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Centralized Wisdom - DeRolph v. State and the Rise of Judicial Paternalism

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CENTRALIZED WISDOM? *DEROLPH* V. STATE AND THE RISE OF JUDICIAL PATERNALISM

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I. INTRODUCTION

On March 24, 1997, the Ohio Supreme Court held 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."¹ Despite the court's direction that the school financing system was unconstitutional, the court did not command specific revisions.² Rather, the General Assembly was mandated to create an entirely new school financing system³ within twelve months.⁴

¹DeRolph v. State, 677 N.E.2d 733, 733 (Ohio 1997).

²See, *Ohio School Financing System Struck Down*, STATE TAX NOTES, Mar. 31, 1997, at 983.

³*Id.* Like most states, Ohio relies heavily on local property taxes to finance public schools. See also, *infra* notes 10-26 and accompanying text. The following states have held that local property taxes are a valid basis of public school finance: *Lafayette Steel Co. v. City of Dearborn*, 360 F. Supp. 1127 (E.D. Mich. 1973); *W.P. Shofsrall v. Hollins*, 515 P.2d 590 (Ariz. 1973); *Thompson v. D.F. Engelking*, 537 P.2d 635 (Idaho 1975); *Borough of Sea Bright v. Department of Educ.*, 576 A.2d 331 (Super. Ct. App. Div. N.J. 1990); *Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982); *Fair Sch. Fin. Council of Okla. v. State*, 746 P.2d 1135 (Okla. 1987); *Olsen v. State*, 554 P.2d 139 (Ore. 1976); *Carrollton-Framers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489 (Tex. 1992); *Northshore Sch. Dist. No. 417 v. Kinnear*, 530 P.2d 178 (Wash. 1995);

This Comment critically evaluates *DeRolph v. State*⁵ and asserts that the supreme court's decision is dangerous precedent, inasmuch as it dispirits the sacrosanct role a legislature assumes in a democratic society and overtly legitimizes judicial policymaking.⁶ This Comment suggests the court's vision of a thorough and efficient school system, via more economic parity,⁷ ultimately undermines the General Assembly of the State and will not extricate Ohio schools.⁸

Part II explores the current system of financing public schools in the State of Ohio. As one might suggest, financing any state-wide system of education is arrantly complex. This section will not delve into the minutia that have come to define school finance, but will instead acclimate the reader to a more holistic perspective of funding public school systems. Part III evaluates *DeRolph v. State*. Part IV contemplates whether more financial parity among school districts and the concomitant expenditure of additional funds is a realistic approach to ameliorating the state of public schools in Ohio. Part IV also examines the notion of judicial policymaking, its deleterious impact on democratic processes, and maintains that the *DeRolph* court arrogated its authority. Part V summarizes this Comment and counsels that *DeRolph v. State* will markedly fail to advance the quality of the Ohio public school system.

Conversely, numerous states have held that local property taxes are an invalid basis of public school financing: *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994); *DuPree v. Alma Sch. Dist. No. 30 of Crawford County*, 651 S.W.2d 90 (Ark. 1983); *Serrano, Jr. v. Priest*, 557 P.2d 929 (Cal. 1977); *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977); *Milliken v. Green*, 203 N.W.2d 457 (Mich. 1972); *Bismark Public Sch. Dist. No. One v. State*, 511 N.W.2d 247 (N.D. 1994); *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990); *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973); *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 884 (N.M. 1989); *Washakie County Sch. Dist. No. One v. Herschler*, 606 P.2d 310 (Wyo. 1980).

⁴*DeRolph*, 677 N.E.2d at 747.

⁵*See infra* Part III.

⁶*See infra* notes 104-131 and accompanying text.

⁷Although the court did not demand "more financial parity" per se, the opinion is premised on the disparities in funding between school districts and the ostensible dearth of funds that is evidenced in some districts. Considering that the court condemns economic "disparity," it is only logical to assume that the justices desire more economic parity. *See infra* Part II.A, for a more thorough analysis of the court's reasoning.

⁸*See infra* notes 70-103 and accompanying text.

II. OHIO SCHOOL FINANCE⁹

A. Background

The Ohio Constitution provides that "[t]he general assembly shall make such provisions, by taxation, or otherwise, as . . . will secure a thorough and efficient system of common schools throughout the State; but no religious sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of the state."¹⁰ In response to the dictates of the Ohio Constitution, the funding¹¹ scheme promulgated by the General Assembly utilizes various sources of revenue.¹²

Boards of education derive their money from several sources: (1) the state foundation program¹³ and other state programs; (2) the sale or other disposition of school property; (3) local property taxes (that is, general and special levies) and the undivided classified property tax; (4) a school district income tax, if approved by district voters; (5) a shared municipal income tax, if approved by the municipality's voters;

⁹Debating the merits of public school finance is certainly not a contemporary issue. See DAVID TYACK ET AL., *LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785-1954* 108-10 (1987). The authors point out that school reformers:

found much to criticize in public education at the turn of the century. Rural schools were too small [and] starved for funds Only re-modeled state law could reach these rural educational wastelands, thought the reformers. The remedies were to consolidate the hundreds of thousands of one-room schools as fast as possible into modern grade schools . . . to upgrade the requirements for certification of teachers, and to provide more financial support from the state.

. . . .

Another problem reformers attacked was chronic shortage of funds Their plans to expand and restructure the schools cost money To supplement local financing of vocational education, for example, the reformers turned first to the state governments and then to the federal government

Id. at 109-10.

¹⁰OHIO CONST. art. VI, § 2.

