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"As Perfect as Can Be Devised": *DeRolph v. State of Ohio* and the Right to Education in Ohio

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“AS PERFECT AS CAN BE DEvised”:¹
DEROLPH V. STATE OF OHIO AND THE RIGHT TO
EDUCATION IN OHIO

It's time for results. It's time to get something out of our money . . . They have to do what everybody else has to do. They have to restructure.

GOVERNOR GEORGE VOINOVICH²

I would invite the governor and his staff to visit some of these districts and show them how to get more for the buck He would find kids going to school without bathrooms. He would find kids going to school in coal bins.

WILLIAM L. PHILLIS, EXECUTIVE DIRECTOR OF THE OHIO
COALITION FOR EQUITY AND ADEQUACY IN SCHOOL FUNDING³

In *DeRolph v. State of Ohio*,⁴ the Perry County Common Pleas Court held that Ohio's current system of funding public elementary and secondary education through local property taxes violates the Ohio Constitution.⁵ The court based its holding on two major grounds. First, the court found that the inequities visited upon poor school districts by the current funding system deprive students of

1. II REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF OHIO, 698 (J.V. Smith ed., 1851) [hereinafter DEBATES OF 1851 CONVENTION] (statement of Delegate Archbold concerning the meaning of a “thorough and efficient system of common schools”).

2. Vindu P. Goel, *Voinovich Assails Schools Over Lawsuit*, CLEVELAND PLAIN DEALER, July 7, 1994, at 5B (criticizing school districts for not “doing more with less” after the issuance of the *DeRolph* opinion).

3. *Id.*

4. *DeRolph v. State of Ohio*, No. 22043, (Perry County, July 1, 1994) (copy available at cost from the Ohio Coalition for Equity and Adequacy in School Funding, 100 South Third Street, Columbus, OH 43215).

5. *Id.* at 463.

their fundamental right to education, guaranteed by the Ohio Constitution, and so deny them the equal protection of the law.⁶ Second, the court held that the State, by not remedying these inequities, has failed to fulfill its constitutional duty to "secure a thorough and efficient system of common schools" throughout the state of Ohio.⁷

Brought by the Ohio Coalition for Equity and Adequacy of School Funding on behalf of 500 of the 748 school districts in Ohio,⁸ *DeRolph* represented a concerted state-wide effort to

6. *Id.* at 469. The Court grounds the fundamental right to education in article I, section 1 and section 7 of the Ohio Constitution. Article I, section 1 states that:

All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.

OHIO CONST. art. I, § 1.

Article I, section 7 states, in pertinent part, that:

. . . Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.

OHIO CONST. art. I, § 7.

Article I, section 2, from which the Court the guarantee of equal protection, states that:

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

OHIO CONST. art. I, § 2.

The Court also held that the current funding system violated OHIO REV. CODE ANN. § 3323.02, (Baldwin 1990), by not providing handicapped students with an appropriate education, as required by the statute. As such, the Court held that this violation deprived handicapped students in poor districts of the article II, section 26 requirement of the "uniform operation of the laws." OHIO CONST. art. II, § 26. This Comment will focus only on how this holding relates to the broader equal protection claim.

7. *DeRolph v. State of Ohio*, No. 22043, (Perry County, July 1, 1994) at 475. Article VI, section 2 of the Ohio Constitution states that:

The general assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state; but no religious or other sect or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state.

OHIO CONST. art. VI, § 2.

8. Tim Miller, *Court Voids System; Ohio School Funding Unconstitutional*, DAYTON DAILY NEWS, July 2, 1994, at 1A.

overturn Ohio's property-based school funding system. The voluminous trial record⁹ demonstrated the plaintiffs'¹⁰ well-organized challenge and the defendant's¹¹ equal resolve in defending against it. Although Judge Linton D. Lewis, Jr.'s opinion represents a complete victory for the plaintiffs, this opinion merely constitutes "the first act in a three-act drama that will not conclude until the Ohio Supreme Court rules."¹²

This Comment will address the strength of *DeRolph's* constitutional holdings. Part I will discuss *Board of Education v. Walter*,¹³ a 1979 case in which the state funding system then in effect, the guaranteed yield¹⁴ formula, withstood a similar constitutional challenge.¹⁵ Part II will briefly describe the current funding system and set forth in detail the *DeRolph* court's essential findings of fact and conclusions of law.¹⁶ Part III will then examine: 1) *Walter's* precedential effect on *DeRolph*;¹⁷ 2) the validity of the equal protection holding,¹⁸ and 3) the validity of the "thorough and efficient" holding.¹⁹

I. BOARD OF EDUCATION V. WALTER

In *Board of Education v. Walter*, the named plaintiffs were the Board of Education, Superintendent, Clerk-Treasurer, students, and

9. With 71 witnesses and 500 exhibits, the total trial record came to 10,827 pages. *DeRolph* at 463.

10. Plaintiffs included three rural and two urban boards of education. The rural districts were Northern Local School District (Perry County), Southern Local School District (Perry County), and Dawson-Bryant Local School District (Lawrence County). The urban districts were Lima City School District and Youngstown City School District. Plaintiffs also included superintendents, board members, teachers, parents, and children of these districts. *Id.* (cover page).

11. Defendants were the State of Ohio, the State Board of Education, the Ohio Department of Education, and Dr. Ted Sanders, in his individual capacity as the Ohio Superintendent of Public Instruction. *Id.* After the *DeRolph* decision, the State Board of Education voted 6-5 not to appeal. The State, however, did appeal and joined the State Board of Education, along with the Ohio Department of Education, as defendants. The plaintiffs planned to challenge the forcible joinder of these parties on appeal. Jonathan Riskind, *State to Appeal School Funding Ruling*, COLUMBUS DISPATCH, August 13, 1994, at 1C.

12. Miller, *supra* note 8 (quoting State Senate President Stanley Aronoff).

13. 58 Ohio St. 2d 368 (1979), *cert. denied*, 444 U.S. 1015 (1980).

14. *See infra* note 21.

15. *See infra* notes 20-59 and accompanying text.

16. *See infra* notes 60-106 and accompanying text.

17. *See infra* notes 107-15 and accompanying text.

18. *See infra* notes 116-49 and accompanying text.

