Approved: July 15, 2005
Date

MINUTES OF THE HOUSE FEDERAL AND STATE AFFAIRS COMMITTEE

The meeting was called to order by Chairman John Edmonds at 9:00 A.M. on June 28, 2005 in Room 519-S of the Capitol.

All members were present.

Committee staff present:
Athena Andaya, Kansas Legislative Research Department
Dennis Hodgins, Kansas Legislative Research Department
Mary Torrence, Revisor of Statutes Office
Rose Marie Glatt, Committee Secretary

Conferees appearing before the committee:
Proponents:
Attorney General Phill Kline
Representative Mike O'Neal
Senator Nick Jordan
Representative Frank Miller
Leo Kerwin, Private Citizen
Representative Lance Kinzer
Neutral
Representative Pat Colloton
Professor James Sherow, Professor of History, KSU
Opponents:
William Rich, Professor of Constitutional Law, Washburn University
Richard Hayes, President of the Kansas Bar Association
Donna Whiteman, Kansas Association of School Boards
Michael Donnelly, Disability Rights Center of Kansas

Others attending:
See attached list.

The Chairman opened the floor for bill introductions. Seeing no bill introductions, he opened the floor for a public hearing.

HCR 5003 - an amendment to the Kansas Constitution relating to appropriations

HCR 5003 if adopted by voters at a special election, would amend Section 24 of Article 2 of the Kansas Constitution (regarding appropriations) to clarify that the executive and judicial branches are with authority to direct the legislature branch to appropriate money; and that the judicial branch is prohibited from fashioning remedies that interfere with the expenditure of funds in compliance with lawful appropriation acts.

The Chairman called the first conferee for the **PROPONENTS**:

Attorney General Phill Kline appeared to present a legal analysis of Kansas Supreme Court Ryan Montoy decision (no written testimony). He commended the members for their recent full debate of the doctrine of separation of powers. It was well reasoned, with deeply thought ideas expressed regarding governance and decision making on both sides. There are many who mock and ridicule legislative debate, however they should truly listen to the discussions that are echoed in the halls today. He spoke of many editorialists that expressed frustration, and questioned the professionalism, and sincerity of the deliberative body, however, he cautioned, they must continue to stand for those beliefs which inspired them to serve their constituents. He questioned whether they would resist the mocking of the Legislative process by the Court. He reviewed the history of the Constitution, importance of the separation of powers, similar court actions in other states, and ramifications of acquiescence to the court order.

He reviewed the rationale behind the monetary amount of the court order. He quoted directly from the Court's opinion (page 19) stating "*The Augenblick and Myers study is the only analysis resembling a legitimate cost study before us. We accept it as a valid basis to determine the cost of a constitutionally adequate public*

education. Furthermore the court acknowledges that full implementation of this study would require additional expenditures, for K-12, of approximately $853 million dollars. (Copies of the court's opinion were provided to Legislative leadership on February 24, 2004 or may be obtained from the Attorney General's office). He reviewed the voting record of the House and Senate regarding acceptance of the Augenblick and Myers study. In conclusion he urged the Committee to pass the amendment, that would provide clear guidance and policy, allowing him to defend the state when the Legislature is not in session. If not he warned they would lose their authority before January and he would be presented with the impossibility of defending a Legislature that says we must comply, but refuses to enact the policy to comply.

He responded to the following questions regarding: recourse or remedy of private citizen in the courts, the correctness of the subject of the separation of powers being germane to the special session, concern over closure of schools, conflicting January and June court orders, differences in SCR 1603 and HCR 5003, discussion of the current authority of the court, process of filing federal lawsuits/motions and other options and questions over loss of local control and the court's order relating to the current school formula.

Representative Mike O'Neal stated that nothing that has happened in his legal or legislative experience of over two decades compared to the current situation faced by the Legislature and the state of Kansas, in the wake of the Montoy decision. He had followed the Montoy case, since 1999, and had no objection to the January 3, 2005 opinion. After a review of the history of education funding he stated that court's June 3rd decision breached the Legislative perimeter, in a number of fashions. These are detailed in two papers that he wrote: (1) *Lesson in Jurisdiction and Separation of Powers; State ex rel. Stephan v. House of Representatives,* June 19, 2005 (2) *The Power of the Court to Order an Amount Is the Power to also Direct the Distribution* June 27, 2005. Copies were distributed to the Committee (Attachment 1).

He stated the rationale behind the governor calling a special session. Following a review of previous legal cases, copies of an article published in Judicature, Volume 88, Number 1 July-August 2004 "*Judicial Independence, The Power Of The Purse, And Inherent Judicial Powers,"* were distributed (Attachment 2). He urged that they take back the ground that states that the Legislature is the branch that develops public policy and decides how much and when funds are distributed. Until then, it is dangerous for the Legislature to take any action, given the overt statements made in the June 3rd opinion.

Discussions followed regarding: remedies available to citizens to address disagreements with the Legislature's decisions, rationale behind special election that would clarify the court's authority, strongly stated inference in the June 3rd opinion regarding the court's ability to direct its distribution, question of responsibility of Legislature for court ruling, need for additional time in order to study issues before passing a resolution and perceived court's misunderstanding of the benefits resulting from a school formula shift.

The Committee recessed at 11:00 a.m. and reconvened at 11:20, upon adjournment of the House.

Senator Nick Jordan addressed his comments to **SCR 1603**, which the Senate passed 30-9 on June 24th (no written testimony). He briefed the Committee on the June 24th, four-hour Senate Judiciary Committee meeting that resulted in the resolution's passage. He gave the background leading up to the Senate and House resolutions. He stated that these issues were not competitive initiatives against funding for schools. The question before them was whether the Supreme Court overstepped its bounds in any way with its June 3 decision. It is the role of the Legislators, elected by the people, to come together, debate the issues in order to gain consensus for a set budget to forward to the Governor. This is a precedent setting situation, a serious constitutional question that needs everyone's attention relating to the separation of powers in Kansas.

He explained the language, regarding the US Constitution, inserted in **SCR 1603**. He discussed recent polls addressing public frustration over the additional money ordered by the court. This resolution simply states that the court has the right to rule constitutionally, but re-affirms the authority of the Legislative Branch to set the dollar amounts. The Legislature has no place to appeal, so the only recourse is to go directly to the people, through a special election.

He answered questions regarding: processes to regain the affordability in budgeting and appropriations, scenario of passing the school bill first, followed by the issue of judicial oversight, and future real cost studies.

Representative Frank Miller testified that the Kansas Supreme Court has triggered a constitutional crisis that must be resolved before they can consider any funding or administrative policies regarding Kansas schools (Attachment 3). He concluded with a pledge to not vote for additional funding for schools until they pass a constitutional amendment that protects the Legislature from further encroachment by the Kansas Supreme Court into the constitutional authority of the Legislature.

Leo Kerwin, Private Citizen, testified that the Legislature is the taxpayers last line of defense (no written testimony). He reviewed his career as a teacher of 38 years and questioned the validity of "education" today after the advent of many federally mandated school programs. He urged the committee not to close small schools but to analyze the caliber of students graduating. Additional funds will come from middle class people, who can afford it least.

Representative Lance Kinzer addressed the committee on the specific language in the amendment (no written testimony). Based on the history of other states, the Legislature could be facing decade long ongoing battles between the Court and Legislature. A decision needs to be made whether the court has the ability to determine amounts of funding, or if their remedy has overstepped their authority. He planned to offer an amendment later that would make the language mesh with the Senate resolution. He cautioned committee members to be aware of the many reasons people believe this would place limitations on the courts and reminded them that this resolution is a clarification of the current separation of powers. He suggested several scenarios for the representatives to consider when confronted with the argument of the resolution's unintended consequences.

He stated that many legislators had questioned why they were attempting to make the language address the *Montoy* order, instead of merely looking forward. If you agree with the premise that all this does is clarify language that is already in the Constitution, by saying the *Montoy* order it becomes ineffectual in the event that the people pass this constitutional amendment. This places the boundary back where it always should have been and undoes an order that the people have specifically indicated that they thought was inappropriate to begin with.

Chairman Edmonds advised members of the remaining agenda issues for the day. Due to the short time frame his intention is to request the committee to consider the resolution, once they have had the opportunity to hear from and question all conferees. They will recess after hearing the neutral conferees and reconvene after the session adjourns.

The Chairman called the first conferee representing a **NEUTRAL** position.

Representative Pat Colloton presented an overview of school finance law (no written testimony). She stated that in 45 states there has been school finance litigation brought before the court. In seven of those the courts have said this is a political question and an issue in which the courts should not be involved and they dismissed the action. In the other 38 states, they have found that under their requirement for a thorough and efficient school system, there is the constitutional right to litigate the question of school finance. She reviewed what had taken place since 1973, when the first school finance suit was brought in New Jersey. Various courts have ordered additional cost studies and others have implemented various programs be added, however no court has ever ordered a specific dollars be appropriated by the Legislature.

She stated that with the January ruling, in her opinion, the Kansas Supreme court was essentially saying that they only had one piece of actual costing in front of them (Augenblick and Myers study) and they found the financing systems inadequate. They requested the Legislature submit some actual costs and then fix the funding to be reflective of those actual costs. The Legislature responded with a statute that did not address the actual costs. This is not different than what the courts in 19 other states have done. She compared what happened to Kansas to a similar scenario in Ohio that resulted in that Legislature's passage of a series of programs, funded over a period of time. That is the example of Ohio much relied upon by the Kansas Supreme court.

In response to the very strong order given by the Kansas court, she believed that they should not rush into a constitutional amendment without appropriate hearings and appropriate vetting of the language in the amendment. She suggested that they should appropriate what they consider is a suitable amount of funding,

and that the court would give due deference to the Legislature, as the Supreme Courts in other states have done when there has been reaction to their orders. She voiced concern over the language in the proposed amendment and cautioned they take time to have sufficient hearings in order to consider all the different sections of the Kansas Constitution.

Discussions followed regarding: determination of actual costs, lack of costing information presented to the courts, concerns of the timeliness of passing a constitutional amendment without additional hearings, qualifications of experts of the Kansas Constitution, and specific language in the current amendment regarding the ability of courts to appropriate funds.

Professor James Sherow, Professor of History, KSU provided the Committee historical background on the Kansas Constitution (Attachment 4). It is the Constitution of Kansas that establishes the powers of court in Article III and the Constitution has served Kansas well, even if there has been 118 attempts to amend it with 89 of those propositions placed into law. Even when it seems clear what the document directs the Legislature to do, as in the case where it states that "The legislature shall make suitable provision for the finance of the educational interests of the state," as far back as 1879 the Legislature cut funding for secondary education, thereby reducing funding for public education by 50% and placing a greater financial burden on all local school boards. He described various events in the history of "bleeding" Kansas that led up to January 29, 1861, when the Constitution met the approval by U.S. Congress, and President Buchanan signed it into law.

He responded to a question about whether he believed this amendment changed or clarified the Constitution, by stating that from his review of the Constitution, Article II is clear on who appropriates money and he didn't see the need for that to be restated and by doing so there may be unintended consequences.

The Committee recessed at 1:30 p.m. to be reconvened upon adjournment of the House.

The Committee reconvened at 3:55 p.m. and continued with **NEUTRAL** opponents

Richard Levy, Constitutional Law Professor, Kansas University, reviewed the *Montoy* lawsuit, from the District Court level through the June 3, 2005 Supreme Court opinion (no written testimony). He stated that the conflict ought to be understood, not necessarily as one involving a court that is out-of-control, rather one that found itself confronted with what it regarded a violation of Article VI. At that time they attempted to draft a remedy that would address the problem they found. The only ultimate remedy that they considered available to them was to issue an order to the Legislature.

Mr. Levy addressed the proposed amendment, stating that it may be justifiable as a matter of separation of powers, but in his opinion, it would not solve any of the underlying problem, that is Article VI imposes a duty on the Legislature to provide funding. The underlying basis for the court's decision in January and in June still remains: (1) the funding that is provided does not reflect the cost, (2) the levels of funding are inadequate, (3) portions of the funding (formula) were not equitable (4) allowing or using local option budgeting to provide some of the essential costs violated the Legislature duties to provide the funding. If **HCR 5003** is adopted the court will still be confronted with a funding formula and a level of funding that it considers constitutionally inadequate and it will still be required, at some level, to fashion a remedy.

Mr. Levy spoke of the importance of separation of powers, however, urged caution when contemplating any kind of Constitutional amendment. He voiced concern over the overall implications of **HCR 5003** stating that it may have an impact on the common practice of judicial remedies that frequently arises in Constitutional litigation. When the court is dealing with an executive branch agency or other governmental official and finds a constitutional violation, it frequently orders some kind of action, that will cost money to the state. HCR 5003 might be interpreted to impose a barrier on those type scenarios, and if so, would cause serious changes in the balance of separation of power. Another concern would be the symbolism this would create between two branches of government.

Discussion followed regarding the amendment setting a precedent, the definition of suitable provision for funding for education, the rationale behind the dollar amount on the court's order, what the amendment would not do, source used to determine the dollar amount specified in the court's decision, the due process clause

of the US Constitution pertaining to Ex Parte communications and his interpretation of the proposed amendment.

When Mr. Levy was asked for his recommendation concerning this matter, he responded that if the Legislators wanted to talk with the court, they should seek a re-hearing or re-consideration of the order denying the right to intervene in which they could articulate the Legislature's particular interest in the separation of powers issues. In addition he suggested combining that with a motion to the court to re-consider it's order on separation of powers grounds.

The Chairman called the first conferee representing the **OPPOSITION** .

William Rich, Professor of Constitutional Law, Washburn University testified that enactment of **HCR 5003** would result in fundamental changes in the relationship between the legislative and judicial branches in Kansas. He stated that his remarks were tentative, as he has had only a brief time to focus on the language of the amendment, which, in his opinion, contained issues for which he currently does not have clear answers. The proposed language represents a marked departure from traditional separation of powers doctrine and contains substantial problems in terms of changing our traditional understanding of the way in which Legislatures and Courts relate to each other.

He spoke about four issues, that he believed deserved consideration, prior to taking action; (1) Separation of Powers Doctrine (2) Proposed Deviations from Separation of Powers Doctrine, (3) Principles of State Sovereign Immunity do not Apply (4) Gaps and Unintended Consequences (Attachment 5).

Discussion followed regarding, terms used in lawsuits pertaining to party being sued. (Legislature or the state of Kansas), worst case scenarios that could result from the proposed amendments, uniqueness of Kansas Supreme Court decision and resulting proposed amendment, concerns of Representatives to explain the additional costs of education, and options available to the Legislature that he believed would be more appropriate.

In response to a question of what it would take to resolve the situation, Professor Rich responded that a good start would be if they complied with the appropriation of dollars as outlined in the court order, order a full post audit study to develop and understand the funding costs, and to show respect, not contempt, for the court.

Richard Hayes, President of the Kansas Bar Association urged the Committee not to pass either of the proposed amendments because they were designed to erode the independence of the Kansas judiciary (Attachment 6). He voiced concern that the current atmosphere in this body would lead to hasty, ill-considered legislation which would produce regrettable results. KBA respectively suggested that the real solution to the problems facing the legislature was to accelerate the new cost study by the Legislative Division of Post Audit, that would yield a product that the Legislature can use and the Supreme Court can look to with confidence. The Legislature could also consider amending the definition of a "suitable education" contained in KSA 46-1225 (e), upon which the study of Augenblick & Myers was based. Unfortunately the time has passed when a motion could be filed for reconsideration of the separation of powers issue. He concluded by requesting that they consider where the process stops, once you start the process of limiting the jurisdiction of the judiciary.

