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DEROLPH V. STATE and OHIO'S LONG ROAD TO AN ADEQUATE EDUCATION

Larry J. Obhof

Ohio's experience with school finance litigation has in many ways paralleled the trends in such litigation nationwide. The 1990s saw a shift in the focus of school finance litigation from "equity" to "adequacy." In contrast to earlier school finance cases, which focused on reducing spending disparities, the adequacy approach concentrates on the sufficiency of school funding.¹ Plaintiffs in these cases seek to invalidate school finance systems not because of funding disparities per se, but rather because the quality of education provided in some districts fails to meet a perceived constitutionally required minimum standard.² Plaintiffs in adequacy-based suits have generally been more successful than those in the earlier equity-based suits, and have won eleven of twenty-two cases.³ Additionally, courts in several states that had previously rejected challenges to their school finance systems have abated and, under the burgeoning adequacy standard, found their states' systems unconstitutional.⁴ Ohio is one such state.

On December 19, 1991, a coalition of five Ohio school districts and various individuals filed a complaint in the Perry County Court of

². Id.
⁴. See also Paula J. Lundberg, State Courts and School Funding: A Fifty State Analysis, 63 Alb. L. Rev. 1101, 1103-04 (2000) (stating that supreme courts in two states—Arizona and Ohio—originally declined to overturn their school funding systems, but later overruled these decisions and found their systems unconstitutional); Karen Swenson, School Finance Reform Litigation: Why Are Some Supreme Courts Activist and Others Restrained?, 63 Alb. L. Rev. 1147, 1149 n. 12 (2000) (noting that among the states that have held their systems unconstitutional, "[t]he Arizona, Ohio, and Washington high courts have also previously upheld their respective state's financing schemes").
Common Pleas, seeking injunctive and declaratory relief, including a determination that Ohio's public school financing system was unconstitutional. In doing so, the plaintiffs joined a nationwide movement to improve the conditions of public schools and reinvigorated a dormant debate in Ohio over the constitutionality of the State's funding scheme. The Ohio Supreme Court ultimately agreed with the plaintiffs, and on several occasions it held that the State's funding system was not "thorough and efficient" and therefore did not meet constitutional muster. Thirteen years and four Ohio Supreme Court rulings later, the legal battles may be over, at least for now. The plaintiffs' struggle for greater and more adequate school funding, however, looks as though it will continue.

The series of cases collectively known as DeRolph v. State is important for a number of reasons. Most importantly, of course, is the fact that the DeRolph cases were the impetus for significant changes to Ohio's school finance system—changes that would inevitably affect the present and future prospects of students throughout the State. The DeRolph saga is also significant because it illustrates important themes in school finance litigation. First, DeRolph demonstrates the shift from equity-based to adequacy-based litigation strategies. Ohio's experience with both DeRolph and prior litigation helps illustrate the perceived weaknesses of the equity approach and the relative strengths of the adequacy approach, even within the same system. The cases, and the responses to the Ohio Supreme Court's decisions, also illustrate some of the pitfalls facing courts that engage in judicial activism.

The DeRolph plaintiffs sued under both equity-based and adequacy-based theories, but they consistently eschewed the leveling-down approach seen in some of the early equity cases. Indeed, plaintiffs' own statements explicitly rejected leveling-down as a remedy. "The mission [of the Ohio Coalition for Equity and Adequacy of School Funding] . . . is to secure high quality educational opportunities for all school children. The Coalition adamantly supports the strategy of leveling up the system without taking resources away from the districts with stronger tax bases." The Ohio Supreme Court, furthermore, accepted only the adequacy-based theory arising under Ohio's Education Clause, ignoring plaintiffs' equal protection challenges. Indeed, both the plaintiffs' strategy and the Ohio Supreme Court's response represented a sea-change from

6. Telephone Interview with William Phillis, Executive Director of Ohio Coalition for Equity & Adequacy of School Funding (May 2, 2003).
the equity-based approach, which hampered earlier reform efforts in states such as California.

The controversy surrounding the judicial activism in the DeRolph cases and the political backlash that followed illustrate the highly polarized nature of school finance cases, particularly in states where judges face elections. The Ohio Supreme Court's decisions were greeted with proposals to strip the courts of jurisdiction over school funding cases, ignore the Court's orders, or even to impeach one or more of the justices. A concurrence to one of the decisions discussed the possibility of holding the legislature in contempt, and some non-governmental organizations advocated putting recalcitrant legislators in jail. These tensions even spilled over into judicial elections and helped make the 2000 race between Justice Alice Robie Resnick and Terrence O'Donnell for a seat on the Ohio Supreme Court one of the ugliest—and most expensive—judicial campaigns in recent history. This illustrates the significant political pressure that elected judges may face from individuals and interest groups that have an interest in a court's decisions. Nevertheless, the failure to unseat Resnick also illustrates how difficult it may be for such pressures to overcome the inertia of judicial incumbency.

Although far-reaching, many of the changes sought by the DeRolph plaintiffs were reasonable and, despite much rhetoric about judicial activism, the Ohio Supreme Court was more constrained in its rulings than courts of other states, such as Kentucky or Vermont. In Kentucky, for example, the courts engaged in a process that can fairly be described as judicial lawmaking. Although a number of other state courts adopted

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14. See Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989) (holding Kentucky's entire education system—not just its school funding scheme—unconstitutional under an adequacy-based analysis); Brigham v. State, 692 A.2d 384 (Vt. 1997) (holding Vermont's school finance system unconstitutional without even establishing facts at trial concerning the inequities or inadequacies of the system).

15. In Rose v. Council for a Better Education, the Kentucky Supreme Court relied on a
Kentucky's definition of adequacy, the Ohio Supreme Court avoided such an approach. In doing so, the Court left itself open to criticism not only from political conservatives, who attacked the Court for "legislating from the bench," but also from liberals who criticized the Court for failing to hold education a fundamental right and for giving too little guidance to the legislature. Indeed, the relatively little treatment that DeRolph has thus far received in the academic literature may stem from the fact that, despite much political rhetoric to the contrary, the core decision showed neither extreme activism nor restraint, but rather a medium between the two.

I. OHIO'S PRE-DEROLPH SCHOOL FINANCE HISTORY

Education was an important part of the public trust in Ohio even before the State had a written constitution. The Land Ordinance of May 20, 1785, which provided for the surveying of lands in the Western Territory (of which Ohio was a part), reserved one thirty-sixth of every township in the Territory for the maintenance of public schools. Congress intended this grant to support the public schools of the state in perpetuity. The Northwest Territory Ordinance built upon this foundation, expressly dictating that "schools and the means of education shall forever be encouraged." Constitutional provision requiring that the state "provide for an efficient system of common schools" to set its own substantive guidelines for the state's education system. 790 S.W.2d at 189. The factors for determining adequacy were mostly aspirational, and included such requirements ensuring that all students have "sufficient self-knowledge" and an ability to react to "complex and rapidly changing situation[s]." Id. at 212. However laudable these goals, they have little support as a constitutional requirement.


17. See infra nn. 442-45 and accompanying text; see generally Larry J. Obhof, Rethinking Judicial Activism and Restraint in State School Finance Litigation, 27 Harv. J.L. & Pub. Policy 569, 598-607 (2004) (arguing that DeRolph I balances the principles of judicial activism and judicial restraint). Obhof compares the moderate approach followed by the Ohio Supreme Court in DeRolph I with courts that have been more activist and more restrained. For examples of each extreme, compare Brigham, 692 A.2d 384 (relying on a very weak educational provision to support an equity requirement) with Committee for Educational Rights v. Edgar, 672 N.E.2d 1178 (Ill. 1996) (holding issues of school finance to be left solely to the legislative branch and therefore nonjusticiable).


19. Id. (Douglas, J., concurring) (citing Spayde et al., Baldwin's Ohio School Law 2, § 1.03 (West 1984)).

20. Id. at 769 (Douglas, J., concurring) (citing Northwest Territory Ordinance art. III, § 14 (1787); 1 Stat. 51); see also Janis J. Winterhof, Student Author, From Rationing Toilet Paper to Computer Hook-ups with Moscow: Wealth-based Disparities Are Held Unconstitutional in DeRolph v. Ohio, 31 Creighton L. Rev. 1251, 1270 (1998).
The framers of the Ohio Constitution believed that education was the building block of liberty and opportunity. Education was considered so important that it was made a part of Ohio's first Bill of Rights. This stated, in part, "[R]eligion, morality, and knowledge, being essential to good government and the happiness of mankind, schools and the means of instruction shall forever be encouraged by legislative provision, not inconsistent with the rights of conscience." The 1802 Ohio Constitution also contained an explicit guarantee that no law could be passed to prevent the poor from equal participation in the schools, academies, colleges and universities within the State.

These education provisions were significantly strengthened as a result of the State's second Constitutional Convention in 1850-1851. Section 7, Article I of the Ohio Constitution of 1851 made public schools the responsibility of the State: "it shall be the duty of the General Assembly to pass suitable laws[,] . . . to encourage schools and the means of instruction." The State's new Education Clause, found in Section 2, Article VI and unaltered since its adoption, also imposed a stringent standard by requiring the State legislature to "secure a thorough and efficient system of common schools throughout the state." By imposing this standard, Ohio became the first state to require a "thorough and efficient" education. Although no explicit definition of "thorough and efficient" was given in the final committee report adopted by the 1851 Convention, the debates surrounding the topic support the view that the goal of public schools was "excellence . . . rather than mediocrity; and that education of the public was intended to be a fundamental function of the state . . . ."

21. Winterhof, supra n. 20, at 1254 (citing DeRolph I, 677 N.E.2d at 736).
22. DeRolph I, 677 N.E.2d at 736; see Ohio Const. art. VIII, § 3 (1802).
23. Ohio Const. art. VIII, § 3 (1802).
24. See Ohio Const. art. VIII, § 25 (1802).
28. DeRolph I, 677 N.E.2d at 772 (Douglas, J., concurring). Justice Andrew Douglas' concurrence to DeRolph I contains several examples, drawn from the Convention's debates, which support this view. See id. at 770-72 (Douglas, J., concurring). Justice Douglas found in these debates evidence that education is a fundamental right of all Ohioans, a view not shared by the majorities in any of the DeRolph decisions. Id. at 772 (Douglas, J., concurring).

The author of this Article finds Douglas' arguments rhetorically persuasive, but notes the difficulties associated with using the Convention debates to prove something not found within the text of the constitutional provisions themselves. Even if one considers the search for intent a proper criterion for judicial decision-making, legislative debates generally cannot provide reliable indicia of intent. For most issues, there is no collective understanding—at least not one that can be discerned—and public statements point in different directions. It is thus often possible to find something in a
The Ohio legislature reaffirmed the State’s commitment to educational equity early in the twentieth century by requiring the State to provide minimum support to poor school districts. Even in the 1990s, however, many Ohio schools faced such serious resource deficiencies that commentators compared them to the eighteenth-century England of Oliver Twist. How could this have happened? We must begin by examining twentieth-century school finance and the Ohio cases that helped shape it.

A. Miller v. Korns: the Meaning of “Thorough and Efficient”

DeRolph was not the first case in which the Ohio Supreme Court sought to define the meaning of the State’s Education Clause, or even the first time that it was asked to consider the constitutionality of the State’s school finance system. The Court first attempted to explain the “thorough and efficient” standard in Miller v. Korns.

The Ohio Supreme Court decided Miller v. Korns and its sister case, Board of Education of Silver Lake v. Korns, in 1923. The plaintiffs in these cases sought to enjoin the State’s practice of apportioning tax revenues to school districts. They argued that apportioning money raised in one school district to be spent in another district was unconstitutional. The Court, however, held that under Section 2, Article VI of the Ohio Constitution, maintaining a “thorough and efficient” system of public
education was an expressly statewide—not local—purpose. Judge Allen explained that the "thorough and efficient" clause "calls for the upbuilding of a system of schools throughout the state, and the attainment of efficiency and thoroughness in that system is thus expressly made a purpose, not local, not municipal, but statewide."

Having determined that Ohio's goal of appropriating funding statewide was not merely a legitimate government purpose but indeed was constitutionally mandated, the Miller Court defined "thorough and efficient" in negative terms. A thorough system was not one, the Court stated, in which any number of school districts were "starved for funds." An efficient system, it further stated, could not be one in which part or any number of school districts "lacked teachers, buildings, or equipment." Although other litigants and courts were decades away from defining school finance litigation in such terms, the Ohio Supreme Court's holding in Miller v. Korns appeared to support a statewide adequacy standard for school finance. Notwithstanding Miller, however, the Ohio Supreme Court heard an equity-based challenge to the State's school finance system in the late 1970s and found the system constitutionally permissible.

B. Board of Education v. Walter and the Search for Equity

Like many states, the central element of Ohio's school finance system has long been the "Foundation Program." Under a foundation

33. Id. at 776.
34. Id.
35. See Id. ("[T]he sovereign people made it mandatory upon the General Assembly to secure not merely a system of common schools, but a system thorough and efficient throughout the state.").
36. Id.
37. Id.
38. See Bd. of Educ. v. Walter, 390 N.E.2d 813, 823 (Ohio 1979) (finding "local control" sufficient grounds for interdistrict inequalities under the rational basis analysis; upholding Ohio's school finance system against equal protection claims).
39. State aid to school districts has historically taken three basic forms: flat grants, foundation programs, and percentage equalizing. Although a number of states previously relied on flat grants—an equal distribution of funds to each district, regardless of need—such programs have fallen out of favor. Today no state relies solely on such a system. Mark G. Yudof et al., Education Policy and the Law 593 (3d ed., West 1992). Under the foundation approach, the state guarantees each district some minimum level of funding, provided the district meet its burden of imposing an agreed upon minimum tax rate. Id. Percentage equalizing occurs when a school district itself determines the size of its budget, and the state provides a percentage of that number. Id. at 593-94. Each of these formulas has an equalizing effect across districts, but this effect is relatively weak. Other provisions, including "save harmless" provisions that guarantee districts the same amount of aid they received the prior year, further dilute this equalizing effect and "in practice have the effect of maintaining the disparities among districts." Id. at 594.
approach, the state guarantees each district a certain minimum level of funding, provided the district meets its own minimally required effort by imposing an agreed upon minimum tax rate.\textsuperscript{40} Ohio's first foundation program, adopted in 1935, provided substantial aid to all school districts.\textsuperscript{41} By the mid-1960s the State was providing roughly one-third of the operating costs of local districts.\textsuperscript{42} Legislation was enacted in the late 1960s and early 1970s that increased state support even further.\textsuperscript{43} At the same time, however, an increasing number of states faced court challenges to their school finance systems, and Ohio was no exception.

There are significant theoretical and empirical disputes about the importance of finance in the delivery of a quality education.\textsuperscript{44} Those debates notwithstanding, educational opportunity is typically defined in terms of resource inputs, such as funding levels, as well as the number and quality of teachers, texts, and other quantifiable factors.\textsuperscript{45} Variations on these measures, including per pupil expenditures, are significant both within and among states.\textsuperscript{46} In any system where local property taxes account for a significant portion of the school finance system, a basic, inescapable problem remains: "property values are unequally distributed across school districts and across states."\textsuperscript{47} Inequalities in revenues per

\begin{itemize}
  \item \textsuperscript{40} Id. at 593.
  \item \textsuperscript{41} Haynes, supra n. 11, at 622 (citing Bd. of Educ. v. Walter, 390 N.E.2d 813, 820 (Ohio 1979)).
  \item \textsuperscript{42} Id. (citing Bd. of Educ. v. Walter, 390 N.E.2d 813, 821 (Ohio 1979)).
  \item \textsuperscript{43} Id.
  \item \textsuperscript{44} These disputes made their way into the various DeRolph decisions. For example, Chief Justice Thomas Moyer's dissents in DeRolph I and II each highlight the idea that spending is not the most important predictor of student performance. Moyer argues that "factors related to families and economic opportunity," and not school finance, are the most influential. See DeRolph v. State, 728 N.E.2d 993, 1034-35 (2000) (Moyer, C.J., dissenting) [hereinafter DeRolph II].
  \item \textsuperscript{45} Yudof, et al., supra n. 39, at 591 (citing James Coleman, The Concept of Educational Opportunity, 38 Harv. Educ. Rev. 7 (1968)).
  \item \textsuperscript{46} See id. Yudof points out that there are at least three kinds of disparities in school finance: interstate, intrastate/interdistrict, and intradistrict. Among these, both interstate and interdistrict disparities appear prominent. "[I]nterstate disparities in per pupil expenditures are significant...[and] the disparity between the poorest district in one state and one of the highest spending districts in another state are orders of higher magnitude." Id. (emphasis in original). Interdistrict disparities within a state, often the subject of school finance litigation, are also significant. In many states the level of spending in one district may be four times that of another district within the same state. Id. at 592.
\end{itemize}
pupil therefore exist within and among school districts. These inequalities "are primarily the result of differences among districts in per pupil taxable property base."48

By the 1970s, many people were concerned about the real and perceived inequalities in some states' funding schemes and sought greater educational "equity." In positive terms, the search for equity meant that all students should be given an equal opportunity to succeed.49 In negative terms, it meant that a student's success should not depend on circumstances outside of his or her control, such as the geographic location or wealth of the family.50 School districts and individuals soon began asking the courts to distribute resources more equally among schools and school districts.

Approximately thirty states were involved in some sort of school finance litigation during the 1970s.51 More than twenty of these states modified their education finance systems, some due to political pressures, and some as a result of judicial decisions and orders.52 A number of these equity lawsuits, however, were rejected. These included cases in Idaho, Oregon, Pennsylvania, and Ohio.53 It was in 1979, in Board of Education v. Walter, that the Ohio Supreme Court first responded to—and rejected—an equity challenge to the State's school funding scheme.54

In 1976, the Board of Education and Superintendent of Schools of Cincinnati, along with parents, students, and other individuals, brought an action for declaratory judgment against the State of Ohio. The plaintiffs' claim in Walter rested on both the State's Equal Protection Clause55 and the "thorough and efficient" standard of the Education Clause.56 The trial court found that the State's financing scheme violated both provisions.57 The appeals court reversed on the "thorough and efficient" grounds but upheld the decision on equal protection grounds. In doing so, the court found that education was a fundamental right, and

48. Yudof et al., supra n. 39, at 593.
50. Id.
51. Yudof et al., supra n. 39, at 592.
52. Id.
54. See Walter, 390 N.E.2d 813 (rejecting state equal protection and education provision challenges based on the grounds that the legislature has discretion in educational matters, and the court will not interfere with such discretion where education appears adequate).
55. See Ohio Const. art. 1, § 2.
56. Walter, 390 N.E.2d at 815.
57. Id.
that there was no compelling state interest to justify the disparities in funding. 58

When the Ohio Supreme Court heard Walter, it redefined the issue as one of taxation, concerned more with "the way in which Ohio has decided to collect and spend state and local taxes than . . . the way in which Ohio educates its children." 59 The Court affirmed the court of appeals in part and reversed in part, finding no violations of either the Equal Protection Clause or the Education Clause. 60

Perhaps more important to the future DeRolph litigants than the decision itself was the Ohio Supreme Court's unambiguous statement that it had jurisdiction in such cases. The Walter Court acknowledged that it is the province of the legislature to determine a funding scheme, but stated that where legislative enactments violate the fundamental law (such as the requirements of the Ohio Constitution), the courts have not only the power, but also the duty, to declare such enactments invalid. "One of the basic functions of the courts under our system of separation of powers is to compel the other branches of government to conform to the basic law." 61 The Court nonetheless held that the legislature had not violated its broad discretion in enacting the system at issue.

