[Cite as *DeRolph v. State (Opinion of Chief Justice Thomas J. Moyer, dissenting)*, 78 Ohio St.3d 193, 264, 1997-Ohio-90.]

1 Moyer, C.J., dissenting. Only infrequently are the members of this court
2 required to balance our appreciation for the principle of separation of
3 powers among the three branches of government against our desire to use
4 the considerable powers of this court to mandate action to improve the
5 imperfect. The issue in this very important case is not whether education
6 in Ohio should be better. All seven members of this court would agree that
7 in an ideal school setting, all children would be taught in well-maintained
8 school buildings by teachers with high salaries and would read from the
9 latest-edition school books. Rather, the question presented is whether
10 specific financing statutes adopted by the Ohio General Assembly violate
11 the words and intent of the Ohio Constitution. By its words, the
12 Constitution requires the General Assembly to "make such provisions, by
13 taxation or otherwise, as *** will secure a thorough and efficient system of
14 common schools throughout the state." Section 2, Article VI, Ohio
15 Constitution. We find that the statutes withstand plaintiffs' constitutional
16 challenge because, rather than abdicating its duty, the General Assembly
17 has made provisions by the challenged statutes for funding a system of

schools with minimum standards throughout the state. The issues of the level and method of funding, and thereby the quality of the system, are committed by the Constitution to the collective will of the people through the legislative branch.

One cannot disagree with the aspirations of the majority to provide a school system that enables children to "participate fully in society," that provides "high quality educational opportunities," and that "allows its citizens to fully develop their human potential." However, the majority relies upon the phrase "thorough and efficient" to declare Ohio's education financing system unconstitutional despite the fact that our Constitution commits the responsibility for ascribing meaning to the phrase "thorough and efficient" to the General Assembly and not to this court. The majority of this court, moreover, apparently interprets the Constitution as requiring that all schools be of the same undefined level of high quality without relying on any supporting text of the Constitution, and equates imperfect schools with an unconstitutional system of funding. We disagree with these conclusions.

We must apply well-established standards before declaring statutes unconstitutional. Among those established standards is a strong

presumption that enactments of the General Assembly are constitutional. *State ex rel. Jackman v. Cuyahoga Cty. Court of Common Pleas* (1967), 9 Ohio St. 2d 159, 161, 38 O.O.2d 404, 405, 224 N.E.2d 906, 908-909. It is not the function of this court to assess the wisdom or policy of a statute or statutory scheme. Rather, we are limited to determining whether the General Assembly acted within its legislative power in enacting that statute. *Austintown Twp. Bd. of Trustees v. Tracy* (1996), 76 Ohio St.3d 353, 356, 667 N.E.2d 1174, 1175-1177.

It has also been recognized that evidence of a long-standing legislative practice "goes a long way in the direction of providing the presence of unassailable grounds for the constitutionality of the practice." *United States v. Curtiss-Wright Export Corp.* (1936), 299 U.S. 304, 328, 57 S.Ct. 216, 224, 81 L.Ed. 255, 267. Local property taxes have funded Ohio schools since 1825 -- *before* the adoption of the Education Clause. *Walter,* 58 Ohio St.2d at 378, 12 O.O.3d at 333, 390 N.E.2d at 820. Local property taxes were the *sole* source of funding until 1906. *Id.* Nonetheless, the majority dispenses with the state's[1] reliance on this historically based method of funding, thereby usurping the authority of the General Assembly.

A fundamental question in this case is which branch of government shall decide the issue of what level of funding of public education satisfies the constitutional standard of "thorough and efficient." To answer this question we rely upon common-law tests that have guided the courts in this country since the first state constitution was adopted over two hundred years ago. For the reasons that follow we respectfully, and jointly, dissent from the opinion of the majority.

## I

## Separation of Powers/Justiciability

In Federalist Paper No. 47, James Madison stressed the importance of judges refraining from lawmaking: "Were the power of judging joined with the legislative *** the judge would then be the legislator." The Federalist Papers (1961) 303.

In *Marbury v. Madison* (1803), 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60, 73, the court established that "[i]t is emphatically the province and duty of the judicial department to say what the law is." The court also pronounced, however, that the judicial branch does not have the authority to answer "[q]uestions in their nature political, or which are, by the

constitution and laws, submitted to" another branch of government. *Id.* at 170, 2 L.Ed. at 168.

We conclude that the question of what level of funding satisfies the constitutional standard of a "thorough and efficient" system of education is a question of quality that revolves around policy choices and value judgments constitutionally committed to the General Assembly. We conclude that defining a "thorough and efficient" system of education financing is a nonjusticiable question.

We do not maintain that this court is without jurisdiction over this case. Rather, we conclude for the reasons stated *infra* that we are restrained by the fundamental principle of separation of powers and the related doctrine of nonjusticiability from deciding what level of educational quality a "thorough and efficient" system of public schools requires.

Such restraint should be exercised only after the court has decided a threshold justiciable issue, that is, whether the General Assembly has made provision by taxation or otherwise to secure a thorough and efficient system of schools. In view of the clear intention of the delegates to the Constitutional Convention of 1851, the words of the Constitution and the

agreement among the parties to this case that all plaintiff school districts have met the minimum standards set by the State Department of Education, we conclude that the justiciable question has been answered in favor of the defendants.

Beyond the threshold question, the term "thorough and efficient" is a question of quality, which is a political question that the Ohio Constitution leaves to the legislature to determine.

The nonjusticiability of a political question is a function of separation of powers. *Baker v. Carr* (1962), 369 U.S. 186, 210, 82 S.Ct. 691, 706, 7 L.Ed.2d 663, 682.[2] "The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of [the legislature] or the confines of the Executive Branch. The Judiciary is particularly ill suited to make such decisions, as 'courts are fundamentally underequipped to formulate national [or state] policies or develop standards for matters not legal in nature.'" *Japan Whaling Assn. v. Am. Cetacean Soc.* (1986), 478 U.S. 221, 230, 106 S.Ct. 2860, 2866, 92

