OHIO'S PUBLIC SCHOOL FUNDING SYSTEM: THE UNANSWERED QUESTIONS AND THE UNRESOLVED PROBLEMS OF *DEROLPH*

I. INTRODUCTION

The topic of educational funding has been debated for decades, yet decades later, there still seems to be no definite answer to the questions swarming about in this area. Public education and funding concerns have been present in Ohio's history for quite some time, dating as far back as the Northwest Ordinance.[1] This issue has been addressed in federal case law as well. However, because the Supreme Court has found that under the federal Constitution, education is not a federal fundamental right,[2] the development and regulation of public educational systems was left to the states.[3]

The issue of public school funding has arisen in Ohio multiple times. However, within the past decade, the issue has really come to the forefront of important state issues. The issue was revitalized in 1991 when *DeRolph v. State*[4] was filed in the Court of Common Pleas of Perry County seeking declaratory and injunctive relief, to be based on a finding of unconstitutionality in Ohio's public school funding system.[5] This case led to much controversy as well as to four Ohio Supreme Court rulings.[6] The most recent state supreme court ruling declared the educational funding system unconstitutional.[7] However, when the original common pleas court attempted to rehear this case and to impose a compliance conference, the Supreme Court of Ohio, upon request by the State, ruled that the *DeRolph* case and litigation was over and that the courts of Ohio could no longer

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1 *See* NORTHWEST ORDINANCE, art. III (1787).

2 *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

3 *See* U.S. CONST. amend. X. The Tenth Amendment states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *Id.*

4 *See* DeRolph v. State, 677 N.E.2d 733 (Ohio 1997) [hereinafter DeRolph I], *aff'd*, 728 N.E.2d 993 (Ohio 2000) [hereinafter DeRolph II], *overruled by* 754 N.E.2d 1184 (Ohio 2001) [hereinafter DeRolph III], *vacated by* 780 N.E.2d 529 (Ohio 2002) [hereinafter DeRolph IV].

5 *See DeRolph I*, 677 N.E.2d at 734.

6 *See DeRolph I*, 677 N.E.2d 733; *DeRolph II*, 728 N.E.2d 993; *DeRolph III*, 754 N.E.2d 1184; *DeRolph IV*, 780 N.E.2d 529.

7 *DeRolph IV*, 780 N.E.2d at 530.

exercise any jurisdiction in this case.[8] This is somewhat surprising since the court went to the trouble to hear the original dispute and continued to exercise jurisdiction in order to ensure compliance with its decisions for six years. Then, in one fell swoop, it ruled that the case was over, never to be heard again.[9] This decision is more than just surprising - it is devastating to the plaintiffs and to the public schoolchildren of Ohio, as a whole.

This Comment will survey the individual Ohio Supreme Court *DeRolph* decisions and will discuss the implications of those decisions. Specifically, this Comment will focus on whether education is really a fundamental right under the Ohio Constitution. *DeRolph* did not address this particular issue, likely because the Ohio Supreme Court in the past had determined that education was not a fundamental right.[10] However, it is still an important inquiry because it was an underlying question in the *DeRolph* decisions and because of its potential effect on future cases. If a fundamental right is involved, then Ohio's Equal Protection Clause[11] is implicated, which would shift the focus from achieving adequacy to achieving equality. This may be a better approach to the problem involved in *DeRolph* than the one utilized.

In addition, the implications of the two most recent *DeRolph* decisions, noted above, will be discussed: in *DeRolph IV* the Ohio Supreme Court ruled that the system still was unconstitutional,[12] but then six months later in *DeRolph V*, the supreme court ruled that the courts no longer have jurisdiction to hear the case,[13] essentially leaving the plaintiffs without redress. Perhaps more importantly, this Comment will evaluate what possible solutions exist to finally make Ohio's educational funding system constitutional. Specifically, it will consider whether a constitutional amendment or an initiative by the people, as suggested by Justice Resnick of the Ohio Supreme Court,[14] is really a viable option as a resolution to this problem. This is potentially the answer to rectifying the governmental crisis that exists: legislative inaction and judicial reluctance and restraint to correct the problem because of underlying separation of powers concerns.

Part II of this Comment will first provide some background into public school funding challenges, both in Ohio and at the federal level. Part III will provide a synopsis of the more recent string of educational funding

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8 State *ex rel*. State v. Lewis, 789 N.E.2d 195, 202 (Ohio 2003) [hereinafter DeRolph V].

9 *See DeRolph V*, 789 N.E.2d at 202-03.

10 *See* Bd. of Educ. v. Walter, 390 N.E.2d 813, 819 (Ohio 1979).

11 OHIO CONST. art. I, § 2.

12 *DeRolph IV*, 780 N.E.2d at 530.

13 *DeRolph V*, 789 N.E.2d 195 at 200.

14 *DeRolph IV*, 780 N.E.2d at 534 (Resnick, J., concurring).

cases heard under the *DeRolph* name. These cases seem to indicate a developing trend of declaring Ohio's public funding scheme unconstitutional, but many questions remain as to why it is unconstitutional and what will be done to correct it. Part IV will analyze the *DeRolph* decisions and address the unanswered questions and the unresolved problems created as a result of those decisions. As noted in the above paragraph, this section will consider the question of whether education is a fundamental right in Ohio and how that would affect the result of *DeRolph*. Part IV will also consider the possibility of voters amending the constitution by their own initiative rather than relying on the legislature and court to do so. Thus far, both have been reluctant to solve the *DeRolph* problem. Part V will conclude that the public school funding issue is not only controversial, but also is extremely important. Unresolved issues such as the fundamentality of the right of education, whether the equal protection clause applies to such issues, and most importantly, what will be done to rectify this unconstitutional system, still remain. Though not all of these questions can or will be resolved easily, an immediate solution is needed to make the system constitutional. The time has come for the voters of this state to take control and get the job done since the legislature seems unwilling to do so and the court seems unwilling or unable to force the legislature to correct this problem.

II. BACKGROUND

State and federal courts have decided many cases that concern education and educational funding. A few are particularly relevant to the issues raised by the *DeRolph* litigation.

A. *U.S. Supreme Court:* San Antonio Independent School District v. Rodriguez

In *Rodriguez*,[15] the United States Supreme Court heard a class action challenge brought against the State of Texas for allegedly violating the Fourteenth Amendment's Equal Protection Clause[16] by basing its public school funding system on local property taxes.[17] The United States Supreme Court reversed the decision of the district court and held that the system was not unconstitutional.[18]

For nearly one hundred years, Texas's Constitution and legislative acts had called for financing the public school systems through both state and local funds, which were raised by levying taxes on the property in that

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

16 U.S. CONST. amend. XIV, § 1.

17 *Rodriguez*, 411 U.S. at 4-5.

18 *Id.* at 6.

locality.[19] The Court noted that the recent advent of industrialization and urbanization was responsible for "increasingly notable differences in levels of local expenditure for education."[20] The disparity was illustrated by comparing the most affluent district in the state, Alamo Heights, to the least affluent, Edgewood Independent School District.[21] Edgewood was able to contribute $26 to each child's education while Alamo Heights was able to contribute $333 per child, over ten times more.[22] The district court had held that "wealth [was] a 'suspect' classification and that education [was] a 'fundamental' interest," which required the state to show a compelling interest for that particular system for it to be upheld, which it could not do.[23] The Supreme Court set out to determine whether the funding system disadvantaged a "suspect class" or infringed on a "fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny."[24] The Court said that if neither a suspect class nor fundamental right were involved, the state need only prove that the system "rationally furthers some legitimate, articulated state purpose" to be constitutional.[25]

The Court found that the wealth discrimination involved in this case was not sufficient to invoke a suspect classification.[26] The lower court had found such a classification under a much too simplistic approach; the Court noted that other issues should have been addressed such as whether the class of "'poor' [can] be identified or defined in customary equal protection terms, and whether the relative—rather than absolute—nature of the asserted deprivation is of significant consequence."[27] The plaintiffs offered no proof that it disadvantaged "any class fairly definable as indigent, or as composed of persons whose incomes are beneath any designated poverty level."[28] Additionally, the plaintiffs did not argue that the system caused "absolute deprivation" of education, but rather only argued that the quality of education was less.[29] For these two reasons, the Court found that no suspect class could be identified in this situation.[30] The Court said that the only common factor within the purported suspect

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19 *Id.* at 6-7.

20 *Id.* at 8.

21 *Id.* at 11.

22 *Id.* at 12-13.

23 *Id.* at 16.

24 *Id.* at 17.

25 *Id.*

26 *Id.* at 18.

27 *Id.* at 19.

28 *Id.* at 22-23.

29 *Id.* at 23.

30 *Id.* at 28.

class was "residence in districts" that had lower property tax rates, which alone was not enough to support a finding of a suspect class.[31]

Even if wealth discrimination was involved (which the Court found was not), strict scrutiny is not invoked unless a fundamental right is alleged to have been infringed.[32] Thus, the plaintiffs alleged that their fundamental right to education was being infringed by this system, and therefore, strict scrutiny was required.[33] In determining whether education is a fundamental right under the Constitution, the Court recognized the great importance of education but said that the "importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause"[34] because, as noted by Justice Harlan in another case, "'[v]irtually every state statute affects important rights,'" which would qualify them as fundamental and subject to strict scrutiny.[35] Instead of the societal importance of a right, the key to finding the existence of a fundamental right is assessing whether such right is guaranteed "explicitly or implicitly" by the Constitution.[36] Finding that the Constitution, obviously, does not explicitly guarantee a right to education or implicitly guarantee it, the Court concluded that education is not a fundamental right under the Federal Constitution.[37]

The Supreme Court concluded that because neither a suspect class based on wealth discrimination nor a fundamental right were involved in this case, strict scrutiny did not apply.[38] Thus, the Court addressed the appropriateness of the lesser standard of rational basis review.[39] The Court noted that courts usually defer to the state legislatures in taxing matters, and because this case was really just a challenge to a state imposed taxing scheme, the Court deferred to Texas's judgment in this area.[40] Applying rational basis review, the Court found that the system was not irrational and upheld Texas's funding scheme.[41]

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31 *Id.*

32 *See id.* at 29.

33 *See id.*

34 *Id.* at 29-30.

35 *Id.* at 31 (quoting Shapiro v. Thompson, 394 U.S. 618, 661 (1969) (Harlan, J., dissenting)).

36 *Id.* at 33-34.

37 *See id.* at 35.

38 *See id.* at 40.

39 *See id.*

40 *See id.*

41 *See id.* at 54-55. "[W]e cannot say that such disparities are the product of a system that is so irrational as to be invidiously discriminatory." *Id.* at 55.

B. *Ohio Supreme Court*

1. Miller v. Korns

The Ohio Supreme Court heard a challenge to several state statutes that provided for certain levels of taxation in order to fund education.[42] The court addressed each of the plaintiff's allegations in turn. The court addressed the contention that taking money from one district and using it in another unrelated district is not a legitimate use of taxation.[43] The court cited Section 2, Article VI of the Ohio Constitution, which gives the legislature the power to tax so as to provide a "'thorough and efficient system of common schools throughout the state.'"[44] The court held that it was reasonable and appropriate for the state to distribute money raised in more affluent areas in the state to less affluent areas in order to achieve the mandated "thorough and efficient system of common schools."[45] Perhaps more importantly, the court defined "thorough" and "efficient."[46] The court stated that "[a] thorough system could not mean one in which part or any number of the school districts of the state were starved for funds" and that "[a]n efficient system could not mean one in which part or any number of the school districts of the state lacked teachers, buildings, or equipment."[47]

Thus, this decision, most importantly, provided the meaning and standard associated with the constitutionally mandated "thorough and efficient system of common schools."[48] Additionally, this case authorized the practice of redistributing tax revenues to areas of the state that are in greater need of funds.[49] Both of these holdings will be influential in future cases.

2. Board of Education v. Walter

The issue of school funding was brought before the Supreme Court of Ohio once again in 1979.[50] This challenge to Ohio's public school funding system concerned the "'equal yield for equal effort' formula," which was

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42 *See* Miller v. Korns, 140 N.E. 773, 774-75 (Ohio 1923).

43 *See id.* at 776.

44 *Id.* "'The General Assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state.'" *Id.* (quoting OHIO CONST. art. VI, § 2).

45 *Id.*

46 *Id.*

47 *Id.*

48 *See id.*

49 *Id.* at 777-78.