19. *See infra* notes 150-71 and accompanying text.

parents of the financially-strapped Cincinnati School District.²⁰ They filed a class action on behalf of all other school districts similarly situated seeking a judgment declaring the guaranteed yield school funding formula²¹ unconstitutional under the "equal protection and benefit" clause of article I, section 2 and the "thorough and efficient" clause of article VI, section 2 of the Ohio Constitution.²² At the trial level, the plaintiffs succeeded in both claims.²³ The court of appeals, however, upheld only the equal protection claim.²⁴ It reversed the trial court's "thorough and efficient" holding, stating that the trial court "overstepped its power" by infringing upon the General Assembly's broad authority in educational matters.²⁵

Upon appeal of this decision, the Ohio Supreme Court held that the guaranteed yield formula violated neither the "equal protection and benefit" clause nor the "thorough and efficient" clause.²⁶ Although this holding seems contrary to the later *DeRolph* opinion, *Walter* is as important for the decisions it avoided as the decisions it made. A close examination of the *Walter* opinion reveals that the court, rather than focusing on the plaintiffs' claim to a right to an adequate education, redefined the issue as one "more directly concerned with the way in which Ohio has decided to collect and spend state and local taxes."²⁷ This reformulation of the case,

20. Board of Educ. v. Walter, 58 Ohio St. 2d 368, 368 (1979), cert. denied, 444 U.S. 1015 (1980).

21. The guaranteed yield formula operated as follows. First, the local districts were required to levy a tax of at least 20 mills per dollar of taxable property valuation. The state would then guarantee each district funds sufficient to achieve a minimum property tax base of \$48,000 per pupil, which results in a minimum guarantee of \$960 per pupil (\$48,000 x 20 mills). The state would also give districts a bonus for extra local millage between 20 and 30 mills. For a more detailed description of this formula see Robert J. Davidek, Note, *The School Funding Challenge in Ohio: Board of Education v. Walter*, 11 U. Tol. L. Rev. 1019, 1019 n.2 (1980). For a thorough description of the deficiencies of this system see Annette B. Johnson, *State Court Intervention in School Finance Reform*, 28 Clev. St. L. Rev. 325, 361 (1979).

22. *Walter*, 58 Ohio St. 2d at 369.

23. *Id.*

24. *Id.*

25. *Id.* at 380.

26. *Id.* at 368.

27. Board of Educ. v. Walter, 58 Ohio St. 2d 368, 375-76 (1979), cert. denied, 444 U.S. 1015 (1980). For further commentary on the *Walter* court's redefinition of the issue see Jeffrey L. Hayman, Comment, *Equal Educational Opportunity and Public School Finance Reform in Ohio: Board of Education v. Walter*, 41 OHIO ST. L.J. 179, 202 (1980) (characterizing the court's opinion as an evasion of the issue of equal educational opportunity); Geoffrey W. Veith, Recent Case, 48 U. CIN. L. REV. 1126 (1979) (stating that the

along with some nifty manipulation of the facts,²⁸ allowed the court to avoid the issues *DeRolph* presented.

In deciding the equal protection claim, the *Walter* court adopted the traditional two-tiered equal protection analysis employed by the United States Supreme Court in its seminal school funding case, *San Antonio Independent School District v. Rodriguez*.²⁹ The *Walter* Court stated that if Ohio's funding system interfered with the exercise of a fundamental right, here the right to an adequate education, it would be overturned unless "closely tailored" to effectuate a compelling state interest.³⁰ Conversely, if no fundamental right were involved, the system would survive if merely "rationally related" to a state interest.³¹

However, the Ohio court declined to adopt *Rodriguez's* test for determining the fundamentality of a right—namely, that the right be "explicitly or implicitly guaranteed by the Constitution."³² First, it correctly pointed out that the Ohio Constitution, unlike the United States Constitution, is one of plenary powers and therefore contains provisions "not considered fundamental to the concept of ordered liberty," like workers' compensation.³³ In addition, the court noted that the test might be too broad in any case since, "the right to acquire and hold property" for example, "is guaranteed in the Federal and State Constitutions [but] surely . . . is not a likely candidate" for strict scrutiny analysis.³⁴ Inexplicably though, the court dropped its analysis of the fundamentality of a right to education at this point. Not only did the court fail to determine whether the right to an education is fundamental, it failed to elucidate any test for determining the fundamentality of any right under the Ohio Constitution.

Rather than developing a standard of its own with which to analyze the fundamentality of a right to education, the court simply decided against strict scrutiny because the case "dealt with difficult

court redefined the issue).

28. See Veith, *supra* note 27, at 1131; see also Davidek, *supra* note 21, at 1041.

29. 411 U.S. 1, 36-7 (1973) (holding that the Texas school funding system did not violate the equal protection clause of the Fourteenth Amendment).

30. *Walter*, 58 Ohio St. 2d at 374 (quoting *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978)).

31. *Id.*

32. *Rodriguez*, 411 U.S. at 33.

33. *Walter*, 58 Ohio St. 2d at 374.

34. *Id.* (quoting *Robinson v. Cahill*, 303 A.2d 273, 282 (N.J. 1973)) (finding the New Jersey school funding system unconstitutional pursuant to its own "thorough and efficient" constitutional provision).

issues of taxation, fiscal planning and education policy.”³⁵ By re-defining the issue as one of taxation, the challenged guaranteed yield program received the generous protection of a rational basis analysis.³⁶ Requiring the plaintiffs to prove the unconstitutionality of the program beyond a reasonable doubt, the court held that the guaranteed yield program passed constitutional muster because it was rationally related to each school district’s interest in local control.³⁷ According to the court, the program comported with the history of state intervention in the funding of public education because it attempted to “ameliorate the disparity in the levels of expenditure without destroying the virtues of local control.”³⁸

The *Walter* court’s resolution of the article VI, section 2 claim involved similar sleight-of-hand. In its legal analysis, the court formulated a relatively clear test for constitutional compliance. However, in its factual conclusions, it simply replaced the trial court’s findings of fact with facts of its own.

After first establishing jurisdiction to hear the issue,³⁹ the court attempted to set forth its standard for reviewing the actions of the General Assembly under article VI, section 2. The court first echoed the court of appeal’s holding that article VI, section 2 constituted a broad grant of authority to the General Assembly rather than an affirmative obligation and therefore, that the General Assembly was entitled to great deference.⁴⁰ However, the court did not close the door on future judicial intervention. To elucidate the limits of its deference, the court quoted a passage from *Miller*

35. *Id.* at 375.

36. *See* Hayman, *supra* note 27, at 202 (noting that the cases the court cites recognizing a legislature’s broad discretion in taxation all “deal[] with classifications created when the state collects taxes,” not the effect of the tax on the groups to whom it is distributed).

37. *Walter*, 58 Ohio St. 2d at 377. The court defined local control as “not only the freedom to devote more money to the education of one’s children but also control over and participation in the decision-making process as to how those local tax dollars are to be spent.” *Id.*

38. *Id.* at 380.

39. *Id.* at 383-84. The court first declared its power to review legislative action taken pursuant to article VI, section 2, holding that “the doctrine of judicial review is so well established that it is beyond cavil.” *Id.* at 383. Then, the court held that the issue was not a “political question,” by relying on similar state court review of school funding systems in New Jersey and Washington. *Id.* at 384 (citing *Robinson v. Cahill*, 303 A.2d 273 (1973) and *Seattle School District No. 1 v. State*, 585 P.2d 71 (1978)).

40. *Id.* at 385 (citing *State ex rel. Methodist Children’s Home Ass’n v. Board of Educ.*, 105 Ohio St. 438 (1922) which states that “[w]ith the wisdom or the policy of such legislation the court has no responsibility and no authority”).

v. *Korns*,⁴¹ an early school funding case:

[Article VI, section 2] . . . 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 state-wide A thorough system could not mean one in which part or any number of the school districts of the state were starved for funds. An efficient system could not mean one in which part or any number of school districts of the state lacked teachers, buildings, or equipment.⁴²

Unfortunately, the court's application of this standard contravened *Miller's* clear language. As an example of a situation in which a system would not be "thorough and efficient," the court cited *Rodriguez's* "absolute deprivation of education" standard.⁴³ The court's factual finding that no child had been deprived of an education because all had received the statutorily-mandated 182 days of instruction reinforces the view that the court would require such deprivation before intervening under article VI, section 2.⁴⁴ However, this interpretation plainly ignored *Miller*, which permitted intervention if a school district "lacked teachers, buildings, or equipment."⁴⁵ In contrast to its own purported standard, the *Walter* court seemed to require the absolute deprivation of all three.⁴⁶

Most disturbingly, the court ignored long-standing Ohio Supreme Court precedent by substituting its own factual findings for

41. 107 Ohio St. 287 (1923) (holding that the state had the authority to apply the taxes collected from one school district to the funding of another, less wealthy school district).

