



Commentary

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***681 MONTROY v. STATE AND STATE RACIAL FINANCE DISPARITIES: DID THE KANSAS
COURTS GET IT RIGHT THIS TIME? [FNa]**

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INTRODUCTION

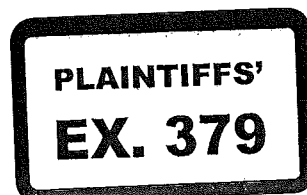
In *Brown v. Board of Education*, [FN1] the Supreme Court held that Topeka, Kansas' system of public school segregation violated the Equal Protection Clause. The Court explained that the opportunity for an education "where the state has undertaken to provide it, is a right which must be made available to all on equal terms." [FN2] In light of this inspiring language, one might be surprised to learn that high-minority school districts in Kansas receive substantially less state and local educational funding than low-minority school districts. The Education Trust observed that in 2001 the per-pupil funding gap between high-minority and low-minority districts in the state was \$1,812 (\$6,033-\$7,845), ranking the state second only to New York in terms of racial funding disparities. [FN3] The Kansas legislature created this inequality by enacting racially neutral organizational and school finance policies that worked in tandem to disadvantage the school districts in which most minority students live. [FN4]

Until *Montroy v. State*, neither school desegregation litigation nor school finance litigation has addressed the racial funding disparities caused by Kansas' school finance system. In *Montroy*, a state district court ruled that Kansas' school finance system had a disparate impact on minority and disadvantaged students in violation of state and federal equal protection provisions. [FN5] The court also held that the legislature had failed to provide school districts with large populations of minority and/or disadvantaged *682 students with an adequate education in violation of the state's education clause. [FN6] The Supreme Court of Kansas reversed the lower court's holding that the school finance system violated the equal protection rights of minority and disadvantaged students. [FN7] However, the court affirmed the district court's ruling that the legislature had failed to provide districts with high proportions of minority and/or disadvantaged students with an adequate education in violation of the state constitution. [FN8]

This article discusses whether *Montroy* might serve as a template for forcing other states to dismantle their racially inequitable school funding systems. The first section explains how Kansas' organizational and school finance policies have worked in tandem to create racial funding disparities. The second and third sections examine school finance litigation and school desegregation litigation prior to *Montroy*, respectively. Both sections show that neither approach addressed Kansas' racial funding disparities. The fourth section analyzes the *Montroy* litigation. The final section discusses legal and policy implications for Kansas and other states with racial funding disparities.

The Kansas School Organizational and School Finance Systems

The Kansas legislature has a lengthy history of constructing state policies that treat rural communities differently from urban communities where most minority students live. In fact, the *Brown* litigation was spawned by a Kansas policy that enabled cities with populations greater than 15,000 to operate racially segregated schools. In 1950, there were eleven such cities in the state. [FN9] *Brown* negated the legislature's ability to preserve segregated schools within these city boundaries.



Subsequent to the Brown decision, the Kansas legislature designed and implemented racially neutral state aid and district organizational policies that had the effect of "separate and unequal" systems of public schooling for whites and minorities in the state. The state legislature enacted the School Unification Law of 1963, [FN10] which reduced the total number of school districts from 1600 to 306. Parameters established for the consolidation movement were generally intended to reorganize rural schooling into fewer units, covering wider geographic areas and complete K-12 grade ranges, but were not intended to integrate rural schooling with city and town schooling in the state. As such, many cases existed where rural communities surrounding cities or towns reorganized and consolidated among themselves, but not with nearby cities or towns (in many cases, less than 20 linear miles from the center of the rural to "urban" district) with higher percentages of minority students.

State aid to local school districts was formalized in policy in Kansas in 1965 with the introduction of the School Foundation Act. [FN11] Major provisions *683 of the act included a basic allotment of \$760 per pupil and included two major adjustments to the allotment: (1) an adjustment based on teacher education and experience levels, and (2) a multiplier based on each districts' pupil-to-teacher ratio relative to the state average. The latter ratio served to place significantly more funding into smaller, rural districts with far fewer pupils per teacher. In addition, districts were limited in the extent that they could increase their budgets annually to 4%. As such, districts with larger budgets retained greater leverage to increase their budgets. These policies would establish the initial momentum leading to present disparities.

After a state district court ruled in *Caldwell v. State* [FN12] that the School Foundation Act violated the Equal Protection Clause, the legislature adopted the School District Equalization Act of 1973 (SDEA). This was the first of Kansas' modern school finance formulas to contain provisions that explicitly treated districts differently on the basis of size. The SDEA provided districts with fewer than 400 pupils a base budget of \$936 per pupil and districts with more than 1,300 pupils a base budget of \$728 per pupil. In addition, the state imposed new limits on the annual growth of budgets and tied those limits to district size groups. Districts above the median for their enrollment group could increase their budget by 5%. Districts below the median for their enrollment group could increase their budget to the lower of 105% of the median, or a 15% increase over the previous year. That is, smaller districts with fewer minorities were allotted a higher budget per pupil and allowed to grow that budget at a faster rate over time than larger districts with more minority pupils. This policy would lead to a ratcheting effect over time, whereby higher funded enrollment categories (small districts) could significantly outpace revenue growth of lower funded enrollment categories (large districts).

The SDEA came under fire in the late 1980s through 1991. Table 1 shows the gap in revenues per pupil that emerged between districts with fewer than 2,000 and greater than 2,000 pupils by that point in time, partly as a result of policies that allowed for differential growth in budgets among small and large districts, but also because of significant differences in property wealth between smaller and larger districts. Note that smaller districts spent, on average, 26% more than larger districts and that they had, on average 83% more taxable property wealth per pupil. Note also that 88% of the state's minority population attended the districts with 26% less funding.

