EACH CHILD, EVERY CHILD -
FROM EQUITY TO ADEQUACY IN KENTUCKY’S SCHOOLS:
THE LEGACY OF THE COUNCIL FOR BETTER EDUCATION

ABSTRACT OF DISSERTATION

A dissertation submitted in partial fulfillment of the requirements for the degree of Doctor of Education in the College of Education at the University of Kentucky

By
Richard Elliott Day
Lexington, Kentucky

Director:  Dr. Susan Scollay, Associate Professor of Administration and Supervision
Lexington, Kentucky
2003

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ABSTRACT OF DISSERTATION

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Support for an efficient system of common schools has been a serious problem throughout Kentucky’s history. The General Assembly has long been content to allow Kentucky’s schools to rank among the lowest in the nation. This study attempts to put the current struggle for adequately funded public schools into an historical context, focusing on the Kentucky Supreme Court’s landmark decision in *Rose v. Council for Better Education*. The study examines this decision in light of present efforts to define and assure a proficient education for each and every child.

The activities of the Council for Better Education were part of a national effort to determine a set of judicially manageable standards for equitable and adequate school funding. This study chronicles the activities of the Council for Better Education from its inception in 1984 through 1993 as Kentucky sought to implement a new system of common schools. This study provides some insight into the effort required to bring about this historic result and reveals the legislature’s adoption of the Kentucky Education Reform Act as the singular event it is – a true exception in Kentucky’s long history of modest support for its schools.
Chapter One provides contextual information, and the author’s perspective, while introducing related topics of law, racial inequality and political culture. Chapter Two examines the history of school funding and equity in Kentucky. Chapter Three chronicles Council for Better Education activities. Chapter Four outlines the legal strategy employed by the attorneys. Chapter Five looks at the case from the point of view of Chief Justice Robert F. Stephens and explores legislative reaction to the *Rose Opinion*. Chapter Six looks at the impact of advocacy groups, the Press, and Council efforts during the early days of KERA. Chapter Seven is an analysis of critical factors that contributed to the Council’s success including case law, judicial activism, political culture, advocacy coalitions, the press and governmental branches. The Epilogue is a reflection on the potential implications of *Rose v. Council* to Kentucky’s public schools today.

*Rose v. Council for Better Education* can best be seen as a pioneering effort to alter Kentucky’s history, and as a move toward more social justice and economic prosperity for all children of the Commonwealth.

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Richard Elliott Day

The Graduate School
University of Kentucky
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DEDICATION

To all of Kentucky’s children

and those educators

who have dedicated themselves to

the proficient education of each and every child.
ACKNOWLEDGEMENTS

The very notion of an exhaustive empirical study about some minuscule topic, which will be forgotten before the doctoral committee wakes up (from having to read it) gives me the willies. I remain grateful to Dr. Ron Threadgill for giving me an interest in the history and politics surrounding Kentucky’s efforts to achieve school finance equity and adequacy.

I am also indebted to Superintendent, Jack Moreland, formerly of the Dayton Public Schools; not just for the beer he bought me one summer at the Kentucky Association of School Administrators summer meeting, but also for his clear interpretation of the events surrounding what will surely be the hallmark of his fine career in public education.

Dr. Charles Faber and Dr. Eddy Van Meter sought to assist me in my studies, but then somebody passed a law that changed education in Kentucky - and I got a little lost. When I finally got back into the game, it was Dr. Susan Scollay who babysat my belated return, my re-qualification, and helped me gain approval from the University of Kentucky Graduate Council to complete my work - albeit, thirteen years behind schedule. I thank Susan for her encouragement, guidance and resourcefulness. I will very likely be a card-carrying feminist before she’s through with me.

Others signed on to assist my efforts as well. Dr. Jane Lindle possesses a keen eye for the political, which is so important in the public arena. Dr. Jim Rinehart is dedicated to the noble pursuit of educating our young and he is always looking for a way to produce better school administrators. I am indebted to Dr. Richard Angelo who gave me a better understanding of the complex history of public education in America and a taste for social reform. And to Dr. Terry Birdwhistell who taught me the importance of hearing all of the voices that contribute to our understanding of our history, and ourselves. These fine professionals challenged my thinking and opened my eyes to new areas of understanding. I hope this effort is worthy of their approval. Great teachers make learning fun.

Along the way, other folks from the University of Kentucky and Lexington community have offered assistance that was greatly appreciated and indispensable to a complete understanding of the issues surrounding the law and education reform. Particular thanks to: Professor Carolyn Bratt, of the UK Law School for her assistance and chats about the law and how attorneys see cases. Dr. Skip Kifer, an outstanding inferential statistician and Master of MiniTab who has volunteered his time (for a couple of years now) to help me identify and close achievement gaps. Dr. Steve Clements, for sharing his ideas on the Council for Better Education and the Kentucky Education Reform Act.

I would also like to acknowledge a few individuals who agreed to read and critique my work. The gift of their unique perspectives helped strengthen the work. Dr. David Hamilton, as fine a scholar, parent, and Site-based Council Member any principal could hope for. Carolyn Witt Jones, a former school administrator who now leads the
Partnership for Kentucky Schools and is truly dedicated to a better Commonwealth. Sandy Canon, Executive Director of the Lexington Chapter of the National Conference for Communities and Justice, whose life is all about social justice and equity – and who actually volunteered!? Arnold Gaither, one who is familiar with the struggle first-hand, tested my ideas through his own unique lens, providing balance for my views. And Bob Sexton, an architect of dreams, a builder of coalitions, and perhaps the best friend Kentucky’s school children ever had.

I thank my parents, who aside from being wonderful parents provided me with everything I needed to grow up loved and cared for. Each gave me something of themselves, which will be a part of who I am forever. My father, who taught me to question and to think for myself, bred a healthy skepticism of institutions and an awareness of human foibles. He also taught me that strong independent action has its costs. My mother taught me to act on my beliefs without too much regard for contrary opinions - “go for respect” she would teach me. She would also say, “It’s easier to stay on the good list than it is to get off the bad list.”

Most importantly I thank my wife, Rita, the love of my life and best friend, all rolled up in great little package. Her love and peace have created a safe place for me to express myself. Her encouragement and affection sustains me and this effort would not have been made without her.

I’d also like to give a shout-out to my children Travis and Ashley. I’m very proud of them. At the time of this writing they are studying history and journalism, respectively, at Georgia State University. And to her children, Elizabeth a student at the University of Kentucky and Catherine, who attends Henry Clay High School. May they add their light to the sum of light.
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NOTE TO THE READER

It is important to note at the outset that this manuscript deals with a case known by three different names at different points in time. The initial action was filed during the gubernatorial administration of Martha Layne Collins as Council for Better Education, et. al. v. Collins. When the late Wallace Wilkinson took over the Governor’s office, this title was altered under a motion to substitute and became Council for Better Education, et. al. v. Wilkinson. The lower court ruling was commonly referred to as “the Corns decision,” for Franklin Circuit Court Judge Raymond Corns. The case was appealed directly to the Kentucky Supreme Court in an action styled Rose v. Council for Better Education, et.al. Since the Supreme Court ruling the case has also been called the Stephens Decision but is most commonly referred to as the Rose case. In this manuscript, references to “the Corns decision” refer to the circuit court action. References to “the Rose case” refer to the Supreme Court action.

It is also important to clarify three concepts central to this manuscript: equity, adequacy and efficient. All are legal terms of art, but they are also words in common usage. I hope a brief discussion helps clarify how I use these terms.

Since the very beginnings of our nation we have used words that communicated a meaning that was applied only to a part of our society. For example, when Jefferson wrote, “that all men are created equal” the understanding at that time was that all really meant all white male landowners. Early references to the education of all children really meant all white boys. Later girls were added to that understanding – and even then, the term all children excluded African American children deep into the twentieth century.

The arguments advanced in the Rose case dealt with inequities among Kentucky school districts after desegregation, but the focus was not on race. It had to do with the support of property-poor districts as compared to more affluent districts. It has only been since the Rose case that all children has come to mean truly all children. Before that time, it was accepted that a significant percentage of Kentucky’s students would fail to attain high standards. In this sense I discuss equity, and the lack thereof, as part of Kentucky’s historical failure to assure fairness, impartiality and social justice for all.

Equity also refers to a relative balance of the financial resources made available to Kentucky’s school districts. Even here, much of Kentucky’s historical debate over questions of equity applied to the resources available to city districts, as opposed to rural districts – this to the exclusion of African American students who were educated under a separate system, typically less adequate than the poorest rural district. Efforts to improve Kentucky’s schools usually focused solely on schools for white children.

Adequacy is sometimes defined as bare sufficiency or just enough, but not in this manuscript. In school funding cases, adequacy becomes an issue of whether schools have the resources necessary to meet the goals set by the state. When our expectations are low, bare sufficiency may well provide adequacy. However, Kentucky’s assertion
that every child can learn and most at high levels is no easy standard. In this sense, an adequate education for Kentucky’s children is thought of as sufficient in quality and quantity to assure that all schools meet the needs of all students. And this time, all means truly all.

The heart of the Rose case was the court’s definition of an efficient system of common schools. In common usage efficient can be thought of as productive without waste but the court went to great lengths to describe it. In just over eight pages the Supreme Court discussed and enumerated nine characteristics of an efficient system of schools. An efficient system is one established and maintained by the General Assembly to be substantially uniform throughout the state, free to all Kentucky children, and one that provides equal educational opportunity regardless of place of residence or economic conditions. An efficient system must also be sufficiently funded, free of waste, duplication, mismanagement, and political influence and it must have as its goal the development of seven specified capacities. These capacities enumerated a substantial set of skills that each student must learn.

Finally, the ideal of the common school in Kentucky is expressed in the following adaptation by the author from the Kentucky Constitutional Debates of 1890. The original sources were two delegates to that convention, delegate Beckner and delegate Moore.

A system of practical equality in which the children of the rich and the poor meet upon a perfect level and the only superiority is that of the mind. There is no check upon the aristocracy of wealth so effectual as the equality of knowledge. A people well educated will never be the slaves of tyrants or the tools of demagogues…Common schools make patriots of those who are willing to stand upon a common level. The children of humble mountain homes 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. The great democratic idea is there taught that you are all equal in that nursery of citizens, and that none are superior.¹

¹ Delegate Beckner, Debates Constitutional Convention 1890 at 4460, 4463; Delegate Moore, Ibid., at 4531.
Prologue

"Never doubt that a small group of committed people can change the world; indeed, it is the only thing that ever has." -- Margaret Mead, anthropologist

One Principal’s Voice

On November 10, 1989, at a meeting of the Council for Better Education in Frankfort, former Kentucky Governor and Federal Judge, Bert Combs suggested that a formal chronology documenting the events surrounding the Council’s lawsuit against the legislature would be important historically. In a sense, this is what I have attempted to do. I must confess that I loved this story from the start. As I saw it, there were a handful of school administrators who thought they could make things better for the children in their districts. Some worked at the state level, some at the local level, but they shared a mission: To be good stewards of the common school ideal.

But, the way this kind of story tends to go in Kentucky is - maybe they go to Frankfort and get some good done, but more likely, they try and fail. They fight a good fight and return home to work for their kids. I liked the idea of the little guys standing up to right a wrong that was being ignored by the more powerful. In that sense, this is an American story.

By the time the case was heard, they were not little guys anymore. Council members had taken their lumps along the way, but they had attracted the best legal counsel one could have hoped for, replete with a Kentucky icon. They had expert technical assistance and the strong support of the press. They were also the beneficiaries of an enlightened and well-supported business community. Professional education groups and an outstanding network of local community persons, all tied together by the Prichard Committee, supported them. The Council for Better Education had become a force to be reckoned with.

All of this momentum arrived in Franklin Circuit Court before a judge who knew education law and more than a few things about what it meant to be a student in Kentucky. After an initial ruling favorable to the Council, the legislature appealed to the Kentucky Supreme Court, which at the time had unmistakable activist inclinations.

Perhaps the most surprising development of all came from the defendants themselves. Beaten in the lower court and again at the Supreme Court, the Kentucky General Assembly, despite significant kicking and screaming along the way, determined in the final analysis that the conditions were right to do some excellent work. The result was the Kentucky Education Reform Act (KERA), arguably the most sweeping educational reform package in American history.

To play some small role in documenting and analyzing this momentous accomplishment is reason enough to take pride in the work. While all of this was going on, I was on the sidelines: a practicing school administrator, an observer of the process, and one who stood to be signifi-
cantly affected. To then become a researcher, required me to challenge my own assumptions and verify my own understandings through an appropriately rigorous academic process. To do less would undermine any analysis that would follow. Perhaps a researcher without connections to public schooling could do as much. My advantage is that being involved in Kentucky public school education over a long time, and especially during this period of great transition, helped my understanding of the significance of the events and their ultimate impact at the individual school level – where the children are. After all, it is only at that level where any of this matters.

After thirty years of service in Kentucky’s public schools I have witnessed a few swings of the pendulum and developed some opinions about the importance of educating all of our community’s children - in all their varieties. But, they are informed opinions. Since I cannot change my circumstances and have decided to write on the subject, it is best that the reader is aware of who is writing.

I am the middle son of an expert real estate appraiser (father) who was serious about the notion that in our country the only way to participate was to speak up. Otherwise, you have no voice. He served briefly in the Kentucky General Assembly in the 1950s. My mother was a long time School Secretary and Treasurer to the Ludlow Board of Education and a significant player among the men who ran our schools.

I was initially educated in the small northern Kentucky, Ludlow Independent School District, graduating as Boy of the Year, in 1969. A small Ohio River town of modest single-family homes, Ludlowites numbered about 6,200 homogenous Caucasians. Our diversity was Protestant and Catholic. I think the shoe repairman was Jewish, but he lived out of town. We were also within the grasp of a major Midwestern city and its media. We did not grow up with a Southern identity. Ludlow school children visited the tight, dark quarters below Mrs. Thomas’s Candy Factory where part of the Underground Railroad once operated, within sight of the Mason-Dixon Line. A short walk across the Ohio River on the Southern Railroad Bridge brought us to Crosley Field, where the Cincinnati Red Legs played - in the days of my youth. I was comfortable in a loving home, basking in white privilege, in small town America, in the middle of the 20th century.

I graduated the University of Kentucky in 1973. I had been active on campus serving a term as President of the Student Center Board, was active in Sigma Nu Fraternity, and left with a degree in elementary education and the Sullivan Medallion under my arm. I taught five years at R. C. Hinsdale Elementary School under the tutelage of veteran principal, Mildred Tupman. Mrs. Tupman was chosen to open this new school, in Edgewood, under the Individually Guided Education model (complete with open classrooms) that had gained some popularity in the late 1960s. The pedagogical philosophy was very similar to the KERA Primary Program that came 20 years later. Both advocated a progressive, child-centered approach focused on the achievement of each child - but in 1973 we tested less.

A Master’s degree from the Xavier University in 1976 brought with it certification for administrative work. I was named Elementary Supervisor for the Kenton County Public Schools, started the county’s first program for gifted children, and later became Principal of Ryland Elementary School. I became very active with the Kentucky Jaycees and played a supportive role in the admission of women in the early ‘80s. In 1985, failing in my attempt to gain an appointment
to the White House Fellowship Program, I accepted a principalship at Meadowthorpe Elementary in Fayette County and, in 1989, Cassidy School. I serve on the Fayette County Equity Council and received the Kentucky PTA’s Outstanding Educator Award for 2002.

As principal of Cassidy School, I have found myself uniquely situated to observe KERA’s implementation, and unfortunately the achievement gap, first-hand. Cassidy is part of the Fayette County Public School District - the district against which all others were equalized under KERA. Founded in 1935, the school enjoyed a long history as a popular and somewhat progressive school in the affluent Lexington neighborhood of Chevy Chase. Student test scores typically measured from the 60th to the 75th percentiles on the nationally normed Comprehensive Test of Basic Skills. Cassidy was commonly said to be a “good school” particularly attractive to the suburban white parents to whom it catered. Under the higher standards described in the Rose opinion, however, disaggregated student data revealed that not all groups of Cassidy students were performing at high levels. Among elementary schools in Kentucky, Cassidy had the largest gap in Black/White test scores at the turn of the new century. This, despite Cassidy’s veteran faculty, the kind advocated for children of color. By 2002, the percentage of low SES children grew to 31.8%, but neither the passage of Senate Bill 168 nor the full commitment of the Kentucky Department of Education to eradicate the achievement gap brought a penny of assistance to the approximately 140 low-income children who were said to be “in the gap.”

I talk about race in this work. In fact, it was a conscious decision on my part to choose that issue upon which to educate myself and, hopefully, improve as a person. I decided to seek an appreciation of other cultures and to try not to judge the value of a society by its level of technology and adherence to western values. I began to look for and notice that other cultures had much to offer my own life. Unbeknown to myself, I was becoming a postmodernist.¹

It is significant that I have spent my entire career in Kentucky. Since the Supreme Court’s decision in Rose v. Council and the passage of the KERA, Kentucky has been the focus of tremendous national attention. Along the way, I experienced the shift toward a more open and participatory form of school administration. The short story is that I have spent a 30-year career in Kentucky that includes district and school level instructional leadership before KERA, during its difficult implementation, and during its present reexamination under the higher mission of assuring a proficient education for each and every child.

This dissertation has been a long journey for me. I completed my qualifying exams in April 1990, slightly less than a year after the decision in Rose v. Council and just after the signing of House Bill 940, The Kentucky Education Reform Act (KERA). My first Qualifying Exam question, in 1990, asked me to gauge the impact of the Rose case. To some degree, I have been trying to answer that question ever since.

I had moved, in 1985, from suburban northern Kentucky to what was the state’s flagship district - Fayette County. I have had a unique set of experiences to accompany my journey

¹ University of Liverpool sociologists Gerard Delanty writes, “The postmodern world is one that has been transformed by globalization and is composed of not one civilization model, but many, for instance the European Union, North America, Japan, the Islamic world, Latin America, South East Asia. Postmodernization, ultimately, then, is the condition of postwesternization.” See: Gerard Delanty, Modernity and Postmodernity: Knowledge, Power and Self, London: SAGE Publications, 2000, 154-155.
through KERA’s implementation. I witnessed a deadly natural gas explosion at Simon Kenton High School. A teacher at one of my schools made national news when she was arrested for prostitution. I have seen children grow to graduate and lead successful lives. I have seen them go to jail and I have seen them die. I have been amazed by brilliant teachers, dismayed by impassive bureaucrats, disappointed by politicians and uplifted by some of Kentucky’s finest school children. When I am not complaining about it, I will attest that public school administration is critically important work.

Along with KERA and the standards-based movement came a new pedagogical paradigm for schooling in Kentucky. The philosophical position shifted from one of equality of educational opportunity to one of equality of educational outcomes. We all knew that this was going to take some time and the implementation required much from those on the front line. In the early years there was an assessment, but no clear curriculum. School councils went from being a trendy idea among progressive schools to a required governing body with tangible legal authority parallel to that of the local boards of education, albeit on a smaller scale. The basic organizational structure of every primary classroom was initially altered, only to fade under the weight of poor implementation and insufficient professional development. School principals were called upon to implement a considerable amount of change. In many cases, the change began with the principal’s own leadership style, as school-based decision making councils effectively eliminated the old-style autocrat.

The increased demands on school leadership turned the Kentucky principalship into a rather all-consuming job. This, along with some personal choices I made at the time, caused me to lose contact with my studies. But by that time, I had gathered most of my primary source data and had written part of what was to have been my dissertation.

It was about twelve years and one false start later that I decided to try again. I had thirteen original interviews with the main actors in the Council for Better Education effort along with boxes of primary source data in the form of Council for Better Education documents and records. In addition, Bill McCann had collected numerous interviews for the University of Kentucky archives but had not written on the subject. The data are important for our state. I wanted to tell the story of this group of local school Superintendents who defied the system and led us to Kentucky’s first real effort to educate all of its children.

So what do I have to offer after all this time and experience? I have a voice. I have one Principal’s voice. I can use it or not. It is my choice. While there is a certain amount of organizational encouragement to keep one’s opinion’s to oneself, there is an equally strong belief in the freedom of speech. It is this one fact that makes a critical assessment of our public institutions ‘from within’ possible. The more common voices of politicians, pundits and upper level administrators are valuable, but certainly not to the exclusion of those actually implementing the programs and teaching the children at the building level. The challenge for the practitioner, one I have accepted here, is to test one’s theories against the rigors of scholarship. Academic analysis sharpens personal reflection. Professional experiences reveal the possibilities that lie within research and launch new areas of inquiry.

Is my opinion biased? Certainly. It’s a practitioner’s bias. It comes from witnessing three decades of promises about new math, multi-aged classrooms and “can’t miss” reading pro-
grams. Madeline Hunter promised that if every teacher would do what great teachers do, they would all be great.\textsuperscript{2} Ron Edmonds told us basically the same thing about building effective schools.\textsuperscript{3} The Interstate School Leaders Licensure Consortium (ISSLC) standards also suggest that Principals are made great by the demonstration of certain skills, described as indicators on a set of standards.\textsuperscript{4} Kentucky Superintendent for Public Instruction, Alice McDonald, reduced our focus to how much time students were spending on tasks. And, Kentucky’s first Education Commissioner, Thomas Boysen, frequently explained the rocky implementation of KERA with the metaphor that we were “building the airplane while we flew.” All of this, against the backdrop of Kentucky’s historically modest support for its schools, has left me skeptical of many claims. But along the way I have been honored to work with hundreds of dedicated public servants that selflessly chose to teach children, when they could have chosen more lucrative careers. I have seen much good being done for many children – but for some more than others.

As a landmark case, \textit{Rose v. Council for Better Education} has drawn widespread attention and has been cited in dozens of cases and hundreds of articles. This manuscript is intended to be a broader survey of the subject based primarily on the original documents of the Council for Better Education. In that sense, it differs from the more common form - a narrowly focused dissertation.

Three particular areas of inquiry deserve more treatment than they receive in this manuscript. Those are Kentucky’s political culture, the policy change process and the mathematical aspects of school finance. The choice to limit my inquiry into these areas is largely a response to two previous dissertations on the subject. Dr. Woody Barwick\textsuperscript{5}, who worked with Dr. David Alexander and Richard Salmon, and who by 1993 was a local Superintendent and member of the Council for Better Education Board of Directors, effectively covered school finance issues in his dissertation. I would not attempt to improve upon Dr. Steve Clements’\textsuperscript{6} work on political culture, the policy creation process and its implications, not only for the legal challenge, but also to the development of the Kentucky Education Reform Act. I agree generally with his conclusion that KERA does not represent a shift toward a more individualistic political culture in Kentucky.

Paul Sabatier suggests that it is helpful to view policy advocacy in periods of a decade or more.\textsuperscript{7} While it was not my initial intention to structure my study in that fashion, it has proven very helpful in providing perspective to my understandings. Viewing the Council for Better

\textsuperscript{2} In the late 1970s I had the rare opportunity to discuss Dr. Hunter’s ideas with her over dinner thanks to the courtesy of Assistant Superintendent Marge Templeton of the Fort Thomas Independent School district.


\textsuperscript{4} No longer an active project, the Interstate School Leaders Licensure Consortium (ISLLC) was established in 1994, under the guidance of the Council of Chief State School Officers (CCSSO). ISLLC was a consortium of thirty-two education agencies and thirteen education administrative associations that worked cooperatively to establish an education policy framework for school leadership. The Consortium’s vision of leadership was based on the premise that the criteria and standards for the professional practice of school leaders must be grounded in the knowledge and understanding of teaching and learning. See Council of Chief State School Officers website, <http://www.ccsso.org>.


Education, the Prichard Committee and other actors from this perspective allows for a clearer view of some of the results of that initial effort and the ability to relate those results to the current challenges in public education. It becomes possible to see how coalitions maintain their core beliefs against changing circumstances.

Some believe schools cannot overcome the disparities present in the larger community. I assume they believe it for at least two reasons. First, that’s about all school folks have told the public for decades. Second, the disparities are real and the effects of poverty on school children are profound. I remember looking into Sally Vest’s primary classroom last year and observing a “free lunch student” who was working diligently. His reading was about two years behind what we would hope for a seven-year old. He was able to get some extra assistance and he was starting to catch up. In the next seat was a boy who read Scientific American, for fun. The gap is real - and it was Sally’s job to make it go away.

Schools *can* make a significant difference in the lives of their students. As schools begin to intentionally focus on the success of African-American and low-income students those students begin to improve. Changes in a school’s culture will also produce needed benefits for children. But schools do not control all of the variables, and changes in school culture alone are not likely to satisfy the promise of a world-class education for each and every child while our funding remains below the national average. To promise the public that schools can fix long-standing problems of poverty and race without additional resources is irresponsible. On the other hand, if it is to be done, the best chance surely lies in a well-supported system of common schools that is intentionally focused on the results we expect.

Much is at stake in Kentucky. The years of effort required to secure the historic Supreme Court decision pale in comparison to the time and effort needed to convert our lofty aspirations into reality. I believe there is a place for the voice of a Principal in this discussion. As Bert Combs understood, implementation of KERA was critical to the Commonwealth and that Kentucky’s Principals would be “vitaly important.”

Unless we do implement it…and implement it properly, Kentucky will not only be back where we were - we will be below where we were. Because we will have proved that we’re too ignorant to help ourselves, even when we try.8

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Chapter 1

Each child, every child…

The establishment and financing of a system of common schools have long been problems in Kentucky. The commitment to a well-educated citizenry has historically been weak at best as time and time again the General Assembly ignored the pleas of Kentucky's educational leaders.

Since the very beginnings of the Commonwealth, Kentucky's agrarian economy and attendant attitudes have shaped its citizens' perceptions of public education. The amount of schooling needed to plow a field, work a mine, or hunt was thought to be very small. The Scotch, Irish, English, and German immigrants were favorably inclined toward education, but as was typical of the people with a transatlantic background, they felt that education, like religion, was a matter of personal rather than public concern.9

In Kentucky’s traditionalistic political culture such attitudes provided little fuel for the development of an efficient system of schools. Kentuckians generally maintained a paternalistic and elitist conception of the Commonwealth reflective of an attitude that accepts a substantially hierarchical society as part of the ordered nature of things. The common citizenry authorized and expected those at the top of the social structure to take a dominant role in the government. In such a political culture the people tend to accept the government as an actor with a positive role in the community, but with a very limited focus, mainly that of maintaining the existing social order. Real political power is confined to a relatively small and self-perpetuating group of social elite who often inherit its 'right' to govern through family ties or social position.10 In such a political culture the general disdain for public schooling, by a largely uneducated population, provided little incentive for the General Assembly to worry much about the establishment of schools at all.

In his 1884 history, *Kentucky: A Pioneer Commonwealth*, N. S. Shaler observes,

The public school system of Kentucky has never been in a satisfactory condition compared with the Northern communities, though, measured against the other Southern States, the showing is very good. The trouble has been that the scattered position of the population has made the gathering of the children for school purposes a very difficult matter; and next, that the standard of education has been low, an evil that Kentucky has shared along with the rest of the Southern States.11

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Private academies were the first schools established in Kentucky, but they were available only to the rich. The decision to establish a system of publicly supported schools for all did not come early, or easily. Kentuckians took the typical backwoods attitude of "wait until we have cleared our forests, and until we have made our fortunes and we will build schools." Historian Thomas Clark describes the narrow curriculum available to boys in the early days of the Commonwealth.

If it was decided a person needed an education their curriculum was dictated by the role they wished to pursue in life. Surveying, arithmetic, geometry, bookkeeping, a little English grammar, and a few other practical subjects were taught to boys in private academies. If they were to become politicians, it was necessary for them to know enough Latin and Greek to impress their constituents.

Almost two hundred years after the establishment of the Commonwealth, its Supreme Court decided that Kentucky needed to start over. "Lest there be any doubt, the result of our decision is that Kentucky's entire system of common schools is unconstitutional." This opinion was the end product of a decision to sue the state of Kentucky on the part of a coalition of educators. This group formed a non-profit corporation called The Council for Better Education and sought a declaratory judgment that Kentucky's system for financing its schools violated the Kentucky and the U. S. Constitutions.

The basic concepts of school finance were originally outlined in a doctoral dissertation by Ellwood Cubberly in 1905. His now famous monograph, *School Funds and their Apportionment*, put forth the basic arguments for state support of education and the apportionment of state school funds:

The state owes it to itself and to its children, not only to permit the establishment of schools, but also to require them to be established even more, to require that these schools, when established, shall be taught by a qualified teacher for a certain minimum period of time each year, and taught under conditions and according to requirements which the state has, from time to time, seen fit to impose. While leaving the way open for all to go beyond these requirements the state must see that none fall below.

Theoretically, all the children of the state are equally important and are entitled to have the same advantages; practically this can never be quite true. The duty of the state is to secure for all as high a minimum of good instruction as is possible, but not to reduce all to this minimum; to equalize the advantages to all as nearly as can be

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13 Ibid., 215.
done with the resources at hand; to place a premium on those local efforts which enable communities to rise above the legal minimum as far as possible; and to extend their educational energies to new and desirable undertakings.\textsuperscript{16}

It was not until the Constitution of 1850 that Kentucky established what was called an inviolable common school fund. This is not to suggest that it was never violated. Even then, no general taxes were levied to support it until 1904.\textsuperscript{17} Constitutional amendments in 1941, 1949 and 1953, new tax policies in the 1950's and 60's, the establishment of the Minimum Foundation Program, and certain hurtful legislative acts set the stage for the school-financing crisis in Kentucky that was in full bloom by the 1980s.

Difficulties with school financing were not exclusive to Kentucky. In the late 1960s, numerous actions were brought in federal court challenging school financing schemes in several states. Collectively, this \textit{first wave} of cases challenged inequities in school financing systems under the equal protection clause of the U.S. Constitution. The earliest of these cases, \textit{McInnis v. Shapiro}, was the first fiscal equalization case to make it all the way to the U. S. Supreme Court. The plaintiffs argued that funds should be distributed based on educational needs. But they were unable to help the court devise “discoverable and manageable standards” by which the court could determine when the Constitution is satisfied and when it is violated.

In 1971, in the celebrated case of \textit{Serrano v. Priest}, the California Supreme Court determined that its state system of school finance, which was substantially dependent on local property taxes, violated the equal protection clause of the Fourteenth Amendment. The court determined that this funding scheme was invidiously discriminatory against the poor since it made the quality of a child's education a function of the wealth of his parents and neighbors. In determining that education was a fundamental interest not conditioned on wealth, the court could find no compelling reason to uphold the system of financing. This decision placed the burden of financing education firmly on the state.

The \textit{first wave} crashed in 1973, when the U. S. Supreme Court denied the plaintiffs relief, and held in \textit{San Antonio v. Rodriguez} that education is not a fundamental right under the U. S. Constitution, and therefore, poor school districts are not a protected class. In this federal case, the court found that the U.S. Constitution does not even mention education; therefore, education cannot be considered a fundamental right. The court rejected the claim that a suspect class was formed on the basis of property wealth. Accordingly, the state of Texas was held to a lower standard of scrutiny, and under that standard, the court refused to overturn what it termed a rational system of finance. This decision by the U. S. Supreme Court effectively precluded plaintiffs from using the equal protection clause of the U. S. Constitution by declaring it applies to individuals, not governmental entities.

After \textit{Rodriguez}, a \textit{second wave} of cases began in 1973 with \textit{Robinson v. Cahill} in New Jersey. Generally brought in state courts, these cases are based on state constitutions and produced mixed results. The plaintiffs generally argued that the presence of an Education Clause

\textsuperscript{16} Ibid., 17.
\textsuperscript{17} Frank L. McVey, \textit{The Gates Open Slowly}. (Lexington, Kentucky: University of Kentucky Press, 1949), 16.
created a fundamental right, but the trend was toward conservative decisions upholding state financing systems.

Despite this trend, a small number of individual educators remained concerned about inequities among Kentucky's school districts. They attributed the existing funding inequities to the Commonwealth’s system of finance. For years, some of these educators were unwilling, for personal reasons, to act on their beliefs.\textsuperscript{18} When the opportunity came, however, one of them met with a group of local school district Superintendents and formed a non-profit corporation that ultimately became the catalyst for revamping Kentucky’s entire system of public education.

This manuscript explores in detail the Council for Better Education, from its genesis in 1984 as a small group of\textit{rabble-rousers} through its emergence as a powerful force for all of Kentucky’s school children. I seek to answer some important questions about how the Council for Better Education succeeded, and in so doing, perhaps to help other groups in other places succeed in the future.

The Council for Better Education set out to achieve some measure of fiscal equity among Kentucky's school districts. What it got, however, was arguably the most sweeping educational reform in the nation's history. This is its story.

\textbf{The Common School Ideal}

“Each child, every child…” Kentucky Supreme Court Chief Justice Robert F. Stephens wrote it that way after much thought. He had been studying the Constitutional Debates to determine the legislative intent in establishing an efficient system of common schools. From the debates he read Delegate Beckner’s stirring comments, “A system of practical equality in which the children of the rich and the poor meet upon a perfect level and the only superiority is that of the mind.” Beckner described four justifications for establishing a system of common public schools that he called “fit nurseries of immortal spirits that have divine purposes to fulfill on earth.” He said the common schools were essential to the prosperity of a free people, that they should embrace all children, assure that students understand our government and should be given to all - rich and poor alike.\textsuperscript{19}

From this Stephens set forth a renewed mandate for the Kentucky General Assembly. In the most sweeping opinion affecting the public schools in the history of the Commonwealth – one that declared Kentucky’s previous attempts to establish an efficient system of schools unconstitutional – the Supreme Court placed responsibility for its creation and sustenance firmly on the legislature.

The system of common schools must be adequately funded to achieve its goals. The system of common schools must be substantially uniform throughout the state. Each child, every child, in this


\textsuperscript{19}Kentucky Constitutional Debates (1890) at 4460 – 4463.
Commonwealth must be provided with an equal opportunity to have an adequate education. Equality is the key word here. 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. This obligation cannot be shifted to local counties and local school districts.\(^\text{20}\)

The court instructed that in redesigning Kentucky’s schools, certain essential, and minimal, characteristics of an "efficient" system of common schools must be satisfied. Stephens wrote,

\begin{quote}
The establishment, maintenance and funding of common schools in Kentucky is the sole responsibility of the General Assembly.

Common schools shall be free to all.

Common schools shall be available to all Kentucky children.

Common schools shall be substantially uniform throughout the state.

Common schools shall provide equal educational opportunities to all Kentucky children, regardless of place of residence or economic circumstances.

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.

The premise for the existence of common schools is that all children in Kentucky have a constitutional right to an adequate education.

The General Assembly shall provide funding which is sufficient to provide each child in Kentucky an adequate education.

An adequate education is one which has as its goal the development of the seven capacities recited previously.\(^\text{21}\)
\end{quote}

The court declared, for the first time, that every Kentucky child had a fundamental right to an adequate education and described the seven capacities that must form the goal of an efficient system of schools:

(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

\(^{20}\) *Rose v. Council for Better Education*, 790 S. W. 2d 186.

\(^{21}\) *Rose v. Council for Better Education*, 790 S. W. 2d 186.
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.22

With this sweeping opinion of the Supreme Court, and the passage of KERA, Kentucky’s public schools were transformed from a largely unregarded system to one that quickly became nationally renown for the scope of its reform effort. The significance of the event is found in Kentucky’s historically weak commitment to public education and the sharp counterpoint provided by such sweeping reform. It is equally surprising for the fact that it occurred in a Southern state with all its agrarian attitudes, traditionalistic ideals and paternalistic racial prejudices.

Kentucky’s public schools developed late and they developed poorly. Without sustained pressure from the populace, the General Assembly was free to ignore the public schools, and ignore them they did. The historical evidence suggests strongly that absent public pressure, the legislature has been largely content to under-fund a very modest system of schools, for the benefit of a portion (certainly not all) of Kentucky’s children. The record shows an uninterrupted stream of legislation that consistently promised much more than it delivered. For those who believe in the common school ideal, it is a history of seduction and abandonment.

The Kentucky Constitution of 1890 clearly placed the responsibility for assuring an efficient system of schools on the General Assembly. But so great was the General Assembly’s disregard for the constitutional mandate that when the Supreme Court issued its opinion in the Rose case, legislative leaders were shocked to discover that the responsibility was entirely theirs. The only mandate that seemed to resonate with elected officials was an implicit understanding that their duty to protect the common good was subservient to a higher calling – no new taxes. Such was the depth of this understanding, that defense attorney William Scent actually argued before the Supreme Court that it was the will of the people that the legislature not raise taxes.23 The defense never offered any proof of this claim and the Justices apparently did not need any. But after the opinion, legislative leaders could no longer claim that local school officials had simply mismanaged an otherwise efficient system of schools. The schools had to be fixed and it was the complete responsibility of the General Assembly to do so.

The Kentucky Supreme Court’s decision in Rose v. Council for Better Education was a landmark case, amid three waves of school finance challenges that began in Federal Court in the late 1960s. The third wave began with Rose, and by the end of 1989, decisions in Montana and

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22 Rose v. Council for Better Education, 790 S. W. 2d 186.

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Texas cemented the emerging trend. Third wave cases de-emphasized equal protection analysis. Rather, plaintiffs relied on education clauses in state constitutions. These cases are for the most part characterized by an emphasis on adequacy rather than equity. Plaintiffs in the first two waves of school funding cases tended to emphasize the reduction of spending disparities. They focused on input measures like per-pupil spending. Conversely, plaintiffs in third wave cases concentrated on the sufficiency of school funding and postulated the existence of a constitutional floor of minimally adequate education to which public school students are entitled. When courts have found the education afforded students to be below this minimum, they have ruled in favor of plaintiffs.

According to Michael Rebell, Executive Director of the Campaign for Fiscal Equity in New York City, “Although plaintiffs prevailed in the early litigation, by the early ’80s, defendants were winning most of these cases, primarily because the courts had great difficulty in devising solutions for the problems of funding inequities.” Rebell sees the third wave cases as offering a benefit to the courts in terms of providing more tangible solutions. “Instead of dealing with equal funding concepts and complex property tax reforms, the adequacy approach allows courts to focus on the concrete issues of what resources are needed to provide the opportunity for an adequate education to all students and the extent to which those resources are actually being provided.”

As Prichard Committee Executive Director, Robert Sexton, understood,

One of the things that has come out of the Kentucky lawsuit, if you look at cases in New York ...or in New Hampshire, is that the plaintiffs are now arguing that...measured academic achievement should be one of the factors the court considers when it’s determining whether there’s equity. Not just funding, it’s achievement. The New York plaintiffs have specifically said they learned that from the Kentucky suit and from what happened in Kentucky after that in the reform.

We weren’t clever enough at that time to say...equal achievement is the desirable outcome. We talked about managing dollars. But I think we did at least open the...argument which was this is not just about making dollars even.

Rebell also argued that the standards-based reform movement, which is active in virtually every state, provided the court ‘judicially-manageable’ tools and a core constitutional definition

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of adequacy…which allow the court to devise effective remedial orders in these cases. Rebell sees a “critical link between mastery of the skills under standards-based reforms and the constitutional requirements for an adequate education.”

Maintaining a school system that passes constitutional muster requires a kind of legislative vigilance not historically witnessed in Kentucky. It requires legislators to “protect and advance” each child’s fundamental right to an adequate education. The true test of adequacy lies in the ability to deliver on the promise of a world-class education for each and every child.

Twelve years after the signing of the Kentucky Education Reform Act, the General Assembly’s commitment to monitor and support an adequate school system appears to be slipping once again. A revitalized Council for Better Education returned to point out that the percentage of state general funds going to elementary and secondary education has decreased from 46.6% to 41% since 1996 and Superintendents are once again feeling the pinch. By 2002, the Fayette County Public School District, once the state’s flagship district, was $100 million short of the funds to make needed facilities improvements. Fayette County Board of Education members were powerless to lower class sizes, expand extended school services for needy children, extend professional development opportunities for teachers, or effectively address the achievement gap by any means other than monitoring test scores. They were not only unable to expand learning time for needy children, but they were forced to consider cuts to basic services. The General Assembly mandated much-needed teacher salary increases but failed to provide local school districts the funds necessary to averted such cuts. Little more than a decade after Kentucky’s most dramatic and historical accomplishment on behalf of the public schools, the adequacy of the system is, once again, being called into question.

Chapter Summary

For reasons owing to Kentucky’s traditionalistic political culture and agrarian attitudes, the Commonwealth was slow to develop a system of common schools and once finally established, support over the years was weak. As a result, the achievement of Kentucky’s children suffered as fiscal support for the schools languished among the poorest in America along with the rest of the South.

A large amount of litigation emerged in the 1960s to challenge state systems of school finance. Plaintiffs seeking to provide legally adequate public schools found success using education clauses from the various state constitutions. Among these plaintiffs was a group of Kentucky public school administrators who formed the Council for Better Education and won a landmark case that launched a new wave of American school finance litigation focused on adequacy and equity.

The Kentucky Supreme Court, in Rose v. Council for Better Education, defined the constitutional mandate declaring the fundamental right of each and every child in the Common-

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wealth to an adequate education. The court also reaffirmed the General Assembly’s sole responsibility to provide an efficient system of common schools and defined the elements of that system.

The Supreme Court decision declared the entire system of school unconstitutional and lead to the most sweeping education reform in Kentucky history. But now, thirteen years after the passage of the Kentucky Education Reform Act the Council for Better Education has reemerged to question the adequacy of that system.
Chapter 2

A Slow Start for Kentucky’s Children

The story of education throughout the South is roughly parallel to that of the rest of the nation but with at least three significant additional influences: 1) the widespread agrarian attitude that education was largely a family matter, and for many, a matter of little necessity; 2) racism, born of slavery and plantation economics; and 3) its offspring, traditionalism, which reinforces paternalism, skeptical attitudes toward government and maintenance of the status quo. So change in the South comes slowly, when it comes.

In the earliest days of the Union, a gradual and essentially peaceful abolition took place in the North. Typically, a state would pass a law declaring: all slaves born after a given date would be free when they reach the age of 21 for women, or 24 for men. A gradual emancipation did not happen in the South because the moral drive to do it did not exist. Furthermore, economics created pressure not to do it. Many more slaves lived in the South. About 40 percent of Virginia's population was African-American. South Carolina had a slave majority approaching 60 percent of the population. So many more complicated problems were associated with abolishing slavery in the South. Also, less anti-slavery agitation appeared in the South although the contradiction between slavery and the Declaration of Independence was evident and spoken about.

Attitudes about schooling differed regionally as well. In the North, almost everyone, including free blacks got three years of three-month schooling. The goal was to teach reading, writing and ciphering. In the South, fewer total children were taught but there were lots of academies for planters' children.

The struggle to make adequate provisions for the education of all children in Kentucky has lasted almost from the time of its admission to the Union. The history of those repeated attempts on behalf of common schools, and of repeated failures, is one of the most interesting and suggestive subjects in the annals of state governance. According to historian Thomas Clark, Kentuckians have stamped

upon their schools, churches, court days, county fairs - on every phase of their lives - the deep impress of the land. It is relatively simple to confirm this fact at any period in the commonwealth's history. Most revealing are educational statistics, which reflect the distinctly rural cast of mind. If the rural Kentuckian during the past two centuries had invested his material resources as recklessly as he supported his public schools he would have been more thoroughly bankrupted than the biblical prodigal son. For almost a century and a half the people elected representatives who set too low educa-

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tional standards for their offspring, and the commonwealth still has not been able to overcome the effects of this cultural denial.\footnote{Thomas D. Clark, *Agrarian Kentucky* (Lexington: University Press of Kentucky, 1977), vii.}

Kentucky’s political culture turned the effort to establish and adequately support an efficient system of common schools into a 200-year struggle. The traditionalistic culture is a product of plantation agrarianism in which social and family ties are paramount. Those who do not have a definite role in politics are expected to be minimally active as citizens. In many cases, they are not even expected to vote. In return, they are guaranteed that family rights (usually labeled ‘individual rights’) will not to be taken lightly or ignored. In return, those individuals who are active in politics are expected to benefit personally (if not financially) from their activity. Good government is seen as the maintenance and encouragement of traditional patterns, while adjusting to changing conditions, with the least possible upset. Accordingly, political leaders tend to play conservative and custodial roles and tend toward inaction unless pressed strongly from the outside.\footnote{For a complete exploration see: Daniel J. Elazar, *The American Mosaic: The Impact of Space, Time, and Culture on American Politics* (San Francisco, CA: Westview Press, 1994); Miller, Penny, *Kentucky Politics and Government: Do We Stand United?* Lincoln: University of Nebraska Press, 1994; and Clements, Stephen K., “The Changing Face of Common Schooling: The Politics of the 1990 Kentucky Education Reform Act.” Ph.D. diss., University of Chicago, 1998.}

The traditionalistic political culture is instinctively anti-bureaucratic since by its nature bureaucracy interferes with the web of interpersonal relationships that lie at the root of the political system.\footnote{Daniel J. Elazar, *The American Mosaic: The Impact of Space, Time, and Culture on American Politics* (San Francisco, CA: Westview Press, 1994), 235-237.} The culture has historically produced government by aristocrats and good ol’ boys.

This is significant as an explanation of the disconnect between our laws and our practices. Kentucky’s history reveals numerous instances in which laws have preceded our actual practice - by as much as decades. This is seen in the passage of laws without the provision of funding. Perhaps the best example may be Kentucky’s first. After statehood, it took the General Assembly 58 years to establish of a system of public schools and yet another 54 years to actually fund that system.

More insidious examples are found in Kentucky’s handling of racial issues through which laws were passed without any real attempt at enforcement. In *Brown v. Board of Education* (Brown I) the U. S. Supreme Court ruled, in 1954, that separate schools for African-American children were unconstitutional. The following year the court in Brown II ordered schools to begin desegregating. But it was not until the Civil Rights Act of 1964, and the decision in *Green v. County Board of Education* in 1968 that school districts made any real attempt to comply with the court’s 1954 ruling.

The state’s traditionalistic political culture provides a prism through which all of Kentucky’s historical activities should be viewed. Failure to do so is likely to produce confusion in those wishing to understand why Kentucky has had such a history of legislative weakness in the face of overwhelming evidence of need. It is a history of failed attempts, of fits and starts, of seduction and abandonment.
The first attempt to establish a system of public schools began with the Seminaries of Learning Act of 1798, which "enabled the county courts of a number of counties to locate 6,000 acres of vacant land for the establishment and support of a County Academy." The law gave title to "the Trustees of each Academy respectively and exempted such lands from taxation so long as they should be held and used for school purposes."\[34\]

A later Kentucky Superintendent of Public Instruction, Moses Ligon, attributed the failure of that effort to seven causes. He reported that the system failed to provide education to the masses, that the Trustees were negligent, and that the donated lands were badly managed. He also noted a general lack of interest in education by the people who were distracted by the development of the new state. Private academies grew in popularity as the public academies failed, but agitation for a system of public schools that were free and open to everyone was the political agenda of the supporters of education, and this ultimately hurt the private academies.\[35\]

Several legislative acts eroded the Seminary system as well. Seminary lands were sold and the proceeds were diverted into the construction of buildings and for other non-school purposes.\[36\]

In a few instances, from the scarcity of good lands, no profitable locations were ever made; but in most others, through the negligence of Trustees, and the arts of speculators, nearly the whole original endowment [of 114,000 acres] was sunk, and with it, for many years, the success of anything like a common school system in Kentucky.\[37\]

The first Kentucky Constitution of 1792 made no law establishing public education. During that time the legislature met annually and each Governor presented an annual report. Not until 1807 did a Governor even mention education. In that year Governor Christopher Greenup said:

Knowledge is in every country the surest basis of public happiness, and the present state of our population and wealth seems to be a proper period for the legislature to turn their attention to a more enlarged sphere of education in science and literature than is at present established.\[38\]

In 1811, Governor Charles Scott addressed the legislature saying,

It ought not be forgotten also, Gentlemen, that to preserve our rights, we must understand them. Few people have been free, that

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\[37\] Ibid.
were ignorant, and if chance has thrown liberty in their way, it has sickened and disappeared when not cherished by the light of knowledge.\textsuperscript{39}

In December of 1821, Governor John Adair signed an act establishing the Literacy Fund. Under this legislation one-half of the clear profits of the Bank of the Commonwealth would go to the fund. Also a provision of this act was the appointment of a committee under the leadership of Lt. Governor William T. Barry to study how other states had become better at educating their citizens than had Kentucky. The committee prepared a circular to gather information from within the state and from outside the state.\textsuperscript{40} The report to the legislature was made in December of 1822 and told of the apathy that greeted their inquiries.

Your commissioners regret the necessity of stating that their efforts to collect information have not been attended with that success which was desired and anticipated. Their domestic circulars have generally been totally disregarded. Many of the foreign circulars have shared the same fate.\textsuperscript{41}

The committee was most impressed with Massachusetts and Connecticut, both of which used an ad valorem tax for the support of schools. Throughout New England, “it is rare to meet a young man or woman who has not knowledge of reading, writing, and arithmetic, competent to all the common business of life.”\textsuperscript{42} The report criticized systems that pay for the education of the poor only and advocated a system of common schools.

...wherever it is practicable, common schools open and free to every description of children are most consonant to the principles of our institutions and produce the most beneficial effects on the minds of the rising generation. It is a system of practical equality, in which the children of the rich and poor meet upon a perfect level, and the only superiority is that of the mind.\textsuperscript{43}

Philosophy aside, the report also argued that the state could spend less money and educate more students under a system that was more efficient. In a letter of support for the committee report, Harvard educated lawyer and former United States President, John Adams stated,

The wisdom and generosity of your legislature in making liberal appropriations in money for the benefit of schools, academies, colleges, and the university, is an equal honor to them and their constituents, a proof of their veneration for literature and science, and a

\textsuperscript{39} Ibid., 54. (from Senate Journal 1811-1812)
\textsuperscript{40} Ibid., 54. (from Senate Journal 1811-1812)
\textsuperscript{42} Ibid., 26.
\textsuperscript{43} Ibid., 28.
portent of great and lasting good to North and South America and to the world.44

Former U. S. President, James Madison, who had contributed to the writing of Virginia’s Constitution added, "A popular government, without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both."45

Unfortunately, the legislature was found lacking in both wisdom and generosity; thus the farce began. The best example may well be Transylvania University. As historian James Klotter wrote,

In 1820, Transylvania University was arguably one of the half dozen best colleges in the United States. It was certainly the best in the South. Its dynamic president, star-studded faculty, outstanding medical and law schools, and widespread reputation caused Thomas Jefferson to say that Virginia needed to establish a university or else ‘send our children for education to Kentucky or Cambridge.’ But — there's always a but — Transylvania's president, Rev. Horace Holley, angered Governor Joseph Desha, who accused the school of becoming elitist. Desha and the General Assembly cut off Transylvania's state funding. Religious leaders criticized Holley, a Unitarian from Boston, for attending the races and buying nude classical statues for his home. Holley finally resigned under pressure, the school lost momentum, and perhaps the state's best chance for a world-class university had passed.46

The General Assembly not only ignored President Madison’s recommendations but also failed to underwrite the Literacy Fund already on the books. The Literacy Fund was suspended in 1824. Thomas Clark notes,

One looks back with profound nostalgia and wonders what might have been had the Kentucky General Assembly been alert to a sense of what was occurring across the nation... The eloquent Barry Report was consigned to oblivion under that great legislative dodge, 'filed away'. The failure of legislators to comprehend the implications of its recommendations must be viewed historically as a great Kentucky tragedy.47

The U. S. Congress had passed Resolutions in Relation to a Portion of the Public Lands of the United States. The resolutions permitted Kentucky to claim "her equitable proportion of the public domain held by the general government, to be used by the State ... for the purpose of

45 James Madison letter to William Barry, 4 August 1822 in Doyle, 41.
47 Thomas D. Clark, “Introduction” in Doyle, 6.
education." In these acts, Kentucky made a case to the federal government that lands had been given to some other states and that the amount necessary to extend the same appropriation to Kentucky would be in excess of 1,000,000 acres, which Kentucky desperately needed for education. As another Kentucky Superintendent of Public Instruction, Barksdale Hamlett observed later,

To divert the funds which might be received from the general government to any other object than that of education, was something which the State could not do without dishonor; and yet the subsequent history of our school system shows that those funds were thus diverted.\textsuperscript{50}

Kentucky Act of 1830 gave the state a third opportunity to address the need for schooling in the Commonwealth. The act “had provided for schools and local taxation, but so great was the indifference of the people to education and their unwillingness to bear taxation that the law remained practically a dead letter.”\textsuperscript{51} “Incompetent trustees of academy endowments frittered away assets; visionary legislatures set up educational funds, only to raid them for any emergency that arose…”\textsuperscript{52} At this time the general educational level of Kentuckians was very modest. A report of 78 of the 83 counties revealed that of the “almost 140,000 children in the State between the ages of five and fifteen years, only 31,834 were attending school.”\textsuperscript{53} “…[A] full one third of the adult population could neither read nor write.”\textsuperscript{54}

Seven years later, however, Kentuckians had yet another opportunity to build their system of schools. In 1837, the State received $1,433,754 as a virtual gift from the national government in the distribution of so-called Surplus Revenue, and $1,000,000 was dedicated to the establishment of schools, the balance being diverted to an extensive and costly system of internal improvements. Almost immediately, when the state found itself in debt, the education fund was reduced to $850,000.\textsuperscript{55}

Unfortunately, it did not stop there.

