Kentucky Law Journal

Volume 98 | Issue 4 Article 3

2010

Foreword: Rights, Remedies, and Rose

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INTRODUCTION

In this Foreword to the University of Kentucky's "*Rose* at 20" Special Feature, I seek to introduce the three featured articles, as well as to identify two major paradigm shifts in school finance litigation that grew out of the Kentucky Supreme Court's decision in *Rose v. Council for Better Education*.[2] The *Rose* decision is commonly thought of as a bridge between prior education litigation strategies founded primarily on theories of equity or equality and subsequent litigation strategies founded primarily on theories of adequacy.[3] Although the distinction between these two

1 Assistant Professor of Law, University of Kentucky College of Law. J.D., *summa cum laude*, 2005, University of Florida; Ph.D., 2009, University of Florida. I would like to extend my most heartfelt thanks to the editors of the Kentucky Law Journal; to my colleagues Justin Bathon and Neal Hutchens of the University of Kentucky College of Education; to the three distinguished panelists who anchored the symposium that spawned the featured articles, R. Craig Wood, William E. Thro, and William S. Koski; to our distinguished moderator, Kern Alexander; and to the members of the Education Law Association for helping, each in very meaningful ways, to bring the issue of education finance litigation and the importance of the *Rose* case before a diverse audience of lawyers, academics, policy makers, and interested citizens. I would especially like to thank Governor Steve Beshear and First Lady Jane Beshear for their participation in and support of the symposium. Their tireless dedication to high-quality education in the Commonwealth of Kentucky stands as an example to state leaders everywhere. I would also like to thank Lee Todd, President of the University of Kentucky; David Brennen, Dean of the University of Kentucky College of Law; and Mary John O'Hair, Dean of the University of Kentucky College of Education for their participation and support. Finally, special thanks go to the sponsors of the "*Rose* at 20" Symposium evening, Wyatt, Tarrant & Combs, LLP and the Education Law Association.

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

3 The scholarly community has generally categorized this litigation into three "waves" of reform. *See, e.g.*, Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1152 (1995) (adopting the "wave" metaphor); William E. Thro, *A New Approach to State Constitutional Analysis in School Finance Litigation*, 14 J.L. & POL. 525, 530 n.14 (1998) [hereinafter Thro, *A New Approach*] (outlining the "wave" metaphor); 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, 600–04 (1994) [hereinafter Thro, *Judicial Analysis*] (further outlining the "wave" metaphor). Recently, scholars have begun to question the precision of the "wave" metaphor. *See* William S. Koski, *Of Fuzzy Standards and Institutional Constraints: A Re-examination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 SANTA CLARA L. REV. 1185, 1283–96 (2003) (explaining that no clear line divides equality-based strategies from adequacy-based strategies, and that in fact, both theories are present in most education finance cases); James E. Ryan,

strategies is well-worn, it obscures two important changes to state constitutional doctrine that help define where the post-*Rose* world began. The plaintiffs in *Rose* sued on the theory that the educational resources in the plaintiff districts were both inadequate and inequitable, but they won a far-reaching judgment based primarily on the total inadequacy of the entire state education system.[4] The two shifts I identify were integral to this decision and have been emulated by several courts since.

Although the *Rose* decision is primarily noted for the success of adequacy theory as a strategy for proving constitutional harm, less noticed doctrinal innovations in *Rose* lay in the court's treatment of education rights and the remedies warranted for their violation.[5] As to rights, the Kentucky court was among the first to enforce the right to education as a positive individual right.[6] As to remediation, the Kentucky court ushered in the still-dominant judicial view of separation of powers as an independent limit on judicial review at the remedial stage of litigation.[7] These two doctrinal changes distinguished *Rose* from the litigation that preceded it, and they remain relevant today.