50 Bd. of Educ. v. Walter, 390 N.E.2d 813 (Ohio 1979).

imposed by Ohio Revised Code section 3317.022 at that time.[51] Essentially, the challenged provision required school districts to levy at least 20 mills to participate in the program and rewarded those districts that raised more than 20 mills, up to 30 mills.[52] Those districts raising the requisite 20 mills received guaranteed state aid of $960 per student, but the districts levying more than 20 mills received additional state bonus aid up to $1,380 per student.[53]

The plaintiffs challenged this statutory scheme under Ohio's Equal Protection and Benefit Clause.[54] The Supreme Court of Ohio asserted that when addressing an equal protection claim, the "test is that unequal treatment of classes of persons by a state is valid only if the state can show that a rational basis exists for the inequality, unless the discrimination impairs the exercise of a fundamental right or establishes a suspect classification."[55] Thus, the court stated that the system would be held constitutional if there was a reasonable basis for the legislature to enact this law.[56] However, if the law infringed on a fundamental right, the statute would have to pass the much higher standard of review imposed under strict scrutiny: the statute must be found to serve a "compelling state interest."[57]

In order to determine whether to apply rational basis or strict scrutiny review, the court first had to decide whether a fundamental interest was involved.[58] The court cited the fundamentality test set out by the U.S. Supreme Court in *Rodriguez*[59] but quickly rejected it as unhelpful to determining the fundamentality of a right under Ohio's constitution.[60] The court rejected the U.S. Supreme Court test because it felt that, under that test, too many rights would be found to be guaranteed by Ohio's constitution, either explicitly or implicitly, thus making them

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51 *Id.* at 816.

52 *Id.*

53 *See id.* at 816-817.

54 *Id.* at 817.

55 *Id.* at 818.

56 *See id.*

57 *Id.*

58 *Id.*

59 *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973). "[T]he key to discovering whether education is 'fundamental' is not to be found in comparisons of the relative societal significance of education . . . . Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution." *Id.* at 33-34.

60 *See Walter*, 390 N.E.2d at 818.

"fundamental" even though they may not be so fundamental.[61] After rejecting the proposition that education is a "fundamental" right in Ohio (and not discussing what *did* make a right fundamental in Ohio), the court refused to apply strict scrutiny and resorted to applying rational basis scrutiny.[62]

Under this test, a statute that treats classes of people differently is "presumed constitutional and can be declared invalid only when its unconstitutionality is shown beyond a reasonable doubt."[63] Though the defendants acknowledged that there was great disparity caused by property wealth differences of the individual districts, they claimed that there was a rational basis for the system causing these disparities: "local control."[64] The court agreed that local control was a rational basis for this system since local control had long been an important aspect of Ohio's history of funding public education.[65] Thus, the court found that even though great funding disparities arose between school districts in the state, the disparity was not a result of a system that was "so irrational as to be an unconstitutional violation of the Equal Protection and Benefit Clause."[66]

The court also addressed whether it has the power to review this type of legislation to determine its constitutionality under the Ohio Constitution.[67] The court responded authoritatively that judicial review has been an important function of the judiciary for a long time and that reviewing legislation so as to determine its compliance or noncompliance with the governing constitution is the exact role of the court.[68] Disposing of this issue, the court moved on to the other important issue raised by the plaintiffs.[69]

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[61] *Id.* The court noted that the Oregon Supreme Court had held similarly because if the U.S. Supreme Court test were applied literally, "it would, for example, make the right to sell and serve liquor by the drink a fundamental interest entitled to 'strict scrutiny' because it is contained in the Oregon State Constitution." *Id.* at n.3 (citing Olsen v. State *ex rel* Johnson, 554 P.2d 139, 144-45 (Or. 1976)). The court also cited to a New Jersey Supreme Court decision that also rejected the U.S. Supreme Court test of fundamentality because as it noted, the "'right to acquire and hold property is guaranteed in the Federal and State Constitutions, and surely that right is not a likely candidate for such preferred treatment.'" *Id.* at 819 (quoting Robinson v. Cahill, 303 A.2d 273, 282 (N.J. 1973)).

[62] *See id.*

[63] *Id.*

[64] *Id.* at 819-20.

[65] *See id.* at 820-22.

[66] *Id.* at 822.

[67] *See id.* at 823.

[68] *See id.*

[69] *See id.*

The plaintiffs alleged that the funding system also violated the "Thorough and Efficient" Clause of the Ohio Constitution.[70] The court noted that the court of appeals was correct in deferring to the legislature's enactments under this particular constitutional provision because that provision itself gives great deference to the General Assembly to enact legislation in accordance with the constitutional mandate.[71] The legislature's discretion is not absolute, however, because the legislation still must cause the implementation of a "thorough and efficient" system of schools.[72] However, in this case, the court deferred to the legislature and its statute because there was no evidence that students had been deprived of a "thorough and efficient" system of education.[73] The effects of this case will be seen in the *DeRolph* litigation.

III. RECENT DEVELOPMENTS: *DEROLPH* AND THE ADVENT OF CHANGE AND CONFUSION

As the background section illustrates, typically, public school funding challenges brought on equal protection grounds, under both federal and state constitutions, were unsuccessful because education was not viewed as a fundamental right nor were any suspect classifications involved (one of which is required to qualify the challenge for strict scrutiny review—a much harder level of scrutiny to pass constitutional muster).[74] Additionally, previous challenges to statutes based on noncompliance with the "thorough and efficient" standard seem to have been unsuccessful as well since the court will defer substantially to the legislature in determining the best way to construct such a "thorough and efficient" system of schools.[75] But then came *DeRolph*, declaring the funding situation unconstitutional, not on equal protection grounds, but under the

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[70] *See id.*; *see also* OHIO CONST. art. VI, § 2; *supra* notes 44 & 47 and accompanying text.

[71] *Walter*, 390 N.E.2d at 824.

[72] *Id.* at 824. The court noted that clearly some situations would not effect implementation of the "thorough and efficient system." *Id.* at 825. A system in which a "district was receiving so little local and state revenue that the students were effectively being deprived of educational opportunity" would not meet this thorough and efficient standard and so deference to the statute enacted by the legislature would not be warranted. *Id.*; *see also* Miller v. Korns, 140 N.E. 773, 776 (Ohio 1923); *supra* note 47 and accompanying text.

[73] *Walters*, 390 N.E.2d at 825-26. The Ohio Supreme Court, relying upon *San Antonio Indep. School Dist. v. Rodriguez*, seems to imply that a deprivation must be "'absolute'" in order for the statute to be unconstitutional. *Id*. at n.14 (quoting 411 U.S. 1, 25 (1972)); *see also supra* notes 27-29 and accompanying text.

[74] *See* discussion *supra* Part II.

[75] *See* discussion *supra* Part II.B.1-2.

"thorough and efficient" standard.[76] However, arriving at this ultimate determination was a long, difficult process.

A. DeRolph I

The Supreme Court of Ohio first granted review of the *DeRolph* case after the Court of Common Pleas of Perry County found Ohio's educational funding scheme to be a violation of the "thorough and efficient" clause of Ohio's constitution[77] and after Ohio's Fifth District Court of Appeals reversed and found no violation of that provision, relying upon *Walter* and its reasoning.[78] The plaintiff school districts filed suit, alleging that Ohio's system of school funding was unconstitutional because of wealth-based funding disparities between school districts, which were created as a result of property taxes levied in those districts.[79] The School Foundation Program[80] provided the statutory basis for the funding scheme in question.[81] That statute stipulated that school districts would receive money from two main sources: state aid and local aid, consisting mainly of revenue earned from "locally voted school district property tax levies."[82] School districts would receive an adjusted per student formula amount for each student in the district from the state[83] if they qualified for such state aid by raising at least 20 mills of local property tax.[84] The amount of state aid that a school district received was subject to multiple complex set-offs and additional appropriations, but the funding scheme made no adjustment "for the relative wealth of the receiving district" or for districts that most needed additional funds.[85] Other statutory provisions were challenged as

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[76] *See DeRolph I*, 677 N.E.2d 733, 747 (Ohio 1997).

[77] *Id*; *see also supra* notes 44 & 47 and accompanying text.

[78] *DeRolph I*, 677 N.E.2d at 735; *see also supra* notes 70-73 and accompanying text.

[79] *See DeRolph I*, 677 N.E.2d at 733.

[80] *See* OHIO REV. CODE ANN. § 3317 (amended 1997, 1998, 1999, 2000, 2001, 2002, 2003).

[81] *See DeRolph I*, 677 N.E.2d at 737-38.

[82] *Id.* at 738.

[83] The formula amount set by the state, though, was not necessarily based on what it really cost to provide a student with an education. *Id.* Rather than determining this figure based on needs of the schools and students, one expert noted that this figure was essentially a "budgetary residual, which is determined as a result of working backwards through the state aid formula after the legislature determines the total dollars to be allocated to primary and secondary education in each biennial budget." *Id.* Once this "formula" amount is calculated, it is adjusted by a "'cost of doing business' factor" which is assumed to be less in rural districts than in urban ones. *Id.*

[84] *Id.*

[85] *Id.* at 738-39. OHIO REV. CODE section 3317.023(B) allowed districts with families receiving Aid to Dependent Children (ADC) additional funding, but it capped the (*continued*)

well.[86] The plaintiffs contended that all of these statutes failed to provide the constitutionally required "thorough and efficient system of public schools," and the Supreme Court of Ohio agreed.[87]

The court analyzed the constitutional provision calling for such "thorough and efficient" schools[88] and determined that it requires the state to provide for and to fund the public education system.[89] Utilizing the definition of "thorough and efficient" set out in *Miller* and reaffirmed in *Walter*,[90] the court found that the public school funding system in Ohio could not meet this standard.[91] The court noted that these statutes essentially had imposed the "majority of responsibility upon local school districts" to fund public education, instead of imposing the majority of this responsibility on the state, where it belongs.[92] The court said that it does not strive to accomplish perfect equality in funding school districts, but it did say that the system under attack in this case did not even accomplish the lesser standard of "thorough and efficient."[93] The overreliance on local

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amount of distributions once the concentration of such families was 20%. *Id.* at 739. Thus, the districts with a very high concentration of such families were only allowed to receive additional funding up to the 20% concentration level, and then had to fund the rest of the expenses through their own local funds, which they probably lacked; otherwise their concentration of ADC families would not have been so high. *Id.*

86 *Id.* at 739-40. The plaintiffs challenged the following provisions specifically: section 133.301, stipulating "'spending reserve' loans"; section 3313.483 requiring, districts to take loans from commercial vendors if the district could not apply a spending reserve loan; section 3313.4810, mandating state supervision of districts taking such loans and disallowing sovereignty of actions and decisions by these districts while under supervision; and the Classroom Facilities Act, providing aid for capital improvements to public schools. *See id.*; *see also* OHIO REV. CODE ANN. § 133.301 (repealed 1997); OHIO REV. CODE ANN. § 3313.483 (West 2003) (amended 1992, 1996, 2000); OHIO REV. CODE ANN. § 3313.4810 (West 2003) (amended 1992); OHIO REV. CODE ANN. § 3318 (West 2003) (amended 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003).

87 *DeRolph I*, 677 N.E.2d at 740.

88 *See* OHIO CONST. art. VI, § 2; *see also supra* note 44.

89 *DeRolph I*, 677 N.E.2d at 740.

90 *See supra* notes 47 and 70-73 and accompanying text.

91 *See DeRolph I*, 677 N.E.2d at 741, 745. A survey of Ohio's public school buildings ordered by the state legislature in 1989 revealed disturbing findings: structurally unsound and even unsafe school buildings and environments, lack of accessibility to everyday school supplies, non-compliance with state law requiring no more than 25 students per teacher because of lack of funds, poor curricula offerings, poor technology, and lower proficiency test passage rates. *Id.* at 742-45.

92 *Id.* at 745.

93 *See id.* at 745-46: *see also supra* note 72.

property taxes was particularly unfair.[94] The poor school districts did not merely fail to pass school levies; the poor districts "simply [could not] raise as much money even with identical tax effort."[95] Since the statutory scheme then in effect allowed for such disparities and did not call for the state to exercise its complete duty, the statutes were held unconstitutional under Section 2, Article VI of the Ohio Constitution.[96] With this holding, the court ordered the legislature to enact legislation that would bring the system into constitutional compliance and remanded the case to the original trial court with directions for that court to retain jurisdiction to determine compliance with the Ohio Supreme Court's decision.[97]

Though the majority of the court found the system unconstitutional under the general constitutional provision dealing with schools,[98] a concurring justice took a slightly different view.[99] In his concurrence, Justice Douglas proposed that education is a fundamental right in Ohio, even though *Walter* had already decided otherwise.[100] He said that this court did, in fact, apply the *Rodriquez* test for fundamentality—whether the right was explicitly or implicitly guaranteed by the constitution—and that since education was explicitly addressed in Ohio's constitution, it was fundamental and, therefore, the Equal Protection Clause of Ohio's constitution was also implicated.[101] In order to survive, the statutes must pass strict scrutiny, which, in his opinion, they could not do.[102] Thus, not only was the system unconstitutional under the Thorough and Efficient Clause,[103] it was also unconstitutional under equal protection principles, according to Justice Douglas.[104]

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94 *See DeRolph I*, 677 N.E.2d at 746.

95 *Id.* The court provided the example of the Dawson-Bryant School District and Beachwood School District to illustrate the great disparity in ability to raise revenue: total assessed property valuation was $28,882,580 and $376,229,512 in 1991 in these districts, respectively. *Id.*

96 *See id.* at 747. Four aspects of the system were particularly troublesome: 1) the School Foundation Program; 2) emphasis on the local property tax; 3) requiring borrowing by school districts through the loan programs; and 4) lack of enough funding in the General Assembly's biennium budget for the building and upkeep of public school buildings. *Id.*

97 *Id.*

98 *Id.*

99 *See id.* at 748 (Douglas, J., concurring).