1 L.Ed.2d 166, 178, quoting *United States ex rel. Joseph v. Cannon*
2 (C.A.D.C. 1981), 642 F.2d 1373, 1379.
3 The fact that this lawsuit implicates other branches of government, or
4 has political overtones, does not automatically invoke the political question
5 doctrine. A political question is one that requires policy choices and value
6 judgments that have been expressly delegated to, and are more
7 appropriately made by, the legislative branch of government. *Japan*
8 *Whaling Assn.,* 478 U.S. at 230, 106 S.Ct. at 2866, 92 L.Ed.2d at 178.
9 The doctrine is one of political questions, not political cases. The doctrine
10 was not designed so that courts might evade their responsibility to interpret
11 the Constitution and we do not apply it here as a means of avoiding our
12 constitutional responsibility. Rather, it was designed "to *restrain* the
13 Judiciary from inappropriate interference in the business of the other
14 branches of Government." (Emphasis added.) *United States v. Munoz-*
15 *Flores* (1990), 495 U.S. 385, 394, 110 S.Ct.1964, 1970, 109 L.Ed.2d 384,
16 396.
17 The words of the Ohio Constitution commit to the General Assembly,
18 not the courts, the responsibility to fund a "thorough and efficient" system

of public schools. The General Assembly has exercised that power, as Ohio unquestionably has a system of public schools that is designed and funded to meet the educational guidelines established through the Department of Education. The level and method of funding beyond those minimum standards constitute, however, a nonjusticiable political question.

In *Baker v. Carr*, 369 U.S. at 217, 82 S.Ct. at 710, 7 L.Ed.2d at 686, the United States Supreme Court identified the characteristics of a political question: "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion ***."

In *Nixon v. United States* (1993), 506 U.S. 224, 228, 113 S.Ct. 732, 735, 122 L.Ed.2d 1, 8-9, the court, in examining the text of the Constitution, outlined the procedure to follow to determine if an issue was nonjusticiable: Courts "must, in the first instance, interpret the text in question and determine whether and to what extent the issue is textually committed [in

this instance, to the legislative branch]. *** [T]he concept of a textual commitment to a coordinate political department is not completely separate from the concept of a lack of judicially discoverable and manageable standards for resolving it; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch."

In accordance with the *Nixon* test, our Education Clause commits to the General Assembly the power to define a "thorough and efficient" system of schools. Section 2, Article VI states: "The *general assembly shall make such provisions*, by taxation or otherwise, as *** will secure a thorough and efficient system of common schools throughout the state ***." (Emphasis added.) Once the constitutional threshold has been met, the Education Clause commits to the General Assembly the responsibility and authority to determine the financing necessary for the level of the quality of education.

Moreover, the constitutional debates demonstrate that the framers of the Education Clause believed that establishing specific criteria for constitutionally required financing of education was best left to the General

1 Assembly. Delegate J. McCormick, dissatisfied with the amount of money

2 previously appropriated by the General Assembly, argued in support of an

3 amendment to require a minimum amount of monetary support in the

4 Constitution. That amendment was rejected. II Report of the Debates and

5 Proceedings of the Convention for the Revision of the Constitution of the

6 State of Ohio, 1850-51 (1851) ("Debates") at 17. Delegate Charles

7 Reemelin envisioned that "all attempts to create a system would be left to

8 the General Assembly." *Id.* at 17. Delegate Van Brown believed that the

9 Education Clause was of a limited general purpose, that being that "there

10 should be schools; and that the means for supporting them should be

11 provided; and that the details should all be left to the General Assembly." *Id.*

12 at 703.

13 Consistent therewith, this court has held that the General Assembly's

14 power over public schools is "plenary." *Hancock Cty. Bd. of Edn. v.*

15 *Moorehead* (1922), 105 Ohio St. 237, 244, 136 N.E. 913, 915. We have

16 also recognized that the court has "no responsibility and no authority" over

17 the "wisdom or the policy of [education] legislation." *State ex rel. Methodist*

1 *Children's Home Assn. of Worthington v. Worthington Village School Dist.*

2 *Bd. of Edn.* (1922), 105 Ohio St. 438, 448, 138 N.E. 865, 868.

3 This finding of a textual commitment to the General Assembly of the

4 quality of education is further bolstered by a lack of judicially demonstrable

5 or manageable standards for determining what constitutes a "thorough and

6 efficient system of common schools." Such standards "forestall reliance by

7 [courts] on nonjudicial 'policy determinations.'" *Immigration &*

8 *Naturalization Service v. Chadha* (1983), 462 U.S. 919, 942, 103 S.Ct.

9 2764, 2780, 77 L.Ed.2d 317, 339.

10 For example, it is significant that the plaintiffs themselves offered

11 neither a constitutional definition of a thorough and efficient system nor

12 direction regarding constitutional funding of such a system. The majority

13 opinion provides the General Assembly with minimal guidance in

14 developing a constitutional school financing system. Aspirational phrases

15 urging that state financing of educational systems enable citizens to "fully

16 develop their human potential," and afford "high quality educational

17 opportunities" are no more amenable to judicial interpretation or

18 enforcement than is the term "thorough and efficient."

1 As succinctly stated by the Illinois Supreme Court, "[w]hat constitutes
2 a 'high quality' education, and how it may best be provided, cannot be
3 ascertained by any judicially discoverable or manageable standards. The
4 Constitution provides no principled basis for a judicial definition of high
5 quality. *** Nor is education a subject within the judiciary's field of
6 expertise, such that a judicial role in giving content to the education
7 guarantee might be warranted. Rather the question of education quality is
8 *inherently one of policy involving philosophical and practical considerations*
9 that call for the expertise of legislative and administrative discretion."
10 (Emphasis added.) *Commt. for Educational Rights v. Edgar* (1996), 174
11 Ill.2d 1, 28-29, 672 N.E.2d 1178, 1191.
12 The Rhode Island Supreme Court similarly recognized inherent
13 problems when the judiciary undertakes to decide education matters.
14 "What constitutes an appropriate education or even an 'equal, adequate,
15 and meaningful' one, is 'not likely to be divined for all time even by the
16 scholars who now so earnestly debate the issues." *Pawtucket v. Sundlun*
17 (R.I. 1995), 662 A.2d 40, 58, quoting *San Antonio Indep. School Dist. v.*
18 *Rodriguez* (1973), 411 U.S. 1, 43, 93 S.Ct. 1278, 1302, 36 L.Ed.2d 16, 49.

1 Plaintiffs' own expert acknowledged the policy-based nature of

2 education decisions when he said that "the foundation level reflects

3 *political* and *budgetary* considerations at least as much as it reflects a

4 *judgment* as to how much money *should* be spent on K-12 education."

