Developing a School Funding Remedy Framework for Ohio and Beyond

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I. INTRODUCTION

> Some of our students are being educated in former coal bins in Mt. Gilead. In Flushing the students have no restroom in the school building itself. In Brown County the only library is an abandoned library truck; the band practices in the kitchen and plays in the cafeteria during lunch. In Nelsonville the building is slipping down a hill. At Plaintiff Northern Local children are educated in modular units situated outside the school with no running water. At Plaintiff Southern Local students recently completed their entire school careers in buildings that for the most part were determined to be improper housing in 1981. Prior to obtaining their new facility Southern Local Board Member Louis Altier was of the opinion that his animals were housed better than his district's school children—at least they were dry and warm.[1]

Such is the current state of public education for many of the children in Ohio. The problem is not limited to Ohio, however, but is national in scope and alarming in magnitude. A recent report issued by the General Accounting Office estimates that one-third of the nation's eighty thousand public schools are in such poor repair that the students attending them are being educated in unsafe or unsuitable conditions.[2]

For over twenty years a battle has been waged in the courts to help redress the above-mentioned inequities in public education. Most of the attacks have centered on spending per-pupil disparities, which result from funding

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[1] DeRolph v. State, No. 22043, mem. op. 463, 474 (Ohio C.P., Perry County, July 1, 1994).

[2] *See* William H. Honan, *14 Million Pupils in Unsuitable or Unsafe Schools, Report Says*, N.Y. TIMES, Feb. 2, 1995 at A21. As educator and author Johnathan Kozol stated after touring poor school districts nationwide:

> One searches for some way to understand why a society as rich and, frequently, as generous as ours would leave these children in their penury and squalor for so long—and with so little public indignation. Is it Unusual? Is it an American Anomaly? Even if the destitution and the racial segregation and the toxic dangers of the air and soil cannot be immediately addressed, why is it that we can't at least pour vast amounts of money, ingenuity and talent into public education for these children?

JOHNATHAN KOZOL, SAVAGE INEQUALITIES 40 (1991).

mechanisms that rely largely on local property taxes.[3] In 1973 the United States Supreme Court effectively closed the federal courts to challenges against disparities in state funding systems by refusing in *San Antonio Independent School District v. Rodriguez*[4] to recognize a fundamental right to education under the United States Constitution.[5] This decision did not sound the death-knell for school funding litigation, however, as litigants quickly seized the opportunity to bring their claims in state court under state constitutional law.

School funding plaintiffs found—and continue to find—state courts attractive for two main reasons. First, state courts in their interpretation of their state equal protection clauses can go beyond holdings of the United States Supreme Court and recognize a broader class of constitutionally-protected rights.[6] Second, unlike the federal constitution, all of the state constitutions contain an education clause of some kind.[7] While these clauses differ in wording from state to state, they allow state courts to use explicit, textually-

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[3] *See* Mark Jaffe & Kenneth Kersch, *Guaranteeing a State Right to a Quality Education: The Judicial-Political Dialogue in New Jersey*, 20 J.L. & EDUC., 271, 279 (1991). Districts that have higher property values can tax at a lower rate and still raise much more revenue for the schools than districts with low property values. When one also considers that residents in low property value districts are already being highly taxed to provide for basic municipal functions, such as police and fire protection, it becomes evident why so many poor districts cannot raise sufficient funds for education. *See id.*

[4] 411 U.S. 1 (1973).

[5] *Id.* at 29–40. The Court then applied the rational basis test and found that the property tax-based system was rationally related to the legitimate state interest of giving substantial control over the education system to the local school districts. *Id.* at 55.

One author claims that even with *Rodriguez*, a federal judicial remedy is still possible under "suspect classification" analysis, the other possible avenue besides "fundamental rights" analysis for courts to invoke "strict scrutiny." Because the majority of the education problems are in the inner city, the argument is that the inner city poor create a definable "suspect classification." *See* Amy Schmitz, Note, *Providing an Escape for Inner City Children*, 78 MINN. L. REV. 1639, 1662 (1994).

[6] *See* Bill Swinford, *Shredding the Doctrinal Security Blanket: How State Supreme Courts Interpret Their State Constitutions in the Shadow of* Rodriguez, 67 TEMP. L. REV. 981, 981 (1994). The ability and willingness of state courts to go beyond the holdings of the United States Supreme Court in equal protection jurisprudence exists even though most state supreme courts have adopted the equal protection methodology used by the United States Supreme Court. *Id.*

[7] Jonathan Banks, Note, *State Constitutional Analysis of Public School Finance Reform Cases: Myth or Methodology*, 45 VAND. L. REV. 129, 140 (1992). There is some debate on whether the education clauses in Alabama and Mississippi contain a specific duty to educate. *Id.* at 140 n.65.

grounded support to eliminate gross funding disparities in public education.[8] Plaintiffs have indeed utilized both state equal protection and education clauses in their attack on property tax-based funding systems. The results of these cases have been mixed, as some courts have upheld their funding systems against constitutional challenges,[9] while others have held that their state funding systems violate the education clause,[10] the equal protection clause,[11] or both.[12]

Out of this substantial and amorphous body of case law, three important trends have emerged. First, state courts in recent years have been more willing to find property tax-based funding systems unconstitutional under their state constitutions.[13] Second, litigants and courts are utilizing education clauses

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[8] *See* Molly McUsic, *The Use of Education Clauses in School Finance Reform Litigation*, 28 HARV. J. ON LEGIS. 307, 311 (1991). Relying solely on the education clause allows courts to avoid the difficult questions and possible ramifications associated with "fundamental rights" and "suspect classification" analysis. *See id.* at 313. Education clauses are also appealing to litigants and courts because strict equality principles are not necessarily involved, as they are with equal protection clauses. *Id.* at 312.

[9] *See, e.g.*, Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005 (Colo. 1982); McDaniel v. Thomas, 285 S.E.2d 156 (Ga. 1981); Thompson v. Engelking, 537 P.2d 635 (Idaho 1975); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758 (Md. 1983); Skeen v. State, 505 N.W.2d 299 (Minn. 1993); Board of Educ., Levittown Free Sch. District v. Nyquist, 439 N.E.2d 359 (N.Y. 1982), *appeal dismissed for want of substantial federal question*, 459 U.S. 1138 (1983); Board of Educ. of City Sch. Dist. of Cincinnati v. Walter, 390 N.E.2d 813 (Ohio 1979), *cert. denied*, 444 U.S. 1015 (1980); Fair Sch. Fin. Council of Okla., Inc. v. State, 746 P.2d 1135 (Okla. 1987); Olsen v. State, 554 P.2d 139 (Or. 1976); Danson v. Casey, 399 A.2d 360 (Pa. 1979); Richland County v. Campbell, 364 S.E.2d 470 (S.C. 1988); Scott v. Commonwealth, 443 S.E.2d 138 (Va. 1994); Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989).