Table 1
 1991 Pre-Reform General Fund Budgets

	Enrollment		Percent Difference
	<2,000	>2,000	
Percent Minority		4%	17%
1991 General Fund per Pupil	\$ 4,550	\$ 3,622	26%

Assesed Value per Pupil 1990	\$	47,876	\$	26,216	83%
Percent of all Students in State		37%		63%	
Percent of all Minority Students		13%		88%	

Data Sources: Demographic Data from the NCES Common Core of Data. School District Financial data from the Kansas State Department of Education (General Fund Expenditures 1991)

*684 Indeed, by this time, a majority of the state's white population also attended these larger districts. In 1950, 46% of Kansans lived in towns with population over 15,000 and school districts of roughly 2,000 or more. By 1970, that number had grown to 58% and by 1990, 64%. Yet, that growth was not a result of an infusion of white residents into the original, higher minority concentration school districts. Rather, that growth was into rapidly expanding suburbs that had been initiated in the post-war (WWII) period as officially segregated white enclaves. From 1900 to 1947, 148 of 154 housing subdivisions in Johnson County, a rapidly growing suburb adjacent to Kansas City, Missouri and Kansas City, Kansas, were racially "restrictive covenants." [FN13] The result by 1990 was that the new mix of large school districts in Kansas consisted of rapidly growing, predominantly white suburbs (concentrated in Johnson County) and relatively stagnant older large cities and towns with expanding minority populations.

Under threat of judicial mandate, the Kansas legislature implemented a new school finance policy in 1992-the School District Finance and Quality Performance Act (SDFQPA). [FN14] The core of the act was a fully state controlled, state prescribed general fund budget for each district. The state would allocate a base budget (general fund budget) to all districts and apply a series of adjustments to accommodate cost differences across districts. A central component of the act was a low enrollment adjustment that would base future budgets (1992 forward) on prior (1991) median spending of districts of different size. This policy would codify the size related, race related disparities that had emerged by 1990 displayed in Table 1. [FN15] Yet, adjusting aid for size alone would place the state's new large school districts, predominantly white suburbs, in the same position as large older districts serving the state's minority population. In fact, the new policy also included small adjustments in aid to help districts serving more children in poverty (a 6% adjustment) and children with limited English proficiency (a 20% adjustment based on cumulative contact hours), policies that might result in more revenue per pupil being allocated to districts serving more minority pupils.

The legislature's resolution to this dilemma was to implement a policy that provided substantial additional aid to districts suffering "extraordinary growth," or new facilities aid and a later adjustment to general fund revenue limits known as ancillary new facilities aid. The state would provide 25% additional funding per pupil for each child in a district attending a new facility for the first two years of operation, and for a select few districts, five to ten times that amount in additional local budget latitude. [FN16] The aid could be accessed if and only if (1) a district's voters approved new local taxes to construct new facilities and (2) a district's voters had already maximized other local taxes.

*685 Table 2 shows how the size and new growth-related policies affect districts by race. The cut-point for receiving low enrollment aid was set originally at 1,900, then moved to 1,800 and is now set at 1,725. We continue to focus on the original pre-Brown cutoff range for consistency, noting that moving the cutoff to 1,800 or 1,725 results in negligible differences in Table 2. Size-related policies alone isolate and disadvantage fiscally 88% of the state's minority students, resulting, on average, in 34% differences in state prescribed general fund budgets per pupil. Note that this is actually an increase from 1991. Yet, 63% of whites in the state also attend the larger districts; 16% of all whites and 14% of all minorities that attend larger districts are advantaged by new facilities adjustments. That, however, amounts to 25% of the 63% of whites in larger districts and only 16% of the 88% of minorities; 73% of the state's minorities attend districts excluded

from either size or growth-related policies. While the difference in average state prescribed budget per pupil between growing and stagnant districts seems relatively small, it is actually quite striking that the new facilities adjustment alone has been large enough to more than counterbalance the effects of student need weights for at risk children and bilingual education.

Table 2
 Mean 1993-2001 Demographics and State Prescribed General Fund Budgets

	Enrollment		Percent Difference	Large Districts		Percent Difference
	<2,000	>2,000		Growing	Stagnant	
Percent	6%	26%		16%	30%	
Minority						
General Fund Budget	\$5,401	\$4,040	34%	\$4,129	\$4,007	
Percent of all Students in State	37%	63%		16%	46%	
Percent of all Minority Students	13%	88%		14%	73%	

Data Sources: Demographic data from the NCES Common Core of Data. Budget Data from the Kansas State Department of Education

Table 3 presents a closer look at two examples where small, rural districts are directly adjacent to larger towns with more minority students and a third example, where the city of Kansas City was allowed to remain carved into three separate districts following the Unification Law of 1963. In example 1 and example 2, the small rural districts had higher general fund budgets and lower minority shares in 1990 and 1991, and retained as a function of low enrollment cost adjustment much higher general fund budgets under the new law-the School District Finance and Quality Performance Act. The distance in linear miles between the rural and large town districts in Example 1 and Example 2 is 19 miles in each case.

Example 3 shows similarly, that Piper-Kansas City school district (a district carved out of the city limits of Kansas City), which had a higher budget per pupil in 1991, was able to retain, or rather was directly provided, a higher general fund budget than its higher minority share neighbors under the new law also as a function of low enrollment cost adjustment. In this case, the differential treatment on the basis of size is provided regardless of the *686 fact that the three districts

fall within the same city and county in a more densely populated metropolitan area.

