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Revisiting Rose and its Effects: A Thirty-Year Retrospective

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REVISITING *ROSE* AND ITS EFFECTS: A THIRTY-YEAR RETROSPECTIVE

*S. Patrick Riley*¹

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¹ University of Kentucky J. David Rosenberg College of Law, J.D. Candidate May 2020. For my dear grandmother, Freida Nell Ross (1930–2018), Alexandria & Philip, Vicki, and Charles T. Additional thanks to University of Kentucky College of Law Associate Professor Zachary A. Bray for re-introducing me to this timely topic, University of Kentucky College of Law Willburt D. Ham Professor of Law Scott R. Bauries for guidance early in the writing process, and University of Kentucky General Counsel William Thro for his wisdom and mentorship.

The fundamental importance of education in a democracy cannot be overstated.² Expanding and improving opportunities for education has been linked to a multitude of enhanced social capital and social welfare measures.³ Additionally, education promotes prosperity at a variety of levels in America.⁴ While the notion of learning as a fundamental and critical process available to all dates back to the “dawn of man,”⁵ education—and, particularly, education as a fundamental social construct—has gained traction only more recently in society and, more specifically, in the United States.⁶ Recognizing the exponential power of education in the lives of students, the federal government has aimed to improve educational opportunities for students through a myriad of educational initiatives over the past two-and-a-half centuries.⁷ Furthermore, to an even greater extent state and local governing bodies

² See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (characterizing education as a “right which must be made available to all on equal terms.”); cf. NAT’L CTR. FOR EDUC. STATISTICS, 120 YEARS OF AMERICAN EDUCATION: A STATISTICAL PORTRAIT 5 (Thomas D. Snyder ed., 1993) (“By the year 2000: . . . Every adult American will be literate and will possess the knowledge and skills necessary to compete in a global economy and exercise the rights and responsibilities of citizenship . . .”). See generally *id.* (detailing the provisions made for education nearly 250 years ago by the federal government).

³ Jonathan Rothwell, *Housing Costs, Zoning, and Access to High-Scoring Schools*, BROOKINGS: METROPOLITAN POL’Y PROGRAM (Apr. 2012), https://www.brookings.edu/wp-content/uploads/2016/06/0419_school_inequality_rothwell.pdf [<https://perma.cc/Q527-Y3UD>] (“Education is enormously important to human welfare. At the individual level, education leads to higher incomes, better labor market performance, higher social status, increased participation in civil society, and better health.”); see also NAT’L CTR. FOR EDUC. STATISTICS, *supra* note 2, at 9 (“Education is generally considered important to individuals to help them obtain good jobs with relatively high pay. More highly educated individuals are paid more, on average, than less well educated persons.”).

⁴ Rothwell, *supra* note 3 (“Education is also increasingly recognized as a key contributor to regional and national prosperity. Researchers find that human capital—measured by education—is the cause of historic economic development, higher living standards over any period, and a more vibrant and trustworthy civil society.”).

⁵ Cf. Art History, 2001: *A Space Odyssey – The Dawn of Man*, YOUTUBE (Apr. 4, 2015), <https://www.youtube.com/watch?v=yEaGQb6dJk> [<https://perma.cc/4CGR-Y4MP>] (highlighting a video clip depiction of the fundamental and critical components of the learning process of early man through the lens of acclaimed director Stanley Kubrick and his film, 2001: *A Space Odyssey*).

⁶ See Michael A. Rebell, *The Right to Comprehensive Educational Opportunity*, 47 HARV. C.R.–C.L. L. REV. 47, 49 (2012) (“Raising academic standards and at the same time eliminating the achievement gaps between advantaged and disadvantaged students are America’s primary national educational goals. This pursuit of equity and excellence reflects a bipartisan consensus of presidents, governors, legislators, corporate leaders, educators, and the public that has been forged over the past two decades. The linking of equity with higher achievement responds to the need to fulfill the promise of equal educational opportunity that the United States Supreme Court declared to be the law of the land more than a half century ago.”).

⁷ See, e.g., NAT’L CTR. FOR EDUC. STATISTICS, *supra* note 2, at 5 (quoting Thomas Jefferson’s “Bill for the more general diffusion of knowledge “. . . [I]t is believed that the most effectual means of preventing [tyranny] would be, to illuminate, as far as practicable, the minds of the people at large, and more especially to give them knowledge of those facts, which history exhibiteth, that . . . they may be enabled to know . . .”); *Race to the Top Program Executive Summary*, U.S. DEP’T EDUC. (Nov. 2009), <https://www2.ed.gov/programs/racetothetop/executive-summary.pdf> [<https://perma.cc/KHX5-F3TJ>] (summarizing a grant program by the U.S. government to encourage “education innovation and reform” for states); *The No Child Left Behind Act of 2001*, U.S. DEP’T EDUC. (Jan. 7, 2002), <https://www2.ed.gov/nclb/overview/intro/exccsumm.pdf> [<https://perma.cc/KS9S-VSTD>] (explaining the reform initiatives of the No Child Left Behind Act).

have enacted measures to positively impact children during this same time span.⁸ Providing a quality education to students has remained a top priority of the states and nation; however, the multifarious ways of accomplishing this goal have been divergent at best and circular at worst.⁹ Therefore, it should come as no surprise that individuals seeking this right to an adequate and equitable education have sought relief from the judiciary when these federal, state, and local efforts have fallen short of the mark.¹⁰

Perhaps the most significant change of the ever-increasing list of educational initiatives placed on schools, teachers, and administrators has been the shift from finances to student achievement—from equity to adequacy—during the 1980s.¹¹ Approximately thirty-five years ago in the midst of the Cold War, the educational treatise *A Nation at Risk* painted a bleak picture of the state of education in the states finding that “[h]istory is not kind to idlers . . . America’s position in the world may once have been reasonably secure with only a few exceptionally well-trained men and women. It is no longer.”¹² As states scrambled to answer the call of *A Nation at Risk*, Kentucky also faced its own educational difficulties.¹³ With school finance issues, failing infrastructure, and diminished academic standards, Kentucky ranked near the bottom of the United States for education: a dubious distinction that it carried for nearly a century.¹⁴

The Kentucky Supreme Court in *Rose v. Council for Better Education, Inc.*¹⁵ answered this call to action. *Rose* was “a landmark case” for the Commonwealth and

⁸ See, e.g., S.B. 1, 2009 Gen. Assemb., Reg. Sess. (Ky. 2009) (codified as amended in scattered sections of Ky. Rev. Stat. Ann. Tit. XIII); H.B. 940, 1990 Gen. Assemb., Reg. Sess. (Ky. 1990) (codified as amended in scattered sections of Ky. Rev. Stat. Ann. Tit. XIII).

⁹ See generally Jamie Robert Vollmer, *The Ever Increasing Burden on America’s Public Schools*, LITTLETON PUB. SCH. (2011), <https://littletonpublicschools.net/sites/default/files/the-list.pdf> [<https://perma.cc/437R-HXTX>] (providing an outline of American public schools’ curriculum trends throughout the decades).