[10] *See, e.g.*, Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806 (Ariz. 1994); Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989); Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684 (Mont. 1989), *amended by* 784 P.2d 412 (1990); Abbott v. Burke, 575 A.2d 359 (N.J. 1990); Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71 (Wash. 1978); Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979).

[11] *See, e.g.*, DuPree v. Alma Sch. Dist. No. 30, 651 S.W.2d 90 (Ark. 1983); Serrano v. Priest, 557 P.2d 929 (Cal. 1976), *cert. denied sub nom.* Clowes v. Serrano, 432 U.S. 907 (1977); Horton v. Meskill, 376 A.2d 359 (Conn. 1977); Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310 (Wyo.), *cert. denied sub nom.* Hot Springs County Sch. Dist. No. 1 v. Washakie County Sch. Dist. No. 1, 449 U.S. 824 (1980).

[12] *See, e.g.*, Opinion of Justices, 624 So. 2d 107 (Ala. 1993) (upon state senate request, the Alabama Supreme Court advised that the legislature was required to comply with circuit court order to provide students with equitable educational opportunities); Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139 (Tenn. 1993); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989).

[13] *See* Gail R. Levine, *Meeting the Third Wave: Legislative Approaches to Recent Judicial School Finance Rulings*, 28 HARV. J. ON LEGIS. 507, 508 (1991) (stating that the

more, either by themselves or in conjunction with state equal protection clauses.[14] Finally, and most importantly for purposes of this Note, a noticeable gap between "right and remedy" has emerged in the majority of the states striking down education funding systems.[15]

This Note provides a suggested framework for the Ohio Supreme Court[16] and other state supreme courts when and if they grapple with the remedy stage of school funding litigation. While other articles have thoroughly covered the question of whether funding disparities of large magnitudes are unconstitutional in Ohio and in other states,[17] there remains an important unresolved question: what should be the next step *after* a state court has declared a school funding system unconstitutional. Whether and to what extent the courts should involve themselves in the remedy stages of school funding litigation are questions that must be carefully considered and resolved in order to help secure a constitutionally acceptable level of education. While this Note focuses on the school funding litigation in Ohio and proceeds under the assumption that the Ohio Supreme Court will find the current system of funding unconstitutional, the remedy framework developed herein is intended to be one of general applicability. Because the states are all facing similar issues in the remedy stage, these issues can be addressed largely by developing a single framework.[18]

Part II of this Note briefly discusses the history and current state of school funding in Ohio in order to set the framework for the remedy analysis in the rest of the Note. Part III argues that while courts were originally correct in granting total deference to the legislature during the remedy stage, history and

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"third wave" of school funding litigation, started in 1989, has produced extremely favorable results for plaintiffs).

[14] *See* McUsic, *supra* note 8, at 311; *supra* notes 10, 12 and accompanying text (citing cases that have relied upon the education clause alone or the education clause in conjunction with the equal protection clause).

[15] *See* Schmitz, *supra* note 5, at 1654; Note, *Unfulfilled Promises: School Financing Remedies and State Courts*, 104 HARV. L. REV. 1072, 1085 (1991).

[16] *See infra* part II for the discussion on school finance litigation in Ohio.

[17] *See, e.g.*, Morris L. Hawk, *"As Perfect As Can Be Devised":* DeRolph v. State of Ohio *and the Right To Education in Ohio*, 45 CASE W. RES. L. REV. 679 (1995); Susan P. Leviton & Matthew H. Joseph, *An Adequate Education For All Maryland's Children: Morally Right, Economically Necessary, and Constitutionally Required*, 52 MD. L. REV. 1137 (1993); Karen V. Martin, Comment, *Constitutional Law*—Tennessee Small School Systems v. McWherter*: Opening the Door for Education Reform*, 24 MEM. ST. U. L. REV. 393 (1994); Troy Reynolds, Note, *Education Finance Reform Litigation and Separation of Powers: Kentucky Makes Its Contribution*, 80 KY. L.J. 309 (1992).

[18] This is not to say that all of the issues are identical or that what works for one state will necessarily work for another.

logic show that this level of deference is no longer warranted. Finally, Part IV proposes a framework for state supreme courts to follow in the remedy stage to determine an acceptable and necessary level of judicial involvement. This framework includes: (1) analyzing the nature of the relationship between the legislature and the courts to help determine the level of judicial involvement; (2) providing a workable definition of the education clause to the legislature; (3) helping to ensure that a system which is in conformity with the state constitution is indeed established; (4) retaining jurisdiction during the remedy stage; and (5) exercising judicial restraint once a court approved plan is in place.

II. SCHOOL FUNDING IN OHIO

In the 1976 school funding case, *Board of Education v. Walter*, the Ohio Supreme Court upheld the property tax-based system of financing education.[19] While the court did not explicitly hold that a fundamental right to education is lacking under the Ohio Constitution, the court applied the rational basis test because the case dealt with "difficult questions of local and statewide taxation, fiscal planning and education policy . . . ."[20] In rejecting the equal protection claim, the court found that the current system of funding was rationally related to the legitimate state interest of allowing and fostering control in the local school districts.[21] While the court acknowledged that the state education clause required a "thorough and efficient" education,[22] the court found that an adequate education was available for all students in Ohio; and because the education clause gives the power of the purse to the legislature, the court granted great deference to the legislature in determining the meaning and reach of an adequate education.[23]

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[19] 340 N.E.2d 813 (Ohio 1979), *cert. denied*, 444 U.S. 1015 (1980).

[20] *Id.* at 819.

[21] *Id.* at 819–20. The court stated: "[w]e conclude that local control provides a rational basis supporting the disparity in per pupil expenditures in Ohio's school districts. This conclusion is valid from an historical point of view, and is also supported by conventional wisdom concerning educational policy." *Id.* at 821. In reaching this determination, the court relied primarily on the United States Supreme Court's holding in *Rodriguez*. *Id.*

[22] *Id.* at 380. The Ohio Constitution states that "[t]he 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 . . . ." OHIO CONST. art. VI, § 2.