Donna Whiteman, Kansas Association of School Boards testified that the proposed language in **HCR 5003** was a concern for five reasons (Attachment 7), (1) Constitutional changes should be carefully considered and analyzed to ensure the proposed changes do not create more problems than the problem meant to be addressed, (2) Consideration must be given to the budgets and services the Legislature funds besides education, (3) Language in the resolution has the potential to upset the separation and delicate balance of powers, (4) The Legislature should not attempt to place itself and its acts above or outside of scrutiny by the courts or any other body, (5) The $1.7 million it will cost to pay for this special election could be spent to address the Supreme Court's concerns in the school finance ruling.

Michael Donnelly, Disability Rights Center of Kansas (DRC) (Attachment 8) testified that **HCR 5003** was not just about *Montoy*. DRC is concerned about the impact that this amendment to the Kansas Constitution would have on the due process rights of Kansas with disabilities, including the due process right to a remedy

as determined by a Kansas court. He cited possible programs that could be impacted by this amendment, i.e., Medicaid program, powers of eminent domain to seize property, and elimination of all neo-natal care, home support and medical care to persons living in a "permanent vegetative state" and breast cancer treatment from the Medicaid budget.

The proposed Constitutional amendment goes far beyond the *Montoy* litigation and touches the very foundation of our constitutional republic. A constitutional republic form of government means that there are certain foundational principles that cannot be voted away. As it relates to our state, the Kansas Supreme Court must have the final word in interpreting and enforcing the Kansas Constitution. Due process of law requires that a wronged party is entitled to a remedy and the Court must maintain its ability to enforce its orders.

The Chairman closed the public hearing on **HCR 5003**.

Chairman Edmonds opened the floor for action on the amendment.

Representative Kinzer made the motion to adopt an amendment on **HCR 5003.** Representative Siegfreid seconded the motion. Copies of the amendment were distributed (Attachment 9).

On page 1, line 23, by striking ". The judicial"; by striking all in lines 24 and 25; in line 26, by striking all before the period and inserting "or to redirect the expenditure of funds appropriated by law, except as the legislative branch may provide by law or as may be required by the Constitution of the United States"; in line 33, by striking "nor shall the"; by striking all in lines 34 and 35; in line 36, by striking "money" and inserting "nor to redirect the expenditures of funds appropriated by law, except as the legislative branch may provide by law or as may be required by the Constitution of the United States "; in line 42, by striking "any" and inserting "a"; in line 43, before the period by inserting ",except as the legislative branch may provide by law or as may be required by the Constitution of the United States";

On page 2, in line 14, by striking "August 16,"; in line 15, by striking "2005 and inserting "the first Tuesday following 60 calendar days after the approval of this resolution by both the Senate and the House of Representatives of the Kansas legislature"; and the concurrent resolution be adopted as amended.

He explained that after all the striking and inserting changes are done the amendment is identical to the language in **SCR 1603.** He clarified the reason for the change of dates. The Secretary of State has indicated that the cost of the special election would be $1.7 million and the money would have to be appropriated.

He explained that it adds in, with specificity, the fact that if there is some legislative enactment that specifically says, for example that the Governor has the authority to under a certain emergency contingency to take money from one fund and transfer it to another, that would not violate this provision. If there is a circumstance where it is found by some Court that the United States Constitution requires something that is in conflict with this amendment, we simply acknowledge that the United States Constitution always controls.

Discussion followed regarding concerns of Committee members

Representative Kinzer closed on his motion to amend **HCR 5003** with the changes outlined. The motion carried.

Representative Kinzer moved that they report **HCR 5003**, as amended, favorably for passage. Representative Siegfreid seconded the motion.

Staff requested that they consider a language change in lines 36 and 41 to make "nor" and "or" consistent.

Representative Kinzer made the motion to withdraw his motion. Permission of the second.

Representative Kinzer made the motion to allow the Revisor's staff to make the technical determination as to whether the word "nor" or "or" should be used in the explanatory portion. Representative Brunk seconded the motion. The motion carried.

MINUTES OF THE House Federal and State Affairs Committee at 9:00 A.M. on June 28, 2005 in Room 519-S of the Capitol.

Representative Kinzer moved that the Federal and State Affairs Committee report out **HCR 5003** favorably, with the stipulation on the language changes just discussed. Representative Brunk seconded the motion.

After discussion, the Chairman called for a vote. A division was called. The motion carried 12-10.

The following members requested that their NO vote be recorded: Representatives McCray-Miller, Loganbill, Cox, Mah, Burroughs and Henderson.

The Chairman thanked the Committee for their patience and adjourned the meeting at 7:30 p.m.

Federal and State Affairs
June 28, 2005

Name	Representing
Jim Edwards	KASB
Matt Fletcher	INTERHAB
Bill Rich	—
Kim Fowler	Judicial Branch
Callee Tell Denton	KS Trial Lawyers Assoc.
Bob Corkins	Freestate Center
Ron Secker	Hein Law Firm
ROBERT KOBLER	

Lessons in Jurisdiction and Separation of Powers:
State ex rel. Stephan v. House of Representatives
Rep. Mike O'Neal, June 19, 2005

In 1984 the Kansas Supreme Court decided an important case dealing with the separation of powers doctrine and suits against the Legislature. In *State ex rel. Stephan v. House of Representatives*, 236 Kan. 45, Attorney General Stephan on behalf of the State of Kansas, filed an original action in quo warranto and mandamus against the House and Senate, and also Gov. Carlin, seeking a determination of the constitutionality of a statute passed by the Legislature which allowed the Legislature to adopt, modify or revoke administrative rules and regulations by concurrent resolutions. The A.G. alleged that the legislation violated the doctrine of separation of powers by authorizing the legislature to usurp the executive power to administer and enforce laws. At issue were concurrent resolutions passed pursuant to the statute.

The Kansas Supreme Court has original jurisdiction in such actions. An action in quo warranto essentially tests the power of the official body defendant, the Legislature in this particular case, to do what it did. Loosely translated, the term asks "by what authority did you act?" The action in mandamus seeks an order directing an official or public body to act in a specific way. Here, the action sought to order Gov. Carlin to ignore the resolutions and implement the underlying rule and regulation.

The Legislature was represented by Legislative Counsel, Bob Coldsnow, who was appointed to that position pursuant to our Legislative Counsel statute - the same statute we amended by legislation in the 2005 session and which was vetoed by Gov. Sebelius. (As a second and third-year law student at Kansas University School of Law, I clerked for Coldsnow in the Office of Legislative Counsel and worked on the constitutional law cases the Legislature was involved in, some of which are cited in this decision. Additional trivia includes the fact that attorney Dan Biles, current counsel for the SBOE, was an assistant A.G. under Stephan and participated in the case. Art Griggs, now with the Revisor's office, argued the case for Gov. Carlin.)

Legislative Counsel filed a motion to dismiss the case against the Legislature on the grounds of sovereign immunity (the King can do no wrong). The modern version of sovereign immunity is that the governmental body, being a sovereign power, cannot be subjected to suit in its own courts except where consent has been given by the

Legislature. (The Court cited *Brown v. Wichita State University* 219 Kan. 2, *cert. denied,* 429 U.S. 806, the 1976 sovereign immunity case I helped brief for Coldsnow, arising out of the tragic Wichita State University plane crash involving numerous members of the football team. Sovereign immunity was upheld and the Legislature then passed the Tort Claims Act, which subjects governmental entities to liability for *damages* caused by the negligence of its employees acting within the scope of their employment. **However, K.S.A. 75-6104(a) specifically exempts the government from liability for damages resulting from "legislative functions, including, but not limited to, the adoption or failure to adopt any statute, regulation, ordinance or resolution.")**

The Court noted, however, that state officials, as distinguished from the state itself, are not immune from actions to restrain them from enforcing, or attempting to enforce, state laws which violate the constitution or from taking unconstitutional action under color of state law.

Importantly, the Court held that the Legislature is a legal entity that can sue and be sued and cited the legislative counsel statute, K.S.A. 46-1224, for the proposition that the Legislature contemplated cases in which the Legislature would bring or defend actions and be represented by its own counsel. The Court went on to hold that service of process upon the presiding officers of each house satisfied the requirement of service upon the Legislature. The Court stated that it was "this notice which gives the court jurisdiction to proceed" citing 62 Am. Jur. 2d, Process, sec. 3:

> "The constitutional guaranty of due process of law means notice and opportunity to be heard and to defend before a competent tribunal vested with jurisdiction of the subject matter of the cause; it is essential therefore to the exercise of that jurisdiction, where the defendant does not enter a voluntary general appearance or otherwise waive service of process, that process issue, giving notice to those whose rights and interests will be affected."

The Court held that it had jurisdiction over the Legislature by virtue of the fact that the House and Senate had been named as parties and their respective presiding officers had been served, and, inferentially, that unless the Legislature had been served, there would not have been jurisdiction, and, accordingly, the Legislature would not have been afforded its due process rights.

The Legislature also contended in *Stephan* that the authority of the Legislature to act is a discretionary function and is not subject to interference by the judiciary and, that this was true whether such action was in disregard of a constitutional duty or was an

enactment of an unconstitutional law. (*Alpers v. City of San Francisco*, 32 F. 503; 16 Am. Jur. 2d, Constitutional Law, sec. 144, 315.) The petitioner argued, however, that the relief sought was not to prevent the passage of an unconstitutional act, but to preclude the Legislature from exercising an executive function.

The Court, in considering the remedy of quo warranto and mandamus, stated that mandamus is an appropriate proceeding designed for the purpose of compelling a public officer to perform a clearly defined duty, **one imposed by law and not involving the exercise of discretion.** The Court went on to hold that where a petition for mandamus presents an issue **of great public importance and concern**, the court may exercise its original jurisdiction in mandamus and settle the question. As to quo warranto, the Court held that in proper cases an original action in quo warranto is an appropriate procedure to question the constitutionality of a statute.

The primary thrust of the Legislature's motion to dismiss in *Stephan* was the common-law immunity of state legislators from suit arising out of the performance of legitimate legislative functions, which is embodied in the Speech or Debate Clause in Art. 2, sec. 22 of the Kansas Constitution. The Court noted that the U.S. Supreme Court has stated that the state legislative privilege is on a parity with the federal privilege and, accordingly, held that the Kansas Constitution affords the state legislature the same immunity that protects Congress. The Kansas court, citing *Supreme Court of Va. V. Consumers Union*, 446 U.S. 719, (1980), found that no distinction has been made between actions for damages and those for prospective or declaratory relief:

> "[W]e have recognized elsewhere that a 'private civil action, whether for an injunction or damages, creates a distraction and forces [legislators] to divert their time, energy and attention from their legislative tasks to defend the litigation.' *Eastland v. United States Servicemen's Fund* [421 U.S.] at 503." 446 U.S. at 733.
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> ...
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> "The immunities of the Speech and Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but **to protect the integrity of the legislative process by insuring the independence of individual legislators."** *United States v. Brewster*, [408 U.S. at] 507 {1972}. (Emphasis added)
>
> ...

"In our system 'the clause serves the additional function of reinforcing the separation of powers so deliberately established by the Founders.' *United States v. v. Johnson*, [383 U.S. at] 178 {1966}.

...

"The Clause is a product of the English experience. *Kilbourn v. Thompson*, [103 U.S. 168, (1881); *United States v. Johnson, supra*, at 177-179. Due to that heritage our cases make it clear **that the 'central role' of the Clause is to 'prevent intimidation of legislators by the Executive and accountability before a possible hostile judiciary,** *United States v. Johnson*, 383 U.S. 169, 181 (1966)'..." 236 Kan. at 55-56. (Emphasis added)

The Court in *Stephan* granted Legislative Counsel's motion to dismiss the Legislature, stating it was hesitant at that time to establish a precedent that actions such as the A.G.'s on behalf of the State and directly against the Legislature were valid. The Court noted:

"Under the Speech and Debate Clause legislators are absolutely immune from the burden of defending lawsuits based upon acts done within 'the sphere of legitimate legislative activity.' In *Eastland v. United States Servicemen's Fund*, 421 U.S. at 503-04, the court defined this by stating:

"In determining whether particular activities other than literal speech or debate fall within the 'legitimate legislative sphere' we look to see whether the activities took place 'in a session of the House by one of its members in relation to the business before it.' *Kilbourn v. Thompson*, 103 U.S. at 204. More specifically, we must determine whether the activities are

"an integral part of the deliberative and communicative process by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.' *Gravel v. United States*, 408 U.S. at 625.

It has been held that the passing of acts and resolutions is the very essence of the legislative process. *Eslinger v. Thomas*, 476 F.2d 225, 228 (4th Cir. 1973)**. It logically follows, therefore, the Kansas Legislature is immune from an action challenging the constitutionality of both K.S.A. 1983 Supp. 77-426(c) and (d)." 236 Kan. At 56**.

(Emphasis added)

The Court went on to hold that where an action is brought against the Legislature as a whole for enacting a law in its official capacity, the legislature is immune from suit the same as if the lawsuit was directed against individual legislators.

The *Stephan* court provides a detailed discussion of the doctrine of separation powers. The court recognized the doctrine and that through it "a dangerous concentration of power is avoided through the checks and balances each branch of government has against the other," and that, generally speaking, "the legislative power is the power to make, amend, or repeal laws; the executive power is the power to enforce the laws; and the judicial power is the power to interpret and apply the laws in actual controversies."

Importantly, the Court noted that certain principals applied:

> "(1) A statute is presumed to be constitutional. All doubts must be resolved in favor of its validity, and before a statute may be stricken down, it must clearly appear the statute violates the constitution. *Leek v. Theis*, 217 Kan. 784 [another case I worked on while clerking for the Office of Legislative Counsel]
> (2) When a statute is challenged under the constitutional doctrine of separation of powers, the court must search for a usurpation by the one department of the powers of another department on the specific facts and circumstances presented. *Leek v. Theis, supra.*
> (3) A usurpation of powers exists when there is significant interference by one department with operations of another department. *State ex rel. v. Bennett*, 219 Kan. 285 (1976) [another case I was involved with in the Office of Legislative Counsel].
> (4) In determining whether or not a usurpation of powers exists a court should consider (a) the essential nature of the power being exercised; (b) the degree of control by one department over another; (c) the objective sought to be attained by the legislature; and (d) the practical result of the blending of powers as shown by actual experience over a period of time. *State ex rel. v. Bennett*, supra." 236 Kan. at 60.

In finding that the subject legislation amounted to an unconstitutional encroachment into the executive branch's power, the *Stephan* court found that once the Legislature had delegated rule & reg authority to the executive branch, the power of the legislature over the rules & regs was to amend the statute(s) granting the authority. The Court found that the legislation giving the Legislature the power to amend or revoke rules and regs by resolution denied the executive branch the right of presentment for approval

of the legislative action. The Court found that the purpose of the legislation was to grant control by the Legislature over the adoption of rules and regulations by executive branch agencies, and, accordingly, the action met the judicial criteria for a finding of a violation of the separation of powers doctrine.

