# Case Comment

## Equal Educational Opportunity and Public School Finance Reform in Ohio: *Board of Education v. Walter*

In *Board of Education v. Walter*[1] the Ohio Supreme Court held that the statutory scheme of financing public education in Ohio[2] was constitutional under the Ohio Constitution. Plaintiffs at the trial court level had challenged the statutory scheme under two provisions of the Ohio Constitution: the equal protection and benefit clause[3] and the thorough and efficient clause.[4] The Ohio Supreme Court first reversed the holding of the court of appeals and the conclusion of the trial court that the statutory scheme violated the equal protection and benefit clause. The supreme court then upheld the holding of the court of appeals, which had found error in the trial court's conclusion that the statutory scheme violated the thorough and efficient clause.

The legal yardstick used by the Ohio Supreme Court and the lower courts to decide both issues was "equal educational opportunity (EEdO)." In this respect the Ohio courts joined a growing number of courts[5] and commentators[6] who have relied on the concept of EEdO to analyze public

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1. 58 Ohio St. 2d 368, 390 N.E.2d 813 (1979). Plaintiffs filed a petition for certiorari in the United States Supreme Court on Oct. 13, 1979. 48 U.S.L.W. 3274 (Oct. 23, 1979). That petition was denied on Jan. 7, 1980. 48 U.S.L.W. 3432 (Jan. 8, 1980).

2. The statutes challenged were OHIO REV. CODE ANN. §§ 3317.022, 3317.023(A), (B), and (C), 3317.53(A) and (B), 3317.02(E), and § 30 of Am. Sub. S. 221 (Page Supp. 1978). § 3317.53 was repealed effective July 1, 1978. 1975 OHIO LAWS 525. *See* Board of Educ. v. Walter, No. C-78001, at 3-5 (Ct. App. Hamilton County Sept. 5, 1978) [hereinafter cited as App. Op.].

3. OHIO CONST. art. I, § 2 (Page 1979) provides: "All political power is inherent in the people. Government is instituted for their equal protection and benefit. . . ."

4. OHIO CONST. art. VI, § 2 (Page 1979) requires the legislature "to make such provisions, by taxation, or otherwise, as . . . will secure a thorough and efficient system of common schools throughout the state."

5. *See* Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345, *cert denied*, 432 U.S. 907 (1977) (*Serrano II*); Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977); Gindl v. Department of Educ., No. 54,665 (Fla. Sup. Ct. May 17, 1979); Thompson v. Engelking, 96 Idaho 793, 537 P.2d 635 (1975); Milliken v. Green, 390 Mich. 389, 212 N.W.2d 711 (1973); Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973); Board of Educ. v. Nyquist, 94 Misc. 2d 466, 408 N.Y.S.2d 606 (1978); Olsen v. State, 276 Or. 9, 554 P.2d 139 (1976); Busé v. Smith, 74 Wis. 2d 550, 247 N.W.2d 141 (1976). For an interesting exclusion from the protection of EEdO, see School Bd. v. Blackford, 369 So.2d 689 (Fla. App. 1979) (right to EEdO does not include right to be seated in a particular desk in a particular room in a particular school).

6. J. BERKE, A. CAMPBELL & R. GOETTEL, FINANCING EQUAL EDUCATIONAL OPPORTUNITY: ALTERNATIVES FOR STATE FINANCE (1972); F. CORDASCO, THE EQUALITY OF EDUCATIONAL OPPORTUNITY: A BIBLIOGRAPHY OF SELECTED REFERENCES (1973); J. GUTHRIE, G. KLIENDORFER, H. LEVIN & R. STOUT, SCHOOLS AND INEQUALITY (1971); F. KEMERER & K. DEUTSCH, CONSTITUTIONAL RIGHTS AND STUDENT LIFE: VALUE CONFLICT IN LAW AND EDUCATION 501 (1979); R. REISCHAUER & R. HARTMAN, REFORMING SCHOOL FINANCE (1973); SENATE SELECT COMMITTEE ON EQUAL EDUCATIONAL OPPORTUNITY, TOWARD EQUAL EDUCATIONAL OPPORTUNITY (1974); A. WISE, RICH SCHOOLS, POOR SCHOOLS: THE PROMISE OF EQUAL EDUCATIONAL OPPORTUNITY (1968); YEARBOOK OF EQUAL

school financing issues. This approach, however, is flawed by analytical vagaries and avoids the crucial issues facing courts in these cases.[7] The Ohio Supreme Court in particular used EEdO in its analysis to reduce important issues of law to factual questions of fault,[8] thus ignoring legislative activity that demands legal leadership.[9]

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EDUCATION OPPORTUNITY (1st ed. 1975); Briggs & Main, Serrano II—*A Case of Missed Opportunities?*, 4 HASTINGS CONST. L.Q. 453 (1977); Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305 (1969); Dugan, *The Constitutionality of School Finance Systems Under State Law: New York's Turn*, 27 SYRACUSE L. REV. 573 (1976); Levin, *Current Trends in School Finance Reform Litigation: A Commentary*, 1977 DUKE L.J. 1099; Lindquist & Wise, *Developments in Education Litigation: Equal Protection*, 5 J.L. & EDUC. 1 (1976); McCarthy, *Is the Equal Protection Clause Still a Viable Tool for Effecting Educational Reform?*, 6 J.L. & EDUC. 159 (1977); McDermott & Klein, *The Cost-Quality Debate in School Finance Litigation: Do Dollars Make a Difference?*, 38 L. & CONTEMP. PROB. 415 (1974); Richards, *Equal Opportunity and School Financing: Towards a Moral Theory of Constitutional Adjudication*, 41 U. CHI. L. REV. 32 (1973); Schwartz, *The Public School Financing Cases: Interdistrict Inequalities and Wealth Discrimination*, 14 ARIZ. L. REV. 88 (1972); Silard & White, *Intrastate Inequalities in Public Education: The Case for Judicial Relief Under the Equal Protection Clause*, 1970 WIS. L. REV. 7; Thomas, *Equalizing Educational Opportunity Through School Finance Reform: A Review Assessment*, 48 U. CIN. L. REV. 255 (1979); Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1975); Yudof, *Equal Educational Opportunity and the Courts*, 51 TEX. L. REV. 411 (1973); Comment, *An Analysis and Review of School Financing Reform*, 44 FORDHAM L. REV. 773 (1976); *Symposium—Equal Educational Opportunity*, 38 HARV. EDUC. REV. 3 (1968); Comment, *The Right to a Meaningful Education in California: Should Dollars Make the Difference?*, 10 PAC. L.J. 991 (1979); Comment, *South Dakota's System of Financing Public Education: Is It Constitutional?*, 24 S.D.L. REV. 365 (1979); Note, *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 YALE L.J. 1303 (1972).

7. *See* Part III *infra*. Twelve years ago, professor Kurland expressed his feelings about EEdO in school finance decisions:

> I am prepared to make the necessary prophecy. I should tell you then, with some assurance, that sooner or later the [United States] Supreme Court will affirm the proposition that a State is obligated by the equal protection clause to afford equal educational opportunity to all of its public school students. But I should also tell you that such a decision . . . will probably only be the creation of a greater problem and not a solution to this one.

Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. CHI. L. REV. 583, 583 (1968).

8. *See* Part III(B) *infra*. Plaintiffs' certiorari petition alleged that the Ohio Supreme Court unconstitutionally devised its own findings of fact. *See* 48 U.S.L.W. 3361 (Nov. 27, 1979).

9. The Ohio legislature continually wrestles with the problems of school financing. Numerous bills have recently been proposed to solve the issues. *See, e.g.*, H. 1000, 1374, 1378, and S. 494, 112th Gen. Assembly (1977-78); H. 673, 113th Gen. Assembly (1979-80). Comprehensive changes were initiated in 1977, and the Education Review Committee, established in 1973 to review continuously the "administration and effectiveness of elementary and secondary education in Ohio . . . ," was reaffirmed in purpose. Am. Sub. S. 221, 112th Gen. Assembly §§ 30, 52 (1977).

These legislative difficulties arise because the scheme is inherently irrational and inequitable. Wessel, *Why Guaranteed Yield Failed in Ohio*, 3 J. EDUC. FINANCE 265 (1978). *See also* Part II *infra*. Recent amendments intended to prevent school closings have only prolonged or exacerbated the problems. *See* OHIO REV. CODE ANN. §§ 3317.61-.62 (emergency school loans); 3317.621-.64 (such loans require the school district to reduce its services to minimal levels); 3317.65-.66 ("school district income taxes" to repay loans); 3317.487-.488 (control of amount of educational services by state superintendent); 3317.483 (absolute prohibition of closing schools for financial reasons; must apply for loans) (Page Leg. Bull. 1979). *See* Thomas, *supra* note 6, at 299 ("In sum, educational financing in Ohio is in a state of operational chaos and legal uncertainty."). *See also Alarming School Decision*, Columbus Citizen-Journal, June 21, 1979, at 6, col. 1.

The Committee to Fund Schools Fairly began an initiative petition drive in 1979 to completely rewrite both the Ohio Constitution and the Ohio Revised Code as they apply to public education. The proposal would have created a state-wide "basic education fund," established a formula for distribution of the basic education fund "so that an equal amount of funds can be provided for the basic education of each pupil in this state," and generally increased taxes and other moneys to fund public education. The proposal was not placed on the November 1979 ballot. *See* OHIO ATT'Y GEN., SUMMARY AND TEXT OF PROPOSED AMENDMENT TO THE CONSTITUTION (certified May 4, 1979).

This Case Comment will explore public school financing issues in the context of Ohio law in an effort to propose a precise constitutional analysis. After setting forth the decisions of the Ohio Supreme Court and the courts below, this Comment will examine constitutional and statutory law in Ohio dealing with public school financing. The author will then explain and develop the role that the judiciary has assumed in these cases—in particular, those cases relying on EEdO—and the problems that have resulted. The final section proposes a precise analysis of possible constitutional challenges to public school financing schemes—an analysis that minimizes the problems associated with the EEdO concept.

## I. *Board of Education v. Walter*

### A. *Trial Court Decision*

Plaintiffs brought a class action suit[10] against various state officers and agencies[11] in the Court of Common Pleas for Hamilton County, located in Cincinnati, Ohio. Plaintiffs asked the court to declare the statutory system of funding public education unconstitutional under the Ohio Constitution,[12] and to make "such ancillary orders as the rights of the plaintiffs require."[13] Plaintiffs' arguments focused on the unequal amounts of money distributed to school districts under the present scheme of funding; this inequality resulted from "wholly irrational factor[s]"[14] that included voter caprice, district wealth, and the multiple financial burdens of municipal government.[15] Plaintiffs then argued that this inequality prevented a thorough and efficient education and denied EEdO to children in certain districts. Asserting that the responsibility for a thorough and efficient education and EEdO lay with the state under the Ohio Constitution and was not delegable to school districts without sufficient financial support,[16] plaintiffs contended that the state had violated the Ohio Constitution by enacting the present system of public school funding.

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10. Board of Educ. v. Walter, No. A7602725 (C.P. Hamilton County Dec. 5, 1977) (Findings of Fact and Conclusions of Law) [hereinafter cited as Tr. Op.]. The trial opinion, almost 400 pages in length, is an adoption *in toto* of the findings and conclusions submitted by plaintiffs. *Id.* at vi. Members of the class included

> all of the school districts in Ohio, all of the members of the boards of education for such districts, all of the administrators employed by such districts, all of the students who reside in Ohio's school districts and who attend public elementary and secondary schools, all of the parents of such students, and all of the owners of real property and personal property used in business who reside in Ohio school districts.

*Id.* at 1.

11. Defendants were the State Superintendent of Public Instruction, the State Board of Education, the State Department of Education, and the State Controlling Board. App. Op., *supra* note 2, at 1.