¹¹Overall, "most of [a school's] expenses are for salaries to pay for the people who perform the services." ROBERT G. STABILE & PAUL G. SPAYDE, *WHAT EVERY OHIO CITIZEN SHOULD KNOW ABOUT SCHOOL FINANCE* 24 (1982). For instance, roughly eighty percent of all funds in a school budget are set aside to pay salaries and salary-related costs. See *id.* This statistic subsumes all service employees, including teachers, administrators, specialists, drivers, and maintenance personnel. See *id.* "Other salary related costs, such as retirement, sick leave, hospitalization and life insurance add considerably to a school's budget." *Id.*

¹²See generally, E. EDMUND REUTTER, JR., *THE LAW OF PUBLIC EDUCATION* 248-277 (4th ed. 1994)(perusing the myriad issues relevant to school finance).

¹³See *infra* notes 27-37 and accompanying text.

and (6) miscellaneous sources such as gifts, federal funds, tuition, and payments resulting from certain property tax abatement programs.¹⁴

Historically, Ohio has supported the operation of public schools by expending state funds to augment local revenues.¹⁵ Contrary to the national trend, Ohio depends more on local revenue than state revenue.¹⁶

Ohio's school funding system is comparable to other states' financing designs, as it relies disproportionately on property taxes¹⁷ assessed by localities,¹⁸ which has provoked vociferous debates nationally.¹⁹ "These taxes are levied upon general property and tangible personal property located within the school district."²⁰ The tax rate is computed in mills²¹ and is largely contin-

¹⁴JONATHAN F. BUCHTER ET AL., OHIO SCHOOL LAW: 1996-97 621 (1996)(footnotes omitted).

¹⁵See ROBERT T. BAKER & KIMBALL H. CAREY, BAKER'S 1995-96 HANDBOOK OF OHIO SCHOOL LAW 234 (1996); see generally, 82 O. Jur. 3rd §§ 393-413 (1988)(discussing the funding, financing, and support of primary and secondary schools in Ohio).

¹⁶*Ohio's Public School Financing System Held Unconstitutional*, OHIO TAX REP., May 21, 1997, at 1; see also, *supra* note 3 (recognizing decisions in other jurisdictions).

¹⁷See BAKER & CAREY, *supra* note 15, at 234; see also, BUCHTER, *supra* note 14, at 621 ("The two major sources of the revenue for most boards of education are taxes levied on property within the school district and the state foundation program."). For an analysis of Ohio's Foundation Program, see *infra* Part II.B.

¹⁸There is no inherent power in school districts to levy taxes. See REUTTER, *supra* note 12, at 248. School districts are limited to those powers that are expressly, or by necessary implication, provided to them by the state's legislature. See *id.* Thus, "[t]axation is a special power which [is] specifically conferred upon a subordinate government agency by the legislature . . ." *Id.* See also, *infra* note 121 and accompanying text (considering the Framers and taxation).

¹⁹A plethora of articles and law reviews have addressed the issue of school funding. See Jonathan M. Purver, ANNOTATION, *Validity of Basing Public School Financing System on Local Property Taxes*, 41 A.L.R. 3d 1220 (1972); see generally, H.C. HUDGINS & RICHARD S. VACCA, LAW AND EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS 131 (1979)("In their insistence on fiscally neutral systems of school finance, courts of law have never demanded that equal dollars must be spent on every child."); JEFFEREY R. HENIG, PUBLIC POLICY & FEDERALISM: ISSUES IN STATE & LOCAL POLITICS 354-357 (1985)(analyzing school finance cases and concluding that "[t]he battle for school finance reform . . . is likely to be with us for some time to come."); MARTHA M. MCCARTHY & PAUL T. DEIGNAN, WHAT LEGALLY CONSTITUTES AN ADEQUATE PUBLIC EDUCATION 6-22 (1982)(discussing challenges to state school finance schemes).

The United States Supreme Court has also decided several cases which are germane to the issues presented in this Comment. See generally, PERRY A. ZIRKEL & SHARON NALBONE RICHARDSON, A DIGEST OF SUPREME COURT DECISIONS AFFECTING EDUCATION 7, 10-11, 22 (1988) (reviewing Supreme Court cases which have considered school finance and per-pupil expenditures).

²⁰STABLE & SPAYDE, *supra* note 11, at 24.

²¹A "mill" is one-tenth of a cent. See *DeRolph*, 677 N.E.2d at 738 n.2.

gent²² on whether citizens of the particular school district advocate the tax.²³ Perhaps contrary to popular belief, the "taxes are state, not local, in nature, even though they are levied by the local district. This result follows from the concept that education is a state, rather than a local function."²⁴

The Ohio Constitution provides that the state legislature has the authority to tax.²⁵ In accordance with legislative enactments, local boards of education have been designated as taxing authorities, with the boards' treasurer as the fiscal officer.²⁶ One program that was organized by the General Assembly to better Ohio schools was appropriately designated the Foundation Program.

B. The Foundation Program

Ohio's school funding debate has principally revolved around the adequacy of the Foundation Program.²⁷ "The foundation program was created to establish a system for distributing state funds to schools for operating expenses and to promote efficiency and economy."²⁸ One objective of the Foundation Program was to establish a minimum level of education for public schools.²⁹ For instance, in school districts with low tax rates, the Foundation Program is significant because it is often their preeminent source of revenue.³⁰ Presently, the State of Ohio *guarantees* that \$3,315³¹ will be allocated for each child in attendance in public schools.³²

²²A board of education may tax without the consent of the people of the school district. See BUCHTER, *supra* note 14, at 622. However, if the contemplated tax imposed by the board exceeds one percent of the property's true value, the proposed levy must be submitted to the citizenry. See *id.*

²³See STABILE & SPAYDE, *supra* note 11, at 24.

²⁴REUTTER, *supra* note 12, at 250.

²⁵See BUCHTER, *supra* note 14, at 622; see also, OHIO CONST. art. I, § 2.

²⁶See *id.* (internal quotation and citation omitted).

²⁷See also *infra* Part III.

²⁸BUCHTER, *supra* note 14, at 625 (footnote omitted).

²⁹See *id.*; see also, BAKER & CAREY, *supra* note 15, at 234 ("Ohio's statutory scheme for funding of its public elementary and secondary schools is a system of combined local and state support which guarantees a minimum dollar amount . . .").

