial opinion on the constitutionality of the state school finance system, the Supreme Court had established a precedent that would apply to any future challenges. Professor Richard Levy, in his extensive review of the *Montoy* litigation, listed three notable points of law established in *U.S.D. 229* that would frame the *Montoy* case just a few years later. These findings of law included: 1) "the requirement of suitable finance for the educational interests of the state includes an obligation to fund an adequate education that reflects certain basic goals" (adopted from *Mock*); 2) "'suitability does not imply any objective, quantifiable standard against which schools can be measured,' but rather involves 'value judgments' that are not properly made by courts;" 3) "for purposes of equal protection, education is not a fundamental right and the rational basis test applies to disparities in funding between districts."[23] Despite these deferential standards, the Supreme Court noted the trial court's admonition that "the issue of suitability is not stagnant . . . [but] underfunding and inequitable distribution of financings [could lead] to judicial determination that the legislation no longer comple[s] with constitutional provisions."[24]

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[16]No. 91-CV-1009, slip op. (Kan. Dist. Ct. Shawnee County, Oct. 14, 1991).
[17]Levy, *supra* note 9, at 1036 (citations omitted).
[18]*Id.*
[19]885 P.2d 1170 (Kan. 1994).
[20]*Id.* at 1186.
[21]*Id.* at 1173.
[22]*Id.* at 1197.
[23]Levy, *supra* note 9, at 1040 (citations omitted).
[24]*U.S.D. 229*, 885 P.2d at 1186.

B. Montoy I

1. District Court, Round I: Dismissal

In 1999, two school districts and several minority, low-income, and disabled students from those districts brought suit against various officials of State of Kansas challenging the constitutionality of the State's public school financing scheme as codified in the State District Finance and Quality Performance Act (SDFQPA).[25] The plaintiffs had originally plead that three components of the SDFQPA—the low enrollment weight, the new school facilities weight, and the local option budget weight—unfairly created disparities in funding between school districts and amounted to an equal protection violation.[26] This equity claim was eventually expanded to also include theories of relief based on substantive due process.[27] Additionally, the plaintiffs argued that such disparities caused the SDFQPA to fail to provide "suitable provision for finance" of public schools under state constitutional standards because the funding system failed to provide an adequate education to each and every Kansas child.[28] As relief, the plaintiffs sought a declaratory judgment finding the SDFQPA unconstitutional under the Kansas Constitution and "a permanent injunction prohibiting defendants from administering, enforcing, and/or funding those provisions of the SDFQPA which are unconstitutional."[29]

On November 21, 2001, Shawnee District Court judge Terry Bullock issued his first of two memorandum decisions in the case of Eric and Ryan Montoy, et al. v. State of Kansas.[30] Acting upon its own motion, the district court dismissed the claims based on binding Supreme Court precedent regarding the constitutionality of the school funding mechanisms utilized in SDFQPA.[31]

Subsequent to their original pleading, and after a court-ordered deadline of November 11, 2000 for pleading amendments, the plaintiffs raised several new issues not contained in their original pleading.[32] Specifically, the plaintiffs sought to attack two other school financing statutes in addition to the SDFQPA—capital outlay and special education excess costs[33]—as

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[25]Montoy v. State (*Montoy I*), Memorandum Decision and Order, No. 99-C-1738, p. 1 (Kan. Dist. Ct. 2001); *see* Petition at 2-4, Montoy v. State, 62 P.3d 228 (Kan. 2003).

[26]*Id.* The plaintiffs' equal protection claims were two-fold: 1) that the "unequal funding to school districts had a disparate impact on certain groups of children, such as at-risk students;" and 2) that such "funding disparities across districts lacked any rational basis." *See* Levy, *Supra* note 9, at 1040.

[27]*See* Montoy v. State (*Montoy I*), 62 P.3d 228, 230 (Kan. 2003).

[28]*Id* at 1, 7-8; *see* KAN. CONST. Art. 6, § 6(b) ("The Legislature shall make suitable provision for finance of the educational interests of the State."); Levy, *supra* note 9, at 1040. Article 6 of the Kansas Constitution is entirely devoted to the subject of public education.

[29]*See* Petition, *supra* note 25, at 10.

[30]*Montoy I* (District Court), No. 99-C-1738 at 1.

[31]*See infra* note 42 and accompanying text. The previous school finance case reviewed by the Supreme Court—*U.S.D. 229 v. State*—had held that the SDFQPA was constitutional because it all schools had met the Legislature's accreditation standards. As this was still the case in *Montoy I*, the district court ruled that the holding in *U.S.D. 229* controlled.

[32]*Id.* at 3.

[33]Capital outlay statutes allowed school districts that are seeking to conduct new building projects to raise additional revenue through local property taxes. *See* K.S.A. § 72-8801(b) (2001). Special education statutes provided state aid

well as the Legislature's alleged "encroachment on the 'general supervision' responsibility of the State Board of Education."[34]

The district court held that the plaintiffs had failed to specifically plead or amend their petition to include the issues regarding the constitutionality of the capital outlay and special education excess costs.[35] As a result, the court in its November 11, 2001 decision did not consider the constitutionality of these provisions.[36] Additionally, noting a previous Kansas Supreme Court decision holding that the SDFQPA did not target any suspect classes,[37] and noting that, as required by the strict scrutiny standard, the plaintiffs failed to suggest that the Legislature enacted the SDFQPA with a discriminatory intent or purpose, the court held that the provisions of the act were merely subject to rational basis scrutiny, which the Supreme Court had already found to have been satisfied.[38]

In addition to their allegation that the SDFQPA violates the equal protection clause of the Kansas Constitution, the plaintiffs alleged that the Act did not fulfill the Legislature's constitutional obligation to make "suitable provision for finance of the educational interests of the state."[39] Specifically, the plaintiffs alleged that the current school financing scheme had deprived the plaintiff school children of a "constitutionally adequate education."[40] The specific issue before the court, under the definition of suitability established in *U.S.D. 229*, was "whether the Legislature, by its own standards and those of the State Board, ha[d] made suitable provision for the financing of public education."[41] The district court held that since the Supreme Court had apparently held in *U.S.D. 229* that the constitutional definition of suitability was not a judicial determination but was to be defined by the Legislature and the

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in proportion to the amount of special education students a school district had. *See* Montoy v. State (*Montoy II*), Memorandum Decision and Order, No. 99-C-1738, p. 79-82 (Kan. Dist. Ct. 2003).

[34]*Montoy I* (District Court), No. 99-C-1738 at 3.

[35]*Id.*

[36]*Id.*

[37]*See* U.S.D. 229 v. State, 256 Kan. 232, 263 (1994) ("A look at specific provisions of the [SDFQPA] reflects we are not dealing with any suspect classes.").

[38]*Montoy I* (District Court), No. 99-C-1738 at 4-5. When reviewing equal protection challenges, courts will apply one of three levels of scrutiny when examining the relationship "between a government classification and the objective of that classification." *See* U.S.D 229 v. State, 885 P.2d 1170, 1187-88. "Rational basis" review is the lowest level of scrutiny that a court will apply to equal protection challenges, and merely requires that "legislative enactments must implicate legitimate goals, and the means chosen by the Legislature must bear a rational relationship to those goals." *Id.*

[39]*Montoy I* (District Court), No. 99-C-1738 at 8 (citing KAN. CONST. Art. 6, § 6(b)).

[40]*Id.* The phrase "constitutionally adequate education" does not appear anywhere in the Kansas Constitution. Other than the equal protection clause, the constitutional language implicating legislative obligation appears in two places. Article 6, section 1 provides that "[t]he Legislature shall provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools." KAN. CONST., art. 6, § 1. Article 6, section 6 provides that "[t]he Legislature shall make suitable provision for finance of the educational interests of the state." KAN. CONST., art. 6, § 6. The Supreme Court in *U.S.D. 229 v. State*, however, blended these two provisions when ruling that "suitable provision for finance" of the public schools requires that the state finance an education system that meets certain "adequate" educational standards. *See U.S.D. 229*, 885 P.2d at 1885-86. "*U.S.D. 229*[] recogni[zed] that the requirement of suitable finance for the educational interests of the state includes an obligation to fund an adequate education that reflects certain basic goals." Levy, *supra* note 9, at 1040.

[41]*Montoy I* (District Court), No. 99-C-1738 at 8.

state board of education, the working definition for suitability applied by the court in the present case was whether schools were funded so as to achieve accreditation.[42] As all of the plaintiff school children's schools "[were] fully accredited under statutory and regulatory requirements," the court held that the state school funding scheme made suitable provision for the finance of such schools as a matter of law. With this holding, combined with its holding regarding the equal protection claims, the court thus concluded that all of the plaintiffs' claims had failed.[43]

2. Supreme Court reverses district court and remands for further proceedings

In their appeal, the plaintiffs contended that the district court erred when 1) excluding the three additional claims made outside of the original pleadings; 2) dismissing the case *sua sponte* instead of upon motion for summary judgment; and 3) finding that the plaintiffs' claims were not legally sufficient. With regard to whether the plaintiffs' addition of three claims after the court-imposed pre-trial deadline should have been considered by the district court, the Supreme Court rejected the district court's reliance on *Missionary Baptist Convention v. Wimberly Chapel Baptist Church*[44] and held that the district court should have considered the claims because, under the liberal interpretation of Kansas's rule of simple notice pleading, the original claim regarding the alleged violation of the suitability requirement "was broad enough to include the additional claims."[45]

The second issue regarded whether the district court had the power to dismiss the case *sua sponte*—upon its own motion—as a matter of law.[46] The Supreme Court held that while the

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[42]*Id.* at 7-8. This legal conclusion—that the definition of "suitable provision" was not a judicial determination but rather a determination properly belonging to the Legislature and Board of Education—was based on the district court's interpretation of *U.S.D. 229* and would later be overruled by the Supreme Court in Montoy I. The district court noted that "[w]hile some might criticize [the current definition of suitability] as 'handing over a legal constitutional determination to the Legislature,' it is nonetheless the holding of our State's highest court, by which this 'inferior' court is bound until there altered." *Id.* at 8.

[43]*Id.* at 9.

[44]228 P.2d 540 (1951); *see Montoy I* (District Court), No. 99-C-1738 at 3. *Missionary Baptist* involved constitutional challenges brought by a party for the first time on appeal and held that appellate consideration of such issues was improper when the issues had not been raised in the original pleadings. *Missionary Baptist* , 228 P.2d at 543-44. In *Montoy I*, on the other hand, the district court had ruled that because the plaintiffs did not raise in the original pleadings their claims regarding the constitutionality of the capital outlay and special education excess costs statutes and the Legislature's alleged encroachment on the constitutional powers of the Board of Education, the *district court* could not properly consider the claims. *See Montoy I* (District Court), No. 99-C-1738 at 3. The Supreme Court distinguished the present case from *Missionary Baptist* by holding that, because the claims in the case at bar were not raised for the first time on appeal but rather were raised properly before the district court, the district court erred in excluding those claims from consideration. Montoy v. State (*Montoy I*), 62 P.3d 228, 231 (Kan. 2003).

[45]*See id.* at 231-32. The Supreme Court ruled that its liberal interpretation of the notice pleading requirements also permits plaintiff "to shift the theory of his case as the facts develop, as long as he has fairly informed his opponent of the transaction or the aggregate of the operative facts involved in the litigation." *Id.* at 232. In the present case, the Supreme Court held that the defendants would not have been subject to unfair surprise or prejudice had the additional claims been considered by the district court. *Id.*

[46]*Id.* at 232-33.

district court "possesse[d] the inherent power to summarily dispose of litigation where there remains no genuine issue as to any material fact," such power may only be made *sua sponte* after a pretrial conference when, like dismissal via summary judgment, the proceedings demonstrate "the lack of a disputed issue of material fact and the facts so established indicate an unequivocal right to a judgment in favor of a party."[47] Because there remained areas of disputed material fact, as discussed below, the Supreme Court held that judgment *sua sponte* as a matter of law after the conclusion of the pretrial conference was improper.[48]

Finally, with regard to the lingering presence of disputed issues of material fact, the court held that the district court had improperly ruled that the plaintiffs' factual allegations were all resolved by *U.S.D. 229*.[49] The Supreme Court held that the district court incorrectly read *U.S.D. 229* as completely deferring to the Legislature the constitutional definition of "suitable provision" for school finance.[50] While language from *U.S.D. 229* did suggest that the court heavily relied on legislative standards when determining the definition of suitability, the Supreme Court in *Montoy I* insisted that the final constitutional determination of the definition of "suitability" lay with the court.[51] As such, the constitutional definition of suitability is not solely a matter of accreditation, even though the Court in *U.S.D. 229* had used the then-current accreditation standards in its determination that the school financing system at that time did not violate the suitability requirement.[52] Rather, "[t]here is a point where the Legislature's funding of education may be so low that regardless of what the State says about accreditation, it would be impossible to find that the Legislature has made 'suitable provision for the finance of the educational interests of the state.'"[53]

The Supreme Court in *Montoy I* reemphasized language from *U.S.D. 229* when stating that "the issue of suitability is not stagnant [but] must be closely monitored."[54] The scenario painted by the district court judge in *U.S.D. 229* demonstrated that the SDFQPA, even though then-constitutional, was not immune from future challenges.[55] Even if "[p]revious school finance legislation, when initially attacked upon enactment or modification, was determined constitutional," subsequent "underfunding and inequitable distribution of finances [may] lead to judicial determination that the legislation no longer complie[s] with constitutional provisions."[56] Thus, according to the Supreme Court in *Montoy I, U.S.D. 229* had *not* found that because the SDFQPA was then constitutional, it would thus always be constitutional.[57] Rather, *U.S.D. 229* had explicitly contemplated the very real possibility that the SDFQPA could

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[47] *Id.* at 233.
[48] *Id.* at 235.
[49] *Id.* at 234-35.
[50] *Id.* at 235.
[51] *Id.* at 234 ("*U.S.D. 229* relied on the Legislature to promulgate standards but asserted that the ultimate question on suitability must be one for the court.").
[52] *Id.* at 234 (citing U.S.D. 229 v. State, 256 P.2d 1170 (Kan. 1994)).
[53] *Id.* at 235.
[54] *Id.* at 234.
[55] Judge Marla Luckert, now a Supreme Court justice, wrote the district court opinion in *U.S.D. 229*.
[56] *Id.*
[57] *See id.*

cease to meet the suitability standard.[58] The base criteria for future suitability challenges to the Act required "the district court [to] make a finding, after giving the plaintiffs the opportunity to substantiate their claims, that the Legislature has provided suitable provisions for financing the educational interests of the State before judgment may be entered for the defendants regarding the plaintiffs' unsuitability claim."[59] Given that the district court failed to address any of the plaintiff's factual allegations,[60] the Supreme Court in *Montoy I* concluded that the case was "sufficiently removed in time from our decision in *U.S.D. 229* so as to preclude summary application of *U.S.D. 229* to dispose of the plaintiffs' claims."[61] The Supreme Court thus concluded that the district court's dismissal of the plaintiffs' equal protection and suitability claims was premature and remanded the case for further proceedings.

C. Montoy II

1. District Court, Round II: The trial

On remand, the parties conducted several months of pretrial discovery and briefing before the case was tried before Judge Bullock from September 23 to October 1, 2003. Before the trial, the parties had briefed and the court had ruled on several issues of law.[62] Most notably, the court followed the Supreme Court's lead in *Montoy I* by expanding the definition of "suitability" beyond the accreditation standards set by the Legislature. The district court determined that the test for the constitutionality of the school financing formula under article 6 of the Kansas Constitution required that "total school funding must be such that it *provides every Kansas student, commensurate with their natural abilities, the knowledge and skills necessary to understand and successfully participate in the world around them both as children and later as adults.*"[63] This standard was crafted in what the court deemed "the

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[58] *Id.* at 235.

[59] *See id.*

[60] The Supreme Court listed at least fifteen issues of material fact that the plaintiffs assert, in their pretrial memorandum to determine legal issues, as disputed. *See id.* at 234-35.

