Education Finance Reform Litigation and Separation of Powers: Kentucky Makes Its Contribution

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INTRODUCTION

"We are ever mindful of the immeasurable worth of education to our state and its citizens, especially to its young people."¹

In 1989, Kentucky joined the ranks of states that have confronted the constitutionality of their educational finance systems.² These constitutional challenges have involved concerns with educational opportunity being dependent on where children live; since funding commonly is tied to property values, and since property

values fluctuate greatly based on location, unequal per pupil expenditures often result.³

During the past twenty years, constitutional challenges to school funding methods have been mounted in almost half of the states.⁴ The importance of state decisions on education questions is amplified by *San Antonio Independent School District v. Rodriguez,*⁵ where the United States Supreme Court held that education is not a fundamental right under the United States Constitution.⁶ The Court's decision pushed school reform into the state courts for litigants concerned that school funding disparity causes unequal educational opportunities.⁷

School reform litigation, which has been divided into three distinct waves by commentators,⁸ has offered a wide range of arguments, with varying degrees of success.⁹ These cases have proceeded along three lines: the *Rodriguez* "rational basis" test as adopted by state courts;¹⁰ education as a fundamental right subject to state equal protection guarantees;¹¹ and education as a fundamental right based on state education clauses, where grossly unequal per pupil expenditures result in a facially unconstitutional

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³ As one commentator noted, although local school districts, with the exception of Hawaii, receive both state and federal aid, much of the money comes from tax rates that are locally set based on the value of real property in the districts. This situation results in unequal per pupil funding. See Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation,* 19 J. L. & Educ. 219, 219 n.2 (Spring 1990).

Maximum rates may be set by state statute, foreclosing residents from providing higher tax funds. See, e.g., Ky. REV. STAT. ANN. § 160.475 (Michie/Bobbs-Merrill 1982) [hereinafter KRS]. Funding differences among local school districts in Kentucky showed great disparity. "The assessed valuation of property per pupil . . . ranged from $244,305.32 for Beechwood Independent . . . to only $29,806.67 for McCreary County." Brief for Appellees at 6, *Rose v. Council For Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989)(No. 88-SC-804-TG).

Three distinct methods have been tried in attempts to remedy funding disparities: flat rate grant foundation programs, power equalization plans, and need based foundation programs. See Thro, *supra,* at 219 n.3.


⁵ 411 U.S. 1 (1973).

⁶ *Rodriguez,* 411 U.S. at 35.


⁸ Thro, *supra* note 3, at 219, 222.

⁹ *Id.*

¹⁰ See *infra* notes 48-112 and accompanying text.

¹¹ See *infra* notes 113-68 and accompanying text.
system. Much of the individual states' inconsistent treatment of the school funding issue may be traced to the different state constitutional clauses and the diverse methods of school financing considered.

While attaining the goal of an equal education is a noble pursuit, it may be argued that this goal is best served through the political process, which recognizes the traditional concern of "local control" in the education context. Nevertheless, when a state legislature shirks its duty to provide an equal education, the courts must exercise the judicial power of constitutional interpretation. However, by engaging in judicial activism in traditional fields of legislative domain, such as education, state judiciaries leave themselves open to attack via principles of separation of powers including the related political question doctrine.

This Note examines the history of school funding decisions relating to the separation of powers doctrine. Part I provides a brief background on the separation of powers doctrine and its relationship to the political question doctrine. In Part II, this Note examines Rodriguez, and state decisions following its analysis. Part III discusses those state cases rejecting the Rodriguez rationale. Part IV explores recent state education cases. Finally, this Note concludes that Kentucky's contribution, Rose v. Council for Better Education, Inc., reflects the proper balance between separation of powers concerns and educational equality.

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12 See infra notes 169-220 and accompanying text.
13 See Note, supra note 4, at 1661-72.
14 See generally supra note 3.
15 The idea of local control has long been used as a justification for different school funding programs; this argument was persuasive in Rodriguez. Rodriguez, 411 U.S. at 50-53; see also Note, supra note 7 (recognizing that there is room for debate as to who can best govern the schools—local districts, the legislature, or the courts).
16 As one commentator has noted, the separation of powers doctrine in the federal system should not preclude courts from "refashion[ing]" schools, prisons, and other such administrative concerns, following the Supreme Court decisions in Brown v. Board of Education, 347 U.S. 483 (1954), and Baker v. Carr, 369 U.S. 186 (1962). Horowitz, Decreeing Organizational Change: Judicial Supervision of Public Institutions, in THE COURTS: SEPARATION OF POWERS 49 (Annual Chief Justice Earl Warren Conference, 1983) (Sponsored by Roscoe Pound-American Trial Lawyers Foundation). It is still an open question as to whether the loosening of doctrinal positions on separation of powers, standing, the political question doctrine, etc., has done more harm than good. See id. at 49-68.
17 See infra notes 23-47 and accompanying text.
18 See infra notes 48-112 and accompanying text.
19 See infra notes 113-68 and accompanying text.
20 See infra notes 169-220 and accompanying text.
21 790 S.W.2d 186 (Ky. 1989).
22 See infra notes 221-28 and accompanying text.
I. THE SEPARATION OF POWERS AND POLITICAL QUESTION DOCTRINES

The framers of the constitution, influenced by political theorists of the Age of Reason,23 formulated the doctrine of separation of powers in American jurisprudence. Separation of powers refers to both the division of government into three branches and the principle of "checks and balances."24 In practice, separation of powers analysis focuses on the differences in government functions among the three branches, resulting in the need to keep the branches separate.25 Resolution of separation of powers questions leads to a "functional" approach or, according to Holmes and Cardozo, a "judgment by labels."26 At first glance, separation of powers analysis is deceptively simple. In evaluating education policy, the conclusion may be reached that this function is better left to the more politically responsive legislature than the judiciary. This "judgment by labels" ignores the fact that implementation of a government program, like education, does not fit neatly under any one division of government.27 As one commentator has noted, in discussing the problems of functional separation of powers analysis:

The inefficacy of resorting to a general notion of separation of powers to resolve contests between . . . branches of government has long been demonstrated by our history . . . . [T]o resort to the idea that there is a tripartite division of powers, legislative, executive, and judicial, each term self-defining, is to deal with phantasms. If we take the basic arguments usually asserted that it is for the legislature to make the rules governing conduct, for the executive to enforce those rules, and for the judiciary to apply those rules in the resolution of justiciable contests, it soon becomes apparent that it is necessary to government that sometimes the executive and sometimes the judiciary has to create rules, that

