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The H'aint in the (School) House: The Interest Convergence Paradigm in State Legislatures and School Finance Reform

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THE H'AINT IN THE (SCHOOL) HOUSE: THE INTEREST CONVERGENCE PARADIGM IN STATE LEGISLATURES AND SCHOOL FINANCE REFORM

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INTRODUCTION

"The people in my area are tired of supporting a 34 percent graduation rate in Cleveland."

-Rep. Jim Jordan, R-West Liberty, Ohio[1]

Representative Jim Jordan made this assertion shortly after the Ohio Supreme Court directed the state legislature to reform the method by which Ohio's public schools are funded.[2] Aside from the political posturing on display, Jordan's statement seems innocuous enough. But given Cleveland demographics, *viz.*, over 40% African-American,[3] and given that city's tortured school desegregation experience,[4] the racial subtext of Jordan's statement is unavoidable.

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1. Lee Leonard, *Suburban, Rural Districts Shouldn't Be Penalized, Lawmakers Say*, COLUMBUS DISPATCH, Jan. 16, 1997, at 6C.

2. DeRolph v. State (*DeRolph I*), 677 N.E.2d 733, 747 (Ohio 1997).

3. Louis Stokes, *Governance Plan Shafts the Voters,* PLAIN DEALER (Cleveland), Feb. 3, 1997, at 9B. In 1997, "Cleveland's population [was] 505,616, with an African-American population of 235,405, for a percentage of 46.6 percent." *Id.* Hispanics comprised 6.9% of Cleveland's population in 1997. *See* Michael O' Malley & April McClellan-Copeland, *Emerging Voice in Government: Newly Elected Nelson Cintron Jr. Faces Challenges as the First Hispanic Elected to Cleveland Council,* PLAIN DEALER (Cleveland), Nov. 10, 1997, at 1B ("Cleveland's Hispanic population is estimated at 35,000.").

4. *See* Reed v. Rhodes, 442 F. Supp. 708 (N.D. Ohio 1976). It was only after twenty-two years and over eighty orders that Cleveland's Board of Education was

Jordan's invective, in a more general sense, captures a socio-political paradigm which has coursed through our nation's battle over school desegregation and school finance reform, that of "interest convergence."[5]

In the context of public education policy, the paradigm's core tenet is that any reform solution which benefits African Americans—whether it be desegregation, busing, or finance adequacy—with no cognizable benefits for whites will be resisted or rejected outright. The interest convergence paradigm is illuminated with disquieting clarity in Professor Derrick Bell's book *Silent Covenants*.[6] Exploring the arc of civil rights history in the United States, Professor Bell demonstrates that "the most significant political advances for blacks resulted from policies which were intended to serve, and had the effect of serving, the interests and convenience of whites rather than remedying racial injustices against blacks."[7] Time and again—from the Emancipation Proclamation, to the Civil War Amendments, to the abolition of slavery in northern states, to *Brown v. Board of Education*—Bell offers compelling evidence to conclude that "[b]lack rights are recognized and protected when and only so long as policymakers perceive that such advances will further interests that are their primary concern."[8] Put another way, Bell is saying that the

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granted unitary status. Reed v. Rhodes, 1 F. Supp. 2d 705 (N.D. Ohio 1998), *aff'd*, 179 F.3d 453 (6th Cir. 1999).

5. *See* DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 49 (2004).

6. *Id.*

7. *Id.* at 56.

8. *Id.* at 49. For example, Bell and others have examined the *Brown v. Board of Education* decisions in the context of the fight against Communism. *See id.* at 59-68. As widely acknowledged, the *Brown* decision was in part a response to circumstances beyond the schoolhouse: the defeat of Nazism and Communism. *Id.* For the United States, segregation "posed a contradiction for the self-proclaimed exemplar of freedom and democracy." *Id.* at 60. On the heels of a WWII victory, and in the throes of a still-existing Communist threat, the Supreme Court—indeed our entire country—was confronting a shameful moral contradiction: how was it that we could fight on behalf of others to live free from oppressive regimes while America continued to confer no rights to African Americans that a "white man was bound to respect." Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 407 (1857). The importance of moral consistency in the global context was not lost on Presidents Roosevelt and Eisenhower, or the Supreme Court. That argument proved to be a powerful weapon in Thurgood Marshall's rhetorical arsenal. Through the *Brown*

victories gained by African Americans never arose out of an absolute moral imperative of restorative justice; those solutions represented, at best, results with which whites would also enjoy some tangible benefit. It is nothing less than disheartening, for those who have viewed such historic accomplishments as affirmations of white enlightenment or beneficence, to acknowledge the reality Bell places before us.

That sinking feeling, on a level, is the head-spinning realization that the h'aint[9]—racism—has lurked above or beneath every matter of unique importance to African Americans. The resulting frustration could compel a reaction to Representative Jordan's statement similar to the reaction President Bush received in the aftermath of Hurricane Katrina—he "doesn't care about black people."[10] Placing Jordan's assertion into the reality of interest convergence, however, while acknowledging the muted specter of racism, offers another interpretation: for Jordan, school finance reform solutions that bring no tangible benefits to his suburban (and overwhelmingly white[11]) constituents will never see the light of day. True to the paradigm, the

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opinion, political leaders were able to claim a degree of moral superiority relative to the world community. But for the existence of this larger, nationalistic self-interest, one wonders whether *Brown* would have been decided as it was. *See* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524-25 (1980).

9. A "h'aint" is a ghost or spirit. The term is a Southern colloquialism, a variation of "haunt." URBAN DICTIONARY, http://www.urbandictionary.com/define.php?term=haint (last visited Sept. 28, 2006).

10. Matea Gold & Scott Collins, *NBC Edits Rapper's Comments on Bush: Kanye West's Remarks During Live Benefit for Hurricane Relief Cut for West Coast Audience*, MORNING CALL (Allentown, Pa.), Sept. 4, 2005, at A5 (quoting Kanye West's criticism of President Bush during NBC's live telecast of *A Concert for Hurricane Relief* on September 2, 2005).

11. Representative Jordan's district, at the time of his statement, included Logan County. In 1998, Logan County had a population of 45,396, of which 96.3% were White, 2.3% Black, .5% Hispanic, .8% Asian/Pacific Islander, and .1% American Indian/Eskimo/Aleut. LOGAN COUNTY DEMOGRAPHIC PROFILE 3-4 (2000), http://ohioline.osu.edu/~dataunit/profiles/pdf/logad.pdf#search='logan%2. According to the latest census available, Logan County's racial makeup is 96.5% White, 1.7% Black, 0.2% American Indian and Alaska Native, 0.5% Asian, 0.0% Native Hawaiian and Pacific Islander, and 0.8% Hispanic or Latino. U.S. Census Bureau, State & County QuickFacts, Logan County, Ohio, http://www.quickfacts.census.gov/qfd/states/39/39091.html (last visited Sept. 28, 2006).

Ohio legislators have yet to converge on an effective, comprehensive solution.

While Professor Bell describes some of the recent school funding litigation and subsequent efforts in his book,[12] he stops short of mining those disputes to further illuminate the interest convergence paradigm. The purpose of this essay is to do so, using the school finance reform controversy in Ohio as an example. Part I describes how the school finance reform debate is an extension of our nation's desegregation history. Part II looks at the school funding controversy in Ohio, highlighting legislator and citizen attitudes toward school finance litigation and public school funding along racial and geographic lines. Part III identifies six interests which emerge in the school funding dispute, arguing that these interests must be taken into account by legislators in crafting school finance policy. This essay concludes by asserting that while some of these interests can be viewed as race-neutral, our nation's desegregation struggle, and the racing of school finance reform efforts lurking just beneath, must be addressed in order to achieve effective solutions to school finance dilemmas.

I. SCHOOL FINANCE REFORM AS AN EXTENSION OF THE *BROWN V. BOARD OF EDUCATION* STRUGGLE

The current school finance reform battle is an extension of the struggle over desegregation precipitated by the U.S. Supreme Court's historic *Brown v. Board of Education* decisions.[13] During the late 1960s into the late 1970s, white opposition to school integration was emboldened by political, judicial, and social forces, which conspired to apply *Brown II*'s "all deliberate speed" directive all too literally. [14] That opposition reached its depths in the fierce resistance to busing.[15]

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12. BELL, *supra* note 5, at 161-79.

13. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955); Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483 (1954); *see* Nathaniel R. Jones, *The Judicial Betrayal of Blacks—Again: The Supreme Court's Destruction of the Hopes Raised by* Brown v. Board of Education, 32 FORDHAM URB. L.J. 109, 128 (2004).

