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School Financing in Ohio Yesterday, Today and Tomorrow: Searching for a "Thorough and Efficient" System of Public Schools

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NOTE

SCHOOL FINANCING IN OHIO YESTERDAY, TODAY AND TOMORROW: SEARCHING FOR A "THOROUGH AND EFFICIENT" SYSTEM OF PUBLIC SCHOOLS

The Thorough and Efficient Clause of the Ohio Constitution provides: "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. . ."1 On December 19, 1991, five school districts, their superintendents, members of their boards of education, and some of the teachers, students, and parents affiliated with those school districts filed a complaint for declaratory and injunctive relief, claiming that Ohio's system of funding public education was unconstitutional under the Thorough and Efficient Clause.2 The case, DeRolph v. State, was the start of a thirteen-year battle over school financing in the state. Despite four Supreme Court of Ohio declarations that the public school financing system was invalid3 and

1 Ohio Const. art. VI, § 2.
2 DeRolph v. State, 677 N.E.2d 733, 734 (Ohio, 1997) ("DeRolph I").
3 Id. at 747 ("We therefore hold that Ohio's elementary and secondary public school financing system violates Section 2, Article VI of the Ohio Constitution, which mandates a thorough and efficient system of common schools throughout the state."); DeRolph v. State, 728 N.E.2d 993, 1020 (Ohio 2000) ("DeRolph II") ("[I]t is apparent to us that, despite the past and present efforts of Governor Taft and our General Assembly, the mandate of the Constitution has not yet been fulfilled."); DeRolph v. State, 754 N.E.2d 1184, 1200 (Ohio 2001) ("DeRolph III") ("Despite the extensive efforts of the defendants to produce a plan that meets the requirements announced by this court, changes to the formula are required to make the new plan constitutional."); vacated, DeRolph v. State, 780 N.E.2d 529, 530 (Ohio 2002); DeRolph v. State, 780 N.E.2d 529, 530 (Ohio 2002) ("DeRolph IV") ("[T]he current school-funding system is unconstitutional.").
a decree that plaintiffs no longer had access to Ohio courts to further litigate the DeRolph case,\(^4\) it is still not clear how to define a constitutionally-valid funding system in Ohio.

While the series of DeRolph decisions very clearly declared what a “thorough and efficient” education is not, the decisions failed to articulate a clear definition of a “thorough and efficient” education. Further complicating the task of determining the application of the DeRolph decisions to future litigation is the fact that only four justices involved in the DeRolph decisions remain on the court at the time of this writing.\(^5\) Only two justices on the current Court were part of the 4-3 majorities declaring the school-financing system unconstitutional in the DeRolph decisions; when Justice Resnick’s term expires in January 2007, only one member of the DeRolph majorities will remain.\(^6\) The other two still-sitting justices from the DeRolph courts argued that the challenge to the General Assembly’s school-financing plan was a non-justiciable political question, and clearly stated they would not have decided the case on the merits.\(^7\) Given both the unclear message of the three DeRolph opinions still in force as law, as well as the changed composition of the court, the outcome of any new challenge to the General Assembly’s enacted school-financing system is unclear.

This paper discusses the current school-financing system and recently proposed changes to it in light of the “thorough and efficient” mandate of the Ohio Constitution. Part I presents a history of the DeRolph litigation. Part II discusses how the highest courts in other states have interpreted the meaning of similar constitutional provisions relating to public education. Based on Ohio jurisprudence as well as the jurisprudence from other states, this paper then offers a working definition of “thorough and efficient.” Part III describes the school funding program in Ohio through fiscal year 2005, the Governor’s proposed changes to it, and the system put in place by the General Assembly for fiscal year 2006-07, then applies the definition of “thorough and efficient” derived in Part II to determine whether any of the systems meet the working definition of “thorough and efficient.” Finally, Part IV offers some concluding thoughts.


\(^5\) Only three justices from the DeRolph court will remain when Justice Resnick’s term on the Court expires in January 2007.

\(^6\) DeRolph III was vacated by DeRolph IV. See note 3, infra.

\(^7\) See DeRolph I, 677 N.E.2d at 782 (Moyer, C.J., dissenting).
I. THE DEROLPH DECISIONS

School finance litigation in the United States has emerged in three distinct “waves.” In the first wave, plaintiffs argued that the federal constitution’s Equal Protection Clause mandated equity in school funding. The second wave also focused on equality in spending, but relied instead upon equal protection guarantees in state constitutions. In the third wave, plaintiffs shifted the focus of litigation from equality to adequacy, arguing that education clauses in state constitutions required a minimum level of education for each student and that this minimum level was not being met by the state funding system. The DeRolph litigation was a part of the third wave.

A. DeRolph I

The boards of education of five school districts, along with their superintendents and certain teachers, students, and next friends affiliated with the school districts, brought suit against the State of Ohio, the State Board of Education, the Superintendent of Public Instruction, and the Ohio Department of Education alleging that Ohio’s system of funding public education was unconstitutional.

Ohio’s system of financing public schools was a foundation-based program, with several provisions that modified the foundation’s basic funding formula. The trial court examined the complex funding framework and found, among other things, that the Ohio system for funding public schools violated the Thorough and Efficient Clause of the Ohio Constitution. The Fifth District Court of Appeals reversed the trial court, finding that the facts in DeRolph were insufficiently different from those in a previous Supreme Court of Ohio case where the constitutionality of the school funding system had been upheld. Plaintiffs appealed to the Supreme Court of Ohio.

Justice Sweeney authored the majority opinion in the 4-3 decision. Before all else, the opinion stated that the issue of whether the school

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8 For a discussion about the waves of litigation in school finance, see Michael Heise, State Constitutions, School Finance Litigation, and the “Third Wave”: From Equity to Adequacy, 68 TEMP. L. REV. 1151 (1995) (discussing the concept of waves).
9 Id.
10 Id.
11 A foundation program funds schools based on a formula that combines variables such as the number of students, number of teachers, and variety of course offerings at a school. The current version of the School Foundation Program is found in OHIO REV. CODE ANN. § 3317.01 (2006) et seq., and is discussed in Part III.
12 DeRolph v. State, 677 N.E.2d at 734.
financing system was constitutional was clearly justiciable. It then turned to the meaning of the Thorough and Efficient Clause.

The majority looked to the history of the Ohio Constitution and the debates surrounding its adoption, then turned to the 1923 decision *Miller v. Korns*. In *Miller*, the Court first made it clear that the school system called for by the Constitution was the responsibility of the state, not localities or municipalities, then offered a definition of "thorough and efficient" in terms of what it was not: "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 the school districts lacked teachers, buildings, or equipment."

The *DeRolph* opinion then turned to the 1979 Supreme Court of Ohio decision in *Cincinnati School District Board of Education v. Walter*, which again defined "thorough and efficient" in terms of what it was not: "[A] school system would not be thorough and efficient if 'a school district was receiving so little local and state revenue that the students were effectively being deprived of educational opportunity.'"

Looking to specific evidence from the trial record in *DeRolph*, the court found that the deplorable conditions of some public school buildings, insufficient funds to purchase basic instructional materials, overcrowded classrooms, severely limited curricula, a lack of technology, and poor student scores on achievement tests, among other things, led to the "inescapable conclusion" that "Ohio's elementary and secondary public schools are neither thorough nor efficient."

The court found that there was no relation between the funding formula and the actual cost of educating students. First, the General Assembly's method for determining the foundation formula's per-student amount used in base payment calculations was a residual figure, calculated after the Assembly determined how much money it was going to allocate to primary and secondary education in the budget. Further, wealthier school districts could secure significant state aid, regardless of need, through categorical programs (such as

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14 *DeRolph* I, 677 N.E.2d at 737.
15 140 N.E. 773 (Ohio 1923).
17 *Id.* at 775.
18 390 N.E.2d 813 (Ohio 1979).
20 *Id.* at 745.
21 *Id.*
vocational education, special education, and transportation), and the guarantee amount provision represented "a flaw in the system of school funding, because they work[ed] against the equalization effect of the formula."\textsuperscript{22}

Further disadvantaging poorer school districts was the problem of "phantom revenue" resulting from the dual method of valuing property within a school district for tax collection purposes and the School Foundation Program charge-off calculation.\textsuperscript{23} The rate of property valuation growth for tax purposes was artificially capped by legislation,\textsuperscript{24} resulting in a school district receiving the same amount of money from tax levies before and after reappraisal of property.\textsuperscript{25} In calculating the charge-off in the School Foundation Program formula, however, the newer, higher property value was used.\textsuperscript{26} This dual method of valuing property resulted in a gap between actual revenues the school district received and the amount the state assumed the district received (and thus discounted from the district's total aid package).

Ultimately, the majority identified four major factors that made Ohio's school funding system "unworkable":

(1) the operation of the School Foundation Program, (2) the emphasis of Ohio's school funding system on local property tax, (3) the requirement of school district borrowing through the spending reserve and emergency school assistance loan programs, and (4) the lack of sufficient funding in the General Assembly's biennium budget for the construction and maintenance of public school buildings.\textsuperscript{27}

The court struck down the corresponding provisions of the Ohio Revised Code as unconstitutional.\textsuperscript{28}

The court declined to order a specific remedy in the case, but instead "admonish[ed] the General Assembly that it must create an

\textsuperscript{22} Id. at 739.
\textsuperscript{23} Id.
\textsuperscript{24} OHIO REV. CODE ANN. § 319.301 (Baldwin 2005).
\textsuperscript{25} DeRolph I, 677 N.E.2d at 739.
\textsuperscript{26} Id.
\textsuperscript{27} Id. at 747.
\textsuperscript{28} The provisions of the Ohio Revised Code declared unconstitutional were Ohio Rev. Code § 133.301 (granting borrowing authority to school districts); Ohio Rev. Code §§ 3313.483, 3313.487, 3313.488, 3313.489, and 3313.4810 (the emergency school assistance loan provisions); Ohio Rev. Code § 3317.01, 3317.02, 3317.022, 3317.023, 3317.024, 3317.04, 3317.05, 3317.051, and 3317.052 (the School Foundation Program), and Ohio Rev. Code §§ 3318, to the extent it was under-funded (the Classroom Facilities Act). DeRolph I, 677 N.E.2d at 747.
entirely new school financing system."\(^{29}\) The court stayed the effect of its decision for one year, to allow time for "adequate study, drafting of the appropriate legislation and transition from the present scheme of financing to one in conformity with this decision."\(^{30}\)

The DeRolph I majority did provide some positive language to define "thorough and efficient": "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, in compliance with all local, state and federal mandates."\(^{31}\) Chief Justice Moyer pointed out in his dissent, however, that exactly what the court meant by "good repair" and "necessary" remained unclear.\(^{32}\)

Perhaps a greater concern, however, was the emerging issue of what role equality played in a "thorough and efficient" system of schools—an issue to be made more obscure by later DeRolph decisions. Exactly what level of inequality would be permitted in school funding was unclear—the acceptable amount of inequality in financing fell somewhere between wide disparity and exact equality. The court took great pains to say equality was not required:

We recognize that disparities between school districts will always exist. By our decision today, we are not stating that a new financing system must provide equal educational opportunities for all... We are not suggesting that funds be diverted from wealthy districts and given to the less fortunate. There is no "leveling down" component in our decision today.