100 *Id.* at 776.

101 *See id.*

102 *See id.* at 776-77.

103 *Id.* at 776.

104 *See id.* at 777.

Chief Justice Moyer, on the other hand, did not agree with the court's decision that the system was unconstitutional.[105] Though he acknowledged the importance of the case, he thought that the court should not have heard this case because the question as to what is "thorough and efficient" is a quality question, which is a political question to be determined only by the legislature, not the court.[106] Placing this matter aside, the Chief Justice went on to say that "thorough and efficient" does not mean equal and that there was no proof of a constitutional violation in this case.[107]

DeRolph I was the beginning of a long path to be taken by the Supreme Court of Ohio. Though, arguably, something good came out of this decision—finding the system causing such horrible disparities to be unconstitutional—one can see the division amongst the court. The issues raised in the concurrence and dissent, discussed above, are recurring themes that may have strong implications for the future. These implications and others will be discussed in section IV of this Comment.

B. DeRolph II

Three years later and after another review by the Perry County Court of Common Pleas, the case returned to the Ohio Supreme Court.[108] *DeRolph I* ordered the General Assembly to enact legislation that would bring Ohio's public school funding system into constitutional compliance and remanded the issue for determination to the Perry County Court of Common Pleas.[109] Upon rehearing, Judge Lewis found the system unconstitutional again, as the state had not completely overhauled the system as it had been directed to do.[110] The state appealed the Common Pleas Court's decision to the Supreme Court of Ohio.[111]

Again, the court applied the standard promulgated in *Miller*[112] in determining whether the legislation was constitutionally acceptable.[113] The court reiterated that it did have the right to determine the constitutionality of the proffered legislation and added that the court cannot just tell the General Assembly what legislation to enact, as some would have liked to

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105 *See id.* at 782 (Moyer, C, J., dissenting).

106 *Id.* at 783. The doctrine of separation of powers precludes the judiciary from hearing cases involving political questions. *Id.* at 783.

107 *See id.* at 787.

108 *DeRolph II*, 728 N.E.2d 993 (Ohio 2000).

109 *Id.* at 997.

110 *Id.* at 993; *see also* DeRolph v. State, 712 N.E.2d 125 (Ohio Ct. C.P., Perry County 1999).

111 *See DeRolph II*, 728 N.E.2d at 993.

112 *See supra* note 47 and accompanying text.

113 *DeRolph II*, 728 N.E.2d at 997-98.

have it.[114] Finally, the court reviewed the progress of the legislature since *DeRolph I*.

The legislature made some changes to the funding scheme, but overall, the system remained essentially unchanged.[115] Though it was comforting to know that the court-ordered mandate for systemic overhaul led to a recalculation of the cost of an adequate education, which had not been done since 1973-74 and was obviously badly needed, the court found that the method used to determine this base cost was still unacceptable.[116]

The court spent little time on the issue of "budgetary residual," or funding "as a 'residual after other mandated programs' were funded."[117] Although suggestions had been made that this residual funding system was still in effect, the court, unenthusiastically, gave the state the "benefit of the doubt" that the program had been abolished and corrected by newly enacted laws.[118]

The court addressed the issue of the underfunding of the Classroom Facilities Act, which it had also declared unconstitutional in *DeRolph I*.[119] The General Assembly, in fact, drafted and passed several new bills designed to impute money into this fund, but the court noted that more progress was needed and that the proffered solutions were not sufficient.[120]

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[114] *See id.* at 1003.

[115] *See id.*

[116] *See id.* at 1004-08. The General Assembly had hired an expert, Dr. John Augenblick, to determine such cost of an education, but subsequently materially altered his method ("Augenblick method"), which "lowered the basic expenditure amount by 'several hundred dollars.'" *Id.* at 1006-07 (quoting Dr. Stephen P. Klein, an independent research consultant). Though the legislature undeniably acted on the court's mandate from *DeRolph I*, the court found it hard to "understand how the state can justify its position that it is funding a thorough and efficient education . . . when it is currently funding below the level that the General Assembly deemed to be the base amount for an adequate education." *Id.* at 1007.

[117] *Id.* at 1008 (quoting *DeRolph I*, 677 N.E.2d 733, 780 (Ohio 1997)).

[118] *Id.* at 1008. The General Assembly promulgated, and Governor Taft signed, two bills, H.B. 282 and H.B. 283, that were to rectify the budgetary residual problem of the past. *See id.*; *see also* H.B. 282, 123d Gen. Assem., Reg. Sess. (Ohio 1999); H.B. 283, 123d Gen. Assem., Reg. Sess. (Ohio 1999).

[119] *See DeRolph II*, 728 N.E.2d at 1008; *supra* note 86 and accompanying text; *see also supra* note 93 and accompanying text.

[120] *See DeRolph II*, 728 N.E.2d at 1009-12. The legislature passed Am. Sub. S.B. No. 102, which created the Ohio School Facilities Commission, which is an agency with oversight powers. *Id.* at 1009. It also created an emergency repair program and a program designed to repair buildings in the state's largest and poorest districts. *Id.* The General Assembly also passed Sub. H.B. No. 412, requiring districts to establish a fund for building maintenance and capital and to deposit a percentage of funds that otherwise would have

(*continued*)

Deplorable conditions still existed in schools across the state, even a few years after the legislature enacted these corrective laws.[121] The court recognized that more recent proposals, the effects of which had not yet been seen, would provide more money to this fund, but the court concluded that the problem was one of immediacy; therefore, more work was needed before the funding scheme would pass constitutional muster.[122] Thus, the funding system was still unconstitutional as to insufficiency of funds which were to serve the purpose of creating "'safe and healthy learning' environments" in Ohio's schools.[123]

Next, the court addressed the borrowing scheme, which was also declared unconstitutional by *DeRolph I*.[124] The General Assembly tried to eliminate the forced borrowing aspect of the funding scheme, but it seemed to the court that the scheme really remained in effect to a decent extent, just under another name.[125] Again, the court found that the legislature had not properly corrected the problem and ordered the legislature to pay more attention to this aspect of the funding scheme.[126]

Finally, the court addressed the very important issue of overreliance on local property taxes.[127] In *DeRolph I*, the court stated that this was one of the most egregious aspects of the school funding system that it had declared unconstitutional.[128] Upon examination, the court found that the *over*reliance on property taxes remained "wholly unchanged" and that the

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gone to the state into this fund. *See id*. at 1009; s*ee also* Am. Sub. S.B. 102, 122d Gen. Assem., Reg. Sess. (Ohio 1997); Sub. H.B. 412, 122d Gen. Assem., Reg. Sess. (Ohio 1997).

[121] *See DeRolph II*, 728 N.E.2d at 1009-10.

[122] *See id.* at 1011. Am. Sub. .H.B. No. 850 designated $505 million to school facilities, while Am. Sub. H.B. No. 283 infused $325.7 million from state budget surplus. *Id.* When combined with other initiatives, Am. Sub. S.B. No. 102, Am. Sub. H.B. No. 215, and Am. Sub. H.B. No. 650, it would create $1.6 billion. *Id.* The Governor proposed a plan called "Rebuilding Ohio's Schools: A 12-Year Commitment," providing the fund with $23.1 billion between fiscal years 2001 and 2012. *Id.* However, the court pointed out that funds may not be appropriated for more than a two year period under Ohio's Constitution and thus the certainty of all of these proposed funds is only certain for two years at a time. *See id.* at 1012; s*ee also* Am. Sub. H.B 850, 122d Gen. Assem., Reg. Sess. (Ohio 1999); Am. Sub. H.B. 283, 123d Gen. Assem., Reg. Sess. (Ohio 1999); Am. Sub. S.B. 102, 122d Gen. Assem., Reg. Sess. (Ohio 1997); Am. Sub. H.B. 215, 122d Gen. Assem., Reg. Sess. (Ohio 1997); Am. Sub. H.B. 650, 122d Gen. Assem., Reg. Sess. (Ohio 1998).

[123] *DeRolph* II, 728 N.E.2d. at 1012 (quoting *DeRolph I*, 677 N.E.2d 733, 744 (Ohio 1997)).

[124] *See supra* note 86 and accompanying text.

[125] *See DeRolph II*, 728 N.E.2d at 1012-13.

[126] *See id.* at 1013.

[127] *Id.* at 1013-15.

[128] *See id.* at 1013.

"vast disparities" resultant from this system of funding still remained.[129] In fact, the court discovered that new legislation actually would increase the reliance on local property taxes and because it was decided in *DeRolph I* that a funding system that "relies too heavily on local property taxes . . . would not satisfy the Thorough and Efficient Clause, . . . a revised funding scheme that increases reliance on local property taxes" would also not meet this standard.[130] Again, the court said that the General Assembly needed to do more to correct this problem and that it should explore every option so as to correct the problem of even greater disparities between the school districts.[131]

Additionally, the court recognized the importance of both school district accountability and academic accountability and applauded the legislature for promulgating legislation to ensure that both existed.[132] The court, however, voiced concern about the difficulty in achieving higher academic standards and the required fiscal accountability when the funding system itself does not even provide adequate funding.[133] The court essentially said that accountability cannot, and should not, be expected if funding is insufficient.[134]

Ultimately, the court ruled that there was still not constitutional compliance with the Thorough and Efficient Clause, and it retained jurisdiction over the matter for roughly one year, when it would consider legislative action again.[135] Therefore, the court essentially granted the General Assembly a one year extension to devise a constitutional funding system.

Just as *DeRolph I* contained several different views, so too did this opinion. Again, Justice Douglas concurred and focused on the continuation of the problematic funding scheme that relied too much on local property taxes.[136] Justice Pfeifer concurred as well and also noted

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[129] *Id.* The court used an example to illustrate its point: Toledo Public Schools faced a deficit and placed a levy on the ballot to increase local property taxes in order to raise the needed funds, but the taxpayers rejected the levy; now Toledo must close schools and lay-off teachers. *Id.* at 1014.

[130] *Id.* at 1014 (citing *DeRolph I*, 677 N.E.2d 733, 747 (Ohio 1997)).

[131] *See id.* at 1015.

[132] *Id.* at 1017-18. H.B. 412 dealt with fiscal accountability of districts and S.B. 55 dealt with academic accountability. *Id.* at 1017. Each provided statutory standards and requirements that would effect implementation of such accountability plans. *Id.* at 1017-18; *see also* H.B. 412, 122d Gen. Assem., Reg. Sess. (Ohio 1997); S.B. 55, 122d Gen. Assem., Reg. Sess. (Ohio 1997).

[133] *DeRolph II*, 728 N.E.2d at 1018.

[134] *See id.*

[135] *Id.* at 1022.

[136] *Id.* at 1022-26 (Douglas, J., concurring).

that the problem of *over*reliance on local property taxes was monumental.[137]

Once again, Chief Justice Moyer dissented on separation of powers grounds, arguing that the judiciary is not able to decide the kinds of issues that this case presented.[138] However, he criticized the majority for giving the legislative and executive branches "vague and generalized" directions as to how to improve the system, by noting that "the majority had failed to provide the General Assembly with sufficient guidance."[139] This is seemingly self-contradictory of his position that the court should not have ever heard this case in the first place. But perhaps he was attempting to reiterate the incapacity of the court to tell the legislature what to do, which lends credence to his argument that this is a political question over which the court has no authority. Without explaining his inconsistent statements, he went on to write that the constitutionality of the funding system needed to be based on its application to the entire public school system and not just the individual school districts.[140] Chief Justice Moyer said that the Thorough and Efficient Clause does not mandate a state-funded public education system, as the majority had interpreted it to require, because no language in Ohio's constitution precludes a system that makes local districts more responsible than the state.[141] Therefore, he found nothing particularly wrong with reliance on local property taxes and did not believe there was overreliance on such taxes.[142] Though disparities arise between school districts because of the reliance or overreliance on property taxes, the Chief Justice said that the Ohio Constitution does not require equality of educational opportunity, but instead only requires adequacy of such opportunity.[143] It seems as though he interpreted the plaintiffs' claim as one of inequality created by the heavy reliance on local property taxes and not one of inadequacy, thus leaving them without a valid claim under Ohio's constitution and governing statutes. Lastly, the Chief Justice once again concluded that the problem with the decision was really one of jurisdiction, or more specifically, the lack thereof.[144]

Justice Cook also voiced his concern about the holding of *DeRolph II* in his own dissenting opinion.[145] He argued that both *DeRolph* decisions were a violation of separation of powers because the court may only go so

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137 *See id.* at 1026-29 (Pfeifer, J., concurring).

138 *See id.* at 1029 (Moyer, C.J., dissenting).

139 *Id.* at 1030.

140 *Id.* at 1031.

141 *Id.*

142 *See id.* at 1031-32.

143 *See id.*

144 *See id.* at 1035-36.