In 1840, a deficit appeared in the amount necessary for the payment of the interest on the internal improvement bonds; and, to supply it, the Commissioners of the Sinking Fund suspended payment of in-

\textsuperscript{48} Barksdale Hamlett, \textit{History of Education in Kentucky} (Frankfort: Kentucky Department of Education, 1914), 7.
\textsuperscript{49} Ibid., 7.
\textsuperscript{50} Ibid.
\textsuperscript{51} Ellwood P. Cubberly, \textit{School Funds and their Apportionment} (New York: Teacher's College, Columbia University, 1905), 137.
\textsuperscript{53} Ibid.
\textsuperscript{54} Ellwood P. Cubberly, \textit{School Funds and their Apportionment} (New York: Teacher's College, Columbia University, 1905), 137.
\textsuperscript{55} Barksdale Hamlett, \textit{History of Education in Kentucky} (Frankfort: Kentucky Department of Education, 1914), 7.
Interest on the internal improvement bonds held by the Board of Education. 56

Finally, the bonds were actually burned. An act of the General Assembly required that all bonds held by the Board of Education be delivered to the Governor to be burned by him in the presence of the Auditor and Treasurer of the State. The state’s creditors were powerless to collect on their investments. 57

Now began a battle to change conditions, led by the Reverend Robert J. Breckinridge, a descendant of a Scottish Covenantor who had come to Kentucky from Pennsylvania, and who became School Superintendent in 1847. He first obtained from the legislature of 1848 a new bond for the confiscated school funds for $1,225,768, thus adding all unpaid interest to the principal of the bond. The next year he secured legislation permitting the people to vote at the fall elections for a two-mill state school tax, stumped the state for the measure, and carried the proposal by a majority of 36,882. In the constitutional convention of 1850 he not only secured the first constitutional mention of education and made provisions for a state system of public schools, but also had the debt to the state school fund recognized at $1,326,770, and declared inviolable. 58

Despite the state constitution's declaration of the inviolability of the common school fund, no mandate yet existed on the legislature to establish a system of state-supported public schools. The General Assembly failed consistently to levy taxes to support the schools. Nevertheless, on four different occasions - in 1849, 1855, 1869 and 1882 - the people approved successive propositions totaling 22 cents on each $100 of taxable property to the support of the common schools. 59

Kentucky had still not accepted the idea of a universal public school system, however. The legislature never even hinted at the idea of free public education for all of Kentucky's school-age children. No power was given to the counties to set and collect a school tax. The General Assembly set no curriculum and adopted no books. Local school commissioners, many of whom were illiterate themselves, selected and certified teachers. Parents chose the books their children were to learn from - mostly the Bible. No provision was made for the education of the children of slaves. Finally, the law failed to prescribe the length of the school term; although, it was generally agreed to be at least three months but never more than five. The fourth grade was considered to be the terminal grade. At this point a student was thought to be able to read a newspaper, the Bible, write a simple letter of correspondence, add and subtract. 60

56 Ibid., 8.
57 Ibid.
58 Ellwood P. Cubberly, School Funds and their Apportionment (New York: Teacher's College, Columbia University, 1905), 138.
59 Moses Edward Ligon, A History of Public Education in Kentucky (Bulletin of the Bureau of School Services XIV no.4, 1942)
Thomas Clark describes decisions made about public education in post-Civil War Kentucky as some of the most momentous and damaging in the state’s history. Social and economic complexities “grew out of racial confusion, the opening of a new agricultural era…a crusade for building new railroads and industry…and by a general uprooting of the older social system itself.”61

No state was more torn by the Civil War than Kentucky, and no state was more torn during the years following. The states to the south were united in defeat, and the knowledge that they fought well; those to the north were united in victory and the promise of prosperity. Poor Kentucky had succeeded, at hideous cost, only in tearing itself apart and planting seeds of enduring hatreds, and now it turned and tore itself again. Having stuck to the Union throughout the war, once the fighting was over it embraced the Confederate cause with an addled passion (partly because of the short-sighted and punitive policies of Union military commanders), leading one historian to remark that it was the only government in history to join the loser after the loss.62

Following the war the landscape was depressing for Kentucky. The ravages of war further tore what was already a poor fledgling school system.

An educated and objective southerner viewing his region in the dreary fall of 1866 might well have given up in despair. Every institution in the South had been injured seriously by the war. Most of all, the embryonic public school system was disrupted at the very moment when it was first gaining momentum. Now the South faced the unsettling blight of post-war confusion which delayed for a half century the maturing of the educational process that should have come to flower no later than 1870. On every hand white and Negro children grew up in gross ignorance, and illiteracy was accepted as a normal state of affairs.”63

John Ed Pearce describes Kentucky’s political landscape during the post-Civil War years as strongly Bourbonic. Kentucky’s leaders were “generally rich and reactionary gentry who clung to visions of the Old South, resisted industrialization, despised blacks, and distrusted government in general, preferring local arbitration of local matters by local gentlemen.”64 The prevalent attitude was that the better class of people would be educated in private schools and there was little need to educate the rest. By 1870, rather than a maturing system of schools, Kentucky’s educational opportunities were sparse and in general disarray.

63 Clark, Three Paths, 1.
The history of Kentucky common schools from 1870 to 1908 can be succinctly summarized by citing stubborn public resistance to taxation, trustee control of the local schools, lack of trained teachers and teacher training institutions, a poor rural agrarian economy, and the woeful lack of expectation that education can improve social and economic conditions.

Running through all the reports of the state and county Superintendents were critical notes concerning the trustee system, the indifference of parents, the shabbiness of schoolhouses, lack of supplies and equipment, and the shamefully low enrollment in schools and the discouraging average daily attendance of those enrolled.\(^{65}\)

In 1866, Kentucky passed its first measure dealing with the education of African-American children.

\[\text{Only taxes collected from blacks could be used in the schools for black children; funds from whites would support the white education only. Then two years later the General Assembly further limited the ‘colored school fund’ by ordering that any money from taxes collected from black residents would go to paupers first, before being spent on education.}\(^{66}\)

Since most blacks came out of slavery without money or property, the yield was not even close to being equitable. The hope for the education of African-American children was to come, not from the General Assembly, but from The Bureau of Refugees, Freedmen and Abandoned Lands, better known as the Freedmen’s Bureau. [Sic] In 1865, the War Department established the Freedmen's Bureau to supervise all relief and educational activities relating to refugees and freedmen. The Bureau assumed custody of confiscated lands in the former Confederate States, border states, District of Columbia, and Indian Territory. In all, 900 Bureau officials scattered from Washington to Texas, ruling, directly and indirectly, many millions of men.

In an article written for the Atlantic Monthly, W. E. B. DuBois called the Freedmen’s Bureau “one of the most singular and interesting of the attempts made by a great nation to grapple with vast problems of race and social condition.”\(^{67}\)

In truth, the organization became a vast labor bureau; not perfect, indeed, --notably defective here and there, --but on the whole, considering the situation, successful beyond the dreams of thoughtful men. The two great obstacles which confronted the officers at every turn were the tyrant and the idler: the slaveholder, who believed slavery was right, and was determined to perpetuate it under another


name; and the freedman, who regarded freedom as perpetual rest. These were the Devil and the Deep Sea. 68

The Bureau showed some success developing a system of free labor, establishing black peasant proprietorships, and securing the recognition of black freemen before courts of law. But the “greatest success of the Freedmen's Bureau lay in the planting of the free school among Negroes, and the idea of free elementary education among all classes in the South.” 69 By 1869, 267 of its schools provided education to 13,000 blacks. Yet like most Freedmen’s Bureau activities, the schools attracted strong - and violent - opposition. School after school was burned and teacher after teacher was whipped or driven away. 70 The Freedmen’s Bureau failed to establish good will between ex-masters and freedmen or to refrain from paternalistic methods that discouraged self-reliance. The number of African-Americans who ultimately became landholders was few.

During this time, Superintendent H.A.M. Henderson campaigned to raise the understanding of Kentuckians to the educational needs of the Commonwealth. He fought the unconstitutional act of the General Assembly that sought to take away school funds (yet again) and he won. He also crusaded for better pay for teachers, better textbooks, local taxation, normal schools for teacher preparation and the implementation of the graded school concept. 71

White voters agreed to increase funding for their schools four-fold, but schools for black children still languished far behind those for whites. In 1874, the federal government offered Kentucky $60,000 for the establishment of a uniform system of schools for black children. Henderson, who opposed “mixing” whites with “ignorant Africans,” accepted the funding and change did occur. However, this only raised the funding level to approximately one-third of that for white students. 72

In the case of Kentucky v. Jesse Ellis, in April 1882, the U. S. federal court declared the state’s funding plan unconstitutional. The General Assembly “responded with a plan to establish a combined funding system with the same per capita rate for black and white schools, to raise the tax rate, and to abolish the poll tax, paid only by blacks.” 73 But that plan covered only state funds and still allowed for local school districts to discriminate. So, in August of 1883, in the case of Claybrook v. Owensboro, Judge John W. Barr ruled that such discrimination violated the 14th Amendment of the U. S. Constitution. “The two systems could remain separate, but in regard to calendar, curriculum, and funding, they must - on the surface at least - be equal.” 74

As late as 1890, two thirds of the teachers were men. They were typically working for pocket change to supplement a farm income or as a stepping-stone to something else. Teaching

68 Ibid.
69 Ibid.
71 Clark, in Klotter, Our Kentucky, 285.
74 Ibid., 380-381.
became a common avenue for boys, and even some girls, to escape the family farm. If a student was good at book learning they could become a teacher. Then, after a few years, they could move on to become a store clerk, newspaper editor or lawyer. Most teachers were hired without contract and their jobs depended solely on their ability to satisfy their patrons. Parents placed little value on regular attendance. Also the common school curriculum consisted of whatever books were available, and lessons generally took the form of memory work.  

All in all, the common schools were well adapted to the lives of middling farmers, men and women who placed scant faith in acquisitiveness and social mobility but labored instead for a competence and a respectable start in life for their children.”

But a significant change was about to take place with the entry of women into Kentucky’s classroom. The increasing numbers of female teachers facilitated expansion of the teaching core and the lengthening of school terms. In 1886, men still outnumbered women in the classroom nearly 2-1. Male and female earnings were roughly comparable with women were receiving an average of 90% of their male counterparts.

As teaching was transformed from a seasonal to a full time occupation, men demanded higher wages, and in some cases the sex differential doubled in individual counties. That was an ominous development in a political environment where proposed increases in the school tax met with determined opposition from voters and lawmakers alike. Under such circumstances, the feminization of teaching was the key both to sustaining the graded schools and to spreading their influence beyond the borders of isolated towns and cities.

The idea of women working for less money than men was well accepted, even by most women. “Assumptions about women’s subordination to men and devaluation of their labor were so deeply imbedded in the culture that they required little comment.” These attitudes persisted well into the twentieth century, particularly in the elementary schools.

Women teachers also tended to demonstrate a greater interest in ‘educational progress.’ Most men who entered the classroom entered teaching as a stepping-stone to more lucrative employment. They relied on their superiors to get them into college or to open the doors of business, law, and medicine. Male teachers took care not to offend the local school committee by embracing unpopular innovations. Women, on the other hand, remained on the periphery of


76 Ibid., 17.


78 Ibid.

79 Ibid.
the political relationships that structured men’s lives. They had less to lose by casting off tradition, and because of their marginal status they received lighter punishments for their transgressions. As a result, argued advocates of the new education, female teachers were more ‘ready witted and quick to catch ideas.’ Their increased presence in the classroom seemed to distance schooling from the politics of neighborhood life. That disentanglement was essential if the new education was to make inroads into the countryside.\textsuperscript{80} 

Just before the turn of the century Superintendent W. J. Davidson reported three paramount needs to the General Assembly: 1) a minimum term of seven months, to be provided for by a system of county taxation; 2) an adequate number of Teacher's Normal Training Schools to accommodate young men and women who desire to prepare themselves for teaching; 3) a system of employing teachers in which merit, qualification and general fitness for the work, rather than the kinship or favoritism, will determine who shall teach our schools. Davidson also underscored his concerns with the trustee system.\textsuperscript{81} 

Many men, without special fitness, moral or educational, or without personal interest in the conduct of the school, seek positions on these boards either for mercenary purposes or to reward some friend or to turn the school over to some relative.\textsuperscript{82} 

The conditions in the schools themselves were demonstrative of the problems inherent in the system. Schoolteacher and author, John F. Day (no known relationship to this researcher) wrote about his experiences in one of Eastern Kentucky's one-room schoolhouses in his book \textit{Bloody Ground}. He described an ugly gray frame structure on a grassless red-clay knoll with half the weatherboard missing. The one remaining window shutter dangled from its upper hinge. Two outhouses were on the property - one with no door, the other on its side like an uprooted tree. The front door was nailed shut. Glass, leaves, dust and nutshells covered the inside. Bullet holes riddled the blackboard and the pipe connecting the wood stove to the chimney. Field mice inhabited the broken teacher's desk and the nearest clean water was a quarter of a mile away.\textsuperscript{83} 

In short, the school buildings themselves reflected that lack of care given the entire system. Absence of curriculum and resources were the norm particularly in rural Kentucky. It may be very well for the older generation to romanticize the ‘little red schoolhouse,’ but there's nothing romantic about the one-room schools of eastern Kentucky. They're not even red - or generally any other color for that matter. Indeed they are little houses on little ground where the little teachers at little salaries for a little while teach little children little things... In one county the health officer advised the Superintendent not to build toilets. His idea was that it

\textsuperscript{80} Ibid., 78.  
\textsuperscript{81} Barksdale Hamlett, \textit{History of Education in Kentucky} (Frankfort: Kentucky Department of Education, 1914), 175.  
\textsuperscript{82} Ibid., 174.  
was better to place a hoe in the corner and let the children take it with them into a nearby cornfield... If there's any place on earth hotter in the summer or colder in the winter than one of those squat [tin roofed] buildings I haven't found it... there isn't even a playground. The children play fox and dog until they tire of that, then they pick fights or throw rocks...if there are any teaching aids - maps, globes, books, magazines, photographs, modeling tables, and the like - the teacher buys them from a pitifully small salary of $50 to $75 a month...  

The mandate requiring the General Assembly to provide for an efficient system of common schools throughout the state and to appropriate to the common schools the income from the common school fund and any sum which may be produced for the purposes of common school education by taxation or otherwise, first appeared in the constitution of 1891. Even so, the General Assembly showed no initiative and lacking a direct mandate from the people did not levy a dollar of public taxes in support of public schools until 1904 - thirteen years after being empowered to do so. Not until 1893 did the statute books contain a single line of legislation actually requiring the establishment of schools and the levying of local taxes in support thereof, and not until 1908 was this mandatory legislation made general for all local units.

Kentucky's fourth constitution is not so much a fundamental rule of government as a piece of omnibus legislation. Implied powers were eliminated wherever possible; nothing was left to interpretation or to changing conditions of the future. Under the heading "Local and Special Legislation," the new constitution gives complete control over local government to the legislature. Sections relating to railroads, commerce, and corporations places these matters directly in legislative hands as well. This desire for centralized control on the part of the constitution's framers is also seen in Section 183, which gives the General Assembly the authority and obligation to provide for a system of common schools. That section calls for an efficient system of common schools throughout the state to be provided through appropriate legislation.

Kentucky's constitution is a narrow, rambling document designed to curb government rather than to guide it, a collection of restrictive statutes rather than an outline of principles. [It] is seven times longer than the constitution of the United States and is marked by neither its wisdom nor its grace.

Incidentally, the people of Kentucky never ratified the constitution. As originally written by the convention, the people ratified the draft. But in the mean time the leaders of the conven-

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tion came to realize that the original document was unworkable and began to substantially re-write it. This revision was never ratified.\textsuperscript{89}

It is important to note that Kentucky was entering the most unsettled and violent period in its political history at the turn of the century. Nightriders harassed African-Americans and their supporters. Returning soldiers from both sides would clash, which in turn spawned feuds in the eastern mountains. Political tricks led to the assassination of one Governor (Goebel) and the fleeing of another (Taylor) when the Court of Appeals declared the office vacant. Dueling was still somewhat commonplace. "In all, not the best possible way to begin a new century."\textsuperscript{90}

The first Superintendent of Public Instruction to serve under the new constitution was Ed Porter Thompson. Like several before him, he called for corrections to the "maladministration" which led some local educators to consider school money as a bonus to the district to be handed out to favored kin instead of educating Kentucky's children. "While this is not the rule, it is safe to say that in this way more of the public money is annually squandered than the state has lost in a century..."\textsuperscript{91} During Thompson's administration legislation was passed to pay teachers according to grade certificate, require all schools to be graded, provide efforts to increase attendance and improve teacher's wages.\textsuperscript{92}

W. J. Davidson, who succeeded Thompson as Superintendent, followed up on the favored kin idea with the passage of a nepotism bill. "A system of employing teachers in which merit, qualification and general fitness for the work, rather than kinship or favoritism, will determine who shall teach our schools."\textsuperscript{93}

While southern states did not pass laws that supported a system of segregation until the 1890s, white hostility had been the hallmark of southern race relations for over two centuries. The traditions of racism, white hostility toward blacks, and the inability of the black minority to protect itself after reconstruction all combined to disadvantage the former slaves from the start. White southerners explored ways to retain their mastery over blacks. Southern legislatures enacted criminal statutes that invariably prescribed harsher penalties for blacks than for whites and erected a formal system marginalizing African-Americans that remained in the early twentieth century.

In \textit{Plessy v. Ferguson}, the U. S. Supreme Court interpreted the 14th Amendment in such a way that equality in the law could be met through segregated facilities. In the 1896 case, Justice Billings Brown asserted that distinctions based on race violated neither the Thirteenth nor Fourteenth Amendment, two of the Civil War amendments passed to abolish slavery and secure the legal rights of the former slaves.\textsuperscript{94} Although the phrase "separate but equal" cannot be found in the court’s ruling, it sanctioned legally enforced segregation provided the law did not make facilities for blacks inferior to those of whites. Jim Crow laws were passed throughout the South that

\textsuperscript{89} Ibid., 16.
\textsuperscript{90} Ibid., 23.
\textsuperscript{91} Barksdale Hamlett, \textit{History of Education in Kentucky} (Frankfort: Kentucky Department of Education, 1914), 162.
\textsuperscript{92} Ibid., 165.
\textsuperscript{93} Ibid., 175.
\textsuperscript{94} Plessy v. Ferguson, 163 U.S. 537 (1896) 163 U.S. 537
established separate facilities for blacks and whites in everything from drinking fountains, through restrooms, and schools, to witness stands in courtrooms. In doing so the court acquiesced in the South's solution to race relations. According to attempts to improve the schools were focused on schools for white children.

State Superintendent Harry McChesney reported in 1903 a serious need for an increase in the length of the term of the rural schools. There was a provision of the law whereby the individual districts had the right to vote a tax to lengthen the term. But little good resulted from this law for several reasons. Many districts were so poor that with an ordinary rate of taxation only a very small amount of revenue could be generated.

Another reason was that the people had been inclined to doubt the authority of a local treasurer to collect taxes and so, where such a tax had been voted, a great deal of litigation resulted from the efforts to collect it. When stumping for a longer school term, McChesney enumerated inequities when describing inefficient state and county tax laws. He raised issues that would echo through the Kentucky Supreme Court some 86 years later. He said,

...what Kentucky's schools need more than anything else, more than all things else, is an increase in the length of the term of the rural schools. There is a provision of the law in existence whereby the individual district has the right to vote a tax to lengthen the term. But little good has resulted from this law, and for several reasons. A great many districts are so poor that with an ordinary rate of taxation only a very small amount can be realized...

About 80 per cent of the total state revenue for school purposes is derived from the tax of twenty-two cents on the one hundred dollars worth of taxable property. This being true, an additional county tax of twenty-two cents, in a county of an average wealth in the state, would increase from five months' term to nine months, and a county tax as low as ten cents would increase the term to about seven months. In the poorer counties it might require a twenty-five cent tax to extend the term to seven months.

When McChesney first raised the issue of equity in Kentucky's schools, his frame of reference was the comparison of white city schools to white rural schools. The issue of educating the African-American population had troubled Kentucky since the Civil War. By 1901, segreg-

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95 In his stirring dissent, Supreme Court Justice John Marshall Harlan wrote: “The white race deems itself to be the dominant race in this country...But in the view of the Constitution, in the eye of the law, there is in this country no superior, dominant ruling class of citizens...Our Constitution is color-blind... In respect of civil rights, all citizens are equal before the law... It is, therefore, to be regretted that this high tribunal... has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race... We boast of the freedom enjoyed by our people above all other peoples. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law. The thin disguise of ‘equal’ accommodations...will not mislead anyone, nor atone for the wrong this day done.”

96 Barksdale Hamlett, History of Education in Kentucky (Frankfort: Kentucky Department of Education, 1914), 179.
tion was de facto public policy throughout the South. For example, in his opening address at the Negro State Fair in Raleigh, North Carolina Governor Aycock,

urged his listeners to abandon their attachment to politics and abstract notions of equality. The social separation of the races was now a settled issue in the South, he explained, and its ‘violation’ would lead only to black ‘destruction as well as the injury of whites’.  

In what reads today like an open threat, Aycock advised African-Americans to stay within their own society. Separate development, Aycock cautioned, ‘it is well for you; it is well for us; it is necessary for the peace of our section.’

In 1904, the General Assembly further complicated the racial imbalance in education in the state when it enacted the flagrantly discriminatory Day Law. This law was aimed principally at ending the segregation of Berea College. Berea had been founded in 1855 with the specific mission of educating black and white students together. The Berea College website states,

Berea College's spiritual foundation, ‘God has made of one blood all peoples of the earth,’ has shaped the institution's culture and programs. Founder John G. Fee, an ardent abolitionist, asserted that Berea was founded ‘in the midst of many privations and persecutions to preach and apply a gospel of impartial love...’

Guided by this inclusive Christian message of impartial love, Berea's founders held fast to their radical vision of a college and a community committed to interracial education, to the Appalachian region, and to the equality of all women and men from all "nations and climes." This spiritual heritage compelled Berea College to serve all persons regardless of race, creed, color, gender, or class and led the College to draw its students from two immediate constituencies: African-Americans freed by the American Civil War and "loyal" white mountaineers.

African-American students had comprised more than a third of the student population. But the Day Law derailed that mission. In "Berea College v. Commonwealth of Kentucky," the

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98 Ibid., 181.

99 Carl Day, (no relation to the author) was a state legislator from Breathitt County. He accused Berea College of contaminating the white race and proposed a bill banning integrated education. The General Assembly passed the law with the support of the state's highest education official, Superintendent Harry McChesney. Governor Beckham signed it.

100 Berea College website, <http://www.berea.edu/Publications/History-of-Berea.html>

101 Section 1 of the Day Law reads: “That it shall be unlawful for any person, corporation, or association of persons to maintain or operate any college, school, or institution where persons of the white and negro races are both received as pupils for instruction; and any person or corporation who shall operate or maintain any such college, school, or institution shall be fined $1,000, and any person or corporation who may be convicted of violating the
college and its supporters fought the law in the courts, presenting a wealth of documentation on how integrated classrooms had benefited students. However the Supreme Court ruled that since Berea was a private college incorporated by the state of Kentucky, the Commonwealth had a right to regulate it according to state laws. The ruling spoke to Berea College, but the Day Law, which stood unaltered by the decision, applied to the entire Kentucky educational system. It remained in force until it was nullified in 1954 by the United States Supreme Court decision in the case of Brown vs. the Board of Education of Topeka. Historian Thomas Clark explained,

Berea College had from its founding in 1854 accepted Negroes, and in 1904 it was the only co-racial school in Kentucky. The college appealed the law…The Supreme Court, following the precedent of Plessy v. Ferguson, refused to decide the issue on the basis of co-racial education…the South now had two powerful precedents for ordering the maintenance of separate schools …This particular case was in many ways an even more important precedent than the Ferguson case because the court did discuss briefly desegregating the races, an issue which had not risen specifically in the former case.

Comments made by Superintendents Henderson and Pickett summarized well the sentiment of the white establishment following the Civil War. According to Henderson,

The most perplexing question connected with our school interest is that which relates to the education of the children of the colored people. In every social aspect of the case they constitute a non-conformable element. Different in history and color, there seems to be no natural affinity between them and the white race. After a long subjection to servitude, the colored people have suddenly been elevated to the franchises of American citizenship. Whatever view we may entertain of the propriety of the amendment to the Federal Constitution conferring this dignity upon them, it confronts us as a fact, and necessitates that we should deal with it as a practical problem, pressing upon us for its proper solution. If education is to be the basis for civil order, then to elevate the ignorant Africans, who

provisions of this act shall be fined $100 for each day they may operate said school, college, or institution after such conviction.”


103 A dissent was written by Kentuckian, Associate Justice John Marshall Harlan, who condemned the Day Law as the unconstitutional product of racial prejudice. The opinion was a major setback to racial justice in Kentucky and throughout the nation.


are invested with the tremendous power of suffrage, becomes at once a necessary duty. It has been truthfully said: "An uneducated ballot is the winding-sheet of liberty."

I presume that candid men of all parties will agree that the mixing of the races in the common schools would dismember the system; yet the colored people ask that something should be done for them to aid in the education of their children and we should not be so imbecile as to dismiss their entreaty without even thinking over the whole field to, at least, ascertain what might be done for them without injury to the whites.  

For the information of those desiring to know what provision has been made for the education of the colored people, we make the following compend of the system: The fund consists of the present revenue tax of forty-five cents on each one hundred dollars' worth of property owned by colored persons (all State taxes paid by colored persons is devoted to their education); a capitation tax on each colored male over twenty-one years of age; all State taxes on deeds, suits, or any license collected from colored persons; all the fines penalties, and forfeitures imposed upon and collected from colored persons due the State; all monies hereafter donated by Congress from the sale of public lands-the pro rata share to each pupil not to exceed that to the whites.  

Superintendent Pickett’s statement about the difficult task before the state underscores the lack of any serious desire to begin the process of conferring the rights and benefits of full citizenship to African-Americans. He lamented,

The State by judicious legislation must be relieved, as far as may be practicable, from the immense mass of ignorant citizenship which was imposed upon it. The question of the Colored Schools in this Commonwealth has assumed serious and prominent importance. The people must know their condition, for the problem must be practically and properly solved, and the Superintendent will spare neither time or toil in assisting in the solution, and he, now, emphatically repeats that the Colored Department, a system in itself, will continue to need for years to come, the friendly, fostering care and supervision of white officials.  

Superintendent of Public Instruction Harry V. McChesney was critical of the common school trustee system. "To say that the present common school trustee system is an absolute fail-

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107 Ibid., 133.
ure would probably be too severe a criticism, but to say the least, it is very unsatisfactory.\textsuperscript{109} However derelict a trustees may have been, it was a rare case for any patron to attempt to enforce the law and punish him. Change was needed, but McChesney had little success in instituting change leading to fiscal equity, adequacy or efficiency.

The means of progress for most blacks was likely to be industrial education. It was Booker T. Washington who brought the concept of industrial education to the Deep South.\textsuperscript{110} His idea was that “blacks would be trained to work out their own salvation through an education adapted to ‘their lives’ and ‘present needs’.”\textsuperscript{111} In his speech at the Cotton States International Exposition in Atlanta, Washington said that in all things “that are purely social we can be as separate as the fingers, yet one as the hand in all things essential to mutual progress.”\textsuperscript{112}

Washington’s speech received enormous publicity. Clark Howell of the Atlanta Constitution Proclaimed it, ‘One of the most notable speeches, both as to character and as to warmth of reception, ever delivered to a white audience. The address was a revolution. The whole speech was a platform upon which blacks and whites can stand with full justice to each other.’\textsuperscript{113}

However, charismatic reformer Marcus Garvey (1887-1940) called for racial separatism and a "Back-to-Africa" colonization program. Nonetheless, it was the decision that African-Americans were in this country to stay and would fight for their freedom and political equality that led to the modern civil rights movement.\textsuperscript{114}

School buildings for black pupils were even worse than those described for white pupils. Materials for blacks were essentially leftovers from white classrooms. But, black schools were a vital part of the African-American community life. The state’s 714 black public high school students and 93 graduates in 1900 led the segregated South, for example, and in 1907 a higher percentage of black youths in Kentucky attended school daily than did whites. Since the teachers in the black schools had often found their choice of occupation limited by segregation, some of the best and brightest went into education, a highly honored profession among blacks. With fewer blacks and whites using teaching as a springboard to other jobs, more stability and a better-educated teaching core characterized many schools.\textsuperscript{115}

The General Assembly of 1908 abolished the local district as the unit of school administration and set up the county to serve that role. This act was a significant watershed in Kentucky school history. Known as the County Administration Law, it was one of the most far-reaching

\textsuperscript{109} Superintendent McChesney in Barksdale Hamlett, \textit{History of Education in Kentucky} (Frankfort: Kentucky Department of Education, 1914), 179.
\textsuperscript{110} Booker T. Washington (1856-1915), the early 20th century's leading advocate of industrial education for blacks, argued for gradual social adjustment rather than political and civil rights.
\textsuperscript{112} Thomas D. Clark, \textit{The Emerging South} (New York: Oxford University Press, 1968), 172.
\textsuperscript{113} Ibid., 172-173.
\textsuperscript{115} Lowell Hayes Harrison and James C. Klotter, \textit{A New History of Kentucky} (Lexington: The University Press of Kentucky, 1997), 381.
pieces of school legislation in the history of the state. One of the chief provisions of the act was that each county was required to levy a tax for school purposes not to exceed 20 cents on each $100 dollars of taxable property. Local taxation for the support of schools was made compulsory. Each county board of education was required to establish one or more county high schools for the benefit of children of rural districts. Thus, after a struggle of 70 years since the establishment of the public school system, the state acknowledged its obligation to the rural children in the field of secondary education.

John Grant Crabbe was elected Superintendent of Public Instruction in 1907. He brought to office an active imagination and boundless energy. In that year well over half of the school aged children were not enrolled in school. Only 311,192 or approximately 42% of the students enrolled were said to have maintained a satisfactory average daily attendance. In the first decade of the twentieth century, illiteracy in Kentucky was the highest in the southern states. Crabbe declared that the Kentucky school system was still beset with the deficiencies of the previous century.116

To underscore his observations and generate grassroots support for better schools, Superintendent Crabbe stumped statewide in what he called The Whirlwind Campaign. He called upon the Kentucky Confederation of Women’s Clubs, the Kentucky Commission for Improvement of Education and the teachers’ associations to visit every community in the state. The Press was a willing supporter of the movement.117 “The campaign was a continuous cyclone bombardment against illiteracy and ignorance, for a period of nine days... Twenty nine speakers...[delivered] nearly three hundred public set addresses...The entire state was covered and every county was visited...”118

The campaign had the desired effect of publicizing and popularizing the need for improved schools. Crabbe called for an educational commission to make a thorough investigation of the school system. The commission was to make a report to the General Assembly including such suggestions, recommendations, revisions, corrections, and amendments, as its members deemed necessary.119

The General Assembly responded by passing the Sullivan Bill, more commonly known as the County School District law. The new law called for the establishment of a high school in every county, changed the name of Kentucky State College to Kentucky State University, increased collegiate appropriations, provided funds to normal schools to enhance teacher preparation, established a State Education Commission and charged it with the responsibility to make a report on the schools, instituted compulsory attendance for children in cities of the fourth class and larger, and passed a child labor law.120

118 Barksdale Hamlett, History of Education in Kentucky (Frankfort: Kentucky Department of Education, 1914), 200.
119 Sessions Act 1908, Chapter 65, 171.
120 Barksdale Hamlett, History of Education in Kentucky (Frankfort: Kentucky Department of Education, 1914), 205.
The educational commission began a thorough study of the education laws of Kentucky and those of other states. The school laws already in force were rewritten, rearranged, codified and became the new school code. After consultation and deliberation with educational leaders, a code was outlined that covered the whole common school system of the state. This code was submitted to the General Assembly of 1910 as the report of the commission.121

The principal recommendations in the report were: (a) the ex-officio, three-member State Board of Education should be supplanted by a seven-member State Board of Education, consisting of the state Superintendent of Public Instruction and six experienced educators; (b) the powers and duties of the State Board of Education and the Superintendent of Public Instruction should be extended; (c) the examination of applicants for certificates and the grading of papers should be under the direction of the State Board of Education; (d) provisions should be made for the certification of high school teachers on the basis of training and for the issuance of certificates in special fields; (e) the powers and duties of the county Superintendent should be increased; and (f) institute instructors should be licensed.

Historian James Klotter, summarized Kentucky’s efforts in the early 1900s.

“In 1900, Kentucky stood fourth in the South in per capita income devoted to education, and had the only compulsory education law in the South. The 1908 legislature required every county to establish a high school, strengthened attendance rules, and poured more money into the newly created teacher training colleges at Bowling Green (now Western Kentucky University) and Richmond (now Eastern Kentucky University). Legislators and education advocates launched a statewide campaign in support of education, and bright days seemed to lie ahead. But it was a false light that soon dimmed. Funding did not continue at an adequate level, and as Kentucky ambled toward education reform, other states ran ahead. By 1920, Kentucky's ranking had fallen from fourth to eleventh. The cost of this lack of progress was incalculable because it drove many of the best and brightest students and teachers out of the state.”122

At the beginning of the 20th century, approximately 90 percent of African-Americans in the United States lived in the South. That number declined precipitously during the first half of the twentieth century during what was called the great migration. Throughout the South, severe labor shortages were reported, particularly in the heavily black, cotton and tobacco growing sections. The exodus of cheap labor was a clear signal that blacks were increasingly unwilling to live according to the racial mores that whites had defined. World War I depleted the supply of immigrant labor in the North, so many American Industrialists turned to African-American workers as the solution. Labor agents were sent to recruit workers frequently with inflated “promises of high wages and a new life free from the rule of Judge Lynch and mob violence.” Some recruits viewed the North as ‘Promised Land’; other understood the harsher realities. The

121 Moses Edward Ligon, A History of Public Education in Kentucky (Bulletin of the Bureau of School Services, XIV no. 4, 1942.)
great migration, as it came to be called, rekindled old fears of black mobility. But few failed to recognize in the exigencies of wartime a chance to seize control of their own fortunes and to secure new opportunities for their children.\textsuperscript{123}

“Many reformed minded whites [believed] that the only hope of slowing the ‘exodus movement’ lay in putting ‘some check’ upon rampant Jim Crow legislation and restrictions. The reformers never called for an end for segregation, but they did insist that, for it’s own sake the white South had to afford African-Americans wider opportunities to ‘better themselves.’ That meant, among other things, providing more equitable school facilities for black children.”\textsuperscript{124}

In 1917, the Kentucky Education Association recommended to the legislature that a minimum taxation of twenty cents per $100 of valuation should be set for every board of education and that the maximum should be fifty cents. At the same time, Superintendent Virgil O. Gilbert recommended a thirty-cent minimum and no maximum.\textsuperscript{125}

The General Assembly responded by providing that "any graded school district be permitted to levy in addition to the fifty cents on each one hundred dollars of taxable property and the $1.50 poll tax, a tax not to exceed twenty-five cents on each one hundred dollars of taxable property in the district and a poll tax of $1.00, for the purpose of maintaining a school and repairing buildings."\textsuperscript{126} Additional taxes were levied on proceeds from the licensing of racetracks, bank deposits, and sales of oil and distilled spirits; a substantial portion of which was to go to the school fund.\textsuperscript{127} In 1918, the maximum was raised to thirty cents on each $100 of taxable property.\textsuperscript{128}

In 1920, the Sullivan Law was revised and amended.\textsuperscript{129} This act provided for a county board of education of five members elected from the county at large, with authority to appoint a county Superintendent for a term of not more than four years. Some opposition developed to the election of the five trustees from the county-at-large.

To meet this opposition, the legislature of 1922 made provision for dividing each county into five divisions, with one board member from each division.\textsuperscript{130} In 1924, the legislature assigned the time of the election of these officials to the regular November election.\textsuperscript{131}

By this time, the Kentucky Commission on Education that was called for by the 1920 General Assembly had made its report. The recommendations made in chapter four of the report dealt with financial support of the schools and called for greater adequacy and the "elimination of

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\footnote{Ibid., 20.}

\footnote{Ibid., 20-21.}

\footnote{Ibid., 21.}

\footnote{Sessions Act, 1920, Chapter 36, 148.}

\footnote{Sessions Act, 1922, Chapter 39, 149.}

\footnote{Session Act, 1924, Chapter 52, 78.}
\end{footnotesize}
educational inequities which arise chiefly from the differences in the amount of taxable wealth in different sections of the state, as well as in different communities within the same section of the state.”

The Commission found that one of the wealthy counties (Woodford) had $7,615 of taxable property per school age child, while one of the poorer counties (Wolfe) had only $545. In its report the Commission underscored the problems inherent with this method of funding distribution saying:

A method of distributing state school funds that thus ignores differences in financial resources, ignores differences in the grade and in the quality of the schools although there is equal willingness on the part of the people to make sacrifices for them, and ignores the State's responsibility to provide equal educational opportunities of a satisfactory standard for all the children of the Commonwealth, ought not to be longer tolerated. Sound policy requires that these differences be taken into account in the distributing of State school funds.

In addition to its calls for equity, the report also made a strong plea for more adequate funding, which came in various recommendations throughout the document.

The state will perhaps be startled by the preceding suggestions, all involving greater expenditures. But let us pause to consider. The tide of prosperity does not rise in countries that pay little for education; it rises in those that pay much. A vigorous and industrious population does not seek a state which has poor schools; it seeks a state which has good schools. Having done far less than it should, and less than it could afford, let Kentucky by a by a supreme effort now do at least what it can afford. The returns will be prompt and large. Such action is recommended not only by statesmanship, but by enlightened selfishness, if one must have a lower justification.

Similarly, Superintendent George Colvin warned that the inequities between rural and city schools were becoming ever more apparent.

With the enactment of the first County District Law in 1908, the maximum levy rate was set at twenty cents. In 1918, it was advanced to thirty cents, and now it was further advanced to fifty cents. Superintendent Colvin considered this only temporary and

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133 *Public Education in Kentucky* (New York: General Education Board, 1922), 140-141.

134 Ibid., 202.
recommends that it should later be raised more, ultimately to the end that rural children be provided for equally with city children.135

In 1920 and again in 1922, graded common school districts, that is, independent districts in cities of the fifth class and smaller, were given "the privilege of a tax rate up to one dollar and twenty-five cents to the hundred, exclusive of any sinking fund levy that might be needed."136 It is interesting to note that by this time Sullivan Law had spawned 388 independent districts in addition to 120 county districts ranging in size from forty students to fifty thousand students.137

Kentucky had not kept up with the degree of change going on in the rest of the region, however. “In 1900 Kentucky had stood fourth in the South in educational spending per student…and by 1920 the state ranked only 11th in the South.” “The promise [of an educational awakening] had not been realized and generations of Kentuckians were doomed to an educational system that stood near the bottom in most national categories.138

In 1924, the revenue laws were revised and the school fund was excluded from the tax on certain classes of property. Under provisions of the 1924 revenue act, the school fund was to receive twenty and seven-tenths of the tax on real estate. Assessments of money in hand, notes, bonds, accounts, and other credits including shares of stock were excluded from the fund.

Again in 1926, on the advice of Superintendent McHenry Rhoads, the General Assembly raised the maximum allowable tax for a county board of education from fifty cents to seventy-five cents. At nearly the same time, Rhoads continued to warn the General Assembly of "glaring and significant inequities in time, revenue, tenure of service, salaries paid to teachers and property investments for school purposes" which needed to be investigated and remediated.139 He asserted,

The distribution of the public school fund of the State should not be made entirely on the basis of school population as at present. A small part of the public school fund should be distributed on the basis of needs. This would require an amendment to the constitution. An alternative, however, would be an appropriation from the general expenditure fund of the State to be administered by the State Board of Education for the purpose of encouraging educational interests in backward sections of the State.140

At length the concerns about equalization were heard by the General Assembly, and in 1930 The Teacher Equalization Act was passed. This act applied $1,250,000 to the equalization of educational opportunities and enabled the State Board of Education to assist boards of educa-

135 H. W. Peters, History of Education in Kentucky, 1915-1940 (Frankfort, Kentucky: Department of Education), 41.
136 Ibid., 43.
137 Ibid.
139 H. W. Peters, History of Education in Kentucky, 1915-1940 (Frankfort, Kentucky: Department of Education), 61.
140 Ibid.
tion in poorer counties in raising teacher salaries to the legal minimum of $75 per month. The passage of this equalization program also permitted the poorer counties to employ better-trained teachers and extend the school term.\textsuperscript{141}

The State Auditor challenged the constitutionality of the act in 1932 on the grounds that the constitution permitted only per capita, or flat grant method of fund distribution of state school funds. The Kentucky Court of Appeals overturned the Teacher Equalization Act on June 24th of that year.\textsuperscript{142} The limitations of the constitution of 1891 left the State Board of Education ill-equipped to legally remedy the problems of inequity.

With the overturning of the Teacher Equalization Act, school officials believed that they were left with only the option of trying to provide an adequate minimum so that no children would suffer. In 1935, Superintendent James H. Richmond advised,

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In order to guarantee equality of educational opportunity for all of the children of the Commonwealth, it is essential that the state provide a substantial share of the cost of public school support. A $12 per capita is far from being a sufficient amount to make this equity possible. However, with a state per capita of $12 or more the children in less favored sections of the state are assured of at least a minimum of educational service, and the public school system of Kentucky will be secure.\textsuperscript{143}
\end{quote}

Enacted in 1934, the next school code provided for the Kentucky public school system to be placed under the control of a State Board of Education. The authority of the State Superintendent of Public Instruction was significantly increased as well.\textsuperscript{144}

The problems inherent in operating two racially separate systems of education continued to be pointed out in a series of court cases. So strong was the desire to keep Kentucky’s colleges and universities segregated that in 1936, the General Assembly passed the Anderson-Mayer State Aid Act. The act “underwrote the graduate education of African-American citizens of the Commonwealth outside the borders of Kentucky in the same fields that were available to white students in public institutions within the state.”\textsuperscript{145} Spawned by a 1921 Missouri law and spread throughout the region, the idea behind the Anderson-Mayer Act was to keep the doors of southern graduate schools closed to African-American students through the first half of the twentieth century.

\textsuperscript{141} H. W. Peters, \textit{History of Education in Kentucky, 1915-1940} (Frankfort, Kentucky: Department of Education), 79.
\textsuperscript{142} Talbott v. Board of Education, 244 Kentucky Reports (1932), 826.
\textsuperscript{143} H. W. Peters, \textit{History of Education in Kentucky, 1915-1940} (Frankfort, Kentucky: Department of Education), 87.
\textsuperscript{144} H. W. Peters, \textit{History of Education in Kentucky, 1915-1940} (Frankfort, Kentucky: Department of Education), 96.
A 1938 Supreme Court case, *Hale v. Kentucky*, outlawed “a systematic and arbitrary exclusion of Negroes from the jury list”\(^{146}\) In 1942, the city of Louisville equalized the salaries of black and white teachers, and in the same year, the two racially separated teachers unions merged. A 1940’s survey of state educational facilities showed that black school buildings had half the value of white ones [and] “the doctrine of ‘separate but equal’ seldom addressed the second part as well as the first. More than that, the spiritual depravation arising from segregation continued to be worse that any building inequities.”\(^{147}\) But efforts to address inequities still focused on differences among schools for white children.

Historian James Klotter says of the 1940s,

Kentucky's education system stood in shambles. Some 95 percent of American children were enrolled in elementary school, but only 63 percent of Kentucky's were. Kentucky's per student expenditure was half the national average. The Commonwealth ranked dead last in the percentage of high school graduates. Segregation, with its separate (and unequal) schools, wasted money and squandered human potential. Kentucky is still struggling to climb out of that educational hole.\(^{148}\)

Superintendent John W. Booker succeeded in convincing the 1940 legislature to place a constitutional amendment to Section 186 on the ballot. Once ratified, the amendment authorized the General Assembly to allocate ten percent of the state education fund to be distributed on some basis other than the census method. The amendment carried and the 1942 Assembly enacted a law governing the distribution of the fund.\(^{149}\)

Chapter 14 of the Acts of 1940 provided that if the available funds of any district failed to provide an income of $30 per pupil per year, then the Equalization Fund would bring the total up to $30 per pupil for the district. In case the fund was not sufficient for this, the available amount of the fund was to be distributed on a percentage basis determined by the ratio of the fund to $30 per pupil per year.\(^{150}\)

The General Assembly enacted the law in January of 1942 directing that $400,000 be sent to districts on other than a per capita basis. The fund was made available to any district with a state-approved budget, salary schedule and maximum permissible school tax. "This law permitted a sufficient amount to be sent to each district to enable the board of education to have available $30 per child per year in average daily attendance."\(^{151}\)


\(^{149}\) *History of Education in Kentucky: 1939-1964* (Frankfort: Department of Kentucky, 1963), 27.


\(^{151}\) *History of Education in Kentucky: 1939-1964* (Frankfort: Department of Kentucky, 1963), 39.
The General Assembly appropriated $1,500,000 in 1944 for equalization purposes to districts whose total net revenue did not yield as much as $40 per pupil in average daily membership. Seventy-eight districts participated in 1943-44. In 1945-46, sixty-nine districts participated, as did ninety in 1946-47. By that time the fund had grown to $1,800,000.152

Despite these efforts, Kentucky's schools continued to lag behind in the support received through state funding.

The annual income of Kentucky is $1,105 for each child. Its rank in ability to support schools is 43, which places it in the lowest eighth of the states as to this criterion. The state also faces the necessity of maintaining separate school systems. It places a relatively low value upon education, devoting but 3.54 per cent of its income to the support of its school system and ranking thirty-seventh with respect to this effort... Kentucky occupies thirty-eighth place with respect to all-around educational performance.153

Again in 1949, Kentucky voters approved a constitutional amendment that permitted twenty-five per cent of the school fund to be allocated to tax-poor districts. An amendment to Section 186 of the Constitution was added in 1952 that nullified distribution of funds on a per capita basis and completely vested the General Assembly with the power and responsibility for creating an efficient system of common schools. The next year, the General Assembly enacted an equalization law that prepared the way for what is known as the Minimum Foundation Program.

In 1950, the Day Law was amended by the state legislature, allowing Berea College, once again, to admit black students. However, the amendment applied only to those students who could not find comparable courses at the Kentucky State College for Negroes.154 This restriction was ultimately removed when

In a unanimous decision in 1954, the court ruled segregation illegal, in Brown v. Board of Education of Topeka Kansas. By declaring that ‘in the field of public education the doctrine of separate but equal has no place,’ for such a policy is ‘inherently unequal,’ the U. S. Supreme Court accelerated a slowly developing Civil Rights movement.”155

But as we have seen, a court ruling seldom produces an immediately favorable response from the public. Kentucky’s most prominent newspaper at the time, the Louisville Courier-Journal, came out in favor of acceptance of the Brown decision and supported the actions of oth-

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152 Ibid., 65.
ers who did as well. Governor Lawrence Wetherby declared, “Kentucky will meet the issue fairly and squarely for all” but, “across the South massive resistance to integration was the common response.”

In the 1950’s white citizens were still far from racial egalitarians but small steps toward social justice for African-Americans began to be taken. In 1955, a young black woman entered Lafayette High School in Lexington. “When the Mississippi Valley Historical Association held its national meeting in Lexington in 1953, one hotel in the city opened its doors to black guests for the first time. The next year the city directory there dropped the C [for colored] designation after people’s names.”

The Minimum Foundation Program 1954

Superintendent of Public Instruction Wendell P. Butler knew first hand of the unfortunate conditions and unforgivable attitudes faced by Kentucky's educators. He was a product of Kentucky schools and colleges and began his career as a teacher.

When I taught during the depression, the state did not furnish free textbooks, so many children had no books. In one class, I asked one of my students if he had a geography book.

He replied matter-of-factly, ‘No, never had one.’

Then I decided to see if a thought-provoking question would remedy the situation. ‘Did you know that three-fourths of the world is covered with water,’ I inquired? ‘We can read about it and prove it if you get your dad to buy you a book.’ The next day I asked, ‘John, what did your dad say?’

‘Pap tolle me to tell you that if three-fourths of the world was covered with water, then just teach me to swim.’

Events like this helped shape Butler's attitudes and desire for a reform of the school system. By the early 1950s, conditions had not improved for many Kentucky children. By all accounts, the school system was still deplorable during this era. Overcrowded classrooms, outmoded buildings, inadequate transportation facilities, and poorly trained teachers all combined to create a general acknowledgement that Kentucky's system of public schooling was certainly not up to the standard set by its constitution. 

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156 Ibid., 387.
159 Ibid., 305.
A century earlier, then State School Superintendent Robert Breckinridge proposed an amendment to the Kentucky Constitution, which would permit the distribution of state education funds to be made on a basis other than a per capita allocation. The voters finally approved this suggestion in November, 1953 and did so by a large margin.\textsuperscript{160} As a result the Minimum Foundation Program was established. The General Assembly of the Commonwealth of Kentucky adopted the program effective July 1, 1954. In so doing so it declared its intent

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to assure substantially equal public school opportunities...for those in attendance in the public schools of the Commonwealth, but not to limit nor to prevent any school district from providing educational services and facilities beyond those issued by the Foundation Program; and to provide, [as funds are made available], ... for the further equalization of educational opportunities.\textsuperscript{161}
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\end{quote}

The Minimum Foundation Program in Kentucky was based upon a model known as the Strayer-Haig Foundation Program, which simply meant that the legislature would provide a financing system putting together state and local resources in a way in which the schools could in fact provide for the expenditures for the education of the children. The idea was to provide a working level for all schools, that is, a minimum level that the legislature believed was adequate for all schools to operate.\textsuperscript{162}

Four provisions constituted the core of the foundation program. A classroom unit was established using a formula based on average daily attendance and divided by a factor determined by the Department of Education. This factor differed for children with special needs so as to produce more funding, due to their greater need. As such, it was a weighted formula. For example, a regular classroom might be established with a student/teacher ratio of 27:1 while a particular type of special education unit may have been maintained at 15:1. This ratio directly affected the number of teachers a district could hire. Based on that measure of educational need, the state set aside an amount of money for salaries, current expenses, capital outlay and transportation.

The money derived from those four categories was calculated for each school district, and from that, the amount of money a district was required to raise in local effort was subtracted. The required effort was a specified tax rate, which equalized up to a given level.\textsuperscript{163} In order to participate in the program, the law required each district to make a contribution based on the proceeds of a tax of $1.10 per $100 of Equalized Value of Taxable Property...

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The [State Tax] Commission undertakes to find the 100 per cent value of each class of property. The finding is known as “Equalized
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\textsuperscript{160} Wendell P. Butler, in Edwina Ann Doyle, Ruby Layson and Anne Armstrong Thompson, eds. \textit{From the Fort to the Future} (Lexington: Kentucky Images, 1987), 118.
\end{flushright}
Assessed Value. The total equalized assessed value is determined for each district and then totaled for the state.\textsuperscript{164}

The percentage of the state total equalized assessed value that was in each county was used to determine each district's contribution to the Foundation Program; that contribution being a proportional percentage of the state total.\textsuperscript{165}

For example, the total of \$1.10 on the state equalized value for 1960 was \$45,873,319.04. Adair County had 0.3387 percent of the state equalized value, and accordingly had that percentage of the total state contribution of all the districts. The amount was \$155,372.93. Similar calculations were made for each district.\textsuperscript{166}

In addition to the Minimum Foundation Program, the legislature added what was called the Power Equalization formula, which simply distributed state funds in a manner inversely proportional to the fiscal capacity of the school district. However, the General Assembly never funded the program at a level adequate to achieve its goal and its potential impact was never fully realized.\textsuperscript{167}

The three factors affecting the Minimum Foundation Program were the decisions to tax property, and to establish school districts and the inadequate funding of the program itself. The property tax was the principal means for local school support, but property ownership was only one measure of the well being of individuals who pay taxes, and it is thought by many not to be the best measure. Because people pay nearly all taxes out of personal income, that measure is usually considered the best single indicator of personal well-being.