[23] *Id.* at 388–89. It is interesting to note that the court found only that an "adequate education" was available to all of Ohio's youth, not a "thorough and efficient" one. As one author aptly notes, *Walter* is a "curious opinion" in that "the court decided the case without ever deciding [the important] issues. It failed to determine whether education was a

Since the *Walter* decision, the state has continued to rely largely on local property taxes to fund public education. By so doing, the state has perpetuated an unconscionable disparity. The wealthiest districts receive roughly eleven thousand dollars per year per student, and the poorest districts receive around three thousand dollars per year per student.[24] Only two other states have funding systems for education more inequitable than Ohio's.[25]

The Ohio Coalition for Equity and Adequacy in School Funding[26] recently challenged this disparity in *DeRolph v. State.*[27] In a thorough opinion,[28] the Perry County Common Pleas Court found education to be a fundamental right and held that the current system of education finance in Ohio was unconstitutional under the state equal protection and education clauses.[29] The court distinguished *Walter* on the grounds that *Walter* dealt with the state school funding system in the 1970's, while *DeRolph* focused on the system in the 1990's.[30] In particular, the court stated:

> Everyday education becomes more and more important and the connection between education and the rights guaranteed by Art. I § 1 becomes greater and greater. Today we live in a high tech world. A world that is becoming more technologically advanced at a rapid pace. The measure of education has never been viewed as a static measure. . . . In light of our founding fathers' constitutional guarantees and the extreme importance of education in today's society this Court finds education to be a fundamental right guaranteed by the Ohio Constitution.[31]

In holding that the State had not provided a "thorough and efficient" system of education, the court cited to the gross inequity of education funding among the districts, the large percentage of high school seniors who had not yet mastered freshman-level skills, and the deplorable physical environment that existed in

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fundamental right and . . . [it] decided the [thorough and efficient] issue on its own facts, not the trial court findings." Hawk, *supra* note 17, at 686.

[24] Mary Beth Lane, *State Board Refuses to Back Voinovich on School Funding Fight*, CLEVELAND PLAIN DEALER, July 13, 1994, at 1A.

[25] DeRolph v. State, No. 22043, mem. op. 463, 468 (Ohio C.P., Perry County, July 1, 1994).

[26] The coalition represents 500 of the 612 school districts in Ohio. Hawk, *supra* note 17, at 680–81.

[27] DeRolph v. State, No. 22043, mem. op. 463, 474 (Ohio C.P., Perry County, July 1, 1994).

[28] The opinion (including the findings of fact) is over 500 pages long.

[29] DeRolph v. State, No. 22043, mem. op. 463, 475 (Ohio C.P., Perry County, July 1 1994).

[30] *Id.* at 466.

[31] *Id.* at 468–69.

the plaintiff school districts.[32] While this was a momentous victory for proponents of school funding reform, the celebration was short lived.

The Ohio Court of Appeals, in an opinion severely lacking in substance, reversed the decision of the common pleas court.[33] With absolutely no analysis, the court dismissed the common pleas court's determination that the increased emphasis on education today elevated education to the status of a "fundamental right."[34] In holding that local control provided a rational basis for the disparity produced by the state funding system, the court did not address the common pleas court's conclusion that local control without sufficient funds amounted to no control at all.[35] What is worse, the court mixed in notions of the political question doctrine with its entire discussion here, by stating, "[t]his issue should not be legislated by the judiciary but should be brought before the General Assembly for public debate and change if necessary or desired."[36] This statement is simply preposterous, given that the Ohio Supreme Court in *Walter* held that the judiciary had a duty to rule on the constitutionality of school funding legislation passed by the Ohio Legislature.[37] Finally in reversing the common pleas court's conclusion that the funding system violated the education clause, the court merely stated that "no expert testimony was offered to establish that [the plaintiff school districts] lacked the means to come into compliance [with the state laws] for those areas in which school administrators believe that a lack of compliance currently exists."[38] The court did not address the common pleas court's substantial findings of fact on the "thorough and efficient" issue, and absolutely no analysis was undertaken by the court to determine if the state standards themselves created a system of education that was not "thorough and efficient." Simply put, the court of appeals opinion has a conclusion but no analysis. As the plaintiffs have appealed this decision, the Ohio Supreme Court will have the final word on the constitutionality of the school funding system in Ohio.[39]

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[32] *Id.* at 473–75.

[33] DeRolph v. State, No. CA-477, 1995 Ohio App. LEXIS 3915 (Aug. 30, 1995).

[34] *Id.* at *9–12.

[35] *See id.*

[36] *Id.* at *10–11.

[37] *See* Board of Educ. v. Walter, 390 N.E.2d 813, 823 (Ohio 1979).

[38] DeRolph v. State, No. CA-477, 1995 Ohio App. LEXIS 3915, *13 (Aug. 30, 1995).

[39] *See* Thomas Suddes, *Schools Drift Into Eighth Inning*, CLEVELAND PLAIN DEALER, Sept. 7, 1995 at 11B.

III. REDUCING THE LEVEL OF JUDICIAL DEFERENCE IN THE REMEDY STAGE

A. *The Reasons for Judicial Deference Are Largely Historically Based*

To understand why there has been little judicial involvement during the remedy stages of school funding litigation, the reasons for the initial reluctance by the judiciary to offer relief of any kind to plaintiffs should be considered. Courts were reluctant to take an aggressive role in school funding litigation for two main reasons.[40] First, courts believed that there was no certainty on how to provide the greatest educational opportunity for all of the state's children.[41] Courts that relied on this ground for non-involvement believed that they lacked the "judicial competence" to effectively understand and manage an issue so involved and complex as school funding.[42] Second, courts did not want to excessively involve themselves with issues of taxation.[43] Because most state constitutions give the taxing powers to the legislature, courts feared that excessive involvement with school funding would disrupt the legislatures' "power of the purse."[44]

These concerns expressed by the courts were and are theoretically legitimate; however, the harsh reality was that the state legislatures were not adequately addressing the significant inequalities present in their respective education systems. Starting with favorable rulings by the highest courts in California[45] and New Jersey,[46] state courts began to address the ineptitude of the legislatures by striking down inequitable funding systems.[47] Yet these were uncharted waters for judicial involvement. To successfully navigate in this unknown area of judicial review, the courts tried to craft their holdings to emphasize the fact that the solutions to the problems of school funding still rested primarily with the legislature.[48]

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[40] *See* Unified Sch. Dist. No. 229 v. State, 885 P.2d 1170, 1188–89 (Kan. 1994) (citing to the many courts that have relied on these reasons in justifying their deference).

[41] *Id.*

[42] John Dayton, *An Anatomy of School Funding Litigation*, 77 WEST. ED. LAW REP. 627, 645 (1992).

[43] *See Unified School Dist. No. 299*, 885 P.2d at 1189.