Since the Court had ruled that the Legislature, while a proper party to the action, was immune, it turned its attention to the Governor and issued an order in mandamus compelling the Governor to enforce the administrative rules and regs which were the subject of the legislative resolutions.

Justice Harold Herd, a former legislator, wrote a remarkable concurring and dissenting opinion. He concurred with the majority's opinion that the Legislature was a legal entity which can be sued and that the Legislature should be dismissed on the basis of legislative immunity, but dissented as to the balance of the decision. He noted:

> "This is an important case in constitutional law. ***In ruling the legislature, which is not before us, is usurping executive powers in violation of the separation of powers, this court is violating the constitutional prohibition against giving advisory opinions,*** an executive function, and thus is itself in violation of the separation of powers.
>
> While the majority opinion makes much of the dangers of a violation of the separation of powers doctrine between the executive and legislative branches, ***the danger of the judiciary usurping executive or legislative powers is more destructive.*** Montesquieu cited the evils of a violation of the separation of powers by the judiciary in I Montesquieu, *The Spirit of Laws*, Books XI, ch. VI, p. 174 (1873):
>
> > **'[T]here is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; *for the judge would be then the legislator*.** Were it joined to the executive power, the judge might behave with violence and oppression.'
>
> On this subject it has also been stated:
>
> > 'American courts are constantly wary to trench upon the prerogatives of other departments of government or to arrogate to themselves any undue powers, lest they disturb the balance of power; and this principal

> has contributed greatly to the success of the American system of government and to the strength of the judiciary itself' See 16 Am Jur. 2d Constitutional Law sec. 309, pp 829-30.
>
> In recent years this court has held fast to the idea that 'the doctrine of separation of powers is an inherent and integral element of the republican form of government....' *Van Sickle v. Shanahan*, 212 Kan. 426, 447, 511 P.2d 223 (1973). **The key to separation of powers for the judiciary is the concept of judicial restraint.** Judicial restraint requires the judiciary to refrain from entering disputes not properly before it and to respect the concept of jurisdiction. The majority opinion violates these principals. In this country's quest for a 'government of laws and not of men' (the rule of law), we have come to realize if the judiciary does not abide by the law, there is no law. The majority opinion is a violation of both the Constitution and the statutes an establishes a precedent which will take years to overcome." 236 Kan. at 66-67. [Emphasis added]

Justice Herd was also concerned about the majority's willingness to address the case where another adequate remedy at law existed and gave a prophetic warning about the dangers of succumbing to the temptation of having the "ends justifying the means";

> "A declaratory judgment action against an agency head by a party threatened with enforcement of a regulation modified by the legislature, would provide an allowable review of the legislature's action by the judiciary. The majority argues it need not impose the adequate remedy rule since the action by the court in this case would avoid numerous lawsuits, provide guidance to agencies, resolve an important question, and deal with the matter which would arise on appeal eventually. ***This is the 'expediency' test based on 'the ends justifies the means' and is the greatest threat to the rule of law.*** Under this rationale all constitutional principals, even due process, can be abolished if it will avoid lawsuits, provide guidance, resolve important questions and resolve a matter which will arise on appeal eventually." 236 Kan. at 68.
>
> ...
>
> "...As Justice Fatzer pointed out in his *discussion* of the separation of powers in his dissent to *State ex rel., v. Fadely*, 180 Kan. 652, 669, 308 P. 2d 537 (1957):
>
> > "There is a time when the powers of government must be kept separate and apart in order that our form of government may be preserved. The doubtful cases make the trouble – the small beginnings and usurpations create the danger. Everyone becomes alarmed at outright usurpation

> and we need have no fear of such occurrence; rather, **what we should be alive to and ever guard against is the imperceptible but gradual increase into the assumption of governmental power by one department, properly belonging to another.**'" 236 Kan. at 70. (Emphasis added)

(Of considerable interest is the fact that Justice Herd's concurring and dissenting opinion was joined in by Justice Kay McFarland, our current Chief Justice.)

So, what is the significance of *State ex rel. Stephan v. House of Representatives* as it relates to *Montoy*? First, it answers the question of whether it would have been appropriate to have named the Legislature in the original suit. Not only would it have been appropriate, the legislature is really the only true party in interest in an Article 6, sec. 6 suit since it is the Legislature and only the Legislature that has any duty under that article as it relates to making suitable provision for finance of the educational interests of the state. The "State" and the "Legislature" are not one and the same for purposes of standing. Indeed, in *Stephan*, it was the State suing the Legislature.

The significance of the fact that the Legislature was not a party in *Montoy* is that the court does not have jurisdiction over the Legislature - jurisdiction that would have existed had the Legislature been named and the presiding officers of each house served. The Legislature has not been afforded its constitutionally guaranteed due process. Ironically, the Court's order in April denying members of the Legislature the right to appear before the Court and answer questions about H.B. 2247 was procedurally correct, since the Legislature was not a party, but the order, and the Court's subsequent June 3, 2005 decision ordering the Legislature to act, are *prima facie* evidence of the Court's own violation of the separation of powers doctrine, the rule of precedent and the limitations on the court's jurisdiction.

Had the Legislature been named and served in the original school finance action, *Stephan* tells us that the Legislature would have been entitled to an order of dismissal on the grounds of legislative immunity. The Legislature is immune from a money judgment for damages under the Tort Claims Act and is entitled to immunity from suit under the speech and debate clause of the Kansas Constitution. As such, any remedy fashioned by the Court would have to be a remedy enforced, if at all, against some one or some entity other than the Legislature.

The other lesson of *Stephan* is what constitutes a violation of the separation of powers by one branch against another. Here, we're evaluating the breadth of the Court's order mandating the Legislature to return, following final adjournment of a regular session, and appropriate a specific sum of money to add to what has already been duly appropriated to the Department of Education to fund school finance for the 2005-2006 school year. Analyzing the order based on the 4 criteria set out in *Stephan*, it is clear that the Court has overstepped its constitutional boundaries and has encroached into an area reserved to the legislative branch - the power to determine public policy and appropriate funds. The order attempts to usurp the prerogative of individual legislators to vote without interference from another department of government and in derogation of the wishes of their constituency.

The Court's violation is not limited to the order for more funding. Although that violation is sufficient in and of itself to warrant a claim of an unconstitutional intrusion upon a proper legislative function, several other aspects of the Court's journey in *Montoy*, thus far, merit comment. The apparent lack of jurisdiction over the Legislature has already been mentioned and discussed. Equally troubling is the Court's attempt to navigate around the long-standing rule that legislative enactments are entitled to a presumption of validity and constitutionality by characterizing H.B. 2247 as "remedial". By utilizing this "ends justifying the means" approach, the Court committed not one but at least two violations. First, since the Legislature was never a party, the Court never had jurisdiction over the Legislature, let alone a statute passed **after** the appellate record in *Montoy* was closed. Second, the Court, in considering H.B. 2247, assumed original appellate jurisdiction, something it doesn't have, except, arguably, in an action requesting mandamus or quo warranto. *Montoy* is neither.

The Court's finding that H.B. 2247 was "remedial" warrants discussion. While it is true that H.B. 2247 contains the Legislature's response to the Court's Jan. 3, 2005 order, it is not true that H.B. 2247 is, in its entirety, devoted to *Montoy*. H.B. 2247 contains many provisions unrelated to *Montoy* or any issues raised therein. The bill addresses the needs of **all** Kansas school districts, virtually all of which were **not** Plaintiffs in the suit, and many whose interests are not compatible with the Plaintiff districts. Nevertheless, the Court seized jurisdiction of the entire bill, not to mention H.B.

2059 and S.B. 43, (the Court, in a footnote says that when it refers to H.B. 2247, it is "collectively" referring to H.B. 2247, S.B. 43 and H.B. 2059) and undertook to determine its constitutionality in spite of the fact that no suit or action had been filed challenging its constitutionality.

Having ignored the rules governing burden of proof, appellate jurisdiction, presumption of constitutionality and separation of powers, the *Montoy* court ruled that some provisions of H.B. 2247 could be implemented but other provisions would be stayed, essentially "cherry picking" provisions in an apparent attempt to create the political will for the Legislature to respond in a manner consistent with the Court's order. This form of judicial extortion is not authorized under any interpretation of the Constitution and is a violation of separation of powers in that it attempts to usurp the independence of the duly elected members of the Kansas House and Senate.

Only the Legislature and Governor have the authority to call for a special session of the Legislature. A question arises as to what would happen if the Governor failed to call a special session and the Legislature refused to petition for one. Any attempt by the Court to mandamus the Governor to perform a discretionary task would be a clear violation of the doctrine of separation of powers. Any attempt to force the Legislature to reconvene would be a violation as well. Accordingly, the fact that a special session has been called does not make Legislative action any more of a requirement than it would have been in the absence of the call.

While in special session the Legislature should do what the Legislature does, examine the landscape and determine, based on good public policy, whether circumstances exist that warrant actions and decisions that the Legislature did not take as of final adjournment of the regular session. If we determine that, based on what we know now about the condition of the state, we would have acted differently prior to final adjournment, we should take appropriate action. We should not, however, feel compelled to take action solely by virtue of the Court's decision in *Montoy*, for the reasons above stated.

The Power of the Court to Order an Amount
Is the Power to also Direct the Distribution

Rep. Mike O'Neal

June 27, 2005

Many members of the legislature have praised the decision of the Kansas Supreme Court in *Montoy* as a bold statement of the legislature's alleged failure to make suitable provision for finance of the education interests of the state. They praise the decision because they agree with it. The "end", in their view, justified the court's "means", in getting there. The court, they say, must have the power to order the Legislature to appropriate a sum certain by a date certain because the court did it, and who are we to question a direct order from the court. To resist, they say, is to show disrespect for the judicial branch.

To those who argue that the court has the power, because they have undertaken to assume that power, I say: "Be careful what you ask for." The same people who claim the court has the power to order a sum certain by a date certain should take some time and reread the court's two preliminary orders, the Jan. 3, 2005 order and the June 3, 2005 order. The Jan. 3, 2005 order, e.g., contains the following:

> "...In particular, the plaintiff school districts (Salina and Dodge City) established that the SDFQPA fails to provide adequate funding for a suitable education for students of their and other similarly situated districts, i.e., ***middle-and large-sized districts with a high proportion of minority and/or at-risk and special education students...***" (Emphasis added.)
>
> ...
>
> "...Specifically, the district court found that the financing formula was not based upon actual costs to educate children but was instead based on *former spending levels and political compromise*. This failure to do any cost analysis ***distorted the low enrollment,*** special education, vocational, bilingual education, and at-risk student weighting factors." (Emphasis added.)
>
> ...
>
> "It is clear increased funding will be required; ***however, increased funding may not in and of itself make the financing formula constitutionally suitable. The 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." (Emphasis added.)

Although the court reversed Judge Bullock's ruling that our formula was a violation of equal protection and found that "all of the funding differentials as provided by the SDFQPA are rationally related to a legitimate legislative purpose" the court went on to hold that "the present financing formula increases disparities in funding." In so stating, the court was clearly critical of present weightings, particularly low enrollment weighting and the political compromises that went into it creation and maintenance.

H.B. 2247 was a good faith effort to address every expressed concern in the court's Jan. 3, 2005 order, including the call for a non-specific level of additional funding. On June 3, 2005 the court issued another interim order in *Montoy*. Most have focused on the court's order for the Legislature, by July 1, to appropriate an additional $143M for schools. There is much more in the court's opinion than that, however. Specifically, the court stated:

> "...no later than July 1, 2005, for the 2005-2006 school year, the legislature shall implement a minimum increase of $285 million above the funding level for the 2004-2005 school year, which includes the $142 million presently contemplated in H.B. 2247. In deference to the cost study analysis mandated by the legislature in H.B. 2247, the ***implementation*** beyond the 2005-2006 school year will be contingent upon the results of the study directed by H.B. 2247 and this opinion. (Emphasis added.)

The court devoted space in its opinion to a discussion of similar litigation in Ohio. Interestingly, the court didn't site the Ohio court's latest opinions on the subject, but rather cited an earlier decision (Ohio has since dismissed its case even though the legislature there had, in its opinion, still failed to do what the court suggested should be done). Quoting from the earlier Ohio decision the Kansas court stated:

> "The legislature has the power to draft legislation, and the court has the power to determine whether that legislation complies with the Constitution. *However, while it is for the General Assembly to legislate a remedy, courts do possess the authority to enforce their orders, since* ***the power to declare a particular law or enactment unconstitutional must include the power to require a revision of***

> ***that enactment,*** *to ensure that it is then constitutional.* If it did not, then the power to find a particular Act unconstitutional would be a nullity. As a result there would be no enforceable remedy. A remedy that is never enforced is truly not a remedy." (Emphasis added) *DeRolph v. State*, 89 Ohio St. 3d 1, 12, 728 N.E. 2d 993 (2000).

Clearly, the court has suggested in its opinion that the power to order an amount of funding includes the power to order the specifics of its distribution (implementation). With that in mind, consider other language in the court's opinion. With regard to base state aid per pupil the court noted:

> "...The plaintiffs, on the other hand, claim ***that increasing the BSAPP only exacerbates the inequities in the system because the formula was not adjusted to make distorted weights, such as the low-enrollment weight, correspond to actual costs.*** For example, for every $1 of base funding that middle-sized or large districts receive, some low-enrollment districts receive $2.14..." (Emphasis added.)
>
> ...
>
> "At a minimum, the increased BSAPP provided for in H.B. 2247 substantially varies from any cost information in the record and from any recommendation of the Board or the State Department of Education."

With regard to at-risk funding the court parroted the A&M recommendations of .20 for districts with 200 or fewer students, .52 for districts with 1,000 students, .59 for districts with 10,000, and .60 for districts with 30,000 students ($1491 - $2,790 per student). As to bilingual, the court acknowledged the increased funding in H.B. 2247 but noted "it still differs substantially from the cost information in the record", namely, the A&M recommendation of weighting based on enrollment and ranging from .15 to .97 ($1,118 to $4,510 per student). With regard to special education funding, the court strongly suggested funding at the level of 100% of excess costs, ruling that there was no evidence in the record that districts had over-identified special ed students. Alternatively, the court noted that A&M recommended a separate weighting range of from .90 to 1.50, "resulting in a nearly $102.9 million (in 2001 dollars) increase in funding – a stark contrast to the $17.7 million provided by H.B. 2247."

The court had harsh words for the LOB, noting that "the LOB does not address inadequate funding of middle-sized and large districts that have a high concentration of bilingual, at-risk, minority, and special education students, high pupil-to-teacher ratios,

and high drop-out rates, but also have low median family incomes and low assessed property valuation." The court agreed with the plaintiffs and the SBOE that the increase in the LOB authority in H.B. 2247 exacerbates the wealth-based disparities between districts.

As to the Cost-of-Living provisions in H.B. 2247, the court noted that it was not the high cost-of-living districts that needed help with teacher salary enhancements but, rather, it was the "high-poverty, high at-risk student populations that need additional help in attracting and retaining good teachers." With regard to the new Extraordinary Declining Enrollment provisions of H.B. 2247, the court noted that "[t]hese provisions have the potential to be extremely disequalizing because they are unlimited and have been designed to benefit a very small number of school districts."