5 (Emphasis added in part.)

6 These policy decisions -- political, budgetary and value judgments --

7 are inextricable from education matters, requiring a balancing of interests

8 that are textually and traditionally committed to the General Assembly, and

9 the General Assembly, not this court, is the proper forum in which competing

10 taxation, budgetary and spending decisions are made. The judicial branch

11 is simply neither equipped nor empowered to make these kinds of decisions.

12 The language of the Education Clause, the history surrounding its

13 adoption, and our precedent (including *Miller v. Korns*, *supra*, 107 Ohio St.

14 287, 140 N.E.2d 773, upon which the majority relies) all uniformly suggest

15 that determination of educational funding adequacy is the responsibility of

16 the General Assembly. In both *Miller* and *Cincinnati School Dist. Bd. of*

17 *Edn. v. Walter* (1979), 58 Ohio St.2d 368, 387, 12 O.O.3d 327, 338, 390

18 N.E.2d 813, 825, the court left the terms "thorough" and "efficient"

undefined in deference to the principle that the Ohio Constitution entrusts the definition of those terms to the General Assembly.

Although we may personally favor it, it is not this court's place to order the General Assembly to give education "high priority" in its budget allocations, any more than it is our place to set policy or prioritize the allocation of funds to other state programs. Members of the legislative branch represent the collective will of the citizens of Ohio, and the manner in which public schools are funded in this state is a fundamental policy decision that is within the power of its citizens to change. Under our system of government, decisions such as imposing new taxes, allocating public revenues to competing uses, and formulating educational standards are not within the judiciary's authority. As noted by the United States Supreme Court in *Rodriguez*, "the ultimate solutions [to perceived problems associated with school funding systems] must come from the lawmakers and from the democratic pressures of those who elect them." *Id.*, 411 U.S. at 59, 93 S.Ct. at 1310, 36 L.Ed.2d at 58.

Moreover, we find it unlikely that the public is "willing to turn over to a tribunal against which they have little if any recourse, a matter of such

grave concern to them and upon which they hold so many strong, though conflicting views. If their legislators pass laws with which they disagree or refuse to act when the people think they should, they can make their dissatisfaction known at the polls. *** The court, however, is not so easy to reach *** nor is it so easy to persuade that its judgment ought to be revised." *Seattle School Dist. No. 1 of King Cty. v. State* (1978), 90 Wash.2d 476, 563-564, 585 P.2d 71, 120 (Rosellini, J., dissenting).

In that determinations of educational funding adequacy and quality are inherently fluid, we believe that the majority's well-intentioned willingness to enter this fray today will only necessitate more comprehensive judicial involvement tomorrow as educational theories and goals evolve, conditions throughout the state change, and the General Assembly responds. The experiences of other states provide ample proof of the troubled history of litigation that ensues when the judiciary deems itself to be the ultimate authority in setting educational funding mechanisms and standards, as revealed by the following citations: New Jersey: *Robinson v. Cahill* (1973), 62 N.J. 473, 303 A.2d 273 ("*Robinson I*"), followed by *Robinson v. Cahill* (1973), 63 N.J. 196, 306 A.2d 65 ("*Robinson II*"); *Robinson v. Cahill* (1975),

1 67 N.J. 35, 335 A.2d 6 ("*Robinson III*"); *Robinson v. Cahill* (1975), 67 N.J.

2 333, 339 A.2d 193 ("*Robinson IV*"); *Robinson v. Cahill* (1976), 69 N.J. 449,

3 355 A.2d 129 ("*Robinson V*"); *Robinson v. Cahill* (1976), 70 N.J. 155, 358

4 A.2d 457 ("*Robinson VI*"); *Robinson v. Cahill* (1976), 70 N.J. 464, 360 A.2d

5 400 ("*Robinson VII*"); *Abbott v. Burke* (1985), 100 N.J. 269, 495 A.2d 376

6 ("*Abbott I"*), followed by *Abbott v. Burke* (1990), 119 N.J. 287, 575 A.2d 359

7 ("*Abbott II"*); *Abbott v. Burke* (1994), 136 N.J. 444, 643 A.2d 575 (*"Abbott*

8 *III*"); Texas: *Edgewood Indep. School Dist. v. Kirby* (Tex. 1989), 777 S.W.2d

9 391 ("*Edgewood I*"), followed by *Edgewood Indep. School Dist. v. Kirby*

10 (Tex. 1991), 804 S.W.2d 491 ("*Edgewood II*"); *Carrollton-Farmers Branch*

11 *Indep. School Dist. v. Edgewood Indep. School Dist.* (Tex. 1992), 826

12 S.W.2d 489 ("*Edgewood III*"); California: *Serrano v. Priest* (1971), 5 Cal.3d

13 584, 96 Cal.Rptr. 601, 487 P.2d 1241 ("*Serrano I*"), followed by *Serrano v.*

14 *Priest* (1977), 18 Cal.3d 728, 135 Cal.Rptr. 345, 557 P.2d 929 ("*Serrano II*");

15 *Serrano v. Priest* (Cal. App. 1986), 226 Cal. Rptr. 584 ("*Serrano III*"); *Butt v.*

16 *State* (1992), 4 Cal.4th 668, 15 Cal.Rptr.2d 480, 842 P.2d 1240;

17 Connecticut: *Horton v. Meskill* (1977), 172 Conn. 615, 376 A.2d 359

18 ("*Horton I*"), followed by *Horton v. Meskill* (1982), 187 Conn. 187, 445 A.2d

579 ("*Horton II*"); *Horton v. Meskill* (1985), 195 Conn. 24, 486 A.2d 1099 ("*Horton III*"); *Sheff v. O'Neill*, *supra*, 238 Conn. 1, 678 A.2d 1267. Each of these cases from other states represents the grim reality of a state supreme court involving itself in setting minimum educational standards, which has resulted in years of protracted litigation, ultimately placing the courts in the position of determining state taxation methods, budgetary priorities and educational policy.

II

Failure of Proof

Although fundamental principles of separation of powers and constraints on judicial review should have, but have not, guided the disposition of this very important case, we nevertheless proceed to analyze the issues as presented by the parties.