[61] *Id.*

[62] Among the four legal issues determined in advance of trial, only one—the constitutional criteria for suitability—was to be ultimately influential. The legal determinations regarding the plaintiffs' equal protection and substantive due process claims—rationale basis as the appropriate level of judicial scrutiny for the plaintiffs' equal protection (disparate impact) claims; the substantive due process claim as requiring the same test as suitability—were rendered moot after the Supreme Court later reversed the district court holdings on these points. Similarly, the district court's legal determination that the Legislature had not usurped the Board of Education's constitutional powers, and the corresponding dismissal of the plaintiffs' claim was later affirmed on appeal. Due to the mootness of these two legal determinations, this paper is concerned only with the constitutional test for suitability adopted and applied by the district court.

[63] Montoy v. State (*Montoy II*), Memorandum Decision and Order, No. 99-C-1738, p. 48 (Kan. Dist. Ct. 2003) (emphasis added). It is important to note that the district court's suitability standard required the distribution of funds by the Legislature to be both *equal* (equity) and *sufficient* (suitability). Thus even though the Supreme Court eventually struck down the district court's holding that the funding scheme violated the equal protection clause of the Kansas Constitution (by lacking a rational basis and causing disparate impact), the district court's factual findings regarding the lack of equitable distribution of funds were still crucial to the Supreme Court's affirmation of the

absence of any appellate court or even legislative suitability standard."[64] In other words, the judge made it up.

2. District Court holds that SDFQPA violates equal protection and suitability provisions of the Kansas Constitution

After conducting an eight day bench trial, reviewing its nearly fifteen hundred pages of transcript and the nearly ten thousand pages of exhibits, and after considering over five hundred sixty-five proposed findings of fact and conclusions of law from the parties, the district court issued its initial memorandum and decision order on December 2, 2003.[65] In its decision, the court found that the school funding scheme was unconstitutional under both the equal protection and suitability provisions of the Kansas Constitution. As an overarching theme to both its equity and suitability rulings, the court noted that "contrary to this court's earlier belief, the current financing scheme was never based upon costs or even estimated costs to educate children, but was in fact the result of a 'political auction' (where various funding levels were proposed until finally, a political majority could be achieved in the Legislature)."[66] Rather than based on actual costs, the court concluded, the current financing

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district court's holding that the funding scheme violated the suitability clause of the Kansas Constitution. *See id.* at 85 ("[A]s a matter of uncontroverted fact and law, the current funding scheme containing, as it does, a 300 percent unexplained [full-time equivalent] pupil disparity for which no rational basis has been shown or provide, violates [the suitability clause of] article 6 of the Kansas Constitution in its failure to provide equity in funding for all Kansas Children."); KAN. CONST. Art. 6, § 6(b) ("The Legislature shall make suitable provision for finance of the educational interests of the state."). The district court's overlapping constitutional standards—equal protection and suitability—that were allegedly violated according to the findings of facts regarding the inequitable distribution of funding were eventually narrowed by the Supreme Court in *Montoy II* when that Court rejected the equal protection (rational basis and disparate impact) holdings of the district court decision. *See* Montoy v. State, 120 P.3d 306, 308 (Kan. 2005).

> "[The district court's] findings are sufficient to support the conclusion that the Legislature has failed to 'make suitable provisions for finance" of the public school system as required by Art. 6, §6 of the Kansas Constitution.... [T]here are many ways to recreate or reestablish a suitable financing formula.... [Along with additional funding, t]he *equity* with which the funds are distributed and the actual costs of education, including appropriate levels of administrative costs, are critical factors for the Legislature to consider *in achieving a suitable formula* for financing education. By contrast, the present financing formula increases disparities in funding, not based on a cost analysis, but rather on political and other factors not relevant to education."

Id. at 310 (emphasis added).

[64] *Montoy II* (District Court), No. 99-C-1738 at 48.

[65] Given the expansiveness of the *Montoy* litigation and its vast implications for state public policy, the author of this paper was disturbed to find it next to impossible to locate and obtain most of the underlying documents and transcripts in this case. The bulk of the record on appeal only exists in microfiche at Shawnee County District Court making any public acquisition of copies both cost and time-prohibitive. It would cost literally thousands of dollars to obtain the many thousands upon thousands of pages making up the part of the official record dating earlier than September 2003, including all of the legal briefs, filings, and transcripts from the district court proceedings in *Montoy I*. This reality is a far cry from the State's official public policy to maintain transparent government and open public access to official records. The author would like to thank the Kansas Revisor of Statutes office for going to extra lengths to lend its private copies of the various court opinions, briefs, trial transcripts, exhibits, and extraneous documents from the *Montoy* case for use in the preparation of this paper.

[66] *Montoy II* (District Court), No. 99-C-1738 at 48 (emphasis added).

scheme was based on previous *spending* levels of school districts under the previous law that had been held unconstitutional by the court in *Mock v. State.*[67] The court took umbrage with the facts that "Kansas has no 'bottom-up' budgeting system for public schools whatsoever," that "[n]o one, in the history of Kansas, has ever asked our schools what resources they need to provide a suitable education for our children," and that the Legislature has instead distributed funding for schools "without any requests, estimates, or other input on costs or needs from the . . . superintendents, principals, or teachers in the field."[68]

The extended opinion made numerous findings of fact documenting the material societal and statutory changes that had occurred since 1994, thus causing the SDFQPA to fail to pass constitutional muster in 2003.[69] Professor Richard E. Levy, in 2006 law article on the *Montoy* litigation, summarizes the court's factual findings describing the statutory changes into four basic categories: 1) the Legislature's removal of both the list of ten education goals and the school finance monitoring committee;[70] 2) "changes to the system of weights and removal of limits on the local option budget exacerbated disparities between districts, so that at the time of trial the per-pupil disparity between the districts with the lowest and highest funding exceeded three-hundred percent;" 3) the disparities and deficiencies in school funding adversely affected minority, disabled, and impoverished children the most;[71] 4) overall school funding levels had fallen below that necessary for each Kansas student to receive a suitable education.

With respect to the first category, the district court found that the post-*U.S.D. 229* removal of the list of ten educational goals from the SDFQPA—goals that had been a central aspect of the Supreme Court's decision in *U.S.D. 229* to uphold the SDFQPA as constitutional[72]—was indicative of the Legislature's disregard for the quality of education necessary to achieving a suitable and equitable school finance system.[73] The second set of findings described the various post-1994 changes to the relationship between various funding mechanisms within the financing system. In 1994, the funding scheme under SDFQPA provided for an equal

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[67]*See id.* at 68; *Mock v. Kansas*, Case No. 91-CV-1009.

[68]*See Montoy II* (District Court), No. 99-C-1738 at 67-68.

[69]*See* Montoy v. State (*Montoy II*), 120 P.3d 306, 308 (Kan. 2005).

[70]Both the educational goals and the monitoring committee had been a part of the original adoption of the SDFQPA in 1992, which was enacted after Judge Terry Bullock's Shawnee County District Court Opinion in *Mock v. Kansas* had found the previous school financing statute unconstitutional. *See* No. 91-CV-1009 (Kan. Dist. Ct. 1991).

[71]Levy, *supra* note 9, at 1042.

[72]The ten educational goals removed from the statute were: 1) "teachers establish high expectations for learning and monitoring pupil achievement through multiple assessment techniques;" 2) "[s]chools have a basic mission which prepares the learners to live, learn, and work in a global society;" 3) "[s]chools provide planned learning activities within an orderly and safe environment which is conducive to learning;" 4) "[s]chools provide instructional leadership which results in improved pupil performance in an effective school environment;" 5) "[p]upils have the communication skills necessary to live, learn, and work in a global society;" 6) "[p]upils think creatively and problem-solve in order to live, learn, and work in a global society;" 7) "[p]upils work effectively both independently and in groups in order to live, learn, and work in a global society;" 8) "[p]upils have the physical and emotional well-being necessary to live, learn, and work in a global society;" 9) "[a]ll staff engage in ongoing professional development;" 10) "[p]upils participate in lifelong learning." *See Montoy II* (District Court), No. 99-C-1738 at 56.

[73]*Id.* at 63.

financial *base allotment* per full time equivalent pupil,[74] *additional funding* via certain "weights" which were available for districts with students having certain characteristics[75] and districts providing vocational education, and *optional* funding for districts choosing to raise funds through a Local Option Budget or, for capital improvements and maintenance, through local bond issues, capital outlay, or local taxes.[76]

The material changes in this funding formula which rendered the formula unconstitutional according to Judge Bullock largely related to the various "weights" and local revenue raising options. First, the Legislature reduced the enrollment threshold for the low enrollment weighting from 1,900 to 1,725.[77] Second, a "correlation" weight was added to compensate the larger districts that did not qualify for the low enrollment weight.[78] Third, the Legislature decreased the school district fund property tax rate from 35 mills to 30 mills.[79] This had the effect, according to the court, of "greatly reducing revenue for school finance." Fourth, the Legislature added a $20,000 exemption to the mill levy calculation for residential property appraisals, "further significantly lowering the property tax yield for school funding."[80] Fifth, the addition of "ancillary weighting," due to the imposition of requirements that must be met for districts to qualify for the weight, solely benefited three of the wealthiest districts in the state.[81] Sixth, "special education funds . . . were added into a school district's general fund for the sole purpose of increasing the base upon which the [Local Option Budget] lid was calculated."[82] The district court found that this functionally enabled the Legislature to pass off basic operational funding responsibilities to local districts via the Local Option Budget. The district court held that this was an unconstitutional dereliction of duty by the Legislature as the Legislature was solely responsible for providing one hundred percent of the funds needed for a "suitable" education.[83] Finally, the removal of the 4 mill levy cap on the Local Budget Option created every more disparities between wealthy and poor districts.[84]

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[74]Since 1992, all school districts have been required to levy a minimum of 20 mills in order to raise (or attempt to raise) the base allotment for their district. *See id.* at 68-69.

[75]Student characteristics for which individual weightings were provided included at-risk (free and reduced lunch), special education, bilingual, students in low enrollment districts, students needing transportation of certain distance.

[76]*Id.* at 56-58 (describing KAN. STAT. ANN. § 72-6405 *et seq.* (2001)).

[77]*Id.* at 64.

[78]*Id.*

[79]*Id.*

[80]*Id.*

[81]*Id.* at 65.

[82]*Id.*

[83]*Id.*

[84]*Id.* at 66. The fourth category of factual findings described by Professor Levy—that minority, disabled, and impoverished students were most affected by the statutory changes—relates to the court-noted *societal* changes that had occurred in the state since 1992. *See id.* at 62-63. These societal changes, reasoned the court, had exacerbated the inadequacy and inequity caused by the statutory changes to SDFQPA's original funding scheme. The court found that increases in the number of students qualifying for free or reduced lunches, bilingual students, special education students, and minority students had significantly changed the educational landscape since 1992, when SDFQPA was adopted. *Id.* at 63. Moreover, admission requirements of state colleges and universities had increased since that time as well. These societal changes, coupled with the disparity-causing statutory changes created a school funding system that was fundamentally inequitable under the Kansas constitution. *Id.*

The district court next issued its findings of facts and conclusions of law regarding the *adequacy* of funding levels. The court held that not only did the inequities created by the system violate the suitability and equal protection clauses, but that total levels of funding fail to meet the suitability clause as well. The Court found that while a judicial determination of the actual costs of a suitable education would be an all but impossible task for the trial court, nevertheless, the fact that, in the court's view, "Kansas ha[d] no cost-based budgeting system from which even estimated costs of a suitable education could be ascertained," demonstrated that the Legislature had not even attempted to consider, let alone truly considered, the costs of providing a "suitable education."[85]

More significant to the court than the absence of systemic cost-based budgeting, however, was the fact that the Legislature *itself* had commissioned a "cost study" to be conducted based on its *own suitability standard*, and then failed to implement the cost study's recommendations for the minimum increase in funding that would be required to provide "suitable provision for finance" of public schools. In 2001, the Legislature authorized the Legislative Coordinating Council to contract "for a professional evaluation of school district finance to determine the cost of a suitable education for Kansas children."[86] The purpose of the "evaluation" (cost study) was to aid the Legislature in addressing the inadequacies and inequities inherent in the act by providing determinations regarding: "funding needed to provide a *suitable* education in typical K-12 schools of various sizes and locations including, but not limited to, per pupil cost;" additional funding needed for bilingual, impoverished, or disabled students; necessary funding adjustments for various districts based on purchasing power; and yearly adjustments for inflation. The cost study was also to consider those costs associated with: providing adequate education opportunities in rural and urban districts, primary and secondary education settings; providing vocational training programs; opening new facilities; and other similar variables.[87]

Acting on this legislation, the Legislative Coordinating Council employed the firm of Augenblick & Myers to conduct the cost study. After the firm began its work on the study, it asked the Legislature to provide a definition of a "suitable education," as that determination was a "policy determination" on which the firm needed legislative guidance.[88] The Legislative Education Planning Committee (LEPC), charged with the task of overseeing the study, coordinated with the firm, the Legislative Coordinating Council, and the Board of Education before arriving at a suitability standard.[89] The standard for suitability for which Augenblick & Myers were to assign minimum cost estimates, included various achievement goals and basic educational offerings.[90] After conducting research for over a year, "having interviewed 59 people (out of 97 who were invited to participate) and met with 47 others in developing cost

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[85] *Id.* at 86.
[86] *Id.* at 87 (discussing Kan. Stat. Ann.46-1225 (2003)).
[87] *Id.* at 88-89.
[88] *Id.* at 66.
[89] *Id.*
[90] "In general, the definition included a curricular program consisting of required elementary subjects . . ., high school graduation requirements . . ., history and government course requirements . . ., State Scholarship Program requirements, and the Qualified Admissions Pre-College Curriculum." *Id.* at 90.

estimates,"[91] the firm concluded that the Legislature needed to appropriate an additional $853 million in order to suitably provide for the finance of public schools.[92] Because no alternative evidence regarding the actual costs of providing an adequate education was offered at trial, the court found that the Legislature had unconstitutionally underfunded the public school system.[93] In all, the court summarized its decision as holding that Kansas' school funding scheme violated two aspects of the equal protection clause—rational basis and disparate impact—as well as the suitability clause of the Kansas Constitution.

As the final matter in its December 2, 2003 memorandum and order, the district court took up the question of an appropriate remedy. In its discussion, the court emphasized that the separation of powers doctrine bound the court in its inability to restructure the current funding scheme. According to the court, the task of writing "a new or different school funding scheme . . . [was] a function of the legislative and executive branches[, not the judicial branch,] of . . . government."[94] Additionally, a court order granting relief to the plaintiffs enjoining the defendants from administering the unconstitutional provisions of the funding scheme, "would further disadvantage those very students [the] suit was brought to protect."[95] Finally, because the start of the 2004 Legislative session was less than a month away from the date the district court was issuing its decision, the district court withheld its final order and judgment until July 1, 2004, in order to "give the executive and legislative branches of our government the luxury of a full legislative session . . . to correct the constitutional flaws outlined in this opinion."[96]

3. District court remedy

After the Legislature chose not to pass legislation addressing Judge Bullock's concerns, the district court revisited the matter of remedies nearly two months earlier than its July 1, 2004 deadline. After being briefed on the remedies issue in light of the recent legislative session, the district court issued its memorandum and order regarding remedies on May 11, 2004.

The court discussed the various efforts that had been made during the legislative session to add funding to and address the inequities of the school finance formula, but frowned upon the fact that in the end, "the Legislature adjourned without addressing or correcting even one of the . . . unconstitutional aspects of [the] State's school funding scheme."[97] The court discussed the various court-ordered remedies utilized in other states when similar funding

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[91]John AUGENBLICK & JOHN MYERS, CALCULATION OF THE COST OF A SUITABLE EDUCATION IN KANSAS IN 2001-2002 USING TWO DIFFERENT ANALYTIC APPROACHES ES-1 (May 2002).

[92]*Montoy II* (District Court), No. 99-C-1738 at 90.

[93]*Id.* "Based on the uncontroverted facts in the record before this Court, the Court [found] as a matter of fact and law that the funds provided to Kansas school districts by the Legislature under the present financing scheme as applied is clearly and grossly inadequate to provide Kansas children a suitable education (as that term is defined by both this Court and the Legislature itself) and, as such, in violation of article 6 of the Kansas Constitution." *Id.* at 101-02.

[94]*Id.* at 120-21.

[95]*Id.* at 122.