Communities, which may be affluent in terms of property valuation, may be less affluent in terms of personal income. This is particularly true in Kentucky where the correlation between personal income and property valuation for school districts is rather low. This data suggests that state school aid formulas might reasonably include factors other than property to measure district wealth.\textsuperscript{168}

The decision to establish school districts based virtually on geography alone resulted in a pattern of organization with some very poor school districts and some reasonably affluent districts. In fact, by the 1980's a differential of fiscal capacity as much as eight to one existed among Kentucky's 178 school districts. For example, in 1985-86 in McCreary County, the assessed valuation of property per child was \$33,945. In Anchorage this figure was \$268,345, approximately eight times greater. The result was that even after the state intervenes with the Minimum Foundation Program and the Power Equalization Formula, a difference in revenues still remained of two to three times as much in the most affluent districts as compared to the

\textsuperscript{164} Report of the Minimum Foundation Program (Study conducted for the Commission on Public Education, Meridian, Mississippi: Associated Consultants in Education, 1961), 47.
\textsuperscript{165} Ibid.
\textsuperscript{166} Ibid.
Finally, inadequate funding kept the program from realizing its full potential to help Kentucky’s schools. In James Melton’s view,

“The big problem with the Foundation Program, like everything else we’ve done in education, is that we had recommendations that were made. For example, the capital outlay allotment was recommended to be set at $600. Well, whenever the program was funded it was funded at $400. The allotment for current expense was recommended to be funded at the rate of $800. And when it was funded it was funded at the rate of $400. It’s the same story. You can develop the best formula that’s possible to develop but if you don’t properly fund it, well; it isn’t going to perform the way it was conceived.”

The inception of the Minimum Foundation Program brought significant changes to Kentucky's schools touching almost every facet of education including, teacher preparation, school facilities, local school governance, pupil teacher ratio, teacher salaries, pupil transportation, total expenditures per pupil, a reduction in high school dropouts and an increase in high school average daily attendance, the number and size of schools, and others.

Superintendent Butler began a second term under Governor Bert Combs, who made funding for education (and a bonus for veterans) his top priority. Upon taking office, Combs immediately set about the task of passing a three per cent sales tax. Coincidentally, Comb’s Revenue Commissioner at the time was attorney William Scent, who would represent the legislature in the Rose case years later. Scent later recalled his experience working with Combs.

“I first became acquainted with [Combs] when he was on the Court of Appeals and I was a young lawyer over in the Revenue Department. I used to fill out his tax returns for him. And, of course, I was for him in ’55. And then in ’59, myself, together with Tommy Carroll, we did all of the legal work for the campaign… After he became elected, I became Revenue Commissioner in December of ’59.

We knew that we were going to have to have a sales tax law. The session had actually started and Combs hadn’t given me any guidance at all about a tax bill. So we decided to go ahead on our own to start learning something about the sales and use tax. We had arranged for…some of us to go to Michigan to look over their opera-

171 *Report of the Minimum Foundation Program* (Study conducted for the Commission on Public Education. Meridian, Mississippi: Associated Consultants in Education, 1961)
173 Ibid.
tion. I think we were going to leave on a Wednesday. And it so happened that on Tuesday Combs called me and asked me to go out to the Stag Country Club to some kind of a Chamber of Commerce luncheon. I went out there with him, and rode with him in his car. And when we came back he let me out in front of the Revenue Department, which is in front of the Capital Annex Building and he just said, (impersonating Combs) ‘Scent, I want you to have a 3% sales tax bill on my desk by Friday.’ So I, of course, couldn’t go to Michigan. I went and got out the…Prentice-Hall tax services that had the Michigan law in it and Colorado and California. And I started drafting a bill.\textsuperscript{174}

The passage of this tax permitted program growth in several areas not the least of which was education and related efforts such as the establishment of the Kentucky Educational Television Network. In November of 1963, Combs reported Kentucky’s progress to the General Assembly saying:

Since 1960 public education has made the greatest gains in the history of Kentucky. More new classrooms have been built than ever before in a four-year period; the loss of teachers to other states has slowed to a trickle; standards for teacher qualifications have been raised; a comprehensive network of vocational schools is being established; 10 community colleges will make higher education available to local areas; and the spadework is complete on what will be the most comprehensive educational television network in the United States.

In the four years of this administration, education has received top priority because the needs in this area were greatest. State financial support for the overall expansion and support of Kentucky’s educational system has increased 84 per cent over the previous four years. All new elementary teachers qualifying for full certification now must hold a college degree, and teacher’s salaries have been increased an average of $1,185 annually.\textsuperscript{175}

Despite the fact that the Combs administration had added large sums of money to funding for education in Kentucky from 1960 to 1963, most districts were not producing maximum local revenues due to a low level of property assessment for general school purposes. It was as if progress made at the state level retarded the effort of many local districts. As Combs observed,

Even though Kentucky in the year 1960 had the greatest increase in teacher’s salaries throughout the nation, it is still a fact that we ought to remember that schoolteachers in Kentucky are still 38th in the nation in amount of pay. And, although we had - I think - the second greatest increase per capita in the nation, it is still a fact that

\textsuperscript{174} Ibid.
\textsuperscript{175} History of Education in Kentucky 1939-1964 (Frankfort: Department of Kentucky, 1963), 193.
Kentucky is 41st from the top in the amount of money that you and I pay for training and education of our children.\(^\text{176}\)

During this period, of course, other states were also increasing support for their schools, which offset what would otherwise have been even greater gains for Kentucky in the national statistical rankings. At the same time, there was a problem in Kentucky regarding property assessments. The constitution required assessments to be set at the fair market value; that is, the price that would be paid by a buyer, who was not compelled to buy, to a seller who was not compelled to sell. Historically, property in Kentucky had been woefully under-assessed compared to its fair market value.\(^\text{177}\) Council for Better Education school finance expert, Kern Alexander recalled the events that led to the General Assembly’s affirmative action to oppose tax increases, even at the cost of quality education for Kentucky’s children.

In 1965 there was the \textit{Russman v. Luckett} case in which the Court of Appeals...held that all property in the state had to be assessed at full value... At that time school districts levied a rate of $1.50 per $100 in property valuation.\(^\text{178}\)

In its ruling, the Kentucky Court of Appeals said “the constitution and statutory law demand assessment of property at its fair cash value, and the people of this Commonwealth and this court will no longer tolerate any substantial retreat from this standard.”\(^\text{179}\) The General Assembly had other ideas, however. Convinced that they would lose their seats if they raised taxes, state legislators decided to change the tax structure of the Commonwealth instead. Intending that \textit{Russman v. Luckett} would not produce an additional penny of new taxes, the General Assembly passed House Bill 1, better known as The Rollback Law. This effort changed several statutes including K.R.S. 160.470, which read:

\begin{quote}
Notwithstanding any statutory provisions to the contrary, no district board of education shall submit a budget which would require more revenue from local ad valorem taxes than would be produced by application of the preceding year's rate to the levies and net assessment, exclusive of voted levies and net assessment growth as defined in Section 7 of this Act, except as provided in K.R.S. 157.380 (4) and as provided in subsection (4) of this section.\(^\text{180}\)
\end{quote}

The practical effect was that school districts were frozen into the pattern of assessment that had existed in the prior year. From that point on the discretion of the local district to levy taxes was restricted by the state. As a district increased in assessed valuation, there had to be a

\text{\(^{176}\) Bert Combs, in \textit{History of Education in Kentucky 1939-1964} (Frankfort: Department of Kentucky, 1963), 192.}

\text{\(^{177}\) For a full exploration of unfair tax assessment practices and their crippling affect on Kentucky’s schools, see “Cheating Our Children” a series of articles printed in the \textit{Lexington Herald-Leader} from 12 November through 15 December 1989.}

\text{\(^{178}\) Kern Alexander, \textit{Council for Better Education v. Martha Layne Collins, Governor}, et. al., Civil Action no.85-CI-1759, deposition, 23 June 1987, 31.}

\text{\(^{179}\) \textit{Russman v. Luckett}, 391 S. W. 2d. 694 (1965).}

\text{\(^{180}\) KRS 160.470, circa 1965.}
corresponding reduction in the rate, so that revenues did not increase.\textsuperscript{181} In an adequate, efficient and equitable system of schools this might not have been a problem. However, as it was in Kentucky, the passage of the Rollback Law froze the inequities that existed within the system at the time. As a by-product, 180 different permissible tax rates were created for the 180 school districts.

In 1966, the General Assembly recognized the taxation difficulties faced by the local school districts as a result of the Rollback Law and allowed the districts authority to levy one of three permissive taxes: the Occupational License Tax, the Utility Gross Receipts Tax and an Excise Tax on gross income. These permissive taxes were subject to recall by the voters, however. The other problem with these permissive taxes was that they were in and of themselves additionally disequalizing. In his deposition for Judge Corns, Alexander explained,

The major problem with the permissive taxes is that the disparity among school districts for non-property taxes in Kentucky is even greater than the disparity for property taxes...These are generally marketplace taxes. A [poor] school district that is not a marketplace would get very little revenue from these permissive taxes. In fact, it's not worth levying the tax because the revenues are so inadequate...the legislature simply provided no source of revenue for the poor school districts and increased the disparity between rich and poor because a few of the more affluent districts were able to levy it and raise more money. It didn't solve the revenue problem and exacerbated the disparity in revenues.\textsuperscript{182}

The General Assembly responded to concerns raised by educators permitting school districts to take a one-time, ten- percent increase in both 1967 and 1968. However, local politicians, like the General Assembly before them, proved to be too worried about being blamed for additional taxes and as a result, few districts took advantage of the opportunity.

The next major event in the saga of Kentucky public school funding came in 1979 with the passage of House Bill 44. In order to counter inflationary effects at work in the nation's economy, a special session of the General Assembly passed House Bill 44. This measure required districts to reduce their tax rates every year so that current receipts would not be more than four percent higher than those of the previous year. Thus, the bill put a cap on school revenue and retained the cap on the tax rate. Any increase that would bring in more than four percent needed voter approval. The combined effects of House Bills 1 and 44 served effectively to stifle any efforts on the part of local school districts to increase their expenditures for children. According to Alexander,

Kentucky...will not allow local school districts to exercise an option to increase property taxes, resulting in the inability and a lack of flexibility in funding the school districts. This limitation on local property tax continues to push Kentucky downward relative to other

\textsuperscript{181} Kern Alexander, \textit{Council for Better Education v. Martha Layne Collins, Governor}, et. al., Civil Action no.85-CI-1759, deposition, 23 June 1987, 32.
\textsuperscript{182} Ibid., 36.
states in the utilization of the property tax or...the utilization of wealth or the stock of capital that a state possesses. So the limitation placed here in House Bill 44 will result in a continuous erosion of the utilization of the property tax. In addition to that, and possibly a result of this is even more objectionable to the efficiency or the equitable distribution of resources, the school districts are frozen now into a pattern of funding at the local level that they are unable to extricate themselves from.\(^{183}\)

The final steps in Kentucky's long and troubled road to an "efficient system of schools throughout the Commonwealth" were taken during the Carroll and Brown administrations. Although Carroll's efforts to raise funding for schools were offset by the passage of House Bill 44 (by Lt. Governor Thelma Stovall in Carroll's absence from the state) he was successful in passing House Bill 4. This act created the Power Equalization program, which was created to directly address the equity issue. Unfortunately, funding of the Power Equalization program was small enough to make little difference in the reduction of disparities between poor and wealthy districts.\(^{184}\)

When Governor John Y. Brown took office in 1981 he reduced the Power Equalization program by executive order from $40,000,000 to $31,000,000. Declining general revenues in Kentucky kept at bay Kentucky's ability to achieve equality of educational opportunity.

**Chapter Summary**

The establishment of an efficient system of common schools, as required by the state constitution, has long been a problem in Kentucky. The commitment to a well-educated citizenry has historically been weak. Kentucky's agrarian economy, traditionalistic political culture made it typical of other states in the South, which languished among the least supported public schools in the nation. Kentucky has a long history of social inequity much of which has been reflected in its laws and in its schools.

By the 1950s a reasonably sound methodology for funding an efficient system of common schools was described in the Minimum Foundation Program. But the system was rendered inequitable and inadequate, due to most legislators' refusal to vote for adequate funding, the lack of a mandate to levy the necessary local taxes, and artificially low tax assessments.

In 1965, the Kentucky Court of Appeals ruled in *Russman v. Luckett* that all property in the state had to be assessed at full value. But rather than support the decision, the General Assembly passed the Rollback Law. Under this law as a school district increased in assessed valuation, there had to be a corresponding reduction in the rate so the funding inequities already pre-

\(^{183}\) Ibid., 34.
sent were frozen into place. Soon followed House Bill 44, which limited school districts to no more than a four percent increase in current revenues and effectively stifled any chance for local school districts to raise revenues.

Time and again the record shows that left to their own devises Kentucky’s legislators would happily content themselves to under-fund a very modest system of schools for the benefit of some students.
It is difficult to say just where any movement toward change actually begins. Every action has its antecedents. In the case of the Council for Better Education's effort to achieve more equitable funding for Kentucky's public schools, it began with the Minimum Foundation Program. Long-time local and state level school administrator, James Melton, was very familiar with school finance issues. He was a strong proponent of better schools and acted as an unpaid consultant to the Council for Better Education. Melton was able to see clearly the negative impact of historical events and how local tax assessors, a governor, and the legislature prevented the Minimum Foundation Program from doing its job. Retracing Kentucky’s most recent school funding concerns Melton recalled,

It goes back to the Foundation Program Study that was done. At that time, a very comprehensive study of the needs of education was conducted, and some of the outstanding consultants in the United States, Dr. Barr, Dr. Morphet and Dr. Johns, were brought in to develop an educational program for Kentucky. This program was developed, and funding levels were identified at that time that they felt would have provided Kentucky with an adequate level of program.

At that time there was to be local participation by what we called required local tax effort. The school districts had at that time $1.50 maximum permissive tax. We were to calculate their program and then subtract the required local tax effort. The required local tax effort, at that time was $1.10, leaving leeway of $.40. Well, the assessments became so poor that the yield from this $1.10 tax rate reached a point where it required, in some districts, $1.77 to produce what a $1.10 should produce.

As a result there was court action where the Kentucky Court of Appeals ruled that all property had to be assessed at fair cash value. That was Russman v. Luckett. The Governor (Ned Breathitt) immediately called the legislature into session and enacted what was called HB1. This rolled the rates back, to where that the districts could produce no more revenue than was produced the previous year, plus 10%. They did allow for two 10% increases. Unfortunately, some of the poorer districts that needed it most didn't take advantage of the 10% increases, which left them with a very low tax rate.185

The local participation continued to erode for about a four-year period after HB1 as a result of the definition of net assessment growth. The definition was very limiting. It allowed for additional revenue only on new property going on the tax roles for the first time, such as a new hotel. An increase in the assessment on a house precipitated a reduction in the tax rate. As a result of this, some districts, such as Pulaski County, ended up with no local tax rate at all. And over time, the rich got richer and the poor got poorer. According to James Melton,

The...disparities between the wealthy and the poor grew greater. And I talked with school districts about the need, since it was rather apparent [that there wouldn't be] legislative action, to go to court with it. ...As far back as the mid 60's we had talked about this.

As a matter of fact we did bring to court a case in the Federal Court in Western Kentucky. It concerned the federal Title I distribution law. That old law provided that if you identified a culturally deprived child, that the federal government would give you half of your average cost spent in your state for ADA. At that time we were probably spending an average of about $1,500, while New York was spending $3,000. So Kentucky would only get $750 per child so identified, while New York would get $1,500. But we had that case dismissed.186

The frustrations surrounding inequitable funding for public schools continued to be felt by school Superintendents and other educators, including several within the Kentucky Department of Education. In addition to Melton, these Department of Education employees included Kern Alexander and Arnold Guess. According to Guess

For a number of years myself, James Melton, and Kern Alexander were working in the Department of Education. We all fancied ourselves to be 'scholars of school finance', I suppose you would say. In any event, we all worked in the area. We were persuaded that the Kentucky School Finance program was not a program that was constitutionally sound because it didn't provide equity for children throughout the Commonwealth. In the face of having assessment ratios per child at 8:1, and with no significant equalization program, we felt that a case could be brought in Kentucky courts and get that corrected.187

These discussions, however, never developed into action on the part of any local school districts. The reason for inaction seems to relate more to a lack of leadership than lack of commitment. No unifying force pulled the parties together. The reason Guess did not act sooner was more personal. As he put it,

186 Ibid.
You don't bite the hand that feeds you ...and we were all three working for the state. Later, Kern [Alexander] went on to other places and eventually Jim [Melton] left the Department and became the Executive Secretary of the School Board Association.\textsuperscript{188}

When Alexander and Melton left the department, they busied themselves with other issues. Still no leadership emerged on this issue, until the election of Alice McDonald in 1983. During the campaign, Arnold Guess had supported the unsuccessful candidate, James Graham. Mrs. McDonald took exception to keeping Mr. Guess on as Assistant Superintendent and sent him a letter asking for a meeting to discuss his separation from the department.

[W]hen Alice came in it was very apparent she was going to let me go so I went ahead and retired December 31st preceding her coming into office January 1 of ’84. After doing not much of anything for about six weeks, I took a part time job with the Commonwealth Credit Union, to promote school districts into joining the credit union and making their services available to their employees. Because I was continually on the phone talking to Superintendents trying to get this sort of thing arranged, we began to talk...about the school finance problems. [I] reached [the] conclusion, after talking to about twenty of them that it would be worthwhile to explore.\textsuperscript{189}

Among the first local district Superintendents with whom Arnold Guess spoke was Frank Hatfield from Bullitt County. He later recalled,

Well, actually I guess it was...1984. Some of us (a group of Superintendents and Arnold Guess) were discussing one day the disparity in funding between school districts in the state...I guess I was particularly aware of that because, being next to Jefferson County, we had kids actually that lived next door to each other that, if you figure an average of 30 kids to a class, the classroom expenditures for one of those children, was as much as $60,000 more than the classroom expenditure for the other just based on them living 50 feet from each other. And we got to discussing that if education, as our constitution says, is a state function, and the constitution says you're to have enough, but the legislature is to provide an efficient system of schools. We wasn’t sure anybody's measure would call that efficient. Shortly after that Arnold called me and asked would I be interested in meeting with a group to talk about looking at that problem and seeing if there was any avenue we could take to, maybe correct it or at least get it clarified.\textsuperscript{190}

\textsuperscript{188} Ibid.
\textsuperscript{189} Ibid.
\textsuperscript{190} Frank Hatfield, Interview by the author. Tape Recording. 5 April 1990. Oral History Collection. University of Kentucky, Lexington, Kentucky.
Guess also called on Jack Moreland, Superintendent of the Dayton Independent School District, Eugene Binion, Elliott County Superintendent, Alex Eversole Superintendent of Jenkins Independent Schools and Wolfe County Superintendent, Tony Collins. Collins recalled the first phone call from Arnold Guess.

Arnold Guess probably was the force that caused [the Council for Better Education] to happen. He called me one day and said he understood I had a big mouth and that I’d been going around the state speaking about the funding.

And I said, ‘That’s exactly right.’

He said, ‘If you feel that way about it, do you have enough guts to file a lawsuit about it?’

I think my answer was, ‘You’re damn right I have.’

Eugene Binion, Superintendent of Elliott County, also saw Guess as the catalyst for the Council. He said,

I think Arnold was a fellow who had been involved with education for many years. He’d been a local school superintendent. He had worked at the state department of education. He worked in finance. He had been involved in working with the legislature and he understood the process real well. I don’t think there was any sense at all of revenge. I don’t think it had anything to do with the fact he’d been fired other than the fact that it freed him to speak his own mind.

I think anybody who works for an agency or who works under civil service rules or other tenure rules...has to be careful about what he says. And I think that at any point somebody could say, ‘stop these outside activities of yours and pay attention to your job.’ So I don’t think he felt any pressure at all any more to have to do that. I just think he thought it was an opportune time to do it and he knew many of us who might be interested in it. I give Arnold a tremendous amount of credit for getting the case started. I don’t think we could have gotten it together without Arnold. And, I think he depended a whole lot on Jim Melton to help him some.

Arnold Guess began his work with the Commonwealth Credit Union in February. By April, he had sufficient encouragement from 23 Superintendents with whom he had been in contact that he issued a memorandum. Dated April 12, 1984, the memorandum was sent to ‘Selected

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Superintendents’ in the bottom third of the state as measured in assessed value per pupil, inviting them and their local Board of Education chairs to a meeting in Frankfort, on May 4, 1984, at 10:00am. This meeting marked the beginning of the Council for Better Education.

The meeting was held at the Capital Plaza Hotel and was chaired by Guess. Thirty-nine people representing twenty-eight school districts heard presentations from James Melton, David Alexander (Kern's brother), and Richard Salmon as well as Arnold Guess. As a result of the presentations and discussion, consensus was that the General Assembly "had not adequately taken into consideration the differences in ability of school districts to support adequate programs of education."[193]

With consensus achieved on the issue of possible litigation, a steering committee was selected and charged with the responsibility of pressing the objectives of the Council. Members of the Steering Committee were Frank Hatfield, Tony Collins of Wolfe County, Jack Moreland of Dayton Independent, Clarence Bates of Wayne County and Alex Eversole of Jenkins Independent. Another important action taken at that first meeting was the request of an "official pledge of up to $.50 per child in Average Daily Attendance for the purposes of filing a suit to test the constitutionality of the state school finance program during the 1984-85 school year."[194]

News of the Council for Better Education meeting spread throughout the Commonwealth prompting legislators to ask for more time to act before any suits were filed. As early as April 20, 1984, Frank Hatfield had received a call from Laurel True with the Kentucky Department of Education. According to Hatfield's notes of the conversation, True was "asking that we consider giving the Interim Committee an opportunity to deal with the equalization issue before taking any legal action."[195] Other discussions with legislators were also held.

[W]e decided that, maybe, the thing we do would be to talk to some of the leadership people about it and just see what their opinion was. So, we... made an appointment to talk to Joe Clarke, who was...Chairman of the House A&R Committee, and told him our first approach, we guessed, would be to see if he thought the legislature might define what they considered to be an efficient system of common schools, and then lay out some kind of path for meeting whatever they thought it would be. He said, ‘Well, that's a noble goal and all, but,’ he said, ‘I can tell you that I think the chances that has are almost nil.’ And pretty much said, ‘I don't like to get sued, but,’ said, ‘If you all really want this question answered that's probably the only way it's going to be done.’[196]

[195] Frank Hatfield, hand written telephone log.
On May 25th, Hatfield and Guess met with Senator Michael Maloney.\(^{197}\) At first, he was - I think he was a little bit irritated by it. And then we went on talking and we suggested the idea, well, ‘Would somebody define that? It's never been - the constitution says that, but nobody's ever said what that [an efficient system] is, and whether we have it and whether we don't.’ He finally said, ‘Well, that's a valid question.’ He said, ‘I'm an attorney. And I know the process you go about to get those kind of things answered. The court's probably who'll have to answer it. Although,’ he said, ‘I don't relish the thought of a lawsuit.’ And he talked about a friendly lawsuit, and said there weren't such a thing in the end. And I agree with him on that.\(^{198}\)

Maloney was later quoted in the *Louisville Times* newspaper as objecting to the filing of a suit saying that such a suit would alienate legislators. “Action in a lawsuit would not be well received by those people in the General Assembly who have been working on the situation. Everyone's being accused of not doing their job.”\(^{199}\)

The Council for Better Education was at that time experiencing problems with stature. The newly formed group was little more than a loose confederation of Superintendents who were "talking up" the idea of an equity suit with legislators who would certainly become defendants. Needless to say, many were not terribly receptive. Jack Moreland was another of the Superintendents who was engaged in discussions with lawmakers.

The mood we experienced at the time we were talking about filing the suit, and when we did file the suit, was a very hostile mood…It all came about because the General Assembly had just met. I think that was in 1984. Money was short. We were just coming off of the cuts of the Brown Administration in the early 80's, of course, there never has been a lot of money, but at time we had some $30 million in Power Equalization. The House had appropriated some $12 million to the Power Equalization Fund and when the Senate met on the Budget Bill they didn't put any money in the Power Equalization Fund...[After the Conference Committee met] the Power Equalization Fund wound up with zero. That was the straw that broke the camel's back because not only were we getting zero -

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197 Senator Michael Maloney was an attorney who had achieved much acclaim as a powerful and technically competent legislator with a strong command of the budgetary process and a bare-knuckle manner. He was reputed to be a tough Democratic campaigner. In the interest of full disclosure, the author acknowledges a mild bias regarding Senator Maloney’s manner in solving problems. The author was once strongly encouraged by the Senator to insist that a teacher testify on behalf of one of the Senator’s clients in a domestic dispute. When the author refused and advised to the contrary, the Senator complained to the district Superintendent who asked the author to reconsider. This did not alter the author’s advice to the teacher.

198 Frank Hatfield, Interview by the author. Tape Recording. 5 April 1989. Oral History Collection, University of Kentucky, Lexington, Kentucky.

we were getting less than zero because the Brown Administration, one of the first places they had looked to cut was the Power Equalization. So the poor school districts that were being helped by Power Equalization, not only had to suck it up, so to speak, when they lost the money from the Brown Administration, but we were not getting any help in an appropriation time for the next two years. And it was so frustrating. And it was one of those things where we'd just had enough.

Frank Hatfield, and Kern and I testified before a joint session of the Senate and House Education Committees one day. This was before the lawsuit was filed. We were just kind of rattling the chains a little...and those legislators were just absolutely hostile.\textsuperscript{200}

Later that afternoon Superintendents Jack Moreland, Frank Hatfield, Clarence Bates, Alex Eversole, and Tony Collins met with State Superintendent of Public Instruction, Alice McDonald. Moreland described the superintendent’s mood and his own reaction.

Alice, who at that time came out very strongly against what we were doing - In fact she had said that what we were doing, as far as using the $.50 per child in ADA, was illegal - and she told us, essentially, that she would own our houses if we went into this. It was a lonesome time there when the Senate and House were all mad as hell at us and Alice McDonald was mad as hell at us. And it was a time when you either stood up and were counted or you went home. The mood at that time was just really nasty.\textsuperscript{201}

Frank Hatfield expressed surprise that any Superintendent of Public Instruction would react as Alice McDonald had.

She got up and said that she thought it was illegal and that she would go to court to see that the money was refunded. She got on my case pretty good out in the corridor. I think we really assumed that being superintendent, she would be for equity and for improved funding for students. We were really surprised at her and her response to it.\textsuperscript{202}

Steve Towler recalled,

Alice didn't like this idea. She threatened us-if you do this I'll blah, blah, blah. So we went to the Attorney General's office and got an


\textsuperscript{201} Ibid.

\textsuperscript{202} Frank Hatfield, Interview by the author. Tape Recording. 5 April 1989. Oral History Collection, University of Kentucky, Lexington, Kentucky.
opinion that says we can [use board fund to sue the state]. She did everything in her power to stop this.\textsuperscript{203}

It seemed that, at this time Council members were getting very little encouragement and no action at all. It was time to obtain counsel. That is when Arnold Guess, Frank Hatfield, Jack Moreland and Alex Eversole decided to go after Bert Combs. As Hatfield recalled,

We then decided what we could do to get some; I guess \textit{stature} is what we wanted to do. Arnold and I then decided we'd go talk to Judge Combs, seeing if we could find somebody with some stature that might represent us if we decided to proceed with it [the suit].\textsuperscript{204}

According to Combs, in 1984,

Arnold Guess…was one of two or three people who came to see me. I was practicing law in Louisville; getting along pretty well. I had forgotten that I had ever been Governor of this state. At least I was trying to forget it…and they said,

‘Yeah. You’re the Education Governor aren’t you?’

And I said, ‘oh yeah, yeah, I’m the Education Governor.’

And then they said, ‘Well you know what’s happened don’t you? You know that the children of this state are not getting a fair shake. They’re not getting an opportunity for an adequate education. And you do know what the constitution says, don’t you?’

And, of course, I do know. I read it. I had ignored it, as had most of the people in Kentucky.

‘And it does say that we shall have an efficient system of common schools, and that it shall be efficient throughout the state. Not just in Fayette County or Jefferson, but throughout the state.’ And they said, ‘Why don’t you join with us in filing a lawsuit, and see if the courts will intervene in the situation?’\textsuperscript{205}

Combs recalled that the group pressed their argument strongly saying,

‘We know, and we believe you know, that the present school system is completely inadequate, not offering an opportunity to the majority of the school children in Kentucky to receive an adequate...'

\textsuperscript{204} Frank Hatfield, Interview by the author. Tape Recording. 5 April 1989. Oral History Collection, University of Kentucky, Lexington, Kentucky.
\textsuperscript{205} Bert Combs in Council for Better Education. Testimonial Banquet Honoring Bert Combs. Tape Recording. 10 August 1990. Author’s Collection.
education. The General Assembly has steadfastly refused to appropriate enough money. We know and you know that Section 183 of the Constitution mandates the legislature to provide an efficient system of schools. We can easily prove that the system is inadequate, not efficient, and that it is not uniform. We can prove that there is a complete lack of uniformity in the system, in that some of the more affluent counties have almost twice as much money to spend per student, as do some of the property poor districts...The legislature is not doing anything about it. We believe education is a fundamental right under the state and federal constitution.’

I said to them, ‘Well, you're half right. It is a constitutional right, in my judgment, under the Kentucky constitution, but under the federal, it is not a right.’

Combs was worried about finding a state judge who would act on the law without politics getting in the way. He pointed out to them that if they could bring a suit in federal court, they would have lifetime federal judges. He told them that in Kentucky, judges, even appellate judges, are elected and thus they look to the taxpayers for reelection just like the sheriff or jailer does. Combs thought that would make the process very difficult. The advantage was that federal judges did not have to worry too much about taxpayers but could look to the law and what was good for the country. All things being equal, Combs preferred going to a federal court. But all things were not equal. The federal courts were an unattractive option legally, and Combs ultimately believed they would lose because of the holding of the Supreme Court in San Antonio Independent School District v. Rodriguez that education was not a fundamental right under the U. S. Constitution.

Combs was less than encouraging. As he put it, “I double-talked them a little, and I said, ‘Let’s think about it a little,’ and so on. And I’m glad to see you...[Y]ou think about it and so will I. And they left. And I was hoping they would go away.” As a name partner in one of Kentucky’s largest law firms, Combs, “needed to sue the Governor and the General Assembly about as much as a hog needs a sidesaddle.” But the issue did not go away – at least, Arnold Guess did not go away. As Combs related the story, “Arnold had time on his hands. Alice McDonald had just fired him.”

Actually I hoped that was the last of it. I had no feel for getting into this sort of thing. I thought it was a very difficult sort of a lawsuit. I knew we didn't have any money. I had no great desire to work for

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nothing. They went away. I thought about it some and maybe I did a little research.\textsuperscript{210}

In fact, he did. Part of that research was to test the idea of a lawsuit with other individuals who were also interested in improving Kentucky’s schools. A relatively new citizen’s advocacy group had formed under the name of the Prichard Committee. An offspring of the Council for Higher Education, the committee had shifted its focus to elementary and secondary education a year earlier.\textsuperscript{211} The group was working to create reform in the schools through a statewide program of town forums, the creation of local citizens groups, business groups and a strong relationship with the Press. The timing was very fortunate for the Council, as many of the Prichard Committee’s activities ran parallel to the Council for Better Education. According to the Prichard Committee’s Executive Director, Robert Sexton,

The first recollection I have of the lawsuit was Bert Combs talking to [Ed] Prichard and me in 1984, not long before the town forum. He said that he had been talked to by folks who were talking about this lawsuit. And, did we think that the Prichard Committee might like to be some part of it. Combs was famous for being somewhat in-elliptical and indirect. He didn’t come in and say, “I want you to be part of this. Here’s the deal.’ He was kind of exploring. He hadn’t decided to be their lawyer at that time…

Prichard and I did not think we should get into it. I know that we talked about this notion that it was this…equity funding lawsuit that didn’t really deal with some of the fundamental problems in public education that we thought had to be dealt with, and probably didn’t take it all that seriously. And Bert Combs wasn’t pushing it that hard. He wasn’t taking it that seriously either. So anyway, we declined to be involved.\textsuperscript{212}

Apparently, Combs was not too discouraged by the Prichard Committee’s lack of enthusiasm. He continued to consider the proposition.

I put it on the back burner. Then in a month or so, well here they come again. [It was the] same group or most of the same group…They said, ‘We're coming back to talk some more to you. We just think that something needs to be done. We are willing to make the effort. We need a lawyer. True, we don't have any money, but we think you ought to do this for the benefit of the school children of the state.’

\textsuperscript{210} Bert Combs, Interview by the author. Tape Recording. 18 July 1990. Oral History Collection, University of Kentucky, Lexington, Kentucky.

\textsuperscript{211} Once established, the Prichard Committee raised their own funding, operated independently, and were no longer associated with any governmental entity.

\textsuperscript{212} Robert F. Sexton, Interview with Catherine Fosl. Tape Recording. 19 January 2000. Oral History Collection, University of Kentucky.
And so we talked some more and I finally said to them, ‘I don't want to embark on a losing cause and I don't think you do. But if you can get a substantial number of school district Superintendents and Boards of Education, in a substantial number of school districts in this state, that would say to me that they want to file this suit, I will give it some serious consideration.’

Combs was concerned with how many people would not only join in the suit, but stay there when the going got rough, as his political experience taught him it would. He said he did not want people who would "yield to pressure and perhaps go behind a log when the Pressure comes.”

As Combs related,

By that time we knew that Alice McDonald, the Superintendent of Public Instruction was bitterly opposed to such a proposal. I thought that would be difficult. I knew, or thought I knew that the leadership of the General Assembly or some of them would resent the lawsuit as being an attempt to invade legislative territories...I wondered, too, how the Governor of the state would react to such a lawsuit. The Governor at that time was Martha Layne Collins and she had been a schoolteacher. I knew that. She was an advocate for better schools but she hadn't been able to do much about it. And I wondered what a state judge would do when he knew that if he ruled in the plaintiff's favor it would mean an increase in tax revenues and whether he would think he could make such a ruling and survive politically.

When the Council members left the second time, there was still no commitment from Combs to represent the group, although, evidence suggests that the Council had gone ahead anyway and used his name to help recruit new member districts. Superintendent Steve Towler recalls being approached to join the Council.

I was impressed. They had a steering committee. They were serious and indicated that they had Judge Combs agreeing to file this suit...To have a person the stature of Kern [Alexander] and the former Governor's law firm...when I went to that first meeting, I said, ‘Boy, this is going to happen. This is absolutely going to happen.’


\[215\] Ibid.

Combs said, “I assume they did [use my name to help recruit members]. In fact, I think they told me that they were.” But this time after the men left, Combs spent more time thinking not only about the case but also about how he was raised to understand his own responsibilities.

I wasn't excited, but my conscience worried me. I wondered to myself, ‘If you don't do this…?’ And these people had deliberately planted this seed and they were persuasive and, of course dedicated, and they knew their subject and so forth.

My father was a practical politician and my mother was an idealist, a very dedicated religious woman who believed that God put you on this Earth for a purpose and that when...the opportunity came for you to do something worthwhile that God expected you to do it. I get a little of both. I did know that what they said was true. I didn't know how easy it'd be to prove it. But I knew that the school system in Clay County was not as good as the school system in Fayette County. I knew that. I was gradually coming to the conclusion that an effort ought to be made, and that I ought to be part of that effort.

Regardless, Combs sent them away again.

Of course, I wasn't discourteous. I wasn't abrupt. I realized that they were making a great sacrifice. They were saying that they were willing to make additional sacrifices. I would say I would give it some additional thought. And then I wouldn't communicate with them. I kept thinking, ‘Well, they'll get off on something else.’ And then too, I had some concern whether they would be tenacious enough to carry this thing to a final conclusion. I kept trying to decide in my own mind...the chances for success...Finally, when they got sixty-six districts, they said, ‘We've done what you you've told us to do, now we want you to file the suit.’ I agreed to do it.

Combs’ agreement to represent the Council was announced on October 9, 1984. Many people felt that the council's ability to get Combs to sign on was the key to turning around what had become a very negative attitude on the part of legislators.

Up until that time we were just a bunch of rabble-rousers. After that we became a legitimate, bona fide organization, with legal counsel that was as good as any legal counsel in the Commonwealth, and somebody who had name recognition all over the state speaking for our position, and we were something to be reckoned

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218 Ibid.
219 Ibid.
with. That's when the legislature began sinking money into this thing...That's when we really started gaining credibility.\textsuperscript{220}

\textbf{Some Powerful Help}

Long before the Council for Better Education, there was the Press – arguably the staunchest ally of American public schooling in the twentieth century. The American press was essentially designed as a vehicle for influencing the public toward one philosophical ideal or another. From the very beginnings, the most important function of newspapers was to express opinion and influence voters. In \textit{American Journalism: History, Principles, Practices}, David W. Sloan explains,

…[P]ublicists had recognized the growing importance of the newspaper in influencing public opinion. In the early Constitutional period, party leaders such as the Federalist Alexander Hamilton and the Republican Thomas Jefferson saw fit to establish organs to espouse their party sentiments. The group that controlled a paper had none of the characteristics, however, of a modern corporation. Few of its members invested in the paper with the main goal – or even the expectation – of making a profit. Their main purpose was to have a forum to promote their party’s views and, they hoped, to win elections, control the machinery of government, and thus determine the nature that the political system would take.\textsuperscript{221}

America in the early 1800s was a highly decentralized agricultural society most aptly described as a loose confederation of localities. Localism was rampant and only a few visionaries had any national vision. Americans were held together by the printed word. Publishing was cheap and it had enormous impact. Literacy was high, particularly in the North. Literacy was essential to commerce as well as entertainment for the 85\% of the population that lived in rural areas. Americans at this time were buying more issues of newspapers than any country in the world. By 1810 there were 371 daily papers for a population of approximately 8 million.\textsuperscript{222}

By the beginning of the \textit{20\textsuperscript{th} century}, American newspapers had changed significantly and two new trends began to emerge. First was the growth of newspapers as big business, which consequently gave rise to the second, the professionalization of journalism. With the shift of emphasis from partisanship to profit, papers found that their editorial positions changed “When profits emerged as a paper’s motive, newspapers [ownership] attempted to broaden their appeal by presenting both sides of the issue and even-tempered opinion.” Increasingly, a city’s newspa-

\textsuperscript{220} Jack Moreland, Interview by the author. Tape Recording. 21 April 1989. Oral History Collection, University of Kentucky, Lexington, Kentucky.


per was its only one, and the paper’s readership was composed of liberals and conservatives…

“Both the economic pressure (what constitutes ‘good business’) and a fair recognition of social obligation reinforce[d] the principle of news objectivity, divorced from editorial bias.”

But even though business-oriented paper owners encouraged a conservative editorial position, “working journalists in the 20th century tended to be ideologically liberal.”

Compelling examples exist demonstrating the power of the Press to spur the public to action including action to reform the public schools. Reform in education seems to occur when a general philosophy of education meets practical public opinion and forms a powerful force for change. Perhaps the best early example of this occurred in 1892, when Walter Hines Paige was editor of The Forum. Paige sent reporter Joseph Rice on a month-long school appraisal expedition. The subsequent articles in The Forum galvanized many strands of protest that were being heard throughout the country into one strong voice advocating reform in the school. Paige’s decision launched a movement toward progressive education that spread across the nation and dominated the first half of the 20th century.

Just as with the progressive education movement, education reform in Kentucky was the product of a public policy campaign supported strongly by the editorial position of the Press. For the Lexington Herald-Leader, that position was established by then Editor, John Sawyer Carroll. John Carroll assumed the editorship of the Lexington Herald-Leader in 1979, having been recruited by then Publisher, Creed Black. Black had known Carroll when they both worked for the Philadelphia Enquirer. Carroll came to Lexington with two aims: 1) making the paper more professional, and 2) capturing half of the state market from the Louisville Courier Journal. As the Herald-Leader Editor he personally decided that school reform in Kentucky would be the paper’s foremost issue. As Carroll recalled,

Back in 1983, when I was still getting my feet on the ground as far as trying to grasp Kentucky issues, we read about Governor Winter, down in Mississippi, who was campaigning for reforming the schools down there. It was a very dramatic thing he was doing and he was very successful in mobilizing people and getting the legislature to do that.

Over the years, Kentucky and Mississippi had very often been vying for ‘last’ on the list of public school systems in the country, by various measurements. And one refrain from Kentucky educators was often ‘Thank god for Mississippi,’ because Mississippi would

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226 As a 25-year-old reporter for the Baltimore Sun, Carroll lost his press credentials when he broke an embargo by reporting the abandonment of the military base at Khe Sanh, in Viet Nam. The report was picked up by the New York Times and Newsweek, and proved to be an embarrassment to President Lyndon Johnson who had previously told the country of Khe Sanh’s crucial importance to the military. He regained his credentials a year later and went on to cover Nixon and McGovern before joining Creed Black at the Philadelphia Enquirer.
come in 50th and we’d come in 49th… Now, here was Mississippi trying to do something about it and Kentucky’s still stuck in the mud. So, I personally decided at the time that that should be our foremost issue — that Kentucky is just not going anywhere without better schools.227

But Carroll did not make his choice in a vacuum. He studiously read and talked to many people on the subject. Significantly, he also developed a close friendship with Edward Prichard, another of Kentucky’s strongest advocates for education reform. According to Carroll, the paper developed a clear strategy, which it followed over the years.

I think that all together we have been a voice for better schools for a long time. That’s certainly been our intent — to raise that issue, and cover the living hell out of it, in a news sense, and to provide commentary that will get people talking and thinking about it…

I’m somewhat proud of this. …I don’t always write editorials and columns that I feel proud to read seven years later, but I wrote one on Governor [John Y.] Brown ignoring the schools versus Governor Winter who’s doing something down in Mississippi. And I concluded…”the need for better schools is a message so true and so powerful that if it reaches all of the voters of Kentucky, no one in public life will dare stand in its way…”228

I wrote this in ’83…and I later came to doubt it. I really came to doubt that…the Kentucky body politic cared that much about schools or children or anything else - and would never do anything to shake itself free of the bonds of ignorance.229

The contemporaneous emergence of the Prichard Committee as a group focused on elementary and secondary education provided assistance to the Council that it would not have likely developed on its own. Seemingly, every time the Council said, ‘We need equity,’ the Prichard Committee would say, ‘Kentucky needs better schools.’ The two groups coexisted in a symbiotic fashion providing an effective one-two punch that gave material to the Press and helped fuel public interest.

Much of the Prichard Committee’s objective was to garner the support of Kentucky’s newspapers. In fact, Robert Sexton had systematically approached each of the major papers. Sexton acknowledged, “[T]he Herald-Leader and the Courier had…done big education stories

228 Editorial, Lexington Herald-Leader, 10 April 1983.
before we even got created. We were talking to them behind the scenes about these stories before we even established ourselves.\textsuperscript{230}

The origin of the Prichard Committee went back to late 1979, when the Council for Higher Education passed a resolution to create a “Committee on Higher Education and Kentucky’s future.”\textsuperscript{231} The Council needed somebody to put that together. Harry Snyder, who served as Director of the Council on Higher Education, recruited Robert Sexton. He was named Deputy Director for Policy and Planning. Snyder and Sexton wanted to create a group structure that would promote buy-in from its members by spending real effort on the relevant topics. During the John Y. Brown administration, the more typical structure was the Blue Ribbon Panel idea where successful business people would “pop in, pop off and pop out.” Sexton was looking for a more meaningful and long-term commitment. The selection of members and particularly the chair had to reflect that commitment.\textsuperscript{232}

Sexton and Snyder thought about many possible candidates for chair (including then Lt. Governor, Martha Layne Collins) and ultimately decided on Lexington attorney, Edward Prichard. Prichard was seen as bright, well respected and he had become “the informal spokesperson for higher education in Kentucky. He was the “public intellectual”\textsuperscript{233} who had been on the Council for Higher Education for fifteen years. The staff knew him. He was well liked (by most) and was effective working with the Press. After his selection as chair, the group adopted his name.\textsuperscript{234}

The Prichard Committee was created to “build a fire under this system in the right places so that something better than we’ve been able to accomplish will happen.”\textsuperscript{235} Before long the focus gravitated from higher education to elementary and secondary education. As Sexton put it,

In a state like Kentucky, your worst educational nightmare was elementary and secondary. Second, the people in the group were just as interested in elementary and secondary as they were higher education. Third, there was a growing national movement. [There had been reform programs in Arkansas and Mississippi. The report “A Nation at Risk” had created waves nationally.] We had to paint a vision that was more compelling for donors.\textsuperscript{236}

\textsuperscript{230} Robert Sexton, Interview with Catherine Fosl. Tape Recording. 10 October 2000. Oral History Collection, University of Kentucky.
\textsuperscript{231} Ibid.
\textsuperscript{232} Ibid.
\textsuperscript{233} The concept of a public intellectual is that individual who speaks to the public on issues of political or ideological importance. See Richard A. Posner, \textit{Public intellectuals: A Study of Decline.} (Cambridge, Mass.: Harvard University Press, 2001). Citing the rapid growth of the media in recent years, Posner laments the decline of a venerable institution that included such individuals as John Dewey. Posner claims that the proliferation of narrowly trained scholars results in off-the-cuff pronouncements, erroneous predictions, and ignorant policy proposals which compare poorly with the performance of earlier public intellectuals whose breadth of knowledge was well suited to public discourse.
\textsuperscript{234} Robert Sexton, Interview with Catherine Fosl. Tape Recording. 10 October 2000. Oral History Collection, University of Kentucky.
\textsuperscript{235} Ibid.
\textsuperscript{236} Ibid.
Sexton’s own description of the philosophical underpinnings of the group is instructive.

I have a drive and a passion for making this kind of long-struggling place that’s Kentucky, a lot better. The notion that people would allow themselves to be in the kind of a terrible economic and social situation we’ve permitted; and correcting that is a passion. And I’ve always been on a kind of political side that says that there’s a top and a bottom to that and the top has let this happen. The people who control the universities, the people who control the businesses, the people who control…the attractive industries have been quite willing to let everybody else languish as long as they provided the kind of strong backs that we needed.

The Prichard Committee became an independent, non-profit organization in the fall of 1983. It began with a plan to deliberately create change in the K–12 system. In Sexton’s words,

From the very beginning there was a notion that we had to do things in a manner that caused action… Governor Collins was not a friend of the Prichard Committee. By that, really, I mean that Edward Prichard actively worked for Harvey Sloane in that campaign, and was actively against her and in the campaign. [He] said some things that were really negative about her. So we didn’t have much of a relationship. We did however establish one. It wasn’t close, but at least we established a relationship that allowed us to suggest things to the Governor or to her staff and to kind of push her along.

She came forward with a reform package for the 1984 legislature. As I remember it was not particularly bold, but it was a step. She also included some revenue increases, and she lost that in the legislature.238

The defeat was galling to Governor Collins. She saw herself as an education Governor but was Kentucky’s first woman Governor and apparently was reminded of that on occasion. As Sexton saw it, “there was a little bit of that kind of element throughout.”239

The thing that had happened in the legislature is that there was coming to be a group of legislators - they were called the ‘Young Turks’ - who were fairly progressive very interested in education. They were very close to the Kentucky Education Association, so on certain topics they weren’t going to be very aggressive. It included Harry Moberly, Roger Noe, Joe Barrows…and a couple of others. I think what happened, they wanted to be the ones who put together

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237 Harvey Sloane had been Mayor of Louisville and was Collins’ defeated opponent in the Democratic primary.
238 Robert Sexton, Interview with Catherine Fosl. Tape Recording. 10 October 2000. Oral History Collection, University of Kentucky.
239 Ibid.
the program and ran it through the legislature. And they couldn’t ever reach agreement with Governor Collins…so essentially, her package was defeated.  

The Prichard Committee wanted the Governor to try again by calling a special session on education, but it was uncertain that it would happen. Committee members were receiving some positive indications, but they could also tell that she “had really been bothered by being beaten on the issue.”  

Sexton revealed the Prichard Committee’s strategy.

We decided that we needed some kind of way to encourage her. And that’s where the Town Forum originated. We got the idea that we needed to start in Kentucky a movement that was made up of more people than the Prichard Committee.

The Town Forum had two or three purposes. One was that we wanted to expand the Prichard Committee’s reach, so that more people knew who we were…Second, we reasoned that if we did that, they would form a political force of some kind. And also we reasoned that if they did that it would attract media attention and politicians would get a sense people cared. Finally, we thought the Governor would get the message and would be given some support to move forward. She would know that there were some people on her side.

But given the Prichard Committee’s tenuous status with the Governor it was not likely they could just call her up and get the job done. According to Sexton,

We thought about two strategies. One was to go to the Governor and say we wanted to put together this forum, ‘Would you help us?’ Or we could have said, “Would you do it?” which was really the model. Around that country in this period you had these outreach programs. A lot of them have been done by governors who were really building support for their own programs. So, we could have done that. We decided to do something else.

We decided to put it together, and organize it and make it very clear that it was going to happen and then go to the governor. I think we did that because we thought the answer might be ‘No.’

What had happened was this – We found a little money to get some staff to work on this [town forum] through an anonymous donor. A $50,000 check came in from an east Kentucky coal person who was a friend of Governor Combs. He was contacted through Lois

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240 Ibid.
242 Ibid.
Weinberg, his daughter. So we got this money… We went to KET and we picked a date, and they agreed to broadcast statewide.243

On October 15, 1984, two weeks after the official announcement that Bert Combs would be representing the Council for Better Education, The Prichard Committee launched its first Town Forum. The Kentucky Educational Television network broadcast the forum statewide with introductions by Governor Martha Layne Collins, former Governor Bert Combs, Robert Sexton from the Prichard Committee and State Superintendent, Alice McDonald. After the broadcast introductions at KET, “Governor Collins drove to the forum in Lexington and wound up on the covers of all the newspapers because they took a great picture of her (with Sexton’s 7-year old son).”244 The strategy worked like a charm. According to Sexton,

I think that what it did, as a political activity, was very successful. We were able to say that about 20,000 people came out. They were located in, I think it was 145 different locations. They represented all of the school districts in the state.

The way the Press carried it was that it was this massive outpouring for better schools. The Press really played along with this. The Press from the beginning said this is a very important part of this movement. Governor Collins immediately began to plan her next move. …She put together a statewide tour, got all of the former governors and other political people and celebrities and they had a helicopter and bus tour to 10 or 15 county seats to talk up the need to improve Kentucky education. So she really took charge. She started really getting energized and came forward with a reform program in 1985.245

After the Prichard Committee’s Town Forum, Governor Collins indicated that a special session of the General Assembly would be called for 1985. There was general agreement among members of the Council for Better Education that any suit should wait, thus giving the legislature an opportunity to fund the power equalization program to a more appropriate level.

Action to initiate the suit was temporarily suspended. The Council issued a memorandum to members of the General Assembly, stating that the contemplated test of the Kentucky system of school finance in the state court was being done without malice and that the action was intended to help define the state role in providing an efficient system of schools. But the message was clear: that the Council urged serious consideration be given to its concerns if such a suit was to be avoided.246

243 Ibid.
244 Robert Sexton, Interview with Catherine Fosl. Tape Recording. 10 October 2000. Oral History Collection, University of Kentucky.
245 Ibid.
Roles of Key Council Members

By the end of June 1984, 39 districts had committed to join the Council for Better Education. But, most of the Council work was being carried out by what Steve Towler refers to as “a little core of...truly convicted people.” Among them were Superintendents Jack Moreland, Alex Eversole and Frank Hatfield. “Arnold Guess was one. I promise you he was, and Kern. Kern could preach on this topic.”

Arnold Guess served as the primary clearinghouse for council communications. Along with James Melton, he worked as an unpaid consultant providing historical school finance information and attending council meetings. Kern Alexander and Richard Salmon were the paid consultants, the experts, providing the research and statistical information. Steve Towler was primarily a recruiter. His previous position as President of the Kentucky Association of School Superintendents made him known to many Superintendents and board members across the state. Frank Hatfield was the chair. He dealt with the Press and directed the organization along with Jack Moreland who served as Secretary/Treasurer, and later as Chair.

Bert Combs was primary counsel and made all of the legal decisions. He described himself as “more a mouthpiece and a PR man.” Combs said, “Debbie Dawahare did most of the research, she did most of the pleadings, wrote most of the memos…” Theodore Lavit, who incorporated the group and stayed on to advise it “was an excellent counsel in the case. He knew the subject” and had been involved in previous litigation. He was the trial attorney in the western Kentucky case with Kern Alexander.

During the summer of 1984 and through the spring of 1985 the Steering Committee, which was acting on behalf of the Council, took care of some organizational concerns. By June, a position paper outlining the Council’s objectives was mailed "to all members of the General Assembly as well as all newspapers, radios and television editors."

The Courier Journal responded with editorials on June 16th and 19th supporting the Council’s efforts saying, "In any event, courts are available to answer these and other questions.