145 *See id.* at 1036-37 (Cook, J., dissenting).

far as to declare legislation void; it may not impose a remedy.[146] As both dissents illustrate, the question of separation of powers that arose in *DeRolph I* was still alive and well in this later decision.

Once again, the majority found that the funding system was still unconstitutional, largely due to the overreliance on local property taxes as a method of raising revenue.[147] The court granted the legislature one year to work out the system's problems.[148] However, the decision was not unanimous because the dissenters still questioned the possibility of separation of powers violations.[149]

C. DeRolph III: *Is the Third Time a Charm?*

As stipulated in *DeRolph II*, the Supreme Court of Ohio considered the public school funding issue again just one year later.[150] One interesting note about this case is that it was authored by the Chief Justice, who in the past two *DeRolph* decisions was a strong dissenter.[151] The Chief Justice recognized the countless differing views of the justices of the court and conceded that all were important, but he found the need to bring this case to a close to be more important than the personal opinions of each individual justice.[152] In what seems to be almost a disclaimer of the opinion to follow, Chief Justice Moyer stated that "[n]one of us is completely comfortable with the decision we announce in this opinion."[153] Thus, this decision called for a truce between the justices: it essentially asked them to put personal thoughts aside, to at least agree that the schisms created by this case were not helpful to anyone involved in the case, and to withdraw the matter from the court.

The opinion scrutinized the legislative efforts made in response to the *DeRolph II* decision.[154] The formula used to calculate the base cost of an adequate education, which had been altered since *DeRolph II*, led to an increased per student cost of an adequate education, was to be adjusted by

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146 *See id.* at 1036.

147 *See id.* at 1022.

148 *Id.*

149 *See supra* notes 138-146 and accompanying text.

150 *See DeRolph III*, 754 N.E.2d 1184 (Ohio 2001).

151 *Id.* at 1188; *see also DeRolph I*, 677 N.E.2d 733, 782 (Ohio 1997) (Moyer, J., dissenting); *DeRolph II*, 728 N.E.2d at 1029 (Moyer, J., dissenting).

152 *DeRolph III*, 754 N.E.2d at 1189-90. Since the division and uncertainty amongst the justices had served no good purpose in the past, this decision "created the consensus that should terminate the role of this court in the dispute." *Id*. at 1190.

153 *Id.* at 1189 (noting that Thomas Jefferson had once said that "the greater good requires us to recognize 'the necessity of sacrificing our opinions sometimes to the opinions of others for the sake of harmony'").

154 *See id.* at 1191-99.

a designated percentage each year for increased costs, and took effect immediately as opposed to being phased in over a period of time.[155] One of the biggest concerns with the system of public funding that was declared unconstitutional by the court in the previous two decisions was its reliance on local property taxes as the major source of funding schools in that district.[156] This type of funding system leads to great funding disparities between the districts, and thus the court held in the previous decisions that property taxes could no longer be the primary means of providing schools with money.[157] The legislature adopted several supplements to reduce the burden of funding an adequate education on struggling, local districts: "'gap aid' to account for districts that are not able to fund their local share of the base cost amount"[158] and "'parity aid,'" whose purpose is to give poorer districts more funds so that those districts have the opportunity to use funds for discretionary purposes just as wealthy districts do.[159] The majority found that those attempts were sufficient to ensure that property taxes would not be the primary means of funding schools.[160]

Improving the condition of the physical school facilities was also a major concern in the previous *DeRolph* decisions and one that the court specifically told the legislature to address.[161] The majority in the present opinion found that the legislature had taken important steps to increase funding for facility improvements and that these provisions were sufficient to ensure state funding for maintaining and improving the physical conditions of schools in the state.[162]

The legislature's adjustments and new programs were largely interpreted by the majority as complying with the constitutional standard of

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155 *Id.* at 1191; *see also* H.B. 94, 124th Gen. Assem., Reg. Sess. (Ohio 2001).

156 *See* discussion *supra* Parts III.A.-B.

157 *DeRolph III*, 754 N.E.2d at 1198; *see also DeRolph I*, 677 N.E.2d 733, 747 (Ohio 1997); *DeRolph II*, 728 N.E.2d 993, 1013 (Ohio 2000).

158 *DeRolph III*, 754 N.E.2d at 1192. This program ensures more state funding to districts that cannot keep up, in terms of raising taxes, with the increased costs of an adequate education. *Id.*; *see also* H.B. 94, 124th Gen. Assem., Reg. Sess. (Ohio 2001).

159 *DeRolph III*, 754 N.E.2d at 1192-93. This program provides funds over and above the base cost of an adequate education to those poorer districts that may not otherwise be able to engage in any discretionary funding. *Id.*; *see also* H.B. 94, 124th Gen. Assem., Reg. Sess. (Ohio 2001).

160 *DeRolph III*, 754 N.E.2d at 1199. The court thought that the gap aid and parity aid programs would effectively make up for the disparities that result from property taxes. *See id.*; *see also supra* notes 158-59 and accompanying text; H.B. 94, 124th Gen. Assem., Reg. Sess. (Ohio 2001).

161 *See* discussion *supra* Parts III.A.-B.

162 *See DeRolph III*, 754 N.E.2d at 1193-95.

"thorough and efficient."[163] However, the majority noted that a few changes were still needed to ensure constitutionality and explicitly told the legislature what changes it should make.[164] The court then ordered the legislature to "implement the changes described above" and dismissed jurisdiction over the case because the majority had faith that the legislature would implement those changes, thus disposing of any need for the court to retain jurisdiction.[165]

DeRolph III seems to have turned its back on the idea that the court is constrained from telling the legislature what legislation to enact because of the separation of powers doctrine.[166] Most interesting of all is the fact that the justice previously most concerned with separation of powers issues, Chief Justice Moyer, led the *DeRolph III* majority in ordering the court's remedy.[167] The majority of the court, including Chief Justice Moyer, easily discarded previous concerns with violating separation of powers and said that in the interests of bringing the case to an end, it would deliberately overstep its proper bounds and impose a remedy.[168]

In her dissenting opinion, Justice Resnick criticized the majority's approach to this case.[169] She noted that in the past two *DeRolph* decisions the court, as a whole, agreed that the legislature, and not the court, was to enact legislation.[170] In her opinion, the majority in this case decided to sit as a "superlegislature and enact its own version of a constitutionally acceptable school-funding plan" in order to expedite this case and to achieve harmony amongst the court.[171] Since the court's role is not to tell the legislature what to do, she said that the majority opinion should have been decided just as the other *DeRolph* decisions had been decided: allow the legislature to make changes and then evaluate those changes for compliance later.[172] Justice Resnick argued that if the majority now saw itself as being able to promulgate legislation, the court should have come to the same conclusion in the previous *DeRolph* cases, thus disposing of the case much earlier.[173]

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163 *See id.* at 1199.

164 *See id.* at 1200-01.

165 *Id.* at 1201.

166 *See DeRolph II*, 728 N.E.2d 993, 1002-03 (Ohio 2000). In *DeRolph II*, the majority explained that the role of the court is merely to decide constitutionality, not to tailor a solution; that is left to the legislature. *Id.*

167 *See DeRolph III*, 754 N.E.2d at 1200-01.

168 *See id.* at 1200.

169 *See id.* at 1216 (Resnick, J., dissenting).

170 *Id.* at 1216-17.

171 *Id.* at 1217.

172 *Id.* at 1239.

173 *Id.* at 1218-19.

Justice Cook again dissented because he felt that the court should not have exercised jurisdiction in this matter because the question of what constitutes "thorough and efficient" is a political question and, thus, is a nonjusticiable issue.[174] He claimed that the majority, by adjudicating such an issue, yet again overstepped its constitutional role.[175]

After hearing the case and declaring the public school funding scheme unconstitutional twice,[176] the Supreme Court of Ohio finally declared the system to be constitutional, contingent upon the legislature actually enacting the alterations that the court specifically ordered in its decision.[177] This decision was surprising since it was written by former dissenter Chief Justice Moyer.[178] Many were angered by the court's actions, which critics viewed as legislative in nature. Despite these concerns, the case was terminated.[179]

D. DeRolph IV

Shortly following the *DeRolph III* decision, upon a motion to reconsider, the court ordered a settlement conference before it would hear the motion to reconsider.[180] Nothing came of such conference, so the *DeRolph IV* decision was issued in response to the motion to reconsider *DeRolph III*, which had been made before the settlement conference was ordered.[181] The majority opinion was written by Justice Pfeifer, whereas Chief Justice Moyer had authored *DeRolph III*,[182] which signified the continuing differences amongst the justices on this case.

Though the majority apparently realized that the purpose behind *DeRolph III* was to put an important constitutional violation to rest, it admitted that this was done out of impatience and haste.[183] Upon reconsideration, the majority held that *DeRolph III* should be vacated as it was inconsistent with the first two *DeRolph* cases, *DeRolph I* and *DeRolph II*.[184] The majority declared *DeRolph I* and *DeRolph II* to be the "law of the case" and announced that the legislature must enact a "thorough and

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174 *Id.* at 1244-45 (Cook, J., dissenting).

175 *Id.* at 1246.

176 *See* discussion *supra* Part III.A.-B.

177 *Id.* at 1201.

178 *Id.* at 1188.

179 *Id.* at 1201.

180 *See DeRolph IV*, 780 N.E.2d 529, 530 (Ohio 2001).

181 *Id.* at 530; *see also* DeRolph v. State, 758 N.E.2d 1113, 113-14 (Ohio 2001) (ordering settlement conference).

182 *See DeRolph IV*, 780 N.E.2d at 529; *DeRolph III*, 754 N.E.2d at 1188.

183 *DeRolph IV*, 780 N.E.2d 529 at 530.

184 *See id.* at 530.

efficient" system under the orders in those two cases.[185] *DeRolph I* ordered a "'complete systematic overhaul'" of the funding system.[186] Thus, anything falling short of this mandate would not qualify as constitutional.[187] The majority agreed that this would be a daunting task but asserted that the Ohio Constitution was binding and controlling.[188] Therefore, since Section 2, Article 6 of the Ohio Constitution instructs the legislature to secure a "thorough and efficient system of common schools,"[189] this standard must be met, which in this case required a "'complete systematic overhaul'" of the system.[190] Thus, for the third time, the Supreme Court of Ohio found the system unconstitutional.[191] But not surprisingly, the court offered the same vague directives as to how to correct the problem as it had offered the previous two times in *DeRolph I* and *DeRolph II*.[192]

Justice Resnick concurred in the majority's holding but wanted to add a few thoughts.[193] Justice Resnick urged voters of the state to amend the state constitution in a form mandating that an "adequate amount of funding" be spent on every child in the state.[194] This is an interesting suggestion and one that avoids the separation of powers issue, which seems to be lurking in this case. This will be discussed in more depth in the analysis portion as a possible solution.

Yet again, Chief Justice Moyer dissented.[195] The majority opinion disturbed him because it simply placed the parties back in the same position that they were in when this litigation all began.[196] In his opinion, the decision was ambiguous and unhelpful because the majority neither retained jurisdiction nor remanded the case to trial court.[197]

After finally declaring the system constitutional in *DeRolph III*, the court reconsidered that decision and vacated it, only to reinstate the *DeRolph I* and *II* decisions. Over the course of five years, the Supreme Court of Ohio heard this case four times, all to return to where it started. Yet again, the plaintiffs would have to wait for the General Assembly to

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185 *Id.*

186 *Id.* (quoting *DeRolph I*, 677 N.E.2d 733, 747 (Ohio 1997)).

187 *Id.*

188 *Id.*

189 *See supra* notes 44 and 47 and accompanying text.

190 *DeRolph IV*, 780 N.E. 2d at 530 (quoting *DeRolph I*, 667 N.E.2d at 747).

191 *Id.* at 530.

192 *See id.* at 530-32.

193 *Id.* at 532 (Resnick, J., concurring).

194 *Id.* at 534.

195 *Id.* at 535 (Moyer, C. J., dissenting).

196 *See id.* at 536.

197 *Id.* at 537.

create a new system of public funding, which judging from past experience, it was unlikely to do.

E. State *ex. rel* Lewis v. State (DeRolph V)

A few months after the *DeRolph IV* decision, the plaintiffs filed a motion in the trial court to request a compliance conference "'in order to ensure that the State initiate[d], without further delay, the process of formulating a school funding system that satisfie[d] the mandates of the Supreme Court.'"[198] In response to this motion, the defendants moved to prohibit the trial court and Judge Lewis from "exercising further jurisdiction" over this case.[199] Plaintiffs argued that the Court of Common Pleas of Perry County and Judge Lewis had jurisdiction to hear the motion for a compliance conference under the remedial order issued in the 1999 remand to that court and judge, as well as under *DeRolph IV*.[200] However, the Supreme Court of Ohio found neither conferred jurisdiction on the trial court or Judge Lewis to consider the case again.[201] Since both the court and the judge then lacked jurisdiction to hear the motion, the supreme court granted the writ of prohibition and dismissed the case.[202] The court noted that not only did *DeRolph IV* not remand the case to the trial court, but it did not contemplate that it or any other court would retain jurisdiction over the case; rather, it left the task of creating a constitutional system solely to the General Assembly.[203]

Essentially, the court not only denied the trial court and Judge Lewis jurisdiction, but it also washed its hands clean of the entire controversy. Even though the school funding system is still unconstitutional, the court system will no longer concern itself with the issue. As a result, the

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[198] *DeRolph V*, 789 N.E.2d 195, 199 (Ohio 2003) (quoting the DeRolph plaintiffs' motion).