42. *Id.* at 297-98.

43. *Board of Educ. v. Walter*, 58 Ohio St. 2d 368, 387 (1979) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 25 (1973)), *cert. denied* 444 U.S. 1015 (1980). In suggesting this standard, the *Walter* Court fails to recognize the context in which this standard arose in *Rodriguez*. In *Rodriguez*, the Court was considering an equal protection claim in which the plaintiffs, on the basis of their poverty, asserted suspect class status. In mentioning this standard, then, the *Rodriguez* Court was merely stating well-established precedent that, in evaluating equal protection claims on the basis of poverty as a suspect class, absolute deprivation of a right is required. *Rodriguez*, 411 U.S. at 20. The language of article VI, section 2, by placing a positive obligation on the state to provide a "thorough and efficient system of" schools, in no way resembles the language of the equal protection clause of the Fourteenth Amendment. Nor does the claim that the legislature has a positive duty under article VI, section 2 resemble the suspect class claim in *Rodriguez*.

44. *Walter*, 58 Ohio St. 2d at 388.

45. *Id.* at 386 (citing *Miller*, 107 Ohio St. at 297-98).

46. *Id.*

those of the trial court.⁴⁷ Although the trial court's findings established that the guaranteed yield program did not meet the *Miller* standard,⁴⁸ the supreme court used a 1973 legislative report not cited in the lower court to conclude that the funding program provided sufficient funds for school districts to meet state minimum educational standards.⁴⁹ On this basis, the court concluded that the program did not violate the "thorough and efficient" clause of article VI, section 2.

In sum, *Board of Education v. Walter* was a curious opinion. The plaintiffs asserted that the Ohio Constitution guarantees each child a fundamental right to an adequate education and that the General Assembly failed to meet its constitutional duty to secure a "thorough and efficient system of common schools."⁵⁰ However, the court decided the case without ever deciding these issues. It failed to determine whether education was a fundamental right and failed, as well, to establish any test of fundamentality for Ohio constitutional provisions.⁵¹ As for the "thorough and efficient" claim, the court set forth a standard that comported with the language of the "thorough and efficient" clause, but decided the issue on its own facts, not the trial court's findings.⁵² Even though the court avoided these issues, however, it unequivocally stated that it had the power to decide them.⁵³

How then should one read this opinion? Perhaps the best reading of *Walter* recognizes the court's unwillingness to prematurely render a new funding system unconstitutional.⁵⁴ At the time, the guaranteed yield program was regarded by many reformers as the most advanced formula for achieving equity in school funding and the plaintiffs challenged it in its first year.⁵⁵ Additionally, the

47. The Ohio Supreme Court does not engage in fact-finding unless there is no evidence in the trial record to support the trial court's factual conclusion. *Gates v. Board of Educ. of River Local Sch. Dist.*, 11 Ohio St. 2d 83, 86 (1967).

48. See *Davidek*, *supra* note 21, at 1041 (stating that the "*Walter* trial court found that 14% of the schools in Ohio had inadequate pupil-teacher ratios under law, 53% of the schools were found to be deficient in curriculum and instruction, as least 31% of the buildings lacked adequate classrooms, libraries, art music, or physical education facilities, and 54% had inadequate textbooks").

49. 58 Ohio St. 2d at 372 (discussed in *Veith*, *supra* note 27, at 1130).

50. See *supra* notes 20-22 and accompanying text.

51. See *supra* notes 29-35 and accompanying text.

52. See *supra* notes 39-49 and accompanying text.

53. *Walter*, 58 Ohio St. 2d at 384.

54. See *Johnson*, *supra* note 21, at 368.

55. *Id.*

court noted that the General Assembly had shown a willingness in the past to study and reform the funding system.⁵⁶ In fact, the guaranteed yield program itself arose from the inefficiencies of the prior foundation program.⁵⁷ Finally, the Ohio court most likely wanted to avoid the clashes with the legislature that would inevitably follow the invalidation of the guaranteed yield program.⁵⁸ One scholar correctly sums up the *Walter* decision when she writes that although the court was "extremely unwilling to intervene in [this] legislative decision, . . . one also gets the impression that it would act differently if things got bad enough."⁵⁹

II. *DeRolph v. State of Ohio*

The plaintiffs in *DeRolph* asserted that things had gotten bad enough. A short list of one plaintiff school district's inadequacies offered proof for this claim. At the Dawson-Bryant School District in rural Lawrence County, the building for grades four through eight is heated by a coal furnace, which leaves a fine layer of dust covering everything inside. The band practices in a former coal bin.⁶⁰ On hot days during the first week of school, the Monitor elementary school averages 94 degrees. If more than three teachers plug in fans at the same time, the circuit breakers engage because the wiring is so bad.⁶¹ The entire science department has purchased one item, an aquarium, in the last three years.⁶² Most tellingly, Dawson-Bryant School District, as of 1993, had yet to meet Ohio's 1983 minimum educational standards,⁶³ standards which the Department of Education itself recognizes as inadequate.⁶⁴

56. *Id.*

57. *Id.*

58. See Davidek, *supra* note 21, at 1043 (stating that the California Supreme Court reviewed the constitutionality of three proposed funding plans and the New Jersey Supreme Court reviewed five such plans).

59. Johnson, *supra* note 21, at 369.

60. *DeRolph v. State of Ohio*, No. 22043 (Perry County. July 1, 1994) at 169.

61. *Id.*

62. *Id.* at 258.

63. *Id.* at 290.

64. *Id.* at 289. The other plaintiff school districts are equally inadequate. In the Northern Local School District, the Glenford Elementary School buildings are separated by State Route 204 which runs without a stop light between them. Kindergarten, first, and second graders must cross State Route 204 five times a day. *Id.* at 179. The Ohio Environmental Protection Agency also discovered a high level of arsenic in the water well at Glenford. *Id.* at 180. In the Southern Local School District, some mathematics textbooks were published in 1975 and 1976. *Id.* at 260. In the Lima City School Districts, teachers must teach classes combining several grades in order to effectively utilize the classrooms. *Id.* at

The acknowledged culprit⁶⁵ behind these deficiencies is the state's current funding system, the school foundation program.⁶⁶ The system works as follows. First, the General Assembly determines the basic aid level necessary to guarantee a student a minimum level of education.⁶⁷ Then, the state adjusts this level from 0 to .075 times the basic amount to account for each districts' cost of doing business, (i.e., adjusting the amount to include the higher labor costs in urban districts).⁶⁸ In order to determine the amount of state funds each district needs to reach the basic aid level, the state next calculates the amount the local districts should purportedly provide. The basis aid level is reduced by this "charge off," equal to 20 mills times the assessed valuation of property in the school district.⁶⁹

This system sounds simple enough, but a myriad of factors converge in its calculation to create insufficient funds in some districts and extravagant riches in others. The problems begin with the 'cost of doing business' factor. By concentrating on labor costs, this calculation assumes that all costs are lower in rural districts.⁷⁰ However, the costs of buying textbooks and materials, purchasing insurance, and paying utility bills in rural districts are not lower than they are in urban districts.⁷¹ Transporting construction materials, mechanical parts, and service personnel can be even more expensive.⁷² Second, the state mandates that each district provide specific programs, such as special education, but does not fully fund them.⁷³ Since each district receives a flat distribution per student for these categorical programs, the burden of providing them falls more harshly upon poor districts, which are forced to use all their discretionary funds, or even go into debt, to provide these.

