

## LITIGATING EDUCATION: THE QUEST TO END INEQUITABLE FUNDING IN PENNSYLVANIA

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### ABSTRACT

*In 2015, the Washington Post published an article that drew attention to something many Pennsylvanians were already acutely aware of: the quality of the commonwealth's schools varies drastically from district to district. One main reason for wide funding disparities between the districts is the heavy reliance upon local property tax revenues to fund public schools.*

*A current lawsuit, William Penn School District v. Pennsylvania Department of Education, is challenging the legislative scheme that apportions state funding to public schools in Pennsylvania. This Note will explain why education funding lawsuits throughout the commonwealth's history have thus far not been successful in achieving more equitable access to education for Pennsylvania's students. This Note suggests that, as a starting point, Pennsylvania must recognize education as a fundamental right. The legislature must also make a change in the way the state's schools are funded, and it should not wait on the courts to force them into action. Other solutions will necessitate additional funding to be directed to the neediest populations and districts. Perhaps this is easier said than done, but the time to make effective changes has long since arrived.*

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## INTRODUCTION

“[E]ducation should be the ultimate equalizer. It shouldn’t matter what your race or class or zip code is; it shouldn’t matter where you come from. It should be that if you work hard because you have access to a great education, you can do anything.”

– Arne Duncan, Former U.S. Secretary of Education<sup>1</sup>

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1. See Alia Wong, *Arne Duncan: 'Everyone Says They Value Education, but Their Actions Don't Follow'*, ATLANTIC (Aug. 7, 2018), <https://www.theatlantic.com/education/archive/2018/08/arne-duncan-how-schools-work/566987/>.

Public schools throughout Pennsylvania are characterized by stark differences in levels of funding that impact the quality of education students receive.<sup>2</sup> The result of funding inequities is that students attending schools in wealthier districts receive a significantly higher-quality education than students attending schools within poorer districts.<sup>3</sup> Two public high schools in neighboring counties in eastern Pennsylvania illustrate the drastic consequences of funding disparities. Overbrook High School in Philadelphia occupies an “historic, yet dilapidated building,” containing “science labs without running water, a lack of functioning art and music rooms, and an auditorium that—while grand—is shedding bits of its ceiling, like tiny leaves falling from a treetop.”<sup>4</sup> Just 45–49% of Overbrook students graduate, and 10–14% score at or above “proficient” levels in math.<sup>5</sup> Less than four miles away is Lower Merion High School in Ardmore, which occupies a “pristine building complete with science labs, a spacious and light-filled library, impeccable art and music rooms, and a state-of-the-art auditorium.”<sup>6</sup> Throughout the Lower Merion School District, “all kindergartners and first-graders have access to iPads, and all high school freshmen are issued laptops to use as their own during their high school years.”<sup>7</sup> According to the latest data

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2. Emma Brown, *In 23 States, Richer School Districts Get More Local Funding than Poorer Districts*, WASH. POST (Mar. 12, 2015, 8:00 AM), <https://www.washingtonpost.com/news/local/wp/2015/03/12/in-23-states-richer-school-districts-get-more-local-funding-than-poorer-districts/>.

3. Adam Harris, *The Whiter, Richer School District Right Next Door*, ATLANTIC (Aug. 1, 2019), <https://www.theatlantic.com/education/archive/2019/08/segregated-school-districts-trapped-their-borders/595318/>.

4. Vincent Hughes & Gregory Holston, Opinion, *Why We Marched from Overbrook to Lower Merion to Demand Fair School Funding*, PHILA. INQUIRER, <https://www.inquirer.com/opinion/commentary/school-funding-formulas-philadelphia-overbrook-lower-merion-high-20190923.html> (Sept. 23, 2019, 1:43 PM).

5. PUB. SCH. REV., OVERBROOK HIGH SCHOOL [hereinafter PUB. SCH. REV., OVERBROOK], <https://www.publicschoolreview.com/overbrook-high-school-profile> (last visited Oct. 17, 2020). This graduation rate represents the most recent data available and is taken from the four-year adjusted cohort for the 2017–18 school year. The math proficiency level also represents data from the 2017–18 school year, as designated by Pennsylvania and its annual state tests.