14. *See* CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* 124-34 (2004).

15. *See, e.g.*, CHARLES T. CLOTFELTER, AFTER *BROWN*: THE RISE AND RETREAT OF SCHOOL DESEGREGATION 75 (2004) (discussing Louisville's busing experience);

Riots arising out of busing, other desegregation efforts, and anti-war and racial strife in the inner-city drove whites to the suburbs in historic numbers, who then drove their children to suburban and private schools.[16] As a result, for those cities under desegregation orders, achieving the racial balance became impossible,[17] in short, because there were essentially no whites to integrate.[18]

With white flight came economic flight, and the tax base upon which urban public schools were financed eroded. At least from the 1960s moving forward, virtually every state relied upon local property tax values and assessments to finance public kindergarten through high school (K-12) education.[19] Inner-city school districts received disproportionately less money per pupil, as urban districts became poorer and experienced drops in residential property values and revenues from businesses.[20] Because it was becoming clear that

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OGLETREE, *supra* note 14, at 63-78 (describing the history of and reaction to busing in Boston).

16. *See* BELL, *supra* note 5, at 110; Gary Orfield, *Segregated Housing and School Resegregation*, *in* DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF *BROWN V. BOARD OF EDUCATION* 291, 314-18 (Gary Orfield et al. eds., 1996); Michael E. Lewyn, *Suburban Sprawl: Not Just an Environmental Issue*, 84 MARQ. L. REV. 301, 320 n.159 (2000) (noting that in the first nine months of 1967, there were 164 race riots throughout the country).

17. *See* SHERYLL CASHIN, [THE FAILURES OF] INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 206-18 (2004).

18. Robert A. Sedler, *Implementing* Brown*: A Lawyer's View*, 50 WAYNE L. REV. 835, 842-43 (2004).

19. James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2058 (2002); William E. Thro, *A New Approach to State Constitutional Analysis in School Finance Litigation*, 14 J.L. & POL. 525, 525 n.1 (1998) (stating that all states except Hawaii rely upon local property taxes as a significant part of their school budgets).

20. *See* Michael E. Lewyn, *The Urban Crisis: Made in Washington*, 4 J.L. & POL'Y 513, 520 (1996) (noting how "suburbanization erodes cities' tax bases," and leaves low-income families in the inner-city); Yale Rabin, *Highways as a Barrier to Equal Access*, 407 ANNALS AM. ACAD. POL. & SOC. SCI. 63, 69 (1973) (discussing the impact of suburbanization on inner-city populations and employment, and noting the consequences of "the departure of commerce, industry, and middle-class residents to the suburbs may reduce the city's tax revenues"); James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432, 435 (1999) ("Poor students have greater educational needs and require more resources to educate than do affluent students. Schools dominated by poor students will therefore usually be more expensive to operate than schools populated by middle-

public schools would not achieve the racial balance envisioned by *Brown*, school desegregation advocates redirected their efforts toward ensuring that public school financing would be equal.

School finance reform litigation came in three waves.[21] The first wave arrived in the early 1970s,[22] when desegregation advocates became increasingly frustrated at the slow pace of improving conditions for African-American children.[23] The second wave came after *San Antonio Independent School District v. Rodriguez*,[24] in which the Supreme Court held that there was neither a constitutional right to a public education nor financial equalization between poor and wealthy school districts.[25] It would take nearly twenty years and another iteration of school finance litigation to only partly nullify *Rodriguez*'s impact.[26]

Within the past ten years, there has been litigation in forty-five states challenging the funding formulas for public schools.[27] This recent "third wave" of challenges to school financing inequities has found some success in the courts.[28] As a result, state legislatures have been forced to address the inherent deficiencies in their school financing systems. After the Ohio Supreme Court's holding that reliance upon a property tax-based methodology violates the state

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and upper-income students." (footnote omitted)).

21. Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1152 (1995).

22. *Id.* (citing Serrano v. Priest, 487 P.2d 1241 (Cal. 1971)).

23. Ryan & Heise, *supra* note 19, at 2058.

24. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); *see* Heise, *supra* note 21, at 1152.

25. *Rodriguez*, 411 U.S. at 36-39, 55.

26. The third wave began in 1989 with two seminal state cases: *Rose v. Council for Better Education, Inc.*, 790 S.W.2d 186 (Ky. 1989) and *Edgewood Independent School District v. Kirby* (Edgewood I), 777 S.W.2d 391 (Tex. 1989).

27. Jennifer Carr & Cara Griffith, *School Finance Litigation and Property Tax Reform: Part I, Litigation*, ST. TAX NOTES, June 27, 2005, at 1015. Five states—Delaware, Hawaii, Mississippi, Nevada, and Utah—have not had lawsuits challenging public school funding schemes. *Id.* at n.1.

28. Michael Griffith, *School Finance Litigation and Beyond*, ECS POLICY BRIEF, April 2005, http://www.ecs.org/clearinghouse/60/26/6026.htm. Of the challenges to the adequacy of K-12 spending, plaintiffs have won eighteen of those cases. *Id.*

constitution,[29] Ohio is just one of several states currently wrestling with court-directed mandates.[30]

II. THE H'AINT IN THE SCHOOLHOUSE? OHIO

An examination of the Ohio experience reveals that the interest convergence paradigm lives on in the debate over school finance reform. Looking at Ohio's demographics, legislature composition, and proposed remedies leads to the conclusion that only reforms in which whites—particularly suburban whites—also stand to benefit will be successful. This is so despite the fact that African-American children continue to suffer disproportionately from the vestiges of the state's disparate education systems and policies.[31]

In 1997, the Ohio Supreme Court in *DeRolph I* held that the state's funding system violated the Ohio Constitution's mandate to provide "a thorough and efficient system of public schools."[32] The

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29. *DeRolph I*, 677 N.E.2d 733 (Ohio 1997).

30. *See, e.g.*, Montoy v. State, 120 P.3d 306 (Kan. 2005); Columbia Falls Elem. Sch. Dist. No. 6 v. State, 109 P.3d 257 (Mont. 2005); Abbott v. Burke, 495 A.2d 376 (N.J. 1985); Neeley v. West Orange-Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746 (Tex. 2005); *Edgewood I*, 777 S.W.2d 391 (Tex. 1989).

31. Stephen Ohlemacher, *Test Scores Reveal Width of Racial Gap: Long-Sealed Data Show White Pupils Twice as Likely To Pass 4th-Grade Tests*, PLAIN DEALER (Cleveland), Nov. 4, 2001, at A1. For the 1999-2000 school year, for example, 29.7% of African-American fourth graders passed Ohio's reading proficiency test, but 64.3% of whites passed; the gaps were just as wide for citizenship, math, and science. *Id.* More recently, in 2005, 47% of African-American sophomores failed the math portion of the proficiency test, and 65% failed science. Scott Stephens, *New Ohio High School Test Trips Up 1 in 3 Takers*, PLAIN DEALER (Cleveland), July 14, 2005, at A1.

32. *DeRolph I*, 677 N.E.2d at 740. The school finance litigation began in 1976 when the Cincinnati Board of Education filed an unsuccessful suit alleging unconstitutional inequities in school funding. Bd. of Educ. v. Walter, 390 N.E.2d 813 (Ohio 1979). DeRolph, along with five school districts, filed suit in 1991 against the state. *DeRolph I*, 677 N.E.2d at 734. The trial court ruled Ohio's funding formula unconstitutional in 1994, but the Fifth District Court of Appeals reversed the trial court decision one year later. DeRolph v. State, CA-477, 1995 WL 557316, (Ohio Ct. App. Aug. 30, 1995). Appeal was made to the Ohio Supreme Court by the plaintiffs, which by then included the Ohio Coalition for Equity and Adequacy of School Funding, a coalition representing over 500 of the state's 611 school districts. *See* Joe Hallett, T.C. Brown & Mary Beth Lane, *Parents and Educators Agree with High Court Conclusion,* PLAIN DEALER (Cleveland), Mar. 25,

court directed the Ohio General Assembly to restructure its school finance methodology to address the inequities between poorer and wealthier school districts throughout the state.[33] To date, there has been little long-term success.[34]

1997, at 1A. In 1997, the appellants prevailed. *DeRolph I*, 677 N.E.2d at 747. In May 2000, the supreme court directed the legislature to enact an order that would bring the public school's funding scheme into constitutional compliance. DeRolph v. State (*DeRolph II*), 728 N.E.2d 993 (Ohio 2000). One year later, the supreme court relinquished jurisdiction over the case, but gave two stipulations: (1) raise the minimum per-pupil funding; and (2) within two years, increase the amount of parity funding to poorer school districts, which were disproportionately overwhelmed with special education, vocational, and transportation needs. DeRolph v. State (*DeRolph III*), 754 N.E.2d 1184, 1200-01 (Ohio 2001). In *DeRolph IV*, the supreme court vacated its *DeRolph III* decision, announcing that *DeRolph I* and *II* were the law of the case. DeRolph v. State (*DeRolph IV*), 780 N.E.2d 529, 530 (Ohio 2001). However, the supreme court, once and for all, washed its hands of the litigation, and held that no court in the state would have further jurisdiction over the matter. State *ex rel.* State v. Lewis, 789 N.E.2d 195, 202-03 (Ohio 2003) (granting the State's application for writ of prohibition against original trial court judge ordering any new proceedings).