208. In the Youngstown City School District, curriculum is determined solely by state and federal mandates. The district lacks the funds to offer any courses beyond the state minimum requirements. *Id.* at 241.

65. The State admitted that the foundation program creates inequities. It merely asserted that the program is not unconstitutional. Barry Kawa, *Equitable School Funding Is Key Issue*, PLAIN DEALER, Oct. 15, 1994, Special Section at 9.

66. The current foundation program, although it bears the same name, is distinct from the foundation program which the guaranteed yield formula replaced.

67. *DeRolph v. State of Ohio*, No. 22043 (Perry County, July 1, 1994) at 42.

68. *Id.* at 42-43.

69. *Id.* at 42.

70. *Id.* at 43.

71. *Id.* at 69-70.

72. *DeRolph v. State of Ohio*, No. 22043 (Perry County, July 1, 1994) at 43.

73. *Id.* at 49-51.

mandated programs.⁷⁴

However, the major force driving some districts to ration toilet paper⁷⁵ and enabling others to set up computer hookups with Russia⁷⁶ is the foundation program's continued reliance on the property tax. Wide gaps in property values necessarily create wide disparities in local millage.⁷⁷ In addition, Ohio law automatically reduces any increase in property tax due to inflation, subject to a 20 mill floor.⁷⁸ Therefore, if a district's property values increase through inflation, the funds available to it from the state decrease because the district's "charge-off" is higher. In reality though, the district receives none of this "phantom revenue" from inflated property values without passing an additional levy. In contrast, districts experiencing rising property values through industrial development or a housing boom do receive this increased revenue.⁷⁹

These factors place property, and income poor districts in an impossible position. In order to keep up with inflation, they must pass levies, but these districts' low property values make the gains from these levies negligible.⁸⁰ Given their lack of disposable income, residents of these districts find this burden more difficult to meet and often refuse to meet it, exercising one of their few opportunities to directly reject a tax.⁸¹ Meanwhile, poor districts fall farther behind.

Seeking a judgment declaring this system unconstitutional, the plaintiffs in *DeRolph v. State of Ohio* brought suit, claiming, as the plaintiffs did in *Walter*, that the funding system violated the "equal protection and benefit" clause of article I, section 2 and the "thorough and efficient" clause of article VI, section 2. The court's opinion represents a victory for the plaintiffs on both grounds.

In its equal protection analysis, the court found education to be a fundamental right deserving of strict scrutiny.⁸² After distin-

74. *Id.*

75. *Id.* at 257.

76. *Id.* at 475.

77. For example, one mill of property tax raised \$22.08 per pupil in the Dawson-Bryant School District in 1994. One mill of property tax in Upper Arlington, an affluent Columbus suburb, raised \$139.26 per pupil. Mike Curtin, *School Issue an Old One: Solution for Ending Financial Disparities Elusive*, COLUMBUS DISPATCH, July 3, 1994, at 1A.

78. OHIO REV. CODE ANN. § 319.301 (Baldwin 1979).

79. *DeRolph v. State of Ohio*, No. 22043, (Perry County. July 1, 1994) at 55-58.

80. *Id.* at 61-66.

81. *Id.*

82. *Id.* at 469. Under a strict scrutiny analysis, the state can infringe upon the exercise of a fundamental right only upon a showing that this infringement furthers a "compelling

guishing *DeRolph* from *Walter* by characterizing *DeRolph* as a "challenge to the way Ohio educates its children" rather than an issue of taxation, the Court culled the right to education from article I, sections 1, 2, and 7 of the Ohio Constitution.⁸³ The court directly linked the fundamentality of education to the "inalienable rights" of "enjoying and defending life and liberty, acquiring, possessing and protecting property and seeking and obtaining happiness and safety" set forth in article I, section 1.⁸⁴ The court emphasized that these rights are "severely restrained if not impossible to meet" without a high quality education.⁸⁵ By linking education to these rights, the court asserted that our definition of high quality must grow as our "high-tech" economy advances.⁸⁶

The Court also emphasized the traditional link between public education and republican government. It echoed article I, section 7's explicit language that "schools and the means of instruction" are essential to instill the "religion, morality, and knowledge" necessary to good government.⁸⁷ Although not directly stated, the implicit assumption was that any institution so closely connected to the effective workings of democracy must be fundamental to that democracy.

Upon finding education to be a fundamental right, the court found that the disparities in funding among districts deny plaintiffs the "equal protection and benefit" of the law as guaranteed by article I, section 2.⁸⁸ The court linked the disparities in funding to the lack of educational opportunity by citing evidence that "school districts with expenditures in the top thirty percent have, by subject matter, higher levels of students succeeding or passing the proficiency tests and scoring satisfactorily on achievement scores."⁸⁹ Additionally, the court found that the conditions these disparities create, such as "buildings with asbestos dangers, out of date textbooks, overcrowded classrooms, and a lack of standard educational equipment," effectively deprive plaintiffs of their fundamental right to education.⁹⁰

state interest." *Id.*

83. *Id.*

84. *DeRolph v. State of Ohio*, No. 22043 (Perry County July 1, 1994) at 469.

85. *Id.* at 468.

86. *Id.*

87. *Id.*

88. *Id.* at 469.

89. *DeRolph v. State of Ohio*, No. 22043 (Perry County July 1, 1994) at 468.

90. *Id.*

The court then subjected the foundation program to strict scrutiny and found that the asserted state interest in "local control" was not compelling.⁹¹ Adopting the *Walter* test, the court held that plaintiffs cannot "develop programs to meet perceived local needs." Citing the plaintiffs' inability to make curriculum or policy changes not mandated by the state, the court declared that "local control without discretionary funds is a myth" and a "cruel illusion."⁹² The court further found that the plaintiffs do not possess "local control" merely because they have the "ability" to raise funding through additional levies.⁹³ Their poverty precludes this option.⁹⁴ In addition, the court noted that the minor plaintiffs are "disenfranchised and have no ability to raise additional funds."⁹⁵

Next, the court tackled the article VI, section 2 claim by first distinguishing *Walter*. The court correctly pointed out that the *Walter* court found the guaranteed yield program thorough and efficient because all districts met certain "minimum standards." In contrast, the *DeRolph* court stated that the current minimum standards are not even being monitored. The court went on to cite the plaintiff districts' failure to meet the ninth grade proficiency test standards as evidence of the General Assembly's failure to provide "thorough and efficient" schools.⁹⁶ This is the weakest part of the opinion. Given the complex relationship between funding per pupil and student performance, the correlation between the proficiency tests and the plaintiff school districts' lack of funds is attenuated.⁹⁷

The court moved to stronger ground when it held that the state funding system fails to meet the *Miller* test. As mentioned earlier, *Miller v. Korns* stated that a "thorough system could not mean one

91. *Id.* at 469.