[44] *See* Note, *Unfulfilled Promises*, *supra* note 15, at 1083.

[45] Serrano v. Priest, 557 P.2d 929 (Cal. 1976), *cert. denied*, 432 U.S. 907 (1977).

[46] Robinson v. Cahill (*Robinson I*), 303 A.2d 273 (N.J.), *cert. denied*, 414 U.S. 976 (1973).

[47] *See supra* notes 10–12 and accompanying text.

[48] *See* George D. Brown, *Binding Advisory Opinions: A Federal Courts Perspective on the State School Finance Decisions*, 35 B.C. L. REV. 543, 544 (1994).

This deference continues today[49] and consists of essentially three characteristics. First, the courts have given little guidance to the legislatures on what is a constitutionally acceptable level of education.[50] This is not to say that the courts have neglected the constitutional analysis. What the courts have neglected, is the translation of the legal analysis into a practical and workable definition for the legislature.[51]

Second, the advice or guidance given by the courts has largely focused on increasing the funding levels, that is, increasing the education "inputs,"[52] to the districts not receiving the constitutionally required level of education. Courts have been reluctant to define the constitutional requirements of education reform in terms of performance improvements, that is, education "outputs."[53] Finally, state supreme courts have been extremely reluctant to take various measures, such as allowing the trial court to retain jurisdiction during the remedy stage,[54] that would send a clear message to the legislature indicating the court's willingness and ability to correct the problems with the education system.

While the judiciary's perceived lack of competence in the areas of education reform and taxation[55] help explain the reasons for this continued deference, other factors are influential. First, the majoritarian constraints that a democratic society places on many state courts may lead the courts to shy away from unpopular decisions.[56] Most state judges are elected and subjected to periodic review by the electorate.[57] Furthermore, because most state constitutions, unlike the federal constitution, are easily amended, a broad ruling

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[49] *See* Brown, *supra* note 48, at 544. A few state supreme courts, however, have recently taken a more involved role. Charles S. Benson, *Definitions of Equity in School Finance in Texas, New Jersey, and Kentucky*, 28 HARV. J. ON LEGIS. 401, 407–20 (1991) (stating that Texas, New Jersey, and Kentucky have taken a more active and expansive role in defining their various constitutional requirements for education). Out of these three states, however, the courts in Texas and New Jersey have both had difficulties in securing the constitutionally required level of education. The problems with the remedies in Texas and New Jersey, and the strong points of the Kentucky decision are discussed *infra* part IV.C.

[50] This shortfall has decreased somewhat recently. Both the Kentucky and New Jersey Supreme Courts have clearly and concisely defined their respective constitutional requirements. *See* Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989); Abbott v. Burke (*Abbott II*), 575 A.2d 359 (N.J. 1990).

[51] *See infra* part IV.B for the proposed framework for Ohio.

[52] *See* Levine, *supra* note 13, at 516; Benson, *supra* note 49, at 417–20.

[53] *See* Levine, *supra* note 13, at 518–19.

[54] *See* Note, *Unfulfilled Promises*, *supra* note 15, at 1085–86.

[55] *See supra* notes 40–44 and accompanying text.

[56] *See* Note, *Unfulfilled Promises*, *supra* note 15, at 1083.

[57] *Id.* at 1084.

by a state court could possibly raise a question about the legitimacy of the court.[58] Finally, Professor George Brown contends that the state courts, to some extent, are consciously developing their own approach to this complex issue.[59] He argues that, by being less managerial and more advisory, the courts are attempting to conquer the school funding crisis by forging a bond and fostering a working relationship with the legislature.[60] While all of the above factors help explain the reasons for the judicial deference, they do not justify the continuation of this level of deference, especially in light of the problems encountered by litigants in securing an adequate education.

B. *The School Funding Saga in New Jersey Illustrates the Need for Increased Judicial Involvement*

One need only look to the saga of school funding litigation in New Jersey to see how the "gap between right and remedy" in school funding litigation emerged.[61] The New Jersey Supreme Court first declared the school funding system unconstitutional in 1973 in *Robinson v. Cahill.*[62] Since the original ruling, the New Jersey Supreme Court has handed down *nine* more rulings or orders on the subject.[63] After five rulings granting plenty of time and deference to the legislature, the court finally issued an injunction that forbade the state from operating an unconstitutional school system.[64] While the legislature then developed a new funding plan and the court lifted the injunction,[65] the school funding crisis was far from over.

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[58] *Id.*

[59] *See* Brown, *supra* note 48, at 563–67.

[60] *Id.* at 566.

[61] *See* Note, *Unfulfilled Promises*, *supra* note 15, at 1078. While New Jersey is being used as the main example in this section, the problems that the New Jersey Supreme Court has had to confront are hardly unique to New Jersey. To date, courts in California, Texas, West Virginia, New Jersey, and Washington have had to confront "second round" compliance litigation after their respective state supreme courts had declared the education system unconstitutional. *See also* G. Alan Hickrod et al., *The Effect of Constitutional Litigation on Education Finance: A Preliminary Analysis*, 18 J. OF EDUC. FIN. 180, 208–09 (1992).

[62] Robinson v. Cahill (*Robinson I*), 303 A.2d 273 (N.J.) *cert. denied sub nom.* Dickey v. Robinson, 414 U.S. 976 (1973).

[63] *See* Mark Jaffe & Kenneth Kersch, *supra* note 3, at 282.

[64] Robinson v. Cahill (*Robinson VI*), 358 A.2d 457 (N.J.), *injunction resolved by* 360 A.2d 400 (1976).

[65] Robinson v. Cahill (*Robinson VII*), 360 A.2d 400 (N.J. 1976).

The new funding plan was then challenged in *Abbott v. Burke*[66] for its failure to achieve a "thorough and efficient"[67] education for the urban poor. Even though the supreme court found the plan unconstitutional as applied to the urban poor,[68] the court refused once again to impose its own remedy.[69] The legislature again revised the plan and it was once again challenged in court. In 1994 the court ruled that the plan was still unconstitutional as applied to the urban poor.[70] While the court retained jurisdiction and stated that it would enter orders in appropriate circumstances, it gave the legislature until September 1996 to ensure that a plan is implemented that will ensure "substantial equivalence" among all the students and that the needs of those in special education programs are sufficiently integrated into the plan.[71] In deciding against taking a more active role, the court noted that the legislature had made substantial progress toward meeting the constitutional mandate set by the court.[72] While the court had good motives in granting deference to the legislature here,[73] many commentators believe that "the court's impassioned quest for equal educational opportunities remains an illusory one."[74]

Given the saga of litigation in New Jersey and other states, coupled with the somewhat disappointing results in securing an effective remedy,[75] one might plausibly conclude that the school funding experiment by the courts was a failure and that they should no longer be involved with the issue. With the great inequities present in the current system, however, removing the courts from this legitimate exercise of judicial review would only exacerbate the

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[66] Abbott v. Burke (*Abbott II*), 575 A.2d 359 (N.J. 1990).