Table 3
Three Examples of the Influence of Low Enrollment Aid

[Note: The following TABLE/FORM is too wide to be displayed on one screen. You must print it for a meaningful review of its contents. The table has been divided into multiple pieces with each piece containing information to help you assemble a printout of the table. The information for each piece includes: (1) a three line message preceding the tabular data showing by line # and character # the position of the upper left-hand corner of the piece and the position of the piece within the entire table; and (2) a numeric scale following the tabular data displaying the character positions.]

***** This is piece 1. -- It begins at character 1 of table line 1. *****

Example 1

District	Minnesota (210)	Dodge City (443)
	Linear Distance	Square Miles
Enrollment 1991	202	5,241
General Fund per Pupil 1991	\$5,388	3,232
Percent Minority 1990	2.6%	23.0%
Enrollment 1993 - 2001	270	4,783
General Fund per Pupil 1993 - 2001	\$6,372	4,144
Percent Minority 1997	2.8%	50.3%

1...+...10...+...20...+...30...+...40...+...50...+...60...+...70

***** This is piece 2. -- It begins at character 71 of table line 1. *****

Example 2		Example 3	
Dexter (471)	Arkansans City (470)	Piper - Kansas City (203)	Kansas City (500)
19 miles			
	19 miles	31	59
162	3,053	1,139	21,021
\$6,521	\$3,438	\$4,257	\$3,712
1.2%	11.1%	4.8%	50.6%
190	2,965	1,254	20,368
\$7,327	\$4,099	\$4,825	\$4,074
5.2%	17.0%	10.6%	70.4%
71..+...80.....+...90.....+...0.....+...10.....+...20.....+...30.....			

***** This is piece 3. -- It begins at character 135 of table line 1. *****

Turner - Kansas

City (202)

17

.3,832

\$3,530

14.4%

3,711

\$4,039

23.2%

135.....+.50

Data Sources: Demographic data from the NCES Common Core of Data. Budget Data from the Kansas State Department of Education

Table 4 displays the pre and post-reform general fund budgets of districts in Johnson County. Recall that Johnson County was originally established as a series of racially segregated residential subdivisions. Further, Johnson County is directly adjacent to the county (Wyandotte) of the Kansas City school districts. Two features of Table 4 are notable. First, four of the six Johnson County districts receive enough new facilities adjustment to provide them significantly larger general fund budgets per pupil than Kansas City or Turner. That is, the new facilities aid serves to promote the persistence of separate and unequal systems of schooling by race. Second, an intriguing pattern appears among Johnson County districts. Maturing communities in Johnson County, including Shawnee Mission and Olathe, have experienced expanding minority populations. In conjunction with their maturation and demographic shift, these districts now receive less general funding per pupil.

Table 4
 Johnson County and the Allocation of New Facilities Adjustment

District	Johnson County Districts					
	Blue Valley	Shawnee Mission	Olathe (233)	Gardner - Edgerton	Spring Hill	Desoto (232)
	(229)	(512)		(231)	(230)	
Square Miles	91	72	75	103	71	100
Enrollment 1991	9,728	29,632	14,649	1,689	1,218	1764
General Fund per Pupil 1991	\$4,703	4,080	\$4,153	\$3,888	\$4,028	\$3,759
Percent Minority 1991	4.7%	5.7%	6.6%	2.9%	2.9%	1.8%
Enrollment 1995 - 2001	14,008	30,348	17,614	2,224	1,309	2,350
General Fund per Pupil 1995 - 2001	\$4,235	3,932	\$4,021	\$4,127	\$4,742	\$4,303

Percent Minority	6.7%	10.3%	10.2%	5.0%	4.3%	4.4%
1997						

*687 Most recently, legislators attempted but failed to increase funding for the older suburbs but not their urban neighbors through a provision that would grant additional general fund budget authority to districts where housing unit values were 25% above the state average. All Johnson County districts, including Shawnee Mission would qualify and only Piper would qualify in Wyandotte County. Each district would be granted around \$200 to \$300 per pupil additional budget authority. [FN17]

Kansas School Desegregation Litigation

The previous section of this article explained how Kansas' racial funding disparities are caused by organizational and state aid policies that have worked in tandem to disadvantage school districts that were permitted to be segregated before Brown. An examination of the state's school desegregation litigation reveals that the courts did not address these racial funding disparities.

In Brown, the Supreme Court assumed that the facilities and other "tangible factors" between black and white schools were equal, but still held that a de jure segregated system was unconstitutional. [FN18] The Court also called for further argument to determine the question of relief. [FN19] In May 1955, the Court observed that Kansas had made "substantial progress" toward eliminating the effects of de jure segregation in its public schools. [FN20] The Court then remanded the case to the United States District Court of Kansas. [FN21] On remand, the district court held that the local board of education's plan, which required Topeka's elementary schools to admit black and white students in the neighborhoods in which they lived, constituted "a good faith effort to bring about full desegregation in the Topeka Schools in full compliance with the mandate of the Supreme Court." [FN22] The court retained jurisdiction but the decision was not appealed.

In 1974, the Department of Health, Education, and Welfare (HEW) investigated an allegation that the school district had permitted predominantly minority schools to fall into disrepair. [FN23] After the board failed to address HEW's concerns, the agency began administrative enforcement proceedings. The board obtained a preliminary injunction in federal court on the ground that it was still operating under the May 1955 order, thus precluding HEW *688 from taking administrative action. [FN24] The district submitted a facilities plan acceptable to HEW that closed or repaired a number of schools and built several new schools. [FN25]

In 1979, a new group of black parents and children asserted that Topeka had failed to comply with the Supreme Court's mandate to desegregate the public schools. After a seven-year discovery process, trial took place in October 1986. In 1987, the Kansas federal district court ruled that the school district had achieved unitary status. [FN26] The court held that the plaintiffs had failed to prove that the racial imbalance of Topeka's schools was the result of the past discriminatory actions on the part of the school district. In reaching this decision, the court observed that "[t]he facilities, curriculum, progress of education, extracurricular activities and transportation offered by the district are not distinguishable on racial grounds" and the district had not engaged in racial gerrymandering. [FN27]

