AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 10: The Reagan Era – Judicial Power and Constitutional Authority

Rose, et al. v. Council for Better Education, et al., 1989 Ky. 55 (Ky. 1989)

Among the notable developments of the Reagan-Bush era was the rise of constitutional litigation in the states.[1] *As conservative judges found some success in discouraging litigation in the federal courts, liberal activists began to look for other venues that might provide better opportunities. Justice William Brennan recognized and encouraged the trend by calling on the state courts to develop state constitutional law on an independent track from federal constitutional law.*[2] *State courts have similar constitutional and doctrinal requirements for granting jurisdiction as the federal courts, requiring that prospective parties demonstrate that they have standing to bring a suit, have a dispute that is ripe for resolution, have a dispute that presents a legal question that is capable of judicial resolution, etc. Nonetheless, state courts may interpret these requirements differently than the federal courts. Moreover, state constitutions present many substantive opportunities for constitutional litigation. State constitutions include many provisions that are comparable to those contained (and frequently litigated) in the U.S. Constitution, but they also include variations of those provisions and additional constitutional provisions that are unique to the states. When the state courts explicitly rest their decisions on state constitutional provisions, even when those provisions mirror provisions contained in the U.S. Constitution, they cannot be reviewed by the U.S. Supreme Court. The state courts are the final judicial authority on the meaning of their own state constitutions.*

The state courts have become an important forum for constitutional litigation in recent years. Activists and interest groups on both the right and the left have turned to the state courts to litigate a range of constitutional issues from property rights to same-sex marriage. Education finance reform was one of the most extensively litigated and politically controversial issues in the state courts in the modern era. After the U.S. Supreme Court turned back efforts to use the U.S. Constitution to reform how schools were funded in San Antonio Independent School District v. Rodriguez *(1973), reform advocates turned to the states. One of the first state court decisions on school finance came in New Jersey in* Robinson v. Cahill*, 70 N.J. 155 (NJ 1970). The New Jersey court's actions left a mixed legacy.* Robinson *was resisted by the legislature for years, but eventually resulted in a sweeping reform that included the adoption of the state's first income tax. Even so, litigation over the implementation of school finance reform continued for two decades in New Jersey, and one governor was defeated for reelection as a result of pushing through the reforms called for by the court.*

The school finance cases, like legislative reapportionment and school desegregation cases, present a particular challenge to the courts not only to determine whether the existing policy is unconstitutional but also how to remedy the injury. The state courts have struggled to determine an appropriate standard for evaluating whether a school finance system meets the requirements of a particular state constitutional text. For some courts, this has meant focusing on disparities in spending across school districts. For other courts, this has meant focusing on whether spending in any given district is adequate to providing a suitable education. But even knowing what the relevant terms of a state constitution might require still leaves open a question of who can come to court to bring a claim, what exactly is supposed to be causing a constitutional injury, whether courts are either authorized or able to remedy the injury, and if so, what tools are available to judges as they attempt to construct a remedy.

The Kentucky public school system, like many others, was funded through a combination of state revenue and local taxes raised by individual school boards. The result was a wide disparity in the amount of money available

[1] It would be more accurate to say the return of constitutional litigation to the states since they have played an important role in American constitutional development at various points in American history. During the late nineteenth and early twentieth centuries, for example, state courts were often at the forefront of developing new doctrine on personal and economic liberty and the scope of state regulatory power.

[2] William Brennan, "State Constitutions and the Protection of Individual Rights," *Harvard Law Review* 90 (1977): 489.

for the public schools in individual districts, whether as a consequence of the limited tax base in some districts or local political decisions not to raise as much revenue for schools as other districts might.