92. *Id.*

93. *Id.* at 470.

94. *DeRolph v. State of Ohio*, No. 22043 (Perry County, July 1, 1994) at 470.

95. *Id.* at 470.

96. *Id.* at 473.

97. *See, e.g.*, Mary Beth Lane, *Too Rich and Too Poor—Ohio School Dilemma*, PLAIN DEALER, July 3, 1994, at 1A (citing a study by two Ohio University professors which found that the 60 districts with the top proficiency test scores spent as little as \$3,000 per pupil and as much as \$11,000 while the 60 districts with the worst test scores spent between \$3,000 and \$9,000 per pupil). This simple comparison of proficiency test scores, however, misconstrues the nature of the *DeRolph* plaintiffs' claims. Because they operate with insufficient funds, the plaintiff school districts cannot provide their students with adequate special education programs or adequate gifted student programs. *DeRolph*, at 232-41. Nor can they provide students with advanced courses necessary for college. *Id.* In addition, their students are forced to undergo these deprivations, among others, in learning environments that can only be described as Dickensian. *Id.* at 167-96.

in which a part . . . of the school districts were starved for funds."⁹⁸ Nor could an "efficient system" mean one "in which part . . . of the school districts lacked teachers, buildings, or equipment."⁹⁹ The *DeRolph* court cited to its findings of fact to demonstrate each plaintiff school districts' deficiencies in teachers, buildings, and equipment.¹⁰⁰ As evidence of their financial need, the court pointed out that some plaintiffs have gone into debt to continue operating and that others "ration paper, [and] paper clips and use out of date textbooks."¹⁰¹

The court also held that the operation of the school funding system violates the plaintiffs' right to "uniform operation of the laws" because of the vast disparities the system creates in educational opportunity.¹⁰² The court specifically pointed to the arbitrary distributions of the State's wealth through the workings of O.R.C. 319.301 which reduces inflationary increases in property taxes.¹⁰³ Finally, the court made clear that the State, not the local districts, is responsible for the creation of a thorough and efficient system.

The *State* is obligated by law to produce a thorough and efficient system of education for all students within the state. To ensure that end, the state is likewise obligated to provide sufficient funds to meet that requirement within the constraints of the Ohio Constitution. This State's current funding system which transfers major obligations for funding from the State to the local school districts does not operate within those constraints.¹⁰⁴

Pursuant to its decision, the court then ordered the Superintendent of Public Instruction in Ohio to prepare a report containing proposals "for the elimination of wealth-based disparities" in education and to submit it to the Legislature.¹⁰⁵ The court further required the Ohio Department of Education to prepare a report setting forth the legislative resolution of this issue and to submit it to

98. *Miller v. Korns*, 107 Ohio St. 287, 297 (1923).

99. *Id.* at 298.

100. *DeRolph*, at 475.

101. *Id.*

102. *Id.*

103. *Id.*; see also *supra* notes 78-79 and accompanying text.

104. *DeRolph*, at 476.

105. *Id.* at 478.

the court after the 1994-1995 session.¹⁰⁶

III. ANALYSIS OF *DeROLPH V. STATE OF OHIO*

A. *Distinguishing Board of Education v. Walter*

Before an analysis of the *DeRolph* court's holdings, their validity in light of *Walter* must be determined. In *DeRolph*, the defendants argued that *Walter* was "binding precedent upon the court and res judicata to the issues" before it¹⁰⁷. In its opinion, the court rejected both of these arguments on three grounds. First, the court pointed out that *Walter* determined the validity of the guaranteed yield program, not the current foundation program. Second, the court stated that the individual plaintiffs in *DeRolph* were not identical to those in *Walter*. Third, the court stated that several issues before the *DeRolph* court, like the "revenue limiting impact of [R.C. 319.301] and the funding of state mandated categorical programs," were not at issue in *Walter*.¹⁰⁸

As a matter of black-letter law, the *DeRolph* court was correct. The syllabus of the *Walter* Court contained only the validation of the statutes setting forth the guaranteed yield program and law not in the supreme court's syllabus is dicta.¹⁰⁹ Therefore, *Walter* is not binding precedent upon *DeRolph*. In addition, although the *DeRolph* plaintiffs are arguably in privity with the *Walter* plaintiffs, the funding systems distribute funds and create funding disparities in different ways.¹¹⁰

Finally, as discussed in Part I, the *Walter* court did not address whether education is a fundamental right. Instead, it redefined the issue before it as a taxation issue.¹¹¹ Consequently, the *DeRolph* court escaped *Walter* when it held that the issue before it is not one "directly concerned" with the collection of taxes, but rather, with the "way in which Ohio educates its children."¹¹² Similarly,

106. *Id.*

107. *Id.* at 466.

108. *Id.*

109. See *Haas v. State of Ohio*, 103 Ohio St. 1, 8 (1921); *State ex. rel. Donahey v. Edwardson*, 89 Ohio St. 93, 107-8 (1913).

110. In fact, the guaranteed yield program, with its "bonus" for schools levying between 20 and 30 mills, is more generous than the foundation program. See *supra* note 21 for a description of the guaranteed yield program. For a detailed description of the foundation program, see *supra* notes 65-81 and accompanying text.

111. See *supra* notes 35-38 and accompanying text.

112. *DeRolph v. State of Ohio*, No. 22043 (Perry County, July 1, 1994) at 468 (quoting

the *Walter* court's reliance on minimum standards, rather than textual interpretation, to decide the article VI, section 2 issue allowed *DeRolph* to escape its precedential value because the State currently is not enforcing minimum standards.¹¹³ Only if one reads *Walter* as establishing a standard of absolute deprivation does it have any precedential effect upon *DeRolph*.¹¹⁴ However, not only would this reading contradict the *Walter* court's use of the *Miller* standard, it also would contradict any reasonable reading of the "thorough and efficient" clause.¹¹⁵ For these reasons, *Board of Education v. Walter* was not binding precedent upon *DeRolph v. State of Ohio*. Nor was the resolution of *Walter* res judicata to the plaintiffs' claims in *DeRolph*.

B. *Validity of the Equal Protection Claim*

In analyzing the *DeRolph* court's equal protection holding, the major issue for this Comment, as for the court, is whether the right to an education is a fundamental right under the Ohio Constitution. However, before reaching the *fundamentality* of education, the *existence* of this right, whether fundamental or not, must be determined. The *DeRolph* court grounded the right to education in article I, section 1 and article I, section 7 of the Ohio Constitution.¹¹⁶ To elucidate the existence and scope of this right, these constitutional provisions shall be examined in turn.