33. *DeRolph I*, 677 N.E.2d at 747.

34. It is unclear how the State of Ohio is going to fix its educational finance problems for the long term.

The Governor of Ohio, Bob Taft, with the legislature, set forth three programs to address some of the more persistent education-related issues. In 1997, the legislature established the Ohio School Facilities Commission, charged with oversight and allocation of school facility improvement initiatives. Editorial, *Ohio Has Made Enormous Strides in Fixing Its Needy Schools,* COLUMBUS DISPATCH, Apr. 8, 2000, at 9A. In 2000, the General Assembly committed $4.5 billion over twenty-six years to facilities improvements. *Id.* The volunteer-centered Ohio Reads program was touted by the Governor to help improve academic achievement through an expansive tutoring program. Dana DiFilippo, *Governor Gives Reading a Boost,* CINCINNATI ENQUIRER, June 25, 1999, at 1C. The Governor's "Ohio Core" initiative, which prescribed "a tougher curriculum for high school graduation," was also proposed. Editorial, *Core Mission: Want To Improve Education in Ohio? Get Serious About Funding*, BEACON J. (Akron), Mar. 15, 2006, at B3. This initiative, however, is still being developed. Sean Strader, *Setzer, Smith Race in 36th a Repeat of 2004 Contest*, DAYTON DAILY NEWS, Nov. 6, 2006, at A7. In 2005, "[t]he state legislature . . . expanded vouchers far beyond Cleveland by allocating money for 14,000 renewable scholarships." Angela Townsend, *More Than 2,500 in Ohio Apply for School Vouchers: Mother of 2 Grateful for State Program*, PLAIN DEALER (Cleveland), July 4, 2006, at B4. Other piecemeal proposals have been attempted. In March of 2006, state legislators passed a bill that would allow school districts to increase their revenues without having to place a levy on the ballot every year the district needs additional funding. *See* Editorial, *The 920 Curse: Ohio Lawmakers*

Ohio's urban exodus has been stark, with significant population shifts out of cities and into its suburbs, exurbs, and rural areas.[35] Ohio's largest cities, with one exception, have suffered net population losses, are poorer, and are now significantly or predominantly African-American.[36] Consequently, the political clout of suburban General Assembly representatives and their constituencies has been strengthened.[37] Since 1994, Republicans have controlled the Ohio General Assembly[38] and have held every statewide public office.[39]

Have Tinkered Again with School Funding, BEACON J. (Akron), Apr. 14, 2006, at B3. In seeking additional funding sources for public schools, a statewide ballot measure, Issue 3, would have allowed slot machines at racetracks, with 30% of the revenue going toward scholarships for college in Ohio. *State Referenda Related to Higher Education*, CHRON. HIGHER EDUC. (Wash., D.C.), Oct. 20, 2006, at A32. That proposal was defeated by a margin of 57% to 43%. Tom Breckenridge, *Middling Support in Cuyahoga Doomed Slot-Machine Proposal*, PLAIN DEALER (Cleveland), Nov. 10, 2006, at B4.

35. According to 2006 estimates, Cleveland's population decreased by 13.4%, Toledo's by 8.8%, Cincinnati's by 13.2%, Dayton's by 20.2%, and Akron's by 7.8%. Editorial, *Our Disappearing Cities*, BLADE (Toledo), Aug. 21, 2006; *see also* David Knox, *Ohio Growth Remains Flat Over 5 Years: Most Areas Lose More Residents Than They Attract, Census Reports*, BEACON J. (Akron), Mar. 16, 2006, at A1 (noting the continuing upward population trends of Ohio suburbs "at the expense of population losses in most urban areas and many rural counties").

36. According to the 2004 census, while African Americans comprised 11.9% of Ohio's population, Cleveland is 51% African-American; Youngstown, 43%; Cincinnati, 43%; Dayton, 43%; Akron, 28%; Columbus, 24%; Toledo, 23%; and Canton, 21%. U.S. Census Bureau, State & County QuickFacts, Ohio, http://www.quickfacts.census.gov/qfd/states/39000.html (last visited Sept. 28, 2006).

37. The Ohio State legislature is comprised of thirty-three Senate and ninety-nine House members. *See* The Ohio Senate, Your Senators, http://www.senate.state.oh.us/senators/by_name.html (last visited Sept. 28, 2006); The Ohio House of Representatives, Your Representatives, http://www.house.state.oh.us/jsps/Searchby Name.jsp (last visited Sept. 28, 2006).

38. William Hershey, *Sherrod Brown Aiming for Senate: House Democrat Hopes To Challenge DeWine After Facing Paul Hackett in Primary*, DAYTON DAILY NEWS, Nov. 27, 2005, at B1. In February 2003, for example, Republicans outnumbered Democrats in the House sixty-one to thirty-eight and, in the Senate, twenty-two to eleven. COUNCIL OF STATE GOV'TS, 35 THE BOOK OF THE STATES 115 (2003). By December 2003, Republicans increased their representation in the House to sixty-two of the ninety-nine seats and maintained their Senate majority of twenty-two of the thirty-three seats. COUNCIL OF STATE GOV'TS, 36 THE BOOK OF THE STATES 84 (2004).

That control has enabled Republicans to entrench, particularly wielding their power in drawing General Assembly district lines,[40] and to control the agenda for, and solutions to, Ohio's school finance quandary.

The resistance to school finance reform by some Ohio state legislators, particularly early on, was baldly hostile. Representative Jim Jordan made his "34 percent graduation rate" remark days after the *DeRolph I* decision was announced. Other suburban Republican representatives invoked similar reactions. Jim Trakas of the 17th District, which includes Independence, Ohio (a suburb of Cleveland), admonished that "[t]aking from Peter to pay Paul is not a sensible school funding measure."[41] Michael Wise (15th District, Chagrin Falls), a Republican representing another suburban district, fanned divisive flames by falsely warning, in a Cleveland newspaper editorial, that "[n]one of the [monies allocated to equalize financing] will go toward suburban school districts."[42] In a phrase that harkened back to reactions to the *Brown* decisions, he also accused the "judicial branch [of] usurping the unique constitutional authority of the legislative branch," and "trash[ing] the concept of separation of powers."[43]

These positions led the Republican-controlled Ohio legislature to devise a taxation solution to the funding inequities. Two years after the Ohio Supreme Court's *DeRolph I* ruling, it was clear that with no

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39. *See* Ohio Secretary of State, Election Results, http://www.sos.state.oh.us/sos/ElectionsVoter/electionResults.aspx (last visited Nov. 15, 2006) (follow links to official results for years 1994, 1998, and 2002). Out of the November 7, 2006 election, Democrats gained control of four of five statewide elected executive offices—the Governor, Attorney General, Secretary of State, and Treasurer. *See id.* (follow link for 2006 results).

40. A five-member State Apportionment Board draws legislative districts. OHIO CONST. art. XI, § 1. The panel is composed of the Governor, State Auditor, Secretary of State, and two other members (one from each party) chosen by legislative leaders. *Id.* Because the Governor, Auditor, and Secretary of State are all Republicans, *see* Hershey, *supra* note 38, the GOP controls the map-making process.

41. Cindy Kranz, *School Funding Options Proposed*, CINCINNATI ENQUIRER, Aug. 14, 2004, at 2B.

42. Michael W. Wise, Editorial, *School Funding: Higher Taxes Are Not the Only Answer*, PLAIN DEALER (Cleveland), July 25, 1997, at 11B.