¹⁰ Michael Heise, *Litigated Learning, Law’s Limits, and Urban School Reform Challenges*, 85 N.C. L. REV. 1419, 1421 (2007) (“Given these stakes [of the equal educational opportunity doctrine], it is not surprising that courts are increasingly called upon to put legal teeth into the equal educational opportunity doctrine and to help deliver an implied promise.”).

¹¹ Daniel Schugurensky, *1989: Kentucky Supreme Court declares entire education system unconstitutional*, HIST. EDUC.: SELECTED MOMENTS 20TH CENTURY, <http://schugurensky.faculty.asu.edu/moments/1989rose.html> [<https://perma.cc/ST5M-PE4J>]; see also NAT’L COMM’N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* 13 (Apr. 1983) (“Our goal must be to develop the talents of all to their fullest.”); Scott R. Bauries, *State Constitutions and Individual Rights: Conceptual Convergence in School Finance Litigation*, 18 GEO. MASON L. REV. 301, 333 (2011) (“Beginning in 1989 with *Rose v. Council for Better Education, Inc.* in Kentucky, state courts began to focus more on education clauses than on equal protection and uniformity provisions, and they began to focus more on educational adequacy than equality.”); William E. Thro, *Judicial Humility: The Enduring Legacy of Rose v. Council for Better Education*, 98 KY. L.J. 717, 720 (2010) (“*Rose* and the other 1989 decisions validated the adequacy theory of school finance litigation. For the first time, courts invalidated educational finance systems not because the expenditures were unequal (the equity theory), but because some schools lacked the money to meet minimum standards of quality (the adequacy theory).”).

¹² NAT’L COMM’N ON EXCELLENCE IN EDUC., *supra* note 11, at 6.

¹³ See *infra* notes 69–78 and accompanying text.

¹⁴ See *infra* notes 69–78 and accompanying text.

¹⁵ *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989).

across the nation.¹⁶ In *Rose*, a collective group of school districts, boards of education, and students filed an action in Frankfort, Kentucky that sought adequate state funding for an efficient system of schools in accordance with the Kentucky Constitution's education clause.¹⁷ Perhaps the most important change engendered by *Rose* was the "paradigm shift" in litigation from negative constitutional rights to positive constitutional rights.¹⁸ Essentially, a negative constitutional right "is one that creates in its holder the power to prevent government actors from engaging in behavior that infringes upon the right."¹⁹ In contrast, a positive constitutional right is one that empowers the holder of such right to take affirmative action to ensure that right.²⁰

On the eve of the thirtieth anniversary of the *Rose* decision, this Note is a thirty-year retrospective shedding light on the intersection of education, school finance, and the evolving focus from negative constitutional rights to positive constitutional rights. And, to an even greater extent, this Note explores how *Rose* served as the foundation for future federal action to ensure that the positive constitutional right of an adequate education—as litigated and recognized in so many state constitutions²¹—is equitably met not merely within districts of a particular state, but among the states of the union as a whole.

Part I of this Note examines the educational landscape of the nation—including Kentucky—leading up to *Rose*, precipitating the monumental decision of the Kentucky Supreme Court in declaring the Kentucky educational system unconstitutional.²² Part I also examines the history of school finance through the lens of *Rose* while paying particular attention to the social influences. Building upon the numerous and varied influences discussed in Part I, Part II examines *Rose* in greater detail for the procedure and the contentions of the parties that drove the court's decision to declare its own educational system unconstitutional. Next, Part III presents an analysis of the current state of Kentucky education through the lens of school finance and specifically with respect to how, if at all, Kentucky education changed for better or worse at measuring student achievement and academic success. Finally, Part IV of this Note combines the boldness of *Rose*, thirty years of insight, and the wisdom of legal scholars to present ideas on how constitutional structures could be incorporated into public education to provide optimal results for students in Kentucky and beyond.

¹⁶ Schugurensky, *supra* note 11.

¹⁷ *Rose*, 790 S.W.2d at 190–91.

¹⁸ Scott R. Bauries, *Foreword: Rights, Remedies, and Rose*, 98 KY. L.J. 703, 708 (2009).

¹⁹ *Id.* at 706.

²⁰ *Id.* at 708.

²¹ *See, e.g.*, *Gannon v. State*, 390 P.3d 461, 475 (Kan. 2017) (finding that the state failed to meet the "Rose standards" through a lack of funding to adequately meet state constitutional requirements under its education article); *Abbeville Cty. Sch. Dist. v. State*, 767 S.E.2d 157, 178 (S.C. 2014) (holding that state failed to fund a "minimally-adequate" education); *McCleary v. State*, 269 P.3d 227, 258 (Wash. 2012) (en banc) (noting that the state failed to adequately fund the education of all students in contravention to the Washington Constitution).

²² *Rose*, 790 S.W.2d at 215.

I. THE EDUCATIONAL LANDSCAPE OF AMERICA LEADING UP TO *ROSE*A. *A Nation at Risk*

The release of *A Nation at Risk* profoundly changed the landscape of American education.²³ Released as an educational treatise by a specially appointed committee named the National Commission on Excellence in Education,²⁴ *A Nation at Risk* outlined the deficiencies inherent in American education in the 1980s. Running contrary to the Republican agenda of President Ronald Reagan,²⁵ the White House eventually embraced the treatise and built upon its momentum for education reform across the nation.²⁶ The document—with its cry to action through not so subtle overtones of Cold War rhetoric²⁷—laid out several macro-reform measures for K-12 schools.²⁸ These reform measures included raising education standards, extending the school day/year, professionalizing the practice of teaching, and ensuring fiscal

²³ Anya Kamenetz, *What 'A Nation at Risk' Got Wrong, And Right, About U.S. Schools*, NPR (Apr. 29, 2018, 6:00 AM), <https://www.npr.org/sections/ed/2018/04/29/604986823/what-a-nation-at-risk-got-wrong-and-right-about-u-s-schools> [<https://perma.cc/22D6-2ZF7>] (“Very few government reports have had the staying power of ‘A Nation at Risk,’ which appeared 35 years ago this month and stoked widespread concerns about the quality of American schools.”).

²⁴ David P. Gardner, *Education and the American Economy*, 1 STAN. L. & POL’Y REV. 75, 77–78 (1989).

²⁵ Christine Patterson, *Measuring the Lasting Impact of a Nation at Risk*, WALTON FAM. FOUND. (Apr. 10, 2018), <https://www.waltonfamilyfoundation.org/stories/k-12-education/measuring-the-lasting-impact-of-a-nation-at-risk> [<https://perma.cc/65YP-N7KR>] (“The Reagan administration’s agenda for education was pretty straightforward and simple. First of all, it wanted to abolish the Department of Education. Secondly, it had a heavy reliance on choice as a mechanism for improving education. And it wanted to bring prayer back to the schools. That was the primary agenda. Well of course, almost every part of that ran into trouble with Congress—Democrats for sure, but even some Republicans—right from the start. Education Secretary Ted Bell thought that the report had to be more broadly based and conceived. There was a clash from the start.”).