Moreover, in no way should our decision be construed as imposing spending ceilings on more affluent school districts. School districts are still free to augment their programs if they choose to do so.\(^{33}\)

Although it took great pains to note that equality was not required, the majority did so in the context of objecting to the school funding formula's reliance on property taxes because it created "wide disparities."\(^{34}\) Further suggesting some degree of equality should be present in a constitutional system was the court's concern that the

\(^{29}\) Id.
\(^{30}\) Id.
\(^{31}\) Id.
\(^{32}\) Id. at 791 (Moyer, C.J., dissenting).
\(^{33}\) Id. at 746.
\(^{34}\) DeRolph I, 677 N.E.2d at 746.
method for funding categorical programs and the guarantee amounts under the School Foundation Program worked against "the equalization effect of the foundation formula."\textsuperscript{35}

Also unclear from the first \textit{DeRolph} decision was exactly what level of adequacy was required under the Thorough and Efficient Clause. One of the issues about which the court expressed concern was that some school districts could not provide honors or advanced placement classes to their students,\textsuperscript{36} and the court lamented that "the system has failed to educate our youth to their fullest potential."\textsuperscript{37} In stating that "money alone is not the panacea that will transform Ohio's school system into a model of excellence,"\textsuperscript{38} the majority seemed to suggest that excellence was a factor in determining whether the state's school system was "thorough and efficient."

Justice Douglas, in a concurring opinion joined by Justice Resnick, provided a very concise explanation of his view of the meaning of "thorough and efficient":

I am also convinced that it is time for the General Assembly to set education standards and to require performance of the education establishment, with rewards when they meet the standards or severe corrective action when they do not. . . . [E]ach district must be given school structures that are safe and conducive to learning, including the necessary fixtures, equipment and supplies that ensure thorough and efficient opportunity to learn. In addition, each district must be placed on a financial footing that permits the district to compete so as to meet the prescribed standards.\textsuperscript{39}

Chief Justice Moyer wrote for the three dissenting justices in \textit{DeRolph I}. The dissenters stated that their position should not be considered an endorsement of the current system of financing,\textsuperscript{40} but concluded that "defining a 'thorough and efficient' system of education financing is a nonjusticiable question" because it was a "political question that the Ohio Constitution leaves to the legislature to determine."\textsuperscript{41} Chief Justice Moyer, quoting the Illinois Supreme Court, noted that "the question of education quality is inherently one of policy involving philosophical and practical consideration that call

\textsuperscript{35} \textit{Id.} at 752.
\textsuperscript{36} \textit{Id.} at 744.
\textsuperscript{37} \textit{Id.} at 745.
\textsuperscript{38} \textit{Id.} at 746.
\textsuperscript{39} \textit{Id.} at 748 (Douglas, J., concurring).
\textsuperscript{40} \textit{DeRolph I}, 677 N.E.2d at 795 (Moyer, C.J., dissenting).
\textsuperscript{41} \textit{Id.} at 784 (Moyer, C.J., dissenting).
for the exercise of legislative and administrative discretion (emphasis omitted).

Moyer’s dissent also took issue with the majority’s implicit reliance on equality and adequacy. Regarding equality, the dissent concluded that “[t]he plain language of our Education Clause, in contrast to the language of other state constitutions, makes clear that our Constitution does not include terms expressly requiring equality of educational opportunity.” Moyer wrote: “We are simply unable to stretch the commonly understood meaning of ‘thorough and efficient’ to include ‘equality.’” Regarding adequacy, the dissent stated that “the constitutional phrase ‘thorough and efficient’ cannot be deemed to impose a duty to provide a ‘quality’ education if the term ‘quality’ is used to mean more than the basic education required by the minimum standards formalized in the Ohio Administrative Code.” To define adequacy otherwise would require consensus as to the purpose of education, a function that is legislative in nature.

On motion for reconsideration and clarification, the Ohio Supreme Court noted that property taxes could be used as part of a funding solution, but could “no longer be the primary means of providing the finances for a thorough and efficient system of schools,” and that the debt incurred by schools under the borrowing statutes declared unconstitutional in DeRolph I remained valid.

B. DeRolph II

The General Assembly adopted several reforms to the school financing system in response to DeRolph I. Among them were changes to the method of financing of capital projects; revision to the School Foundation Program; phase-out of the borrowing structure declared unconstitutional in DeRolph I; the establishment of both academic and fiscal standards for school district performance; and the separation of the education budget from the general operating budget.

42 Id. at 785 (Moyer, C.J., dissenting) (quoting Comm. for Educ. Rights v. Edgar 672 N.E.2d 1178, 1191 (Ill. 1996)).
43 Id. at 789 (Moyer, C.J., dissenting).
44 Id. at 790 (Moyer, C.J., dissenting).
45 Id. at 791 (Moyer, C.J., dissenting).
46 DeRolph I, 677 N.E.2d at 785 (Moyer, C.J., dissenting).
47 DeRolph v. State, 678 N.E.2d 886 (Ohio 1997). The Court also addressed a third issue regarding jurisdiction: the Supreme Court did not retain exclusive jurisdiction of the matter to review the remedial legislation that was enacted in response to DeRolph I, because it was “not the function of the judiciary to supervise or participate in the legislative and executive process.” Id. at 887. Chief Justice Moyer and Justice Lundberg Stratton dissented regarding this point, believing that since the Supreme Court had ordered the legislature to comply with the constitution, it should retain continuing jurisdiction over the matter. Id. at 888–89.
of the state.\textsuperscript{48} The state also proposed a one-cent sales tax increase to fund schools on the May 1998 ballot, but the electorate rejected the proposal in May 1998.\textsuperscript{49}

On remand, the trial court found the state had failed to comply with the \textit{DeRolph I} order because it had not implemented a complete, systematic overhaul of the school funding system.\textsuperscript{50} The state appealed directly to the Ohio Supreme Court. The Court again split 4-3, to hold that the financing system was still unconstitutional. Despite what the Court acknowledged as "a good faith attempt" to meet the constitutional requirements in the school financing system, the changes were not enough.\textsuperscript{51}

Still, the court objected to the fact that even under the revised system, after federal funding, the state contribution to public elementary and secondary education was approximately 43.8\% and the local share was about 56.2\%.\textsuperscript{52} It again focused on the reliance on property taxes to fund the system, and the equity and adequacy arguments that had been hinted at in Justice Sweeney's opinion in \textit{DeRolph I} resurfaced in Justice Resnick's opinion, with stronger force. In its conclusion, the majority presented areas that warranted "further attention, study, and development by the General Assembly,"\textsuperscript{53} It also suggested that an inequitable system could not comply with the Thorough and Efficient Clause by noting that the failure to correct overreliance on the property tax would "make it exceedingly difficult of any system of school funding to comply with the Thorough and Efficient Clause, since the inherent inequities will remain."\textsuperscript{54} The discussion of the ability of wealthier school districts to spend additional funds above the funding formula under the constitution essentially disappeared from the majority's opinion.

The majority's discussion of statewide standards suggested that adequacy and the hint of high quality had become a more prominent part of the concept of "thorough and efficient:"\textsuperscript{55} "[W]e clearly state that in order to have a thorough and efficient system of schools, there must be statewide standards that are fully developed, clearly stated,

\begin{itemize}
\item \textsuperscript{48} For detailed discussion of the changes and their effects, see sections II and III of the \textit{DeRolph II} majority opinion: \textit{DeRolph II}, 728 N.E.2d at 1003–20.
\item \textsuperscript{49} \textit{Id.} at 1015.
\item \textsuperscript{50} \textit{DeRolph v. State}, 712 N.E.2d 125 (Ohio 1998).
\item \textsuperscript{51} \textit{DeRolph II}, 728 N.E.2d at 1020.
\item \textsuperscript{52} \textit{Id.} at 999. Including the federal share of 6\%, the state share was 41.2\% and the local share was slightly more than half, at 52.8\%.
\item \textsuperscript{53} \textit{Id.} at 1021.
\item \textsuperscript{54} \textit{Id.} at 1021.
\item \textsuperscript{55} \textit{Id.} at 1002 (stating that the objective of the General Assembly was to achieve "a statewide thorough and efficient system of schools that is adequately funded and that has statewide standards for success").
\end{itemize}
and understood by educators, students and parents.\footnote{Id. at 1019.} The court clearly felt that the standards that had been put in place by the legislature after \textit{DeRolph I} were not sufficient, and spoke of the need for "higher academic standards," but did not articulate exactly what those standards should be.\footnote{\textit{DeRolph II}, 728 N.E.2d at 1022.}

As in \textit{DeRolph I}, the court declined to put forth a specific definition of the Thorough and Efficient Clause. It again noted that "thoroughness and efficiency embrace far more than simply adequate funding,"\footnote{Id. at 1001.} but noted that it is impossible to generate an all-inclusive list that specifically enumerates every possible component of a thorough and efficient system. In light of this, we offer the following guidance: A thorough system means that each and every school district has enough funds to operate. An efficient system is 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 fire and building codes, and equipment sufficient for all students to be afforded an educational opportunity.\footnote{Id.}

Like the definitions of "thorough" and "efficient" the court had adopted from \textit{Miller v. Korns} in \textit{DeRolph I}, the definition presented in the majority opinion contained vague expressions that left the court’s meaning unclear. The court failed to specify what "enough funds to operate" meant, or what programs the school needed to operate in determining the funds required (did it need to provide honors and advanced placement programs?), or what comprised "an ample number of teachers" or "equipment sufficient for all students to be afforded an educational opportunity." One specific mandate regarding equipment did emerge later in the opinion:

\begin{quote}
We are still a long way from the goal of providing sufficient computers to allow a \textit{high quality} education in this computer age. Moreover, there is no specific program in place to provide computers for students above the fifth grade level. This is a crucial need so that students nearing graduation will be computer-literate.\footnote{Id. at 1020–21 (emphasis added).} 
\end{quote}
Again the concept of high quality appeared in the majority decision. In DeRolph I, Justice Sweeney had only alluded to the idea that excellence was a component of a "thorough and efficient" system.\textsuperscript{61} In DeRolph II, however, Justice Resnick wrote as if high quality were a \textit{de facto} part of the definition of "thorough and efficient."

That the definition of "thorough and efficient" was elusive and seemed to encompass some unexplained vision of the majority was not a point lost on the dissenting justices. Chief Justice Moyer again penned the dissenting opinion. After repeating that the issue was nonjusticiable,\textsuperscript{62} the chief justice took the majority to task for its failure to sufficiently define "thorough and efficient."

The majority still has not clearly told the General Assembly what "thorough and efficient" means, or what "overreliance" on property tax is, or what would constitute the kind of educational opportunity it believes the Ohio Constitution guarantees to every Ohio child. Instead, the majority today tells the General Assembly once again to go back to the drawing board, while not describing in a meaningful way what the final design must look like.

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\textbf{\ldots} [I]n attempting to clarify the ambiguous phrase "thorough and efficient," the majority merely substitutes additional ambiguous and subjective criteria. Whether a district has "enough" funds, or an "ample" number of teachers, is in the eye of the beholder.\textsuperscript{63}

Chief Justice Moyer further criticized the majority for its emphasis on adequacy and equality, issues the dissenting justices argued were not requirements of Ohio's Thorough and Efficient Clause. "[T]he majority opinion more than once suggests that the fundamental problem with property tax funding is that it creates inequities. Yet this court has previously expressly rejected the contention that the Ohio Constitution mandates equal educational opportunity throughout the state."\textsuperscript{64} Regarding adequacy, the chief justice noted that the court

\textsuperscript{61} See DeRolph I, 677 N.E.2d at 744 (majority notes with concern that some school districts could not provide honors or advanced placement classes to their students); \textit{id.} at 745 (majority laments that "the system has failed to educate our youth to their fullest potential."); and \textit{id.} at 768 (majority observes that "money alone is not the panacea that will transform Ohio's school system into a model of excellence").