The Tenth Circuit Court of Appeals reversed this decision on the ground that the lower court had incorrectly assigned the burden of the proof to the plaintiffs to establish that the district had acted in a racially discriminatory fashion. [FN28] Instead, the Tenth Circuit observed: "Once a plaintiff has proven the existence of a current condition of segregation, the school district bears the substantial burden of showing that that condition is not the result of its prior de jure segregation. Under the relevant Supreme Court decisions, mere absence of invidious intent on the part of the school district is not sufficient to satisfy its 'heavy burden' of proof; the district's duty is to act affirmatively, not merely to act neutrally." [FN29]

The Supreme Court vacated the Tenth Circuit's decision and remanded the case to the Tenth Circuit for further consideration in light of the Supreme Court's rulings in *Freeman v. Pitts* and *Board of Education of Oklahoma City Public Schools v. Dowell*. [FN30]

On remand, the Tenth Circuit reinstated its prior decision that the school district was not entitled to unitary status. [FN31] The Tenth Circuit found that the *Freeman* and *Oklahoma City Public Schools* decisions had not retreated from the principle requiring districts to demonstrate that any current racial imbalance was not traceable to the prior *de jure* system. [FN32] The Tenth Circuit then ordered the district court to fashion an appropriate remedy. [FN33] In 1994, the district court adopted a plan proposed by the school district that required the majority/minority student populations of all elementary, middle, and high schools to fall within 15% of the majority/minority populations of all elementary, middle, and high school students within the *689 district. [FN34] In 1999, the federal district court concluded that the school district had complied in good faith with the desegregation order and granted unitary status. [FN35]

Kansas School Finance Litigation Prior to Montoy

An analysis of Kansas' school finance litigation prior to *Montoy* also indicates that the courts did not address the racially inequitable aspects of the state's school finance system. In 1972, a state district court ruled in *Caldwell* that the School Foundation Act was unconstitutional because the education a student received was based primarily on the wealth of the district in which he lived. [FN36] The next year, the state legislature responded to *Caldwell* by enacting the SDEA, which addressed the inequities between rich and poor districts by providing equalization aid to districts to supplement the funds raised by local property taxation. However, as discussed above, the SDEA also contained provisions that expressly treated school districts differently on the basis of size. This scheme enabled rural districts to receive more educational funding than the large, urban districts where most of the minority students in the state resided.

In *Mock v. State*, [FN37] a different set of plaintiffs argued that the SDEA violated, *inter alia*, a state constitutional provision that requires the legislature to establish and maintain public schools and to "make suitable provision for finance of the educational interest of the state." [FN38] In an opinion issued in advance of trial, Judge Terry Bullock ruled that the education clause required the legislature "to furnish each child an educational opportunity equal to that made available to every other child." [FN39] This educational duty would "unquestionably require different expenditures at different times and places." [FN40] For example, the court observed that a limited-English-proficient (LEP) student might need greater expenditures in the form of English as a second language (ESL) instruction in order to have the same educational opportunity to learn math and other subjects as native English speakers. [FN41] The district court cautioned, however, that the state must provide a "rational educational explanation" for any differences in the distribution of educational expenditures. These conclusions were significant because the court appeared to apply the concept of vertical equity: that certain disadvantaged groups might need greater expenditures and resources to receive the same level of education. Under the concept of vertical equity, it might be possible for minority students to receive greater educational resources than their white counterparts because of the combined negative effects of race and *690 poverty. [FN42] Unfortunately for plaintiffs, the state legislature responded to the *Mock* decision by enacting the SDFQPA, which codified the size-based funding disparities that arose under the SDEA and later added the growth based disparities previously discussed.

In *Unified School District No. 229 v. Kansas*, [FN43] the state supreme court upheld the constitutionality of the SDFQPA. The court found that the SDFQPA did not violate the education clause. The court found that the education clause requirement of a "suitable provision of finance" obliged the state to provide all students with an adequate education. However, the court refused to develop its own standard of adequacy, but instead deferred to the standards developed by the state legislature and state department of education. [FN44] The court then found that the state's schools were meeting the standards set by these entities. [FN45] Note that the Kansas Supreme Court failed to find, as had the *Mock* court, that the education clause required the state legislature to provide students with "equal educational opportunity" and that such

opportunity might require the state to provide certain students with increased educational resources. This is significant because the court seemed to reject Mock's suggestion that minority students may need greater educational expenditures and resources to receive the same level of education.

The Kansas Supreme Court also ruled in Unified School District. No. 229 that the state's low enrollment provisions did not violate the equal protection rights of large school districts. The court refused to apply strict scrutiny, which is the most difficult level for the government to overcome, because education was not a fundamental right and the enrollment provisions did not discriminate against suspect classifications. [FN46] Instead, the court applied the rational basis test, which is the least strict level of scrutiny for the government to overcome. The court rejected the plaintiffs' claim that the lines drawn for determining which districts received low enrollment weighting was irrational because they were not based on scientific evidence. The court found that the low enrollment weighting provisions were rationally related to the interest of economies of scale: small districts have higher unit costs of education than large districts. [FN47] Furthermore, there was a rational basis for the lines set by the legislature for determining low enrollment weighting because they were based upon actual spending by the school districts during the 1991-92 school year. [FN48]