²⁶ *Id.* (“The administration saw that it was getting front page attention and it captured the imagination of the American public, not only the education community. Secretary Bell tried to build on this interest. And Reagan’s second education secretary, Bill Bennett, saw a significant opportunity. He framed the administration’s agenda around what he called the three C’s—content, character, and choice. These themes were well received by Republicans. But Democrats also found things in the report that attracted them. For example, the emphasis on high standards for all kids, the same expectations for all kids, creating a real profession in teaching—these were seen as issues related to civil rights and social justice. They saw the report as a way to expose the system for what it was—a dual system with a big achievement gap between mostly white and minority kids.”).

²⁷ See NAT’L COMM’N ON EXCELLENCE IN EDUC., *supra* note 11, at 5 (“We report to the American people that while we can take justifiable pride in what our schools and colleges have historically accomplished and contributed to the United States and the well-being of its people, the educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a Nation and a people. What was unimaginable a generation ago has begun to occur—others are matching and surpassing our educational attainments. If an unfriendly foreign power had attempted to impose on America the mediocre educational performance that exists today, we might well have viewed it as an act of war. As it stands, we have allowed this to happen to ourselves. We have even squandered the gains in student achievement made in the wake of the Sputnik challenge. Moreover, we have dismantled essential support systems which helped make those gains possible. We have, in effect, been committing an act of unthinking, unilateral educational disarmament.”) (emphasis added).

²⁸ *Id.* at 23–33.

responsibility.²⁹ With a final plea, *A Nation at Risk* cried out for all vested parties to take action:

It is their America, and the America of all of us, that is at risk; it is to each of us that this imperative is addressed. It is by our willingness to take up the challenge, and our resolve to see it through, that America's place in the world will be either secured or forfeited. Americans have succeeded before and so we shall again.³⁰

America responded in the years that followed *A Nation at Risk* by implementing a variety of educational reforms “to address teacher status and compensation; the content, scope, and sequence of curricula; the quality of textbooks; and the special needs of gifted and disadvantaged students.”³¹ Furthermore, in the years between 1981 and 1986, “[p]er capita state spending for elementary and secondary education increased nationally by more than 40 percent”³² Ultimately, *A Nation at Risk* provided the spark—the catalyst—for future education litigation and the school reform movement that exists to present day: seeking to adequately and equitably provide for *all* students.³³ While the treatise was sufficient in increasing awareness around the dire state of American education and catalyzing action around education reform, it was not until later in the 1980s that education reform—in its current iteration—really began to take shape.³⁴

B. The “Three Waves” of School Finance Litigation Actions

In the wake of the rapidly evolving public perception of education in America, beginning with the Civil Rights Movement in the 1960s and continuing through the 1980s, many groups took to the courts across the nation to affect educational change.³⁵ Legal scholars refer to “waves” of school finance challenges in federal

²⁹ *Id.*

³⁰ *Id.* at 36.

³¹ Gardner, *supra* note 24, at 77.

³² *Id.*

³³ Noelle Quam, Note, *Big Philanthropy's Unrestrained Influence on Public Education: A Call for Change*, 21 WASH. & LEE J. C.R. & SOC. JUST. 601, 611 (2015); see also Edward Williams, Note, *Diversity, the Legal Profession, and the American Education Crisis: Why the Failure to Adequately Educate American Minorities is an Ethical Concern for the Legal Profession*, 26 GEO. J. LEGAL ETHICS 1107, 1107 (2013) (“Thirty years later, the education system in the United States is still in drastic need of reform, as it continues to fail to educate minority students to the same level as their non-minority counterparts.”).

³⁴ See Jared S. Buszin, Comment, *Beyond School Finance: Refocusing Education Reform Litigation to Realize the Deferred Dream of Education Equality and Adequacy*, 62 EMORY L.J. 1613, 1621 (2013) (“The third wave of school finance litigation began in 1989 as plaintiffs shifted their equality arguments to adequacy arguments, claiming that school finance schemes failed to provide a minimally adequate education as required by state constitutions. During this period of litigation, which continues today, courts have interpreted the education clauses in state constitutions to require states to provide a substantive education that does not fall below a minimally adequate level.”); see also William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 603–04 (1994) (discussing the third wave of educational reform that took place in the late 1980s).

³⁵ See Thro, *supra* note 34, at 600–04.

courts that started in the late 1960s.³⁶ The first wave of school finance challenges began in the early 1970s with *Serrano v. Priest*³⁷ and ended with the Supreme Court decision in *San Antonio Independent School District v. Rodriguez*.³⁸ Both focused on the reduction of spending disparities³⁹ and the federal Constitution's Equal Protection Clause.⁴⁰ Legal scholar Michael Heise noted that two key jurisprudence trends—couched in the federal Constitution's Equal Protection Clause—made these actions possible: (1) the Supreme Court's jurisprudence around the Equal Protection Clause insofar as it could impact public policy⁴¹ and (2) the Court's recognition of education's societal importance.⁴²

In *Rodriguez*, Mexican-American parents brought a class action on behalf of students who were minority members and/or economically disadvantaged and attacked “the Texas system of financing public education.”⁴³ The trial court delivered a *per curiam* opinion that held the entire Texas school finance system unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.⁴⁴ In contrast, the Supreme Court confirmed that “education is not a fundamental federal constitutional right,”⁴⁵ however, the Court did note that under the right circumstances “an equal protection claim might be made upon a showing that the state, having made school funding substantially dependent upon local resources, then so regulated the local districts' taxing powers as to make it essentially impossible for them to better themselves.”⁴⁶ Essentially, the door still remains open for the right case at the right time to make an argument under the Equal Protection Clause of the Fourteenth Amendment for education as a fundamental constitutional right.⁴⁷

³⁶ *E.g., id.* at 597–98 (1994) (“Since the late 1960s, litigants, alarmed at the existence of funding disparities between local school districts and believing that it is wrong for local property values to determine the quality of a child’s education, have challenged the validity of their state’s public school financing methods in an effort to win finance reform. These challenges to the school finance systems of the various states can be divided into three distinct ‘waves’ of cases.”); *see also* Bauries, *supra* note 11, at 333 n.150 (noting that “[t]he most common way of describing this shift is by designating the federal efforts and the state equality-dominated efforts as the first two ‘waves’ of reform-based litigation and the recent move to education clauses and adequacy as the dominant focus as the ‘third wave.’”); Schugurensky, *supra* note 11.

³⁷ *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971), *cert. denied*, 432 U.S. 907 (1977).

³⁸ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

³⁹ *See* Schugurensky, *supra* note 11.

⁴⁰ Michael Heise, *State Constitutions, School Finance Litigation, and the “Third Wave”*: *From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1152 (1995); *see also* U.S. CONST. amend. XIV, § 1.

⁴¹ Heise, *supra* note 40, at 1153–54.

⁴² *Id.* at 1154.

⁴³ *Rodriguez*, 411 U.S. at 4–5.

⁴⁴ *Id.* at 6; *see also* Thro, *supra* note 34, at 600–01 (“Essentially, the plaintiffs asserted either that all children were entitled to have the same amount of money spent on their education, or that children were entitled to equal educational opportunities (“equality suit”). In effect, those equality suits were premised on the belief that more money meant a better education and on a lack of tolerance for any differences in money or opportunities.”).

⁴⁵ Debra H. Dawahare, *Public School Reform: Kentucky’s Solution*, 27 U. ARK. LITTLE ROCK L. REV. 27, 31 (2004).