\textsuperscript{62} DeRolph II, 728 N.E.2d at 1029 (Moyer, C.J., dissenting).

\textsuperscript{63} \textit{id.} at 1030–31.

\textsuperscript{64} \textit{id.} at 1032–33.
was substituting its own concept of quality for the judgment of the elected representatives of the people: "The majority is really saying that it does not think the minimum educational standards now in place are high enough, thereby substituting its own judgment of educational sufficiency for constitutional analysis."\(^{65}\)

Instead of remanding to the trial court, the court maintained jurisdiction over the DeRolph case, continuing the matter for 13 months.

C. DeRolph III

In June 2001, the DeRolph litigants returned to the Supreme Court to argue the validity of the Ohio funding system as revised by the General Assembly in the prior year. Since the DeRolph II decision, the General Assembly had implemented further changes in the education funding system. These changes included substantially revising the funding formula for the base cost of providing an adequate education by deriving the figure from the cost incurred by "model" school districts that were meeting at least a minimum number of performance standards established by the General Assembly; phasing in new "parity aid" payments to poorer districts to permit discretionary spending on programs such as honors programs; and further developing programs to fund facilities improvements.\(^{66}\)

The members of the court realigned in the DeRolph III decision: Justices Douglas and Pfeifer, who had been in the majority in DeRolph I and II, joined with Chief Justice Moyer and Justice Lundberg Stratton, who had dissented from the earlier rulings to create a new working majority, while Justice Cook, who had been in the minority before, and Justices Sweeney and Resnick, who had written the lead opinions in the prior decisions, dissented. Chief Justice Moyer authored the majority opinion. The Court held, with three specific modifications to the foundation formula to determine the cost of providing an adequate education\(^{67}\) and full funding of the parity aid program in fiscal year 2003 (as opposed to proposed the phase-in through fiscal year 2006), the school financing system would

\(^{65}\) Id. at 1033 (Moyer, C.J., dissenting).

\(^{66}\) For detailed discussion of the changes and their effects, see section II of the DeRolph III majority opinion: DeRolph III, 754 N.E.2d at 1191–98.

\(^{67}\) Under the formula studied by the court, some school districts that only achieved 18 or 19 objectives could count as districts that had achieved at least 20 standards ("model" school districts); the wealthiest and poorest model schools were eliminated from the model school districts sample used to determine costs; and an "echo effect" adjustment was made to model school budgets that spent above what the state thought was actually needed to meet standards. The Court ordered all three of these adjustments be eliminated from the formula, as all likely reduced the formula amount. Id. at 1200–01.
be constitutional.\textsuperscript{68} The court ordered implementation of the modifications to the base cost formula and full funding for the parity aid program, and relinquished jurisdiction of the case, noting that “[i]f the order receives less than full compliance, interested parties have remedies available to them.”\textsuperscript{69} In a vitriolic dissent, Justice Resnick termed this decision a “Machiavellian maneuver to halt this litigation”\textsuperscript{70} and faulted the majority because it “acquiesced to the desires of the defendants, and ha[d] abandoned all pretense of objectivity, ostensibly in the spirit of creating a consensus.”\textsuperscript{71} She was especially critical of the majority’s willingness to specify the legislative action necessary to make the system constitutional, noting that the prior DeRolph decisions had been very careful not to direct the General Assembly to take specific action because it was not the Court’s role to legislate.\textsuperscript{72} Because school funding was a complicated and intricate process, the court needed to be wary that any change to one aspect could have a “ripple effect” and unintended consequences that the justices did not anticipate.\textsuperscript{73}

Justice Resnick argued that the prior DeRolph decisions had required a “complete systematic overhaul” of the system and that the state had failed correct the problems identified in the prior DeRolph decisions. Her dissent, like the majority opinion in DeRolph II, suggested adequacy and equity were inherent in the concept of “thorough and efficient” by noting that the majority had “set[ ] the bar lower than is justified” in declaring the system constitutional pending implementation of the Court’s modifications.\textsuperscript{74} Arguing that the Ohio Constitution “envisions much more than a school system that barely meets the minimum needs of its pupils,”\textsuperscript{75} and suggesting that advance placement courses for high school students and foreign language opportunities in elementary schools were minimum inputs to determine a model school,\textsuperscript{76} Justice Resnick viewed the majority’s decision as “knelling defeat for the students and citizens of Ohio.”\textsuperscript{77}

Returning to the equality concepts advanced in the discussion of property taxes in DeRolph I and DeRolph II, Justice Resnick complained that “[w]hile the ‘adjustments’ imposed by the majority

\textsuperscript{68} Id.
\textsuperscript{69} Id. at 1201.
\textsuperscript{70} Id. at 1216 (Resnick, J., dissenting).
\textsuperscript{71} Id. at 1217.
\textsuperscript{72} DeRolph III, 754 N.E.2d at 1218.
\textsuperscript{73} Id.
\textsuperscript{74} Id. at 1218.
\textsuperscript{75} Id. at 1219.
\textsuperscript{76} Id. at 1233.
\textsuperscript{77} Id. at 1219.
do increase somewhat the total state education spending package above the [General Assembly’s budget] level, those adjustments do nothing to rectify the inherent disparities.” Justice Resnick joined Justice Sweeney’s dissent, which was even more explicit about the equality requirement suggested by the prior DeRolph decisions: “The hallmark of a thorough and efficient form of public education is that it works as well for the least advantaged as it does for the most advantaged.”

D. DeRolph IV

One month after the court issued its decision in DeRolph III, the state brought a motion to reconsider the decision because “changes to the base cost of the formula ordered by the court...may have been based in part upon erroneous calculations and data.” In a 4-3 decision split along the same lines as the DeRolph III decision, the majority granted the motion to reconsider, but first ordered the parties to a settlement conference. When the parties failed to reach agreement, the court ruled on the merits of the case on reconsideration, and issued a decision vacating DeRolph III.

In a change of the court’s “collective mind,” the majority from DeRolph I and DeRolph II realigned in DeRolph IV to overturn the DeRolph III decision, finding the funding system unconstitutional. Justice Douglas concurred in the judgment only. Justice Pfeifer, who had been a member of the majority in all three previous DeRolph decisions, wrote the plurality opinion.

The plurality returned to “the core constitutional directive of DeRolph I: ‘a complete systematic overhaul’ of the school-funding system,” and found that because there had not been such an overhaul, the system remained unconstitutional. The court then issued its order: “(w)e direct the general assembly to enact a school-funding scheme that is thorough and efficient, as explained in DeRolph I,

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78 DeRolph III, 754 N.E.2d at 1225 (emphasis added).
79 Id. at 1244 (Sweeney, J., dissenting). As he had in the prior decisions, Justice Cook continued to maintain that the school funding dispute was nonjusticiable, stating: “I continue to believe that this cause presents a nonjusticiable political question... The term ‘thorough and efficient’ speaks to the question of educational quality, which is an issue that unquestionably involves difficult policy choices and value judgments that courts are not in the business of making.” Id. at 1244–45.
81 DeRolph IV, 780 N.E.2d at 530.
82 Id.
DeRolph II, and the accompanying concurrences." The court relinquished jurisdiction over the DeRolph dispute.

That the plurality suggested the accompanying concurrences in the first two DeRolph decisions carried the force of law did not sit well with the Chief Justice: "I certainly do not believe that the opinions of individual members of the court as reflected in separate concurrences are binding in any litigation that may follow today's decision." In response to the plurality's return to the "complete overhaul" requirement, Chief Justice Moyer's dissent returned to criticism of the plurality's vague directives and unexplained vision of a "thorough and efficient" system of public schools, arguing that "the majority today issue[d] an opinion that ignores as many questions as it decided." Noting that the opinions in DeRolph I and DeRolph II did not provide the General Assembly with "clear guidance," the Chief Justice targeted the discussion of "overreliance": "The majority has yet to define what it means by 'overreliance' on property tax, and Ohio's policymakers are left to wonder, 'If the percentage of local to state funding were inverted would that be sufficient, or is the majority seeking only a fifty-one-percent reliance on state funds?'" The questions about the definition of "thorough and efficient" will remain unanswered in terms of DeRolph litigation. When the plaintiffs returned to trial court to attempt to gain judicial oversight over the General Assembly's revision process, the state requested a writ of prohibition to prevent the trial court from ruling on the issue. The court granted the writ, noting that because it had relinquished jurisdiction in DeRolph IV, the plaintiffs could not further pursue the issue in any Ohio court.

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83 Id. (emphasis added).
84 Though the court did not explicitly state that it was relinquishing jurisdiction the Supreme Court of Ohio, in State v. Lewis, found that no court had jurisdiction over the DeRolph dispute:

We crafted our language in the DeRolph IV mandate to order that the trial court "carry this judgment into execution." We did not remand the cause for further proceedings. In fact, if we had intended a remand for further proceedings in this litigation, we would have expressly provided for that action. By contrast, we did not specify any remand in DeRolph IV. (citations omitted)[A] review of the various opinions in DeRolph IV supports our construction that no further jurisdiction over that particular case would be exercised, whether by this or any other court.

85 DeRolph IV, 780 N.E.2d at 537 (Moyer, C.J., dissenting).
86 Id. at 536.
87 Id. at 537.
88 Lewis, 789 N.E.2d 195.
89 Id. at 202 ("[A] review of the various opinions in DeRolph IV supports our construction that no further jurisdiction over that particular case would be exercised, whether by this or any other court.").
II. INTERPRETATIONS OF "THOROUGH AND EFFICIENT" FROM OTHER STATES

With little positive definition of "thorough and efficient" emerging from Ohio jurisprudence, the examples of other states could be useful to future litigants, courts, and policy-makers in defining what a "thorough and efficient" system in Ohio should look like. Sixteen other state constitutions require either "thorough and efficient," "efficient," or "thorough" school systems. To the extent that their courts have considered the meaning of these terms, their examples are instructive in developing a general definition of "thorough and efficient." This section examines the decisions of the other states in which the courts have defined the requirements of either "thorough and efficient" together or "thorough" and "efficient" separately.

A. States with "Thorough and Efficient" Clauses

Seven other states have a provision for "thorough and efficient" education systems in their constitutions: Maryland, Minnesota, New Jersey, Pennsylvania, South Dakota, West Virginia, and Wyoming. The highest courts in five of these states have discussed the meaning of "thorough and efficient" in the context of the legislature's obligation to provide a public school system.

90 "The General Assembly, at its First Session after the adoption of this Constitution, shall by Law establish throughout the State a thorough and efficient System of Free Public Schools; and shall provide by taxation, or otherwise, for their maintenance." MD. CONST. art. VIII, § 1 (2004).

91 "The legislature shall make such provisions by taxation or otherwise as will secure a thorough and efficient system of public schools throughout the state." MINN. CONST. art. XIII, § 1 (2004).

92 "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." N.J. CONST. art. VIII, § IV, ¶ 1 (2005).

93 "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth." PA. CONST. art. 3, § 14 (2004).

94 "The Legislature shall make such provision by general taxation and by authorizing the school corporations to levy such additional taxes as with the income from the permanent school fund shall secure a thorough and efficient system of common schools throughout the state." S.D. CONST. art. VIII, § 15 (2003).

95 "The legislature shall provide, by general law, for a thorough and efficient system of free schools." W. VA. CONST. art. XII, § 1 (2004).

96 The legislature shall make such further provision by taxation or otherwise, as with the income arising from the general school fund will create and maintain a thorough and efficient system of public schools, adequate to the proper instruction of all youth of the state, between the ages of six and twenty-one years, free of charge . . ." WYO. CONST. art. 7, § 9 (2004).