24 Id. at 593.
25 See Strauss, Formal and Functional Approaches to the Separation-of-Powers Questions—A Foolish Inconsistency?, 72 Cornell L. Rev. 488, 492-93 (1987). Professor Strauss distinguishes between "functional" and "formal" approaches to separation of powers questions. Under a "formal" analysis, the functions of the three branches of government are thought incapable of being joined in a "shared" government powers system. A "functional" approach attempts to classify government action as legislative, executive, or judicial. Id.
26 See Kurland, supra note 23, at 593.
27 Id. at 603.
sometimes the legislature and sometimes the judiciary has to
enforce rules, and sometimes the legislature and sometimes the
executive has to resolve controversies over the rules. And these
variations became more imperative as government became more
invasive and complex. 28

The purpose of the doctrine was to protect individual liberty
from a centralized government. 29 However, the doctrine's impor-
tance has faded as protection of individual liberty has come, in
large part, from limitations imposed by the Bill of Rights. 30 As a
theoretical underpinning of our republican form of government,
reasons for adherence to the separation of powers doctrine in the
modern era derive from "the rule of law," which "is the last best
hope for avoiding the arbitrary tyranny of government." 31

While separation of powers remains a deeply rooted ideal fed-
erally, as the Supreme Court has recognized, "[T]he doctrine of
separation of powers embodied in the Federal Constitution is not
mandatory on the States." 32 Thus, education finance reform litig-
ation that centers on state constitutional law 33 derives any sepa-
ration of powers constructions from state constitutional provisions. 34

The Kentucky Supreme Court has held, "[T]he separation of
powers doctrine is fundamental to Kentucky's tri-partite system of
government and must be 'strictly construed.'" 35 In Legislative Re-
search Commission v. Brown, 36 the court rejected a call to construe
the doctrine liberally by distinguishing authority from states that
did not have the "unusually forceful" separation of powers lan-
guage of the Kentucky Constitution. 37

The court's meaning of "strict" construction is readily appar-
ent from the Brown decision. In Brown, the court examined sta-
tutes passed by the General Assembly that empowered the Legislative Research Commission (LRC) to veto administrative regulations and declared the LRC, "an independent agency of state government . . . which is exempt from control by the executive branch and from reorganization by the Governor." The court considered legislative and executive functions, strictly applying separation of powers to hold the LRC statutes unconstitutional. By examining traditional functions of the legislature, executive, and judiciary, the court’s separation of powers analysis approached a "judgment by labels." Nevertheless, commentary following Brown praised the court’s method, heralding the case as "Kentucky’s Marbury v. Madison."

A functional approach to separation of powers is distinguished from those instances when a court declines to examine a constitutional issue by deferring to another branch, because it perceives the judiciary as less competent to deal with an area of government activity. This judicial deference, on such matters as education policy, implicates the political question doctrine, which has a close relationship to separation of powers. As Justice Brennan noted in Baker v. Carr, "The nonjusticiability of a political question is primarily a function of the separation of powers."

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion.

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38 KRS § 7.090(1).
39 Brown, 664 S.W.2d at 912.
45 Id. at 217.
Without addressing academic concerns over the continued viability of the political question doctrine, in large measure, Justice Brennan's approach can be phrased: Where in the three branches of government does the constitutional issue reside? By any other name, this analysis appears little different from a "functional" approach to separation of powers. Indeed, when a court declines to rule on educational guarantees because education policy is traditionally for the legislature, the court's concerns touch both the separation of powers and political question doctrines. For the purposes of this Note, separation of powers broadly includes the functional division of powers among the three branches of government and the system of checks and balances implicated in the political question doctrine.

II. HISTORY OF SCHOOL FINANCE REFORM CASES: THE RODRIGUEZ RATIONAL BASIS TEST AND ITS ADHERENTS

A. The Rodriguez Decision

In 1973, recognizing that education is "important" based on Brown v. Board of Education, the Supreme Court in San Antonio Independent School District v. Rodriguez, held that education is neither an explicit nor an implicit fundamental right under the United States Constitution. Had the Court found education to be a fundamental right, Texas conceded that its funding system, under attack in the case, could not withstand a "strict scrutiny"
test under the fourteenth amendment's equal protection clause analysis.51

The Court approached the specific question of school funding constitutionality under a "rational basis" test,52 by balancing a "legitimate state interest" against the impact of the funding system on a suspect class of "poor" students. However, the Court did not find "poor" persons living in low property value districts to be such a suspect class.53 The court held that the Texas system of public finance did not purposely discriminate, but was a product of experimentation reflecting the beliefs of qualified educators and legislators.54

In dicta, the court expressed great reluctance to invade taxation and education, areas "reserved for the legislative processes of the various states," noting specifically, "[W]e do no violence to the values of federalism and separation of powers by staying our hand."55 Part of the Court's hesitance may be traced to the popularly held belief that education is best left to "home rule," local control attuned to community values.56 Moreover, the Court was unwilling to assume that it could correctly second-guess state legislators and educational experts of the fifty states by judicially implementing funding reforms designed to improve educational quality.57

The Rodriguez decision pushed school reform litigation into state courts, to depend on state constitutional guarantees of equal protection or state education clauses.58 The cases proceeding on state constitutional grounds have had mixed results, with claims based on either a combination of equal protection and education clauses or solely upon education clauses.59 As one commentator indicates, the success of these challenges, in large part, has de-

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51 Id. at 16.
54 Rodriguez, 411 U.S. at 55.
55 Id. at 58.
56 Id. at 50-53; see Note, supra note 7, at 799-800.
57 Rodriguez, 411 U.S. at 42.
58 Thro, supra note 3, at 225.
59 Id. at 222. For an excellent discussion of state education and equal protection clauses and their interplay in the field of school finance reform litigation, see also Note, supra note 4.
pend on the specific wording of the relevant education clauses.\textsuperscript{60} Whether a state court finds education to be a fundamental right correlates with the type of education clause at issue.\textsuperscript{61} In that respect, some states have followed the \textit{Rodriguez} equal protection analysis in the state equal protection context.\textsuperscript{62} Significantly, those state decisions recognized the Supreme Court's deference to state legislatures in formulating education policy and found separation of powers objections to a state constitutional right to education.\textsuperscript{63}