Montoy v. State

In **Montoy**, the judiciary finally addressed the constitutionality of Kansas' racial funding disparities. In this case, African-American, Hispanic, and disabled groups alleged that such disparities violated state and federal *691 constitutional provisions. Judge Bullock granted summary judgment to the defendants because he believed that Unified School District No. 229 placed responsibility on the legislature instead of the judiciary for determining whether the school finance system was "suitable." The Kansas Supreme Court reversed and remanded because there were genuine issues of material fact as to whether: (1) the state was providing a suitable education as required by the state constitution; (2) the achievement gap between whites and minority/disadvantaged students was evidence of a denial of state equal protection and due process rights. [FN49] Moreover, the state supreme court observed that this case was sufficiently removed from Unified School District No. 229 to preclude summary judgment. [FN50]

On remand, the district court issued a preliminary order finding that the state's school finance system violated the state's education clause and the equal protection clauses of the state and federal constitutions. [FN51] The court ruled that Kansas' school finance system "is grossly inadequate to provide Kansas children a suitable education" and was thus in violation of the education clause. [FN52] The court noted with alarm the fact that "minorities, disabled, [and] non English speakers...are failing at alarming rates" on the state's assessment system. [FN53] For example, "83.7 percent of Kansas African American students, 81.1 percent of Kansas Hispanic students, 64.1 percent of Kansas Native American students, 87.1 percent of Kansas limited English proficiency students, and 77.5 percent of Kansas impoverished students" were failing the 10th grade mathematics assessment. [FN54]

The district court also ruled that Kansas' funding disparities had an unconstitutional disparate impact on minority, disabled, and non-English speaking students in violation of the state and federal equal protection clauses. According to the court, the appropriate test for disparate impact claims was whether the disparate funding was rationally related to the educational clause's guarantee of providing each child with an equal educational opportunity. [FN55] There was no justification for the disparities in educational funding in light of the fact that: (1) minority and disadvantaged students were performing so poorly on the state's assessment system; and (2) increases in educational funding would enable schools to employ strategies, such as reducing class sizes and hiring better trained teachers, designed to raise their educational performance. [FN56] The court also rejected the contention of the defendants' expert witnesses that there was no correlation between educational funding and student performance. [FN57] The court then withheld its final order and judgment until the end of the 2004 legislative session to repair the constitutional deficiencies of the funding scheme. [FN58]

After the legislature adjourned in 2004 without addressing the district court's concerns, it issued a remedy order on May 11 directing the public schools to be closed until the unconstitutional aspects of the funding system *692 were fixed. [FN59] Although the court observed that "there must be literally hundreds of ways the Legislature could constitutionally structure, organize, manage and fund public education in Kansas," it identified "certain basic provisions" necessary to withstand constitutional scrutiny. [FN60] For instance, the legislature had to determine the structure and organizational forms that would enable the schools to operate most efficiently. [FN61] The court also instructed the legislature to determine the actual cost of providing a "suitable education" and fund the educational system accordingly. [FN62] Moreover, differences in per pupil spending had to be "premised on differences in the actual costs incurred to provide an essentially equal educational opportunity to each child." [FN63] Furthermore, the funding system could not have an adverse disparate impact on any category of Kansas children. [FN64]

On May 19, the Kansas Supreme Court blocked the district court's order to close the public schools and agreed to hear an appeal of the district court's decision. [FN65] On January 3, 2005 the Kansas Supreme Court reversed the lower court's finding that the school finance system violated state and federal equal protection provisions. [FN66] The state high court divided the equal protection question into a racial disparity claim and a general equal protection claim. "In order to establish an equal protection claim on [the] basis of disparate impact," the court observed that "one must show not only that there is a disparate impact, but also that the impact can be traced to a discriminatory purpose." [FN67] The court rejected the racial disparity claim because plaintiffs did not show discriminatory purpose. [FN68] With respect to the general equal protection claim, the state high court found that the rational basis test was appropriate, but concluded that each of the disparity-causing classifications was rationally related to a legitimate governmental interest. [FN69]

However, the Kansas Supreme Court affirmed the lower court's ruling that the school finance system failed to "make a suitable provision for finance" in violation of the state constitution. The court found that the current school finance system failed to satisfy the legislature's own definition of a suitable provision for the finance of education, which was based on student academic performance and school accreditation standards. [FN70] The court cited a study commissioned by the legislature which concluded that the *693 school finance system needed an additional \$850 million to satisfy the legislature's standard. [FN71]

Also, the court agreed that the school finance system specifically failed to provide adequate funding to middle- and large-sized districts with high proportions of minority and/or disadvantaged students. Perhaps most directly related to our analyses herein, the Kansas Supreme Court found that legislative decisions to base the current formula on prior spending levels and political compromises had "distorted" the various cost adjustments, including those for low enrollment, at risk and bilingual education programs. [FN72]

To satisfy the constitutional mandate, the court observed that "[i]t is clear increased funding will be required; however, increased funding may not in and of itself make the financing formula suitable," [FN73] Other considerations included "[t]he equity with which funds are to be distributed and the actual costs of education, including appropriate levels of administrative costs." [FN74] The Kansas Supreme Court retained jurisdiction to give the legislature time to correct the constitutional deficiencies with the current school funding formula. In the meantime, the current school funding formula would remain in effect. [FN75]

Implications for Kansas and Other States with Racial Funding Disparities

Montoy has important implications for minority students in other states. Note that Kansas is not the only state with racial school funding disparities. The Education Trust observed that in 2001, 27 other states had school funding systems that provided high-minority school districts with less state and local funding than their low minority counterparts. [FN76] This section discusses important implications for Kansas and other states.