6. Hughes & Holston, *supra* note 4.

7. *William Penn Sch. Dist. v. Pa. Dep’t of Educ.*, 170 A.3d 414, 430–31 (Pa. 2017).

available from the National Center for Education Statistics (NCES), Lower Merion High's graduation rate is 97%, and 82% of students score at or above "proficient" levels in math.<sup>8</sup>

State Senator Vincent Hughes attributes the differences between these neighboring schools to a "rigged" school funding policy that "remains a monument to a tainted legacy" of "inequity born of racism."<sup>9</sup> Maintaining equitable schools across a state with 500 districts is not an easy task by any stretch of the imagination,<sup>10</sup> but the time has long since arrived to make a serious adjustment to the way Pennsylvania directs its resources. Some districts are simply needier than others, and Pennsylvania must devise a way to redistribute revenue to those districts that are suffering. When districts are underfunded, schools are unable to provide sufficient staff to meet students' needs, including: teachers, administrators, librarians, aides, mental health professionals, and nurses.<sup>11</sup> And when students' educational needs go unmet, disastrous consequences ensue that can shape the rest of their lives.<sup>12</sup>

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8. PUB. SCH. REV., LOWER MERION HIGH SCHOOL [hereinafter PUB. SCH. REV., LOWER MERION], <https://www.publicschoolreview.com/lower-merion-high-school-profile> (last visited Oct. 17, 2020). This graduation rate represents the most recent data available from the NCES and is taken from the four-year adjusted cohort for the 2017–18 school year. The math proficiency level also represents data from the 2017–18 school year, as designated by Pennsylvania and its annual state tests.

9. Hughes & Holston, *supra* note 4. The racial breakdown between these two schools is telling: 95% of Overbrook's students are Black, while the population at Lower Merion is 70% white. Compare PUB. SCH. REV., OVERBROOK, *supra* note 5, with PUB. SCH. REV., LOWER MERION, *supra* note 8.

10. See Alana Semuels, *Good School, Rich School; Bad School, Poor School*, ATLANTIC (Aug. 25, 2016), <https://www.theatlantic.com/business/archive/2016/08/property-taxes-and-unequal-schools/497333/>.

11. Petition for Review in the Nature of an Action for Declaratory and Injunctive Relief at 74–75, *William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 114 A.3d 456 (Pa. Commw. Ct. 2015) (No. 587-MD-2014) [hereinafter Petition for Review].

12. "A good education is the foundation for successful life experiences. Children who receive quality education services, meet age-appropriate education milestones, and earn high school diplomas and post-secondary school diplomas have significantly brighter outcomes as adults." PETER LEONE & LOIS WEINBERG, CTR. FOR JUV. JUST. REFORM, ADDRESSING THE UNMET EDUCATIONAL NEEDS OF CHILDREN AND YOUTH IN THE JUVENILE JUSTICE AND CHILD WELFARE SYSTEMS 5 (2010), <https://cjr.georgetown.edu/wp-content/uploads/2015/03/EducationalNeeds>

There is general societal agreement that students' access to educational opportunities and their ultimate educational outcomes ought to be unencumbered by their parents' financial situations.<sup>13</sup> Yet, in many parts of the United States, this fundamental truth has never been a reality.<sup>14</sup> The culprit may surprise you: property taxes. More than half the cost of primary and secondary public education in Pennsylvania is supported by local taxes—nearly all of which come from property taxes.<sup>15</sup> The more property tax revenue a school district is able to drum up, the more local money the district is able to contribute toward its annual budget.<sup>16</sup>

This Note will illustrate that, in Pennsylvania, attempts to use the judiciary to address the systemic, societal issue of educational inequity have been ineffective. Because Pennsylvania's legislature has failed to address the commonwealth's persistent educational inequities, lawsuits

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ofChildrenandYouth\_May2010.pdf. Studies have shown that morbidity, mortality, and life expectancy are associated with the level of education achieved during one's life:

From the perspective of life expectancy, at age 25 in 2005, a man in the United States with less than a high school education could expect to live . . . to age 69.2 years; a man with a graduate degree could expect to live more than 15 years longer. At age 25 years, a woman in the United States with less than a high school education could expect to live to age 74.9 years; a woman with a graduate degree could expect to live more than 11 years longer.