[96]*Id.*

[97]Montoy v. State (*Montoy II*), Decision and Order Remedy, No. 99-C-1738, p. 13 (Kan. Dist. Ct. 2004).

schemes had been found unconstitutional, remedies such as: appointing a special master to take over and address the constitutional deficiencies in the school finance system; ordering the state to determine and then provide for the cost of providing a constitutional education, a process that was to be overseen by a court-ordered accountability system; and ordering government officials to make specific recommendations and then adopt them.[98] Acting with these comparable approaches in mind, the court found it necessary to enjoin the defendant from the use of the unconstitutional statutes in order to fund the public schools. Although the court noted that this action would in effect put the school system "on pause" until the unconstitutional nature of the statutes was corrected, the court consoled itself by noting that such an action would "end the inadequate and inequitable education being provided now and the disparate damages presently being done to the most vulnerable of our children."[99]

Next, the court issued its criteria for a constitutional school funding system. While the various alternatives in constructing a constitutionally sound system were legion, the court emphasized that the Legislature must, at a minimum: manage the school system in such a way as to correct expensive inefficiencies in the present structure of the schools; determine and provide for "the actual costs of a suitable education for every Kansas child;"[100] ensure that differences in per pupil funding from district to district be "justified by actual differing costs necessary to provide . . . suitable and equal education [opportunities]" for each child in Kansas; eliminate any disparate impact that the current system has on any category of children; and provide for an oversight mechanism over the distribution and future adjustment of funding.[101] The court again emphasized the need for school funding to be "based on actual costs incurred by our schools in providing a suitable education for our children."[102]

The court concluded its order by chiding the Legislature in its choice to lower property taxes during the same years that the school financing system became unconstitutional, noting that the Legislature has the choice whether to "levy taxes or . . . spend the funds it . . . collect[s]", but it does not have the choice whether to fund the state education system. The Constitution requires, the court insisted, that the Legislature fund the school system before it funds "other programs not required by the Constitution."[103]

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[98] *Id.* at 22.

[99] *Id.* at 28.

[100] The court rearticulated its suitability standard from its December 1, 2003 memorandum and order as requiring that the school finance system "provide all Kansas students, commensurate with their natural abilities, the knowledge and skills necessary to understand and successfully participate in the world around them both as children and later as adults." *Id.* at 31.

[101] *Id.* at 30-34.

[102] *Id.* at 38.

[103] *Id.* at 41.

4. Montoy II: Supreme Court upholds district court's suitability holding and reverses equity holding – January 3, 2005

After its initial order, the district court retained jurisdiction over the litigation to issue and monitor the remedy. As a result, its decision was not yet final and was thus not appealable.[104] During the 2005 session, however, the Legislature passed special legislation allowing immediate appeal to the Kansas Supreme Court.[105] The Kansas Supreme Court thus took up the appeal, and on January 3, 2005 issued its opinion.

The Court reversed the district court's holding that the Kansas school finance system violated the equal protection clause.[106] However, the Court upheld the district court's holding that the school funding system violated the suitability provision of the Kansas Constitution. Citing the societal and statutory changes described by the district court, and noting that the state funding system was not based upon "actual costs"[107] of providing an education that would meet the Legislature's own suitability standard, the Court held that the district court's findings of fact were "sufficient to support the conclusion that the Legislature has failed to 'make suitable provisions for finance' of the public school system as required by Art. 6, section 6 of the Kansas Constitution."[108]

With regard to an appropriate remedy, the Court echoed the district court when suggesting that there are "literally hundreds of ways" the Legislature could alter the funding scheme in order for it to come into compliance with the Constitution. The critical factors for the Legislature to consider in achieving a suitable formula for financing education were "equity with which the funds are distributed and the actual costs of education, including appropriate levels of administrative costs." Moreover, in contrast to the actions taken in its decision six months later, the Court plainly stated that even though it was clear both that "increased funding will be required" and that the inequities inherent in the present system would need to be addressed, the Court would not "dictate the precise way in which the Legislature must fulfill its constitutional duty," as the decision remained the Legislature's alone.[109] Issuing its decision a few days before the beginning of the 2005 legislative session, the Court stayed all district court proceedings, including its remedy orders, and withheld formal opinion until April 12, 2005 to allow the Legislature to attempt to address the constitutional violations.[110]

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[104] *See* Levy, *supra* note 9, at 1042.

[105] *See id.* at 1043.

[106] With respect to rational basis, the Supreme Court simply held that "all of the funding differentials as provided by SDFQPA are rationally related to a legitimate legislative purpose." *Id.* at 1044 (quoting Montoy v. State, 102 P.3d 306, 308 (Kan. 2005)). With respect to disparate impact, the Supreme Court held that the distict court had failed to find the requisite discriminatory intent under the two-pronged strict scrutiny test. *Id.*

[107] *See* Montoy v. State (*Montoy II*), 102 P.3d 306, 310. "[T]he present financing formula increases disparities in funding, not based on a cost analysis, but rather on political and other factors not relevant to education." *Id.*

[108] *Montoy II*, 102 P.3d at 310.

[109] *Id.*

[110] *Id.* at 311.

D. Montoy III

During the 2005 session, the Legislature passed House Bill 2247, appropriating an additional $142 million for the financing of the public school system, and making several major structural changes to the school financing formula as a whole.[111] Such changes included: an alteration to the Base Student Aid per Pupil; increases in weightings for bilingual and special education students; an adjustment mechanism for inflation; the removal of correlation weighting for larger districts; a phased-in increase to the local option budget cap; the addition of a local revenue raising mechanism for districts with high property values.[112] The bill also established the "2010 Commission," a new government body tasked with monitoring the school finance system and provided for a Legislative post-audit study to be conducted in order to "determine the costs of delivering the kindergarten and grades one through [twelve] curriculum, related services and other programs mandated by state statute in accredited schools."[113]

The Supreme Court, in keeping with its April 12, 2005 deadline for compliance, issued an order directing the parties to the suit to brief the Court regarding "whether the financing formula, as amended by H.B. 2247, meets the Legislature's constitutional burden to 'make suitable provision for finance' of the public schools."[114] Specifically, the Court asked the parties to address three issues: 1) whether H.B. 2247 reflects that the Legislature considered the actual costs of education and whether H.B. 2247 increases funding disparities between districts; 2) whether additional fact-finding was necessary; and 3) what remedial action the Court should order.[115]

After briefing and oral arguments were conducted by the parties, the Court rendered its decision on June 3, 2005. The Court held that H.B. 2247 had not brought the school funding scheme into compliance with the suitability clause of the Kansas Constitution, as the added provisions either failed to adequately address the inadequacies and inequities of the current system, or, in some cases, actually functioned to exacerbate the current deficiencies. With respect to the Court's question of whether the bill indicated that the Legislature considered the actual costs of providing a suitable education, the Court found that because the A&M study was the controlling authority[116] reflecting the actual costs of education, the fact that the Legislature failed to appropriate additional funding at the levels recommended by the study demonstrated that the Legislature gave little thought to the matter.[117]

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[111] *See* Montoy v. State (*Montoy III*), 112 P.3d 923, 926 (Kan. 2005).
[112] *Id.*
[113] *Id.* at 927.
[114] *Id.*
[115] *Id.* at 926.
[116] The reason for the Court's deference to the A&M study was four-fold: 1) the study was the only admitted trial evidence on the issue of actual costs; 2) the study was commissioned by the Legislature itself for the exact purpose of discovering the actual costs of education; 3) the study was the only cost study before either the Court or Legislature; 4) both the Board of Education and the State Department of Education recommended that the Legislature adopt the study recommendations. *Id.* at 932.
[117] *Id.*

The Court devoted much of its opinion to a discussion of the changes to the various weightings, including those for bilingual, at-risk, and special education students, declining and low enrollment school districts, and others. The Court concluded that these weightings did not reflect an actual cost basis, but were rather added merely as a "good faith effort toward compliance." Some of the weightings, as well as the increased local budget authority reflected in the capital outlay and local option budget provisions, actually served to exacerbate the disparities existent before the change.[118] And finally, while the addition of both a monitoring committee and an alternative cost study by Legislative Post-Audit made large strides toward compliance, the Court found that the cost study parameters were deficient because its task was to only compile cost-estimates on the basis of how much funding would be required to *provide* certain "inputs"—i.e. curriculum, teaching staff, facilities, etc.—rather than how much funding would be required to *achieve* certain "outcomes"—i.e. progressive proficiency levels.[119]

After addressing all of these concerns, the Court found that the funding levels as a whole fell grossly short of the funding levels—those reflected in the A&M study—that the Court felt represented the minimum threshold for a constitutional funding scheme.[120] But rather than stopping at the point of declaring the financing scheme yet again unconstitutional and following through with the district court remedies of enjoining the administration of the unconstitutional aspects of the financing scheme, the Court took the unprecedented step of ordering the Legislature to *appropriate* an increase of $285 million in school funding—including the $142 million already appropriated—for the upcoming school year.[121] The $285 million increase reflected one-third of the recommended increase of the A&M study.[122] Further, the Court threatened to order the Legislature to spend the additional $568 million recommended by the A&M study, should the Legislature's post-audit report lack timeliness or validity or should the Legislature fail to provide additional funding that is both based on the actual costs of a suitable education and adequately addresses the inequities of the current system. After issuing these direct orders, the Court indicated that it would retain jurisdiction over the litigation in case further action was necessary by the Court to ensure compliance with the Court's orders.[123]

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[118] *Id.* at 932-936.
[119] *Id.* at 939.
[120] *Id.* at 936-37.
[121] *Id.* at 940-41
[122] *Id.* at 940. "We . . . conclude . . . that at least one-third of the $853 million amount reported to the Board in July of 2002 (A&M study's cost adjusted for inflation) shall be funded for the 2005-2006 school year." *Id.*
[123] *Id.* at 941.

E. Montoy IV

The unprecedented step taken by the Kansas Supreme Court in *Montoy III* of ordering the Legislature to appropriate a specific amount of money for school finance raised obvious questions in many minds as to the propriety and legality of such an action. When the Legislature was called by the Governor into a Special Session to address the court order, many legislators openly criticized the Court for violating the separation of powers doctrine.[124] While work commenced on addressing the specific constitutional deficiencies in H.B. 2247, some legislators introduced bills and proposed constitutional amendments that sought to specifically limit the Court's remedial power with regard to school finance.[125] None of these efforts were successful however, and, in the end, the Legislature passed a bill making several changes to the school finance formula. In addition to an overall increase in school funding of $147 million (bringing the funding level into compliance with the court-mandated $285 million for the current school year), the Legislature made significant changes to the various base aid, weighting, and local revenue provisions.[126]

These changes prompted the Court to hold in its July 8, 2005 interim decision that the funding levels had come into compliance with the Court's earlier order for the current school year. Nevertheless, the Court retained jurisdiction once again to review the Legislature's funding levels for the subsequent two years, with special respect to the upcoming legislative post-audit cost study due at the start of the 2006 session.[127] After that study came out in January 2006, the Legislature adopted still more increases to the funding levels and changes to the aid distribution system,[128] such that the Court held on July 28, 2006 that the Legislature had substantially complied with an addressed the concerns of its previous orders.[129] As a result, the Court lifted the stays on the previously unconstitutional portions of the funding scheme and dismissed both the appeal and the underlying case.[130]

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[124] *See* Levy, *supra* note 9, at 1046.

[125] *See id.*

> During the [special] session, many legislators (and the Attorney General) sharply criticized the court's decision. Of particular concern was the court's statement that the Legislature "shall" provide a specified dollar amount, which opponents of the court's decision regarded as a usurpation of the Legislature's exclusive authority to make appropriations. Various constitutional amendments were proposed in response, including amendments that would prohibit the courts from ordering or redirecting appropriations, prevent judicial enforcement of school funding provisions in the Constitution, and change the manner of selecting judges. Some legislative leaders indicated that they would not address the funding issues until a constitutional amendment was approved for submission to the voters. The Attorney General suggested that it might be possible to distribute funds early so as to prevent the court from closing the schools.

Id.

[126] *See id.*; Montoy v. State (*Montoy IV*), 138 P.3d 755, 760.

[127] *See Montoy IV*, 138 P.3d at 760.

[128] *Id.* at 760-61.

[129] *See id.* at 766.

[130] *Id.*

III. Determining 'Costs'

At its core, the extensive *Montoy* legal battle described above was about both how the *costs* of public education in Kansas should be measured, and secondarily, about who is qualified to make such measurements. Before any of the legal or constitutional arguments, the result of the *Montoy* struggle was in some real sense predetermined by the manner in which the Legislature chose to allow these questions to be answered. What follows is a detailed examination of the legislatively commissioned cost studies with particular attention paid to the methodology adopted by those studies.

A. Legislature commissions professional cost study

During its 2001 session, the Kansas Legislature passed a bill authorizing the Legislative Coordinating Council to commission a "professional evaluation of school district finance to determine the cost of a suitable education for Kansas children."[131] The statutory language describing the parameters and purpose of the study indicated that the objective of the thorough review of the SDFQPA was to "address[] inadequacies and inequities inherent in the act."[132] The study's recommendations were to be geared toward nothing less than describing "the components of a school district finance plan that [would] fulfill the state's obligation to provide a suitable education for Kansas children." In other words, the statutory language commissioning the study clearly demonstrated that the Legislature intended the study to assist the Legislature in meeting its constitutional obligation to provide "suitable provision for finance" of the public school system.[133]

The statute granted the Legislative Coordinating Council (LCC) broad discretion to direct the scope of the study, and listed four specific determinations for the study to make. First, the study was to determine the cost, both per pupil and additional costs, of providing a suitable education "in typical K-12 schools of various sizes and locations."[134] Additionally, the study was to determine the costs associated with: providing a suitable education to special education, at-risk, and bilingual children; the need to accommodate discrepancies in purchasing power among various districts; and annual inflation adjustments.[135] The statute also listed various factors that the study was to consider when determining various educational costs, including those associated with: providing similar educational

[131]Kan. Stat. Ann. § 46-1225 (2001) (repealed 2005).
[132]*Id.* at §46-1225(a).
[133]In its post-trial memorandum and order, the district court in *Montoy II* pointed to the fact that the Legislature's language in the statute was clearly aimed at raising appropriation for school finance to a minimally constitutional level of "suitability." *See* Montoy v. State (*Montoy II*), Memorandum Decision and Order, No. 99-C-1738, p. 120-21 (Kan. Dist. Ct. 2003). The court tied its holding that the school finance plan was unconstitutional to the fact that the Legislature had refused to implement the study's recommendations after it had commissioned the study in order to address what the Legislature itself had identified as possible "inadequacies and inequities inherent in the [current school finance plan]." *Id.* (quoting at length and emphasizing language from Kan. Stat. Ann. § 46-1225(a)).
[134]*Id.* at § 45-1225(a).
[135]*Id.* at § 46-1225(a)(1)-(4).

opportunities in rural and urban settings; providing suitable opportunities at elementary, middle, and high school levels; providing special and vocational programming; building and operating new facilities; and accommodating costs in various geographical settings.[136]

The statute called for the LCC to designate a special committee to oversee the progress of the cost study. The LCC delegated this responsibility to the already-in-existence Legislative Education Planning Committee (LEPC), indicating that the special committee was to be composed of "some or all of the members" of the LEPC.[137] Among tasks like soliciting bids and recommending a firm to conduct the study to the LCC, the statute directed the LEPC to "act in an advisory capacity to assist the consultant in the conduct of the evaluation."[138]

A. Augenblick & Myers cost study

After several months of soliciting various firms, the LEPC contracted with the firm Augenblick & Myers, Inc. (A&M) to conduct the study. Before beginning the process of developing determinations of the estimated costs of a suitable education, the firm sought clarification and recommended expansion of the commissioning statute's definition of the term "suitable education."[139] Kansas statute 46-1225 subsection (e) had defined the term as merely consisting of a general curricular program covering a range of core grade-level-appropriate subjects.[140] This definition was built on the standards in the accreditation statutes of the Kansas Quality Performance Act.[141] A&M sought a more specific definition of "suitable education," suggesting to the LEPC that the term incorporate both input-based (based on services provided) and outcome-based (based on student performance) measures.[142] A&M sought an expanded "input-based" standard by recommending that the LEPC supplement the general curricular requirements of K.S.A 46-1225 with language that included "vocational education as a required course offering"[143] as well as other services it deemed essential to a "suitable education."[144]

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[136] *Id.* at § 46-1225(b)(1)-(7).