43. *Id.*

new taxes, or higher taxes, school finance reform had little chance of succeeding.[44] Yet, when a taxation solution was finally proposed, lawmakers sought not only to shift the disproportionate financial burden to the poorest Ohioans, but also to provide a windfall for their suburban constituents.[45] In May 1998, the state legislature put Issue 2 on the ballot; Issue 2 would have provided funds for school building construction by increasing state sales tax by one cent, and also would have *lowered suburban property taxes* by 15%.[46] Though soundly defeated,[47] the facts were crystal clear: Issue 2 would impose a regressive tax structure and stood to provide the biggest windfall to suburban constituents.

The opinions of Ohio citizens revealed a racial and geographic divide in their opposition to certain school reform measures. According to a poll conducted in 2001-2002,[48] nearly one in four (23.9%) white respondents felt the Ohio Supreme Court should *not* be involved in school funding issues,[49] and 63% said that they would not donate time or money to a school outside of their district.[50] By comparison, only 7.3% of African-American respondents felt that the court should not be involved in school funding issues,[51] and 41% said

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44. *See* Mary Beth Lane, *School Fund Reform Plan Would Cost Billions More*, PLAIN DEALER (Cleveland), Apr. 16, 1997, at 1A (reporting that a proposed school reform plan in compliance with the guidelines set forth by the Ohio Supreme Court would cost an extra $4 billion).

45. *See* Randy Ludlow, *Issue 2 Would Tax Poor the Most to Help the Poorest Schools*, CINCINNATI POST, Apr.13, 1998, at 10A.

46. Mary Beth Lane & Benjamin Marrison, *State Issue 2 Crushed: Tax Hike for Schools Refected by 4-1*, PLAIN DEALER (Cleveland), May 6, 1998, at 1A.

47. *Id.*

48. OHIO'S EDUCATION MATTERS: KNOWLEDGEWORKS FOUNDATION 2001-2002 POLL (2002), *available at* http://www.kwfdn.org/poll/2001/poll02.pdf. The purpose of the survey was to identify public awareness of and reaction to certain significant events and attitudes related to school funding and the *DeRolph* litigation. *Id.* at 4. The 2001-2002 poll convened a panel of 505 randomly selected respondents, and then two months later followed up with phone call surveys of 323 of those respondents. *Id.* Upon request of this author, the data was recompiled by KnowledgeWorks Foundation to examine findings based on, *inter alia*, race and geography [hereinafter Author's Poll 2001-2002] (on file with author).

49. Author's Poll 2001-2002, *supra* note 48, at 18.

50. *Id.* at 6.

51. *Id.* at 18.

that they would not donate time or money to another school district.[52] On those same questions, there was an urban/suburban split as well, yet not as dramatic: 20% of urban respondents felt the court should not be involved in school funding issues, versus 24.3% of suburban respondents;[53] 57.3% of urban respondents would refuse to donate time or money to other school districts; 56.6% of suburban respondents felt the same.[54]

A subsequent poll sought additional information on the distribution of public education resources.[55] Asked whether "it is necessary to spend more money and resources on poor students or not," 51.7% of white respondents said "yes," in contrast to 77.8% of non-white respondents who answered "yes."[56] Asked whether they would support a local school board-sponsored vote to increase property taxes in order to increase school funding, 43.2% of white respondents were somewhat or strongly opposed, in contrast to 25.6% of non-white respondents.[57]

Several conclusions emerge from this discussion of Ohio's school finance reform debate: (1) Republican legislators who represent suburban constituents are most strongly opposed to reform (a) directed by courts, (b) resulting in tax increases with no perceived benefit to their constituents, and/or (c) perceived to solely or disproportionately benefit urban (and largely African-American) constituents; and (2) there is a substantial black/white and urban/suburban divide amongst citizens on (a) the role of the courts in remedying the problem of public school funding, (b) providing more resources to the poor for education, and (c) taxation as a means of providing more financial resources to public schools. Tying these conclusions to the interest convergence paradigm then requires us to explore precisely what interests are at play.

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52. *Id.* at 6.

53. *Id.* at 18.

54. *Id.* at 6.

55. OHIO'S EDUCATION MATTERS: KNOWLEDGEWORKS FOUNDATION 2003-2004 POLL (2004) (on file with author). These survey results were also recompiled for the author.

56. *Id.* at 7.

57. *Id.*

III. THE H'AINT IN THE SCHOOLHOUSE? POSSIBLE EXPLANATIONS

There are six themes which course through the school finance reform debate. These themes—collectively, individually, or in some combination—explain the sentiments about, as well as the processes and outcomes of legislative responses to, the school finance dilemma. While they are not necessarily distinct, these themes also reflect interests which must be acknowledged before any statewide, legislatively-driven solution can be obtained.

A. *Race, Desegregation Efforts, and the Persistence of Memory*

Court-ordered desegregation is much less prevalent today.[58] Yet its perceived failures, such as the racially-corrosive busing efforts and the persistent disparate education outcomes for African-American students, linger.[59] Interpreting the Ohio KnowledgeWorks Foundation survey data, it might be postulated that white resistance to school finance reform directed by courts, which seeks to distribute financial benefits to minority school districts, can be attributed to a type of "desegregation fatigue" on the part of white suburbanites. In this sense, such directives and efforts are viewed with skepticism, seen as an attempt to extend and force a demonstrably failed social policy.[60] What prevails out of this skepticism is an attitude that the larger society no longer bears a moral imperative to remedy the conditions of public education which have an adverse, disproportionate impact on African Americans.

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58. While the number of active desegregation cases arising out of the *Brown v. Board of Education* rulings once exceeded 500, there remain only 284 *currently* active cases that the Department of Justice is prosecuting. Telephone Interview with Franz R. Marshall, Deputy Chief, Educ. Opps. Section, Civil Rights Div., U.S. Dep't of Justice (Nov. 14, 2006).

59. For example, according to the National Assessment of Educational Progress, in 2003, 60% of black fourth-graders were unable to read at that their grade level, compared to 25% of whites. George Achibald, *50 Years Later,* Brown *Disappoints: Blacks Lag as Schools Resegregate*, WASH. TIMES, May 17, 2004, at A1. In 2004, over 15% of African Americans could not read proficiently upon leaving high school. *Id.* Furthermore, only 50.2% of blacks graduate from high school in four years, versus 74.9% of whites. CHRISTOPHER B. SWANSON, URBAN INST., PROJECTIONS OF 2003-04 HIGH SCHOOL GRADUATES 11, 12 (2004), *available at* http://www.urban.org/UploadedPDF/411019_2003_04_HS_graduates.pdf.

60. Such a sentiment is also a possible interpretation of Jim Jordan's comment.

As seen in Ohio, this skepticism is reinforced (or at least, not disabused) by powerful legislators, themselves doubtlessly aware of the protracted and contentious litigation that shaped the school desegregation fight in Cleveland and other major Ohio cities for over twenty years.[61] Even African-American legislators, or others representing large urban districts, consciously or unconsciously invoke connections to that history.[62] By tethering the school finance reform debate to a painful past, these legislative actors reinforce in the collective imagination of their constituents a raced and distorted view of the primary "instigators" and beneficiaries of school finance reform.

That view is not simply imposed on constituents; many constituents have formed that view on their own. In his analysis of school finance reform controversy in New Jersey, Douglas Reed found that parents of school children viewed legislative reforms largely "through racial lenses,"[63] regardless of the actual reform scope and targets. Whites tended "to perceive school finance reform as primarily benefiting minorities, even when inconsistent with reality."[64] In Ohio, for example, the facts that the *DeRolph* litigation was led by a white plaintiff[65] and instituted in a rural, mostly white county by a coalition of over 500 of Ohio's 611 school districts[66] seem

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61. *See, e.g.*, Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 526 (1979); Bell v. Bd. of Educ., Akron Pub. Sch., 683 F.2d 963 (6th Cir. 1982); Alexander v. Youngstown Bd. of Educ., 675 F.2d 787 (6th Cir. 1982); Deal v. Cincinnati Bd. of Educ., 369 F.2d 55 (6th Cir. 1966); Reed v. Rhodes, 442 F. Supp. 708 (N.D. Ohio 1976).

62. State Senator C.J. Prentiss observed that "[w]hile race defined the boundaries of segregation then, today we face segregation and educational inequalities that are rooted in economic differences in addition to racial issues." Scott Stephens & Dave Davis, *66% of Cleveland's Minorities Attend Racially Isolated Schools*, PLAIN DEALER (Cleveland), May 16, 2004, at A1.

63. Ryan, *supra* note 20, at 474 (quoting Douglas S. Reed, *Twenty-Five Years After* Rodriguez*: School Finance Litigation and the Impact of the New Judicial Federalism*, 32 LAW & SOC'Y REV. 175, 212 (1998)).