97 The Supreme Court of South Dakota has not issued judgment on the meaning of its "thorough and efficient" education requirement. The Supreme Court of Minnesota briefly discussed West Virginia's meaning of "thorough and efficient" in reaching the conclusion that the funding system in place did not violate the Education Clause of the Minnesota Constitution.
Two of the courts provided cursory discussions of "thorough and efficient" that were tangential to the issues upon which they ultimately decided the cases before them. The Supreme Court of Pennsylvania ultimately decided the issue of whether the legislature’s school financing system was "thorough and efficient" was nonjusticiable. In reaching that conclusion, however, it rejected the notion that "thorough and efficient" could be defined in terms of equal funding per pupil.

Similarly, the Supreme Court of Wyoming decided the state financing scheme was unconstitutional because it did not provide substantially equalized funding, in violation of the "complete and uniform system of public instruction" mandate of its Constitution, obviating the need to rule on the issue of whether the system was "thorough and efficient." Still, in its decision, the court offered a lexically based definition of a "‘thorough and efficient” system as one that “is marked by full detail or complete in all respects and productive without waste and is reasonably sufficient for the appropriate or suitably teaching/education/learning of the state’s school age children.”

The Supreme Court of Appeals of West Virginia offered its definition of “thorough and efficient” in Pauley v. Kelly. The decision included a lengthy discussion of the origins of “thorough and efficient” mandates for public education in West Virginia and Ohio, as well as a review of the jurisprudence in 15 states on the meaning of “thorough and efficient” together, and “thorough” and “efficient” separately, as they related to the legislative requirement to provide public schools, then turned to the dictionary definitions of “thorough” and “efficient.” With the history of the constitution, other states’ jurisprudence, and dictionary definitions established, the court defined a thorough and efficient system of schools as one that “develops, as best the state of education expertise allows, the minds, bodies, and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically.” Perhaps realizing that this definition did not provide


very manageable standards, the court then articulated specific standards:

Legally recognized elements in this definition are development in every child to his or her capacity of (1) literacy; (2) ability to add, subtract, multiply and divide numbers; (3) knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his own governance; (4) self-knowledge and knowledge of his or her total environment to allow the child to intelligently choose life work—to know his or her options; (5) work-training and advanced academic training as the child may intelligently choose; (6) recreational pursuits; (7) interests in all creative arts, such as music, theatre, literature, and the visual arts; (8) social ethics, both behavioral and abstract, to facilitate compatibility [sic] with others in this society.

Implicit are supportive services: (1) good physical facilities, instructional materials and personnel; (2) careful state and local supervision to prevent waste and to monitor pupil, teacher and administrative competency.\textsuperscript{104}

The court then noted that the Thorough and Efficient Clause of the West Virginia Constitution required the development of “high quality” standards, and that the standards should comprise part of the test against which the education system would be tested for constitutional compliance.\textsuperscript{105} The court noted that individual school districts’ failure to meet the standards would not automatically mean the education system as a whole was unconstitutional—the court would look to whether the failure was the result of inefficiency and noncompliance with existing school statutes before declaring the system unconstitutional.\textsuperscript{106}

West Virginia’s decision in \textit{Pauley} was one of many state cases considered by the Court of Appeals of Maryland in \textit{Hornbeck v. Somerset County Board of Education}.\textsuperscript{107} After reviewing the history of Maryland’s constitutional clause, the court reviewed the decisions of the highest courts in Pennsylvania, Ohio, Colorado, New York, Oregon, Idaho, Georgia, New Jersey, and West Virginia. In light of

\textsuperscript{104} \textit{Id.}
\textsuperscript{105} \textit{Id.} at 878.
\textsuperscript{106} \textit{Id}
\textsuperscript{107} 458 A.2d 758 (Md. 1983).
the state's own history and the interpretations from other states, the court concluded that the provisions of Maryland's education clause at most required the legislature "to establish such a system, effective in all school districts, as will provide the State's youth with a basic public school education."\(^{108}\) The "basic" education was defined by Maryland laws and the State Board of Education's regulations that set forth "statewide qualitative standards that governed all facets of the educational process in the State's public elementary and secondary schools."\(^{109}\) Further, the Thorough and Efficient Clause did not require uniform spending across districts. The constitution did not, "either explicitly or implicitly, inhibit local subdivisions from spending locally generated tax revenues for public school purposes in supplementation of amounts to be received from the state school fund."\(^{110}\) So long as a basic education was fully funded for each student, the funding system was constitutional.\(^{111}\)

The Supreme Court of New Jersey originally reached a similar conclusion in *Abbott v. Burke*,\(^ {112}\) noting that "equalization is constitutionally required only up to a certain level—that necessary to achieve a thorough and efficient education—and . . . districts may exceed that level. . . ."\(^ {113}\) The court began its evaluation of the school system by reviewing its past decisions, and noting that in general, a thorough and efficient education provided "that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market."\(^ {114}\) The court then looked to the standards outlined in the Public School Education Act of 1975 and the Board of Education's rules to implement it, and determined that they provided sufficient definition for a thorough and efficient system:

The Act defines thorough and efficient education on a statewide basis as including: (a) establishment of educational goals at both the state and local levels; (b) encouragement of public involvement in goal-setting; (c) instruction intended to produce the attainment of reasonable levels of proficiency in the basic communications and computational skills; (d) a breadth of program offerings designed to develop the individual talents and abilities of pupils; (e) programs and

\(^{108}\) Id. at 776.

\(^{109}\) Id. at 780.

\(^{110}\) Id. at 776.

\(^{111}\) Id.

\(^{112}\) 575 A.2d 359 (N.J. 1990).

\(^{113}\) Id. at 395.

\(^{114}\) Id. at 372 (quoting Robinson v. Cahill, 303 A.2d 273 (N.J. 1973)).
supportive services for all pupils especially those who are educationally disadvantaged or who have special educational needs; (f) adequately equipped, sanitary, and secure physical facilities and adequate materials and supplies; (g) qualified instructional and other personnel; (h) efficient administrative procedures; (i) an adequate State program of research and development; and (j) evaluation and monitoring programs at both the state and local levels.\(^{115}\)

The court noted, however, that the Act and the corresponding educational system had not created a thorough and efficient education in specific school districts ("Abbott Districts") because poorer students could not compete with relatively advantaged students in the labor market.\(^{116}\) The court looked to curriculum offerings and found that technology, science, foreign-language, music, art, and physical education programs were vastly superior in wealthier districts than they were in the Abbott Districts. It ultimately expanded the general definition of "thorough and efficient" it had cited at the start of the decision:

> Thorough and efficient means more than teaching the skills needed to compete in the labor market, as critically important as that may be. It means being able to fulfill one’s role as a citizen, a role that encompasses far more than merely registering to vote. It means the ability to participate fully in society, in the life of one’s community, the ability to appreciate music, art, and literature, and the ability to share all of that with friends.\(^{117}\)

The court ordered a "leveling up" of the per-pupil funding in Abbott Districts to match per-pupil spending in the property-richest districts. It did not, however, require that funding for every school district in the state be matched to the property-rich district average.\(^{118}\)

**B. States with "Thorough" or "Efficient" Requirements**

The term "thorough" or "efficient" is used to describe the school systems to be established by the legislature in the Constitutions of eight states. "Efficient" is the sole requirement for the free public

\(^{115}\) *Id.* at 390.

\(^{116}\) *Id.* at 372.

\(^{117}\) *Id.* at 397.

\(^{118}\) *Abbott*, 575 A.2d at 409.
school systems in Kentucky\(^{119}\) and Texas,\(^{120}\) and "efficient" is combined with other descriptors in the requirements for public schools set forth in the Arkansas,\(^{121}\) Delaware,\(^{122}\) Florida,\(^{123}\) and Illinois\(^{124}\) constitutions. "Thorough" is a conjunctive requirement for the public school systems in Colorado\(^{125}\) and Idaho.\(^{126}\)

In Kentucky, Texas, and Arkansas, the highest courts have ruled on the meaning of the constitutional requirement of an "efficient" education. In Illinois, the court refused to rule on the merits of the school financing issue, finding it to be a nonjusticiable political question.\(^{127}\) The highest courts in Delaware and Florida have not issued a ruling regarding the meaning of "efficient" in light of the duty of the legislature to provide a system of schools.\(^{128}\)

The Supreme Court of Kentucky, in *Rose v. Council for Better Education*,\(^{129}\) found that the public school funding system failed to comply with the "efficient" requirement of the Kentucky

\(^{119}\) "The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State." KY. CONST. § 183 (2004).

\(^{120}\) "A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools." TEX. CONST. art. VII, § 1 (2004).

\(^{121}\) "Intelligence and virtue being the safeguards of liberty and the bulwark of a free and good government, the State shall ever maintain a general, suitable and efficient system of free public schools and shall adopt all suitable means to secure to the people the advantages and opportunities of education." ARK. CONST. art. 14, §1 (2005).

\(^{122}\) "The General Assembly shall provide for the establishment and maintenance of a general and efficient system of free public schools, and may require by law that every child, not physically or mentally disabled, shall attend the public school, unless educated by other means." DEL. CONST. art X, §1 (2005).

\(^{123}\) "Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require." FLA. CONST. art. IX, §1 (amended 2007).

\(^{124}\) "The state shall provide for an efficient system of high quality public educational institutions and services." ILL. CONST., art. X, §1 (2004).

\(^{125}\) "The general assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state, wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously." COLO. CONST. art IX, §2 (2004).

\(^{126}\) "The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools." IDAHO CONST. art. IX, §1 (2004).


\(^{128}\) "The Supreme Court of Florida had found, prior to the 2004 Constitutional Amendment adding "efficient, safe, secure, and high quality" to the requirement that the public school system be "uniform," that the issue of whether the school system was uniform and adequate was nonjusticiable. Coalition for Adequacy & Fairness in Sch. Funding v. Chiles, 680 So. 2d 400 (Fla. 1996)."

\(^{129}\) "790 S.W.2d 186 (Ky. 1989)."
Constitution. The court, resting its decision in large part on the Supreme Court of West Virginia's opinion in Pauley, chose to articulate the definition of an "efficient" education in terms of specific standards, as well. It first described the goal of an efficient education system in terms of a goal of providing an adequate education for every student:

[An] efficient system of education must have as its goal to provide each child with at least the seven following capacities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in academic or vocational fields so as to enable each child to choose and pursue life work intelligently; (vii) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics, or in the job market.\textsuperscript{130}

Then, the court described the elements of an efficient system:

The essential, and minimal, characteristics of an "efficient" system of common schools, may be summarized as follows:

(1) The establishment, maintenance and funding of common schools in Kentucky is the sole responsibility of the General Assembly.

(2) Common schools shall be free to all.

(3) Common schools shall be available to all Kentucky children.

(4) Common schools shall be substantially uniform throughout the state.

\textsuperscript{130} \emph{Id.} at 212.
(5) Common schools shall provide equal educational opportunities to all Kentucky children, regardless of place of residence or economic circumstances.

(6) Common schools shall be monitored by the General Assembly to assure that they are operated with no waste, no duplication, no mismanagement, and with no political influence.

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

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

(9) An adequate education is one which has as its goal the development of the seven capacities recited previously.

The court instructed the General Assembly to re-create a new public school system, in accordance with the court’s definition of “efficient.”