As to all three of the local components the court noted that they "fully acknowledge that once the legislature has provided suitable funding for the state school system, there may be nothing in the constitution that prevents the legislature from allowing school districts to raise additional funds for enhancements to the constitutionally adequate education already provided." However, while not striking down these provisions, the court stayed the provisions, presumably until after the 2006 legislative session. The fact the court has indicated it will retain jurisdiction until after the legislature has acted in 2006 suggests these provisions will be stayed no matter what action is taken by the Legislature in the Special Session.

The court had particularly strong concerns about low-enrollment weighting. The fact that the court lacks an understanding of this element is no comfort. The court noted:

> "Because of the significant impact of low-enrollment weighting on the financing formula, in our January opinion and April order we sought cost justification for it. In response to questions from the court at oral arguments, counsel for the state could not provide any cost-based reason for using the 1,750 enrollment figure or for the weight's percentage. This absence of support is particularly troubling when we consider the disparity this low-enrollment weighting may produce. H.B. 2247 has the potential to worsen this inequity because it eliminates correlation weighting for districts with 1,750 enrollment or more. The funds allocated for correlation weighting were transferred to the BSAPP; this gives low-enrollment districts even more of the funds that previously

> were devoted to balancing the disparities in per pupil funding caused by the low-enrollment weighting."

In discussing the school finance formula as a whole the court noted that "counsel for the State could not identify any cost basis or study to support the amount of funding provided by H.B. 2247, its constellation of weightings and other provisions, or their relationships to one another."

Any doubt that the court's perceived power to order the Legislature to appropriate a sum certain by a date certain includes the perceived power to control the distribution of any appropriated funds should be laid to rest after review of the provisions of the court's June 3, 2005 order, which not only stayed the three local option provisions in H.B. 2247 but also ordered revision of the Legislature's cost study language in H.B. 2247. In that regard, the court ruled:

> "...The post audit study must incorporate the consideration of outputs and board statutory and regulatory standards, in addition to statutorily mandated elements of kindergarten through grade 12 education. Further, post audit's report to the legislature must demonstrate how this consideration was accomplished."

If the court has the power to amend legislation under the guise of "remedial" action, the court has the power to take whatever the Special Session produces and judicially legislate a different distribution or stay provisions they disagree with. The ONLY certainty there is if we pass a bill with $143M in funding is that it will be spent. There is NO certainty that the court will agree with our decision as to how it must be spent. The court stated that they were "guided not only by [their] interpretation of Article 6, sec. 6, but also by the present realities and common sense." In other words, the justices have reserved unto themselves the right to substitute their collective judgment for the will of the peoples' elected representatives.

Questions to ponder in considering various school finance proposals:

1. Would the court accept a plan that put money in the base, in light of its expressed concerns in the June 3 opinion?

2. Would the court accept any plan with local option budgeting involved, in light of the concerns expressed in its opinions?

3. Would the court accept any plan that increases funding for transportation, e.g., in light of the fact that transportation weighting was not one of the areas the court expressed concerns about?

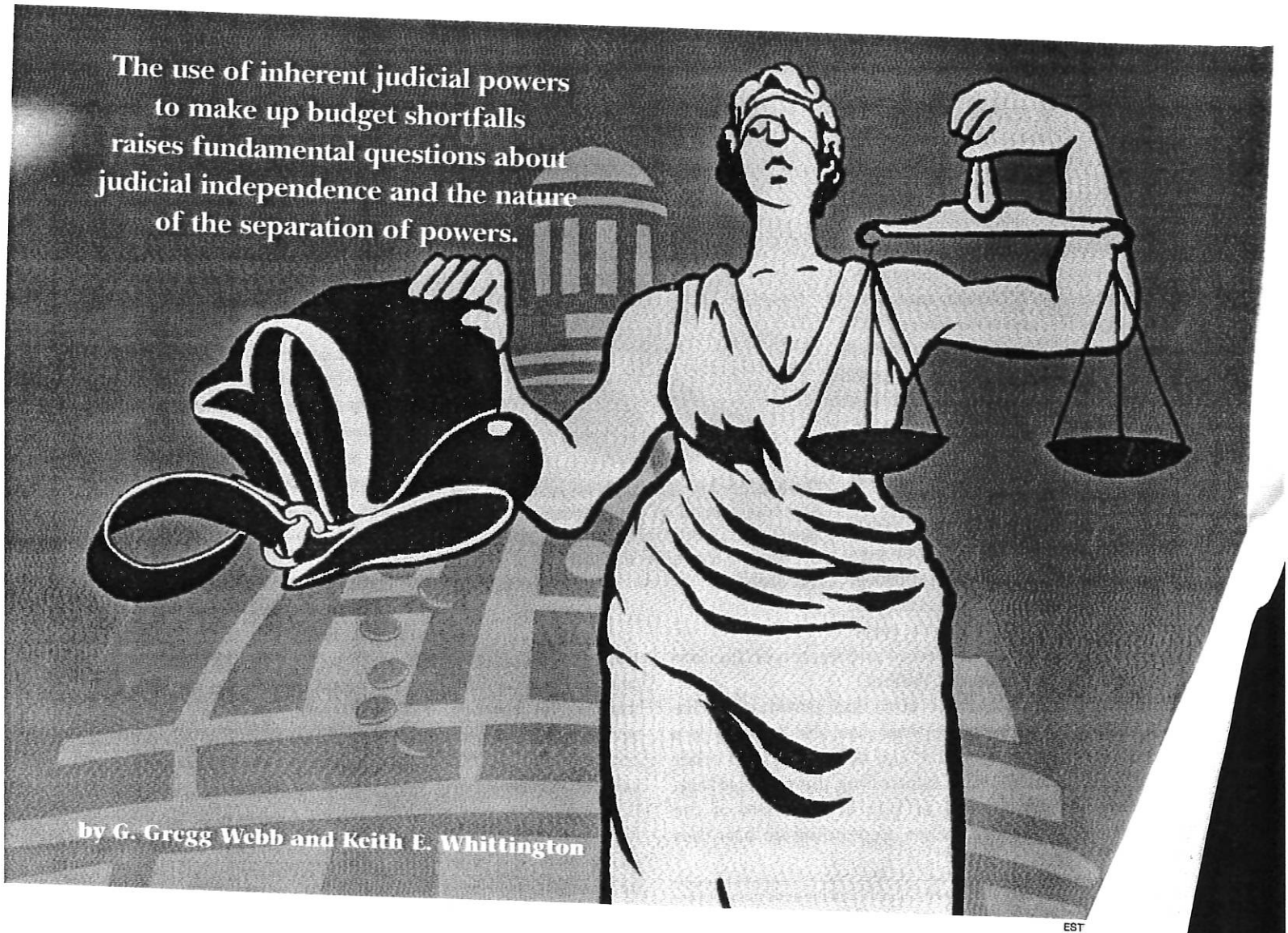
4. Would the court accept a plan that adds to at-risk, bilingual, and/or special ed funding without an adjustment to compensate for the court's perceived concerns over low-enrollment weighting?

5. Would the court accept a plan that varies from the A&M recommendations with regard to particular weights, in light of the court's apparent reliance on the A&M results?

It has been argued that while the court had the power to order us to appropriate a sum certain by a date certain, the court wouldn't undertake to order a distribution of those funds in a manner different than what is approved in the Special Session. My questions: What makes anyone think they wouldn't? Where do we go to look up the answer? What law book, constitutional provision, court rule, etc., says the court can't or wouldn't take this additional extraordinary step. What about the court's decisions in *Montoy* thus far suggests they wouldn't?

To some this Special Session is about school finance. To others it's about separation of powers. To still others it is about BOTH. We must, as the peoples' representatives, first protect the separation of powers and the authority of the legislative branch to determine public policy and control the purse by passing the proposed constitutional amendment. Only then can we determine what is good public policy with regard to funding public education, free of undue influence from another co-equal, but not superior, branch of government.

JUDICIAL INDEPENDENCE, the power of the PURSE, and inherent JUDICIAL POWERS



On March 14, 2002, Chief Justice Kay McFarland of the Kansas Supreme Court ordered an across-the-board increase in court fees in the state.

Money lies at the root of many conflicts between the branches of government. It is at the heart of many policy disputes—as different interests, political parties, and government officials stake out divergent priorities in the raising and spending of public funds—and creates substantial institutional tensions within any system of separated powers. In such systems, the legislature rightfully holds the "power of the purse," given the intimate connection between effective democratic representation and control over government taxation and spending. Indeed, the mother of all legislatures, the British Parliament, largely came into existence in order to expand and legitimate the flow of revenue into government coffers.

As the very example of the birth and growth of Parliament indicates, however, control over the treasury is a powerful political weapon that can be used against other government institutions. In controlling the purse strings, the legislature can reward or punish members of the executive and judicial branches, depending on how they conduct their offices. As James Madison noted in explaining the operation of constitutional checks and balances, "the legislative department alone has access to the pockets of the people."[1]

An effective power of the purse gives the legislature a powerful trump card when disagreements arise between it and the other branches of government, one that is so potent that it can threaten judicial independence. To limit this threat, the American founders wrote into the U.S. Constitution the guarantee that salaries of judges shall not be diminished during their time in office. (Although such a guarantee is common in American state constitutions and endorsed by the United Nations, worldwide it is one of the least-used constitutional provisions for securing judicial independence.[2]) Though important to preserving the independence of individual judges to make controversial decisions, the guarantee of undiminished salaries remains fairly marginal to the central conflicts between courts and legislatures over money and the ability of the judiciary to serve as an effective and independent branch of government. In extreme cases, judges may be denied such basics as an office, an adequate supply of paper, and an up-to-date compendium of statutes.[3] Fortunately, American judges are rarely faced with such deprivation, but the adequacy of resources provided by legislatures to handle judicial business continues to be a contentious issue—especially in the states.

The authors thank Ken Kersch, Howard Gillman, and the anonymous reviewers for their helpful comments.

1. THE FEDERALIST NO. 48, at 310 (James Madison) (Clinton Rossiter, ed., New York: New American Library, 1961).

2. Linda Camp Keith, *Judicial independence and human rights protection around the world*, 85 JUDICATURE 195, 198 (2002).

3. *See, e.g.*, Jennifer A. Widner, BUILDING THE RULE OF LAW 68, 217, 219 (New York: W.W. Norton, 2001).

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A new challenge is emerging in this recurrent struggle between legislatures and judiciaries over resources. During the past three decades, administrative and budget authority over state judicial systems have been concentrated in state supreme courts. As a consequence, tough budgeting decisions increasingly invite direct confrontations between the heads of the legislative and judicial branches of state governments. The possibility of a constitutional standoff now looms in the states as centralized judicial administrations combine their institutional muscle with the doctrine of inherent judicial powers to secure their own funding when state legislatures are either unable or unwilling to authorize adequate appropriations. This convergence of contemporary bureaucratic and fiscal reality with fundamental constitutional principle threatens to dilute traditional notions of the legislative power of the purse.

Kansas has recently provided a glimpse of this possibility. On March 14, 2002, Chief Justice Kay McFarland of the Kansas Supreme Court ordered an across-the-board increase in court fees in the state. This "emergency surcharge" was aimed at making up a $3.5 million shortfall in the judiciary's fiscal year 2003 budget, which was itself dwarfed by the state's broader projected deficit of $680 million for that fiscal year. The supreme court order establishing the surcharge relied upon the judiciary's "inherent power to do that which is necessary to enable it to perform its mandated duties." In an accompanying press release, Chief Justice McFarland explained that, "while there are things the people of Kansas may have to give up in these trying fiscal times, justice cannot and must not be one of them."[4]

This innovative use of inherent judicial powers raises fundamental questions about judicial independence and the nature of the separation of powers. This article examines how states reached this point and raises some questions about the path ahead. It begins by reviewing the doctrine of inherent judicial power, its development over time, and its connection with the centralization of judicial administration. It then takes a closer look at events in Kansas and the broader constitutional questions they raised. It closes with some cautionary notes on the use of such tools to improve the conditions of the judicial branch.

The expanding doctrine

The doctrine of inherent judicial power licenses the courts to take necessary actions to fulfill their constitutional functions, even when those actions are not specifically authorized by either constitutional text or legislative statute. Inherent judicial power operates as an implicit "necessary and proper" clause to the establishment of the judiciary as an independent and equal branch of government. In its most minimal guise, the doctrine empowers judges to control and manage their own courtrooms—for example, by punishing contempt of court, excluding photographers from the courtroom, or appointing counsel for criminal defendants. In its more muscular form, the doctrine authorizes judges to protect themselves and their functions from the neglect or interference of the other branches of government. It thus operates both as an implication and guarantor of judicial independence.

It is in this more muscular form, as a positive safeguard of judicial independence, that the inherent power doctrine has been extended to budgetary matters. This budgetary power developed, however, from relatively modest efforts at courtroom management. When a trial judge ordered that a jury be sequestered during a murder trial and the county commissioners refused to pay for the jurors' lodgings, the Pennsylvania Supreme Court explained in 1838 that the judge had the authority to draw directly on the public purse to cover such "contingent expenses of the court" and provide for "emergencies" that require "the prompt and efficient action of the court" without the usual deliberation and consent of the relevant legislative body.[5]

Similarly, state supreme courts have backed judges who have claimed the authority to set the salaries of courthouse personnel or who have ordered other institutions to provide, or to provide funding for, temporary facilities for holding court after the regular courthouse was condemned, the operation of a courthouse elevator, chairs and carpeting for a courtroom, and courthouse air conditioning.[6]

Such disputes have prompted state supreme courts to issue particularly high-flown paeans to judicial independence. The Indiana Supreme Court observed in the elevator case, for example:

> Courts are an integral part of the government, and entirely independent; deriving their powers directly from the constitution, in so far as such powers are not inherent in the very nature of the judiciary. A court of general jurisdiction, whether named in the constitution or established in pursuance of the provisions of the constitution, can not be directed, controlled, or impeded in its functions by any of the other departments of the government. The security of human rights and the safety of free institutions require the absolute integrity and freedom of action of courts.[7]

In explaining why county commissioners were required to pay clerical staff in the courthouse at a rate set by the judges rather than at the general rate established for comparable county employees, the Colorado Supreme Court quoted approvingly from the opinion of the trial court that the separation of powers

4. Kansas Supreme Court Order 2002 SC 13, as amended March 22, 2002 (www.kscourts.org/surcharg.htm, last accessed February 6, 2004); State of Kansas Office of Judicial Administration Press Release, March 14, 2002 (www.kscourts.org/feenews.htm, last accessed February 6, 2004).

5. *Commissioners v. Hall*, 7 Watts 290, 291 (Pa. 1838).

6. *See, e.g., State ex rel. Schneider v. Cunningham*, 39 Mont. 165 (1909); *Wichita County v. Griffin*, 284 S.W.2d 253 (Tex. App. 1955); *Bass v. County of Saline*, 171 Neb. 538 (1960); *Ex Parte Turner*, 40 Ark. 548 (1883); *Commissioners v. Stout*, 136 Ind. 53 (1893); *State ex rel. Kitzmeyer v. Davis*, 26 Nev. 373 (1902); *Pena v. District Court*, 681 P.2d 953 (1984).

7. *Board of Commissioners v. Stout*, 136 Ind. 53, 59-60 (1893).