I. RIGHTS AND REMEDIES BEFORE *ROSE*

Education reform litigation has always been concerned with rights. Beginning with *Brown v. Board of Education*,[8] and continuing through *San Antonio Independent School District v. Rodriguez*[9] and the numerous school finance cases that continue to be filed in most states, the courts have been faced with the question of the right of each person to an education. Although the United States Constitution contains no education provision,

Standards, Testing, and School Finance Litigation, 86 TEX. L. REV. 1223, 1237–38 (2008) (calling into doubt the distinctions made between the second and third "waves"); *id.* at 1229 n.35 (citing Richard Briffault, *Adding Adequacy to Equity*, *in* SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY 25, 25–27 (Martin R. West & Paul E. Peterson eds., 2007) (critiquing the use of the "wave" metaphor)); *see also* William S. Koski & Rob Reich, *When "Adequate" Isn't: The Retreat from Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545, 547 (2006) (making the prescriptive case for preserving equity as the ultimate strategic goal of school finance litigation). Nevertheless, the "wave" metaphor remains the dominant shorthand utilized in describing the history of this litigation.

4 *Rose*, 790 S.W.2d at 190–91, 215. Debra H. Dawahare, who represented the plaintiff districts, relates that, in referring to the relief that their clients ultimately received, lead counsel and former Kentucky Governor Burt T. Combs observed, "We asked for a thimbleful but got a bucketful." *See* Debra H. Dawahare, *Public School Reform: Kentucky's Solution*, 27 U. ARK. LITTLE ROCK L. REV. 27, 39 (2004).

5 *See Rose*, 790 S.W.2d at 205–06, 214, 216.

6 *Id.* at 206.

7 *Id.* at 214.

8 Brown v. Bd. of Educ., 347 U.S. 483, 492–93 (1954).

9 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 17 (1973).

each of the fifty states has in its constitution some provision mandating the establishment and maintenance of a tuition-free school system in the state.[10] A legitimate interpretation of such provisions is that they afford each individual living in a state some sort of "right" to education.

But does this right require a certain quality of education for each child, either by reference to the education that others receive or in the absolute? Education finance litigation seeks the answer to this question. Courts in most states have experienced constitutional challenges to state legislative enactments establishing and funding the state's education system.[11] Initially, plaintiffs brought challenges in federal and state courts based on the Equal Protection Clause of the Fourteenth Amendment.[12] Through its rulings in *Rodriguez* that education is not a federal fundamental right,[13] and that wealth is not a suspect classification,[14] however, the United States Supreme Court effectively closed the door to federal constitutional education rights claims, other than claims directly seeking to enforce *Brown*. The Court has kept the door closed through subsequent rulings.[15]

The rejection of education funding litigation in federal courts shifted this litigation to state courts and refocused it on state constitutions.[16] Initially, state-court suits were dominated by equity- and equality-based theories of relief.[17] Often, the central questions in the early cases were the same as those in *Rodriguez*.[18] Thus, courts were asked to determine whether education was a fundamental right in the state, or whether (real property) wealth was a suspect classification, on the way to deciding whether to apply strict scrutiny to legislative decisions allocating educational resources unequally—typically through the maintenance of funding schemes heavily reliant on ad valorem taxation of real property.[19]

In state courts, several of these suits were more successful than the *Rodriguez* suit was in federal court. These successes occurred most often where state courts declared that education was a fundamental, individual

10 R. CRAIG WOOD, EDUCATIONAL FINANCE LAW: CONSTITUTIONAL CHALLENGES TO STATE AID PLANS—AN ANALYSIS OF STRATEGIES 103–08 (3d ed. 2007). I will refer to each such provision discussed herein as the relevant state's "education clause." For a complete collection of the fifty state education clauses, see *id.*

11 *See, e.g.*, Heise, *supra* note 3, at 1151.

12 *Id.* at 1152.

13 *Rodriguez*, 411 U.S. at 37.

14 *Id.* at 28–29.

15 *See, e.g.*, Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 458 (1988) (declining to apply strict scrutiny analysis to a state's requirement for the payment of a transportation fee before a student could ride the public school bus).

16 Thro, *Judicial Analysis*, *supra* note 3, at 601–03.

17 *Id.* at 601.

18 *Id.* at 600–03.