The majority retreats from our long-established judicial deference to the determination by the legislative branch of educational funding adequacy and quality, while providing virtually no guidance to the General Assembly as to what the adequate levels of constitutional funding might be. Borrowing the words of another jurist in an analogous case, "if I were a member of

either the executive or legislative branch of our government, I would have but the slightest glimmering of what kind of legislation would comport with the majority's mandate ***." *Sheff v. O'Neill, supra,* 238 Conn. at 128, 678 A.2d at 1329 (Borden, J., dissenting).

A

The Record

In view of the reliance of the plaintiffs and the majority upon anecdotal evidence of conditions of some schools districts, it is important to emphasize that the record also reveals compelling evidence supporting our conclusion that the plaintiffs did not meet their burden of proving that the General Assembly has failed to establish and fund a thorough and efficient system of education. Rather than supporting the conclusion that the General Assembly has totally abdicated the responsibilities imposed upon it by the Education Clause, the record demonstrates that, in recent years, the General Assembly has responded to unfavorable conditions in some Ohio schools by providing a significant infusion of additional funds to primary and secondary education, particularly in those districts most in need. Examination of recent General Assembly initiatives supports the conclusion

that that body is moving to ensure adequacy and reduce inequalities of educational opportunity in Ohio.

Plaintiffs' own expert testified that in one survey, Ohio ranked eleventh among the fifty states in per-pupil educational spending according to one measure, and fourteenth by another. Since 1980, increases in the foundation level of state support have outpaced the rate of inflation by sixty percent. During the 1980s, the state's share of education funding increased from thirty-seven to forty-seven percent of total educational spending. In July 1991, Am.Sub.H.B. No. 298 appropriated money for "equity aid" to ameliorate disparity between the richest and poorest districts. *Id.* at Section 59.02, paragraph entitled "School Finance Equity," 144 Ohio Laws, Part III, 3987, 4551. This aid totaled approximately $45 million to the poorest two hundred eighteen school districts in Ohio in fiscal year 1993. It was distributed pursuant to R.C. 3317.0213 and 3317.0214. Sub.H.B. 671, Section 2, 144 Ohio Laws, Part IV, 6062, 6064. Thereafter, this supplemental equity aid increased to approximately $60,000,000 in fiscal year 1994, $75,000,000 in fiscal year 1995, $90,000,000 in fiscal year 1996, and $100,000,000 in fiscal year 1997. Am. Sub.H.B. No. 152, Section 36,

1 line item 200-500, and Section 36.06, 145 Ohio Laws, Part III, 4400, 4417;
2 1995 Am.Sub.H.B. No. 117, Section 45, line item 200-500. Since this case
3 was tried in 1993, the state school foundation level has increased from
4 $2,871 to $3,500 per pupil. Am.Sub.H.B. No. 152, Section 36.12, 145 Ohio
5 Laws, Part III, 4432-4433; R.C. 3317.022(A).

6 At the time of trial, new technology grant legislation totaling
7 approximately $5 million had been enacted to provide funds to Ohio schools
8 for purchases of computers and associated equipment. Sub.H.B. No. 671,
9 Sections 4 and 5, 144 Ohio Laws, Part III, 6064. Since trial, additional
10 school technology initiatives have been enacted, resulting in appropriations
11 of $95 million in the 1995-1996 capital appropriations bill (Am.Sub.H.B. No.
12 790, Sections 30-33, 145 Ohio Laws, Part IV, 7681-7683), $125 million in
13 the 1996-1997 budget bill (1995 Am.Sub. H.B. No. 117, Section 45, line item
14 200-698 and Section 45.36), and an additional $150 million for the 1997-
15 1998 capital appropriations bill (1996 Am.H.B. No. 748, Section 21).

16 One expert testified that it was “virtually indisputable” that Ohio’s
17 system of school finance was more equitable in 1991 than in 1979 when
18 *Walter* was decided. The trial court expressly found less of a relationship

between current expenditures per pupil and assessed valuation per pupil in school year 1988-1989 than in either of school years 1980-1981 or 1982-1983, demonstrating increased equality. Similarly, state basic aid in 1991 was more strongly distributed in inverse proportion to assessed valuation per pupil than in 1979.

The current foundation program does, in fact, narrow the gap between educational spending in rich and poor districts. In poor districts, state aid may represent as much as eighty percent of the foundation amount provided to the district.

In 1993, the pupil-teacher ratio in Ohio public schools was the eighteenth lowest ratio in the country. Snyder & Hoffman, State Comparisons of Education Statistics: 1969-70 to 1993-94 (1995 U.S. Department of Education) 18, Figure 9.

Thus, the evidence demonstrates that the General Assembly has discharged its constitutional duty for funding a "thorough and efficient" system.

## B

## Equality and Adequacy

Plaintiffs contend that "thorough and efficient system" means a system which guarantees equality and adequacy in public education in Ohio.[3] The plaintiffs contend, first, that the state's public school financing scheme violates a constitutional requirement of equal educational opportunity and, second, that the state has failed to ensure that a constitutionally required minimum standard of education has been met.

Plaintiffs' two-pronged argument reflects those made in recent school funding cases litigated throughout the country. See McUsic, The Use of Education Clauses in School Finance Reform Litigation (1991), 28 Harv. J. Leg. 307, 308-309; Enrich, Leaving Equality Behind: New Directions in School Finance Reform (1995), 48 Vanderbilt L.Rev. 101, 104 *et seq.* In that equality and adequacy are entirely separate concepts, a proper resolution of the cause before us depends upon separate analysis of those two concepts in light of the requirements imposed by the Education Clause of the Ohio Constitution.

## 1

## Equality

1 The state does not dispute that disparity exists in the funding of
2 elementary and secondary public schools among Ohio school districts. The
3 state concedes that public schools throughout the state differ widely, *e.g.*, in
4 available course offerings, quality of school facilities and other resources,
5 and available extracurricular activities. The parties do dispute, however,
6 whether the Ohio Constitution permits these disparities to exist.
7 In arguing that the Education Clause requires equality, plaintiffs
8 contend that each Ohio child has a fundamental right to compete on a "level
9 playing field" of educational opportunity with all other Ohio children. The trial
10 court accepted this line of argument, and held that the Education Clause
11 imposed upon the General Assembly a duty to create a system of education
12 “that will allow students to be educated *at similar levels* and provide students
13 with *similar opportunities for growth and educational benefits*." (Emphasis
14 added.)[4] The state, in contrast, argues that the requirement of a thorough
15 and efficient system of public education simply does not include equality.
16 In reviewing this clause, this court should follow established principles
17 of constitutional interpretation. Pivotal in the construction of constitutional,
18 as well as legislative, provisions is the intention of the drafters. *Castleberry*

*v. Evatt* (1946), 147 Ohio St. 30, 33 O.O. 197, 67 N.E.2d 861. Thus, when we interpret a constitutional provision it is our duty to ascertain the object of the people in adopting it, and then to give effect to that object. *Id.* We determine that intention by looking first to the words used. We then examine the meaning of those words at the time of their adoption. It is also appropriate to consider the history surrounding adoption of the provision, if available. See *State ex rel. Swetland v. Kinney* (1982), 69 Ohio St.2d 567, 23 O.O.3d 479, 433 N.E.2d 217.