64. *Id.* at 475.

65. Catherine Candisky, *Political Fix Pitched for School Funding*, COLUMBUS DISPATCH, Sept. 18, 2003, at 5C (displaying a photograph of Nathan DeRolph).

66. *See DeRolph I*, 677 N.E.2d 733 (Ohio 1997). The suit was instituted in Perry County, Ohio, *id.* at 734, which in 2000 had a population of just over 34,000—98.5% of whom were white, U.S. Census Bureau, American FactFinder, Perry County, Ohio, QT-P5. Race Alone or in Combination: 2000,

to have been lost on many. Thus, it is fair to conclude that raced perceptions "appear[] to play a 'major role in explaining the level of [white] support for'" or opposition to reform.[67]

These raced perceptions also explain, at least in part, the reasons why some finance reform efforts have been more contentious and protracted. In his article, *The Influence of Race in School Finance Reform*, Professor Jim Ryan compares school finance litigation in minority and non-minority school districts.[68] Examining thirty-six state supreme court decisions, and subsequent legislative responses, Ryan makes three primary findings: (1) urban minority school districts, acting alone, did not do as well as white districts (i.e., majority districts) in school finance reform litigation;[69] (2) when urban minority school districts were successful in courts, "they have encountered legislative recalcitrance that exceeds, in both intensity and duration, the legislative resistance that successful white districts have faced";[70] and (3) the public—even when confronted with contrary evidence—invariably viewed legislative reforms in racial terms.[71]

Of the thirty-six cases analyzed, eighteen upheld the state school finance scheme at issue, and eighteen struck down the scheme at issue.[72] Of those financing schemes struck down, only one was brought by a predominately minority urban district,[73] two were an

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http://factfinder.census.gov/servlet/QTTable?_bm=y&geo_id=05000US39127&qr_name=DEC_2000_SF1_U_QTP5&-ds_name=DEC_2000_SF1_U (last visited Sept. 28, 2006).

67. Ryan, *supra* note 20, at 475 (quoting Kent L. Tedin, *Self-Interest, Symbolic Values, and the Financial Equalization of the Public Schools*, 56 J. POL. 628, 638 (1994)).

68. Ryan, *supra* note 20, at 433. Ryan argues for school choice and racial and socioeconomic integration, using as a basis Kent Tedin's Texas study and Douglas Reed's New Jersey study of citizen attitudes toward public school finance litigation. *Id.* at 432-34. For example, in a survey of "roughly 1,000 whites in two predominantly white districts near Houston," Texas, 82% assumed the reform would benefit predominately Hispanic districts, 83% assumed reform would benefit blacks, and 73% thought whites would lose money. *Id.* at 473.

69. *Id.* at 476.

70. *Id.* at 433.

71. *Id.* at 458.

72. *Id.* at 451.

73. *Id.*

admixture of suburban and rural minorities,[74] one was an integrated urban district,[75] and the rest were suburban/rural white districts.[76] Of the unsuccessful challenges, "seven were brought either exclusively by urban minority districts, or by a small group of plaintiffs that included at least one urban minority district."[77] In short, predominately minority districts won three out of twelve challenges, while majority districts won eleven of fifteen.[78]

B. *Political Ideology, Self-Perception, and Race in State Legislatures*

The prevailing political ideology and racial composition of state legislatures also influence efforts toward, and outcomes of, school finance reform. It is obvious that the political party in control shapes the legislature's structure, committee assignments, and agenda. Consequently, the controlling party (especially the one in decisive control, as the Republicans in Ohio) dictates the ultimate policy outcomes. However, it is useful to explore some of the more complex aspects of legislators, the legislative process, and legislative decision making to more clearly identify how ideology, self-perception, and race are relevant to school finance reform.

1. *Political Ideology*

A fundamental principle of representative democracy is that legislators represent the goals and desires of their district constituents.[79] Another abiding principle is that legislators may also seek to realize goals at times independent of constituent interests, and express their personal ideologies through policy initiatives.[80]

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74. *Id.* at 451-52.

75. *Id.* at 452.

76. *Id.* at 452-53.

77. *Id.* at 453.

78. *Id.* at 455.

79. *See* Scott Ashworth & Ethan Bueno de Mesquita, *Delivering the Goods: Legislative Particularism in Different Electoral and Institutional Settings*, 68 J. POL. 168, 170-71 (2006) (discussing the constituency-serving model of representation).

80. *See* James B. Johnson & Philip E. Secret, *Focus and Style Representational Roles of Congressional Black and Hispanic Caucus Members*, 26 J. BLACK STUD. 245, 251 (1996) (discussing the trustee style of representation).

Moreover, advocacy groups, coalitions, and networks of all political or ideological stripes "explicitly seek to exert agenda-setting influence" upon representatives.[81]

In general, these principles guide Democrats and Republicans equally. However, it is obvious that Republican and Democratic ideologies view the role of government, separation of powers, taxation, and education policy in markedly distinct ways. Thus, ideological affiliation itself provides some insight into legislative responses to school finance reform. Beyond political ideology however, legislators and legislative decision making should be more closely examined by considering self-perceptions of legislative roles.

2. *Legislators' Self-Perceptions of Legislative Roles*

Role theory posits a set of informal norms of behaviors that guides actual behavior.[82] Generally, legislative roles fall into five categories: (1) representational, (2) areal, (3) purposive, (4) partisan, and (5) pressure group.[83] To add insight into school finance reform debates, it is instructive to focus on the representational and areal aspects of legislative roles.[84]

While district constituency and service are important to legislators across the ideological spectrum,[85] "[*w*]*ho* a representative views as his or her primary constituency and *how* a legislator views the job of

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81. Neil D. Theobald, *Listening, Not Telling: The Need for Issues-Driven School Funding Reform*, N. CENT. REGIONAL EDUC. LABORATORY POL'Y NEWS, Oct. 2000, at 1.

82. Johnson & Secret, *supra* note 80, at 248. "Legislative role is conceived as a set of norms of behavior that a person in the position of legislator has internalized, which (consciously or unconsciously) guides that person's actual behavior." *Id.* Johnson and Secret's study was based upon face-to-face interviews with eighteen members of the United States Congress in 1992, twelve African Americans and six Hispanics. *Id.* at 251.

83. *Id.* at 248.

84. The "purposive" aspect of legislative roles examines how a legislator views what his or her job is, or should be. The "partisan" aspect of legislative roles refers to the manner in which a legislator relates to his or her party leadership and organization. The "pressure group" aspect of legislative roles identifies how a legislator deals with outside influences, such as lobbyists—"as a friend, neutral, or foe." *Id.*

85. *See* Ashworth & Bueno de Mesquita, *supra* note 79, at 168.

representing that constituency may well affect what positions he or she is likely to take on the issues before" the legislative assembly more than district constituency allegiance.[86] Representational and areal role orientations "are normative positions that define obligations and proper methods for the representative."[87] The areal (or "focus") orientation seeks to identify for *whose* interests a legislator holds himself responsible.[88] For example, a legislator may see his constituency as being *intra*-district, regional, statewide, or a distinct affinity group (e.g., African Americans or women). The representational (or "style") role orientation informs *how* a legislator goes about exercising his or her perceived role, *viz.*, as a trustee, delegate, or politico.[89]

As a trustee, a legislator may see himself as a steward, exercising independent judgment based upon his own conscience or information.[90] This means at times acting in a manner (e.g., voting) toward legislative matters that transcend constituents' or *other*[91] pressure groups' needs. As a delegate, a legislator perceives himself as the unwavering voice of the district constituents, articulating issues and implementing policy addressing their predominant concerns.[92] As a politico, a legislator mediates between the two aforementioned roles, making pragmatic determinations, on an issue by issue basis, to apply his own judgment or advance constituency preferences.[93]

Consequently, as it regards school finance reform, support for or opposition to a particular measure might, to a degree, be predictable by a legislator's ideology. It is important to state that a given position is not necessarily fixed nor gleaned from a legislators' political ideology. So, as a suburban Republican representative, Jordan's statement is perhaps predictable and typical—anti-tax, (charitably) anti-"urban," and pro-accountability, with a strong delegate/district

86. Johnson & Secret, *supra* note 80, at 249 (emphasis added).

87. *Id.*

88. *Id.*

89. *Id.* at 251.