[137] *Id.* at § 46-1225(d).

[138] *Id.*

[139] *Id.*; JOHN AUGENBLICK & JOHN MYERS, CALCULATION OF THE COST OF A SUITABLE EDUCATION IN KANSAS IN 2001-2002 USING TWO DIFFERENT ANALYTIC APPROACHES ES-1 (May 2002), http://skyways.lib.ks.us/ksleg/KLRD/Publications/SchoolFinanceFinalReport.pdf [hereinafter A&M Study].

[140] *See* Kan. Stat. Ann. 46-1225(e).

> For the purpose of the professional evaluation of school district finance, the term "suitable education" means a curricular program consisting of the subjects and courses required under the provisions of K.S.A. 72-1101,72- 1103 and 72-1117, and amendments thereto, the courses in foreign language, fine arts and physical education required to qualify for a state scholarship under the provisions of K.S.A. 72-6810 through 72-6816, and amendments thereto, and the courses included in the precollege curriculum prescribed by the board of regents under the provisions of K.S.A. 76-717, and amendments thereto.

Id.

[141] *See* AUGENBLICK & MYERS, *supra* note 139, at ES-2.

[142] *Id.* at III-2.

[143] *Id.*

[144] *See id.* at Appendix B. In addition to the general curriculum of Kan. Stat. Ann. 46-1225(e) and vocational education, the services that A&M convinced the LEPC to include in the "input-based" standard included a *mix* of the

The outcome-based standards that A&M convinced the LEPC to include in the expanded "suitable education" definition provided specific student proficiency targets in math and reading statewide assessment tests over a five year period.[145] A&M's redefinition of suitability has deeply colored every legal and political dispute over school finance in Kansas since 2001. After soliciting and obtaining this expanded definition, A&M proceeded to conduct the study via several general tasks, including conducting interviews with a hand-selected panel of citizens connected to the educational industry, calculating the base cost figure estimate under two different methodologies, and making a series of recommendations regarding increased funding and structural changes to the system.[146]

1. Task 1: interview various educationally-informed citizens regarding their views of Kansas school finance

A&M formed a committee of fifty-nine "educationally-informed" citizens[147] in order to obtain "their views about the Kansas school finance system."[148] A&M openly acknowledged that it had *not* sought to obtain the opinion of the general public regarding school finance, and thus, accordingly, "a random sample of Kansas citizens was *not* selected to respond to a survey focused on the implications of school funding for the average citizen."[149] Instead, the specific design and purpose of the citizen-committee was to:

> identify the strengths and weaknesses of the funding system *based on the views of people who were generally familiar with schools, and the way they are funded . . .* [P]articipants were not selected on the basis of how well they, as a group, represent[ed] the population of the state; rather, they were selected based on their knowledge of and interest in the funding of education.[150]

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following: student and staff safety, extended learning time, technical education, library media services, fine arts, activities programs, qualified teachers, early childhood programs, alternative schools, technical training, foreign language, nursing and counseling services, student transportation. *Id.*

[145] *See id.*

[146] *Id.* at ES-1. A&M described its approach as including five general tasks:

> 1) Meeting with 60 or so people to discuss the strengths and weaknesses of the school finance system; 2) using two methodologies to calculate a base cost figure; 3) estimating adjustment factors to the base cost for school district size, special education, at-risk students, and bilingual students; 4) reviewing the structure of the school finance system and examining several ancillary issues (the approach to allocating state aid for transportation, the use of a regional cost factor, a procedure to make annual changes in school finance formula parameters, the way the state supports vocational education, and the provision of state aid for newly opened schools); and 5) making recommendations to improve the structure of the school finance system and set the levels of the parameters used in the system's formulas.

Id.

[147] A&M extended invitations to participate in the committee to ninety-seven people, and formed the committee with the fifty-nine people who replied. *See id.* at Appendix D.

[148] *Id.* at Appendix D, 1.

[149] *Id.* at Appendix D, 1 (emphasis added).

[150] *Id.* at Appendix D, 1, 2 (emphasis added).

In other words, A&M only sought the opinion of members and supporters of the educational bureaucracy regarding their views of the adequacy of school funding and structure of the funding system in Kansas. Among the fifty-nine members participating in this committee, 87% were currently full-time or retired employees of a school district or public school organization.[151] The remaining 13% were members of the community who, though not currently employed by the public schools, were extraordinarily familiar with the state's school financing system.[152] The names of the people invited to participate were suggested by both the Board of Education and the LEPC.[153]

Given the overtly "insider" nature of the committee's purpose and design, the views put forth by the committee members on a general questionnaire were hardly surprising. All but three of the fifty-nine members felt that the base-funding level (the "foundation level") was too low, suggesting a 22% across-the-board increase.[154] Various levels of majorities felt, respectively, that weightings for at-risk students, vocational education, and bilingual students were too low.[155] Similarly, a majority of members thought that adjustments based on school size—the low enrollment and correlation weightings—were too low.[156] A majority thought that school transportation services should be increased to include more students.[157] Varying levels of majorities thought that the suitability standard should require schools to provide services such as school libraries, school nurses, technology training, early childhood programs, and alternative schools.[158]

Panel discussions among the committee members rendered a similar theme: more funding, more services. Increased teacher salaries, expanded services, increased student-performance requirements, more professional development training were all supported by majorities as required for a suitable education.[159] Similarly, while participants generally supported the idea of the local option budget (LOB) mechanism that had allowed districts to raise additional funds locally, the participants nevertheless felt that rather than serving its original purpose of supply funds in addition to that which is provided by the state to meet the minimum adequacy funding level, districts had been forced to exercise the LOB mechanism as a means of reaching that base funding level.[160] One is reminded here of the wisdom of Benjamin Franklin's proverb about two lions and a lamb voting on what to have for dinner.

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[151]The forty-nine educator-members of the committee included school board officials, teachers, superintendents, principals, site councils, PTA leaders, and other education professionals. *See id.* at Appendix D-1.

[152]The ten community-members of the committee included five business leaders, two attorneys, one parent/community leader, one restaurateur, and one financial officer. *See id.*

[153]*Id.* at Appendix D, 1.

[154]*Id.* at Appendix D, 2.

[155]*Id.* at Appendix D, 2-3.

[156]*Id.* at Appendix D, 3.

[157]*Id.*

[158]*See* Appendix D, 4.

[159]*Id.*

[160]*Id.* at Appendix D, 3

2. *Task 2: calculate base-cost figure using both the professional judgment approach and the successful schools approach*

Apart from interviewing a select group of educational insiders, the central task of the A&M study was to apply two popular methodologies—the professional judgment approach and the successful school approach—to the suitable education definition in an effort to divine the "actual costs" of providing such an education in Kansas.[161] As indicated in its final report, the whole purpose of commissioning a study of the suitability of school finance was to "link education accountability to finance."[162] A&M reasoned that the very fact that Kansas had adopted educational standards for improving student performance implicitly required the state to "assure that sufficient resources are available so that school districts can reasonably be expected to meet state standards."[163] A&M reasoned that the use of both the professional judgment and successful school methodologies was based on the need to calculate the base cost in such a way as to "reflect the cost of fulfilling a particular set of services or a particular level of performance, or both, so that the base cost has a meaning beyond simply reflecting available revenue."[164] A&M conducted two parallel studies (each using one of the two methodologies) of the estimated costs of meeting the expanded suitability definition because Kansas, unlike every other state besides Maryland, had indicated its preference for the combination of the two approaches.[165]

a. Professional Judgment Approach

The first methodology A&M used to estimate the cost of a "suitable education" was the professional judgment approach. The approach "is based on the assumption that experienced educators can specify the resources prototype schools need in order to assure that school districts can meet state expectations."[166] A&M developed four "school site" panels consisting of various combinations of six to eight principals, superintendents, teachers, business managers, curriculum specialists, and special education providers.[167] In addition, A&M developed two district panels, made up of similar mixtures of education professionals, to review the work of the school site panels,[168] and one expert panel, to review the work of the district panels.[169] The objective for each of the panels was "to identify the resources school districts would need to have in place to meet the state's definition of

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[161] *See id.* at ES-1, 2.
[162] *Id.* at ES-2.
[163] *Id.* at ES-2.
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] *Id.*
[168] The two district panels consisted of 7 and 8 school administrators, respectively, and, in addition to reviewing the school site panels' estimations of the resource needs of prototype schools, were also responsible for estimating the resource needs of prototype school *districts*. *See id.* at IV-1.
[169] *Id.* at ES-2. The expert panel consisted of six total educational experts, including two superintendents, one deputy superintendent, one teacher, one school board member, and one retired Kansas State Department of Education officer. *See id.* at C-1.

education suitability."[170] The panels were asked to separate their consideration of the estimated costs for educating students with special needs from the costs for educating students without such needs. Additionally, each of the four school site panels reviewed one of four "prototype schools," which were made up of varying enrollment levels with corresponding demographic characteristics,[171] in order to identify the distinctive costs associated with such variations.[172]

The school site panels identified the resources they deemed necessary to provide a suitable education. These resources included, among other things: the number and size of classes offered, supplemental learning opportunities during both the regular school year and the summer, pre-kindergarten services for some children, professional development, equipment, technology, support services, and extracurricular activities.[173] The two district panels each reviewed the work of two of the four school panels (one reviewing small/moderate and the other reviewing moderate/large) and amended the respective school panels' lists of resources.[174] The district panels also determined additional resource lists for central district activities (which had not been within the scope of the school panels' objectives).[175] After the district panels had completed their determinations, A&M set out to assign costs to the various resource suggestions for both basic services and special needs services.[176] These cost estimates, along with the resource suggestions of the district panels, were then reviewed by the expert panel, which in turn suggested changes to cost estimates and modified resource suggestions to make them more consistent among schools.[177]

In the end, under the professional judgment model, the base cost estimate for providing a suitable education to students without special needs was $5,811.[178] This base cost increased as the enrollment level dropped, with the smallest school districts requiring up to $8,581 base cost per student.[179] Special education students required over $7,000 per student in additional funding, at-risk students required an additional $2,000 per student, and bilingual students required between $1,200 and $6,000 per student, with all of these added costs increasing as the enrollment level increases.[180]

After rendering its recommendations, A&M conceded the highly subjective nature of the cost estimates: the figures reflected the resources identified by panels who were assigned to complete defined objectives using a defined methodology. As a result, the figures largely "reflect[ed] the assumptions that were used to calculate them . . . [and] could change more substantially if other people, informed by experience, research, and expertise, thought the

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[170] *Id.* at ES-2.
[171] For example, the prototype school representing a "large" enrollment level also included the highest proportions of free/reduced lunch and bilingual students. *See id.* at IV-3.
[172] *Id.* at IV-1.
[173] *Id.* at IV-4.
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *Id.* at ES-3.
[179] *Id.*
[180] *Id.*

objectives identified to the panels could be met even if some components were modified or eliminated."[181]

b. Successful Schools Approach

The second methodology A&M used to estimate the cost of a "suitable education" was the successful schools approach. "This approach determines a base cost amount by looking at the actual spending by districts that already meet the suitable education standard."[182] In order to identify which Kansas school districts to use as models of "successful schools," A&M collected the list of school districts that had already met both the input and outcome standards of the suitable education definition.[183] This list included 85 school districts.

A&M emphasized that some of the strengths of the successful schools approach were its ability to identify a base cost figure,[184] and "that it allows for the inclusion of spending efficiency to be used as a measure of success."[185] Regarding the latter, A&M had hoped to further winnow the number of "successful school" district models by examining the efficiency with which the 85 districts spent their money.[186] After analyzing how several factors (such as attendance center size, enrollment, proportion of low-income students, and local tax effort) affected spending, A&M used these results to estimate a "predicted spending" efficiency level for each district.[187] A&M then compared this "predicted spending" level for each district to a district's actual spending, seeking to identify which school districts were spending efficiently.[188] But when the results demonstrated that *50 of the 85 "successful school" districts would be considered inefficient spenders*, A&M decided not to use *efficiency* as a component of a "successful school," choosing instead to use all 85 school districts.[189] A&M concluded that had it used efficiency standard to exclude those 50 districts, this "might [have] undermine[d] the possibility that this higher [albeit inefficient] spending is what allows district to be successful in Kansas."[190] In other words, as throughout the cost-study process, methodologies were adopted expressly because of the results they could be expected to deliver.

After choosing to use all 85 districts, A&M calculated $4,547 to be the average base cost per pupil under the successful schools model.[191] This number did not demonstrate anything "about how the districts spend their money."[192] This number only demonstrated that "on

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[181] *Id.* at IV-9.
[182] *Id.* at V-1.
[183] *Id.*
[184] A&M explained that the approach was not frequently used to determine special education costs, and accordingly, that A&M chose not to use the approach for this purpose in their report. *Id.* at V-1.
[185] *Id.*
[186] *Id.* at V-2.
[187] *Id.*
[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] *Id.*
[192] *Id.*

average, the amount of money districts need to provide an education to average students to meet the success standards."[193] Moreover, the number demonstrated that "higher performing districts in Kansas spend more than lower performing districts," and that in order for performance among all districts to increase, "spending may have to be increased."[194]

3. A&M's overall recommendations

A&M concluded its study by recommending an overall increase in base student spending to $4,650 per student (from the then current level of $3,820 per student).[195] This number reflected a compromise between the results under both the professional judgment ($5,811 per student) and successful school ($4,547 per student) approaches.[196] After surveying the added costs associated with providing a suitable education in low enrollment districts as well as those associated with educating special education, at-risk, and bilingual students, A&M recommended a variety of weights to be used in order to calculate the appropriate amount of additional funding needed above the base student level.[197] A&M recommended that additional funding be allocated for vocational education and newly opened schools, and that the state should continue to use an equalizing method for granting local budget option authority by capping the local option rate at 25% more than a district's foundation level allocation.[198] Finally, A&M recommended that school districts across-the-board be required to contribute to the foundation program by imposing a 25 mill levy property tax (increased from 20 mills).[199] All in all, A&M recommended a minimum school funding increase of $773 million (which the court a few years later increased, based on inflation, to $853 million), based on the recommended higher foundation level cost ($4,650 per student) and higher adjusted base cost as determined by the added weights for special needs students ($6,918) per student.[200]

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[193] *Id.* at V-2 through V-3.
[194] *Id.* at V-3.
[195] *Id.* at VII-17.
[196] *Id.* at ES-3.
[197] *Id.* at VII-18.
[198] *Id.*
[199] *Id.* at VII-18.
[200] *Id.* at ES-5. Regarding the total increase in funding needed to provide a suitable education, A&M recommended additional expenditures of between $520 million and $773 million depending on whether the [LOB cap] is based on 25 percent of the base expenditure ($4650) or 25 percent of the adjusted base cost per student ($6,918, on average, including expenditures based on school district size, special education, at-risk students, and bilingual students).

Id. In *Montoy III*, the Supreme Court ordered a total increase of $853 million, which reflected A&M's higher estimate ($773 million) adjusted for inflation in the 2005-2006 school year. Montoy v. State, 112 P.3d 923, 940 (Kan. 2005). The Court departed from one aspect of A&M's recommendation when it ordered the *Legislature* to spend an additional $853 million, because while A&M's recommendation had incorporated both state spending and local option budget revenues into the increase, the Court found that the Legislature should be held responsible for all of the increased funding, since that amount represented the minimum increase needed to obtain the "suitability" threshold. *See id.* at 937. Because the Constitution required the Legislature to make "suitable provision for the finance" of public schools, the Legislature alone was responsible for the increased funding, and local option budgets

C. A&M, Montoy, and the road to Legislative Post-Audit

When the A&M cost study was submitted to the Legislative Coordinating Council in May 2002, the *Montoy* school finance litigation was already two and a half years old. The cost study, however, played a crucial role in the subsequent district and Supreme Court rulings. By the time the district court trial began in September 2003, A&M remained the only professional evaluation of the actual costs of providing a suitable education in Kansas. At trial, A&M was admitted as the only evidence of such actual costs—a fact highlighted by the district court in its holding that the present system demonstrated the Legislature's failure to even consider the correlation between funding and school performance expectations.[201] Even though A&M served as the backbone of the district court's December 2003 declaratory judgment which found the current school funding level as unconstitutionally inadequate, the district court's remedy, issued immediately after the 2004 Legislative session, did not grant the plaintiff's request to order the "[Legislature to implement] each and every reform recommended by Augenblick & Myers on a schedule calculated to achieve rapid implementation of reform by no later than the end of the 2005 legislative session."[202] Rather, the district court insisted that "the next logical and correct step is not for the court to take charge of the school system or to write a new school finance law but instead to simply declare

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and other forms of funding (i.e. federal or grant funding) could only be used as funding in excess of the minimum base funding level. *Id.*

> At least to the extent that funding remains constitutionally equalized, [use of the local option budget to raise additional funds] may be permissible. Clearly, however, such assessments are not acceptable as a substitute for the state funding the Legislature is obligated to provide under article 6, § 6. That should pre-exist the local tax initiatives. At this time, the Legislature has failed to provide suitable funding for a constitutionally adequate education. School districts have been forced to use the LOB to supplement the State's funding as they struggle to suitably finance a constitutionally adequate education, a burden which the constitution places on the State, not on local districts.