³⁰STABILE & SPAYDE, *supra* note 11, at 24.

³¹See Part IV.A. for an examination of the effect of expenditures on student performance.

³²See BAKER & CAREY, *supra* note 15, at 234. In actuality, the specific dollar amount may fluxuate. This amount is multiplied by the "number of students in average daily membership" vis-a-vis the number of students who are registered to attend elementary and secondary school. *Id.* If property taxes in a district adequately provide for this minimum amount, the state funds are not guaranteed. See *id.* Conversely, if there is a dearth of revenue from property taxes, the state will supply more aid to enable the district to meet the minimum amount that is guaranteed. See *id.*

School districts are not entitled to state aid under the Foundation Program, ipso facto; the district must comply with statutory preconditions:³³ a school district is compelled to levy a minimum of twenty mills for current operating expenses;³⁴ schools in the district must be open for instruction at least 182 days per year;³⁵ and teachers must receive the "prescribed minimum" salary.³⁶ If these prerequisites are satisfied and the district still cannot meet the minimum level of education prescribed by law, the Foundation Program functions as a safety net.³⁷

The current system of school finance in Ohio would not exist in perpetuity; its dismantling would soon begin.

III. *DEROLPH V. STATE*³⁸

A. *The Holding*

Justice Sweeney, speaking on behalf of a narrow majority of the Ohio Supreme Court,³⁹ held that the current system of school financing was unconstitutional,⁴⁰ thereby reversing the Fifth District Court of Appeals.⁴¹

³³ See *id.* at 235.

³⁴ See *id.* at 627.

³⁵ See BUCHTER, *supra* note 14, at 626.

³⁶ *Id.* at 627 (footnote omitted); see also, OHIO REV. CODE ANN. § 3317.01 (Banks-Baldwin 1997) (governing the School Foundation Program, eligibility and administration of funds).

³⁷ "The foundation program is administered by the state board of education, with the approval of the state controlling board. Money is appropriated to the state board of education out of money in the state treasury's general revenue fund." BUCHTER, *supra* note 14, at 626.

³⁸ A conglomeration of school districts, superintendents, teachers, and pupils filed suit on December 19, 1991, in the Court of Common Pleas of Perry County claiming that Ohio's system of funding public education was unconstitutional, as it did not secure a "thorough and efficient" public school system. OHIO CONST. art. VI, § 2. The trial court held that the current system violated the "equal protection" and "thorough and efficient system of common schools" clauses of the Ohio Constitution and was unconstitutional.

See BUCHTER, *supra* note 14, at 622.

The named defendants were the State of Ohio, the State Board of Education, the Superintendent of Public Instruction, and the Ohio Department of Education. *DeRolph*, 677 N.E.2d at 734.

³⁹ Justices Douglas, Resnick, and Pfeifer concurred and also filed separate opinions.

⁴⁰ For a more general discussion of equal educational opportunity and school finance, see MARK G. YUDOF ET AL., EDUCATIONAL POLICY AND THE LAW: CASES AND MATERIALS 565-628 (1982).

⁴¹ *DeRolph* at 735. The majority relied heavily on *Cincinnati Sch. Dist. Bd. of Educ. v. Walter*, 390 N.E.2d 813 (Ohio 1979). In *Walter*, the court held that the statutory system of financing public education did not violate the Ohio Constitution, see *id.* at 815, and declined to hold the Foundation Program, as it existed in 1979, unconstitutional. See BUCHTER, *supra* note 14, at 621. The court recognized that the General Assembly's

By our decision today, we send a clear message to lawmakers: the time has come to fix the system. Let there be no misunderstanding. Ohio's public school financing scheme must undergo a complete systematic overhaul. . . . The funding laws reviewed today are inherently incapable of achieving their constitutional purpose.

Although we have found the school financing system to be unconstitutional, we do not instruct the General Assembly as to specifics of the legislation it should enact. However, we admonish the General Assembly that it must create an entirely new school financing system. In establishing such a system, the General Assembly shall recognize that there is but one system of public education in Ohio: It is a statewide system⁴²

The Foundation Program was "[a]t the heart of the present controversy," Sweeney declared, because it did not alleviate the "vast wealth based disparities among Ohio's schools, depriving many of Ohio's public school students of high quality educational opportunities."⁴³ Moreover, the court determined the current system of financing had no real relation to the actual cost of educating students⁴⁴ and did not enable "its citizens to develop their human potential. . . . [R]ich and poor alike [must] be given the opportunity to become educated so that they may flourish and our society may progress."⁴⁵ In essence, the court was not persuaded that the Foundation Program furnished schools with passable funds to efficiently and thoroughly operate a school district.⁴⁶

discretion is not absolute, *see* Cincinnati Sch. Dist. Bd. of Educ., 390 N.E.2d at 824, but held that "the General Assembly has not so abused its broad discretion in enacting the present system of financing public education as to render the statutes in question unconstitutional." *Id.* at 825. The court also declared that:

local control [is] a rational basis [for] supporting Ohio's system of financing elementary and secondary education. By local control, we mean not only the freedom to devote more money to the education of Ohio's children but also control over and participation in the decision-making process as to how those local tax dollars are to be spent.

The history of public education in Ohio is essentially a history of local control over education and the use of property as the primary means to finance that education.

Id. at 820; *see also*, Miller v. Korns, 140 N.E. 773, 776 (1923) ("The legislature followed a method well calculated to secure that attainment of a legitimate and proper state purpose."); *infra* notes 101-103 and accompanying notes.

⁴² *DeRolph*, 677 N.E.2d at 747 (footnote omitted).

⁴³ *Id.* at 737.

⁴⁴ *Id.* at 738.

⁴⁵ *Id.* at 741.