12. *See* notes 3, 4 *supra*.

13. Tr. Op., *supra* note 10, at 11.

14. *Id.*

15. *Id.* at 10-11.

16. *Id.* at 2.

### 1. *Findings of Fact*

The trial court began its opinion by finding that plaintiffs had "proved far more concerning the sorry state of public education in Ohio and the collapse of the school funding system than they originally alleged."[17] In support of this statement the court detailed in almost three hundred pages of factfindings[18] the problems with which Ohio schools had been faced in recent years[19] and the relevant sources of those problems.[20] The court held in general findings that

> the law does not even purport to equalize the provision of educational opportunities, or educational resources, to the school children of Ohio, or even to the school districts. The emphasis of the statutory scheme is rather upon a measure of equity for taxpayers in the form of equal access to state aid. . . . At least this much is certain: the level of funding is now so low that the equalization of the state's resources which are now committed to financing public elementary and secondary education would result only in the equalization of poverty.[21]

The court then commented on the relation of this disparity to both a thorough and efficient education and to EEdO:

> The Court also finds that equalizing the taxing capacity of school districts rather than equalizing the educational opportunities of school children is inimical to the concept of equality of educational opportunity. In the matter of education, the State has a duty to see that a thorough and efficient school system is provided for school children. To ignore that duty and, instead, to consign the school systems of the districts to the whim of the voters, is to imbue the voters of every school district with the power to deprive the children of their district of a satisfactory educational opportunity. Such a concept is, by definition, the abdication by the General Assembly of its indisputable duty to make provision for a thorough and efficient system of common schools throughout the state.[22]

The court concluded its factfindings by approving a proposed model school district scheme as a feasible alternative to the present plan.[23]

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17. *Id.* at 14-15.

18. *Id.* at 33-307.

19. *See id.* at 53-184. "[A]lmost 97% of the 1869 schools which were inspected were found not to be in compliance with one or more separate [state minimum] standards." *Id.* at 54. "The total number of deficiencies in significant categories in all of the schools which were inspected was 7797." *Id.* at 55. The closing of school districts was found to be the major problem. *Id.* at 57-69. The effects of these closings were disruption of educational development by sequential learning, loss of summer time to earn money, decreased student and teacher morale, and lost extracurricular activities. *Id.* at 70-71. The conditions in urban districts, *e.g.*, Toledo, Cleveland, Columbus, and Cincinnati, were even worse. *Id.* at 93-120. At the same time, certain well-financed districts had "great educational opportunities." *Id.* at 121-40. *See also* Landsman, *Can Localities Lock the Doors and Throw Away the Keys?: Fiscally Motivated Suspensions of Public Education Programs: A Proposed Equal Protection Analysis*, 7 J.L. & EDUC. 431, 435 n.32 (1978).

20. *See* Tr. Op., *supra* note 10, at 185-301. The sources included the failure of local tax efforts, insufficient financial support for the total system, irrational and unfair property tax machinery, and neglect of capital needs. In particular, the court criticized the failure of the statutory scheme to compensate for, and instead compound, these problems. *Id.* at 209-301.

21. *Id.* at 302-03. *See also id.* at 357.

22. *Id.* at 304.

23. *Id.* at 307-09. *See also id.* at 388-89.

### 2. *Conclusions of Law*

The court first considered the thorough and efficient clause in its Conclusions of Law. Examining the legislative history[24] and case law[25] interpreting the clause, the court held that

> it is clear that the command of the thorough and efficient clause has historically and consistently been construed by both the Supreme Court and the General Assembly as that of providing not only an educational system which has the elements of thoroughness and efficiency *but [also] one which delivers an education of high quality as well as equality of educational opportunity* to Ohio's school children.[26]

Listing the problems that beset Ohio's school system,[27] the court concluded that the entire statutory system violated the thorough and efficient clause.

The court next applied the equal protection and benefit clause. In accordance with equal protection "guidelines" of the United States Supreme Court,[28] the court held that Ohio's schoolchildren have a fundamental interest derived from their right to attend a thorough and efficient system of schools—an interest guaranteed by the Ohio Constitution.[29] For a state to justify discrimination that impairs the exercise of this interest, it must show a compelling state interest.[30] Rejecting local control of education and lack of financial resources as possible compelling justifications,[31] the court held that no compelling state interest, nor even a rational basis, existed to justify "such a destructively discriminatory system."[32] Thus, the court concluded that the statutory scheme also violated the equal protection and benefit clause.

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24. *Id.* at 359-62, 368.

25. *Id.* at 362-68. The court also briefly mentioned evidence offered by defendants of the dictionary definitions of "thorough" and "efficient." *Id.* at 369.

26. *Id.* at 368-69 (emphasis added).

27. *Id.* at 369-70:

> The present system, under which almost all of the schools in the state are found to be unable to comply with the State Board of Education's minimum standards . . . , under which numerous school districts were forced to close their schools for lack of funds . . . , thereby causing students to suffer irreparable educational deficits . . . , under which conditions of educational deprivation exist in more than half of Ohio's school districts . . . , including the state's large urban districts . . . , under which vast disparities exist among Ohio's school districts in total state and local support . . . , under which . . . only substandard educational services are delivered to the overwhelming majority of the pupils . . . under which the local tax effort mechanism . . . has collapsed of [its] own weight . . . , under which the state has absolutely neglected the capital needs of the school districts . . . , under which the funding formula rewards the school districts which have high tax rates because they have high median income . . . , [and] provides only inadequate and disequalizing subsidies for its categorical problems . . . , imposes penalties upon poor districts for lacking the funds to comply with statutory mandates . . . , and under which most of the school districts are unable to determine their future revenues definitely enough to be able to plan their curricula and staffing . . . , represents the absolute failure of the General Assembly to carry out its duty as provided in Article VI, § 2 of the Ohio Constitution.

28. *Id.* at 372-73. *See* cases cited *id.* nn.48-51.

29. *Id.* at 374.

30. *Id.*

31. *See id.* at 378-79.

32. *Id.* at 377.

B. *Court of Appeals Decision*

The State of Ohio appealed the trial court's conclusions of law under five separate assignments of error, three of which are relevant here.[33] In its first assignment of error the state argued that the court lacked jurisdiction over the subject matter under the separation of powers doctrine because the particular issues were "constitutionally committed to a coordinate branch of government."[34] The court of appeals, asserting its duty to interpret the Ohio Constitution, assumed that the state was disclaiming all judicial review, and dismissed such a contention as "devoid of merit."[35]

In the third assignment of error, the state explicitly challenged the authority of the trial court under the thorough and efficient clause to set educational requirements and to determine the most appropriate method of securing those requirements.[36] The court agreed with the state and held that the "general rule of noninterference" precluded a substitution of the court's judgment for that of the legislature on the issue of whether the statutory scheme fulfilled the commands of the thorough and efficient clause.[37] Thus, the court held that the statutory scheme did not violate the thorough and efficient clause.

Finally, the fourth assignment of error concerned the trial court's conclusion that the statutory scheme violated the equal protection and benefit clause. Using the same federal equal protection analysis as did the trial court, the court of appeals found that a "fundamental right to the educational benefits which naturally flow from a 'thorough and efficient system . . .' " is at least implicitly guaranteed by the Ohio Constitution.[38] The court further held that EEdO is required by the equal protection and benefit clause.[39] From these two premises, the court concluded that the crucial issue under its equal protection analysis was "whether the operation of the challenged statutes results in such inequality of educational opportunities as to impinge upon the fundamental right [to educational benefits that naturally flow from a 'thorough and efficient system']."[40] The court derived this inequality of educational opportunity from the conclusions of the trial court: "Because the system is one in which vast differentials in resources exist among the school districts, the present

33. The two assignments of error that are not relevant to the constitutional issues herein discussed concern the standing of the state agencies in the plaintiff class and the certification limits of the class asserted to be represented by plaintiffs. The court of appeals overruled both assignments of error. App. Op., *supra* note 2, at 12, 28. The Ohio Supreme Court dismissed the issue of standing in one paragraph. 58 Ohio St. 2d at 388, 390 N.E.2d at 826. The state did not appeal the class certification issue.

34. App. Op., *supra* note 2, at 5.

35. *Id.* at 7.

36. *Id.* at 12-13.

37. *Id.* at 13.

38. *Id.* at 19.

39. *Id.*

40. *Id.* at 19-20.

system . . . deprives the school children of Ohio of an *essentially equal opportunity to achieve educationally and equip themselves for future life.*"[41]

Although the court of appeals did not then expressly hold that this inequality impinged upon the fundamental rights of schoolchildren, the court nonetheless proceeded to apply strict scrutiny to the interests asserted by the state as justification for the statutory scheme. The state again asserted the need for local control of education. The court rejected the state's argument on two grounds. First, the court held that local control over the funding of education permitted voters to perpetuate unequal educational opportunities in violation of the state's constitutional duty to equalize educational opportunities.[42] Second, local control, including real property taxation, could be permissible, and important to a certain degree, under a different funding scheme if the state first complied with EEdO.[43] Thus, the present statutory scheme was not the only available means to foster local control over education. The court of appeals therefore affirmed the conclusion of the trial court that the statutory scheme violated the equal protection and benefit clause.

### C. *Ohio Supreme Court Decision*

#### 1. *Equal Protection and Benefit Clause*

The Ohio Supreme Court began its analysis with the equal protection and benefit clause. The court approved the "two-tiered test" for equal protection, explaining that the court "has consistently applied federal guidelines in construing the Ohio Constitution's Equal Protection and Benefit Clause."[44] The court then explained the federal two-tier test:

> Simply stated, the test is that unequal treatment of classes of persons by a state is valid only if the state can show that a rational basis exists for the inequality, unless the discrimination impairs the exercise of a fundamental right. . . . If the discrimination infringes upon a fundamental right, it becomes the subject of strict judicial scrutiny and will be upheld only upon a showing that it is justified by a compelling state interest.[45]

The Ohio Supreme Court then applied what it termed the "strict scrutiny test" by determining whether a fundamental interest was affected.[46] Initially, however, the court rejected the fundamental right test of the United States Supreme Court in *San Antonio Independent School*

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41. *Id.* at 21 (quoting from a summary of the findings and conclusions of the trial court's opinion) (emphasis added).

42. *Id.* at 22.

43. *Id.* at 22-23.

44. 58 Ohio St. 2d at 373, 390 N.E.2d at 817.

45. *Id.*, 390 N.E.2d at 818 (citation omitted).

46. *Id.* at 374, 390 N.E.2d at 818. The court's analysis here is twisted. The court should have applied strict scrutiny only if it *first* found a fundamental interest. *See, e.g.*, State *ex rel.* Heller v. Miller, 61 Ohio St. 2d 6, 11 (1980).