\section*{B. State Decisions Applying Rodriguez}

In \textit{Danson v. Casey},\textsuperscript{64} the Pennsylvania Supreme Court affirmed the dismissal of a complaint alleging that the state's education funding system violated a state constitutional mandate that the General Assembly "provide for the maintenance and support of a thorough and efficient system of public education."\textsuperscript{65} Notably, the "thorough and efficient" education clause involved is the same type of clause that has brought the most favorable results to reform litigants.\textsuperscript{66} In \textit{Danson}, where the complainants failed to allege legal harm to a class of school children, the court found no cause of action stated, and declined to find education a fundamental right under this clause.\textsuperscript{67} Likewise, the court followed the \textit{Rodriguez} analysis by questioning whether the school funding legislation bore a reasonable relation to the constitutional purposes of a "thorough and efficient" education, and not "the reason, wisdom, or expediency of the legislative policy with regard to education."\textsuperscript{68}

Recognizing that the legislature was in a better position to deal with education policy, the court refrained from action, in part, because of separation of powers.\textsuperscript{69} In sum, the court declined to define a "thorough and efficient" education where any rule the court promulgated concerning education funding "would be the rigid rule that each pupil must receive the same dollar expendi-

\textsuperscript{60} Note, \textit{supra} note 4, at 1661-72.
\textsuperscript{61} Id.
\textsuperscript{62} See \textit{infra} notes 64-104 and accompanying text.
\textsuperscript{63} Id.
\textsuperscript{64} 399 A.2d 360 (Pa. 1979).
\textsuperscript{65} \textit{PA. CONST.} art. III, § 14.
\textsuperscript{66} See Note, \textit{supra} note 4, at 1661.
\textsuperscript{67} \textit{Danson v. Casey}, 399 A.2d at 360, 367 (Pa. 1979).
\textsuperscript{68} \textit{Id.} at 366 (quoting Teachers' Tenure Act Cases, 197 A. 344, 352 (Pa. 1938)).
\textsuperscript{69} \textit{Id.} at 367.
From a judicial management viewpoint, the court felt that such a rule would inadequately serve the needs of different school districts, and more importantly, the future needs of school children.\textsuperscript{71}

Unlike the plaintiffs in \textit{Danson}, who relied on a "thorough and efficient" education clause,\textsuperscript{72} the plaintiffs in \textit{Board of Education, Levittown Union Free School District v. Nyquist},\textsuperscript{73} relied on federal and state equal protection guarantees, as well as a state education clause imposing a duty of maintaining "free common schools," in seeking a declaratory judgment that the school funding system was unconstitutional.\textsuperscript{74} After disposing of the federal claim under the authority of \textit{Rodriguez}, the court applied the \textit{Rodriguez} "rational basis" test to the state claim.\textsuperscript{75} While the level of education funding in New York exceeded most other states, there remained a wide disparity in per pupil funding between districts.\textsuperscript{76} Nevertheless, the court declined to find a state equal protection violation noting, like the \textit{Rodriguez} Court, that education is a high priority, but not a fundamental right triggering heightened equal protection analysis.\textsuperscript{77} Instead, the court found the less strict "rational basis" test satisfied since the state gave an equal amount of funds to each district, with the disparity in per pupil spending coming from different district property tax bases.\textsuperscript{78}

It has been recognized\textsuperscript{79} that cases like \textit{Nyquist}, proceeding under a "free and common schools" clause, which arguably imposes only a minimum duty on a state legislature, are distinguishable in many respects from those cases that utilize a "thorough and efficient" education clause.\textsuperscript{80} However, the \textit{Nyquist} court noted
that education is a concern of both the legislative and executive branches.\textsuperscript{81} Education involves taxation, a traditional legislative function, and the dual executive/legislative roles of distributing available state funds across all state programs.\textsuperscript{82} Further, the court expressed the longstanding belief of the American people that a public school education should reflect "local control."\textsuperscript{83} The mere existence of wide disparity in per pupil expenditures did not over-ride these concerns.

Similarly, the Maryland Court of Appeals, in \textit{Hornbeck v. Somerset County Board of Education},\textsuperscript{84} found no fundamental right to education under a "thorough and efficient" education clause, and thus employed a rational basis test in a school funding challenge.\textsuperscript{85} In a broadly worded lower court decision, education was found to be a fundamental right and, therefore, equal per pupil funding was constitutionally required.\textsuperscript{86} The lower court also held that a "thorough and efficient" education clause required a "system . . . full and complete by contemporary standards throughout the state."\textsuperscript{87}

By extensively examining the history of the framers' intent relating to changes in Maryland's education clause,\textsuperscript{88} the \textit{Hornbeck} court concluded that the clause did not demand a "uniform" system, but rather that the legislature had a duty to provide "all school districts . . . a basic public school education."\textsuperscript{89} Rejecting decisions from other "thorough and efficient" education clause states which held per pupil funding disparities constitutionally impermissible,\textsuperscript{90} the court followed \textit{Rodriguez} and held that education is not a fundamental right under the Maryland constitution, citing

\begin{itemize}
\item \textsuperscript{81} \textit{Nyquist}, 439 N.E.2d at 363, 453 N.Y.S.2d at 648.
\item \textsuperscript{82} \textit{Id.}
\item \textsuperscript{83} \textit{Id.} at 367-68, 453 N.Y.S.2d at 651-52; see also supra note 14.
\item \textsuperscript{84} 458 A.2d 758 (Md. 1983).
\item \textsuperscript{85} \textit{Hornbeck v. Somerset County Bd. of Educ.}, 458 A.2d 758, 782 (Md. 1983). That constitution provides: "The General Assembly . . . shall by Law establish throughout the State a thorough and efficient System of Free Public Schools; and shall provide by taxation, or otherwise, for their maintenance." Md. Const. art. VIII, § 1.
\item \textsuperscript{86} \textit{Hornbeck}, 458 A.2d at 769.
\item \textsuperscript{87} \textit{Id.} at 767-68.
\item \textsuperscript{88} While the 1864 Maryland Constitution called for simply a "uniform" system of schools, it was subsequently amended in 1867. Specifically, some delegates thought the phrase "efficient" required an "economical system." Additionally, the delegates expressed concern that future details of the system "should be left to the Legislature . . . ." \textit{Id.} at 772-73.
\item \textsuperscript{89} \textit{Id.} at 776.
\item \textsuperscript{90} \textit{Id.} at 777-79.
\end{itemize}
Danson and Nyquist as support for its decision. In that regard, the different wording of the respective educational clauses, “thorough and efficient” versus “free common schools,” was not significant to the Maryland court’s holding that education was no more fundamental than other government services such as a right to police or fire protection. Under the rational basis test, the court decided that the values of “local control” were satisfactory.