⁴⁶ Justice Sweeney stated that Cincinnati Sch. Dist. Bd. of Educ. v. Walter was not controlling, as "[t]he system in place today differs dramatically from that in place nearly

"Another weakness in the system is certain tax reduction factors introduced into law by the General Assembly . . ."⁴⁷ Section 319.310 of the Ohio Revised Code limits the growth of real property tax revenue.⁴⁸ As real property values increase, one would naturally expect to pay more property taxes on that parcel. However, pertinent provisions of section 319.310 enable property owners to limit the taxes they would have to pay, should their property values increase as a result of inflation or reappraisal.⁴⁹ Justice Sweeney avouched that

[t]he result is that a school district will receive the same number of dollars from voted tax levies after reappraisal as it did before reappraisal, even though real property valuation in the district increased through real estate inflation. As a direct result of these tax reduction measures introduced by H.B. No. 920, local revenues cannot keep pace with inflation, and school districts have been required to propose additional tax levies--most of which ultimately fail.⁵⁰

These nuances in state law permitted a school district to "experience an increase in the valuation of its taxable property without enjoying additional income and yet receive less"⁵¹ under the Foundation Program.⁵²

In addition to concluding that Foundation Program funding had no relation to the cost of education,⁵³ and that tax reduction factors contributed to the

twenty years ago" *DeRolph*, 677 N.E.2d at 745. The Ohio legislature passed a new school aid bill after the decision in *Cincinnati Sch. Dist. Bd. of Educ. v. Walter*. However, the new bill increased the money available and added new provisions, but "*basically carried forward the existing equal-yield concept which had been in effect.*" *STABILE & SPAYDE*, *supra* note 11, at 35 (emphasis added). The system that was in place when *Cincinnati Sch. Dist. Bd. of Educ. v. Walter* was decided was fittingly deemed the "Equal Yield Formula" because it "establish[ed] a funding floor, at twenty mills, that [the legislature decided was] sufficient to assure that each school district ha[d] the means to comply with state minimum standards" *Id.* (internal quotation and citation omitted).

⁴⁷*DeRolph*, 677 N.E.2d at 739.

⁴⁸*See id.*

⁴⁹*See id.* at 739.

⁵⁰*Id.* at 739.

⁵¹*Id.* The court referred to this apparent dilemma as "phantom revenue" and pronounced that the "increased valuation of property is taken into account in the charge-off portion of the foundation program." *Id.*

⁵²Is this really an "inherent weakness" in the school financing system? It is certainly illogical to permit property-owners to circumvent additional taxation while school districts concomitantly receive less under the Foundation Program. However, this ostensible deficiency could be remedied by simply amending the statute. *See supra* note 36, for the statute governing the Foundation Program.

⁵³*See supra* note 46 and accompanying text.

dearth of funds in public education,⁵⁴ the court rebuked the Classroom Facilities Act which dispensed aid to school districts for capital improvements.⁵⁵ "The evidence showed, and the trial court found, that the Act is insufficiently funded to meet the needs of districts that are poor in real property value."⁵⁶ The court did not explicate its understanding of "sufficiency."⁵⁷

B. The Dissent

In dissent, Chief Justice Moyer⁵⁸ admonished the majority for arrogating responsibilities beyond the traditional role of a court, and advised:

One cannot disagree with the aspirations of the majority to provide a school system that enables children to participate fully in society, that provides high quality educational opportunities, and that allows its citizens to fully develop their human potential. However, the majority relies upon that phrase "thorough and efficient" to declare Ohio's education financing system unconstitutional despite the fact that our Constitution commits the responsibility for ascribing meaning to the phrase "thorough and efficient" to the General Assembly and not to this court.⁵⁹

Characterizing the majority's decision as "usurping the authority of the General Assembly,"⁶⁰ Chief Justice Moyer annunciated that the issues presented in this case were quintessentially nonjusticiable⁶¹ political questions.⁶²

⁵⁴ See *supra* notes 47-52 and accompanying text.

⁵⁵ *DeRolph*, 677 N.E.2d at 740. The court provided a litany of examples to illustrate that public schools in the State of Ohio are in disrepair. See *id.* at 742-46.

⁵⁶ *Id.* at 740.

⁵⁷ Justice Sweeney also asserted that school districts were ultimately forced to borrow funds. See *id.* at 738-39. The court characterized this as problematic because the loans were often repaid "by diverting funds otherwise available to the school district under the School Foundation Program to the commercial lender." *Id.* at 740 (citation omitted).

⁵⁸ Justices Cook, Lundberg, and Stratton signed on to the Chief Justice's dissenting opinion.

⁵⁹ *DeRolph*, 677 N.E.2d at 782 (internal quotations omitted).

⁶⁰ *Id.*

⁶¹ See *id.* at 784; see also, *Baker v. Carr*, 369 U.S. 186 (1962). In *Baker*, the Court explained that "[t]he political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the [legislature] or the confines of the Executive Branch. The Judiciary is particularly ill-suited to make such decisions" *Id.* at 210.

⁶² But see *infra* note 101.

The dissent maintained that the current system of school finance in Ohio was functionally adequate.⁶³ Notwithstanding the lack of financial parity among districts,⁶⁴ Ohio spent more than thirty-nine other states in per-pupil expenditures.⁶⁵ "The current foundation program [did], in fact, narrow the gap between educational spending in rich and poor districts"⁶⁶ and there was no convincing evidence that additional expenditures would actually raise test scores:

by way of example, while plaintiff district Northern Local ranked at the bottom quarter of all Ohio school districts in total revenue and expenditure per pupil in 1992, its passage rate on the ninth grade proficiency test has been higher than the state average. . . . Proficiency test results should not be used to measure the sufficiency, or insufficiency, of educational funding. Proficiency test results are just as easily correlated with external socioeconomic factors

. . . . Students themselves, their families, and their local communities bear their own responsibility, inside and outside the classroom.