19 *See* WOOD, *supra* note 10, at 69–70 (outlining the history of the "equity" strategy).

right under the state constitution, and state defendants could not justify identified inequalities as narrowly tailored to a compelling state interest.[20] The approach used during this era should sound familiar because it was identical to the federal approach to fundamental rights,[21] save that, unlike under the Federal Constitution, education could actually be considered a fundamental, individual right under some state constitutions.[22]

This mostly "lockstep" approach[23] to constitutional adjudication supported several decisions—both for and against the state—during what Professor Thro calls the "Second Wave"[24] of education finance litigation,[25] allowing plaintiffs bringing these suits to cite familiar precedent and to place education rights into the familiar mold into which all constitutional rights—state and federal—had previously fit comfortably: the mold of negative rights. 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.[26] For example, the negative right to equal

20 *See, e.g.*, Serrano v. Priest, 557 P.2d 929, 951 (Cal. 1976) (declaring that the interaction of the "fundamental interest" in education under the state constitution and the "suspect" nature of the classification of local property wealth require the application of strict scrutiny); Horton v. Meskill, 376 A.2d 359, 373 (Conn. 1977) (declaring the system to be in violation of the state constitution's equality provisions and stating: "we must conclude that in Connecticut the right to education is so basic and fundamental that any infringement of that right must be strictly scrutinized").

21 *See, e.g.*, Kramer v. Union Free Sch. Dist., 395 U.S. 621, 625–33 (1969) (applying strict scrutiny to a New York education statute that only permitted landowners and the parents of school children to vote in school board elections because the law placed a burden on the fundamental right to vote, and it was not narrowly tailored to achieve a compelling state interest).

22 This similarity illustrates the propensity of federal constitutional interpretive doctrine to be adopted wholesale in the states, a practice which has been oft and famously criticized. *See, e.g.*, James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 788–93 (1992) (explaining the problems revealed by the "lockstep" interpretive approach utilized by many state supreme courts in adjudicating individual rights claims under state constitutions, treating federal and state rights doctrine as indistinguishable); *see also* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) (admonishing state courts to develop their own conceptions of individual rights independent of federal doctrine); Robert F. Williams, *A "Row of Shadows": Pennsylvania's Misguided Lockstep Approach to Its State Constitutional Equality Doctrine*, 3 WIDENER J. PUB. L. 343, 347–48 (1993) (criticizing the "lockstep" approach of the Pennsylvania Supreme Court in interpreting the various equality–based provisions of the state constitution by applying federal equal protection doctrine); Robert F. Williams, *Foreword: The Importance of an Independent State Constitutional Equality Doctrine in School Finance Cases and Beyond*, 24 CONN. L. REV. 675, 678 (1992) (leveling a similar critique against the Connecticut Supreme Court).

23 *See* WOOD, *supra* note 10, at 69–70 (outlining the history of the "equity" strategy).

24 Thro, *Judicial Analysis*, *supra* note 3, at 601–03.

25 *See* WOOD, *supra* note 10, at 69–70.

26 *See* David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 864–66 (1986) (outlining the concepts of positive and negative rights and evaluating commonly recognized constitutional rights under these competing paradigms).

protection allows its holder to prevent the government from treating the holder differently from those similarly situated.[27] The negative right to procedural due process of law allows the holder to prevent the government from taking the holder's life, liberty, or property without providing the holder with notice and an opportunity to be heard on the issue.[28] This conception of rights was and remains the most familiar one to federal constitutional adjudication,[29] and it was the dominant conception of rights evident in state constitutional litigation over education finance until *Rose* was decided.

Importantly, to avoid violating a negative right, all the government must do in most cases is simply refrain from taking unconstitutional action.[30] Thus, if the government is determined to be acting in violation of a negative right to equality by operating a funding scheme that makes educational resource levels dependent on unequal local property wealth, it need only eliminate the influence of local property wealth from the formula to remedy the harm. So, for example, if a state's education finance system were to be held unconstitutional based on its violation of the negative rights to equal protection held by those in property-poor districts, valid remedial responses might include eliminating a local effort requirement for local districts, engaging in resource recapture to equalize ultimate local revenues, or applying state revenue to guarantee an equal tax yield for equal millage rates among local districts—basically any approach that would eliminate or neutralize the affirmative inclusion of local property

27 *See id.* at 880–81.