Notably, the Hornbeck court expressed concern over its inability to deal effectively with the perceived deficiencies of the public system. While the court recognized the “central role of education in... society,” it nonetheless admitted,

[It] is not within the power or province of members of the Judiciary to advance their own personal wishes or to implement their own personal notions of fairness under the guise of constitutional interpretation. The quantity and quality of educational opportunities to be made available to the State’s public school children is a determination committed to the legislature or to the people of Maryland through adoption of an appropriate amendment to the State Constitution.

In 1989, the Wisconsin Supreme Court, in Kukor v. Grover, became the most recent adherent of the Rodriguez rational basis test. Construing the Wisconsin education clause calling for education “as nearly uniform as practical,” the court upheld dismissal of a complaint alleging that unequal per pupil spending caused by different local tax bases was constitutionally infirm. The court found that the framers of the state constitution intended to provide for a method of distribution of school funds; the “uniform” provision was simply “to assure that the ‘character’ of instruction was as uniform as practicable.” This duty was met by minimum statutory standards of teacher education, a minimum number of school days, and a standard school curriculum.

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9 Id. at 778-79.
9 Id. at 785.
9 Id. at 788.
9 Id. at 790.
9 Id.
9 436 N.W.2d 568 (Wis. 1989).
9 Wis. Const. art. X, § 3.
9 Id. at 577.
10 Id. at 577-78.
Moreover, the court rejected an equal protection argument under the Wisconsin constitution by applying a modified *Rodriguez* rational basis test. The court recognized that "equal opportunity for education" is a fundamental right under Wisconsin's equal protection clause; however, where there was no complete denial of education, the proper standard to be applied was the rational basis test. The dichotomy between state and local control that existed since the adoption of the constitution warranted application of this lower test for spending disparities. Additionally, the court declined to become a "super-legislature," deferring instead to the legislative judgment in education, given the strong "political perceptions and emotionally laden views" over the issue of equality in education.

C. The Place of the Danson-Nyquist-Hornbeck-Kukor Line in School Finance Reform

The Maryland court, in *Hornbeck*, declined to follow the example of other states that had construed "thorough and efficient" education clauses to impart a fundamental right to education; similarly, other courts have declined to follow *Hornbeck*. Nevertheless, the *Danson-Nyquist-Hornbeck-Kukor* case line's adoption of the *Rodriguez* rational basis test provides an avenue for states to follow when faced with school finance reform litigation that seeks to cast education as a fundamental right, and is arguably not dependent on a particular education clause. While state courts naturally may decline to follow nonbinding Supreme Court rationale construing the federal Constitution, the *Rodriguez* analysis remains alive in school finance litigation.

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101 Id. at 579.
102 Id. at 579-80.
103 Id. at 580-81.
104 Id. at 582-83.
106 See *infra* notes 113-68 and accompanying text.
107 Commentators generally have noted the once expansive role state courts took in constitutional jurisprudence. However, to a certain extent, that role diminished as the states "tended to have a 'sorry' record in protecting individual rights." *See Note, supra* note 4, at 1657-58.

Nevertheless, some commentators believe that trend to be reversing, with states once
Undoubtedly, strict adherence to a "bright line" between legislative and judicial functions in this field avoids criticism under the separation of powers doctrine. The courts should not impose their own theories of education policy. However, if state courts are to regain their prominent role of advancing individual rights, as some commentators maintain, their decisions should not ignore the basic and necessary role of an adequate education in today's society. As a function of judicial authority, courts should readily receive education reform cases, despite protestations of the violation of separation of powers and the incapacity of the courts to deal with certain constitutional questions. As one commentator noted,

While common sense may dictate an appropriate degree of substantive deference, the broad policies behind the concept of judicial review require that the judiciary exercise its function, even

again occupying a protective role regarding individual's rights. Most forcefully, the argument continues that states are more representative of their citizens' values and as such more political:

Because of state constitutions' unique nature and greater political accountability to the public will, state courts should not feel compelled to follow blindly federal precedent when interpreting similar state constitutional provisions. Instead, the courts should strive to develop their own independent modes of analysis, taking into account such factors as the text of the state constitutional provision and the state's history, in addition to the matter being litigated.  

_Id._ at 1658.

This assumes that courts can readily discern the tri-partite structure in a functional separation of powers analysis. _See supra_ notes 25-27 and accompanying text.

See _supra_ note 107 and accompanying text.

Dissenting Justice Liebson would have held the Kentucky education reform case to be nonjusticiable, with the court precluded by the political question doctrine from undertaking review. _Rose_, 790 S.W.2d at 221.

Generally, the reasons given for a court's determination that a particular issue is nonjusticiable under the political question doctrine are,

(1) the inability of the judiciary to develop general principles and rules of construction of a particular constitutional provision; (2) the judiciary's lack of institutional capacity to review particular judgments of one or both of the political branches; and (3) the judicial humility that flows from the judiciary's inherently undemocratic nature . . . [and] the fear that the judiciary's authority and legitimacy will be undermined by a blatant disregard of its decision by the political branches.

Redish, _supra_ note 42, at 1043-44.

Professor Redish rejects such judicially protective rationales given for the political question doctrine as "unduly narrow, short-sighted and even solipsistic view[s] of the judiciary's function in a constitutional system." _Id._ at 1049. Instead, he asserts that as an exercise of the ultimate judicial function, judicial review, courts should confront the "difficult" cases involving constitutional issues. _Id._ at 1050-51.
if this results in an abandonment of rigid adherence to generalized principle in favor of partially intuitive judgments on the issue of necessity.\textsuperscript{111}

Finally, as a part of the broad spectrum of judicial review, it is argued that the judiciary's function and role in jurisprudence is to decide "cases having a substantial 'political' component or presenting difficult fundamental questions . . . focus[ing] on the democratic nature of American government and law and on the societal development at issue . . . further[ing] societal development with respect to the concerns in dispute."\textsuperscript{112}

III. HISTORY OF SCHOOL FINANCE REFORM: STATE CASES REJECTING THE RODRIGUEZ ANALYSIS

Prior to \textit{San Antonio Independent School District v. Rodriguez}, California dealt with challenges to its state school finance system on federal and state equal protection grounds, as well as under a "common schools" education clause.\textsuperscript{113} In \textit{Serrano v. Priest},\textsuperscript{114} the court evaluated a motion to dismiss petitioner's complaint.\textsuperscript{115} Taking the allegations to be true, the court formulated the issue as whether unequal per pupil funding violated the constitutional mandate of a system of "common schools."\textsuperscript{116} Although finding that the education clause did not require equal spending per pupil,\textsuperscript{117} the court held that where a child's education depended on the affluence of the district in which she lived, a suspect class based on wealth existed and a "strict scrutiny" test applied.\textsuperscript{118} Local

\textsuperscript{111} \textit{Id.} at 1050.