The Ohio Supreme Court began its analysis in Walter with a discussion of Ohio's finance system. The State's Foundation Program had been changed to a two-tiered "Equal Yield Formula" in fiscal year 1975-1976. 62 The first tier guaranteed a specific amount of funding per student per mill assessed by the school district up to 20 mills. 63 If local taxes were insufficient to meet the present amount, the State would make up the difference. A second tier enabled districts to obtain additional state support by increasing local taxes greater than 20 mills (but not more than 30 mills). 64 The Equal Yield Formula at issue in Walter was

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58. Id. at 817.
59. Id. at 819.
60. Justice Ralph S. Lochner dissented, and argued that education was a fundamental right "implicitly mandated" by the Ohio Constitution. Id. at 826-27 (Lochner, J., dissenting). Justice Lochner stated that the system therefore failed under an equal protection analysis because he found no compelling interest for the system's inequalities. He further argued that the system was not "thorough and efficient" because school districts were "starved for funds" and children were "deprived of educational opportunity." Id. at 829 (Lochner, J., dissenting).
61. Id. at 823.
63. Walter, 390 N.E.2d at 816. A "mill" is equal to one-thousandth of a dollar (.001), and is the measurement used to determine the amount of money raised through property taxes. The amount of money that a school district will raise through one mill is therefore equal to the total taxable property value in a given district, multiplied by .001.
64. Id. at 816-17.
therefore designed to enable districts to obtain even more funding per pupil than necessary to meet the state-determined cost of education, regardless of the amount that could be raised from local property taxes.65

The Walter Court rejected the equal protection claims against Ohio's local property tax-based system.66 The Court did not find a fundamental right to education, but it also did not explicitly reject the notion of education as a fundamental right. Writing for the Court, Justice Brown said, "We have not found helpful the concept of a 'fundamental' right. No one has successfully defined the term for this purpose. . . . [But] because this cause deals with difficult questions of local and statewide taxation, fiscal planning and education policy, we feel that this is an inappropriate cause in which to invoke 'strict scrutiny.'"67 The Court therefore applied the more lenient rational basis test, and found that local control not only provided a rational basis for the spending disparities, but was "of overriding importance from an educational standpoint."68 Thus, although the Ohio Supreme Court recognized that reliance on property taxes may lead to inequality, it held that some inequality alone is not a sufficient basis for striking down the State's funding scheme.

The Walter Court's decision relied heavily on the existence of an "Education Review Committee," established by the General Assembly to recommend the minimum amount of funding necessary to provide each student with a high-quality education.69 The review board at issue in Walter recommended funding of $715 per student, which the first tier of the Equal Yield Formula easily surpassed by establishing a funding level of $960 per student.70 Schools were also eligible to receive up to an additional $420 per student through the second tier of the formula.71 The Court thus held that the legislature had fulfilled its duties under the Education Clause because the Equal Yield Formula enabled districts to meet the minimum standards set by the Education Review Committee.72

67. Walter, 390 N.E.2d at 819.
68. Id. at 822 (citing Wright v. Council of the City of Emporia, 407 U.S. 451, 478 (1972) (Burger, C.J., dissenting)).
69. Drummond, supra n. 65, at 441; see Walter, 390 N.E.2d at 817.
71. Id. at 331.
72. Drummond, supra n. 65, at 441 (citing Bd. of Educ. v. Walter, 390 N.E.2d 813, 825 (Ohio 1979)).
Having determined that "each child received an adequate education," the Court concluded by noting that the possibility of creating an even more thorough and efficient system was immaterial to the constitutionality of the current one.\(^{73}\)

Three years after the Ohio Supreme Court's decision in Walter, the legislature eliminated both the Equal Yield Formula and the Education Review Committee that had been so important to the Court's decision.\(^{74}\) It replaced this program with a new Foundation Program—a complex system designed to ensure that each district would receive enough local property tax revenue and state funding to attain a state-defined per pupil foundation amount. This foundation amount was estimated by the State Board of Education to be roughly $4,000 in 1992; for the fiscal year 1992–1993, however, the amount actually provided was only $2,817.\(^{75}\) This system, the post–Walter Foundation Program, would be at the center of the DeRolph controversy in the 1990s.

II. THE SHIFT FROM EQUITY TO ADEQUACY: THE ORIGINS OF DEROLPH V. STATE

Of the eight school finance cases tried by various state supreme courts between 1981 and 1988, the plaintiffs were successful in only one.\(^{76}\) The recession of 1981–1982, combined with a growing sentiment that the problems of school finance had been "dealt with" in the prior decade, weakened both legal and popular support for equity measures.\(^{77}\) When A Nation at Risk was published in 1983, however, it called attention to the inadequacies, both real and perceived, of education in the United States.\(^{78}\) Governors and state legislators turned their attention toward "achieving excellence in education," often by changing education standards, graduation requirements, and teacher certification requirements and compensation.\(^{79}\)

While most of these "second wave" cases still focused on equality,
some also dealt with state constitutional provisions requiring an adequate or thorough system of public schools. 80 This trend became increasingly common as plaintiffs recognized a number of problems with the equity approach. Among the most important was the simple fact that fiscal equality offers no solutions if all districts are equally funded at an inadequate level. 81 Indeed, thanks in part to the experience in California following Serrano v. Priest and its progeny, Proposition 13, many saw the banner of "equity" as "equally bad for all." 82 By the late 1980s, any theory that hoped to succeed had to shed the idea of leveling-down funding from the highest spending districts.

A. Searching for a Remedy: the Coalition of Rural and Appalachian Schools

Ohio's school district superintendents sought to increase funding to primary and secondary education throughout the 1980s. Many believed the Walter decision was too political. Some thought that the system was broken in 1979, and that it had remained that way after the Court's decision. 83 Thus in the mid-1980s a group of Appalachian-area school superintendents began working toward obtaining equal educational opportunities for the children in rural southeastern Ohio. These school districts suffered from low funding levels, inadequate facilities, poor curriculum, and a lack of special education programs. 84 In 1987, southeastern Ohio school superintendents initiated an effort called Promoting Appalachian and Rural Initiatives for Teaching Youth (PARITY). 85 This initiative was designed to communicate the lack of

81. Yudof et al., supra n. 39, at 810.
82. See Serrano v. Priest, 557 P.2d 929 (Cal. 1976) [hereinafter Serrano II]. Following Serrano II the voters of California passed Proposition 13, a constitutional amendment that limited property tax rates to 1% of the cash value of real property subject to taxation. See Paul A. Minorini & Stephen D. Sugarman, School Finance Litigation in the Name of Educational Equity: Its Evolution, Impact, and Future, in Equity and Adequacy in Education Finance 34, 49 (Helen F. Ladd et al. eds., Natl. Acad. Press 1999). Proposition 13 also required a two-thirds vote of the legislature to increase state taxes and absolutely prohibited the imposition of a statewide property tax. Id. Over time the effect of Proposition 13 has been to slow the overall growth in spending. California has therefore gone from being one of the highest spending states for elementary and secondary education to one of the lowest. Id. The Serrano cases and Proposition 13 became increasingly unpopular, and in fact may have dramatically reduced public support for education. William N. Evans et al., The Impact of Court-Mandated School Finance Reform, in Equity and Adequacy in Education Finance 72, 75 (Helen F. Ladd et al. eds., Natl. Acad. Press 1999).
83. Telephone Interview with William Phillis, supra n. 6.
84. Id.
educational opportunity and the school-funding inequities in poor, rural Appalachian school districts to members of the Ohio General Assembly. Fearing that PARITY would not achieve its political goals, the superintendents reorganized as the Coalition of Rural and Appalachian Schools (CORAS) in July 1988, ostensibly for the purposes of researching and discussing the problems facing schools in rural southeastern Ohio.\(^{86}\)

In the late 1980s CORAS funded research aimed at improving Ohio’s education system. A study done for CORAS by Dr. Kern Alexander, a nationally recognized school finance expert from Virginia Tech University, concluded that Ohio’s school finance system was both inequitable and inadequate.\(^{87}\) Dr. Alexander found that Ohio was far behind other industrial states in its level of state funding for public education.\(^{88}\)

CORAS was already quite large by the time Dr. Alexander’s study was released—it had (and maintains to this day) roughly 125 member school districts in the twenty-nine county region of Ohio designated as Appalachia.\(^{89}\) In 1990, CORAS began to discuss its findings with district superintendents statewide, who were generally frustrated with their inability to change the school finance system through normal political channels (such as contacting their legislators).\(^{90}\) They decided to once again test the efficacy of litigation, and organized into a broader coalition aimed solely at challenging the constitutionality of Ohio’s school finance system.\(^{91}\) Thus the Ohio Coalition for Equity & Adequacy of School Funding (the “Coalition”) was formed in 1990 with approximately 275 member school districts statewide.\(^{92}\) The Coalition’s only mandate was to “secure adequate educational opportunities for all school children.”\(^{93}\) This mission would mix well with the direction of school finance suits in

86. Id.
88. Ohio Coalition for Equity & Adequacy of School Funding, supra n. 87, at 4.
89. See Coalition of Rural and Appalachian Schools, available at http://www.coras.org/.
90. Telephone Interview with William Phillis, supra n. 6.
91. Id.
92. Id.; Ohio Coalition for Equity & Adequacy of School Funding, Ohio Coalition for Equity & Adequacy of School Funding: Mission and Progress 5, available at http://www.ohiocoalition.org/PDFs/Tabloid2.pdf. The Coalition is organized as a council of governments under Chapter 167 of the Ohio Revised Code, which allows political subdivisions to organize for the purpose of engaging in cooperative efforts. See Ohio Rev. Code Ann. §§ 167.01-.08 (West 2002).
93. Telephone Interview with William Phillis, supra n. 6; Ohio Coalition for Equity & Adequacy of School Funding, supra n. 92, at 4.
other states.

By the late 1980s, plaintiffs nationwide were finding potential in the adequacy approach. This standard received some support from the United States Supreme Court's decision in \textit{San Antonio Independent School District v. Rodriguez}, which rejected a federal equity claim but recognized the difference between an "unequal system" and one that "occasioned an absolute denial of educational opportunities to any of its children."\textsuperscript{94} The \textit{Rodriguez} Court acknowledged that a system that absolutely precluded poor children from receiving an education "would present a far more compelling set of circumstances for judicial assistance" than mere equity suits.\textsuperscript{95}

A third wave of school finance litigation began in 1989 with important plaintiff victories in Kentucky and Montana. These cases have focused on state education clauses\textsuperscript{96} and emphasized adequacy rather than equity. Rather than focusing on the distribution of expenditures, the plaintiffs in the third wave cases have argued that all children are entitled to a base level of educational quality, and have therefore sought the financing necessary to bring the poorest school districts up to the minimum level mandated by the state constitutions.\textsuperscript{97} Courts soon followed the Kentucky Supreme Court, and between 1990 and 1999 more than a dozen states recognized a cause of action for failure to provide an adequate education.\textsuperscript{98} One of these states was Ohio, where the Coalition grew to more than 580 member school districts and picked up where the \textit{Walter} plaintiffs left off by bringing a suit that sounded in both equity and adequacy.

\textsuperscript{95} Id. at 25 n. 60.
\textsuperscript{96} Every state constitution has some provision guaranteeing a right to public education. O'Neil, supra n. 27, at 892 n. 3 (noting that "all fifty states mention education in their constitutions"); see also Swenson, supra n. 4, at 1148 n. 9 (listing state constitutional provisions); William E. Thro, \textit{A New Approach to State Constitutional Analysis in School Finance Litigation}, 14 J.L. & Pol. 525, 538-39 n. 33 (1998).
\textsuperscript{97} Michael Heise, \textit{State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy}, 68 Temp. L. Rev. 1151, 1153 (1995); Ryan, supra n. 3, at 268 (citing William E. Thro, \textit{Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model}, 35 B.C. L. Rev. 597, 603 (1994)).
\textsuperscript{98} Cochran, supra n. 80, at 415-16. Although the results of these cases have also been mixed, a number of courts have been persuaded by evidence that their states' poorest school districts fail to meet even minimum standards. Swenson, supra n. 4, at 1149. The third wave has been better for plaintiffs, who have won 11 of 22 cases. Ryan, supra n. 3, at 269. These successes notwithstanding, however, twenty-six courts of last resort have upheld their states' funding schemes. Swenson, supra n. 4, at 1149.
B. The Coalition and the Beginnings of the DeRolph Litigation

The Coalition, which was organized for the explicit purpose of challenging the constitutionality of Ohio's school funding system, is unique in a number of ways. First and perhaps most important, the Coalition has the highest percentage of school district membership of any school finance litigation support group in the country. Its membership grew to over 500 school districts by 1992, and has ranged from 500 to 580 member districts ever since. School districts become members of the Coalition by passing a resolution of joinder and paying an annual fee of $0.50 per district student. Since the Coalition's inception more than 80% of Ohio's 700-plus school districts have joined.

Second, the Coalition enjoys both broad support and diversity of membership. Coalition leaders note that "[m]embers display a wide range of pupil enrollment, fiscal capacity, report card scores, per pupil expenditures, income and other demographics." The membership includes both low- and high-wealth districts, organized to serve the joint goal of securing greater educational opportunities for all students. CORAS also continues to work with the Coalition and has generally supported its efforts.

The Coalition, represented by the Columbus law firm of Bricker & Eckler, filed the DeRolph case on December 19, 1991 in the Perry County Court of Common Pleas. The named plaintiffs consisted of five Ohio school districts and various individuals who sought injunctive and declaratory relief, including a determination that Ohio's public school financing system was unconstitutional. The complaint sounded in both equity and adequacy, and focused not only on the vast inequities among school districts but also on the unsafe facilities and inadequate curriculum of the lowest-spending districts. The five school districts that brought the suit were located hundreds of miles apart, and included districts in urban Youngstown (located in the northeastern part of the State), rural Lima (located on the State's western border with Indiana), and rural Appalachian districts in the southeast.

99. Telephone Interview with William Phills, supra n. 6; Ohio Coalition for Equity & Adequacy of School Funding, supra n. 98, at 5.
100. Telephone Interview with William Phills, supra n. 6; Ohio Coalition for Equity & Adequacy of School Funding, supra n. 92, at 5.
101. Ohio Coalition for Equity & Adequacy of School Funding, supra n. 92, at 5. Indeed, the leaders of the Coalition believe that it is the most diverse school finance litigation support group in the nation. Id.
102. Telephone Interview with William Phills, supra n. 6.
103. DeRolph I, 677 N.E.2d at 734.
104. Telephone Interview with William Phills, supra n. 6.
The plaintiff districts provided stark examples of the conditions among the State's poorest schools. Such conditions, however, were representative of those of a much larger group of districts. Although the Ohio Supreme Court had previously rejected an equity challenge to the State's finance system, the Coalition hoped to use the vast inequities between districts to highlight the inadequacy of funding to the poorer districts.

Although one could expect high-wealth districts to oppose the Coalition's attempts to alter the State's funding scheme, the Coalition has in fact faced little dissent from Ohio school districts. There has never been an organized long-term effort by wealthy school districts to challenge the Coalition's efforts. To the contrary, even most wealthy school districts supported the DeRolph litigation. The Alliance for Adequate School Funding (AASF), for example, was formed in the mid-1990s to protect the interests of wealthier school districts. The sixty high-wealth school districts that make up the AASF have consistently supported the Coalition's efforts on behalf of poorer school districts. The group has even filed briefs as amicus curiae in support of the DeRolph plaintiffs in several of the cases. This is largely because the Coalition learned from the experiences of other states, and sought only a leveling-up approach that would leave wealthy school districts unharmed. This approach has created strong support and unity within Ohio's education community.

III. DeRolph I: The Quest for Educational Adequacy in Ohio

The trial in the Ferry County Court of Common Pleas was long and complex. Over the course of 30 days, 61 witnesses testified or offered sworn depositions, and 450 exhibits were admitted into evidence. The trial generated more than 5,600 pages of transcripts. Although the parties disagreed over the constitutionality of the funding system, there were no significant disputes over the facts of the case. Both sides agreed

105. When asked if the specific districts involved in the lawsuit were perhaps not representative of Ohio schools as a whole, Coalition Executive Director William Phillis stated that the Coalition could have just as easily highlighted "the poor conditions in Cleveland, Akron, or Cincinnati" and any of "roughly seventy-five different rural districts" to demonstrate the inadequacies of Ohio's school funding system. Id.

106. Id. ("It was both an adequacy and an equity case all along. . . . We hoped to use the inequities to show the inadequacies.").

107. Id.

108. The AASF filed a brief as amicus curiae on behalf of the state defendants in DeRolph I, but sided with the DeRolph plaintiffs in the subsequent cases. See DeRolph I, 677 N.E.2d at 734.