28 U.S. CONST. amend. XIV, § 1.

29 Judge Posner has most directly stated this widely-held view. *See, e.g.*, Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982) ("The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order."). This negative view of the rights embedded in the Federal Constitution has been widely criticized in the scholarly community. *See, e.g.*, Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2272–73 (1990); Michael J. Gerhardt, *The Ripple Effects of* Slaughter-House*: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 409–13 (1990). One scholar has recently extended these arguments to make a forceful case for a positive right to education under the Fourteenth Amendment. *See* Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 334–35 (2006) (locating a federal positive right to adequate education in the Fourteenth Amendment). Nevertheless, the negative rights paradigm endures in the federal courts.

30 Of course, remedies for the violation of negative rights have often required specific actions on the part of the government (orders to desegregate school districts, for example). Nevertheless, each of these remedial orders was crafted to remedy a harm caused by affirmative government action in violation of the rights of identifiable individuals, and such harm could have been avoided in every case by the simple expedient of refraining from acting in violation of these individual rights (by never forcibly assigning black students and white students to strictly segregated schools, for example). *See* Currie, *supra* note 26, at 873–74 (making this same point in the context of other affirmative orders to remedy violations of negative rights).

wealth as a distinguishing factor in local funding.

The plaintiffs during the Second Wave achieved some notable victories, and they were successful at convincing courts to order these types of remedies for inequality in some states. Nevertheless, they also noticed and lamented the potential for these negative remedies to result in an equality of poverty, the political impracticality of recapture and redistribution from wealthier districts to poorer ones, and the sheer ineffectiveness of equalizing funding where local factors often require extra funding to equalize opportunities.[31] A new approach was needed, but the old conceptions of education as a negative right could not support it.

II. *ROSE* AND RIGHTS

When Chief Justice Stephens conceived the form of the *Rose* opinion late during a sleepless night at his home in Lexington,[32] he doubtless had little idea that the decision would do more than invalidate the indisputably inadequate system of education[33] then in place in the Commonwealth of Kentucky—or at least "destabilize"[34] it, as Professor Koski puts it. Nevertheless, the opinion did much more. It ushered in the new "Third Wave" of education finance litigation.[35] It showed that, despite the lingering failures of equity–based litigation, state supreme courts were not ready to leave the field of education finance yet. It also catalyzed the complete overhaul of the education system in Kentucky, resulting in measurable improvements in outcomes and large expenditure increases.

Most importantly, though, 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. In contrast to a negative individual right, which merely allows the holder to prevent unconstitutional government actions, a positive right theoretically allows its holder to compel government action.[36] That is, a holder of

31 *See, e.g.*, Michael Heise, *Equal Educational Opportunity, Hollow Victories, and the Demise of School Finance Equity Theory: An Empirical Perspective and Alternative Explanation*, 32 GA. L. REV. 543, 579–85 (1998) (explaining these theories and introducing the alternative explanation that remedies did not have their desired effects of centralization of and increases in spending).

32 *See* William H. Fortune, *Tribute to Robert F. Stephens, in* Joseph E. Lambert et al., *Tribute to Robert F. Stephens*, 91 KY. L.J. 289, 296 (2003) ("[Chief Justice Stephens] told the students that he woke in the middle of the night, and unable to sleep for thinking about the case, he went downstairs for a vodka and tonic and—Eureka!—it came to him—'The whole system must be struck down as unconstitutional.'").

33 *See* Dawahare, *supra* note 4, at 32–33 (describing the sad state of the education system in Kentucky at the time of the suit).

34 *See infra* note 63 and accompanying text.

35 *See* Thro, *Judicial Analysis*, *supra* note 3, at 603.

36 *See* Currie, *supra* note 26, at 864.

a positive right has the ability to compel the political branches to act to further the holder's constitutional interest, rather than simply the power to prevent the political branches from interfering with it.

Identifying an individual right to adequate education under the Kentucky Constitution, the *Rose* court held:

> A child's right to an adequate education is a fundamental one under our Constitution. *The General Assembly must protect and advance that right.* We concur with the trial court that an efficient system of education must have as its goal to provide each and every child with at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) 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.[37]

The requirement to "protect and advance" the "right to adequate education" is a textbook statement of a legislative duty correlative to a positive individual right.[38]

The Kentucky Supreme Court, in stating this positive conception of individual rights and legislative duties relating to education, opened the doctrinal door to adequacy as a theory of relief.[39] For, without the

37 Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989) (emphasis added).