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required that each of the three branches

> not interfere with or encroach on the authority or within the province of the other. . . . In their responsibilities and duties, the courts must have complete independence. It is not only axiomatic, it is the genius of our government that the courts must be independent, unfettered, and free from directives, influence, or interference from any extraneous source.[8]

Several features of this traditional use of inherent judicial powers are notable. The amounts at issue usually involve small contingencies rather than the central operation of the courts. The disputes usually begin with local officials. When neither the local judge nor the local fiscal authority relents in the standoff, the matter is appealed up the judicial hierarchy. These traditional fiscal battles are ultimately asymmetric proceedings between a local legislative body and a state's highest court. They become as much a matter of state and local divisions as interbranch divisions, often with state legislatures either unaffected or implicitly behind the state courts.

In such circumstances, supreme courts can serve as relatively neutral arbiters capable of providing satisfactory dispute resolution for two equally situated parties. State supreme courts, which usually have not directly benefited from traditional uses of inherent judicial power by local courts, have proven willing to reduce and void lower-court orders as well as uphold them and are capable of applying external standards and outside accountability to ensure the reasonableness of such judicial requests.[9] The potentially irresolvable conflict of two equal and coordinate branches of government, each holding fast to its respective claims of autonomy and prerogative, is thereby abated by the presence of a common judge—the state supreme court.[10]

The doctrine of inherent judicial power licenses the courts to take necessary actions to fulfill their constitutional functions.

The doctrine has been put to more ambitious use in recent years. In December 1969, the judges of the Philadelphia Court of Common Pleas submitted a budget request to the city's finance director of nearly $20 million for fiscal year 1970. The mayor ultimately recommended, and the city council approved, a budget of just under $16.5 million. When the court's request for an additional $5 million was refused, the judges ordered the city to appropriate the additional funds. In *Commonwealth ex rel. Carroll v. Tate*, the Pennsylvania Supreme Court eventually awarded the Court of Common Pleas approximately $1.4 million for what was left of the fiscal year.

In a period of general judicial assertiveness vis-à-vis other branches of government, especially in the design of equitable remedies, *Carroll* lifted the doctrine of inherent judicial power from its roots in discrete fiscal disputes over courtroom temperature and clerks' salaries and positioned it as a viable judicial recourse for obtaining multimillion-dollar appropriations and supplanting the normal budget-making process. In order to "protect itself" from the other branches, the *Carroll* court argued, "the [j]udiciary *must possess* the inherent power to determine and compel payment of those sums of money which are reasonable and necessary to carry out its mandated responsibilities, and its powers and duties to administer [j]ustice."[11] *Carroll* influentially held that courts were entitled to whatever funds were "reasonably necessary" for the "efficient administration of justice."

Though the court understood that the demand for limited city funds and services was increasing across the board, judicial requests were to trump all others. "The deplorable financial conditions in Philadelphia must yield to the [c]onstitutional mandate that the [j]udiciary shall be free and independent and able to provide an efficient and effective system of [j]ustice," the court reasoned—including the creation of "[n]ew programs, techniques, facilities, and expanded personnel." What was "reasonably necessary" to operate the city courts was ultimately not to be decided in the normal legislative process in the context of the overall budget, but by "[c]ourt review."[12]

Cases such as *Carroll* did not become common, however, in part because many states altered their systems of funding the judicial branch so as to minimize the local conflicts from which the doctrine had emerged. Just as *Carroll* was being handed down, members of the American Bar Association's Commission on Standards of Judicial Administration were arguing that constitutional propriety dictated

8. *Smith v. Miller*, 153 Colo. 35, 40 (1963). For similar examples, *see O'Coin's, Inc. v. Treasurer of the County of Worcester*, 362 Mass. 507 (1972); *In re Salary of Juvenile Director*, 87 Wn.2d 232 (Wash. 1976).

9. This was obviously not true in the relatively few instances in which the state supreme court has itself been the initiator of the inherent judicial power claim, such as when the Wisconsin Supreme Court squared off against the state superintendent of public property over who had the authority to appoint and remove the court's janitor. *In re Janitor of the Supreme Court*, 35 Wis. 410 (1874).

10. On the "logic of the triad in conflict resolution," see Martin Shapiro, COURTS (Chicago: Univ. of Chicago Press, 1981). On the fundamental risk of interbranch conflict in a system of separated powers, see Keith E. Whittington, *Yet Another Constitutional Crisis?*, 43 WM. AND MARY L. REV. 2093 (2002).

11. *Commonwealth ex rel. Carroll v. Tate*, 442 Pa. 45, 52 (1971). *See also* William Scott Ferguson, *Judicial Financial Autonomy and Inherent Power*, 57 CORNELL L. REV. 975 (1972); Jeffrey Jackson, *Judicial Independence, Adequate Court Funding, and Inherent Judicial Powers*, 52 MD. L. REV. 217 (1993).

12. *Id.* at 56, 57.

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that the "judiciary will always be subordinate to the legislature on significant matters of finance. It is for the legislature to determine which 'essential services' the government will provide and to decide the judiciary's share of the common financial shortage."[13] The better solution, they urged, was unitary budgeting, which would link administration and budgeting and allow for more centralized and efficient management of judicial expenditures.

This recommendation was widely accepted, and many state judiciaries shifted away from relying on local funding sources, such as county commissioners, in favor of consolidated budgets approved by state legislatures. Pointing to budget conflicts between county governments and local courts such as the one that gave rise to *Carroll*, the Pennsylvania Supreme Court even ordered the state legislature to take over funding of the state judiciary, though the state has taken few steps to comply with that order, partly out of concern over the tax implications.[14] At the same time, state courts were given greater spending flexibility through lump-sum budgets rather than detailed, itemized budgets—allowing judges to buy their own carpeting without specific legislative approval. The growth of the inherent judicial power doctrine, however, created a "remote danger" that the judicial system might "try to secure its appropriations by mandamus," to the likely "discredit" and embarrassment of both branches.[15] This potential consequence suggested to some that the shift to unitary budgeting would render the inherent judicial powers doctrine "legally and politically impotent."[16]

The New York standoff

The "remote danger" was realized and the constitutional and institutional implications of these developments were made particularly evident in a 1991 funding dispute in the state of New York. In submitting his budget to the legislature, Governor Mario Cuomo recommended a 10 percent cut from Chief Judge Sol Wachtler's $966.4 million request for the state judiciary. As legislators and the governor negotiated, the chief judge told the press, "as far as I'm concerned, that's an unconstitutional budget," because the governor had not passed on the judiciary's full budget request.[17] The legislature eventually compromised with an appropriation of $889.3 million for the judicial branch—more than the governor's recommendation but substantially less than the chief judge's request.

Chief Judge Wachtler reacted to the legislature's action by filing a lawsuit in state court claiming that the judicial branch was entitled to the full amount of its request based on its inherent power to compel funds for its maintenance. Governor Cuomo countered by filing a federal lawsuit seeking to dismiss the chief judge's suit, thereby preventing any change to the legislature's version of the judicial budget. The federal district court demurred. After substantial public and political maneuvering, the chief judge largely relented and a settlement was reached that provided for only a very modest increase, restoring the judicial budget to 1990 levels, just days before the state case was set for argument.[18]

Despite its inglorious end, *Wachtler v. Cuomo* represents an important turn in the development of inherent judicial power in the budget context. Of course, *Wachtler* involved amounts far exceeding anything previously contemplated in such cases. By involving nearly 9 percent of the consolidated budget of the entire state judiciary, the chief judge was no longer seeking to fill specific gaps in the judiciary's budget but rather to provide for the judiciary's general finances. Perhaps more ominously, absent federal intervention, the combination of unitary budgeting and the assertion of inherent judicial power left no place for the disputing institutions to go. The constitutional equality of the three coordinate branches of New York's state government replaced the institutional inequality present in earlier inherent judicial power disputes. Unlike even the *Carroll* situation, all state courts were implicated in the New York suit, as the governor and the press were quick to point out.[19] Constitutional deadlock and informal compromise were the only available options.

Fiscal autonomy in Kansas

The recent economic downturn and attendant budgetary pressures in many of the states have given renewed significance to these doctrinal and institutional developments. Recent fiscal relations between the judicial and legislative branches in Kansas parallel the conditions in Philadelphia and New York that led to their respective inherent-power showdowns. As in Pennsylvania and New York, the Kansas courts have faced serious financial neglect at the hands of their legislative peers. A government-wide funding crunch in Kansas in 2002 brought the situation between the two branches to a head, with fiscal and political stakes comparable to those raised in New York. The Kansas courts, however, adopted an innovative political strategy that proved more successful than that of their predecessors in New York—but that raises its own constitutional difficulties.

Developments in judicial administration and budgeting in Kansas during the past 30 years mirror national trends, including the adoption of state funding of the judiciary through unitary budgeting and the consolidation of administrative responsibility for the state's judicial branch in its supreme court. In 1972, the state's voters ratified a constitutional amendment making the legislature responsible for funding all

13. Geoffrey C. Hazard, Jr., Martin B. McNamara, and Irwin F. Sentilles III, *Court Finance and Unitary Budgeting*, 81 YALE L.J. 1286, 1292 (1972).

14. *County of Allegheny v. Commonwealth*, 517 Pa. 65 (1987); *Pennsylvania State Association of County Commissioners v. Commonwealth*, 545 Pa. 324 (1996).

15. Hazard et al., *supra* n. 13, at 1300.

16. Carl Baar, *The Scope and Limits of Court Reform*, 5 JUST. SYS. J. 274, 281 (1980).

17. Elizabeth Kolbert, *Wachtler Says Cuomo Cut Judiciary Funds Unconstitutionally*, N.Y. Times, April 11, 1991, at B5.

18. For an overview of the case, see Howard B. Glaser, *Wachtler v. Cuomo: The Limits of Inherent Power*, 14 PACE L. REV. 111, 122-135 (1994).

19. *Id.* at 130.

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Kansas courts. Five years later, the legislature exercised some of that authority by placing all district courts under the administrative purview of the state supreme court and shifting financing of all court system personnel to the state. (The state has not yet assumed all non-salary operating expenses for the judiciary from the counties.) Since 1978, the judicial branch has been required to submit its budget to the executive branch Division of the Budget, which then produces a single state budget that is submitted to the legislature and becomes the basis for legislative deliberations.

The Kansas Court broke new ground by invoking its inherent power in order to raise its own revenue rather than to mandate appropriations from the legislature.

Judicial complaints of inadequate funding by the state legislature have been common for years. In the years leading up to the 2002 confrontation, the executive routinely reduced the judiciary's requested budget when compiling the state budget to submit to the legislature, imposing hiring freezes on the judiciary in eight of the ten years prior to 2002. (While case filings rose 54.6 percent between 1987 and 1999, the number of judges increased only 5.5 percent and nonjudicial employees only 9 percent during the same period.[20]) Insufficient funding in the regular budget led to a recurrent pattern of annual judicial service cutbacks, salary reductions and furloughs for nonjudicial employees, and supplemental appropriations from the legislature to carry the courts through each fiscal year. In fiscal year 2001, the legislature's initial appropriations left a shortfall in the judiciary's "maintenance budget" (the amount needed to maintain salaries and wages of existing employees) of $1.2 million; in fiscal year 2002, the shortfall increased to approximately $2 million.[21]

The Kansas judiciary invoked its inherent judicial power in the midst of the budget process for fiscal year 2003. In spite of the judiciary's expressed concerns about the shortfalls of previous years, the legislature cut the 2003 maintenance budget by $3.5 million. The state was projecting an overall revenue shortfall of $680 million, rendering any substantial improvement in the judicial budget unlikely. Instead, legislators urged Chief Justice McFarland to seek "innovative means of securing the necessary funding." On March 8, 2002, the chief justice responded by ordering an "emergency surcharge" on existing court fees to be paid into an emergency fund separate from the state treasury and available "only for [j]udicial [b]ranch expenditures" approved by the chief justice.[22]

The chief justice followed form in justifying this exercise of inherent judicial powers. In an earlier 2002 State of the Judiciary message, she reviewed the courts' recent fiscal woes and concluded, "The simple truth is the [j]udicial [b]ranch cannot perform its constitutional and statutory duties with such a shortfall in funding," even though the "courts are the last bulwark of freedom as guaranteed by the Bill of Rights . . . [and a] fully functioning court system is essential to the American way of life." Though "there are things the people of Kansas may have to give up in this fiscal crisis, justice cannot and must not be one of them."[23]

This message also included a renewed call for a change in budget procedures so that the judiciary could submit its budget request directly to the legislature without executive intermediation. The chief justice's justification for this proposal echoed Chief Judge Wachtler's arguments in New York and similarly laid the implicit foundation for autonomous judicial action. A direct budget submission was necessary "to safeguard [the judiciary's] constitutional position from invasion by the [e]xecutive [b]ranch," and though the legislature ultimately made the appropriations, the chief justice blamed the executive branch Division of the Budget for "many of the funding problems the [j]udicial [b]ranch faces each year" by making "drastic cuts before [the judiciary's budget request] is even seen by the [l]egislature." Indeed, given the thoroughness of the judiciary's own budget review process, which ensures that "every request is necessary," and the lack of "expertise . . . as to judicial operations and needs" in the executive branch, "all cuts made [were] arbitrary because there [were] no reasonable cuts left to be made."[24]

In issuing the "emergency surcharge" order, the chief justice did not provide elaborate authority for her action—the order itself made clear that the court relied on its inherent power. The review of the budget situation in the order and the chief justice's other statements implicitly established the grounds for meeting the "reasonable necessity" standard outlined in earlier inherent judicial power cases. The

20. STATE OF THE JUDICIARY: ANNUAL REPORT OF THE CHIEF JUSTICE OF THE KANSAS SUPREME COURT 2 (2002) (www.kscourts.org/2002soj.pdf, last accessed February 8, 2004).

21. Chief Justice Kay McFarland, Judicial Branch Budget Issues: Testimony before the Senate Ways and Means Committee, February 7, 2002 (www.kscourts.org/budgetmf.htm, last accessed February 8, 2004).

22. Kansas Judicial Branch Fiscal Year 2003 Emergency Surcharge, 2002 SC 13 (as amended March 22, 2002) (www.kscourts.org/surcharg.htm, last accessed February 8, 2004).

23. *Supra* n. 20, at 10 (emphasis omitted), 15, 16.

24. *Id.* at 12.

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Kansas Supreme Court had itself asserted more than a century before, "It can hardly be supposed that the action of the supreme court may be thwarted, impeded or embarrassed by the unwarranted intermeddling of others without any power in the supreme court to prevent it."[25]

Breaking new ground

In turning to the inherent power doctrine to resolve its budget dispute with the state executive and legislature, the Kansas courts followed in the footsteps of the New York courts from a decade before. The Kansas Court, however, broke new ground by invoking its inherent power in order to raise its own revenue rather than to mandate appropriations from the legislature. This unprecedented step created distinctive constitutional and political repercussions.