[67] New Jersey's education clause is extremely similar to Ohio's. *See supra* note 22 for text of Ohio's "thorough and efficient" clause.

[68] *Abbott II*, 575 A.2d at 363.

[69] *Id.* at 411.

[70] Abbott v. Burke (*Abbott III*), 643 A.2d 575, 576 (N.J. 1994).

[71] *Id.* at 576–77.

[72] *Id.*

[73] See *infra* part IV and accompanying text for an analysis of when courts should give more deference to the legislatures.

[74] *See, e.g.*, Edward B. Foley, Education for Deliberative Democracy: Defining a Constitutional Standard of Educational Opportunity, (Aug. 1995) (unpublished manuscript on file with *Ohio State Law Journal*). For the problems with the *Abbott* approach and ways to improve upon it, see *infra* part IV.B.

[75] There is overall agreement that substantial deference in other states during the remedy process has also created problems in securing a constitutionally acceptable education. *See* Note, *Unfulfilled Promises*, *supra* note 15, at 1078–81 (arguing that the legislatures have been unable to construct sufficient remedies largely because the wealthy school districts have disproportionate control over the legislative process); Schmitz, *supra* note 5, at 1661–72 (arguing for federal judicial intervention to more adequately ensure a remedy for the urban poor).

problem.[76] Yet at the same time, continuing under the assumption that the courts can sufficiently address the problems by merely declaring the current education system unconstitutional is no longer warranted.[77] The courts need to consider the level and type of involvement they will take. The following section of this Note addresses both of these issues.

IV. DETERMINING HOW MUCH AND WHAT KIND OF JUDICIAL INVOLVEMENT IS NECESSARY TO SECURE AN EFFECTIVE REMEDY

A. *The Level of Involvement Should Depend to Some Extent on the Legislature's Willingness to Act*

A few courts have correctly concluded that the willingness of the legislature to take the initiative to eliminate gross disparities caused by traditional funding mechanisms should be a key factor in determining the level of judicial involvement. For example, the Arizona Supreme Court, which recently found the Arizona property tax-based system unconstitutional, granted substantial deference to the legislature to enact a system of funding that satisfies the Arizona constitutional requirement of a "general and uniform" education.[78] The court justified this deference by stating that, "there is significant public support for reform and that the Governor, the Superintendent of Public

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[76] While school funding cases do involve issues of taxation and legislative planning, the court's job is not to enact a new plan, but to decide whether the contested plan passes constitutional muster. This is by no means "judicial legislation." As the Kentucky Supreme Court stated:

> The issue before us—the constitutionality of the system of statutes that created the common schools—is the only issue. To avoid deciding the case because of "legislative discretion," "legislative function," etc., would be a denigration of our own constitutional duty. To allow the General Assembly . . . to decide whether its actions are constitutional is literally unthinkable.

Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 209 (1989).

[77] As one author stated, "[o]ne of the ironies in this judicial deference is that 'efforts by courts to avoid direct involvement in formulating change may have the effect of extending the duration of their involvement and thereby arousing the very charges of meddling that they were attempting to prevent.'" Dayton, *supra* note 42, at 646 (quoting La Morte, *Court Decisions and School Finance Reform*, 21 EDUC. ADMIN. Q. 59, at 72 (1985)).

[78] Roosevelt Elementary Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 812 (Ariz. 1994).

Instruction, and some legislators have attempted to take up the challenge."[79] Similarly, the Kansas and Iowa Supreme Courts refused to invalidate education funding systems largely because their respective legislatures had recently enacted entirely new systems with the intention of eradicating the disparities present in the old systems.[80] In fact, the Kansas legislature enacted the new education system after a trial court found the old system unconstitutional in 1991.[81] This prompt response by the Kansas legislature most likely increased the amount of deference that the Kansas Supreme Court was willing to give.

With these cases in mind, the amount of deference the Ohio Supreme Court gives the legislature should depend largely on whether the legislature has already enacted remedial legislation, or whether it is content with the current system and merely hoping that the court will uphold its constitutionality. If the Ohio legislature is concerned that broad mandates by the supreme court will restrain its legislative capabilities, then the legislature should take the initiative by completely restructuring the present system *now*, before the Ohio Supreme Court hears the *DeRolph* case.[82] At the present time, however, the legislature appears to be waiting to see how the supreme court rules before enacting any type of sweeping legislation.[83] Governor George Voinovich has voiced his displeasure with the trial court ruling and has indicated that he is waiting for the Ohio Supreme Court to rule on the issue.[84] If this is indeed true, the

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[79] *Id.* at 816 n.9 (citing *Education Finance: What a Mess*, ARIZONA REPUBLIC, Feb. 22, 1994, at B8). The court, however, did order the trial court to retain jurisdiction "to determine whether, within a reasonable time, legislative action had been taken." *Id.* For more on the retention of jurisdiction issue see *supra* part III.E.

[80] *See* Exira Community Sch. Dist. v. State, 512 N.W.2d 787, 793 (Iowa 1994); Unified Sch. Dist. No. 229 v. State, 885 P.2d 1170 (Kan. 1994), *cert. denied sub nom.* Unified Sch. Dist. No. 244 v. Kansas, 115 S. Ct. 2582 (1995).

[81] *Unified Sch. Dist. No. 229*, 885 P.2d at 1178. The trial court decision, Mock v. State, No. 91 Civ. 1009 (Kan. D.C., Shawnee County, Oct. 14, 1991), was handed down in October of 1991, and before the end of 1992 the legislature repealed the old school act and enacted the School District Finance and Quality Performance Act. *Id.* at 23. Unless the new act was facially unconstitutional (which it was not), it would be hard to imagine a situation where a court, without jeopardizing its legitimacy, could strike down an entirely new system of education.

[82] *See* Levine, *supra* note 13, at 538-39 (arguing that legislators should seize the moment and enact legislation that is completely of their own doing, rather than being restricted by a court opinion telling them what they can and cannot do).

[83] *See* Editorial, *Education Gets the Spotlight; But That Doesn't Mean it Gets the Innovation and Support it Needs to Better Educate Children*, CLEVELAND PLAIN DEALER, June 27, 1995, at 8B.