Lake View School District No. 25 v. Huckabee addressed an Arkansas mandate that the state “maintain a general, suitable, and efficient system of free public schools.” Noting that the General Assembly had incorporated much of Kentucky’s Rose decision into its legislation defining “efficient,” the Supreme Court of Arkansas found that General Assembly had “partially addressed what an adequate education in Arkansas would entail.” Specifically, the Assembly’s legislation required students be competent in English, mathematics, science, and social studies, and acquire practical knowledge (such as computer science and basic economics) that would prepare them for working. Whether the students had achieved these goals was to be measured by tests defined by the State Department of Education. That agency, however, had declined to implement any standards or testing regime. The court ultimately

131 Id. at 212–13.
132 Id. at 212.
135 Lake View III, 91 S.W.3d at 486.
136 Id. at 487.
137 Id.
held that the public school system was unconstitutional and explained the actions necessary to ensure compliance with the constitutional mandate:

It is the State’s responsibility, first and foremost, to develop forthwith what constitutes an adequate education in Arkansas. It is, next, the State’s responsibility to assess, evaluate, and monitor, not only the lower elementary grades for English and math proficiency, but the entire spectrum of public education across the state to determine whether equal educational opportunity for an adequate education is being substantially afforded to Arkansas’ school children. It is, finally, the State’s responsibility to know how state revenues are being spent and whether true equality in opportunity is being achieved. Equality of educational opportunity must include as basic components substantially equal curricula, substantially equal facilities, and substantially equal equipment for obtaining an adequate education. The key to all this, to repeat, is to determine what comprises an adequate education in Arkansas.\(^{138}\)

The decision was remanded for further proceedings. The Supreme Court of Arkansas did not substantively address the issue in a later appeal, merely noting that an “efficient” system required only equality in funding to the extent that each school district was able to provide an adequate education; school districts could exceed the base spending amounts if they so chose.\(^{139}\)

This sentiment was echoed by the Supreme Court of Texas in *Edgewood Independent School District v. Meno*:\(^{140}\) “As long as efficiency is maintained, it is not unconstitutional for districts to supplement their programs with local funds.”\(^{141}\) In finding plaintiffs had failed to produce enough evidence to support their claim that the Texas public school system was unconstitutionally inefficient, the court recognized two dimensions to the constitutional requirement: financial efficiency and qualitative efficiency. Qualitative efficiency was a “general diffusion of knowledge,” which the legislature had sufficiently defined by implementing academic accreditation standards.\(^{142}\) Financial efficiency required that districts “have

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\(^{138}\) *Id.* at 500.


\(^{140}\) 917 S.W.2d 717 (Tex. 1995).

\(^{141}\) *Id.* at 732.

\(^{142}\) *Id.* at 730.
substantially equal access to funding up to the legislatively defined level that achieves the constitutional mandate of a general diffusion of knowledge."\textsuperscript{143} The court also found that the constitutional requirement for an efficient education implicitly required proper facilities and equipment.\textsuperscript{144}

The meaning of "thorough" has been examined by the highest courts in both Colorado and Idaho. In \textit{Lujan v. Colorado State Board of Education}\textsuperscript{145} the Supreme Court of Colorado simply stated that the "thorough and uniform" clause of the constitution was "satisfied if thorough and uniform educational opportunities are available through state action in each school district."\textsuperscript{146} It only offered slight clarification: "'thorough and uniform' does not require complete equality in the sense of providing free textbooks to all students";\textsuperscript{147} "'uniform' means a pupil residing in a district without a high school is entitled to attend a high school in another district at the former district's expense";\textsuperscript{148} and the thorough and uniform clause did not prevent local school districts from providing additional educational opportunities beyond the minimum constitutional standard.\textsuperscript{149}

In Idaho, the constitution requires that the legislature create a "general, uniform, and thorough system of public, free common schools."\textsuperscript{150} Unlike most other states, it was actually the legislature that defined the meaning of "thorough":

A thorough system of public schools in Idaho is one in which:

(1) A safe environment conducive to learning is provided;

(2) Educators are empowered to maintain classroom discipline;

(3) The basic values of honesty, self-discipline, unselfishness, respect for authority and the central importance of work are emphasized;

\textsuperscript{143} Id.
\textsuperscript{144} Id. at 725.
\textsuperscript{145} 649 P.2d 1005 (Colo. 1982).
\textsuperscript{146} Id. at 1025.
\textsuperscript{147} Id. at 1025 (citing Marshall v. Sch. Dist. RE # 3 R. 10.2.1(f), 553 P.2d 784 (Colo. 1976)).
\textsuperscript{148} Id. (citing Duncan v. People ex. rel. Moser, 299 P. 1060 (Colo. 1931), and Hotchkiss v. Montrose Co. High Sch. Dist., 273 P. 652 (Colo. 1914)).
\textsuperscript{149} Id.
\textsuperscript{150} IDAHO CONST. art. IX §1 (2006).
(4) The skills necessary to communicate effectively are taught;

(5) A basic curriculum necessary to enable students to enter academic or professional-technical postsecondary educational programs is provided;

(6) The skills necessary for students to enter the work force are taught;

(7) The students are introduced to current technology; and,

(8) The importance of students acquiring the skills to enable them to be responsible citizens of their homes, schools and communities is emphasized.\textsuperscript{151}

The legislature's definition was supplemented by the executive branch's development of academic standards. Because the challenge before the Supreme Court of Idaho in \textit{Idaho Schools for Equal Educational Opportunity v. State}\textsuperscript{152} specifically dealt with whether the state was required to fund a safe environment conducive to learning exclusive of property taxes, the court only examined the legislature's definition in cursory fashion, noting that it had previously reviewed the definition and found it satisfactory, and it remained so.\textsuperscript{153}

\textbf{C. A Working Definition of "Thorough and Efficient"}

Although the Ohio Supreme Court chose to define "thorough and efficient" in negative terms, it is possible to craft a positive definition of "thorough and efficient" looking at the common themes that emerge in all the state court discussions of thoroughness and efficiency as they relate to the legislative duty to provide a public school system. These themes suggest a working definition of "thorough and efficient."

First, the constitutional requirement that the legislature provide a "thorough and efficient" system of public schools is a mandate that the legislature provide a statewide system—evidence of only a few "failing" districts does not appear to render the legislative funding scheme unconstitutional. With the exception of New Jersey, in all the

\textsuperscript{151} \textit{IDAHO CODE ANN.} § 33-1612 (Michie 2006).
\textsuperscript{152} 976 P.2d 913 (Id. 1998).
\textsuperscript{153} Id. at 920.
states discussed above, the financing system was examined in light of overall structure rather than the results of individual districts.

Related is the idea that if the system of schools must be a statewide one, then funding the system is the state’s responsibility. While legislatures may require local subdivisions to share funding responsibility through local tax provisions, the state must ensure that all subdivisions receive at least the cost of a basic or “base” education for each pupil.

Although the state must equalize to the cost of a base education, a thorough and efficient system requires equality of spending only to the extent that a base education is provided for each student. School districts with adequate means may spend beyond the base amount if they so choose. A showing of inequality in spending is not sufficient to find the legislative funding scheme unconstitutional.

If the level of funding is determined by a “base” education, then an established definition of a “base” education also becomes a necessary part of a “thorough and efficient” education. Courts agree that a “base” education is one that prepares students to interact as workers, citizens, and members of a community. Inherent in this theme is the idea that there are minimum quality standards associated with a “thorough and efficient” education. These standards should be defined by articulated academic standards.

Articulated academic standards should, at a minimum, include targets for math, reading, writing, science, and civics. These standards are most preferably set by the legislature or the executive departments responsible for education, but may be set by the courts, as in the cases of West Virginia and Kentucky.

Finally, a “thorough and efficient” education entails not just meeting academic standards, but also providing safe facilities in which students can learn.

III. APPLICATION OF THE POSITIVE STANDARD FOR “THOROUGH AND EFFICIENT” TO OHIO

Given this positive standard for “thorough and efficient,” does the current Ohio financing system and proposed changes to it satisfy the Thorough and Efficient Clause of the Ohio Constitution? First, this Part describes the current funding system. Then, it turns to Governor Taft’s Blue Ribbon Commission and his biennium budget proposal, and examines the anticipated effects of the budget on Ohio school districts. After discussing the systems, it looks to the positive “thorough and efficient” standard developed above, and discusses
whether Ohio’s funding is and would be constitutional using the positive standard.

A. Ohio’s Current System: The Foundation Program

The current version of the Foundation Formula is found in Ohio Revised Code Chapter 3317. To be eligible to receive funds, a school district must levy at least twenty mills for operating expenses,\(^{154}\) and must meet minimum operating hour requirements\(^{155}\) and minimum teachers’ salaries guidelines.\(^{156}\) This section describes the funding formula that was in effect prior to June 30, 2005; the newly enacted funding formula, which will control school funding in Fiscal Year (“FY”) 2006 and FY 2007, is briefly outlined in section D below.

Determining the amount of funds a school is eligible for under the Foundation Program begins with establishing the cost of an adequate education (the “formula amount”),\(^{157}\) which the General Assembly found to be $4,814 per pupil in FY 2002.\(^{158}\) The General Assembly adjusted the formula amount by projected inflation at 2.8% in FY 2003, and 2.2% in fiscal years 2004 and 2005.\(^{159}\) To determine the cost of an adequate education, the General Assembly calculated the average cost per student for school districts that met twenty of twenty-seven performance indicators\(^{160}\) subject to a rounding procedure\(^{161}\) (the same rounding procedure the court disapproved in DeRolph III\(^{162}\)). The average figure excluded data from schools that were among the highest or lowest five percent in income,\(^{163}\) as well as data from schools that were among the highest or lowest five percent in per-pupil spending.\(^{164}\)

The base cost funding allocated to a school district is calculated from the following formula:

\(^{154}\) OHIO REV. CODE ANN § 3317.01(A) (West 2005).
\(^{155}\) OHIO REV. CODE ANN. § 3317.01(B) (West 2005).
\(^{156}\) OHIO REV. CODE ANN. § 3317.01(C) (West 2005).
\(^{157}\) The base figure excludes the costs of capital, costs paid by federal funds, programs funded by disadvantaged pupil aid, transportation, and cost of doing business factors. OHIO REV. CODE ANN. § 3317.012(B) (LexisNexis 2002 & Supp. 2003).
\(^{159}\) Id.
\(^{160}\) The performance indicators set forth graduation and attendance rates and minimum percentages of students in the fourth, sixth, ninth, tenth, and twelfth grades that score “proficient” on standardized mathematics, reading, writing, citizenship, and science tests. OHIO REV. CODE ANN. §§ 3317.012(B)(1)-(aa) (LexisNexis 2002 & Supp. 2003).
\(^{161}\) Id.
\(^{162}\) 754 N.E.2d 1184, 1200 (Ohio 2001).
(CODB factor x formula amount x formula ADM) - (0.023 x recognized valuation)

where the CODB factor is a cost of doing business factor created to alleviate the differences in costs between school districts; the formula amount is the average cost of providing an adequate education described above; the formula ADM is the average daily membership of the school district; and the recognized valuation is the value of the property recognized under foundation formula guidelines set forth in the Revised Code.

The second quantity in the foundation program formula above is referred to as the "charge-off amount," which represents the portion of education costs the state assumes a school district collects from property taxes. Due to other provisions in the Ohio Revised Code, however, it is possible that the formula charge-off amount is greater than the amount a school district can actually collect from its levies. This phenomenon is called "phantom revenue." To alleviate the phantom revenue problem, the foundation formula provides for the issuance of gap aid, which adjusts the charge-off amount to equal that which was actually collected by the school district.