In connecting the right to education to article I, section 1, the court makes an argument essentially from individual economic utility—namely, that the right to education is essential to achieve the rights set forth in section 1.¹¹⁷ Although this constitutional interpretation makes good policy, both the plain language of section 1 and the history of its enforcement compel a contrary result. First of all, section 1, as written, makes no mention of a governmental obligation to further the rights set forth in it. In fact, "inalienable rights" are, by their very nature, inherent ones that require only the absence of state intrusions, rather than the exercise of state intervention, to exist.¹¹⁸ The treatment of section 1 in

Board of Educ. v. Walter, 58 Ohio St. 2d 368, 375-76 (1979), *cert. denied*, 444 U.S. 1015 (1980)).

113. *Id.* at 466.

114. *See supra* notes 43-46 and accompanying text.

115. *See infra* notes 150-71 and accompanying text.

116. *See supra* notes 82-87 and accompanying text.

117. *Id.*

118. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 371 (Phillip Laslett ed.,

Ohio courts supports this conclusion. Although the protection of these rights has been historically enforced, no Ohio court has ever placed a "positive" obligation on the government to further these rights.¹¹⁹

In connecting education to article I, section 7, the court makes a fundamentally different argument. In Section 7, the court finds language asserting the necessity of education in ensuring "good government," an idea that forms the foundation of our republican form of government.¹²⁰ American thought has long regarded education as "essential to self-government."¹²¹ Both the founders of the nation and the framers of the Ohio Constitution recognized that education renders "the people the safe, as they are the ultimate, guardians of their own liberty."¹²² The early leaders of the public school movement, as well, regarded this "republican" function of

Cambridge Univ. Press, 1967) ("[b]ut though Men when they enter into Society, give up the Equality, Liberty, and Executive Power they had in the State of Nature, into the hands of the Society, to be so far disposed of by the Legislature, as the food of the Society shall require, yet it being only with an intention in every one the better to preserve his Liberty and Property"); JEAN-JACQUES ROUSSEAU, *ON THE SOCIAL CONTRACT*, 53 (Roger D. Masters ed. & Judith R. Masters trans., St. Martin's Press, 1978) (asserting that people institute government to form "a sum of forces that can prevail" over the obstacles to the exercise of natural rights).

119. OHIO CONSTITUTIONAL REVISION COMMISSION, *RECOMMENDATIONS FOR AMENDMENTS TO THE OHIO CONSTITUTION, PART II*, 14 (1971) ("No Ohio case was found in which this section alone was cited by a court as setting forth and enforceable right or guarantee.").

120. See Kern Alexander, *The Common School Ideal and the Limits of Legislative Authority*, 28 HARV. J. ON LEGIS. 341, 347 (1991) (discussing the republican foundations of the common school movement); Allen Hubsch, *Education and Self Government: The Right to Education Under State Constitutional Law*, 18 J.L. & EDUC. 93, 94 (1989) (arguing that the republican theory forms the basis of all state constitutional education clauses).

121. Hubsch, *supra* note 120, at 96.

122. THOMAS JEFFERSON, *NOTES ON THE STATE OF VIRGINIA*, *quoted in* A.E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 917 (1976). See also, GEORGE WASHINGTON, *THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, quoted in* L. CREMIN, *THE AMERICAN COMMON SCHOOLS: AN HISTORIC CONCEPTION* 29 (1951) ("Promote then as an object of primary importance, Institutions for the general diffusion of knowledge. In proportion as the structure of a government gives force to public opinion, it is essential that public opinion be enlightened."); *DEBATES OF 1851 CONVENTION, supra* note 1, at 14 (comments of Delegate Quigley concerning Ohio's duty to educate its children: "Intelligence is the foundation-stone upon which the mighty Republic rests—its future destiny depends upon the impulse, the action of the present generation"); *id.* at 11, 13 (comments of Delegate McCormick: "Educate them and they become useful members of the community that has cared for them Education will tend to make men moral and useful members of society; therefore, let us provide for the education of every child in the state.").

education as one of its most important.¹²³ Although the plain language of section 7 does not require but only “encourage[s] schools and the means of instruction” to further the development of “good government,”¹²⁴ article VI, section 2 does place an affirmative obligation upon the state to educate its citizens.¹²⁵ When read together, these two constitutional provisions create a right to education in Ohio to ensure a healthy and functioning government.¹²⁶

Whether the right to an education is fundamental is a closer question. As the *Walter* court correctly recognized, fundamental rights analysis appropriate for the Federal Constitution is inappropriate for state constitutions.¹²⁷ The Federal Constitution is one of limited powers—the federal government can only do those things explicitly or impliedly permitted in the document. In contrast, states have plenary power; a state can do anything not prohibited by its constitution or the Federal Constitution.¹²⁸ In addition, state constitutions, unlike the Federal Constitution, are easily and often amended; they change with the changing values of the electorate.¹²⁹ State constitutional provisions are also more precise.¹³⁰ Further complicating matters, states have often followed Jefferson’s advice to write a new constitution for every generation. Ohio, for example, has had constitutional conventions in 1851, 1874, and 1912.¹³¹ Therefore, while federal constitutional interpreters can

123. See HORACE MANN, LECTURES ON EDUCATION 55 (1850) (“Education must be universalWith us the qualification of voters is as important as the qualification of governors, and even comes first in the natural order.”); Calvin E. Stowe, *Report on Elementary Public Instruction in Europe, Made to the Thirty-Sixth General Assembly of the State of Ohio, Dec. 19, 1937*, reprinted in CREMIN, *supra* note 122, at 75 (“[D]o not patriotism and the necessity of self-preservation call upon us to do more and better for the education of our whole people than any despotic sovereign can do for his.”).

124. OHIO CONST. art. I, § 7.

125. See *infra* notes 150-71 and accompanying text.

126. In concert with these two provisions, article I, section 1 can be regarded as contemplating a right to an education to the extent that the political well-being of the state depends on its economic strength, which is in turn dependent on an educated citizenry.

127. See *supra* notes 32-34 and accompanying text.

128. William E. Thro, Note, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1656-7 (1989).

129. See Howard, *supra* note 122, at 939.

130. See, e.g., Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 196 (1983).

131. See generally DEBATES OF 1851 CONVENTION, *supra* note 1; PROCEEDINGS AND DEBATES OF THE THIRD CONSTITUTIONAL CONVENTION OF OHIO (J.G. Adel, rep. 1874); PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO (C.B. Galbreath, sec. 1912).

look to the "framers;" interpreters of state constitutions must first ask, "which framers?"¹³²

Though the concept of fundamentality in state constitutional interpretation presents problems, state constitutions, beyond question, contain fundamental rights.¹³³ How then does one distinguish provisions embodying fundamental rights from provisions that do not? First of all, given the mutability of state constitutions, a search for the fundamental is arguably the search for the immutable, those provisions present at the creation of the constitution which have not passed into irrelevancy.¹³⁴ Although some argue that more recent provisions better reveal the "felt needs of each generation,"¹³⁵ those provisions also tend to be time-bound.¹³⁶

The second inquiry corresponds to the first. The one constant among the widely variable state constitutions is the inclusion of a bill of rights.¹³⁷ Provisions found there should carry a greater presumption of fundamentality than those found in articles more concerned with the delegation of power. Finally, a provision prevalent in other state constitutions and the Federal Constitution should carry a greater presumption of fundamentality than a provision peculiar to one state constitution. This prevalence establishes a close connection between the provision and something fundamental

132. Sanford Levinson, *Interpreting the State Constitution by Resort to the Record*, 6 FLA. ST. U. L. REV. 567, 569 (1976).