*District v. Rodriguez*.[47] This test was summarized by the Ohio Supreme Court as whether the right was "explicitly or implicitly guaranteed by the Constitution."[48] Under this test, the court concluded, "educational opportunity would [indeed] be a fundamental interest entitled to strict scrutiny."[49] The court rejected the *Rodriguez* test for two reasons. First, the Ohio Constitution and the United States Constitution, said the court, differed sharply in their respective purposes. The United States Constitution contained those powers delegated to the federal government, whereas the Ohio Constitution was not one of such limited powers. Thus, the Ohio Constitution had provisions "not considered fundamental to our concept of ordered liberty, *e.g.*, workers' compensation."[50] Second, the court criticized the *Rodriguez* test as going too far, since the right to acquire and hold property, although guaranteed by the United States Constitution, would not be considered fundamental by the Ohio Supreme Court.[51]

Without further analysis of fundamental rights, the court ended its discussion of strict scrutiny by noting that it would be inappropriate for the issues herein:

> Finally, because this cause deals with difficult questions of local and statewide taxation, fiscal planning and education policy, we feel that this is an inappropriate cause in which to invoke "strict scrutiny." This case is more directly concerned with the way in which Ohio has decided to collect and spend state and local taxes than it is a challenge to the way Ohio educates its children.[52]

The court therefore applied the traditional test of equal protection, that is, whether a rational basis existed for the inequity. The court explained this test as placing a burden on the challenger to show unconstitutionality beyond a reasonable doubt, or stated another way, to show that there are no " 'state of facts that reasonably can be conceived to constitute a distinction, or difference in state policy. . . .' "[53]

Plaintiffs, bearing a heavy burden of persuasion for the first time in this litigation, pointed out the disparity in expenditures per pupil in Ohio's school districts. The supreme court agreed with defendants' argument that local control over education supplied the rational basis for this disparate treatment. Local control, the court held, "meant not only the freedom to devote more money to the education of one's children but also control over and participation in the decision-making process as to how those local tax

47. 411 U.S. 1 (1973). Other aspects of this case are discussed in text accompanying notes 129-39 *infra*.

48. 58 Ohio St. 2d at 374, 390 N.E.2d at 818, *quoting* 411 U.S. at 33-34.

49. 58 Ohio St. 2d at 374, 390 N.E.2d at 818.

50. *Id.* at 375, 390 N.E.2d at 818 (citation omitted).

51. *Id.* 390 N.E.2d at 819. The court quoted the critique of *Rodriguez* by the New Jersey Supreme Court in Robinson v. Cahill, 62 N.J. 473, 491, 303 A.2d 273, 282 (1973).

52. 58 Ohio St. 2d 375-76, 390 N.E.2d at 819.

53. *Id.* at 376, 390 N.E.2d at 819.

dollars are to be spent."[54] Further, the court found that the history of Ohio education law showed an attempt "to ameliorate disparity in the levels of expenditures without destroying the virtues of local control."[55] Finally, local control enhanced " 'experimentation, innovation, and a healthy competition for educational excellence.' "[56] Thus, the court held that the disparity in expenditures was not so irrational as to violate the equal protection and benefit clause.

### 2. *Thorough and Efficient Clause*

The Ohio Supreme Court prefaced its analysis of the thorough and efficient clause by discussing the scope of review. The court first reaffirmed its authority and duty to review statutes for constitutionality: "The doctrine of judicial review is so well established that it is beyond cavil."[57] In the same vein the court rejected any suggestion that the issues were not justiciable. Nonetheless, the court recognized the great deference that must be accorded the Ohio legislature in the area of education legislation, quoting from an Ohio Supreme Court case decided in 1922: "*With the wisdom or the policy of such legislation the court has no responsibility and no authority.*"[58] Finally, the court noted that the legislature's discretion in this area is not absolute, and the court would not permit an effective deprivation of "educational opportunity":

> To state that the General Assembly must be granted wide discretion and that it is not the function of this court to question the wisdom of the statutes, is not to say that the General Assembly's discretion in this area is absolute. . . . For example, in a situation in which a school district was receiving so little local and state revenue that the students were effectively being deprived of educational opportunity, such a system would clearly not be thorough and efficient.[59]

In a footnote to the phrase "effectively being deprived of educational opportunity," the court cited *Rodriguez* for the proposition that a financing scheme was not unconstitutional absent "absolute deprivation of education."[60]

In this case, however, the court held that the legislature "ha[d] not so abused its broad discretion" when it enacted the present statutory scheme.[61] This holding was based primarily on the minimum amount of money[62] guaranteed by the statutory scheme to each school district. This

54. *Id.* at 377, 390 N.E.2d at 820.

55. *Id.* at 380, 390 N.E.2d at 821.

56. *Id.* at 381, 390 N.E.2d at 822, *quoting* 411 U.S. at 50.

57. 58 Ohio St. 2d at 383, 390 N.E.2d at 823.

58. *Id.* at 385, 390 N.E.2d at 824, *quoting* State *ex rel.* Methodist Children's Home Ass'n v. Board of Educ., 105 Ohio St. 438, 448, 138 N.E. 865, 868 (1922) (emphasis added by the *Walter* court).

59. *Id.* at 386-87, 390 N.E.2d at 824-25 (citation omitted).

60. *Id.* at 387, 390 N.E.2d at 825 n.14, *quoting* 411 U.S. at 25.

61. 58 Ohio St. 2d at 387, 390 N.E.2d at 825.

62. $960 per pupil per school district. *See* text accompanying notes 102-08 *infra*.

funding floor only had to be "sufficient to ensure that each child receive[d] an adequate education."[63] Thus, the funding scheme was constitutional since it *attempted* to set a funding floor "sufficient to assure that each school district ha[d] the means to comply with state minimum standards."[64] Educational deprivation, explained the court, was not the equivalent of school closings, since there was no evidence that any student received less than the required days of instruction per year. Nor did educational deprivation exist in those school districts that offered services in excess of state minimum standards yet claimed to be "starved for funds." Finally, the court held, degrees of thoroughness and efficiency were irrelevant to constitutionality.

### 3. *Justice Locher's Dissent*

Justice Locher, in a strongly worded dissent, disagreed with both holdings of the majority. He would instead have found a fundamental interest of EEdO and applied strict scrutiny under the equal protection and benefit clause, since "the fundamental right to equal educational opportunity is the American Dream as incarnate as constitutional law."[65]

> The American Dream is thwarted by the archaic and unconstitutional statutory system of financing elementary and secondary education. Evidence abounds that Ohio's beleaguered schools are overwhelmed by problems of such magnitude that the basic needs of pupils go unfulfilled. The majority opinion flies square in the face of reality, not to mention the findings of fact and legal conclusions of the trial court and the Court of Appeals.[66]

Locher's dissent, relying primarily on the findings and conclusions of the trial court, agreed with that court that a clear connection existed between the disparity in the funding of school districts and the "general malais[e]" of many schools that were unable to meet even minimum state standards.[67] Thus, local control, although a rational basis for the statutory scheme,[68] was not a compelling justification under strict scrutiny. The effect was "a deplorable situation [that] crie[d] out for a remedy."[69]

The dissent also disagreed with the majority's holding that the legislature had not abused its discretion under the thorough and efficient clause. Again relying on the trial court opinion, Justice Locher found that some children were forced to attend schools that did not meet state minimum standards, thereby depriving those children of educational opportunity. The dissent concluded that "[s]uch a system [was] not 'thorough and efficient.' "[70]

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63. 58 Ohio St. 2d at 387-88, 390 N.E.2d at 825.
64. *Id.*
65. *Id.* at 391, 390 N.E.2d at 827 (Locher, J., dissenting).
66. *Id.*
67. *Id.* at 391, 393, 390 N.E.2d at 827-28.
68. *Id.* at 393, 390 N.E.2d at 828.
69. *Id.* at 394, 390 N.E.2d at 829.
70. *Id.*

## II. OHIO EDUCATION LAW

### A. *Ohio Constitution*

Two sections of the Ohio Constitution are central to the issue of the constitutionality of Ohio's public school financing scheme.[71] The education, or "thorough and efficient," clause places a specific constitutional duty on the Ohio Legislature to provide a thorough and efficient system of schools.[72] The equal protection and benefit clause[73] prescribes the manner by which the Ohio legislature performs its constitutional duty under the thorough and efficient clause.

#### 1. *Thorough and Efficient Clause*

Although the general duty to educate Ohio children can be derived from the plain meaning of the thorough and efficient clause, the exact boundaries of that duty and the extent to which those boundaries have been constitutionalized have been subject to some debate. The wording of the clause underwent many changes in the Ohio Constitutional Convention of 1851 because of sharp differences among the delegates of the extent of state incursion into management of education.[74] This ambiguity of meaning, combined with a history of restrained state interference with public education,[75] has prompted the Ohio Supreme Court to defer consistently to the discretion of the state legislature on the scope of the thorough and efficient clause.[76]

In *Miller v. Korns*,[77] the Ohio Supreme Court held that the legislative authority to tax one school district for funds to be used in another school district lay in the discretion reposed in the thorough and efficient clause.[78]

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71. OHIO CONST. art VI, § 3 (Page 1955), which is not considered in this Comment, authorizes the Ohio Legislature to set up a system of financing public education. For other parts of the Ohio Constitution dealing with education, see EDUCATION AND THE LAW IN OHIO 31 (1968).

72. *See* note 4 *supra.*

73. *See* note 3 *supra.*

74. *See* J. SMITH, 2 OHIO CONSTITUTION CONVENTION: DEBATES AND PROCEEDINGS 11-20 (1851).

75. *See* text accompanying notes 95-101 *infra.* For a complete history of the development of public education in Ohio, see OHIO ALMANAC 270-71 (C. Williams ed. 1970); EDUCATION AND THE LAW IN OHIO 29-40 (1968).

76. *See* State *ex rel.* Core v. Green, 160 Ohio St. 175, 115 N.E.2d 157 (1953) (creation and modification of school districts); City of East Cleveland v. Board of Educ., 112 Ohio St. 607, 148 N.E. 350 (1925) (state law defeats any municipal ordinance); Miller v. Korns, 107 Ohio St. 287, 140 N.E. 773 (1923) (tax money for one district can be used for other districts); State *ex rel.* Methodist Children's Home Ass'n v. Board of Educ., 105 Ohio St. 438, 138 N.E. 865 (1922); Bd. of Educ. v. Moorehead, 105 Ohio St. 237, 136 N.E. 913 (1922); State v. Powers, 38 Ohio St. 54 (1882); State *ex rel.* Garnes v. McCann, 21 Ohio St. 198 (1871) ("separate but equal" school system permitted).

Other jurisdictions with similar clauses have divided on the issue of legislative discretion. The Pennsylvania and Illinois Supreme Courts agree with the Ohio Supreme Court on the issue of discretion, *see* Danson v. Casey, 399 A.2d 360, 366-67 (Pa. 1979); Cronin v. Lindberg, 66 Ill. 2d 47, 58, 360 N.E.2d 360, 365 (1977); *but cf.* Board of Educ. v. Redding, 32 Ill. 2d 567, 207 N.E.2d 427 (1965) (definition of requirements of "thorough and efficient" in dicta), whereas the New Jersey Supreme Court prescribed the end product of a thorough and efficient education and permitted legislative discretion only on the means to achieve the end product. *See* Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973).

77. 107 Ohio St. 287, 140 N.E. 773 (1923).

78. *Id.* (syl. 2).

In dicta[79] the court placed constitutional significance on the phrase "thorough and efficient" to legitimize further the need for such a taxing scheme: "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 of the state lacked teachers, buildings, or equipment."[80]

### 2. *Equal Protection and Benefit Clause*

Equal protection is concerned with statutory classifications.[81] Generally, equal protection clauses of the federal and state constitutions require government to treat persons equally under certain conditions. Although all statutes necessarily result in some classification, equal protection forbids the state to use either arbitrary or invidious differences between persons when placing individuals in different classifications.[82] To determine whether the state has complied with this constitutional duty, courts examine the relation between what the state *intended to do*, that is, the objective of the legislation, and what the state *actually did*, that is, the classification that resulted.[83] How close this relation must be depends upon the importance of the interests to the person affected by the classification, the extent to which those interests are actually affected, and the groups of persons classified.

The determinative test that follows this analysis can be either rigid or generalized in scope, depending on which court decides the issue. The United States Supreme Court and those state courts that follow Supreme Court guidelines for state equal protection clauses generally use a rigid two-tiered test of "all or nothing."[84] In the absence of particular

79. Law not in the syllabus of Ohio Supreme Court opinions is dicta. State *ex rel.* Donahey v. Edmonson, 89 Ohio St. 93, 105 N.E. 269 (1913); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).