Once the base cost funding for a district is determined, the figure is then adjusted to the specific vocational, special education, and transportation needs of each school district. Base cost funding is also adjusted for districts where more than 25 percent of property is tax-exempt, according to incentives focused on decreasing student-

\[\text{Base cost funding} = (\text{CODB factor} \times \text{formula amount} \times \text{formula ADM}) - (0.023 \times \text{recognized valuation})\]

169 The recognized valuation is comprised of all the property taxed in the prior year ("carryover property") and any new property added to the school district. If a county in which the school district is located has reappraised values in any of the preceding three years, the increased valuation is incrementally added to the recognized valuation for Foundation Program purposes. See OHIO REV. CODE ANN. § 3317.015 (LexisNexis 2002 & Supp. 2003). For a general discussion of tax reduction factors and recognized valuation, see 1 KIMBALL H. CAREY, ANDERSON'S OHIO SCHOOL LAW GUIDE § 5.24 (2001–02 ed.).
170 For a discussion of the tax reduction factors that affect the ability of a school district to collect its full charge-off amount, see 1 CAREY, supra note 169, §§ 5.24, 5.25.
171 For an example of how phantom revenue works in practice, see GOVERNOR'S BLUE RIBBON TASK FORCE ON FINANCING STUDENT SUCCESS IN OHIO ("GOVERNOR'S TASK FORCE"), BUILDING A BETTER SCHOOL FUNDING SYSTEM 46 (2005). The report is available at http://www.blueribbontaskforce.ohio.gov/02022005brtf.pdf.
teacher ratios and student-educational personnel ratios; and to support districts offering specific programs for free lunch, adult basic literacy, mentor teachers, and gifted students.

The two largest and most broadly applied adjustments are disadvantaged pupil impact aid (DPIA) and parity aid. DPIA provides funding to school districts based on the number of enrolled students whose families receive some type of state welfare assistance. DPIA funds must be used by schools to provide, among other things, all-day kindergarten classes, safer schools, and remedial academic programs. Parity aid is calculated based on the average amount that school districts with wealth per pupil in the upper tenth to thirtieth percentiles spend above the minimum amount to finance the local shares of an adequate education. It is allocated to the 490 school districts with the lowest wealth. Like DPIA funds, parity aid must be spent on specific programs, such as lowering pupil-teacher ratios, offering more advanced curriculum activities, and increasing professional development. The parity aid program was added to the Foundation Program in fiscal year 2002, and was phased in to be fully funded starting in fiscal year 2006.

The foundation program also contains income guarantees for school districts, ensuring that school districts receive a minimum amount of funding regardless of the amount suggested by the base

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174 Deductions are made to the base cost formula for districts that have less than 1 teacher for each 25 students. OHIO REV. CODE ANN. § 3317.023(B)-(C) (Baldwin 2005).

175 Educational service personnel include elementary school art, music, and physical education teachers, counselors, librarians, visiting teachers, social workers, and nurses. Deductions are made to the base cost formula for districts with less than five educational service personnel per 1,000 students. Id. § 3317.023(D).

176 For a complete list of programs for which additional money is appropriated for districts, see id. at § 3317.024.

177 CAREY, supra note 169, § 5.43.

178 School districts with less than the state average percentage of “disadvantaged pupil[s]” receive a flat amount per student; school districts with concentrations higher than the state average receive a higher amount per student, calculated according to the concentration of the disadvantaged students. OHIO REV. CODE ANN. § 3317.029(C) (Baldwin 2005).

179 Id. § 3317.029(F).

180 Currently, the amount of parity aid is calculated to be 9.5 mills of recognized valuation times the difference between the district’s wealth per pupil and the average wealth per pupil of the 10th to 30th districts with the highest wealth per pupil. Id. § 3317.0217(C)(2). Wealth is defined as two-thirds times the district’s recognized valuation and one-third the average personal income of its residents. Wealth is then divided by the formula ADM to obtain the local wealth per pupil for the school district. Id. § 3317.0217(A).

181 This requirement is relaxed if the school district maintains an “excellent” or “effective” rating. CAREY, supra note 169, § 5.43.2.

182 OHIO REV. CODE ANN. § 3302.41 (Baldwin 2005).

183 The parity aid program was to be funded at 20% in FY 2002, 40% in FY 2003, 58% in FY 2004, 76% in FY 2005, and at 100% in all fiscal years thereafter. Id. § 3317.0217(C) (1).
cost formula and adjustments. These guarantees are limited to either one or three fiscal years after the change triggering the guarantee.  

B. The Foundation Program in Practice

Since the Foundation Program was first challenged, funding in the program has risen substantially:

Diagram 1: Foundation Program Funding, 1994-2005

The precipitous increase between 2001 and 2002 was due to the introduction of the parity aid program, which provided an additional $97 million in funding in its first year. Although the parity aid program continued to be phased in from Fiscal Year 2002-2005, the reduction of the inventory tax, as well as the expiration of hold-harmless guarantees after changes to the Foundation Program in Fiscal Year 2002 served to minimize gains from the expansion of the parity aid program.

A look at growth in Foundation Program funding relative to the Consumer Price Index, a general measure of inflation, reveals a subtle problem with the current Foundation Program: it is rather unpredictable. Some years school funding grows far ahead of inflation, while others it lags behind.

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184 If the school district is consolidated or transfers property, the guarantee provides the same amount of funding allocated to affected portions of district in the year prior to the change for three fiscal years. Id. § 3317.04(A)-(B). If the guarantee provision is triggered by reassessment by the county auditor, the guarantee is effective for one fiscal year. Id. § 3317.04(C)-(D).

Variability in funding increases from year-to-year creates substantial difficulty for school districts planning their budgets. In years where the nominal increase in Foundation Program funding remains below the increase in inflation, school districts must effectively plan for a real decrease in funding unless they are able to alleviate the difference with local funds. This was the case in both fiscal years 2004 and 2005, where more school districts were added to the Fiscal Watch and Fiscal Emergency lists than during any other two consecutive fiscal years since the state’s fiscal accountability program was implemented in the mid 1990s.¹⁸⁶

Despite the variability of funding from the Foundation Program, school districts must still plan for the future, and more than one out of every three school districts in Ohio is anticipating a fiscal deficit within three years. In October 2004, the Ohio Department of Education summarized the five-year forecasts of all Ohio school districts. The number of schools projecting current-year deficits rose from 35 to 41, while 205 more school districts projected deficits within three years. While not much different than the Fiscal Year 2004 report (in which 243 districts reported expected deficits within

¹⁸⁶ Nine districts were added to the Fiscal Watch list in FYs 2004–2005, while seven schools were added to the Fiscal Emergency list. During the same time, only one school was removed from either list. A school in fiscal watch has conditions threatening its financial solvency and must develop a financial recovery plan approved by the State. If it cannot do so and its fiscal condition worsens, it is downgraded to financial emergency, where the auditor of the state assumes financial control of the district and may appoint a commission to replace the board of education until the district’s danger of insolvency is eliminated. For more information, see http://www.auditor.state.oh.us/WhatsNew/FiscalWatchEmergency/SchoolFactSheet.htm (last visited April 29, 2005).
three years), the number was significantly larger than the 157 districts that expected deficits within three years in Fiscal Year 2003.  

Along with state funds, school districts continue to rely on property taxes to fund their operations. Over the last five years, Ohio school districts have turned to their voters 1,410 times in hopes of maintaining or increasing their funding bases for operations through renewed or increased property taxes, meeting with a 52.1% success rate. Eliminating renewal levies, the success rate has been considerably lower: only 38.7% of new and replacement levies were approved. Recent elections suggest property owners are not more willing than they have been in the past to grant school districts' requests for increased taxes in the face of tightening budgets, layoffs, and cutbacks in program offerings. In February 2005, new levies saw a passage rate of 33.0%, and in May 2005, the passage rate was only slightly better, at 38.7%.

C. Ohio's Future Funding System? The Governor's Proposals

Economic conditions in Ohio have continued to remain poor since the last DeRolph decision, creating what Governor Taft has called "very difficult economic times" that required him to reduce or hold flat spending for most agencies in his 2006-2007 biennium budget. When the governor released his budget in February 2006, headlines from papers across the state lamented cuts in education. Cleveland's Plain Dealer noted that "[m]any schools lose out in Taft's budget plan," while the Akron Beacon Journal lamented that "the governor's budget plan for schools highlights the familiar flaws of a sorry funding formula," and the Dayton Daily News reported that "funding schools put on hold again." At the same time, however,

187 The Ohio Department of Education’s summary of five-year school district forecasts can be viewed at http://www.ode.state.oh.us (follow “finance and grants” hyperlink, then follow “finance related data” hyperlink, then follow “five-year financial forecasts” hyperlink, then follow “Five-Year Forecast Projections and Assumptions”) (last visited August 15, 2006), while individual school district forecasts can be viewed at http://fyf.oecn.k12.oh.us/fyforecast/ (last visited April 29, 2005).

188 The Ohio Department of Education reports election results for school-related ballot issues at http://www.ode.state.oh.us (follow “finance and grants” hyperlink, then follow “School District Financial Status” hyperlink, then follow “Election Results” hyperlink) (last visited April 29, 2005).


some headlines noted that improvement for the poorest of Ohio's school districts was incorporated into the governor's plan. The *Columbus Dispatch* reported that "Taft's plan would give poor schools more funds, wealthier schools less,"193 and even the usually pessimistic *Plain Dealer* acknowledged "Taft school budget gives boost to low-income districts."194

1. The Blue Ribbon Task Force on Financing Student Success

The governor based his budget plan in part on recommendations from his Blue Ribbon Task Force on Financing Student Success. The Governor had convened the Task Force in 2003, and it issued its final report in February 2005.195 Comprised of thirty-five professionals, including politicians, local school board leaders, business leaders, and academics, the Task Force identified its goal as developing "a school funding system that maintains the shared state and local partnership to raise sufficient revenue reliably and predictably, allocate funds fairly and effectively, and spend resources efficiently and with accountability."196 The Task Force issued 18 recommendations, "strongly urging" policymakers to view the recommendations "as a package, not as a menu of choices for selective implementation."197

Four recommendations of the Task Force most substantively affected the current Foundation Program: Recommendations 1, 2, 3, and 10. Recommendations 1 and 2 suggest changing the tax laws to permit growth, within limits, of school levies commensurate with increases in inflation and property valuations, as well as adjusting the charge-off calculation to eliminate phantom revenue.198 Changing the tax law would require a constitutional amendment.199 Recommendation 3 suggests revision of the tax code to reform the tangible property tax in conjunction with "a mechanism to protect schools from a precipitous loss in revenue they currently receive from this tax."200 Noting that the tangible property tax has been criticized as hurting Ohio's competitiveness in attracting business to the state, the Task Force acknowledged that the tax on inventory was already being phased out and the General Assembly has considered the

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193 Catherine Candisky, *Cuts Loom for Ohio Schools: Taft's Plan Would Give Poorer Schools More Funds, Wealthier Schools Less*, COLUMBUS DISPATCH, February 18, 2005 at 1A.
195 See GOVERNOR'S TASK FORCE, supra note 171.
196 Id. at 7.
197 Id. at 2.
198 Id. at 25–26.
199 Id. at 46.
200 Id. at 26.
gradual elimination of the remaining tangible property tax.\textsuperscript{201} Still, the Task Force warned that an alternative revenue source must be identified in reforming or eliminating the tangible property tax, as it provided nearly $1.3 billion in funding to school districts in 2002,\textsuperscript{202} 25.1\% of the total state share of funding. Recommendation 10 suggests possible reallocation of the cost-of-doing-business (CODB) factor in a manner that better directs funds to the districts whose students are most in need.

The Task Force made one recommendation that part of the Foundation Program remain completely intact: Recommendation 8 suggests that the parity aid program remain on its original phase-in schedule and be fully funded in FY 2006.