90. *Id.*

91. Some may perceive, in some cases, constituents themselves as a pressure group.

92. Johnson & Secret, *supra note* 80, at 251.

93. *Id.*

constituent focus. Based upon research regarding the trustee-representative approach, it is nonetheless possible that another suburban Republican might break from her constituents' preferences, moving to support a school finance plan which would, arguably, work against their interests, but towards a larger good. In this sense, her focus and style yield an outcome that is perhaps counterintuitive to her party affiliation.

3. *Legislators' Race and Impact on "Black Interest" Legislation*

How a legislator looks and acts is highly correlated.[94] It has been long understood that African-American constituents have needs and interests distinct from whites.[95] As a result, African-American representatives "differ in their responsiveness to the needs and interests of these constituents."[96] Research has shown that African-American representatives demonstrate a constituency affinity in their representational focus in a manner that tends to reach *across* districts on issues of unique importance to African Americans.[97] Moreover, it has been demonstrated that a legislator's race has a significant influence on legislative agendas, as well as legislation introduction and passage.[98] Unfortunately, results of African-American representatives' legislative *outcomes* on behalf of their African-American constituents have not been so successful.

Kathleen A. Bratton and Kerry L. Haynie studied legislators in six different states[99] and legislation sponsored in 1969, 1979, and 1989.[100]

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94. *See* Kathleen A. Bratton & Kerry L. Haynie, *Agenda Setting and Legislative Success in State Legislatures: The Effects of Gender and Race*, 61 J. POL. 658, 659-60 (1999) ("There are many reasons to expect that descriptive representation translates into substantive representation, and that African-American and female representatives would indeed introduce new issues to the legislative policy agenda.").

95. *See id.* at 660.

96. David T. Canon, *Electoral Systems and the Representation of Minority Interests in Legislatures*, *in* LEGISLATURES: COMPARATIVE PERSPECTIVES ON REPRESENTATIVE ASSEMBLIES 149, 159 (Gerhard Loewenberg et al. eds., 2002).

97. Johnson & Secret, *supra* note 80, at 257-58.

98. Bratton & Haynie, *supra* note 94, at 660-61.

99. *Id.* at 663-64 ("Arkansas, California, Illinois, Maryland, New Jersey, and North Carolina").

100. *Id.* at 663.

Specifically, their study of "women's interest" and "black interest" bills was designed to test whether African-American and women legislators, by virtue of their group membership, behaved differently, advanced each other's agenda, or were less likely than others to successfully pass bills they sponsored.[101] Bratton and Haynie defined "black interest" bills as those "that may decrease racial discrimination or alleviate the effects of such discrimination, and those that are intended to improve the socioeconomic status of African-Americans."[102]

They found race exerted a strong influence on the introduction of black interest bills, and African-American legislators introduced such bills more often than other legislators.[103] Furthermore, they found the size of the largest city and the number of African Americans in a district to be significantly associated with the introduction of black interest bills.[104] In three of the states, African-American legislators were less likely to get their bills passed than whites.[105] Finally, they concluded that "urban legislation"[106] was less successful than others.[107]

What the Bratton and Haynie findings suggest, *inter alia*, is that African-American representatives have to rely more upon coalition-building with colleagues than their white counterparts in order to achieve desired outcomes on their public policy goals. In the context of school finance reform and interest convergence, this means that African-American representatives must be more accommodating of the interests of their white and/or suburban counterparts. This, of

101. *Id.* at 659, 663-65.

102. *Id.* at 664. Bratton and Haynie defined "women's interest bills" as "those bills that may decrease gender discrimination or alleviate the effects of such discrimination, and those that are intended to improve the socioeconomic status of women" (e.g., equal pay measures, day care services, or health services essential for women). *Id.*

103. *Id.* at 667. In addition, Bratton and Haynie found that "women are more likely than men to introduce women's interest bills . . . . [B]lacks introduce more women's interest measures than do whites, and women introduce more black interest measures than do men." *Id.* at 667, 670.

104. *Id.* at 670.

105. *Id.*

106. "Urban legislation" was characterized as bills focused on health care, children, and welfare. *Id.* at 670.

107. *Id.* at 672.

course, is especially true if they are in the racial and/or party minority.[108] Consequently, reform solutions will reflect a significant bias toward the interests of non-African-American and suburban interests.

C. *Suburban v. Urban Constituent Interests—Local Control*

Most starkly, the school finance reform debate revives the urban/suburban chasm.[109] The suburban "anti-urban" sentiment arose out of the desegregation era—a product of racism, decaying cities and school quality, and/or interdistrict busing attempts.[110] Whites who perceived African Americans as the primary beneficiaries of the *Brown* decisions and integration remedies might now see the school finance reform efforts with the same raced perception.[111] Like the resistance to interdistrict busing,[112] suburban resistance to school finance reform is, in many ways, nothing more than suburbanites rejecting any sense of personal responsibility to improve the education conditions of those in the inner-cities. When viewed in this light, Representative Jordan's statement is hardly surprising.

Explicit in the suburban resistance to school finance reform is the primacy of local control.[113] Certain finance reform proposals would threaten such control. In Ohio, for example, wealthy, suburban

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108. In the Ohio General Assembly, of the 132 members, there are presently 17 African Americans, all Democrats. Ohio Legislative Black Caucus, About Us, http://www.olbc1967.org/ht/d/CaucusDetails/i/767/aboutus/true/pid/273477 (last visited Oct. 29, 2006).

109. *See* CASHIN, *supra* note 17, at 266; Ryan, *supra* note 20, at 479; *see also* Ryan & Heise, *supra* note 19, at 2045.

110. *See supra* note 16 and accompanying text.

111. Ryan, *supra* note 20, at 475.

112. *See* Milliken v. Bradley (*Milliken II*), 433 U.S. 267 (1977); Milliken v. Bradley (*Milliken I*), 418 U.S. 717 (1974).

113. *See* Ryan & Heise, *supra* note 19, at 2060-61 (discussing the strong suburban opposition to recapture plans and spending caps). Ryan and Heise contend that the politics of school choice must be altered to consider strong suburban interests, and school choice will only be effective if the ways in which suburban schools can protect their physical and financial independence can be altered. *Id.* at 2047. In their view, suburban homeowners are the most important stakeholders in the school-choice debate, and they have self-interested reasons to oppose most choice plans. *Id.* at 2045-46.

schools could spend more money on their own schools, without regard to a state-imposed cap or penalty. Finance reform proposals which sought to cap a district's spending or take monies from wealthier districts to redistribute to poorer districts were a direct threat to local control. Thus, the primary interest of local control is critical.

To be sure, the interest in "local control" was used to compel a rejection of interdistrict busing during desegregation.[114] Ryan and Heise remind us of the banners of suburbanites, marching in response to interdistrict busing fears, that read "PRESERVE OUR NEIGHBORHOOD SCHOOLS."[115] In that sense, this argument in the context of school finance reform carries a vaguely racial tone.[116] However, school finance reform, unlike desegregation efforts, does not threaten suburban constituents through fear of integration into their schools; even with voucher programs and school choice, suburban school districts have been successful in staving off meaningful integration.[117] The most perceived risk is to the suburban pocketbook.[118]

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114. *Id.* at 2056 (remarking that politicians and the courts "acted to protect 'local control' of the schools, which in the context of *Milliken* and interdistrict integration meant the physical independence of the suburban neighborhood school").

115. *Id.* at 2055.

116. In the wake of *Brown*, suburbanization and suburban residential discrimination (through redlining and restrictive covenants) were the major culprits in aiding resistance to integration. *See* Peter P. Swire, *The Persistent Problem of Lending Discrimination: A Law and Economics Analysis*, 73 TEX. L. REV. 787, 794-802 (1995). Opposition to school desegregation and specifically to busing was often couched in the rhetoric of preserving neighborhood schools and local control. *See* Ryan & Heise, *supra* note 19, at 2050-51. For those who objected to integration on less-than-principled grounds, "pro-local control" and "pro-neighborhood" arguments acted as a proxy, or mask, for racial animus. *But see* James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1375 n.203 (2000) ("There is a great deal of emphasis on limiting desegregation decrees in order to preserve or return to local control of schools. Local control is not really justified in educational terms, however, but rather as consistent with tradition and with principles of federalism; the notion, in other words, is that state and local governments, not federal courts, are the proper authorities to run public schools.").

117. *Id.* at 2058.