80. 107 Ohio St. at 297-98, 140 N.E. at 776. *See* App. Op., *supra* note 2, at 17. *But cf.* Tr. Op., *supra* note 10, at 362-64. In *Walter*, however, the Ohio Supreme Court relied on this passage to show the limits placed on legislative discretion. 58 Ohio St. 2d at 386-87, 390 N.E.2d at 824-25. *See* text accompanying note 59 *supra*.

81. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 60-61 (Stewart, J., concurring); Ohio Ass'n of Pub. School Employees v. Board of Educ., 28 Ohio St. 2d 58, 275 N.E.2d 610 (1971); Continental Can Co. v. Donahue, 5 Ohio St. 2d 224, 215 N.E.2d 400 (1966); City of Xenia v. Schmidt, 101 Ohio St. 437, 130 N.E. 24 (1920).

82. State *ex rel.* Soller v. West Muskingum Local Bd. of Educ., 29 Ohio St. 2d 148, 280 N.E.2d 382 (1972); State *ex rel.* Cooper v. Warren, 27 Ohio St. 2d 47, 271 N.E.2d 795 (1971); Fleischman v. Flowers, 25 Ohio St. 2d 131, 267 N.E.2d 318 (1971); Continental Can Co. v. Donahue, 5 Ohio St. 2d 224, 215 N.E.2d 400 (1966); Porter v. Oberlin, 1 Ohio St. 2d 143, 205 N.E.2d 363 (1965); State *ex rel.* Hostetter v. Hunt, 132 Ohio St. 568, 9 N.E.2d 676 (1937); City of Xenia v. Schmidt, 101 Ohio St. 437, 130 N.E. 24 (1920). *But cf.* Krause v. State, 31 Ohio St. 2d 132, 145-46, 285 N.E.2d 736, 744 (1972) (no statutory classification created).

83. *See* Coca-Cola Bottling Corp. v. Lindley, 54 Ohio St. 2d 1, 374 N.E.2d 400 (1978); Primes v. Tyler, 43 Ohio St. 2d 195, 331 N.E.2d 723 (1975); State *ex rel.* Hostetter v. Hunt, 132 Ohio St. 568, 9 N.E.2d 676 (1937); Danson v. Casey, 382 A.2d 1238 (Pa. Commw. Ct. 1978); McCarthy, *supra* note 6, at 179.

84. *See* Hawkins v. Superior Ct., 22 Cal. 3d 584, 586 P.2d 916, 150 Cal. Rptr. 435 (1978) (Mosk, J., concurring); Schwartz, *supra* note 6, at 113; Wilkinson *supra* note 6, at 998. One exception to this test is sex discrimination cases. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976).

fundamental interests or suspect groups of individuals, the Supreme Court generally defers to legislative discretion by requiring only a "rational relation" between the objective and the classification[85]—a requirement rarely not met by the state. When the Court finds a fundamental interest or suspect group, however, it generally strikes down the classification under "strict scrutiny."[86]

A second test used by other state courts[87] is a more generalized and fact-focused approach to equal protection. The "sliding scale" approach, espoused by Mr. Justice Marshall,[88] concentrates on the material facts of each case to arrive at a proper constitutional balance. Generally, as the importance of the interest affected and its infringement by the state increase, the relation between the objective and the classification must be closer. This relation is scrutinized for the importance of the interest of the state in creating and perpetuating the particular classification, and the extent to which the challenged classification actually accomplishes the legislative objective. The effect is a balancing of the rights of the individual or group affected against the interest of the state in using a particular statutory scheme.[89] This approach avoids definitions of "fundamental rights,"[90] and arguably gives state courts a freer hand to determine rights of individuals against the state.[91]

The Ohio Supreme Court generally adheres to federal guidelines when construing Ohio's equal protection and benefit clause.[92] In particular, challengers to statutes dealing with education bear a heavy burden to show unconstitutionality if based on equal protection,[93] and the state need only show a reasonable basis to discriminate in the area of education.[94] Nonetheless, prior to *Walter*, no Ohio Supreme Court

85. *E.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 37 (1973).

86. *E.g.*, Zablocki v. Redhail, 434 U.S. 374, 388 (1978); Nyquist v. Mauclet, 432 U.S. 1, 7 (1976).

87. *See* Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973); Alevy v. Downstate Medical Center, 39 N.Y. 2d 326, 384 N.Y.S.2d 82 (1976); Olsen v. State, 276 Or. 9,554 P.2d 139 (1976). *But cf.* Robbiani v. Burke, 77 N.J. 383, 399, 390 A.2d 1149, 1157 (1978) (Pashman, J., dissenting) (majority ignored sliding scale test of *Robinson*).

88. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 99-103 (Marshall, J., dissenting); Dunn v. Blumstein, 405 U.S. 330, 335 (1972); Dandridge v. Williams, 397 U.S. 471, 520-21 (1970) (Marshall, J., dissenting). *See also* Gammon, *Equal Protection of the Law and* San Antonio Independent School District v. Rodriguez, 11 VAL. L. REV. 435, 470 (1977).

89. *See* Perry, *Constitutional "Fairness:" Notes on Equal Protection and Due Process*, 63 VA. L. REV. 383, 388 (1977).

90. Robinson v. Cahill, 62 N.J. 473, 491-92, 303 A.2d 273, 283 (1973).

91. *See* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

92. Denicola v. Providence Hosp., 57 Ohio St. 2d 115, 387 N.E.2d 231 (1979); Primes v. Tyler, 43 Ohio St. 2d 195, 331 N.E.2d 723 (1975); Krause v. State, 31 Ohio St. 2d 132, 285 N.E.2d 736 (1972); State *ex rel.* Platz v. Mucci, 10 Ohio St. 2d 60, 225 N.E.2d 238 (1967); Porter v. Oberlin, 1 Ohio St. 2d 143, 205 N.E.2d 363 (1965).

93. *See* City of Dayton v. Cloud, 30 Ohio St. 2d 295, 285 N.E.2d 42 (1972).

94. Meyer v. Cuyahoga County Bd. of Revision, 58 Ohio St. 2d 328, 390 N.E.2d 796 (1979) (taxation); Towne Properties, Inc. v. City of Fairfield, 50 Ohio St. 2d 356, 364 N.E.2d 289 (1977) (taxation); City of Painesville v. Board of County Comm'rs, 17 Ohio St. 2d 35, 244 N.E.2d 892 (1969) (allocation of state funds); State *ex rel.* Ach v. Evans, 90 Ohio St. 243, 107 N.E. 537 (1914) (classification of school districts by population).

decision squarely faced the issue of equal protection as it controlled the manner by which the Ohio legislature provided a thorough and efficient system of education.

### B. *Ohio's Statutory Financing Scheme for Education*

#### 1. *History of School Finance in Ohio*

Until 1905, financing of public education in Ohio was accomplished solely by means of local property taxation.[95] Taxation of property by Ohio school districts, however, had always been subject to constitutional and statutory restrictions, which required any tax rate in the excess of one percent (ten mills) of taxable property value to be approved by a majority of voters in that school district.[96] By 1906, these restrictions and the Industrial Revolution of the late 19th Century forced the Ohio legislature to provide state funds to "weak school districts."[97]

In 1935 the state established its first Foundation Program, providing a flat grant of subsidies per pupil to each school district and "additional aid" to poorer districts.[98] The legislation declared that "equalization of educational opportunities" was an express purpose of the new statutory scheme.[99] The program was amended several times thereafter to increase the amount of state aid, to change the measurement standards for distribution of state funds, and to provide categorical assistance to certain special programs of the school districts.[100] These amendments eventually produced a substantially disequalized funding scheme.[101]

#### 2. *Present Financing Scheme*

In 1975 the Ohio legislature enacted an "equal yield" formula to fund school districts, designed to equalize the property wealth base used by the school districts to raise operating revenues.[102] The formula first sets up a funding floor of $48 per pupil per mill for every district that levies at least twenty mills of local property taxation, or a total of $960 per pupil.[103] The difference between this funding floor and local district yield per pupil is supplied by the state.[104]

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95. Tr. Op., *supra* note 10, at 16; 58 Ohio St.2d at 377-78, 390 N.E.2d at 820.

96. Tr. Op., *supra* note 10, at 16-17.

97. 58 Ohio St. 2d at 378, 390 N.E.2d at 820. The Ohio Supreme Court termed the relationship thereby created between the state and local school districts a "financial partnership." *Id.*

98. Tr. Op., *supra* note 10, at 17; 58 Ohio St. 2d at 378-79, 390 N.E.2d at 820-21.

99. Tr. Op., *supra* note 10, at 17.

100. *Id.* at 18-19; 58 Ohio St. 2d at 379, 390 N.E.2d at 821.

101. Tr. Op. at 19.

102. *Id.* at 20; 58 Ohio St. 2d at 370-71, 390 N.E.2d at 816. This formula is a variation of so-called "district power equalizing" financing schemes. *Id.*

103. OHIO REV. CODE ANN. § 3317.022 (Page Supp. 1978). The $48 figure was increased to $65 in 1979. OHIO REV. CODE ANN. § 3317.022 (Leg. Bull. 1979). The $960 total was based on a 1974 Education Review Committee report that determined an even lower amount to be sufficient to operate at state minimum standards. 58 Ohio St. 2d at 371-72, 390 N.E.2d at 817.

104. 58 Ohio St. 2d at 371, 390 N.E.2d at 816.

In addition to this funding floor, the state provides a "reward for effort." Under this second formula, the state "rewards" districts that levy millage above twenty mills, up to thirty mills, by setting an additional funding floor of $42 per pupil per mill, or a maximum total of $420 per pupil. Again the state supplies the difference between this second funding floor and the local district yield.[105]

Certain school districts receive additional state funds. Under "save harmless" guarantees, districts that received more money under the old financing system are guaranteed those additional funds regardless of the new "equal yield" formula.[106] The scheme also rewards or penalizes certain districts for compliance or noncompliance with statutory mandates of teacher-student ratios, training and experience of teachers, and number of educational service personnel; financial penalties are subtracted from basic aid funds.[107] Finally, the scheme continues to provide categorical funding for special programs of school districts.[108]

### 3. *Minimum Standards*

In addition to financing public education in Ohio, the Ohio legislature established minimum standards of conformity for all elementary and secondary schools as early as 1902.[109] The legislature in 1956 created the State Board of Education with the authority to [f]ormulate and prescribe minimum standards . . . for the purpose of requiring a general education of high quality."[110] These minimum standards set by the State Board of Education[111] supplement other statutory requirements separately enacted for elementary schools.[112]

## III. Role of the Judiciary in Constitutional Challenges to Public Education Financing Schemes

Any legal analysis of constitutional challenges to public school financing schemes must overcome numerous practical and theoretical hurdles. First is the practical problem of personal bias. Public school issues strike at the heart of American society.[113] No analysis can ignore the fact

105. *Id.*, 390 N.E.2d at 816-17.

106. Tr. Op., *supra* note 10, at 22.

107. *Id.* at 291-93.

108. *Id.* at 22-23. This funding is restricted to education of categorical students only. *Id.* For a complete breakdown of funding for the Cincinnati School District, see Tr. Op. at 32 (plaintiffs' exhibit #41).

109. Ohio Almanac 271 (C. Williams ed. 1970).

110. Ohio Rev. Code Ann. § 3301.07 (Page Supp. 1978).

111. These standards cover, in both general and specific terms, curriculum and instruction, instructional materials and equipment, organization and administration, staff personnel, physical facilities, pupil services, school and community relations, and evaluation and research. Ohio Admin. Code chs. 3301-31, 3301-35, 3301-37 (Banks-Baldwin 1970). *See also* Landsman, *supra* note 19, at 433 nn. 13-18 (minimum standards set by other states).