Sixty-six school districts in Kentucky joined together to form the Council for Better Education, which then filed with a state trial judge for a declaratory judgment that the state was in violation of Section 183 of the Kentucky constitution, which required the General Assembly to provide for an "efficient" system of public schools. The suit was joined by additional school districts and a group of public-school students, acting through their parents. The complaint was lodged against the president pro tempore of the state senate (John Rose), the speaker of the state house of representatives, and members of the state board of education. The schools requested that the court issue writs of mandamus directing the school board to cease implementing the unconstitutional state statutes on education, the house speaker and senate president to introduce constitutionally valid school legislation, and the state legislature as a whole to adopt that legislation. The state denied that the school system was unconstitutional, but maintained that the matter was a "political question" in which the courts could not intervene in any case. The defendants also argued that the school boards did not have legal authority to sue the state and that the court could not provide an adequate remedy to the complaint even if it could find a constitutional violation.

The trial judge found that the state was failing to provide an "efficient" school system and as a consequence was violating a "fundamental right" to education under the state constitution. The judge then appointed an expert committee to advise him on devising a remedy and eventually issued an order indicating that the legislature would have to raise additional funds for education and was required to provide a state school system that was "substantial[ly]" uniform, was adequate in quality, and was adequately supervised by state officials. The judge stopped short of specifying how the additional funds were to be raised but required that the legislature report back to him with a plan for a new educational system.

The state supreme court accepted the case on appeal. In a 5-2 decision, the Supreme Court agreed that the existing state system was unconstitutional but reversed the part of the order that kept the state legislature under the continuing supervision of the trial court as a violation of the separation of powers. The Court's opinion largely concerned the substantive meaning of the state constitution's educational requirement, but the justices also grappled with the problem of how far the courts could go in directing the legislature and enforcing such a constitutional provision. Is the Court capable of offering relief to the plaintiffs in this case? Does Section 183 of the Kentucky Constitution entrust the issue solely to legislative judgment, or does it provide a basis for judicial supervision of the legislature's performance?

CHIEF JUSTICE STEPHENS delivered the opinion of the Court.

The issue we decide on this appeal is whether the Kentucky General Assembly has complied with its constitutional mandate to "provide an efficient system of common schools throughout the state" Ky. Const. Sec. 183.

In deciding that it has not, we intend no criticism of the substantial efforts made by the present General Assembly and by its predecessors, nor do we intend to substitute our judicial authority for the authority and discretion of the General Assembly. We are, rather, exercising our constitutional duty in declaring that, when we consider the evidence in the record, and when we apply the constitutional requirement of Section 183 to that evidence, it is crystal clear that the General Assembly has fallen short of its duty to enact legislation to provide for an efficient system of common schools throughout the state. In a word, the present system of common schools in Kentucky is not an "efficient" one in our view of the clear mandate of Section 183. The common school system in Kentucky is constitutionally deficient.

In reaching this decision, we are ever mindful of the immeasurable worth of education to our state and its citizens, especially to its young people. The framers of our constitution intended that each and every child in this state should receive a proper and an adequate education, *to be provided for by the General Assembly*. This opinion dutifully applies the constitutional test of Section 183 to the existing system of common schools. We do no more, nor may we do any less.

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. . . . It is our sworn duty, to decide such questions when they are before us by applying the constitution. The duty of the judiciary in Kentucky was so determined when the citizens of Kentucky enacted the social compact called the Constitution and in it provided for the existence of a third equal branch of government, the judiciary.

The issue before us -- the constitutionality of the system of statutes that created the common schools -- is the only issue. To avoid deciding the case because of "legislative discretion," "legislative function," etc., would be a denigration of our own constitutional duty. To allow the General Assembly (or, in point of fact, the Executive) to decide whether its actions are constitutional is literally unthinkable.

. . . . We do not question the wisdom of the General Assembly's decision, only its failure to comply with its constitutional mandate. In so doing, we give deference and weight to the General Assembly's enactments; however, we find them constitutionally deficient.

The judiciary has the ultimate power, and the duty, to apply, interpret, define, construe all words, phrases, sentences and sections of the Kentucky Constitution as necessitated by the controversies before it. It is *solely* the function of the judiciary to so do. This duty must be exercised even when such action serves as a check on the activities of another branch of government or when the court's view of the constitution is contrary to that of other branches, or even that of the public.