38 The notion that duties and rights are "jural correlatives" was first developed by Wesley Newcomb Hohfeld in two seminal articles. *See* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 710, 717 (1917); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30–37 (1913).

39 Some may argue that the 1979 case of *Pauley v. Kelly*, 255 S.E.2d 859 (W.Va. 1979), was the first state supreme court opinion to conceive of education rights in this way. It is true that the *Pauley* court interpreted the "thorough and efficient" language of the state constitution to derive the fundamentality of education rights in the state, and it is true that the *Pauley* court set forth several principles inherent in a "thorough and efficient" system as part of its formulation. *See id.* at 877 (listing elements of a "thorough and efficient" education system). It is also true that the *Rose* court cited the *Pauley* opinion with approval in developing its own standard. *Rose*, 790 S.W.2d at 209-10. However, a close reading of the *Pauley* opinion reveals that, as of 1979, there was no paradigm shift. The *Pauley* court, after declaring the right to education

grounding of a positive individual right to a certain quality of education resources, education finance adequacy claims present nothing more than broad, generalized grievances claiming that state appropriations should be increased. The existence of positive individual rights, however, gives these claims constitutional significance. Simply put: policy decisions are subject to legitimate dispute, and judges should question the value of their involvement in such disputes, but infringements upon rights call for judicial correction.[40] Indeed, state courts today often hold up an individual's right to education under the state constitution as a justification for judicial review in the face of separation of powers objections.[41] Thus, *Rose* provided plaintiffs in school finance adequacy cases with a powerful tool for surmounting the initial hurdle of justiciability—the tool of positive

"fundamental" in the state and listing its elements of a "thorough and efficient" education, went on to conduct the familiar equal protection analysis that had been adopted wholesale from the federal courts to adjudicate governmental violations of negative equality rights:

> We conceive that both our equal protection and thorough and efficient constitutional principles can be applied harmoniously to the State school financing system. Certainly, the mandatory requirement of "a thorough and efficient system of free schools," found in Article XII, Section 1 of our Constitution, demonstrates that education is a fundamental constitutional right in this State.
>
> Because education is a fundamental constitutional right in this State, then, under our equal protection guarantees any discriminatory classification found in the educational financing system cannot stand unless the State can demonstrate some compelling State interest to justify the unequal classification.

Pauley, 255 S.E.2d at 878 (citations omitted). An even better argument can be made that the Washington Supreme Court's 1978 decision in *Seattle School District v. State*, 585 P. 2d 71 (Wash. 1978), accomplished the paradigm shift identified here. In *Seattle*, the court actually both articulated and applied a positive rights-based conception of the state's education clause, striking down the legislature's use of special excise levies to fund the system. *See id.* at 98-104. However, and perhaps due to the uniquely strong language of the Washington Constitution, which designates education as a "paramount duty of the state," *see id.* at 91, education finance plaintiffs failed to adopt a positive rights conception to ground challenges under other state constitutions until after *Rose* was decided more than ten years later. Thus, both the *Pauley* opinion and the *Seattle* opinion, while important in laying the foundation for *Rose*, failed to accomplish the paradigm shift in conceptions of education rights that *Rose* accomplished.

40 This distinction stems from the Supreme Court's initial articulation of both the practice of judicial review and the limits placed on such review of political questions in the venerable case *Marbury v. Madison*. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803) ("The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.").

41 *See* Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. (forthcoming 2010) (manuscript at 48–49, on file with author) (discussing the individual rights justification used in several state courts to overcome justiciability concerns).

rights.

III. *ROSE* AND REMEDIES

The innovation of the *Rose* court did not stop with its shifting of rights paradigms. The court ultimately held the entire state education system unconstitutional, and was immediately faced with the question of how to fashion a remedy. It simply would not do to employ the familiar negative-rights approach and enjoin the offending legislation from being applied to the aggrieved rights-holders—that would have left the children of Kentucky with no education at all as a remedy for inadequate education.