⁴⁶ *Id.*

⁴⁷ *See* Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 339 (2006) (stating that the question of whether the Fourteenth Amendment “guarantees an adequate education” remains open in case law); *see also id.* at 339 n.31 (citing *Papasan v. Allain*, 478 U.S. 265, 285 (1986) for

Ultimately, however, the first wave—and specifically *Rodriguez*—ended with the failure to make school finance challenges based upon the United States Constitution.⁴⁸

Subsequently, the second wave of school finance challenges centered “on the equal protection and education clauses found in state constitutions” and ran from 1973 to 1989.⁴⁹ The second wave of school finance litigation began with *Robinson v. Cahill*.⁵⁰ In *Robinson*, the New Jersey Supreme Court affirmed the invalidation of the New Jersey school finance system by the trial court.⁵¹ The New Jersey Supreme Court, however, went beyond the trial court’s ruling by holding the issue “to be inappropriate for decision on federal or state equal protection grounds[,]” and instead based the decision “on the basis of the ‘thorough and efficient’ education clause of the New Jersey constitution.”⁵²

While *Rodriguez* seemingly closed one avenue, another avenue of education litigation arose with *Robinson*.⁵³ Plaintiffs of both waves challenged such notions as the equity of per pupil spending.⁵⁴ But in contrast to the first wave, “the second wave of court decisions turned away from the federal Constitution’s Equal Protection Clause and toward state constitutions.”⁵⁵ Notably, the move away from the federal Constitution “decentralized the effort to equalize educational spending and made such an effort less efficient.”⁵⁶ In addition, education reformers found a friend in the state constitutions through generally more favorable language.⁵⁷ As Heise explains:

School finance reformers find education clauses particularly attractive because they make it easier for some courts to reach the results reformers seek. State education clauses directly address states’ educational duties. In contrast, federal constitutional language, such as that of the Fourteenth Amendment, addresses educational duties only indirectly. Also, school finance decisions rooted in state education clauses pose fewer implications for other areas of the law than similar decisions involving state equal protection clauses. Thus, state court judges can be relatively less concerned about the influence of their school finance decisions on areas outside the educational context.⁵⁸

the proposition that “[t]his Court has not yet definitively settled . . . whether a minimally adequate education is a fundamental right . . .”).

⁴⁸ See Dawahare, *supra* note 45, at 31.

⁴⁹ Heise, *supra* note 40, at 1152.

⁵⁰ *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973); see also Heise, *supra* note 40, at 1152.

⁵¹ Paul L. Tractenberg, *Reforming School Finance through State Constitutions: Robinson v. Cahill Points the Way*, 27 RUTGERS L. REV. 365, 372 (1974).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Schugurensky, *supra* note 11; see also Heise, *supra* note 40, at 1157 (“The second wave of school finance decisions emerged soon after the Supreme Court’s *Rodriguez* decision. Like its predecessor, the second wave was characterized by a commitment to equity and focused on reducing per-pupil spending disparities.”).

⁵⁵ Heise, *supra* note 40, at 1157.

⁵⁶ *Id.*

⁵⁷ *Id.* at 1158.

⁵⁸ *Id.* at 1158–59.

While these school finance litigation cases were tinged with some success, “the overwhelming majority of the cases resulted in victories for the state.”⁵⁹

Finally, beginning in 1989 with *Rose*, the third wave of education finance challenges revolved solely around the “education clauses of state constitutions.”⁶⁰ This third wave of school finance litigation could be characterized as “concentrat[ing] on the sufficiency of school funding and postulat[ing] the existence of a constitutional floor of minimally adequate education to which public school students are entitled.”⁶¹ Plaintiffs of the third wave who established that the state public education offered was below this “constitutional floor” have succeeded on school finance challenges.⁶² A “subtle yet dramatic shift in school finance litigation theory and strategy”⁶³ took place during the third wave: “[t]hese decisions reflect the replacement of the traditional focus on equity—that is, per-pupil spending disparities—with a focus on adequacy, or the sufficiency of funds allocated to students and schools.”⁶⁴ Regarding school finance adequacy lawsuits, plaintiffs contend “not that all students are entitled to the same resources, but rather that all students should receive the funds necessary to finance an adequate education.”⁶⁵ Furthermore, as opposed to the equity theory of school finance, which sought “per pupil spending equality across districts within a state,” the adequacy theory instead “seeks the level of per pupil spending necessary to generate desired student outcomes.”⁶⁶

Ultimately, each wave had its own “set of characteristics with respect to legal theory, methods of judicial analysis and the plaintiffs’ success rate.”⁶⁷ The third wave, however, purported to be the most impactful “in terms of cases, numbers of plaintiffs’ victories and amount of substantial change[.]”⁶⁸

II. FOR BETTER OR WORSE: KENTUCKY LEADS THE NATION

A. *Kentucky Schools Prior to Rose*

There never was a metaphorical “little red schoolhouse” in Kentucky education.⁶⁹ This halcyon memory of education-reform-opponents obfuscates the reality of Kentucky education prior to 1990: “Kentucky had a poorly educated adult populace,

⁵⁹ Thro, *supra* note 34 at 603 (noting successful school finance challenges in Arkansas, California, Connecticut, New Jersey, Washington, West Virginia, and Wyoming).

⁶⁰ Heise, *supra* note 40, at 1152.

⁶¹ Schugurensky, *supra* note 11. One legal practitioner even theorizes that a more recent fourth wave has emerged. See, e.g., David G. Hinojosa, “Race-Conscious” School Finance Litigation: Is a Fourth Wave Emerging?, 50 U. RICH. L. REV. 869 (2016). Some legal scholars believe that the entire wave metaphor lexicon is imprecise at best. See Bauries, *supra* note 18, at 703–04, n.3 (citing to several legal scholars who have questioned the “precision” of the wave metaphor).

⁶² Schugurensky, *supra* note 11.

⁶³ Heise, *supra* note 40, at 1162.

⁶⁴ *Id.*

⁶⁵ Heise, *supra* note 10, at 1446–47.

⁶⁶ *Id.* at 1447.

⁶⁷ Thro, *supra* note 34, at 598.

⁶⁸ *Id.* at 598–99 (citations omitted).