Robert A. Hahn & Benedict I. Truman, *Education Improves Public Health and Promotes Health Equity*, 45 INT'L J. HEALTHSERVS. 657, 665 (2015).

13. See *infra* Part I.

14. In the following states, students residing in poor districts receive less educational funding than students residing in affluent districts: Alabama, Arizona, Colorado, Connecticut, Delaware, Idaho, Illinois, Kentucky, Maine, Maryland, Michigan, Missouri, Montana, Nevada, New York, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Vermont, Virginia, West Virginia, and Wyoming. Brown, *supra* note 2.

15. GREGORY J. COLLINS, CONSORTIUM FOR POL'Y RSCH. IN EDUC., PENNSYLVANIA SCHOOL TAX BURDEN 2 (2016), [https://repository.upenn.edu/cpre\\_policybriefs/53/](https://repository.upenn.edu/cpre_policybriefs/53/) (highlighting that the "highest-burden" districts receive 75% of their school funding from local taxes).

16. See Jacqueline Palochko, *Special Report: Why the Allentown School District Is Continuously in a Financial Hole*, MORNING CALL (Oct. 5, 2018), <https://www.mcall.com/news/education/mc-nws-allentown-school-district-finances-20181007-story.html>. In Lehigh County, Pennsylvania, neighboring school districts Parkland and Allentown are a prime example of how districts' tax bases affect local per-student spending. The contrast in spending, student test scores, and graduation rates is comparable to that of Lower Merion and Philadelphia. See *id.*; *supra* notes 3–10 and accompanying text.

have been the primary means of attempting to solve the issues that have come with inadequate and inequitable funding. Part I provides some background information on the history of educational equity issues in the United States and Pennsylvania. Part II briefly examines the history of education funding lawsuits in the commonwealth leading up to today and then focuses on an ongoing lawsuit, *William Penn School District v. Pennsylvania Department of Education*. Part III explains why it is essential for education to be considered a fundamental right in Pennsylvania. Finally, Part IV argues that if equalizing educational opportunities for Pennsylvania's school-age children is the goal, there need to be legislative and public policy changes to ensure more equal access to educational opportunities across the board.

#### I. AMERICAN PUBLIC EDUCATION

Scholars, politicians, and the public in general tend to agree that there is an inequality of outcomes within the United States public education system.<sup>17</sup> Unlike in many other nations,<sup>18</sup> public education in the United States is a state and local matter, as there is no federal educational system.<sup>19</sup> While the Supreme Court has recognized that "education is perhaps the most important function of state and local governments,"<sup>20</sup> there is no federal constitutional right to education.<sup>21</sup> Nationwide, state and local funding account for approximately 92% of all

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17. See, e.g., Adam Harris, *Kamala Harris's Long-Shot Bid to Fix School Funding*, ATLANTIC (May 10, 2019), <https://www.theatlantic.com/education/archive/2019/05/kamala-harris-america-needs-fix-public-k-12-funding/589207/>; Andrew Ujifusa, *Is Geography Destiny? The Debate over Boosting K-12 Quality*, EDUC. WK. (Jan. 15, 2019), <https://www.edweek.org/ew/articles/2019/01/16/is-geography-destiny-the-debate-over-boosting.html>.

18. For example, France's national government bears the brunt of the burden of financing its public schools. Max Roser & Esteban Ortiz-Ospina, *Financing Education*, OUR WORLD DATA (2016), <https://ourworldindata.org/financing-education>.

19. See, e.g., Ujifusa, *supra* note 17; *The Federal Role in Education*, U.S. DEP'T EDUC., <https://www2.ed.gov/about/overview/fed/role.html> (May 25, 2017).

20. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

21. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.").

education funding in public schools—the federal government contributes only about 8% of the funding.<sup>22</sup> In Pennsylvania, local taxes account for approximately 56% of statewide public school funding, although the degree to which each district must rely on local funding varies greatly.<sup>23</sup> This puts Pennsylvania among the states with the highest reliance on local taxes in public education funding sources.<sup>24</sup>

Inequitable funding among school districts within the commonwealth impedes efforts to improve outcomes for students, especially the most vulnerable: the poor, the English language learners, and those with disabilities.<sup>25</sup> A district's funding impacts everything from classroom student-to-teacher ratio to whether a school can offer Advanced Placement classes or before- and after-school care.<sup>26</sup> Largely because public schools are commonly funded by local property taxes, educational benefits are “stratified . . . by location, wealth, and race,” and disparities are identifiable at the district level.<sup>27</sup> Professor Michael B. Katz at the University of Pennsylvania sums up the problem well: “The forces eroding the fiscal capacities of cities and old suburbs—withdrawal of federal aid and a shrinking tax base—have had a devastating impact on public education and on children and adolescents, relegating a great many youngsters living in poor or near-poor families to second-class citizenship.”<sup>28</sup>

There is a large gap between our ideals and reality in the realm of K-12 education in the United States. On one hand,

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22. *The Federal Role in Education*, *supra* note 19.

23. COLLINS, *supra* note 15, at 2.

24. *Id.* (“Pennsylvania ranks seventh in the nation in its dependence on local taxes for school funding.”).

25. See Cory Turner, Kevin McCorry, Lisa Worf, Sarah Gonzalez, Kirk Carapezza & Claire McNerny, *Can More Money Fix America's Schools?*, NPR (Apr. 25, 2016, 6:00 AM), <https://www.npr.org/sections/ed/2016/04/25/468157856>.

26. David G. Sciarra, *Public School Funding a National Disgrace*, EDUC. WK. (Aug. 23, 2017), <https://www.edweek.org/ew/articles/2017/07/28/is-school-funding-fair-a-roundtable-debate.html>.

27. Michael B. Katz, *Public Education as Welfare*, DISSENT MAG., Summer 2010, at 52, 56.

28. *Id.*

there is near complete societal agreement that children should not be victims of their parents' financial circumstances.<sup>29</sup> For instance, the Trump Administration's Secretary of Education Betsy DeVos stated that she agrees all children should receive a quality education, no matter the color of their skin, possession of a disability, how much money their parents make, or what neighborhoods they live in.<sup>30</sup> On the other hand, there is a deep ideological divide regarding not only how to solve the problem, but what the root of the problem even is.<sup>31</sup> This societal notion

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29. See, e.g., Ujifusa, *supra* note 17 (noting that "it's hard to find people in the public sphere who will eagerly proclaim that the quality of students' education should be determined by where they live and their socioeconomic status.").

30. See *Betsy DeVos, Secretary of Education—Biography*, U.S. DEP'T EDUC., <https://www2.ed.gov/news/staff/bios/devos.html> (June 27, 2019); Betsy DeVos, Sec'y of Educ., Prepared Remarks to the Brookings Institution (Mar. 29, 2017), in U.S. DEP'T EDUC., <https://www.ed.gov/news/speeches/us-secretary-education-betsy-devos-prepared-remarks-brookings-institution>. DeVos is a billionaire who both attended and sent her children to private schools. Her supporters say she is an "'advocate' who cares for children." Stephen Henderson, Opinion, *Betsy DeVos and the Twilight of Public Education*, DETROIT FREE PRESS (Dec. 3, 2016, 11:36 PM), <https://www.freep.com/story/opinion/columnists/stephen-henderson/2016/12/03/betsy-devos-education-donald-trump/94728574/>. On the opposing side, she has been referred to as the "most hated Cabinet secretary" in the Trump administration. See Amanda Terkel, *How Betsy DeVos Became the Most Hated Cabinet Secretary*, HUFFPOST, [https://www.huffpost.com/entry/betsy-devos-most-hated-secretary\\_n\\_59ee3d3be4b003385ac13c9b](https://www.huffpost.com/entry/betsy-devos-most-hated-secretary_n_59ee3d3be4b003385ac13c9b) (Oct. 24, 2017).