We simply do not find, on this record, that plaintiffs carried their burden of proving that school districts have been unable to provide students with adequate education due to lack of funds.⁶⁷

Without proof that infusing additional funds would refine public education,⁶⁸ the dissent was disinclined to engage in "judicial second-guessing" of a finance system originating in the General Assembly.⁶⁹

⁶³*DeRolph*, 677 N.E.2d at 788.

⁶⁴The dissent repudiated plaintiffs' argument that the Education Clause commanded financial equality:

The 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. . . .

The Ohio Constitution could have been drafted with similar language. It was not. And surely sometime during the past one hundred and forty years, the citizens of Ohio could have amended their Constitution that all public schools be equally funded. They have not.

Id. at 789.

⁶⁵*See id.* at 787.

⁶⁶*Id.* at 788. "In poor districts, state aid may represent as much as eighty percent of the foundation amount provided to that district." *Id.*

⁶⁷*See infra* notes 70-99 and accompanying text.

⁶⁸*See, DeRolph*, 677 N.E.2d at 793.

⁶⁹*Id.* at 795.

IV. THE RISE OF JUDICIAL PATERNALISM

A. *The State of Our Schools: Reconsidering DeRolph v. State*

Justice Sweeney's opinion in *DeRolph v. State* is premised on the assumption that money, and inter-district financial parity, is ultimately responsible for ensuring educational opportunity.⁷⁰ Because wealth-based disparities do exist, "the funding laws . . . are inherently incapable of achieving their constitutional purpose."⁷¹ However, if money is proven to be extraneous to a child's educational success, the majority opinion in *DeRolph* is intellectually dishonest and entirely dependent on manufactured logic.

Spending disparities across student populations are insignificant in their effect on student achievement. Historical data shows that more resources have been devoted to public schools over time.⁷² Nonetheless, "[t]hey do not show a corresponding improvement in average student performance, at least in the period since 1960."⁷³ Between 1970 and 1990, for instance, expenditures per pupil almost doubled, while student achievement often declined.⁷⁴ This is certainly not to insinuate that public schools in Ohio are as efficient as they can be, but is it vacuous to suggest that expenditures will have a talismanic impression.

James S. Coleman conducted a landmark study on school expenditures and student achievement. Coleman collected data from 4000 public elementary and secondary schools.⁷⁵ In addition, school administrators, teachers and students completed questionnaires.⁷⁶ *The Coleman Report concluded that the relationship between "school inputs"⁷⁷ and student achievement was insignificant if family background was controlled for.*⁷⁸ The Report underscored that "one implication stands out above all. That schools bring little influence to bear on a child's achievement that is independent of his background and general social context."⁷⁹ Also, "differences in school facilities and curriculum, which are the major variables by which attempts are made to improve schools, are so little

⁷⁰See *id.* at 738-39.

⁷¹*Id.* at 747.

⁷²Gary Burtless, *Introduction and Summary*, in *DOES MONEY MATTER: THE EFFECT OF SCHOOL RESOURCES ON STUDENT ACHIEVEMENT AND ADULT SUCCESS* 1, 21 (Gary Burtless ed., 1996).

⁷³*Id.*

⁷⁴*Id.* at 26.

⁷⁵See HENIG, *supra* note 19, at 334-35.

⁷⁶See *id.*

⁷⁷"Inputs included attributes of the schools and teachers themselves." *Id.* at 334.

⁷⁸See *id.*

⁷⁹*Id.*

related to differences in achievement levels of students that, with few exceptions, their effects fail to appear even in a survey of this magnitude."⁸⁰

Eric A. Hanushek, professor of economics at the University of Rochester and an expert on school finance and student achievement, similarly found that "[t]he existing evidence simply indicates that the typical school system today does not use resources well (at least if student achievement is their purpose)."⁸¹ Hanushek⁸² argued that:

[t]he reason why this situation [spending unwisely] could persist seems to lie in the lack of incentives to improve student performance. School personnel—teachers, principals, superintendents, librarians, and other staff—have little at stake in student outcomes. Whether students do particularly well or particularly poorly, the career progression and rewards of school personnel remains unaffected.⁸³

In essence, the "aggregate data provide a *prima facie* case that *school spending and school resources are not linked to performance*."⁸⁴ Hanushek's studies also disclosed that *teacher-pupil ratio was not a determining factor in student performance*.⁸⁵

⁸⁰ARTHUR E. WISE, *RICH SCHOOLS POOR SCHOOLS: THE PROMISE OF EQUAL EDUCATIONAL OPPORTUNITY* 141 (1968). Wise avouched that

[t]he import of the Coleman study would seem to be that the effects of school variables with the possible exception of teacher variables are extremely limited. *At best, then, the generalization that educational resources are related to educational achievement must be regarded as tentative. At worst, it must be concluded that there is no relationship.*

Id. at 141 (emphasis added).

⁸¹Eric A. Hanushek, *School Resources and Student Performance*, in *DOES MONEY MATTER: THE EFFECT OF SCHOOL RESOURCES ON STUDENT ACHIEVEMENT AND ADULT SUCCESS* 43, 69 (Gary Burtless ed., 1996).

⁸²Hanushek conducted a study in 1986 and emphatically argued that "[t]here appears to be no strong or systematic relationship between school expenditures and student performance." Eric A. Hanushek, *The Economics of Schooling: Production and Efficiency in Public Schools*, 24 J. OF ECON. LITERATURE 1141, 1162 (1986).

⁸³Eric A. Hanushek, *School Resources and Student Performance*, in *DOES MONEY MATTER: THE EFFECT OF SCHOOL RESOURCES ON STUDENT ACHIEVEMENT AND ADULT SUCCESS*, *supra* note 72, at 69 (footnote omitted).

⁸⁴*Id.* at 51. (emphasis added). In an earlier study, Hanushek stated, "[f]or more than two decades . . . researchers have tried to identify inputs that are reliably associated with student achievement. *The bottom line is that they have not found any.*" Gary Burtless, *Introduction and Summary*, in *DOES MONEY MATTER: THE EFFECT OF SCHOOL RESOURCES ON STUDENT ACHIEVEMENT AND ADULT SUCCESS*, *supra* note 72, at 1, 8-9 (emphasis added).