Having applied those principles, we conclude that plaintiffs' interpretation of Ohio's Education Clause as requiring equal educational opportunity for all Ohio schoolchildren is unduly broad, was not intended, and would result in either an enormous increase in tax support of schools to raise the lowest-funded districts to the level of the highest-funded districts, or a decrease in funding for the highest-funded districts so that there is equal funding for all. Neither the language of the Education Clause itself nor its history justifies the plaintiffs' contention that our Constitution requires that all Ohio schoolchildren attend schools that are funded equally.

1 The plain language of our Education Clause, in contrast to the
2 language of other state constitutions, makes clear that our Constitution does
3 not include terms expressly requiring equality of educational opportunity. Cf.
4 Section 1(1), Article X, Montana Constitution (guaranteeing "[e]quality of
5 educational opportunity" to each person of the state); Section 2(1), Article
6 IX, North Carolina Constitution (requiring "a general and uniform system of
7 free public schools, *** wherein equal opportunities shall be provided for all
8 students"); Section I, Article IX, Florida Constitution ("Adequate provision
9 shall be made by law for a uniform system of free public schools ***); see,
10 generally, Hubsch, The Emerging Right to Education Under State
11 Constitutional Law (1992), 65 Temp. L. Rev. 1325, 1343 -1348.
12 The Ohio Constitution could have been drafted with similar language.
13 It was not. And surely sometime during the past one hundred forty years,
14 the citizens of Ohio could have amended their Constitution to require that all
15 public schools be equally funded. They have not.
16 In our view, the plaintiffs rely too heavily on the comments of individual
17 delegates to the constitutional convention in determining intent, rather than
18 looking to what the convention as a whole agreed to following full debate.

1 Analysis of the history surrounding the drafting of the Ohio Constitution

2 leads to the conclusion that it was not the majority intent in adopting the

3 Education Clause to guarantee equality of educational opportunity. This

4 conclusion is supported most directly by the express rejection of proposed

5 amendments to the Constitution which would have had just such an effect.

6 For example, Delegate J. McCormick proposed that all state and local funds

7 generated throughout the state be consolidated and distributed equally

8 among all the schoolchildren of the state. Debates at 17. In opposition,

9 Delegate D.P. Leadbetter spoke against "any attempt to equalize by

10 consolidation the local funds of the State, [in that it] would enlist numbers

11 against the Constitution, who would drag it down in spite of the efforts of its

12 friends." *Id.* The proposal was defeated.

13 Similarly, at the time the Education Clause was adopted, the length

14 of the school year varied throughout the state. In some areas, school

15 sessions lasted only three months while other areas provided school years

16 in excess of six months. *Id.* at 703-704. A proposal was made, and

17 defeated, that the new Constitution require that all Ohio schools be open a

18 minimum of six months of the year. In rejecting the proposed amendment,

1 the delegates clearly sanctioned a system where educational opportunity

2 varied from place to place throughout the state, convincingly rebutting the

3 argument that the framers intended the Education Clause to require equality.

4 Some courts, including the trial court in this case, have held that the

5 history surrounding use of the words "thorough" or "efficient" in state

6 constitutional education clauses justifies the conclusion that those clauses

7 must provide statewide equality of opportunity. See, *e.g.*, *Robinson v.*

8 *Cahill, supra,* 62 N.J. at 513, 303 A.2d at 294; *Edgewood*, *supra*, 777

9 S.W.2d at 394-397; *Rose v. Council for Better Edn.* (Ky. 1989), 790 S.W.2d

10 186, 205-206.

11 We simply are unable to stretch the commonly understood meaning of

12 "thorough and efficient" to include "equality."

13 The majority interprets the Education Clause as imposing a duty upon

14 *the state* to provide a system of public education. We concur with that

15 premise, but do not believe, nor do we believe the majority intends to hold,

16 that the Education Clause thereby precludes individual local school districts

17 from supplementing state funds in pursuit of the goal of seeking educational

18 excellence. Nonetheless, by concluding that "the establishment,

organization and maintenance of public education are the state's responsibility" with only incidental reference to the local funding or management of public schools, the majority has at least impliedly relegated local control to an insignificant role.

The majority opinion and the syllabus law of the case eliminate all vestiges of the current system by which the state provides its funds to public school districts -- all are declared to be unconstitutional. It follows that the General Assembly cannot comply with its constitutional mandate by continuing its course of substantially increasing the flow of funds to poorer school districts and special funding for specific purposes to all districts. It seems that, although the majority has not said so, the General Assembly has two options that may satisfy the plaintiffs' view of equity in providing an "equal playing field": (1) The adoption of a new tax structure that will provide sufficient revenues to bring the school funding of the poorest districts up to an undefined level of support, or (2) placing a statutory limit on the ability of some districts to spend what they choose to spend on public education.

We note that in New Jersey the legislative response to judicially mandated equalization "has been to increase spending in special needs districts while limiting spending in wealthier districts" to put a cap on school spending. *Neptune Twp. Bd. of Edn. v. Neptune Twp. Edn. Assn.* (1996), 144 N.J. 16, 675 A.2d 611. Nothing could be more ironic than if our holding today were to reduce the quality of Ohio's best public schools in the interest of raising the quality of those most in need of improvement.

There is no public good in achieving funding equality if the new statewide standard is a forced equalization of funding that prohibits the residents of one school district from spending as much as they wish to educate their children in order that public school districts be "equal." Under such circumstances, those inclined to purchase an educational edge for their children may well devote their excess resources to private, rather than public, education. In the end, equalization of funding of public schools would not end wealth-based disparity; it would merely reestablish the economic lines on which that disparity exists. Even the majority asserts that wealthy school districts should be allowed to augment their own programs.