Perhaps the court could have taken notice of the numerous desegregation cases that had reached consent decrees in the federal courts and attempted to fashion a monitoring system like those in place to enforce these desegregation decrees.[42] The will was certainly there, and it would seem that, if the entire system needed to be redesigned, it would help to have the court involved in the redesign to make sure that it was completed. However, unlike the federal courts carrying out desegregation consent decrees, the Kentucky Supreme Court was faced with a state constitutional provision specifically mandating the distribution and separation of governmental powers.[43]

Separation of powers clauses are unique features of many state constitutions that create a very clear contrast with the more familiar Federal Constitution, which has no language relating to separation of powers.[44] Kentucky's version of this command appears in two clauses. The first, mandating the distribution of the powers of government, provides:

> The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.[45]

The second, prohibiting encroachment upon one branch's powers by a member of another branch, provides:

> No person or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except

42 For a comprehensive, but critical overview of these decrees, see GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 39–170 (2d ed. 2008).

43 *See Rose*, 790 S.W.2d at 213–14 (outlining the separation of powers provisions upon consideration of remedial matters).

44 *Id.* at 214.

45 KY. CONST. § 27.

> in the instances hereinafter expressly directed or permitted.[46]

In evaluating the portion of the trial court's order establishing judicial monitoring, which would have required periodic status reports from the legislature on the progress of the reform of the system, the *Rose* court cited these provisions, rejected just the portion of the trial court opinion that would have maintained enforcement jurisdiction, and stated:

> One last point must be disposed of. We are referred by appellees to several federal cases where federal courts maintained continuing supervision over its own order—e.g., supervision of prisons, court ordered busing, etc. The United States Constitution has no separation of powers provision within it. The separation of powers doctrine in the Federal area, has been recognized in federal common law. We on the other hand, are faced with a strongly written, definitive constitutional scheme. We must, perforce, follow our constitution. The federal cases and situations referred to are clearly not even persuasive here.[47]

Following that pronouncement, the court "decline[d] to issue any injunctions, restraining orders, writs of prohibition or writs of mandamus."[48] The court also did not retain jurisdiction over the case.[49]

In so deciding, the *Rose* court was the first to employ what I have elsewhere referred to as "remedial abstention."[50] Judicial abstention from the remedial process after rendering a judgment in favor of the plaintiffs is, as far as I can tell, unique to education finance litigation. This form of abstention is similar to the form of abstention that results from the application of the political question doctrine, and it stems from identical concerns. The political question doctrine counsels courts to abstain from adjudicating the merits of claims over which they otherwise have jurisdiction, due to concern for the separation of powers and the potential for irreconcilable conflicts with a coordinate branch of government.[51]

Remedial abstention, as exemplified by the *Rose* court, also results from a concern over separation of powers, focusing on the inevitable intrusion upon the functions of a coordinate branch that would result from active judicial remediation.[52] The only doctrinal difference between the

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46 *Id.* § 28.

47 *Rose*, 790 S.W.2d at 214.

48 *Id.* at 215.

49 *Id.* at 215–16.

50 *See* Bauries, *supra* note 41 (manuscript at 52–54, on file with author).

51 *See* Baker v. Carr, 369 U.S. 186, 210 (1962) (explaining the political question doctrine as "primarily a function of the separation of powers").

52 *See* Bert T. Combs, *Creative Constitutional Law: The Kentucky School Reform Law*, 28 HARV. J. ON LEGIS. 367, 370 (1991) (describing the influence of the explicit separation of powers provisions in the Kentucky Constitution and the general concerns over the practicality of

two appears to be the timing of the decision to abstain, but the practical difference is that remedial abstention at least allows the court to construe the constitution and decide whether the challenged legislative action satisfies it, while total abstention at the threshold stage of litigation avoids all review of the merits.[53]

The appeal of this approach is understandable. Judicially directed or monitored remediation of constitutional harms to individual rights to adequate educational resources would inevitably place the courts in direct or indirect control of state appropriations and revenue policy. Indeed, in the few cases where injunctive remedies have been ordered, these remedial orders have tended to do just that.[54] In contrast, remedial abstention allows for a court to construe the state constitution, but to avoid any activity that could be considered legislating.

In Kentucky, remedial abstention seems to have worked—the legislature took its cue from the court and enacted the most sweeping education reform legislation then seen.[55] In other states, however, the data on remedial abstention are inconclusive.[56] Even in Kentucky, the original plaintiffs recently returned to court to seek similar relief, albeit unsuccessfully.[57] Since *Rose* was decided, however, courts throughout the country have taken notice of this approach to remediation, and several have adopted it.[58] Thus, although the use of remedial abstention may be

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any remedial order against the legislature as the primary concerns in the case).