[84] *See* Hawk, *supra* note 17; Mary Beth Lane, *Education Chief Wants Fair Funding*, CLEVELAND PLAIN DEALER, Oct. 15, 1994, at 7B. The Governor concedes that the current funding system is inequitable, but he contends that it is not unconstitutional. *Id.* at 7B. This

reluctance to change closely resembles that of the New Jersey legislature during the *Robinson* era[85] and should lead the Ohio Supreme Court to take a more active role in the remedial stage of the litigation.

B. *The Court Should Give a Workable Definition of a "Thorough and Efficient" Education to the Legislature*

Regardless of whether or not the Ohio legislature is dedicated to education reform, the Ohio Supreme Court should give the legislature some guidance on what constitutes a "thorough and efficient" education. This is not to say that the legislature is incapable of interpreting constitutional provisions. Indeed, members of the legislature take an oath to uphold the Ohio Constitution.[86] With this in mind, however, advice from the high court is all the more warranted. One can logically assume that the legislature believes they are providing a "thorough and efficient" education through the current financing and substantive education laws.[87] But because the legislature has not provided either a "thorough" or an "efficient" education, it needs to know the correct interpretation of these words. By defining the standard of education required by the constitution, the court will not be displacing any legislative functions, but will merely be serving as a "goad" or "backstop" to the legislature's responsibility to meet constitutional standards.[88] The court need not expound for pages in defining "thorough and efficient"; rather, it should simply give a common sense interpretation that can serve as the groundwork for a new legislative scheme.[89]

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reasoning by the Governor is perplexing at best. While a court has no power to remedy an inequitable system that is not unconstitutional, the Governor is not so constrained. If he truly believes the current system is "inequitable" he should act now to attack the disparities rather than wait for the Ohio Supreme Court to rule on the issue.

[85] *See supra* notes 62–65 and accompanying text.

[86] *See* OHIO REV. CODE ANN. §101.01(b) (Baldwin 1994).

[87] This is especially true since the Supreme Court in *Walter* quoted with approval the Illinois Supreme Court, which stated: "This court has consistently held that the question of the efficiency of the educational system is properly left to the wisdom of the legislature." Board of Educ. v. Walter, 390 N.E.2d 813, 824 n.12 (Ohio 1979) (quoting Cronin v. Lindberg, 360 N.E.2d 360, 365 (Ill. 1977)), *cert. denied*, 444 U.S. 1015 (1980).

[88] Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 175 (1995).

[89] As stated earlier, see *supra* notes 16–18 and accompanying text, the purpose of this Note is not to argue that funding systems which cause gross disparities are unconstitutional, but to suggest a framework for what should be done by the courts if they do decide that such systems are unconstitutional. In dealing with the first step of the issue, the court certainly should consider in more detail the meaning of a "thorough and efficient"

In defining the constitutional standard, the court should first focus on what is *not* a constitutionally permissible level of education. This can be accomplished by looking to Ohio Supreme Court precedent. In *Miller v. Korns*[90] the court stated: "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."[91] By giving this pronouncement alone, the court would clearly establish to the legislature that whatever type of new funding system the legislature chooses to devise, essential resources must be provided to all of the school districts in the state.[92] In other words, the court will not accept any system that leads to the results produced by the current one.

In building upon the framework supplied by *Miller*, the court should then tell the legislature that the basic "core courses" need substantial improvement. While one would think that most students educated in the public school system would at least have a good understanding of the basic courses, at the time of the *DeRolph* trial seventeen thousand of the seniors in Ohio had yet to pass the *ninth* grade proficiency test, a test that students must pass to graduate from high school.[93] Why this alarming statistic alone does not convince the legislature to overhaul the education system is a mystery. Yet something must be done and it is the court's time to act. Unless students in the poorer districts can master these basic skills, they will continually be at an extreme disadvantage in the labor market.[94] A level of education must be provided to ensure that this is no longer the case.

While these basic minimum skills are certainly important and essential to a "thorough and efficient" education, they are not enough. An education that

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education. What is given here are suggestions to the court for devising a framework that the legislature can work with in dealing with this issue *after* it has found the current system to be unconstitutional.

[90] 140 N.E. 773 (Ohio 1923).

[91] *Id.* at 776.

[92] While the court in *Walter* quoted this passage from *Miller*, it was in the context of the discussion on how the legislature should be given great deference and discretion in deciding what level of education is "thorough and efficient" and what type of program will achieve that result. *See* Board of Educ. v. Walter, 390 N.E.2d 813, 815–16 (Ohio 1979).

[93] DeRolph v. State, No. 22043, mem. op. 463, 473 (Ohio C.P., Perry County, July 1, 1994).

[94] The New Jersey Supreme Court has continually referenced the constitutional standard of "equip[ping] a child for his [or her] role as a citizen and as a competitor in the labor market." Abbott v. Burke, (*Abbott II*), 575 A.2d 359, 372 (N.J. 1990) (quoting Robinson v. Cahill (*Robinson I*), 303 A.2d 273 (N.J.), *cert. denied sub nom.* Dickey v. Robinson, 414 U.S. 976 (1973)).

does not prepare students to be effective members in our society and our republican form of government can neither be thorough nor efficient.[95] As the New Jersey Supreme Court stated in *Abbott II*,

> [t]horough and efficient means more than teaching the skills needed to compete in the labor market, as critically important as they 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.[96]

This third requirement, that the education system prepare our children to be effective members of our democratic government, is the most important of the three. Professor Edward Foley believes this requirement can be reached by guaranteeing to all citizens the right to receive a college-level education in political philosophy.[97] Such a guarantee, he argues, would: (1) fully allow citizens to achieve personal political objectives; (2) allow citizens to make better value choices about important public policy issues; (3) allow all citizens, both rich and poor, to think more critically in order to avoid "knee-jerk" voting on "tax-and-spending" issues; and (4) give citizens the tools to determine the legitimacy of the very regime that governs them.[98]

Professor Foley's proposal is important for a number of reasons. First, it provides a practical means by which eloquently stated goals can be reached. While a court or legislature does not have to endorse Professor Foley's political philosophy theory, his theory illustrates how complex education goals can be simplified to include a smaller, but more focused, number of objectives. Second, such a theory relies on the adequacy of educational opportunity, not equality.[99] By defining the constitutional standard in adequacy terms, the risk of a "zero-sum game" decreases and the opportunity for more localized control increases.[100] Under an adequacy standard, families that place a higher value on education can still spend more to achieve their desired level of education. Adequacy also forces legislators and educators to focus more on performance-based standards and less on equalizing tax dollars. For these reasons, a simple

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[95] *See* DeRolph v. State, No. 22043, mem. op. 463, 468 (Ohio C.P., Perry County, July 1, 1994) (stating that "knowledge [is] essential to 'good government,' a concept explicit in Article I, § 7 of the Ohio Constitution").