\textsuperscript{113} \textit{CAL. CONST.} art. IX, \S 5.

\textsuperscript{114} 487 P.2d 1241, 96 Cal. Rptr. 601 (1971). The first \textit{Serrano} case found a cause of action averred by class action plaintiffs charging that the state education finance system violated both federal and state equal protection guarantees. The court remanded the case to give plaintiffs the opportunity to prove their allegations. The disposition of the case under the fourteenth amendment was overturned by \textit{Rodriguez}. However, on remand, the court affirmed its holding under the California Constitution, article I, sections 11 and 21, (state equal protection guarantees) that poorly funded districts were a suspect class and local control formed no legitimate state interest. \textit{Serrano v. Priest}, 557 P.2d 929, 135 Cal. Rptr. 345 (1977) [hereinafter \textit{Serrano II}].

\textsuperscript{115} \textit{Serrano v. Priest}, 487 P.2d 1241, 1245, 96 Cal. Rptr. 601, 605 (1971) [hereinafter \textit{Serrano I}].

\textsuperscript{116} \textit{Id.} at 1248, 96 Cal. Rptr. at 608.

\textsuperscript{117} \textit{Id.} at 1249, 96 Cal. Rptr. at 609.

\textsuperscript{118} \textit{Id.} at 1260-63, 96 Cal. Rptr. at 620-23.
administrative control of school funds did not provide a compelling state interest, where "fiscal freewill [was] a cruel illusion for the poor school districts." Thus, the court found unequal spending violative of both the fourteenth amendment's Equal Protection Clause and the state equal protection guarantee.

After remand of Serrano, the California legislature acted to correct objectionable features of the funding system. In the interim, the United States Supreme Court decided Rodriguez, foreclosing fourteenth amendment equal protection remedies. Nevertheless, the modified funding system failed "strict scrutiny" under state equal protection analysis in the second Serrano case. The majority concluded that under a "strict scrutiny" test, presumptions of constitutionality afforded to legislative acts disappear. The dissent argued that separation of powers required the court to uphold the legislature: "So long as [it] has performed its work in a manner consistent with overriding constitutional principles, [the court] must uphold its efforts regardless of our personal views as to the fairness or wisdom of those legislative results." While the dissent did not rely solely upon the separation of powers question, its concerns reflect the lingering doubts of those that question judicial intrusion into educational matters.

Illustrating that state constitutional jurisprudence may differ dramatically from federal constitutional construction, the New Jersey Supreme Court gave its response to school finance litigation, thirteen days after the Rodriguez decision, in Robinson v. Cahill. The court discussed different constructions applicable to federal equal protection and its state counterpart, finding that labels such as "fundamental right," and "compelling state interest," do little to aid equal protection analysis. However, the particular balancing the court employed, "[A] court must weigh the nature of the

119 Id. at 1260, 96 Cal. Rptr. at 620.
120 Id., 96 Cal. Rptr. at 620.
122 Id. at 949, 135 Cal. Rptr. at 365.
123 Id. at 951-52, 135 Cal. Rptr. at 367-68 (1977).
124 Id. at 957, 135 Cal. Rptr. at 373.
125 Id. at 958-59, 135 Cal. Rptr. at 374-75. (Richardson, J., dissenting).
126 Id. at 959, 135 Cal. Rptr. at 375.
restraint... against the apparent public justification," appears scarcely different from the Rodriguez rational basis test. The court declined to hold the New Jersey funding scheme unconstitutional under the state equal protection clause, noting "[T]he equal protection clause may be unmanageable if it is called upon to supply categorical answers in the vast area of human needs... ." Finding education to be "vital" rather than "fundamental" under the New Jersey constitution, the court turned instead to the state's education clause, which mandates a "thorough and efficient" system of public schools, to declare the school finance program unconstitutional. The court concluded that the framers adopting the education clause had equal educational opportunity in mind, as opposed to equality among state taxpayers. Because the court was not offered another means to gauge whether the state school system met the constitutional mandate of a "thorough and efficient" system, the court found that discrepancies in per pupil funding, based on local property values, did not meet constitutional muster. Noting that it could not "unravel the fiscal skein," the court reserved jurisdiction to hear arguments on whether it could order distribution of funds appropriated by the legislature without violating the separation of powers doctrine. Subsequently, the court decided it could direct distribution of funds consistent with separation of powers.

Ironically, the court cited the second Serrano decision for the proposition that equality measured by the "needs" of pupils would be judicially unmanageable while equality in dollar amounts would not. Reviewing the history of the Robinson litigation, one

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130 Id.  
131 Id. at 283.  
132 Id. at 284. Subsequently, the New Jersey court construed the "thorough and efficient" education clause to afford a fundamental right to education. Robinson v. Cahill, 351 A.2d 713, 720 (N.J. 1975) [hereinafter Robinson II].  
133 Robinson I, 303 A.2d at 294.  
134 Id. at 294.  
135 Id. at 295.  
136 Id. at 298.  
137 Id.  
138 See Robinson II, 351 A.2d 713.  
139 Robinson I, 303 A.2d at 278.  
140 To call the Robinson history never ending may not be an overstatement. Robinson has been before the New Jersey Supreme Court seven times over thirteen years. See Robinson I, 303 A.2d 273; Robinson v. Cahill, 306 A.2d 65 (N.J. 1973); Robinson v. Cahill, 335 A.2d 6 (N.J. 1975); Robinson II, 351 A.2d 713; Robinson v. Cahill, 355 A.2d 129 (N.J. 1976); Robinson v. Cahill, 358 A.2d 457 (N.J. 1976); Robinson v. Cahill, 360 A.2d 400
wonders whether the same can be said for the court's attempt to oversee school funding schemes. In one of its many decisions, the court expressed an unwillingness to intrude into the legislative process. However, the court found that an exigency existed with no constitutional system of financing and no concomitant administrative processes in place before the coming school year. The court thus limited its intrusion as a last resort in an effort to comport with the separation of powers doctrine. While the entire question of education policy is arguably best left to legislatures, the court may have been correct when it stated:

> If then, the right of children to a thorough and efficient system of education is a fundamental right guaranteed by the [New Jersey] Constitution, . . . it follows that the court must "afford an appropriate remedy to redress a violation of those rights. To find otherwise would be to say that our Constitution embodies rights in a vacuum."