⁸⁵*See* Eric A. Hanushek, *School Resources and Student Performance*, in *DOES MONEY MATTER: THE EFFECT OF SCHOOL RESOURCES ON STUDENT ACHIEVEMENT AND ADULT SUCCESS*, *supra* note 72, at 59.

Few would disagree that schools require tremendous sums of money to operate. Perhaps the focus should not necessarily be on the amount of money that is spent, but rather on how present money is allocated in each district.⁸⁶

Research has also analyzed whether the influx of money that results from court-ordered desegregation decrees has any appreciable impact on student performance.⁸⁷ In Austin, Texas, fifteen schools were given \$300,000 each.⁸⁸ Despite this massive disbursement, "at the end of the 1993 school year, student achievement and student attendance remained extremely low in thirteen of the fifteen schools. In those schools there was no discernable evidence of improved outcomes despite the extra money."⁸⁹ This research revealed that simply expending money was impertinent if the money was not "spent and invested wisely."⁹⁰

Although it is certainly beyond the scope of this Comment to evaluate each and every study that has concentrated on school expenditures and student achievement, Gary Burtless of The Brookings Institution collected and reviewed the premier studies in *Does Money Matter: The Effect of School Resources on Student Achievement and Adult Success* and summarized his opinions:

The studies in this book suggest, on balance, that the case for additional school resources is far from overwhelming. Increased spending on school inputs has not been shown to be an effective way to improve student achievement in most instances where this strategy has been attempted. Individual studies show that in some cases additional school resources have effectively been used to improve student test scores, but this experience is not the dominant one in recent experience. . . .

Statistical evidence and recent historical experience suggest to me that school performance is unlikely to be improved solely by investing extra money in the nation's schools. Increased spending on school inputs without any change in the current arrangement for managing schools offers little promise of improving either student performance or adult earnings.⁹¹

⁸⁶See *id.* at 10. "[A]dditional resources are not effectively used by most schools to produce improved student outcomes." *Id.*

⁸⁷Richard J. Murnane & Frank Levy, *Evidence from Fifteen Schools in Austin, Texas*, in *DOES MONEY MATTER: THE EFFECT OF SCHOOL RESOURCES ON STUDENT ACHIEVEMENT AND ADULT SUCCESS*, *supra* note 72, at 93.

⁸⁸See *id.*

⁸⁹*Id.*

⁹⁰*Id.* at 96. Two schools in Austin did, in fact, improve student achievement. In these schools, money was spent efficiently: reducing class size, revamping special needs programs, and bringing health care to schools. *Id.* at 95.

⁹¹Gary Burtless, *Introduction and Summary*, in *DOES MONEY MATTER: THE EFFECT OF SCHOOL RESOURCES ON STUDENT ACHIEVEMENT AND ADULT SUCCESS*, *supra* note 72, at 1, 40-41 (emphasis added); see also, Henry M. Levin, *Educational Opportunity and the*

These findings compliment a 1995, Cleveland Plain Dealer inquiry. The Plain Dealer conducted an extensive analysis of Ohio schools and found that "factors related to families and economic opportunity - not school district - most influence how well students perform on standardized tests."⁹²

In *DeRolph v. State*, the court acknowledged that many factors contribute to a "thorough and efficient" school system.⁹³ Nevertheless, money precipitated the court's pronouncement of unconstitutionality:

[M]oney alone is not the panacea that will transform Ohio's school system into a model of excellence. Although a student's success depends on numerous factors besides money, we must ensure that there is enough money that students have the chance to succeed because of the educational opportunity provided, not in spite of it.⁹⁴

Remarkably, the court's assessment that current levels of funding do not provide students with "the chance to succeed"⁹⁵ is pure conjecture and is not supported by reliable evidence. The court's proclamation that "[t]he funding laws reviewed today are inherently incapable of achieving their constitutional purpose,"⁹⁶ is equally facetious. Reliable evidence *does exist* that student success is dissociated with escalating expenditures.⁹⁷ Wherefore, any lack of thoroughness or inefficiency⁹⁸ does not necessarily emanate from financial deficiencies and hence cannot be palliated by judicially- envisioned economic sorcery.⁹⁹

Distribution of Educational Expenses, in *RETHINKING EDUCATIONAL EQUALITY* 27, 37 (Andrew Kopan & Herbert Walberg eds., 1974)(suggesting ways in which schools can spend money to assist the disadvantaged).

⁹²Desiree F. Hicks & David Davis, *A Family Matter: Plain Dealer Analysis Shows Economic, Home Conditions Have Largest Impact on Student Performance*, *PLAIN DEALER*, Aug. 20, 1995, at A1. The Plain Dealer used generally accepted statistical methods and additionally had two experts review the findings for statistical integrity. *Id.* See generally, FRANCIS A.J. IANNI, *HOME, SCHOOL AND COMMUNITY IN ADOLESCENT EDUCATION* (1983)(discussing adolescent development and the challenges facing our youth).

⁹³See *DeRolph*, 677 N.E.2d at 746.

⁹⁴*Id.*

⁹⁵*Id.*

⁹⁶*Id.* at 747.

⁹⁷See *supra* notes 77-99 and accompanying text.

⁹⁸See *supra* note 1 and accompanying text.

⁹⁹The litany of anecdotal evidence supplied by the majority is fatuous. See *DeRolph*, 677 N.E.2d at 742-744. Not a modicum of evidence was adduced that the ostensible conditions described by the majority translated into a lack of thoroughness and inefficiency. It is illogical to argue that because certain improvements need to be made in some districts that the system of common schools throughout the State is not thorough and efficient.