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252 Steering Committee memorandum to Local School District Superintendents. 27 July 1984.
In a free country, there is no valid reason why anyone shouldn't make use of them, and there are some convincing arguments that this issue should be settled once and for all.\(^{253}\)

Members of the General Assembly were assured that the contemplated suit was being considered without malice but was seen "as yet another way to assist in defining the role of the state in providing an efficient system of common schools."\(^{254}\) At the same time Local School Superintendents were encouraged by the Council to assure their Senators and Representatives that the suit was being considered without malice. They were also asked to help recruit more member districts and to talk to the local media and opinion leaders about the organization's position.\(^{255}\)

The Council next met in Louisville on September 4, 1984 with Bert Combs, Kern Alexander and Theodore Lavit making presentations. It was decided that the Steering Committee would continue to act on behalf of the Council for the time being until the addition of other members, who were expected in October and November.\(^{256}\)

On October 3rd the Steering Committee met again with Bert Combs who informed them that Wyatt, Tarrant and Combs would represent the Council and that Dr. Tom Lewis and Edward F. Prichard would be a part of the legal team.\(^{257}\) This prompted several more articles from the Press. The Kentucky Post and the Louisville Times were both supportive of the Council's efforts. The Post editors stated, "Kentuckians shouldn't fool themselves into believing the state can improve its national image and ranking while it allows so many poor districts to remain at the bottom of barrel in the amount of money spent for education."\(^{258}\)

Combs drew much of the attention. He was referred to as a "heavy legal hitter" who was willing to "represent the plaintiffs at cost." Combs' commitment to the Council seemed to sway the approximately 25 uncommitted, but interested Superintendents to recommend to their Boards of Education that they join the Council.\(^{260}\)

Some Superintendents were reluctant to join due to their uncertainty that the use of school funds was legal. To allay their fears, Combs “pledged to get a definitive ruling” on the legality of the per-pupil assessment before school boards [would be] required to pay [their proportionate shares].\(^{261}\)

Still other Superintendents were concerned that what Debra Dawahare later referred to as the 'Robin Hood Theory' might be employed. "Several [Superintendents] asked if the suit would result in a downward equalization penalizing wealthier districts. But...Kern Alexander...said that

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\(^{254}\) Steering Committee memorandum to The Kentucky General Assembly, 19 June 1984.

\(^{255}\) Steering Committee memorandum to Local Superintendents, 19 June 1984.

\(^{256}\) Steering Committee memorandum to Local Superintendents, 21 September 1984.

\(^{257}\) Steering Committee memorandum to Local Superintendents, 9 October 1984.

\(^{258}\) “Opinion: Inequity in Our Schools” Kentucky Post, 12 October 1984.


in 15 states where similar suits have been successful, 'No district was harmed at the top, except in a very few circumstances'.

In December, Frank Hatfield asked for an Attorney General's Opinion regarding the legality of school districts expending Board of Education funds to cover the cost of reasonable fees, including attorney's fees, in order to sue the state. A seminar on the equity question was held for local Superintendents at the KSBA meeting in Louisville on January 27, 1985. The seminar was an opportunity for the Council to answer questions and perhaps persuade more members to join.

Favorable responses to discussions with local Superintendents, the addition of Combs, favorable newspaper reports, and efforts like the Equity Seminar began to pay off. By March 10, 1985, the Ashland Daily Independent was reporting that 61 school districts serving over 150,000 of Kentucky's students had pledged more than $75,000 to the filing of the equity suit.

By April the Council membership was declared to be 66. This was 26 more districts than Combs had previously indicated would be necessary to give the Council "psychological and political credibility." The Steering Committee reported to the members concerning their recent activities including the development of the complaint, considerations of the proper jurisdiction in which to file and the development of the bylaws. The membership report seemed to be based on the Council’s understanding of a district’s verbal commitment to join the Council. Council records show the actual payment of dues came later, after the local district’s Board of Education passed an appropriate resolution. Superintendent Jack Moreland’s Dayton Independent School District was the first to pay its dues on May 24, 1985.

By the end of June, 49 of the committed 66 school districts had paid their dues. Some were reluctant, however, due to a lack of definitive assurance that such a remittance was legal. For example, G. C. Garland, Superintendent of Laurel County Schools, wrote of his concerns to Jack Moreland saying, "We have your request for payment on the amount pledged by the Board. However, we understood that there would be some assurance of the legality of that payment before payment was actually required. Has that assurance been given?" That assurance was to come on July 2, 1985 in the form of an Attorney General's Opinion OAG 85-100. After disclaiming that "this opinion in no respect will address the merits of the anticipated litigation," David Armstrong opined that the Council could well expend school tax money to finance litiga-

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262 Ibid.
263 Frank Hatfield letter to David Armstrong. 12 December 1984.
264 Steering Committee memorandum to Local Superintendents and Board of Education Chairs, 17 January 1985.
268 See Appendix - Membership
270 OAG85-100, 2 July 1985.
tion. He wrote, "We believe there is bountiful statutory and case authority to be harvested and applied to your question..."

The Council formed a Board of Directors, which met in Frankfort on May 8, 1985 to act on several organizational matters. Frank Hatfield was named President and Chair of the Board of Directors. Jack Moreland was named Secretary-Treasurer and Steve Towler, Vice President. A depository was also named. Two other matters of importance were acted upon. The legal firms of Wyatt, Tarrant & Combs and Theodore Lavit attorney-at-law were directed to "develop all necessary complaints and legal documents necessary to bring suit in accordance with the purposes of the Council in courts of proper jurisdiction at the earliest possible time." And Dr. Kern Alexander was hired by Council to act as principal consultant and to advise, assist, and in all manner work with the Council and its attorneys in developing evidence necessary to support the pleas made by the Council through their attorneys in State and Federal Courts.

By May 14, 1985, Theodore Lavit had completed work on the Articles of Incorporation and was seeking tax-exempt status for the group through the I.R.S. The Board of Directors met again at the end of May to ratify the bylaws and the elected officers now that the group had been incorporated. This process was repeated, in part, at a later date, due to the simple misspelling of "Council" in the Articles of Incorporation. The error accidentally created the ‘Counsel’ for Better Education, and it became necessary to change all documents filed with the Secretary of State.

A Special Session of the Kentucky General Assembly began on July 8, 1985 and saw the legislature attempt to reconcile itself with the issues raised by the Council. Unfortunately, the General Assembly employed the historical practice of passing legislation without funding in an effort to claim the moral high ground while taking no risks with the taxpayers. Even so, as more political pressure was applied some Superintendents became uncomfortable with the pursuit. On August 12, 1985, the Board of Directors met to review the Governor's Education Improvement Program as it related to the suit.

By that time, due to "internal pressure from Jody Richards," the Warren County Board of Education voted to rescind its action to join the Council. The Board minutes stated, "The reason for this action is that Governor Martha Layne Collins' proposed Education Improvement Program to be considered in Extra-ordinary session of the Kentucky General Assembly beginning on July 8, 1985, contains considerable funding for elementary and secondary education, including a substantial increase in the level of support in the Power Equalization Program." Council financial records show that the refund of $4,328.80 requested by the Warren Co. Board was never made. The Warren County School District was, however, removed from the membership roles.

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272 Council for Better Education Board of Directors, minutes, 8 May 1985.
273 Ibid.
274 Theodore Lavit letter to Frank Hatfield, 1 June 1985.
275 Frank Hatfield memorandum to the Council for Better Education Board of Directors, 21 May 1985.
276 Theodore Lavit letter to Frank Hatfield, 1 June 1985.
Governor Collins was concerned that a suit, such as the Council was anticipating might undermine her efforts to lure the Toyota Motor Manufacturing Company to Kentucky, something that was seen as a major economic boost for the Commonwealth. If she bore any acrimony toward the Council or strong disagreements with its cause, it was not readily apparent. Bert Combs confirmed his understanding of the Governor’s sympathy toward better schools. As he later stated publicly, “I understood that Martha Layne didn’t object to the suit being brought.”

As Wolfe County Superintendent Tony Collins told interviewer William McCann Jr.,

… I sat and talked with Governor Collins. And she didn’t want us to file that lawsuit because she was negotiating with some serious state business - and we didn’t. We held it until she finished her negotiations because it was good for the state. This [suit] was not [intended] to get someone. You know, I think that’s the difference. Everyone thinks that someone’s out to get them. And this was not to get anyone. This was to correct some wrong that had constantly been ignored up through the years.

Superintendent Eugene Binion of Elliott County was receiving negative feedback as well.

Some of the people in leadership positions in the legislature became quite angry about the suit. And we as individuals, and as a group, received information that we ought to be careful about what we were doing. And, that we ought to think twice before we agreed to take part in such a suit. I guess you could use the term threats. We were told that we would be prosecuted for spending public money in a wrong manner, fraudulently, and that we might have to pay it back out of our pockets. The Superintendent of Public Instruction [Alice McDonald] told us that she didn’t want us to file the suit. Nelson Allen who was involved with the legislature at the time was saying that we shouldn’t be filing the suit.

With the close of the 1985 Extraordinary Session of the General Assembly, it was time for the Council to make a decision. Once strongly stated opinions had softened somewhat. Council attorney Theodore Lavit tried to “rally the troops” composing a rather stirring letter of encouragement to Frank Hatfield saying,

I hope that we have not lost our fervor in pursuing the equity in education case for Kentucky school children...Sixty million dollars, which is still unappropriated, over a period of three years, is but a pittance of what is needed to equalize the school districts. We can do much better, and in fact, if we have the courage to begin the suit,

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we will win because we have the law squarely in our corner. ...[T]o fold up now is an admission that we are satisfied or should be satisfied. In fact, we have received but a promise of so small proportions that I would not hesitate to recommend ignoring same in light of prospects of the suit.\textsuperscript{283}

President Hatfield next received a letter from Kern Alexander containing his assessment of the progress, or lack thereof, in the special session of 1985. Alexander stated, “I believe we can predict, with reasonable confidence, that the wealth differentials between rich and poor school districts will not be appreciably altered during the next few years.” Despite his opinion, Alexander was sensitive to the political pressure the members had come under. He wrote,

Frank, as always, there is both a funding and a political question involved here. From a funding perspective, the 1985 Special Session achieved very limited success. In fact, the provisions were so modest that fiscal disparities may well increase rather than decrease by 1987-88. The fiscal inequities which existed prior to the Special Session are changed little, if at all, by the new legislation... Politically, only the Superintendents are in a position to analyze their local conditions to determine if further pursuit of change through judicial action is advisable.\textsuperscript{284}

On September 5, 1985, Jack Moreland responded, sending identical letters to Kern Alexander, Debra Dawahare and Theodore Lavit stating, "the proposed law suit was in a form ready for filing." He called for all bills to be submitted for payment and alerted all consultants that they would "proceed on an assignment basis."\textsuperscript{285}

At last the Council was in a position to file. The only thing remaining was a 'green light' from the membership, which the Board of Directors hoped to obtain by mailed ballot. The members were asked to respond to two options: 1) Proceed with filing the lawsuit at the earliest possible date; or 2) Remain active as an organization but not file suit prior to the regular session of the Legislature in 1986. Prior to that session, lobby the legislature to define efficiency and set a timetable for establishment of an efficient school system. Then, based upon the outcome of this activity, decide the proper course of action following the regular 1986 session.\textsuperscript{286}

While the Board of Directors waited for member responses, the Courier Journal quoted State Representative and Chair of the House Appropriations and Revenue Committee, Joe Clarke saying, “It’s unlikely that the legislature will increase money for power equalization.” It was the Council’s contention, as expressed by Kern Alexander, that the Power Equalization formula offered an appropriate solution to the problem. “It’s a good idea and the formula will do the job, if they just appropriate enough money for it.” The $39 million dollars allocated equalized “only

\begin{itemize}
\item Theodore Lavit letter to Frank Hatfield, 28 August 1985.
\item Kern Alexander letter to Dr. Frank Hatfield, 3 September 1985.
\item Jack Moreland letters to Kern Alexander, Debra Dawahare and Theodore Lavit, 5 September 1985.
\item Frank Hatfield letter to Jack Moreland, 16 September 1985; Executive Committee memorandum and ballot to Council for Better Education Members, 16 September 1985.
\end{itemize}
part of the tax rate and therefore doesn’t accomplish the purpose of offering the same quality
education to children in rich and poor districts.  

This response from the membership, however, proved to be "less than overwhelming." The twenty-four responses gave the Board of Directors little direction producing the following:

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The lukewarm response prompted President Hatfield to call for a special meeting of the Board of Directors. The meeting was held at the KSBA headquarters in Frankfort on November 8, 1985. In attendance were Frank Hatfield, Ray Hammers, Steve Towler, Clarence Bates, Dennis Lacy (by proxy), Arnold Guess, Alex Eversole, Charlie Brown and Jack Moreland. After some discussion, Ray Hammers and Steve Towler moved and seconded that the suit should be filed "with all due speed to answer constitutional questions contained therein.” The motion carried.

As Eugene Binion explained,

You’ve got to realize that the 66 of us took a lot of risk to begin with. If we had been scared, or if we hadn’t believed in what we were doing we wouldn’t have done it to start with. We know several local Superintendents who would not participate for that very reason, because they were told not to. And that’s not being critical of them - that’s just fact. There were Superintendents who were afraid to become involved in the case even though they knew it was the right thing to do. That’s their problem and they have to live with that.

In preparation for the Press conference that would announce the Council’s suit, Frank Hatfield released two statements to further explain the Council's action. In the release titled

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289 Council for Better Education Board of Directors, minutes, 8 November 1985.
“Statement,” the Council took the position that, "For the past 31 years the General Assembly has been committed to a substantially equal educational opportunity for all Kentucky school children. When enacting the Foundation Program in 1954 the General Assembly clearly stated in KRS 157.310 its intention, "...to assure substantially equal public school educational opportunities..." Contending forces, circumstances, and the assignment of financial priorities have combined to substantially diminish the progress made toward meeting their stated intention."

In a second statement titled, “Why This Action at This Time” the Council stated, “The Council, in general, supports the educational reform legislation passed by the special session and the last regular session...however...many of the reform measures...make the issue of equal funding more imperative than it has been at any previous time." The Council cited the new testing program, statewide accreditation, and legislation allowing districts to be declared educationally bankrupt. This, along with the general trend toward more state control led the Council to seek to answer the question as to what is meant by our constitution when it speaks of an efficient system of common schools throughout the state and what the legislature intended in 1954 when it spoke through KRS 157.310 of assuring substantially equal public school educational opportunities statewide."

The action styled Council for Better Education, et. al. v. Martha Layne Collins, Governor, et. al.; Civil Action No. 85-CI-1759 was filed November 20, 1985. Again, the Press was supportive of the Council's actions. The Courier Journal argued that, "...unless the word 'efficient' is given an exceedingly loose interpretation, nothing fitting the description yet exists. The wonder is that is has taken this long for anyone to mount a court challenge to Kentucky's ramshackle, inequitable methods of financing the education of its children."

At the November 8th Council meeting, members also decided to send notices to those districts that had pledged membership but had not yet paid their dues. The letter sent by Jack Moreland drew what perhaps should have been a predictable response from some districts. A letter from Charles Parsons, Superintendent, Rockcastle County Schools, is instructive on this point. In it Parsons explains,

It seems ironic that we cannot pay a bill which is for the purpose of improving our financial status, but at this point in our budget we are not sure we will end the year in the black...I'm afraid to pay this right now until I can see how our balance looks next Spring. I hope the Council can bear with me until later in the year.

The Council understood and Moreland encouraged Rockcastle County to continue its support and "forward the money as soon as there is light at the end of the financial tunnel."

291 KRS 157.310, circa 1954.
The winter of 1985-1986 was a cold one, indeed, for members of the Council in Frankfort. "Angry members of the Senate Education Committee approved a bill forbidding school systems from using public money to pay the costs of suing the General Assembly, individual members or the Superintendent of Public Instruction." Senate Bill 102 was clearly aimed at the Council and served to underscore the animosity of some legislators who thought the Council members ungrateful.

The General Assembly was flexing its muscle. The Council, however, thought that its best defense was through the House Education Committee chaired by Roger Noe of Harlan. On January 27, 1986, Jack Moreland sent a memo to all Superintendents urging their support in testifying against the bill when it came before the House Education Committee. Frank Hatfield, Theodore Lavit and others communicated directly with Noe, however, and were ultimately successful in convincing him to kill the bill in committee. In a letter to Noe, Lavit asserted that the sponsors of this bill seek to curtail the efforts of poor counties of the Commonwealth to improve their education systems or to bring them up to the level of the wealthier districts. The brightest children in some of these poor districts are not able to be accepted into the University of Kentucky, except as provisional students, simply because of curriculum deficiencies. This is appalling...why [does] a child from Harlan County [have] to suffer a lower standard of education simply because happens to...live in a poor county?

More evidence of the hard feelings came from Hardin County where Superintendent and Council Vice Chair, Steve Towler had come under pressure from Joe Prather who was then the President Pro Tem of the Senate and a defendant in the suit. At the February 19th Special Meeting of the Executive Directors (formerly referred to as the Board of Directors) Towler had indicated that Prather felt he was not properly notified that the group was going ahead with the suit. The situation was similar to the one some eight months earlier when Warren County Superintendent Bob Gover resigned his position on the Council's Board. Towler's explanation of this situation, which ended with his March 12, 1986 resignation as Vice Chair is elucidating.

I ran into a little problem in my district... in that I had a very influential state senator. Joe Prather was in the house for years and then he went to the Senate and became Pro Temp... Joe felt like I hadn't communicated with him, and I hadn't. I didn't see any real need to do that. I don't know that it's the best approach to go into to somebody and say, 'I'm going to sue you.'

He was named and the Governor was named. And it took some nerve to do this. We were kind of treading into some new territory. And so when this thing was filed, I was there in the rotunda of the

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300 Council for Better Education Executive Directors, minutes of the special meeting, 19 February 1986.
301 Steve Towler letter to Frank Hatfield, 12 March 1986.
capitol and Joe Prather was up on the second floor and later it came to me that he was very upset that I hadn't told him about this.

And in retrospect, I probably would have done that differently. I would have gone to him...I guess I assumed that he knew...it was in the paper that our board had agreed to go along with this council. Maybe he just didn't put those together. I had no reason to keep it a secret. I liked Joe then. I do now. We just had a little bit of a disagreement on strategy. Why did I not come to him? That wasn't going to stop a suit had I gone to him.

Towler believed that Prather took his participation as a personal affront. Hardin County’s involvement in a suit against ‘one of their own’, was difficult for Prather to accept. “I told Joe. I said, 'No. We're not suing you. We're not suing the General Assembly. We're not suing the Governor. We're suing to see if the system is right. It's not you.'" Towler believed that education was the responsibility of the state, and something had to be done.

And I still think, to this day, that if we had not filed this suit, we would not be talking about KERA and we would not be talking about 10% salary raises, we would not be debating whether we would be giving 15 or 20% salary raises in some districts or 10% in others, we'd still be talking and debating...

[Joe spoke] to our local board members, whom he knew very well. Of course, the board was not backing off of our commitment to go through with this. Obviously, when he expressed displeasure with the way this was done, and with me, for not communicating with him, I apologized to him.

I went to his office in Frankfort, and sat down with him and said ‘Joe I'm sorry if I offended you. I only did what I thought was right, and our board did, for the kids of Hardin Co. It was in no way a personal attack on you.’ So, I think that we healed that up. I think that to this day that's all bygones.

But the board asked me, just as a gesture, to resign from the board. He [Joe] never did ask me to do that. It was strictly a discussion between my Board of Education and me. They said, 'Can you think of something that will show him that we're sorry?' And I said, 'Well, what about getting my name out of the limelight?' And they said, 'That's Fine.' So that was kind of our decision. The Council had no

problem with that. I told them that I'd still be just as active as I always was because I was truly committed to the cause. I still am.  

Prather told me later, and this is the kind of man he is, he said, ‘Steve, want you to know that I was wrong when I got upset about that.’ He said, ‘What occurred from all of that action was the right thing to do. I’m not sure that litigation had to be filed to do it, but it did happen after litigation was filed.’

Bert Combs’ related his own humorous recollection of Towler’s difficulties.

Steve…thought the children of Kentucky deserved a better opportunity than they were getting. It so happened that my friend and his friend, Joe Prather was majority leader in the Senate. And, so when we…filed [the suit], my friend Joe Prather, and he’s still my friend—but that doesn’t mean he’s always right, you know. But he said, ‘This is a legislative matter and the judiciary ought to stay out of it. And that Combs ought to stay out of it. And if Combs was so damn smart, why didn’t he fix it while he was here?’

It’s been about 25 years ago and if I’d ‘a been a fortune-teller, or sooth-sayer, I would have. But, I didn’t have the Wisdom of Solomon. And neither did Joe Prather.

Relations between Council members and the Superintendent of Public Instruction, Alice McDonald, continued to be contentious as well. Tony Collins, Superintendent of Wolfe County Schools, had a heated exchange with Superintendent McDonald at a meeting of the Joint Education Committee. As he described it,

Mrs. McDonald and I berated each other pretty heavily. She said I had no business filing the suit. It was the dumbest thing she’d ever heard of. And I asked her to send her daughter up to Wolfe County to go to school.

She said, ‘Don’t be silly. My daughter is going to go to Duke University. She needs a better education.’

I said, ‘What makes your daughter any better than my daughter? If my daughter’s not going to get an adequate education, why should yours get one?’

The Joint Committee on Education berated me heavily and criticized. So, I made them a deal. ‘Any one of you, if you will get up

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304 Ibid.
here and tell me that students in some parts of Kentucky deserve an inferior education and other parts deserve a superior education, I’ll withdraw the suit.’

And Representative Joe Barrow said, ‘Boy, he hit a nerve that time didn’t he fellas. You’re crazy if you think I’m going to get up there and say that. I’d never get reelected again.’

By the February 19, 1986 special meeting of the Council for Better Education Executive Directors, attorneys Debra Dawahare and Theodore Lavit were reporting that the suit had been assigned to Judge Ray Corns who had not, as yet declared himself ineligible to hear the case. According to Judge Corns,

When we got that case and had our first meeting, I told all the attorneys present, although most knew it, that I had been attorney 16 years for the Education Department. I had known Judge Combs. Of course, I’d known Bill Scent who represented the legislature for many years. It's not uncommon. These scenarios happen all the time in a small town like Frankfort. You know the parties really well, the opposing counsel really well. So I said, 'You know my various associations, if any of you feel uncomfortable with me hearing the case I'd step aside.'

And they said, 'No. We want you to hear the case and call it as you see it.' So that's the way it came down.

Bert Combs had spent some time early on thinking about the best venue for filing. Once it was determined that the suit would come in state court, it was only a question of which of two judges would be assigned to the case. According to Combs,

I was trying to get a feel for the prospects of winning if we filed such a lawsuit. Of course, I considered where the case would have to be filed: if it was filed in federal system or state system.

It wasn't any accident because the law required that [if it was to be filed in the state] it [had to be] be filed in the Franklin Circuit Court. Since the leadership of the legislature and the Governor, I thought, had to be parties, and they were made parties, and also we made the Superintendent of Public Instruction a defendant since she had announced her objection to any such ... and so we filed it in the Franklin Circuit court. Now, I knew there were two judges there. And I knew that one of them was Judge Corns who had been an As-

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istant Attorney General assigned to the Department of Education and who knew the problems, and in fact participated in the writing of a book on school finance in Kentucky. He had collaborated with Kern Alexander in a book on school finance. I got into the matter enough to know that he had that background. And I assumed that Judge Corns would be sympathetic to our cause, because I knew that he was aware of the problems, whereas another judge who didn't have that background would need to be convinced and perhaps would not have been convinced that he ought to take the initiative...

I didn't have any way to influence who got the case. I was pleased when Judge Corns got the case. It was a 50:50 chance. They get these cases by lot. I don't know what method they use. I had hoped in advance that he would get the case.  

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**Through the Looking Glass, with Alice**

Alice McDonald proved to be one of the more colorful characters in the story of the Council for Better Education. She served as Kentucky’s Superintendent of Public instruction from 1984 until January 1988, during the time of the Council’s formation and litigation at the Circuit Court level. It is instructive to note that McDonald was a fierce opponent of the Council leadership and attempted on several occasions to intimidate the Superintendents and quash the effort. She touted the virtues of Kentucky’s public school system but did little to move beyond the status quo. As Superintendent she appeared less sympathetic to those pressing for improvements to the schools than she did toward maintaining her political relationships with the General Assembly. Despite this, the troubles of McDonald’s administration contributed greatly to the elimination of the office of Superintendent of Public Instruction, which legislators ultimately came to see as part of the problem with Kentucky’s schools. McDonald’s approach to her duties as State Superintendent and her extensive use of Department of Education personnel in support of her own political aspirations stand in sharp contrast to the approaches employed by the Education Commissioners who would come later.

McDonald had been a high school guidance counselor and mid-level administrator in the Jefferson County Public Schools but had also been very active politically with the Democratic Party. Her entrance into the Kentucky Department of Education came from Raymond Barber who first approached her to manage his Jefferson County campaign.

> Raymond Barber came to me - That’s a true statement. You can ask him. - when he was running for the Superintendency. In the primary, Taylor Hollin was driving him. And he also worked for the Kentucky Department of Education. In my administration he

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310 The author made several attempts to interview Ms. McDonald, both in 1990 and again in 2002. Her husband graciously took repeated messages but none of these attempts received a response.
would have been investigated. But in Raymond’s he was not. Anyway, Taylor Hollin, who was with the Department of Education, drove Raymond down to spend a couple of days in Jefferson County during the primary. Raymond called and asked to see me. He came in and talked to me and asked me if I would support him. I told him I probably wasn’t going to get very involved in this race because of the mayor. John Y. [Brown] was running for Governor. And I wasn’t going to get very involved in the Governor’s race because I was Executive Assistant to the mayor [of Louisville, Harvey Sloane]. I was very happy and that’s where I wanted to stay.\footnote{Alice McDonald, Interview with William McCann Jr., Tape Recording. 3 December 1990. Oral History Collection, University of Kentucky.}

McDonald ultimately did help with Barber’s campaign and after the election he made her an unusual offer.

Raymond called me and said he wanted to see me, came to Louisville - he came to me - after he was elected Superintendent and offered me the Chief Deputy position.

He said, ‘I need to hire a woman…I need somebody from Jefferson County…who’s an educator but who’s not in the fray’…At that time we had just merged and…anybody you picked form the Jefferson County school system had enemies. …And, I understand that you’re a good administrator.’ And I said…”It would have meant a lot more to me if you had said, you’re a good administrator, and I need somebody from Jefferson County and you’re a woman.” I mean, I guess there was just no other woman in the state. Why he wanted me as his chief deputy is beyond me.\footnote{Ibid.}

The Kentucky Democratic Party saw McDonald as something of a rising star until ethics problems began to surface late in her term. Her own assessment of her performance in office was predictably positive. She stated that, ‘by any standard of Kentucky history, this \footnote{Alice McDonald in Doyle, Edwina Ann, Ruby Layson and Anne Armstrong Thompson, eds. \textit{From the Fort to the Future}. (Lexington: Kentucky Images, 1987.)} [1986-87] has been a period of progress.”\footnote{Edwina Ann Doyle, Ruby Layson and Anne Armstrong Thompson, eds. \textit{From the Fort to the Future}. (Lexington: Kentucky Images, 1987), 341.} In 1987, McDonald described her ideas about the state of education in Kentucky in a Foreword and Afterword written for the book, \textit{From the Fort to the Future}. In her articles, she described a relatively positive story that disagrees, at least in tone, with accounts by Thomas Clark, Lowell Harrison, James Klotter and virtually every other historian who has published on the subject. For example, she asserted, “Long ago, dedicated citizens won the battle to convince their fellows that the education of all the state’s children was the responsibility of the state as a whole…[Kentuckians]…have led the way in many areas almost from the beginnings of our educational history.”\footnote{Ibid.} McDonald cited several examples of Kentucky’s pioneering leadership such as, the first to provide a state-supported school to educate deaf children, settle-
ment schools which provided a model to be followed in developing countries, the first to teach adult illiterates to read and write.

She claimed that individual Kentuckians were leaders in the education of black children and even concluded, “no significant educational achievement has ever been lost.” Rather, she asserted, each educational leader, each innovator seeking ways to overcome obstacles and meet new challenges, has built on the accomplishments of the past. At the time Kentucky was mired in the bottom quartile of the states in most statistical categories.

The Kentucky Personnel Board had received numerous complaints about McDonald’s conduct in office. “Her critics charge[d] that she ha[d] hired unqualified political associates for key positions in her department and ha[d] granted contracts or fees to political supporters. Personal items were printed for her within the department at state expense.”

Despite the public criticism of her employment practices, Alice McDonald announced her candidacy for Kentucky Lieutenant Governor in the summer of 1986. McDonald’s activities during her campaign led to an investigation by the Personnel Board. An investigative report dated December 11, 1987, and written by Investigating Examiner, Wilburn K. DeBruler, indicated information was requested during the investigation that the Department of Education failed to provide. The investigation found that employees were being hired for merit level positions at salaries “in excess of the maximum salary range,” excessive use of emergency appointments in a 12-month period that accounted for more than “80% of all such appointments in state government.” The immediate naming of some of these individuals to merit positions compounded this offense. It was alleged that this was “a frequent practice” of McDonald’s administration. Employees were resigning “from non-merit positions to accept merit positions prior to merit certification” being processed, which was an indication that hiring decisions were probably being made illegally.

DeBruler’s own assessment of the situation indicated that some of these acts, while being contrary to compensation regulations were “approved and processed by the Department of Personnel” anyway. In one instance he noted the Department of Education’s “excessive use of emergency appointments to merit positions” which “the Department of Personnel has allowed…to occur without challenge or question.” In another case, DeBruler noted “possible violations” of the merit selection process where, once again, “the Department of Person-

\[315\] Ibid., 342-343.


\[317\] At their September 1987 meeting the Kentucky Personnel Board had received a report of the initial investigation dated 17 September 1987. On 18 September 1987, an order was issued calling for Department of Education representatives to attend a special meeting of the Kentucky Personnel Board on 8 October 1987. DeBruler’s final report was not among the material received by the author under an Open Records request. Current Executive Director of the Kentucky Personnel Board, R. Hanson Williams responded to the author’s request on 28 June 2002 stating, “A search of our records reveals no existing file on the investigation involving Alice McDonald concerning the Department of Education circa 1987. Aside from DeBruler’s final report and references to the investigation from Personnel Board minutes, apparently no material was retained. Williams was at a loss to explain. “Frankly, I am surprised that our records do not contain the fifteen complaints, which were referred to the Attorney General, but they simply do not appear to have been kept in this office.” Investigators from the Attorney General’s office later related that when they were finally allowed an afternoon to look through the files, there were three filing cabinets full of information on Alice McDonald in the Personnel Department.
nel…allowed this procedure…without requiring…compliance with the law.” His curious recommendation called for training for Department of Education so that they would stop “making requests which are not specifically allowed by law and regulation.” DeBruler offered no specific recommendations to address what the Department of Personnel might do to refrain from approving such requests. Instead he recommended a review and that the department “take such action as it deems appropriate.”

DeBruler reported “A considerable number of individuals in non-merit positions were not performing the duties for which the positions [were] classified and compensated,” and many were “not working in the office” for which they were hired - in some cases for “several years.” Some applications upon which individuals were hired appeared to “contain inaccurate or falsified information.”

During the Personnel Board’s investigation Arthur Hatterick showed some interest in controlling information and limiting the scope of inquiries that individual Personnel Board members might make. At the September 1987 meeting of the Kentucky Personnel Board, “Mr. Hatterick cautioned members that this was still an on-going investigation and that all inquiries be referred to him.” Despite his admonishment to the members, Hatterick told the Personnel Board in October, that he had engaged in “various discussions with Mr. Yater and Mr. Woolums.” Steve Yater was the Deputy Associate Superintendent of Personnel Management and had been authorized to act as attorney for the Department of Education. Joseph Woolums was one of Alice McDonald’s Deputy Superintendents. Hatterick admitted discussing “Stipulations” made by the Department of Education and “various options” regarding the Department of Education’s questionable use of federally-funded-time-limited (FFTL) positions. Hatterick claimed that the “Stipulations were discussed solely for the purpose of expediting” the board meeting.

Personnel Board attorney, Anne Keating, saw the situation differently, however, and complained that Hatterick’s offer of Stipulations to Yater constituted “a violation of the statute relating to ex parte communications. Keating “pointed out that the department had gone on record in the past as to these kinds of investigations and the way in which they” were to be conducted. Hatterick’s actions served to compromise any investigation. She complained “the Department of Personnel had no information concerning the Board’s investigation until receipt of the order issued in September” and that now,

The department was placed in the position to show cause based on an investigation which involved interviewing various employees who have answered questions without benefit of counsel; without a court reporter present to record testimony and that the department

319 Ibid.
320 Kentucky Personnel Board, minutes, Frankfort, Kentucky, September 1987.
321 Kentucky Personnel Board, minutes, Frankfort, Kentucky, 8 October 1987.
ha[d] no record of what questions were asked of employees or their responses.322

Steve Bolton, attorney for the Personnel Board, questioned Keating’s implication that there was “an impropriety on the part of Hatterick in talking with Yater and Wollums.” Ms. Keating referenced KRS 18A.095(21) and stated that even “this proceeding (the discussion before the Personnel Board)...could be considered as such.” According to the minutes of the special meeting,

Mr. Hatterick stated he felt no reason to rebut some of the comments made pointing out that some comments were inaccurate. He stated that if in fact Ms. Keating felt that his actions were in violation of the law he welcomed her to file a complaint in court.323

Finally, the Personnel Board referred 15 complaints (which, if confirmed, would indicate violations of criminal statutes) to then Attorney General, Fred Cowan. Cowan’s office conducted an investigation focusing on Kentucky Department of Education activities from January to July 1987. The Attorney General’s investigators found the Department of Education during McDonald’s last two years in office to be “primarily operated in the political interest of Alice McDonald and not in the interest of Kentucky’s children.”324

The summary report of the investigation (which is marked personal and confidential) was obtained by the author, along with notes from numerous interviews and miscellaneous financial records, under the Kentucky Open Records Act. In the report, Deputy Attorney General, David G. Vest,325 enumerated a laundry list of misadministration. “There is little doubt that...significant numbers of Department of Education non-merit employees devoted substantial amounts of state time to Alice McDonald’s campaign and to political fund raising,” Vest reported. He stated that the “record reveals clear and convincing evidence that the McDonald administration engaged in a widespread ‘spoils’ system, wherein political allies...were rewarded...with little regard for Personnel Regulations.” He also found, “There is no question that Alice McDonald surrounded herself with people who...did not perform the duties...for which they were receiving compensation.”326

Vest ultimately recommended against pursuing criminal charges against McDonald, however, citing several legal considerations. Vest found “enough evidence to establish probable cause” for certain violations “which under current statutes were and are misdemeanors.” He also noted that “the statute of limitations had run on virtually every allegation prior to the active in-

322 Ibid.
323 Kentucky Personnel Board, minutes, Frankfort, Kentucky, 8 October 1987.
325 Vest began the Attorney General’s investigation as Deputy Attorney General. By the time the investigation concluded he had departed the office and submitted the Final Report as Special Assistant. In the interest of full disclosure, the author has known and worked with David Vest’s wife at Cassidy School for more than a decade. The author happily promoted Ms. Sally Vest to a primary teaching position several years ago and her husband David is an acquaintance.
volvement of the Office of Attorney General,” and that “in those instances where we can prove, without doubt, that a criminal offense was committed, we are invariably limited by the status of the offense.”

In Vest’s opinion, the investigation was substantially hampered by bureaucratic footdragging from Personnel Board administrators themselves, quite possibly in support of a spoils system of its own. As Vest explained,

Within State Government as an entity there are a group of politically astute bureaucrats that float from administration to administration and survive through political contacts. At the time of the McDonald Investigation, the Governor had no right of succession and incumbent legislators provided continuity in state government. Both the house and senate were, and had been for decades, controlled by one party. I observed a strong connection and interaction between legislative leadership and certain politically active state employees who formed almost a sub-culture within state government that relied, to a great extent, on the continuing power of certain key legislators for their existence. I would refer to them as “shadow employees.”

These people operate in the same manner at the end of each administration. They slide into positions protected by the merit system in sufficient time to have cleared probationary status before a new administration takes office. They cannot be fired absent cause and the Personnel Board historically protected these people out of deference to these key legislative leaders.

By its nature the State Personnel Board can be a powerful instrument within state government. For many years the Director of the Personnel Board was Arthur ‘Dutch’ Hatterick. William DeBruler, an attorney, served as Dutch’s right hand man. Both men were well aware of the system in place and survived by playing within that system. I cannot imagine that either would have failed to recognize the political connections associated with many of the “shadow employees” involved in the McDonald administration.327

Once the investigation was referred to the Attorney General’s office, the Personnel Board administrators, Vest recalled, “then placed every obstacle available in order to keep us from reviewing their work. We finally had to resort to threats of subpoena in order to get a glimpse at their records.”328 According to Vest,

Hatterick made the OAG aware of Personnel’s findings with a simple transmittal letter saying, in essence, ‘here you go, do something.’ I do not remember DeBruler’s Report being part of that

327 David G. Vest, personal communication with author October 2002.
328 Ibid.
original correspondence. In fact I don’t think we saw the report or Personnel’s investigation files until well after the Statute of Limitations had run and we had no chance of prosecution under state law…I am still not convinced that we ever saw all of the Department of Personnel’s files on Alice McDonald.

There is no question that Hatterick’s action in delaying delivery of the report from December 1987 until March 1988 compromised the OAG’s ability to prosecute. Given the unexplained delay and Personnel’s lack of subsequent cooperation with us, there was never a question in my mind that the McDonald Investigation was passed to us to suit someone else’s purposes.329

The Attorney General’s investigation was also hampered by the fact that other administrations had acted in the same fashion, if on a much smaller scale. As Vest reported, “the ‘traditional’ nature of much of the activity conducted by employees of the Department of Education by and on behalf of Alice McDonald…is neither illegal nor out of the ordinary for state government.” Furthermore, apparently most of what McDonald did, was done with the approval of the Personnel Board and very likely had Hatterick’s signature on every one of them.

Vest lamented that the “extremes exhibited by the McDonald administration may be abhorrent but are only to be expected” when a constitutional officer’s power is unchecked. In this regard it was noted that the State Board of Education was found to have exerted “little, if any, restraint” on McDonald. In the end, while McDonald “may have engaged in activities which would constitute felony offenses,”…there was “simply not enough to go forward with any particular instance where the statute of limitations does not bar the way.”330

Vest concluded that his investigation “revealed widespread abuses” of the office of Superintendent of Public Instruction during what was “arguably the most corrupt” Administration of Alice McDonald. Vest offered four recommendations for the future to prevent “the kind of abuses experienced during the McDonald Administration.” These recommendations would collectively prevent the operation of a political spoils system and included the increase of the status of personnel violations from misdemeanors to felonies. The Alice McDonald case was offered to the U. S. Attorney for the Eastern District of Kentucky who declined to even review the matter.”331

The public, however, did respond. Vest recalled the embarrassing treatment she received at the 1987 Kentucky State High School Boys Basketball Championship Tournament. At half time of the Championship game, McDonald was scheduled to present the trophy for the best Cheerleading squad in the tournament before a packed house at Rupp Arena. “I really felt sorry for Alice, although I had done this investigation…she had turned into such a pariah that…when they introduced her, everyone stood up and booed to the point that she would not come out” from the concourse. “Where Sally and I were sitting we could see her, and she never came out and one

329 Ibid.
330 David G. Vest, personal communication with author October 2002.
331 Ibid.
of her deputies made the award. I had never seen that happen with that many people in a public arena.”

In an interview conducted in May 1990, Lexington Herald-Leader Editor, John Carroll recalled McDonald’s administration with a mix of hope and disappointment.

I thought Alice McDonald came in with a very clear understanding of what had to be done and what was important. And she was pathologically political. She could not refrain from shaking down employees, and coercion people, and playing political games. She had a perfect opportunity to ride a white horse. And, every now and then you see somebody who just is constitutionally incapable of doing things properly and she was one of them. I regard her recent arrest for shop lifting as just more of the same. I think she’s got something in her, in her psychological make up that doesn’t allow her to do things properly on a consistent basis. And so, she lost an opportunity that she had to be effective. I liked her when she started out.332

Chapter Summary

On December 31st 1983, incoming State School Superintendent, Alice McDonald, released veteran school administrator and financial expert, Arnold Guess, from the Department of Education. This act freed Guess to pursue a long-standing problem in Kentucky’s – inequitable and inadequate funding for the public schools. He called together a group of “66” School Superintendents under the name of the Council for Better Education and together they challenged the legislature to do more for Kentucky’s children. With outstanding technical consultants and legal counsel, the Council, lead by a little core of truly convicted people lobbied the legislature for change and threatened to sue. The Council met with hostility from legislators who did not want to be blamed for the existing conditions, and even from the State Superintendent whose job it is to nurture the school system. Instead, the Superintendent attempted to use the Department of Education as her own political springboard. When lobbying efforts failed, the council filed suit.

The Council greatly benefited from powerful outside forces including the Press and a host of civic, business and education groups - all pressing for better schools. But despite this ground-swell, the legislature did not go far enough to satisfy the council or forestall litigation.

Chapter 4

The Council's Case

The ultimate decision to file in a state court rather than a federal court was a matter of legal necessity, not one of preference. While Combs was ultimately satisfied with Judge Corns, he wondered whether they would be better off in a federal court. As he explained,

If they could bring a suit in federal court they would have lifetime federal judges who didn't have to worry too much about taxpayers, but could look to the law and what was good for the country ... other things being equal I would prefer going to a federal court. But I thought we would lose in view of the holding of the Supreme Court in the Rodriguez case...Kentucky judges, even appellate judges, are elected and that they have to look to the taxpayers for reelection just like a sheriff or jailer does, and that would be a very difficult process.333

But, Rodriguez was too large a hurdle in Combs' opinion, so it was decided to try the case in Kentucky. With that decision behind him, Combs began to formulate a legal strategy upon which to build his case. In doing so, he looked first to the law but also at the politics surrounding the conduct of the case. Combs not only had to consider whether his clients had the mettle to withstand the process, but he also knew the state-level politics involved in a case like this would be considerable. Lead counsel, Bert Combs, and co-counsel, Debra Dawahare, discussed the construction of their case. According to Combs,

The first hurdle you...attempt to get over is 'Do you have a...justiciable lawsuit?' Do you have a factual situation, which the court would determine was a justiciable case...Assuming a justiciable issue; are you on the right side? Do the facts support what is your version of the case? ...I did make the decision that it was a justiciable issue in that it presented a valid constitutional question.334

Next Combs had to determine who were the real plaintiffs and who were proper defendants?” Combs explained,

I knew that this suit would be strongly defended, perhaps bitterly defended. I knew that certain members of the General Assembly would consider themselves 'offended' that someone would have the audacity to sue, make them defendants, and allege that they had

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failed in their constitutional duties. I knew that every technical question that an ingenious lawyer could dream up would be raised.\footnote{Bert Combs, Interview by the author. Tape Recording. 25 July 1990. Oral History Collection, University of Kentucky, Lexington, Kentucky.}

Choosing plaintiffs was a crucial part of structuring the case. The choice had to satisfy certain legal requirements. Specifically, the Council had to identify individuals who had been damaged according to the evidence that would be produced in the trial court. Combs talked about what he looked for in the plaintiffs.

I wanted someone tough enough. I wanted...people who would not succumb to pressure. But...more importantly I wanted some people that very clearly had a complaint, people who were being prejudiced - damaged, by the failure to have an adequate and a uniform system of schools.

I considered that the students were the real plaintiffs in this case that they were the individuals who were being injured by reason of an inadequate school system. But I wanted to...have enough plaintiffs so that even if they knocked out two, three, four that I'd still have enough plaintiffs. And so we made the Council for Better Education a party and, in a footnote, named each school district, which was a member.

But I didn't have authority to name all the student in these districts. I thought if I should attempt to do something like that the defendants would get a hundred students somewhere and say, 'No, we don't want any part of this suit.' And so we selected, we investigated, and looked for students who fit our description. Children who were being discriminated against and parents of those children who were willing to have their names used as parents of injured children...They did knock out a few. Some of them didn't testify. Opposing council said that if they didn't testify that they had abandoned the suit.\footnote{Ibid.}

The basic plan was to show the court particular students from districts across the state who were receiving an education significantly inferior to that received by other Kentucky students. According to Combs,

The crux of the matter was that we convinced the court, as to plaintiffs, that there were some children who had some standing and who were being discriminated against, regardless of school board members, regardless of Superintendents, regardless of parents - and the defense was that these people would have enough money if they didn't waste it. Poor management and worse than that, you know,
under the table stuff. And I always came back to this. Well, here's a child, 8yrs old, Jimmy Duff. Has Jimmy Duff done anything? Has he stolen any money? Has he exercised any poor management? He is the plaintiff.337

The legal team vacillated with regard to whether it would be filing a class action or not. The case started out that way, but as Dawahare explains, they gave up on the idea.

We started out with this as a class action, and then more or less just abandoned that notion. [We] just went ahead with what we had, assuming that it logically followed that if it applied to these students, the same theory applied to them all.

Since we were having a bench trial, and since the students really wouldn't have a lot to say except, ‘Here I am. I'm 14 years old. I know that over in the next district they have all this stuff I know I'd like to take and I can't because I live over here.’ That's really about all they can say. We did put the kids up for just a little while. We didn't want to belabor that. We did have their parents on as 'next friends' but we didn't emphasize that too much.338

The complaint was filed on May 28, 1985. By the time of the filing the Council had obtained a rather long list of plaintiffs who joined in the suit, including the following:

The Council for Better Education, Inc.
The Boards of Education of Dayton Independent
Elliott County
Harlan Independent
Knox County
McCreary County
Morgan County and
Wolfe County School Districts and
Michael Wilson
Lisa Marie Gilreath,
Greg Chaney
Courtney Cox
Le Ann Simmons
Nicholas Underwood
Paul Lewis Wesley
Brandon Kaye Thomas
Jennifer Paige Thomas
Jeffery Oliver
Andreana Brewer

Brian Brewer  
Brian Carter Wells  
Sean Jarrells  
Michael Williams  
Sharon Duvall  
Tammy Lee Utchek  
Mary Nikole Williams and  
Roma M. Adkins, all respectively by their parents as next friends.

An averment was made in the complaint that these student-plaintiffs were not only suing as individuals but also represented a class of all similarly situated students attending so-called poor school districts.\(^{339}\)

The Council was immediately forced to fend off motions from the defense that challenged the named plaintiffs. Debra Dawahare recalled,

> The first thing we got hit with as plaintiffs was a motion to dismiss. The defendants were saying that we did not have standing, that people in our position should not be permitted to bring a suit of this kind because the school boards, you know, all of the people except the individual plaintiffs, were creatures of the legislature, of the state. 'And you can't sue your creator,' they said. We said, 'Well, everybody else has been doing it. Why can't we?'\(^{340}\)

Eugene Binion recalled that he helped recruit several of the plaintiffs. He identified potential plaintiffs based on their interest in the issue and their willingness to participate in the case. He knew that witnesses might have to miss a day’s work and be prepared to testify quickly. Several individuals had direct connections to the schools. Binion noted,

> We got criticized for those people being involved simply because they worked for the school system. But who else would they work for in a county like this. If you go out here and choose anybody to do anything they’re going to have some connection, in all probability, to the school system. They’re either going to be a student, or they’re going to be an employee or they’re going to have a relative who is an employee. So that never bothered me at all about the fact that a school principal’s daughter was one of the litigants. She had the same rights to expect a good education from this system as the local banker’s daughter would.\(^{341}\)

On Monday June 2, 1986, during a pre-trial conference, Judge Corns had given the go ahead to the suit having settled on the issues of plaintiffs and defendants. At that time Judge

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Corns heard oral arguments from the defense and required the addition of the State Board of Education as an indispensable party to the suit. He also overruled a motion from the defense for a summary judgment and concluded that the plaintiffs did have proper standing to prosecute the cause of action. As Dawahare related,

I think Mr. Rose and Mr. Blandford took [the suit] somewhat personally...It seems to me that after that initial volley, when they tried to just laugh it out of court, there really wasn't too much after that. Discovery commenced and was had and we really moved through this quite expeditiously.  

The plaintiffs faced challenges in naming their defendants as well. It turns out that in the history of Kentucky jurisprudence the issue of how one goes about suing the General Assembly had remained relatively unexplored. This proved to be an important factor in the case. As Debra Dawahare explained,

As for the defendants...well, just about everyone in sight. I thought certainly that the leadership of the General Assembly had to be made defendants because we were complaining that the General Assembly was violating the constitution.

[The General Assembly has] 138 people. I knew that this case would rock along for a while. This kind of a case always does. I knew there'd be resignations, there'd be elections, and deaths, and so on. If we tried to make 138 people defendants, I guess we still would've been in court because we would had to have brought them up to date, you know, currently.

And that was one of the questions raised, that we couldn't sue the General Assembly except by suing each member. Some of the judges were impressed by that. But, again, as a practical matter, we just couldn't handle a case like that. We did have some authority, that a body, Congress, for instance, the House of Representatives in Washington, has been sued, on constitutional questions in particular, by making the leadership of the body a party.

Dawahare continued,

I knew that we had to make the Governor a party because the constitution requires the Governor to report to the General Assembly on the state of the Commonwealth and to make recommendations to the General Assembly. I knew that it was the constitutional duty of the Governor to talk about education and financing education.

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342 Debra Dawahare, Interview by the author. Tape Recording. 7 January 1990. Oral History Collection, University of Kentucky, Lexington, Kentucky.
343 Debra Dawahare, Interview by the author. Tape Recording. 7 January 1990. Oral History Collection, University of Kentucky, Lexington, Kentucky.
We made it very clear in the complaint that all of these people were made defendants in their official capacity not as individuals - that we were not seeking relief against them as individuals.\textsuperscript{344}

Assuming the plaintiffs had standing and were suing the proper defendants, an even more difficult issue involved the relief sought by the plaintiffs. What can the court direct the legislature to do? As Dawahare explained,

We realized we had a separation of powers problem. We wanted, all along, to avoid making suggestions as to what the remedy might be but only to focus on the fact that there was a great problem and an unconstitutional situation. It's sort of a legal maxim to sue everybody that you think might be responsible. The judge will sort the souls. Since this was new and we were paddling in uncharted waters we wanted to make sure we had in all the parties that conceivably might be necessary, really for the purposes of enforcement, if we got a judgment. We weren't even sure how to go about suing the legislature. It's not something that's done very much. We found some Federal cases where it would be some person versus Tip O'Neill. You always sue congress by suing the Speaker of the House and the President Pro Temp of the Senate. So we followed that model rather than taking on the unwieldy task of trying to name the whole legislature...I mean, the paperwork alone would have taken years.\textsuperscript{345}

With these threshold issues decided, the Council began building its case. This required Combs and Dawahare to assign roles to each of the plaintiffs’ witnesses. Their testimony was designed to do a particular job or cover a particular issue. As Dawahare related, the Council needed Arnold [Guess] to give everyone an overview - a background of the big picture. As it turned out, Arnold's deposition was absolutely crucial because on the day of the trial, when he was to be called as the first witness, he was in the hospital...so we read his deposition. Jim Melton was going to tell us about the tax structure and what, in that, was harming the schools. Kern Alexander and Dick Salmon were going to tell us about what educational scholars would say about this kind of phrasing. Dick was going to do the statistical correlations and basically that kind of real hard demographic work. He did that largely out of the kindness of his heart. I mean he was paid but certainly not what he usually charges. He did us a very great service.\textsuperscript{346}

\textsuperscript{344} Ibid.
\textsuperscript{345} Debra Dawahare, Interview by the author. Tape Recording. 7 January 1990. Oral History Collection, University of Kentucky, Lexington, Kentucky.
\textsuperscript{346} Ibid.
Some students and parents also testified. Dawahare realized that the students could not offer much in the way of testimony. However, some parents were able to demonstrate to the court how the schools had remained relatively unimproved over many years. Dawahare related,

One [parent] I remember talked about how he'd gone to school in a particular district and now his kids are going to school there...And to his amazement nothing had changed. It was the same as when he had been there.

The plaintiffs operated on a relatively small budget and this prompted an unusual decision not to depose the other side. As Dawahare explained,

Curiously, in this case, instead of deposing the other side, which is what you usually do to find out what they're going to say, we deposed our own, because we wanted to make sure we had a good foundation. We didn't [depose the other side]. We were operating on a really low budget so it's kind of an old fashion trial in that regard.347

But the Council also had a very helpful resource that did not cost a penny. That was the Prichard Committee and its relentless public support for the improvement of Kentucky’s schools. Robert Sexton talked about how the Prichard Committee’s involvement.

[It] was actually when the suit got going, which would have been...in ’85 or ’86, after [Ed] Prichard was dead, that it became a bigger thing. It was a real lawsuit then. And that time, Combs was in touch again. I met with him several times on the suit. He used me as kind of a – I helped get data, and so forth.

I continued to meet with Combs. [I] met with him and several other folks. We would gather together to talk about the briefs, the remedies at all stages. [I] testified in Judge Corns’s court, using the charts we had used in all our public presentations, that showed how poorly Kentucky was doing - basically national rankings and things like that. We were part of it, but never central. We never became a plaintiff.348

But this was exactly what the Council needed. Dawahare explained what Sexton had to offer to the plaintiff’s case.