As the court indicates, where a legislature fails to meet its constitutional duty, the judiciary may be wholly justified in invading its domain. However, the saga of the Robinson litigation also foretells the dangers of judicial intervention into education policy. Such dangers exist, ranging from a decreased expectancy of the judiciary as an effective problem solving institution to the concerns of the court itself with respect to conservation of judicial resources. But, avoiding difficult decisions because of general institutional concerns ignores the court's function and duty to exercise judicial review. Such abdication would then make the Robinson court correct that rights would exist "in a vacuum."

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141 Robinson II, 351 A.2d 713.
142 Id. at 718.
143 Id.
144 Id. at 723.
145 See Rodriguez, 411 U.S at 50-53. As commentators have noted: "It is an axiom of American government that the legislature holds the purse strings . . . This is traditionally viewed as the means by which the representatives of the people hold their most powerful check and balance on the executive branch." Snyder & Ireland, supra note 40, at 225.

146 Robinson II, 351 A.2d at 720.
147 See Redish, supra note 42, at 1061.
148 Robinson II, 351 A.2d at 720.
Recognizing that provisions of a state constitution may require higher standards of protection than its federal counterpart, the West Virginia Supreme Court of Appeals ruled its state school funding scheme unconstitutional in *Pauley v. Kelly.* The court declined to follow *Rodriguez* and criticized the Supreme Court for its failure to recognize education as a "fundamental right." Inspired by the *Robinson* litigation, the plaintiffs in *Pauley* successfully argued that West Virginia's "thorough and efficient" education clause gave a "fundamental right" to education, which under state equal protection was not overcome by a "compelling state interest" of local control. The decision in *Pauley* broadened *Robinson* by defining a "thorough and efficient" education as; "[one which] develops, as best the state of education expertise allows, the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically."

The court dismissed any possible separation of powers concerns by maintaining, "[C]ourts are not concerned with the wisdom or policy of the legislation." Rather, the question upon review was whether the legislation "ha[d] a reasonable relation to the thorough and efficient mandate." The court would only intrude into traditional legislative functions when legislation "is offensive to judicial notions about what a thorough and efficient education system may be."

While the *Robinson* court believed in some judicial restraint in traditional legislative fields, the *Pauley* court criticized the New Jersey Supreme Court's restraint in application of equal protection guarantees. Instead, the *Pauley* court noted that equal protection in the education field, "must mean an equality in substantive educational offerings and results, no matter what the expenditures are."

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151 For a discussion of that litigation, see *supra* notes 128-48 and accompanying text.
152 *Pauley,* 255 S.E.2d at 864.
153 *Id.* at 877.
154 *Id.* at 870.
155 *Id.*
156 *Id.* at 871.
157 *Id.* at 865 n.7.
158 *Id.*
The court's holding in Pauley did not invade a legislative function. Rather, it merely passed upon the constitutionality of the education system as determined through the court's responsibility as constitutional interpreter. Although the court's language could be read broadly to mean that the judiciary might determine public school policy routinely, thus violating the province of the executive and legislative branches, questions of education management are best left to the legislature, following a court's adjudication of a constitutional guarantee of equal education.

One reason given for a court's reluctance to intrude into political/legislative fields is the inadequacy of standards by which to guide lower courts. To its discredit, the Pauley court's broad definition of "thorough and efficient" does not set specific measures by which to gauge the quality of West Virginia education. However, the "absence of standards" criticism ignores the judiciary's function of judicial review in favor of more limited institutional concerns.

A. The Place of the Serrano-Robinson-Pauley Line in School Finance Reform

Undoubtedly, Serrano and its progeny breathed life into school finance reform litigation in the wake of the Rodriguez decision. These cases support the argument that state constitutional jurisprudence may take a leading role in placing higher standards on equal protection. However, as the previous discussion suggests, their rationales are left open to attack on separation of powers grounds, thus potentially lessening the appeal of their reasoning. Of course, constitutional interpretation seldom remains static and is subject to differing views by state judiciaries. The lasting impression from these decisions is that the separation of powers doctrine is a minimum hurdle to overcome in school funding cases. The Pauley court crossed the threshold by framing the issue as simply an

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159 See infra note 179 and accompanying text.
160 See Redish, supra note 42, at 1060. Professor Redish rejects this rationale, maintaining that any constitutional provision can be supplied with workable standards of interpretation. Id. at 1047.
161 Id. at 1050-51.
162 See generally Thro, supra note 3 (predicting new hope and optimism in school finance reform cases); Note, supra note 4.
163 See supra note 107.
164 Id.
165 Id.
interpretation of "thorough and efficient.""166 The New Jersey court felt compelled to intrude into a traditional legislative function only after finding an exigency.167 As the Serrano-Robinson-Pauley line of cases indicates, separation of powers is hardly fatal to school finance challenges. The argument to overcome separation of powers concerns rests on the courts' function of judicial review. Once the state court finds education to be a fundamental right, it is axiomatic that the court may "decide cases which involve consideration of deeply ingrained social attitudes or prejudices"168 in spite of contrary doctrinal arguments.

IV. RECENT SCHOOL FINANCE CASES: EDUCATION AS A FUNDAMENTAL RIGHT

It was against the backdrop of prior school funding litigation that the Supreme Court of Kentucky, in Rose v. Council for Better Education, Inc., considered "whether the Kentucky General Assembly ha[d] complied with its constitutional mandate to 'provide an efficient system of public schools throughout the state.'"169 Based on the framers' intent,170 the court found education a "fundamental right."171 Additionally, the court found the goal of an "efficient" education clause to be a "system hav[ing] the twin attributes of uniformity and equality."172 The court, like the trial judge, could have turned to equal guaranty provisions in the Kentucky constitution to find the school finance system unconstitutional.173 However, for some inexplicable reason, the court declined to do so. Instead, the court framed the issue as whether Kentucky's finance system was "efficient."174 The court noted the overall

166 Pauley, 255 S.E.2d at 887.
167 Robinson II, 351 A.2d at 718.
168 Osgood, supra note 112, at 589.
170 Consider the comments of Delegate Moore, as quoted by the Rose Court: Common schools make patriots and men who are willing to stand upon a common land. The boys of the humble mountain home stand equally high with those from the mansions of the city. There are no distinctions in the common schools, but all stand upon one level.
171 Id. at 206 (citation omitted).
172 Id. at 203-06.
173 Id. at 207.
174 See Ky. Const. §§ 2-3.
175 The court listed a summary of what "efficient" requires:

1) The establishment, maintenance and funding of common schools in Kentucky is the sole responsibility of the General Assembly.
inadequacy of the schools, as delineated by education experts, through Kentucky's rankings among benchmark states and the past failure of the General Assembly to provide for the schools. The court had little trouble finding the Kentucky funding scheme unconstitutional, where unequal per pupil funding implicated unequal educational opportunities.