Although inherent power had been used to compel legislatures to provide judicially needed resources, judges had previously drawn a bright line between such actions and the raising of revenue. The Michigan Supreme Court, for example, used the taxation example to show why traditional uses of inherent judicial power did not create separation-of-powers problems: "This broad power to assess and declare the needs of administering justice does not usurp the fiscal authority of the legislative department. The courts do not levy taxes, or appropriate public monies. Those things must be done by the legislative bodies."[26]

In another prominent inherent power case, the Pennsylvania Supreme Court had similarly asserted that "[c]ontrol of state *finances* rests with the legislature. . . . The function of the judiciary to administer justice does not include the power to levy taxes in order to defray the necessary expenses in connection therewith. It is the legislature which must supply such funds."[27]

On the other hand, in 1990 a majority of the justices of the U.S. Supreme Court blurred the line in the context of equitable remedies, recognizing that taxation by judicial order was an "extraordinary event" that potentially could fall within judicial power, leading four justices to object in a concurring opinion that it is "not one of the inherent powers of the court to levy and collect taxes."[28]

The Kansas Supreme Court's "emergency surcharge" steers a careful revenue-raising course. As the Kansas attorney general noted in his opinion supporting the court's power, the surcharge is characterized as neither "a docket fee . . . service or operational charge" nor "a tax . . . deposited into the state general fund," both of which are circumscribed by constitutional and statutory provisions.[29] By withholding the collected funds from the state treasury, the court appears to want to avoid running afoul of the state constitutional requirement that "[n]o money shall be drawn from the treasury except in pursuance of a specific appropriation made by law."[30]

The Kansas judiciary does have some limited statutory authority to set docket fees. However, this would not seem to include the emergency surcharge, unless the statute is "read in light of the inherent authority possessed by the supreme court to take such action as is necessary to maintain its independence as a co-equal branch of government," as the attorney general suggested.[31] The chief justice herself has only ever pointed to the abstract inherent judicial power as the authority for her actions, not any legal context specific to Kansas. The Kansas court's order gives previously uncontemplated meaning to the concept of judicial fiscal independence.

Political implications

The political implications of the court's move are equally groundbreaking. As *Wachtler v. Cuomo* demonstrated, a state judiciary's effort to compel a state legislature to fully fund its budget request invites intransigence and puts the two co-equal branches at loggerheads. The very political and financial calculus that would lead a legislature to underfund the courts in the first place would also lead it to resist judicial efforts to claim a larger share of the state budget and crowd out other constituencies. While courts have been successful in claiming inherent judicial power to order (usually local) institutions to make discrete expenditures, they were notably unsuccessful in their one effort to trump the state legislative budget process.

The Kansas court has effectively sought the same outcome—to mandate its preferred judicial budget—but by means that do not impinge on the legislature's ability to satisfy favored interests in its budgeting. Elected officials clearly risk paying a political price when either raising taxes or denying appropriations. The Kansas court absolved the legislature of facing either option by raising revenue on its own.

Chief Justice McFarland was well-positioned to take the initiative. In Kansas, the justices of the supreme court are chosen by merit selection and subject to periodic, non-competitive retention elections. Since that system was instituted, no justice has ever come close to losing a retention election, and McFarland herself had served on the high court for a quarter century. Although the governor's proposed fiscal year 2003 budget had fallen short of the judiciary's request, the courts were largely exempt from the deep cuts imposed by the governor and the legislature across the rest of the state government. Additional funding for the courts was included in separate budget items that were packaged with several proposed tax increases. More politically salient, and far more expensive,

25. *Chicago, Kansas, and Western Railroad Company v. Commissioners of Chase County*, 42 Kan. 223, 225 (1889).

26. *Wayne Circuit Judges v. Wayne County*, 383 Mich. 10, 22 (1969).

27. *Leahey v. Farrell*, 362 Pa. 52, 56 (1949).

28. *Missouri v. Jenkins*, 495 U.S. 33, 51 (1990); *Id.* at 74 (Kennedy concurring, quoting *Heine v. Levee Commissioners*, 86 U.S. 655, 661 (1873)).

29. Kansas Attorney General Opinion No. 2002-17, 2 (www.kscourts.org/ksag/opinions/2002/2002-017.htm, last accessed February 8, 2004).

30. KAN. CONST. art. II, § 24.

31. K.S.A. § 60-2001 (2002); Kansas Attorney General Opinion No. 2002-17, 7. The court itself made no reference to this statute.

32. *Supra* n. 4.

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causes than the needs of the court were featured in the legislative struggle over this tax package. Ultimately, the package was rejected by a coalition of dissident conservative Republicans, who had taken a "no new taxes" pledge, and nearly all the Democrats, who accused the Republican majority of fiscal mismanagement and a reliance on regressive tax schemes.

Legislative support

It is unsurprising, then, that legislators generally responded with enthusiasm to the Kansas court's initiative, since it freed them of any responsibility for the political fallout from making an unhappy fiscal choice regarding the judiciary. Far from challenging the judiciary's assertion of authority, as Governor Cuomo had done in New York, the other branches encouraged the court to move forward and sought to bolster its authority. As noted, the attorney general issued an opinion backing the court's innovative use of inherent judicial powers. The chief justice, in ordering the surcharge, reported that "the legislative leadership in both houses and on both sides of the political aisle . . . showed understanding of and concern for the crisis facing the [j]udicial [b]ranch" and had "expressed [support] for the [j]udicial [b]ranch to seek innovative means of securing the necessary funding."[32]

In earlier committee hearings on the judicial budget, one senator suggested, "Why don't you just sue the heck out of us?" The chief justice responded, "Suing won't get you anything soon."[33] The chair of the Senate Ways and Means Committee indicated that the courts would have the first claim to any new revenue, but noted that if "we don't have it, we can't put it in."[34] After the court order imposing the emergency surcharge was issued, the Kansas Senate Judiciary Committee chair exclaimed, "I'm glad to see the courts take some action to meet their financial needs," and declared that the court had the power to do whatever "the court believes it has the power to do."[35] The House Speaker simply announced that the legislators' hands were tied: "Who are we going to appeal to? The supreme court?"[36] And the governor gave the chief justice "high marks" and praised her for taking "bold steps when necessary."[37]

Well-placed policy makers had sent clear signals to the chief justice that they were substantively supportive of her budget stance, and they backed judicial authority when she took an initiative that required no politically costly response from them. Indeed, the Kansas court's turn to judicial user fees is in keeping with broader tendencies in state court budgeting to emphasize court-generated revenues. While such tendencies have raised concerns on the judicial side that legislatures may come to rely on such court fees and give less support to the courts from general tax revenues, it has traditionally been understood that the decision to turn to such revenue streams was by its nature a legislative one.[38]

The inherent judicial power doctrine was developed to be a defensive weapon to protect judges from subversion or obstruction by other officials.

Beyond Kansas

Few courts would be tempted to follow the lead of Judge Wachtler of New York and run headlong into a political struggle with the legislative and executive branches, though his actions followed naturally from the historic development of the inherent judicial powers doctrine when combined with unitary budgeting. Chief Justice McFarland has found what might prove to be a more tempting path, one that is constitutionally bolder but politically less hazardous. Indeed, the "emergency stopgap measure" was so politically successful that it was extended into the next fiscal year. When the Kansas legislature again failed to fully fund the court's budget request, the chief justice reported that the judicial branch "was urged by many legislators to extend the emergency surcharge," though the legislature itself did not take steps to authorize by statute or legislate directly the new court fees.[39] (The executive and legislature did accept the court's proposal to allow the judiciary to submit its budget requests directly to the legislature.)

Kansas was hardly alone in its fiscal struggles—state courts elsewhere have been facing similar pressures in recent years. A special district judge in Oklahoma used his unofficial website to publicize the "Kansas 'surcharge' solution" and urged his colleagues to follow McFarland's "fiscal leadership," although the chief justice of the Oklahoma Supreme Court declined to take such unilat-

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33. Quoted in John Hanna, *Chief Justice Says Tight Funding Will Mean Court Closings*, Associated Press Newswires, February 7, 2002.

34. John Hanna, *Panel Provides Money for Courts Now but Only Sympathy after July 1*, Associated Press Newswires, February 22, 2002.

35. John Hanna, *Supreme Court's Budget Order Alters Balance of Power in Government*, Associated Press Newswires, March 18, 2002.

36. John Hanna, *Supreme Court Goes around Legislature to Solve Budget Problems*, Associated Press Newswires, March 14, 2002.

37. John Hanna, *Chief Justice Faces Retention after Dealing with Budget*, Associated Press Newswires, September 4, 2002.

38. David Bresnick, *Revenue Generation by the Courts*, in Steven W. Hays and Cole Blease Graham, Jr., eds., HANDBOOK OF COURT ADMINISTRATION AND MANAGEMENT 355-365 (New York: Marcel Decker, 1993); James W. Douglas and Roger E. Hartley, *The Politics of Court Budgeting in the States: Is Judicial Independence Threatened by the Budgetary Process?* 63 PUB. ADMIN. REV. 441, 450-451 (2003).

39. 2003 SC 51 (www.kscourts.org/surcharg2004.pdf, last accessed February 8, 2004).

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eral action.[40] Budget battles in Illinois led to an initial standoff, followed by more extended litigation, over judicial pay.[41] State courts, often spared the budget ax in the past, have recently had to deal with significant cuts; the events in Kansas could easily recur.[42]

The American system of separation of powers runs the inherent risk of gridlock. While this is a danger, it can also be regarded as a virtue. By denying any single branch of government the power to act unilaterally, this constitutional framework requires government officials to win the cooperation of others in order to take effective action.

The inherent judicial power doctrine was developed to be a defensive weapon to protect judges from subversion or obstruction by other officials. It has not traditionally been used to place the courts on an independent financial footing or to shelter them from the regular budgetary process. The rhetoric of judicial independence accompanying earlier uses of inherent judicial power harkened back to a pure theory of separation of powers, in which each branch was left free to exercise its own functions without encroachment from the others, but the judicial dependence on the legislature for its financing was a reflection of checks and balances that necessarily impinged on this separation of powers.

The situation in Kansas can be placed on a scale of possible budgetary conflicts between courts and legislatures. The gravest fiscal threats to judicial independence may come when governors and legislatures use budgetary tools to attempt to influence judicial decisions. The use of inherent judicial powers as a safeguard to judicial independence may be most justified in such cases, which fortunately are rare. A less extreme, but more common, threat to judicial independence arises from the competition for limited resources. Chronic budget scarcity, such as arose in Kansas, may pose less of a threat to judicial independence per se than to judicial effectiveness. In such situations, the use of inherent judicial powers may be harder to justify.

To the extent that such fiscal starvation impinges on positive constitutional obligations that a state maintain an effective system of justice, school finance litigation may provide the more appropriate model for judicial action. When finding that states have failed to provide functioning educational systems as required by their constitutions, courts have mandated that legislatures fix the problem but have generally avoided specifying the ultimate solution. In that model, courts have played an important role in holding legislators' feet to the fire to meet their constitutional responsibilities, but have left the problem of how best to raise and distribute adequate revenue to the legislature. Such a process tends to be slow and incremental, but it arguably preserves the respective constitutional responsibilities of the various branches of government while maintaining legislative accountability for budgeting. The requirement of a finding that the states have actually violated constitutional provisions for maintaining a functioning judicial system may also set a higher and more publicly sustainable threshold for judicial action than does the reasonable necessity standard of inherent judicial power cases such as *Carroll*.

The boldness of the rhetoric accompanying traditional invocations of inherent judicial power has been tempered *sub silencio* by the modesty of its practical claims and its effective submission to the checks and balances of the judicial hierarchy and state political institutions. Although relatively small in fiscal terms and understandable in a political context, the innovation in Kansas of using the power to independently raise revenue to fund judicial expenses threatens to undo those historic checks on judicial power. After the Illinois justices ordered the government to pay state judges the salary increases that had been vetoed by the governor, the state comptroller remarked, "I wouldn't say that this is a constitutional crisis. But it is a constitutional clash."[43] Precisely by avoiding an institutional clash, the "Kansas solution" is all the more corrosive of the state's vital constitutional balance.

40. Oklahoma Family Law Information (www.pryorok.org/legal, accessed July 1, 2003, post later removed); *Jurists Feeling the Pinch of Budget Cuts*, Associated Press Newswires, February 2, 2003.

41. Daniel C. Vock, *High Court to Decide Judicial Pay Raise Issue*, Chi. Daily L. Bull., January 15, 2004.

42. Budget battles also gave rise to the highly unusual order by the Nevada Supreme Court that the legislature raise taxes under simple-majority rule, despite a state constitutional requirement of a two-thirds majority. *Guinn v. Legislature*, 71 P.3d 1269 (Nev. 2003).

43. Monica Davey, *Justices in Illinois Order Increases in Their Salaries*, N.Y. Times, July 29, 2003, at A12.

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Rep. Frank Mille

June 28, 2005

Honorable John Edmonds
Chairman Federal & State Affairs Committee
Kansas House of Representatives

Mr. Speaker and Committee:

I stand before this committee with a sincere desire to be submissive to law yet also true to the trust that my constituents have placed in me as their Representative.

My statements at this time are not prompted by anger, nor by some misguided passion to wreak revenge on the Kansas Supreme Court. I have read the paragraphs in our State Constitution regarding the role of the Legislature and that of the Judiciary, and am convinced that if we (i.e. the Kansas Legislature) acquiesce to the court order now before the House – we will commit a grave error in Judgment, -- and – one that will set a precedence for future interference by the Court into the legislative responsibilities we have been elected to execute.

My primary concern and the one that I suggest is shared by many of my fellow legislators is that the Kansas Supreme Court has triggered a Constitutional Crisis that first and foremost must be resolved before we can reasonably consider any funding or administrative policies regarding Kansas Schools. Fellow legislators and committee members -- does it make any sense for us to labor over legislation, levels of funding, or administrative policies, when we have no substantive assurance that the Court will yet approve of our actions? The Kansas Supreme Court has misused its judicial power, and that must be the first item of legislative business that we need to address!

Make no mistake about our situation! -- the Court order now before the legislature -- orders the legislature to increase one item in the Kansas budget (K-12 Education) for 2005-2006 by $143 million – and this is over and above the $142 million already approved by the 2005 legislature. Mr. Chairman, the Kansas legislature as we all know did a lot of hard work during the 2005 legislative session to craft legislation that took into account as closely as possible the opinions of the court – and in accordance with our Constitution – and yet protecting our constituents from further tax increases!

Then again -- according to the Court for next year 2006-2007 -- we are ordered to increase that very same budget item by a whopping $568 million more! Fellow legislators, this would represent an increase in spending over last year's budget of $853 million! -- And could mean a family of four will have to ante up annually on average approximately an extra $1,240 more tax money! --This is outrageous and will spell economic suicide for our Beloved State! THIS IS TAXATION WITHOUT REPRESENTATION!

When we went to school we were extensively taught that the Government of the United States is composed of three branches -- The Executive branch -- The Legislative branch -- and the Judicial branch -- each having equal but separate pov

HS FEDERAL & STATE AFFAIRS
SPECIAL SESSION
JUNE 28, 2005
ATTACHMENT 3

Our Kansas Constitution follows very closely our National Constitution, and we legislators need to remind ourselves that in our inaugural ceremony we swore to uphold the U.S. and the Kansas Constitution.

The Kansas Constitution states: Article 2 sec. 1. **"The legislative power of this state shall be vested in a House of Representatives and Senate."** There is also a very interesting Case Annotation No. 17 following this definition that says: **"Legislative, executive and judicial powers cannot be commingled and interwoven".** Mr. Chairman and fellow legislators -- it is my sincere belief that at this moment in Kansas History our Supreme Court is usurping the authority of the Kansas Legislature.

Further; the Kansas Constitution also states regarding the Legislature: Article 2 sec. 24 **"Appropriations. No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law"** i.e. a law enacted by the legislature -- NOT ORDERED BY THE SUPREME COURT!