53 Referring to the then-nascent approach as "remedial deference," Professor George D. Brown has termed the decisions employing remedial abstention "binding advisory opinions." *See* George D. Brown, *Binding Advisory Opinions: A Federal Courts Perspective on the State School Finance Decisions*, 35 B.C. L. REV. 543, 563–67 (1994) (analyzing the unique remedial approach then emergent in the state courts in education finance cases). My own analysis of the cases persuades me that, if "deference" to the legislature is indeed what is being displayed, then such deference is total at the remedial stage. Thus, I prefer the term "remedial abstention" as a more precise description of the approach used by the *Rose* court and many that followed it.

54 *See, e.g.*, Montoy v. State, 112 P.3d 923, 940 (Kan. 2005) ("Specifically, no later than July 1, 2005, for the 2005–06 school year, the legislature shall implement a minimum increase of $285 million above the funding level for the 2004–05 school year, which includes the $142 million presently contemplated in H.B. 2247.").

55 *See* Kern Alexander, *The Common School Ideal and the Limits of Legislative Authority: The Kentucky Case*, 28 HARV. J. ON LEGIS. 341, 343 (1991) ("The court's decision led directly to a complete revision of the scheme of school finance and substantial modification in the organization and administration of the public schools. The case caused the legislature to fashion new tax legislation which resulted in increased revenues of over one billion dollars.").

56 *See* Bauries, *supra* note 41 (manuscript at 28, on file with author); Michael Heise, *Preliminary Thoughts on the Virtues of Passive Dialogue*, 34 AKRON L. REV. 73, 105 (2000) (relating the success of the Massachusetts experience with remedial abstention, which Heise calls "passive dialogue").

57 *See* Young v. Williams, No. 03-CI-00055 & No. 03-CI-01152 (Franklin Cir. Ct. Feb. 13, 2007) (order & opinion granting summary judgment to the state defendants, based on the failure to demonstrate inadequacy of the system).

58 *See, e.g.*, Hull v. Albrecht, 960 P.2d 634, 640 (Ariz. 1998) (invalidating legislative action

criticized,[59] it presents an attractive way of simultaneously valuing both judicial review and the separation of powers, and its use in *Rose* stands as an important innovation in state constitutional law adjudication.

IV. RIGHTS, REMEDIES, AND *ROSE* AT 20

As one can readily see from even a brief perusal of the literature, scholarship of education finance litigation is often concerned with the extent of judicial power and the proper parameters of its use.[60] In the preceding sections, and by way of a preface to the featured papers in this issue, I have offered my view of the paradigm shifts that *Rose* engendered in two important facets of this larger topic—judicial conceptions of education rights and judicial approaches to remediation.

Each of the three main papers included in this Special Feature wrestles with the difficult question of the legitimacy of judicial involvement in

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in establishing capital facilities funding on adequacy grounds, but deferring to the legislature as to a remedy, stating, "Accordingly, in deference to legislative authority and intent, we invalidate the entire Act, thereby enabling the legislature to reconsider the entire financing mechanism in light of the constitutional requirement that a 'general and uniform' system cannot allow some districts to employ local funding mechanisms that the state system withholds from other districts"); Idaho Sch. for Equal Educ. Opportunity v. State, 129 P.3d 1199, 1208–09 (Idaho 2005) (after holding portions of the state system unconstitutional, abstaining from any specific remediation out of concern for judicial usurpation of the legislative role to determine policy); McDuffy v. Sec'y of Executive Office of Educ., 615 N.E.2d 516, 552–54 (Mass. 1993) (invalidating the state education system on adequacy grounds, but abstaining from remediation); Columbia Falls Elementary Sch. Dist. v. State, 2005 MT 69, 326 Mont. 304, 109 P.3d 257, 261–63 (deferring to the legislature to define an adequate education); DeRolph v. State, 677 N.E.2d 733, 747 & n.9 (Ohio 1997) (after holding the state system unconstitutional on adequacy grounds, declining to order specific remedial action because it would encroach on a "clearly legislative function"); Abbeville County Sch. Dist. v. State, 515 S.E.2d 535, 541 (S.C. 1999) (after determining that educational adequacy was justiciable, admonishing the trial court on remand not to order any policy-directive remedy if a violation were identified, so as not to become a "super-legislature"); W. Orange-Cove Consol. I.S.D. v. Alanis, 107 S.W.3d 558, 563–64, 582 (Tex. 2003) (reaffirming the judiciary's authority and responsibility to adjudicate educational adequacy, but also leaving it to the legislature to determine how to meet the constitutional standard); Brigham v. State, 889 A.2d 715, 721–22 (Vt. 2005) (explaining that remediation of a constitutional violation on adequacy grounds would consist only of a declaration of unconstitutionality).