[199] *Id.*

[200] *Id.* at 200.

[201] *Id.* at 200-02. The court said that after the trial court issued its 1999 remedial order, the Supreme Court of Ohio heard the same issue in *DeRolph II*, which altered the 1999 trial court remedial order by allowing the defendants an extension of time. *Id.* at 200. Since these two mandates were inconsistent, the 1999 trial court remedial order was superseded by the Supreme Court of Ohio's allowance of a time extension. *Id.* at 200-01. As to the claim that the *DeRolph IV* decision mandated a remand of the case to the trial court, the Court said that it mandated the trial court to "'carry this judgment into execution,'" but did not "remand the cause for *further proceedings*." *Id.* at 201 (quoting DeRolph v. State, 780 N.E.2d 282 (Ohio 2002)). Allowing the court to hold a compliance conference would have been an encroachment into legislative powers, as it would require legislation to be approved by the court before it was even enacted. *Id.* at 202.

[202] *Id.* at 202-03.

[203] *Id.* at 202.

plaintiffs now have no right to have the judiciary enforce their constitutional rights against the other branches of the state government. Because of this decision, the legislature has no one to whom it must answer in regards to its actions, or more likely in this case, its inaction. The legislature has free reign to create proper, or improper, resolutions, and a challenge to any legislation would have to come in the form of a new lawsuit, not as a continuation of *DeRolph*. One cannot help but wonder whether all of the time and effort put into this case was in vain since the result was a complete dismissal without a remedy.

F. *The Plaintiffs Make an Unsuccessful Appeal to a Higher Authority*

After the *DeRolph V* decision, the plaintiffs appealed the decision to the United States Supreme Court by filing a petition for writ of certiorari in August 2003.[204] The plaintiffs only asked the Court to decide whether the *DeRolph V* decision, by "barring [plaintiffs] from access to Ohio's courts for the enforcement of a final judgment, including remedial orders," deprived them of their due process and equal protection rights under the U.S. Constitution.[205] Unfortunately, the Supreme Court denied certiorari to this case.[206] This now precludes the plaintiffs from continuing the case at any level, state or federal. The plaintiffs can do nothing more than wait to see if Ohio's legislature corrects the problem. If the legislature does not follow through on the court's orders, the plaintiffs are without recourse, at least until another group of plaintiffs decides to embark on what could be another decade-long crusade to help Ohio's schoolchildren.

IV. ANALYSIS

Though the *DeRolph* decisions may have been revolutionary in Ohio to the extent that they ordered a complete overhaul of an unconstitutional funding system, they certainly did not solve the problem completely, nor did they answer other important questions.

A. *The Problem*

It is now evident that Ohio's system of public education funding is unconstitutional under the Thorough and Efficient Clause. The Supreme Court of the state has so declared three times within the past six years.[207] Some might argue that this is the outcome that the plaintiffs desired, and this is true on the most superficial basis. As stated by Mr. William Phillis, president of The Ohio Coalition for Equity & Adequacy of School

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[204] Pet. for Writ of Cert. at 29.

[205] *Id.* at i; *see also* U.S. CONST. amend. XIV, § 1.

[206] *DeRolph V*, 789 N.E.2d 195 (Ohio 2003), *cert. denied*, 540 U.S. 966 (2003).

[207] *See DeRolph IV*, 780 N.E.2d 529, 530 (Ohio 2002); *DeRolph II*, 728 N.E.2d 993, 1019-20 (Ohio 2000); *DeRolph I*, 677 N.E.2d 733, 747 (Ohio 1997).

Funding, "the Court has washed its hands of the enforcement" of the right to a thorough and efficient education in this state; additionally he noted that "[a] declaratory judgment that is not enforceable renders the judgment meaningless."[208] These statements drive to the heart of the problem, which is that there really seems to be no force behind the court's rulings. The court has told the legislature to correct the system, and the legislature has taken some steps to alter the system. However, neither branch has shown a meaningful intent to solve the problem. The court says that it can do no more without violating separation of powers, and the legislature says it has corrected the system and that the court has not provided enough guidance as to how to correct the system. This appears to be a case of "he said, she said," which has the potential to continue forever. In the meantime, the educational funding system continues to hurt the innocent victims of this controversy: the children.

B. *A Question Left Unanswered: Is Education a Fundamental Right in Ohio?*

1. *Precedent*

One issue that was not specifically addressed by the majority of the court during the litigation is whether education is a fundamental right in Ohio. Plaintiffs suggested several times that education is a fundamental right and even requested that the court declare it to be a fundamental right.[209] Justice Douglas argued in his concurrence to *DeRolph I* that education is, in fact, a fundamental right in Ohio, and thus, legislation concerning education must withstand both equal protection scrutiny and scrutiny under the Thorough and Efficient Clause.[210]

The majority of the court, no doubt, recognized the importance of education, or else it would not have ruled that the system was unconstitutional. The majority opinion in *DeRolph I* even began with a brief history of education in Ohio, noting how it has been asserted as a truly important goal of the state from the state's beginning.[211] But, the majority seemed to accept the holding and reasoning of the earlier Ohio Supreme Court case, *Walter*, which is discussed above in the background section.[212] The court held in that case that it would not utilize the *Rodriquez* test—whether it is explicitly or implicitly guaranteed by the

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[208] William Phillis, *Mr. DeRolph Goes to Washington*, The Ohio Coalition for Equity & Adequacy of School Funding, *at* http://www.ohiocoalition.org (last visited October 20, 2003).

[209] *See DeRolph II*, 728 N.E.2d at 998.

[210] *See DeRolph I*, 677 N.E.2d at 748-77 (Douglas, J., concurring).

[211] *See id.* at 736-37.

[212] *See* discussion *supra* Part II.B.2.

constitution—to determine the fundamentality of a right and held that education was not a fundamental right in Ohio.[213] Had the court utilized the *Rodriguez* standard, though, education most definitely would be considered a fundamental right under the Ohio Constitution since the right is explicitly guaranteed.[214] Apparently, the majority in *DeRolph I* accepted *Walter's* theory because it never once addressed the question nor ruled that education was fundamental, and it even explicitly refused to hear the *DeRolph* case under the Equal Protection Clause of Ohio's Constitution.[215]

2. *Constitutional History*

Clearly, the majority of the Supreme Court of Ohio has never declared education to be a fundamental right, but in light of the history of this right, such a declaration is proper. Justice Douglas's argument that education is a fundamental right is very persuasive and should be accepted by the majority. Others have made persuasive arguments that education was intended as a fundamental right in other states based upon explicit constitutional guarantees and statements made by the framers of those constitutions,[216] and Justice Douglas utilized the same method in his argument.[217] Considering the question under this sort of analysis, it seems as though education in this state is, in fact, a fundamental right.

The importance of the right to an education was recognized over 200 years prior to *DeRolph*. Before Ohio compiled its first constitution and applied for statehood in 1802, it was part of the Northwest Territory and was governed by its laws.[218] The Northwest Ordinance of 1787, which governed the Northwest Territory, contained a provision that recognized the importance of education.[219] Recognizing the importance of education to society, Article III of Section 14 provided that schools and education should be encouraged and that this goal should never be altered unless agreed by "common consent":

> It is hereby ordained and declared, by the authority aforesaid, [t]hat the following articles shall be considered

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213 *See supra* notes 55-66 and accompanying text.

214 *See* OHIO CONST. art. VI, § 2.

215 *See* DeRolph v. State, 699 N.E.2d 516, 516 (Ohio 1998).

216 *See, e.g.*, Mikal Watts & Brad Rockwell, *The Original Intent of the Education Article of the Texas Constitution*, 21 ST. MARY'S L.J. 771, 791 (1990).

217 *See DeRolph I*, 677 N.E.2d at 768-72 (Douglas, J., concurring). Note also that the trial court that originally heard this case had concluded that education is a fundamental right in Ohio. *Id.* at 772.

218 *See* GALBREATH, C. B., CONSTITUTIONAL CONVENTIONS OF OHIO 10 (1911).

219 AN ORDINANCE TO PROVIDE FOR GOVERNMENT OF THE TERRITORY NORTHWEST OF THE OHIO RIVER, art. III, § 14, 1 stat. 50, 52 (1789).

> as articles of compact between the original States and the people and States in the said territory, and forever remain unalterable, unless by common consent, to wit: . . . [r]eligion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged . . . .[220]

Thus, as early as 1787 and before statehood, education was deemed a very important interest by the laws governing the territory from which Ohio arose.

In 1802, and after it had held a constitutional convention to draft and approve a constitution for the state, Ohio requested the United States Congress to declare it an independent state.[221] Contained in that first constitution were several provisions concerning education.[222] Section 3 of Article VIII called for the encouragement of education and schools because of the importance of knowledge.[223] It stated, "[b]ut religion, morality and knowledge being essentially necessary to good government and the happiness of mankind, schools and the means of instruction shall forever be encouraged by legislative provision."[224] This seems to have been a retention of Section 14, Article III of the Northwest Ordinance discussed above. Additionally, Section 25 of Article VIII recognized that education was a right owed to all, and it specifically prohibited laws that would serve to disadvantage the poor or to discriminate against the poor in the context of participation in education.[225] It stipulated that "no law shall be passed to prevent the poor in the several counties and townships within this state, from an equal participation in the schools."[226] This provision, though enacted nearly 200 years before *DeRolph*, seems to anticipate the same sort of problems—wealth based funding disparities—that were involved in that case. More importantly, it seems as though that constitution would have interpreted the problems in *DeRolph* as a constitutional violation under this provision. Although this version of the Ohio Constitution has been superseded, the noted provisions seem to have transgressed the ages very

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220 *Id.*

221 *See* Letter from Thomas Worthington, Delegate to the First Constitutional Convention of 1802, to United States Congress (December 23, 1802), *microformed on* Ohio Constitutional Conventions (Greenwood Pub. Corp.); OHIO CONST. of 1802; GALBREATH, C.B., *supra* note 218, at 10-13.

222 *See* OHIO CONST. of 1802.

223 *See* OHIO CONST. of 1802, art. VIII, § 3.

224 *Id.*; *see also supra* note 210.

225 *See* OHIO CONST. of 1802, art. VIII, § 25.

226 *Id.*

well because these were essentially the issues at hand in *DeRolph*, which arose nearly 200 years after these provisions were formulated.

As the newly formed State of Ohio grew and changed, legislators realized that a new constitution was in order.[227] Though much had changed, education seemed to have retained its status as an important right that was to be recognized and promoted by the legislature. In fact, the constitutional convention of 1850-51 even designated a standing committee on education.[228] Article VI of the Ohio Constitution arose out of this constitutional convention and remains an integral part of the state's constitution today. It is the article under which *DeRolph* was scrutinized.[229] For the first time, the state of Ohio had officially mandated an educational system instead of just recognizing the importance of education as a mere aspirational goal. The Ohio Constitution of 1851, in addition to creating an entire education article, continued to recognize the importance of education in a more general sense. Article I (Bill of Rights), Section 7 of the Ohio Constitution of 1851 called for continued encouragement of education because of its societal importance.[230]

However, a notable difference exists between the constitution of 1851 and its predecessors: the constitution of 1802 and the Northwest Ordinance. The constitution of 1851 provides that "[r]eligion, morality, and knowledge, however, being essential to good government, it shall be the *duty* of the General Assembly to pass suitable laws . . . to encourage schools and the means of instruction."[231] The constitution of 1802 stipulated "knowledge being essentially necessary to good government and the happiness of mankind, schools and the means of instruction shall be forever *encouraged* by legislative provision."[232] The Northwest Ordinance stated that "knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be *encouraged*."[233] The use of the word "duty" in the constitution of 1851 is a much more forceful choice of words than the use of the word "encourage"

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227 *See* GALBREATH, *supra* note 218, at 14-22.

228 *Id.* at 25.

229 *See* OHIO CONST. art. VI, § 2. "The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the State . . . ." *Id.*

230 *See* OHIO CONST. art. I, § 7.

231 *Id.* (emphasis added).

232 OHIO CONST. of 1802, art. VIII, § 3 (emphasis added); *see also supra* notes 222-224 and accompanying text.

233 AN ORDINANCE TO PROVIDE FOR GOVERNMENT OF THE TERRITORY NORTHWEST OF THE OHIO RIVER, art. III, § 14, 1 stat. 50, 52 (1789) (emphasis added); *see also supra* notes 219-220 and accompanying text.

in the constitution of 1802 and the Northwest Ordinance.[234] The difference now is that the legislature must encourage education through legislation, whereas before it was only strongly recommended. Arguably, even though education was viewed as a very important right prior to the Ohio Constitution of 1851, the enactment of this constitution solidified the importance of a right to an education by imposing a "duty" upon the legislature to aid people in accessing and utilizing that right. Whatever the true meaning behind the differences in phraseology, it is undisputable that the framers of the 1851 constitution intended the legislature to promote education because it was viewed as a very important right.