Throughout its opinion, the Kentucky court addressed the separation of powers issue, maintaining, "We do not instruct the General Assembly to enact any specific legislation . . . [or] to raise taxes . . . . We only decide the nature of the constitutional mandate. We only determine the intent of the framers. Carrying out that intent is the duty of the General Assembly." Taking their cue from Pauley v. Kelly, the plaintiffs argued that there is broad judicial power to determine what is "offensive to judicial notions about what a thorough and efficient education system is." The court declined to follow Pauley's broad approach to the separation of powers doctrine. Instead, the court, based on Legislative Research Commission v. Brown, held that the doctrine must be "strictly construed." Separation of powers restrictions on the court were satisfied where no "specific legislation" or tax increase was ordered. However, the court found that the trial

2) Common schools shall be free to all.
3) Common schools shall be available to all Kentucky children.
4) Common schools shall be substantially uniform throughout the state.
5) Common schools shall provide equal education opportunities to all Kentucky children, regardless of place of residence or economic circumstances.
6) Common schools shall be monitored by the General Assembly to assure that they are operated with no waste, no duplication, no mismanagement, and with no political influence.
7) The premise for the existence of common schools is that all children in Kentucky have a constitutional right to an adequate education.
8) The General Assembly shall provide funding which is sufficient to provide each child in Kentucky an adequate education.
9) An adequate education is one which has as its goal the development of the seven capacities recited previously.

Rose, 790 S.W.2d at 212-13.

175 Id. at 213.
176 Id. at 211-212.
177 Id. at 212.
178 See supra notes 149-61 and accompanying text.
180 664 S.W.2d 907 (Ky. 1984). For a discussion of the separation of powers analysis under Brown, see supra notes 35-40 and accompanying text.
181 Rose, 790 S.W.2d at 213.
182 Id. at 214.
judge's retention of jurisdiction and supervision of the General Assembly's efforts violated separation of powers under the "strongly written, definitive constitutional scheme." 183

Justice Liebson dissented from the majority holding on the grounds that the court violated both the separation of powers and political question doctrines. 184 Although the dissenting justice agreed that the General Assembly had failed to provide an "efficient" public school system, Justice Liebson felt that the judgment should be reversed because the issue was nonjusticiable in that there was no "actual controversy." 185 Citing Baker v. Carr 186 as the touchstone of the political question doctrine and its relationship to separation of powers, Justice Liebson's principal concern was that the court declared the entire school funding system unconstitutional, rather than any specific statutes. 187 Justice Liebson wrote:

[I]n asking that we declare the system unconstitutional but not the statutes, they were presenting us with a "Gordian" knot . . . , thus presenting us with an insolvable, nonjusticiable dilemma. And, we have responded with what could be expected when you open Pandora's box, an Opinion which at the same time declares everything unconstitutional and nothing unconstitutional. 188

Liebson feared that the judiciary did not have the capacity to examine the issue because the court would go too far in an area of constitutional law where standards are difficult to formulate. 189 Thus, Justice Liebson placed the institutional concerns of the court over its functional role of constitutional interpreter. 190 In that respect, the justice's argument proves too much. As has been noted: "[The Judiciary] has never been at a loss to decipher workable standards for the vaguest of constitutional provisions when it so desires." 191

During the period when Rose was working its way through the Kentucky courts, Montana was grappling with a constitutional

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183 Id. at 214; see also Ky. Const. §§ 27-28 (specifying separation of powers).
184 Rose, 790 S.W.2d at 224, 228-29 (Liebson, J., dissenting).
185 Id. at 223-25 (Liebson, J., dissenting); see also Pauley v. Kelly, 255 S.E.2d 859, 897 (W.Va. 1979) (Neely, J., dissenting) (arguing that educational funding is best left to the legislature where the court is without proper standards to resolve the issue).
187 Rose, 790 S.W.2d at 223-24 (Liebson, J., dissenting).
188 Id. at 224 (Liebson, J., dissenting).
189 See Redish, supra note 42, at 1050-51.
190 See id.
191 Id. at 1060.
challenge to its 1985-86 school funding program. In *Helena Elementary School District No. 1 v. State*, the court ruled that Montana's education clause, which provides that "equality of educational opportunity is guaranteed to each person of this state," was violated upon a showing of funding disparities. Given the clause's guarantee of equal educational opportunity, the court did not reach the question of whether funding violated state equal protection, nor the question of whether education is a "fundamental right." Highlighting what the court considered to be elements of qualitatively equal education, the court recognized that the legislature "has the power to increase or reduce various parts of these elements, and in addition to add other elements for [public school] funding." The court declined, however, to "spell out the percentages . . . required on the part of the State under the [school funding program] . . . [where the] control of such funds is primarily in the Legislature.

Hence, the court in *Helena* reviewed the legislative funding statutes under its role as constitutional interpreter, while recognizing the traditional legislative function of controlling the purse. In this regard, the *Helena* court went no further than the Kentucky court did in *Rose.*

Later in 1989, Texas, in *Edgewood Independent School District v. Kirby*, handed down its ruling that state school funding programs were unconstitutional. As in *Rose*, the education clause at issue required "an efficient system of public free schools." The Texas Supreme Court overruled the lower court's holding that the challenge involved was a "political question not suitable for judicial

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194 Id. at 689.
195 Id. at 691.
196 The court noted:
   There are a number of additional factors which are a significant part of the education of each person in Montana, including but not limited to such elements as individual teachers, classroom size, support of the parents of students, and the desire and motivation on the part of the student which moves him or her to seek earnestly after an education.