31. See, e.g., Julien Lafortune, Jesse Rothstein & Diane Whitmore Schanzenbach, *School Finance Reform and the Distribution of Student Achievement*, 10 AM. ECON. J.: APPLIED ECON., no. 2, Apr. 2018, at 1, 1 ("Economists have long been skeptical of resource-based education policies . . . . Accordingly, recent policy discussions have focused on ways to improve the productivity of existing inputs rather than on changes in school resource levels."); Jason Richwine, *The Myth of Racial Disparities in Public School Funding*, HERITAGE FOUND. (Apr. 20, 2011), <https://www.heritage.org/education/report/the-myth-racial-disparities-public-school-funding> ("Since unequal funding for minority students is largely a myth, it cannot be a valid explanation for racial and ethnic differences in school achievement, and there is little evidence that increasing public spending will close the gaps."). *But see* Jack Schneider, *What School-Funding Debates Ignore*, ATLANTIC (Jan. 22, 2018), <https://www.theatlantic.com/education/archive/2018/01/what-school-funding-debates-ignore/551126/> ("A large body of research, however, demonstrates that school funding has a significant impact on student achievement. And recent studies suggest that the magnitude of the impact may be greater than previously understood. While enhanced school funding, alone, might not close the achievement gap, it would almost certainly do more than an equal distribution of resources would."); Carmel Martin, Ulrich Boser, Meg Benner & Perpetual Baffour, *A Quality Approach to School Funding*, CTR. AM. PROGRESS (Nov. 13, 2018, 12:01 AM), <https://www.americanprogress.org/issues/education-k-12/reports/2018/11/13/460397> ("Dollars must be at the start of every conversation around equity. Funding is a central component to providing a high-quality education and often leads to improved outcomes. A

that the quality of a child's education should not depend on her race or socioeconomic status has turned out to be not a norm at all, but an ideal we are desperately striving—but year after year miserably failing—to reach.

*A. Federal Battles Over Public Education in the United States*

To understand the problem of inequality in education within Pennsylvania, it is first necessary to briefly examine the underpinnings of the issue on a federal level. Almost a century after the passage of the Fourteenth Amendment's Equal Protection Clause, institutionalized racism through Jim Crow laws persisted in the South, and produced racial segregation in nearly every aspect of public life.<sup>32</sup> In the 1954 landmark decision *Brown v. Board of Education*, the Supreme Court declared that "separate but equal" was in fact *not equal* in the context of state public school systems.<sup>33</sup> One year later, in the *Brown II* decision, the Court ruled that the public schools at issue in the case should desegregate "with all deliberate speed."<sup>34</sup> And so began the long, arduous, and highly contentious process of desegregating public schools. This ruling was met with opposition from every direction. Federal district judges struggled to implement the vague instructions to integrate handed down by the Supreme Court, and parents, schools, and local school boards vigorously fought integration efforts.<sup>35</sup> Rather than desegregate schools, "white parents left

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2016 study found that, between 1990 and 2011, states that reformed school finance policies in order to allocate more funding to high-poverty school districts narrowed the achievement gap by an average of one-fifth.").

32. See Louis Menand, *The Supreme Court Case that Enshrined White Supremacy in Law*, NEW YORKER (Jan. 28, 2019), <https://www.newyorker.com/magazine/2019/02/04/the-supreme-court-case-that-enshrined-white-supremacy-in-law>.

33. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that "[s]eparate educational facilities are inherently unequal").

34. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955). Notably, the order to desegregate only applied to the public school defendants in those consolidated cases, which would require a massive effort from future plaintiffs to seek desegregation in other southern states.