109. Id.
that the conditions of many schools were squalid. According to the trial court, "plaintiff and defense witnesses alike testified as to the inadequacies of Ohio's system of school funding and the need for reform."¹¹⁰ The defendant State Board of Education not only advocated comprehensive reform but also set equity, adequacy, and reliability of school funding as the goals of such reform.¹¹¹

On July 1, 1994, the trial court issued a 478-page opinion containing extensive findings of fact and conclusions of law. Judge Linton Lewis held that Ohio's school finance system violated both the Equal Protection Clause and the Education Clause of the Ohio Constitution.¹¹² Judge Lewis relied heavily on evidence of "gross disparities in funding among the districts, the failure of curriculum to prepare students for higher education, and the appalling condition of Ohio's school facilities" to hold that the State had not met the requirements of a "thorough and efficient" education under Section 2, Article VI.¹¹³ The court ordered the Superintendent of Public Schools and the State Board of Education to submit proposals to the State legislature that would eliminate wealth-based disparities among districts.¹¹⁴ Although the State Board of Education voted not to appeal the trial court's decision, the Ohio Attorney General appealed the decision to the Fifth District Court of Appeals.¹¹⁵ This was done at the urging of then-Governor George Voinovich, who had already undertaken a series of education reforms and hoped that DeRolph would ultimately be overturned by the Ohio Supreme Court.¹¹⁶

The Fifth District Court of Appeals relied on Board of Education v. Walter to reverse the trial court's decision. A majority of the court held

¹¹⁰. Id.
¹¹¹. Id. The State Board has continued to advocate such reforms. "The Board of Education wants funding that is stable, reliable, and equitable." Telephone Interview with Matt DeTemple, Chief Counsel for the Ohio Department of Education (May 14, 2003).
¹¹². As part of its equal protection analysis the trial court also determined that education was a fundamental right under the Ohio Constitution. See DeRolph v. State, 712 N.E.2d 125, 297 (Ohio C.P. Perry, July 1, 1994).
¹¹³. Drummond, supra n. 65, at 442.
¹¹⁵. Id. at 735.
¹¹⁶. According to William Phillis, Executive Director of the Coalition, Governor Voinovich "blasted the trial judge" for his "overreaching," and expected the Ohio Supreme Court to overturn the trial court's decision. For the plaintiffs, the Governor's decision to appeal the case signified a refusal to abide by the court's ruling and a declaration to fix the state's education problems. Telephone Interview with William Phillis, supra n. 6. Some legislators, however, saw things very differently. "Governor Voinovich had a whole program of school reforms, including statewide testing, academic accountability measures, and efforts toward equalization." Telephone Interview with William Batchelder, Former Speaker Pro Tempore of the Ohio House of Representatives (May 5, 2003).
that Judge Lewis had exceeded his authority by requiring new legislation from the General Assembly, and that this was an impermissible attempt by the courts to legislate school funding.\textsuperscript{117} In reversing the equal protection holding, the court reasoned that in \textit{Walter} the Ohio Supreme Court had decided that education was not a fundamental right under the Ohio Constitution.\textsuperscript{118} The appellate court also emphasized the separation of powers and pointed to the broad discretion granted to the legislature. The court argued that it was required by the \textit{Walter} precedent to uphold the system: "The law enunciated in \textit{Walter} is binding... upon this court and only the Supreme Court and the General Assembly can change Ohio law."\textsuperscript{119}

Although the Fifth District Court of Appeals held the system constitutionally permissible, none of the parties to the appeal disputed that the system suffered from extreme inequalities. Judge Reader made this very clear in his concurrence to the appellate decision: "The defendants... agreed with almost everything the plaintiff-appellee stated. In fact, an examination of testimony by defense witnesses in this case would indicate... that the system of funding was immoral and inequitable. If there was ever a case where the parties acted more in concert than this one, I haven't seen it."\textsuperscript{120} In contrast, Judge W. Scott Gwin dissented and argued that Ohio's school finance system simply did not meet the \textit{Miller} standard of "thorough and efficient."\textsuperscript{121}

A. The Ohio Supreme Court - Round I

The Ohio Supreme Court granted the plaintiffs a discretionary appeal, and arguments were offered in late 1996.\textsuperscript{122} On March 24, 1997, the Ohio Supreme Court reversed the Court of Appeals and held that Ohio's school finance system was in fact not "thorough and efficient."\textsuperscript{123}

Justice Francis Sweeney's opinion for the four-to-three majority in

\begin{itemize}
\item \textsuperscript{117} McMillan, \textit{supra} n. 30, at 775 (citing \textit{DeRolph v. State}, 1995 WL 557316 at 11 (Ohio App. 5th Dist. Aug. 30, 1995)).
\item \textsuperscript{118} \textit{DeRolph v. State}, 1995 WL 557316, at 2–3 (Ohio App. 5th Dist. Aug. 30, 1995)). This reasoning does not properly follow from the \textit{Walter} decision. As noted above, the \textit{Walter} Court declined to hold education a fundamental right. The Court \textit{did not}, however, hold that education is not a fundamental right. See \textit{supra} nn. 66-68 and accompanying text.
\item \textsuperscript{119} \textit{DeRolph v. State}, 1995 WL 557316, at 2–3.
\item \textsuperscript{120} \textit{Id.} at 11 (Reader, J., concurring); see also \textit{DeRolph I}, 677 N.E.2d at 735 (same). Nor was Judge Reader's statement mere hyperbole. "Judge Reader's statement was a pretty accurate representation," notes Department of Education counsel Matt DeTemple. "The State Board had voted not to appeal... and the Department's position at that time was that the system was not 'thorough and efficient.'" Telephone Interview with Matt DeTemple, \textit{supra} n. 111.
\item \textsuperscript{121} \textit{DeRolph v. State}, 1995 WL 557316, at 17 (Gwin, J., dissenting).
\item \textsuperscript{122} \textit{DeRolph I}, 677 N.E.2d at 733.
\item \textsuperscript{123} \textit{Id.} at 747.
\end{itemize}
DeRolph I began by dismissing claims that the courts were engaging in impermissible judicial activism. "Under the long-standing doctrine of judicial review, it is our sworn duty to determine whether the General Assembly has enacted legislation that is constitutional." The Court acknowledged the legislature's discretion in such areas and noted that such legislation is presumptively valid. The decision followed, however, that the presumption of constitutionality is rebuttable, and that the Ohio Supreme Court would not "dodge [its] responsibility" by declaring the case nonjusticiable. "Fortunately, however, for the people, the function of the judiciary in deciding constitutional questions is not one which [the Ohio Supreme Court] is at liberty to decline." After asserting its jurisdiction, the Court described and criticized the complex statutory scheme of Ohio's school funding system. Funding was available to districts from two primary sources: state revenue, available through the School Foundation Program, and local revenue, derived mostly from local property taxes. Contrary to the national trend, Ohio relied more on local revenue than state revenue. Under the Foundation Program, state aid was available for school districts that levied at least 20 mills of local property tax revenue for current operating expenses. State basic aid for qualifying school districts was calculated as a part of the legislature's biennial budget.

The Court found that the foundation amount was a budgetary residual, and that the formula amount for determining aid bore no relation to what it actually costs to educate a student. The foundation dollar amount, the Court said,

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. Thus, the foundation level reflects political and budgetary considerations at least as much as it reflects a judgment as to how much money should be

124. Id. at 737.
125. Id.
127. See DeRolph I, 677 N.E.2d at 737–40. For an excellent, brief explanation of the foundation formula, see Martha S. West, Equitable Funding of Public Schools under State Constitutional Law, 21 J. Gender Race & Just. 279, 288–89 (1999).
129. Id. For example, in the 1991–1992 school year schools received 5.7% federal funding, 42.7% state funding, and 51.6% local funding. DeRolph v. State, 1995 WL 557316, at 2.
130. DeRolph I, 677 N.E.2d at 738.
131. Id.
132. Id.
spent on K-12 education.  

In 1992-1993, the State financing began at a base level of $2,817 per pupil. That figure was then adjusted by an equalization factor, called the "cost of doing business" factor, which assumed that costs were lower in rural schools than in urban ones. The State then subtracted an amount known as a "charge off," which reflected a percentage of the taxable value of real and tangible property in the district. The remaining amount was the district's basic state aid money.

As taxable wealth increased, a district's "charge off" amount increased and lowered the district's state aid. At the same time, however, a number of "tax reductions factors" limited increases in property taxes and thus prevented districts from making up the charged off amount by increasing local revenues. The Supreme Court dubbed this problem "phantom revenue"—a school district could experience an increase in the valuation of its real property without enjoying any additional income, but consequently receive less under the State formula because the value of taxable property had increased. The problem of phantom revenue therefore prevented many districts from keeping pace with inflation.

The Ohio Supreme Court also found that many districts engaged in "forced borrowing." When a district could not meet its budget it was forced to borrow funds. The first type of loan available was a "spending reserve loan," borrowed against the subsequent year's revenue. If this was insufficient, districts had to borrow funds from commercial lenders. Such loans were repaid by diverting funds that otherwise would have been available to the district for operating expenses under the School Foundation Program.

If a commercial loan was denied, the district was required to submit a plan for reducing the district's budget. The Court found that this systematic borrowing had dire results. "The debt which stems from mandated borrowing programs is in many instances staggering, and the cyclical effect of continued borrowing has made it more difficult to

133. Id. (emphasis in original).
134. This assumption often led to insufficient funding for rural districts. For example, it was applied even to textbooks and supplies, which cost all school districts the same amount regardless of location. Drummond, supra n. 65, at 444.
135. West, supra n. 127, at 289.
136. Id.
137. DeRolph I, 677 N.E.2d at 739.
138. Id.
139. Winterhof, supra n. 20, at 1259.
140. DeRolph I, 677 N.E.2d at 739.
141. Id.
142. Id. at 740.
maintain even minimal school operations.” The Court characterized the loan programs as a clever disguise for the State’s failure to adequately fund education. Last, the Court found that the School Foundation Program contained no express aid for capital improvements, despite sufficient evidence that vast improvements were needed.

Although the Ohio Supreme Court had never clearly spelled out what a system would need to do in order to be “thorough and efficient,” the decisions from Miller and Walter provided the Court with guidelines for making such a determination. If it followed the Miller precedent, the Court could not uphold a system in which school districts were “starved for funds” or “lacked teachers, buildings, or equipment.” To be consistent with its holding in Walter, however, the Court had to respect the broad discretion granted to the legislature to determine the school finance system so long as the State set a minimum education standard and provided the funding necessary to meet that minimum.

Several important factors distinguished the DeRolph litigation from Board of Education v. Walter. For one thing, the Education Review Committee—heavily relied on by the Walter Court—no longer existed. That Committee had recommended the minimum total funding necessary to the legislature before the Walter case commenced. Without such a committee, however, the finance system of the 1990s bore no relation to the actual cost of educating a child. As the Court pointed out, the State Superintendent had suspended even routine minimum standard evaluations in 1992, and no minimum standards had been regularly enforced since that time. Thus, whereas the finance scheme in Walter had actually provided more money than the state-determined adequate amount, the system at issue in DeRolph I did not even have a specific target to meet. Rather than determining the cost of educating a child, the budget process funded all other state programs first and then simply allocated the remainder to education.

The Ohio Supreme Court applied the Miller and Walter standards of “thorough and efficient,” and found that many districts were in fact starved for funds and lacked teachers, buildings, and equipment. The Court relied on substantial evidence that many districts suffered from

143. Id.
144. Id. at 741.
147. DeRolph I, 677 N.E.2d at 745. Justice Resnick highlighted the lack of procedures to determine the cost of an adequate education: “Yet the General Assembly does not know the actual per-pupil cost of education in Ohio, since it has not calculated the cost of a quality education since 1973–1974.” Id. at 780 (Resnick, J., concurring).
148. Id. at 746.
“unsafe and inadequate facilities, lack of current textbooks and adequate supplies, limited curriculum, and lack of access to modern technological education.”

The record from the trial court was replete with evidence of unsafe and inadequate conditions among schools in the plaintiff districts. Just among the districts from rural western and southeastern Ohio, the Court found that children were attending classes in a school building that was sliding down a hill at a rate of one inch per month; that necessities like paper, art supplies, and toilet paper were rationed; that hundreds of students were hospitalized because carbon monoxide leaked out of heaters and furnaces; and that some schools lacked appropriate structures and were forced to use closets, windowless storage rooms, and even an unventilated coal bin as classrooms. The rural Dawson-Bryant School District still used a coal heating system that forced students to breathe coal dust in such large proportions that it actually covered the students’ desks after accumulating overnight. There was also testimony that some schools in the plaintiff districts were not handicap accessible.

The record also documented that schools in Perry County, where DeRolph was filed, suffered from serious health and safety concerns. The Northern Local School District had facilities with leaking roofs and windows, an outdated sewage system that caused sewage to flow onto a high school’s baseball field, and arsenic in their drinking water. The facilities in the Southern Local School District had reached such a dilapidated state that custodians deliberately knocked plaster off of the ceilings so it would not fall on students. Importantly, the most serious safety concerns were not limited to the plaintiff districts. The trial court found, for example, that asbestos had yet to be removed from 68.6% of Ohio’s school buildings, and over 99% of all Ohio public school structures had asbestos in them.

The Ohio Supreme Court also placed great emphasis on The 1990 Ohio Public School Survey, commissioned by the General Assembly to determine the cost of bringing school facilities into compliance with state building codes and asbestos removal requirements. The survey found

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149. West, supra n. 127, at 290 (citing DeRolph I, 677 N.E.2d at 745).
150. DeRolph I, 677 N.E.2d at 743.
151. Id.
152. Id. The court noted testimony, for example, that a handicapped third-grader at Deering Elementary had never been to the school’s library because it was not wheelchair accessible.
153. Id.
154. Id.
155. Id.
that only half of Ohio's schools contained adequate electrical systems, and only 17% of the heating systems and 31% of the roofs were satisfactory.\textsuperscript{156} More than 80% of schools' windows and three-fourths of their plumbing fixtures were inadequate.\textsuperscript{157} Only one in five schools was handicap accessible.\textsuperscript{158} Perhaps most shocking, the survey found that a paltry 30% of Ohio's schools had adequate fire alarm systems and exterior doors.\textsuperscript{159} In total, the survey identified a need for approximately $10.2 billion in facility repair and construction.\textsuperscript{160}

In addition to the safety concerns, the Court found that many of the appellant districts could not provide the basic resources necessary to educate their students, such as new, updated textbooks.\textsuperscript{161} Such deficiencies garnered national media attention. A PBS report noted that thousands of Ohio's students read textbooks that failed to mention Neil Armstrong or the wars in Vietnam and the Persian Gulf because some districts had gone decades without enough funding to purchase new textbooks.\textsuperscript{162} For some classes, moreover, there were no textbooks at all.\textsuperscript{163} The Court also found compelling evidence that (1) districts lacked funds to comply with a state law requiring a district-wide average of no more than twenty-five students per classroom teacher;\textsuperscript{164} (2) curricula in appellant school districts were severely limited;\textsuperscript{165} and (3) none of the appellant districts were able to provide appropriate technological training.\textsuperscript{166}

The Court was shocked by the economic disparities between school districts, and its decision rejected the notion that these disparities were caused by a lack of effort on the part of poorer districts. "[P]oor districts simply cannot raise as much money even with identical tax effort. For

\textsuperscript{156} Id. at 742.
\textsuperscript{157} Id.
\textsuperscript{158} Id.
\textsuperscript{159} Id.
\textsuperscript{160} Id.
\textsuperscript{161} Id. at 744.
\textsuperscript{162} Haynes, supra n. 11, at 611 (citing \textit{Children in America's Schools with Bill Moyers} (PBS Sept. 13, 1996) (television broadcast)).
\textsuperscript{163} \textit{DeRolph I}, 677 N.E.2d at 744.
\textsuperscript{164} Id. Indeed, some school districts had as many as thirty-nine students per teacher. Educators testified that it is "virtually impossible" to educate children with such a high student-teacher ratio. Id.
\textsuperscript{165} Id. For example, Dawson-Bryant elementary students had no opportunity to take computer courses or courses in foreign language, art, or music. The junior high students had no science lab. The high school students had no opportunity to take advanced placement courses, which disqualified them "from even being considered for a scholarship or admittance to some universities." Id.
\textsuperscript{166} Id. Districts lacked computers, computer labs, training, software, and related supplies.
example, total assessed property valuation in the Dawson-Bryant School District in 1991 was $28,882,580, while Beachwood School District in Cuyahoga County had $376,229,512.\textsuperscript{167} These districts had approximately the same number of students, and thus spent vastly different sums per pupil.

The Ohio Supreme Court reasoned that these factors could lead to poor academic performance and hamper the labor market prospects of the appellant districts' students.\textsuperscript{168} Indeed, districts with high local funding tended to have substantially higher test scores.\textsuperscript{169} In 1993, for example, up to one-third of high school seniors in some poor districts had not passed the ninth-grade proficiency exam, despite having six opportunities to do so.\textsuperscript{170} This contrasts sharply with the passage rate of the wealthiest school districts. By way of comparison, the Beachwood School District had one senior (out of a class of 100) who had not been able to pass the proficiency exam in 1993.\textsuperscript{171}

For the reasons outlined above, the Ohio Supreme Court held that the State's funding system violated the "thorough and efficient" requirements of Section 2, Article VI of the Ohio Constitution. "A thorough and efficient system of common schools includes facilities in good repair and the supplies, materials, and funds necessary to maintain these facilities in a safe manner . . . ."\textsuperscript{172} The Court held four specific features of the system unconstitutional. First, it held the School Foundation Program unconstitutional because the amount of state aid bore no relationship to the actual cost of educating a child.\textsuperscript{173} Second, the Court stated that Ohio's over-reliance on property taxes impermissibly prevented poor districts from raising funds comparable to that of wealthy districts with similar tax burdens.\textsuperscript{174} Third, the Court unequivocally held the requirement of school district borrowing through the spending reserve and emergency school assistance loan programs unconstitutional.\textsuperscript{175} Last, the Court ruled that the State's facilities

\textsuperscript{167} Id. at 746.

\textsuperscript{168} See id. at 744 ("[I]t does not appear likely that the children in appellant school districts will be able to compete in the job market against those students with sufficient technological training.").

\textsuperscript{169} Haynes, supra n. 11, at 627.

\textsuperscript{170} West, supra n. 127, at 290. The failure rates in plaintiff districts Dawson-Bryant and Lima City school districts were 32\% and 27\%, respectively. DeRolph I, 677 N.E.2d at 744-45; id. at 762 (Douglas, J., concurring).

\textsuperscript{171} DeRolph I, 677 N.E.2d at 762 (Douglas, J., concurring).

\textsuperscript{172} Id. at 747.

\textsuperscript{173} Id.

\textsuperscript{174} Id.

\textsuperscript{175} Id.
funding provisions were unconstitutional because they were vastly underfunded.\(^1\) Put simply, the Court required the legislature to provide sufficient funds for each student in Ohio to have an opportunity for an adequate education.\(^2\)

The Ohio Supreme Court did not require the legislature to take any specific course of action. The majority made clear that it was not advocating a “Robin Hood” approach, and stated that it did not support placing spending ceilings on wealthier districts.\(^3\) The Court did, however, offer an admonition to the General Assembly: “[The General Assembly] must create an entirely new [statewide] finance system; the establishment, organization, and maintenance of public education are the state’s responsibility.”\(^4\) With that, the Court remanded DeRolph to the trial court and retained jurisdiction until such time as appropriate legislation was passed. The Court stayed the decision for twelve months in order to give the legislature time to act upon its mandate.