We wanted [Sexton] to present the poignant picture of what these statistics really meant. Sexton had zingers. You know, he had good

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347 Ibid.
headline things, like ‘the most illiterate populous in the country,’ and ‘in this county 48% can't even read.’

The presentation of evidence included a substantial amount of quantitative data. Much of the most compelling testimony, however, came in qualitative forms – stories and pictures of deplorable conditions existing in some Kentucky public schools. Dawahare recalled,

Frank Hatfield...[and] a lot of Superintendents got up. That was really, I think, the most colorful testimony... Talking about these horrible roads they had to drive on and that's why they spent so much on their school buses... Little kids were selling sponges and things so they could buy air conditioners...

The summer of 1986 was used to gather data and clarify the legal strategy the plaintiffs would employ. During this time, Richard Salmon gathered information with which to compare the course offerings of every Kentucky school district. By the end of November, Frank Hatfield had prepared a group of Superintendents to testify including Rayden Hammers of Butler County, Clarence Bates of Wayne County, Richard Bowling of Leslie County and David Webb of Edmonson County. The legislature had also created a Management Assistance Program that identified a number of Council member districts as needing assistance, inferring that they were being mismanaged. Hatfield and Guess asked Combs to consider whether the list of schools would provide additional evidence supporting the equity argument. However, does not appear Combs used this argument at all.

Throughout 1987, and until April 18, 1988 when final arguments were heard, the long legal processes ticked quietly away. Other than case preparation, the Council generated very little activity and did not meet again until July 19, 1987. Council correspondence was sparse during this time. Tony Collins in Wolfe County and Alex Eversole in Jenkins Independent photographed representative school buildings to be used as evidence in contrast to similar photographs taken in Ft. Thomas. Depositions were taken and the Council made another presentation to the Kentucky Association of School Administrators. At that meeting, the Council leadership reorganized to deal with the retirement of Frank Hatfield from his Superintendency in Bullitt County. Jack Moreland was elected as the new President; Eugene Binion was elected Vice President and Harrison County Superintendent, Martin Carr was elected Secretary/Treasurer.

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349 Included in Sexton’s facts about Kentucky were; 50th in adults with high school diplomas; 49th in college graduates; 1st in adult illiteracy; 46th in college attendance; 1st in receipt of U.S. education funds; 5th in unemployment; 3rd in the poverty of its population; 3rd fastest in increase of poverty; 1st in teen pregnancy; 48th in spending for education.
350 Debra Dawahare, Interview by the author. Tape Recording. 7 January 1990. Oral History Collection, University of Kentucky, Lexington, Kentucky.
351 Debra Dawahare, Interview by the author. Tape Recording. 7 January 1990. Oral History Collection, University of Kentucky, Lexington, Kentucky.
352 Ibid.
353 Frank Hatfield letter to Bert Combs, 2 December 1986.
Efficiency, Adequacy and Equity

At the heart of the case of The Council for Better Education v. Collins, et. al. is the definition of efficiency and its relationship to the issues of equity and adequacy. Clearly, when the Council leadership first approached Bert Combs with the idea of filing this suit, equity was foremost in their minds. Indeed, several of these men have said privately that if the legislature had only funded the Power Equalization Program to a significantly higher level, this suit would have simply gone away. As Combs began to look at the issues, however, the focus changed. Combs remembered,

I pointed out to them early on that we had a better shot on adequacy... The word efficient clearly meant adequacy, in my opinion...and the uniformity thing came into being by reason of the phrase 'throughout the state,' which was not as mandatory.

The [Council leaders] had no reluctance [on this point]. They were strong on both points. I think they were more conscientious of the lack of uniformity originally, than they were that the system statewide was inadequate.\textsuperscript{356}

Debra Dawahare coined the notion of a 'Robin Hood Theory' of equity, and while treading dangerously close to suggesting to the legislature the appropriate remedy, argued before the court that this theory provided no solution to the problem.

[The case was argued from an adequacy point of view rather than equity] because we didn't want anyone going off on the idea that you had to have equitable mediocrity...that you had to take money away from Jefferson County so that Martin County could have more. Our theory all along was that no district in the state was over funded. Possibly, as compared to Connecticut, we're all a mess. It's clear that we don't want to do that. But there has to be more of a congruence than there is. There has to be less disparity than there is. So if you're not going to take things away from the richer districts, it's logical that you must put a floor under the poor ones.

Perhaps it was [a suggestion of remedy to the General Assembly]. We, at no time, said, 'Legislature, you must not do this.' We did make statements, particularly to the media that our theory in this case all along is, 'Raise the tide and all ships will rise.'\textsuperscript{357}

In his deposition to the court, Dr. Kern Alexander, then President of Western Kentucky University, testified that efficiency means more than equity.

\textsuperscript{356} Bert Combs, Interview by the author. Tape Recording. 18 July 1990. Oral History Collection, University of Kentucky, Lexington, Kentucky.

\textsuperscript{357} Debra Dawahare, Interview by the author. Tape Recording. 7 January 1990. Oral History Collection, University of Kentucky, Lexington, Kentucky.
The word 'efficient' is probably given the best discussion in the New Jersey case of Robinson v. Cahill, wherein the State Supreme Court of that state held that the system of financing in New Jersey was unconstitutional. They elaborated on the term 'efficiency' and in fact indicated that it meant more than simple equality or equal distribution of resources. It meant, in addition to that, the leveling or evening-up for children that have educational deficiencies.  

The Council for Better Education ultimately sought a declaratory judgment, which was presented in the complaint in three counts. Count One stated "under the Constitution of Kentucky, the creation and maintenance of a statewide system of common schools is expressly made a responsibility of the Commonwealth under section 183." The complaint then goes on to state that

[T]he General Assembly and the Executive Branch have assumed responsibility for and control of the structure of the public schools...[and that accordingly]...the total financial resources available to a school district [are] dependent upon the assessed valuation of property per pupil...[in which there are] gross disparities, the consequences of... [which] are devastating for thousands of Kentucky school children, and for the Commonwealth as a whole.

The plaintiffs further complained that,

(Property-poor districts and the school children they serve are irrationally trapped in a system which makes the scope and quality of education provided depend first on local assessed property values, and then limits local taxing powers so that the tax base in a property-poor district cannot effectively be reached.

Finally the complaint states that,

(UNDER Kentucky law, school children have a substantial, fundamental interest in and right to adequate educational opportunity...[That] the plaintiff school children and the class they represent are arbitrarily denied access to adequate educational opportunity, in violation...of the fourteenth amendment of the United States Constitution, and of Sections 1, 3 and 183 of the Kentucky Constitution.

Accordingly, the plaintiffs asked for the following relief:

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359 Complaint, Civil Action No 85-CI-1759, filed May 28, 1985.
360 Ibid.
361 Ibid.
That the court declare the present statutory structure for funding public school in Kentucky unconstitutional... [that the various defendants be enjoined by the court] from implementing the unconstitutional educational funding statutes currently in effect in Kentucky...[that the Governor be required to] call for a special session of the General Assembly...[that the President Pro Tempore of the Senate and the Speaker of the House] place before the General Assembly common schools legislation which will comply with the constitutions of the United States and the Commonwealth...[and that] the General Assembly...increase the funding for public schools in an amount sufficient to provide an equitable, adequate and efficient funding program for all school children of the Commonwealth of Kentucky.  

Even after the filing of the complaint and all of the long hours of planning and strategy that went into that effort, the plaintiffs’ counsel had mixed feelings about their chances. Debra Dawahare recalled her reluctance at the time:

I never believed we'd win. I didn't think this was a cause that had much future. It just seemed to me that it was not the kind of think that you could absolutely support in a hard core way. It seemed to me that it was going to be very hard to show that there was a direct correlation between money and the quality of education, or the results. For example, if assumed that Kern Alexander, Judge Combs and I are all successful results of the school system, more or less - we all went to public school - well, look where we went. Judge Combs went to a one room school somewhere in...Clay County. And Kern Alexander's from Marrowbone, Kentucky. I don't even know where that is. It might be Greenup County. It's certainly a poor area. And I went to Danville High, which probably was the height of sophistication compared to those two. And arguably, if we'd all gone to ideal schools, you know, maybe we would have all accomplished more. I don't know. But it just seemed to under cut our very premise.

Combs was more confident but for different reasons. From the start, he clearly understood that he was involved in a multifaceted effort.

I thought we were entitled to win. I, as most lawyers imbued with their own rhetoric, develop a feeling that they're entitled to win. [I thought that] if [the case was] present[ed] properly and [we] got the right judges - we'd win. A judge is a product of his environment and his heredity. The problem was not that these judges were not willing to face up to their responsibilities. The problem was a natu-

363 Ibid.
364 Debra Dawahare, Interview by the author. Tape Recording. 7 January 1990. Oral History Collection, University of Kentucky, Lexington, Kentucky.
eral reluctance of the judiciary to infringe on the jurisdiction of the legislature. I had the best case on the law. Psychologically and politically I had a weak case.\textsuperscript{365}

As the legal wrangling began, the defense made its positions known through its Answers to the Council’s Complaint. The defense attacked the plaintiffs on several fronts including the court’s jurisdiction, the plaintiffs’ standing and whether they had the authority to sue to General Assembly. As Combs explained,

The answers filed by the various defendants were basically identical. It was pled that the complaint failed to state a claim against any of the defendants; that the court had no jurisdiction because the subject matter was purely a 'political' one; that all school boards should have been joined as parties [to the defense]; that all members of the General Assembly (1986) should also have been joined as parties [to the defense]; that all plaintiffs lacked standing to bring the action; that, specifically, the plaintiff Council for Better Education, Inc., had no legal authority to sue; that the plaintiff school boards similarly had no legal authority to sue; that a class action was improper; and as would be expected, the defendants denied all of the alleged constitutional violations and the facts underlying such alleged violations.

The defendants also filed a self-styled 'affirmative defense' claiming that education reform laws passed by the General Assembly at a special session in 1985 and various budget changes and other educational laws passed by the General Assembly at its 1986 regular session inferentially corrected the situation alleged in the complaint. Reference was also made to past legislative efforts of the General Assembly in the education field, presumably to further demonstrate the General Assembly's compliance with its constitutional mandate.\textsuperscript{366}

The defense made much of the fact that several of the plaintiff districts never levied any of the permissive taxes, claiming that if they had, the disparities would not have existed. To punctuate its argument, the defense asked for certain facts to be stipulated. In addition to this response, the defense asked plaintiffs to make certain admissions including the fact that none of the plaintiff districts (Elliott County, Knox County, McCreary County, Wolfe County, Dayton Independent or Harlan Independent) had ever levied any of the permissive taxes allowed by law.\textsuperscript{367}

\textsuperscript{365} Bert Combs, Interview by the author. Tape Recording. 18 July 1990. Oral History Collection, University of Kentucky, Lexington, Kentucky.


\textsuperscript{367} In the Hopper, #126, June 1986.
Bert Combs had arranged for the Prichard Committee to file a brief of Amici Curiae supporting the Council’s position. Governor Combs seemed to be in a particularly advantageous position to do this.

I'm a member of the [Prichard] Committee. They meet here occasionally. Bill McCann\textsuperscript{368} [of Wyatt, Tarrant and Combs] is a member. He used to be President. Robert Sexton, I knew, believed in our cause and testified...very effectively. I'm sure I said to the committee that I thought this was an appropriate opportunity for the committee to take a stand, that they did have the privilege of filing an amicus curiae brief.\textsuperscript{369}

The Prichard Committee was accustomed to making public statements on education issues. The support of the Council’s position provided yet another opportunity. As Sexton recalled,

The Prichard Committee decided that we needed to say something. So we did decide to write an amicus curiae brief. We asked Phil Shepard, who had been Prichard’s law partner and Phillip Lanier who was one of our members to draft an amicus brief, and basically argued that adding more funding alone was not the answer to improving education in Kentucky.\textsuperscript{370}

The brief filed on March 9, 1988 by Philip Lanier and Philip Shepherd on behalf of the Prichard Committee advocated the following:

I. This court should recognize education as a fundamental right under the Kentucky Constitution; any legislation placing a discrete class of children at a disadvantage in their ability to obtain a meaningful public education should be subjected to the strictest constitutional scrutiny... II. If the constitutional minimum of an 'efficient system of common schools' has been met, then the court must decide if the legislature has adequately funded the system it has designed... [and] III. This court should mandatorily enjoin the state Board of Education to enforce adequate standards governing expenditure of school funds if it accepts defendants' argument that the lack of educational achievement is due to wasteful practices in the plaintiff school districts.\textsuperscript{371}

The brief concludes,

\textsuperscript{368} The reference here is to Bill McCann, Sr. He is the father of William McCann Jr. who contributed numerous interviews to the University of Kentucky Oral History Collection, providing primary sources for this manuscript. Like David Vest, Bill McCann, Sr. is an acquaintance of the author, and the author also hired his wife.
\textsuperscript{369} Bert Combs, Interview by the author. Tape Recording. 18 July 1990. Oral History Collection, University of Kentucky, Lexington, Kentucky.
\textsuperscript{370} Robert F. Sexton, Interview by Catherine Fosl. Tape Recording. 10 October 2000. Oral History Collection, University of Kentucky, Lexington, Kentucky.
\textsuperscript{371} In the Hopper, #126, June 1986.
[We] respectfully urge this Court to hold that education is a fundamental right under the Kentucky Constitution, to declare that the constitutional obligation to "provide for" an efficient system of common schools has not been met, and to reject the defendants' attempt to assert that waste and mismanagement of local school districts provides a defense to the plaintiffs' claims that the constitutional mandate for public education has been violated.\(^{372}\)

By the time of the final oral arguments in Franklin Circuit Court a statewide election had been held, and on March 28, 1988 the plaintiffs entered a motion to substitute, naming new defendants. Newly elected Governor, Wallace Wilkinson, replaced outgoing Governor, Martha Layne Collins. John Brock replaced Alice McDonald as Superintendent of Public Instruction. Legislative officers and State Board of Education members were also substituted. Judge Corns postponed arguments from April 5 until April 18 in order to allow new defendants some preparation time.

On April 18, 1988, oral arguments were heard before Judge Raymond Corns. The defense immediately asked for a summary judgment, based primarily on the claim that no relief could be granted against the General Assembly because of the lack of service on all 138 of the members. The defense also asserted the parties lacked standing or legal capacity to sue. Corns overruled the motion in its entirety and the testimony began.\(^{373}\)

Scent’s defense was not nearly so involved as that of the plaintiffs. The crux of his argument was that inequities were the product of failure on the part of individual districts to levy permissible taxes and widespread mismanagement. Scent recalled,

We didn’t have an expert come in from out of state, or even in state for that matter, and give an opinion other than {Joe} Gormley [Superintendent of Woodford County]. I don’t know that we could have found anybody to come in (chuckles) and testify for us. I made no effort to do it. I really felt like the only defense we had was the one we made. The only way it could be presented was the way we presented it, making Woodford County the benchmark and showing what could be done with relatively few dollars. And despite House Bills 1 and 44 and the scarcity of population, and the low property tax assessment, what could have been done if they had just enacted a utility gross receipts tax.

Of course on of the things I tried to do with the superintendent’s and assistant Superintendents who were called was to show how they had not taken measures to correct deficiencies in their own sys-


\(^{373}\) Defendant’s First Request for Admissions, Civil Action No. 85-CI-1759, April 18, 1986.
tems. Most of them wouldn’t even propose a Utilities Gross Receipts Tax.³⁷⁴

Scent’s defense relied on the court to see Kentucky as a poor state and therefore hold the state to a lower standard that reflected that poverty. In Scent’s view,

I felt that all of the statistics showing the Kentucky was 48th here, or 43rd here, or 41st there should be considered in the context that Kentucky was also 44th or 45th in per capita personal income. And, there were a lot of other financial demands that had to be met by the General Assembly other than education. In that context, they had made a good effort for education, particularly in the ‘86 special session. There was just no basis for holding the system unconstitutional.

I think where the plaintiffs really fell down in their proof was that where the system did fail to meet constitutional muster was in those districts that were so under-financed compared to the wealthier districts. That’s where the inequality was. Not between the average in Kentucky and the average in other states.³⁷⁵

Even despite House Bill 1 and House Bill 44, the failure to adequately finance the schools was just the refusal on the part of the local school boards to do the things that could have been done. They could have put in a Utility Gross Receipts Tax, for example. That would have been a big help.

We used Woodford County system as our benchmark comparison. Here was a very very wealthy county that made a very poor local tax effort. They did not have much more money than these named plaintiff county districts. The difference Woodford County did have, that these counties did not have was a Utility Gross Receipts Tax. And, Woodford County had a very good system and put out a good product, and so forth.³⁷⁶

While the trial continued, the General Assembly met again with its new Governor, Wallace Wilkinson. Wilkinson had developed a reform plan unilaterally, and members of the legislature did not embrace it as the Governor had hoped they would. There were also political issues important to the General Assembly to which the Governor was apparently not sensitive. At one point Wilkinson made it clear that the only reform plan he would support was his own. Don Blandford thought that Wilkinson’s personality made it difficult for the General Assembly

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³⁷⁶ Ibid.
to operate as equal partners and probably caused the ultimate defeat of Wilkinson’s Education Reform Plan. Blandford recalled,

The Governor had an Education Reform Program. I never did know exactly what it was, to be honest with you. He and Jack Foster had drawn up an education reform program without any legislative input, without any legislative involvement - period. It was one of those things. Jack Foster sends a letter one day and says, ‘Here’s our reform package. We want you all to go out there and pass it.’ We just felt like it needed to be a more comprehensive package, more involvement of more people. You know, school boards, KEA, PTA and all of these people weren’t involved in it and they were a little bit leery of it. The Governor had the plan and he did not sell it to the satisfaction of the General Assembly. It didn’t fair very well.377

According to Robert Sexton,

Wilkinson and the legislature were at such loggerheads that they didn’t want him to take the lead on education. They didn’t want him to get the credit. They didn’t trust him. …He had run as a no-tax-increase governor. So he kept saying, ‘I will increase taxes if you show me results.’ And the people who opposed him in the legislature were saying, ‘We won’t go along with that.’378

In late 1987, John Brock had become Kentucky's Superintendent of Public Instruction, replacing the troubled Alice McDonald. Brock had just previously been the Superintendent of the Rowan County School District and a member of the Council for Better Education. Evidence suggests that he was fully supportive of the Council’s objectives, although he was not part of the inner circle who conducted most of the official work of the group. Brock seems to have suffered the most, in terms of personal setbacks, for his participation in the Council. Despite his election to state office, he was greatly marginalized by both the Governor and the General Assembly from the start.

Dr. Steve Clements offered several reasons for this. First, a growing consensus opined that the Kentucky Department of Education “was part of the problem rather than a viable source of school improvement ideas.” Alice McDonald had vigorously promoted reform ideas during her Superintendency, but her other failings produced a more negative perception of KDE than her proposals could overcome. In the end, McDonald’s behavior provided much of the basis for Kentucky’s shift to an appointed Commissioner. Brock’s lack of an agenda did nothing to dis-

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During his campaign for the state Superintendency, Brock rose in prominence, but once elected, he never seemed to become a force. He did not come into office with a well-defined plan and apparently had made some enemies along the way. One such enemy was Roger Noe, the Chair of the House Education Committee, whom Brock defeated in the Democratic primary. “Noe had considerable disdain for Brock during and after the primary, and had no intention of allowing him significant influence in reform matters.”\footnote{Ibid., 296.}

The Governor’s heavy-handed tendency toward unilateral decision making and the General Assembly’s flat rejection of the Governor’s plan also tended to leave Brock out of the debate. “Brock was disliked personally by many members of the Wilkinson Administration,” and he was not consulted as plans were developed.\footnote{Ibid.} The growing tensions between the Governor and the legislature not only took center stage – it seemed to be the only show in town. \emph{Lexington Herald-Leader} Editor, John Carroll, described Brock in very modest terms,

\begin{quote}
I think John Brock has been ineffectual. He seems almost a bystander in education. When he tries to seize on issues like family values where he can be a champion of virginity and not letting kids get any kind of training in reproduction and so on, and meanwhile the schools educationally are poor. I don’t think he’s done anything. I don’t think he’s done anything particularly bad either. I just don’t think he’s been a force.\footnote{John Sawyer Carroll, Interview by William McCann Jr. Tape Recording. 23 May 1990. Oral History Collection, University of Kentucky.}
\end{quote}

Cut out of the reform debate and lacking his own plan, Brock decided to go in a different direction. He understood that the profession had a huge stake in whatever was going to happen. So, he turned his attentions to the professional organizations, hoping to find areas of agreement around which a coalition might be built and certain ideas might be advanced. As Clements learned, early in 1988, prior to the rendering of the Corns decision, Brock convened representatives of the main education interest groups,\footnote{Those groups included The Catholic Conference of Kentucky, The Kentucky Association of School Administrators, The Kentucky Association of School Superintendents, The Kentucky Chamber of Commerce, The Kentucky Congress of Parents and Teachers, The Kentucky Department of Education, The Kentucky Education Association, The Kentucky Educational Foundation, The Kentucky School Boards Association and The Prichard Committee for Educational Excellence.} including the Prichard Committee and the Chamber of Commerce…into a coalition. “The idea would be for Brock to lead the coalition in development of a reform agenda that all member groups could agree upon, so that the [Superintendent
of Public Instruction] and interests could compete with the Governor and [the Interim Joint Education committee] on education policy playing field.”

Steve Kay, who was brought in by Brock to facilitate the discussions, indicated that Brock was partly interested in formulating a plan but he had more esoteric notions in mind as well. Kay recalled,

Yes…I think [formulating a plan] was part of it. And, part of it was, I think, that John had a right notion, which was, if…they could get some, at least minimal, kinds of alignment amongst the constituency groups, if they could agree on some things, that they could move those things forward. But, …absent that, not much was going to happen.

The Prichard Committee decided that it would not support any reform plan that did not come with dollars already attached to it. But Wilkinson was noncommittal on the tax issue unless he got unqualified support. Sexton recalled,

By the time the ultimate reform was enacted in 1990 [the Education Coalition] had basically agreed on the elements of it. The KEA had even agreed to accountability in return for dollars. Our role in that was to keep that issue on the table. Other groups had other agendas. But our role, [as] we saw it, was to say, ‘As taxpayers, we are willing to support more money but there has to be some evidence that there’s going to be improvement as a part of that.’

But the Education Coalition apparently got the same treatment as the one that caused the legislature to balk. According to Sexton,

The culmination of all that work came in a horrendous meeting with Governor Wilkinson. Where he came to us, this is a long story, but he had been working with Superintendent of Schools, John Brock. And John had been sitting in on these coalition meetings and had somehow or other communicated with the Governor. By this point the Governor did not have legislative support. He needed to build other support for his program. So he came to this coalition of groups and we had a meeting and the question was, ‘Will you support my program?’

A lot of what he was proposing was what we wanted. There was a lot of agreement. But in that meeting he said, ‘If you’ll do that, then I will pass the biggest tax increase you’ve ever seen. It will

surprise all of you. Governor Wilkinson was a man who loved to use superlatives. Everything was either the biggest or the first or something like that. Biggest you’ve ever seen. Biggest you’ve ever imagined.

And I think we were in his office, it seemed like a day, it might have been three or four hours, fighting over this. And we as a group, and I was the spokesperson for the group, said, ‘We’re not going to do that.’ We didn’t say it, but the implication was, ‘We don’t trust you to do that. If we agree to support your program, then it’s all over. We have no more leverage.’ And so he was not happy. He was furious.387

Overall, interest group involvement in Kentucky school reform, particularly those directly involved with education, proved to be very weak. The General Assembly’s growing strength was only made stronger when Judge Ray Corns made his ruling. The legislative leadership made it clear to all other interest groups that if indeed, as the judge ruled, the responsibility for an efficient system rested exclusively with the General Assembly, then they would decide who was in (and not in) the debate. The only uninvited entity that the legislature had to keep in the loop was the Governor, due to his responsibilities for the all-important state budget. Left unfunded, the best reform package in the world would not produce a good result.

The Corns Decision

Judge Ray Corns reached his momentous decision on May 31, 1988. He explained his decision to declare the school system unconstitutional in very straightforward terms.

I decided that it was a duty of the General Assembly, a mandatory duty, to provide and adequate educational opportunity for our children in need. And on the basis of the facts, I determined that it was not adequate. And secondly, I determined that as a matter of law, not only did it have to be adequate, but there had to be equity. It had to be applicable throughout Kentucky and that a child could not be penalized educationally because of geography: because of where they live.388

One of the provisions in Judge Corns’s decision called for a committee to advise the court on issues raised in the case. This decision was subject of a certain amount of criticism. Corns explained the origin of the committee idea.

387 Ibid.
After I issued my opinion on May 31st 1988, holding the system unconstitutional. I told them I would issue a final opinion by October 15th of that year. And I followed a principle that had been approved in a case in West Virginia.  

As Combs and Dawahare knew, the separation of powers was a tightrope that the court would have to walk. Judge Corns’s decision to name an Education Committee to report to the court before its final ruling in October raised hackles among the legislators and prompted an appeal to the Kentucky Court of Appeals seeking a Writ of Prohibition. According to Dawahare,

After Judge Corns had ruled the first time in May of ’88, Rose and Blandford went to the Court of Appeals asking for a Writ of Prohibition, which is the Court of Appeals ordering the trial judge not to do something. What they wanted the Court of Appeals to order Judge Corns not to do was [to hold the meetings with the committee he appointed]. They kept saying, ‘You can’t do that and you certainly can’t spend state money.’

That was really quite hilarious because the first thing that happened was the Dan Jack Combs appeared on the panel. He and a member of our firm, Kilmer Combs, were once partners. They didn’t part on the kindliest of terms, so we worried about prejudice. Also, Judge Combs had supported Dan Jack’s opponent. (laughs) So, Dan Jack, he’s very expansive anyway, he said, ‘Well, I have long ago forgotten any hard feelings I may have had against Mr. Kilmer Combs. And as for you, Bert Combs, it is true that you supported my opponent. Not too well, I might add. But I feel I can put that aside and I’m not going to recuse myself.

Then we had this lengthy hearing with everybody arguing back and forth. And the one thing they really seemed interested in, I believe this was Anthony Wilhoit, was ‘Well, how much money has this committee spent?’ I believe Arnold Guess was in the back and said, ‘$11.’ So they came back with the decision that this was really a piecemeal appeal that Rose and Blandford were trying and that could be taken care of when it got to, wherever, but they weren’t going to prohibit it now.

Rose objected to the Education Committee, arguing it violated the separation of powers but otherwise was not too harsh in his criticism of Corns’s decision. Rose said,

The Corns decision itself, as far as addressing the basic issue that education in Kentucky is not funded equitably – there’s no problem. I agree with that. I disagree very strongly with a couple of the other

389 Ibid.
390 Debra Dawahare, Interview by the author. Tape Recording. 7 January 1990. Oral History Collection, University of Kentucky, Lexington, Kentucky.
things that Judge Corns was trying to do. This is another reason we wanted to appeal, and we did indeed prevail in these things later on. What Judge Corns wanted to do was appoint a committee. And initially wanted myself and Speaker Blandford and other people in the legislature serve on that committee, to develop a plan for education and then to bring that plan back to him. And he would decide if that’s what needed to be done. That very clearly was not something that he ought to be doing. That in fact makes the judge a legislator. Now I have no problem with the court system determining if what we did is constitutional or not. But I have a very real problem with them telling us what we can pass. If you’re going to do that you just need one branch of government.

Attorney for the General Assembly, William Scent did not think much of Judge Corns’s Education Committee either and even went so far as to suggest other motives for its creation.

Looking back on it, I realize now that I never had a chance of winning that from the word go. It was before a judge that had all this background in the education department. Combs was lead counsel. He and Corns were very good friends. You had all this lobbying going on in the background with all these do-gooder groups about, you know, ‘Something had to be done to improve education.’ All the media hype started about it and I just should have read it as being a situation where I wasn’t going to win the case.

Of course, that wouldn’t have deterred me from going ahead and defending it the way I did anyway. What was going to happen was going to happen. The court was going to declare it unconstitutional and so forth. It was a juggernaut that got in motion and there wasn’t any way that anybody was going to stop it.

I felt [Corn’s Decision] was wrong that it went way too far. Certainly, remedy-wise he exceeded his power and authority. He was going to keep the case on the docket and monitor it. He was going to judge whether the legislature was complying with his mandate, and so forth.

[The committee] was just a dog and pony show to get some more media hype worked up about the case. That’s what it amounted to. It may have very well influenced the Supreme Court and their looking at the case. They’re not immune from reading the papers and so forth. And that created a vehicle to publicize the Corns decision. By having those hearings and having the report, I’m sure the mem-

bers of the court all read that. It’s bound to have had some effect on them.\textsuperscript{392}

As Superintendent of the Rowan County School District, John Brock was a member of the Council for Better Education. Upon his election to the state Superintendency, he became a defendant in the Council’s action - but not for long. As Brock recalled,

When I became Superintendent, I suddenly found myself to be a defendant in a suit where I had been a plaintiff. My local Board of Education had been a plaintiff. I just expressed to the department’s attorney here, Mr. Gary Bale that I wished to express to the judge that I did not wish to defend against that suit. My sympathies were with the plaintiffs and that’s a similar position taken by the Superintendent of Public Instruction in California.\textsuperscript{393}

Governor Wilkinson made the same decision. So by the time the Supreme Court heard oral arguments, the main appellants were members of the legislative branch of government. Prior to oral arguments, both sides issued extensive briefs to the court, on a fairly short time line, that drew compliments from the justices for their quality. Due to the importance of the case both sides were granted extended time for oral arguments. As Debra Dawahare recalled,

Everybody knew it was going [to the Supreme Court] anyway, so why waste time at the next level? The Supreme Court, to our surprise, and I think anticipating a possible special session in January, wrote to us almost at once and said, ‘Appear here December Seventeenth for oral arguments. In the meantime, have your briefs ready in two weeks.’ We went, ‘Oh, god!’ They also gave an hour for the arguments - an hour a piece. The typical time is fifteen minutes. In addition, they waived page limits on the briefs.\textsuperscript{394}

Late in 1988, Lawrence Forgy reflected upon Judge Corns’s decision at a meeting of the Kentucky Association of School Superintendents. Forgy had been a member of the committee appointed by Corns, a law partner with Bert Combs and was a prominent Republican political leader in the state. He shared with the Superintendents his views of the political and legal significance of the ruling.

It seems to be the consensus of the political writers at least, and of a lot of people that are political junkies...that the real political significance of the case is that it has created a way in which the Governor can rationalize some change in his ‘no tax’ stand, which was, of course, one of the hallmarks of his campaign. The second politi-

\textsuperscript{393} John Brock, Interview by William McCann Jr. Tape Recording. 9 November 1989. Oral History Collection, University of Kentucky, Lexington, Kentucky.
\textsuperscript{394} Debra Dawahare, Interview by the author. Tape Recording. 7 January 1990. Oral History Collection, University of Kentucky, Lexington, Kentucky.
The real significance of this case...from a legal standpoint...[is that] no Kentucky court has ever so firmly instructed the General Assembly of its constitutional obligations in a matter of such great consequence.

Since 1979...the Kentucky General Assembly has been on a drive toward essential primacy in state policy-making. And little doubt remains in my mind that in the last four to five years they have achieved that essential primacy. Most major policy in this state now, is made by the General Assembly and not by the Governor. 395

In mid October 1988, Combs became aware that the Council’s Domestic Corporation Charter had been revoked. This had the potential to derail Council efforts at the time preparations were being made for oral arguments before the Supreme Court. It fell to Jack Moreland as President of the Council to fix the problem. He recalled a very hectic day.

Once the Corns Ruling was passed out, of course, Mr. Scent was looking anything and everything he could use [against] the organization that actually filed the suit. We were initially incorporated but you had to file update papers in order to keep in good stead with the state as far a being a non-profit corporation. We didn’t have to pay any taxes...but we had to file and we had to keep everything in good order. And this would have been somewhere around NKEA Day [October 14, 1988] and I was over here one day by myself. Well, we were doing some things up on the football field and I was up there tinkering around with them. My son was here in the office. He didn’t want to be up there. He wanted to watch television. There was nobody in the school district [office] and the phone rang. It was Judge Combs.

What had happened was Arnold had been taking care of this stuff when he was in the private situation. He had left an address that was really nothing more than a post office box where he got the mail that dealt with the Council for Better Education. When he went back to work for the department we hadn’t thought anything about it. Most of his mail was sent to the department, but this information went to that post office box.

We got that call and Judge Combs told my son, who’s nine-years old. And Bernie came up and said, ‘Daddy, a Mr. Combs called and he said it’s absolutely important that you call him right now.’ So I got on the phone with Judge Combs. He said, ‘Jack, You have got to get this straightened out by the end of business today.’ Now this was like 10:30 in the morning. He said, ‘I don’t care what hap-

395 Lawrence E. Forgy address made to the Kentucky Association of School Superintendents. Tape Recording. Winter, 1988. Author’s collection.
pens. ‘You’ve got to do that by the end of business today.’ And I had to file the necessary papers with the Revenue people. I had to go to the Secretary of State’s office and prove to them that we were OK with Revenue. And then they would reissue [a reinstatement].

And I had been up there on the football field. I was in my blue jeans. I looked like a damn wreck, you know. (laughs) We loaded in the car and took off. And we got it done by the end of business. But that could have been very important for us.396

Having lost their ‘mismanagement’ argument in court, the leadership of the General Assembly sought to prove their point in another, more vindictive fashion. Sometime after Judge Corns’s initial ruling they called for Robert Babbage, the State Auditor, and grandson of former Kentucky Governor Keen Johnson, to conduct an investigation of Kentucky’s poorest school districts and report any mismanagement. Superintendent John Brock’s initial reaction was strongly negative, even to the point of threatening Babbage with a lawsuit if he proceeded. As Brock recalled,

The auditor was asked to audit the 66 districts that had filed suit, and that had won the case. And that just was punitive and intimidating in nature. In fact, I advised the auditor that he was really moving into dangerous ground to be perceived as personally attacking 66 districts that had undergone great criticism from people to stand up for youngsters in those poor communities.397

Brock questions whether Babbage might be encouraging such an audit due to a personal interest in running for State Superintendent himself. Babbage admitted, “I did have an interest in that assignment and was encouraged by some people to consider it.” But he steadily maintained that his actions as auditor would only be motivated by his understanding of his constitutional role.398

Babbage acknowledged the anger of some legislators and understood very well the depth of emotion coming from all quarters. Was the call for audits really a punitive move by legislative leaders as Brock had suggested? Babbage said,

It probably was motivated that way in the beginning. But that doesn’t diminish the real validity to have audits done of school systems. I mean there’s no question the legislature may have been angry when they asked me to [audit]. They also had a very reasoned basis for their request. So what I had to try to do was defuse the

396 Jack Moreland, Interview by the author. Tape Recording. 3 April 1990. Oral History Collection, University of Kentucky, Lexington, Kentucky.
anger and the emotion. And believe me, I heard a lot of it from legislators and Superintendents and other people.399

Robert Babbage read the law literally, and as he saw it, “The law says that the legislature can cause this office, by request, to do whatever it wants. It also says that I should honor those requests, and I did.” The Attorney General agreed with Babbage and the decision to conduct an audit was made. Babbage recalled the fun the newspapers had with the fuss. He kept a political cartoon on his wall “that says, ‘School Lunch Menu’ Babbage and Brock share a knuckle sandwich.”400

The State Auditor ultimately decided to audit a sample of districts across the state to remove the appearance of vindictiveness. Babbage decided to take three school districts from each of the six congressional areas, leaving out Jefferson and Fayette Counties due to their size, and Pike County because the Kentucky Department of Education had already taken over the school district due to preexisting concerns with management. According to Babbage, 18 school districts were identified for audit.

Those 18 went berserk, together. But then when we finished the audits and handed it to them, almost every one said, ‘You know, if I could save some money here, and you’re talking five and six figures, then you’ve really done something to help me out.’ Some people said we weren’t hard enough on the school systems. Some said we were too hard on them. I don’t know what the answer is. I think we tried to shoot it straight down the middle.401

In the final analysis, Robert Babbage was philosophical about his job as State Auditor and having been called upon for this task.

We don’t audit taxpayers. We audit the government on behalf of the taxpayers. But, nobody likes that kind of look. And you just have to accept that coming in here. Now, if you can do that with some politeness and some diplomacy and consistency then I think you can maybe survive a four-year term in this office.402

The Council for Better Education approved of his handling of the audits and later, at the testimonial banquet for Bert Combs, Council President Jack Moreland remarked, “Fortunately, because of the integrity of Bob Babbage, our auditor, the audits were done very fairly.”403

399 Ibid.
401 Ibid.
402 Ibid.
Mr. Scent’s Case before the Supreme Court

The Appellants, Senator John “Eck” Rose and Representative Donald Blandford, believed that Judge Corns’s ruling ought to be reversed and that the General Assembly had already provided an efficient school system through their legislative acts. In making this argument before the Supreme Court, Paducah Attorney William Scent attempted to explain that this case was actually a multifaceted public policy “campaign” that had already gotten appropriate attention from the legislature. As we have already seen, Robert Sexton thought in terms of a public policy campaign from the start. Council for Better Education member, Eugene Binion, recognized the impact of the collective efforts on public opinion and legislators. Binion commented,

I think that the public knowledge that came about because of the suit helped bring about the kind of things that we’re witnessing now. I think that the School Facilities Construction Commission grew out of the efforts that many of us were making about the suit. That happened right before we filed…with the 1985 session…Those were the kinds of ways to improve education in poor districts that we wanted to bring to the attention of the public to start with.

I think the articles about Cheating Our Children…have [had] a tremendous affect on what may happen in the next ten years with public funding and with public interest in education. Those kinds of things have to be done by somebody. I think a lot of those things were brought about because of the interest of the 66 school districts who joined the Council for Better Education.

Appellants’ counsel William Scent decided to use his allotted hour before the Supreme Court in two parts. He argued for 50 minutes initially and reserved 10 minutes for rebuttal. In his opening, Scent attempted some prefatory remarks, but got off to a rocky start. His first two points were: This case had “already had a salutary effect on the campaign, and I believe it is a campaign, to secure additional funds for elementary and secondary education.” And, that the

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404 From November 12 – December 15, 1989, The Lexington Herald-Leader published a twelve part series describing tax giveaways, payroll padding, the persecution of teachers, nepotism, and many other affronts to good education. The articles were principally written by Kit Wagar, Lee Mueller, Bob Geiger, Bill Estep, Jack Brammer, John Winn Miller, Jamie Lucke, Mary Ann Roser and Valerie Honeycutt. The series generated more reader response than anything previously published by the Herald Leader. Some of the titles of articles included: How Politicians Win and Schools Lose; This Tax Man Gives Away the Store – and the Schools; Even Governor Wilkinson Gets Property Tax Breaks; Cabinet Member Admitted Falsifying Property Tax Records; In Floyd, Tax is a Dirty Word; Governor Wilkinson Says He Misspoke When He Advocated Tax Avoidance; Politics and Neglect Bring Tax System to its Knees; The Story of a Poor County That Won’t Help Itself; Teaching in Fear; Woe to the Educator Who is Politically Wrong; Administrator: It’s Only Politics When They Don’t Get the Jobs; Custodian: My Salary Was Cut. I didn’t Play School Politics Right; Kentucky Now Faces a Test of its Heart and its Politics.

“General Assembly had as its goal and continues to have as its goal the best system of educa-
tion…possible in Kentucky.”

But Justice Stephens offered a quick retort. “Is that really the issue Mr. Scent? Or is the
issue whether they have achieved the constitutional mandate?”

Scent agreed that the issue was the constitutional mandate, regrouped and continued his
remarks, but he seemed unable to gain any headway by telling the court how hard the legislature
had tried.

Scent: Have the Appeallees shown by clear and convincing evi-
dence that the legislature has failed in their constitutional duty to
provide by appropriate legislation, an efficient system of common
schools throughout the state…”

Stephens: Judge Corns has already made that ruling and the ques-
tion you have to show is that under Rule 52 his findings are not
supported by evidence…

Scent: The point I’m trying to make is that the legislature has
done its best funding-wise to constantly improve public elementary
and secondary education in Kentucky in the context of the general
fund resources that are available and the other budgetary demands.

Stephens: Are you saying that there are no more resources avail-
able?

Scent: No, I’m not saying that there are no more resources avail-
able. What I am saying is that the legislature has been responsive to
the will of the people. And I think the court can take judicial
knowledge of the fact that people do not want any increased taxes.
Now I think that if it can be shown to them that there’s no other
course available then they will go ahead and authorize it.

Stephens: Is that another way of saying that whether the constit-
uition is complied with is based upon the will of the people? If that’s
the case, what are we doing here?

Scent later recalled his oral argument this way:

I remember that right in the beginning that Stephens, much to my
surprise, hopped all over me. You know, it was pretty obvious that
he had prejudged that case. This was just a formality as far as he
was concerned.

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ences are made to this videotape, a historical recording of the oral arguments before the Kentucky Supreme Court.

407 Ibid.

The tone and tenor of his questions, in fact he didn’t question me. He just kind of attacked me for reviewing what the legislature had done. I was saying that they had made good effort. And, he was saying, ‘Well, do you mean that if the legislature says that they’ve made a good effort that that’s going to overcome a constitutional duty imposed upon them?’ I don’t know what his purpose was but to me – I knew then that he had a very preconceived notion about it. I could not say that about the rest of them at that time but I knew that he did.409

After five minutes of effort, Justice Vance appealed to Scent to abandon his opening remarks and argue the legal issues. Scent began to make another point when Justice Liebson quickly echoed Vance’s request. At that point, Scent abandoned his prefatory remarks. Of course, this did not end the challenges from the Justices. Supreme Court Justices routinely interrupt attorneys during their presentations. As Supreme Court Administrator, Susan Stokley Clary, explained to her Kentucky Educational Television audience before the oral arguments began,

This is an appellate court. Its main task is not fact-finding. The Justices are here to determine the law as it has been applied to the facts by the trial court. …The Justices will be asking questions throughout their presentations. …They are asking questions about the facts that they’re interested in. Of course there are seven Justices sitting on the case and if one Justice wants an issue discussed, he may be in fact acting as a devil’s advocate.410

Scent began his legal arguments stating that the rule certifying a class action had not been followed. He said that the only plaintiffs who had standing were the student plaintiffs and that they did not represent a class. Justice Donald Wintersheimer disputed Scent’s claim saying that the case was never a class action. Justice Joseph E. Lambert asked, “What difference does it make? If you establish that at least one has standing does it make any difference if others do not?”411 According to Scent’s logic, the plaintiff school districts had no standing to bring the complaint and “if it’s not a class action, then [the court was] going to measure whether or not there’s been a violation on the basis of that individual student.”412 According to Scent, few of them testified and they “offered no proof.” Except of one student who said they could not take a computer course.413 His position was that in order to have a justiciable issue, the plaintiffs had to show that their rights had been violated.

413 Ibid.
But Justice Stephens ignored the question of whether an individual student’s rights had been violated and focused instead on Scent’s admission that from district to district there were differences in educational opportunity. (See figure 4.1 on page 184.)

Pointing out that the rights under Section 183 of Kentucky’s Constitution were not given to the school boards, but were given to the students, Scent claimed that these groups had no standing to sue. Arguing the logic of a Michigan case, *East Jackson Public Schools v. State*, William Scent claimed that school boards could not sue their creators.

Justice Charles Liebson offered the rejoinder that local boards of education are creatures of the state. But, if funding is insufficient the only people who can change that is the General Assembly. Liebson asked why the enemy was the local board and not the General Assembly who could adopt an efficient system of statewide funding? Scent reasserted his claim, but Stephens, in a punctuated exchange, read from the statute that established local boards of education. (See figure 4.2 on page 185 and Figure 4.3 on page 186.) Scent countered that in the Kentucky Supreme Court case *Board of Education of Louisville v. Board of Education of Jefferson County*, the court said a local “district is…an agency of the state, existing for one public purpose only – to locally run the schools in their district subject to the paramount interests of the state.”

Scent argued further, if school boards have no authority to maintain the action, then certainly the Council for Better Education had no authority, since it was essentially a funding vehicle created for the sole purpose of bringing the suit while utilizing school funds. He asserted that since the rules for filing a class action had not been followed by the appellees, there was no class action. He did concede that some student plaintiffs had the necessary standing but that the evidence presented by them failed to show that, as to each of them, the system produced any unconstitutional result. But, once again, Justice Stephens drove home the point that it was the General Assembly that was ultimately responsible. (See figure 4.4 on page 187.)

The most troubling issue for the Supreme Court may well have been the question of how one goes about suing the General Assembly. It was Scent’s contention that nothing was done to make the membership of the General Assembly a party to the suit. He argued that each and every member of the General Assembly must be served in order to appear before the court and since they were not, no judgment could be made binding against them. Chief Justice Stephens asked for legal authority supporting the argument that each member had to be served and Scent cited *Brown v. LRC* in which the Kentucky Supreme Court held that the General Assembly could only act through its elected membership. But Stephens bristled and remarked that he knew something about that case [having written the court’s opinion] and that is not what it said.

The separation of powers doctrine loomed large. On one hand, during oral arguments, Justice Liebson indicated that any specific remedies were likely to conflict with that doctrine. On the other hand, Justice Vance seemed to want specific standards against which to measure the legislature’s compliance with any order the court might issue. Scent argued that the lower court

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414 *East Jackson Public Schools v. State*, 348 NW 2d 303
415 *Board of Education of Louisville v. Board of Education of Jefferson County*, 458 S.W.2d 6
had ruled the system unconstitutional because it is under-funded. And therefore, in order to have sufficient funds to comply, the court was telling the legislature it had to raise taxes, a violation of the separation of powers. Particularly troubling to Scent, and to Chief Justice Stephens, was the lower court’s request that the General Assembly meet with the court to discuss what it had done to comply with Corns’s order. This further violated the separation of powers, Scent said.

The Council for Better Education had been sensitive to the so-called Robin Hood Theory in the lower court. Fearing that it would be politically unpalatable for the richer districts if they thought they were raising taxes to support schools in poorer parts of the state, Combs decided to argue that no district was adequate enough, such that funds should be taken from them. There also remained a contradictory allowance that any district meeting the constitutional minimum could then be allowed to sweeten the pot with more local funds. This paradox was clear to Justice Vance who raised the question of whether the system is unconstitutional because it is discriminatory, or because it is inefficient. He pointed out that on one hand Corns says the funding of districts cannot be different, but on the other hand, he allows local districts to provide more.

Justice Donald Winterscheimer focused on the fact that some districts had levied the permissive taxes while others had not. Scent conceded that if the General Assembly was subject to criticism anywhere it was that the local boards were subject to referendum provisions on levying taxes rather than operating under a mandatory provision. But, Scent suggested that the Supreme Court had previously ruled that so long as any proposed tax rate was subject to a vote, it passed constitutional muster. In his opinion, the local district’s failure to levy these taxes, along with the lower court’s decision, had put the General Assembly in a straight jacket.

Justice Liebson responded sharply, “That’s nonsense.” The General Assembly could pass a law to “throw out the whole local system of funding schools and have it state funded, could it not? And have it all equal.” Are you saying “that the General Assembly has provided an efficient school system if it has delegated to the counties the responsibility for doing so”\textsuperscript{418} Justice Winterscheimer added that even taking into account all the alleged mismanagement, there still was not enough money.

The Supreme Court, however, did not appear to be very concerned by the Robin Hood Theory. Scent argued that the whole basis for Corns’s holding that the system was inefficient was that it did not produce enough money for some districts – that citizens in Fayette County must pay more money to support schools in Wolfe County. Stephens asked, “What’s legally wrong with that?” As a former Revenue Commissioner, knowing that the system was based on a state tax collected locally, Scent was forced to concede, “Nothing.”\textsuperscript{419}

Returning to the question of standards, Justice Vance asked,


Assuming that that is true, that… there’s not enough money for some districts…how does a court determine how much is the minimum necessary for a district? What I’d like to know is what were the standards used by Judge Corns…to determine whether a district needs $1,500… or $5,000? I don’t know how you measure that to determine whether its efficient or not unless you have some standards to say that there must be enough money provided to do this or do that and that’s what I fail to find in the opinion.420

William Scent offered that if Woodford County could do it, anybody could do it. All one must do is require these poor districts to levy taxes and take care of their mismanagement problems and the system would be efficient. But once again Stephens turned to the General Assembly asking that to require these local districts to levy these taxes “would require some legislative action - wouldn’t it?” Scent countered that the mechanism was already there, but these five districts do not bother to use it. And Stephens questioned rhetorically, so “if they don’t, it’s just tough for these kids?”421

In his summation, William Scent called Corns’s Education Committee a “Dog and Pony Show” intended to advertise the court’s decision. With regard to Rule 52, Scent argued that the lower court erred in failing to enter the proposed findings submitted by the defendants and in finding that the system of common schools provided by the General Assembly is not efficient. He said that *Wooley v. Spaulding* was not prosecuted as a class action, or if it was, it was not properly so.

Scent again made the point that the lower court ruling would in effect cause money to be taken from the rich districts to be given it to the poor districts and that permissive taxes were not disequalizing. He asked the court to accept Superintendent Joe Gormley’s definition of efficient – that it meant making the maximum use of available resources based on what the taxpayers say you can have as a school district.

Scent reiterated his central argument that Judge Corns was, in fact, telling the legislature that they must levy new taxes and that the court was going to keep tabs on the General Assembly – violating the separation of powers doctrine. Finally, Scent criticized the use of what he called old data (Kentucky was the most illiterate state) based on the 1980 census. He said that Kentucky may have been the most illiterate state in 1980, but there is no proof that it was at the time of the trial. He urged the court to identify specific offending statutes rather than declaring the entire system to be unconstitutional because in Scent’s view, such a finding would not help anybody.422

Combs and Dawahare’s Case Before the Supreme Court

The appellees, The Council for Better Education, and the various school districts and students, believed the General Assembly had failed in their constitutional mandate to provide an efficient system of schools throughout the state and that the lower court judge’s ruling should be upheld. Unlike Scent, Combs got straight to the legal issues presented by the case and got off to an appreciably better start. His more philosophical arguments were saved for his closing. Initially, he even received some good-natured teasing from the Chief Justice regarding the court’s system of lights, which alert attorneys when their allotted time before the court is complete. (See figure 4.5 on page 188.) Combs argued for forty-five minutes followed by Debra Dawahare for fifteen minutes.

Combs argued that it was very clear that school districts have a right to maintain the action citing Russman v. Luckett in which plaintiffs were students and parents. He countered Scent’s argument by pointing out that the Michigan case is the only authority they could find anywhere which does hold that, according to Michigan law, local districts being an arm of the state, had no right to sue. But Combs added, in Michigan, municipal corporations could not sue. Neither could counties sue – so it is not much authority. Combs had cited several cases in the Council brief that he said would convince the court that the plaintiffs do have the right to sue. Even Scent, he said, conceded that students could sue.

Combs disagreed with Scent’s contention that the case was a class action. However, he did acknowledge that there were some initial allegations. “But then we decided we didn’t need a class action. We’d have to get into a lot of notices, motions, and it would make the case too cumbersome. And, it was not necessary.”

Combs pointed out that authorities in Kentucky are sparse on the question of how one sues the General Assembly. Combs and Dawahare decided to follow the federal model in which the proper way to sue Congress is through and by its elected leadership. This concerned Justice Liebson who asked if Combs was saying that all individual members of the General Assembly were before the court because their leaders had been named, and that judge Corns could therefore command individual members of the General Assembly to do something. Combs responded that he did not know the answer to that but “The Pro Temp leader is before the court. The Speaker of the House is before the court. And we are asking that they should exercise their authority to proceed as far as they can to enact an efficient system of public schools.”

Chief Justice Stephens asked, “How far is that?” And Combs responded, “I don’t know, Judge, and I don’t think we have to answer that this morning.” Justice Winterscheimer wondered, “How can we enforce any judgment?” Combs suggested that the court could say to the Speaker and the Pro Temp – “You can exercise your authority to propose legislation that is constitutional.”

The Chief Justice seemed to be somewhat critical of how Judge Corns had written his findings. He asked, “Suppose this court upheld - and I’m a little unclear frankly, quite unclear, as

424 Ibid.
425 Ibid.
to what Judge Corns really ruled - but suppose we did say that the system of public schools is inefficient and stopped there. Where would that leave your clients? Combs simply responded that it would leave them knowing what the law is, and the Governor would know, and the General Assembly would know.

Quickly opining the limits of the court’s authority, Combs added that he did not think the court had to answer the question of how far they must go. Combs said that nowhere in Judge Corns’s ruling does he direct the General Assembly to pass any particular laws, or derive school funding from any particular source or to adopt any particular system. According to Combs, Corns went as far as he could go in his ruling. If he had been specific about a remedy, he would have violated the separation of powers doctrine. In *Brown v. Board of Education* the U. S. Supreme Court said, you have to desegregate with all deliberate speed. They did not define any standards, Combs said.