112. *See* Ohio Admin. Code § 3301-31-01 (Banks-Baldwin 1970).

113. *See* the discussion of Justice Locher's dissent in *Walter* in the text accompanying notes 64-

that a majority of citizens have at one time in their life experienced public education,[114] and have consequently formed opinions on what an education can or should be or do. These personal biases stay with the graduate of the public education system and surface dominantly when a person has school-age children of his own. Subjective attitudes of decisionmakers necessarily interject emotion into any purportedly rational analysis of education issues.

Second, the subject matter of these issues is theoretically impossible to define in precise terms. While the general populace may identify an "education" with school attendance and the process of learning, these connotations do little for the legal analyst faced with a constitutional question of educational deprivation.[115] Such an analyst finds no solace in the purposely vague terms of state constitutions.[116]

Third, these challenges center on only one facet of intricate education issues: public school finance. The relation between the financing of education and the constitutional rights of children, however, defies simplistic cause and effect analysis.[117] Consequently, the analysis may either rely on disputed assumptions[118] or be unnecessarily limited on scope.[119]

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65 *supra*. *See also* Judge Brennan's "addendum" in Milliken v. Green, 389 Mich. 1, 42-43, 203 N.W.2d 457, 475-76 (1972):

> Even worse than the court's blatant interference with the executive and legislative branches of government is the inept, confusing, and ambiguous nature of its interference.
>
> . . . How long will the people permit such judicial meddling in the affairs of state? How long will the legislature tolerate such pompous interference with their duties? And when—
>
> When, in the name of all that is sacred in the administration of justice will the members of this court turn a deaf ear to the siren call of executive and legislative politics, and come home to the dignity of judicial scholarships, judicial decision, and judicial restraint?

114. *See* the statistics in R. REISCHAUER & R. HARTMAN, *supra* note 6, at 35 (1973) (table 3-9); YEARBOOK OF EQUAL EDUCATIONAL OPPORTUNITY, *supra* note 6, at 5.

115. The dictionary definition of "educate" is appropriately vague: "1: to provide schooling for 2: to develop mentally or morally esp. by instruction. . . ." WEBSTER'S NEW COLLEGIATE DICTIONARY 361 (2d ed. 1974).

116. *See, e.g.*, ARIZ. CONST. art. XI, § 1 (West 1956) ("establishment and maintenance of a general and uniform public school system"); CONN. CONST. art. VIII, § 1 (West 1967) ("free public elementary and secondary schools"); IDAHO CONST. art. IX, § 1 (Bobbs-Merrill 1949) ("establish and maintain a general, uniform and thorough system of public, free common schools"); ILL. CONST. art. X, § 1 (Smith-Hurd 1971) ("efficient system of high quality public educational institutions and services"); KAN. CONST. art. VI, § 6 (1969) ("suitable provision for finance of the educational interests of the state"); N.Y. CONST. art. XI, § 1 (McKinney 1969) ("maintenance and support of a system of free common schools"); OHIO CONST. art. VI, § 2 (Page 1955) ("thorough and efficient system of common schools"); OR. CONST. art. VIII, § 3 (1977) ("establishment of a uniform, and general system of Common schools"); WASH. CONST. art. IX, § 2 (West 1966) ("general and uniform system of public schools").

117. *See* Note, *supra* note 6, at 1318.

118. The debate rages among commentators on the extent of the relation between the amount of money available for a given school district to spend and the quality of the education produced. *See, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 24 n.56 (1973); Thompson v. Engelking, 96 Idaho 793, 800, 537 P.2d 635, 642 (1975); Milliken v. Green, 390 Mich. 389, 404, 212 N.W.2d 711, 719 (1973); Coons, Clune & Sugarman, *supra* note 6; McDermott & Klein, *supra* note 6; Comment, *Texas School Finance: The Incompatability of Property Taxation and Quality Education*, 56 TEX. L. REV. 253 (1978).

119. *See, e.g.*, McInnis v. Shapiro, 293 F. Supp. 327, 336 (N.D. Ill. 1968), *aff'd sub. nom.*

Finally, for every judicially determined right there must, of course, be a legal remedy to enforce that right.[120] When a financing scheme is reviewed for possible unconstitutionality, the analyst cannot avoid the difficult problems of *who* decides *which* remedy to *what* extent within *how much* time.

As the following section of this Comment will demonstrate, many state courts, hampered by these and other practical and theoretical difficulties, have accordingly relied upon vague and ambiguous standards in constitutional adjudications.[121] This was particularly true after the United State Supreme Court lifted the burden from the federal court system and effectively closed the gate to a mounting flood of federal constitutional attacks two years after its crest.[122] State courts responded by employing a variety of devices—in particular, the concept of EEdO—to either avoid or justify judicial intervention. The Ohio Supreme Court's decision in *Walter* is a prime example of the analytical problems this approach creates rather than solves.[123]

## A. *Case Law Prior to* Walter

### 1. *Early Federal Constitutional Challenges*

From the beginning, cases challenging public school financing schemes on federal equal protection grounds were clouded by the issue of constitutional standards. Although the financial disparity between school districts was obvious, federal courts early rejected the notion that state funds had to be allocated according to a child's needs to comply with equal protection.[124] In the early 1970s, however, the California Supreme Court in *Serrano v. Priest (Serrano I)*[125] constitutionalized the principle of "fiscal neutrality"[126] and held that plaintiffs had a cause of action to invalidate California's public school funding scheme on federal and state equal

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McInnis v. Ogilvie, 394 U.S. 322 (1969) (educational needs standard); Danson v. Casey, 399 A.2d 360, 368 (Pa. 1979) (Manderino, J., dissenting) (majority examined wrong issue and wrong claims, used wrong analysis, and arrived at wrong result); and text accompanying note 52 *supra*.

120. Ashby v. White, 2 Ld. Raym. 938, 953 (1703).

121. Other problems that are particularly troublesome to courts are listed in Serrano v. Priest, 18 Cal. 3d 728, 787-90, 557 P.2d 929, 964-67, 135 Cal. Rptr. 345, 381-83, *cert. denied*, 432 U.S. 907 (1977) (Clark, J., dissenting) (*Serrano II*); Levin, *supra* note 6, at 1107-14; and Thomas, *supra* note 6, at 262-74.

122. *See* text accompanying notes 129-39 *infra*.

123. *See* note 7 *supra*.

124. *See* McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill, 1968), *aff'd sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969); Burruss v. Wilkerson, 310 F. Supp. 572 (W.D. Va. 1969), *aff'd*, 397 U.S. 44 (1970). *See also* LeBeauf v. State Bd. of Educ., 244 F. Supp. 256 (E.D. La. 1965) (refusal to enjoin funding system of state to accomplish desegregation); *but cf.* Hobson v. Hansen, 327 F. Supp. 844 (D.D.C. 1971) (order to redistribute school funding to prevent *racial* discrimination, as opposed to *wealth* discrimination in *McInnis*).

125. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971). The comment on *Serrano I* is voluminous. *See, e.g.*, the commentators listed in Comment, *Educational Financing, Equal Protection of the Laws, and the Supreme Court*, 70 MICH. L. REV. 1324, 1324 n.3; Note, *supra* note 6, at 1303 n.2.

126. This principle is from Coons, Clune & Sugarman, *supra* note 6, later published in J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION (1970).

protection grounds. "Fiscal neutrality" assumed the existence of a relation between the amount of money expended by a school district for education and the quality of the education produced, and prohibited the quality of public education from being a function of wealth other than the wealth of the state as a whole.[127] Under this principle interdistrict disparity of property tax values and personal incomes ("wealth") could not determine the amount of money available to a school district to spend on education. This equal protection concept was embraced by both federal and state courts.[128]

2. San Antonio Independent School District v. Rodriguez

In 1973 the United States Supreme Court decided to examine the issue whether interdistrict expenditure disparities in Texas denied equal protection under the federal Constitution. In *San Antonio Independent School District v. Rodriguez*,[129] the Court employed its traditional two-tier test[130] and held that the state need only demonstrate a rational basis for the interdistrict disparity since no identifiable suspect class was affected and no fundamental rights were infringed upon.[131] The state justified the discrimination on grounds of local control of education, and the Court upheld the funding scheme.

The Court's discussion of a "suspect class" and "fundamental rights," however, has led some commentators to believe that a challenge to a funding scheme on the grounds of an absolute deprivation of education would be successful under *Rodriguez*.[132] The Court stated that it was unable to identify a suspect class because the Court had no evidence of discrimination against a particular group of poor people, nor evidence of an "absolute deprivation of education" resulting from the Texas funding scheme.[133] Nonetheless, the Court elaborated on the circumstances that would justify judicial intervention:

> An educational financing system might be hypothesized, however, in which the analogy to the wealth discrimination cases [that were held to deny equal protection] would be considerably closer. If elementary and secondary education were made available by the State only to those able to pay a tuition assessed against each pupil, there would be a clearly defined class of "poor"

127. Coon, Clune & Sugarman, *supra* note 6, at 311 ("Proposition I").

128. *See* Van Dusartz v. Hatfield, 334 F. Supp. 870 (D. Minn. 1971); Milliken v. Green, 389 Mich. 1, 203 N.W.2d 457 (1972). Numerous other cases were filed. *See* Milliken v. Green, 389 Mich. 1, 43, 203 N.W.2d 457, 476 n.1 (Brennan, J.); Levin, *supra* note 6, at 1111-12 n.11. *See also* SENATE SELECT COMMITTEE ON EQUAL EDUCATION OPPORTUNITY, *supra* note 6, at 335.

129. 411 U.S. 1 (1973).

130. *See* text accompanying notes 84-86 *supra*.

131. 411 U.S. at 40.

132. *See, e.g.*, Porter, *Rodriguez, the Poor, and the Burger Court: A Prudent Prognosis* 29 BAYLOR L. REV. 199, 227-34. (1977). *See also* Lau v. Nichols, 414 U.S. 563 (1974) (failure to provide bilingual education denies meaningful opportunity to participate); Kruse v. Campbell, 431 F. Supp. 180 (E.D. Va.), *vacated on other grounds sub nom.* Campbell v. Kruse, 434 U.S. 808 (1977) (failure to provide all handicapped children with an appropriate education tuition-free denied equal protection).

133. 411 U.S. at 25.

> people—definable in terms of their inability to pay the prescribed sum—who would be absolutely precluded from receiving an education. That case would present a far more compelling set of circumstances for judicial assistance than the case before us today.[134]

The class against whom the funding scheme discriminated had only one thing in common, that is, residence in a district with less taxable wealth. Such a class, said the Court, was not suspect, since a state had the power to draw reasonable distinctions between the political subdivisions within the state.[135]

Although the Court then held that education was not a fundamental right explicitly or implicitly guaranteed by the Constitution, the Court again distinguished the *Rodriguez* facts from a situation in which the results of a funding scheme failed to produce a minimal education:

> Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of [the right to speech or the right to vote], we have no indication that the present levels of educational expenditures in Texas provide an education that falls short.
>
> . . .
>
> [N]o charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.[136]

Justice Marshall wrote a lengthy and detailed dissent.[137] He criticized the majority's inflexible two-tier approach to equal protection and advocated his "sliding scale" test,[138] arguing that the "overarching form of discrimination in this case [was] between the schoolchildren of Texas on the basis of the taxable property wealth of the districts in which they happen to live."[139] This discrimination could not be justified under Marshall's test.

### 3. *State Constitutional Challenges and EEdO*

*Rodriguez* shifted the arena to state courtrooms and effectively limited the battle to interpretation of state constitutions. For various reasons,[140] however, state courts have gone either way on the issue of constitutionality of funding schemes under state constitutions.[141] In a

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134. *Id.* n.60.