The Court responded quickly to motions for clarification of its holding in DeRolph I. First, it held that while property taxes could be used as a part of the funding system, it could no longer be the primary means of financing.\(^5\) Second, the Court held that debt obligations incurred under the State’s unconstitutional forced borrowing program were nonetheless valid if incurred before March 24, 1997.\(^6\) The Court further stated that the Perry County Court of Common Pleas, and not the Ohio Supreme Court itself, would retain jurisdiction in the case.\(^7\)

Each justice voting with the majority concurred separately.\(^8\) Justice

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1. West, supra n. 127, at 291.
2. West, supra n. 127, at 291; McMillan, supra n. 30, at 780.
3. DeRolph I, 677 N.E.2d 746; see also West, supra n. 127, at 291; McMillan, supra n. 30, at 780.
6. Id.
7. Id. at 887–88.
8. DeRolph I, 677 N.E.2d 733. In addition to Justice Douglas’ concurrence discussed below, some aspects of Justice Pfeifer’s and Justice Resnick’s concurrences are worth mentioning. Justice Pfeifer highlighted the “unconscionable funding inequities,” and stated that they were the result of a flawed system, and not of a lack of commitment by the districts themselves. As Justice Pfeifer explained, it was simply much more difficult for poor districts to yield funding, regardless of millage. For example, in 1994 it required over 27 mills in East Cleveland to yield the amount of 1 mill in neighboring Cuyahoga Heights. Id. at 780 (Pfeifer, J., concurring). Justice Resnick emphasized that while funding need not be equal or even substantially equal across districts, there must be a threshold funding amount provided by the state that gives each district the ability to provide an adequate education. Id. at 779 (Resnick, J., concurring). Resnick also stressed that although educational
Douglas' concurrence was significantly longer than the majority opinion. Douglas began by discussing the history of education in Ohio, beginning with legislation that actually predated the State's founding, and continuing with a long discussion of the legislative history surrounding the Ohio Constitution's Education Clause. He then noted that, contrary to the court of appeals holding, the Walter Court had not determined whether education is a fundamental right in Ohio. Douglas found this right to be implicit in the Ohio Constitution and in Ohio's history. "To hold otherwise," he argued, "is to bury our head in the sand." Because Justice Douglas found education to be a fundamental right, he applied a strict scrutiny analysis and determined that the system violated the Equal Protection Clause of Section 2, Article I of the Ohio Constitution. "Local control . . . in the Plaintiff districts is a cruel illusion. . . . The fact that school districts have the 'ability' to determine how dollars are spent . . . is a hollow argument where there are not sufficient funds . . . "

Chief Justice Thomas Moyer wrote an equally strong dissent, joined by conservative Justices Deborah Cook and Evelyn Lundberg Stratton. The dissent parallels arguments later made by members of the General Assembly. Chief Justice Moyer first argued that school funding was a nonjusticiable political issue, and that the Ohio Supreme Court had usurped the authority of the General Assembly. "What constitutes a 'high quality' education, and how it may best be provided, cannot be ascertained by any judicially discoverable or manageable standards." In short, the dissent argued that the courts were neither equipped nor empowered to make such decisions. Decisions regarding the level and method of funding, Moyer argued, require policy choices and value judgments that are appropriately left up to the legislature.

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184. Id. at 747-772 (Douglas, J., concurring).
185. Id. at 776 (Douglas, J., concurring). Although the question of whether education is a fundamental right in Ohio had been a central point of contention between the trial and appellate courts, the DeRolph I majority never decided the issue.
186. Id. (Douglas, J., concurring).
187. Id. (Douglas, J., concurring).
188. Id. (Douglas, J., concurring).
189. Id. at 782 (Moyer, C.J., dissenting).
190. Id. (Moyer, C.J., dissenting).
191. Id. at 785 (Moyer, C.J., dissenting) (citing Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1191 (Ill.1996)).
192. Id. at 784 (Moyer, C.J., dissenting).
Having determined the issue to be nonjusticiable, the dissenting justices nonetheless analyzed the issues presented in *DeRolph* and found that the State’s funding system did not violate the Education Clause. Chief Justice Moyer pointed out that even plaintiffs’ own expert had testified that Ohio ranked eleventh nationally in per pupil education spending.\(^{193}\) Furthermore, Ohio ranked eighteenth nationally in student-teacher ratio,\(^{194}\) and since 1980 increases in the foundation level of state support had outpaced inflation by 60%.\(^{195}\) Moyer quoted one expert as testifying that it was “virtually indisputable” that Ohio’s school finance system was more equitable than it had been when *Walter* was decided in 1979.\(^{196}\) Moyer also criticized the evidence as anecdotal and not representative of Ohio’s system as a whole.\(^{197}\) “The system is not unconstitutional because individual school buildings have fallen into disrepair, or because individual school districts face funding challenges.”\(^{198}\) Based on the totality of the evidence, the dissenters found that the General Assembly had in fact discharged its duty to provide a thorough and efficient system of public schools.\(^{199}\)

**IV. *DeRolph* I IN THE MEDIA, THE PUBLIC, AND THE STATEHOUSE**

The first *DeRolph* decision immediately met with strong responses from the media, the public, and the legislature. On March 25, 1997, the day following the Ohio Supreme Court’s decision, the editorial page of the Columbus Dispatch predicted that the Court would wreak havoc upon Ohio’s schools.\(^{200}\) The editorial echoed what many political

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193. *Id.* at 787 (Moyer, C.J., dissenting). In contrast, plaintiffs had argued that averages were meaningless because Ohio was the third worst state nationwide in variance from the mean in per pupil spending. Pls./Appellants’ Reply Br. to the Sup. Ct. at 8, *DeRolph I*, 677 N.E.2d 733 (Ohio 1997) (No. 94-CA-477), available at http://www.bricker.com (accessed Jan. 10, 2005).


195. *Id.* at 787 (Moyer, C.J., dissenting).

196. *Id.* (Moyer, C.J., dissenting). This expert’s testimony was directly countered by plaintiffs’ brief. “The State’s expert witness’ conclusion … was reached only after manipulation of the data by excluding approximately 30% of the school revenue … excluding a number of pupils as large as the entire student population of ten of our states, and weighing the largest district (Cleveland) equally with the smallest.” Pls. Appellants’ Reply Br. to the Sup. Ct. at 7, *DeRolph I*, 677 N.E.2d 733 (Ohio 1997) (No. 94-CA-477), available at http://www.bricker.com (accessed Jan. 10, 2005). Other experts agreed that school funding had become more inequitable. *Id.* This is consistent with the trial court’s finding that Ohio ranked 48th among the states in the level of funding disparity. *Id.*

197. See *DeRolph I*, 677 N.E.2d at 792–795 (Moyer, C.J., dissenting).

198. *Id.* at 793 (Moyer, C.J., dissenting); *but see supra* n. 105 (stating that the *DeRolph* plaintiff districts were representative of a much larger group of districts throughout Ohio).


conservatives and the DeRolph I dissenters had been thinking all along: that the decision was simply the product of an overreaching, activist court; that the admittedly awful conditions of some plaintiff districts were not representative of the entire Ohio school system; and that the courts had neither the institutional competency nor the legal authority to make such determinations.\textsuperscript{201} Indeed, the decision was greeted with proposals to strip the courts of jurisdiction over school funding cases, to ignore the Supreme Court’s orders, or even to impeach one or more of the justices.\textsuperscript{202} One law professor even suggested in the Columbus Dispatch that Ohio amend its Constitution to prevent further judicial involvement in school finance.\textsuperscript{203}

The Court’s mandate to provide additional funding concerned many. Businesses feared the DeRolph holding would require massive tax increases, particularly on businesses and industries that were already feeling a significant tax crunch.\textsuperscript{204} As the legislature began to look for sources of additional school funding, other areas of spending, including higher education, were in danger of large budget cuts.\textsuperscript{205} Although it did not address the propriety of the holding, a statement released by the Ohio Chamber of Commerce on the day of the Supreme Court’s decision foreshadowed the political battle that would be fought in upcoming judicial elections. “As a long-standing, vocal advocate of tying state funding to performance, the Chamber hopes there will be a greater sense of accountability.... Simply throwing more money at an existing problem has never eliminated that problem.”\textsuperscript{206}

The Ohio Supreme Court’s decision in DeRolph I met with a mixed reaction from legislators and the governor. Most lawmakers accepted the premise that the Court was within its authority to hold the system unconstitutional. As one legislative staff member told the author, “the Court does have the right to examine all aspects of the Constitution, and

\textsuperscript{201} Id.
\textsuperscript{202} See e.g. David N. Mayer, Editorial, Ohio’s School Funding Dilemma: Is the Court on the Right Track? Part 2 of 2: No: Majority of Justices on Unconstitutional Ground, Columbus Dispatch 9A (May 15, 2000).
\textsuperscript{203} David N. Mayer, Editorial Comment, Columbus Dispatch 8A (Mar. 18, 1999) (stating that “a constitutional amendment may be required to keep the judiciary in its proper bounds and to save representative democracy in Ohio”).
\textsuperscript{204} See Alan Johnson, Electric Industry Deregulation, School Funding Tied, Group Says, Columbus Dispatch 2C (Apr. 11, 1997) (stating that a shift away from the property tax could lead to higher excise taxes on electricity, but that the utilities were already burdened by unequal tax treatment).
\textsuperscript{205} Telephone Interview with Herb Asher, Professor of Political Science and Advisor to the President of Ohio State University (Apr. 18, 2003).
since education is specifically mentioned in the Constitution, they do have the right and the authority to make this decision." This theme has echoed in the statements of many lawmakers even through the most recent DeRolph decision. Many legislators, however, also expressed doubts about the propriety of the Ohio Supreme Court's ruling. According to William Batchelder, former Speaker Pro Tempore of the Ohio House of Representatives, "A majority of legislators had a real reservation about the Supreme Court getting involved to the extent that they did. Our view in Ohio has generally been that the Court does not have the power to fiddle with formula numbers."

Like some members of the media and the public, the most conservative members of the Republican legislative caucuses responded to DeRolph I by proposing to strip the courts of jurisdiction in school funding cases, even suggesting a constitutional amendment. Some have suggested to the author that these proposals were merely "off the cuff remarks" picked up (and blown out of proportion) by the press. Others, however, have stated that these proposals were much more serious. According to Batchelder, "There was considerable support for an amendment that would give the legislature the final say on school finance issues." There apparently was also some support for impeaching Republican Justice Paul Pfeifer, who along with Republican Justice Andrew Douglas had sided with Democratic Justices Francis Sweeney and Alice Robie Resnick to form the DeRolph majority. As political scientist Lawrence Baum has noted, however, "None [of these suggestions] came anywhere near enactment, which suggests that ... they were mostly symbolic."


208. See e.g. Telephone Interview with Paulo DeMaria, Chief Policy Advisor to Governor Robert Taft (May 6, 2003) ("The Governor does not question that the Court has the authority to rule on constitutional questions. He feels that the system is constitutional, but recognizes that the Supreme Court has the right to make that decision."). As another policymaker has told the author, "The people of Perry County have a right to argue their case, and they did so. You can't begrudge them that."

209. Telephone Interview with William Batchelder, supra n. 116.

210. Email from Marianne White, supra n. 207.

211. Telephone Interview with William Batchelder, supra n. 116.

212. Id. (stating that some legislators supported impeaching Justice Pfeifer because the Ohio Supreme Court did not have the constitutional authority to make a number of the decisions that it had). Justices Pfeifer and Douglas in particular incurred the anger of conservative legislators, who were disappointed in their fellow Republicans' more activist judicial philosophy. Douglas, however, was nearing the state's mandatory retirement age of 70, and was never considered for impeachment. Justice Pfeifer therefore bore the brunt of the legislators' disenchantment with the DeRolph majority.

213. Email from Lawrence Baum, Professor of Political Science at Ohio State University, to Larry J. Obhof (May 6, 2003) (copy on file with author).
Some Ohioans praised the decision as an historic opportunity to shape the future of education.\(^{214}\) Others sharply criticized suggestions that the Ohio Constitution be amended. This sentiment was captured by an editorial in the Columbus Dispatch: "Would the Constitution then read, 'The General Assembly shall not secure a thorough and efficient system of common schools throughout the state'? ... 'The Supreme Court shall not have the function of judicial review'? ... I say, 'Shame on you!'\(^{215}\)

Despite the more evenly distributed and more polarized split in public opinion, legal scholarship has been overwhelmingly supportive of the Ohio Supreme Court and, by extension, the plaintiffs' cause.\(^{216}\) Publications such as the Harvard Law Review lauded the DeRolph decision as "a step in the right direction,"\(^{217}\) and some scholars even questioned whether the Court had gone far enough.\(^{218}\) Indeed, for some the primary point of contention has been what the Ohio Supreme Court did not say, particularly by failing to declare education in Ohio to be a fundamental right.\(^{219}\)

A. The Legislative Response to DeRolph I

A flurry of legislation followed the Ohio Supreme Court's decision in DeRolph I, but DeRolph was certainly not the only factor influencing the General Assembly. Governor George Voinovich had already proposed a number of statewide school reforms, including a push towards statewide testing and fiscal and academic accountability measures. Indeed, throughout the litigation legislators have focused not only on complying with DeRolf, but also toward solving various non-monetary problems as well. "DeRolph is important," the Chair of the Ohio House Education

\(^{214}\) See e.g. Karen Duty, Editorial Comment, Education Opportunity Knocks, Politicians Should Not Cower, Columbus Dispatch 11A (Apr. 5, 1997).

\(^{215}\) Bruce Ebert, Editorial Comment, Unequal School Funding Shouldn't be Legalized, Columbus Dispatch 10A (Apr. 23, 1997) (emphasis added).

\(^{216}\) Lexis-Nexis and Westlaw searches, for example, routinely turn up dozens of law review articles and notes mentioning DeRolph, less than 10-15% of which are unfavorable to the decision or criticize the court for being too "activist."

\(^{217}\) Student Author, Ohio Supreme Court Declares State's Public School Financing System Unconstitutional, 111 Harv. L. Rev. 855, 857 (1998).

\(^{218}\) See Haynes, supra n. 11, at 634 (stating that the Ohio Supreme Court "mistakenly stopped at the point of declaring the system unconstitutional and turned the entire situation over to the General Assembly with no direction as to how to establish a new system").

\(^{219}\) See id. at 632 ("the court avoided deciding the issue of whether education is a fundamental right ... [this decision] may have been expedient for the court but leaves a critical issue unresolved"); see also Winterhof, supra n. 20, at 1287-88 (arguing that the DeRolph Court should have explicitly declared whether or not education is a fundamental right in Ohio, because prior decisions of the Ohio courts are unclear).
Committee recently told the author, "but it is not the only issue that the Education Committee deals with." 220

The Ohio General Assembly thus responded to DeRolph I not with the "complete systematic overhaul" of the school finance system required by the Ohio Supreme Court, but with a series of legislation aimed at solving a number of problems affecting the State's education system. The legislation passed in this period reflects the differing views among the legislators themselves as to which problems were most significant. One legislative aide commented, "Legislators were all over the place when trying to determine what was the most significant problem." 221 Some lawmakers wanted more academic accountability on the part of school districts; some wanted more fiscal accountability; others believed that the State needed to alter its funding formula to comply with the DeRolph decision itself. 222

The diversity of views in the legislature led to some basic changes in the structure of legislative committees. Four new education-related committees were established in the Ohio Senate—one to deal with academic accountability; one to deal with the fiscal issues; one to reexamine the State's funding formula; and one to deal with other issues, including the funding of facilities. 223 This new committee structure allowed individual legislators to focus their efforts toward the areas they felt presented the most pressing problems. 224 The flood of legislation that began two months after DeRolph therefore reflected each of these concerns.

In May 1997 the General Assembly enacted Senate Bill 102, which created the Ohio Schools Facilities Commission. 225 The commission was charged with assessing facility needs and conditionally approving repair and construction projects. Senate Bill 102 also established the Emergency School Building Repair Program to fund districts' urgent needs. 226 A similar program, known as the Big Eight Program, was set up for school districts that had roughly 12,000 students or more. 227 In all, the legislature appropriated $300 million for capital improvements statewide—228—a hefty sum, but only a fraction of the $10.2 billion in need

220. Telephone Interview with Arlene Setzer, Ohio State Representative and Chair of the House Education Committee (Apr. 29, 2003).
221. Email from Marianne White, supra n. 207.
222. Id.
223. Id.
224. Id.
226. Id.
227. Id.
228. Id.
identified by the Court in *DeRolph I*.

The biennial budget bill for fiscal years 1998–1999 was signed on June 30, 1997. It made adjustments to the basic aid formula and increased equity aid and funding for textbooks.229 The new budget also provided additional funding for facilities and for the SchoolNet and SchoolNet Plus technology programs, and created and provided the initial funding for a Disability Access Program.230

On August 22, 1997, Governor George Voinovich signed two accountability-based bills into law—House Bill 412 and Senate Bill 55. House Bill 412, known as the School District Fiscal Accountability Act, required school districts to maintain budget reserves and required set asides for textbooks, building maintenance and emergencies.231 Senate Bill 55, the “Academic Accountability Bill,” increased high school graduation requirements from 18 to 21 credit hours, made modifications to the State proficiency tests, established standards for “school district report cards” (which rated school districts’ effectiveness), and instituted the “Fourth-Grade Guarantee,” requiring students to pass a fourth-grade proficiency test before they could advance to the fifth grade.232

The passage of House Bill 650 in February 1998, with amendments added by House Bill 770 in June 1998,233 altered the State’s basic funding formula.234 The bill assigned a base cost per pupil of $4,063 for fiscal year 1999, to be adjusted for inflation at an annual rate of 2.8%.235 The bill’s stated goal was to “establish a new system for funding education,” but no fundamental changes were made to either the funding system itself or the formula for dispersing state aid.236 By any objective measure, the changes made by the legislature in House Bill 650 fell short of meeting *DeRolph I*’s mandate that the State establish an entirely new finance system. Despite significant efforts to improve the State’s education system, it seemed as though the legislature had not focused enough on the school finance system itself to solve the specific problems addressed by the Ohio Supreme Court in *DeRolph I*.

1. **“Issue 2”: A failed attempt to fund the schools**

The State legislature, led by conservative Republicans who often

230. *Id.*
236. See also Haynes, *supra* n. 11, at 637.
campaigned on an anti-tax platform, was reluctant to raise taxes in order to meet the DeRolph Court's mandate. It instead placed a one-cent sales tax increase on the May 1998 primary ballot that employed constitutional provision allowing the legislature to delegate its lawmaking authority on education matters. The proposed tax increase, known on the ballot as "Issue 2," was projected to raise roughly $1.1 billion annually, to be divided roughly equally between increased spending for schools and property tax relief.

Governor Voinovich publicly argued that, as a philosophical matter, the taxpayers should be allowed to vote on any proposed major tax increase. He called this process "participating in the debate." The editorial staffs of major newspapers, however, were more skeptical of the motives behind Issue 2. A Columbus Dispatch editorial asserted that "Issue 2 literally asks voters to approve what the governor and the legislature could have done by themselves but didn't.... [T]hey cloak this public referendum with nice-sounding rhetoric about 'letting the people decide'... constructing an elaborate and confusing scheme to election-proof themselves...." In truth, Issue 2 appears to have been a pragmatic compromise between different wings of the Republican Party, which controlled both houses of the Ohio legislature by wide margins, rather than an attempt to shift responsibility to the voters. Conservative legislators wanted Issue 2 on the ballot because they saw it as a referendum on the DeRolph decision itself. Some legislative leaders did not believe that voters supported the decision, and they wanted to bring the Ohio Supreme Court and its jurisprudence into the public debate. Perhaps more importantly, a strong anti-tax wing of the legislature had the power to resist proposed major tax increases. "It probably would have failed on the floor," notes one legislative leader. "I don't think many people seriously believed that a tax increase would get through the legislature." Issue 2 had to be put on the ballot, or there would be no chance for a sales tax increase at all.