118. *See id.* at 2058-62 (explaining how suburban districts have been able to remain financially independent). Douglas Reed found in his study that whites and minorities differed significantly in their support or opposition to financial equalization efforts. Douglas S. Reed, *Court-Ordered School Finance Equalization: Judicial Activism and Democratic Opposition*, *in* DEVELOPMENTS IN SCHOOL

D. *Anti-Tax and Economic Self-Interest*

The most apparent interest at issue in school finance reform is taxation. The chances are great that a proposed reform will be rejected if it results in (a) the redistribution of tax revenue to poorer school districts,[119] (b) a tax increase to generate additional revenue,[120] or (c) a cap on spending for local school districts.[121] Any of these remedies could result in economic loss to some.[122] Wealthier districts in particular might perceive themselves as the financial losers in school finance, and thus have a heightened incentive to protect their economic self-interest by opposing such reform efforts.[123] Thus, we hear the sentiments of Ohio representatives who decry attempts to "rob Peter to pay Paul" or use "Robin Hood" methods of school financing.[124]

Furthermore, it can be said that anti-tax and economic self-interest motivated Ohio voters to reject the Issue 2 sales tax levy. While

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FINANCE, 1996, at 91, 102-03, 105 (Nat'l Ctr. for Educ. Statistics, U.S. Dep't of Educ. ed., 1997) (concluding that economic self-interest is the overriding influence on attitudes toward reform).

119. Ryan & Heise, *supra* note 19, at 2060 ("They especially dislike the idea that locally raised revenues might be recaptured and redistributed to the rest of the state.").

120. *See* Reed, *supra* note 118, at 103.

121. Ryan & Heise, *supra* note 19, at 2060-61.

122. Reed, *supra* note 118, at 103. Reed examines responses in Texas and New Jersey to school finance litigation along the interests of economics, anti-tax/government ideology, and racial geography. Reed observes that "an anti-tax sentiment model could account for much of the opposition—independent of whether one's own district gains or loses aid or independent of whether one's own tax bill goes up or down. This could be particularly true if the sentiment is conjoint with an overall conservative ideological bent." *Id.*

123. *Id.*

124. *See, e.g.*, Scott Stephens, *School Funding: Textbook Failure,* PLAIN DEALER (Cleveland), Oct. 17, 2004, at A1 (quoting Jim Trakas', R-Independence, criticism of finance reform as "[t]aking from Peter to pay Paul"). Reform measures have even be re-characterized as "adequacy" measures when they were formerly called "equalization" measures—a concession to suburban constituents who felt reform suggested wealth redistribution. Ryan & Heise, *supra* note 19, at 2062 ("Adequacy arguments are . . . 'less threatening' than equality arguments because they do not interfere with local control over resources or the ability of wealthy districts to retain a superior position.").

legislation that might seek tax increases is unpopular across all ideological and racial spectrums,[125] its unpopularity is intensified for some if tax increases are used in support of government obligations to the poor, or as a wealth distribution mechanism.[126]

E. *Separation of Powers*

Even where there may be agreement on the need for school funding remedies, *where* the directive to act comes from also impacts the chances of success. As Ryan's research demonstrated, court-"imposed" directives—particularly those initiated by minority school districts—face fierce opposition.[127] Judges who have ruled in favor of plaintiffs in school-funding litigation have been labeled "activists"[128] and worse. [129] To those in like mind with Representative Wise,[130]

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125. *See* Reed, *supra note* 118, at 103 (positing, through analysis of survey results, that "no" votes on ballot proposition which would raise taxes may be better explained by class than race); Author's Poll 2001-2002, *supra* note 48, at 5 (finding the percentage of opposition to local tax levy proposal was roughly the same across racial lines).

126. Ryan & Heise, *supra* note 19, at 2061.

127. Ryan, *supra* note 20, at 455-63.

128. *See, e.g.*, *Bush Leads Poll as Voters Stay Mostly Faithful to Their Party*, COLUMBUS DISPATCH, Apr. 19, 2000, at 2D (quoting Ohio Attorney General Betty Montgomery, "We've got a very activist court which in many cases is making law from the bench."); Barbara Hollingsworth, *Justices United in Ruling: Washburn Professor Calls 'Activist' Label Unfair*, TOPEKA CAPITAL-JOURNAL, June 7, 2005, at A1 (quoting Kansas Senator Tim Huelskamp, R-Fowler, "This is not a case of judicial activism. This is a case of judges out of control."); *Judicial Lawmaking: High Court Wreaks Havoc on Ohio Schools*, COLUMBUS DISPATCH, Mar. 25, 1997, at 14A ("Today's court is marked by judicial activists who do not feel constrained by the explicit words of the Ohio Constitution . . . ."); Richard Nadler, *Forgetting Federalism*, NAT'L REV., June 28, 2005 ("No [litigation] trend better illustrates judicial activism than the steady stream of state school-finance decisions . . . .").

129. In Ohio, Judge Resnick, the author of the majority opinion in *DeRolph II*, endured an unprecedented campaign against her re-election. The Ohio Chamber of Commerce, in conjunction with the United States Chamber of Commerce, spent $3 million in the campaign to defeat her. Alan Johnson, *O'Donnell May Be Taft's Pick: Likely Choice For Supreme Court Seat Lost to Resnick in Bruising 2000 Race*, COLUMBUS DISPATCH, May 9, 2003, at 1F. As another example, shortly after the Kansas Supreme Court ruled that the legislature had to reconvene to resolve outstanding school finance issues, Senator Kay O'Connor, R-Olathe, said that "the 'goofy court' was 'out of line' and needed to be 'put in its place.'" Scott Rothschild,

such court rulings abrogate of the separation of powers and usurp legislative authority.

Moreover, as the Ohio KnowledgeWorks Foundation survey reveals, African Americans and whites have a markedly different view of the role of courts on the subject of school finance reform.[131] This is not without historical precedent either, as African Americans have often had only the courts to ensure some measure of justice in the realm of public policy.[132] That said, the hue and cry that came in the wake of several state court decisions on school finance reform is disturbingly familiar, particularly if one recalls the outrage over the Supreme Court's "abuse of power" in deciding *Brown*.[133]

Tensions Run High as Conservatives Try To Defeat Bill Funding Schools, LAWRENCE JOURNAL-WORLD, June 23, 2005, http://www2.ljworld.com/news/2005/jun/23/schools/. Representative Lance Kinzer, R-Olathe, introduced a constitutional amendment which would remove school finance appropriation issues from the court's jurisdiction. Scott Rothschild, *Legislators Gear Up for Historic Special Session*, LAWRENCE JOURNAL-WORLD, June 21, 2005, http://www2.ljworld.com/news/2005/jun/21/legislatorsgearup/. An alternative measure would have restructured the manner in which judges were appointed to the courts, making them subject to Senate confirmation. Carl Manning, *Legislators Angered by High Court Decisions: Death Penalty, School Finance Spark Backlash in Statehouse*, LAWRENCE JOURNAL-WORLD, Mar. 27, 2005, http://www2.ljworld.com/news/2005/mar/27/legislators_angered_by/. These examples of legislator and voter responses to judges deciding school finance cases in Ohio and Kansas also suggest that a ripe area for further research would be an examination of the influence of court-directed school finance reform on judicial candidates in states in which judges are elected, and on legislators' responses to such directives through campaigns or retributive legislation proposals.

130. *See supra* note 42 and accompanying text.

131. *See supra* notes 48-57 and accompanying text.

132. On the issue of civil rights, one need only look to the political and legislative barriers placed before African Americans since the Emancipation Proclamation. *See* OGLETREE, *supra* note 14, at 97-122. As a result, the NAACP's strategy against Jim Crow laws and segregation was an intentional, deliberate battle waged in the courts. *See id.* at 113-23. Cases such as *Pearson v. Murray*, *Missouri ex rel. Gaines v. Canada*, *Sipuel v. Oklahoma*, *Sweatt v. Painter*, and *McLaurin v. Oklahoma* successfully chipped away at Jim Crow laws, and eventually provided the foundation for the *Brown v. Board of Education* decision. *Id.* at 120-22.