Justice Liebson was concerned that in upholding such a ruling the court might unwittingly make suing the state a new cottage industry. Liebson contended that in *Brown v. Board of Education* the court did not keep jurisdiction; it rendered a judgment, and then there were subsequent cases. Bert Combs agreed that if the court affirmed Corns, and later somebody made a claim that their child had been denied an adequate education, they would have to litigate that question. Combs added, “I hope it doesn’t come to that. But that would be the case.”

The trial court had done no more than to declare that Kentucky’s existing school system unconstitutional and to direct that the defendants comply with the constitution, Combs argued. He also claimed that the appellees had done nothing to argue that the system is constitutional, that the system does not provide an opportunity for an adequate education, and there is no semblance of uniformity.

Justice Vance once again raised the question of standards by which the court could determine whether a system is efficient or not. According to Combs, efficient meant funded at an adequate level. Despite the legislative provisions allowing for permissive taxes, subject to referendum, the General Assembly is the only agency mentioned in Section 183. If local officials do not do what they need to do, the legislature has to require them do it. The bottom line, Combs argued, is that every child ought to have an adequate education.

I want this: I want an adequate educational system in every district in the state and then if local districts like Lexington or Anchorage want to sweeten the pot - if they want to pay their teachers more - let them do it. That’s, I think, the accepted theory at this point. But every child ought to have an adequate education. So if we reach that, my clients are going to be satisfied.427

Having served as Federal Judge himself, Combs anticipated the justices might be somewhat reluctant to create new law. He provided some sympathetic encouragement by acknowledging,

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This is not an easy case. And it’s the first case of this nature in this state. It’s not that I want you to follow an uncharted course. But I think you’re going to have to write some new law here. This is the first time in the history of Kentucky where all three branches of government have attempted to do something about the school system.428

Justice Gant responded by asking if the court was supposed to declare that system unconstitutional because one little girl could not get the computer class she wanted? Combs argued that overwhelming testimony revealed that the schools in these 66 districts were inadequate. He noted the 19 plaintiff students who were in those districts - kids who would not know themselves if an education was adequate or not. And he said that the appellees did not think they should haul the children into the court to ask them if they had a constitutional education. In addressing the question of adequacy, Combs claimed that money was one factor, and one indispensable factor, in establishing an adequate school system. The constitution says throughout the state, so the system had to be substantially uniform. He argued that Judge Corns went as far as he could go in his ruling. In his summation Bert Combs said,

This is an important case as this court has recognized. And I think it is a fact that Kentucky is becoming recognized, unfortunately, as the most illiterate state in the Union – not a proud heritage to pass on to our children. I believe it’s fair to say that in this age of high technology, the hour is growing late for Kentucky in the field of education if it is to remain a progressive, competitive state. It is imperative…that we commence to properly educate our children.

The Constitution says that the system shall be throughout the state. So it has to be uniform - at least substantially uniform. I saw plastered across a billboard recently these words, ‘A mind is a terrible thing to waste.’ And it’s an indisputable certainly that countless young minds throughout our fair state are being wasted. Those are strong imaginative original minds that if properly trained could make a better Kentucky. But it is - and I take as much responsibility as anybody - a discredit to my generation. It’s even shameful – that these eager young, youths throughout Kentucky are not being properly trained. And this record is absolutely beyond question, overwhelming on this point, that we are depriving our young people the opportunity to receive the kind of training that will permit them to compete on level ground for the things that make life worthwhile.

And no one should point the finger of blame. I want to make it clear that we’re not blaming this particular legislature or this particular governor. There’s enough blame to go around. But the fact is that other states have been moving forward. Kentucky has been standing still or slipping backward. And so, in the 5th Congres-

428 Ibid.
sional District, it’s a national problem. Forward in the Fifth has been talked about on the floors of Congress. And the Fifth District is, of course, in this set of plaintiffs. And I might point out that of these 66 school districts not all of them are in Appalachia. About half of them are in Appalachia. The others are scattered throughout Kentucky. Bullitt County within the shadow of …Jefferson County …has made a case here that its children don’t get an adequate education and certainly that the system is not uniform. But the important thing is that we recognize the lateness of the hour and the necessity to do something about it.

In the words of Judge Corns…”The crisis in education has reached emergency proportions. I think that is a fair statement, certainly. It is not exaggerated…I think that Judge Corns’s decision is not only legally sound, but certainly it’s morally, progressively sound. I know it’s not as specific as we would want in a boundary line case. But Judge Corns does say that the system is inefficient, and says why. And he says what it would take to make it efficient, although he doesn’t put it in amounts of dollars, Judge. So I think we’re about as far as we could go on this case. And there’s very little opposition really…except for some of these procedural errors, and the fact that, well, we haven’t gone this particular route before in Kentucky. But I think the circumstances require that we all put our best efforts to it. And I submit this case to you for your most careful, and even prayerful consideration.”429

Debra Dawahare’s presentation provided the logical counterpoint to Scent’s attempted absolution of the General Assembly. Citing past legislation and court action, she presented a clear history of the acts of the legislature relative to public schooling in Kentucky. Jack Moreland later recalled “I saw her in action in front of the Supreme Court and she absolutely closed the door and nailed it down for our side.”430

Dawahare began with a reminder that in Wooley v. Spaulding the high court held that the circuit court would retain jurisdiction to ensure compliance with the court’s ruling. She then outlined for the court a summary of the historical evidence showing that the legislature had acted affirmatively to create the existing unconstitutional system.

Dawahare argued that when the legislature had dealt with school finance it had been a one-step-up, two-steps-back situation. Old Section 186 of the Constitution was a flat per capita grant. That was a disaster, she said. In 1941, the people went to the polls to allow 10% of the existing school funds to be used for equalization but that did not work either. In 1952, the people went to the polls again and eliminated section 186 entirely and gave the General Assembly the entire authority to solve the problem. In 1954, the General Assembly created the Minimum Foundation Program that, Dawahare said, was fine as far as it went. It provided a flat grant to

school districts on the basis of the number of classroom units. Referring to Scent’s arguments, Dawahare responded that so much had been made of poor local effort that the point should be made that it was state money, but the ad valorem tax was collected locally. One problem of generating money through this method was that there were so many variations in local tax assessments. The court tackled this problem in *Russman v. Lucket*, in 1965, Dawahare said. The court in that case mandated tax assessment at full cash value. Immediately, the Governor called a special session and House Bill 1 was passed. It froze the inequitable tax assessments into the system creating 180 different school-taxing districts. She argued that there was no way for the districts to extricate themselves from that mess even if they wanted to. In 1966, HB 44 was passed allowing permissive taxes, which were in themselves disequalizing because they were all tied to district wealth. Dawahare concluded that any remedy could only be tested by its results. The result in Kentucky was an inefficient system of schools because the disparities were so broad. She appealed to the court to uphold Judge Corns’s ruling. Once again, it was time to wait for a decision - this time, from the Kentucky Supreme Court.

Chapter Summary

While Plaintiff’s attorney Bert Combs would have preferred a federal court, after *Rodriguez* it was clear that state court was the right venue for this case. He began building his case by considering the appropriate plaintiffs and defendants, and by determining the individuals whom would best contribute to the case. Combs knew there was a separation of powers problem and appropriate relief would have to be suggested carefully so as not to intrude on legislative authority. The plaintiffs sought a declaratory judgment that the present system was unconstitutional; that the Governor must call a special session; and that the legislative leaders must present legislation that would increase funding to an amount that was equitable and adequate. Members of the Council for Better Education along with their consultants and others who were sympathetic to the effort identified those who would testify and gathered evidence for trial.

Defense attorney, William Scent argued that the inequities cited in the complaint would not exist if the plaintiff had not mismanaged funds and had passed permissive taxes in their districts. He claimed the General Assembly had done the best they could since the people of Kentucky did not want more taxes and that judicial notice should be made that Kentucky is a poor state. Meanwhile, a statewide election produced a new Governor (who had promised no new taxes) and State Superintendent (who was a member of the Council for Better Education) while the Prichard Committee continued to forge new coalitions with business and education groups.

In a momentous decision on May 31, 1988, Franklin Circuit Court Judge Raymond Corns decided that the legislature had failed in their duty to provide an efficient system of schools. Following a principle used in West Virginia, Corns established an Education Committee to advise the court on issues raised by the case. Having lost their mismanagement argument before the court the General Assembly punitively called for audits of the plaintiff school districts. After some wrangling with Superintendent Brock, State Auditor Bob Babbage agreed to a plan that

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would audit school districts more broadly, and ultimately found that schools were managing their resources fairly well.

The case was immediately appealed to the Supreme Court where Scent argued that the General Assembly had as its goal the best system possible in Kentucky. He said that recent legislative changes had already had a salutary effect and that “efficient” means doing the best with the dollars one is given. He challenged that standing of the plaintiffs, calling the Council for Better Education a funding vehicle created solely for the purpose of suing the state, using tax dollars. He claimed that school districts could not sue their creators and that Corns’s Education Committee was simply a “dog and pony show” which violated the separation of powers doctrine.

Bert Combs and Debra Dawahare countered Scent’s claims point by point but focused most of their effort on confirming the lower court’s conclusion that the General Assembly had failed in their duty to provide an efficient system of schools. Combs was particularly careful arguing the separation of powers issues and guiding the court to conclude the system was unconstitutional without demanding specific remedies of the legislature.
Attorney William Scent: “Judge, How can you have the same curriculum in a high school that’s got a hundred students that you have in a high school that’s got fifteen hundred? But as pointed out by one of the…”

Chief Justice Robert Stephens: “So, you concede there are differences in the curriculum?

Scent: “Yes sir.”

Stephens: “And, even that some of those hundred students who might want to take Latin or Computer science can’t do it, but that’s tough…

Scent: “No, that’s not tough.”

Stephens: “…because they’re in school because of the place where they live, where their parents live and where they were born.”
Scent: “The local boards of education have no power to bring this kind of action.”

Stephens: “Where does it say that, Mr. Scent?” The statute says each board of education shall be a body politic and corporate with political succession…”

Scent: “Well, I…”

Stephens: “Wait a minute! Let me finish…”
Stephens: “It may sue and be sued and do all things necessary to accomplish the purposes for which it is created. I think it’s a reasonable inference that if there were not education funding provided, that they could, indeed, raise that question. Or, are you saying that the boards of education could never sue the state for anything?”
Stephens: “But the ultimate responsibility lies with the General Assembly, doesn’t it?”

Scent: “There’s no question about that.”

Stephens: “That’s the issue in this case.”

Scent: “Absolutely, that’s right.”
Plaintiff’s attorney Bert Combs: “I’ve never been able to understand that lighting system.”

Chief Justice Robert Stephens: “Well, I could tell you that if you’d just read the little green sheet we pass out you’d understand it. But, I won’t say that, Judge.”

Combs: “I’ll get around to that.”
Chapter 5  

The View from the Bench

The central focus of this manuscript has been the examination of pertinent school finance issues largely from the point of view of the Council for Better Education. Another vital perspective, however, is that of the Supreme Court, and particularly its most notable personality - Chief Justice Robert F. Stephens. Stephens led what most observers consider to have been an activist Kentucky Supreme Court at the time of the Rose decision. Stephens was a Covington, Kentucky native, the grandson of a police officer, who was raised by his Roman Catholic mother and his stepfather. His stepfather, Joe Dressman, was a newspaper editor who worked for the Miami Herald and later the Cincinnati Times Star.432

As happens throughout this case, prior personal connections exist among the main characters. Chief Justice Robert Stephens and Senator Michael Maloney had Democratic political connections dating from the early 1970s when Stephens was a successful candidate for Fayette County Judge Executive. He was largely responsible for the Lexington-Fayette Urban County merged government, at some official sacrifice, as the merger effectively put the Judge Executive out of business. He was jokingly referred to as “Landslide Stephens” for his narrow victory in the race for Kentucky Attorney General, a position he held from 1975 to 1979. Maloney at the time was Fayette County Democratic Party Chair and supported Stephen’s candidacy.

Judge Ray Corns was former legal counsel to the Kentucky Department of Education. The appellant’s attorney, William Scent, was Governor Bert Combs’s Revenue Commissioner in 1959 and later intervened in LRC v. Brown before Justice Stephens, etc. Possibly the earliest of these connections occurred in 1951 when Stephens got his first job out of law school. As a law clerk for the Court of Appeals, at the time Kentucky’s highest court, his first task was to complete a research project for Judge Bert Combs.433

Prior to his death in early 2002, former Chief Justice Robert Stephens spoke on tape with Robert Sexton, Executive Director of the Prichard Committee and Debra Dawahare, second chair to Bert Combs who led the Council’s case. Like most people, Stephens had his own personal experiences that helped shape his judgments in the case. As he explained it,

I had the good fortune to go to a really fine…public…Kentucky high school, at Beechwood, up in northern Kentucky. Good teachers, they had plenty of money, nice physical facilities – everything. But, I had traveled enough around the state, when I was campaigning for Attorney General, and had talked to enough people to know…that was a very rare example of what Kentucky schools had.

433 Ibid.
When you travel, and when I was Attorney General I traveled a lot in every county. And we’d have some meetings in schools. And, my god they were just terrible – the physical structures. And I remember – this may have been after [the opinion] - I was introduced to a teacher…This person was introduced to me as the outstanding English teacher in Floyd County…But this person couldn’t even speak the English language. The syntax was wrong, pronunciation was wrong; I mean that whole thing. This teacher couldn’t speak. And I thought, ‘My God!’ That even convinced me more that I was right. If this was the person who was the outstanding English teacher in Floyd County…

What I thought about was, hypothetically, there’s a girl from Hazard that God has touched with being a genius at playing the violin. Her parents are poor. The school is poorer. So, we need to provide some education that will encourage her to learn how to play the violin with skill, and so forth. And that was the plan. Wintersheimer was from Covington. Vance is from Paducah. Joe Lambert was the only one that really knew what I was talking about. I mean, how many geniuses are moldering up in eastern Kentucky?  

So Combs’ earlier assessment of the significance of a judge’s temperament proved true, in Stephens’ case at least. But along with a judge’s experience comes one’s orientation to one’s job, and Stephens thought himself a judicial activist.

You know, a lot of people have said, ‘Well, you’re one of those typical activist judges.’ And, I say, ‘Yes, I am.’ They thought they were insulting me.

It’s pretty egotistical, but if I see something that I think is really wrong, based on my life’s experiences, what I believe in, and if there’s a constitutional basis for it, I mean, if you have to stretch a little…

Look at the Toyota case. I didn’t write that thing but I was the swing vote in it… Our court has absolutely stretched the constitution to the breaking point. I mean, if it was a rubber band it’d been broke years ago. But it just looked to the four of us that this was something that was just one more little logical extension of the constitutional interpretation…And maybe [i]t’s wrong to do that.

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436 The Toyota case Chief Justice Stephens refers to was Hayes v. State Property & Buildings Commission, 731 S. W. 2d 797 (Ky. 1987) where the court held constitutional a financing plan, which obligated the state to incur $35 million in debt to acquire and develop the 1600 acres needed for the Toyota plant, without putting the measure to the voters as is required by the Kentucky Constitution. In his dissent, Justice Charles Liebson expressed the hope
But, that’s my philosophy. I’ve never minded sticking my neck out a little bit. What are they going to do - shoot me? Line me up and shoot me? No.

It was a pretty activist [court]. And, Charlie Liebson was the most activist of all of us. A lot of his stuff is being overruled now.

Stephens acknowledged that his background in education law was not as extensive as that of Judge Ray Corns. But his attitudes about the importance of a high quality system of schools for the Commonwealth were nonetheless obvious. Stephens reflected,

I didn’t practice education law. [Ray] Corns was attorney for the Department of Education for years. He had a lot more knowledge, expertise and interest than I did. I think everybody in the state knew how he was going to decide that case. And, Ray’s a dear friend of mine, so I’m not talking behind his back.

But, I didn’t have any particular interest in it. If I told you that I didn’t believe that this decision would improve the quality of life for all Kentuckians – I’d be a liar, because I did think that.437

One of Stephens’ initial concerns with the Rose case was the composition of the court itself. He knew that a change in the composition of the court might have a significant impact on the resolution of the case.

One of the things a lot of people don’t realize is that during the processing of the suit in our court, we had an election and the incumbent, Justice James B. Stephens of Pikeville, ran against Dan Jack Combs, also of Pikeville. [They had] completely different judicial philosophies – just as different day and night. Jim was a very scholarly man, but very, very, very conservative.

I didn’t know who was going to win the election when we originally set [the case] so I sent briefs to both. And, of course, the argument was after the election so Dan Jack Combs [who ultimately won] came up, and he didn’t sit with the court, but he sat out in the audience with his brief, and so he was able to intelligently vote.”

As a matter of fact, I think, in the Courier Journal article, maybe two days after the opinion came out they got a bunch of so-called

that the decision was a “fact specific legal aberration” rather than a precedent that might confirm “that so long as the Governor and the General Assembly perceive the need, there are no constitutional restraints on the power of state government to raise and spend money for the benefit of a private business.” He concluded that the court “succumbed to powerful non-judicial arguments to uphold this legislation” because “the consequences that will flow from declaring this Act unconstitutional are so grave, we have no choice but to go along. Pressure on the judiciary to find some way around the constitution in the name of political expediency has proved to be overwhelming.”

constitutional experts, and [James Stephens] was one of them and sharply criticized that opinion. And so maybe, the *God of Elections* was on the side of the Council.\(^{438}\)

Stephens talked about some of the more practical aspects of the case from the Justices’ perspective. Discussions among the Justices about how the case would be handled began sometime before the December 7, 1988 oral arguments were heard. As early as January 1989, a judicial conference revealed that Stephens had a consensus on the major issues of school finance and that he would be writing the decision.

We met in conference before the argument. We knew that we weren’t going to be able to assign the case right away, because it’s so huge. I told the court I thought what we ought to do is wait about a month, early in January, and have everybody come to Frankfort and discuss the case just to see if there was any kind of consensus.

I knew that if I was in the majority, that I was going to write the opinion. First of all, I had a lot of interest in it, as they all did. Of course, I didn’t have any more interest or any more skills than any of the rest of them had. But, I felt that if we were going to uphold Judge Corns, it was going to be a bit historical, and perhaps, most people would think, ‘Well, the Chief Justice ought to write an opinion of that import.’ I think we all felt that. So, we did come back. I took the briefs home, and read them, [and] made extensive notes on it for my own benefit. We did meet in January and it became obvious that we had at least five votes. That’s not to say that they all were going to vote on everything, but there were five votes to uphold Judge Corns. I was trying for six but it didn’t work. So, I went ahead and assigned that case to myself at that time.\(^{439}\)

So it fell to Stephens to begin the solitary work of writing the opinion on behalf of the court. As he recalled,

I didn’t talk to anybody. I’m not sure about the ethics of doing that. When you’re a judge … you can talk to others judges on your court and your law clerk. But, I couldn’t come up, if you were a school lawyer, and talk to you about it. Now, I know some judges have done that. Some trial judges do that all the time. But I don’t consider that ethical. Maybe that’s just me.\(^{440}\)

\(^{438}\) Ibid.
\(^{440}\) Ibid.
He did have some background knowledge to draw upon, however, from his research into the Rodriguez case and from a conversation with United States Supreme Court Justice, Antonin Scalia.

After I read the Rodriguez case, I thought, my god, we can’t use the federal [constitution]. I got trapped on a criminal case that I wrote a long time ago where I really decided on the basis of the Kentucky Constitution, but [in my opinion] I kept talking about the Sixth Amendment. The Supreme Court of the United States reversed it. I had a chance to talk to [Justice Antonin] Scalia, who wrote the opinion, and he said, ‘If you hadn’t mentioned it [the sixth amendment] we’d have left it alone.’ I knew we had to leave the federal constitution out of it because Rodriguez says education’s not a right. And, my god, that just horrifies me."

The process took hundreds of hours and, of course, Justice Stephens did receive help from his clerk, court administrator and even the appellees’ brief.

At that time I was teaching at UK and they had given me a place to leave my books and everything, so I just took all my research and left it out there in one of those little carrels. I spent about 325 hours in writing and research. The first draft was really rough.

The part [Debra Dawahare] wrote about the history of education, I just virtually copied everything [she] said. Maybe I changed a few things but that was easy because of the work Debra had done writing that brief.

Most judges rely very heavily on the research done by the parties. You have to pick and choose, and I did a lot myself, but I relied on what [Debra Dawahare] wrote.

I went out probably three or four afternoons a week. I’d leave about noon, and turn all of the work over to Susan Clary and to my secretary, and went to the [University of Kentucky] law school where I had just a nice academic atmosphere. The students all respected my privacy. I think that helped me concentrate. But the first draft was really pretty much of a mess. [My secretary] typed it all. I had a really good law clerk who checked all the citations, quotes [and] punctuation.

When I got through with the draft, there wasn’t anything about a new system. It was just money. And, I really wasn’t satisfied with

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that. I couldn’t tell you why but I wasn’t satisfied. I didn’t think money was the only problem.\footnote{\textit{Ibid.}}

Even then, after the first draft was completed, Stephens was not satisfied. Late one night he realized what was bothering him.

I woke up one night. I probably didn’t get to sleep but I just tossed and turned. And, I did something I very seldom do, and that is drink in the middle of the night. And so I had a vodka and tonic. I was sitting there and we had a very modern apartment with real high ceilings a lot of windows and everything. And I remember I turned the lights out and I’d sit, looking outside at the streetlights and so forth. All of a sudden it occurred to me that what we’re talking about here is not just money. Because there’s a lot of other evils in the system, a lot of other things that are wrong, a lot of inefficiencies, if you will.

I just said, well hell, what we’re talking about here is a whole system. And, 183 says, ‘an efficient system.’ System doesn’t mean one statute or fifty statutes, it means everything that goes into making up the common schools. At least, that’s what I thought. And so, I’ve never had any doubt that that was correct. I think that’s absolutely legally correct. I don’t even think that’s arguable.

So, I could hardly wait to get to work. I went upstairs, shaved, showered and got dressed and got to Frankfort about five o’clock in the morning and started to write. And, you know the results.\footnote{Robert F. Stephens, Interview by Robert Sexton and Debra Dawahare. Tape Recording. 15 December 2001. Prichard Committee Collection, Lexington, Kentucky.}

But the court’s decision to confirm Judge Corns’s decision was not unanimously supported. The Justices differed on various points. Was a ruling enforceable? Should the court order the Governor and General Assembly to take specific actions? How does one go about suing the General Assembly? As Stephens recalls,

When I turned it over to the court, I circulated it, and there were five quick votes. Roy Vance, he wavered a lot. And Charlie Liebson - god love him. He was the best friend I had on the court, and probably the smartest person on the court, he and Roy Vance. But, he just could not – he was being so technical about it. I’m satisfied that the opinion is legally correct. However, I must tell you, there’s a couple of points that are a little weaker than others. But, I still think they’re correct.

Charlie told me one time, ‘I just couldn’t vote for it.’ He wrote in his dissenting opinion that among other things we had just created a
cottage industry. When I left the court there had been five cases under that. I don’t know if there’s been any more or not. I wrote four of the five opinions, but it was because I was in the minority on the other one.  

Legal cases that touch upon numerous issues provide ample opportunity for reasonable minds to disagree. This was certainly the case with *Rose v. The Council for Better Education*. The separation of powers doctrine loomed large. To what extent can the judiciary actually compel the legislature to do anything? Can a governmental entity sue its creator? To what extent can the judiciary maintain control over the legislature? If only the leadership of the General Assembly is actually before the court, are other members compelled to act? As Stephens explained, the court was split on some of these issues.

One of the things…we argued about a lot was whether it would be enforced or not. My point was, ‘I don’t care. That’s not our job.’ I really felt that most of the members of the legislature really wanted a better system of education but they didn’t want to raise the taxes for anything, which is just the way they are now. I felt that maybe if we directed them to do it they would. And, this is what happened. They had an election that year and they raised taxes 22%. What they did, they went out to their constituents and said, ‘That G. D. Chief Justice. We have to do it. We’ve got no choice.’ I was willing and I think the other members who joined in the majority opinion were willing to do that, too. I know they were.

Bill Gant wanted to make a lot of quicker remedies. He wanted to order the Governor and order the legislature to do specific things. I just didn’t think that was necessary. It was my idea to say, OK, on a certain day there will no longer be an educational system. Now, if you think any of those legislators are going to let the schools close and let the kids stay home without getting an education and the parents who work - it wasn’t going to happen. I was really never worried that they wouldn’t do their job. I did think they might do what they did in *Pauley*. They might do a little bit here and a little bit there. That’s why I put in there that’s it’s still under our control. So, if they don’t do the job…

Ray Corns deserves and awful lot of credit. But, [it] would have been a horrible mistake if that committee had been permitted to monitor. That really would have been a violation of the separation of powers. There is no doubt about it.

There was some issue, I think of some considerable magnitude, about the jurisdiction we had over all 138 members. I told [Alabama’s Chief Justice], they’d had one of those suits down there, that

444 Ibid.
‘you’d better write it so that you don’t have to put every member of legislature in jail.’ I’m not sure we could have done that under that way that case was framed.

I thought I handled [Scent’s complaint that school boards could not sue their creator] pretty well. There were three or four interpretations of statutes. The one I was really worried about was just suing Blandford and Rose. That’s the one that worried me the most. The effect of what we did was to say to the whole legislature, ‘You’ve got to create a new system of education.’ But only two of them were actually before the court. The argument was, and it’s probably right, you can’t say that because Rose was President of the Senate and Blandford was Speaker of the House – that doesn’t mean that they can dictate what things [the General Assembly] do[es]. That was one of the points we discussed a lot. Wintershimer said, ‘I think maybe I have a solution.’ And, he added...three words, ‘in this case.’ Somebody asked me later, one time. I said, [if I were suing the General Assembly] I’d join every member of the legislature. Hell, if it took a month to get service on all of them, I’d serve every one of them. I told Tom Lewis that.445

As both Scent and Combs understood very well, judges do not live in a vacuum. They are informed individuals who understand that their decisions carry ramifications. They are also products of their own set of life experiences. In Stephen’s view, “Personally, I think judges have an obligation to think about, at least what they think the implication of their opinions are going to be on the public.”446 Recognizing that his position is a departure from the concept of blind justice, he illustrated his point. “If 95% of Kentuckians got a petition passed out and said, ‘We don’t think you ought to do this,’ the Supreme Court’s not supposed to pay any attention to that. If you think they don’t, why (laughs) you believe in the tooth fairy.”447 But he stopped well short of suggesting that he knew things would turn out after the announcement of the decision in Rose v. Council.

I think we were lucky, in hindsight. I’m not going to tell you I anticipated it. We had Wilkinson who had campaigned on, among other things, no more taxes. I think the quality of the legislature then was very superior compared to other times. And, of course, they got together two days after [the decision was rendered] and had a press conference. And it was a lovefest. Fortunately, the legislature and the Governor got together and did a good job...

We had members of the legislature who realized, especially the leadership, that this was an opportunity to do something and get

446 Ibid.
447 Ibid.
away with it without political blame. Blame it on us. That’s the way I felt about it.\footnote{Ibid.}

Like former U. S. Supreme Court Chief Justice Earl Warren, Stephens relied very little on oral arguments before the court. By the time briefs are filed, and cases studied, the central issues the members of the court typically develop firm views on how a case should be decided. For many it was unlikely that a point would be raised in oral arguments that the members had not already decided.\footnote{Walter F. Murphy, C. Herman Pritchett & Lee Epstein, \textit{Courts, Judges & Politics: An Introduction to the Judicial Process}. (New York: McGraw-Hill, 2002).}

Well, actually, I really gave the summary of the evidence very short shrift because they didn’t have any evidence. Their only definition of \textit{efficient} was made by the school superintendent of Woodford County. He said, ‘You do the best you can with the money you’ve got’. (laughs)

You know, the thing about it is, I’ve got to tell you that in most cases, when the case comes up for oral argument most of us have read the brief and done our homework. I’d say probably, with respect to me, I used to have my mind pretty well made up in probably 75\% of the cases. Now, I did change on certain [ones]. A good oral argument maybe would bring something up I hadn’t thought about, or whatever, but they [the appellants] were walking uphill when they walked in there as far as I was concerned.\footnote{Robert F. Stephens, Interview by Robert Sexton and Debra Dawahare. Tape Recording. 15 December 2001. Prichard Committee Collection, Lexington, Kentucky.}

Even though Stephens felt he was right on the law, he understood the potential impact of the decision and as the time approached for its release, he got nervous.

The last day…when we were putting the final touches on [the opinion] and proof reading it for the eighty-fifth time. I got very nervous. I gave advance copies to the Governor and to John Brock, with the admonition that it was not to be released to the papers. Of course, the Governor’s office, Jack Foster, he released it. One of the reporters said he was the one who released a copy of it to the papers. And that was wrong, but you know… We thought we’d give them an opportunity to read it and prepare.\footnote{Ibid.}

Twelve years after the opinion was rendered, Chief Justice Stephens talked about KERA and the Rose case and reflected on their relative importance.

People ask me what I think about KERA. I’ve never read it. It’s so big and beyond my comprehension. But, I read the Prichard Committee reports and there’s no doubt that education’s on the way up.
in Kentucky. But you don’t undo in twelve years what’s taken a hundred years to do. That’s my answer to people.

It sounds so self-servimg when I say that [Rose was the case of the century], and I’m not known for my modesty or anything like that. But I do think that there’s no case that’s had more potential impact on the quality of life of our citizens.

I think it’s a very important case. Probably, as far as what I have done just from the pure standpoint of constitutional law, the LRC against Brown was more important. It was better written and it was a unanimous decision. I think probably as far as eventual use as precedent there’s already more on the [Rose] case because it sort of set the pattern on separation of powers. It defined it and hopefully, straightened it out. And I don’t think [subsequent supreme courts] have ever done anything to even modify that opinion. I think as far as positive impact on the public there’s no case that can even touch this.

I don’t know how many states have followed. I know, for example, the Chief Justices have two meetings a year and at every meeting for at least two years, I mean, hell, it’s all they wanted to talk about. We’d go out and sit in a bar and we wouldn’t talk about women or sports or anything. We’d talk about that case. I know the guy from Massachusetts called me and told me they were going to come down with the same result and that he was going to use a lot of quotes from my opinion. And then in Wisconsin, the fellow who was Chief Justice was my very dear friend. [We] convinced him, but unfortunately, he was in the minority. He didn’t get it passed. And then, of course New York…

I never really had the chance to sit down and talk to [Combs] about [the case].

I have to tell you, which you’ve already guessed, I’m pretty proud of the opinion. I really am.452

After the decision and the passage of the Kentucky Education Reform Act, Governor Wilkinson organized a signing party, an event that prompted Stephens to reveal another side of his personality.

I think one of the funniest things that happened when Wilkinson had that big ceremony signing the KERA bill - there was a legislator from Lexington, (Ruth Ann Palumbo, who’s my niece, finally beat him.)…Anyway, this guy, Tony…he had voted against the

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KERA bill. And, of course, all members of the legislature were sticking their heads in front of the cameras. The place was packed. He was over there too, and I got irritated with him. And, I didn’t give a damn what he thought about me and I said, ‘What are you doing here smiling and celebrating?’ I said, ‘You were one of those few who voted against this bill. You don’t need to be here. Get the hell out of here.’ I’m sure he never voted for court bills after that, but it just irritated the hell out of me.453

By the time of his interview with Sexton and Dawahare, Justice Stephens had been diagnosed with cancer. Years previously, his children had asked him to make all of the decisions about his funeral arrangements in advance. At the time of his interview he was doing just that.

I remember something I read in the constitutional debates454 about children of the poor and rich and from the mountains and so forth, and I thought that was exquisite language. I’ll tell you how much I think about that language, and you’ll probably think I’m kind of morbid. One of the things I’ve done, I’ve bought a plot at Lexington Cemetery and I’m going out there in a couple of weeks and buy a stone and put the quote455 on the stone. That’s what it’s going to be if I can kind of capsule it, because it’s pretty long.456

On April 13th 2002, Chief Justice Robert Frances Stephens was laid to rest at the Lexington Cemetery, Section 46, Lot 754 South ½. Unfortunately other issues related to the cemetery and the family headstone prevented the inscription from being placed.457

Reaction to the Supreme Court’s Decision

Reaction to the Supreme Court’s decision ranged from elation to shock. Combs expressed his surprise in his own inimitable style, saying, ”We asked for a thimble-full and we got a

454 From the Constitutional Debates, Delegate W. M. Beckner, Committee on Education. “A system of practical equality in which the children of the rich and the poor meet upon a perfect level and the only superiority is that of the mind.” [Debates Constitutional Convention 1890 4459] And from Delegate Moore, “Common schools make patriots of men who are willing to stand upon a common level. The boys of humble mountain homes 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.” [At 4531]
455 The language Stephens decided upon for his opinion was as follows: “Each child, every child in this Commonwealth must be provided with an equal opportunity to have an adequate education. Equality is the key word here. The children of the poor and the children of the rich, the children who live in poor districts and the children who live in rich districts must be given the same opportunity and access to an adequate education.”
bucket-full." Don Blandford described his reaction to the Supreme Court verdict as, "Shock." Blandford remembered calling together some legal advisors to review the opinion and it was not very long before they realized that the court had completely kicked out the education system as they had known it and ordered the construction of a new one.

The thing that struck me was that the General Assembly was totally, completely...the words were very strong - it’s our responsibility. Even to the point that if you were to delegate it, if you were to get other people to do the job, you’re still responsible.

I remember my first reaction – ‘Where in the world do you start to build a complete new school system?’ After that initial shock wore off, we knew that we had to do the job. We were under a court order to do it. We settled down to work and got it done.

Debra Dawahare had not been at all certain that the Council would win. She felt that the Council had a strong case morally, but she did not think the case was nearly so strong legally:

I kind of grew up with this case. I came here [to Wyatt, Tarrant and Combs] in ’83. I’d been here a few minutes and along comes this case. I did as they asked me to do. It was not a popular case at the outset. I think at the beginning, nobody thought we’d win. And toward the end, even when it looked like we might get something, we didn’t expect what we got.

Theodore Lavit, who assisted on the Council for Better Education legal team, wanted the court to retain jurisdiction. He expressed concern that this point had not been argued more vigorously by the appellees:

I think we made a mistake by not insisting on continuing jurisdiction. I’m not looking at this case for an opinion. I want far-reaching effect, constant review of this case from now until the next century. Make them hold on to this case just like they held on to integration, in the United States District Court.

The biggest problem we’ve got with this case…is having to start all over and regroup. Gear up again? Well, hell, I don’t know if we can ever do that. That man’s dead [Combs] and that man’s near dead [Guess]. We had it in our hands and...we just didn’t pluck the whole chicken. We really didn’t. And Bert Combs, with his influence, and his command, and authority – former Governor, former

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460 Ibid.
461 Debra Dawahare, Interview by the author. Tape Recording. 7 January 1990. Oral History Collection, University of Kentucky, Lexington, Kentucky.
member of the Sixth Circuit, certainly could have gotten the court to handle that. My complaint asked for that relief. And, I begged Judge Combs to come down hard on it. And he told me, ‘You know, half a loaf is better than no loaf at all.’

A brief period of uncertainty followed the decision during which it was unclear whether the legislature would accede to the Supreme Court’s decision or engage in a constitutional struggle. At one point, Senator Michael Maloney engaged in a little saber rattling with Dawahare. As she remembered it, “Senator Maloney actually said to me at a meeting, ‘Well, what are you going to do – put me in jail? I’d like to see the Council for Better Education try that’.”

The threat of a constitutional struggle was a topic speculated upon by Lawrence Forgy some months earlier, when he addressed the Kentucky Association of School Superintendents, after Judge Corns’s final ruling. As an attorney, Forgy saw that the court had authority derived from the constitution, and could use sanctions should the General Assembly decide to “play hardball.” Forgy said to the Superintendents,

Now, I don’t want to get into what will happen in this state. But let me tell you what...has happened in other states. Contempt citations could be issued in a case like this where if individuals do not respond to these things. Obviously, that is a power the court always has. I don’t predict that. I hope that never happens in Kentucky.

Second thing is you could do what the court did in New Jersey, which is to shut down the school system – lock, stock and barrel – until the legislature of the Commonwealth provides funding adequate to create an efficient system of...common schools throughout the Commonwealth.

And the third thing is that we are not a lawless people in Kentucky...The nearest we ever came to evolving into lawlessness, I suppose was the Gobel assassination and the matters relating to Governor Beckam’s succession to the Governorship in 1901. ...The political stigma of a General Assembly and its leaders defying an order...that had been upheld on an appeal by the Supreme Court would be a serious political matter to the people of this Commonwealth.

But it quickly became apparent that legislators saw the possibilities in the situation and that they would respond as the court had directed. According to Dawahare,

463 Debra Dawahare, Interview by the author. Tape Recording. 7 January 1990. Oral History Collection, University of Kentucky, Lexington, Kentucky.
465 Lawrence Forgy address made to the Kentucky Association of School Superintendents. Tape Recording. Winter, 1988. Author’s collection.
I think some inspiration struck them and they thought, ‘This might be good for our careers. We’ve already sustained some damage here just by the effect of being sued. And if we defy the judgment it’s going to look like we’re stepping on the toes of little kids. The media’s been behind them all along. So, we’d better do this, because it helps us. What a cynic I am.’

Senator Joe Wright took a broader view of the politics and social circumstances at work in the state at the time.

I think the way the Supreme Court, the action they took, was the only way that would have allowed the General Assembly to do what we did in the end. I think [the decision] was so broad and so sweeping that special interests couldn’t even focus. It was more than they could deal with quite frankly.

In other sessions, you always had the KEA on one side and the School Boards on the other and the Superintendents on one side or the other. Anything we tried to do to improve education always met with obstacles and stumbling blocks from some of these special interest groups. Once we had this real broad decision we really didn’t find any real focus from any of these groups, opposing specific things, and so forth.

By the time the Kentucky Education Reform Act was signed into law, the former defendants had reinvented themselves as the heroes of Kentucky’s children. Governor Wilkinson gathered Casey County school children in Frankfort for the signing, which Judge Corns and Chief Justice Stephens, also witnessed. Stephens said at the time that he hoped those who would implement the new system would, “put aside all of their previous thoughts and feelings” and get the job done. The irony was not wasted on Debra Dawahare. She recalled,

It amazed me. I’m not going to name names because that’s not necessary. People did the right thing and that’s fine. Certainly, the reasons may matter in a spiritual sense but in a practical sense, I guess, the results are the same… But…the very people who were most upset seemed to have the attitude, almost immediately, that they had thought this up. And what took us so long to give them the millions to grease the pork barrel?

Sounding like one who had labored mightily in support of the Council’s effort, Senator Michael Maloney was quoted by Education Week saying, “I guess I feel a whole lot like the dog

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466 Ibid.
469 Debra Dawahare, Interview by the author. Tape Recording. 7 January 1990. Oral History Collection, University of Kentucky, Lexington, Kentucky.
that finally caught the car he had been chasing. Now that I’ve caught it, what do I do with it?” Later in the same article, and sounding much less like a dog that had been chasing anything, he referred to legislative inaction as the ultimate weapon available should the General Assembly choose to defy the court. He likened it to an “atomic bomb, [but] one we can’t afford to use.”

In general legislative leaders appeared ready to follow Stephen’s advice. The Lexington Herald-Leader quoted “Eck” Rose as saying that the signing was “as significant as the first passing through the Cumberland Gap.” In effusive comments, Rose praised Wilkinson for his leadership in getting the bill passed. That same morning Wilkinson, who had previously said he would slice pork barrel projects, changed his mind and signed the $1.32 billion tax bill to pay for the reform. Wilkinson continued to tout education reform as his own personal victory even to the point that legislators grew tired of agreeing with him.

Governor Wallace Wilkinson, during the heady days of his wife's abortive gubernatorial campaign, aired TV spots that made the misleading suggestion that Kentucky's education reforms were enacted 'all because of him.' Legislators openly expressed their hostility and disdain, and stated that the General Assembly deserved most of the credit, and that some should go to the school districts that filed the Rose suit, to the courts, and to the education reform groups.

As Sexton understood, some people need credit more than others. However, any accurate assessment of who is most deserving of it must start well before the signing of KERA. It starts with Arnold Guess. He and his fellow consultants Kern Alexander, James Melton and Richard Salmon were vital to the effort and provided a vital scholarly establishment of the issues. Alexander deserves extra mention because of his steadfast testimony in the court and before the legislature, even after he became the President of Western Kentucky University and had more at risk. And, of course, the Council for Better Education itself; this tenacious group of school Superintendents from across the state including Frank Hatfield, Jack Moreland, Alex Eversole, Tony Collins, Eugene Binion, Steve Towler, and a host of others. Then there’s the legal team including Bert Combs, Debra Dawahare, Theodore Lavit and others who led the Council through the judicial processes. The judiciary was crucial to the success of reform including Judge Raymond Corns and Chief Justice Robert Stephens along with the other confirming justices Dan Jack Combs, William Gant, Joseph Lambert and Donald Winterscheimer. Much credit is due to the media for keeping the issue alive in the minds of its citizens, particularly the state’s newspapers the Lexington Herald-Leader, the Louisville Courier-Journal, The State Journal and others from Ashland to Paducah. The numerous civic, professional and business groups that rallied support like the Prichard Committee, the Kentucky Chamber of Commerce, the Education Coalition and others broadened the base of support within local schools and communities across the state. Governor Wilkinson deserves credit for abandoning his campaign promise not to raise taxes and

473 Penny Miller, Kentucky Politics and Government: Do We Stand United? (Lincoln: University of Nebraska Press, 1994.), 255.
for his efforts supportive of school reform, particularly after the Supreme Court’s action. And finally, the General Assembly deserves credit for acting quickly and responsibly in the face of the Supreme Court’s decision, albeit belatedly and only when support for school reform had become a popular notion.

On August 10, 1990, a testimonial banquet was held in Lexington to honor Bert Combs for his skill and leadership. At that banquet, Council for Better Education President, Jack Moreland, invited seven speakers to reflect on Combs and the Council’s effort. In his introduction of Robert Sexton, Moreland acknowledged,

> We would all be naïve to believe that any one group brought about the change that has occurred in the Commonwealth. Long before the Council for Better Education was formed, long before reform was discussed, the Prichard Committee was trying to accomplish things for kids in Kentucky that were far beyond our imagination.  

Sexton in return focused on the road ahead.

> The heavier burden than we’ve had so far, I think, comes to those people who are going to follow after you. Because what we’ve done is change our schools in legislation but we haven’t changed our schools in reality…It seems to me that the greatest tribute that could possibly [be paid to Combs] would be to make absolutely certain that these changes that were initiated in your court case…result in good teaching, good administration, good parent involvement in the schools, and good schools. I think to do anything less would be a mockery of what has gone on up to this point.

In his remarks, Combs was characteristically generous.

> I realize that I’m only symbolic of an effort which involved a great many dedicated Kentuckians and that many of those, and some of you, are more deserving than am I. I am overwhelmed by the comments of these eloquent speakers…and I think it is fair to say that it has been a good movement. It has been successful by reason of chance, luck, dedication, effort, and so on.

He had his own list of people he credited with the success of the movement. Combs called them pioneers and like everyone else, he started with Arnold Guess.

> …[H]e, and Frank Hatfield, Alex Eversole, one of the Superintendents in eastern Kentucky that everybody thinks are terrible, you

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474 Jack Moreland, Council for Better Education. Testimonial Banquet Honoring Bert Combs. Tape Recording. Author’s Collection, 10 August 1990.
475 Robert Sexton, Council for Better Education. Testimonial Banquet Honoring Bert Combs. Tape Recording. Author’s Collection, 10 August 1990.
476 Bert Combs, Council for Better Education. Testimonial Banquet Honoring Bert Combs. Tape Recording. Author’s Collection, 10 August 1990.
know. Alex Eversole was one of the pioneers that said that we ought to do something about this. And Jack Moreland...one of those early people. And you know he’s not from the hill country. He’s from the educated, sophisticated country of northern Kentucky...These pioneers deserve more credit than I do, for initiating this movement and persisting. And it goes back a little farther that that really...It goes back to the Prichard Committee, the first gentleman [Robert Sexton] of the Prichard Committee and...the most visionary member...a blind man [Edward Prichard] who saw more clearly than did most of the rest of us Kentuckians...

I am most grateful that you have come here this evening. I know I don’t deserve the tributes that have been paid to me. But, I am weak enough to be very appreciative.477

Chapter Summary

The Kentucky Supreme Court came to its landmark decision under the leadership of an activist Chief Justice, Robert F. Stephens. An election changed the court’s composition during the case, but that change did not derail the consensus of the court around the major issues of the case. Stephens decided to assign the writing of the opinion to himself and after hundreds of hours of study at the University of Kentucky, and at least one late night vodka and tonic, he changed the course of the opinion from one closely crafted around finance issues only to a broad declaration that the entire system was unconstitutional.

Stephens acknowledged stretching some parts of the law. He was most concerned about the court’s ability to require anything of the General Assembly when only the Speaker of the House and the President Pro Tempore of the Senate were actually before the court. He finally advised that if he was the attorney, and even if it took a month, he’d serve every member of the legislature.

Reaction to the ruling was initially shocking to the General Assembly, but after a brief flirtation with defying the court, the legislative leaders embraced the decision and used its political capital to reform the public school system in Kentucky. This was immediately followed by a series of public proclamations where everyone from Governor Wilkinson to the various members of the General Assembly began taking credit for the reform. But as this research confirms, it was the combined efforts of the Council for Better Education and its allies which persuaded the courts and gave the legislature the necessary courage to reform Kentucky’s schools.

477 Bert Combs, Council for Better Education. Testimonial Banquet Honoring Bert Combs. Tape Recording. Author’s Collection, 10 August 1990.
Chapter 6

Aftermath: The Council for Better Education after the Opinion

In recognition of the Council’s successful litigation, State Representative John Harper sought to have the member districts’ expenses returned to them. HJR 25 sponsored by Harper and thirteen other representatives, called for the “state to reimburse local school districts for actual costs incurred in…Rose vs. Council for Better Education…”478 Moreland expressed his appreciation for the unsolicited attempt stating, “whether this legislation is successful or not, your intentions are greatly appreciated.”479 HJR 25 was assigned to the House Appropriations and Revenue Committee, where it died.

After the Supreme Court decision, the Council for Better Education evolved from a litigant into a watchdog for the equity issue. In a period two years the group’s presidency changed twice. In 1991, Robert Arvin, Superintendent of the Oldham County Public Schools was elected only to resign six-months later when he accepted a position with the Kentucky Department of Education. James Young, the Superintendent of the Russellville Independent School District, followed him in office and served for a year and a half. The Council’s plan was to monitor developments, but try to allow the new system to be implemented without Council intervention, at least, not for a while. Council members wanted to be supportive of the change, while waiting for the right time to reemerge and more effectively address adequacy. According to Moreland,

We knew that we were not going to achieve mathematical equity immediately. And we’re willing to be tolerant of the system, provided the mechanism is good, and provided that we’re working toward that equity in the rollout period, which looks like it’s going to be some five or six years. Once that equity is achieved…then I think we’ve got to go toward the concept of adequacy. That doesn’t mean that we’re willing to take what is given to us. There are enough chain-rattlers in our group that if it looks like we’re advancing backwards then…we’re ready to go. We’ll do what we feel like we have to do.”480

Immediately following the Supreme Court’s decision, the Council busied itself monitoring the efforts of the Task Force on Education, a group formed to guide the development of Kentucky’s new system of schools. In the Council’s view, the first attempt at a formula to prescribe how funds would be distributed under the new Kentucky Education Reform Act would not achieve the equity that was promised. Concerns arose early on that the formula might, in fact, allow the inequitable distribution of public school funds to continue. The Governor and members of the General Assembly were solicitous of the Council and wanted to obtain the Council’s acknowledgement that they were fully committed to reform.

478 Kentucky General Assembly, HJR 25/FN (BR 424), 1990.
Jack Moreland drafted a widely distributed letter claiming that “[c]onsciously or unconsciously, the Task Force [had] deviated from the main themes of the Stephens decision; namely, equity and adequacy.” The Council once again hired Dr. Kern Alexander; this time to draft a report that outlined specific concerns with the direction the Task Force seemed to be taking. The Council promised that it was “absolutely committed to a fair and just resolution of those issues.”

The letter drew quick responses from key staff in the Governor’s office, assuring the Council that the Task Force was “very much aware of the importance of thoroughly addressing the court’s mandate,” that they had “not strayed from the equity and adequacy issues,” and that the points made in Alexander’s document “deserve reemphasis.” In the final analysis a new formula was developed for the distribution of public school funds called SEEK (Support Educational Excellence in Kentucky).

The methodology in SEEK provided a ‘tiered’ system composed of three components. First, the Adjusted Base Guarantee was “a guaranteed amount of revenue per pupil to be provided for each school district” equal to the “base funding level for each pupil in average daily attendance in the district in the previous year.” That base funding was adjusted by the number of at-risk students, the number and types of exceptional children, vocational school students and transportation costs. The number of at-risk students was multiplied by a factor of .15 and added to a district’s funding. The funding for exceptional children was an add-on based upon the December 1st student count from the prior year and the types of exceptionality as defined by KRS 157.360. Transportation allocations utilized a complex graph-adjusted cost per district, described in KRS 157.370. A deduction factor of .3 was also applied against the base for each child attending a state-operated vocational center. Districts were reimbursed for Home and Hospital costs for students with short-term health impairments. Districts were also permitted to levy an equivalent tax rate, which would produce up to 15 percent of the funds provided by the base rate and add-ons, and receive equalization at 150 percent of the statewide average per pupil assessment. The highest level of effort ever afforded Kentucky’s school children underwrote the formula.

Continuing Kentucky’s past pattern, even the newly created SEEK formula was not fully funded. Although, at 96%, it was much closer to full funding than historically had been the case for a statewide school-funding scheme. “During the first year of the new funding program, districts didn’t receive all the money they expected because not enough money was put into a matching fund that rewarded districts for raising taxes.” During the second two years of SEEK, allocations were cut. The formula was under-funded by $24 million in the first year of SEEK, and $50 million in the second. When the Council complained, Kentucky Department of Education Finance Director, Kyna Koch explained to the Kentucky Post, “If SEEK were fully funded,
you wouldn’t even hear this discussion because everybody would be getting everything they felt like they were entitled to.”

The SEEK formula provided more money for poorer districts. Wealthier districts complained that without a guarantee of continued funding at existing levels, or better, their programs would suffer. A group calling itself The Coalition of High Aspiration School Districts formed just long enough to issue a report. Some Council members feared that the group, which consisted of 15 affluent school districts including Anchorage, Murray, Ft. Thomas and Beechwood Independents along with Fayette, Jefferson, Boone and Woodford counties, might serve to counteract the equity issue by pressing the General Assembly to permit higher local taxes in certain districts. However, the report focused squarely on the issue of adequacy stating that, “…by some criteria, Kentucky has no rich districts.”

KERA represents an ambitious and commendable effort to respond to a court order and move Kentucky toward educational excellence. As KERA reforms are implemented, the challenge will be to ensure (1) that funding level for excellence is adequate, (2) that the full range of special needs students and special conditions are recognized in the state’s program and (3) that educational progress can be achieved by all students.

Apparently, the Coalition’s voice was heard. When a budget shortfall struck the state, the 1992 General Assembly passed a “hold harmless” provision, which guaranteed 18 of Kentucky’s richest school districts that they would not receive less funding than they had during the 1991-1992 fiscal year. The Council immediately recognized the disequalizing aspects of such a decision and went to work arguing that the General Assembly’s action was a retreat from the Rose decision. The Council members complained that those ‘hold harmless’ school districts would in fact be exempt from any cuts while the rest of the districts had to make up any difference. As Jack Moreland put it, “that absolutely gets at the crux of what we’re all about, which is equal justice for all.”

The issue remained a concern into 1993, when Council for Better Education President James Young wrote to Commissioner Thomas Boysen. He asked for “clarification as to whether the State budget passed by the 1992 General Assembly is in conflict with the Supreme Court’s ruling…” Deputy Commissioner, Randy Kimbrough, responded for the Commissioner by providing data regarding the 1992-93 tentative budget and the 1993-94 forecast, but avoiding the question of legal conflicts altogether. She wrote that, indeed, the “hold harmless provisions in the 1993-94 forecast provide[d] over $12 million to 18 eligible districts.”

488 James R. Young letter to Commissioner Thomas Boysen, 8 January 1993.
out that the money needed to fund the hold harmless districts reduced by more than $12 million the amount available and therefore it was, in effect, taken from the poorer districts.

For example, the *Kentucky Post* reported that Ft. Thomas, a well-to-do school system, was designated as a hold harmless district. As such, Ft. Thomas received an additional $611,799 during the 1992-93 school year. At the same time, Dayton Independent lost $21,500. Moreland acknowledged the state shortfall but argued the answer is not taking more money from the poor districts when they are trying to catch up. According to Council President, James Young, “They cut us pretty wickedly. I didn’t mind taking a flat cut but when they took $68,000 to send to Jefferson and Fayette County so that they could pay their people more than mine, now that bothered me.” Young had been in contact with several of his colleagues. It soon became apparent to him that there was not any pattern or formula used to make the cuts; rather it appeared to be whoever had money left in their budgets from the prior year.