Id.

[201] *See* Montoy v. State (*Montoy II*), Memorandum Decision and Order, No. 99-C-1738, p. 91 (Kan. Dist. Ct. 2003).

> When asked whether there was anything the Court could consider other than the Augenblick & Myers report in deciding what a suitable education would cost and how that figure compared to current funding, the State Commissioner of Education, Defendant Dr. Andy Tompkins, testified unequivocally there was nothing.

Id.

[202] *See* Montoy v. State (*Montoy II*), Decision and Order Remedy, No. 99-C-1738, p. 13 (Kan. Dist. Ct. 2004). In their original petition, the plaintiffs had sought relief in the form of a declaratory judgment finding "the SDFQPA to be in violation of the Kansas Constitution," and "a permanent injunction prohibiting defendants from administering, enforcing and/or funding those provisions which are unconstitutional." Petition, *supra* note 25. Though the plaintiffs also requested "such other and further relief as the court deem[ed] just and equitable," the petition made no specific mention of court-ordered restructuring and appropriation. It was only later, at the conclusion of the trial, that the plaintiffs expanded their relief request to include a court-ordered "structured remedy with a timeline" because, according to the plaintiffs, "[t]he Kansas Legislature and educational leadership ha[d] shown that they need[ed] more specific guidance in the area as well as a system of checks to evaluate honest, rapid progress toward the mandated constitutional guarantee." *See* Plaintiff's Proposed Findings of Fact and Conclusions of Law at 80, Montoy v. State, No. 99-C-1738, p. 13 (Kan. Dist. Ct. 2003).

the [unconstitutional] funding statutes . . . void as they apply to the funding of our public schools."[203]

As discussed in greater detail above, in January 2005, the Supreme Court in *Montoy II* upheld the portion of the district court's ruling that had found the Legislature's school finance formula unconstitutional under the suitability provision of article 6, section 6 of the state constitution.[204] The Supreme Court stayed the district court's remedy in order to allow the Legislature time during its upcoming session to fix the unconstitutional provisions of the SDFQPA.[205] In addition to increasing overall funding by $142 million,[206] H.B. 2247 also provided for a new cost study to be conducted by the Legislative Post Audit Division that would "assist the Legislature in the gathering of information which is necessary for the Legislature's consideration when meeting its constitutional duties.[207] Specifically, the study was to provide information regarding the actual costs of education based on determinations of the costs of education in several sample school districts and other variable costs including those associated with serving at-risk, minority, and special needs students as well as students in varying geographical locations.[208]

Despite ordering the Legislature to spend, for the 2005-2006 school year, an amount equal to one-third of the total funding increase recommended by A&M, the Court in *Montoy III* refrained from ordering funding increases for future school years in deference to the LPA cost study that was soon to commence.[209] The Court made clear, however, that it would not hesitate to order the Legislature to spend the remaining two-thirds of the A&M study recommendations ($568 million) if:

> "the post audit study" is not completed or timely submitted for the Legislature to consider and act upon it during the 2006 session, (2) the post audit study is judicially or legislatively determined not to be a valid cost study, or (3) legislation is not enacted which is based upon actual and necessary costs of providing a suitable system of finance and which equitably distributes the funding.[210]

Furthermore, the Court conducted a thorough review of the LPA cost study commission in its decision. In addition to noting the deficient timing of the study (the cost study did nothing to rectify the inadequate funding provided for the 2005-2006 school year, as the study was to be completed and presented in January 2006), the Court deemed the current scope of the cost study commission to be unacceptable.[211] Specifically, the Court found that the study contemplated by HB 2247 was "deficient because it [would] examine only what it costs for education 'inputs'—the cost of delivering kindergarten through grade 12 curriculum, related

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[203] *Id.* at 28.
[204] Montoy v. State, 112 P.3d 923, 926-27 (Kan. 2005).
[205] *Id.* at 927.
[206] *Id.* at 927, 940.
[207] *Id.* at 937 (quoting H.B. 2247 §3).
[208] *See id.* at 937-38 (Kan. 2005) (discussing H.B. 2247 § 3).
[209] *Id.* at 940-41.
[210] *Id.* at 941.
[211] *Id.* at 939.

services, and other programs 'mandated by state statute in accredited schools."[212] In order to be deemed an adequate and complete cost study by the Court, the Court insisted that the LPA study consider the costs of meeting the "outcome" requirements of both the Legislature's and Board of Education's accreditation standards.[213] Reasoned the Court, "Such outcomes are necessary elements of a constitutionally adequate education and must be funded by the ultimate financing formula adopted by the Legislature," and as such, they must be considered by the LPA study.[214]

So even though the Court refrained from issuing a remedy for the school years after 2005-2006, the Court insisted that, if the study was to be considered valid by the Court, the LPA study must "incorporate the consideration of outputs and board statutory and regulatory standards" as well as input-based estimates. Furthermore, "post-audit's report to the Legislature must demonstrate how this consideration was accomplished."[215]

D. Legislative Post-Audit

On June 9, 2005, a week after the Supreme Court had issued its *Montoy III* decision, Governor Kathleen Sebelius called the Legislature into special session in order to address the court order.[216] On July 6, 2005, the Legislature passed S.B. 3, increasing school funding for the 2005-2006 school year by $148.4 million, for a total increase (in addition to funds appropriated during the regular 2005 session) of $289.5 million.[217] This total increase was $4.5 million more than the court-ordered amount of $285 million. In addition to the spending increase, "S.B. 3 also amended the cost study provision to require the LPA to conduct two cost studies: one would study the cost of inputs, and the other would estimate the cost of meeting student performance outcome standards adopted by the State Board of Education."[218]

After the Legislature had passed S.B. 3, the parties appeared before the Court and all agreed that S.B. 3 had complied with the Court's order in *Montoy III* regarding a spending increase for the 2005-2006 school year. The Court retained jurisdiction, however, to review the case after the Legislature had had a chance to receive the LPA study and act on its findings during the 2006 session.[219] So during the fall of 2005, the LPA cost study was conducted with the pressures of an expansive scope of the study (which was to include both input-based and outcome-based considerations), the strict deadline for presentation of the report to the

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[212]*Id.*
[213]*Id.*
[214]*Id.*
[215]In its overall endorsement of the provisions "for analysis of the percentages of sample school district spending on instruction, central administration, and support services" as well as other components of the existing funding formula, the court made one exception, insisting that "all administrative costs, not just costs of central administration, must be analyzed." *Id.*
[216]Montoy v. State (*Montoy IV*), 138 P.3d 755, 759 (Kan. 2009).
[217]*Id.*
[218]*Id.* at 760.
[219]*Id.*

Legislature in early January 2006 (a deadline emphasized by both the Legislative commission and the court order in *Montoy III*), and the promise of intense political scrutiny from both sides of the aisle during the 2006 Legislative session.

The LPA study was presented to the Legislature on January 9, 2006, and was framed around three specific questions: 1) "What are the estimated costs for K-12 public education in Kansas, and how do those estimates compare with current state funding levels?";[220] 2) "Which special needs students receive services, and what services are available to them?";[221] and 3) "What does the educational research show about the correlation between the amount of money spent on K-12 educational and educational outcomes?"[222] As a preface to the complete study, LPA made a clear concession to the very subjective nature of the process of estimating costs for public education, one which highlights the unique role the Legislature plays in any policy and lawmaking process:

> It's important for the reader to understand that any study involving the estimation of costs for something as complex as K-12 education involves a significant number of decisions and assumptions. Different decisions or assumptions can result in very different cost estimates. For example, in the input-based cost study, the estimated cost of funding enough teachers in all school districts to achieve an average class size of 20 students is significantly more expensive than funding enough teachers to achieve an average class size of 25 students.
>
> Our goal was to make decisions and assumptions in both [input-based and outcome-based] cost studies that were reasonable, credible, and defensible. Because K-12 education funding levels ultimately will depend on the Legislature's policy choices, we designed the input-based cost study to allow different "what if" scenarios. For the outcomes-based cost study, we can adjust certain variables, such as the performance outcome standards, to develop other cost estimates. In either study, we could adjust assumptions about the level of efficiency at which districts are expected to operate.
>
> In other words, it's important to remember that these cost studies are intended to help the Legislature decide appropriate funding levels for K-12 public education. They aren't intended to dictate any specific funding level, and shouldn't be viewed that way.[223]

This extended statement concerning the subjective "scope" of the cost study demonstrates the reality that when any entity—public agency or private consultant—attempts to estimate the "costs of a suitable education," every decision at each stage in the process involves policy judgments properly and ultimately belonging exclusively to the legislative branch. So while

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[220]Legislative Post Audit Division, *Elementary and Secondary Education in Kansas: Estimating the Costs of K-12 Education Using Two Approaches* [hereinafter *LPA Executive Summary*] at 5 (Jan. 2006), *available at* http://skyways.lib.ks.us/ksleg/KLRD/Publications/Education_Cost_Study/Cost_Study_Summary.pdf .

[221]*Id.* at 19.

[222]*Id.* at 23.

[223]Legislative Post Audit Division, *Elementary and Secondary Education in Kansas: Estimating the Costs of K-12 Education Using Two Approaches* [hereinafter *LPA Cost Study*] at 2 (Jan. 2006), *available at* http://www.skyways.org/ksleg/KLRD/Publications/Education_Cost_Study/Cost_Study_Report.pdf.

the LPA study—and the A&M study for that matter—attempted to provide informed estimates of the price of certain policy decisions, in the end, LPA rightly recognized that only the Legislature is capable of making such decisions. As such, the best that any cost study can do is *inform* the Legislature as to the range of possible costs associated with different policy decision, and not *dictate* the exact price tag associated with a funding system that passes constitutional muster. This fact simply brings critical clarity to the contradictions at the heart of the school finance debacle in Kansas. If policy determinations precede cost estimates, and cost estimates form the basis for constitutionally mandated spending, then the *Montoy* Court cannot lay any legitimate claim to merely rendering Constitutional decisions, but is rather engaged in the declaration of educational policy.[224]

In the end, the LPA study found that "the additional amount of foundation-level funding needed for 2006-2007 would be at least $316.2 million using the input-based approach, and would be $399.3 million using the outcomes-based approach."[225] These estimates were, respectively, $251.8 million and $168.7 million less than the $568 million price tag representing the remaining two-thirds of the A&M recommendations that the Court had threatened to order the Legislature to spend in the absence of any other valid cost study information. Moreover, the respective increases were 3.7% and 11% higher than the then-current funding level established in July 2005 in S.B. 3.

IV. Hurdles to Reform

The foregoing discussion demonstrates the depth and expanse of the problem facing Kansas with regard to future decisions concerning state funding of our public schools. The constitutional history, the legislative history, the cost study methodology, and finally the Court's actions, have so completely painted the state into a corner with respect to its obligations to fund a powerful special interest (i.e., the education establishment and their taxpayer-funded lobbyists and lawyers), that many may wonder if reform is even possible. Before setting forth some possible avenues for such reform, it is necessary to at least sketch out the very real hurdles that any proposed reform must clear.

First, this paper discusses the collapse of the canons of jurisprudence which have traditionally served to protect the democratic prerogative of the people's elected representatives to effect political change. Through the course of the Montoy litigation these legal principles have been significantly weakened. As such, the current legal playing field represents a significant barrier to reform. Second, the Kansas Supreme Court is more progressive today than it was when it rendered its Montoy decisions, with a majority of the justices poised to rule that education is a fundamental right in Kansas. Third, the Legislature faces a significant barrier in the Court definition of the term "suitable." Fourth, the fiction of "cost-studies" carried out in the

[224] *See* Levy, *supra* note 9, at 1078 ("While courts are competent to define legal rights by interpreting constitutions and laws, they are poorly equipped to make educational policy by determining the content of an adequate education or designing a system of funding to enable the schools to provide that education.").
[225] *LPA Executive Summary*, *supra* note 220, at 5.

context of a state monopoly makes arrival at true cost-based reform a near impossibility. And finally, the fact that Kansas courts have crafted what amounts to a "special rule" for dealing with "the children" erects an extra-constitutional hedge around public schools making the issue a veritable "third rail" in Kansas politics.

A. Legal Issues

In *Montoy III*, the Kansas Supreme Court usurped the constitutional powers of the Legislature to control the purse, and by so doing, violated the separation of powers necessary to preserve Kansas's republican form of government. There should be no doubts that by this decision the Court threw down the gauntlet to the other branches of state government, and, in effect, to the people of Kansas, arrogating to itself the power not only to declare the meaning of the law, but also to make and execute law. As a result, the legal canons described below have been significantly weakened in their power to serve as bulwarks protecting legislative attempts to reform school finance in Kansas.

1. Separation of powers is a bedrock principle of our form of self-government

The separation of powers is the bedrock of our form of limited government designed to preserve and protect the liberty of the people to govern themselves. The United States Constitution guarantees to the states that they shall have a "republican form of government."[226] Kansas courts, and indeed, all courts, have traditionally recognized that:

> The concept of a republican form of government and by implication the doctrine of separation of powers were the underlying assumption upon which the framework of the new government was developed. In reaching this conclusion, this court holds that the doctrine of separation of powers is an inherent and integral element of the republican form of government, and separation of powers, as an element of the republican form of government, is expressly guaranteed to the states by ... the Constitution of the United States.[227]

Historically, it was clearly understood that without separation of powers among the various branches of government, rule of, by, and for the people would soon end. Thomas Jefferson wrote that the Constitution did not create a single governing body, "knowing that to whatever hands confided, with the corruptions of time and party, its members would become despots."[228] Instead, our founders

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[226]U.S. CONST. Art. 4 § 4.

[227]Van Sickle v. Shanahan, 212 Kan. 426, 447 (1973); *see also* Gleason v. Samaritan Home, 260 Kan. 970, 982 (1996) ("The doctrine of separation of powers is an inherent and integral element of the republican form of government.").

[228]Letter from Thomas Jefferson to William Jarvis (September 28, 1820), *in* SAMUEL E. FORMAN, THE LIFE AND WRITINGS OF THOMAS JEFFERSON, at 276. (Bowen-Merrill Co. 1900).

> "more wisely made all the departments coequal and co–sovereign within themselves. If the Legislature fails to pass laws for a census, for paying the judges and other officers of government, for establishing a militia, for naturalization as prescribed by the Constitution, or if they fail to meet in Congress, the judges cannot issue their mandamus to them; if the President fails to provide the place of a judge, to appoint other civil and military officers, to issue requisite commissions, the judges cannot force him."[229]

Otherwise, the people would be placed under "the despotism of an oligarchy."[230]

Further, it was historically understood that should the power of the judiciary ever be combined with the power of any other branch of government, liberty would be destroyed. Alexander Hamilton wrote that: "there is no liberty, if the power of judging be not separated from the legislative and executive powers."[231] He went on to argue that "liberty ... would have every thing [sic] to fear from [the judiciary's] union with either of the other departments ... notwithstanding a nominal and apparent separation."[232]

2. *Montoy* violated separation of powers by invading the exclusive province of the Legislature to raise and appropriate funds.