Although there is a range of per pupil spending from $3,500 to $12,000, such variances do not necessarily mean that low-spending districts spend too little. Arguably, such disparities exist because some communities choose to spend more. The state itself acknowledges that the vigorous legislative attention to the problems of the most needy of Ohio schools must continue. Plaintiffs have not submitted evidence of the per-pupil cost of adequately educating an Ohio schoolchild. How can we declare a system of funding public education to be unconstitutional when none of the parties even attempt to prove what would constitute such a system?

## 2

## Adequacy

Plaintiffs assert that implicit in the phrase "thorough and efficient system" is a requirement that each Ohio school child be afforded the opportunity to receive an "adequate" education. They contend that Ohio's current system of funding primary and secondary education has resulted in school districts in Ohio being so grossly underfunded as to force those districts to offer educational opportunity which can only be described as

inadequate. They equate adequacy of educational opportunity with availability of education of high quality.

In contrast, the state contends that the Education Clause requires the General Assembly only to provide each public school student with an opportunity to receive a basic education. Inherent in its argument, and consistent with our holding in *Walter*, is the premise that the constitutional phrase "thorough and efficient" cannot be deemed to impose a duty to provide a "quality" education if the term "quality" is used to mean more than the basic education required by the minimum standards formalized in the Ohio Administrative Code. See Ohio Adm.Code Chapter 3301-35. The educational minimum standards established by the Department of Education are incorporated into the Administrative Code, and carry the force of law, and are consistent with the mandate of the Education Clause that the opportunity to obtain a basic education be afforded every Ohio child.

The majority requires the General Assembly to provide sufficient funding by taxation or otherwise to ensure that all schools are safe, in good repair, and adequately supplied, and in compliance with all applicable laws. But, while these criteria seem more closely aligned with the state's position

1 that adequacy requires only a basic education, the majority further advises
2 that Ohio's children should be educated so that they are “able to participate
3 fully in society" and to "fully develop their human potential." It would be
4 difficult to disagree with such laudable goals for any school system, public or
5 private. But if it is the majority's intent to incorporate these standards into
6 <u>constitutional requirements</u>, it is equally difficult to imagine the creation of
7 any funding system that would pass constitutional muster.
8 The majority notes that some components of the existing system
9 constitute "weaknesses." But surely the existence of weaknesses in a
10 legislatively devised funding system cannot be the basis of a finding of
11 unconstitutionality.
12 We agree with the majority’s conclusion that the framers of our
13 Constitution deemed the providing of education to every Ohio child to be of
14 great importance to the state's future, and intended to guarantee that every
15 Ohio child have an opportunity to receive an adequate education.
16 Defining adequacy, however, requires consensus as to the purposes
17 education is to serve -- plainly a function legislative in nature. To define
18 adequacy would presuppose that there is a bottom line of educational quality

1 below which no school may constitutionally be allowed to fall. That bottom

2 line would have to be flexible, so that it may change over time with changing

3 conditions.

4 In *Rose*, *supra*, 790 S.W.2d 186, the Kentucky court defined an

5 "efficient system" to include nine minimum characteristics. It found that an

6 efficient system requires substantially uniform schools throughout the state

7 and the provision of equal educational opportunities to all Kentucky children.

8 It further found that, under an efficient system, the Kentucky General

9 Assembly not only has *sole* responsibility for funding common schools, but

10 also a duty to monitor the state's schools "to assure that they are operated

11 with no waste, no duplication, no mismanagement, and with no political

12 influence." *Id.* at 213.

13 Reading these extensive requirements into the definition of the single

14 word "efficient" bears "'simply the imprimatur of result oriented jurisprudence

15 cloaked in superfluous reasoning.'" *Commt. for Educational Rights v. Edgar,*

16 *supra*, 174 Ill.2d at 16, 672 N.E.2d at 1188, quoting Note, State

17 Constitutional Law--Public School Financing--Spending Disparity Between

18 Wealthy School Districts and Poor Urban School Districts, Caused By

Reliance on Local Property Taxes, is Violative of the "Thorough and Efficient Education" Clause (1991), 21 Seton Hall L. Rev. 445, 480. See, also, *Hornbeck v. Somerset Cty. Bd. of Edn.* (1983), 295 Md. 597, 632-639, 458 A.2d 758, 777-780 (collecting cases, and determining, at 632, 458 A.2d at 776, that "[t]o conclude that a 'thorough and efficient' system *** means a full, complete and effective educational system throughout the State *** is not to require a statewide system which provides more than a basic or adequate education to the State's children."). Imposition of such extensive requirements is certainly inconsistent with the history surrounding adoption of Ohio's Education Clause.

Plaintiffs stipulated in the trial court that they were all in compliance with state minimum standards on their most recent scheduled evaluations. In that "an Ohio Administrative Code section is a further arm, extension, or explanation of statutory intent implementing a statute passed by the General Assembly," *Meyers v. State Lottery Comm.* (1986), 34 Ohio App.3d 232, 234, 517 N.E.2d 1029, 1031, it follows that those plaintiff schools met the standard of adequacy established by the General Assembly at that time. Plaintiffs did not prove that compliance with the minimum standards then in

1 effect was insufficient to provide an adequate education. Plaintiffs did not
2 attempt to prove that any graduate of any of the plaintiff school districts had
3 been refused entrance to college because his or her diploma was
4 unacceptable. No Ohio school was shown to have been denied
5 accreditation. Plaintiffs did not prove that any Ohio child was without a
6 school to attend.

7 Plaintiffs attempted to prove that conditions in some Ohio schools
8 amounted to educational deprivation. But, as in *Walter*, plaintiffs did not
9 provide evidence that any student received fewer than the full number of
10 days of instruction required by law, and, as in *Walter*, "the record reveals
11 that several *** school districts that claim to be 'starved for funds' in fact offer
12 programs and services in excess of state minimum standards." *Walter*, 58
13 Ohio St.2d at 387, 12 O.O.3d at 338, 390 N.E.2d at 825-826.

14 The majority concludes that "[l]ack of sufficient funding can also lead
15 to poor academic performance," and that "[p]oor performance on the ninth
16 grade proficiency tests is further evidence that [plaintiff school districts] lack
17 sufficient funds with which to educate their students."