I’ve got 1,500 students. They took $48 and some odd cents [per child] out of my district…[anticipating the short fall] I laid off four teachers and didn’t give a teacher’s raise this year. Now, they looked and said, ‘Jim’s going to have a decent balance. We’ll take more money from him.’ Todd County over here has got 2000 students; they took about $7 per pupil from them. Logan County has a higher assessment per pupil than we have and 3,200 students and they took about $8 per student…arbitrarily.

Young called a meeting of the Council membership for Friday, February 26, 1993, in Frankfort, to vote on a course of action but a sudden snow storm prevented all but four members from attending. Those present decided to wait until June to meet again and vote. In the meantime, Moreland and Young had been invited by State Representative, Joseph Barrow to testify before a committee of the State House of Representatives. Moreland also responded to an invitation to meet with Dudley Cotton and Robert V. Wagoner, both of whom worked in the area of school finance with the Office of Educational Accountability (OEA) to discuss the hold harmless provisions in light of the court’s ruling. The hold harmless provision was ultimately supported by the OEA making a bureaucratic resolution unlikely. By June, Superintendent Young retired and Moreland was once again named President of the Council for Better Education.

Kern Alexander discouraged Council members from pursuing legal action, however. He related to Moreland his opinion that as long as the hold harmless provision was working toward a diminishing number that the Council lacked the strong legal position needed to go back to court.

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492 “Poor Districts Say Funding Hurt Under ‘Hold Harmless’,” *Kentucky Enquirer*, Tuesday, 28 September 1993.


494 Office of Educational Accountability, annual report to the Kentucky General Assembly, December 1993.
The formula continued to move toward more relative equity rather than less. “However,” Moreland cautioned, “If, because of the shortfall of funds, that turns and goes in the opposite direction… I would suggest that we would be back in court fairly quickly.” The watchdog barked, but did not bite.  

In fact, the Council members had openly discussed disbanding. KERA had been signed and it became clear that the Prichard Committee was going to remain active to make certain that KERA was implemented statewide. The reason that the Council was kept alive was to address adequacy. In Young’s view, KERA raised the level of expected student outcomes but with a level of funding that made it impossible to achieve. He had spoken to legislators arguing that Kentucky’s state revenue was not where it should be. As he put it, “You can’t expect us to turn out an internationally superior product and we’re still not even at the national average for expenditure.”

In the final analysis, did the Council for Better Education improve conditions for children in Kentucky’s poorest districts? The evidence from Dayton Independent Schools demonstrates that it did. By 1993, Dayton had moved from its traditional place near the bottom of northern Kentucky school districts to a more competitive position. In 1990, Dayton Independent Schools received $2,900,000, a 57% increase in state funds as a direct result of the SEEK funding formula in KERA. As a result of the action, Moreland was able to bring in as much new money in one year as he would have normally received for a biennium. According to Moreland, “To achieve that, it required an investment on the part of the Dayton Board of Education of approximately $700.” In terms of money for teacher salaries, Dayton had historically floundered around 140th in the state. By the 1992-93 school year, Dayton ranked 40th in the state in salaries.

By early July 1993, Moreland had written to Debra Dawahare asking her to consider “re-establishing a relationship with the Council for Better Education.” At the time he was not necessarily thinking about “a full-fledged lawsuit” but perhaps an injunction declaring the hold harmless provision illegal. But Moreland knew that this was not the major issue. He concluded, “I don’t think the hold harmless is worth a six-year process in the courts.” Although the Council was genuinely concerned about any erosion to the equity question, its members did share a core belief with the leadership of the General Assembly - that Kentucky needed KERA to succeed. Moreland said, 

The worst thing that can happen is if we all get into a contest fighting with each other again. We’ve got much too strong a goals in terms of education to be fighting one with the other over $450 million out of a $2 billion budget.

Besides, the Council’s prime interest lay elsewhere. Moreland asked in his letter to Dawahare, “Since adequacy was so much a part of the *Rose vs. Council for Better Education* ruling, should not someone be defining adequacy and working toward same?” Dawahare responded that she “would be pleased to undertake the representation” but after some consideration, and without Alexander’s encouragement, it was determined that the time was not right for legal action.

Aside from a small core of Superintendents there was very little activity being carried on by the Council, and what was done, was mainly done by Moreland in the Council’s name. Few meetings were held, but when they were (and when minutes were kept) the minutes were sent to all Superintendents in the state in an effort to forestall any impression that the Council was taking any under-the-table action that might be thought divisive by the more affluent districts. In Moreland’s mind, those districts were potential allies whenever the Council moved toward addressing adequacy. Council membership stood at ninety, but it is likely that many of those districts did not know they were members. Over time, Superintendents and local Board of Education members had changed, and in many cases, more than once.

We feel right now that our thrust is as much in the area of adequacy as it is in equity and that everyone can benefit from that…There’s not been a lot of recent activity. We did talk about going out for another assessment of another $.25 per child on the premise that we might very well get into some litigation…a kind of a war chest…There is some movement in that area.499

From the time of Arnold Guess’s invitation, approximately nine years of effort was required from the Council for Better Education to carry out the case and monitor KERA’s early implementation. It took six months to secure Bert Combs as lead counsel, another six for the “66” districts to verbally commit to Council membership.500 The Attorney General’s Opinion allowing the Council for Better Education to assess membership dues from school funds came three months later, and it took three more to get the suit filed. The Circuit Court trial began nineteen months after filing, and it took almost three years before Judge Corns entered a final judgment. Eight months later the Supreme Court ruling came down, followed by the signing of KERA ten months later.501

In general, Council record keeping appeared to be about as rigorous as one might expect from a local civic club. Files were kept in boxes and handwritten notes were made on letters as busy Superintendents took messages from each other. For example, the author used four different kinds of “authorities” to verify membership – 1) handwritten notes on letters, 2) copies of check stubs from local school districts, 3) ledger entries and 4) listings on the Council member-

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500 The number 66 is in quotes because the whole issue of membership is rather murky. Council records only verify 60 districts as paid members as late as 2 January 1996. One assumes verbal commitments were accepted as membership.
501 See Appendix – Chronology of Events
In the final analysis, it appears that Council membership reached 70 with the last district joining sometime during or after March 1990.\textsuperscript{502}

Council for Better Education, Inc. bank statements showed deposits of $153,317.16 from May 1985 to December 1989. Expenses appear to have been approximately $150,000, most of which went to legal and consultant services.\textsuperscript{503}

Such evidence of Council activity does not go beyond 1993. Moreland left the Dayton Independent School District to become Interim President of Northern Kentucky University, and for several years the Council for Better Education slipped into complete dormancy. The Council did not reappear until the winter of 2002 when Moreland, who had become the Superintendent for the Covington Independent School District, started rattling the saber once again.

\textbf{Nurturing the Change}

When Robert Sexton commented at Bert Comb’s testimonial dinner about the difficulties that lay ahead – after the passage of legislation – he foresaw the breadth of commitment required to implement such a sweeping reform. The early days of reform required diligent attention to many details and the legislature as well as the Department of Education needed support in order to effect change at the classroom level, and to resist those who would simply prefer to throw the reform out.

The Prichard Committee, Kentucky’s most prominent citizens’ advocacy coalition to emerge the 1980s had a decision to make. The Committee had already reinvented itself from a group with a higher education mission into an elementary and secondary education watchdog. After the passage of the Kentucky Education Reform Act, it evolved again, into one dedicated to supporting the changes; not a lapdog, but clearly unwilling to be too critical. The larger question of systemic reform outweighed any particular problems with implementation. The Prichard Committee’s intellectual leader, Robert Sexton recalled the internal debate about whether the committee should continue after the passage of reform.

I think it was a critical decision as to whether to continue [after KERAs adoption]...By the late 1980s I was getting pretty tired of this whole thing. The work was beginning to get a little bit boring. It was like one more damn legislative session, and another Governor to argue with, another press conference. Same old, same old, again and again. And I had kind of said, ‘Should I move on to whatever else is next?’ The fund raising was not fun. Still isn’t, but it was less fun then because...we never knew where our money was going to come from.

[After the reform act was passed] there was the question of what our staff does...How long do we do this? So the chair and I, Wade

\textsuperscript{502} See Appendix – Council Membership

\textsuperscript{503} See Appendix – Council Bank Statements and Expenses
Mountz, decided we needed to talk to some of our active members and said, ‘OK, we’ve got to decide what we do.’ …Wade and I drafted a letter and essentially said, ‘Here’s what’s happened. We set out to do this. Please write and tell us what you think.’

By that time Kentucky had been all over the national newspapers. I had even talked to a national foundation that was interested in us. I mean, things had changed dramatically…for us…just in the few weeks after the reform act passed…Kentucky had never gotten that kind of positive publicity. So that was quite an upper…The boredom factor changed. Anyway, we wrote to them and overwhelmingly people wrote back and said, ‘No, we’ve got to continue on.’

Closely associated with the Prichard Committee was the Partnership for Kentucky School Reform, a business group born out of United Parcel Service Chairman Oz Nelson's participation in the Business Roundtable. Joined by other Roundtable members, David Jones and John Hall, Chief Executive Officers of Humana and Ashland Oil respectively, the vision was that the changes brought about by reform would only be sustained if everyone, including the business community, supported it.

Georgetown University’s Douglas Reed validated Sexton and Nelson’s concern for sustainability issues in school finance reform efforts. In his study, *Court Ordered School Finance Equalization: Judicial Activism and Democratic Opposition*, he found that dealing with public opposition was a crucial and inevitable part of implementing reform,

State supreme courts can have substantive effects on the equity of school finance. Their effort to do so, however, will engender equally substantive opposition – some of which will be racially based. This public opposition is in many ways a constant to school finance reform. As a result, the success or failure of courts’ efforts to improve the equity of school funding in primary and secondary education depends ultimately on the capacity of the legislature to withstand this heated political opposition.

The Partnership's Executive Director, Carolyn Witt Jones, made clear that these groups were aware of Kentucky's political culture every step along the way. In her assessment, Jones was also very sensitive to Kentucky's tendency toward maintaining the status quo.

I think that was the whole premise behind the action the business community took. There was going to be a need for an independent voice that would remind Kentuckians of where we were, how bad it was, and that we had to move forward. If we left it only to the persuasive will of educators, and the work of educators, then that

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would not shine the kind of light on what needed to be done, as much as [could be done by] people who were ‘outside this loop.’

People were used to school boards taking a position, KEA taking a position, the business community taking a position. [The effort was] to pull these groups together, and to form a coalition, with the full knowledge that if we couldn’t, that a lot of what we were trying to do in this state was in jeopardy.

So I believe…it's about identifying change, sustaining that change, and then reminding people of what the change has brought about…That's the reason we've been able to keep the business community interested in our work…

The idea of public engagement and the powerful role it played in the passage and sustenance of education reform in Kentucky was explored by Molly Hunter. In her 1999 article, All Eyes Forward: Public Engagement and Educational Reform in Kentucky, she agreed that,

Grassroots organizations such as the Prichard Committee, Forward in the Fifth, and the Kentucky PTA, as well as broad-based coalitions like the Education Coalition and the Partnership for Kentucky Schools, have been instrumental in initiating the reforms, supporting parents and educators in their innovative and demanding new roles, and involving the broader community in education reform. These organizations and others with which they collaborate are striking in their apparent willingness to work together and coordinate efforts rather than compete for control or attention.

The public can be fickle, or at least forgetful. Sexton’s decision to continue the Prichard Committee’s work was in a real sense a commitment to stay in for the long haul and to teach the public that patience would be necessary in what promised to be a long implementation. According to Sexton,

We decided that our job was still to set the agenda. But it was also to keep the public aware of what was happening. It was really; overall, it would be to counsel patience. If there’s a lesson of these reforms, if there’s a lesson in American education, it’s really that you have a reform…that’s passed by a legislature…two or three years later the next people in power throw it over and say start over again. That’s why you don’t have fundamental and deep change because you never have a chance to work it down into the culture of

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the schools where the teachers are actually teaching kids, which requires years and years and years.\textsuperscript{508}

Sexton saw the Prichard Committee as a campaign to set the agenda for school reform. The principal means was by focusing particularly on the Governor.

If we see ourselves as a campaign... in Kentucky it would be to influence the Governor. We saw ourselves as doing that by using our credibility with the Press, by using growing credibility with the public, by using growing credibility with the business community and by having at least the semblance of a network of people who we could contact.

It was not that we had to be highly visible. We didn’t have to be getting all the credit. I think from the very start we knew that if you’re gong to get something done in politics the politicians who make the decisions and do what you want have to get the credit. I mean, that’s the game, right? They need it. We don’t. Our goal was to have the politician that we agreed with succeed.\textsuperscript{509}

Incidentally, future Governors Brereton Jones and Paul Patton were members of the Prichard Committee in the late ‘80s. Governor Martha Layne Collins also joined the committee after leaving office.

Coalition building to produce policy change requires great effort. In this case, that effort came from the Prichard Committee’s work with the Education Coalition, established groups that already had their own communication networks. One lesson from the reform experience may well be that without such broad-based support from the public, in Kentucky’s traditionalistic political culture, or perhaps any American political culture, systemic reform that requires legislative action may not be possible.

Like the Prichard Committee, the Press, after the Rose case redirected its editorial position from the advocacy of reform to the maintenance of that reform. The path chosen by Lexington Herald-Leader Editor, John Carroll was to look for a way to support public school reform. He wanted something that was direct and got at the heart of what was arguably Kentucky’s most pressing problem - a lively local patronage system that served the interests of persons in positions of authority, but contributed little to the support its public schools. The political interests in some cases appeared significant enough that other interests, such as the education of Kentucky’s children, was somewhere down the list of priorities. This would seem to have occurred with far too many supposed stewards of the public trust. According to Carroll,

\textit{[W]e knew that there was a lot of corruption in the tax system. And we knew that there was a lot of nepotism. You know, most people who’d studied schools knew that stuff was going on. When the


\textsuperscript{509} Ibid.
state Supreme Court, in 1989, declared the school system unconstitutional we decided that, you know, this was a climactic period. And we’re a newspaper that had taken some pride in its education coverage. That’s our foremost goal – to do that right…

Moreover, Carroll did not think that school reform was out of the woods as far as funding was concerned. The General Assembly had shown repeatedly that passing a bill and funding it were two different things. Carroll thought about the issues surrounding reform looking for a way to influence the General Assembly and the citizens at large that the reform movement deserved their support. At the same time, Carroll was very concerned that many eastern Kentuckians might be so accepting of political corruption that they could not be moved to action. In Carroll’s opinion, “…the people out in the state were very reluctant to support any more money for education as long as they knew that their local school people were doing the things they were doing – not collecting the taxes fairly, appointing their friends to school jobs, basically manipulating the schools to keep themselves in power…There’s a political tradition there that makes it acceptable to use the schools for your own personal profit.” Carroll “had come to doubt whether the average citizen in Kentucky gave a damn about what happened to his kids in school.” He finally settled on an approach that would help repair serious flaws in the tax system and also got at the heart of the people’s distrust of the system. He recalled,

We floundered around for a while, but we decided…that we would concentrate on the local political control of the schools and the toll that takes, not only in dollars, but in faith. People don’t have faith in the school system’s ability to absorb more dollars effectively as long as political hacks at the local level are in charge. We felt that was an essential issue…to getting the Legislature and the Governor to support more money for the schools and to getting the public to support more money. …It was an ugly subject, but it was like a boil. It had to be lanced before people would be willing to go forward with anything very ambitious for the schools.

Then Carroll had to decide how he was going to approach the treatment of the topic. He might have relegated it to the editorial pages, or had a few reporters do a series. But he believed that the average person on the street would have a hard time relating to a typical education series. Instead, he chose a full-court press. According to Carroll,

The more we learned, the more we realized that it truly was an outrage the way the local school systems were being milked by local politicians. Whether through the taxes or…padding the payrolls with their relatives or driving off teachers who were on the wrong side of the fence politically, the level of intimidation in some of those small towns was shocking. And we thought it was truly a

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512 Ibid.
story about an outrage and we handled it that way. We didn’t pull any punches. We didn’t write it like something you would read in a scholarly book. I mean, you don’t have to read…more than four or five paragraphs before you hit the next outrage in that story. We packed it tightly with outrages. We thought that was appropriate. We didn’t think that was yellow journalism. We thought it was definitely called for.\textsuperscript{513}

The result was a twelve-part series of stories that ran from November 12 through December 15, 1989 utilizing nine reporters and support staff. Collectively they describe tax giveaways, payroll padding, the persecution of teachers, nepotism, and many other affronts to good government and good education. The articles were principally written by Kit Wagar, Lee Mueller, Bob Geiger, Bill Estep, Jack Brammer, John Winn Miller, Jamie Lucke, Mary Ann Roser and Valarie Honeycutt. The public response was huge. As Herald-Leader Editor, John Carroll recalled,

\begin{quote}
I feel like we got an extremely strong reaction to this story – stronger than anything I’ve seen...We’ve had over 1,800 letters, which is a multiple of the letters we’ve had on anything else...virtually all of them, favorable to the paper, thanking us for doing it.\textsuperscript{514} And so many of them coming from what I call real people out there in little towns - the kind of people we don’t hear from very often. It was a wonderfully rewarding thing to do. You know...an editor suffers a lot of slings and arrows for the things he publishes. But I’ll tell you I was coming in – typical day for a while - with 50, 60, 70, 80 letters on my desk, all of them telling me what a great guy I was. It certainly boosted my spirits. I think that series really stirred people. We distributed massive numbers of reprints – about 100,000 reprints...Seven other Kentucky newspapers distributed them, and bought them from us and inserted them in their papers... All I know is that this story really grabbed people in a way that even I am amazed at.\textsuperscript{515}
\end{quote}

Carroll believed the paper’s efforts helped push the legislature toward the passage of reform. He recalled that there “was a tremendous political force generated.” The paper published the names and addresses of all of the state legislators, and in Carroll’s view the citizens of Kentucky were not just writing to the paper.

I’m sure the mail was pouring in...and it was reflected in the debate in the General Assembly. The phrase ‘cheating our children’ was used over and over again in the various hearings. Just routinely they’d say, ‘Well, we can’t cheat our children any longer.’ And, much of the reform bill, or a good part of it, address[ed] those prob-

\textsuperscript{513} John Sawyer Carroll, Interview by William McCann Jr. Tape Recording. 23 May 1990. Oral History Collection, University of Kentucky.

\textsuperscript{514} In the interest of full disclosure, one such letter came from the author.

\textsuperscript{515} John Sawyer Carroll, Interview by William McCann Jr. Tape Recording. 23 May 1990. Oral History Collection, University of Kentucky.
lems that were discussed in our series. I think that was a political price that had to be paid. In order to pump more money into it you had to clean it up.516

Even after passage of the Kentucky Education Reform Act, Carroll remained cautious. Like many of Kentucky’s educational leaders, he thought much could still go wrong and that greatest amount of effort was yet to come.

This is such a sea change in educational policy in Kentucky that its implementation will be as difficult as achieving the legislation… I think it will be as difficult to implement it in a way that it really does what its intended to do for the state, as it was to get it in the first place. And you know it was a Herculean effort to get it in the first place. And I think the paper’s foremost duty is to follow up and focus on these things and make sure that …they’re done properly… basically just to keep a very bright spotlight on what’s going on…517

Is It Time to Address Adequacy?

From 1989 to 1993 Kentucky’s standing relative to 15 “southern” states (including the states typically identified as southern plus Oklahoma, Texas, Arkansas and Maryland) improved. Kentucky rose in rank from 12th to 7th in total annual per pupil expenditures (to $5300 per child). But other states were improving their schools as well, and the national average annual expenditure was nearly $1000 more per child at $6280.518

By 1994, the Office of Educational Accountability (OEA), which was formed to advise the Legislature on the implementation of reform, began warning the General Assembly that despite the “tremendous strides” made during the initial years of KERA “we have not arrived.” The OEA said, “…much work and energy must still be expended if we are to attain the level of equity and adequacy required to fulfill the Kentucky Supreme Court’s ruling in Rose v. Council for Better Education.”519

The year 1995 marked a significant milestone when for the first time, “all the factors and components of the SEEK program were fully funded.” This important event prompted the OEA to encourage continued vigilance to funding, and to advocate an increase of four to six percent biennially, and to suggest that performance expectations should be raised accordingly.

517 Ibid.
518 Office of Educational Accountability, annual report to the Kentucky General Assembly, December 1996, 134.
519 Office of Educational Accountability, annual report to the Kentucky General Assembly, December 1994, 23.
Kentucky is rapidly approaching the point where the primary purpose for additional dollars to school districts should be raising educational outcomes. OEA suggests that in the future both school finance and school improvement must be managed together, and the only place this can effectively occur is at the school level.\(^{520}\)

Despite this bright spot in Kentucky’s history of support for its schools, much ground remained to be made up. In 1996, the OEA advised the General Assembly that the “SEEK program does not provide enough support for capital outlay and debt service needs” nor the revenue needed “to properly compensate teachers.” In the OEA’s annual report, it echoed the concern of high property wealth school districts that the SEEK program was “constraining their ability to address the educational needs of students.” The report rhetorically asked, “Is it time to address adequacy?”\(^{521}\)

OEA’s 1998 report continued to call for increased allotment for capital outlay and the development of a professional compensation plan.\(^{522}\) In 1999, the OEA advised the General Assembly to continue annual increases to the SEEK formula and to fully fund all of its components.\(^{523}\) The collective attention paid to the support given public schools had raised Kentucky’s national standing. No longer did Kentucky educators joke, “Thank god for Mississippi.” In KERA’s first decade, Kentucky’s rank in Revenues Per Pupil rose from 49\(^{th}\) to 36\(^{th}\). But while improved, the per pupil expenditure in Kentucky was only $6472 compared to a national average of $7179. OEA’s 2000 report showed evidence that “local funding is increasing faster than state funding.” Consequently, OEA recommended increases in SEEK funding levels and renewed its call for enhancements to capital outlay. Prior reports cited the need to roll funding for special programs into the SEEK formula, but this had never been accomplished. By 2000, the OEA expressed the concern that “funding for special needs independent of the SEEK formula has a negative effect upon equity.”\(^{524}\)

On February 13, 2002, nine years since its last activity, a group of more than 100 Superintendents met to discuss the reactivation of the Council for Better Education’s corporate charter. The group met in response to Governor Paul Patton’s planned cuts to the K-12 education budgets.\(^{525}\) There was initial concern expressed over “unfunded mandates” and for a brief time it appeared that the Council might get sidetracked.\(^{526}\) But the Council’s discussions quickly returned

\(^{520}\) Office of Educational Accountability, annual report to the Kentucky General Assembly, December 1995, 288-289.
\(^{521}\) Office of Educational Accountability annual report to the Kentucky General Assembly, December 1996, 131 – 138.
\(^{522}\) Office of Educational Accountability annual report to the Kentucky General Assembly, December 1998, 141 – 142.
\(^{523}\) Office of Educational Accountability annual report to the Kentucky General Assembly, December 1999, 120.
\(^{524}\) Office of Educational Accountability annual report to the Kentucky General Assembly, December 2000, 202 – 213, 214.
to adequacy. Citing a gradual decline in the percentage of general fund expenditures devoted to elementary and secondary education, Beechwood Independent Superintendent, Fred Bassett said, “In effect, the state is shifting the burden of supporting schools to the local districts.”

The Council’s resurrection had some immediate positive effect. By July, Governor Patton removed the planned budget cuts after meeting with Council representatives who he said “convinced me” that districts needed the money to offset cuts elsewhere in the budget.

The focus of the Council for Better Education was now clearly adequacy. A statement issued on February 7th, 2002 said, “The bottom line is do we have the will to maintain the progress this state has made since the inception of KERA to assure all children, regardless of income, receive an opportunity for a quality education?” The reorganization got a quick response from the state’s Superintendents as 100 districts sent representation to Frankfort for a February 13th meeting and by summer 2002, 140 of the 176 Kentucky districts had pledged $.25 per student, thus raising $100,000, to join the Council’s effort. According to newly reelected Council President, Jack Moreland, “The idea of adequacy is woven throughout the 1989 Supreme Court decision, but until now, no one has defined adequacy as it relates to the funding mechanism.”

The group hired school finance experts to begin studying what an adequate education would cost in Kentucky.

There are other signs of life in Kentucky’s perennial educational reform effort as well. The Prichard Committee showed great interest in the question of adequacy in its summer 2002 newsletter. Reporting to its members on the revival of the Council for Better Education, one article asks, “Does Proficiency = Adequacy?” The way The Prichard Committee sees it, “Kentucky has defined what all students should know, but no one has determined what that proficient schooling would cost.”

As former Education Commissioner, Wilmer Cody understood, the Rose decision had a dramatic impact on the way all states view education. Before the court decision, quality was measured only by what goes into schools – dollars, salaries, books, buildings, and so forth. Now education is judged mainly by the academic achievement of its students. It’s the results that matter most. Since the mid ‘90s, the productivity expectations of Kentucky’s schools were raised a full 30% without any increase in resources.

School finance experts like Kern Alexander warn that one of the problems may be Kentucky’s adherence to the property tax as the principal means of generating school revenue. Part of any lasting solution will likely require the legislature to reconsider a fairer method of deriving

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528 Crystal Harden, “Patton: Schools Can Keep Funds.” Kentucky Post, 10 July 2002.
531 Ibid., 4.
532 See, Perspectives: Newsletter of the Prichard Committee for Academic Excellence, (Summer, 2002) 13 no.2.
school funds. But some short-term ideas have already surfaced. State Representative John Draud, the former Superintendent of the Ludlow Independent School district, and member of the original Council for Better Education, proposed a cigarette tax of $.44 per pack. “We are really at a crossroads in education again because we don’t have any money. This would resolve that problem.”

The Kentucky Post reported that in other states an increase in the state’s cigarette tax had already shown some acceptance.

In April 2002, the Maryland legislature boosted the state’s cigarette tax to begin paying for a six-year plan to hike school spending by $1.3 billion a year…The increase followed the recommendations of a state commission which had studied the adequacy of school funding for two years… Mike Griffith, who tracks national school finance issues for the Education Commission of the States in Denver, said that many states are now using adequacy studies or lawsuits to ensure that school funding gives educators a fair chance to meet school standards. Groups in Kansas, Nebraska and Montana are in the midst of studying the issue, and Texas officials appear ready to embark on an extensive adequacy study. ‘In the old lawsuits that focused on equity, there were no results expected. It was just the idea of, let’s get everyone on a level playing field.’

The state’s print media picked up the theme. Supportive editorials are starting to appear in Kentucky newspapers advocating an excise tax on tobacco products. In an editorial appearing July 21, 2002, the Lexington Herald-Leader writes that Kentucky is losing momentum in education and advocates a $.40 per pack tax. Noting that, “[h]igher tobacco taxes won’t substitute for the overhauled tax structure that Kentucky needs” it will produce ”an additional $200 million” and help “keep pace” with the other states, all but one of whom has a higher tax. The editorial goes on to state that, “Kentuckians deserve more political courage from our law makers” and that a price increase “would have almost no effect on demand…” The effort did not succeed, however, as the 2003 General Assembly subsequently adjourned without passing any kind of revenue enhancement.

More important than any particular proposed solution may be the fact that broad-based groups like the Prichard Committee, the Partnership for Kentucky Schools and the Press remain active and vigilant to the new mission of adequacy. By all accounts, these groups form an indispensable element in statewide reform that is no less valid today than it was a decade and a half ago. In tandem with the Council for Better Education, they created a powerful force. Michael Rebell notes that Kentucky’s reform after Rose was “strongly influenced by an extensive round

535 Ibid., 4-5.
536 See Kinney: Kentucky’s excise tax is the second lowest in the country at 3 cents per pack. Only Virginia is lower at 2.5 cents a pack. The state with the highest tax is New York, which in April 2002 raised its tax to $1.50 a pack.
of state-wide dialogues…which the Prichard Committee had initiated years before the court’s decision.” He underscored his belief in the impact of such broad-based support saying, “The Campaign for Fiscal Equity, Inc., has instituted a state-wide public engagement process in New York in conjunction with its on-going adequacy litigation.”

By September 2002, Education Commissioner Gene Wilhoit added his voice to the call for adequacy. Unlike Superintendent McDonald two decades earlier, Commissioner Wilhoit focused his advocacy on the needs of Kentucky’s school children rather than other, more political concerns. In his “Commissioner’s Comments” published in the Kentucky Department of Education publication, the Leadership Letter, Wilhoit explained,

The good news is that Kentucky’s districts and schools are much more equitably funded. The bad news is that we have yet to address the issue of adequacy of funding. Now, at the mid-point between passage of the Kentucky Education Reform Act and our target for having all students performing at proficient levels, we’re recognizing that the progress we’ve made could be at risk without additional dollars to fuel future progress.

Wilhoit applauded the efforts of Governor Paul Patton and quoted him in a recent speech during which the Governor asked, ‘Are we willing to do the things that have to be done for Kentucky’s children to realize their full potential? What is more important, maintaining our offices or providing children with a high quality of life?’ He also acknowledged the Council for Better Education and the Prichard Committee for their “hard work on behalf of public education.” Wilhoit concludes,

[W]e need to honor Kentucky’s commitment to offer all students the kind of education they need to become self-sufficient and socially responsible citizens…We cannot undereducate our children and expect them to lead us well in the decades to come. Funding adequacy is an issue whose time has come. Kentucky’s economic, political and social future depends on it.

Chapter Summary

After the Supreme Court decision the Council for Better Education evolved, briefly, into a watchdog group monitoring the implementation of the Kentucky Education Reform Act. In 1993, the group objected to “hold harmless” provisions added to the state’s funding scheme (SEEK) intended to keep funds to rich districts from eroding under the new equity requirements.

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539 Gene Wilhoit, “Funding for Public Schools: We have Equity. What about Adequacy?” Leadership Letter, September 2002, Kentucky Department of Education.
540 Ibid.
While the Prichard Committee and the Press continued their vigilance, once it was decided that additional court action was not indicated, the Council for Better Education fell into dormancy.

By 1993, Kentucky was spending approximately $5300 per pupil and its standing among southern states rose from 12th to 7th while continuing to lag about $1000 per child behind the national average. The Office of Educational Accountability reported annually to the General Assembly regarding Kentucky’s progress at meeting its constitutional obligations and in 1995, for the first time, all facets of the SEEK formula were funded. The OEA reminded the legislature that there was still a lot of ground to be made up and advocated modest annual increases to the formula. By 1999, Kentucky had risen from 49th to 36th in the nation but the OEA warned that increases would have to continue to keep pace, specifically citing needs in capital outlay, debt service, special education and teacher compensation.

Concerned by the erosion of education’s share of the state budget the Council for Better Education reemerged, 140 members strong, to question the legislature’s commitment to its schools. The Council commissioned a study of the adequacy of Kentucky’s schools as groundwork for a possible future action.
Chapter 7

Analysis: From Equity to Adequacy

Rose v. Council for Better Education was a landmark case that launched the third wave of American school finance cases in 1989. Since that time plaintiffs in other states have been more successful challenging state financing schemes by suing under education clauses in their respective state Constitutions. While Rose challenged inequities in Kentucky’s system, Combs argued strongly for adequacy as well. In fact, it is Combs’ focus on adequacy that defines the present trend in school finance litigation. In addition, it is believed by many that the emergence of the standards-based reform movement will help plaintiffs describe to the court a set of judicially manageable standards that will focus more on student outcomes than systemic inputs.

The Council for Better Education and the Kentucky Department of Education have undertaken studies with the specific objective of answering the question, “What does an adequate education cost?” If judicially manageable standards can be presented to the court, with the power of the ruling in Rose behind the effort, the court ought to be able to define what an adequate education means in Kentucky.

But is it reasonable to expect that the law alone is sufficient motivation for the General Assembly to establish and maintain an adequate system of schools? Evidence reveals that much more is necessary to assure that legislators fulfill their constitutional mandate. Clearly, legislators must be given the public’s blessings to provide the necessary leadership. Those blessings are apparently granted only when a public policy campaign reaches a level sufficient to assure legislators that they will not be blamed for spending the money necessary to fix the schools.

An exploration of the confluence of events that produced the initial success of the Council for Better Education reveals many elements – all of which seem crucial in the sense that each had the potential to derail the Council before it reached its objective. Consider the potential consequences of Combs arguing his case before judges who were more judicially restrained. Surely Justice Vance’s concerns over judicially manageable standards and the separation of powers or Justice Liebson’s concerns about the justiciability of the issues provided sufficient logic to throw out the case, if the court had been looking for a reason to do so. Suppose there was no Prichard Committee or that the Press was disinterested. Would a high degree of public interest have been aroused by the Council’s action alone? Even if the Council achieved a favorable court ruling but the General Assembly decided to drag their feet with years of baby steps and a lack of commitment to improving the schools: Where would Kentucky’s schools be then?

Crucial to this case was the contemporaneous existence of a host of factors that elevated the Council’s efforts to unique heights. It is useful to briefly explore some of the more significant.

In this case, the issue of judicial policy making came directly into play in determining the ultimate result in Rose v. Council for Better Education. As Brian Porto explained in his book,
May it Please the Court: Judicial Processes and Politics in America, 541 “The exercise of judicial power frequently results from the exercise of legislative power.” Alexis DeTocqueville suggested that American democracy would naturally give rise to legal conflicts since prejudice toward “some private interests” would invariably seep into legislative action. 542

In public law litigation, courts must decide whether the numerous public agencies, such as departments of education, enforce statutes consistent with legislative intent or constitutional command. “Scholars disagree vehemently about whether courts…should make such broad policy decisions…[and] whether courts’ policy decisions produce the social change that the courts intend.” As Porto explained,

Conflicting views about the wisdom of ‘majority rule’ lie at the heart of the debate about judicial activism. Scholars and judges who revere majority rule and who believe that only the elected branches of government should make public policy reject judicial activism and favor restraint. Their colleagues who are skeptical about majority rule and who believe that courts best protect minority rights reject judicial restraint and favor activism, especially if they think that courts can make public policy wisely. 543

One of the most famous examples of judicial activism is found in the landmark case of Brown v. Board of Education of Topeka, Kansas, where the court first employed the imposition of detailed plans of action to remedy constitutional violations. In Brown, the court redressed years of governmental inaction, focusing on the constitution, and deciding that the court’s own precedent established in Plessy v. Ferguson was wrongly decided. 544

After examining the history of support for Kentucky’s public school children one is tempted to ask, Are our American rights most secure when legislators make public policy? Kentucky’s history strongly suggests that, left to their own devises, the legislature would have been largely content to under-fund a very modest system of schools, for the benefit of a majority of its children. Porto concludes,

There is limited benefit in a debate about whether courts should make public policy, because they most assuredly do. Indeed, judicial policy making is inevitable, because courts’ most important function is to protect constitutional principles against the tyranny of the majority…The courts’ constitutional role legitimizes their policy making…Courts do not initiate significant social change nor can they achieve it single-handedly, but they can influence it…by le-

544 C. Alan Tarr, Judicial Process and Judicial Policymaking. (Belmont, California: West/Wadsworth, 1999), 288-303.
gitimizing emergent views, by forcing public officials to address long-standing problems, and by enabling them to do so without paying a high political price…*Rose v. Council for Better Education*…show[ed] a court forcing legislators to address long-standing problems. 545

In his Cornell Journal of Law and Public Policy article, Avidan Y. Cover explores the political dimensions of education finance cases. The article, titled “Is ‘Adequacy’ a more ‘Political Question’ than ‘Equality?’: The Effect of Standards-Based Education on Judicial Standards for Education Finance,” explores the relative advantages and disadvantages of cases argued on claims of inequality and those argued on adequacy. Cover cites the *Rose* case, in which the court “found even the state’s wealthy districts inadequately funded in comparison to the rest of the country.” 546

Cover faults equality arguments for having weaknesses, including the very complex nature of the concept of “equality.” The debate over the relevance of financial input to educational output requires an exploration of tax capacity and expenditures that are not easily understood by the public. Equality arguments intrude on wealthier school districts and play to people’s fears that their schools will be diminished by the loss of funds and a loss of local control. Equality claims can also run the risk of producing funding schemes that violate “other constitutional clauses regarding local control of property taxes” and that might even expand into other areas of government service. 547

Conversely, adequacy standards are clearly embedded in the education clauses of most state constitutions. This makes it easier for the court to determine if the state has fulfilled its mandate. Adequacy standards are exclusive to the constitutionality of education and are not likely to extend into other areas of government service. Adequacy also appeals to many because “it appears to only promise a ‘floor’ criteria and no ‘ceiling’ for education funding.” 548 Thus adequacy arguments are not particularly susceptible to the fears engendered from the Robin Hood theory and actually produce allies of persons from wealthy and poor districts alike. However, “[g]iven a state’s limited budget and resources, a judicial order that all districts must fund at a minimum level may often interfere with the state funding of wealthy districts.” 549 In this sense, it may prove to be very helpful that Kentucky created a substantially equal funding mechanism before tackling adequacy.

Cover warns that many judges may be concerned about the non-justiciability criticisms surrounding an adequacy claim if courts

547 Ibid., 423-424.
548 Ibid. 426.
become more entrenched in the creation of education policy rather than adjudicating its legality. Unfortunately, given the powerful impact of prior Federal and State cases regarding equality claims, adequacy may often be a litigant’s and court’s only recourse to correcting education finance wrongs.\textsuperscript{550}

Kentucky’s political culture is always an interesting area of inquiry and one that is central to understanding policy change in the Commonwealth. In her book, \textit{Kentucky Politics and Government: Do We Stand United}, Penny Miller, finds that, "In the broadest sense, Kentucky is dominated by a political culture that is highly traditionalistic. Variations and differences within the state are best viewed against this powerful traditionalistic background."\textsuperscript{551} She notes, Kentucky's political institutions - the legislature, the executive, the judicial, and political parties and interest groups - have changed significantly during the last two decades. There is now a better balance between legislative and gubernatorial powers because the legislature has grown more professional and more powerful, while there has been less change in the governorship...Kentucky's legal system has...undergone [n] overhaul...[making it] one of [the] most innovative. Industrialism, in-migration, statewide urbanization, the demise of factionalism, the rise of candidate-oriented political campaigns, the growth of new special interests, and the emergence of a diversified middle class - are all acting to accelerate change within what still is a predominantly agrarian, rural, small-town state.\textsuperscript{552}

She argues that education reform in Kentucky is partial verification, and the best example, of this change.

Education reform, which involved every branch and every level of Kentucky government, may well reflect a dramatic shift in Kentucky's fundamental attitudes. In Kentucky's traditionalistic political culture, there has long been a disdain for intellectual pursuits; Kentuckians in general do not believe in the intrinsic value of an education. It is unlikely that there has been a shift to moralistic attitudes... More likely, Kentuckians have adopted more practical individualistic attitudes that reflect the fact...that communities and states cannot develop economically and financially without a well-educated workforce, and that individuals cannot prosper without training provided by sound public schools... With massive support

\textsuperscript{550} Ibid., 439.
\textsuperscript{551} Penny Miller, \textit{Kentucky Politics and Government: Do We Stand United?} (Lincoln: University of Nebraska Press, 1994.), 58.
\textsuperscript{552} Ibid., 8.
from the Press, probably reflecting changing attitudes among rank-and-file Kentuckians, dramatic change has occurred.⁵⁵³


From the standpoint of political structure and culture, Kentucky remains, as Miller argued, a traditionalistic governmental entity. The formulation and passage of KERA does not, however, represent so much an 'upthrust' of individualism, as Miller contended. Rather, it appears that KERA - non-incremental, innovative policy change - came into existence because of, rather than in spite of, Kentucky's traditionalistic legislative environment, and traditionalistic structure and culture. This happened in part because of the policy competition between the governor and legislature, which resulted from the growing strength of the General Assembly. It also happened because the legislature itself, along with key education interest and activist groups within the state, had built an education policy apparatus with substantial capacity.⁵⁵⁴

The members of this education policy 'network,' whose members operated both inside and outside of the government during the late 1980s, interacted freely with policy leaders in the national education reform movement, and hence stayed abreast of the most-favored ideas for education change that evolved as the national reform movement progressed throughout the 1980s. By the time of the *Rose* decision, so-called systemic, or structural, education reform was being promoted by most members of the national education policy community. This idea was embraced wholeheartedly by most members of Kentucky's education policy network...well within the state with the time honored, paternalistic, government - rather than market - oriented approaches... The traditionalistic, one-party dominant legislative environment allowed the state's Democratic leadership to push KERA through the General Assembly... The interest groups were fundamentally weak - typical of traditionalism - but were sympathetic with the reform direction KERA represented, and they helped stifle significant competition over alternative reform approaches that may have developed under a more individualistic political cultural setting. Had Kentucky been more individualistic in its orientation, in other words, I believe KERA would likely have failed completely, passed but included more

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⁵⁵³ Ibid., 9.
market-oriented reform elements, or been more incremental in nature.\textsuperscript{555}

Clement’s position is consistent with Elazar's assertion that "Where the traditionalistic political culture is dominant in the United States today, political leaders play conservative and custodial rather than initiatory roles unless pressed strongly from the outside."\textsuperscript{556} The General Assembly, as has been shown, was strongly pressed in the late 1980s.

Fully understanding all of the forces behind Kentucky’s policy shift represented by the court’s decision in Rose is logically impossible. The complexity of the events, the numerous private and public interactions of the various actors (including individuals and interest groups) over a long period of time and in different places, makes the topic difficult to study. But the questions are important. Were Kentucky’s special interest advocacy coalitions fundamentally weak, as Clements has suggested? Or, did they ultimately play a crucial, if unaccustomed, role in the public’s acceptance of the Supreme Court ruling and the reform that followed? The evidence in this case strongly suggests that the various advocacy coalitions provided a powerful and largely unified voice that was not only influential with the public, the courts, the governor and the legislature, but may well have been a necessary ingredient to the plaintiff’s success. Furthermore, the role of these groups, most notably the Prichard Committee, gained enhanced prominence as the legislature debated KERA and each group got on board.

According to Sabatier, “policy change over time is a function of three processes.” An advocacy coalition consisting of various actors “who share a set of basic beliefs.” The coalition “seek[s] to manipulate the rules, budgets, and personnel of governmental institutions” in order to achieve certain goals over time. “The second set of processes concern changes external to the subsystem in socioeconomic conditions…that provide opportunities and obstacles to the competing coalitions.” The third set of processes involves the effects of “stable system parameters – such as social structure and constitutional rules” which constraint the various actors.\textsuperscript{557}

If the Council for Better Education is considering another campaign to improve Kentucky’s schools – as apparently is the case – then an understanding of the effectiveness of these coalitions will be important. The advocacy coalition framework (ACF) advanced by Sabatier argues, “…understanding the process of policy change requires a time perspective of a decade or more.” He suggests that “the most useful way to think about policy change is through focusing on policy subsystems, and the interactions of the different institutions that seek to influence governmental decisions,” at all levels, in a given policy area. The competition for change in public policy among advocacy groups “can be conceptualized in terms of the policy’s priorities, assumptions and how to realize them."\textsuperscript{558} ACF recognizes that policymaking is constrained by the

\textsuperscript{555} Ibid., 63.
\textsuperscript{558} Ibid., 16.
same variety of social, legal, and resource issues present in the larger society.\textsuperscript{559} In the end, all of these competing “[c]oalitions seek to translate their beliefs into public policies.”\textsuperscript{560}

With only this much explanation, one can quickly see the relevance to the various coalitions that were at work in the present case. Consider, the Council for Better Education (a coalition of local Superintendents, retired mid-level state administrators, and their legal counsel), The Prichard Committee (a coalition of grassroots individuals and their ‘leading

\textsuperscript{559} Ibid., 20.
\textsuperscript{560} Ibid., 28.
citizens’), The Partnership for Kentucky Schools (a coalition of concerned business people), The Education Coalition (a collection of leaders from various professional education groups, such as the Kentucky School Administrators, The Kentucky Education Association, the Department of Education, etc.), the Press (whose editorial boards provided a strong voice for school reform) and more.

A central feature of the advocacy coalition framework (ACF) is its focus on the belief systems of advocacy coalitions. A belief system guides the coalition members concerning the problems that should receive the highest priority, the causal factors that need to be examined most closely and the governmental institutions most likely to be favorably disposed to the coalitions’ point of view. The coalition then seeks to alter the behavior of governmental institutions in order to achieve its policy goals over time.⁵⁶¹

The story of the Council for Better Education is rich with actors and coalitions whose core beliefs were well aligned behind a simple principle – that Kentucky’s schools needed improvement - somehow. True, there were disagreements regarding secondary aspects. For example, within the Education Coalition, the Kentucky Education Association had to be convinced to shift to a more open posture on accountability in order to gain agreement on improved adequacy of funding, including better salaries for teachers. But, the core belief in the need for school reform was strong across interest groups and resistant to change.

On the other hand, during the General Assembly’s consideration of KERA, the professional education advocacy groups, with their relatively homogenous reform proposals were specifically excluded from participation. Throughout the process they were apparently regarded by the legislators as having relatively little clout and were very easily moved aside. It was as if the legislature said to them, ‘We’ve seen your plans, but the Supreme Court says it’s our responsibility, so you’re just going to have to answer to us for a while.’

So, why did the General Assembly act as it did in passing KERA? A few things seem clear. While many members probably wanted better schools, that desire paled when compared to potential consequences of a legislative tax hike without political cover for its members. In fact, if the legislature had the political will to fund the Power Equalization Formula, a cheaper option at $400 million, the Council’s lawsuit would have simply gone away. Such a decision would have achieved equity, but would have provided even less adequacy.

The members of Kentucky’s General Assembly considered their options: They could refuse to follow the court’s directive and threaten a constitutional struggle. But then, they would look like they were denying Kentucky’s children. Or, they could look like progressive thinkers, heroes even, by taking the opportunity afforded them and running with it. Given the circumstances, to do anything other than what they ultimately did would have flown in the face of reason and the benefits were large enough that, after the fact, legislators scrambled in front of cameras hoping to appear like reform was their idea all along. Political expediency came directly into play. Consider the arguments for passage of the Reform Bill:

• Disparities in support for the schools got so bad that something needed to be done.

• Passage of reform supported the general legislative intent to improve schools as evidenced by the General Assembly's passage of legislation during the Collins Administration.

• The public expected the General Assembly to follow the Supreme Court’s directives.

• The General Assembly could now blame tax increases on the Supreme Court.

• The decision supported the General Assembly's desire to strengthen itself against a historical pattern of gubernatorial control.

• The reform movement was strongly supported by virtually every education establishment group in the state - which made strong opposition from an organized professional group highly unlikely.

• The Prichard Committee had made significant inroads with public opinion on the issue of elementary and secondary education - which made strong citizen opposition unlikely.

• Several supportive business interests made their presence in the public debate known through a series of "White Papers" issued by the Kentucky Chamber of Commerce, and others calling for better schools - which made strong opposition from the business sector unlikely.

• The Press pounded away with their support. The Lexington Herald-Leader, for example, did some of their best work ever, pointing out corruption and other problems in the tax system while reform legislation was being debated on the floors of both houses.

• The confluence of all of these factors made passage of the reform bill the only correct political choice. It could be justified on economic grounds for the individualists. It could be justified on the benefits to the common good for the moralists. Most traditionalists, one assumes, would accept the General Assembly's decision, even though they might chose to complain about it later.

• And by all accounts, it was the right thing to do for the children of Kentucky.

But at the time of this writing, more than a decade after passage of the Kentucky Education Reform Act, the political landscape has changed. Once again the Council for Better Education appears to be the group willing to raise the legal questions and act on the issues. But this time the Council for Better Education got a quick positive response from Superintendents in 140 local and county public school districts, far quicker than the first effort. This underscores the contention that adequacy is an easier issue for all school districts to support than equity - being less likely to alienate affluent districts. In the present case, Superintendents are being asked to support a study, rather than litigation - at least at this point. The quick commitment to member-
ship by such a large number of Superintendents also speaks somewhat to human nature. With the Supreme Court’s vindication of the Council for Better Education in the *Rose* decision, membership becomes a much more comfortable and popular idea among the state’s Superintendents.

The Press, the Prichard Committee, and the Partnership for Kentucky Schools have remained active in their advocacy for strong public schools. Unlike Alice McDonald, the current State Education Commissioner, Gene Wilhoit has advocated Kentucky to do what is necessary to assure that the schools are adequate and meet their stated objectives for students. But other changes cast doubt about the chances for another successful challenge to Kentucky school funding scheme.

First of all, the “God of elections” has not smiled quite so brightly on those desiring an activist judiciary. Some observers have concluded that the Stephens court had significantly more activist tendencies than the present court under Chief Justice Joseph Lambert. If true, and assuming such a challenge would once again be appealed to the Supreme Court, it presents the most likely roadblock to future plaintiffs. After all, *Rose* was not a unanimous decision. If there is good news for plaintiffs, it is that any future cases tried in Kentucky will be tried in a new light – under which education is a fundamental right for each and every child.

The composition of the General Assembly has also changed. At the time of KERA’s passage, the Democratic Party controlled the Kentucky General Assembly as it had for years. Republican competition for seats had been weak at best. But by 2002, Republicans held a majority in the Senate and were strong enough to block Governor Paul Patton’s efforts to pass the state budget. As for the Governor, the situation is uncertain. While he started supporting the idea of more adequate schools in February of 2002 and made it clear that he would advocate for needed improvements, by fall a scandal with possible ethics implications had significantly weakened the Governor’s and thrown his effectiveness into question. He abandoned his interest in seeking an U. S. Congressional post.

Public education in Kentucky is once again at a crossroad. A declining share of state funds for education and an economic downturn which lead to a budget deficit have conspired to threaten the progress made in Kentucky’s schools in the 1990s. Once again, the question will be asked, ‘Do Kentucky’s public schools meet their constitutional mandate?’ KERA did not represent a final resolution of Kentucky’s long-standing lack of support for its schools. It is important to view the passage of KERA from the broader historical perspective. And from that perspective, there is cause for concern. It is important to remember that the *Rose* decision is remarkable specifically because it was exceptional - a break from Kentucky’s traditional lack of attention to its schools. What are the chances Kentuckians will rise again to maintain strong support for public schools?

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**Chapter Summary**

Bert Comb’s strong argument on the issue of adequacy in *Rose v. Council for Better Education*, defined a new trend in school finance litigation. Plaintiffs in other states have been more successful challenging state funding schemes since that time. The standards-based education
movement has also served to help the courts define judicially manageable standards that are focused more on student outcomes than they are system inputs.

To help answer the question, “What does an adequate education cost?” the Council for Better Education and the Department of Education initiated adequacy studies. With the constitutional mandate affirmed by Rose, and the availability of technical studies on adequacy, one might think that future plaintiffs would be assured success in Kentucky. But as this study has shown, the law alone is apparently insufficient to compel the General Assembly to maintain an efficient system of schools. Several other issues come into play including public engagement and support for quality schools, judicial activism, separation of powers, legislative political will, the ability of advocacy coalitions to maintain common core beliefs, and leadership from educational leaders. What seems less in question is the commitment of the Council for Better Education, the Prichard Committee and the Press to high quality schools of all of Kentucky’s children.
Epilogue

The Proficient Education of Each and Every Child

The Kentucky Supreme Court determined that a fundamental right to an adequate education is the constitutional mandate in the Commonwealth. It is the non-transferable duty of the legislature to assure this right to all of Kentucky’s children. This certainly means that adequate funding for necessary programs must be available to every school district. But it also means that the legislature must assure that resources reach every child. Evidence shows that this is not yet the case.

While KERA brought about a new means of funding school districts, little attention has been paid to the needs of particular school children, and thus equity concerns remain at the school level. The General Assembly still relies on local boards of education to distribute funds to local schools in an equitable manner, but it has failed to set any requirements that might assure that each child and every child has access to needed programs. The broad inequities that existed at the district level before KERA still exist, albeit on a smaller scale, and now at the local school level. This has resulted in identifiable groups of students who are not realizing the promise of KERA and the Kentucky Department of Education appears powerless or unwilling to address the problem. The rhetoric of reform assures the public that no child will be left behind, but old methods of distributing supplementary funds for extra school services continue to flow only to schools with high percentages of low-income students. Low-income students who may need extra assistance are not likely to get the programs they need if they attend a school with a high percentage of affluent peers.

In addition Federal dollars, particularly Title I funds, are distributed within the state in the same manner. This has the effect of leaving thousands of needy children without access to programs they would enjoy if they only attended a different school. For example, during the 2001-2002 school year, Cassidy Elementary School in Fayette County served approximately 125 free/reduced lunch students, representing about 27% of the school’s population. By contrast, Russell Elementary served approximately 200 free/reduced lunch students, representing nearly all of its population.Russell Elementary received approximately $173,000 in Title I assistance, enough to fund four teachers with change left over. Cassidy School received no Title I dollars. 562 This is based on a distribution formula that provides funding for poor students, only if those students attend a school with a high percentage of free/reduced lunch students. All 325 students in question live in an urban area within a mile of each other, and all within the same school district. In the 2002-2003 school year, the percentage of Cassidy’s free/reduced lunch students rose to 31.8%, still with no assistance for poor students. 563

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562 Source: Sandra Wilson, principal of MIAMI at Russell Elementary School and the author, who is the principal of Cassidy School, both in Fayette County, Kentucky.