The legislative power of the purse is inviolate. James Madison wrote that "the House of Representatives cannot only refuse, but they alone can propose, the supplies requisite for the support of government. They, in a word, hold the purse."[233] Madison extolled the power of the purse in Britain as the one mechanism whereby "an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government."[234] He concluded that "this power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."[235] Should the Legislature give up the power of the purse, or allow it to be invaded by another branch of government, the people lose their most effective way to limit "the overgrown prerogatives of the other branches of the government." Hamilton wrote that while the "Legislature ... commands the purse," the "judiciary, on the

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[229] *Id.*
[230] *Id.*
[231] THE FEDERALIST PAPERS, no. 78.
[232] *Id.* While Hamilton was in this passage defending the independence of the judiciary from overreach by either the legislative or executive branches, the principle of separation remains the same. It is ironic that the *Montoy* court cloaks its ruling in language about the need for an independent judiciary while all the while trampling the co-equal independence of the legislative power. The court's claim not to "quarrel with the Legislature's authority" may be technically correct—it eviscerated the Legislature's authority.
[233] THE FEDERALIST PAPERS, no. 58.
[234] *Id.*
[235] *Id.*

contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever."[236]

This founding principle was enshrined at Kansas's founding as well. The state constitution expressly vests the authority of the purse in the Legislature, and makes it clear that taxation and appropriation are exclusively *legislative powers.*[237] One commentator has written in the context of judicially imposed spending increases that:

> it may seem odd ... to suggest that the limits on federal judicial power have any relevance when the courts are seeking to fashion protection for individual liberties. But if the courts were to have plenary power to define constitutional values, command sufficient appropriations to support those values, and then control by equitable decree the spending of the money appropriated, they would be exercising all power of government—judicial, legislative and executive. Such a concentration of power was never contemplated by the Constitution.[238]

Moreover, "it is not enough to say that it is the Legislature, not the courts, that formally appropriates the money, and that it is the executive, not the courts, that formally directs its spending, if they have no choice but to do so in response to a court order."[239] As such, courts have regularly practiced restraint in this area, finding that "a heavy judicial hand ... possibly requiring school districts to raise substantial funds by taxation or transfer of appropriations, raises substantial and sensitive separation of powers problems."[240]

When faced with essentially the identical issue as was before the *Montoy* court (whether the Legislature's funding scheme satisfied the state constitution's requirements for funding state schools), the Illinois Supreme Court made the following, correct, analysis:

What constitutes a "high quality" education, and how it may best be provided, cannot be ascertained by any judicially discoverable or manageable standards. The constitution provides no principled basis for a judicial definition of high quality. It would be a transparent conceit to suggest that whatever standards of quality courts might develop would actually be derived from the constitution in any meaningful sense. Nor is education a subject within the judiciary's field of expertise, such that a judicial role in giving content to the education guarantee might be warranted. Rather, the question of educational quality is inherently one of policy involving philosophical and practical considerations that call for the exercise of legislative and administrative discretion. To hold that the question of educational quality is subject to judicial determination would largely deprive the members of the general public of a voice in a matter which is close to the hearts of all individuals in Illinois. Judicial determination of the type of education children should receive and how it can best be provided would depend on the opinions of whatever expert witnesses the litigants might call to testify and whatever other evidence they might choose to present. Members of the general public, however, would be obliged to listen in respectful silence. We certainly do not mean to

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[236]THE FEDERALIST PAPERS, no. 78.
[237]*See* KANSAS CONST. Art. 2 § 24.
[238]G. Frug, "The Judicial Power of the Purse," 126 U. PA. L. REV. 715, 733 (1978).
[239]*Id.*
[240]DeLeon v. Susquehanna Community School Dist., 747 F.2d 149, n. 8 (3rd Cir. 1984).

trivialize the views of educators, school administrators and others who have studied the problems which public schools confront. But non-experts—students, parents, employers and others—also have important views and experiences to contribute which are not easily reckoned through formal judicial fact-finding. In contrast, an open and robust public debate is the lifeblood of the political process in our system of representative democracy. Solutions to problems of educational quality should emerge from a spirited dialogue between the people of the State and their elected representatives.[241]

Unfortunately, the *Montoy* court did not have as high a level of respect for the people of Kansas and their freedom to engage in a robust public debate with and through their elected representatives over issues of public policy. Instead, the Court engaged in the "transparent conceit" of claiming to be able to judicially discern what a "suitable" education is and then forced the people of Kansas to pay for that conceit.

It is instructive to note that the Court, virtually identical in make-up, less than 6 months prior to the *Montoy* decision, reversed a previous decision (*State v. Kleypas*, 272 Kan. 894 (2001)) which not only found a statute unconstitutional, but rewrote it to bring it into compliance with constitutional requirements.[242] The Court in *Marsh* reasoned that: "*Kleypas'* ... rewriting of K.S.A. 21-4624(e) was not only clearly erroneous; as a constitutional adjudication, it encroached upon the power of the Legislature."[243] Moreover, the Court declared that its decision in *Marsh*:

> recognizes the separation of powers and the constitutional limitations of judicial review and rightfully looks to the Legislature to resolve the issue of whether the statute should be rewritten to pass constitutional muster. This is the Legislature's job, not ours. This decision does more in the long run to preserve separation of powers [and] enhance respect for judicial review."[244]

The decision in *Montoy* was completely at odds with the reasoning of *Marsh*. The *Montoy* Court not only struck down HB 2247, it essentially wrote a de facto new school finance bill, and ordered the Legislature to pass it.[245] It is undoubtedly the case that *Montoy* has undone any progress *Marsh* may have made in "preserv[ing] separation of powers" and "enhanc[ing] respect for judicial review."

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[241]Committee for Educations Rights v. Edgar, 672 N.E.2d 1178, 1191 (Ill. 1996).

[242]*See* State v. Marsh, 278 Kan. 520 (2004). (Overturning State v. Kleypas, 272 Kan. 894 (2001)).

[243]*Id.* at 544.

[244]*Id.* at 544-45.

[245]There is an interesting constitutional wrinkle not addressed by the court or any other commentator that the author is aware of. While Article 6 § 6 of the Kansas Constitution binds the Legislature to provide "suitable" funding for public schools, it does not bind the governor to sign proposed measures. It is an unanswered question as to what would happen were the Legislature to pass a bill providing suitable financing (according to the court's standard) and the governor were to veto it. Even given the court's overreach in *Montoy*, it appears the court would be unable to similarly order the governor to sign any bill, as there is no constitutional mandate to the governor to provide suitable financing.

3. *Montoy* violated the guarantee of due process of law and adequate representation

The revolutionary rallying cry of "no taxation without representation" has long been enshrined in our law. The 5th and 14th amendments to the Constitution prohibit the state from depriving any citizen of their property without due process of law and adequate representation. As such, of vital importance to our system of ordered liberty is placing the power to tax and spend as close to the will of the people as possible; *i.e.*, with the legislative branch. The legislative branch is most directly answerable to the people, whereas the judiciary is not answerable at all. For the judicial branch to mandate massive expenditures of state funds, which requires either new taxation or reallocation of existing revenues, as it did in *Montoy*, is to revert to a system of taxation without representation which was so offensive to the founders of this nation.

"The description of the judicial power [in the U.S. Constitution] nowhere includes the word 'tax' or anything that resembles it."[246] The United States Supreme Court has left "no doubt that taxation is not a judicial function."[247] This is because "any attempt [by the judiciary] to collect ... taxes from the citizens would [be] a blatant denial of due process."[248] Importantly, "[a]ny purported distinction between direct imposition of a tax [by the judiciary] and an order commanding the school district to impose the tax is *but a convenient formalism.*"[249] When the Legislature imposes taxes or appropriates funds, it raises no due process issues because the people's "rights are protected in the only way that they can be in a complex society, but their power, immediate or remote, over those who make the rule."[250] "The citizens who are taxed are given notice and a hearing through their representatives, whose power is a direct manifestation of the citizens' consent."[251] The judicial power is not answerable to the citizens at large, and any general order requiring such massive expenditures from the state treasury (whether by new tax or by reallocation of revenues) is a blatant violation of the due process right to notice and adequate representation. *"A judicial taxation order is but an attempt to exercise a power that always has been thought legislative in nature."*[252] As such, *Montoy* violated the due process rights guaranteed to Kansas citizens.

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[246]Missouri v. Jenkins, 495 U.S. 33, 65 (1990) (Kennedy, J., concurring). While Kennedy's concurrence does not necessarily reflect the majority opinion in *Jenkins*, it remains persuasive authority for policy makers attempting to strike the proper balance between and among the various branches of government. When considering the difficult mix of constitutional, historical, and political issues raised by *Montoy*, it is important to distinguish between, on the one hand, legal arguments that could actually prevail in a court of law given today's judicial environment and accumulated precedent and, on the other hand, valid and legitimate legal arguments that have (perhaps) been wrongly discarded by an activist judiciary but which continue to provide historic and jurisprudential authority for action by the legislative or executive branches.

[247]*Id.*

[248]*Id.* at 66.

[249]*Id.* at 63-64 (emphasis added).

[250]Bi-Metallic Co. v. Colorado State Bd. of Equalization, 239 U.S. 441, 445 (1915).

[251]*Jenkins*, 495 U.S. at 66 (Kennedy, J., concurring).

[252]*Id.* at 67 (emphasis added).

4. *Montoy* violates the political question doctrine

The political question doctrine is a function of the principle of separation of powers. It stands for the rule that issues that involve "political questions" are inherently non-justiciable, and as such, are outside the jurisdiction of the courts. The Kansas Supreme Court has previously articulated the standard for determining when the political question doctrine is implicated:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or in unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements of various departments on one question.[253]

The issue at stake in *Montoy* epitomizes what a "political question" might look like. First, there is a "textually demonstrable constitutional commitment of the issue" to the Legislature. Article 6 § 6 of the Kansas Constitution expressly states: "the Legislature shall . . . ." This represents a clear commitment of the issue of school finance to the Legislature (not to mention the constitutional imperative that the Legislature control the purse) and is non-justiciable. Second, there is clearly a "lack of judicially discoverable and manageable standards" for determining what a "suitable" education is.[254] As the Illinois Supreme Court so eloquently stated, as quoted above, the "suitability" question is tied inextricably to the political will of the people and is not discoverable by the traditional forms and modes of judicial analysis.[255] Thirdly, for the judiciary to decide an issue of this magnitude that clearly implicates the legislative power of the purse requires the Court to express a "lack of the respect due coordinate branches of government."[256] And finally, the *Montoy* decision gave rise to the distinct possibility of "embarrassment from multifarious pronouncements of various departments on one question."[257] In short, the *Montoy* Court failed in a most basic way to exercise the kind of restraint that is necessary to the preservation of democracy—restraint that is mandated by the political question doctrine.[258]

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[253] *VanSickle*, 212 Kan. at 438 (quoting and adopting the standard set forth in *Baker v. Carr*, 369 U.S. 186 (1962)).
[254] *See id.*
[255] *See id.*
[256] *See id.*
[257] *See id.*
[258] Of note, nowhere in the court's decision in *Montoy* is the political question doctrine discussed; no attempt is even made to except this case from the wider application of the doctrine. The court has simply ignored its own precedent to impose its will on the people of Kansas.

B. *Education as a fundamental right*

Another significant hurdle to reform is the Court's own evolving jurisprudence, even since *Montoy*. Before *Montoy v. State*, the jurisprudence regarding education as a fundamental right was quite clear: neither the U.S. Constitution nor the Kansas Constitution guaranteed a fundamental right to a free public education.[259] As a result, prior challenges to state public education funding systems were not subject to heightened or strict scrutiny.

In *U.S.D. 229 v. State*, the Kansas Supreme Court affirmed the district court opinion authored by then Shawnee County District Court Judge (now Justice) Marla Luckert which "exhaustively analyzed decisions from other jurisdictions in concluding that education was not a fundamental right requiring application of the strict scrutiny test in analyzing legislation involving the funding of public education."[260] On appeal, the Supreme Court approved of then Judge Luckert's four main reasons for why sister courts have held that education is not a fundamental right: 1) "courts have noted that there is no authoritative consensus on how to provide the greatest educational opportunity for all students"; 2) "courts should avoid excessive involvement in questions of taxation"; 3) "if the right to education is fundamental, . . . the State would be required to show a compelling interest for maintaining any differences among the State's school districts, even if the differences were not financial"; 4) "[because] educators, social scientists, and courts have been unable to agree on the correlation between educational expenditures and the quality of education[,] . . . it is difficult, if not impossible, to develop an ascertainable standard by which to measure equality."[261]

In *Montoy*, the issues presented to the Court combined with both the personnel changes on the Court since *U.S.D. 229* as well as the fact that, since *U.S.D. 229*, an increasing number of courts in other states had held that education was a fundamental right under their state constitutions, gave the Court an "opportunity . . . to overrule the *U.S.D. 229* holding on the status of the right to education under the Kansas Constitution."[262] Nevertheless, in *Montoy II*, the per curiam opinion made no mention of the fundamental right issue or the previous ruling in *U.S.D. 229* that had established that education was *not* a fundamental right under the Kansas Constitution. Instead, the Court simply held that, with regard to the district court's holding that "the SDFQPA's financing formula [was] a violation of equal protection[,]

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[259] *Id.* at 35 (reversing district court's holding that education was a fundamental right under the U.S. Constitution and thus triggered strict scrutiny review). In *San Antonio School District v. Rodriguez*, the United States Supreme Court held that the U.S. Constitution does not guarantee—either explicitly or implicitly—a fundamental right to education. *Id.*

> [T]he key to discovering whether education is "fundamental" . . . lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution. . . . Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual [rational basis] standard for reviewing a State's social and economic legislation.

Id. at 33, 35 (citations omitted).

[260] U.S.D. 229 v. State, 885 P.2d 1170, 1189 (Kan. 1994). In her concurring opinion in *Montoy II*, Justice Luckert disagreed with the *U.S.D. 229* court's interpretation of her holding. *See infra* notes 271-273 and accompanying text.

[261] *U.S.D. 229*, 885 P.2d at 1189-90.

[262] Montoy v. State, 120 P.3d 306, 311 (Kan. 2005) (Beier, J., concurring).

. . . the district court correctly determined that the rational basis test was the proper level of scrutiny . . . ."[263] As a result, the Court resisted the opportunity to declare that public education was a fundamental right in Kansas, choosing instead to simply extend the default standard of review from *U.S.D. 229* to the equal protection challenge in *Montoy*.

Though the per curiam opinion did not address the fundamental right issue, Justice Beier and Justice Luckert (who was joined by Justice Davis) issued two separate concurring opinions in *Montoy II* for the express purpose of noting their belief that the Kansas Constitution guarantees the fundamental right to a free public education. Justice Beier's concurrence provided an extensive analysis of both the United State Supreme Court jurisprudence and the high court decisions in other states. Justice Beier based her rationale upon the four factors considered by district court Judge Luckert in *U.S.D. 229*.[264] Justice Beier concluded that the right to education was fundamental under the constitution because: 1) "the language of the education article in the constitution is mandatory;" 2) "the education article's relationship to the constitution as a whole emphasized its centrality to the document's overall design;" 3) "[Kansas'] constitutional history reinforces the importance even before statehood"; 4) "indicators are that the framers of [the Kansas] constitution intended education to be a fundamental right."[265] Moreover, because "[e]ducation is vital for each citizen and no less imperative for the survival and progress of our republic," Justice Beier reasoned, "an individual citizen's right to education . . . is 'fundamental' in every imaginable sense of the word."[266]

Even though Justice Beier believed that education should be afforded fundamental right status, she nevertheless stated her belief that legislation implicating education financing should, most of the time, still be reviewed under the rational basis standard.[267] In this respect, she agreed with both the majority in *Montoy* and with then-Judge Luckert's analysis in *U.S.D. 229*.[268] Because the right to education, in Justice Beier's mind, was distinct from rights like the right to privacy, in that the latter was "inherent in the humanity of any individual" while the former was:

> at least in part a function of the way in which our society and other societies of the world have chosen to order and govern themselves and to prepare citizens for full political and economic participation, ... [As a result,] it is logical and reasonable that the Legislature should be more free than the specter of strict scrutiny would allow it to be when it makes policy choices.[269]

Nevertheless, while Justice Beier indicated her belief that rational basis was, for the most part, the appropriate standard for reviewing school funding legislation affecting the fundamental right to education, she did indicate that the Court should retain the power apply strict scrutiny

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[263] *Id.* at 308.
[264] *Id.* at 315 (Beier, J., concurring).
[265] *Id.* at 315-17 (Beier, J., concurring).
[266] *Id.* at 317(Beier, J., concurring).
[267] *Id.* (Beier, J., concurring).
[268] *Id.* (Beier, J., concurring).
[269] *Id.* (Beier, J., concurring).