In evaluating the possible costs of its bundle of proposals, the Task Force calculated that the recommendations would provide roughly $178 million in additional funding to school districts in the first year of implementation, with approximately 72\% of that increase coming from state revenues and the remainder from local property tax increases under the plan.\textsuperscript{203} In the fourth year of implementation, the additional money provided school districts would be roughly $696 million more than the current law provides, with state revenues providing 83\% of the increase.\textsuperscript{204}

2. The Governor's Budget Proposal

Despite the Task Force's warning that its recommendations should be considered a package (not a menu), the Governor did not incorporate all the Task Force's recommendations into his 2006-2007 biennium budget proposal. The most obvious omission of the Task Force's recommendations was the Governor's failure to request consideration of the constitutional amendment permitting the growth of property taxes collected under school levies to grow with inflation and reappraisal. In speaking about the proposal, Governor Taft made it clear he would support the amendment only if the education community first gathered the bulk of support required for passage of the amendment.\textsuperscript{205}

\textsuperscript{201}Governor's Task Force, supra note 171, at 24.
\textsuperscript{202}Id.
\textsuperscript{203}Id. at 55.
\textsuperscript{204}Id. at 56.
\textsuperscript{205}Catherine Candisky & Mary Bridgeman, Taft Wants Allies for School-Funding Idea, 'Enthusiastic' support from educators needed for amendment, he says, COLUMBUS DISPATCH, February 3, 2005, at 1A (reporting on Taft's goal of including educators in the decision to raise real estate taxes).
The substantive changes to the Foundation Program in the Governor’s budget include the complete elimination of the cost-of-doing-business factor in FY 2006. In FY 2004, the CODB factor’s inclusion in the Foundation Formula accounted for roughly $372 million in aid to districts. The Governor’s plan promises that school districts will be held 100% harmless relative to their FY 2005 level of state funding in FY 2006 and held 98% harmless in FY 2007 for any losses they will incur from the elimination of the CODB factor, but providing no guarantees beyond FY 2007 for the changes.

The Governor also proposed slowing the phase-in of the parity aid program, offering funding for the program at 80% in FY2006 and 85% in FY2007, in direct conflict with the Task Force’s recommendation that the program be fully funded as originally planned when it was enacted in 2002. The Ohio Legislative Commission estimates that the difference in Parity Aid, should the Governor’s proposal be accepted, would result in the Parity Aid program being funded at approximately $100 million less than originally planned in FY 2006 and $85 million less in FY 2007.

Consistent with the Task Force’s recommendation, the Governor’s budget proposed the acceleration of the phase-out of the inventory component of the property tax, as well as the two-year phase-out of the machinery and equipment component of the property tax. The Governor’s plan promises to hold districts 100% harmless for the revenue losses due to elimination of the two components of the personal property tax until FY 2011. The effect of this recommendation varies widely across districts; the percentage of local operating revenue generated through the tax on tangible personal property differs across Ohio’s school districts, ranging from 0.1% to 54.8%, with 142 districts relying on the tax for more than 20% of their local operating revenues. The machinery and equipment

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206 Ohio Legislative Service Commission, 2005 Red Book for Department of Education at 12.
208 Id. at 25.
209 Id. at 14 (proposing the creation of new commercial taxes).
210 Executive Budget Briefing Document, FY 2006–2007 at 26. The tangible personal property tax is comprised of three components: inventories, which comprise roughly 39% of tangible personal property tax revenues; machinery and equipment, which comprise roughly 34% of tangible personal property tax revenues; and furniture and fixtures, which comprise roughly 27% of tangible personal property tax revenues. After the Governor’s proposed phase-outs, only the furniture and fixtures component of the tangible personal property tax will remain. See Ohio Legislative Service Commission, 2005 Red Book for Department of Education at 20.
211 Ohio Legislative Service Commission, 2005 Red Book for Department of Education at 19 (explaining that the taxes may be more important to some school districts than to others).
component of the tangible personal property tax provided more than $383 million to school districts in tax year 2003.212

The Governor proposed the introduction of a Commercial Activity Tax (CAT) to replace the lost revenues from the change in property taxes, but not all of the CAT will be allocated to school districts.213

3. What Does the Governor's Proposal Mean in Dollar Terms to School Districts?214

On balance, the governor's budget proposed funding for the Foundation Program of $6.15 billion in FY 2006, and $6.29 billion in FY 2007.215 The increases equal 2.5% and 2.3%, respectively, figures equal to outside economic projections for inflation in the corresponding years,216 effectively holding the Foundation Program at a flat funding level in real economic terms. That the program is being held at flat funding does not reveal the complete story, however: one needs to examine the effect of the plan on individual school districts to gain an idea of how the plan will work.

The Ohio Office of Budget and Management issued its projections on how the Governor's plan would affect each of the school districts in Ohio.217 A cursory glance of the data shows that 439 districts are slated to receive no increase or an increase less than the expected increase in inflation in FY 2006, an effective decrease in funding from the foundation program in real economic terms. Roughly the same number will experience a real economic loss in funding in FY 2007. As can be seen from the table below, the effect of the plan differs depending on the property wealth of the school district:

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212 Id. at 20. Ohio's tax year runs concurrently with the calendar year, as opposed to Ohio's fiscal year of July 1 to June 30.
213 Executive Budget Briefing Document, FY 2006-2007 at 26 (explaining that districts will not be accountable for revenue losses until 2011).
215 Executive Budget Briefing Document, FY 2006-2007 at 23 (increasing funding by approximately 2.4% per year).
216 Blue Chip Economic Indicators, April 10, 2005 (Aspen Publishers).
Table 1: Expected Impact of Governor Taft’s Proposed Changes to the Foundation Program

<table>
<thead>
<tr>
<th></th>
<th>Average Property Valuation per Pupil, 2003 tax-year</th>
<th>Average Spending per Pupil, FY 2004</th>
<th>Expected Change from Governor’s plan, FY 2006</th>
<th>Expected Change from Governor’s plan, FY 2007</th>
</tr>
</thead>
<tbody>
<tr>
<td>Property-Poorest 10</td>
<td>$37,683.70</td>
<td>$8,018.60</td>
<td>3.5%</td>
<td>3.1%</td>
</tr>
<tr>
<td>Property-Wealthiest 10</td>
<td>$419,516.33</td>
<td>$13,420.33</td>
<td>0.0%</td>
<td>-2.0%</td>
</tr>
<tr>
<td>The “Big 8”</td>
<td>$94,613.50</td>
<td>$10,994.75</td>
<td>0.7%</td>
<td>3.5%</td>
</tr>
<tr>
<td>All Districts, ranked by property valuation per pupil</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Lowest Quintile</td>
<td>$63,929.54</td>
<td>$7,850.52</td>
<td>3.1%</td>
<td>2.2%</td>
</tr>
<tr>
<td>Second Quintile</td>
<td>$86,439.37</td>
<td>$7,706.43</td>
<td>2.6%</td>
<td>1.5%</td>
</tr>
<tr>
<td>Middle Quintile</td>
<td>$103,571.35</td>
<td>$7,674.11</td>
<td>2.0%</td>
<td>1.4%</td>
</tr>
<tr>
<td>Fourth Quintile</td>
<td>$131,895.61</td>
<td>$7,961.53</td>
<td>1.2%</td>
<td>0.4%</td>
</tr>
<tr>
<td>Highest Quintile</td>
<td>$207,422.34</td>
<td>$9,366.54</td>
<td>0.6%</td>
<td>-1.1%</td>
</tr>
</tbody>
</table>

Figures in bold denote nominal increases in foundation funding below the expected rate of inflation, suggesting decreases in funding in real economic terms. According to the Governor’s projections, on average, only the school districts in the lowest 40% of rankings by property taxable property per pupil will have increases above expected inflation in fiscal year 2006, while in fiscal year 2007, on average, none of the quintiles will experience foundation funding growth above expected inflation.

The governor’s plan yields some odd results: for example, the so-called “Big 8” school districts (Akron, Canton, Cincinnati, Cleveland, Columbus, Dayton, Toledo, and Youngstown) together will receive an increase in foundation funding less than inflation in fiscal year 2006. Examined individually, the Akron, Columbus, Cincinnati, and Dayton school districts all are slated for no increase in foundation formula funds in 2006. Cincinnati is slated for a 2% decrease in 2007.

Results for individual school districts are also interesting. For example, East Cleveland School District (Cuyahoga County), with one of the highest concentrations of students qualifying for DIPA funding and falling in the lowest quintile when ranking the districts by property valuation, will receive no increase in funding in 2006 and a 2% decrease in funding in 2007 despite the already severe fiscal problems it suffers as indicated by its Fiscal Emergency status. In sharp contrast, Woodridge Local School District (Summit County), with the sixteenth highest property valuation per pupil and spending
over $9,500 per pupil, will receive a 7.7% increase in FY 2006 and an additional 5.8% increase in 2007.

**D. The Legislature’s Response: House Bill 66**

The General Assembly submitted the main operating budget\(^{218}\) for the state to the Governor for his signature on June 29, 2005.\(^{219}\) The Governor signed the bill into law (with some item vetoes) on June 30.\(^{220}\)

The General Assembly incorporated Governor Taft’s suggested revisions to the state’s taxing structure into the budget, creating the corporate activity tax and beginning the phase-out of both the inventory and manufacturing machinery and equipment components of the tangible personal property tax.\(^{221}\) The General Assembly then went beyond the Governor’s recommendation regarding the reduction of tangible personal property tax: although the Governor suggested leaving the furniture and fixtures tax in tact, the General Assembly voted to phase-out this component of the tangible personal property tax as well, resulting in the complete elimination of the tangible personal property tax by tax year 2009.\(^{222}\)

The General Assembly also made four significant changes to calculations in the Foundation Program: it reduced the number of mills used to compute parity aid, effectively lowering the amount of parity aid available to districts;\(^{223}\) it eliminated the state aid guarantee;\(^{224}\) it began phasing out the cost of doing business factor,\(^{225}\) and it altered the method for calculating the formula amount (the cost of a base education).\(^{226}\)

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\(^{221}\) The corporate activity tax will be codified in Chapter 5751 of the Ohio Revised Code, while the changes to the tangible personal property taxes will be codified at Ohio Rev. Code 5711.22. Am. Sub. H.B. No. 66, supra note 218, §§ 5751.01–5751.98 and § 5711.22.

\(^{222}\) Id. § 5711.22

\(^{223}\) Prior to July 1, 2005, parity aid was calculated 9.5 mills times the difference between the district’s wealth per pupil and the average wealth per pupil of the 10th to 30th districts with the highest wealth per pupil. OHIO REV. CODE ANN. § 3317.023(B)–(C). Commencing July 1, 2005, parity aid will be calculated as 7.5 mills times the difference between the district’s wealth per pupil and the average wealth per pupil of the 10th to 30th districts with the highest wealth per pupil. Am. Sub. H.B. No. 66, supra note 218, § 3317.0217(C).

\(^{224}\) Id. (repealing OHIO REV. CODE ANN. § 3317.0212, containing the state aid guarantee).

\(^{225}\) Id. § 3317.017(N).

\(^{226}\) Id. §3317.012(A)–(D).
Instead of calculating the cost of a base education using the expenditures model that was in effect prior to FY 2006, the cost of a base education is now calculated by summing the cost of "building blocks." In particular, the General Assembly has determined the cost of classroom teachers, other personnel support, and non-personnel support necessary for an adequate education. Then, funds for large group intervention, professional development, data-based decision making, and professional development regarding data-based decision making are added to calculated cost of the building blocks to derive the formula amount for each school district.