563 I am arguing here that this circumstance is improper under Kentucky law and is directly on point in the Supreme Court Opinion rendered in Rose v. Council for Better Education. Such circumstances reveal a flaw in the SEEK funding formula. It is the non-transferable duty of the General Assembly to assure that each and every child receives an equitable and adequate education. But presently, once the SEEK funds are allocated to local districts,
One might think that under the philosophy of President Bush’s education plan, *No Child Left Behind*, Federal dollars would follow the child. This would assure that each and every child would receive his or her share. But that has not been the case. Funding practices have not kept pace with the new rhetoric and the correspondingly higher aspirations. This failure leaves the Department of Education at the mercy of local Superintendents and board members to assure that equity issues are addressed. But if they are not, apparently there is nothing to be done about it - but to blame the school.

At the state level, that same philosophy of providing extra support only to schools rather than to children, keeps many needy Kentucky students from receiving the extra help or extra time they need to close the achievement gap. Most notably, the Early Reading Incentive Grants and the Innovative Extended School Services grants both promise substantial help for low performing students. But these grants also target the same student populations as does Title I, and so help is still not available.

The low SES children attending affluent schools are as valuable as any other children in the state. Why should these needy children be denied the services they need to reach high standards, based solely on the demographics of other children who attend the same school they do? The *Rose* case made it clear that any system that permits such disparities does not meet the constitutional mandate under Section 183.

Through the late ‘80s, and for a short time after KERA’s passage, Kentucky schools continued to receive accolades if 65% of their students scored at or above average on nationally normed tests. By the mid-nineties this changed, as attention was called to the widening achievement gap between Caucasian and African-American students. For the first time race and student outcomes were directly introduced and applied to the *Rose* decision. Recognizing Kentucky’s history of saying *all* but not meaning it, the Department of Education issued an Equity Task Force Report that had as it’s title and central theme, “All Means All.” This expression reflects Chief Justice Stephen’s use of “Each child, every child,” and is a significant part of the state’s accountability system. Schools that fail to close the achievement gap are subject to sanctions. This has the practical effect of raising the expectations of every Kentucky school by approximately 35%. What was an adequately funded education in 1990 had changed substantially by 1999. The passage of Senate Bill 168, in 2002, formalized a system of targets for closing the gap in every Kentucky school with penalties for schools failing to meet those targets.

Thus, the question of an adequate education for all has been expanded to include strong measures of equity in student outcomes. It has been made a statewide objective, acknowledged by Education Commissioner Gene Wilhoit, and affirmatively acknowledged by the General Assembly in Senate Bill 168. What remains to be answered is whether closing the achievement gap is a measure of equity as a legal matter. It is noteworthy that the General Assembly has ac-

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564 Affluent schools tend to receive less than the district average in per pupil expenditure. *Affluence* is therefore a reference to the income of the families themselves, not necessarily the school’s budget.

565 Senate Bill 168, Kentucky General Assembly, 2002 session.
knowledged the need to close the gap but failed to spend a penny on the effort. So what must be done to assure that an efficient system of schools still exists throughout the state – a system that is both equitable and adequate?

The Achievement Gap

Discussions about the achievement gap are essentially discussions about poverty and race, and race is a topic many Americans prefer to avoid. This detachment is probably the largest barrier to leadership on the issue. As Angela Blackwell, Stewart Kwoh and Manuel Pastor explain in their book, *Looking for the Uncommon Common Ground: New Dimensions on Race in America,*

Race is a difficult subject for Americans. Many simply do not want to talk about it. Those who try often find the discussions unproductive, particularly with members of other races. There is almost palpable fatigue that hangs in the air whenever the subject comes up. To the ears of many white Americans, cries of racism sound shrill. On the other hand, many black Americans are exasperated and angry that they must continue to face discrimination in their everyday lives. Latinos are often tired of hearing the issue of race reduced to black and white. Asians are increasingly boxed into a corner, monolithically considered the ‘model minority’ by the larger society and often resented by other minorities. To Native Americans, it must appear that the atrocities committed against them have been forgotten. And, of course, there are Americans of all racial backgrounds who feel that racism no longer exists and that the term is no longer relevant.

Adding to the perception of many Caucasians that race is not a problem in America is the growing African-American middle class. Haya El Nasser reported “an analysis of census 2000 data reveals that the phenomena [sic] of ‘flight to the suburbs’ is spreading among people of color. ‘Minorities are moving to the nation’s mostly white suburbs like never before and forming their own racial and ethnic enclaves’.”

But, after 400 years of racism and oppression, it is unreasonable to expect that there would be no residual negative effects for African-Americans. The over-representation of African-Americans among our nation’s poor is perhaps the most powerful of its manifestations.

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566 Senate Bill 168 does provide 2.5 million dollars from the Commonwealth School Improvement Fund to be used for closing the gap. But this includes no new funding. The only schools eligible for the funds are those who would have been identified as Level 3 schools anyway. The only difference is that now those schools must identify efforts to close the achievement gap among their other improvement plans. Level 3 is the lowest accountability level and indicates significant performance deficits.


Throughout our history, active measures were taken to assure that African-Americans were kept down through a set of “Jim Crow” laws that prevented any real equality, and indeed, seriously limited opportunities, thus perpetuating the poverty that already existed. And, poverty is well known by educators to have a debilitating impact on far too many of our students, black and white. Each of these variables seems to have an additive impact, however. That is to say that, if a student is disadvantaged by poverty, racial factors may well exacerbate the problem.

The National Assessment of Educational Progress (NAEP) shows a significant narrowing of the gap between blacks and non-Hispanic whites on reading and mathematical tests between 1971 and 1996. Although the NAEP did not begin collecting data until 1971, the seventeen year-olds it tested in 1971 were born in 1954 and entered school around 1960. Their scores, therefore, reflect the cumulative effects of home and community environments dating from the late 1950s and 1960s including,

• National efforts to equalize opportunity and reduce poverty that began in the mid-1960s and continued or expanded in the subsequent decades [Head Start, compensatory funding for poor schools, affirmative action].

• Educational changes that were not primarily intended to equalize opportunity [such as increased spending and early schooling].

• Changes in families and communities that may have been influenced by efforts to equalize opportunity and reduce poverty but occurred mainly for other reasons. [Parents had more formal education, more affluent blacks moved to the suburbs].

The importance of social programs to the success of school students appears to be significant and direct. During the presidency of Lyndon Johnson, when such programs flourished, the gap began to narrow. After the cuts made during the Ronald Reagan administration, the gap grew. Atlantic Monthly author, Nicholas Lemann, observed the impact of such programs on individual families in his book, The Promised Land: The Great Migration and How it Changed America. He concludes that no American president did more to help the lives of the poor than President Johnson, and there was not another President even close.

The test score achievement gap between blacks and whites in our nation’s schools has received only sporadic attention over the years. The debate was most recently rekindled by the 1994 publication, of The Bell Curve, by Richard Herrnstein and Charles Murray. At issue is whether cognitive skills have become the most important determinant of personal success in modern American. Given the advances in modern technologies, the increase in offshore produc-

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tion of manufactured goods (once a mainstay of American industry), and a general reduction in the availability of unskilled jobs, it is becoming increasingly difficult to imagine a productive future life for far too many. Clearly, the information age is requiring a different set of skills than did the industrial age. But, why is there such disparity in school performance between students of different races? Apparently ignoring the fact that oppression inflicts long-term consequences on the oppressed, Herrnstein and Murray opined, “cognitive inequality was largely explained by genetic inequality.”

The subsequent flood of responses to Herrnstein and Murray’s position generally rejects this conclusion. Those attacking on scientific grounds tended to cite what Harvard sociologist, Christopher Jencks calls “labeling bias,”573 where a researcher concludes that the data presented is really a proxy for something else, whether such conclusions can be substantiated or not. Those attacking their conclusions on social grounds cite racism. Consider Asa Hilliard’s review,

Here we have the dangers of the misuse of one type of high-stakes standardized test exposed. The authors see IQ as intelligence, and they see intelligence as the causal factor for poverty and for affluence, or low- and high-class status. This means that the low class does not have the mental capacity to be improved, and therefore, charitably; they should be neglected.574

Clearly, the collective economic future of the United States will be threatened if substantial portions of American workers are under-skilled. Future changes to the American social landscape reinforce the need to address achievement gaps effectively and immediately. In her book Culturally Responsive Teaching: Theory, Research and Practice, Dr. Geneva Gay states,

The best avenue out of poverty is an education that allows for meaningful work. When a person is working and productive it enhances our nation’s collective resources. As the American demographic continues to change, people of color will comprise an increasingly greater percentage of the workforce. The U.S. Census predicts that by the year 2025, 38% of America’s population will be people of color.575

An effort to quantify the gap over the past thirty years was undertaken by Larry Hedges and Amy Howell. Their evidence from national samples between 1965 and 1996 suggests that black-white differences in achievement are large but are decreasing over time – slowly. About one-third of the gap can be accounted for by racial differences in social class, and though the gap has narrowed, the rate of change has slowed. Scores for blacks and whites are becoming more

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equal at the bottom of the score distribution, but not at the top. Indeed, blacks are hugely under-represented at the top and the rate of narrowing (if there is one) is very slow.576

The pattern in the schools is reflective of the pattern that exists in the larger society. As Angela Blackwell explains,

Examples of individual advancement abound, and the cabinet of President George W. Bush rivals that of his Democratic predecessor, Bill Clinton, in its diversity. But diversity at the top does not necessarily spell justice at the bottom. The extraordinarily high poverty rates of blacks, Latinos and Native Americans should be of concern to everyone...The economic parallel is clear: minorities have generally done much better when the overall economy experiences a long-term boom, partly because it takes a while for recovery to reach inner-city and other minority communities.577

Narrowing the achievement gap in our schools is likely to be our nation’s best chance to achieve ultimate racial equality. But, do we have the political will to do what is necessary to close the gap? And, if so, do we really know what to do? An effort to understand the issues was undertaken by Christopher Jencks and Susan Mayer at the University of Chicago, in 1995. They called together scholars from several disciplines for a yearlong study of the issues and emerged with two conclusions.

First, the test score gap between blacks and whites turned out to play a much larger role in explaining racial disparities in educational attainment and income than many had realized. Second, many common explanations for the test score gap, including racial disparities in family income, school resources and innate ability, did not seem to be as important as their proponents claimed...but...these conclusions were controversial, even among experts.578

In recent years, the existence of an achievement gap between black and white students in Kentucky’s schools has been well established. It has been publicly attested to by Commissioner of Education, Gene Wilhoit, and is visible to anyone else who examines the record. How we address it – what we actually do - will say more about what we truly believe about equity in our schools than any amount of possible rhetoric. It might be useful to ask a hypothetical question: If our government (at every level) did commit to closing the gap, what would it do? As Jencks points out,
...no single change...could possibly...usher in an era of full racial equality...but, if racial equality is America’s goal, reducing the black-white test score gap would probably do more to promote this goal than any other strategy that commands broad political support. Reducing the test score gap is probably both necessary and sufficient for substantially reducing racial inequality in educational attainment and earnings.⁵⁷⁹

So, what can schools do? Jencks says that,

The most promising school-related strategies for reducing the black-white test score gap seem to involve changes like reducing class size, setting minimum standards of academic competency for teachers, and raising teacher’s expectations of low-performing students. All these changes would benefit both blacks and whites, but all appear to be especially beneficial for blacks.”⁵⁸⁰

Katie Haycock of Education Trust agrees that, “To increase the achievement levels of minority and low-income students, we need to focus on what really matters: high standards, a challenging curriculum, and good teachers.”⁵⁸¹

The famous Tennessee Class Size Study (Project STAR) found significant positive effects for all children when class sizes were reduced from an average of 22 to an average of 15. Additionally, the benefits for children of color outweighed those for whites. Longitudinal studies continue to confirm the lasting benefits when classes in grades K-3 are smaller, particularly for African-American children. Charles Achilles, Jeremy Finn and Helen Bain point out, “Confusion over two terms – ‘class size’ and ‘pupil teacher ratio’ – causes problems and misunderstandings...[and they] are not the same thing.”⁵⁸²

With research evidence as a guide, it seems logical that we begin at the outset to reduce the achievement gap, instructing primary-grade children in classes of about 15 students – the average class size in the STAR project. Classes of this size benefit all children, but particularly those who traditionally need some extra help.”⁵⁸³

Lowering the student-teacher ratio by adding Title I and other special programs has not shown success, and paradoxically, may have increased the gap it was intended to reduce. Achilles, Finn and Bain advise,

To people who say that the lack of classroom space is a problem (and it is), a response is, ‘Think space and be creative with technol-

⁵⁷⁹ Ibid., 4.
⁵⁸¹ Katie Haycock, “Closing the Achievement Gap,” Educational Leadership, 58 no. 6 (March, 2001).
⁵⁸³ Ibid., 42.
ogy’…Define the problem as space, not classrooms…[and remem-
ber] grade retention is expensive, and smaller classes result in less
grade retention…[and] teachers in small classes quickly identify
learning problems that go undiagnosed in regular classrooms.584

Allan Odden identifies two, more economical, research-based strategies. First, dramat-
cally reduce class size to allow for individual or small group (two or three students) tutoring.
Second, combine individual tutoring with class size reduction to 15 for just language arts/reading
instruction (where students are placed in ability groups across grades) in kindergarten through
Grades 3.585

The most recent calculations from the STAR study were presented in, “The Enduring Ef-
fecteds of Small Classes.” Looking at the amount of time students spent in small classes and its fu-
ture effect, Jeremy Finn, Susan Gerber, Charles Achilles and Jayne Boyd-Zaharias were able to
substantiated three conclusions.

First, on average, students in small classes perform better than do
students in regular classes or regular classes with teacher aides in
each grade on all tests of academic performance…although we did
not find as many significant interactions with race/ethnicity or ur-
banicity as found previously. Those interactions that were signifi-
cant or approached statistical significance were all in the direction
of greater small-class advantages for students who usually have
lower performance, i.e., minorities or students attending inner-city
schools.

Second, both the year in which a student first enters a small class
and the number of years (s)he participates in a small class are im-
portant mediators of benefits. For students who began small classes
in kindergarten or Grade 1, there was a significant advantage in
reading and mathematics. For those who attended small classes in
both kindergarten and Grade 1, the small-class advantage was
greater, putting these students from approximately 1.3 months to
3.4 months ahead of their counterparts who attended full-size
classes. The pattern was repeated in Grades 2 and 3…

Third, there were few if any academic benefits associated with a
full-time teacher aide.”586

It is instructive to note that class size was an important issue in the 2001 New York Su-
preme Court case, Campaign for Fiscal Equity v. State of New York. The court heard evidence
on class size and rendered the opinion that an appropriate class size (not specifying a number)

584 Ibid.
585 Allan Oden, “Class Size and Student Achievement: Research-Based Policy Alternatives.” Educational
Evaluation and Policy Analysis 12 no. 2 (Summer, 1990), 213-227.
586 Jeremy D. Finn, Susan B. Gerber, Charles M. Achilles and Jayne Boyd-Zaharias, “The Enduring Effects
of Small Classes.” Teachers College Record, 103 no. 2 (2001), 159 -160.
was one factor in the court’s definition of a “sound basic education” as required by New York’s state constitution.\textsuperscript{587}

Avoiding the question of whether schools caused the gap, Harvard economist and Senior Research Associate, Ronald Ferguson suggests five conclusions from the data. First, teachers do have lower expectations for blacks than whites. Second, teacher’s expectations have more impact on the success of blacks than whites. Third, teachers expect less of blacks than whites because past performance and behavior have been worse for blacks. But, he finds no evidence that teachers’ expectations differ by race when they are asked to assess children who have performed equally well and behaved equally well in the past. Fourth, by basing their expectations on past performance and behavior, teachers unwittingly perpetuate the gap. Fifth, exhorting teachers to have more faith in black children’s abilities is unlikely to make a difference, but professional development programs in which teachers actually see disadvantaged black children performing at high levels can make a difference.\textsuperscript{588}

Ferguson also argues that a teacher’s own test score may be the best indicator of the teacher’s ability to raise the children’s scores – although there is no definitive research on the topic.\textsuperscript{589} The push for higher quality teachers does seem to present a reasonable approach, but for one sizable problem. If teachers were screened by requiring higher cut scores on teacher preparation exams, then it is likely to reduce the number of blacks who qualify. This is both a political problem and a pedagogical problem. There seems to be some evidence that black children perform better for black teachers, but that data is weak in comparison to the data on the correlation between the teachers’ own scores and their student’s scores.

Clearly, teacher quality is a crucial issue. But, teacher quality is no longer simply a matter of knowing one’s content – although that, too, is vital. Today’s teachers need to be competent in their understanding of the various cultural factors that students bring with them when they enter the schools. Ronald Ferguson points out that the average black child arrives at kindergarten with fewer academic skills than the average white child does. Then, schools may actually do things, probably unintentionally, that reinforce the difference.

\ldots if instruction is appropriately stimulating and responsive to children’s progress, teachers’ expectations may be neither self-fulfilling nor sustaining. The more inviting and responsive instruction is to children’s own efforts to improve, the less teachers’ initial perceptions and expectations will predict later success.\textsuperscript{590}

\textsuperscript{587}Campaign for Fiscal Equity v. New York, 187 Misc. 2d 1; 719 N.Y.S.2d 475.
\textsuperscript{589}The quantification of effective teaching has led researchers to create lists of standards and characteristics to describe good teaching, good administration and good schools. The assumption is that despite the particular personalities and creativities of our professional staff, teachers are sufficiently malleable that, with appropriate pounding from administrators, they can be transformed into finely tuned instruments of love and instruction.
Dr Geneva Gay argues that efforts to improve education “…need to be diversified according to the social variance of students, attending deliberately and conscientiously to such factors as ethnicity, culture, gender social class, historical experiences, and linguistic capabilities.”

Aside from the issue of what schools can do, there is a larger obligation on the part of our elected officials to protect and nurture the public trust as it applies to our public schools. At the state and federal level much of the rhetoric is aimed at the issue of what schools can do. This is, of course, absolutely necessary, but insufficient. The school-level focus does not in any way excuse those at higher levels from exercising their responsibilities.

In their “Memorandum to the President” Chester Finn, Bruno Manno and Diane Ravitch address a different kind of gap – the one between our leaders’ rhetoric and their actions. Succinctly put, they advise President Bush that the mandate for a unified education reform agenda is clear, “Do what it takes. Spend what it costs. But fix the schools. And start now.” They offer seven principles to guide the needed changes, including,

Offer freedom in return for results [allow local flexibility for spending but insist on results]; Prevention beats remediation [federal funds should focus on initial success in schools]; Power to the People [be wary of monopoly providers]; Fund children not institutions [America’s obligation is to its children, not the system]; Stop funding failure [federal programs that don’t show results should be replaced]; Inform, inform, inform [provide timely accurate information about results]; Use the bully pulpit to empower and inspire [Celebrate great teaching, shame those who hold to the status quo, and remind parents that they are their children’s first and most important teachers].

Many school administrators predict the public would respond negatively to any move toward revenue enhancement. This may be particularly true in difficult economic times. Yet, ten years after the passage of KERA, “The highest spending districts in Kentucky allocate less than the lowest spending districts in Wisconsin. And the poorest children in high-spending states receive an education richer in resources than the wealthiest children in low-spending states.”

And, on every measure (4th and 8th grade, Math, Reading, Science and Writing), since 1992, (and likely before) Wisconsin students consistently outperformed Kentucky students.

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592 Chester E. Finn, Bruno V. Manno and Diane Ravitch, “Memorandum to the President,” Education Week on the Web <http://www.edweek.org/ew/ew_printstory.cfm?slug=19finn.h20>
In the end, “Closing the achievement gap will require bold, comprehensive, and long-term strategies.”

Monitoring the progress of our public schools will continue to be an important part of ensuring that the effort is sustained. A fair amount of time is also necessary for schools, (some only recently committed to the effort) to show results. If adequate resources reach every child who needs them, there is no reason for the public to expect less than a dramatic reduction in the achievement gap.

But, the degree to which we shortchange our schools, is likely to be the degree by which we fail.

The Kentucky Education Reform Act was the legislature’s response to the constitutional mandate to provide an adequate and equitable education for all of Kentucky’s children. Since that time the legislature has acknowledged that substantial gaps exist in the educational results of our students. It has moved to hold schools more accountable and has recognized that much of what needs to be done exists within the culture of each school and will cost little or no money to fix. But at the same time it appears that the Kentucky General Assembly has failed to recognize that much of what must be done to create and sustain meaningful change will require additional funding for improved access to academic pre-school programs, lower class sizes and expanded funding for students of low economic status: funding that follows each needy child regardless of the school she or he attends.

Evidence suggests that, at least in the early years of this effort, Kentucky returned to its traditional pattern of talking the talk while resisting any sweeping changes or revenue enhancements. In 1999, the Kentucky Board of Education’s first effort established a Minority Student Achievement Task Force to review achievement data, investigate promising research and develop a set of actions and timelines for schools. In October 2000 the task force released a final report that called for a ‘no excuses’ foundation, high expectations for all students, focus on student success, the valuing of each individual, safe learning environments, accountability at the school level, high quality teachers, and class size reductions, so that no child is left behind.


597 While not a subject of this study, I am intentionally implying that schools do not control all of the variables that account for the Black-White test score gap. Surely, the larger society will always account for a major share of what remains to be healed in America. I don’t think the Coleman report can be completely ignored. Whatever social ills impact children in the larger society are directly inherited by the public schools. My experience teaches me to disagree with those who those who promise that creating an open and accepting climate is all that is necessary to close the Black-White test score gap. While a school climate that is fully accepting of each and every child is central to the mission of the common school, climate alone does not produce academic excellence. If that were true, would not Berea College be expected to rival Harvard and Yale for national prestige? It would be difficult to find another educational institution with better credentials for climate and social justice than Berea College.

598 As political pressure for tested results increases but funding remains static, Superintendents seeking improved results may resort to curious (and coercive) approaches. For example in 1998, then Fayette County Public Schools Superintendent, Peter Flynn, set a goal for his administrators saying: “Through our collective efforts, all children will read ‘on level’ by June of 2001.” As part of his leadership toward this goal, the district’s administrators were assembled in a large room and asked to stand on one side of an imaginary line if they agreed with the statement, and on the other side if they did not. Confidently, upper level administrators followed the Superintendent to the correct side of the line. Uncomfortably, most others followed. The brave did not, and plaintively looked across the abyss at those soon to be praised for their faith. Some upper level administrators openly criticized the faithless saying, “If they can’t even say they believe it, how can we possibly achieve it.” Viewed in retrospect, the few were, of course, correct, and everybody on the “right side” of the line was wrong. Flynn had presented an ambitious goal, one that was monitored with colorful charts in every school, but no new assistance was provided to actually help a student read. As the pretty charts clearly showed, we missed our goal - by a lot.
Since 73% of Kentucky’s African-American students reside in five districts, the task force called for partnership sites in which to focus initial implementation of the plan. Pilot schools were identified and promised unspecified support from the department of education to implement and test strategies. The district pledged to “do all that it could to support” the pilot schools. The Kentucky Education Equity Task Force was then established to advise KDE on equity issues, recommend strategies for removing barriers, plan to ensure equity and to “demonstrate that it is possible to improve learning, increase academic achievement and personal success while ensuring equity…” One of the Task Force functions was also to “monitor the implementation of model equitable schools’ projects funded by the Department of Education.” In the final analysis, however, there was no funding. Model sites received no help and very little communication from the Department of Education. Instead, the schools underwent an equity audit, and by September 2002, pilot schools were asked to report to KDE what they had been doing. It became clear to pilot participants, somewhat after the fact, that the real opportunity was for KDE “to learn from these initial efforts and inform future legislation and implementation plans.”

If there are sweeping changes occurring to assure that every child received the services he or she needs, it is not apparent at the school level. There exist in Kentucky’s schools certain identifiable groups of students who are denied Title I and other services—not because they do not need it—but merely because of where they live. Providing the tangible support for all schools and all children in every one of those schools is the constitutional mandate and should be the paramount objective of the public schools. So far, it’s not.

Citizens from the African-American community emerged to lobby the General Assembly for some action on the widening achievement gap. This effort was largely instrumental in the passage, in 2002, of Senate Bill 168, sponsored by Metro Louisville’s Senator Gerald Neal.

Senate Bill 168 set aggressive targets and monitoring for improvement but offered nothing to support children who may need extra time to learn such as through full day kindergarten programs. Neither does it provide support for teachers who must become better trained and more culturally responsive. The accountability it provides is necessary to focus the attention of all of Kentucky’s educators, but it is not sufficient to assure the success called for in the law.

Taken as a whole, Senate Bill 168 is myopic and anemic. The approach is not nearly comprehensive enough and will likely produce an insufficient result for Kentucky’s children. Given Kentucky’s historically paternalistic attitudes and tendency to marginalize the powerless, and noting that Senate Bill 168 is completely devoid of resources that might actually teach a child to read, one must at least question if it was passed as an appeasement to certain legislative and social leaders. If this were true, in a political sense, Senate Bill 168 would carry the added benefit of appearing to be aggressive while costing the legislature nothing. Even the ultimate

penalty for a school failing to meet its targets is benign; the school simply loses decision-making authority over its own professional development funds.

The situation in 2003 is similar in some respects to 1988, when revenue shortages bred budgetary turmoil in the Commonwealth. In a speech to the Louisville Rotary Club, Robert Sexton reminded business leaders of what would be needed to successfully reform Kentucky’s public schools and improve economic conditions in the state.

...Although those who’ve been hoping for improved Kentucky education are still hopeful, their optimism is probably something like Vince Lombardi’s, who said: ‘We never lose, but sometimes the clock runs out.’ Which leads to the current situation in Frankfort, where the clock ran out some time ago. Sometimes it’s necessary to be diplomatic when talking about the Governor and the Legislature. But this time, they’ve spared us the need for delicacy…

The Speaker of the House says the budget is a ‘disaster.’ Another legislator calls it ‘a thousand broken promises.’ A Senator says it’s ‘not Kentucky first, it’s Kentucky fiftieth.’ And the Governor agrees that his budget is awful and says, ‘I’m not responsible for the mess we’re in.’ …He says education and jobs are his top priority; then he doesn’t propose funding education adequately…It seems now that the prospects for breaking away from Kentucky’s history and uncompetitive economic condition, and the prospects for an improved Kentucky economy, for better standard of living, are slipping through our fingers.

...The inadequacy of the budget forces us to talk more about money, and the lack of it, and the need for more of it, than we are now or ever have been comfortable about. So much more than money is needed and we know that. But we might as well also tell the truth: You don’t get something for nothing – better schools aren’t free.600

It is going to cost some money to do this right. The good news is that much of what must be done is free, only needing to be nurtured in every educator’s heart. But caring for the legitimate needs of each and every student will mean recognizing those students who are presently missed when funding is distributed within each school district. Schools must take extra care to assure equitable practices, fair policies and administration, respect for every individual, and a fundamental respect for every child - regardless of what adults may believe about other adults. While overt racism at the individual level has largely been driven underground, institutional and private racism still abide.

It is significant that throughout the Rose case - from the Department of Education personnel, to the district school Superintendents, to the attorneys and judges, nowhere is an African-

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American found. And with the somewhat less rare exceptions of Alice McDonald, Debra Dawahare and Martha Layne Collins neither can one find a woman. (State Treasurer, Francis Jones Mills was also named in the original complaint but did not figure in the suit.) This is significant since it serves as one more example of how Kentucky’s African-American community is frequently beholden to Caucasian males to do the right thing in support of the poor and people of color.

While the language of the Supreme Court does establish education as a fundamental right in Kentucky, attorneys seeking to use that language to argue cases outside of the financial realm tend to run into brick walls. A recent interview with Lexington attorney, Edward Dove, who has tried two cases citing the Rose opinion and its establishment of education as a fundamental right in Kentucky, revealed frustrating results.

When I've raised that issue...[in a case where] basically...[my client] lost that fundamental right to an education under Rose [because the district condoned more than forty instances of harassment.]...what [Judge] Hood said in that opinion, and that was KCG. v. Franklin County Schools, was that, it's only a funding statute...It doesn't mean any more than funding... It got kicked back to Judge Graham...and Graham dismissed it basically because...he didn't find that his fundamental right to an education had been violated.

Now the problem is, what do you do about it... You have no recourse in the state of Kentucky, if you're deprived a fundamental right...The Kentucky Constitution has no remedy for a violation of Kentucky law. You can not sue a school district for a denial of the fundamental right of education. You couldn't sue them in federal court because those judges aren't going to entertain it. Hood made that clear.... You could sue for being arbitrary and capricious and have an injunction... but what attorney's going to take it, because there's no attorney's fees? ... You have no judge that's really going to say, put a million into education...

You know, you think about who brought the action in the first place...Combs...I mean, somewhere, the politics were just right for him at that time to get this done. You couldn't do it now. I don't see Debra [Dawahare] picking up the shield and doing it now... If you believe what Judge Hood and Keller said, that Rose only stood - that a child's fundamental right to an education was dicta, meaning that it was just there as support - it wasn't law. The holding on that case is that it's got to be equity and funding.

Now, with...[Rose] saying that [there's] a fundamental right to an education - I'm reading that as...that's the law of the Commonwealth of Kentucky. And... Judge Hood read it, and what Judge
Keller reads it as, is that it's a fundamental right, but, it's a fundamental spending right… it doesn't go to educational opportunity.\textsuperscript{601}

As demonstrated, the \textit{Rose} decision established for the first time that education is a fundamental right in Kentucky and that it is the General Assembly's responsibility to ensure an efficient system of schools. It was also demonstrated in the case, that in an efficient system, wide disparities could not exist. Evidence was presented that showed unequal and insufficient educational opportunities for the poor as compared to the affluent. It was also shown that poorer schools tend to produce a poorer product. African-Americans are over-represented among the poor in Kentucky, but nowhere in the case is the issue of race specifically mentioned.

So, in large measure it becomes a matter of political will. Do we have the will to really look at ourselves, say what we believe to be best for our common good, and then build a school system that would produce that result? Do we really think Kentucky’s children worthy enough to stand among the best-educated students in America? If so, we should set our sights on that objective and provide adequate resources: resources that are as great as our expectations.\textsuperscript{602}

The mere perception that closing the gap will have a draining effect on school resources will encourage more parents to gravitate toward an increasing array of private options for their children. The apparent diminution of programs for gifted children and the arts will concern many suburban parents, may convince them that we are not really serious about maintaining high standards for all children, and will likely encourage political backlash from those who may yet oppose the full integration of every student into our schools and everything that means.\textsuperscript{603}

The issue of \textit{political will} remains relatively unexplored in this manuscript. Still it is generally seen as a necessary ingredient for systemic change. In the \textit{Rose} case, political will was generated in the General Assembly by broad-based \textit{grassroots} support nurtured with care. Along with the Supreme Court, this support gave legislators the political cover they needed to act. I believe it also reminded them that they alone were in charge of public education, not that they did not know, but perhaps they had forgotten. They had built the


\textsuperscript{602} I do not intend to infer that we should simply throw resources at schools. Schools need clear objectives and expectations, measurable even at the classroom and student levels. The main benefit of Senate Bill 168 is the creation of a firm set of renewable accountability measures that are disaggregated so that they can be effectively analyzed. It is incumbent upon school administrators to demonstrate to the public that there will be none of the waste that historically existed in some places within our state. I do suggest that we will never have a “world-class” program on a below average effort.

\textsuperscript{603} I suggest here that while we have desegregated, we have yet to fully integrate our schools. Under \textit{Brown v. Board of Education (Brown I)} the Supreme Court found segregation to be unconstitutional. A year later, in \textit{Brown II}, the court ordered the schools to be desegregated. Then, after more than a decade of significant national foot dragging, the passage of the Civil Rights Act, and still after \textit{Green v. County School Board}, we finally began to desegregate our schools. We have yet to fully integrate our schools such that every child gets to play, every child gets the care they need, and is “at home” in their own school.
Department of Education, entrusted it with the creation of our common pedagogy, and ultimately began to view the department as part of the problem. They funded it to a level that allowed them to still protect their other interests, particularly not raising taxes. What we got was what we had - before reform. When it became apparent that the public was open to reform, the legislature got on board, heavily - as though they had been there all along.

To paraphrase Dr. Jane Lindle, ‘If all that was needed were potent legal arguments made on constitutional grounds, the Council’s case could have been decided in 1954.’ The legislature’s strong policy shift was made possible by the collective nature of the effort. Without the galvanization of the various interest groups there would have been no change.

As James E. Ryan wrote for the Yale Law Review, the question is “whether a sufficient number of suburban parents and legislators can be persuaded to allow urban minority students to share their schools…” He speculated, “They can be, if the case is made correctly and sufficient attention is paid to how integration would occur.” Opinion polls continue to show support for integration. In order to make the case, “school finance and school desegregation scholars and advocates must begin to work together” and “examine much more thoroughly the evidence gathered in both fields of research.” He predicts that, “persuading parents and legislators to work toward greater integration will be something of a battle, but…it is the right battle to fight.”

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604 Dr. Jane Lindle, personal communication with the author, 2002.
Part of the fight will surely require the re-education of a generation of Americans; not school children, but their parents who have been taught (largely by educators) that family background factors were the primary determinate of future success in school. This belief, reported broadly, starting with the Coleman Report in 1966, and reinforced by three decades of policies and practices, is very much a part of many people’s beliefs about just how much schools can do to effect a positive future for all children. David J. Hoff reported for Education Week on the Web a conversation he had with Boston College’s Albert Beaton who helped analyze the Coleman Report.

It changed the way we thought about the whole issue of equality of educational opportunity. Instead of proving that the quality of schools is the most important factor in a student's academic success— as its sponsors had expected— the report written by the sociologist James S. Coleman of Johns Hopkins University found that a child's family background and the school's socioeconomic makeup are the best predictors.606

**Rose and the Achievement Gap**

Absent an unprecedented legislative turn toward adequate support for the schools in their quest to meet the increasingly lofty standards for all students, litigation remains a real possibility for the future. How is that litigation likely to be structured? Who would sue? How will plaintiffs structure their cases? Can the opinion in *Rose* be effectively extended to address the achievement gap? I asked Professor Carolyn Bratt of the University of Kentucky College of Law to speculate about a legal strategy for such a hypothetical case.

I have had people from the African-American community who have wondered whether you could take *Rose* and make it apply. My reading of *Rose* is that there’s enough language... and it’s broad enough that you could use it as a basis for arguing that the state has an affirmative obligation to get rid of any achievement gap. It’s whatever it takes to do it, money, programs, special teachers, whatever.607

If a case were to be made, who could sue?

Certainly, based on *Rose*, you might be able to use some school districts to come together to do it. I have always believed that parents who have kids enrolled in a particular school system would be appropriate plaintiffs and then join with them groups [of interveners] to come in on their side and say, ‘We support what they’re doing.’

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What I would want, as a lawyer, are individual plaintiffs whose kids are in the elementary, junior high and high school so we were covering the whole gamut. I’d want ones whose kids represent the kinds of problems we’re going to be alleging existed. That means that you have to pick your plaintiffs very carefully. You wouldn’t just take the first one. You’d also want parents and kids who don’t present side issues that you don’t want to get into. So you spend a lot of time on who the plaintiffs are going to be.608

Finding the ‘right’ plaintiffs is based in large measure on the legal arguments that would be presented. Those plaintiffs reflect the disparities that will be alleged. But what’s the legal strategy?

You would start with Rose. And what I would look at as an attorney to see what I could do with formulating a legal argument that these disparities that we see, based on race, come within Rose’s command and have to be fixed. I would be looking not just at the outcomes, which are the test results, but I’d want to look at the inputs, too. I want to look at everything from teacher pupil ratio to where are students in the system?609

Examples of such disparities will not be hard to find. Increasingly, school administrators are examining data to determine results. And almost as frequently that data is being disaggregated, most commonly by race, sex, and condition of special need.

It’s my understanding, and I don’t know if it’s true or not, but I’ve been told that there’s an overrepresentation on minority students in the special education programs. One has to wonder what that’s all about. And so I would want to look at things like the experience of teachers in the various schools particularly the ones that are having the poorest performances. Are we seeing a lot of new teachers being assigned there and not the older master teachers so that there really isn’t an equality of input if the best teachers are being assigned to the schools that are getting the best results?

It’s my understanding, too, that African-American kids, and Latino kids are more likely to be dropping out of school at higher ratios than white kids. Why is that? Is that not…an outcome of these lousy test scores that by the time they get to be sixteen they’ve been failures for so long that they then choose to leave the school system?610

Data shows that schools do not control all of the variables that create the gap. For example, Richard Rothstein of the Economic Policy Institute in Washington goes so far as to suggest

608 Ibid.
610 Ibid.

Ronald Ferguson points out that the average black child arrives at kindergarten with fewer academic skills than the average white child does.\footnote{Christopher Jencks and Meredith Phillips, eds. The Black White Test Score Gap. (Washington, D.C.: Brookings Institution Press, 1998), 301.} But will the court accept that differences in student outcomes relate to shortcomings within the control of the schools?

\textit{Rose} gives you a basis on which to argue that you don’t have an efficient school system because there’s an identifiable group of students who are going through the system who are not acquiring the skills that we know are necessary for them to be successful when they get out of school. [And the failure to acquire those skills is] directly attributable to a lack of the kind of resources that need to be committed in order to get those children up to whatever level we’re trying to achieve. The constitution requires it.\footnote{Carolyn Bratt, Interview with author. Tape Recording. Author’s collection, 25 June 2001.}

I think that the critical part of that argument is to have in your hand what remedies you want so that you can say to them, ‘Here’s how you go about doing it.’ You attach the dollars to the child, or every school has to have a reading specialist. Those kinds of things so that you’re not leaving it to those who aren’t on the ground doing the work to come up with…the remedies…

The evidence is likely to convince any fair judge that these differences do exist from kindergarten to graduation. The gaps can even be seen at the top of the range as well as the bottom.\footnote{Edward Kifer, “Which Achievement Gap, Where?” Annual meeting of the American Educational Research Association. (April, 2002). Dr. Kifer argues that the most common methods of looking at achievement gaps used mean group scores and mask the fact that the gap exists across that whole range of scores. He found that in Kentucky “there is a negative correlation between the size of the achievement gap and the proportion of black students in the school.” He fears that a view of the gap based on mean differences “could lead to what are essentially remedial programs because one could believe the issue is low scoring black students.” He advocates looking for interventions “that are effective at every score level not just the low ones.”}

And the \textit{Rose} decision was written in very broad language.

It is not a decision that is written in the stingy kind of cramped style that a Scalia or a Rehnquist would write a decision with. They have to get to that result but, by god, they’re going to give you no room to argue anything else. There is some very sweeping language in there. That education is a fundamental right; we had never had that declaration – a state constitutional fundamental right to an educa-
tion. So, yes, there’s big language in there that you could play
with.615

One of the factors in the favor of the Council for Better Education was the presence of judi-
cial activism at both the circuit and Supreme Court levels. Justice Stephens is now gone. This
is an important potential barrier to a future plaintiff.

Justice Stephens was committed to this particular case, making sure
that it was decided correctly. You know, when the Chief Justice is
on a side in a case then that certainly helps the court come to a deci-
sion that is one that does more than just the bare bones minimum.616

The school finance literature tends to focus on those issues of definitions and remedies.
Also important in Rose however, were procedural questions relative to separation of powers and
how one goes about suing the legislature.

I frankly thought they had problems with this case in terms of who
do you sue and how do you get relief when the responsibility is the
legislature’s? I went back and looked at it and they’re saying, ‘OK,
we’re not telling you how to do it. We’re just telling you you’ve
got an unconstitutional school system. You’re going to have to fix
it.617

Justice Stephens had reflected on this issue in his interview with Robert Sexton and Debra
Dawahare and went so far as to suggest that if he were trying a future case against the General
Assembly he’d serve every member of the legislature just to be safe.618

I’ve always had the sense, at least in this case that the non-legal di-
mensions were rather significant. There was a lot going on besides
legal arguments being made. People were talking to people who
were talking to people who needed to know and this was a political
decision as well as a legal decision. Who knows how that comes
out the next time around?

The court’s still stuck with what it said, unless it’s willing to over-
rule itself, which it has the power to do. It would have to do some
pretty careful wording to get around some of this. I can’t see them
coming out and announcing, ‘We were wrong. There’s no funda-
mental right to an education in Kentucky.’ I think that stays in
place.619

617 Ibid.
618 Robert F. Stephens, Interview by Robert Sexton and Debra Dawahare. Tape Recording. Prichard Com-
As one studies this case there is an unmistakable feeling that Bert Combs networked in an uncommonly broad fashion. There are several instances where he is revealed to be behind the scenes, including the arrangement of a $50,000 donation to kick-start the Prichard Committee. He was shown to have had early conversations with Robert Sexton, Edward Prichard and other key individuals. I believe it would have proved fascinating to review his phone records to determine just how extensively he networked. The impact of his loss to any future effort is difficult to overestimate.

The unanswered question is whether the court would be willing to go beyond a case about financial equality in terms of the funding? Bratt speculated,

I would think they would have to say it goes beyond that, but how much more? I don’t know if there’s the political will power to do more. At the time [of the Rose decision] there was the political will that there was something so wrong with our school system and the way we were funding them that it was the good thing to do to say, ‘OK, we’re going to have to go back and figure out how to fund it.’ Now there’s a great deal of pride about what we’ve done. I go to national conventions and people want to know, ‘How did that Rose decision come down? How come Kentucky is doing that?’ So there’s a kind of a national recognition that we did something very important here. But, are we willing to take the next step? Or do we just rest on our laurels and say, ‘OK we did the really hard important thing. We don’t have to do this.’

Professor Bratt also expressed concerns about the political will as it involves the introduction of racial issues into the school finance question.

Nationally, recent cases have been filed in state courts and focused on definitions of adequacy to bolster support for schools. One case that is notable for dealing with racial issues is Sheff v. Oneill. The Connecticut Supreme Court used a state education clause, which included specific language regarding segregation to overturn the state system of funding. But language specific to segregation only exists in two state constitutions (not Kentucky’s) and for that reason it is not likely that Sheff will become a useful precedent.

Much of that national dialogue in support of strong public schools centers on the creation of the “informed citizen,” however, there has been little analysis of the specific skills needed to be one. According to Michael Rebell, “the standards-based reform movement has now put this question into focus, and, at the same time, it has provided specific tools for determining the extent to which the schools are actually producing students who can effectively carry out their presumed societal responsibilities.” The Council on Curriculum and Assessment in New York specifically considered the analytical skills students would need to participate in civic discussions

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620 Ibid.
621 Sheff v. Oneill 238 Conn. 1, 678 A.2d 1267
serve as a juror and to generally carry out their duties as a citizen. “With these new standards, courts are now in a position to probe unanalyzed past assumptions about students’ preparation to function as productive citizens.”

For example, in CFE v. State, Justice Leland De Grasse instructed the parties to have their witnesses analyze a charter referendum proposal that was actually on the ballot in New York City at the time of the trial. The question was whether a graduate of New York high schools would have the skills to comprehend the document. Plaintiffs called Linda Darling-Hammond as their primary witness on these issues. She identified the specific reading and analytical skills that an The tenor of the times right now [nationally] in terms of concerns about race relations; I don’t see the political will to address that. Rose isn’t a case about race at all. In some ways it’s an easier case because you have all these rural legislators who could in fact sign on to this decision and say, ‘Yeah, I’m going to be able to go back home and tell my constituents that we’ve given them a school system that fairly funded. Now, play that through on issues of race.

Legally is there a basis to go forward? Yes, of course there is. But, for lawyers, the reality is to try to sit down and figure out what the reality is. Can you actually win? Can you do more than make the legal argument? Can you make the case so strong and compelling that even though they may not want to reach your decision that they’re going to have to go there with you anyway? Or do you have the political clout behind you to make it happen? I don’t see the political clout.

I’d like to believe that…if you can come up with the right plan and the right people you could make this happen. I think though that when you get into the hard part about figuring out what you would do to actually eliminate this gap; everything from [some] school’s problem that [they] don’t get any extra help for doing it to having to go back in and look at policies about who’s suspended and who’s expelled and who’s allowed to drop out, then at that point you start going people’s oxen. You start doing things that are going to cause people who might say, ‘Yes we should close the achievement gap’ to say, ‘but, you can’t close it that way.’ And pretty soon you discover that there’s no coalition that will come together and say that this way is the way it ought to be closed. Everybody wants you to do it over here and over there but don’t disturb what’s on the ground and being done now.

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623 Ibid., 61.
individual would need in order to understand that document. She then related these skills to particular standards set forth in the Regent’s Learning Standards in English Language Arts, Social Studies, and Mathematics and Sciences. She described the kinds of skills a juror would need to understand and use such as, “the preponderance of the evidence,” how to “weigh the evidence,” what kind of evidence is “credible” and the specific skills needed to undertake complex reasoning. Further she “explained how skills such as the ability to analyze statistical tables and graphs, understand concepts like ‘opportunity costs’,,” and comprehend scientific studies were developed by the mathematical, science and social studies standards.625

The defense countered with the argument that most Americans get their news from radio and television and that does not require high-level cognitive skills, since most voters make up their minds without actually reading the ballot propositions. They claimed that seventh or eighth grade reading skills were sufficient.

Justice De Grasse rejected the defense argument holding in CFE v. State that, “An engaged, capable voter needs the intellectual tools to evaluate complex issues such as campaign finance reform, tax policy and global warning.” The justice further stated, “a capable and productive citizen doesn’t simply show up for jury service. Rather she is capable of serving impartially on trials that may require learning unfamiliar facts and concepts…”626

As Rebell sees it,

It is difficult to conceive of our society knowingly perpetuating a state of affairs in which voters cannot comprehend that ballot material about which they are voting and jurors cannot understand legal instructions or major evidentiary submissions in the cases they are deciding. In order to function productively in today’s complex world, citizens need a broad range of cognitive skills that will allow them to function capably and knowledgeably, not only as voters and jurors, but also in petitioning their representatives, asserting their rights as individuals, engaging in deliberations with other citizens and otherwise taking part in the broad range of interchanges and relationships involved in the concept of “civic engagement.”627

In the current high-stakes environment the public’s expectations of the principal have shifted toward more direct accountability in a results-oriented manner. The Pressure is on. The sentiment is that only the results matter, and it is up to the principal to figure out how to lead a group of people to consensus to achieve the expected targets. The successful school will be the one whose data reveals that all demographic sub-groups of students show steady progress toward high achievement while decreasing achievement gaps.

625 Ibid., 62.
627 Ibid., 65.
The trick is to close the achievement gap without lowering standards along the way. In support of efforts to close the gap, advocates like Kati Haycock of the Education Trust, point to the growing number of schools with high percentages of low-income students that are achieving at high levels.628 There is substantial question whether some of these districts have closed the gap or if they have lowered standards to produce better results.

Appropriately, the Education Trust hopes to "dispel the destructive myth that race and poverty are insurmountable barriers to high achievement." To do so, the argument is made that if some schools can close their achievement gaps then any school can do it. How many such schools would one have to see to be convinced that it is possible anywhere?

This argument is compelling at first blush, but fails when logic is applied. The essential argument against is that it has never been accomplished on a significant scale, anywhere, for any sustained period of time and the data are, perhaps, a description of outliers. Moreover, the argument loses its power when reversed, and is what logicians call a hasty generalization.629

For example, a former African-American student from the most humble circumstances rises above her family's poverty, lack of education, and violent behavior in the home, to become an outstanding student, graduating from the University Michigan with honors. How many such students would one have to see to be convinced that sufficient educational opportunity presently exists for each and every student who chooses to take advantage of what the system offers?

Unfortunately, the argument echoes throughout Kentucky, promoted by well-intentioned educators to prod their principals and assure their boards of education that any school can achieve - without any additional funding - if only they wanted to. The Ed Trust is committed to finding enough schools to make the generalization valid. The problem with this approach is that it tends to provide another way out for a tax averse General Assembly, to relocate the problem, absolving themselves of responsibility - at least, in their own minds.

Viewed another way, however, the General Assembly might unwittingly open themselves up to more claims of institutional racism. After all, nobody said that we could educate gifted children, if only we wanted to, without any extra resources.630 The brief history is that in the mid 1970s, parents of ‘gifted’ students identified a group of children whose legitimate educational needs were not being met within the existing program. They lobbied and they were heard. It took a few years, but the program was established. The gifted program was built to provide the necessary programs for an estimated student population of less than 10%. The state budget for programs for Gifted and Talented children, during the 2001-2002 fiscal year, was $7.4 million. In addition, school districts reported to the Kentucky Department of Education that they spent another $1.9 million in local funds to supplement that amount. This means that the total effort on

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628 Katy Haycock, see <http://www.edtrust.org>
629 A hasty generalization is a logical fallacy committed when a person draws a conclusion about a population based on a sample that is too small. The hasty generalization uses the following type of reasoning: 1) X % of all observed A’s are B’s., 2) Therefore X % of all A’s are B’s. See The Nizkor Project, <http://www.nizkor.org/features/fallacies>
630 The establishment of Gifted and Talented education programs is useful as an example, in part because the debates about funding gifted programs were been free of racial and socio-economic considerations. So, the public has borne little emotional baggage. It is also useful as an example of how we should respond to any effort toward excellence - to support the change we desire.
behalf of Gifted and Talented children in Kentucky was approximately $9.3 million.\textsuperscript{631} Low income children, children of color, children with special needs – all deserve careful monitoring and certainly need more support than our most advantaged students.\textsuperscript{632} Now that it is poor children and children of color that need the legislature’s protection and advocacy – they are nowhere in sight.

Generally speaking, the more diverse the economic base of the student population, the larger the achievement gap. The fewer African-American students in a school, the larger the gap.\textsuperscript{633} But arguments in support of closing the gap are increasingly made in the lowest possible terms. Others have achieved. If a given school has not, it’s only because the principal has not done what it takes. Or perhaps, it’s because one does not really believe all students can learn - or worse - because someone actually wants one group to do better than another. The later notion would be grossly offensive if it were not for the Commonwealth’s long history of wanting just that.

In general, the public gets what it deserves: not always, but generally. Those who educate themselves tend to end up with the resources necessary for a comfortable life. Similarly, people understand the qualitative differences among certain things. For example, there is a direct relationship between the amount of money spent, and the quality of home one might purchase. But in Kentucky’s political culture, with its dubious view of the bureaucracy, spending more on education apparently seems to many to be like dumping money down a rat hole. It would be hard to listen to many people and not come away with the notion that Kentuckians are the most highly taxed people on the planet. This of course, is a long way from true.

Did \textit{Rose v. Council} and KERA produce Kentucky’s ultimate funding scheme? Did it produce a system that provides adequate resources for every school child regardless of the school the child attends? Or, will there possibly be other challenges ahead as the national focus shifts from equity of resources to equity of student outcomes – an adequate education for each and every child?

Assuring the promise of \textit{Rose v. Council} to Kentucky’s children will require vigilant attention from our state’s leadership. Adequate funding to meet the increased demands is an indispensable ingredient to success. However, viewing equity from the standpoint of dollars alone may keep us from the promise of full social and economic justice for all. Much of the work that must be done exists in the hearts and minds of Kentucky’s educators and citizens – and does not cost a cent.

As Ms. Dawahare observed, the original case was made with only a miniscule precedent - \textit{Wooley v. Spaulding}. Despite all of the stated reasons to doubt the success of another challenge to Kentucky’s funding system - one thing is clear. Any future challenges will be built on the foundation laid by the Council for Better Education. Courts considering such claims will do so

\textsuperscript{632} I say this with no malice, having been fully supportive of programs for gifted children and somewhat instrumental in the creation of Kenton County’s ASCENT Program in the late ‘70s.
with the knowledge that education is a fundamental right in Kentucky, that equity and adequacy are requirements of an efficient system under Section 183, and that the system must work for all children regardless of the school they attend. The responsibility is not transferable from the legislature. This is the proud legacy of the Council for Better Education.

A Modest Proposal

Kentucky’s children deserve a fair opportunity to reach high standards. And as our General Assembly has already determined, goal setting should help. If setting goals and monitoring our progress are good ideas (and they are), then I propose that we get the Legislature and the Governor involved. We would all have to agree that if we were to set a goal as lofty as our aspirations, then nothing short of a full commitment to making Kentucky first - the highest state in per pupil expenditure by the year 2014.

But let’s be reasonable. Our past failures have kept Kentucky a relatively poor state. Perhaps the General Assembly and the Governor would agree to commit to a goal of reaching the national average in per pupil expenditure by 2014, as evidence that the legislature is deserving of our good faith. Is that so unreasonable for a world-class system of schools?