35. See Nikole Hannah-Jones, *Segregation Now...*, ATLANTIC (Apr. 16, 2014), <http://www.theatlantic.com/features/archive/2014/04/segregation-now/359813>.

for the suburbs, created Christian schools, formed White Citizens' Councils and filed lawsuits."<sup>36</sup> Virginia schools went to the extreme of closing all public schools to avoid desegregation mandates.<sup>37</sup>

After the *Brown* decisions came several other Supreme Court rulings that slowly worked toward ending state and local obstruction to desegregation.<sup>38</sup> Perhaps most important in this effort was the passage of Title VI of the Civil Rights Act of 1964. Title VI stipulates that federal funding for public schools is revocable if schools and districts discriminate on the basis of race, color, or national origin.<sup>39</sup> It also made clear that the U.S. Attorney General could intervene where districts were reluctant to comply with desegregation decrees.<sup>40</sup> Subsequently, the Elementary and Secondary Education Act of 1965 was passed, which earmarked \$2.5 billion for schools.<sup>41</sup> As Professor Erwin Chemerinsky explains, "[t]he combination of federal court action and the federal law had an effect in bringing about desegregation. . . . By 1968, the integration rate in the South rose to 32 percent, and by 1972-1973, 91.3 percent of Southern schools were desegregated."<sup>42</sup>

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36. Gloria J. Browne-Marshall, *Busing Ended 20 Years Ago. Today Our Schools Are Segregated Once Again*, TIME (Sept. 11, 2019, 8:12 AM), <https://time.com/5673555/busing-school-segregation>.

37. *Id.*

38. Throughout the South, states were extremely resistant to desegregation efforts. See Mark Golub, *Remembering Massive Resistance to School Desegregation*, 31 L. & HIST. REV. 491, 504-05 (2013) ("In response to *Brown*, state legislatures enacted legislation prohibiting the use of state funds for desegregated schools and making it a criminal offense for public officials to assign white and black students to the same school. A number of states repealed compulsory attendance laws and held referendums amending state constitutions to remove language that required state provision of public education, thereby setting the stage for public school closings as an alternative to desegregation.").

39. See JARED P. COLE, CONG. RSCH. SERV., R45665, CIVIL RIGHTS AT SCHOOL: AGENCY ENFORCEMENT OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, 1 (2019), <https://crsreports.congress.gov/product/pdf/R/R45665>; ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 807 (5th ed. 2018).

40. See CHEMERINSKY, *supra* note 39, at 807.

41. *Id.*

42. *Id.*

However, though sixty-five years have passed since the *Brown* decisions, there is no doubt that school segregation continues—in fact, racial segregation has been on the rise in recent decades.<sup>43</sup> This is in large part due to the 1974 decision in *Milliken v. Bradley*, which provided that “interdistrict remedies,” i.e., bussing between white suburban districts and mostly-Black urban districts, could only be implemented where there had been “interdistrict violations,” i.e., where there had been “a constitutional violation within one district that produce[d] a significant segregative effect in another district.”<sup>44</sup> Since *Milliken*, many federal district courts have released school districts from court-ordered segregation decrees, which has often resulted in the re-segregation of those schools.<sup>45</sup>

Just prior to this blow to desegregation efforts, in 1973 the Supreme Court held that disparities among school districts within a state do not constitute violations of the Equal Protection Clause.<sup>46</sup> In *San Antonio Independent School District v. Rodriguez*, parents of school-age children brought action seeking to change the Texas school system’s reliance on local property taxes.<sup>47</sup> Plaintiffs’ children attended public schools in the Edgewood School District, of which the majority of residents were poor families with low property valuations;

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43. Fred Harris & Alan Curtis, Opinion, *The Unmet Promise of Equality*, N.Y. TIMES (Feb. 28, 2018), <https://www.nytimes.com/interactive/2018/02/28/opinion/the-unmet-promise-of-equality.html> (“In many ways, things have gotten no better—or have gotten worse—since 1968. Public schools have been re-segregating for decades. Today the gap between poorer and richer American students in access to qualified teachers is among the highest in the world. Fewer African-Americans have access to majority-white (read: generally better financed) schools. We know why. One reason: When schools are released from court-mandated desegregation, that progress gradually is reversed.”); CHEMERINSKY, *supra* note 39, at 807–08 (“A study by the National School Boards Association found ‘a pattern in which impressive progress toward school integration among blacks and whites during the 1970s petered out in the 1980s.’” (quoting Larry Tye, *Social Racial Gaps Found Nationwide*, BOS. GLOBE, Jan. 9, 1992, at 3)).