[96] Abbott v. Burke (*Abbott II*), 575 A.2d 359, 397 (N.J. 1990).

[97] *See* Foley, *supra* note 74, at 55.

[98] *Id.* at 59–65.

[99] *Id.* at 11–25.

[100] *See* Enrich, *supra* note 88, at 167–68.

adequacy-based standard provides the best means for reaching the third requirement.

With this framework in mind, the legislature should know that a "thorough and efficient" system of education includes three essential factors: (1) it must not lead to insufficient "teachers, buildings or equipment" in any district in the state;[101] (2) it must provide the core educational classes in a manner that will prepare the children of the state to be competitive in the job market with each other and with those from other states and nations;[102] and (3) it must provide the tools to enable the students to become effective citizens in our society and our republican form of government.[103]

C. *Total Education Reform Is Needed to Secure a "Thorough and Efficient" Education*

By not trying to repair a system that cannot be fixed, the Ohio Supreme Court can avoid the problems faced in New Jersey. After nine judicial attempts to establish a "thorough and efficient" education, it is clear that tinkering with the numbers has not and will not lead to New Jersey's desired level of education. Total education reform, not a chess game with tax dollars, must be undertaken before meaningful change will occur.

To achieve total education reform, the Ohio Supreme Court should follow the Kentucky Supreme Court's lead in *Rose v. Council for Better Education, Inc.*,[104] and declare the entire system of education in Ohio unconstitutional and order the legislature to devise a new system.[105] This would send a clear message to the legislature that simply "rearranging the chairs on the deck"[106] would be an inappropriate response for a system so badly in need of repair. By now there is hardly any debate that the traditional property tax-based system of education, the system still present in Ohio, is inequitable and inefficient.[107] Expending more resources on a system that has not been successful in even *remotely* achieving a "thorough and efficient" education is unwise and

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[101] *See supra* notes 90–93 and accompanying text.

[102] *See supra* notes 93–94 and accompanying text.

[103] *See supra* notes 95–97 and accompanying text.

[104] 790 S.W.2d 186, 189 (Ky. 1989).

[105] As the *Rose* court stated: "[l]est there be any doubt, the result of our decision is that Kentucky's entire system of common schools is unconstitutional. . . . This decision applies to the entire sweep of the system . . . . It covers school construction and maintenance, teacher certification—the whole gamut of the common school system in Kentucky." *Id.* at 215.

[106] *See* Jonathan Riskin, *Voinovich Plan for School Aid Branded Unfair*, COLUMBUS DISPATCH, Feb. 5, 1995, at 1A–2A.

[107] *See supra* notes 19–29 and accompanying text.

unrealistic. As the Texas Supreme Court stated, "the system itself must be changed. . . . As long as our public school system consists of variations on the same theme, the problems inherent in the system cannot be expected to suddenly vanish."[108] While the current state of affairs does call for more money in the short-run to immediately address the lack of basic resources in the poorest districts,[109] reworking the numbers in the present system will not achieve the ultimate goal—a "thorough and efficient" education for all of Ohio's children.

D. *The Court Must Realize that More Money Alone Will Not Solve the Education Crisis*

Effective education reform cannot be achieved by focusing solely on money. In striking down the entire system in Kentucky, the *Rose* court did not simply order the legislature to expend more resources on the poor districts; it ordered total education reform.[110] The court correctly realized what other courts had failed to realize: that unless the focus of the analysis shifted from education "inputs" to "outputs,"[111] the same problems with the old system would continue to plague the schools, regardless of how much more money courts were willing to order the legislature to spend.[112]

If the court follows the *Rose* plan and decides to jettison the entire education system, it should not lose focus on the need for more money in the poor districts. While today's schools operate extremely inefficiently[113] and many experts on education are arguing that education reform should focus on more incentives and not more money,[114] it can hardly be argued that students being educated in facilities without running water, without restrooms, and with asbestos and other unsafe and unsuitable conditions can be helped by mere incentives. The school districts in which these children are educated need

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[108] Carollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist., 826 S.W.2d 489, 524 (Tex. 1992).

[109] *See infra* notes 113–14 and accompanying text.

[110] Rose v. Council for Better Educ., Inc., 790 S.W. 2d 186, 215 (Ky. 1989).

[111] *See id.* at 212.

[112] *See* Benson, *supra* note 49, at 404.

[113] *See* Eric A. Hanushek, *When School Finance "Reform" May Not Be Good Policy*, 28 HARV. J. ON LEGIS. 423, 425 (1991).

[114] *See* Eric A. Hanushek, *Schools Need Incentives, Not More Money*, WALL ST. J., Oct. 5, 1994 at A16 (summarizing the findings of the "Panel On The Economics of Education Reform"). But other experts continue to insist that there is a strong correlation between financial expenditures and student performance. *See* Special Issue, *Further Evidence on Why and How Money Matters in Education*, 20 J. OF EDUC. FIN. 1 (1994).

immediate funds to obtain the essential resources that will allow a restructured education system to succeed.

Aside from these pressing financial needs, the legislature should be encouraged to move as far away from the old system as possible. Experts are in growing agreement that, in order to raise the level of education, efficiency problems must be addressed.[115] Numerous recommendations to improve efficiency have been made, such as school choice or voucher programs,[116] site-based management,[117] tuition tax credits,[118] merit pay for teachers,[119] and merit awards for schools.[120]

If the Ohio Supreme Court follows the framework in this Note and strikes down most or all of the education system, the court should give the legislature deference in deciding the best route by which to achieve substantive change. The courts are certainly not in a position to judge which type of new school reform will most likely lead to a "thorough and efficient" education. The court should simply: (1) find the entire education system to be unconstitutional; (2) emphasize the problems in the "at-risk" districts and how without the proper resources, a "thorough and efficient" education is not obtainable; and (3) convey to the legislature that systematic change is needed and that the legislature will possess the power to design and implement this systematic change, as long as the change is designed to secure a "through and efficient" education for all of Ohio's children.

E. *The Court Should Retain Jurisdiction and Watch the Remedy Evolve*

The trial judge should retain jurisdiction during the remedial stages of the litigation.[121] First, no individual has a better working knowledge of the case,

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[115] *See* Hanushek, *supra* note 114, at A16; Jonathan Riskin, *Good Will Alone Won't Solve Schools' Problems*, COLUMBUS DISPATCH, Nov. 25, 1994 at 15A.