1 The strength of correlation between expenditures and test results is
2 subject to debate. By way of example, while plaintiff district Northern Local
3 ranked in the bottom quarter of all Ohio school districts in total revenue and
4 expenditure per pupil in 1992, its passage rate on the ninth grade proficiency
5 test has been higher than the state average. It has been reported that Ohio
6 public school students rank above the mean of national scores on both the
7 SAT and ACT. Feistritzer, Report Card on American Education: A State-by-
8 State Analysis 1972-73 to 1992-93 (1993) 18. In 1992, Ohio eighth grade
9 students scored one point higher than the national average of two hundred
10 sixty-six in mathematics proficiency, and Ohio public school fourth grade
11 students scored three points above the national average of two hundred
12 sixteen in reading proficiency. Snyder & Hoffman, State Comparisons of
13 Education Statistics: 1969-70 to 1993-94 (1995 U.S. Department of
14 Education) 46 and 48, Tables 15 and 16.
15 Proficiency test results should not be used to measure the sufficiency,
16 or insufficiency, of educational funding. Proficiency test results are just as
17 easily correlated with external socio-economic factors, *i.e.*, poverty,
18 unemployment, health, and degree of family involvement. Again, in the

1 words of Justice Borden, "[a]lthough schools are important socializing

2 institutions in our democratic society, they cannot be constitutionally

3 required to overcome every serious social and personal disadvantage that

4 students bring with them to school, and that seriously hinder the academic

5 achievement of those students." *Sheff, supra*, 238 Conn. at 144, 678 A.2d

6 at 1336 (Borden, J., dissenting).

7 There simply is no proof that changing Ohio's funding system or

8 infusing additional funds will improve education. See, for example, *Missouri*

9 *v. Jenkins* (1995), ___ U.S. ___, ___, 115 S.Ct. 2038, 2055, 132 L.Ed.2d

10 63, 88, where the court noted that, despite massive court-ordered

11 expenditures in the Kansas City school district providing its students with

12 school "facilities and opportunities not available anywhere else in the

13 country," those students had not come close to reaching their maximum

14 potential, and that the "learner outcomes" of those same students were "at

15 or below national norms at many grade levels."

16 One commentator has concluded that "available evidence suggests

17 that substantial increases in funding produce only modest gains in most

18 schools." Clune, New Answers to Hard Questions Posed by *Rodriguez*:

Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and Remedy (1992), 24 Conn. L.Rev. 721, 726.

Moreover, the constitutional mandate that the General Assembly fund a thorough and efficient system requires only that each Ohio child be given an *opportunity* to receive an adequate education. Success in education is not solely the responsibility of the providers of public education. Students themselves, their families, and their local communities bear their own responsibility, inside and outside the classroom. Students themselves must attend classes and study, and they need encouragement and support in those efforts.

We simply do not find, on this record, that plaintiffs carried their burden of proving that school districts have been unable to provide students with an adequate education due to a lack of funds. That being the case, a constitutional violation has not been proven.

## III

## Local Control

While it is true that the framers of our Education Clause envisioned educational opportunity for all, the framers contemporaneously

1 acknowledged and approved of a statewide educational system in which

2 local districts were primarily responsible for providing educational

3 opportunity to their children. When the Education Clause was adopted,

4 determination of adequacy was dependent upon the resources available at

5 the local level and the amount local residents were willing to spend on

6 educating local children. See Debates at 702-704.

7 This court has previously recognized that inherent in the concept of

8 local control is the freedom to "devote more money to the education of one's

9 children." *Walter*, 58 Ohio St.2d at 377, 12 O.O.3d at 331, 390 N.E.2d at

10 820. Equally inherent in the concept of local control is the freedom of local

11 taxpayers to devote less money to local education. So long as it does not

12 deprive children of basic educational opportunity, that decision is

13 constitutional. *Id.*

14 The interests of local taxpayers and local schoolchildren may, at times,

15 conflict. The parties stipulated that less than fifty percent of school tax

16 issues submitted to local voters passed in 1987 through 1992. Voters in

17 plaintiff Northern Local school district have defeated no fewer than twelve

18 school levies since 1982, and one of the plaintiff school districts (Dawson-

Bryant) placed no education tax levy on its ballot between 1980 and 1992 for fear of failure, *even though its residents are taxed at a millage below the state mean*.

The majority imposes an obligation on the state to rectify the shortcomings of individual schools when the quality level of education within any individual district "falls short of the constitutional requirement that the system be thorough and efficient." However, the Education Clause mandates neither that each Ohio school be "thorough and efficient" nor that education be "thorough and efficient." It requires the General Assembly to establish and fund a thorough and efficient *system* of schools. The system is not unconstitutional because individual school buildings have fallen into disrepair, or because individual school districts face funding challenges. See *Leandro v. N. Carolina (*1996), 122 N.C. App. 1, 8-10, 468 S.E.2d 543, 548-549. Nor does proof of such facts necessarily mean that those districts have failed to fund and provide an adequate educational opportunity for their students.

Local control of public schools is a pillar of our system which neither the plaintiffs nor the state wants eliminated. But inherent in local control

must be local responsibility, both on the part of voters, who influence the amount of local funding of local schools, and of local school boards and administrators, who allocate available funds. Where local taxpayers refuse, or are unable, to increase their property taxes, school boards necessarily are called upon to make hard choices to reduce costs. See *Russell v. Gallia Cty. Local School Bd.* (1992), 80 Ohio App.3d 797, 610 N.E.2d 1130 (elimination of busing). Local control, by definition, contemplates the exercise of discretion by local school officials to prioritize the expenditure of funds. While the trial court found that one of the plaintiff school districts had inadequate funding to meet all minimum standards, the impact of that conclusion is diminished by the court's further conclusion that this same district spent more money on salaries and on improving student-teacher ratios than required by minimum standards.

Local boards of education and administrators have historically been responsible for allocating funds, setting salaries and fringe benefits, designing curricula beyond state requirements, and choosing materials and technology.

1 While plaintiffs forcefully argue that the record contains no evidence of

2 local mismanagement, this simply was not emphasized by either plaintiffs or

3 defendants in the trial court. That having been said, anyone who has

4 served on a board of education has experienced the difficult tasks involved

5 in setting priorities for allocating school district funds -- negotiating

6 employee contracts, adding or eliminating educational programs, choosing

7 which social services will best meet the needs of students who come to

8 school ill prepared to learn, and selecting superintendents and

9 administrative staff. It is our view that all parties to this suit failed to

10 address one of the most important issues in public education in this state

11 or any state -- the prudent management of the substantial tax monies

12 available to school districts.