**State and Federal Equal Protection Clauses May Be an Ineffective Tool for
Challenging Racial Funding Disparities**

A major deficiency of state and federal equal protection challenges to racial funding disparities is that they would most likely be subject to rational basis analysis. The rational basis test is traditionally undemanding. Governmental classifications subjected to rational basis review "must be upheld ... if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." [FN77] The Kansas Supreme Court's decision *694 to find the racial disparities permissible under the state and federal equal protection clauses is consistent with this traditional approach. The size and shape of the state's funding disparities were irrelevant because the disparity-causing provisions were based on rational concepts.

It is important to observe that plaintiffs have occasionally succeeded in their equal protection challenges, even though the courts have applied rational basis analysis. [FN78] Scholars have concluded that the courts have applied a heightened form of rational basis in these cases, or rational basis "with bite." [FN79] The district court's preliminary order shows that plaintiffs could prevail on their equal protection claims under heightened rational basis analysis. The court employed heightened rational basis analysis by identifying only one policy goal of the school funding formula: to provide all children with an equal opportunity to an adequate education. As the Kansas Supreme Court's decision makes clear, there are a number of legitimate ends under traditional rational basis analysis for the disparity-causing provisions within the formula.

The district court also applied heightened rational basis analysis by refusing to automatically accept the defendants' claim that "money doesn't matter" with respect to academic performance. Instead, the court performed a close examination of this assertion. It observed that four of the five expert witnesses offered no opinions about the adequacy of Kansas' school finance system. [FN80] The court also found that the testimony of the witness who performed an adequacy study of the Kansas system was "less than helpful" because of methodological flaws. [FN81] Furthermore, the court noted that two experts conceded that "money matters" with respect to academic achievement. [FN82]

**Future Kansas Plaintiffs Might Successfully Argue That Racial Funding
Disparities Are a Continuation of De Jure Segregation**

In Montoy, the Kansas Supreme Court ruled that plaintiffs were not entitled to heightened scrutiny under state and federal equal protection provisions because they failed to show that the state had acted with discriminatory intent against minority and/or disadvantaged students. Future future *695 plaintiffs might obtain heightened scrutiny by demonstrating that the combination of racially discriminatory organizational policies and racially neutral funding policies has prevented the state from fulfilling its affirmative duty to eliminate the vestiges of de jure segregation.

For instance, recall that the Unification Law of 1963, which was enacted merely nine years after Brown, permitted rural cities and towns to consolidate among themselves instead of the city districts where most minorities live, and that subsequent state aid policies increased funding to these towns. Also, recall that none of the Brown decisions addressed the impact that the Unification Law might have had on school desegregation efforts. Plaintiffs might be able to convince a court to reopen Brown and to impose a desegregation remedy that would eliminate the funding disparities between urban school districts and surrounding rural towns. Plaintiffs would have to establish that the Unification Law was enacted with the intent of creating white enclaves. [FN83] If the state legislature had enacted the Unification Law with the intent to circumvent Brown, then it would have had an affirmative duty to eliminate segregation caused by this provision "to the extent practicable": the standard that is used for determining whether to dissolve a desegregation decree. [FN84]

Moreover, the state legislature would have a "heavy burden" of justifying the adoption of racially neutral policies that have prevented it from dismantling its segregated system. [FN85] Evidence indicates that the state's low enrollment fund-

ing policies might have subverted efforts to desegregate public schools by drawing white students from urban school districts. In fact, the district court observed in Montoy that "[m]any small, low enrollment Kansas school districts actually advertise in newspapers and publications in neighboring mid and large-sized districts seeking the transfer of students from the large districts into their smaller district by touting the educational benefits available to students in those smaller districts which, because of the gross disparities in funding, are not afforded students in the larger and mid-sized districts where the targeted students live." [FN86] Thus, future plaintiffs might convince a court to impose a desegregation remedy that eliminates funding disparities between the Brown school districts and surrounding rural towns if they could show that: (1) the Unification Law was enacted with the intent to circumvent school desegregation efforts; and (2) the low enrollment policies have further prevented the state from eliminating desegregation "to the extent practicable."

***696 It Is Unclear Whether Montoy Will Force the Legislative and Executive
Branches to Correct Kansas' Racial Funding Disparities**

The state supreme court's ruling that high-minority school districts have not received an adequate education could theoretically require the other branches of government to correct the disparities between high-minority and low-minority districts. For instance, the state supreme court referenced the legislative criterion of student performance levels in determining whether the school funding system was adequate. [FN87] Also, the court cautions that the equitable distribution of resources is a critical factor in determining adequacy. [FN88] However, the court's adequacy analysis provides a great deal of flexibility to the legislature and the governor, which they may use to maintain the racial funding disparities within the state. For example, the decision provides no guidance in determining the "actual costs of education" and the "appropriate levels of administrative costs." Thus, there are no safeguards to prevent the legislature from developing a process that would underestimate the needs of high-minority districts, while overestimating the needs of low-minority districts.

CONCLUSIONS

Fifty years after Brown, the Kansas' educational system remains "separate and unequal" because high-minority school districts receive significantly less funding than their low-minority counterparts. Such funding disparities are the result of racially neutral organizational and school finance policies that have worked in tandem to underfund high-minority school districts. Until Montoy, neither school desegregation litigation nor school finance litigation has addressed the state's racial funding disparities. Although the Kansas Supreme Court in Montoy held that the racial funding disparities were permissible under state and federal equal protection provisions, it also held that the school finance system violated the state constitution by failing to provide high-minority school districts with an adequate level of funding.

Montoy is significant because it shows that state and federal equal protection provisions may be an ineffective tool for challenging racial funding disparities. It is important to observe, however, that future plaintiffs might prevail under an equal protection theory by showing that: (1) the Unification Law of 1963, which permitted predominantly white, rural school districts to consolidate, was enacted with the intent to thwart Brown's mandate to desegregate the public schools; and (2) subsequent racially neutral low enrollment policies have prevented the state from eliminating de jure desegregation "to the extent practicable" by creating "gross disparities" between rural and urban districts. Finally, it remains to be seen whether the state supreme court's adequacy ruling will force the legislative and executive branches to remedy the state's racial funding disparities.