⁶⁹ Dawahare, *supra* note 45, at 27–28.

public school students who consistently performed badly on standardized tests, and many miserable, depressing public schools that did little to prepare young people for a productive future.”⁷⁰ Furthermore, to complicate matters, the 178 Kentucky school districts—during the 1980s and prior—exhibited “[m]arked disparities . . . from district to district and also within districts.”⁷¹ While Kentucky began the twentieth century near the top of education rankings throughout the south, “[t]he state’s public schools soon began to fall far behind those of nearly every other state, however, and they continued that trend for nearly ninety years.”⁷² By the time *Rose* began, education in Kentucky had reached a critical mass.⁷³

Kentucky schools were riddled with sub-standard physical facilities and sub-standard academic offerings.⁷⁴ Buildings were crumbling and the gymnasiums were cold for many of the poorer counties: “[l]eakage, falling plaster, and the continuous, futile expense of repairs were constant problems in facilities . . .”⁷⁵ The poorest counties suffered the worst burden of these faltering conditions: “kindergarten, fifth grade, and special education students in Appalachian Elliott County were attending classes in trailers salvaged from an eastern Kentucky flood.”⁷⁶

For Kentucky education, and for the constitutionality of the “efficient system of common schools,”⁷⁷ the writing was on the wall:

A century after the 1891 General Assembly required itself through constitutional mandate to provide for an efficient system of common schools throughout the State, Kentucky’s public schools had produced the following: (1) the most illiterate citizenry in the country; (2) the highest percentage of counties with undereducated populations; (3) a functional illiteracy rate of 48.4% in the state’s Appalachian counties; (4) a state ranking of 43rd in the nation in per pupil expenditures for education; (5) a state ranking of last place in the nation for citizens over twenty five years old with high school diplomas; (6) a state ranking of 49th in the nation with citizens over twenty-five years old with four or more years of college; (7) a state ranking of 47th in the nation in per capita expenditures of state and local government for public schools; and (8) students falling well behind national norms on standardized tests, with students in Appalachian districts scoring considerably lower than those in other districts.⁷⁸

⁷⁰ *Id.* at 28.

⁷¹ *Id.*

⁷² *Id.* at 30 (citing Richard Elliott Day, *Each Child, Every Child: The Story of the Council for Better Education, Equity and Adequacy in Kentucky’s Schools* 42–84 (2003) (unpublished Ph.D. dissertation, University of Kentucky) (on file with author)).

⁷³ *See id.* at 32.

⁷⁴ *Id.* at 32–33.

⁷⁵ *Id.* at 33.

⁷⁶ *Id.* at 32–33.

⁷⁷ *Id.* at 32.

⁷⁸ *Id.*

Against the backdrop of dismal test scores, failing schools, and subpar physical structures, “educators realized that Kentucky could no longer remain complacent in forty-ninth place because persons educated in its public schools could not meaningfully compete in the national economy.”⁷⁹ Then, enter Edward F. Prichard who made it his mission to impact change.⁸⁰ A Princeton University and Harvard Law School graduate who garnered the ire of then FBI Director J. Edgar Hoover,⁸¹ Prichard was a Kentucky hero—and celebrity—with an unusual past.⁸² Prichard was to be a key figure in organizing action around the education reform movement in Kentucky.⁸³ As a “champion of educational reform,” Prichard spearheaded the Kentucky citizens’ committee on education that later launched the Kentucky Education Reform Act of 1990.⁸⁴ But, the Kentucky legislature needed more than just the persuasive power of Prichard to enact sweeping reform; ultimately, such reform required a perfect storm of judicial action.

B. The Rose Action

Comprised of sixty-six local school districts in the state of Kentucky, the declaratory judgment action of *Rose v. Council for Better Education, Inc.* was filed in Franklin County.⁸⁵ Furthermore, Boards of Education also asserted plaintiff status: from the independent school districts of Dayton and Harlan and the county school districts of Elliot County, Knox County, McCreary County, Morgan County, and Wolfe County.⁸⁶ Twenty-two students even joined the *Rose* action from McCreary, Wolfe, Morgan, and Elliot Counties, and Dayton and Harlan Independent School Districts—suing by and through their parents.⁸⁷ For the defendants, the complaint named the Governor, the Superintendent of Public Instruction, the State Treasurer, the President *Pro Tempore* of the Senate, the Speaker of the House of Representatives and the State Board of Education and its individual members.⁸⁸

As for the contentions of the parties, the complaint was both broad in scope and damning in nature.⁸⁹ At the heart of the complaint, the plaintiffs charged the

⁷⁹ *Id.* at 35.

⁸⁰ *Id.* at 37.

⁸¹ *Id.* at 36.

⁸² See *id.* at 36–37 (noting that Prichard was indicted and prosecuted for “stuffing [the] ballot box” in his hometown of Paris, Kentucky).

⁸³ *Id.* at 37.

⁸⁴ Kenneth H. Williams et al., “I’m sure there were some that thought I was too smart for my own good”: *The Ed Prichard Oral History Interviews*, 104 THE REGISTER OF THE KENTUCKY HISTORICAL SOCIETY 395, 397 (Summer/Autumn 2006); see *infra* Part III.

⁸⁵ *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 186 (Ky. 1989).

⁸⁶ *Id.* at 190.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* (“[It] included allegations that the system of school financing provided for by the General Assembly is inadequate; places too much emphasis on local school board resources; and results in inadequacies, inequities and inequalities throughout the state so as to result in an inefficient system of common school education in violation of Kentucky Constitution, Sections 1, 3, and 183 and the equal protection clause and the due process of law clause of the 14th Amendment to the United States Constitution. Additionally the complaint maintains the entire system is not efficient under the mandate of Section 183.”).

defendants with not maintaining an efficient system of common public schools in contravention of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Section 183 of the Kentucky State Constitution.⁹⁰ Section 183 of the Kentucky State Constitution states the following: “The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State.”⁹¹ The plaintiffs essentially argued for the adequacy of an efficient system.

The defendants answered the complaint with unilateral denials of “all of the alleged constitutional violations and the facts underlying such alleged violations.”⁹² *Inter alia*, the defendants claimed that the complaint failed to state a claim, several of the parties had no standing to sue, the subject matter was “purely a ‘political’ one,” and that the school boards and members of the General Assembly should all have been joined.⁹³ While the defendants moved for summary judgment at the trial court level claiming “lack of service on all 138 members” of the General Assembly and “that the parties lacked standing[,]” the trial court completely overruled the motion.⁹⁴

In its analysis, the Kentucky Supreme Court wrestled with the meaning of an “‘adequate’ education.”⁹⁵ The Kentucky Supreme Court then delineated seven basic capacities that every Kentucky student should have developed.⁹⁶ These capacities included the following:

- (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.⁹⁷

Additionally, at the heart of this decision, the court enumerated what it meant to have an “*efficient* system of common schools.”⁹⁸ Over eight pages, the court

⁹⁰ Susan Perkins Weston & Robert F. Sexton, *Substantial and Yet Not Sufficient: Kentucky's Effort to Build Proficiency for Each and Every Child*, CAMPAIGN FOR EDUC. EQUITY, TEACHERS C., COLUM. U. 5 (Dec. 2009), <https://files.eric.ed.gov/fulltext/ED523999.pdf> [<https://perma.cc/WC68-TSH3>].

⁹¹ KY. CONST. § 183.

⁹² *Rose*, 790 S.W.2d at 191.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Heise, *supra* note 40, at 1163–64.

⁹⁶ *Rose*, 790 S.W.2d at 212.

⁹⁷ *Id.*

⁹⁸ Schugurensky, *supra* note 11.

discussed the varying characteristics of an efficient system: “one established and maintained by the General Assembly to be substantially uniform throughout the state, free to all Kentucky children, and one that provides equal educational opportunity regardless of place of residence or economic conditions.”⁹⁹ Furthermore, an efficient system of common schools must be “sufficiently funded, free of waste, duplication, mismanagement, and political influence and it must have as its goal the development of seven [aforementioned] specified capacities.”¹⁰⁰

While initial reaction to the decision ranged from dismay to euphoria, the Kentucky legislature eventually “embraced the decision and used its political capital to reform the public school system in Kentucky.”¹⁰¹ Part III addresses this arduous journey toward proficiency in Kentucky education.