The Foundation Program¹⁰⁰ and Classroom Facilities Act are genuine attempts to provide all school district throughout the state with the opportunity to educate their pupils. Instead of commanding change via judicial fiat,¹⁰¹ a wiser, and more democratic,¹⁰² approach would have been to defer to the judgment of the legislature and recognize that neither the General Assembly nor the courts can rectify the many social pathologies that plague our State's, and Nation's, schools.¹⁰³

As more courts imitate *DeRolph* and engage in policy-oriented decision-making, the cogency of democratic processes fleetly diminishes. The next section elucidates this progression.

B. Judicial Policymaking

Throughout students' educational careers, they presumably have been introduced to a somewhat superficial understanding of the respective roles of the legislature and judiciary in democratic society.¹⁰⁴ Unfortunately, when a particular branch of government usurps its designated authority, the ramifications are seldom contemplated, even in our nation's law schools. Conversely, outcome defines the wisdom of a particular course of action; process becomes ephemeral. "But for all of American history before World War

¹⁰⁰See *supra* notes 27-37 and accompanying text.

¹⁰¹The author does not purport to argue that the issues presented in *DeRolph* were non-justiciable political questions. Compare, *Cincinnati Sch. Dist. Bd. of Educ.*, 390 N.E.2d at 824 ("We find that the issue concerning legislation passed by the General Assembly pursuant to Section 2 of Article VI of the Ohio Constitution presents a justiciable controversy."), with *DeRolph*, 677 N.E.2d at 737 ("The judiciary was created as part of a system of checks and balances. We will not dodge our responsibility by asserting that this case involves a nonjusticiable political question. To do so is unthinkable."). The author contends that the issues were indeed justiciable, but the court exhibited a distrust for current educational legislation that was manifestly unwarranted. Instead of presuming that current legislation was constitutional, see *Adamsky v. Buckeye Local Sch. Dist.*, 653 N.E.2d 212, 214 (Ohio 1995), the court flagrantly substituted its judgment for that of the General Assembly.

¹⁰²See *infra* notes 104-30 and accompanying text.

¹⁰³See *supra* notes 67, 78 and accompanying text; see also, *Northshore Sch. Dist. No. 414*, 530 P.2d at 188 (recognizing testimony that "neither the teacher-student ratio nor the expenditures per pupil were adequate criteria for explaining and judging the quality of education a student is achieving in various school districts of the state.").

¹⁰⁴In high school, textbooks purport to differentiate the various branches of government and their respective roles. See generally, HENRY N. DREWRY & THOMAS H. O'CONNOR, *AMERICA IS* 179 (1987)(explaining the Presidency, Congress, and the courts, respectively).

II, courts were small in number and, with only occasional exceptions, small in their impact on public policy."¹⁰⁵

The seeds of judicial policymaking were planted in recent decades:¹⁰⁶

[T]he legal system changed on its own. A new legal realism emerged, but it had few thoughtful advocates, no conscious connections to the rest of the political system, and, eventually no real supporters . . .

Congress helped to invent this new legalism, but the courts have been accomplices as well. Neither institution fully imagined the extended impact that its tinkering would have. Together, they threw open the doors to American courts, and in response a broad range of American social and economic interests left congress and the agencies behind and began to take their business to court.¹⁰⁷

Courts are inevitably an appealing venue for communicating grievances.¹⁰⁸ "Who could blame [the American people]? The courts offered attractive possibilities for action--and sometimes for desired delay--that Congress and the agencies could not match. Like wise consumers, political interests shopped around for a venue that promised them the most satisfactory outcome. It was the rational thing to do."¹⁰⁹

The problems with judicial policymaking are manifold.¹¹⁰ First, judges' conclusions and public opinion are often discordant.¹¹¹ Despite the benevolent intentions that admittedly guide judges, these contradictions are corrosive over the long term.¹¹² "Persistent nonmajoritarian activity . . . undermines support for government action. It breeds dissatisfaction, which quickly festers into disaffection. The legitimacy of government itself may be cast in doubt."¹¹³ Rather than soliciting the deliberative processes of the legislature, individuals

¹⁰⁵G. CALVIN MACKENZIE, *THE IRONY OF REFORM: ROOTS OF AMERICAN DISENCHANTMENT* 135 (1981). Although Mackenzie's critique was directed toward the federal government, the author contends that the ramifications of judicial policymaking at the state level are analogous.

¹⁰⁶*Id.* at 149.

¹⁰⁷*Id.*

¹⁰⁸Before 1836, 112 education-related cases were heard in state appellate and federal courts. In 1986, an estimated 9,550 such cases were heard. See TYACK, *supra* note 9, at 215.

¹⁰⁹MACKENZIE, *supra* note 105, at 149-50.

¹¹⁰See generally, John E. McDermott, *Federal Courts and Federal Education Policy*, in HARRY L. SUMMERFIELD, *POWER AND PROCESS: THE FORMATION AND LIMITS OF FEDERAL EDUCATIONAL POLICY* 203-13 (1974)(addressing federal judicial review of school financing and interdistrict expenditure inequalities).

¹¹¹MACKENZIE, *supra* note 105, at 156.

¹¹²*Id.* at 156.

¹¹³*Id.*

increasingly look to courts to undertake the responsibility of fashioning solutions to vexing problems.

Judicial policymaking "raises troublesome questions about accountability and responsibility."¹¹⁴ Although federal judges are more susceptible to such a critique, because they are never subject to reelection,¹¹⁵ state judges should not be immune from criticism. Though Ohio Supreme Court justices are elected,¹¹⁶ "judges rarely have to endure consequences for the pain their decisions impose."¹¹⁷ This is dissimilar to representatives who must perennially justify their decisions to the body politic¹¹⁸ -- unlike the judiciary, a legislator must attempt to meet the needs and desires of a constituency.¹¹⁹

Judges likewise do not "have to face up to the budgetary implications of their decisions."¹²⁰ Accordingly,

If the Framers of the Constitution were in consensus on nothing else, they were of one mind on the singular importance of placing the power to tax the people in the hands of the people. . . . Yet courts these days often impose standards of performance on governments that they cannot evade and that have the inevitable impact of increasing expenditures and thus raising taxes. Legislators and executives may pay a political price for such actions, but judges never do.¹²¹

¹¹⁴*Id.* at 157.