135. *Id.* at 28 & n.66.

136. *Id.* at 36-37. Martin Essex, Ohio Superintendent of Public Instruction in 1973, stated that the decision in *Rodriguez* was not unexpected and that Ohio would be unaffected by the decision. Thomas, *supra* note 6, at 288 n.132.

137. *See id.* at 71-132. Justice Marshall's clerk allegedly spent several months writing the opinion. *See* B. WOODWARD & S. ARMSTRONG, THE BRETHREN 258-59 (1979).

138. *See* text accompanying notes 88-89 *supra*.

139. 411 U.S. at 96.

140. *See* Levin, *supra* note 6, at 1126.

141. Cases in which courts have upheld public school funding schemes against constitutional attacks are Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590 (1973); Gindl v. Department of Educ., No.

majority of the cases, the answer depended upon the "education clause" of the state constitution requiring the state to educate its children, and its effect on the state's version of an equal protection clause. The constitutional standard created, borrowed from desegregation cases,[142] was EEdO.[143]

The concept of EEdO, however, is plagued with ambiguities. The problem with using EEdO as a standard that funding schemes must meet stems primarily from the numerous possible definitions of EEdO.[144] Some courts have rationalized their decisions to uphold the funding scheme because of this ambiguity.[145] Other courts have adopted varying definitions or failed to define EEdO.[146] This choice of definition inevitably influenced the outcome of the case.

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54,665 (Fla. Sup. Ct. May 17, 1979); Thompson v. Engelking, 96 Idaho 793, 537 P.2d 635 (1975); Cronin v. Lindberg, 66 Ill.2d 47, 360 N.E.2d 360 (1977); Board of Educ. v. Walter, 58 Ohio St. 2d 368, 390 N.E.2d 813 (1979); Olsen v. State, 276 Or. 9, 554 P.2d 139 (1976); and Danson v. Casey, 399 A.2d 360 (Pa. 1979). Cases in which courts have struck down all or part of public school funding schemes on constitutional grounds are Serrano v. Priest (*Serrano II*), 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345, *cert. denied*, 432 U.S. 907 (1977); Lujan v. Colorado State Bd. of Educ., No. C73688 (Dist. Ct. Denver Mar. 13, 1979); Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977); Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973); Board of Educ. v. Nyquist, 94 Misc. 2d 466, 408 N.Y.S. 606 (1978); Seattle School Dist. No. 1 v. State, 90 Wash. 2d 476, 585 P.2d 71 (1978); and Busé v. Smith, 74 Wis. 2d 550, 247 N.W.2d 141 (1976). In Michigan, the supreme court initially followed *Serrano I* and invalidated the funding scheme, *see* note 128 and accompanying text *supra*, but, after a statewide referendum and quick legislative action, the supreme court reversed itself in an amended order vacating the prior opinion. Milliken v. Green, 390 Mich. 389, 212 N.W.2d 711 (1973). *See* Thomas, *supra* note 6, at 291.

142. Brown v. Board of Educ., 347 U.S. 483, 493 (1954). *See* Hobson v. Hansen, 269 F. Supp. 401, 493 (D.D.C. 1967); Coleman, *The Concept of Equality of Educational Opportunity*, 38 HARV. EDUC. REV. 7, 14 (1968); Yudof, *supra* note 6, at 434-72.

143. *See* cases listed in note 5 *supra*. Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973), held that EEdO was guaranteed by the New Jersey education clause by itself. In Busé v. Smith, 74 Wis. 2d 550, 247 N.W.2d 141 (1976), the court discussed EEdO in dicta, and invalidated the funding scheme because the means of taxation was unconstitutional. The case is thoroughly criticized in Comment, Busé v. *School Finance Reform: A Case Study of the Doctrinal, Social, and Ideological Determinants of Judicial Decisionmaking*, 1978 WIS. L. REV. 1071. Three cases considered only the state's education clause without discussing EEdO: Cronin v. Lindberg, 66 Ill.2d 47, 360 N.E.2d 360 (1977); Danson v. Casey, 399 A.2d 360 (Pa. 1979); Seattle School Dist. No. 1 v. State, 90 Wash. 2d 476, 585 P.2d 71 (1978). The Arizona Supreme Court apparently held education to be a fundamental right under equal protection only to the extent of the guarantees in the Arizona education clause. *See* Shofstall v. Hollins, 110 Ariz. 88, 90-91, 515 P.2d 590, 592-93 (1973).

144. *See* J. GUTHRIE, G. KLIENDORFER, H. LEVIN & R. STOUT, *supra* note 6, at xiv; YEARBOOK OF EQUAL EDUCATIONAL OPPORTUNITY, *supra* note 6, at 37-38; R. REISCHAUER & R. HARTMAN, *supra* note 6, at 72-75; A. WISE, *supra* note 6, at 146-58 (nine definitions); Briggs & Main, *supra* note 6, at 481; Levin, *supra* note 6, at 1107-14 (four definitions); Lindquist & Wise, *supra* note 6, at 1-2; McDermott & Klein, *supra* note 6, at 416 (eight definitions); Silard & White, *supra* note 6, at 26 (four definitions); Thomas, *supra* note 6, at 262; Yudof, *supra* note 6, at 412-13 (three definitions); Comment, *An Analysis and Review of School Financing Reform*, 44 FORDHAM L. REV. 773, 775 (1976) (five definitions).

145. Thompson v. Engelking, 96 Idaho 793, 537 P.2d 635 (1975); Milliken v. Green, 390 Mich. 389, 212 N.W.2d 711 (1973) (amended order).

146. Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345, *cert. denied*, 432 U.S. 907 (1977) (*Serrano II*) (equal financial ability to provide students with substantially equal opportunity for learning); Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977) (same), Gindl v. Department of Educ., No. 54, 665 (Fla. Sup. Ct. May 17, 1979) (no definition); Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973) (equip a child for role as citizen and competitor in labor market); Board of Educ. v. Nyquist, 94 Misc. 2d 466, 408 N.Y.S. 606 (1978) (end product); Olsen v. State, 276 Or. 9, 554 P.2d 139 (1976) (no definition). *See also* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 71-133 (Marshall, J., dissenting) (no definition).

Each definition in turn has theoretical difficulties.[147] "Fiscal neutrality," reaffirmed by the California Supreme Court in *Serrano II*[148] as the definition of EEdO, rests on the controversial assumption that the quality of an education depends upon the amount of money expended by a school district for education.[149] Further, EEdO refers to "equality," "education," and "opportunity," each of which represents only an ideal,[150] rather than justiciable standards.[151] Definitions based on the outcome of an education (equal output), or the resources available to be expended by a school district (equal input), must therefore be guided by notions of equality; yet "equality of input" ignores the real world differences among students,[152] and "equality of output" defies statistical measurement.[153] Further, definitions based on minimum adequacy of education completely ignore the concept of equality.[154]

Combining the education and equal protection clauses of state constitutions to produce EEdO has, in effect, created a constitutional ogre that has swallowed up the real issues under each clause.[155] State courts have been sidetracked by EEdO and consequently have differed on the crucial issue in the consitutional challenges. In *Milliken v. Green*,[156] the court upheld the funding scheme because the challenger could not show a substantial increase in EEdO if the scheme were declared unconstitutional, and because the objective of the plaintiffs was, in reality, "tax reform." In *Robinson v. Cahill*,[157] the court struck down the funding scheme because the state legislature failed to define the contents of EEdO and failed to fund a system that complied with EEdO. In *Thompson v. Engelking*,[158] the court upheld the funding scheme because EEdO was not a fundamental right, whereas, in *Horton v. Meskill*,[159] the court struck down the funding scheme because EEdO *was* a fundamental right. In *Olsen v. State*,[160] the

147. *See* authorities cited in note 144 *supra*.

148. 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345, *cert. denied*, 432 U.S. 907 (1977).

149. *See* note 118 and text accompanying note 127 *supra*.

150. *See* Yudof, *supra* note 6, at 412 (EEdO is as widely shared a value as monopoly regulation, monogamy, and peace); Coleman, *supra* note 142, at 21-22 (EEdO can only be approached, never reached).

151. For attempts at legal definitions of "opportunity," see Richards, *supra* note 6, at 41-44; Wilkinson, *supra* note 6, at 985.

152. Levin, *supra* note 6, at 1108-09, 1114.

153. *See* McDermott & Klein, *supra* note 6, at 423-32, Thomas, *supra* note 6, at 264; Yudof, *supra* note 6, at 419, 430. *Cf.* Coleman, *supra* note 141, at 15 (EEdO should focus on the effects of schooling).

154. Levin, *supra* note 6, at 1114.

155. *See* Kurland, *supra* note 7, at 590.

156. 390 Mich. 389, 212 N.W.2d 711 (1973) (amended order).

157. 62 N.J. 473, 303 A.2d 273 (1973).

158. 96 Idaho 793, 573 P.2d 635 (1975). *See also* Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590 (1973), and Gindl v. Department of Educ., No. 54, 665 (Fla. Sup. Ct. May 17, 1979), both of which held that the legislature needed only a rational basis to discriminate in the area of education.

159. 172 Conn. 615, 376 A.2d 359 (1977).

160. 276 Or. 9, 554 P.2d 139 (1976).

court upheld the funding scheme because the relative deprivation of EEdO therein was justified, on balance, by the need for local control of education. In *Busé v. Smith*,[161] the court struck down the funding scheme because of the means of taxation, but only after the court established EEdO as the ultimate, "altruistic goal."[162] In *Serrano v. Priest (Serrano II)*,[163] the court struck down the funding scheme because EEdO required that the amount of money available in school districts not be a function of district wealth. In *Danson v. Casey*,[164] the court distinguished successful EEdO challenges in other jurisdictions by the significant disparity in expenditures in those jurisdications, an allegation not made by the plaintiffs in *Danson*.[165] Each case is a demonstration of judicial groping to overcome the practical and theoretical difficulties associated with public school financing issues.

In *Seattle School District No. 1 v. State*,[166] the court examined two education clauses[167] without reference to equal protection or EEdO. Recognizing the need for judicial interpretation along with the difficulty of defining a term as amorphous as "education," the court described its duty as setting broad guidelines for a minimum required constitutional education.[168] The legislature's duties, said the court, were to give substantive content to the meaning of a "basic education," and then to fund schools according to that definition by dependable and regular tax sources.[169] The court then proposed three definitions of a basic education, none of which were met by the amount of money distributed under the present funding scheme.[170] The court gave the legislature three years to comply with its duties.

## B. *EEdO and* Walter

### 1. *Lower Court Decisions*

Both the trial court and the court of appeals in *Walter* were confused on the guarantees of Ohio's education and equal protection clauses. The trial court, under the thorough and efficient clause, used the term "EEdO" expansively in an effort to strike down a funding scheme that the court felt resulted in equalized taxing capacity but ignored the significant interdistrict disparity produced thereby.[171] The court of appeals, evidently

161. 74 Wis.2d 550, 247 N.W.2d 141 (1976).

162. *Id.* at 565, 247 N.W.2d at 149.

163. 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345, *cert. denied*, 432 U.S. 907 (1977).

164. 399 A.2d 360 (Pa. 1979).

165. *Id.* at 365 n.10 (dicta).

166. 90 Wash. 2d 476, 585 P.2d 71 (1978).

167. WASH. CONST. art. IX, §§ 1, 2 (West 1966).

168. 90 Wash. 2d at 518-19, 585 P.2d at 95.

169. *Id.* at 520-22, 585 P.2d at 96-97.

170. The three definitions were (1) standards established by the state education agency; (2) accreditation standards; and (3) "collective wisdom" standards that focus on the "normal range ability student" as determined by the collective experience of educators, parents, and school boards. *Id.* at 533-35, 585 P.2d at 102-03.