III. THE CURRENT STATE OF KENTUCKY EDUCATION

Based largely on the spearheading efforts of Edward F. Prichard in the early 1980s, the Prichard Committee was formed as an educational advocacy group committed to four fundamental priorities for Kentucky education: (1) strong standards and accountability; (2) adequate financing; (3) effective teaching; and (4) sustained and expanded engagement.¹⁰² Setting the goal of top twenty in the nation by the year 2020, the Prichard Committee has seen marked growth in many areas with several opportunities for further improvement.¹⁰³

Notably, in 2018, six areas of Kentucky education warranted praise: (1) 7th in high school graduation rate; (2) 9th in fourth-grade science; (3) 17th in fourth-grade reading; (4) 18th in eighth-grade science; (5) 18th in high school graduates going to college; and (6) 19th in two-year postsecondary graduations.¹⁰⁴ After progress was made since the inception of the 2020 goal in 2008, however, Kentucky currently has lost ground in several areas: (1) preschool enrollment; (2) eighth-grade reading; (3) eighth-grade math; (4) higher education funding; and (5) the share of higher education funding paid by families.¹⁰⁵ Not surprisingly, correlations can be made between the erosion of SEEK Funding (Kentucky’s per pupil annual expenditures) and the regression of Kentucky rankings in many categories.¹⁰⁶

In terms of data specific to Kentucky schools, reports on school finance detail that a “funding gap between rich and poor schools remains in Kentucky, in part because lawmakers did *not* deal with the fundamental imbalance that comes with a

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Top 20 By 20: 2018 Update*, PRICHARD COMMITTEE, <http://www.prichardcommittee.org/library/wp-content/uploads/2018/11/Top2018-FINAL-VERSION.pdf> [<https://perma.cc/TV27-4FSL>].

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ See Ashley Spalding, *Governor’s Budget Cuts Per-Student SEEK Funding*, KY. CTR. ECON. POL’Y: KY. POL’Y BLOG (Jan. 23, 2018), <https://kypolicy.org/governors-budget-cuts-per-student-seek-funding> [<https://perma.cc/J3PZ-5M3N>].

reliance on local property taxes.”¹⁰⁷ Furthermore, in terms of academic achievement, Kentucky schools have plateaued during the past five years on statewide accountability measures, according to Kentucky Interim Education Commissioner Wayne Lewis when detailing the 2017–2018 Kentucky test results.¹⁰⁸ Specifically, in the critical areas of reading and math, the 2017–2018 Kentucky test results remained “largely flat.”¹⁰⁹ In fact, only half of the elementary and middle school students tested managed to meet a standard of proficiency or higher.¹¹⁰ Commissioner Lewis also reported that “achievement gaps between student populations continue to be incredibly disturbing.”¹¹¹

While the data were indeed sobering for reading results, the schools located within urban districts (such as Jefferson County and Fayette County) bore a large share of disappointing test scores: “[i]n 23 schools more than half of the students tested couldn’t read beyond a beginner or novice level. Most of those schools were in Jefferson County, with one – William Wells Brown – from Fayette County.”¹¹² In regard to math assessment data, again the trend continued: “[n]ineteen schools had more than half of those tested performing at the lowest level in math.”¹¹³ To wit, “[s]ixty-three schools had 40 percent or more of the students tested performing at the bottom level, including Bryan Station High School, William Wells Brown Elementary and Booker T. Washington Elementary in Fayette County.”¹¹⁴

Through the vehicle of school finance challenges of arriving at education as a fundamental right, Part IV seeks to determine if there is a solution for Kentucky and beyond to deliver on the promise of an equal educational opportunity for all children.

IV. A NEW VISION FOR KENTUCKY AND BEYOND

The traditional Kentucky adage of “we are not first, but we are not worst” should not be the measuring stick of equal educational opportunity for the Commonwealth. But, in spite of the variation of per pupil spending within the state, the most alarming disparity arises *among* the states.¹¹⁵ Legal scholar Goodwin Liu noted that

¹⁰⁷ Claudio Sanchez, *Kentucky’s Unprecedented Success in School Funding is on the Line*, NPR (Apr. 26, 2016, 7:00 AM), <https://www.npr.org/sections/ed/2016/04/26/475305022/kentuckys-unprecedented-success-in-school-funding-is-on-the-line> [<https://perma.cc/GGD8-U9D3>].

¹⁰⁸ Valarie Honeycutt Spears, *Kentucky schools face ‘a daunting moment of truth.’ Here’s what new test scores show.*, LEXINGTON HERALD-LEADER (Sept. 26, 2018, 12:27 AM), <https://www.kentucky.com/news/local/education/article218935950.html>.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* (Commissioner Lewis also commented, “[t]his is a daunting moment of truth for our state. We cannot lie to ourselves about what these scores mean any longer. While the data are sobering, it allows us to get an accurate picture of where our schools are and strengthens our conviction in what is needed in the months and years ahead Instead of being discouraged, this is a call to action for schools, districts, educators, parents, students, and community and business leaders. We must take bold and immediate action for the benefit of our students.”).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ Kimberly Jenkins Robinson, *No Quick Fix for Equity and Excellence: The Virtues of Incremental Shifts in Education Federalism*, 27 STAN. L. & POL’Y REV. 201, 202–03 (2016) (“Federal options for

“roughly two-thirds of nationwide inequality in [district] spending is between states and only one-third is within states.”¹¹⁶ And, while admittedly, more money does not necessarily equate to higher student achievement, there is a large body of research that states the “positive effect of increased funding for obtaining particular resources and student outcomes.”¹¹⁷ One such study by the National Bureau of Economic Research states:

[A]lthough we find small effects for children from affluent families, for low-income children, a 10% increase in per pupil spending each year for all 12 years of public school is associated with 0.46 additional years of completed education, 9.6% higher earnings, and a 6.1 percentage point reduction in the annual incidence of adult poverty. The results imply that a 25% increase in per pupil spending throughout one’s school years could *eliminate* the average attainment gaps between children from low-income . . . and nonpoor families . . . [¹¹⁸]

Therefore, per pupil spending is a palatable proxy for the way the general public interprets school reform and improvement data. School finance cases, however, usually make two important assumptions: (1) “school quality (or, in today’s school finance lexicon, school ‘adequacy’) is best understood in terms of student academic achievement” and (2) “student academic achievement is a function of per pupil spending.”¹¹⁹

Nevertheless, if money contributes positively to student achievement—which a large body of research confirms—then the dismal student achievement data for minority populations and urban centers should be even more alarming in Kentucky and across America. Thus, it is imperative to find an equitable solution—one that goes beyond state school finance litigation and addresses this issue of disparity among the several states in a more comprehensive and uniform manner.

A. *Rights and Rose*

As previously discussed, many legal scholars cite *Rodriguez* for the proposition that a fundamental right to education vis-à-vis the Fourteenth Amendment and its Equal Protection Clause has been foreclosed.¹²⁰ Nonetheless, however narrowly,

addressing spending disparities are particularly crucial because the greatest variation in per pupil spending occurs between states, rather than within states.”)