"if inequities in a school financing system become so egregious that they actually or functionally *deny* the fundamental right to education to a segment of otherwise similarly situated students."[270] This blurring of deeply settled and precedential standards of judicial review is indicative of a judicial philosophy that is merely making things up as it goes along. Rather than articulating and imposing a clear rule that might be relied upon by policy and law makers, the opinion here essentially carries the implied threat that the applicable standard of review is dependent on the justice's view of the relative substantive merits of the claim rather than being a function of procedural safeguards. This suggests that judicial preference controls outcomes rather than legal canons and precedents.

Justice Luckert's concurrence indicated complete agreement with Justice Beier, and stated that, though she agreed with the majority's result and most of its rationale, she would have found "that education is a fundamental right under the Kansas Constitution."[271] She dedicated the remainder of her brief concurrence to clarify what she considered an interpretational blunder by the Supreme Court in *U.S.D. 229* when it had adopted language from her district court opinion in concluding that education was not a fundamental right in Kansas. Justice Luckert stated that in her district court opinion, "I addressed [the fundamental right] issue when acting as the trier of fact in [*U.S.D. 229*] but did not state a conclusion of law regarding whether there was a fundamental right to education under the Kansas Constitution."[272] Instead, she insisted that in *U.S.D. 229*, she had "left open the issue stating that 'there may be a fundamental right.'"[273]

As a result, after *Montoy II*, three Supreme Court justices—Justices Beier, Luckert, and Davis—had publicly recorded their belief that the Kansas Constitution guarantees all Kansas children the fundamental right to education. The doctrine of education as a fundamental right was nonetheless not the legal standard as it did not yet commanded a majority position in the Supreme Court. However, in *Montoy IV*, Justice Eric Rosen (having been newly appointed to the bench by Governor Kathleen Sebelius in November 2005) issued a separate concurrence in the case for the express purpose of indicating his belief that education is a fundamental right under the state constitution.[274] While his separate concurrence did nothing to affect the established precedence of *U.S.D. 229*, it did indicate that a majority of the members on the current Supreme Court individually believed that the doctrine should become law in Kansas, should the issue arise in future litigation. In addition to the four members—Justices Beier, Davis, Luckert, and Rosen—who filed separate concurrences in *Montoy II* and *IV*, expressing their belief that the Kansas Constitution guarantees a fundamental right to public education, the Court has since replaced two of the majority justices ruling in *Montoy* with two justices appointed by then Governor Kathleen Sebelius: Justice Lee Johnson, who was appointed in January 2007; and Justice Dan Biles, who was

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[270] *Id.* at 317-18 (Beier, J., concurring).
[271] *Id.* at 318 (Luckert, J., concurring).
[272] *Id.* (Luckert, J., concurring).
[273] *Id.* (Luckert, J., concurring).
[274] Montoy v. State (*Montoy IV*), 138 P.3d 755, 766 (Kan. 2006) (Rosen, J., concurring). "Every child in Kansas has a fundamental right to an education guaranteed by the Kansas Constitution. I, therefore agree with the concurrences to [*Montoy II*], previously filed by Justices Beier, Davis, and Luckert." *Id.* (Rosen, J., concurring).

appointed in March 2009 after having served more than two decades as chief counsel to the Kansas State Board of Education.[275]

C. *Suitability*

Still another hurdle to reform is the now constitutionally enshrined, yet elusive, definition of "suitability" as decided by the Supreme Court. Though article 6 of the state constitution had been dedicated to the subject of education since the original version of the constitution was adopted in 1859, the current text of the article, including the "suitability" clause at issue in *Montoy*, dates to more recent amendments made in 1966. The suitability clause, located in section 6 of article 6 reads: "The Legislature shall make suitable provision for finance of the educational interests of the state." Before *Montoy*, the Supreme Court had never struck down a state school finance law under article 6, section 6 (or any other article or section for that matter) of the Kansas Constitution.

Only one case—*U.S.D. 229*—had reviewed a school finance law under the suitability clause, and thus remained the only precedent informing the *Montoy* Court (or the Legislature) as to the judicial definition of this clause. Moreover, the Court in *U.S.D. 229* did not provide a precise definition of suitability against which all future school litigation would be measured. Instead the Court clearly indicated that the definition involved a host of policy decisions and "value judgments" that may only be properly made by the Legislature and not the courts.[276] The Court thus linked the constitutional definition of what constitutes "suitable provision for the finance" of the public schools with the Legislature's own accreditation standards.

> Through the quality performance accreditation standards, the Act provides a legislative and regulatory mechanism for judging whether the education is 'suitable'. These standards were developed after considerable study by educators from this state and others. It is well settled that courts should not substitute judicial judgment for educational decisions and standards. Hence, the court will not substitute its judgment of what is 'suitable', but will utilize as a base the standards enunciated by the Legislature and the state department of education.[277]

The Court applied this deferential standard when upholding the SDFQPA in the case, but nevertheless indicated that "the issue of suitability is not stagnant" and that the SDFQPA might very well become unconstitutional if "underfunding and inequitable distribution of finances lead to judicial determination that the legislation no longer complied with constitutional provisions."[278] Thus while refraining from issuing a judicial determination of

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[275] *See Honorable Dan Biles, Kansas Supreme Court 2009-*, http://www.kscourts.org/kansas-courts/supreme-court/justice-bios/biles.asp (last visited September 29, 2009).
[276] *See U.S.D. 229*, 885 P.2d at 1186; Levy, *supra* note 9, at1040.
[277] *U.S.D. 229*, 885 P. 2d at 1186 (citations omitted).
[278] *See U.S.D. 229*, 885 P.2d at 1186.

suitability, the *U.S.D. 229* Court "recognized that article 6 encompassed a minimum adequacy requirement."[279]

Faced with *U.S.D. 229*'s precedent of judicial deference to legislative standards, the *Montoy* Court exercised quite a bit of "finesse" on its way to ordering the Legislature to spend close to a billion dollars in additional school financing.[280] While paying lip-service to the idea that the Legislature alone could make the plethora of policy decisions that make up the school financing and accreditation system, the Court nevertheless made clear that it intended to have the last word on the suitability definition.

In *Montoy I* after Shawnee District Court Judge Terry Bullock had dismissed the plaintiff's case after ruling that *U.S.D. 229*'s definition of suitability—as that which is needed to achieve the legislative accreditation standards—was controlling, the Supreme Court departed from its traditionally deferential role toward suitability when it remanded the case for trial, holding that *U.S.D. 229* was not controlling. Instead, the Court found that the final decision regarding the suitability definition lay with the Court, insisting that "[t]here is a point where the Legislature's funding of education may be so low that regardless of what the State says about accreditation, it would be impossible to find that the Legislature has made 'suitable provision for the finance of the educational interests of the state.'"[281]

At trial, after having being freed from the yoke of judicial deference, Judge Bullock wrote his own vastly expanded definition of suitability: article 6 of the Kansas Constitution requires that "total school funding must be such that it provides every Kansas student, commensurate with their natural abilities, the knowledge and skills necessary to understand and successfully participate in the world around them both as children and later as adults."[282] This definition was significant shift from previous legislative definitions in that the accreditation standards had thus far focused on *school districts*, while the new suitability definition written by Judge Bullock focused directly on *students*. While subtle, this shift nevertheless foreshadowed the emphasis the Supreme Court would place in *Montoy III* on student *outcomes* over and above school district *inputs*.

In *Montoy II*, the Supreme Court emphasized its prerogative to have the last word on suitability, while nevertheless "finessing" the problem of having to issue judicially-created education policy from the bench by relying on the Legislature's own definitions of suitability.[283]

Although in *Montoy I* ... we concluded that accreditation standards may not always adequately define a suitable education, our examination of the extensive record in this case leads us to conclude that we need look no further than the Legislature's own definition of suitable education to determine that the standard is not being met under the current financing formula. Within that record there is substantial competent evidence, including the

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[279] *See* Levy, *supra* note 9, at 1069.

[280] *See* Levy, *supra* note 9, at 1070.

[281] Montoy v. State *(Montoy I)*, 62 P. 32 228, 235 (Kan. 2003).

[282] *See supra* note 63 and accompanying text.

[283] *See* Levy, *supra* note 9, at 1070.

Augenblick & Myers study, establishing that a suitable education, as that term is defined by the Legislature, is not being provided.[284]

The Supreme Court took advantage of the fact that, in the course of commissioning Augenblick & Myers to conduct a cost study Kansas school financing system, a legislative sub-subcommittee (the Legislative Education Planning Committee) had assisted Augenblick & Myers in creating a vastly expanded definition of suitability. When the Legislature failed to adopt the spending recommendations of the A&M cost study, the Court felt it needed to look no further than the discrepancy between the legislative subcommittees' definition of suitability and the Legislature's failure to take action on A&M's recommendations in order to hold that the Legislature was defunct in its constitutional obligations.

The implications of the judicial philosophy underlying the Supreme Court's new approach to the suitability standard are troubling. The Court has clearly held that school finance legislation is subject to a judicially determined "minimum level of adequacy" rather than merely to the Legislature's own accreditation standards yet has failed to issue a precise definition of this minimum threshold. In essence, the Court is "hiding the ball" regarding constitutional requirements by imposing a circular definition of suitability. In other words, in order to meet its constitutional burden to provide suitable provision for the finance of education, the Legislature must provide funding based on the "actual and necessary costs" of a suitable education. The Supreme Court shies away from providing specific guidance with regard to the definition of a "suitable education" because such direction would clearly implicate the Court in dictating education policy. The Court instead relies on inadequate cost studies as its constitutional proxy.

D. Cost study methodology

Though its greatest flaw is its exercise of raw power over the prerogatives of another co-equal branch of government, the *Montoy* decision is fatally flawed in that the Court asserted unfounded authority to direct the scope and methodology of future cost studies. *Montoy III* expressly rejected the "input based" methodology crafted by the Legislature to arrive at a factually based cost analysis for providing an adequate and suitable education to Kansas children. Instead, *Montoy III* mandated the use of an "outcome based" approach to cost analysis, making the state wholly responsible, not just to deliver a suitable educational product to Kansas children, but to ensure that they meet what will surely be vague, shifting, and thus far undefined standards of educational "outcomes." While *Montoy III* allegedly granted the Legislature the ability to conduct new cost studies, it severely restricted the Legislature's ability to set the parameters of those studies, and went so far as to retain jurisdiction over those studies, to determine if they are "valid."[285]

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[284]Montoy v. State (*Montoy II*), 120 P.3d 306, 309 (2005).

[285]*See* Montoy v. State (*Montoy III*), 112 P.3d 923, 942 (2005). After ordering the Legislature to spend an additional $143 million for the 2005-2006 school year, the Court threatened to order an additional $568 million based on its own asserted authority to determine the "validity" of that study.

Through its actions in *Montoy III* and *IV*, the Court has enshrined the cost-study approach as the state's "official" methodology for making public policy decisions regarding school finance legislation. This presents a significant obstacle to school finance reform in two respects. First, by overstepping its bounds in "prescribing" the outcome-based cost study methodology as the approach the Legislature *must* take when making school finance policy decisions, the Court installed itself as the final arbiter of education policy in the state. The Court has thus reduced the role of the Legislature to mere judicial *staff* whose responsibility is to: 1) perpetually commission academic policy theorists to apply any one of a number of competing academic methodologies in order to estimate the actual and necessary costs of providing a proper education to every child in the state; and 2) pass legislation apportioning nothing less than every dollar that such academics recommend be spent on the public schools. Should the Legislature adopt school finance legislation which does not adopt the reports of such cost studies, or should the Legislature attempt to commission additional cost studies with the aim of seeking additional or competing recommendations, the Court has asserted its own prerogative to strike down the legislation or invalidate such cost studies within its own discretion.

Second, by requiring future school finance legislation to be "based upon actual and necessary costs of providing a suitable system of finance and which equitably distributes the funding," *as determined by court-approved cost studies*, the Court has proclaimed the professionally conducted *cost-study* approach—an approach which the authors of the A&M and LPA cost studies readily acknowledged as susceptible to wide variations and which at best provides a rough estimate of costs—as the state's official school finance algorithm.[286] On the one hand, such cost studies follow a demonstrably biased and results-oriented approach. On the other

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> Further, if (1) the post audit study is not completed or timely submitted for the Legislature to consider and act upon it during the 2006 session, (2) the post audit study is judicially or legislatively determined not to be a valid cost study, or (3) legislation is not enacted which is based upon actual and necessary costs of providing a suitable system of finance and which equitably distributes the funding, we will consider, among other remedies, ordering that, at a minimum, the remaining two-thirds ($568 million) in increased funding for the 2006-2007 school year.

Id.

[286] *See LPA Cost Study, supra* note 223, at 2; AUGENBLICK & JOHN MYERS, *supra* note 139 at II-3 through II-4, IV-9.

> [I]t's important to remember that these cost studies are intended to help the Legislature decide appropriate funding levels for K-12 public education. They aren't intended to dictate any specific funding level, and shouldn't be viewed that way.

LPA Cost Study, supra note 223, at 2.

> None of these approaches [i.e. professional judgment approach or successful schools approach] are immune to manipulation; that is, each is subject to tinkering on the part of users that might change results. In addition, it is not known at this point whether they would produce similar results if used under the same circumstances (in the same state, at the same time, with similar data). In fact, there is some speculation that the successful school district approach and the comprehensive school reform approach produce lower costs than the professional judgment approach or the statistical approach. Regardless of these shortcomings, each approach represents an attempt to rationally determine the parameters that drive the allocation of state aid, and the use of any of the approaches raises the level of discussion about school finance adequacy.

AUGENBLICK & MYERS, *supra* note 139 at II-3 through II-4.

hand, the whole notion of an effective and accurate cost assessment in a closed economic system in which the state holds monopoly power is suspect. A full explanation of the impossibilities of obtaining accurate cost figures in a closed economic system with no competitive pressures is beyond the scope of this paper, however, it is clear that "costs" in this context are code for "price-fixing." Such government price-fixing is subject to all the inefficiencies and price-gouging associated with the absence of market forces.[287]

E. Playing politics with "the children"

Beyond the interpretational turnip-squeezing the Court engaged in in order to extract an additional $853 million of taxpayers' money from the constitutional doctrine of "suitability", perhaps the most alarming aspect of the judicial philosophy driving the *Montoy* litigation was the unapologetic approach the district court took to the entire subject of education as it relates to "the children." Two weeks before the trial began in *Montoy II*, District Court Judge Terry Bullock made clear where his sympathies, and resulting fact-finding approach, lay. In a letter to the counsel of record dated September 8, 2003 (fourteen days *before* the trial commenced), Judge Bullock made clear that, even before hearing any evidence in the case, the purported victims in this case—i.e. "the children"—held his allegiance before any other consideration:

> Finally, in case the Court has not been crystal clear, the Court takes the view that this case is about *children* and their *suitable* and *equal educational opportunities*. Nothing else. If we all keep our focus on the *children*, I believe we shall reach the goal our constitution mandates.[288]

The subject of public education has essentially become a legal and political "third rail" in Kansas—a political subject that is immune from contest by any other competing consideration. When the education of *children* is at stake, "nothing else" will be considered—no fiscal concerns, no policy concerns, no legislative concerns, and no concern for the bedrock principles of our republican system of government. Indeed, Judge Bullock made clear in his memorandum decision that public education in our state is to be funded *even if it means shutting down every other part of the state government to do so.*

> Although ordinarily it is not the Court's role to direct the Legislature on how to levy taxes or on how to spend the funds it does collect, this case is the exception. The Constitution provides virtually no mandatory state programs or services, *except for the education of our children*. If the Legislature deems a increase (or a restoration of taxes) inappropriate to adequately fund education, it most certainly has the authority to make that decision. However, it has no choice when it comes to funding education. Under the Constitution, it simply must do it and do it adequately. Accordingly, other programs and services not required by the Constitution may

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[287] *See supra* note 190 and accompanying text.

[288] Letter from Judge Terry Bullock to Counsel of Record dated September 8, 2005, Montoy v. State, No. 99-C-1738, p. 48 (Kan. Dist. Ct. 2003).