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Our job is to determine the constitutional validity of the system of common schools within the meaning of the Kentucky Constitution, Section 183. We have done so. We have declared the system of common schools to be unconstitutional. It is now up to the General Assembly to re-create, and re-establish a system of common schools within this state which will be in compliance with the Constitution. We have no doubt they will proceed with their duty.

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JUSTICE GANT, concurring.

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This action should be remanded to the Franklin Circuit Court with direction to immediately issue writs of mandamus requiring the Governor to call an Extraordinary Session of the General Assembly; requiring the Governor, the Superintendent of Public Instruction, and members of the State Board of Education to recommend appropriate corrective measures; and requiring the General Assembly to enact legislation necessary to bring the Kentucky school system into compliance with § 183 of the Kentucky Constitution.

JUSTICE WINTERSHEIMER, concurring.

. . . . My concern is that the language of the majority is too sweeping when it asserts that the result of the decision is that the entire system of common schools is unconstitutional. We must leave it to the good common sense of the legislature to develop an appropriate system of legislation.

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JUSTICE VANCE, dissenting.

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… I do not believe it is within the province of this court to interfere with legislative discretion as to the level of school funding unless it clearly appears from the record that the level of funding is so low that it cannot reasonably accomplish basic educational necessities. Not all academic failure is the result of under-funding.

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Whether the General Assembly will provide a system of common schools of the highest order or one which barely meets the minimum requirements is a burden which must be placed squarely upon the shoulders of the General Assembly, where the constitution places it. It does not rest with the courts, and indeed the doctrine of separation of powers prohibits judicial interference with legislative prerogative. If

we do not exercise restraint in this matter, I fear that every theoretical defect in the educational system will be escalated into litigation to determine the constitutional efficiency of the system.

The system of common schools is created by many statutes, none of which have been directly attacked. Since we have not been asked to declare any statute unconstitutional, I fail to see how we can, in effect, declare them all unconstitutional.

The majority has heaped upon the General Assembly a monumental task with little guidance. It is confronted with a necessity to create a new system of common schools without being told specifically what is wrong with the old one. . . .

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JUSTICE LEIBSON, dissenting.

Respectfully, I dissent. I agree in principle with the majority's opinion that the General Assembly has failed thus far to, "by appropriate legislation, provide for an efficient system of common schools throughout the State." Nevertheless, this case should be reversed and dismissed because it does not present an "actual" or "justiciable" controversy. . . .

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An actual controversy is one admitting of specific relief through a decree conclusive in character. A judicial pronouncement in the present case where there are public questions of the utmost importance but no such justiciable controversy will cause more problems than it will solve. Worse yet, it opens the doors of the courthouse to a host of new lawsuits by litigants seeking a forum to argue questions of public policy which are incapable of specific judicial resolution. In line with the legal truism that "bad cases make bad law," we can expect this case to be cited as precedent in a new wave of litigation involving issues that should be debated in the forum of public opinion, and then legislated rather than litigated.

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We were only asked to decide one issue in this lawsuit: whether the General Assembly has responded adequately to its constitutional responsibility. This is a political question, pure and simple. We have undertaken to "enter upon policy determinations for which judicially manageable standards are lacking." Without such standards, a case is not justiciable. It is not enough to decide that Kentucky does not have an "efficient system of common schools throughout the State," as Section 183 of the Constitution requires, without specifying what statutes are unconstitutional, and why. Yet, the former is not asked, and the latter is not possible. I repeat, this case is not justiciable.

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At the heart of this case is the problem created by the uneven tax base for support in a public school system that is built on local property taxes. This problem is not unique to our state. Supreme courts from several of our sister states, confronted with this problem and caught up in a rush of judicial activism, have attempted to intervene judicially in the legislative process. *None* have undertaken to intervene where the issues were as nonspecific as presented here, and thus as incapable of judicial resolution. Further, as subsequent cases from West Virginia and New Jersey attest, when they intervened in the process their initial rulings were just the beginning of a long-running dialogue. They have been confronted with complex sequels to original decisions that did not improve matters significantly in the first place. They have been inundated with subsequent litigation.

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