E. Application of the Positive "Thorough and Efficient" Standard

Given the anticipated effects of the Governor's plan, the budget as enacted by the General Assembly, as well as the known progress of students under the current funding scheme, are Ohio's current and proposed financing systems "thorough and efficient?"

As discussed above, jurisprudence from Ohio and other states share common themes regarding the meaning of "thorough and efficient." These themes are:

(1) The legislature must provide a statewide system—evidence of only a few "failing" districts is not sufficient to trigger a declaration of unconstitutionality.

(2) The state must identify minimum academic standards that identify a "base" education, and ensure that those standards are met. Articulated academic standards should, at a minimum, include targets for math, reading, writing, science, and civics.

(3) While legislatures can require local subdivisions to share funding responsibility through local tax provisions, the state must ensure that all subdivisions receive at least the cost of a base education for each pupil.

(4) A thorough and efficient system only requires equality of spending to the extent that a cost of base education is

\[227\text{ Id. } § 3317.012(A).\]
\[228\text{ Id. } § 3317.012(C)(1).\]
\[229\text{ Am. Sub. H.B. No. 66, supra note 218, } § 3317.012(C)(2).\]
\[230\text{ Id. } § 3317.012(C)(3).\]
\[231\text{ Id. } § 3317.012(C)(4).\]
provided for each student. School districts with adequate means may spend beyond the base amount if they so choose.

(5) A "thorough and efficient" education entails not just meeting academic standards, but also providing safe facilities in which students can learn.

The data available on the condition of school buildings in Ohio are limited, so this Note will not discuss the fifth element. Similarly, because the Ohio Supreme Court has never objected to the school financing scheme on the grounds that it was not a statewide system, this note presumes the first obligation would be met.

First, then, is the issue of standards. The State of Ohio has articulated its academic standards in the Ohio Revised Code: the performance indicators outlined in section 3317.012(B)(1) set forth graduation and attendance rates, and minimum percentages of students in the fourth, sixth, ninth, tenth, and twelfth grades that should score "proficient" or better on standardized mathematics, reading, writing, citizenship, and science tests. The table below shows the 2003-2004 academic year results.

Table 2: Percentage of Ohio Students Scoring "Proficient" or Better on State Proficiency Tests

<table>
<thead>
<tr>
<th>4th Graders</th>
<th>6th Graders</th>
<th>9th Graders*</th>
<th>12th Graders</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Target</td>
<td>Actual</td>
<td>Target</td>
</tr>
<tr>
<td>Citizenship</td>
<td>75.0</td>
<td>59.4</td>
<td>75.0</td>
</tr>
<tr>
<td>Mathematics</td>
<td>75.0</td>
<td>65.8</td>
<td>75.0</td>
</tr>
<tr>
<td>Reading</td>
<td>75.0</td>
<td>70.8</td>
<td>75.0</td>
</tr>
<tr>
<td>Science</td>
<td>75.0</td>
<td>64.4</td>
<td>75.0</td>
</tr>
<tr>
<td>Writing</td>
<td>75.0</td>
<td>78.6</td>
<td>75.0</td>
</tr>
</tbody>
</table>

* The 9th Grade proficiency tests were administered to 10th Graders in 2003-2004.

While the proficiency test results suggest that the secondary education being provided students might be "thorough and efficient" according to the academic standards set by the state, the dismal achievement of fourth and sixth grade students suggests this is not true at the elementary school level (breaking these scores down into ethnic minorities and students from "disadvantaged" backgrounds shows even poorer passage rates). Regardless of the funding structure, the outcome indicates Ohio's system through FY 2005 was
not "thorough and efficient" in providing an adequate education. No program in the Governor's budget is targeted to improving proficiency scores, suggesting the funding system under his plan would be similarly deficient in this area. It is unclear whether the data-based decision making funding enacted by the General Assembly will adequately address the issue of standards.

Failure of Ohio students to meet state-articulated minimum standards aside, the funding system would likely also fail the funding characteristics of the positive "thorough and efficient" standard. The Foundation Formula base cost of educating a student was studied and established in 2001 based on 1999 data, and has been adjusted for inflation each fiscal year at pre-determined rates between 2.1% and 2.8%, without any reevaluation of actual costs or actual inflation. Since 2001, the base cost formula has increased 7.37%, while inflation as measured by the Consumer Price Index (CPI) has risen 8.66%. As the Governor's task force noted, however, CPI inflation is not the appropriate measure to use when determining the change in the base cost. Because approximately 85% of the average school district's budget is employee compensation, which is comprised of wages and benefits, the Employment Cost Index (ECI) should be factored into the base cost adjustments, as well. From 2001-2005, the ECI for state and local government employees increased 14.75%, double the amount anticipated by the General Assembly in setting the base cost inflation factors through 2005. The mechanism to adjust the base cost set in 2001 arguably underestimates the cost of an adequate education in each year thereafter, and the funding formula that relies on it necessarily does the same. That more than one-third of Ohio's school districts either currently face or will face spending deficits within the next three fiscal years also suggests the current funding formula is not funding an adequate education. Failure to guarantee school districts minimum base cost funding that equals the actual cost of providing an adequate education in the current fiscal year violates the fiscal principles of the positive "thorough and efficient" standard.

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235 The Governor's plan does allocate funds for the "continued development of achievement and diagnostic tests," including new math, reading, social studies. New tests could change the proficiency outcomes. The Governor also promotes the development of model curricula in his budget, but the areas of focus are foreign language, fine arts, and technology, areas not reflected in the proficiency tests. Executive Budget Briefing Document, FY 2006-2007 at 27.


237 Governor's Task Force, supra note 171, at 28.

238 Id.

If the current funding formula fails to meet the "thorough and efficient" mandate of the constitution, the Governor’s plan most certainly fails to do so as well. Although the Governor’s plan does calculate the increase in base cost for FY 2006 according to the modified price measure considering the ECI as well as the CPI recommended by the task force, it uses the General Assembly’s FY 2005 figure as its base, which, as noted above, does not reflect the cost of an adequate education in FY 2005. Further, as discussed earlier, the Governor’s plan actually cuts funding in real economic terms for more than two-thirds of Ohio school districts in both FY 2006 and FY 2007.

While the figure for the base cost of an adequate education using the building blocks methodology set by the General Assembly in FY 2006 is presumptively valid,\(^2^{40}\) the inflation adjustment to the figure for FY 2007 creates the same problem endemic to the previous system and the governor’s plan: it underestimates growth in costs. Although its inflation adjustment is now split between personnel and nonpersonnel costs, the adjustment to personnel costs is 2.3% for 2007,\(^2^{41}\) a figure significantly below the projected average compensation growth of 4.1%.\(^2^{42}\)

The Governor’s plan to slow the phasing-in of Parity Aid, something both the Task Force and the Ohio Supreme Court said were necessary to ensure adequate education in poorer districts, also suggests his plan would not adequately fund Ohio schools. Although the General Assembly did not slow the phase-in of the Parity Aid program, its decision to lower the millage rate from which parity aid is calculated reduces the amount of aid available to schools, funding the program at a level lower than anticipated by both the Task Force and the Ohio Supreme Court.

Finally, the Governor’s suggested elimination of Foundation Program funding through the acceleration of the elimination of the inventory tax and the elimination of the tangible tax on machinery and equipment without guarantee of a replacement revenue stream seems to seriously jeopardize the state’s ability to simply maintain funding to school districts (even if it is redistributed) at arguably inadequate levels.\(^2^{43}\) Most certainly the General Assembly’s complete

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\(^{240}\) The Ohio Supreme Court has ruled that policy determinations manifested in legislation (such as the cost of an adequate education) are presumptively valid. See DeRolph I, 677 N.E.2d 733, 737 (Ohio 1997) (stating, “We are aware that the General Assembly has the responsibility to enact legislation and that such legislation is presumptively valid”).

\(^{241}\) Am. Sub. H.B. No. 66, supra note 218, § 317.012(B)(2).

\(^{242}\) Blue Chip Economic Indicators, ECONOMETRIC DETAIL, Vol. 21, No. 3, September 10, 2005.

\(^{243}\) Districts are only held 100% harmless in FY 2006, and at 98% in FY 2007, without any
elimination of all tangible personal property taxes causes the same uncertainty regarding revenue streams.

All three systems have deficiencies that must be addressed before Ohio's system of public schools under them could be considered constitutional under the positive "thorough and efficient" standard. The problems with the structure of the systems, however, are not so great that they cannot be overcome. Optimally, the General Assembly should undertake a study of the cost of adequate education every five years, to be certain it captures the changing costs of technologies, textbooks, and other inputs to education. It would then need to review the inflation adjustment proposed in each budget cycle to ensure the projected figure was in-line with actual inflation growth. With change to the base cost formula adjustment procedure, the Foundation Formula would likely cover the minimal cost of an adequate education: the gap aid payments eliminate the problem of phantom revenue, DPIA payments assist school districts in meeting the needs of their disadvantaged pupils, and parity aid payments permit less wealthy school districts the opportunity to make discretionary outlays to improve offerings where their students need it most.

While structurally sound, the system would not be constitutional unless it actually funded school districts at the mandated level. Both the Governor's plan and the system enacted by the General Assembly create uncertainty in funding by eliminating revenue streams and only partially replacing them. The Governor's plan also creates a problem in that it decreases in funding expected for two-thirds of the school districts once the figures are inflation-adjusted. While most of the wealthier school districts will be unaffected by the change, poorer school districts, such as East Cleveland, most certainly will not be able to absorb the loss. The General Assembly failed to issue revenue projections for school districts; it is unclear whether this problem remains under the newly-enacted system. The General Assembly's modification to the parity aid program, however, is likely to reduce the amount of money available to poorer districts.

Regarding the failure of the school system to meet academic standards, analysis of the strategies successful schools implement should be conducted, as should research on the specific needs of the groups that fail to perform well, such as disadvantaged students. As the Governor suggested, the testing tools should also be studied for guarantee beyond that, and the Governor's lack of specificity regarding the portion of the CAT to be attributed to the Foundation Program does not suggest solid funding for the program from this tax.
defects or biases that might disadvantage student populations within
the testing group.

IV. CONCLUSIONS

Thirteen years ago, the DeRolph case began a highly charged
debate over the constitutionality of Ohio’s Foundation Program. Four
Supreme Court decisions failed to provide a positive definition of the
Ohio Constitution’s Thorough and Efficient Clause, and the General
Assembly’s attempts to create a system that met the constitutional
mandate fell short. The case concluded with the Supreme Court
relinquishing jurisdiction over the dispute, without ever issuing a
finding that the system of funding in Ohio was constitutional.

The themes in DeRolph, combined with the themes from
jurisprudence of other state high courts, suggest a positive “thorough
and efficient” standard for public education. The positive standard
requires a statewide system, in which the state serving at least as
guarantor of a minimum level of funding that is sufficient to permit
school districts to provide a base education that meets articulated
academic standards in math, science, reading, writing, and civics. While equality is required up to the level of a base education, the state
need not ensure equality of funding beyond the base education
funding level.

The Ohio School Foundation Program in its FY 2005 form is
arguably the closest incarnation of a “thorough and efficient” system
the General Assembly has created to date, but still needs slight
modification to ensure the base amount used in the funding formula
actually reflects the base cost of an adequate education and to ensure
students actually obtain an adequate education as measured by state
testing programs. The Governor’s proposed modifications to the
Funding Formula, as well as the plan enacted by the General
Assembly for FYs 2006-07 seem to have potential to move Ohio
further away from a constitutionally “thorough and efficient” system, by reducing funding for poorer districts and placing the revenue streams that fund the Foundation Program in question.

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