¹¹⁶ Liu, *supra* note 47, at 333 (quoting Shelia E. Murray et al., *Education-Finance Reform and the Distribution of Education Resources*, 88 AM. ECON. REV. 789, 808 (1998)). Liu further notes that “State-court school finance litigation ‘is able to attack only a small part of [educational] inequality,’ and ‘it seems unlikely that further litigation will yield large reductions in national inequality in the future.’” *Id.* at n.5.

¹¹⁷ Robinson, *supra* note 115, at 209.

¹¹⁸ *Id.* at 208–09 (quoting C. Kirabo Jackson et al., *The Effects of School Spending on Educational and Economic Outcomes: Evidence from School Finance Reforms*, 131 Q. J. ECON. 157, 160 (2016) (emphasis added)).

¹¹⁹ Heise, *supra* note 10, at 1451 (“Courts that accept these pivotal assumptions presume causal simplicity and clarity where reality is anything but simple and clear.”).

¹²⁰ See Thro, *supra* note 34, at 601–02 (“However, because *Rodriguez* had foreclosed the use of the Federal Constitution . . .”).

school finance litigation based on the federal Constitution is still an open question.¹²¹ While negative rights preclude the government from infringing on a specific right, one strand of legal thought extends equal status to the positive rights that the government has a duty to maintain.¹²² Therefore, by extending the legal scholarship on the Constitution to include both negative rights *and* positive rights, and “equal constitutional status” for each,¹²³ a strong argument can be made for the inclusion of a fundamental right to education inherent in the federal Constitution. Embedded in this assumption, in what legal scholar William Forbath termed the “social citizenship tradition,”¹²⁴ is this notion that “there is a ‘basic human equality associated with the concept of full membership of a community’ and that it is the duty of government to ensure the civil and political as well as social and economic prerequisites for the realization of this equality.”¹²⁵

Essentially, “it is a mistake to equate the adjudicated Constitution with the full meaning of the Constitution itself”¹²⁶ since the “adjudicated Constitution often falls short of exhausting the substantive meaning of the Constitution’s open-textured guarantees.”¹²⁷ Other legal scholars posit that judicial doctrine does not capture truly the full extent of the federal Constitution and therefore leaves “the full scope of constitutional norms ‘underenforced.’”¹²⁸ This enlargement of the Constitution to include a fundamental right to education brings us full circle back to *Rose*, which instrumentally pivoted from negative rights to positive rights in the Kentucky Constitution.¹²⁹

Regarding *Rose*, “the opinion ushered in a paradigm shift among state courts by enforcing a conception of education as a conception of education as a *positive* individual right under the state constitution.”¹³⁰ When the Kentucky Supreme Court required the state “to protect and advance” the “right to adequate education,” as quoted above in the seven capacities of a fundamental education, this requirement was a “textbook statement of a legislative duty correlative to a positive individual right.”¹³¹ Ultimately, adequacy now became a theory of relief through the “positive conception of individual rights and legislative duties relating to education[.]”¹³²

¹²¹ See Liu, *supra* note 47, at 332.

¹²² See *id.* at 336.

¹²³ See *id.* (“[C]ontrary to the conventional wisdom that ‘the Constitution is a charter of negative rather than positive liberties,’ the social citizenship tradition assigns equal constitutional status to negative rights against government oppression and positive rights to government assistance on the ground that both are essential to liberty.”).

¹²⁴ William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 1 (1999).

¹²⁵ Liu, *supra* note 47, at 336 (quoting T.H. Marshall, *Citizenship and Social Class*, in T.H. MARSHALL & TOM BOTTOMORE, *CITIZENSHIP AND SOCIAL CLASS* 2, 6 (Pluto Press 1992) (1950)).

¹²⁶ *Id.* at 338 (citing LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004)).

¹²⁷ *Id.*

¹²⁸ *Id.* (quoting Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978)).

¹²⁹ See Bauries, *supra* note 18, at 708–11.

¹³⁰ *Id.* at 708.

¹³¹ *Id.* at 709.

¹³² *Id.*

While policy decisions may not merit judicial involvement, “infringements upon rights call for judicial correction.”¹³³

Moving from equalization to adequacy,¹³⁴ while *Rose* sparked what came to be known as the “adequacy movement,”¹³⁵ challenges to school finance and state educational systems failed to solve the most pressing problem of “nonuniformity in education spending: differences in spending across [the] states.”¹³⁶ The argument, therefore, is typically made at the state level to attack educational funding through the disparities among the various school districts within the state.¹³⁷ Attacking school reform at the state level, however, is able to “attack only a small part of the inequality.”¹³⁸ Ultimately, for the state courts that have held that finance claims are indeed justiciable—the first hurdle to adjudication—and found for the plaintiffs, the “litigation victories have not generally led to greater educational equality or adequacy.”¹³⁹ Furthermore, “[s]chool finance research confirms that state funding systems are not effectively linked to the desired educational outcomes or meeting students’ needs, including successfully providing the content within state standards.”¹⁴⁰ Is the Pyrrhic victory for the plaintiffs indeed worth it, especially in light of the disappointing results on student achievement? No. Therefore, it is imperative that school funding advocates assume a new mode of attack and insist on legislative and judicial change at the federal level. As stated by Professor Chemerinsky, “without judicial action, equal educational opportunity will never exist.”¹⁴¹ In essence, federal mandates should be enacted to provide a flexible minimum benchmark of funding for states to provide an adequate education to all students.

For students to fully have equal educational opportunity, this minimum benchmark funding level must be implemented. As previously noted, even 250 years ago, the federal government was making provisions for education: “even as early as the Northwest Ordinance of 1787, the federal government set aside resources for education. The creation of the federal Department of Education in 1867, while not a cabinet level position, did reinforce the importance of education.”¹⁴²

Education scholars Allan Odden, Lawrence Picus, and Michael Goetz recommended a \$9,940 funding level based on 2005–2006 data to meet the needs of

¹³³ *Id.* at 710.

¹³⁴ *See id.* at 703–04.

¹³⁵ JOAN YOUNGMAN, *A GOOD TAX: LEGAL AND POLICY ISSUES FOR THE PROPERTY TAX IN THE UNITED STATES* 63 (2016) (quoting PAUL A. MINORINI AND STEPHEN D. SUGARMAN, *Educational Adequacy and the Courts: The Promise and Problems of Moving to a New Paradigm*, in *EQUITY AND ADEQUACY IN EDUCATION FINANCE* (Helen F. Ladd et al eds., 1999)).

¹³⁶ *Id.* at 63–64.

¹³⁷ *See id.*

¹³⁸ *Id.* at 64 (quoting Sheila E. Murray et al., *Education-Finance Reform and the Distribution of Education Resources*, 88 AM. ECON. REV. 789, 808 (1998)).

¹³⁹ Buszin, *supra* note 34, at 1631–32.

¹⁴⁰ Robinson, *supra* note 115, at 214.

¹⁴¹ MICHAEL A. REBELL, *COURTS AND KIDS: PURSUING EDUCATIONAL EQUITY THROUGH THE STATE COURTS* 5 (2009).