On March 25, 1998, the Ohio Supreme Court's one-year deadline

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238. Some disparaged even this aspect of the proposal, and argued that it would lead to no real tax cuts at all because for most taxpayers the decrease in local property taxes would be offset by an increase in federal income taxes. See Barbara Carmen, Real Costs of Issue 2 Can't be Heard over the Porker's Squeals, Columbus Dispatch 1D (May 3, 1998).
239. Leonard, supra n. 237, at 7A.
240. Id.
242. Id.
passed without comment from the Court or from Judge Lewis, perhaps because they were waiting to see the fate of Issue 2. It would prove to be an ill-fated quest. Issue 2 had the public support of most legislative leaders and a popular governor, but it did not have the support of the DeRolph plaintiffs, most school administrators and educators, or organized labor. The Coalition and its allies in the labor and education establishments decried Issue 2 as a “ploy designed to disguise the state’s failure to overhaul the system” as required by DeRolph I. The Coalition also expressed doubts that the money would be used for education.

The Coalition’s opposition to Issue 2 was just the tip of the iceberg. Democratic voters were wary of voting for a proposal made by the Republican leadership, and many saw an increased sales tax as regressive. A substantial number of voters from both parties, moreover, simply did not want a tax increase. Others were angered by the legislature’s refusal to raise taxes itself. Like the DeRolph plaintiffs, many also doubted that the money, if raised, would actually be spent on education. Still others, including Nathan DeRolph, in whose name the case was brought, saw Issue 2 as being too little, too late. “I’m suspicious,” stated one reporter shortly before the election. “When have we ever seen politicians pushing a tax increase for schools and educators opposing one?” Most voters wondered the same thing. On May 5,


244. See Carmen, supra n. 238, at 1D (noting that politicians supported the tax increase but educators did not).

245. Telephone Interview with William Phillis, supra n. 6. It is unclear what alternate course of action the DeRolph plaintiffs would have preferred. Even to this day the Coalition argues for a “complete systematic overhaul,” but refuses to suggest specific funding levels or methods that might satisfy this burden.

246. Indeed, many voters were skeptical that increased funding was even necessary. This effect is compounded by the fact that most legislators are reluctant to ask their constituents for statewide tax increases. As one legislator has told the author, “My constituents don’t want money going to Columbus, and I don’t want to tell my constituents that $1 will leave the district and less than $1 will come back.”

247. See e.g., Afi Odelia E. Scruggs, *Vote Against Issue 2 Tough, but Right Move*, Plain Dealer 18 (May 6, 1998) (“I didn’t like voting against Issue 2. I think public schools are taking a financial beating here in Ohio . . . [but] instead of coming up with the bucks, [the General Assembly] sat back and passed them.”).

248. See e.g., Darrel Rowland, *Poll Shows Voters Skeptical of Sales-Tax Ballot Proposal*, Columbus Dispatch 2A (May 3, 1998). One voter summed up this position: “Everything that comes up there’s supposed to be so much allotted for schools, but it never gets there,” he said. “When someone can come up with some concrete evidence that all this money’s going to be allotted [to schools], then I’ll vote for it.”


250. Carmen, supra n. 238, at 1D. Some political scientists who study Ohio politics have underscored the impact of the Coalition’s efforts in defeating Issue 2. See Telephone Interview with
1998, Issue 2 failed by a margin of four-to-one, one of the worst defeats of any ballot issue in Ohio's history. In August 1998, with the $1.1 billion in projected aid from Issue 2 no longer forthcoming, the litigants returned to court.

V. DEROLPH v. STATE REVISITED

Beginning August 24, 1999, Judge Lewis held a nine-day hearing to determine if the State had met its burden of making Ohio’s school funding system constitutional. The State argued that although its reliance on property taxes had not changed, the statutes passed since DeRolph I had achieved the constitutionally required minimum of equity and adequacy in school funding. Judge Lewis disagreed, and held that the State had failed to implement a systematic overhaul of Ohio’s school funding system and that the system therefore remained unconstitutional.

The State appealed Judge Lewis' ruling directly to the Ohio Supreme Court. In its brief, the State discussed each area of concern expressed by the Supreme Court in DeRolph I and outlined the legislation that had been enacted to remedy those problems. The defense also focused on the absolute size of the education budget. “[W]ell over 50% of State revenue in the capital and non-capital budget now goes to primary, secondary, or college education... [T]he Department of Education now receives more State money than any other agency or department in the state.” The legislature, defendants argued, had not only exhaustively debated and carefully studied Ohio’s school finance system, but had also determined the cost of an adequate education and aggressively funded its initiatives. According to the State defendants, the new system was thorough because it guaranteed sufficient resources to provide an adequate education to every child in the State, and efficient because it spent the taxpayers'
money in a responsible manner. The plaintiffs, for their part, argued that the legislature had retained—and in some respects exacerbated—the unconstitutional system outlined in DeRolph I. They argued that the State had not presented evidence of any net increase in school funding; that the methodology used by the State’s expert in determining an adequate funding level was “junk science,” and at any rate was arbitrarily lowered by the legislature; and that the General Assembly had ignored the Supreme Court’s ban of forced borrowing by simply reenacting unconstitutional statutes and changing their names.

Notwithstanding the plaintiffs’ complaints, the Ohio government had taken important steps toward remedying the system’s deficiencies. Governor George Voinovich, who now hoped to salvage his legacy as the “Education Governor,” continued working with the legislature to improve the system. In December 1998, the General Assembly allocated an additional $505 million for school facilities.

Beginning in 1999, newly-elected Governor Robert Taft began implementing his own plans for Ohio’s schools, seeking both to comply with DeRolph and to actualize his own policy agenda. Governor Taft accepted the legitimacy of the Supreme Court’s ruling and recognized that more resources were necessary. Like the legislature, though, he saw a number of problems besides just a lack of resources and accountability. Taft swept in a series of reforms that focused on what he considered to be the root causes of poor educational attainment (some of which coincided with problems highlighted by the DeRolph Court). These included a lack of adequate facilities; a lack of early educational development that hindered educational attainment at later stages; and a need for greater leadership and curriculum development within the schools.

On June 29, 1999, Governor Taft signed into law House Bills 282 and 283. House Bill 282, which was Ohio’s first budget exclusively dedicated to education, made adjustments to the per pupil formula amount and the

255. See id. at 2.
257. Id.
258. Id. at 6–7.
259. Id. at 14–17.
261. Telephone Interview with Paulo DeMaria, supra n. 208.
262. Id.
263. Id.
funding formula and provided additional funding for technology.\textsuperscript{264} House Bill 283 allocated the State budget surplus toward education and appropriated $325.7 million in surplus money toward school construction and repair.\textsuperscript{265} On November 2, 1999, only two weeks before the Ohio Supreme Court heard arguments in \textit{DeRolph II}, the voters authorized the issuance of general obligation bonds to pay for school facilities.\textsuperscript{266} In total, the legislation passed between \textit{DeRolph I} and \textit{DeRolph II} provided nearly $2 billion toward school facilities.\textsuperscript{267} Additionally, the Court admitted evidence that Senate Bill 192 (signed into law after oral arguments had been heard) allocated money that was received by the State pursuant to the Tobacco Master Settlement Agreement between the states and tobacco-producing companies. This committed an additional $2.5 billion for school construction and repair over the next twelve years.\textsuperscript{268}

The General Assembly also implemented programs that did not alter the funding system but were nonetheless important steps toward providing an adequate education. First, in March 1999, the State initiated Governor Taft's "OhioReads" program, which provided grants for tutors to assist children with their reading.\textsuperscript{269} Although this program was not formulated in response to \textit{DeRolph I} and did not alter the funding system, it was an important part of Governor Taft's efforts to eliminate the root causes of low educational attainment.\textsuperscript{270} Second, the legislature not only required districts to develop comprehensive school safety plans, but also set specific penalties for violent offenses in or near schools.\textsuperscript{271}

\textbf{A. The Ohio Supreme Court – Round II}

On May 11, 2000, the Ohio Supreme Court once again held Ohio's school funding system unconstitutional.\textsuperscript{272} Although the State had made


\textsuperscript{265} See Ohio Amend. Substitute H. 283, 123d Gen. Assembly, Reg. Sess. (1999); see also Nine Years of Litigation, supra n. 243, at 6A.

\textsuperscript{266} This issue had been placed on the ballot by the legislature. See Ohio Substitute Sen. Jt. Res. 1, 123d Gen. Assembly, Reg. Sess. (1999). The authorization of bond issuance does not illustrate a significant change among voting behavior since the failure of Issue 2. The various reasons for Issue 2's failure have been discussed at length above; these elements were not present in the low-publicity campaign for bond authorization. Bond authorizations typically fare well with the voters and, in contrast to Issue 2, the bond issue enjoyed the support of the education community.

\textsuperscript{267} Haynes, supra n. 11, at 639.


\textsuperscript{270} Telephone Interview with Paulo DeMaria, supra n. 208.


\textsuperscript{272} See DeRolph II, 728 N.E.2d at 1022.
progress, the Court found that the system still suffered from an over-reliance on property taxes, unfunded legislative mandates, an inadequate basic aid formula, and forced borrowing.

Justice Alice Robie Resnick, writing for the same four-justice majority as that in DeRolph I, commended the State for making limited progress. The Court noted the General Assembly's efforts to ensure that education was no longer a budgetary residual, and despite serious misgivings, gave the legislature the benefit of the doubt that its efforts were genuine. The Court also recognized the significant recent investments by the State in facilities construction and repair. Citing a study by Achieve, Inc., however, the majority stated that too many children still attended classes in dreadfully substandard facilities. In fact, despite the State's increasing efforts to fund facilities, the amount of funding necessary for facility repair and construction was estimated to have risen from $10.2 billion in 1990 to $16.5 billion in 1997. The majority thus found the $300 million that had been appropriated for capital improvements to be insufficient.

The Ohio Supreme Court also found that none of the factors that contributed to the unconstitutionality of the system in DeRolph I had been eliminated. According to the majority, the problem of over-reliance on property taxes, which had been central to the DeRolph I decision, had not changed at all. The legislature had failed to specifically address this problem, except through the failed Issue 2 ballot proposal, and instead sought to minimize its importance by focusing on the other problems addressed in DeRolph I. The Court found the State's arguments unconvincing and held that the problem of over-reliance on property taxes must be dealt with independently.

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273. See id. at 1008 ("We give defendants the benefit of the doubt . . . that they have not merely disguised residual budgeting. However, we cannot totally discount the evidence that the actual cost might have been the deciding factor in selecting the method used to determine the base cost of an adequate education.").

274. In November 1998, outgoing Governor George Voinovich requested a study by a group of experts, Achieve, Inc., in order to provide incoming Governor Taft and the legislature with a candid assessment of the strengths and weaknesses of Ohio's reforms. The report highlighted Ohio's need for facilities improvements; it noted that the General Accounting Office ranked Ohio dead last among the fifty states in the condition of its school facilities. See Achieve, Inc., A New Compact for Ohio's Schools: A Report to Ohio's Educational Policy Leaders 8 (1999).

275. DeRolph II, 728 N.E.2d at 1009. The Court also accepted testimony from the Executive Director of the Ohio Facilities Commission that at the current funding rate it would take 55 years to correct the deficit. Id. at 1011.

276. See DeRolph II, 728 N.E.2d at 1020.

277. See id. at 1013 ("this aspect of the former system persists in the state's current funding plan, wholly unchanged") (emphasis in original).

278. Id. at 1015.
The DeRolph II majority further stated that recent legislation would in fact exacerbate some of the problems cited by the Court in DeRolph I. A phase-out of the inventory tax could actually increase reliance on local property taxes, and the unfunded mandates of House Bill 412 and Senate Bill 55 (which had anticipated a one-cent sales tax increase) would force districts to levy additional taxes in order to satisfy set-aside requirements.\(^{279}\) The Court held that these unfunded mandates must be addressed and immediately funded.\(^{280}\) The majority also suggested that the new formula of House Bill 650 could create additional types of "phantom revenue." Property valuation increases under the new system would cause the millage rate to be reduced.\(^{281}\) The majority reasoned that this would cause some districts to lose equalization payments and would, in turn, force those districts to vote for increased millage every time reappraisal occurred.\(^{282}\) This was obviously something the Court wanted to avoid.

The DeRolph II majority found that the basic aid formula designed in response to DeRolph I had structural deficiencies and did not reflect the per pupil amount necessary to fund an adequate education.\(^{283}\) The formula was, in fact, almost identical to its predecessor.\(^{284}\) The Court also had serious misgivings about the manner in which the State's funding formula was designed. The legislature had hired Dr. John G. Augenblick to determine the cost of providing an adequate education, but then modified Augenblick's formula downward without explanation.\(^{285}\) At least one expert opined that this was done solely to come up with a lower number.\(^{286}\) The Court also questioned the State's justification of a "phase-in" period (i.e., the legislature did not plan to fund the fiscal year 1999 base level of $4,063 until fiscal year 2001) when it was currently funding below the level the legislature had deemed to be the base amount for an adequate education.\(^{287}\)

The last significant problem from DeRolph I was the State's "forced borrowing" program. Although the Spending Reserve Loan Fund was being phased out, the Court remained concerned that set-asides required

\(^{279}\) Id. at 1014.

\(^{280}\) Id. at 1021.

\(^{281}\) Id. at 1016.

\(^{282}\) Id.

\(^{283}\) Id. at 1021.

\(^{284}\) Id. at 1006.

\(^{285}\) Id. at 1006–07. These changes reduced the base cost from $4,269 for fiscal year 1999 to $4,063. Id.

\(^{286}\) Id. at 1007.

\(^{287}\) Id.
by new legislation would lead to additional borrowing. While noting the similarities between the new School Solvency Assistance Fund and the former Emergency School Assistance Loan Program, the Court did not state, as plaintiffs had hoped, that the new program was merely a reenactment of the unconstitutional former program. It did, however, make clear that "any system that entails borrowing from future funds to meet ordinary expenses is not a thorough and efficient system."

The Ohio Supreme Court once again declined to fashion its own remedy for the school funding system. The Court acknowledged and quickly dismissed plaintiffs' request that the Court simply order that the foundation amount be set in excess of $5,000 per pupil. Such involvement, the majority stated, was not the role of the judiciary. "Our role, as we have declared it in past cases, is to decide issues of constitutionality—not to legislate . . . ." The Court did, however, finally take the opportunity to define "thorough and efficient." Noting that the concept itself is not static, and that it would be impossible to list all of the possible components of such a system, the Court expanded upon the standard set out in Miller:

A thorough system means that each and every school district has enough funds to operate. An efficient system means one in which each and every school district in the state has an ample number of teachers, sound buildings that are in compliance with state building and fire codes, and equipment sufficient for all students to be afforded an educational opportunity.

Once again, the Court emphasized that the attainment of such a system was a purpose expressly made statewide. The Supreme Court maintained jurisdiction and gave the General Assembly a little more than one year to make the necessary changes to the State's funding system.

Justices Douglas and Pfeifer again joined the majority with concurring opinions. Douglas noted that the local share of funding had increased vis-à-vis the state share since DeRolph I, while over the same time period the General Assembly had given tax refunds of nearly $1.3 billion. According to Douglas, that money could have and should have

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288. See id. at 1012.
289. See id.
290. Id. at 1013.
291. Id. at 1003.
292. Id.
293. Id. at 995, 1001.
294. Id. at 995.
295. See id. at 1022.
296. Id. at 1025 (Douglas, J., concurring).
been spent on education. Justice Pfeifer's concurrence reminded the defendants that the case was primarily about school funding and not about setting new academic standards: "[S]etting minimum requirements for the availability of modern textbooks and computers does not meet the mandate of [the Education Clause] when those standards are simply not met."

Chief Justice Moyer and Justice Deborah Cook wrote separate dissents. Moyer argued that the Ohio Supreme Court had not only assigned itself veto power over the policy determinations made by the General Assembly, but also simply replaced one ambiguous criterion with another. For example, the Chief Justice reasoned that whether a district has "enough" funds or an "ample" number of teachers is entirely subjective. Justice Cook agreed, and argued that the Education Clause is so vague that it is incapable of meaningful enforcement. Cook felt that this left only the General Assembly with the authority to make the policy decisions necessary to satisfy the clause.

Chief Justice Moyer, again, argued that the deficiencies of individual schools did not themselves demonstrate the failure of the entire statewide system. The majority, however, had drawn precisely this inference. Nor did the Chief Justice accept the assertion that the Education Clause requires a state-funded system of public schools. He pointed out that nothing in the Ohio Constitution precludes a system in which local school districts are partly responsible for funding schools, and that any decision to the contrary would be inconsistent with the history of education in Ohio. Quoting his own dissent from DeRolph I, Moyer reiterated that the judicial branch is neither equipped nor empowered to make policy decisions regarding school finance. The Chief Justice

297. See id. at 1025-26 (Douglas, J., concurring).
298. Id. at 1028 (Pfeifer, J., concurring); see also id. at 1029 (Pfeifer, J., concurring) (stating that the Court's decision in DeRolph II "is not about high standards," but rather about funding an adequate education).
299. Id. at 1030-31 (Moyer, C.J., dissenting).
300. Id. (Moyer, C.J., dissenting).
301. Id. at 1036 (Cook, J., dissenting).
302. Id. (Cook, J., dissenting); see also Mary I. Amos, DeRolph v. State: Who Really Won Ohio's School Funding Battle?, 30 Cap. U. L. Rev. 153, 172 (2002) (stating that Justice Cook finds Ohio's Education Clause so vague that she believes only the General Assembly should be permitted to make the policy determinations necessary to satisfy its requirements).
304. Id. (Moyer, C.J., dissenting).
305. Id. at 1031-32 (Moyer, C.J., dissenting).
306. Id. at 1029 (Moyer, C.J., dissenting) (citing DeRolph I, 677 N.E.2d at 785-86 (Moyer, C.J., dissenting)); see also id. at 1035 (Moyer, C.J., dissenting) (stating that the majority's decision in DeRolph II is legally unwarranted and inappropriate).
emphatically argued that the majority's decision in *DeRolph II*, as in *DeRolph I*, overstepped the bounds of judicial review and was an impermissible attempt at judicial legislation.\(^{307}\)

Some legal commentators have questioned whether *DeRolph II* can even be termed a victory for the plaintiffs.\(^{308}\) In the end, the Ohio Supreme Court granted plaintiffs only one of eight remedies they had requested.\(^{309}\) The majority not only did not hold education to be a fundamental right, but failed to even address the issue.\(^{310}\) Importantly, the Court also refused to establish a "market basket" of programs and services, determine its own funding formula, or issue an interim funding order to direct the expenditure of funds. The *DeRolph* plaintiffs had requested all of these things.\(^{311}\) *DeRolph II* is thus perhaps best viewed not as a "victory" or a "loss" for the plaintiffs, but rather as an assertive restatement by the Court of the principles it outlined in *DeRolph I*.