133. In fact, the framers of the Federal Constitution developed the Bill of Rights from the original state constitutions, Kenneth R. Bowling, "A Tub to the Whale:" *The Adoption of the Bill of Rights*, in *THE BILL OF RIGHTS AND THE STATES*, 49 (Patrick P. Conley & John P. Kaminski eds., 1992) and up through the 19th century, state constitutions were the primary defenders of individual rights. Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1199-211 (1985). Such a central position for state constitutions should not be surprising. In theory, the plenary powers of the states pose a more direct threat to individual liberties than the limited powers of the Federal Constitution. In this sense, state constitutions are the most appropriate place for fundamental rights.

134. See ROBERT DISHMAN, *THE SHAPE OF THE DOCUMENT* 40 (1968) for a discussion of irrelevancy in state constitutions. See also Frank Grad, *The State Constitution: Its Function and Form for Our Time*, 54 VA. L. REV. 928, 949-50 (1968) (arguing that fundamental provisions qualifying for inclusion in state constitutions must be "so important and enduring" as to justify placing them in an "area beyond change by normal law-making processes").

135. Howard, *supra* note 122, at 940.

136. For example, one of the most hotly debated issues at the 1851 Ohio Constitutional Convention, and a major reason for calling it, was the constitutionality of granting of corporate charters to private businesses. It was this issue, not the general right to equal protection, that drew the majority of attention in the drafting of article I, section 2. See *DEBATES OF 1851 CONVENTION*, *supra* note 1, at vol. II, 486-512.

137. DISHMAN, *supra* note 134, at 6.

to our system of government.¹³⁸

Applying these criteria to *DeRolph*, the right to education is a fundamental right under the Ohio Constitution. First, the right to education contained in article I, section 7 has been present in some form in every document granting sovereign authority to Ohio. The Ordinance of 1787, which established the system of governance for the Northwest Territory, encoded language essentially identical to article I, section 7 concerning education.¹³⁹ The Constitution of 1802 repeated this language in its article VIII, section 3 and stated in article VIII, section 25 that "the doors of [] schools . . . shall be open for the reception of scholars, students and teachers, of every grade, without any distinction or preference whatever."¹⁴⁰ Finally, the Constitution of 1851 fixed article I, section 7 and article VI, section 2 in their present form.¹⁴¹

In addition, the substantive guarantee of the right to an education finds its source in article I, section 7, a provision of the Bill of Rights.¹⁴² Although article VI, section 2 grants the state the authority to establish a system of education, article I, section 7 provides the purpose behind the grant. Finally, all fifty state constitutions contain amendments similar to article VI, section 2.¹⁴³ Therefore, the states have uniformly recognized their obligation, as republican governments, to educate their citizens. These factors, along with the historical connection between education and self-government, render the right to an education a fundamental right under the Ohio Constitution.

The status of education as a fundamental right, then, invokes the strict scrutiny of the foundation program. Under such scrutiny, *DeRolph* correctly invalidated the program. Although the local control is, and has historically been, an important interest of the state, the evidence before the court demonstrated that the funding

138. See Hubsch, *supra* note 120, at 95; see also Grad, *supra* note 134, at 951 ("One value which may weigh heavily . . . is the significance of the provision for effective government.").

139. "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." ORDINANCE OF 1797, *reprinted in* OHIO REV. CODE ANN. App. (Baldwin 1979).

140. CONSTITUTION OF 1802, *reprinted in* DEBATES OF 1851 CONVENTION, *supra* note 1, at vol. I. 11-12.

141. DEBATES OF 1851 CONVENTION, *supra* note 1, at 3552.

142. The provisions in article I of the Ohio Constitution constitute Ohio's Bill of Rights.

143. See Hubsch, *supra* note 120, at 142-48 for a listing of these provisions.

system actually precluded the *DeRolph* plaintiffs from exercising such control.¹⁴⁴ The poverty of their districts makes the passage of levies difficult and the low value of their property renders those levies ineffectual.¹⁴⁵ Finally, the arbitrary effects of O.R.C. 319.301 in restricting inflationary increases in property values calls into question even the rational basis for the foundation program.¹⁴⁶

In sum, the *DeRolph* court correctly held that Ohio's current funding system violates the "equal protection and benefit" clause of article I, section 2. First, article I, sections 1 and 7 clearly establish the existence of a right to education in the Ohio Constitution.¹⁴⁷ Second, the long history of these provisions and their embodiment of the republican tenet that education is an essential attribute of a democracy establish the fundamentality of this right.¹⁴⁸ Because the current funding system does not allow, but actually precludes some school districts from exercising meaningful local control, the system violates the "equal protection and benefit" clause because it infringes upon the fundamental right to an education for no compelling state interest.¹⁴⁹

C. Validity of the "Thorough and Efficient" Claim.

In its findings of fact, the *DeRolph* court conclusively demonstrated that the plaintiff school districts lacked sufficient numbers of teachers, buildings, and equipment.¹⁵⁰ Therefore, this analysis will focus on whether *DeRolph* correctly construed the state's obligation under article VI, section 2. In order to determine this, this portion of the Comment will focus on: 1) the plain meaning of the "thorough and efficient" clause; 2) the framers' intent in adopting it, and 3) the history of school funding in Ohio.

When interpreting legislative documents such as constitutional provisions, it is important to look first to the clear language of the document.¹⁵¹ The language of article VI, section 2 lends strong support to the *DeRolph* court's interpretation of the provision. Section 2 states that the General Assembly "shall make such provi-

144. See *supra* notes 91-95 and accompanying text.

145. See *supra* notes 75-81, 91-95 and accompanying text.

146. See *supra* notes 75-81 and accompanying text.

147. See *supra* notes 116-26 and accompanying text.

148. See *supra* notes 127-43 and accompanying text.

149. See *supra* notes 144-46 and accompanying text.

150. See *supra* notes 99-101 and accompanying text.

151. See Williams, *supra* note 130, at 196; Levinson, *supra* note 132, at 568.

sions . . . as . . . secure a thorough and efficient system of common schools throughout the state."¹⁵² This language denotes not only a duty to fund schools, but also a duty to provide sufficient funds to secure a high quality of public education throughout the state. The use of "shall" places an "imperative"¹⁵³ duty upon the state to create a state-wide funding system. The imperative "shall" also endows the recipients of this obligation, the children of Ohio, with a right to the enforcement of this imperative.¹⁵⁴ Further, the words "thorough" and "efficient" extend this duty to the creation of a funding system that provides schools which are "complete or perfect in all respects"¹⁵⁵ and which "perform[] or function[] in the best possible and least wasteful manner."¹⁵⁶ Therefore, from the plain meaning of article VI, section 2, the *DeRolph* court's ruling seems unassailable.