The A&M study was just that -- a study – not unlike many such studies that the legislature may from time to time order. However, the legislature is never, nor should it ever be, under any compulsion to accept all -- or part -- or none of such study -- regardless of what branch of government ordered the study. The legislature must be zealous to maintain its independence to enact laws or appropriate funds based on agreed rules of procedure and freely voted upon by the elected legislators without being imposed upon by either the executive or judicial branches of government. We must weigh all legislation and appropriations against the needs of all governmental agencies, -- and the taxpayer. Please! -- Let's keep in mind that tax money taken from parents also hurts the children in our schools.

In closing I suggest we consider what Robert Yates who was one of the delegates from New York to the Constitutional Convention in 1787 had to say about the judiciary. Yates who wrote under the name of "Brutus" was especially wary of the power of the judicial, and had the following to say about the judicial branch of government. This quotation is taken from the recently published book entitled "Men In Black" by Mark R. Levin.

"When the courts will have a precedent before them of a court which extended its jurisdiction in opposition to an act of the legislature, is it not to be expected that they will extend theirs, especially when there is nothing in the constitution expressly against it? . . . Their decisions on the meaning of the constitution will commonly take place in cases which arise between individuals, with which the public will not be generally acquainted; one adjudication will form a precedent to the next, and this to a following one."

Most of my constituents have little knowledge regarding Montoy vs. State, and thus do not understand the nature of the Constitutional Crisis we are now having to confront. However, from the responses I have received, I believe that the majority of my constituents

in the 12th district, do not like unelected judges deciding what laws are enacted and what taxes they must pay.

Thus my pledge: **"I shall not vote for additional funding for schools until we pass a constitutional amendment that protects the legislature from further encroachment by the Kansas Supreme Court into the constitutional authority of the legislature.**

Thank you Mr. Chairman -- I stand for questions.

Respectfully yours,

Representative Frank Miller -- District 12
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JAMES SHERROW
PROF OF HISTORY
NEUTRAL
CONFEREE #8

June 28, 2005
Testimony Before House Subcommittee
Kansas Legislature

Greetings honorable members of the House of Representatives. This is indeed an honor and a privilege for me to appear before you. I have been asked to give you some historical background on the Kansas Constitution, and I'm happy to do this.

First, I'd like to introduce myself to you. I am a 4th generation Kansan on both sides of my family. My parents raised me in Maize, Kansas, where I graduated from high school in 1969. I am a Vietnam era veteran of the Air Force. I graduated from Wichita State University with both my B.A. and M.A. degrees, and from the University of Colorado with my Ph.D. in 1987. I taught for four years at Southwest Texas State University before returning to Kansas to accept my current position in the history department at Kansas State University, where I teach Kansas history among other subjects.

Like you, my family has had some experience in constitutional matters. One grandfather was a Populist, and a small general store owner. He and his brother operated a billiard hall on the second floor that a local town ordinance prohibited. My grandfather fought the closing all the way to the Kansas Supreme Court where the town was upheld against my grandfather and great uncle in a decision rendered in 1912. I guess it goes to show that not every Supreme Court decision goes as you would like, but the court did uphold the law of the state even if it meant an economic hardship for my grandfather.

Of course it is the Constitution of Kansas that establishes the powers of the court in Article III. This venerable document has served this state well even if there have been 118 attempts to amend it with 89 of those propositions placed into law. And even when it seems

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clear what the document directs the legislature to do, as in the case where it states that "The legislature shall make suitable provision for the finance of the educational interests of the state," as far back as 1879 the legislature cut funding for secondary education, thereby reducing funding for public education by 50% and placing a greater financial burden on all local school boards.

The laws of the state have always been subject to interpretation, both by the legislature and courts, and according to many, that is the strength of our constitution. I find Joseph G. Waters' words, given in an address in 1909, instructive and insightful on this point. A well known Topeka lawyer at the time, and he gave his remarks to celebrate the 50th anniversary of the Wyandotte Constitution.

> The parliament is its own expounder, probably; but when great events possess a people, or the huge power of business and commerce, or of patriotism, urge the courts to find a new meaning or drop an old one, it will be done in such neat, cogent and instructive opinions, that the wonder grows on us why it was not always thus."

In comparison, he sharply criticized Oklahoma where the attempt was made "to put every thing in its constitution–hedging against the judiciary, protecting themselves against themselves, curbing the legislature and preventing the due and onward course of public opinion from change in interpretation." In other words, Waters' point was that our constitution, through its sharp separation of powers, has the flexibility to meet the changing economic and social needs of our state.

Before our current constitution was enacted, there were three other attempts at making a viable constitution for Kansas before people settled on the one written in Wyandotte. In the

heat of the "Bleeding Kansas," that violent struggle to determine whether or not Kansas would be free of slavery, the first try was the Topeka Constitution, which delegates modeled somewhat on the California experience.

Free State supporters rallied behind this one with luminaries such as Charles Robinson and James Lane leading the way. The delegates had no authority from Congress to proceed, but they did anyway. They eliminated slavery, but the document only allowed white males to vote, and even left the question open whether or not free blacks would be allowed to reside in Kansas. President Pierce objected to the constitution, and even order troops under Colonel Sumner to break apart the convention in Topeka. By the summer of 1858, the delegates had given up.

Another attempt, this one quite feeble, was made in Leavenworth in May 1858. Those Free State delegates met to offer an alternative to what they saw as the near passage of the Lecompton Constitution with its protection of slavery. Once the Lecompton movement died, the Leavenworth delegates adjourned permanently.

The most infamous attempt was the pro-slave supporters attempt to enact a pro-slave constitution regardless of political ethics and niceties. The delegates met in September 1857 to frame a pro-slave constitution under the auspices of the "Bogus Legislature," a body voted into being by more Missourians than Kansans. In October, a Free State Legislature was elected, but its will was thwarted by the troops ordered out of Fort Leavenworth to protect the Lecompton delegates. Several votes on the constitution were taken once the delegates had completed their pro-slave handiwork. In separate votes, the Free Staters objected to it while the pro-slave voters gave it their approval. President Buchanan wanted to sign it into law, but

the Senate, especially through the leadership of Senator Stephen A. Douglas, prevented this from happening.

This failure led to the last attempt to frame a constitution. The delegates for this effort met in Wyandotte, Kansas beginning in July 1859. There men were relative newcomers to the state with most living in it for less than two years. Non hailed from any Southern state. They were young, too, with 2/3 of the delegation under 35 years of age. Among the 52 delegates numbered eighteen lawyers, who some think dominated the outcome.

They purposefully modeled the vast majority of this constitution on the one for Ohio, which in turn had been modeled on the one for New York. Fifteen committees worked on the various articles, which included many elements considered progressive or socially advanced for that day. They prohibited slavery, allowed free blacks to reside in the state, provided for common school and universities, and protected and defined the rights of women. However, they could not bring themselves to enact women suffrage (passed in 1912), black suffrage (provided by the 15th Amendment to the U.S. Constitution), prohibition (enacted in 1880 and repealed in 1948), and the integration of the state militia (enacted eventually in 1888). This constitution met the approval of the U.S. Congress, and President Buchanan, reading his political tea leaves, signed it into law on January 29, 1861.

Thank you for your time, and I hope this answers some basic questions about the origins of our state constitution. The state then had its framework of law.

James E. Sherow
Professor of History
Kansas State University

June 28, 2005
Testimony Before House Subcommittee
Kansas Legislature

Topic: Some historical background on the origins of the Kansas Constitution

I. Personal Background

II. My family and the Supreme Court

III. The Court and Interpretation of Law

IV. The First Three Attempts at Writing a Constitution

A. Topeka Constitution (1857)

B. Leavenworth Constitution (1858)

C. Lecompton Constitution (1858)

V. Wyandotte Constitution

To: **Kansas House of Representatives**
Federal and State Affairs Committee

June 28, 2005

Fr: **Bill Rich**
Professor of Law

Re: **House Concurrent Resolution No. 5003**

I have been asked to respond to a proposed amendment to the Kansas Constitution which makes it unlawful for the judicial branch of this government to *"fashion any remedy that interferes with the expenditure of funds from the treasury in compliance with an appropriation made by law or to redirect the expenditure of funds appropriated by law, except as the legislative branch may provide by law or as may be required by the Constitution of the United States."* Enactment of that amendment would result in fundamental changes in the relationship between the legislative and judicial branches in Kansas. As a result, it is important to consider these issues carefully prior to taking action.

Separation of Powers Doctrine

Let me begin by pointing out that Kansas is not bound by separation of powers doctrine as developed under the United States Constitution. Federal separation of powers doctrine applies only to relationships among branches of the federal government. States are free to develop alternative approaches. The unicameral legislature in Nebraska is often cited as an obvious example. In Kansas, judges stand for retention every six years and, therefore, do not have the same degree of protection as that afforded to federal judges under the United States Constitution. There is nothing "unconstitutional" about state decisions to take an approach to separation of powers different from that taken by the government of the United States. Many believe, however, that the United States Constitution provides a good model that other governments should emulate, and a significant burden should be met by those who seek to deviate. Members of this Committee now face this burden.

In looking at the model provided by the United States Constitution, there should be no question about existing authority of federal courts to order broad remedies including expenditure of unappropriated funds. For an example, we need look no farther than orders that arose out of school desegregation litigation in Kansas City, Missouri. In that case a federal judge ordered an expenditure of more than $187,000,000 for improvements in the schools within that one district. The United States Supreme Court upheld that order and in doing so authorized the federal judge to over-ride state laws requiring voter approval for property taxes that would be needed to raise that amount of money. There is no legitimate dispute regarding the authority of courts to order expenditure of unappropriated funds in order to comply with constitutional mandates.

Comparison of Kansas and U.S. provisions relating to appropriations illustrate that both constitutions currently draw comparable lines. The existing text in the Kansas Constitution

provides that "No money shall be drawn from the treasury except in pursuance of a specific appropriation made by law." That provision has a counterpart in the Appropriations Clause of the United States Constitution, and does not create any unusual separation of powers concerns. The federal provision has been interpreted on rare occasions by the United States Supreme Court as a constraint on actions by the executive branch of government. (For example, federal agencies cannot enter into binding contracts without legislative authorization and appropriation.) The Appropriations Clause has generally been narrowly construed, and it has never been relied upon as a basis for limiting judicial remedies for constitutional violations. Other states also have similar provisions, and I not aware of cases in which those states have determined that such provisions restrict the courts from ordering remedies to violations of their respective state constitutions. In other words, the current Kansas Constitution contains a routine provision regarding appropriation of funds that is entirely consistent with decisions made on both state and federal levels in which orders have been issued to force the redirection of those funds.

In *Montoy*, the Kansas Supreme Court did not appropriate funds. It ordered the State to provide funds. That distinction may seem technical, but it is broadly understood and accepted in both state and federal courts. Furthermore, the Court's decision was based upon evidence. The State of Kansas made losing arguments regarding limits on judicial responsibility, and failed to produce reliable evidence to contradict evidence offered by plaintiffs regarding funding needed to produce a suitable education. Under those circumstances, the traditional doctrine of separation of powers led directly to the Court's decision to order increased funding. When ordering remedies for constitutional violations, the remedial authority of the courts has always been recognized for its breadth and its flexibility. There is nothing new in that doctrine.

Proposed Deviations from Separation of Powers Doctrine

The proposed language for amending the Kansas Constitution deviates from the federal model and from the approach taken by other states in fundamental ways. At least some of this deviation appears to have been recognized by those who originally drafted and then revised the text that has become House Concurrent Resolution No. 5003. The revised text allows for exceptions when necessary to comply with the United States Constitution; it, therefore, recognizes that courts generally have authority to interpret and apply constitutions in a manner that leads to redirection or expenditure of funds. There is no explanation, however, for why state compliance with the Kansas Constitution should be accorded lesser status than state compliance with the United States Constitution. In fact, most provisions of the United States Constitution are replicated within our state constitution. Under the proposed Amendment to the Kansas Constitution, the provisions of the United States Constitution continue to take precedence over state legislation, but the Kansas Constitution would not longer have that affect.

It may be that this denigration of the Kansas Constitution results from inclusion within that text of an affirmative duty to provide a "suitable education"as distinguished from mere negative constraints on the exercise of government power. In contrast, the Bill of Rights of the U.S. Constitution is built upon limitations on the government. Enforcement of those provisions does not necessarily involve orders for expenditures of money. In contrast, the right to a "suitable education" in Kansas entails, by its nature, an expenditure of funds.

This provision for an affirmative duty in the field of education, however, is not unique to Kansas. Interpreting such provisions, other state supreme courts came to the same conclusion arrived at by a unanimous Kansas Supreme Court, and ordered increased funding for public schools. At least 17 other state supreme courts have declared their state systems for financing education unconstitutional. There are multiple examples for you to consider: Supreme courts in Kentucky, Tennessee, New Jersey, New Hampshire, Arkansas, Texas, West Virginia, Connecticut, North Carolina, Vermont, Wyoming, Montana, Alaska, and Michigan have all ruled that their respective state constitutions create affirmative obligations to provide increased or redirected funding for education. When those decisions were rendered, they did not precipitate "constitutional crises." Legislators in those other states understood that the court orders were a legitimate reflection of judicial responsibility in a constitutional democracy. None of those states resorted to broad changes that rendered their state constitutions unenforceable. (It would be a shame if the positive rights contained in the Kansas Constitution were given the same meaningless status found in certain other nations which include similar provisions in their constitutions and then bar courts from ordering compliance.)

At least one state supreme court, Alabama, has ruled that the education clause within its state constitutions is nonjusticiable. (Two other states, South Carolina and Mississippi, have amended their constitutions to eliminate judicial oversight of education. Other state supreme courts have recognized their authority to resolve such issues and have upheld their state education finance schemes.) The Alabama decision, however, represent the exception rather than the rule. The Alabama Supreme Court acted in response to the history and tradition of the provisions within that state. The Kansas Attorney General attempted to make similar arguments repeatedly before the Kansas Supreme Court in spite of clear notice from a unanimous Court that such an approach would not succeed. In its ruling on this issue of separation of powers, Kansas remains aligned with the vast majority of other state courts. The decision of the Kansas Supreme Court regarding its authority to order expenditure or redirection of state funds for education was consistent with more than a century of experience with the specific provisions in the Kansas Constitution. It does not represent a departure.

The distinctive history of this state illustrates why the Alabama approach would be inappropriate in Kansas. Long before the Suitability Clause was added to our state constitution, Kansas courts had asserted their authority to order increases or redirection of funds for education. No one can reasonably deny this understanding of judicial responsibility which preceded the modern text requiring state provision of a suitable education. It would have been a gross distortion of Kansas constitutional history to assert that such authority did not exist.

Principles of State Sovereign Immunity do not Apply

In trying to understand the arguments of those who question judicial power to order expenditures of money, it has occurred to me that there may be some confusion that results from traditional doctrines of sovereign immunity. There is a long history behind the doctrine that sovereigns are immune from suits for monetary damages. There is a subtle and yet vitally important distinction between immunity from monetary damages and immunity from suits seeking government compliance with its own law. The school finance case did not seek

monetary damages for past failure to provide adequate funds for education; instead it sought orders instructing the state to comply with the state constitution provision in the future. If the proposed amendment to the state constitution seeks to bar the courts from making such orders -- and that's what it appears to do -- that would represent a radical revision in the role of the courts.