[116] Hanushek, *supra* note 113, at 451.

[117] Johnathon C. Reitz, *Public School Financing in the United States: More on the Dark Side of Intermediate Structures*, 1993 B.Y.U. L. REV. 623, 638 (1993).

[118] Hanushek, *supra* note 113, at 451.

[119] *Id.*

[120] *Id.*

[121] Different states have different viewpoints on when a court can retain jurisdiction. For instance, the North Dakota Supreme Court upheld a trial court's determination that the funding system was unconstitutional, but reversed the trial court's decision to retain jurisdiction. Bismark Public Sch. Dist. No. 1 v. State, 511 N.W.2d 247, 263 (N.D. 1994). The court, concerned about separation of powers implications, determined that a declaratory judgment action provided an adequate alternative to the retention of jurisdiction. *Id.* However, in Arizona, the supreme court affirmed the trial court's retention of jurisdiction so that the trial court could "determine whether, within a reasonable time,

the parties, and the issues than the judge who presided at the trial.[122] For instance, in *DeRolph*, the trial court reviewed over five hundred exhibits, read and ruled on over five thousand pages worth of deposition testimony, reviewed testimony from thirty-eight witnesses who testified at trial and another thirty-three who testified by way of deposition, and then spent one hundred twenty-three hours ruling on post-trial matters.[123] In all, the transcript of the proceedings totaled over ten thousand pages.[124]

The trial court's knowledge and familiarity with the case, combined with its retention of jurisdiction, allows it to efficiently solve any problems that might arise in the remedy process.[125] This supervision also helps to ensure that the legislature will indeed enact legislation that is geared toward creating a "thorough and efficient" system of education and that the legislature adequately funds such a program.[126] In this respect, the retention of jurisdiction is extremely important because courts have historically not protected constitutional rights vigilantly when the violations resulted from legislative inaction.[127] Also, with the knowledge that any shortcomings in the legislation will be immediately subjected to judicial review, the legislature should have more of an incentive to develop an acceptable system on its first attempt.

While retention of jurisdiction sounds like a drastic judicial remedy, it need not involve any more than the court simply placing its seal of approval on the plan developed by the legislature and then dissolving its jurisdiction.[128] In fact, if the remedy phase goes smoothly, this should be the extent of the court's involvement. Furthermore, even if the newly created education legislation has shortcomings, as long as the legislature understands the constitutional

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legislative action has been taken." Roosevelt Elem. Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 816 (Ariz. 1994). It is interesting to note that besides the order to retain jurisdiction, the *Roosevelt* decision is one of the most deferential. *See supra* notes 79–80 and accompanying text. What should be gained from these two cases is that both courts realized the importance of giving the successful plaintiffs a speedy and effective remedy. As long as a state's declaratory judgment act is sufficiently broad, it should provide an adequate alternative to the retention of jurisdiction.

[122] *See* Note, *Unfulfilled Promises*, *supra* note 15, at 1085.

[123] DeRolph v. State, No. 22043, mem. op. 463 (Ohio C.P., Perry County, July 1, 1994).

[124] *Id.*

[125] *See* Note, *Unfulfilled Promises*, *supra* note 15, at 1085.

[126] *Id.* at 1085–86.

[127] *Id.* at 1022.

[128] *Id.* at 1086. While the Kentucky Supreme Court did not actually retain jurisdiction after its ruling in *Rose*, it reserved the finality of its judgment until the end of the legislative session, to give the legislature time to enact an effective remedy. Once the new system was enacted, there was nothing left for the court to do. *Id.* at 1086 n.101.

requirements[129] and is making a good-faith effort to enact legislation designed to satisfy the requirements, the court should refrain from issuing any injunctive remedies; instead, the court should simply send the legislation back to the legislature for more refinement.[130] Injunctive remedies should only be used as a last resort—when it is clear that the legislature is either unwilling or unable to enact legislation that satisfies the "thorough and efficient" requirements of the constitution.

F. *The Court's Role Should Decrease Dramatically After an Acceptable Remedy Is in Place*

After the court has dissolved its jurisdiction,[131] its active contribution to the school funding debate should be finished. Reflecting back on all that has happened up to the point at which jurisdiction is dissolved should remind the court what an extraordinary undertaking it just performed. By dissolving its jurisdiction, the court is opining that, on its face, the new funding system is constitutional. When the magnitude of school funding litigation is considered along with the arguments that the courts should not even be involving themselves with issues of education and taxation,[132] invitations to revisit such holdings, especially when the legislation is still young, should not be taken lightly. This is not to say that the court should turn its back on all subsequent challenges to funding plans; rather, before taking corrective action, it should just be certain that the plan on which it gave its original approval fails to conform to the mandates of the constitution.

In making this decision, the court needs to consider the extent of the change from the old system. For example, if the "new" system is merely a "variation[] on the same theme,"[133] it is likely that the legislature did not adequately address the structural problems with the system. The court should act on any perceived constitutional violations under a system that has not been significantly reformed. Alternatively, if the legislature enacted sweeping reform legislation, the courts should be much more deferential in giving the system sufficient time to develop. While courts have developed enough knowledge and understanding of property tax-based funding systems that they can authoritatively strike down such systems and their off-springs for the great

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[129] *See supra* part IV.C.

[130] *See supra* notes 77–78 and accompanying text.

[131] *See supra* note 121 and accompanying text.

[132] *See supra* notes 40–44 and accompanying text.

[133] Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist. (*Edgewood III*), 826 S.W.2d 489, 524 (Tex. 1992). See *supra* part III.C for discussion on why significant change is needed.

inequities that they cause, completely new systems pose a more difficult problem for the courts. Unless it is clear that the new system is incapable of securing a "thorough and efficient" education, the wisdom and resolve of the legislature in attempting to improve the overall level of substantive education should be respected.

V. CONCLUSION

As the Twentieth Century nears its completion, public education in Ohio and the United States is at a crossroads. The issue is clear: Are we content in continuing with an education system that has led to gross inequities and large inefficiencies, or are we willing to press for change and ensure a better future for the children of our country. Many states have made an appreciable start in the right direction by striking down property tax-based systems. As time has shown, however, the powerful judicial rhetoric by the state courts has not led to an acceptable legislative remedy. This Note has proposed a comprehensive, yet practical approach for the Ohio Supreme Court and other courts to manage the remedy stage of school finance litigation. Perhaps with an acceptable remedy in place, "thorough and efficient" will no longer be an illusion but instead will be a reality for all of Ohio's children.