A strictly textual exploration of Ohio's governing codes, the Northwest Ordinance and both Ohio Constitutions reveals that the right of education is so important that it is explicitly guaranteed.[235] Support is also added to the argument by examining the intent of the constitutional framers. The framers indeed realized the importance of education generally because, as noted above, a separate committee was created for this purpose and an entire article was dedicated to it.[236] In fact, the debates regarding Ohio's Constitution of 1851 specifically addressed the same constitutional provision—article VI, section 2—under which *DeRolph* was decided 150 years later.[237]

The constitutional convention considered the standing committee on education's report and allowed for debate amongst the delegates.[238] While the delegates had the opportunity to comment on all sections promulgated by the standing committee, and in fact did, the comments concerning the "thorough and efficient" clause will be most relevant for purposes of this Article. The consideration of this section led to much comment and reflection. On December 4, 1850, the convention considered the third section of the education article.[239] Though arguably much different than the wealth-based disparities situation existent in *DeRolph*, there was much debate as to whether the section's call for a "thorough and efficient system of Common Schools" could be further qualified to apply only to white children and, thus consequently, to not apply to negros.[240] Mr. Bates argued that there should be no classification at all as to this right because if

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234 *See supra* note 217 and accompanying text.

235 *See supra* notes 231-233 and accompanying text.

236 *See supra* notes 228-229 and accompanying text.

237 *See* 2 REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO, 1850-51 (1851) [hereinafter REPORT OF THE DEBATES AND PROCCEDINGS].

238 *See id.*

239 2 *id.* at 11. Note that this was referred to as the third section but that it is, in fact (after revision), section 2 of article 6. *See id.*; OHIO CONST. art. VI, § 2.

240 2 REPORT OF THE DEBATES AND PROCEEDINGS, *supra* note 237, at 11-14.

the wording were changed to extend the right only to "white" children, it necessarily "declared that a certain class *shall not* receive any of the benefits."[241] He continued with his concern and concluded that "[g]ood policy, humanity, and above all, the spirit of the Christian religion, demands that we should provide for the education of every child in the State."[242] The delegates seemed opposed to making any sort of distinctions as to whom this "thorough and efficient system of Common Schools" was to apply, which is evidenced in Mr. Bates' comments and the delegates' refusal to adopt an amendment calling for establishment of separate school systems.[243] By analogy, the framers would not have intended for other types of class distinctions, such as the wealth-based ones in *DeRolph* to inhibit children's right to a "thorough and efficient" education because they intended this provision to apply to all school children and not only to certain classes.

A more direct application of the framers intent is also available. Mr. Quigley commented on the third section (Article VI, section 2) of the standing committee on education's report. He applauded the wording calling for a "thorough and efficient" system of schools as "expressive of the liberality worthy a great State, and a great people."[244] He observed that education and intelligence were becoming more and more important to society and concluded that the state would not, and should not, require its citizens to fund education alone:

> Intelligence is the foundation-stone upon which this mighty Republic rests-its future destiny upon the impulse, the action of the present generation in the promotion of literature. Will we not, are we not, as patriots, bound in solemn duty to use our energies, our influence to forward this greatest of interest to present and future generations; and especially will the great State of Ohio fall short in so mighty an enterprise-so essential and indispensable a duty?...Will it be necessary to appeal to the generosity of her citizens to pay tax for such purposes? Certainly not. …Massachusetts raises annually for school purposes…New York…Connecticut…Pennsylvania…Mississippi and Louisiana…Other states are fast on the advance, and I ask again, can it be that Ohio will remain an exception, and not

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241 2 *id.* at 13.

242 2 *id.*

243 2 *id.*

244 2 *id.* at 14-15.

> assist in so great an enterprise? The answer, I doubt not, will be returned—*she will not*.[245]

An amendment was proposed, in response, that would fix an amount owed by the state to provide for a "thorough and efficient" system of schools.[246] Mr. Hawkins was opposed to such "minuteness in the detail," and both Mr. Manon and Mr. Hawkins believed that it would be better to not fix an obligatory amount because the legislature would then have to respond to the public demand and public concern for a "full, complete, and efficient system of public education."[247] These views were apparently dominant, and not surprisingly, the amendment was not adopted.[248] It appears that the framers preferred the more liberal construction of "thorough and efficient" over a set dollar amount that the state should provide to the educational system because it would allow the state to be more flexible in its funding, based upon the current needs of the system.

This same section (Article VI, section 2) was reconsidered in its amended form on February 24, 1851.[249] The amended section read somewhat differently from the promulgated version coming directly out of the standing committee on education, but it still retained the "thorough and efficient" standard.[250] Mr. Larwill moved to amend the section to read that the General Assembly "may," instead of "shall," make provisions to provide for this system of schools, but this was quickly rejected.[251] Mr. Hitcock moved to completely strike the third section, and this too was rejected.[252]

Ultimately, the third section became Article VI, section 2.[253] After much debate and comment, the framers finally came to an agreement on the issue of providing a "thorough and efficient" education. These debates can provide some insight into the framers' thoughts on education. Obviously, they recognized the importance of education (otherwise it would not have been included in the constitution), but in addition, they seemed to harbor the idea that the system should not classify between persons entitled to the benefits of the provision. Whether the classification be based on race, as it was in the debates, or upon wealth, as it was in

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245 2 *id.* at 15.

246 2 *id.* at 16.

247 2 *id.*

248 2 *id.* at 17.

249 *See* 2 *id.* at 698.

250 *See* 2 *id.* (the amended version); *c.f.* 2 *id.* at 11 (original version from standing committee).

251 2 *id.* at 699.

252 2 *id.* at 699-700.

253 *See* OHIO CONST. art. VI, § 2.

DeRolph, it seems abundantly clear that the framers intended the system to work without imposing classes.[254] Education was so important and fundamental, even 150 years ago, the framers believed that education was a right that all must be entitled to receive.[255] Additionally, attempts to make the "thorough and efficient" system of schools only optional, as opposed to required by the state, were quickly put to rest.[256] The framers intended the state, and not the local school districts, to provide a "thorough and efficient" education to every child in the state because of the fundamentality of the right to an education.[257]

3. *Non-Binding Precedent-Other States Interpretation of the Right*

Several other state supreme courts have considered the importance of the right to an education. Though the decisions are not binding, they may be useful in making the argument that education is a fundamental right, at least in Ohio.

The Supreme Court of Arizona held that the Arizona state constitution created a fundamental right in education for children between the ages of six and twenty-one.[258] Oddly enough though, the court seemed to apply rational basis review instead of strict scrutiny review in deciding whether the educational system was a violation of the state's equal protection clause, which required that "'[n]o law shall be enacted granting to any citizen, . . . privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.'"[259] Though rational basis is typically not the correct standard of review to apply to fundamental rights under equal protection challenges, the important holding is that education is indeed a fundamental right under the state constitution. This and the following cases provide support for the argument that education can be a fundamental state right if the supreme court so finds.

The highest courts of California, Connecticut, and West Virginia have all applied strict scrutiny to equal protection challenges concerning their educational systems, though they were not always very clear in their reasoning as to why education is a fundamental right in each state.[260] The Supreme Court of Connecticut addressed an equal protection challenge similar to the one involved in the *DeRolph* litigation, and the court politely

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254 *See supra* notes 240-243 and accompanying text.

255 *See supra* note 243 and accompanying text.

256 *See supra* notes 251-252 and accompanying text.

257 *See supra* notes 244-245 and accompanying text.

258 Shofstall v. Hollins, 515 P.2d 590, 592 (Ariz. 1973).

259 *Id.* at 592-93 (citing ARIZ. CONST. art. II, § 13).

260 Allen W. Hubsch, *The Emerging Right to Education Under State Constitutional Law*, 65 TEMP. L. REV. 1325, 1335 (1992).

rejected the use of the fundamentality test set out in *Rodriguez*.[261] Instead, the court concluded that education is a fundamental right in Connecticut because it is a right that the citizens of the state have come to expect and because it is a truly important right upon which growing into a contributing citizen of the state depends.[262] The court then applied strict scrutiny to the challenged financing system—one in which local property taxes, "without regard to the disparity in the financial ability of the towns to finance," were heavily utilized to fund education and one in which the state offered no meaningful "equalizing" funds—and declared the system unconstitutional because it did not provide the students their fundamental right to *"substantially* equal educational opportunity."[263] In making this determination, the court relied upon the state constitution's educational provision which requires the legislature to implement "'free public . . . schools in the state'"[264] and the constitution's provision noting that "'[a]ll men . . . are equal in rights.'"[265]

The Supreme Court of Appeals of West Virginia also declared education as a fundamental right in that state based upon the "mandatory requirement of 'a thorough and efficient system of free schools,' found in Article XII, Section 1 of our Constitution."[266] The court noted that "both our equal protection and thorough and efficient constitutional principles can be applied harmoniously to the State school financing system."[267] Therefore, the court directed that, upon remand, both strict scrutiny and the quality standard of "thorough and efficient" should be applied to the inequalities of the financing system to determine whether the system meets the constitutional requirements.[268] However, the court cautioned that "[e]qual protection, applied to education, must mean an equality in substantive educational offerings and results, no matter what the expenditure may be"[269] and that equal protection does not demand "'inflexible statewide uniformity in expenditure.'"[270]

The Supreme Court of California also found education to be a fundamental right because of its important impact on society and government and declared that, as such, it was entitled to strict scrutiny

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261 *See* Horton v. Meskill, 376 A.2d 359, 372-73 (Conn. 1977).

262 *Id.* at 373.

263 *Id.* at 374-75 (emphasis added).

264 *Id.* at 362 n.2 (quoting CONN. CONST. art. VIII, § 1).

265 *Id.* at 362 n.3 (quoting CONN. CONST. art. I, § 1).

266 Pauley v. Kelly, 255 S.E.2d 859, 878 (W. Va. 1979).

267 *Id.*

268 *Id.*

269 *Id.* at 865 n.7.

270 *Id.* (quoting Robinson v. Cahill, 303 A.2d 273, 284 (N.J. 1973)).

under an equal protection challenge.[271] The court also believed that the educational funding system, which was based upon district wealth just as Ohio's funding system was, also involved a suspect classification that also invokes strict scrutiny analysis.[272] Since the state could not meet its burden of proving a compelling state interest for its funding system that was based upon district wealth, the court declared it unconstitutional under California's equal protection clause,[273] providing that "[a] person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws."[274]

The above cases can serve as persuasive authority for the Ohio Supreme Court in making a determination that education is a fundamental right in Ohio. Most of the states did not rely upon an explicit or implicit guarantee test, but relied instead upon the societal importance of education as the basis for concluding that the right was fundamental. The approach taken by these states only adds support to the theory that education is a fundamental right in Ohio because, as discussed in sections above, education has a long history of importance to the people of this state, in addition to the explicit and implicit guarantees of this right found in the state constitution and the framers' intent. Some of these cases may also be useful in arguing that *DeRolph* also involved an equal protection violation, which will be discussed below.

4. *What Are the Implications of Education Being Deemed a Fundamental Right?*

a. *Equal Benefit and Protection Clause*[275] *Implicated*

Although the Supreme Court of Ohio has already addressed the issue of equal protection violations and the fundamentality of the right to an education in *Walter*,[276] the court should reconsider whether the educational funding system involved in *DeRolph* is, in fact, a violation of equal protection. The discussions in the previous sections, based on the framers' intent and persuasive precedent from other state high courts, seem to provide a strong argument that education is indeed a fundamental right under Ohio's constitution. This being the case, strict scrutiny review must be applied by the court. The Supreme Court of Ohio noted in *Walter* that had strict scrutiny review been required to be applied, the statute would

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271 Serrano v. Priest, 557 P.2d 929, 951 (Cal. 1976).

272 *See id.*

273 *Id.* at 957-58.

274 *Id.* at 949 n.40 (citing CAL. CONST. art. I, § 7(a)).

275 *See* OHIO CONST. art. I, § 2.

276 *See supra* notes 58-62 and accompanying text; *see also supra* note 214 and accompanying text.

only have been upheld if there was a compelling state interest in allowing the disparities between the school districts.[277] Since the court in that case determined that education was not a fundamental right,[278] it only applied rational basis review and upheld the funding system because it found local control of schools was sufficient reason to uphold the system under rational basis review.[279] Though local control may be a sufficient state interest under rational basis review,[280] it is likely not enough to be deemed a compelling state interest and, thus, will not survive strict scrutiny review. Therefore, if education is deemed a fundamental right in Ohio, a funding system such as the one in *Walter* or *DeRolph* would likely be a violation of the state's equal protection clause.