[FNa] The views expressed are those of the authors and do not necessarily reflect the views of the publisher. Cite as 195 Ed.Law Rep. [681] (April 21, 2005).

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[FN1]. 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

[FN2]. *Id.* at 493, 74 S.Ct. 686.

[FN3]. Kevin Carey, *The Funding Gap: Minority and Low-Income Students Still Receive Fewer Dollars in Many States*, at <http://www2.edtrust.org/NR/rdonlyres/.pdf> (visited Oct. 2, 2004).

[FN4]. See Bruce D. Baker & Preston C. Green III, *Tricks of the Trade: State Legislative Actions in School Finance Policy that Perpetuate Racial Disparities in the Post-Brown Era*, *AM.J. OF EDUC.* (in press).

[FN5]. Technically, the district court issued a preliminary order in December of 2003 indicating that the formula would be overturned if changes were not made during the 2004 legislative session. *Montoy v. Kansas*, 2003 WL 22902963 (Kan. Dist. Ct. Dec. 2, 2003).

[FN6]. *Id.*

[FN7]. *Montoy v. State*, 102 P.3d 1160 [194 Ed. Law Rep. [439]], 2005 WL 11558 (Kan. Jan. 3, 2005).

[FN8]. *Id.*

[FN9]. Coffeyville, Emporia, Hutchinson, Kansas City, Lawrence, Leavenworth, Manhattan, Pittsburg, Salina, Topeka, Wichita. Source: Census 1950.

[FN10]. Kan. Stat. Ann. § 72-6734 (repealed 2003).

[FN11]. Kan. Stat. Ann. § 72-7001 (repealed 1973).

[FN12]. *Caldwell v. State*, No. 50616 (Kan. Dist. Ct. Aug. 30, 1972).

[FN13]. KEVIN F. GOTHAM, *RACE, REAL ESTATE AND UNEVEN DEVELOPMENT* 32 (2003).

[FN14]. Kan. Stat. Ann. §§ 72-6405-6445 (2003).

[FN15]. Bruce D. Baker & Mickey Imber, "Rational Educational Explanation" or Politics as Usual? Evaluating the Outcome of Educational Finance Litigation in Kansas, 25 *J. EDUC. FIN.* 121 (1999).

[FN16]. Kan. Stat. Ann. § 72-6407 (2003). In FY 2003, three predominantly white Johnson County districts qualified for this additional supplement: Blue Valley, Olathe and DeSoto. The cumulative effect of the weight in 2000-2001 was an added 7,482 weighted pupils (7.04% of total weighted pupils) and 28.6 million dollars to districts with pupils in new facilities.

[FN17]. H.R. 2940, 80th Leg. (Kan. 2003). Also in the Spring of 2004, voters in the Shawnee Mission school district approved bond issues that would replace several of the districts' older facilities with new ones (rather than renovating), in part to access substantial new facilities and ancillary new facilities aid. In contrast, in 2003-2004, Kansas City finally completed retrofitting its much older facilities with air conditioning.

[FN18]. *Brown*, 347 U.S. at 493, 74 S.Ct. 686.

[FN19]. *Id.* at 495, 74 S.Ct. 686.

[FN20]. *Brown v. Board of Educ.*, 349 U.S. 294, 299, 75 S.Ct. 753, 99 L.Ed. 1083 (1955).

[FN21]. *Id.*

[FN22]. *Brown v. Board of Educ.*, 139 F.Supp. 468, 470 (D.Kan. 1955).

[FN23]. Steven J. Crossland, *Brown's Companions: Briggs, Belton, and Davis*, 43 WASHBURN L.J. 381, 420 (2004) [hereinafter Crossland].

[FN24]. *Brown v. Board of Educ.*, 671 F.Supp. 1290 [42 Ed.Law Rep. [789]] (D.Kan. 1987).

[FN25]. Crossland, *supra* note 23, at 420.

[FN26]. *Brown*, 671 F.Supp. 1290.

[FN27]. *Id.* at 1310.

[FN28]. *Brown v. Board of Educ.*, 892 F.2d 851 [57 Ed.Law Rep. [1167]] (10th Cir. 1989).

[FN29]. *Id.* at 861.

[FN30]. *Brown v. Board of Educ.*, 503 U.S. 978, 112 S.Ct. 1651, 118 L.Ed.2d 381 [73 Ed.Law Rep. [616]] (1992).

[FN31]. *Brown v. Board of Educ.*, 978 F.2d 585 [78 Ed.Law Rep. [292]] (10th Cir. 1992).

[FN32]. *Id.* at 588-590.

[FN33]. *Id.* at 593.

[FN34]. *Brown v. Unified Sch. Dist. No. 501*, 56 F.Supp.2d 1212, 1212-13 [137 Ed.Law Rep. [931]] (D.Kan. 1999).

[FN35]. *Id.* at 1214.

[FN36]. Caldwell, No. 50616.

[FN37]. No. 91-CV-1009 (Shawnee Co. Dist. Ct. Oct. 14, 1991) (reprinted in Philip C. Kissam, *Constitutional Thought and Public Schools: An Essay on Mock v. State of Kansas*, 31 WASHBURN L.J. 474, 489 (1992)).

[FN38]. Kan.Const. art. 6, §§ 1, 6.

[FN39]. *Mock*, No. 91-CV-1009 (reprinted in Kissam, *supra* note 37 at 500).

[FN40]. *Id.* (reprinted in Kissam, *supra* note 37 at 500).