Gaps and Unintended Consequences

There are additional, more practical problems with the proposed amendment. The new text specifies that the state must comply with the United States Constitution and with ordinary state legislation. By expressing the constraint in those terms, the legislature is creating two major gaps. It appears to bar authority to order compliance involving any "redirection of funds" to comply with obligations created by either the Kansas Constitution or federal statutes. I suspect that very little attention has been given to the problems created by lack of authority to order compliance with federal statutes. As a result, the proposed amendment could have some dramatic unintended consequences (which is always a problem with hastily enacted laws). For example, if a court determines that the state is out of compliance with federal medicaid laws (and in danger of losing millions of dollars as a result) it would apparently be unable to require compliance. The fact is that the states must comply with both the United States Constitution and federal statutes as long as the federal government has acted within the legitimate sphere of its authority. Do you really want to say that in the future all cases involving state compliance with federal law need to be litigated exclusively in the federal courts because we have restricted state courts from being able to provide remedies in such cases?

Some members of this Committee will undoubtedly remember a case that arose about ten years ago involving taxation of military retirees. In simplest terms, a federal statute required equal treatment of state and federal retirees, and the United States Supreme Court ruled that Kansas had to comply with that law by reimbursing the military retirees who had been paying Kansas state taxes. The cost of that remedy amounted to tens of millions of dollars. Impact on the state treasury was moderated somewhat by the fact that it was the Kansas Supreme Court that determined how that remedy was to be complied with. In the future we would essentially be forcing such cases into the federal courts.

A still more basic problem arises from the most literal reading of the proposed text. Presumably, every time a court determines that the State of Kansas is liable for damages it will be "redirecting" state expenditures. What is a court to do every time that it is asked to rule on a question involving state contracts or state tort liability? Imagine the case in which a child has been harmed by an inattentive state employee. The proposed text would appear to prohibit court ordered compensation for ordinary acts of negligence by state employees. If the state adopts a scheme that prohibits compensation in such cases, then the entire scheme would be deemed unconstitutional. Such a challenge could conceivably be saved by the clause that provides for compliance with the United States Constitution, but only by turning all such cases into federal questions. Do we really want all issues involving state liability to become federal questions subject to control and resolution by the federal courts?

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TESTIMONY OF RICHARD F. HAYSE, PRESIDENT, KANSAS BAR ASSOCIATION BEFORE THE HOUSE FEDERAL AND STATE AFFAIRS COMMITTEE IN OPPOSITION TO HCR 5003 JUNE 28, 2005

As president of the Kansas Bar Association, I urge you not to report HCR 5003 favorably (or its cousin, SCR 1603) because it is designed to erode the independence of the Kansas judiciary. The KBA has a long-standing policy supporting that independence because our members feel it is an important basic element of our system of checks and balances.

We are concerned that the current atmosphere in this body will lead to hasty, ill-considered legislation which will produce regrettable results in response to a single court decision with which some legislators disagree. But I suggest to you that the judiciary did not overstep its constitutional bounds in deciding the *Montoy* case. In fact, the judiciary did exactly what it is intended to do in our system of government. It decided an adversarial case by interpreting the constitutionality of a statute, and then decreed a remedy for the prevailing side.

It is important to focus on how the *Montoy* decision came to be decided by the Kansas Supreme Court. Two school districts and about three dozen students brought suit in district court in 1999 alleging that they were under-funded and that the lack of funding was a violation of their constitutional rights. After an extensive trial in the district court, the case was appealed to the Kansas Supreme Court on the evidentiary record introduced in the trial court. Based upon the evidence presented and the constitutional mandate of Article VI Section 6, the Supreme Court agreed with the district court that existing funding legislation was constitutionally inadequate to fund the requirements imposed by law.

As with any other court decision, upon a finding that one litigant was entitled to relief from the other litigant, the Supreme Court established an amount of money which needed to be exchanged to remedy the legal deficiency indicated in the case. This is the duty which is fulfilled by courts in Kansas on a regular basis: It is a futile task to adjudicate rights without also imposing a remedy. When the only cost evidence in *Montoy* demonstrated a deficiency in funding, the court had no choice but to order additional funding as a remedy.

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HCR 5003 would deprive the successful litigants of a remedy for a proven constitutional violation. If the legislature passes a constitutional amendment which would deprive the court of the power to enforce its remedy, how would litigants in this or any other case obtain a redress of their grievances through the judicial process?

We respectively suggest to this committee that the real solution to the problems facing the legislature is to accelerate the new cost study by the Legislative Division of Post Audit in order to provide supplemental evidence in the case. The Supreme Court's decision in *Montoy III* clearly invites and anticipates such evidence to fill the gap in the present trial record.

If necessary, this body could also consider amending the definition of a "suitable education" contained in KSA 46-1225(e), upon which the study by Augenblick & Myers was based.

The KBA respectfully requests this committee to be extremely cautious in considering the long range effect of any constitutional amendments which may be proposed. By changing the delicate constitutional scheme of checks and balances, the proposed amendment in HCR 5003 will undoubtedly produce unintended consequences, especially if it is enacted hurriedly, with inadequate opportunity to consider the ramifications.

As lawyers in Kansas we want to ensure that our cases are heard by an independent judicial system which bases its decisions on the evidence presented in the case and the law that applies to that evidence, without influence by outside forces. If this body begins to erode the jurisdiction of the courts to hear and decide cases, the enduring principle of judicial independence will be sacrificed to a much less valuable expediency of the moment.

Speaking on behalf of the members of the Kansas Bar Association I urge you to reject such unwelcome long-term policy and to preserve our delicate system of checks & balances.

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KANSAS ASSOCIATION OF SCHOOL BOARDS

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Testimony on **HCR 5003**
before the
House Federal and State Affairs Committee

by

Donna L. Whiteman, Assistant Executive Director/Legal Services
Kansas Association of School Boards

June 28, 2005

Mr. Chairman and members of the Committee:

On behalf of the Kansas Association of School Boards and the Kansas National Education Association, thank you for the opportunity to present testimony in opposition to **HCR 5003**.

The proposed language in this resolution is of great concern for the following reasons:

- Changes to our state constitution should be carefully considered and analyzed to ensure the proposed changes do not create more problems than the problem meant to be addressed. Experience teaches us to exercise caution and not to use a sledge hammer when a fly swatter will suffice and to be careful what one asks for as the solution may create greater problems than the original concern.

- Serious consideration must be given to the myriad of budgets and services the Legislature funds besides education, and the problems this language could create.

- The language in this resolution has the potential to upset the separation and delicate balance of powers established in our state constitution. These checks and balances between the judiciary, legislative and administrative branches of government protect ordinary citizens and allow them an opportunity to challenge legislative acts and the acts of the administrative branch of government that may infringe upon the constitutional rights of Kansas citizens. The wisdom of the separation of powers doctrine and the delicate balance of power among the three branches of government has stood the test of time and has served our state and democracy well. To upset this balance of power by permitting the Legislature to act and not be challenged by citizens is a serious disruption and threat to the protections currently provided to Kansas citizens.

- The Kansas Legislature should not attempt to place itself and its acts above or outside of scrutiny by the courts or any other body. It sets a bad example for other public bodies and presumes that every act of appropriation by the Legislature is correct and in compliance with the rights guaranteed to average citizens.

- The $1.7 million it will cost to pay for this special election could be spent to address the Supreme Court's concerns in the school finance ruling.

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Consideration needs to be given to the future impact of this change. This is a time for thoughtful, deliberative action. Good judgment, reasonableness and caution needs to prevail. Seven years as a 7th grade English and history teacher taught me to never back a student in a corner as they could come out fighting. It is critical the Legislature allow for options and continued dialogue with the Supreme Court.

The Supreme Court cannot allow an unconstitutional statute to remain in force and effect. Therefore, if this amendment should be passed, in the future the Supreme Court, being limited in their remedies by this resolution, and not having the opportunity to interact with the Legislature directly, may have to resort to more serious, direct orders addressed specifically to schools or state agencies.

Thank you for the opportunity to provide testimony.

DISABILITY RIGHTS CENTER of KANSAS
EQUALITY • LAW • JUSTICE

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Testimony to the
House Committee on Federal and State Affairs

House Concurrent Resolution 5003
June 28, 2005

Chairman Edmonds and members of the committee, my name is Michael Donnelly. I am the Director of Policy and Outreach for the Disability Rights Center of Kansas. The Disability Rights Center of Kansas (DRC) is a public interest legal advocacy agency, part of a national network of federally mandated and funded organizations legally empowered to advocate for Kansans with disabilities. As such, DRC is the officially designated protection and advocacy system for Kansans with disabilities. DRC is a private, 501(c)(3) nonprofit corporation, independent of both state government and disability service providers. As the federally designated protection and advocacy system for Kansans with disabilities our task is to advocate for the legal and civil rights of persons with disabilities as promised by federal, state and local laws. Those rights are promised in laws like the Rehabilitation Act of 1973, as amended, Americans with Disabilities Act of 1990 (ADA), Medicaid, Help America Vote Act (HAVA), and others.

HCR 5003 is not just about *Montoy*. It is also about how the State of Kansas will, or will not be held accountable for its actions. HCR 5003 represents a fundamental change to the founding principles of our Kansas Constitution, especially due process of law. Specifically, DRC is very concerned about the impact that this proposed amendment to the Kansas Constitution would likely have on the due process rights of Kansas with disabilities, including the due process right to a remedy as determined by a Kansas court. Putting aside the debate over separation of powers, the long term consequences of this major amendment to the Constitution are frightening. This amendment would impose absolute power of the legislature to deny monetary judicial remedies if, or when a State Court determines that the State has wronged a person, or group of persons.

Please allow me to illustrate our concern using a bit of Kansas disability history.

In the late 1800s the practice of forced sterilization of persons with disabilities was begun and by the 1920s every state, including Kansas included sterilization (Eugenics) as a normal course of business. In 1883 Sir Francis Galton in England coined the term eugenics to describe his pseudo-science of "improving the stock" of humanity. The effort to sterilize the "unfit" in Kansas began in 1894 with F. Hoyt Pilcher, then superintendent of Winfield's Kansas State Asylum for Idiotic and Imbecile Youth. By 1895, Pilcher had developed a reputation as a trailblazer. The Winfield Courier reported: "The unsexing of one hundred and fifty of these inmates—male and female—was an innovation that received the endorsement of the entire medical profession of the world, and the plaudits of right thinking people everywhere." On March 14, 1913, Kansas, well after Pilcher's reign, passed a law stating that forced sterilization was acceptable if "the mental or physical condition of any inmate would be improved . . . or that procreation by such inmates would be likely to result in defective or feeble-minded children." On October 6, 1928, the Supreme Court in Kansas held that a later version of the Kansas sterilization law (passed March 13, 1917) was constitutional. Landman (1932) observed that "The *Buck v. Bell* decision mandated May 2, 1927 has definitely altered the judicial opinion of this country in favor of this kind of legislation". (**Eugenics and Sterilization in the Heartland, 2002)**

By the mid 1970s nearly 3,000 Kansans had undergone forced sterilization in the state run "hospitals" for persons with mental illness and developmental disabilities. Kansas hosted the third most active eugenics program in the country just behind Virginia and California. For its population, Kansas probably subjected the highest percentage of its population to this crime. The State of Kansas continues to operate 4 large institutions for citizens with disabilities located in Larned, Osawtomie, Parsons and Topeka. The practice of forced sterilization ended in the mid 1960s in Kansas.

Were this practice taking place today this proposed constitutional amendment would deny those 3,000 Kansans who were forcibly, and without consent, sterilized would have no real remedy available to them. Why? Because the legislature decided that the Courts can not impose a financial remedy on the state.

We don't like to think that the state is ever wrong, or would ever harm any of its citizens. Unfortunately, as in the practice of forced sterilization, sometimes people get hurt and the only remedy available to them is monetary. The state, like any other defendant in a law suit, needs to be held accountable for its actions by the judicial system.

For example, medical care to sustain a persons life. You as the legislature require the director of the Medicaid program to cut $30 million from the state's Medicaid budget. The director elects to eliminate the Medicaid programs that provide in home supports and medical care to persons living in a "permanent vegetative state," in other words, people with multiple severe disabilities. The decision means that nurse visits, nutritional supplements, medical supplies, medications, etc., are no longer available to keep those Kansans alive. As a result of the decision several people die. What remedy is available to the victims and their families? Primarily, the court would provide a monetary remedy. In this example, the state made a very bad decision but with the implementation of the proposal in HCR 5003 the legislature will have immunized itself from paying the damages awarded by the court as the only remedy available to the family. Is that what Kansans want?

Second example, what would be the remedy if the state clearly abused used its powers of eminent domain to seize your property. Imagine if you will that the state decided to seize your property (home, farm, business) to set it aside for future developments. You sue the state and win at all levels, district, appeals and Supreme Court. The Court orders the state to compensate you for damages and the state says they are exempt because the judicial branch can not require the legislature to appropriate the funds. Is that OK?

Another example. As the legislature you decide to eliminate all neo-natal care from the Medicaid budget in clear violation of Medicaid statutes. 50 babies die and their parents sue the state. Legislators don't like the Court's final decision awarding the parents monetary remedies for their losses. They refuse to fund the award. Are you OK with that?

A final example, breast cancer treatment for Medicaid recipients. The 2005 legislature cuts funding for treatment and ensuring death for hundreds of women. What remedy do they have?

The constitutional amendment proposed in HCR 5003 goes far beyond the *Montoy* litigation and touches the very foundation of our constitutional republic. A constitutional republic form of government means that there are certain foundational principles that cannot be voted away, like the rule of law, separation of powers, and constitutional due process. As it relates to our state, the Kansas Supreme Court must have the final word in interpreting and enforcing the Kansas Constitution. Due process of law requires that a wronged party is entitled to a remedy. Regardless of the remedy, e.g., declaratory relief, injunctive relief, or monetary relief, the Court must maintain its ability to enforce its orders. The legislature, and by default the State of Kansas, can not put itself above the law. Anything less borders on anarchy.

REPORTS OF STANDING COMMITTEES

MR. SPEAKER:

The Committee on **Federal and State Affairs** recommends **HCR 5003** be amended on page 1, in line 23, by striking ". The judicial"; by striking all in lines 24 and 25; in line 26, by striking all before the period and inserting "or to redirect the expenditure of funds appropriated by law, except as the legislative branch may provide by law or as may be required by the Constitution of the United States"; in line 33, by striking "nor shall the"; by striking all in lines 34 and 35; in line 36, by striking "money" and inserting "nor to redirect the expenditures of funds appropriated by law, except as the legislative branch may provide by law or as may be required by the Constitution of the United States"; in line 41, by striking "for any purpose" and inserting ", except as the legislative branch may provide by law or as may be required by the Constitution of the United States"; in line 42, by striking "any" and inserting "a"; in line 43, before the period by inserting ", except as the legislative branch may provide by law or as may be required by the Constitution of the United States";

On page 2, in line 14, by striking "August 16,"; in line 15, by striking "2005" and inserting "the first Tuesday following 60 calendar days after the approval of this resolution by both the Senate and the House of Representatives of the Kansas legislature"; and the concurrent resolution be adopted as amended.

_____Chairperson