Ohio's "equal protection and benefit" clause stipulates that

> [a]ll political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.[281]

The apparent purpose of this provision is to provide the citizens of this state equal benefit and protection of the laws of the state. If the detailed findings of fact of *DeRolph* were considered under this standard, it is unlikely that one could say that the educational financing system operated in a manner that provided students equal benefit of the public educational system. Likewise, it could not easily be denied that the wealthier school districts were, in a sense, granted a "special privilege." *DeRolph I* discussed the staggering results of a public schools survey, which was conducted in 1989.[282] The plaintiff school districts were often structurally unsound and unsafe (asbestos infiltrated, coal heating systems, crumbling plaster and falling bricks); lacked accessibility to everyday school supplies (paper, chalk, toilet paper); could not comply with a state requirement that a teacher not be assigned more than twenty-five students; offered poor curricula (no foreign language, computer, or music or art courses); and received lower proficiency test passage rates.[283] Although the state did not explicitly grant wealthier districts a "special privilege" or intend for those

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277 Bd. of Educ. v. Walter, 390 N.E.2d 813, 818 (Ohio 1979).

278 *Id.* at 819.

279 *See id.* at 819-20.

280 *Id.* at 820.

281 OHIO CONST. art. I, § 2.

282 *See DeRolph I*, 677 N.E.2d 733, 742-45 (Ohio 1997).

283 *Id.*; *see also supra* note 91.

districts to benefit more than poorer districts, the educational funding scheme utilized to fund public schools, ultimately, led to that result.

There was clearly a violation of the equal protection and benefit clause, and it appears from the earlier discussion that education is a fundamental right. Thus, the question becomes whether the state would have been able to offer a compelling interest for the financing system, enabling it to withstand strict scrutiny review. The state would probably have argued that local control of the local school districts was a compelling state interest. However, in *Walter*, the court noted that, where the exercise of a fundamental right is infringed, the state must not only have a compelling interest in the system or program, but it must also be the "least restrictive alternative."[284] Even if local control of the school districts is a compelling state interest, it is unlikely that the financing system is the least restrictive means of achieving that local control. The plaintiffs in *Walter* argued that local control could be achieved "under other financing schemes that would result in more equality in educational expenditures,"[285] and the same argument could have easily been made by the *DeRolph* plaintiffs. Even if local control is a compelling interest, it still must be achieved in a manner that does not restrict other rights and liberties of the citizens, such as the students' rights to an education and equal benefit of that right. The funding system involved in *DeRolph* did, in fact, infringe on students' rights to a "thorough and efficient" education[286] and to equal benefit of that education. Some students—those in wealthier districts—in the public school system were benefiting tremendously from the educational system, while others—those in the poorer districts—were not benefiting nearly as much and were perhaps even being harmed by the system (exposure to asbestos and coal dust generated by coal heating systems).[287] Since the funding scheme does not achieve local control in the least restrictive means, it is also a violation of the equal protection and benefit clause of the Ohio Constitution.

Other states have made similar findings, which might serve to add weight to this argument. The Supreme Court of Connecticut held a similar financing system to be unconstitutional under its equal protection clause because it relied too heavily on local property taxes, which did not allow "substantially equal" opportunity to education.[288] The Supreme Court of California also found a funding system based upon district wealth to be

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284 *See Walter*, 390 N.E.2d at 822 (citing San Antonio Indep. Sch. Dist. v. Rodriquez, 411 U.S. 1, 51 (1973)).

285 *Id.*

286 *See* discussion *supra* Part III.

287 *See supra* notes 91 and 283 and accompanying text.

288 *See supra* notes 261-265 and accompanying text.

unconstitutional under its equal protection clause.[289] The Supreme Court of Ohio, just as other courts have done, should have recognized that education is a fundamental right and that the financing system involved in *DeRolph* was also a violation of the equal protection and benefit clause.

b. *Has the Court Already Treated Education as a Fundamental Right Without Expressly Saying So?*

Did the court in fact apply a sort of heightened scrutiny to *DeRolph*? It found that overreliance on property taxes created disparities based on wealth classifications leading to "inadequacies" in the system.[290] This reasoning sounds similar to language used with an equal protection analysis. In fact the supreme courts of California and Connecticut both found that the state's equal protection clause had been violated because the system made the child's educational quality contingent upon the wealth of the district in which the child lived.[291]

Therefore, it could be argued that the Ohio Supreme Court might have been utilizing a bit of equal protection analysis in its decision. Perhaps the court was not exercising mere rational basis review when it considered the reliance on local property taxes; if it had done so and followed the reasoning of *Walter*, the legislation would likely have been found to be reasonable, which is all that is required under rational basis review.[292] However, the court seems to have implicitly applied more than rational basis, perhaps because it viewed the situation as one involving wealth classifications and/or a fundamental right to education, both of which require application of heightened judicial review, as evidenced by supreme court decisions of other states.[293]

It is also possible to argue that the court deferred to the legislature to effectuate a "thorough and efficient" system of schools. Even after deferral and rational basis review, the legislation was still just too "arbitrary, oppressive, or discriminatory" to be upheld.[294] The inadequacies were just too great, whether based upon wealth classifications and disparities or not, for the court to uphold the system.[295] The inadequacy of the system was unreasonable, not because of wealth

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[289] *See supra* notes 271-274 and accompanying text.

[290] *See DeRolph I*, 677 N.E.2d 733, 742 (Ohio 1997).

[291] *See* Jonathan M. Purver, LL.B., Annotation, *Validity of Basing Public School Financing System on Local Property Taxes*, 41 A.L.R.3d 1220 (1972); *supra* notes 261-265, 271-274 and accompanying text.

[292] *See supra* notes 62-66 and accompanying text.

[293] *See* discussion *supra* Part IV.B.3.

[294] *See In re* Russo, 150 N.E.2d 327, 331 (Ct. App. Ohio 1958) (citing Davis v. State, 160 N.E. 473, 474 (Ohio 1928)).

[295] *See supra* notes 91 and 283 and accompanying text.

disparities or inequalities, but because it did not provide students with a "thorough and efficient" education.[296]

Therefore, the questions as to whether education is a fundamental right and whether equal protection analysis applies to such challenges in this state were left open by the *DeRolph* decisions. Though a determination as to the fundamentality of education was made over two decades ago in *Walter*,[297] now might be a good time for the Supreme Court of Ohio to reconsider that determination because, as the *DeRolph* cases illustrate, it is far from clear how the court views the right to education. Upon reconsideration, if the court considers factors such as those discussed above, it would be very difficult for it to conclude that education is not a fundamental right under the Ohio Constitution and that it is not subject to review for violations of the equal protection and benefit clause.

c. *Does Implication of the Equal Benefit and Protection Clause Matter?*

One might argue that declaring education a fundamental right, thus implicating the equal protection clause, still does nothing to solve the problem that was brought before the court under *DeRolph*. Agreeably, the problem with *DeRolph* is creating and instituting a proper remedy, not declaring the system to be unconstitutional. An additional declaration of unconstitutionality is not needed since *DeRolph I*, *II*, and *IV* all declared the system unconstitutional under the Thorough and Efficient Clause.[298]

One might think that it makes no difference to also declare the system unconstitutional under the equal protection clause of Ohio's constitution because it is just reinforcing the idea that the system is unconstitutional, which has already been declared. However, and importantly so, declaring education a fundamental right and imposing strict scrutiny review under the equal protection clause will have important effects on future challenges. Rather than challenging the adequacy of education under the Thorough and Efficient Clause, the inequality of the educational funding system based upon wealth classifications can be challenged under the equal protection clause as well. Challenging the equality of education rather than the adequacy of education has the potential to truly equalize the educational opportunity of students in this state.

Equality of education was, in fact, the underlying issue in *DeRolph*. The plaintiffs attempted to implicate the fundamental right/equal protection clause argument into the litigation, but the court explicitly rejected the

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296 *See supra* notes 91 and 283 and accompanying text.

297 *See supra* notes 58-62 and accompanying text.

298 *See DeRolph I*, 667 N.E.2d 733 (Ohio 1997); *DeRolph II*, 728 N.E.2d 993 (Ohio 2000); *DeRolph IV*, 780 N.E.2d 529 (Ohio 2002).

proposal.[299] Therefore, the plaintiffs and the court focused on the "thorough and efficient" standard instead of the equality standard.[300] The court merely determined that the funding system did not provide a "thorough and efficient" standard of education (i.e. adequate education).[301] Though providing an adequate standard of education is very important, it is just as important that every student be provided with the same, equal benefit of an adequate education. Obviously, many wealthier school districts were providing adequate educations to the children in those districts, but they were also providing much more than adequate educations. Therefore, the problem with the funding system was not only that it could not provide for adequate educations, but that it could also not provide "equal" educations.

After determining that education was a fundamental right, the Supreme Court of West Virginia instructed the lower court to apply the strict scrutiny standard of review to the *equality* question and to apply the "thorough and efficient" standard to the *quality* question.[302] This is exactly the approach that should have been taken in *DeRolph* and that should be taken in the future.

C. *The Power of the People-A Constitutional Amendment*

Clearly, questions remain as to what should have been done in *DeRolph* and what should be done in the future, but presently, finding a solution to the unresolved problems of the unconstitutional funding scheme of *DeRolph* is more important. Since the court is constrained from acting, for risk of violating separation of powers, and the legislature seems unable or unwilling to aid in the problem, perhaps the solution involves neither. The citizens of the state of Ohio might hold the solution in their own hands.

Justice Resnick wrote an interesting concurring opinion to the *DeRolph IV* decision.[303] The majority decision concluded that the funding system was still unconstitutional but that the Supreme Court of Ohio no longer retained jurisdiction over the case.[304] Justice Resnick agreed that the system remained unconstitutional, mostly because of the system's overreliance on local property taxes as funding sources.[305] However, she was appalled at the decision to not retain jurisdiction.[306] In her opinion, the

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299 *See* DeRolph v. State, 699 N.E.2d 518 (Ohio 1998).

300 *See* discussion *supra* Part III.

301 *See* discussion *supra* Part III.

302 *See supra* notes 266-270 and accompanying text.

303 *See DeRolph IV*, 780 N.E.2d 529, 532-34 (Ohio 2002) (Resnick, J., concurring).

304 *Id.* 529-32.

305 *Id.* at 533 (Resnick, J., concurring).

306 *See id.* at 532-34.

only alternative left to resolving this unconstitutional problem is a constitutional amendment by the people of the state.[307] She suggested that perhaps the amendment could stipulate a specific amount to be spent on each student, each year, with an adjustment provision included for inflationary purposes.[308]

This suggestion deserves some attention and, in the end, may be the only way to put the *DeRolph* issues to rest. If the court and legislature are unwilling to step in and remedy the problem, then the voters of the state should do so. As discussed in Section III, the legislature has been ineffective in promulgating legislation that would rectify the constitutional violation, and the court is unable to do so because of the constraints of separation of powers.[309] Therefore, the voters should address the problem directly and without governmental intermediaries, such as the legislature and the court.

The voters retain this authority through the power of an initiative, which can be either direct or indirect.[310] A direct initiative allows voters to amend a state constitution and bypass the legislature by going straight to the electorate for approval.[311] An indirect initiative allows citizens to

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[307] *Id.* at 534.

[308] *Id.* at 534.

[309] *See supra* Part III.

[310] Richard A. Chesley, Comment, *The Current Use of the Initiative and Referendum in Ohio and Other States*, 53 U. CIN. L. REV. 541, 541 (1984); *see also* OHIO CONST. art. II, § 1.

> The legislative power of the state shall be vested in a General Assembly consisting of a senate and house of representatives but the people reserve to themselves the power to propose to the General Assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to . . . independent of the General Assembly to propose amendments to the constitution and to adopt or reject the same at the polls . . . .

Id.

[311] Chesley, *supra* note 310, at 541; *see also* OHIO CONST. art. II, § 1a.

> The first aforestated power reserved by the people is designated the initiative, and the signatures of ten per centum of the electors shall be required upon a petition to propose an amendment to the constitution. When a petition [is] signed by the aforesaid required number of electors, . . . the secretary of state shall submit for the approval or rejection of the electors, the proposed amendment . . . .