59 I have been a recent critic of this approach, arguing that remedial abstention places legislatures in the difficult position of having to continually guess at whether their responsive actions are sufficient. Scott R. Bauries, Judicial Review and the Separation of Powers in State Constitutional Litigation Challenging the Adequacy of Education Spending: Complementary Analyses and a Proposed Adjudicatory Model 200–06 (Aug. 10, 2009) (unpublished Ph.D. dissertation, University of Florida) (on file with University of Florida Library System and Pro-Quest Digital Dissertation Database); *see also* Heise, *supra* note 56, at 106 ("Specifically, problems—both theoretical and practical—arise when courts clearly articulate a constitutional right that for whatever reason defies an adequate constitutional remedy.").

60 *See* Bauries, *supra* note 41 (manuscript at 21–35, on file with author).

education finance cases, just as the *Rose* court and most other state supreme courts have had to, and each comes to a different conclusion regarding the proper extent, scope, direction, and goals of school finance litigation. From these varying scholarly perspectives we gain a richer understanding of the challenges that such litigation presents to the legitimacy of judicial review and remediation of alleged state constitutional harms, as well as the promise that such litigation may hold in helping to secure the benefits of education for all on equitable terms.

Professor R. Craig Wood presents and analyzes justiciability concerns in light of the influence of advocacy organizations in many education finance cases, focusing his analysis on the scientifically dubious methodologies employed by expert witnesses at the merits adjudication stage as a means of illustrating the lack of judicially manageable standards of adjudication.[61]

Professor William E. Thro begins from the proposition that the cases are uniformly justiciable, but contends that merits adjudication and remediation should be approached from a judicially "humble" posture—meaning maintaining fidelity to the constitutional text and giving effect to complementary constitutional provisions (such as separation of powers clauses) without abdicating the judicial role.[62] Professor Thro situates the *Rose* court as an early exemplar of a (mostly) "humble" court.[63]

Professor William S. Koski provides an illuminating analysis of modern education finance litigation as a form of institutional reform litigation highlighting the "destabilization" function of judging.[64] Professor Koski sees the *Rose* case as an early (but not necessarily catalytic) exemplar of this emerging approach to litigation–based reform, whereby courts act as facilitative, but not directive, participants in a highly interactive process of building constitutional meaning among many stakeholders.[65]

None of these papers specifically state their primary focus as an evaluation of the legitimacy of the exercise of judicial review in *Rose* or the cases that followed it. However, each paper offers a unique and nuanced perspective of the development and implementation of state constitutional norms in the field of education, and each offers a unique normative view of the expanses and limitations of the judicial role in education policy

61 *See* R. Craig Wood, Rose *at Twenty: Justiciability, Adequacy, Advocacy, and the American Dream*, 98 KY. L.J. 739 (2010).

62 *See* William E. Thro, *Judicial Humility; The Enduring Legacy of* Rose v. Council for Better Education, 98 KY. L.J. 717 (2010).

63 Thro, *supra* note 62, at 722.

64 *See* William S. Koski, *The Evolving Role of the Courts in School Reform Twenty Tears After* Rose, 98 KY. L.J. 789, 793 (2010) (citing James S. Liebman & Charles Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 207 (2003); Charles Sabel & William Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1016–28 (2003)).

65 Koski, *supra* note 64, at 794.

reform. These papers also demonstrate the enduring importance of the *Rose* decision in shaping the way that we think about constitutional rights, legislative duties, inter–branch relations, and litigation as a means to achieve public policy reforms in the states.