The legislative intent behind the drafting of section 2 also lends credence to the view that the provision is not simply a grant of discretionary power.¹⁵⁷ The remarks of the drafters of section 2 at the 1851 Constitutional Convention reveal an intent to see the schools "grow with the growth, and strengthen with the strength of the state."¹⁵⁸ The delegates also repeatedly warned of the harm to the state if a "permanent and efficient system of education" were not established.¹⁵⁹ Most importantly, the delegates conceived of education not just as a benefit to the state, but as the right of the children. As Delegate Curry stated: "In my opinion, the great

152. OHIO CONST. art. VI, § 2.

153. BLACK'S LAW DICTIONARY 958 (6th ed. 1990).

154. *Id.* at 348. ("[I]n jurisprudence, [a duty] is a correlative of right.")

155. RANDOM HOUSE COLLEGE DICTIONARY 1367 (rev. ed. 1988).

156. *Id.* at 421.

157. Interestingly enough, the West Virginia Supreme Court has already come to this conclusion. In *Pauley v. Kelley*, 255 S.E.2d 859 (W. Va. 1979), the West Virginia reviewed the legislative history of article VI, section 2 in order to determine the meaning of its own "thorough and efficient" clause, W. VA. CONST. art. XII, § 1, which it had borrowed from Ohio. The West Virginia Court determined that "the tenor of the discussion [] by those advocating the entire education as it was finally adopted, leaves no doubt that excellence was the goal, rather than mediocrity," *Pauley* at 867, and partly on this finding, declared its school funding system unconstitutional.

158. DEBATES OF 1851 CONVENTION, *supra* note 1, at vol. II, 711 (remarks of Delegate Reemlin.)

159. *Id.* at 15 (remarks of Delegate McCormick.); *id.* at 13 (remarks of Delegate Bates: "[T]he state would materially suffer if a provision to exclude any class of children from the benefits of common schools should be engrafted in the new Constitution."); *id.* at 11 (remarks of Delegate Taylor: "I think it must be clear to every reflecting mind that the true policy of the statesman is to provide the means of education, and consequent moral improvement, to every child in the state.").

object to be attained is a system of education, general and complete, which shall extend its advantages to all the children of the State, and afford to each an opportunity to secure all the benefits which it affords."¹⁶⁰

Admittedly, the historical reality of school funding in Ohio has often belied both the language and intent of article VI, section 2.¹⁶¹ The *Walter* court was correct in stating that this history was one of local control¹⁶² and often inadequate funding. However, history also reveals that this reliance upon property tax was based on economic assumptions which no longer have relevance in today's society. The source of Ohio's reliance upon the property tax is the Land Ordinance of 1785, which ceded the sixteenth section of every township to the support of education upon Ohio's admission to the Union.¹⁶³ From its early reliance on the income from these lands, Ohio developed its system of school funding through the taxation of property.¹⁶⁴ As long as Ohio remained a largely rural state, land formed the major asset for Ohio's population and its major source of income.¹⁶⁵ Therefore, the funding system made sense. However, Thomas Jefferson authored the Land Ordinance of 1785 on the assumption that Ohio, and the other new states, would remain rural and agricultural in nature.¹⁶⁶

160. *Id.* at 710.

161. See GEORGE KNEPPER, OHIO AND ITS PEOPLE 185 (1989) ("There was an enormous gap between the dream of an educated citizenry and the reality."); EDWARD A. MILLER, HISTORY OF EDUCATIONAL LEGISLATION IN OHIO: 1803-1850, at 114-18 (Arno Press 1969) ("The traditions of Ohio were from the first against centralization.").

162. See *supra* note 38 and accompanying text.

163. See CREMIN, *supra* note 122, at 119 (citing JOURNALS OF THE CONTINENTAL CONGRESS, XXVIII, 378).

164. *Id.* at 122-25; see also MILLER, *supra* note 161, at 6-10.

165. See KNEPPER, *supra* note 161, at 117-36; Interestingly enough, the facts of *Miller v. Korns* reflect this first demographic shift:

"In the attainment of the purpose of establishing an efficient and thorough system of schools throughout the state it was easily conceivable that the greatest expense might arise in the poorest districts . . . while districts underpopulated with children might represent such taxation value that their school needs would be relatively over supplied . . . Presumably, the instant law was drawn to meet just such a situation."

Miller v. Korns, 107 Ohio St. 287, 298 (1923).

166. STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 199 (1993) (asserting that *Notes on the State of Virginia*, along with his various legislative proposals, reveals Jefferson's conviction that "the United States ought to remain a rural nation"); CALEB P. PATTERSON, THE CONSTITUTIONAL PRINCIPLES OF THOMAS JEFFERSON 171 (1971) (linking the Land Ordinance of 1785 to Jefferson's belief in a "republics of the farm").

Unfortunately, Jefferson's predictions proved wrong. Since the turn of the century, Ohio has become almost completely urbanized.¹⁶⁷ With this urbanization, the rough equality of the frontier farmers disappeared, and income became the function of employment, not land. However, because cities formed around certain economic functions, these early urban areas at least required the presence of citizens from different social strata.¹⁶⁸ It has been the creation of suburban communities that has proved most detrimental to the purposes of article VI, section 2. As communities based on income rather than economic function, the suburbs hopelessly skewed the distribution of school funds through property taxation.¹⁶⁹ Therefore, although history demonstrates the longevity of school funding through property taxation, it also demonstrates its irrelevance.

The *DeRolph* court correctly held that the present funding system violated the "thorough and efficient" clause of article VI, section 2. The clear language of the provision and the intent of its framers demonstrate that the state has an affirmative obligation to secure a high quality education for every public school student in Ohio.¹⁷⁰ The history of school funding in Ohio further demonstrates the inappropriateness of continued funding of schools through local property taxation.¹⁷¹

IV. CONCLUSION

In *DeRolph v. State of Ohio*, the court correctly held that Ohio's current funding system violates the "equal protection and benefit" clause of article I, section 2 and the "thorough and efficient" clause of article VI, section 2. Both the founders of our country and the framers of the Ohio Constitution recognized that education is fundamental to our society. Not only does an adequate education prepare citizens to take part in the democratic process, it ensures the state of a population capable of maintaining a strong

167. See KNEPPER, *supra* note 161, at 313-47.

168. *Id.*

169. See Alexander, *supra* note 120, at 348 (asserting that "[a] sense of solidarity and community based on economic condition is formed around shall, affluent school districts" and that the interests of the parents in these districts are "insular" and "driven toward two primary objectives: maintaining the educational advantage for their children and a near obsessive concern with maintaining or upgrading property values" (citations omitted)).

170. See *supra* notes 150-60 and accompanying text.

171. See *supra* notes 161-69 and accompanying text.

middle class, the foundation of every healthy democracy.¹⁷²

Equally clear is the duty of Ohio to provide this education. The strength of *DeRolph* lies in its recognition that the drafters of article VI, section 2 intended to establish a system of *education*, not a system of *funding*. They expected the educational system to grow to meet the needs of a changing society, not stagnate to conform to an outmoded means of taxation.

Governor Voinovich has stated that “one southern Ohio judge” should not determine the fate of Ohio’s school funding system.¹⁷³ The Governor has it wrong. Judge Lewis did not determine the fate of school funding; he enforced the Ohio Constitution. This author hopes that the State will do the same.

MORRIS L. HAWK

172. See *supra* note 126.

173. Jonathan Riskind, *State to Appeal School Funding Ruling*, COLUMBUS DISPATCH, August 13, 1994, at 1C.