> ultimately face termination or reduction if the Legislature elects to provide no additional revenue and adequate funds are not otherwise available to provide for both constitutionally mandated education and those programs and services which are merely discretionary.[289]

This approach was confirmed by the Supreme Court's ruling, and in particular, by Justice Beier's concurrence, in *Montoy II*. After acknowledging that "no amount of money committed to public education" will solve all of Kansas's problems, Justice Beier nevertheless wrote that she was "unwilling to graft a 'good enough for government work' phrase onto [the school finance provision] of our state constitution" and that she therefore would prefer to keep jurisdiction of Kansas school finance with the Supreme Court for "further, much better informed review by myself and my colleagues."[290] The courts of our state are apparently not concerned or impressed with Justice Jackson's admonition that the Constitution is *not* a suicide pact.[291]

V. Conclusion: Reform Alternatives

The Legislature may consider three broad categories of reform to address the school finance induced budget crisis currently facing our state: 1) funding reform; 2) structural reform; or 3) constitutional reform. While in normal circumstances funding reform would be the most direct and efficient means of addressing the budget imbalance, given the history and barriers to reform set forth above, funding reform is not currently a feasible option. Special interests in the education monopoly held by state education bureaucrats lie in wait to pounce on any perceived deviation from the Court's clear mandate in *Montoy* and Kansas courts have made very clear that current constitutional interpretation will force dramatic cuts to every other aspect of the state budget before cuts to public education will be permitted.

The second possible path to reform is structural in nature, takes a long view, and has as its end a reform of the *actual costs* of providing a suitable education in Kansas. Such reforms may include plans to consolidate districts or other such structural changes intended to cut costs. The difficulty with these options lies in the nature of public education in Kansas as a state monopoly and the inherent biases and predetermined results incorporated into Kansas's scheme for determining costs as discussed above. However, one possibility for true structural reform that has a chance of success is to introduce some measure of school choice. Such reform would break the power of the state's monopoly over education, would fatally undermine the assumptions behind the state's faulty cost-study methodologies, and

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[289]Montoy v. State (*Montoy II*), Decision and Order Remedy, No. 99-C-1738, p. 41 (Kan. Dist. Ct. 2004) (emphasis in the original).

[290]Montoy v. State (*Montoy IV*), 138 P.3d 755, 770 (Kan. 2006) (Beier, J., concurring).

[291] Abraham Lincoln had once famously asked, (are all the laws but one to go unexecuted, and Government itself to go to pieces lest that one be violated?)—to which Judge Bullock answers (Yes!) See *Edward Everett & Frank Moore, The Rebellion Record: A Diary of American Events*, vol. II 226 (New York: G.P. Putnam 1862) (transcribing speech of Abraham Lincoln Joint Session of Congress on July 4, 1861).

would utilize true market forces to establish costs all while continuing to meet the state's court-mandated obligations regarding funding. With a track record of accurate cost estimates established by a free and open market, the Legislature would be appropriately armed to reduce state spending in accordance with a true picture of costs.

Finally, and most importantly, legislators must consider constitutional reform.[292] Such attempts were previously made to introduce a variety of amendments during the legislative sessions following *Montoy III*.[293] However, rather than amendments that directly address the relative powers of the courts or the Legislature, a recommended approach is the measure adopted by Missouri defining suitable finance as a function of state revenue.[294] Sample language for Kansas may be as follows:

> The Legislature's obligation to provide suitable finance for education contained in article 6, section 6 of this Constitution shall be satisfied by the provision of an amount for education equal to twenty-five percent of the general state revenue. Nothing in this provision shall be construed to require the Legislature to make provision for education in an amount equal to twenty-five percent of the general state revenue and nothing in this provision shall be construed to prevent the Legislature from making provision for education in an amount to exceed twenty-five percent of the general state revenue."

Regardless of the specific constitutional proposals, it is incumbent upon the Legislature to address the matter constitutionally, as until that point the taxpayers of the state will be held hostage by a powerful special interest the with constitutional *carte blanche* to spend with virtually no limit.

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[292] Alternatively, some have suggested the possibility of reform through a federal remedy in federal court. While there are many plausible arguments for a federal remedy, a full discussion of that possibility is beyond the scope of this paper which is confined to questions of state law and policy.

[293] *See* Levy, *supra* note 9, at 1095, 1096-1104 (discussing various proposed constitutional amendments aimed at "address[ing] the possibility of . . . later school finance litigation and to avoid setting a precedent for the assertion of judicial power to direct legislative appropriations").

[294] *See* MO. CONST. Art. IX, § 3(b).

> In event the public school fund provided and set apart by law for the support of free public schools, [sic] shall be insufficient to sustain free schools at least eight months in every year in each school district of the state, the general assembly may provide for such deficiency; but in no case shall there be set apart less than [25] percent of the state revenue, exclusive of interest and sinking fund, to be applied annually to the support of the free public schools.

Id.; *see also* Committee for Educational Equality v. Missouri, -- S.W.3d ----, 2009 WL 2762464 (Mo. 2009) (holding that the Missouri Constitution does not "require the Legislature to provide 'adequate' education funding in excess of the 25-percent requirement contained in section 3(b)").

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Commencement Address, Spring 2009, Veritas Christian School

Let me be the first to congratulate you on what is truly a significant and lasting achievement. Your parents, I'm sure, think I am talking to them, and while their accomplishment is likely the greater one, tonight our congratulations go to you graduates. You have completed a course of study that will serve you well for the rest of your lives. The plaudits and praise you will receive tonight and through this season are well earned and you should enjoy them to the fullest.

Let me also, however, be the first the burst your bubble. Most of the failures of your life, your most heartbreaking regrets, and your worst mistakes lie ahead of you. Take heart though, for most of your triumphs, large and small, lie in front of you as well. Which is just to say that you stand at a grand beginning, the cusp of possibility.

It has been exactly twenty years since I sat where you are now and I can still clearly recall the feeling of that tremendous and daunting possibility stretching ahead of me. And as I reflect back on those twenty years, I can report that I have had my share of triumphs, and I don't mind sharing them with you. I have had the unsurpassed joy of raising five wonderful sons with the bride of my youth. I have been blessed with meaningful work that has carried me into the crucible of some of the most vexing arguments at the highest levels about who we should be as a people. I have been quoted on the front pages from Topeka to New York City and lots of places in between. Which is not to say I have been listened to in any of those places.

The failures, mistakes, and regrets are all there too. From personal and painful mistakes to business failure to dashed hopes. For some reason I have a hankering to be a farmer—and as my boys can tell you (they take great glee in this), I am a terrible farmer. My fences fall apart, my livestock dies, my pastures grow more rocks than grass.

Why do I share this with you? Just to say that through this all, and above all, I have hoped to become a student of the human heart. This is at once the easiest and most difficult apprenticeship you can undertake. Easy, if you choose to submit yourself to the study, because you will carry a human heart with you always, wherever you are. Difficult because the human heart is the most complex, wondrous, fascinating, and surprising instrument in the universe. The real vista of endless possibility lies in the human heart, for you will never exhaust its highways and byways.

So you have graduated. Now the real course of study begins, and this is the study I would call you to tonight. And if you are attentive, you will not be alone. The poets and philosophers have all made the human heart their one great study—from David the Hebrew poet king ("What is Man, O God, that you should care for him?") to Walt Whitman, the tramp poet of New England ("There is this in me—I do not know what it is—but I know it is in me.") to the whole of human culture in between. They are there for you if you will have them, as are your friends, your mentors, and those who will come after you.

But for tonight, I'm all you have. So I have distilled a few things that I think are true; things that are true about the human heart; things that I want to share with you tonight. And the most basic truth—most basic for us in this time and place because it is the one most obscured by the society we inhabit—is the truth articulated most poignantly by Booker T. Washington. Washinton was born into slavery and rose to prominence after the Civil War as a leader of Southern blacks. In 1895, speaking to an American South still struggling with Reconstruction, Washington wanted to urge blacks to stop looking to the North for their needs and for their future, so he told this story.

There was a ship lost at sea for many days which suddenly sighted a friendly vessel. From the mast of the stranded ship was seen a signal: "Water, water. We die of thirst."

The answer from the friendly vessel at once came back: "Cast down your bucket where you are." A second time, the signal, "Water, send us water!" went up from the distressed vessel. And was answered: "Cast down your bucket where you are." A third and fourth signal for water was answered: "Cast down your bucket where you are." The captain of the distressed vessel, at last heeding the injunction, cast down his bucket and it came up full of fresh, sparkling water from the mouth of the Amazon River.

Cast down your bucket where you are!

In less poetic language, this is what I have sometimes called practicing the discipline of place. To practice this discipline is to believe that to suffer one's place and one's people in the particularity of its and their needs is the primary basis for finding love, friendship, and an authentic, meaningful life. This is nothing less, I would argue, than the key to the pursuit of Christian holiness, which is the whole of the Christian adventure: to live in love with the frailty and limits of one's existence, suffering the places, customs, rites, joys, and sorrows of the people who are in close relation to you by family, friendship, and community—all in service of the truth, goodness, and beauty that is best experienced directly.

Now, what am I saying? Does this mean that I think you should always stay in one place, that you cannot be called elsewhere, or that you ought to forever limit your own horizons. No. I am neither foolish nor naïve enough to think that this is either possible or even a good thing. What it does mean is that the human heart, your heart, will never flourish and blossom if it is forever pining after the next thing, or captured by the false promise of something better just out of grasp, always seeking satisfaction somewhere other than where it is. Rather, it is that marriage between the endless internal horizon of your heart and the limited, restrained, concrete life of geography and community that has borne the most delightful and satisfying fruits of human history.

So cast down your bucket where you are.

This is at once the most radical and the most conservative thing you can do with your life. Yet you are heading out into a very conventional, middling, controlled world. Oh, they will tell you that their marches for progress and rights are daring, that they are radical. Or they will tell you that their religious revivals are conservative, that they are the moral center. You will hear it all, but the truth is that for the most part, people are in the grips of a boring, lifeless ideology of personal fulfillment, choice, and upward mobility. We live in a society of tourists—and if tourists have one thing in common it is this—that they are not at home.

Many if not all of you are off to college somewhere to further your education. This is not a bad thing, and may become a very good thing for you, but I am here tonight with a warning. The world of higher education is a strip mining operation, plain and simple, and you will become the raw resource being mined. This is the result of a system designed to discover and refine the most meritorious among you and ship you off to whatever spot in the world you will be most "productive."

You will hear over and over and over again, in many different forms, that nothing must get in the way of making the most of your social and economic opportunities. No ancient bonds of tradition must hold you back (look to the Future, they will say); no loyalties to your home, to the place of your memory and your belonging must interfere (you can be a Jayhawk anywhere, they will say); no sentimental attachment to those who have befriended and loved you can count (think of all the diverse experiences you will miss, they will say).

I say, resist! Resist the spirit of the age. It does not have your welfare in mind. Cast down your bucket.

If you do, they will say you are crazy, or foolish, or worse. You will be a heretic in the

church of convenience and exploitation and false freedom which feeds at a trough of waste and ruin.

Remember and take heart from the words of the poet farmer Wendell Berry:

To be sane in a mad time
is bad for the brain, worse
for the heart.

And this:

As soon as the generals and the politicos
can predict the motions of your mind,
lose it. Leave it as a sign
to mark the false trail, the way
you didn't go. Be like the fox
who makes more tracks than necessary,
some in the wrong direction.

Let me take time out for a short war story, one that, I confess, gives me great pleasure. For you may be thinking right now that, geez, this guy is a real downer. He wants me stuck in some backwater the rest of my life. Nothing could be further from the truth! It is my hope tonight, if nothing else, to at least awake within you a glimmering possibility. What if maybe, just maybe, it is they who are stuck in a backwater of their own delusions and that the real adventure lies at your very feet—wherever they happen to be?

As many of you know, I had the privilege of serving as the lead attorney in what was one of the most important courtroom battles over abortion in many years. At the crux of the case was whether laws restricting abortion could ever actually be enforced. My client was a man named Phill Kline, the former Attorney General of Kansas, and arrayed against him were the whole forces of the abortion industry

nationwide and virtually all of the powers of the State Government. We had been ordered by the Kansas Supreme Court to a secret trial which would end up stretching over several grueling weeks, and during which, many of the most powerful men in the State would be called to testify. Suffice it to say, this was a big deal, and was being watched closely by activists across the country, by the major national media outlets, and by the United States Congress.

At the first conference of all the lawyers before the judge, the other side was represented by eight or nine lawyers, some from the State, and several from both New York and Washington D.C., brought in to this troublesome little state in fly-over country to protect the abortion industry. On the other side was me. Upon passing out my card which identified me as a lawyer practicing in Perry, KS (if you don't know, Perry is a little town of 900 people just north of here—just a few miles from my ramshackle fences and failing farm), one of the big city lawyers turned to his colleague and said with more shock than condescension in his voice, "Where the heck is Perry, Kansas?" Only he used more colorful language.

Cast down your bucket! I promise you, they'll never see you coming. Such a creature cannot exist in the impoverished realm of their imagination.

I have heard that only two things are certain to happen at a graduation. First, the graduation speaker will speak, and second, the graduating class will stop listening at some point. So let me conclude with one last truth that I have arrived at about the human heart. What is the most important characteristic for resisting this spirit of the age, as I've called it?

Many things are necessary—courage certainly, strength, patience—but most important, and I have hinted at this already, is love. Specifically, it is to love the world and your life in it. "This world has a spiritual life possible in it," wrote the moral philosopher George

Santayana, "which looks not to another world but to the beauty and perfection that this world suggests, approaches, and misses."

The world and your life in it are not yours. They are a gift—wholly gratuitous and bountiful. They are not that kind of thing which begins as a gift and becomes yours once given—instead they bear within them the enduring character of givenness, given to the point of being so basic that their grace cannot be fully wiped away, even from the hearts of those who turn against them. You are wholly dependent on this grace of givenness. From these headwaters springs love.

Love for your place and its beauty and heartbreaks and strands of memory; love for the people and customs of your place and their brokenness and the sheer glory of their existence. And love for your life in that place—note, I did not say love of yourself, but of your life; and by extension, the lives of those around you. There is no wealth but life, said John Ruskin, and your life lies at your feet.

Cast down your bucket where you are!

And where and wherever you are will be full of its own particular version of humanity's one song—a chorus of sin and rot and suffering and pain, and hope and joy and triumph. You must learn to love both.

The Greek Gods were said to envy men their mortality. You have studied Homer, I am sure, and if you recall, in Homer's Odyssey, Odysseus faces many trials as he is returning home after many years away at war. The final trial Odysseus faces is his encounter with the beautiful Calypso who offers Odysseus immortality if he will stay with her as her lover. Wendell Berry writes that the reader of Homer's Odyssey knows—"as Odysseus undoubtedly does also—the extent of his love for Penelope because he can return to her only by choosing her at the price of death." On his return Odysseus must have felt the thrill and the pang of knowing that Penelope was more beautiful in that moment than she

had ever been, or would ever be again in this life.

The Greeks understood that all things pass away, and that this is what makes life infinitely sweet. The poets have always understood this truth as well. "Leaf subsides to leaf" and "dawn goes down to day." Or another: "Time hurries on, and the leaves that are green turn to brown." There is a sweetness that is nearly unbearable in those words. You, at this very moment, with new faces turned towards the world, are as fresh and eager as you will ever be. If you don't know this now, I assure you that your parents do. And we can only know this because, like Odysseus and the poets, we understand that time hurries on and leaf subsides to leaf and everyone owes a death. It is a sweet understanding laced with a sadness that is itself, a species of sweetness.

Saint John, exiled on the Island of Patmos at the end of his life had a vision of the great marriage feast after the end of time when Christ would call his Bride, the Church, home to him—the wedding supper of the Lamb. The sweetness of mortality is bearable because the Greeks didn't know the end of the story, that there was one coming who would, after the end, make new all that has passed away.

So cast down your bucket where you are. Understand that you are graced. Learn to love the sweetness of a world that is passing away—a world that suggests yet misses perfection. And persevere through the tragedy with faith in the comic finish of the marriage feast when yes, all things will be made new.

So I wish you and each of your hearts the bounty of every flourishing in this life, and God's blessing now, and in the everafter. Thank you.