Id.

propose legislation to the legislature, which approves or disproves the proposal for a vote by the electorate.[312] Therefore, the citizens of Ohio could amend the constitution—the "thorough and efficient" clause, specifically—to impose a mandatory spending amount for each student per year, to stipulate that education is a fundamental right in this state, or to impose whatever financing scheme they desire and see as the most beneficial.[313] Alternatively, the voters could propose and pass a law providing for similar effects, but it seems more prudent to choose an amendment to the constitution, as it would have a more permanent effect.[314]

Although the initiative power seems to be a useful vehicle for implementing changes, it is a power that is subject to some restrictions and qualifications.[315] Proposing an amendment and a law through the initiative power seems to be a fairly easy thing to do; the constitutional provisions call for ten percent of the electorate to sign a petition for an amendment and only three percent of the electorate to sign a petition for a law.[316] However, the process is not quite this easy. Each signer must comply with certain requirements; the circulator must witness and attest to every signature; petitions must be filed in at least half of the counties in the state and each county petition must contain signatures "of not less than one-half of the designated percentage of the electors" of that county; and the proposed law or amendment must be published with arguments or explanations in a local newspaper for three weeks in every county.[317]

After reading the constitutional provisions further, the initiative power seems a bit more intimidating. It would be an imposing task to muster one-half of the qualified electorate's signatures in 44 counties. Some might argue that there is not enough popular support from the voters to produce sufficient legislative action to remedy the situation, let alone to

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[312] Chesley, *supra* note 310, at 541-42; *see also* OHIO CONST. art. II, § 1b. This provision allows the citizens of Ohio to propose a law rather than an amendment. *Id.* The proposed law must be filed "not less than ten days prior to the commencement of any session of the general assembly" and must be signed by "three per centum of the electors." *Id.* After the law is proposed to the legislature, the law may be approved by the legislature, either as is or amended, and it is then subject to a referendum. *Id.* If the law is not passed, or if it is passed in amended form, or if the legislature takes no action for four months, then the proposed law is submitted to the public for approval or rejection at the next election. *Id.* If the majority of voters approve the law, it takes full and binding effect as the law. *Id.*

[313] *See id.*

[314] *See supra* note 312 and accompanying text.

[315] Chesley, *supra* note 310, at 548-58; *see also* OHIO CONST. art. II, § 1e; OHIO CONST. art. II, § 1g.

[316] *See supra* notes 311-312.

[317] OHIO CONST. art. II, § 1g.

produce an initiative or constitutional amendment promulgated by the voters. However, education is, and has been since *DeRolph* arrived in the Ohio Supreme Court, the biggest concern for the citizens of Ohio.[318] This proves that there is popular support for remedying the school funding system. Perhaps people would support an initiative or amendment by the people more than legislative action by the legislature because they feel as though they are more neutral or more able policymakers than the legislature in this area. Additionally, people may have lost faith in the legislature's ability to find a solution and may now feel compelled to try to do so on their own.

In addition to the extensive requirements mentioned above, there is also a major limit on the voters' initiative power. The initiative may not be used to

> pass a law authorizing any classification of property for the purpose of levying different rates of taxation thereon or of authorizing the levy of any single tax on land or land values or land sites at a higher rate or by a different rule than is or may be applied to improvements thereon or to personal property.[319]

Though this seems to be a large restriction on how the initiative power can be used, note that it only applies to laws and not to constitutional amendments.[320] Therefore, section 1e of Article II does not preclude an amendment to the constitution that calls for non-uniform taxation.[321] This is significant because tax levies, uniform or non-uniform, may be an integral part of reforming the unconstitutional educational funding system of this state. Had the constitution disallowed non-uniform tax levies for both proposed laws and amendments, it would have inhibited the power of the people to reform the system greatly.

Perhaps the people could propose an amendment that calls for slightly higher taxation rates on persons with higher property values and lower taxation rates for persons with lower property values. All of the revenue could go to the school funding fund and be redistributed proportionately based on the number of students in each district. This would relieve the system of its overreliance on local property taxes to fund the local school districts and create a funding system that is more proportionate to the wealth of the districts. Under such an amendment, everyone would pay property taxes, which would in turn be directed to the local school district,

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[318] The Ohio Poll, *Education, Economy Head List of Problems Facing Ohio* (July 19, 2002), *at* http://www.ipr.uc.edu/Services/OPPressRelease.cfm.

[319] OHIO CONST. art. II, § 1e.

[320] *Id.*

[321] *See* Thrailkill v. Smith, 138 N.E 532, 535 (Ohio 1922).

but the wealth of the state would be more equalized under this approach because it eliminates the practice of each local district funding itself from property taxes levied on itself. Though the likelihood of passing such an amendment is slight, the option is available and is worth attempting. The people may even be surprisingly empathetic to the amendment since children and their futures are, ultimately, what is at stake.

One approach that has been attempted, but failed, is increasing the state sales tax by 1%.[322] After *DeRolph I*, the General Assembly proposed an increase in the state sales tax from five to six percent.[323] However, the proposal never passed the General Assembly by the required supermajority and was not placed on the ballot as an amendment;[324] but, through use of a bizarre loophole, requiring only a majority vote of approval by the General Assembly, the proposal for a tax increase was put on the ballot as a proposed law instead.[325] This proposal would have increased school revenue by nearly 1 billion dollars, thereby reducing the overreliance on local property taxes, but to the surprise of the legislators, the proposed law failed by a four to one margin.[326] Though this was not an example of the use of the people's initiative power, it was reflective of the power granted to the people in deciding certain issues. Though proposed by the legislature, the people were given the ultimate authority in accepting or rejecting the proposal.[327] The people spoke clearly in rejecting the proposal.[328] Dr. Richard L. Lucier has suggested that the people did not think that this was a big enough solution to the problem and that they feared that it would follow the unsuccessful path of the lottery, which was created as a solution to revenue problems in the past.[329]

These explanations make good sense, but the real question is whether the voters will always remain opposed to such a tax increase. If the voters are still opposed to such an increase and they are also unlikely to propose an amendment that redistributes revenue equally to the school districts earned from non-uniform taxation on property, is there any solution left?

1. *An Example to Be Followed-Michigan's Solution*

Other states do provide a glimpse of hope for the educational funding system in Ohio, and perhaps Ohio should adopt their approaches as a

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322 *See* DR. RICHARD L. LUCIER, THE DE ROLPH CASE: OHIO'S STRUGGLE FOR A CONSTITUTIONAL SCHOOL FINANCE SYSTEM 93 (2001).

323 *Id.*

324 *Id.*

325 *See id.* at 96.

326 *Id.* at 96-97.

327 *See id.*

328 *See id.* at 97.

329 *Id.* at 108.

model. Michigan provides a successful example of educational funding reform. In 1993, a member of the state Senate proposed an amendment that would eliminate the local property tax as a source of funding schools completely.[330] Accused of creating a crisis, she stated, "We created a deadline for solving a crisis," and indeed, this statement proved true since the legislature finally developed a true reform for the school financing system.[331] The legislature devised two options: the "ballot plan," which involved a fifty percent increase in state sales tax, and the "statutory plan," which would increase state income taxes.[332] The choice was placed before the voters, and if they rejected the "ballot plan" then the "statutory plan" took effect anyway.[333] The "statutory plan" never had to come into play though because the voters chose to implement the "ballot plan" instead by a margin of 69% to 31%.[334] The new system produced favorable results and provides a good model for other states who are trying to reform their funding systems. The elimination of local property taxes and the implementation of a fifty percent increase in the state sales tax produced the following results: it effectively shifted responsibility for educational funding from the local level to the state level; homeowners received a huge reduction in property taxes; each district received a set amount of money for each student; and most impressive of all, state aid increased from 2.5 billion to 7 billion over the course of one year.[335] This resulted in more equal spending and a reduction in funding disparities between the low-property wealth and high-property wealth districts.[336] Just like the situation presented by the *DeRolph* litigation, voters and the legislature wanted reform in Michigan, but could not agree; but when forced to do so, a remedy was created.[337]

The citizens of Ohio have manifested their desire for reform for nearly a decade, but the legislature and the supreme court have not been able to achieve it because of separation of powers constraints.[338] Now that the court has decided to not retain jurisdiction in the case, there is no guarantee that reform will be pursued by the legislature because the court will no longer enforce its orders to reform the system.[339] Therefore, the citizens

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330 *Id.* at 160.

331 *Id.*

332 *Id.* at 163.

333 *Id.*

334 *Id.* at 165.

335 *Id.* at 166-67.

336 *Id.* at 170.

337 *See id.*

338 *See* discussion *supra* Part III.

339 *See DeRolph V*, 789 N.E.2d 195, 203 (Ohio 2003).

and voters of Ohio are forced to create a remedy and reform the system on their own if they want to effect change.

The success story of Michigan's educational funding system reform could easily be adopted in Ohio. Though the legislature most definitely has the power to implement such a plan, as was the case in Michigan, the people as a group also hold the power to cause such reform. Through use of the initiative power, Ohio voters could propose the same sort of plan and submit it to the electorate for approval as an amendment to the Thorough and Efficient Clause. The abolition of local property taxes as a source of funding the educational system would effectively remove the overreliance on local property taxes that was highly criticized by the Supreme Court of Ohio in the *DeRolph* decisions.[340] Results show that before the Michigan amendment was adopted, local school districts funded 70% of educational costs and the state funded only 30%; 3 years after the amendment was enacted, the figures flipped.[341] Additionally, discrepancies in funding between school districts were reduced as a result of Michigan's amendment. The funding gap between wealthier and poorer districts was lessened by nearly fifty percent within five years of the adoption of the amendment as a result of a minimum per pupil foundation allowance.[342] Michigan's plan seems to be working well, and it looks like Michigan not only found the solution for itself, but may have found a plan for Ohio as well.

2. *An Alternative Path—Kentucky's Solution*

Kentucky also experienced problems with its educational funding system, and it chose a different, yet also successful, method of reform. Kentucky school districts experienced significant funding disparities, just like Ohio.[343] The Supreme Court of Kentucky found that not only was Kentucky's educational funding system unconstitutional, but that the entire public school system was unconstitutional as well.[344] The Kentucky Education Reform Act (KERA) was promulgated by a group that was headed by administrative employees, former politicians, judges, attorneys, and persons with personal experience with the school system.[345] This group relied heavily on the media and the citizens of the state, and it also instituted accountability plans, which instilled faith in the citizens that the

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340 *See* discussion *supra* Part III.

341 *See* Metropolitan Philadelphia Policy Center, Tax Reform in Michigan-Proposal A, *at* http://www.metropolicy.org/pdfs/TAX%20REFORM%20IN%20MICHIGAN.pdf (last visited Feb. 11, 2004).

342 *See id.*

343 *See* LUCIER, *supra* note 322, at 176.

344 *Id.*

345 *See id.* at 178.

program reform package, consisting of increased taxes, would actually work and be beneficial to all students.[346] The lesson to be learned from Kentucky's example is that perhaps a radical approach, like that of Michigan, is not needed to institute a successful system of reform. What is needed is public support and confidence that the reform will actually work.

Again, Ohio could choose to follow in the footsteps of Kentucky. However, this option seems less beneficial than the option provided by the Michigan example because Ohio has been attempting, for nearly a decade now, to institute a reform similar to the one that Kentucky successfully enacted. The problem in Ohio seems to be lack of public confidence in the reformers, or the legislature in Ohio's case. Therefore, though Kentucky's plan was a good fit for it, it may not be such a good fit for Ohio.

Both Michigan and Kentucky have reaped the benefits of reforming their educational funding systems. Ohio can also enjoy such benefits, but reform must first be accomplished. Though Michigan and Kentucky both created successful reform packages, Michigan's approach may be a better option at this point in time for Ohio. Kentucky's approach could have worked well had it been followed at the outset of the *DeRolph* litigation, but it seems unlikely to be as successful today, nearly ten years later. Michigan's approach would be effective almost immediately, and it could be proposed by the General Assembly or by the people via an initiative. Such a proposal might end up being unsuccessful, but it also may well prove to be the solution to Ohio's school funding problems.

V. CONCLUSION

The decade of *DeRolph* litigation left the educational funding system problems still largely unresolved. Declarations of unconstitutionality are important, but resolution of the problem is the real objective. In the case of Ohio's educational funding system, the real objective has not yet been achieved.

The *DeRolph* litigation was a landmark of its time, but perhaps for undesired reasons. *DeRolph* has the potential to be remembered as the decade-long battle between the court and the legislature of the state of Ohio with unfortunate consequences for the citizens and schoolchildren of this state. The decisions left questions unanswered: whether education is a fundamental right in Ohio and whether discrepancies in education and the educational funding system are entitled to equal protection under Ohio's laws. However, the most important question left unanswered by the *DeRolph* case is what is to be done to rectify the system that has already been declared unconstitutional three times.

This Comment has attempted to answer those questions. There does seem to be substantial evidence that education is a fundamental right in

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346 *See id.* at 187-88.

Ohio, which would invoke equal protection analysis.[347] However, even if found to be unconstitutional on equal protection grounds, the question of how to rectify the problem would still exist. The problem is the ends, not the means, in this case.

No matter how one looks at this situation, the fact of the matter is that a solution is still needed, and soon. The problem has been placed before the legislature several times to no avail, so now seems a prudent time to suggest that citizens utilize their power as an electorate to correct the system. The initiative power belongs to the people and, by uniting together, that power can be awesome. Education is the number one concern for citizens of this state (and has been since 1997), ranking above unemployment, crime, and taxes.[348] Obviously, the people of Ohio believe that education is very important and deserving of considerable time and attention. There would be no better way to rectify the school funding problems than by involvement in the process by the concerned citizens of this state. Voters need to send a message to the government that if it cannot get the job done, then the people will. Vivre l'initiative!

CHRISTEN SPEARS HIGNETT

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347 *See* discussion *supra* Part IV.B.

348 *See supra* note 318 and accompanying text.