171. *See* text accompanying notes 21-27 *supra*.

attempting to limit the role of Ohio's judiciary in the public school financing controversy, rejected this expansive interpretation of the thorough and efficient clause and instead granted complete discretion to the legislature on the interpretation of the clause.[172] Yet, from the equal protection and benefit clause the court of appeals extracted both EEdO and a fundamental right to educational benefits that "naturally flow" from the thorough and efficient clause.[173] The court of appeals did not explain what those benefits were; instead, the court agreed with the trial court that inequality of educational opportunity existed when children are unable to equip themselves for future life.[174] In this roundabout fashion, then, the court of appeals managed to define both EEdO and benefits that "naturally flow" from the thorough and efficient clause, and thus to interpret the clause itself—precisely the outcome that the court avoided earlier.

### 2. *Supreme Court Decision*

The Ohio Supreme Court's decision in *Walter* exemplifies judicial reliance on EEdO that confuses the basic issues of the case and merely justifies reluctance to intervene in public school financing issues. The decision, in actuality, is more an essay on the good faith attempts of the legislature to solve educational finance problems, and on the school district mismanagement that has caused these problems, than an analysis of constitutional issues.

Under both the equal protection and benefit clause and the thorough and efficient clause, "educational opportunity" was the crucial issue.[175] Under the equal protection and benefit clause, the court could not agree, however, with the criteria used by the United States Supreme Court in *Rodriguez* to determine whether a right was fundamental and therefore deserving of strict scrutiny. It *did* agree that educational opportunity would be a fundamental right under the *Rodriguez* criteria. Since the Ohio Supreme Court did adopt the United States Supreme Court's two-tiered test, the next issue should have been whether educational opportunity was a fundamental interest under whatever other criteria the Ohio Supreme Court decided to use.[176]

Instead, the court decided that the real challenge by plaintiffs was directed towards the state's method of collecting and distributing tax money, not the effect of the funding scheme on education.[177] Since the legislature traditionally has broad discretion in taxation issues, the court

172. *See* text accompanying note 37 *supra*. The state had to make two assignments of error, however, before the court of appeals understood the state's argument. *See* text accompanying notes 34-35 *supra*.

173. *See* text accompanying notes 38-39 *supra*.

174. *See* text accompanying notes 41 *supra*.

175. *See* text accompanying notes 49, 59 *supra*.

176. It is doubtful, however, that the Ohio Supreme Court does have different criteria to determine whether a right is fundamental. *See* Denicola v. Providence Hosp., 57 Ohio St.2d 115, 119, 387 N.E.2d 231, 234 (1979).

177. *See* text accompanying note 52 *supra*.

explained,[178] strict scrutiny would be inappropriate. The court therefore applied the rational basis test.

The court's analysis of educational opportunity and the rights of children was therefore only a minor detour. By limiting its consideration to the state's method of taxation and distribution—and ignoring the effect of the funding scheme on the constitutional rights of children—the court was able to find an easy answer to the issues—an answer, however, that ignored both reality and the allegations of plaintiffs. The cases cited by the Ohio Supreme Court in support of the broad discretion granted to the legislature in the field of taxation do not answer this issue; those cases dealt with classifications created when the state collects taxes, not the effect on groups of children when the state distributes the money collected.[179] This issue was discussed by the trial court, which criticized both the intent of the funding scheme, that is, taxpayer equity, and its effect, that is, interdistrict expenditure disparities.[180] At no time, however, did the plaintiffs merely challenge the state's method of collecting and distributing tax money.

The Ohio Supreme Court, therefore, used three methods to avoid the hard issues of equal protection and educational financing. First, the court mentioned its concern for EEdO only in passing. Second, it redefined the issues of the case for an easy answer. Finally, it extended the broad discretion of the legislature under the equal protection and benefit clause to include any classifications created by distribution of state funds, as long as the funds were raised by taxation and used for education.

Similar problems occur in the court's analysis of EEdO under the thorough and efficient clause. Effective deprivation of educational opportunity, said the court, was the bottom line of legislative discretion under the clause.[181] Such deprivation was tantamount to an absolute deprivation of education, which, the court stated, was required by the United States Supreme Court to declare a funding scheme unconstitutional.[182]

What the Ohio Supreme Court focused on thereafter, however, was not deprivation of EEdO, but rather the objectives that the legislature had *attempted* to accomplish by the funding scheme.[183] Thus, the legislature's intent to set a funding floor sufficient to assure compliance with state minimum standards justified the funding scheme, regardless of whether the effect of the funding scheme was an effective deprivation of education.

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178. For this proposition the court cited Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973); Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940); and Madden v. Kentucky, 309 U.S. 83 (1940). *See* 58 Ohio St. 2d at 376, 390 N.E.2d at 819 n.4.

179. *See* the United States Supreme Court cases cited in note 178 *supra*.

180. *See* text accompanying note 21 *supra*.

181. *See* text accompanying note 59 *supra*.

182. *See* text accompanying note 60 *supra*. The United States Supreme Court actually held that an absolute deprivation of education would enable the Court to identify a suspect class, not to declare a funding scheme unconstitutional. *See* text accompanying note 133 *supra*.

183. *See* text accompanying note 64 *supra*.

Although the trial court had detailed the effects of school closings on educational development and had listed the districts unable to meet state minimum standards,[184] the Ohio Supreme Court ignored these findings and latched onto the facts that all students had received the days of instruction required per year and that some districts offered services in excess of minimum standards.

Again the court's analysis mentioned EEdO, but this time redefined the issue to one of legislative intent, rather than the effects of the funding scheme. Apparently, then, if the legislature makes a good faith attempt to prevent absolute deprivation of education, the effect is irrelevant. This holding is particularly troublesome in light of a prior Ohio Supreme Court decision that scrupulously analyzed each minimum standard of education to determine its effect on the first amendment rights of schoolchildren.[185] Here instead, by emphasizing efforts of the legislature to supply districts with sufficient money to meet minimum standards, and by criticizing districts that offered services in excess of minimum standards, the court was solving constitutional issues by laying blame for financial distress on the districts' own financial management policies. Upon whom the blame rests for an inability to meet minimum standards of education, however, is not the issue.

The Ohio Supreme Court in *Walter* thus represents another instance of a state court using EEdO in an effort to redefine and thus avoid the crucial issues—in this case, the effect of the Ohio public school financing scheme on a child's constitutional rights. The real issues that faced the *Walter* court and other state courts will be explored in the next section of this Comment.

## IV. A Precise Analysis of Constitutional Challenges to Public School Financing Schemes

Two distinct constitutional challenges to public school financing schemes must be distilled from the public school financing reform cases. Both challenges focus on the results of financing schemes, rather than the intent of the legislators that created them.[186] The first result giving rise to a constitutional challenge is inadequacy of education of one or more children individually, based on the education clauses of most state constitutions.[187] The second challengable result is comparative inadequacy

184. *See* note 19 *supra*. *See also* text accompanying notes 67, 70 *supra*.

185. State v. Whisner, 47 Ohio St. 2d 181, 351 N.E.2d 750 (1976).

186. The intent of legislators in creating a statutory classification may be important in other constitutional challenges to educational policy, *e.g.*, racial discrimination in segregated schools. *See, e.g.*, Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218, 231 (1964). Advocates of school finance reform, however, do not question the motives of the legislature, but rather the effect of the financing scheme on the constitutional rights of children.

187. For a list of state constitutions with education clauses, see Comment, *An Analysis and Review of School Financing Reform*, 44 Fordham L. Rev. 773, 787 n.115. In those jurisdictions without education clauses, a good argument can be made for the right to a minimum education based

of education, based on equal protection. Although the analyses of these challenges intermesh, it is possible for one challenge to succeed or fail independently of the other, and a court must consider each separately and in correct order.

### A. *Minimum Adequate Education*

A state court faced with these challenges should begin its analysis by determining the requirements of a "minimum adequate education." State constitutions or statutes generally form the basis for this claim; a right to a minimum education could also be claimed under *Rodriguez*.[188] In Ohio, since the state has a duty to provide a thorough and efficient system of education under the Ohio Constitution, it follows that the state must provide at least *some* education. This constitutional duty creates a corresponding entitlement or right[189] to this minimum adequate education that inheres to every schoolchild in Ohio, regardless of the child's location within the state. In other words, if the words "thorough and efficient" are to have any constitutional significance,[190] there can be no logical disagreement with the proposition that the basics of an "education" must be supplied to every child in Ohio. Further, the legislative means used to achieve this minimum adequate education must *actually* do so; the thorough and efficient clause nowhere sanctions merely good faith attempts. The issue for the judicial branch, then, is one of definition: What are the essential requirements of a minimum adequate education for a particular district or jurisdiction?

Placing this definitional responsibility with the judiciary has many advantages. Educational issues are traditionally highly emotional because of the conflicting needs of the parties in the decisionmaking process: the legislature's political and economic concerns, teachers' financial demands, parents' emotional outcries, and the child's unexpressed educational needs. A neutral third party[191] can evaluate these considerations and arrive at a decision in a limited capacity and without the risk of personal bias. Further, a judicial definition of a minimum adequate education can be phrased in such a way that accomodates inevitable changes in our society, yet limits governmental action to present needs. Moreover, public respect for the judicial branch permits the innovation desperately needed to solve the education financing dilemma, if the issues are handled within judicial

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on substantive due process. *See* Lindquist & Wise, *supra* note 6, at 9 n.31. *See also* Goss v. Lopez, 419 U.S. 565 (1975) (right to an education cannot be denied without procedural due process); Mitchell C. v. Board of Educ., 67 A.D.2d 284, 414 N.Y.S.2d 923 (1979).

188. *See* text accompanying notes 132-36 *supra*.

189. *See* Hohfield, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30-37 (1913).

190. *See* text accompanying notes 79-80 *supra*.

191. This assumes, of course, that judges will separate their own roles as parents and as decisionmakers.

authority and with proper discretion.[192] Finally, as in New Jersey,[193] judicial activism in this area would have the effect of pressuring other parts of government into action, rather than permitting drawn-out delays in the preservation of constitutional rights.

This expansive judicial role in the area of education is not, however, devoid of theoretical problems. In particular, courts defining minimum adequate education must justify such blatant interference with the process of education, an area traditionally considered to be under the near-exclusive auspices of state legislatures.[194] The factor distinguishing intervention in these cases, and not in other areas of education, must be, bluntly, whether the legislature is doing its job. For example, a court should *not* take action to the extent that a legislature has attempted to define a minimum adequate education by considering all relevant factors, and has fully funded this minimum adequate education. In this manner federal courts have successfully limited intervention to specific areas, such as desegregation. However, intellectual honesty prohibits a court from justifying reluctance to intervene on grounds of legislative discretion when the court knows that, in fact, constitutional rights are just not being upheld.

To eschew the vagaries and other problems inherent in the EEdO concept, the judicial definition must focus on education input, as opposed to the process of education or educational output. "Input" in this sense means all resources (financial, human, capital, etc.) devoted to an education; the "process" is what occurs when the child attends school; the "output" is, of course, the end product of the process and the input, or what the school produces. By avoiding consideration of the process and the output of education, the judiciary necessarily assumes that the input produces these two aspects of education. This theory presents problems, however, primarily because education is not the exact equivalent of a sale of services.[195] A barber, for example, may perform skilled services while the

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192. *See, e.g.*, Seattle School Dist. No. 1 v. Washington, 90 Wash. 2d 476, 585 P.2d 71 (1978).