133. One response to the *Brown* decisions, the infamous Southern Manifesto—sponsored by Strom Thurmond of South Carolina, Harry Byrd of Virginia, and Richard Russell of Georgia (and signed by ninety-three others)—stated in part: "[T]he school cases [are] a clear abuse of judicial power . . . . With the gravest concern for the explosive and dangerous condition created by this decision and

F. *Accountability*

"Accountability" demands have become an explicit component of virtually all modern public school finance reform legislation.[134] It is a term invoked by politicians, pundits, and policymakers alike.[135] Accountability standards are based upon factors such as student test

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inflamed by outside meddlers . . . [w]e commend the motives of those States which have declared the intention to resist forced integration by any lawful means." THE SOUTHERN MANIFESTO (1956), http://www.strom.clemson.edu/strom/manifesto.html. Shortly after the *Brown I* ruling, Governor Orville Faubus blithely declared that Arkansas was "not bound by . . . *Brown*"; only federal troops would compel, if not persuade, him otherwise. *See* Cooper v. Aaron, 358 U.S. 1, 4, 12 (1958). *But see id.* at 18-19 (holding that a state governor has no power to nullify a federal court order). In Virginia, Governor Thomas Stanley appointed the Gray Commission to "study" methods by which to keep the schools separate. Edward H. Peeples, Jr., Prince Edward County: The Story Without an End (July 1963) (unpublished manuscript, *available at* http://www.library.vcu.edu/jbc/speccoll/pec03a.html). The Texas legislature passed a law stating that no child could be compelled to attend a racially mixed school. The History of Jim Crow, http://jimcrowhistory.org/geography/geography.htm (follow the State of Texas image hyperlink) (last visited Oct. 31, 2006). The Delaware legislature passed a comparable law preventing a predominantly African-American school district from consolidating with other districts. Leland B. Ware, *Educational Equity and* Brown v. Board of Education*: Fifty Years of School Desegregation in Delaware*, 47 HOW. L.J. 299, 315 (2004).

134. *See* NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., OVERVIEW AND INVENTORY OF STATE EDUCATION REFORMS: 1990 TO 2000, at 2, 13-18 (tracking states' factors and measures on student and teacher performance).

135. Rachel F. Moran, *Sorting and Reforming: High-Stakes Testing in the Public Schools*, 34 AKRON L. REV. 107, 109-112 (2000). Moran discusses the movement toward accountability standards in public education and assessment, "particularly in urban schools." *Id.* at 109. For an example of legislation invoking accountability standards, see No Child Left Behind Act of 2001, 20 U.S.C.A. § 6301 (West 2003). Lieutenant Governor David Dewhurst of Texas has discussed the need to craft a school finance bill that "will improve our schools, such as teacher pay raises, incentives and increased accountability and performance." Terrence Stutz, *Senate To Add School Fixes: Dewhurst Questions If House's Property Tax Cut Is Doable*, DALLAS MORNING NEWS, April 26, 2006, at 1A. Upon the New York Senate's passage of education reforms, Senator Steve Saland noted the "scandalous financial occurrences in some school districts in New York State recently," saying that the new bills "would put more appropriate checks in place to account for the use of taxpayer dollars. Accountability in our schools must be a priority." Press Release, N.Y. State Senate Republican Majority, Senate Passes School Accountability Legislation (June 21, 2005), *available at* http://www.senate.state.ny.us/pressreleases.nsf/public_bruno?openform.

performance, dropout rates, attendance, resource expenditures, and graduation rates.[136] Data is compiled, examined, and utilized to "hold educators and others responsible" for performance outcomes.[137] Since finance reform litigation in many states has mandated reallocation of public monies, there is an interest, above all, that those monies be spent responsibly. This interest is also inferred in Representative Jordan's statement.[138]

One could argue that demands for accountability are also vestiges of the desegregation experience. As monies flowed into public schools as a result of integration orders, intense dissatisfaction was expressed about waste, mismanagement, and fraud. [139] Most importantly, for some, the monies seemed to do nothing to improve the ultimate goal of desegregation: better achievement outcomes for African Americans.[140] As we have seen outcome improvement over time, there are still vast disparities between African-American student outcomes and others. With school finance reform, provisions for fiscal management, teacher training, curriculum reform, and student performance measurements will be imperative for any legislation to obtain consensus.

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136. NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 134, at 13.

137. *Id.*

138. Leonard, *supra* note 1.

139. Melissa C. Carr & Susan H. Fuhrman, *The Politics of School Finance in the 1990s*, *in* EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 136, 152 (Helen F. Ladd et al. eds., 1999).

140. CASHIN, *supra* note 17, at 213; Bell, *supra* note 8, at 530-31; *see also* Janet Ward Schofield & Leslie R.M. Hausmann, *The Conundrum of School Desegregation: Positive Student Outcomes and Waning Support*, 66 U. PITT. L. REV. 83, 99 (2004) ("[A]lthough academic gains have been made for African-American students as a result of desegregation, there continues to be a marked achievement gap between African-American and White students."). As Professor David Armor of George Mason University observed, "Pretty much, the outcomes were negative . . . . Busing caused substantial white flight, making racial isolation worse. We've never been able to document achievement increases (for minority students)." Kenneth Jost, *Debating Desegregation*, ST. PETERSBURG TIMES, Nov. 17, 1996, at 1D.

SUMMARY

It has been said that "school finance court decisions will lead to legislative reform only when those decisions coincide with an existing political consensus in favor of reform."[141] In other words, the interests of policymakers must converge in order to implement an effective solution to public school funding imperatives. Examining the Ohio experience, the interests are clear. Successful legislative solutions will:

(1) Preserve local control and decision making.
(2) Not entail wealth redistribution by:
    (a) Limiting amounts given to wealthier districts while giving more to poorer districts,
    (b) Constraining the ability of local districts to spend as much as they want to fund their local education, or
    (c) Seeking to capture or recapture local revenue to fund other school districts.
(3) Provide a mechanism for low-wealth districts to generate needed funds without decreasing monies to, or reallocating monies from, wealthier districts.
(4) Provide for accountability measurements on fiscal responsibility, teacher performance, and student performance.[142]
(5) Emphasize school reform's benefits to poor, not just urban poor, and to rural and middle class.
(6) Require urban/rural coalitions of state legislators, who share common interests regarding education reform.[143]

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141. Ryan, *supra* note 20, at 475.

142. *See* David H. Monk & Neil D. Theobald, *A Conceptual Framework for Examining School Finance Reform Options for the State of Ohio*, 27 J. EDUC. FIN. 501, 501-02 (2001) (evaluating the results of forty interviews involving fifty-eight stakeholders in the school finance debate); Ryan & Heise, *supra* note 19, at 2059-63.

143. Yohance C. Edwards & Jennifer Ahern, Note, *Unequal Treatment in State Supreme Courts: Minority and City Schools in Education Finance Reform Litigation*, 79 N.Y.U. L. REV. 326, 354-60 (2004) (noting the success and common interests in education finance reform between urban and rural constituents). *But see* Ryan, *supra* note 20, at 476 ("It is . . . difficult to imagine a strong political consensus among state legislators to redistribute or raise resources for predominantly minority districts.").

These solutions, espoused by reform advocates, glaringly ignore the interests that are most salient to African Americans and their representatives. Solutions to school finance reform must also specifically assure that disadvantaged African-American students (and other minorities) benefit from quality facilities, teachers, and resources in ways tailored to their needs, and in a manner that does not place disproportionate burdens on those with the least.

CONCLUSION

The thesis that the interest convergence paradigm exists in legislative decision making, at first blush, may seem like Politics 101 and thus not worthy of much discussion. Any school finance reform at the legislative level will require, and certainly represent, some expression of shared ideas and majority consensus. However, the reality is much more complex. By their very nature, legislative institutions, political ideology, legislative party control, majority/minority ratios, and the inherent (and under-examined) complexities of representational focus and style (and other role aspects) will impact school finance reform inputs and outcomes. Consequently, school finance reform solutions—if and when they come—must represent some form of interest convergence.

In Ohio, legislators have attempted to resolve school finance dilemmas through "majority appeasement," that is, in a manner that not only is the *least harmful* to their constituents, but in a manner that will also *benefit* their constituents. Though overreaching and disingenuous, one could view that goal as race-neutral. However, suburban and conservative resistance to school finance reform will always carry a discomfiting subtext so long as political leaders continue to tether the present debate to our nation's chaotic and bitter desegregation history. Even race-neutral terms, such as "anti-taxation," "Robin Hood" financing, "judicial activism," "local control," and "accountability," carry the scent of racial animus when used irresponsibly or in demagoguery.

In addition, the political, geographic, and racial composition of state legislatures have rendered those most compelled to advocate for African-American student interests marginalized in policy outcomes, particularly in Ohio. There is no interest convergence if the only interests being promoted are those of the majority. True interest

convergence means that the majority must also account for African-American interests as well. The result should be that public education is reformed to meet the specific needs of and challenges to African-American students, and racing reform solutions—whether directly or by rhetorical proxy—are stopped.

The h'aint—racism—is still in the house. Unlike in the past, however, it has become more difficult to smoke out. While there are certainly other important dynamics at play, we must continue to exorcise the h'aint in order to achieve meaningful solutions to the school finance reform debate.