   Id.
197 Id.
198 Id.
199 See supra note 145 and accompanying text.
200 See supra notes 169-91 and accompanying text.
201 777 S.W.2d 391 (Tex. 1989).
review."203 As other state judiciaries have done,204 the Texas court held, "[T]his is not an area in which the Constitution vests exclusive discretion in the Legislature."205 Citing Rose and decisions from eight other states,206 the court limited its holding to construction of the constitutional mandate and, like the Kentucky court, "[d]id not . . . instruct the legislature as to the specifics of the legislation it should enact; nor [did the court] order it to raise taxes."207

As in the Rose and Helena decisions, the Texas court engaged in constitutional interpretation, but complied with the separation of powers doctrine by ruling solely on the constitutional mandate at issue and not ordering specific legislation.208 Constitutional interpretation will often greatly affect the other branches' functions. However, to refuse to examine a constitutional issue because of deference to political/legislative functions, as flexible as those terms may be in this field of constitutional law, goes too far toward abrogating the traditional duty of judicial review.209

A. The Addition of the Rose-Helena-Edgewood Decisions to School Finance Reform Litigation

By "strictly" adhering to constitutional provisions of separation of powers, Rose indicates that courts will do more than simply give lip service to the separation of powers doctrine. Although the court did not order a tax increase or specific legislation, thus technically meeting the court's separation of powers analysis, the breadth of the court's decision left the legislature few options other than to enact new school legislation and tax increases.210 The Rose court held:

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203 Id. at 394.
205 Edgewood, 777 S.W.2d at 394.
207 Edgewood, 777 S.W.2d at 399.
208 See supra notes 177-83 and accompanying text.
209 See Redish, supra note 42, at 1050.
210 The trial judge, Ray Corns, strongly intimated that, in his view, the General
Lest there be any doubt, the result of our decision is that Kentucky's *entire system* of common schools is unconstitutional . . . . This decision applies to the statutes creating, implementing and financing the *system* and to all regulations, etc., pertaining thereto. This decision covers the creation of local school districts, school boards, and the Kentucky Department of Education to the Minimum Foundation Program and Power Equalization Program. It covers school construction and maintenance, teacher certification—the whole gamut of the common school system in Kentucky.211

Arguably, this broad holding does more than project the framers' intent regarding an "efficient" school system, implying that separation of powers is not a restriction on judicial power to define constitutional terms. Certainly, the doctrine did not prevent the court from defining constitutional terms in such a manner as to cause the revamping of an entire legislated educational system.

The future in this field remains unclear. Kentucky has just begun to implement some of the changes mandated by *Rose*.212 Nevertheless, *Rose* presents a new beginning to education finance reform, which may be particularly extensive given the broad invalidation of an entire public education system.213 The *Rose-Helena-Edgewood* decisions add additional weight to general theories of expanded state constitutional jurisprudence.214 These cases, relying solely upon state education clauses to make their sweeping changes, signify the potential for a new revolution in school finance litigation.215

The decisions in *Rose, Helena*, and *Edgewood* make clear that the separation of powers doctrine will not necessarily act as an impediment to education finance reform litigation. Separation of powers remains a minimal obstacle to overcome, if an obstacle at

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211 *Rose*, 790 S.W.2d at 215 (emphasis in original).

212 The full impact of the *Rose* decision has not yet been felt. However, the Kentucky education reforms have been heralded as a model for other states, with the process receiving passing grades in meeting its first year goals. Haas, *First-Year Goals Attained in Education Reform*, Cincinnati Enquirer, Mar. 3, 1991, § B at 3, col. 1. Colorado's governor recently heralded Kentucky's lead in education reform. Lexington Herald-Leader, Jan. 5, 1991, § C at 1, col. 5.


214 See *supra* note 107.

all, where courts rightly exercise their roles in constitutional construction. A court, in its separation of power analysis, will look to traditional functions of the different branches in making its findings. In doing so, the court will perform its function of constitutional interpretation. Classifying a government function as legislative, executive, or judicial in a separation of powers "judgment by labels" analysis presents some difficulty. Nonetheless, wholesale deference to another branch’s function at the expense of settling a difficult constitutional question reduces judicial power and lowers public expectations by expending the court’s "moral capital." As one commentator noted:

Indeed, there are times when it seems that there is nothing between the potential tyranny of the political branches and the liberty of the people but a vigilant judicial branch. It is to be hoped if not expected that the judiciary will have the intelligence, good will, and judgment not to go the way of all flesh.

CONCLUSION

State constitutional jurisprudence, allowing a constitutional guarantee of an equal education, may be applauded for this result in education finance reform litigation. As this Note indicates, courts are no longer constrained by notions of judicial deference to the legislative branches for fear of violating separation of powers and the related political question doctrine. Assuming a court can undertake "judgment by labels," strict adherence to traditional legislative or executive roles precludes a court from judicially defining a qualitatively adequate education. As the individual case histories convey, such judicial intrusions are fraught with the danger of seemingly endless litigation and problems of judicial management. While the proclamation of constitutionally guaranteed educational equality may herald the coming of a new age, in practice, it remains an elusive goal. Under the factors promul-

216 See supra notes 25-27 and accompanying text.
217 See Redish, supra note 42, at 1050.
218 Kurland, supra note 23, at 593.
219 See Redish, supra note 42, at 1053-54.
220 Kurland, supra note 23, at 611.
221 Id. at 593.
222 See supra notes 55-63 and accompanying text.
223 See supra note 140 and accompanying text.
224 See supra note 212 and accompanying text.
gated in *Rose v. Council for Better Education, Inc.*, questions may again arise as to what an equal education really is.

While *Kukor v. Grover* indicates that the separation of powers doctrine may still cause a court to be reluctant to proclaim guarantees of educational equality, out of concern over the traditional role of legislatures, the better and more responsive approach follows from *Rose*. The Kentucky court fulfilled separation of powers proscriptions by adhering to a narrowly defined "strict" functional construction of separation of powers. To its credit, the court did not fall prey to judicial avoidance of a difficult constitutional decision by citing its own inadequacy to deal effectively with the issue. Rather than deny plaintiffs the opportunity to litigate unfair school fund distribution, the courtroom doors remained open. Avoiding the broad language of *Pauley v. Kelly*, that found unconstitutional legislation "offensive to judicial notions about what an...efficient education system is," *Rose* struck a balance that comports with the separation of powers doctrine in spirit, if not in actual effect.

*Troy Reynolds*

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225 *See supra* note 174 and accompanying text.
226 Questions of how equal is equal are elusive. If schools in Lexington, a well funded district, offer French in elementary grades, must Eastern Kentucky schools, which made up the Council for Better Education, Inc. in *Rose*, offer similar courses? Such concerns influenced the *Rodriguez* Court in declining to rule on the right to education issue out of deference to state legislators and education experts. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 53 (1973).

The *Rose* court addressed this problem by imposing on the General Assembly the constitutional duty to adequately fund and supervise a system of common schools "substantially uniform throughout the state." *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 211 (Ky. 1989). The emphasis was on equal funding, whereby "The children of the poor and the children of the rich, the children who live in the poor districts and the children who live in the rich districts must be given the same opportunity and access to an adequate education." *Id.*

227 436 N.W.2d 568 (Wis. 1989).