VI. SCHOOL FUNDING, JUDICIAL ACTIVISM, AND THE BALLOT BOX

Ohio Congressman Ted Strickland, who had filed an amicus brief in support of the plaintiffs, seemed optimistic on the day of the *DeRolph II* decision: "I think we're going to look back at this time a few years from now and we're going to be very happy at what the court's done here. I think it's going to result in good things for the state of Ohio and for our kids."\(^{312}\) Others criticized the State legislature for not having complied with the Ohio Supreme Court's first ruling.\(^{313}\) Some signs, moreover, pointed to the practical necessity of the Court's holding. For example, even as the litigants awaited the Court's decision an Ohio Department of Education Study revealed that only 31 of 607 school districts in Ohio were "operating effectively."\(^{314}\)

*DeRolph II* was met with disappointment by many lawmakers, including the leaders of both the Ohio House of Representatives and the

\(^{307}\) See id. at 1035 (Moyer, C.J., dissenting).

\(^{308}\) See e.g. Amos, supra n. 302, at 153 (arguing that because the plaintiffs did not get most of the remedies sought, they did not really "win" *DeRolph II*).

\(^{309}\) Id. at 173.

\(^{310}\) Id. at 153.


\(^{312}\) Reaction Swift, Strong to State Court Decision, Dayton Daily News 7 A (May 12, 2000).

\(^{313}\) See e.g. Andrew G. Benson, Editorial, Ohio's School Funding Dilemma: Is the Court on the Right Track? Part 1 of 2. Yes: Legislature Is Failing to Do the Job Needed, Columbus Dispatch 9A (May 15, 2000) (stating that the legislature's efforts to fix the funding system were akin to wrapping broken machinery with duct tape and wire—"too much duct tape and too few new parts").

\(^{314}\) Safier, supra n. 66, at 996 (citing Local News (WMUB 88.5 NPR Feb. 28, 2000) (radio broadcast)).
Although some in the media remained optimistic, most of the commentary following *DeRolph II* was also decidedly negative. Even before the Supreme Court’s decision, editorial pages decried the trial court’s holding and chided Judge Lewis for ignoring the State’s efforts in support of primary and secondary education. One even likened *DeRolph II* to a ransom note: “Send more money or else.”

Most of the arguments against *DeRolph II* were based on the doctrine of the separation of powers. Ohio Senate President Richard Finan and Senate Majority Legal Counsel April Williams likened Ohio’s government to a three-legged stool consisting of the legislature, the governor, and the courts. “If one leg gets longer than the other, government, like a stool, becomes imbalanced and unstable.” Finan and Williams argued that recent Supreme Court decisions, including *DeRolph I* and *DeRolph II*, had ignored legislative intent and put the stool on a slippery slope. Some took this argument much further. One commentator decried the Ohio Supreme Court as a “super-legislature,” and argued for the removal of judges that had usurped the legislature’s function. At least one law professor publicly called for the Ohio House of Representatives to begin impeaching judges who encroach on the

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315. Former Governor (and current United States Senator) George Voinovich strongly disagreed with the court’s holding, and argued that significant reforms had already been made in the years since the suit was filed. *Reaction Swift, Strong to State Court Decision, supra* n. 312. Ohio Senate President Richard H. Finan and Ohio House Speaker Jo Ann Davidson recognized that more would need to be done, but asserted that the issue was not merely one of money. “Republicans remain committed to improving the overall quality of education in this state, not simply focusing on the mandates of this most recent court decision.” *Id.*

316. *See e.g.* Editorial, *School Funding Courts Must Observe Separation of Powers, Columbus Dispatch* 12A (Mar. 3, 1999). The editorial points to an increase in per pupil student aid from $2,636 to $3,663 between 1991 and 1998. It also focuses on Ohio’s national rank in a number of funding categories, nearly all of which place Ohio near the middle nationwide. The courts, the editorial argued, were giving the state no credit for its efforts.


319. *Id.* at 517. The “three-legged stool” analogy used by Finan and Williams echoes the sentiments of some legislators that the author has spoken with. William Batchelder, former Speaker Pro Tempore of the Ohio House of Representatives, highlighted the synergistic effects of an activist court and legislative term limits. “The legislature in Ohio has traditionally exercised quite a bit of power... But with the Ohio Supreme Court expanding the scope of its authority... and with legislative term limits... the legislature’s clout has been diminished.” Telephone Interview with William Batchelder, *supra* n. 116.


321. Owsiany, *supra* n. 9, at 555 (arguing that it may be appropriate for the General Assembly to remove judges who systematically overreach judicial authority).
separation of powers. That professor also considered an impeachment of sorts by the taxpayers: "Resnick, who wrote the majority opinion, is up for re-election this fall; certainly her judicial activism is a legitimate issue in the campaign."323

A. The Price of Activism?

The majorities in DeRolph I and II consisted of two Republicans, Justices Andrew Douglas and Paul Pfeifer, and two Democrats, Justices Francis Sweeney and Alice Robie Resnick. For several years the Ohio Supreme Court had also been deciding cases against business interests by the same four-to-three majority.324 In 1999, Justice Resnick wrote for this majority in a controversial tort reform case, Ohio Academy of Trial Lawyers v. Sheward, where the Court struck down a tort reform statute that placed caps on punitive damage awards.325

The Sheward majority invoked the separation of powers arguments that it had all but ignored in the DeRolph cases, and based its decision on the curious premise that state courts alone have the exclusive right to make tort law.326 Resnick stated that caps on tort recovery were unconstitutional because they violated citizens’ rights of due process, and that the limits themselves were “unreasonable and arbitrary.”327 Chief Justice Moyer found Resnick’s language to be inflammatory and accusatory, as well as unwarranted and inappropriate.328 This case solidified business opposition to the DeRolph majority, and all but ensured that judicial elections in Ohio would become more politicized than ever before.

Ohio Supreme Court justices are elected in contested but nonpartisan races for six-year terms.329 The costs of such campaigns are steadily increasing nationwide,330 and these increases are not limited to

322. See Mayer, supra n. 202, at 9A.
323. Id.
325. See Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062 (Ohio 1999).
326. See id. at 1086, 1097; Owсяня, supra n. 9, at 554.
327. Sheward, 715 N.E.2d at 1095.
328. Id. at 1114 (Moyer, C.J., dissenting) (stating that Resnick’s accusatory language has "no place in an opinion of this court").
329. These "nonpartisan" candidates are typically chosen in party primaries, and then appear on the ballot for the general election without mention of party affiliation.
expenditures by the candidates themselves.\(^\text{331}\) Interest groups frequently run issue ads which do not explicitly recommend a vote for or against a candidate, but whose message is often clear. Despite the high costs involved in some judicial races, such advocacy has become very popular because it is a less expensive means of influencing policy than the alternatives available to interest groups. Although some commentators have been critical of this approach,\(^\text{332}\) the use of issue ads does not imply any impropriety on the part of a candidate or the groups that implicitly support that candidate's election. Groups often need only to elect an honest judge with the desired judicial temperament in order to achieve their goals. Following a series of controversial cases, most notably Sheward, many hoped for a less activist temperament on the Ohio Supreme Court.

**B. Campaign 2000**

Increasing sentiment against judicial activism became more apparent, and more important to judicial elections, over the course of the DeRolph litigation. Republican maverick Paul Pfeifer retained his party's nomination in 1998, but Democrat Ron Suster received strong support from the business community, including the Ohio Chamber of Commerce.\(^\text{333}\) Despite this opposition, however, Pfeifer easily won reelection.\(^\text{334}\) "We will continue to operate," lamented one political activist, "in an atmosphere marked by judicial activism."\(^\text{335}\)

When Justice Alice Robie Resnick ran for reelection in 2000, pro-business groups, concerned with the prospect of future cases like Sheward, had another opportunity to impact judicial elections. In the race between Resnick and Terrence O'Donnell, a number of issue-based groups voiced opposition to Resnick, and ultimately spent significantly more money on the campaign than did the candidates themselves.\(^\text{336}\) In fact, outside expenditures outpaced the candidates' spending by a margin

\(^{331}\) Id. at 159–60 (citing Jason Miles Levien & Stacie L. Fatka, Cleaning Up Judicial Elections: Examining the First Amendment Limitations on Judicial Campaign Regulation, 2 Mich. L. & Policy Rev. 71 (1997)).

\(^{332}\) See e.g. Schotland, supra n. 324, at 865 (criticizing the use of issue ads in judicial campaigns).


\(^{334}\) David Jacobs, GOP Keeps Majority, Dayton Daily News 8A (Nov. 4, 1998). Pfeifer received more than 71% of the vote in the general election. Hoffman, supra n. 333, at 1.

\(^{335}\) Hoffman, supra n. 333, at 1.

of approximately five-to-one, with the first radio ads run against Resnick in November 1999, a full twelve months before the general election. Resnick faced strong opposition from a number of groups, including the Ohio Chamber of Commerce. The Chamber of Commerce in particular was worried that the Ohio Supreme Court’s decisions were having a deleterious effect on Ohio’s tax rates and tort law, and were thereby inflicting long-term harm on the state’s economy.

The most well-known anti-Resnick ad first ran on October 11, 2000, and asked, “Is justice for sale in Ohio?” The ad depicted Lady Justice, with someone dumping money onto one side of the scales. She peeked from behind the blindfold and tipped the scale toward the money, as a voice informed viewers that Justice Resnick had received over $750,000 from personal injury lawyers. Some ads, moreover, were education-specific. One depicted students “fooling around in an unattended classroom.” A voice told viewers that Justice Resnick had “blocked the legislature’s effort to ensure that teachers spend more time in the classroom.” As the voice informed viewers that the decision had been overturned, the view changed to a classroom where students listened attentively to their teacher. “Today in Ohio,” claimed the ad, “instructors teach and students learn, in spite of Alice Robie Resnick.”

National groups ran similar ads, including one in which a female judge changed her vote in favor of a plaintiff after someone dumped a

337. Resnick and O'Donnell raised $793,132 and $1,116,994, respectively. Schotland, supra n. 324, at 875 n. 126. By way of comparison, non-candidates were estimated to have spent from $8-12 million on the 2000 Ohio Supreme Court races. See id. at n. 128. See also Randy Ludlow, Justice Resnick Survives TV Ad Salvos, Cincinnati Post 15A (Nov. 8, 2000) (stating that at times Resnick and O'Donnell "appear[ed] to be little more than underfunded spectators in their own campaigns").


339. The Chamber, whose primary purpose is to present the business perspective on issues, also aims to create a business climate responsive to economic expansion and growth. See http://www.ohiochamber.com (accessed Jan. 10, 2005).


343. Id.

344. Id. at 163 (citing Spencer Hunt, Campaign 2000: Anti-Resnick Ad Pulled, Replaced, Cincinnati Enquirer B2 (Oct. 25, 2000)).

345. Id.

346. Id. at 159 (citing http://www.ohiochamber.com/court/index.html (accessed Feb. 10, 2001)).
pile of cash on her desk. Such advertisements were among the strongest examples of a national trend toward outside expenditures in judicial campaigning. This was not, however, even the first time that Justice Resnick herself had been the subject of such ads. In a prior race, an ad against Resnick read: “On the Ohio Supreme Court, one justice has a problem. It’s money . . . [from] the plaintiff lawyers who sue, sue, sue. Over $300,000 from just them . . . [This group] wants Resnick with her liberal rulings to make it easier for them to collect millions in fees.”

With so many ads being run by interest groups, the candidates’ own campaigns seemed almost secondary. Terrence O’Donnell, for his part, did not support the campaigning by non-candidates. “I want to run a positive campaign. I have not spoken negatively about my opponent.” O’Donnell was never given the opportunity. The Lady Justice ad backfired and, in the words of Chief Justice Moyer, “guaranteed election of the person it was designed to defeat.” So much negative attention was focused toward Justice Resnick that a backlash of support carried her to an easy election night victory.

VII. CHANGE AND CONTINUITY IN SCHOOL FINANCE: DEROLPHS III AND IV

While Alice Robie Resnick was fighting to continue her career as a justice, Governor Taft and the General Assembly were working to meet the mandates of DeRolph II. Lawmakers were becoming increasingly frustrated, however, by the lack of a more specific definition of “thorough and efficient.” In spite of its efforts, the Ohio Supreme Court had offered little guidance as to what specific changes lawmakers would need to make in order to bring the system into compliance with the Court’s rulings.

347. See id. at 165–66.
351. Mike Wagner, Despite Negative Ads, Resnick Retains Seat, Dayton Daily News 1A (Nov. 8, 2000).
352. Legislators and executive policymakers alike have voiced this concern. See e.g. Telephone Interview with Arlene Setzer, supra n. 220 (stating that even after four cases the Ohio Supreme Court has never offered a complete definition of “thorough and efficient”); Telephone Interview with Paulo DeMaria, supra n. 208 (stating that the Governor’s office is not entirely sure “what it means to comply with DeRolph”). Clear guidance has also not been forthcoming from the Coalition, which has rebuked mediation and other discussions of specific financial deals in lieu of the much vaguer “complete systematic overhaul” requirement of DeRolph I.
Although many legislators disagreed with the Court over the school finance system's adequacy, and some found the "thorough and efficient" standard hopelessly vague, most were nonetheless willing to make the changes they thought were necessary to bring the system into compliance. As one Senate aide noted, "The General Assembly was frustrated that we could not seem to appease the Court...[but] we were willing to make serious changes to the funding formula."353

Meanwhile, Governor Taft continued to promote his own policy proposals (such as the "OhioReads" program) aimed at alleviating the root causes of low educational attainment. Taft also sought improvements in those areas where the Court had supported earlier reforms, such as repair and construction of facilities and increased funding of parity aid to low-wealth school districts.354 House Bill 640, signed on June 15, 2000, provided an additional $1.1 billion for school construction.355 Senate Bill 272, which became law the same day, accelerated funding to urban districts, provided permanent funding to districts with funding levels below the fiftieth percentile, and provided assistance for districts that suffer a natural disaster. Senate Bill 272 also established a procedure whereby districts could seek an Ohio Schools Facilities Assessment of their needs.357

Perhaps most importantly, the biennial budget bill changed the formula for determining the level of basic aid, raising the base level to $4,814 per pupil in fiscal year 2002, with increases of 2.8% every year thereafter.358 Such changes would be enough to reconfigure the majority of the Ohio Supreme Court, whose membership had remained unchanged but whose alliances had begun to waiver.

A. DeRolph III: A Reversal of Fortune?

Pursuant to its order in DeRolph II, the Ohio Supreme Court heard arguments again in June 2001. The Coalition argued that the State had simply repackaged the system that the Court had rejected in DeRolph I and DeRolph II.359 "Local property taxation continues to be a hallmark of

353. Email from Marianne White, supra n. 207.
354. Telephone Interview with Paulo DeMaria, supra n. 208.
357. Id.
358. DeRolph III, 754 N.E.2d at 1191.
Ohio's school funding system," the plaintiffs stated, "together with the educational disparities that inevitably flow from that reliance." 360 Thus the Coalition, in response to its frustration with Governor Taft's and General Assembly's efforts, asked the Ohio Supreme Court to take the extreme measures of ordering the legislature to spend additional money on specified programs; issuing contempt citations against recalcitrant legislators; and ordering the State Treasurer to pay funds out of the State treasury to the plaintiffs. 361

On September 6, 2001, a majority consisting of two justices from the original DeRolph majorities (Justices Douglas and Pfeifer) and two original dissenters (Chief Justice Moyer and Justice Stratton) held that the State's funding system was still unconstitutional. 362 The new majority emphasized, however, that many of the changes made in the 1990s had begun to take effect, and that the system was on its way to becoming thorough and efficient. 363 The Court then ordered the State defendants to alter the methodology for determining the per pupil base cost and to accelerate the phase-in of parity aid. 364 The Court stated that once its directives were fulfilled the funding scheme would become constitutional. 365

Chief Justice Thomas Moyer, writing for the majority, readily admitted that DeRolph III was born of compromise. "None of us is completely comfortable with the decision we announce," he stated, "[but] no one is served by continued uncertainty and fractious debate." 366 The decision was both controversial and divisive—between them, the seven members of the Court wrote the majority opinion, three concurrences, and three dissents.

The new four-justice majority relied heavily on the new base cost formula, which had been altered in House Bill 94 to increase the base amount to $4,814. 367 The most significant aspect of this formula was the fact that it funded the full amount immediately, without a phase-in period. 368 House Bill 94 adopted a charge-off rate of 23 mills, and continued to offer gap aid to districts that were not able to fund their local share of the base cost amount. 369 Importantly, gap aid also applied

360. Id. at 2.
361. Id. at 48.
363. Id.
364. Id.
365. Id. at 1201.
366. Id. at 1189–90.
367. Id. at 1191.
368. Id.
369. Id. at 1192.
to special education, vocational education, and transportation costs, so that no district could be required to pay more than an additional 3 mills for their share of such programs.\textsuperscript{370} Gap aid thus addressed the problem of phantom revenue by contributing additional funding to districts where the tax base did not increase at the same rate as increases in base cost.\textsuperscript{371}

The \textit{DeRolph III} majority also noted the improvements made by the addition of parity aid by the State. Eligible districts received funding to make up the difference between what they could raise on 9.5 mills and what the district at the eightieth percentile in income-adjusted wealth could raise.\textsuperscript{372} This helped low-wealth districts spend funds on discretionary items in the same manner as wealthier districts. Importantly, parity aid was not dependent on local tax effort. A district would receive parity aid when it fell below the eightieth percentile, regardless of its willingness to generate additional funding.\textsuperscript{373} The majority found that the combination of the new base cost formula, gap aid, parity aid, and millage caps had established a system that, once changed in accordance with the mandates of the Court's opinion, would reduce reliance on local property taxes to a constitutionally permissible level.\textsuperscript{374}

In its discussion of facilities, the \textit{DeRolph III} majority considered whether the legislation enacted in response to \textit{DeRolph II} would, once fully implemented, likely bring facilities into compliance within a reasonable time frame.\textsuperscript{375} The Court noted that the State had allocated nearly $2.7 billion to this effort since 1998, and that the General Assembly had enacted accelerated programs for urban schools and exceptional needs programs for low-wealth districts.\textsuperscript{376} In addition, Senate Bill 272 required the State to make facilities assessments within two years of a district's request.\textsuperscript{377} The State had set comprehensive guidelines for funding facilities and was doing so in a manner the Court found acceptable. Furthermore, unlike the record of \textit{DeRolph I}, which showed a system in which many districts were "starved for funds," the record of \textit{DeRolph III} revealed a system in which deprivation was a rarity,

\textsuperscript{370} \textit{Id.}
\textsuperscript{371} \textit{Id.}
\textsuperscript{372} \textit{Id. at 1193.}
\textsuperscript{373} \textit{Id.}
\textsuperscript{374} \textit{Id. at 1199.}
\textsuperscript{375} \textit{Id. at 1193-94.}
\textsuperscript{376} \textit{Id. at 1194.}
\textsuperscript{377} \textit{Id. at 1195.}
rather than the norm.\textsuperscript{378} Last, the majority noted with approval the academic standards established by Senate Bill 1 in January 2001.\textsuperscript{379} Among the bill’s provisions was a requirement that academically failing districts receive state review and assistance, including additional funding.\textsuperscript{380} The Court found that because of such provisions, “Ohio schools are already improving.”\textsuperscript{381}

In an extraordinary move that angered the dissenters and stretched the limits of judicial authority, the \textit{DeRolph III} majority specified several changes that had to be made by the General Assembly before the system would become constitutional. First, the Court stated that the base cost formula must be modified to include the richest and poorest 5% of districts, whose exclusion from the State’s formula had resulted in a lower base cost.\textsuperscript{382} Second, the State calculated its base cost using either inflation-adjusted spending data from 1996, or actual expenditures for 1999, whichever was lower. The majority stated that there was no legitimate purpose behind this system, and held that the State could no longer use the lower base amount.\textsuperscript{383} Last, the Court held that in order to be constitutional, the parity program had to be fully funded by the beginning of fiscal year 2004, rather than 2006 as the State had planned.\textsuperscript{384} According to the Court, the system would be constitutional once these mandates were met. Because the Court had “no reason to doubt defendants’ good faith,” it relinquished jurisdiction in the case.\textsuperscript{385}

This holding drew furious dissents from Justices Resnick, Sweeney, and Cook, for quite different reasons. They each argued, separately, that the majority’s decision overstepped the separation of powers and constituted impermissible judicial lawmaking.\textsuperscript{386} Justice Cook also continued to argue that the entire series of \textit{DeRolph} cases presented a nonjusticiable political question.\textsuperscript{387} Justice Sweeney remained

\textsuperscript{378} See \textit{Id.} at 1196 (“The record before us today is very different . . . These complaints simply do not equate to deprivation of an opportunity to receive a basic education.”).