¹¹⁵*See id.*

¹¹⁶"Two judges of the supreme court shall be chosen in each even-numbered year. Each judge shall hold office for six years." OHIO REV. CODE ANN. § 2503.03 (Banks-Baldwin 1997).

¹¹⁷MACKENZIE, *supra* note 105, at 157. Mackenzie opined that when citizens cannot petition in democratic channels, such as the legislature, they often resort to street demonstrations and violence. *Id.*

¹¹⁸Alexis de Tocqueville remarked that:

[t]he legislature is, of all political institutions, the one which is most easily swayed by the wishes of the majority. The Americans determined that the members of the legislature should be elected by the people immediately, and for a brief term, in order to subject them, not only to the general convictions, but even to the daily passions of their constituents.

¹ ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 298 (Henry Reeve trans., First Schocken ed., 1961)(1835).

¹¹⁹*See* MIKE M. MILKSTEIN & ROBERT E. JENNINGS, EDUCATIONAL POLICY-MAKING AND THE STATE LEGISLATURE: THE NEW YORK EXPERIENCE 33 (1973). Milkstein and Jennings analyzed The New York legislature and found that legislators are influenced by myriad groups when formulating educational policies. *See id.* at 54-56.

¹²⁰MACKENZIE, *supra* note 105, at 157.

¹²¹*Id.*

Unfortunately, the magnification of the judicial role in policymaking invites irresponsibility among elected officials.¹²² "Knowing, as they now must, that many of their most controversial decisions will ultimately be reargued and redecided in court, public officials are relieved of much of the pressure to act responsibly."¹²³

Arguably the most alarming dilemma that emanates from judicial policymaking is the bearing that it has on democratic crusades.¹²⁴ In democratic governments, the most constructive actions are collective in nature.¹²⁵ Essentially, "[w]hen popular will is mobilized, when public officials act in accord with a popular consensus and contribute to its creation, policy falls on fertile ground."¹²⁶ Legislatively-derived policies are more studied and reasoned and are far less likely to command dramatic change. When courts aspire to legislate, the implementation is often hasty and incomplete as judges are not as intimately involved in the policies they have been asked to carry out.¹²⁷ Consequently,

[t]he hegemony of courts diminishes the energy that goes into popular mobilization. As judges make more and more of society's important decisions, elections and legislative debates become steadily less relevant. Why invest the time in election campaigns or voting if the purpose is only to pick officials who make speeches, nothing else.¹²⁸

By demanding a "complete overhaul"¹²⁹ of the current system, the court is ignoring the compelling body of evidence that substantiates that funding is immaterial to student achievement and is *directing* the legislature to institutionalize a policy that even the court cannot authenticate.¹³⁰ In the final

¹²²In *DeRolph*, the majority stated that the court was influenced by the amicus curiae briefs of thirty-seven lawmakers. See *DeRolph*, 677 N.E.2d at 746. This is a classic illustration of Mackenzie's point. These legislators find it easier to write to the supreme court than to undertake a politically divisive, and perplexing, issue in the legislative arena. The legislators can conveniently evade responsibility by asserting that the court was solitarily responsible for the decision. Unfortunately, as more legislators shirk their obligations as elected officials, petitioning the General Assembly to promulgate change becomes futile.

¹²³MACKENZIE, *supra* note 105, at 157-58.

¹²⁴See *id.* at 158.

¹²⁵See *id.*

¹²⁶*Id.*

¹²⁷See *id.*

¹²⁸MACKENZIE, *supra* note 105, at 159.

¹²⁹*DeRolph*, 677 N.E.2d at 747.

¹³⁰Pursuant to the court's opinion, the Foundation Program and other enactments are essentially void. See *id.* However, these programs are legitimate attempts to address the issues that concerned the majority. If the legislature was convinced that money would help, they could have allocated more money to districts under the Foundation Program.

analysis, the *DeRolph* court was aspiring to resolve a public policy controversy¹³¹ and was determined to exalt contrived arguments to rationalize its decision.

V. CONCLUSION

The recent decision of the Ohio Supreme Court in *DeRolph v. State* is alarming. The underpinning of Justice Sweeney's majority opinion is that the system of public schools in Ohio is not adequately funded.¹³² Neither the Foundation Program nor the Capital Improvements Act is sufficient to meet the needs of school districts.¹³³ However, the evidence is overwhelming that additional funds will not enrich the state of Ohio schools.¹³⁴ The court was initiating its own public policies by commanding the legislature to exhaust more money on the public school system.¹³⁵ This course of action subverts democratic processes¹³⁶ while elevating the court to a position in democratic society that it is not worthy of assuming.

The dichotomy between those who support the expenditure of additional funds and those who do not will surely persist. Issues such as the suitable use of money in a school system¹³⁷ and discussions which revolve around the social dilemmas facing students in our society, albeit provocative, deserve more assiduous reflection and are clearly beyond the reach of this inquiry. While cognizant of the importance of these issues, the intent of this analysis was not to address all the vexing questions which encircle school finance. Instead, this Comment unequivocally disproves one facet of the *DeRolph* logic – that money will better Ohio schools. This Comment should not be read as providing any easy answers, but rather simply points out that a finding of unconstitutionality, that is premised whole or in part on the insufficiency of funds in Ohio schools, is pretextual.

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¹³¹See MACKENZIE, *supra* note 105, at 158.

¹³²See *supra* notes 39-57 and accompanying text.

¹³³See *supra* notes 46 and accompanying text.

¹³⁴See *supra* Part IV.A.

¹³⁵See *supra* notes 120-121 and accompanying text.

¹³⁶See *supra* notes 104-130 and accompanying text.

¹³⁷See *supra* notes 81-83 and accompanying text.

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