193. In New Jersey, the supreme court declared the funding system unconstitutional based on an education clause similar to Ohio's. After seven successive decisions in over three years, the New Jersey Supreme Court eventually forced the New Jersey legislature to increase taxes to fund schools by enjoining the distribution of any state funds under the old financing scheme. *See* Robinson v. Cahill (*Robinson I*), 62 N.J. 473, 303 A.2d 273 (1973); *Robinson II*, 63 N.J. 196, 306 A.2d 65 (1973); *Robinson III*, 67 N.J. 35, 335 A.2d 6 (1975); *Robinson IV*, 67 N.J. 333, 339 A.2d 193 (1975); *Robinson V*, 69 N.J. 449, 355 A.2d 129 (1976); *Robinson VI*, 70 N.J. 155, 358 A.2d 457 (1976); *Robinson VII*, 70 N.J. 464, 360 A.2d 400 (1976). Although the cases have been criticized, *see* Note, Robinson v. Cahill: *A Case Study in Judicial Self-Legitimization*, 8 RUT.-CAM. L.J. 508 (1977); Fiske, *School Funding in New Jersey Remains Separate But Still Unequal*, N.Y. Times, Jan. 21, 1979, at E7, col. 1, many commentators have realized the importance of the case to a quick resolution of financing problems. *See* R. LEHNE, THE QUEST FOR JUSTICE: THE POLITICS OF SCHOOL FINANCE REFORM 200-07 (1978); Comment, *supra* note 143, at 1081 n.45.

*See also* Silard & White, *supra* note 6, at 30-33; Thomas, *supra* note 6, at 301; Note, *supra* note 6, at 1340-41.

194. *See, e.g.*, text accompanying notes 74-80, 92-94 *supra.*

195. *See* Behrend v. State, 55 Ohio App.2d 135, 379 N.E.2d 617 (1977).

customer sits passively and merely pays consideration when the barber's services are completed. In contrast, the process of education requires as much active participation by the student as it requires quality services from the school itself to achieve the desired end product. It is submitted, however, that a state's duties are discharged by regulating inputs of education; regulation of student participation would be inimical to today's society. It is further submitted that a worthwhile judicial evaluation of the output of education is theoretically and practically impossible.[196]

Three factors should be central to a state court definition of the requisites of a minimum adequate education. First, any legislative or administrative guidelines should be given great deference.[197] In fact, if the legislature or administrative agency has adequately considered the other two factors mentioned below, a judicial imprimatur may be all that is necessary. This deference is due because the legislature and administrative agencies, as compared with courts, possess equal or greater competence on the issue of the requisites of a minimum adequate education, since this issue affects all members of society. These two branches of government have already undertaken the difficult task of setting educational standards and deserve judicial respect. Further, as stated above, a court must limit its intervention into educational policymaking to the extent of legislative inaction.

Second, a court should consider traditional notions of the characteristics of an adequate education.[198] These characteristics would include facilities, teacher-student ratio, academic curricula, extracurricular activities, and the like. This factor should be based on an impartial evaluation of the history and status of education in that jurisdiction, rather than particular judicial beliefs, again to avoid personal bias. The purpose of this factor is to cover any gap created by the absence of state legislative history, to allow judicial flexibility in considering arguments of parties to the dispute other than the legislature, and to recognize that education of children is a continually changing process that seeks to avoid problems of the past.

The third factor that a court should consider is the special needs of various school districts in the jurisdiction. Special problems in a given district may increase the input necessary to meet a minimum adequate education. For example, municipal school districts with heavy financial burdens of municipal services other than schools may have less money to devote to education than rural districts, and thus need more resources to operate city schools.[199] In combination, these three factors balance governmental, general, and specific needs to determine the requirements of a minimum adequate education.

196. *See* note 153 and accompanying text *supra*.

197. *See, e.g.*, notes 109-12 and accompanying text *supra*.

198. This factor is comparable to the collective wisdom approach. *See* note 170 *supra*.

199. This is termed "municipal overburden." *See* Levin, *supra* note 6, at 1118-19.

Once the court has arrived at the definition of a minimum adequate education, the next question would be mathematical and empirical: Does the present financing scheme operate in a way that discharges the duty of the state to supply every child in every district with a minimum adequate education? If the factfinder decides that a child within a given district is not receiving that minimum education, the court should strike down the funding scheme with respect to that district.[200] If the remainder of the scheme cannot independently survive, the court should strike down the entire scheme as violating a constitutional or statutory right to a minimum adequate education.

Assuming that the financing scheme or any part is thereby struck, the question of remedies arises. At this point a court would be wise to permit the state legislature the opportunity to select a scheme that completely finances a minimum adequate education for all schoolchildren, and to retain jurisdiction to assure prompt compliance with constitutional mandates.

### B. *Equal Protection*

The second distinct challenge to a funding scheme is comparative inadequacy of education, a concept rooted in equal protection. This equal protection analysis necessarily intermeshes with the analysis of a minimum adequate education. Assuming that every child in the state is receiving a minimum adequate education under the judicial definition described earlier,[201] the state has necessarily created statutory classifications under its funding scheme by creating and/or perpetuating school districts that, in effect, receive different amounts of input[202] depending on the district's location within the state. How or why this has occurred—that is, because of the wealth of the district, the burden of other services borne by the district, or other reasons—is not important to the constitutional analysis at this point; what is important is that the *net* effect is a classification of children by locality created when the state discharged its duty to educate those children. A proper equal protection challenge, then, would complain that the amount of "extra input" that each child receives, that is, input over and above a minimum adequate education, should not depend on *where* that child goes to school.[203]

Under the present Supreme Court two-tier test, children in a given

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200. One of the basic functions of courts is to compel other branches of government to conform to basic law, and the power to compel performance includes the power to invalidate legislation. State *ex rel.* Scott v. Masterson, 173 Ohio St. 402, 405, 183 N.E.2d 376, 379 (1962).

201. *See* notes 188-98 and accompanying text *supra*. If the child is *not* receiving a minimum adequate education, the funding scheme violates the state's education clause, and *not* equal protection. Equal protection is not triggered until the state has first fully complied with the requirements of its education clause.

202. *See* text accompanying notes 194-95 *supra*.

203. "Extra input" should be distinguished from "equality of input," "fiscal neutrality," and "relative deprivation of education"—concepts associated with EEdO.

district would not be a suspect group,[204] nor would their interest in nondiscrimination of extra input by locality be termed "fundamental."[205] Therefore, under the rational basis test, this discrimination would be validated with little or no justification by the state.

A sliding scale test, on the other hand, is complicated by factual considerations. Under this test a court must first look to the importance of the interests of these children and the extent to which those interests are actually abridged. For example, the importance of a child's interest in nondiscrimination by locality depends primarily on the extent to which the amount of extra input in a given district actually produces a "better" education, a cost-quality correlation disputed by many scholars.[206] However, nondiscrimination by locality may be more important to children than to other persons since children have little or no control over where they live.[207] The extent of abridgment of this interest depends on the actual degree of variance of extra inputs among the different districts.

Against these considerations the court must weigh the interests of the state in perpetuating this classification, and the extent to which those interests are enhanced by the classification. The primary interest asserted by the state in support of this discrimination by locality is "local control." Local control is composed of two separate concerns of the electorate in a school district: (1) control over the administration of the school system; and (2) voluntary choice in providing input above minimum adequate education levels.[208] These interests are, concededly, historically and functionally important.[209] However, the question arises whether a statutory system actually fosters local control over the amount of extra input in a given district when such input depends on arbitrary factors—factors other than voluntary electorate choice[210]—and when local control

204. *See* text accompanying note 135 *supra*.

205. *See* Horton v. Meskill, 172 Conn. 615, 658-59, 376 A.2d 359, 379 (1977) (Loiselle, J., dissenting).

206. *See* note 177 *supra*.

207. For examples of the United States Supreme Court disfavoring discrimination against children, see Frontiero v. Richardson, 411 U.S. 677, 686 (1973); Gomez v. Perez, 409 U.S. 535, 538 (1973); Wisconsin v. Yoder, 406 U.S. 205, 241 (1972) (Douglas, J., dissenting in part); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Ginsberg v. New York, 390 U.S. 629 (1968). *Cf.* Matthews v. Lucas, 427 U.S. 495, 506 n.13 (1975) (illegitimate children are not a suspect class).

One commentator also argues that state compulsion of school attendance is such a "confining regimentation" that it creates a reciprocal obligation of "equal educational quality." Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CALIF. L. REV. 275, 349 (1972).

208. Serrano v. Priest, 5 Cal. 3d 584, 610, 487 P.2d 1241, 1260, 96 Cal. Rptr. 601, 620 (1971) (*Serrano I*).

209. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 53 n.109 (1973); Wright v. Council of Emporia, 407 U.S. 451, 469 (1972); Deerfield Hutterian Ass'n v. Ipswich Bd. of Educ., 468 F. Supp. 1219, 1231 (D.S.D. 1979); McInnis v. Shapiro, 293 F. Supp. 327, 333 n.20 (N.D. Ill. 1968), *aff'd sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969); and text accompanying notes 54-56 *supra*.

210. *See* Tr. Op., *supra* note 10, at 270-79, 378-79; Milliken v. Green, 389 Mich. 1, 30-33, 203 N.W.2d 457, 470-71 (1972); Olsen v. State, 276 Or. 9, 27, 554 P.2d 139, 147; L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 16-56 (1978); Levin, *supra* note 6, at 1122-23.

is progressively diminished by recent statutory enactment.[211] Further, local control over the administration of school systems may arguably be effectively encouraged in a manner less detrimental to children's interests.[212]

### C. *Ohio's Statutory Scheme*

Ohio's definition of a minimum adequate education should rely heavily on the comprehensive regulations of the State Department of Education.[213] In addition, the special needs of urban districts should be taken into consideration, along with other factors.[214] The constitutional requirement of a minimum adequate education is based, as stated above, on the duty of the Ohio legislature to provide a thorough and efficient system of education to all Ohio school children.

The factual evidence at the trial court level clearly indicated, however, that under any reasonable definition of a minimum adequate education, the legislature has failed to create and fund a system that, in effect, complied with its constitutional duties.[215] The funding scheme should be declared unconstitutional under Ohio's thorough and efficient clause, and the issue of equal protection should not even arise.[216] The Ohio Supreme Court should have retained jurisdiction and given the Ohio legislature a reasonable opportunity to comply with its mandate.

## V. CONCLUSION

Theoretical and practical difficulties with a legal analysis of the constitutionality of public school financing schemes have led courts to use ambiguous standards to examine the issues. State courts have thus combined education and equal protection clauses of state constitutions to form "equal educational opportunity," a concept that serves only to enable those courts to avoid real issues. The Ohio Supreme Court used EEdO in this manner in an effort to redefine the issues facing the court, to avoid judicial intervention, and to bury criticism of school district management in a superficial constitutional analysis.

A precise legal analysis of the constitutionality of a funding scheme should start with a judicial definition of a minimum adequate education. If the funding scheme is unable to provide every schoolchild in the state with a minimum adequate education, the court should declare the

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211. Recent statutory enactments in Ohio have put considerable control over education under the authority of the State Superintendent of Education. *See* note 9 *supra*; Thomas, *supra* note 6, at 299. For this reason the plaintiffs in *Walter* filed a separate suit in federal court, alleging that local control of education is not a rational basis to justify Ohio's funding scheme. *Id.*

212. *See* Tr. Op. at 307-36; J. COONS, W. CLUNE, & S. SUGARMAN, *supra* note 126, at 14-20; Levin, *supra* note 6, at 1123-26.

213. *See* notes 109-12 and accompanying text *supra*.

214. *See, e.g.*, Tr. Op., *supra* note 10, at 388-89.

215. *See* notes 19, 27 *supra*; Wessel, *supra* note 9.

216. *See* note 201 *supra*.

funding scheme unconstitutional. Even if the funding scheme does supply a minimum adequate education, however, the final step should be an equal protection analysis of the right of a child not to have the amount of "extra input" depend upon where that child lives.

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