\textsuperscript{379} \textit{Id.} at 1197.

\textsuperscript{380} \textit{Id.} at 1197–98.

\textsuperscript{381} \textit{Id.} at 1198.

\textsuperscript{382} \textit{Id.} at 1200.

\textsuperscript{383} \textit{Id.} at 1200–01.

\textsuperscript{384} \textit{Id.} at 1201.

\textsuperscript{385} \textit{Id.}

\textsuperscript{386} See \textit{id.} at 1239 (Resnick, J., dissenting) (“It is tempting to do what the majority has done . . . but that is not the prerogative of the judiciary.”); \textit{id.} at 1241 (Sweeney, J., dissenting) (“I find it incredible that the majority takes it upon itself to make unconstitutional legislation constitutional.”); \textit{id.} at 1245 (Cook, J., dissenting); (“The majority has made an initial policy determination that the judiciary is ill equipped to make and that is characteristic of nonjusticiability.”).

\textsuperscript{387} \textit{Id.} at 1244 (Cook, J., dissenting).
unconvinced that the State had fulfilled the mandate of DeRolph I to overhaul the school finance system. He argued that the system was, at its core, the same as it was when the case was filed: inadequate and over-reliant on local property taxes. Justice Resnick also decried what she viewed as an ongoing over-reliance on local property taxes; an inadequate basic aid formula; a lack of facilities funding; and the continued presence of unfunded mandates and forced borrowing. Resnick sharply criticized the majority for relying on the good faith of the defendants. "They have stamped 'new and improved,'" she stated somewhat hyperbolically, "on a system that is neither."

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Why did the Ohio Supreme Court do what it did in DeRolph III? "If I knew that," says Coalition Executive Director William Phillis, "I would be writing a book. I think a lot of people in the statehouse would like to buy that book as well." Most likely, the DeRolph III decision was exactly what Chief Justice Moyer said it was—a compromise between the Court's moderate and conservative Republicans designed to bring the case to a halt. Although Moyer had indicated in DeRolph I and DeRolph II that he thought Ohio's school funding system was constitutional, in DeRolph III he was willing to hold it otherwise, so long as the Court put an end to the controversy by giving the legislature guidance as to what changes to make. Republican Justices Andrew Douglas and Paul Pfeifer shifted in the opposite direction. They still believed that the system was unconstitutional. Unlike the more liberal Justices Resnick and Sweeney, however, they were willing to hold the system constitutional if the State made the changes recommended in the decision. Thus, a new majority was formed, which upheld the core of the first two decisions but nonetheless seemed to present a long-term victory to the State defendants.

Neither the Coalition nor the State defendants were satisfied with the Court's decision. The Coalition opposed DeRolph III because it seemed to be a retreat from DeRolph I's mandate of a "complete systematic overhaul." According to William Phillis, "It would cost $1.2 billion to change the methodology [in accordance with the DeRolph III decision],

388. See id. at 1242 (Sweeney, J., dissenting).
389. See id. at 1231–32 (Resnick, J., dissenting).
390. Id. at 1217 (Resnick, J., dissenting).
391. Telephone Interview with William Phillis, supra n. 6.
392. See DeRolph III, 754 N.E.2d at 1201.
393. Id. at 1215 (Douglas, J., concurring) ("once modified, the new legislation will meet the constitutional standard") (emphasis added).
but this was not the systematic change that we had sought."\(^{394}\) For their part, legislative leaders were surprised by the specific holding in *DeRolph III*, but had come to expect the Ohio Supreme Court to reject any system put before it and had therefore shifted their focus from meeting the Court's mandates toward promoting their own policy goals. As one exasperated legislator told the author, "*DeRolph III* and *IV* were met with a big yawn in the legislature."\(^{395}\) Lawmakers also began to express frustration with the Court's decision. Republican leaders felt that the Court had ignored the important changes the State had made since *DeRolph I*,\(^ {396}\) and many reiterated that money was not the solution to all of the State's problems.\(^ {397}\) Perhaps more importantly, some legislators questioned the Ohio Supreme Court's ability to impose a remedy. The key question for many was not whether the system was unconstitutional, but whether the Ohio Supreme Court had overstepped its institutional bounds. Does the Court have the ability to create an obligation for the legislature? Many lawmakers did not think so.

### B. *DeRolph IV*—The Real About-Face

The State of Ohio and other defendants immediately filed a motion with the Ohio Supreme Court asking the Court to reconsider its holding in *DeRolph III*.\(^ {398}\) Governor Robert Taft believed that the Court's monetary value for adequate funding was based on flawed math. The Court held in *DeRolph III* that the per pupil base cost formula "must be modified to include the top five percent districts and the lower five percent districts," thereby ordering the elimination of "wealth screens" that excluded the wealthiest and poorest 5% of school districts from the base cost formula.\(^ {399}\) The State now argued, however, that the use of

\(^{394}\) Telephone Interview with William Phillis, *supra* n. 6.

\(^{395}\) This legislator requested anonymity. Similar sentiments were expressed "off the record" by a number of other policymakers also not cited in this article.

\(^{396}\) Telephone Interview with Arlene Setzer, *supra* n. 220 ("I think that the courts have ignored the great strides that we have made.") (emphasis added).

\(^{397}\) *Id.* (noting that "funding is not the solution to everything"); Telephone Interview with Paulo DeMaria, *supra* n. 208 (stating that "the education issue is not simply about money," and emphasizing the importance of accountability, early childhood education and curriculum development).

\(^{398}\) *DeRolph v. State*, 780 N.E.2d 529, 535 (2002) (Moyer, C.J., dissenting) [hereinafter *DeRolph IV*]. The state defendants filed for reconsideration on September 17, 2001, only 11 days after the decision in *DeRolph III* was announced.

\(^{399}\) *DeRolph III*, 754 N.E.2d at 1200. The term "wealth screen" refers to the practice of excluding ("screening out") a number of school districts from the formula used to determine the per pupil base funding cost. Prior to *DeRolph III*, the state's formula screened out the top and bottom 5% of all Ohio districts based on income and property wealth from the state's pool of 170 top-performing districts. This practice lowered the per pupil base funding amount by excluding wealthy
wealth screens was necessary because inclusion of data from the top and bottom 5% of districts had a dramatic effect and unreasonably distorted the base cost calculation. 400

In support of its motion for reconsideration, the State provided the Court with evidence that the use of wealth screens is standard practice throughout school finance, and in any event was not an attempt to artificially lower the final per pupil base cost. 401 This evidence included testimony from a number of experts, including one of the witnesses for the DeRolph plaintiffs. 402 This small change to the funding formula represented a massive change in statewide funding—in DeRolph III the Ohio Supreme Court had essentially ordered a $1.2 billion annual funding increase. The State was already feeling the budgetary effects of an economic downturn, and the difference in methodologies represented hundreds of millions of dollars in additional funding.

On November 2, 2001, the Ohio Supreme Court agreed to reconsider its September 6 decision. Although Governor Taft wanted to address only the issue of the base cost formula, the Court indicated that it would reconsider the entire case. 403 Rather than immediately reconsidering its holding, though, the Court also ordered a settlement conference between the plaintiffs and the State defendants. 404

The mediation never got off the ground. For roughly three months in early 2002, the parties argued not over the composition of the funding formula, but rather over what issues the mediation should involve. 405 The defendants wanted mediation limited to a few specific issues, particularly the changes to the funding formula that the Court had required in DeRolph III. The Coalition, on the other hand, hoped to use the mediation process to discuss all of the points at issue in DeRolph I and DeRolph II. The parties were generally unwilling to move from their pre-mediation positions, and on March 21, 2002, the court-appointed master commissioner, Howard Bellman, notified the Supreme Court that mediation had not produced a resolution. 406 Howard Bellman had a seemingly impossible task. The State appeared willing to compromise, but it could not, while faced with a slow economy and a budget crunch,

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400. See DeRolph IV, 780 N.E.2d at 540 (Moyer, C.J., dissenting).
402. Id. (Moyer, C.J., dissenting).
404. Id. at 1113.
405. Telephone Interview with William Phillis, supra n. 6.
406. DeRolph IV, 780 N.E.2d at 537 (Moyer, C.J., dissenting). Additional information on mediation is by and large unavailable. The discussions themselves are confidential, and representatives from both the Coalition and the state are generally unable to discuss details.
act like it had a blank check.

The parties once again argued their case to the Ohio Supreme Court in October 2002. On December 11, the Court did an about-face that was perhaps even more surprising than *DeRolph III*. The majority from *DeRolph I* and *II* reunited for a brief, relatively simple decision that reinstated the key holding of *DeRolph II* but ended the courts' jurisdiction in the *DeRolph* litigation. In a three-page opinion remarkably lacking in factual or legal substance, Justice Paul Pfeifer unsuccessfully sought to make sense of the majority's action. "We do not regret [DeRolph III] .... However, upon being asked to reconsider that decision, we have changed our collective mind. Despite the many good aspects of DeRolph III, we now vacate it." Pfeifer briefly lauded the legislature's increases in school funding before reiterating the *DeRolph I* requirement of a systematic overhaul of Ohio's education system. The Court's decision in *DeRolph III* notwithstanding, this burden had apparently not been met.

Justice Douglas, whose vote made the majority, was reluctant. "I would ... reaffirm our decision in *DeRolph III* with the exception of the wealth-screening issue. There are not, however, four votes for that approach." Justice Resnick, on the other hand, exhorted the voters to take the issue farther than the Court was permitted to do. Resnick suggested that further litigation was inevitable, and that without a constitutional amendment mandating an adequate per pupil funding level the General Assembly would continue "fail[ing] to perform its responsibilities." Resnick even suggested adopting an amendment specifying the funding formula and a specific per pupil amount.

The dissenters stayed a little more on topic. Justice Cook, citing her *DeRolph III* dissent, simply reiterated that she would have dismissed the case altogether. Chief Justice Moyer offered the only recitation of facts found in *DeRolph IV* and argued that the State presented compelling evidence that the use of wealth screens was not merely desirable, but in fact was scientifically necessary. He sharply criticized the majority for turning *DeRolph III* on its head with little explanation and derided the decision as "little more than a summary proclamation of a change of 'collective mind.'" Indeed, there seems to be little else in the decision

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408. See id.
409. Id. at 534 (Douglas, J., concurring).
410. See id. (Resnick, J., concurring).
411. Id. (Resnick, J., concurring).
412. See id. at 542–43 (Cook, J., dissenting).
413. Id. at 536 (Moyer, C.J., dissenting).
that explains the Court's turnaround.

Although those involved in the litigation cannot fully explain the Ohio Supreme Court's divergent holdings in DeRolph II, III, and IV, the shift in DeRolph IV does fit within this author's explanation of DeRolph III as a compromise. For Justices Pfeifer and Douglas, the State's school funding system had always remained unconstitutional. They had agreed to Chief Justice Moyer's decision in DeRolph III as part of a bargain, whereby they would hold the system constitutional only if the State made specific changes, most notably altering the funding formula to add roughly $1.2 billion of additional annual spending. The State did not meet those terms, and because mediation failed the system remained (in Pfeifer's and Douglas' opinion) in its unconstitutional pre-DeRolph III condition. By contrast, the more conservative Chief Justice Moyer and Justice Evelyn Stratton seemed to have agreed to DeRolph III solely to bring an end to the controversy, so their position in DeRolph IV actually better represents their true opinions of the merits of the case.

By the time DeRolph IV was decided, the case's importance to legislative leaders had seemingly come and passed. The State had made efforts to comply with the Ohio Supreme Court's holdings, but had long since shifted its primary focus to such things as accountability, early educational attainment, and stronger curricula. DeRolph IV therefore met with relatively less concern from the General Assembly than had its predecessors. According to one prominent legislator, "DeRolph makes up very little of what the [Education] Committee does. . . . We have a lot of issues to deal with, and not all of them stem from money." Some also express disappointment with the courts. "We simply do not know what we can do to appease the courts other than to take over the entire funding system and eliminate all local money, which we will not do."

1. Campaign 2002

Perhaps the strangest turn in DeRolph IV was the Ohio Supreme

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414. See supra n. 391 and accompanying text.
415. DeRolph IV, 780 N.E.2d at 530.
416. The remaining Justices were somewhat more consistent throughout the DeRolph litigation. Justices Resnick and Sweeney consistently took a more activist approach than the rest of the Court was willing to follow. Justice Cook, meanwhile, steadfastly maintained that the entire case was nonjusticiable from its very beginning.
417. Telephone Interview with Arlene Setzer, supra n. 220.
418. Email from Marianne White, supra n. 207. Other legislators and political scientists echo these sentiments. The idea of operating the entire funding system statewide, moreover, has never been seriously considered. "The power of suburban districts is strong in the legislature," noted former Speaker Pro Tempore William Batchelder, "and high spending districts don't need state money and don't want state control." Telephone Interview with William Batchelder, supra n. 116.
Court's decision to release jurisdiction in the case. In *DeRolph I* and *II*, the Court had taken the truly extraordinary step of retaining jurisdiction,\(^{419}\) essentially for the purpose of checking in on the legislature's progress and forcing it to act. Yet in *DeRolph IV*, where the Court simply reinstated the core of the prior holdings, it did no such thing. This could have been the result of battle fatigue. The unhappy compromise of *DeRolph III* had already demonstrated the justices' desire to get *DeRolph* off their hands. It is also possible, however, that the decision had something to do with the changing majority following the 2002 elections.

In November 2002, then-Lieutenant Governor Maureen O'Connor was elected to replace the retiring maverick Republican Justice Andrew Douglas on the Ohio Supreme Court.\(^{420}\) O'Connor campaigned on reversing the Court's increasingly activist trend, stating that as a justice she would "respect the governor" and "leave policy debates where they belong—in the legislature."\(^{421}\)

As the lieutenant governor, Maureen O'Connor enjoyed substantial name recognition and was ahead in the polls by double digits throughout the race. When election night concluded, the implications of O'Connor's joining the Ohio Supreme Court were clear. "There is probably a new majority, a new philosophy which cases will be tested against, and that is judicial restraint," O'Connor told supporters on election night.\(^{422}\) Justice Stratton was even more emphatic: "[The majority] now will respect the role of the court, not be activists; not render decisions ... that make absolutely no sense."\(^{423}\) There would soon be a new four-person majority in Columbus—Chief Justice Moyer and Justices O'Connor, Stratton, and Cook, all conservatives who believe in judicial restraint.\(^{424}\) The old

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\(^{419}\) See e.g. *DeRolph IV*, 780 N.E.2d at 535 (Lundberg Stratton, J., concurring in part and dissenting in part) ("In no case other than *DeRolph* have we retained jurisdiction once we have made a finding of unconstitutionality.").

\(^{420}\) See e.g. Laura A. Bischoff, *Stratton, O'Connor Win Ohio Supreme Court Races*, Cox News Service (Nov. 6, 2002) (available at LEXIS, News library, Cox News Service file).


\(^{422}\) Bischoff, supra n. 420.

\(^{423}\) Id.

\(^{424}\) Id. Some observers have pointed out, however, that predictions of judicial temperament often miss the mark. "Certainly she [O'Connor] would not have been given the Republican nomination if there had not been the general perception that she would take conservative positions on economic issues, including school funding. But as you're well aware, such perceptions sometimes turn out to be wrong." Email from Lawrence Baum, supra n. 213. It is also worth noting that within five months of Justice O'Connor joining the Ohio Supreme Court, Justice Deborah Cook was confirmed to the United States Court of Appeals for the Sixth Circuit. Tom Deamer, *Senate Confirms Cook to Appellate Court*, Plain Dealer AS (May 6, 2003). Governor Taft filled the vacancy on the Court with the appointment of Terrence O'Donnell. T.C. Brown, *Taft picks O'Donnell for Supreme*
majority knew this and decided to release jurisdiction over DeRolph.

VIII. ASSESSING THE DEROLPH LEGACY

It is important to put the DeRolph decisions in perspective. DeRolph I and II did not, by way of comparison, suffer from many of the problems that have plagued other states' school finance litigation. Such cases tend to be dominated by two jurisprudential extremes: judicial activism and judicial abdication. Some state supreme courts have found school funding to be a nonjusticiable political issue. In doing so, they have often abdicated their responsibility to provide adequate judicial review. Others have been so activist that the words of state constitutions and the principle of deference to the legislature become almost meaningless. Although the Ohio Supreme Court's decisions in DeRolph III and IV are difficult to explain, the Court successfully took a more moderate approach in DeRolph I and II. In those cases, the Court delineated the State's constitutional standard and applied that standard to the factual record to hold the system unconstitutional. The Court properly left the job of remedying the system to the legislature.

As this author has noted elsewhere, there are strong arguments against judicial activism in school finance cases. Finding a statewide system of school finance unconstitutional may be the quintessential example of judicial activism—it involves the least accountable branch of government overruling the policies set not only by state and local legislative bodies, but also by voters themselves. School finance cases also rely on novel legal precedent and inevitably lead to court involvement in taxation issues. Even the courts themselves are often wary to do this.