¹⁴² NAT’L CTR. FOR EDUC. STATISTICS, *supra* note 3, at 5.

ninety percent of students in achieving state proficiency standards.¹⁴³ When incorporating this benchmark, however, more than thirty states failed to meet the minimum needs of students to receive an adequate education, including Kentucky by \$838.¹⁴⁴ Among other recommendations suggested by Professor Kimberly Jenkins Robinson to remedy this inequity, the most cogent avenue of education reform is the “meaningful mandates” approach.¹⁴⁵ Yet, in order to maintain the tenuous balance of federalism and subsequent concerns, states, as the laboratories of democracy, must have flexible options to meet the needs of all learners within the state.¹⁴⁶

What constitutional principle would undergird such a federal statute? Michael Rebell makes the most convincing argument under the Equal Protection Clause of the Fourteenth Amendment that “children have a right to ‘meaningful educational opportunities that include a range of comprehensive services.’”¹⁴⁷ Rebell defines the contours of this fundamental right through what is termed “rights talk[,]” or the language Americans employ “to focus political dialogue, galvanize social movements, and press for major reforms.”¹⁴⁸ Furthermore, by couching the fundamental right of an equal educational opportunity as a right—and as a positive right—“will focus attention on the critical link between poverty and achievement gaps, and will require the government to provide the full range of resources necessary to meet the urgent educational needs of children from backgrounds of poverty.”¹⁴⁹

Since the Supreme Court issued the *Rodriguez* ruling, multiple state courts have examined identical issues of “the inequities in education funding under state equal protection and adequate education clauses.”¹⁵⁰ This development regarding equal educational opportunity was left open by the Supreme Court in *Rodriguez*.¹⁵¹ In fact, “[t]he adequacy issue had not been raised in *Rodriguez* because the plaintiffs there solely focused on the dollar disparities in funding between school districts.”¹⁵² Therefore, the adequacy issue of an equal educational opportunity is still ripe for litigation—especially in light of the many state courts in school finance challenges who have found for plaintiffs. To wit, the “ubiquity of affirmative duty provisions among state constitutions at the time of the adoption of the Fourteenth Amendment, the conclusion that education is a right ‘deeply rooted in American history and tradition,’ and is thus a ‘fundamental right,’ is almost inevitable.”¹⁵³ Ultimately, as promisingly noted by Rebell:

¹⁴³ See Robinson, *supra* note 115, at 216 (citing Allan R. Odden et al., *A 50-State Strategy to Achieve School Finance Adequacy*, 24 EDUC. POL’Y 628 (2010)).

¹⁴⁴ *Id.* at n.106.

¹⁴⁵ *Id.* at 232–37.

¹⁴⁶ See *id.* at 234.

¹⁴⁷ *Id.* at 233 (quoting Michael A. Rebell, *The Right to Comprehensive Educational Opportunity*, 47 HARV. C.R.-C.L. L. REV. 47, 90 (2012)).

¹⁴⁸ Rebell, *supra* note 6, at 52.

¹⁴⁹ *Id.* at 53.

¹⁵⁰ *Id.* at 90.

¹⁵¹ *Id.*

¹⁵² *Id.* at 91 (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973)).

¹⁵³ Scott R. Bauries, *The Education Duty*, 47 WAKE FOREST L. REV. 705, 723 (2012).

A current case involving the denial of comprehensive educational opportunity to students from backgrounds of poverty could bring to the Court's attention the strong evidence of educational inadequacy that plaintiffs developed in many of the state adequacy cases, thereby presenting persuasive evidentiary justification for the adequacy claim that was lacking in *Rodriguez*.¹⁵⁴

Education as a positive, fundamental right underscores an efficacious democracy. If students should be able to engage in political discourse, then a “minimally adequate education” should ensure this right with the requisite skills to fulfill this promise, as evidenced in many state court rulings.¹⁵⁵ Furthermore, it is not enough to just be minimally adequate, students should have the equal opportunity to engage at a high level since American society “cannot knowingly perpetuate a state of affairs in which voters cannot comprehend the ballot materials about which they are voting and jurors cannot understand legal instructions or major evidentiary submissions in the cases they are deciding.”¹⁵⁶ Even at the strict scrutiny level of judiciary review, plaintiffs would most likely succeed in convincing the court that there is no compelling reason for states not to fund a minimally adequate education: “a compelling reason to deny these children their right to an adequate basic education, since both federal and the state courts have repeatedly held that the cost factors cannot justify the denial of constitutional rights.”¹⁵⁷

With the Fourteenth Amendment underscoring a federal mandate to flexibly equalize a minimally adequate education for students, federal concerns should be allayed insofar as past efforts—such as No Child Left Behind and Race to the Top—have also couched federal initiatives in state-friendly terms. To succeed, “[i]mplementation of a right to comprehensive educational opportunity can best be effectuated through a cooperative, functional separation of powers whereby all three branches of the government are involved at both the federal and the state levels.”¹⁵⁸ Ultimately, courts cannot bear the entire burden of providing equal educational opportunity for all students; all branches of government must participate.¹⁵⁹

In thinking about the future, it is perhaps best to be reminded of our past whereby the Supreme Court reminded us that education is a fundamental right and that the call for the “full implementation of *Brown*'s vision of equal educational opportunity, cannot be achieved without the concerted efforts of all three branches of the government.”¹⁶⁰ As *Brown v. Board of Education* stated:

¹⁵⁴ *Rebell*, *supra* note 6, at 91–92.

¹⁵⁵ *Id.* at 93; *see id.* at 92 (“The virtual unanimity of state court findings in this regard is itself a strong indication of a pervasive national problem of educational inadequacy of which the U.S. Supreme Court should take note.”).

¹⁵⁶ *Id.* at 96.

¹⁵⁷ *Id.* at 97.

¹⁵⁸ *Id.* at 112–13.

¹⁵⁹ *See id.*; *see also id.* at 112 (“[F]ederal judges are not the only officials sworn to uphold the Constitution. The President and Congress, as well as the governments of the states and their political subdivisions are equally obliged to serve constitutional values . . . [.]” (internal footnote omitted)).

¹⁶⁰ *Rebell*, *supra* note 141, at 6.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.¹⁶¹

CONCLUSION

Rose v. Council for Better Education, Inc. was a moment in time whose impact was felt across America. Catalyzing a number of school finance litigation actions through the “third wave,” *Rose*’s emphasis on efficiency and an adequate education—moving from equality/equity to adequacy—changed education in Kentucky for the next thirty years. Nonetheless, perhaps even more significant, *Rose* introduced school finance litigation to the positive conception of rights—as opposed to the more traditional negative conception of rights—which opened the door for further state litigation based on adequacy, but, to an even greater extent, did not shut the door theoretically on what was potentially foreclosed by *Rodriguez*.

In conclusion, the two avenues for effective school reform—legislative and judiciary—are both equally effective means of achieving this goal of equal educational opportunity. Through minimum funding mandates and the relevancy of another *Rodriguez*-type suit, in the mold of *Rose*, the dream of education as a fundamental right appears plausible. With no easy answers, educators and taxpayers alike are hoping to rekindle some of the spark of the 1989 decision to precipitate education reform again and to meet the goals of adequacy, proficiency, and beyond.

¹⁶¹ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).