[FN41]. *Id.* (reprinted in Kissam, *supra* note 37 at 500).

[FN42]. See Julie K. Underwood, *School Finance Adequacy as Vertical Equity*, 28 U.MICH.J.L. REFORM 493 (1995).

[FN43]. 885 P.2d 1170 [96 Ed.Law Rep. [258]] (Kan. 1994).

[FN44]. *Id.* at 1186.

[FN45]. Id.

[FN46]. Id. at 1189-90.

[FN47]. Id. at 1190.

[FN48]. Id. at 1191.

[FN49]. *Montoy v. Kansas*, 62 P.3d 228, 234 [173 Ed.Law Rep. [187]] (Kan. 2003).

[FN50]. Id.

[FN51]. *Montoy*, 2003 WL 23002704.

[FN52]. Id. at a43.

[FN53]. Id. at a40.

[FN54]. Id.

[FN55]. Id. at a21.

[FN56]. Id. at a47-48.

[FN57]. Id. at a48-49.

[FN58]. Id. at a51.

[FN59]. *Montoy v. State*, 2004 WL 1094555 (Kan.Dist.Ct. May 11, 2004).

[FN60]. Id. at 11.

[FN61]. Id. at 12.

[FN62]. Id.

[FN63]. Id.

[FN64]. Id.

[FN65]. John Hanna, *Supreme Court Blocks Lower Court Order Closing Schools*, ASSOCIATED PRESS, May 19, 2004.

[FN66]. *Montoy v. State*, 2005 WL 11558, 102 P.3d 1160 [194 Ed.Law Rep. [439]], (Kan. Jan. 3, 2005).

[FN67]. Id. at a1, 102 P.3d at 1163.

[FN68]. Id. The court's analysis on this point is questionable because evidence of intent alone is not the basis of constitutionality. Rather, the question of intent is important for determining the level of scrutiny. If plaintiffs could establish intent to discriminate on the basis of race under traditional equal protection principles, then courts would apply strict scrutiny analysis, which would be difficult for the plaintiffs to overcome. If plaintiffs cannot establish intent, then rational basis analysis would be applied.

[FN69]. *Id.* This per curiam decision did not identify legitimate governmental interests.

[FN70]. *Id.* at a3, 102 P.3d at 1164.

[FN71]. *Id.* (citing JOHN AUGENBLICK ET AL., *CALCULATION OF THE COST OF A SUITABLE EDUCATION IN KANSAS 2000--2001 USING TWO DIFFERENT ANALYTIC APPROACHES*. (2002)). Notably, application of the findings of that study to school finance policy in Kansas would negate or reverse, depending on how the findings were applied, the racially disparate effects of current policy. See BRUCE D. BAKER, *FAVORING DISTRICT NEEDS OVER STUDENT NEEDS: THE ADVERSE EFFECT OF THE SCHOOL DISTRICT FINANCE ACT ON MINORITY CHILDREN AND CHILDREN WITH DISABILITIES. EXPERT TESTIMONY IN THE CASE OF ROBINSON V. KANSAS* (2003).

[FN72]. Montoy, 2005 WL 11558, at a3, 102 P.3d at 1164.

[FN73]. *Id.* at a4, 102 P.3d at 1165.

[FN74]. *Id.*

[FN75]. *Id.*

[FN76]. Kevin Carey, *The Funding Gap: Minority and Low-Income Students Still Receive Fewer Dollars in Many States*, at <http://www2.edtrust.org/NR/rdonlyres/.pdf> (visited Oct. 2, 2004).

[FN77]. *F.C.C. v. Beach Commun.*, 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993).

[FN78]. See, e.g., *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County*, 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989) (finding that the tax assessment scheme that treated similarly situated owners of real property unequally was not rationally related to goal of assessing property at true current value); *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 [109 Ed.Law Rep. [539]] (1996) (concluding that a Colorado constitutional amendment that forbade the state from prohibiting discrimination against homosexuals was passed for the impermissible purpose of discriminating against homosexuals); *Zobel v. Williams*, 457 U.S. 55, 102 S.Ct. 2309, 72 L.Ed.2d 672 (1982) (ruling that an Alaska statute that would distribute dividends from the state's oil fund according to length of residency was enacted for the impermissible purpose of awarding citizens for past contributions, and that statute was not rationally related to legitimate goals of encouraging individuals to live in the state, or encourage sensible management of the oil fund).

[FN79]. See, e.g., Preston C. Green III & Bruce D. Baker, *Circumventing Rodriguez: Can Plaintiffs Use the Equal Protection Clause to Challenge School Finance Disparities Caused by Inequitable State Distribution Policies?*, 7 TEX.F. ON C.L. & C.R. 141 (2002).

[FN80]. *Id.* at a48-49.

[FN81]. *Id.* at a48.

[FN82]. *Id.* at a49.

[FN83]. See *Milliken v. Bradley*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974) (holding that a multidistrict remedy for de jure segregation could not be imposed in the absence of any finding that school district boundary lines were established with racially discriminatory intent).

[FN84]. Board of Educ. of Okla. City Pub. Sch., Indep. Sch. Dist. No. 89, Okla. County, Okla. v. Dowell, 498 U.S. 237, 250, 111 S.Ct. 630, 112 L.Ed.2d 715 [64 Ed.Law Rep. [628]] (1991).

[FN85]. See Green v. County Sch. Bd. of New Kent County, Va., 391 U.S. 430, 439, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968) (holding that a racial neutral "freedom of choice" plan was unconstitutional where no white child had chosen to attend the former black public school and 85% of black children still attended the school).

[FN86]. Montoy, 2003 WL 23002704, at a39.

[FN87]. Id. at a3.

[FN88]. Id. at a4.

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