At the other extreme, however, some courts have declined to declare education a fundamental right even though the relevant state's

Court Seat, Plain Dealer B1 (May 13, 2003). These events should not have much effect on the Ohio Supreme Court's overall jurisprudence. Cook was, and O'Donnell is generally expected to be, among the more conservative justices on the Court. Indeed, this appears to be one of the primary reasons that O'Donnell was selected. "I was looking for a candidate," said Governor Taft, "who understood and believed in the separation of powers of government." Id.

425. See generally Thro, supra n. 96; Obhof, supra n. 17.
426. See e.g. Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1189 (Ill. 1996) (stating that questions relating to the quality of education are solely for the legislative branch to answer).
427. Thro, supra n. 96, at 530.
428. Id. at 532. See also supra nn. 14, 17.
429. See Obhof, supra n. 17, at 593-95.
430. Swenson, supra n. 4, at 1150.
431. See James C. Joslin, Student Author, Developing a School Funding Remedy for Ohio and Beyond, 56 Ohio St. L.J. 1247, 1254 (1995).
constitutional provisions suggest that it is.\textsuperscript{432} Many courts have also simply held that questions of educational quality are nonjusticiable. In \textit{Coalition for Adequacy v. Chiles}, for example, the Florida Supreme Court stated, “Appellants have failed to demonstrate . . . an appropriate standard for determining ‘adequacy’ that would not present a substantial risk of judicial intrusion” into the powers of the other branches of government.\textsuperscript{433}

Indeed, courts may not be competent to establish their own educational standards. Courts are, however, not only permitted but also required to apply a standard created by another branch.\textsuperscript{434} That is the very essence of judicial review. Illinois Supreme Court Justice Charles Freeman made this point clear when he dissented in part from \textit{Committee for Educational Rights v. Edgar}. “Courts cannot exercise legislative powers or compel their proper action. . . . However, ‘the judiciary has always had the right and duty to review all legislative acts in the light of the provisions and limitations of our basic charter.’”\textsuperscript{435} A court should be constrained by the limitations of its role. It should not, however, abandon its duty to determine whether the legislature has complied with the State’s constitution.\textsuperscript{436}

\textit{DeRolph I} and \textit{II} illustrate a third, more moderate course of action. The Ohio Supreme Court first asked whether the Ohio Constitution sets a minimum standard of education, and found that it did. The Court then looked to \textit{Miller v. Korns} and \textit{Board of Education v. Walter} to determine what that standard was. Having decided that a system could not be thorough and efficient if it was “starved for funds” or “lacked teachers, buildings, or equipment,” the Court then applied that standard to the facts at hand. Although the Ohio Supreme Court held the State’s funding system unconstitutional on adequacy grounds, it also declined to fashion a remedy, leaving that instead to the State legislature and governor. This middle ground approach balanced the principles of judicial restraint and judicial review.

The Ohio Supreme Court has consistently relied on many of the same variables that other courts have focused on when deciding school finance cases. These include disparities in interdistrict per pupil

\textsuperscript{432} Thro, supra n. 96, at 542.

\textsuperscript{433} \textit{Coalition for Adequacy v. Chiles}, 680 So.2d 400, 408 (Fla. 1996). The Rhode Island Supreme Court echoed these sentiments in \textit{City of Pawtucket v. Sundlun} by stating that finding for plaintiffs would have been “far beyond the Judiciary’s constitutional powers or institutional capacity.” \textit{City of Pawtucket v. Sundlun}, 662 A.2d 40, 55 (R.I. 1995).

\textsuperscript{434} Thro, supra n. 96, at 547.


\textsuperscript{436} \textit{Id.} at 1204 (Freeman, J., dissenting in part).
spending, percentage of the tax burden placed on the local level as opposed to statewide sources, and districts' ability to attract high quality teachers and administrators.\textsuperscript{437} Each of these factors played an important role in the DeRolph decisions.\textsuperscript{438}

The example of Ohio is particularly unique because the DeRolph Court was not making entirely new law. It was not required, like many other states' courts have been, to attempt to define its state's education provisions for the first time. The DeRolph Court applied the prior interpretations of Ohio's Education Clause from Miller and Walter. Those precedents implied that there is an adequacy standard in Ohio. The Court applied this standard forcefully, but did so in a manner that constrained the holding to an adequacy framework. Although the plaintiffs brought the suit under both equity and adequacy-based claims, the Ohio Supreme Court did not, as so many others have, require an equity standard that was clearly beyond the scope of the State constitution.\textsuperscript{439} In fact, the Court specifically stated that it did not support an equalizing "Robin Hood" approach.\textsuperscript{440} This choice was wise both as a legal and a pragmatic matter—it has allowed Ohio to avoid the problems that have plagued equity states such as California.\textsuperscript{441}

In the first two rounds of the DeRolph battle, the Ohio Supreme Court left broad discretion to the legislature to change the education system. Unlike other states' courts, such as those in Kentucky and Massachusetts, the Court recognized that there are limits to judicial competence in the area of school finance. While the Court did order a sweeping remedy, and probably overstepped its authority by retaining jurisdiction,\textsuperscript{442} it did not legislate its own remedy or establish strict and unattainable guidelines. The Court wisely declined the opportunity to instruct the General Assembly as to what type of legislation to enact.\textsuperscript{443} It chose instead to state which aspects of the system were unconstitutional, explain the basis for its holding, and allow the General Assembly to fill in

\begin{thebibliography}{99}
\bibitem{437} Lundberg, \textit{supra} n. 4, at 1109.
\bibitem{438} Some courts have paid particular attention to their state's average per pupil spending vis-à-vis the national average. As Chief Justice Moyer pointed out in his dissents, however, Ohio ranked highly in this category. \textit{See DeRolph I}, 677 N.E.2d at 787 (Moyer, C.J., dissenting).
\bibitem{439} \textit{Id.} at 746.
\bibitem{440} \textit{Id.}
\bibitem{441} \textit{See supra} n. 82.
\bibitem{442} Justice Cook was adamant about this point in a number of dissents. "I would modify the order," she stated upon motion for clarification of \textit{DeRolph I}, "by disposing altogether with any continuing jurisdiction." \textit{DeRolph v. State}, 678 N.E.2d 886, 890 (Ohio 1997) (Cook, J., dissenting). "There is no case or controversy pending ... [and] the courts are not in the business of making new laws." \textit{Id.}
\bibitem{443} \textit{DeRolph I}, 677 N.E.2d at 747.
\end{thebibliography}
the blanks. Thus, despite being attacked for "legislating from the bench," the DeRolph Court's first two decisions were relatively moderate. As State Senator Jeff Jacobson, who later devised a finance plan that the Court approved in DeRolph III, stated in April 2001, "I think that the court was right in what they did. . . . [I]t was a very moderate decision. . . . [I]t was not the type of decision that would lead itself to a constitutional crisis and yet that's the way many people treated it."445

The decisions in DeRolph III and IV are less defensible. Although DeRolph III was designed specifically to end the dispute between the plaintiffs and the State, it was a much stronger example of judicial activism than the prior decisions. The Ohio Supreme Court not only held the system unconstitutional, but also effectively required the General Assembly to enact specific legislation as a remedy. Such recommendations violated the separation of powers and were constitutionally inappropriate. It is not the province of the courts to order specific remedies when legislative responses are insufficient. The role of the judiciary is merely to say what the law is and to direct other public officials back to the proper course.446 The Court's decision in DeRolph III should not have dealt with such details as the use of wealth screens in the base cost formula, except to find that the system as a whole was not thorough and efficient. As Justice Resnick argued in dissent, "[I]f the system is not thorough and efficient, this court should say so and then . . . give the General Assembly additional time to craft a constitutional system."447 To take further action oversteps the Supreme Court's role in the State's constitutional system.

It is important to note that courts generally lack not only the legal authority but also the institutional competence to make policy determinations in an area as complex as school funding. Merely defining what constitutes an "adequate" education requires judges to go far beyond their area of expertise, and has "spawned a huge industry of competing expert witnesses, traveling from state to state, from one

444. See id.
446. Thro, supra n. 96, at 528; see also Alexander Hamilton, The Federalist No. 78, at 437 (Clinton Rossiter ed., New Am. Lib. 1961). Alexander Hamilton offered the classic argument against judicial encroachment on the functions of the legislature and executive. The courts are to only say what the law is, Hamilton argued, and not what it should be. "If [courts] should be disposed to exercise WILL instead of JUDGMENT, the consequences would equally be the substitution of their pleasure to that of the legislative body." Id. (emphasis in original).
There is also little reason to believe that courts are either more in touch with the voters’ views or more capable of formulating sound public policy decisions than the other branches of government. Additionally, courts frequently place too much emphasis on money, and minimize the fact that not all education problems stem from a lack of resources. One would hardly know from reading most school finance decisions (including those by the various DeRolph majorities) that there are actually significant empirical disputes as to the importance of finance in the delivery of a quality education.

The Ohio Supreme Court’s turnaround in DeRolph IV is also questionable. The Court did a complete about-face in one of the most important cases in the State’s history—a case with significant budgetary implications and a direct effect on nearly every student in Ohio’s public school system. The majority nevertheless found it unnecessary to explain its reasoning, other than to say that some justices had “a change of mind.” For a case of such practical and constitutional import, one would expect slightly stronger support than that. Such unexplained activism perhaps explains why the General Assembly, which was rocked by the first DeRolph decision, has now shifted its focus almost entirely towards its own initiatives rather than the mandates of the Court.

The indirect effects of DeRolph on other parts of the State’s budget, particularly higher education, are certainly worth mentioning. “Each time we added money to meet one of the decisions,” notes an advisor to Governor Taft, “we had to squeeze other parts of the budget.” A comment from State Treasurer Joseph Deters captures both the positive and negative aspects of this relationship. “The DeRolph case has dramatically changed the way schools have been funded in our state, and has been the catalyst for improving existing buildings and constructing new schools all across Ohio. However, because no state has unlimited resources . . . it has also had an impact on other areas of the state budget.”

Lawmakers and administrators alike suggest that higher education has suffered because of the DeRolph cases. Universities’ budgets have seen limited growth, and some have estimated that Ohio’s higher

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449. This debate did, however, play a role in Chief Justice Moyer’s dissents to DeRolph I and II. See supra n. 44.

450. Telephone Interview with Paulo DeMaria, supra n. 208.


452. See Telephone Interview with Herb Asher, supra n. 205 (stating that although most areas
education budget is as much as 10-15% lower than what it would have otherwise been without DeRolph.\footnote{453} Job training programs have also suffered, which may have indirectly lowered the State's income.\footnote{454} The legislature seems determined to make these areas priorities in the next decade, at least partly to compensate for the relative neglect that they have experienced because of DeRolph.\footnote{455}

A. The Aftermath

Ohio's education system, though much improved over its pre-DeRolph state, is still in the process of reform. As a matter of basic case law, the mandates of DeRolph I and II remained unfulfilled, and the system is still unconstitutional. The Coalition plaintiffs remain strong in their resolve and foresee future litigation. On March 4, 2003, the DeRolph plaintiffs asked Judge Lewis to schedule and conduct a "compliance conference" to address the State's compliance with DeRolph IV. The plaintiffs also requested that the State be ordered to prepare a report setting forth proposals to comply with the DeRolph decisions.\footnote{456} The State immediately sought a writ of prohibition from the Ohio Supreme Court to prevent Judge Lewis and the common pleas court from exercising further jurisdiction in DeRolph.\footnote{457}

On May 16, 2003, the Ohio Supreme Court ordered Judge Lewis to stop any proceedings in his court aimed at enforcing DeRolph IV. Justice Stratton, writing for a five-justice majority, characterized the Coalition's request for a conference as "nothing more than an ill-disguised attempt to require judicial approval for proposed remedies even before those remedies are enacted."\footnote{458} Such actions, she stated, were inconsistent with DeRolph IV. "The duty now lies with the General Assembly to remedy an educational system," Justice Stratton concluded. "Judge Lewis and the common pleas court patently and unambiguously lack jurisdiction over any post-DeRolph IV proceedings, we now grant a peremptory writ and end any further litigation in DeRolph v. State."\footnote{459}

The Coalition quickly petitioned the United States Supreme Court

\footnote{453. Telephone Interview with William Batchelder, supra n. 116.}
\footnote{454. Id. ("As factory training programs were cut, we lost skilled workers, which lowered the future tax base and led to long-term losses in state income.").}
\footnote{455. In discussions with the author, most lawmakers have also emphasized the importance of Medicaid—which is the fastest-growing part of the state's budget—as well as other social services.}
\footnote{456. Telephone Interview with Matt DeTemple, supra n. 111.}
\footnote{457. Judge Lewis also petitioned the Supreme Court for guidance as to the proper course to follow. See State ex rel. State v. Lewis, 99 Ohio St.3d 97, 100 (2003).}
\footnote{458. Id. at 103 (emphasis in original).}
\footnote{459. Id. at 104.}
for a writ of certiorari. Its efforts were no doubt hampered by prior Supreme Court precedent stating that education is not a fundamental federal right and that the states are free to balance the values of local control and equality of educational resources.\footnote{See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (holding that education is not a fundamental right, and upholding an unequal school funding scheme under a rational basis review).} This forced the \textit{DeRolph} plaintiffs to find a different federal claim that would give the Supreme Court jurisdiction to hear the case. They therefore asserted various claims of denial of due process and equal protection, alleging that the Ohio Supreme Court's refusal to assure compliance with its remedial orders effectively denied the plaintiffs their right of access to the courts. They argued, in essence, that "\textit{Lewis}' denial of Petitioner's federally-protected right of access to Ohio's courts works a complete deprivation of the remedy to which \textit{DeRolph IV} entitles Petitioners."\footnote{Petition for Writ of Certiorari at 16, \textit{DeRolph v. Ohio}, 124 S. Ct. 432 (2003) (No. 03-245), available at http://www.bricker.com (accessed Jan. 10, 2005).}

The State sharply criticized this approach, arguing not only that the petition raised no federal claims, but also that the Coalition clearly had not been denied access to the courts, as it had in fact used them effectively and had won all of the preceding lawsuits.\footnote{Br. of the Respondent at 2, \textit{DeRolph v. Ohio}, 124 S. Ct. 432 (2003) (No. 03-245) ("They had their day in court; indeed, they had their decade in court. . . . [T]hey won repeatedly") (emphasis in original), available at http://www.bricker.com (accessed Jan. 10, 2005).} The State also disparaged what it saw as an ongoing attempt by plaintiffs to federalize virtually all state law issues. "In our federalist system, public education has long been the province of state and local government. . . . [T]he Court ought not to stretch due process principles to create federal oversight over whether a State's educational system is 'thorough and efficient.'"\footnote{Id. at 28–29.} The United States Supreme Court agreed with the State on at least one of the points—it unanimously rejected the petition on October 20, 2003.\footnote{\textit{DeRolph v. Ohio}, 124 S. Ct. 432 (2003).}

It thus appears that the \textit{DeRolph} saga is definitively over. Any future court actions will have to take place under the aegis of a different lawsuit.

\textbf{IX. CONCLUSION}

It is too early to tell what the long-term effects of \textit{DeRolph v. State} will be. The \textit{DeRolph} litigation has undeniably benefited a great many students. When the case was brought in 1991 there was no known adequate level of per pupil education funding in Ohio. The State had not
even tried to determine such costs since the early 1970s. Despite having a respectable per pupil average funding level, Ohio was also marked by large disparities. The Ohio Supreme Court's holding in DeRolph IV notwithstanding, the State now has a rational formula for determining the cost of a basic education, and has programs in place to fund those costs. Ohio also now has programs in place to even out the disparities caused by the property tax system. While disparities will always exist, underprivileged children today have a much greater chance of getting a quality education than they did in 1991 or even 1998.

When DeRolph v. State was filed, some of Ohio's school districts faced such substandard conditions that they were compared to the world of Oliver Twist. The trial court's record for DeRolph I demonstrated that some districts were forced to ration even the most basic supplies, including such necessities as toilet paper and textbooks.\(^{465}\) The Ohio Supreme Court has remained strong in its resolve; the legislature and the governor have responded by increasing funding and instituting important academic reforms. As Chief Justice Thomas Moyer has pointed out, the dire circumstances outlined in the initial trial court decision have mostly disappeared. Far from the earlier complaints of sewage-covered baseball fields and arsenic-laced drinking water, plaintiffs now speak of advanced placement courses and different classes having to share rooms.\(^{466}\) Does this mean that school funding in Ohio is perfect? Certainly not—but it does mean that significant progress has been made since the courts first heard the DeRolph case.

The question now facing Ohio is whether the State can sustain the commitment it has made to education. In early 2003, a budget crisis caused by economic recession led to significant cuts in education spending.\(^{467}\) These cuts even provoked a lawsuit of their own, wherein parents and superintendents challenged the governor's ability to decrease funding for primary and secondary education. The case was quickly dismissed, however, as a four-justice majority summarily upheld the governor's constitutional authority to make cuts to the education budget.\(^{468}\) Despite their victory in court, the legislature and governor ultimately remedied these short-term decreases and increased education funding through an increase in the state income tax.\(^{469}\)

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466. Id.
467. Governor Taft and the General Assembly were forced to cut the overall statewide budget by roughly $300 million in January 2003, and cut primary and secondary education spending by about $100 million. Telephone Interview with Paulo DeMaria, supra n. 208; see also A Disaster for Urban Schools, Plain Dealer B8 (Feb. 21, 2003); William Hershey, House Backs Senate Budget: Unhappy Taft says Education Cuts Due, Dayton Daily News B1 (Feb. 26, 2003).
468. See State ex rel Christopher v. Taft, 787 N.E.2d 1226 (Ohio 2003).
spending by more than 5% for the next fiscal year. Unfortunately, they had to raise taxes substantially in order to do so, and efforts to rescind the new taxes were well underway by the end of the year.

Ohio's leaders have made commendable changes to the State's school finance system. Though not without its faults, Ohio's school system is vastly improved from its pre-DeRolph state. Can Ohio continue down the path it began in the mid-1990s, and fully fund such things as special education, advanced placement courses, and modern technological education? These are important problems, and we must hope that the State's leaders are up to the task. We can no doubt be thankful, though, that the dismal situation described by the Perry County trial court in 1994 has become a remnant of the past.

469. Lee Leonard, Taft Signs $48.8 Billion Budget Bill, Columbus Dispatch 1D (June 27, 2003).

470. These included a one-cent sales tax increase, which was used primarily to meet the state's obligations to other areas, such as Medicaid and essential government services. See id.; see also Lee Leonard, More Taxes, More Spending, Columbus Dispatch 1C (July 27, 2003).

471. The largest and most organized effort to repeal the state's tax increases was led by Ohio's Secretary of State, J. Kenneth Blackwell. Blackwell and the group Citizens for Tax Reform obtained more than 90,000 citizens' signatures in an attempt to force the state legislature to reconsider the issue or, alternatively, to place the issue of repealing the tax on the November 2004 ballot. See Blackwell Breaks with Party Line, Mansfield News Journal 4A (Oct. 14, 2003); Lee Leonard, Blackwell Initiative; Petitions to Repeal Tax Fall Short, Columbus Dispatch 1A (Feb. 13, 2004).