13 IV

14 Remedy

15 In ordering the elimination of the School Foundation Program and

16 establishment of a system with less disparity among districts, the majority

17 has effectively removed other reform alternatives from the General

18 Assembly's consideration. We agree with the United States Supreme Court

1 when it observed that a legislative body has the right to accomplish

2 educational reform "'one step at a time, addressing itself to the phase of the

3 problem which seems most acute to the legislative mind.'" *Rodriguez*, 411

4 U.S. at 39, 93 S.Ct. at 1300, 36 L.Ed.2d at 46, quoting *Katzenbach v.*

5 *Morgan* (1966), 384 U.S. 641, 657, 86 S.Ct. 1717, 1727, 16 L.Ed.2d 828,

6 840.

7 The General Assembly may, for example, decide to increase the

8 foundation amount while preserving the underlying property-tax-based

9 foundation system of school funding. Or it may legislate the consolidation of

10 the less efficient school districts into larger regional districts, or otherwise

11 legislate measures to increase economies of scale.

12 Even accepting the majority's conclusion that the current funding

13 system fails to provide a thorough and efficient system, the General

14 Assembly should be given all available options as it attempts to design a

15 funding system that will be deemed constitutional by this court, including

16 keeping, but modifying, the current system.

17 The majority has determined that the entire system for funding public

18 education in Ohio is unconstitutional. Yet most of the factual support cited

for the majority's conclusion relates to the condition of school buildings and other facilities. Since most of the plaintiffs' evidence relates to allegations of inadequate school buildings and facilities, the remedy should be narrowly tailored to those issues.

## V

## Conclusion

All parties in this action have acknowledged that the level of funding education varies throughout the state, and that significant capital deficiencies exist in some Ohio school buildings and facilities. No one wants a child to attend school in a building with leaky roofs and inadequate plumbing.

However, in the absence of proof of a constitutional violation, the fact that hard problems require hard solutions does not justify judicial second-guessing of the educational funding system established by the General Assembly. Regardless of the appeal of plaintiffs' policy arguments before this court, their arguments are simply addressed to the wrong branch of government. Those who believe that the Education Clause should be

1 changed have procedures available to them by which the Constitution can
2 be amended. See Section 1, Article II (establishing right to referendum).
3 In the final analysis, however, it is as true now as it was at the time of
4 the adoption of the Education Clause in 1851 that "if enough has not been
5 hitherto done for education, it is because public sentiment has not
6 demanded it; and if we attempt to go in advance of that sentiment, we shall
7 not be followed and shall be forced to retreat." Debates at 16.
8 Our dissent should not be viewed as an endorsement of the status
9 quo. However, in the absence of a showing that the statutes in question
10 violate the Constitution, responsibility for correcting the funding of Ohio's
11 educational system does not rest with this court.
12 As members of the judicial branch of government, we must stop our
13 inquiry upon reaching the determination that the General Assembly has
14 done what our Constitution requires it to do. The record before us does not
15 demonstrate that the General Assembly has failed to comply with its
16 constitutional mandate to “make such provisions, by taxation or otherwise,
17 as *** will secure a thorough and efficient system of common schools
18 throughout the state.”

1 We jointly agree that the judgment of the court of appeals should be

2 affirmed.

3 COOK and LUNDBERG STRATTON, JJ., concur in the foregoing dissenting

4 opinion.

5 FOOTNOTES:

6 [1] Throughout this opinion, the defendants-appellees will be collectively

7 referred to as "the state."

8 [2] *Walter* discounted the justiciability argument and any reliance on

9 *Baker v. Carr,* (1962), 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663, finding

10 that *Baker* did not represent the Supreme Court's most recent

11 pronouncement on the issue, and "whatever viability this doctrine had was

12 certainly greatly dampened by the later decision in *Powell v. McCormack*

13 (1969), 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491." *Walter.*, 58 Ohio

14 St.2d at 384, 12 O.O.3d at 336, 390 N.E.2d at 823.

15 However, recent Supreme Court decisions reveal that *Baker* is

16 considered the leading case on justiciability. See *United States Dept. of*

17 *Commerce v. Montana* (1992), 503 U.S. 442, 112 S.Ct. 1415, 118 L.Ed.2d

18 84 (relying on *Baker* to find issue presented did not warrant invocation of

political question doctrine); *Nixon v. United States* (1993), 506 U.S. 224, 113 S.Ct. 732, 122 L.Ed.2d 1 (relying on *Baker* to define a nonjusticiable controversy). Additionally, the *Nixon* court's explanation of *Powell*'s holding thwarts the *Walter* court's view of that case. *Powell*, the *Nixon* court explained, was "based on the *fixed* meaning of '[q]ualifications' set forth in Art. I, § 2. The claim by the House that its power to 'be the Judge of the Elections, Returns and Qualifications of its own Members' [under Art. I, § 5] was a textual commitment of unreviewable authority was defeated by the existence of this separate provision specifying the only qualifications which might be imposed for House membership." (Emphasis *sic.*)

In contrast, the Ohio Constitution does not provide a *fixed* meaning of "thorough and efficient." In fact, a review of other sections in Article VI of the Ohio Constitution reveals that instead of providing a fixed meaning of "thorough and efficient," the Constitution grants the General Assembly even broader discretion in education matters. See Section 1, Article VI; Section 3, Article VI. Nor is the phrase "thorough and efficient" susceptible of a *fixed* meaning. Matters of education are fluid and subject to changing

conditions and ideas. Most important, education matters inherently involve policy choices that are inappropriate for determination by the judiciary.

[3] The majority has stated that the General Assembly is not required to create a new financing system that "must provide equal educational opportunities for all." However, the majority has remanded this cause to the trial court, which is to retain jurisdiction until legislation in conformity with the majority opinion is enacted. The trial judge found and the plaintiffs argued in this court that the Constitution does require equality of educational opportunities. Because the majority opinion requires a "complete systematic overhaul," "an entirely new school financing system" and that "the establishment, organization and maintenance of public education are the state's responsibility," we believe it is necessary to discuss the arguments that relate to equality and adequacy.

[4] The majority does not address the equal protection arguments of the parties and does not declare that education is a fundamental right subject to strict scrutiny. In these respects, *Walter*'s holding survives and we find it unnecessary to discuss the issue.