44. *Milliken v. Bradley*, 418 U.S. 717, 744–45 (1974).

45. See, e.g., Hannah-Jones, *supra* note 35 (“[S]ince 2000, judges have released hundreds of school districts . . . from court-enforced integration . . . . Black children across the South now attend majority-black schools at levels not seen in four decades.”).

46. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 55 (1973).

47. Alissa Gipson, *Attempting to Reform the Use of Local Property Taxes to Finance Education: A Strategic Approach*, 16 HOUS. BUS. & TAX L.J. 147, 152 (2016).

thus, their schools received significantly less funding than surrounding, more affluent, districts.<sup>48</sup> The Court concluded that the Texas system did not disadvantage any suspect class, and further held that education is not a fundamental right under the United States Constitution, and so applied the rational basis test to Texas's funding scheme.<sup>49</sup> In holding that funding disparities among school districts within a state do not violate the Fourteenth Amendment's Equal Protection Clause, the Court rejected an equality standard in education funding disputes, and instead applied a "race neutral" standard.<sup>50</sup> The Court found that local control over education funding enabled school districts "to tailor local plans for local needs [which] affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence."<sup>51</sup> Between *Milliken* and *Rodriguez*, the result has been de facto "separate but equal" educational facilities.<sup>52</sup> What have become the norm are "separate and unequal schools: wealthy white suburban schools spending a great deal on education surrounding much poorer black city schools that spend much less on education,"<sup>53</sup>

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48. *Id.*

49. *Rodriguez*, 411 U.S. at 37. See also Trish Brennan-Gac, *Educational Rights in the States*, HUM. RTS., July 2014, at 12, 12 ("[M]ost Americans are surprised to learn that our federal Constitution does not provide the right to an education at all.").

50. Gipson, *supra* note 47, at 150.

51. *Rodriguez*, 411 U.S. at 51; Preston C. Green, III, Joseph Oluwole & Bruce D. Baker, *Getting Their Hands Dirty: How Alabama's Public Officials May Have Maintained Separate and Unequal Education*, 253 EDUC. L. REP. 503, 510 (2010).

52. The Court's rulings in *Rodriguez* and *Milliken*, taken together, have meant that "funding inequalities between poor and rich districts are constitutionally irrelevant. In short, if plaintiffs cannot find a smoking gun, these decisions allow segregated and unequal education." Valerie Strauss, *Federal Court Delivers Holy Grail of Education Advocacy: A Fundamental Right to Basic Education. Don't Count on Supreme Court to Uphold it*, WASH. POST (Apr. 29, 2020, 7:00 AM), <https://www.washingtonpost.com/education/2020/04/29/federal-court-delivers-holy-grail-education-advocacy-fundamental-right-basic-education-dont-count-supreme-court-uphold-it/>.

53. CHEMERINSKY, *supra* note 39, at 815. Moreover, as Jack Balkin notes, "there is no federal constitutional requirement that pupils in predominantly minority school districts receive the same quality of education as students in wealthier, largely all-white suburban districts." JACK M. BALKIN, *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* 8 (2001).

because they have less to spend.<sup>54</sup> The fact that most school districts are funded by local property taxes compounds this disparity problem.<sup>55</sup>

While the United States Constitution does not recognize a fundamental right to education, the plaintiffs in *Brown* succeeded because they were able to frame the issues in terms of constitutionally guaranteed rights and notions of equal protection.<sup>56</sup> As another scholar has noted, “*Brown* is why equity concerns undergirded the first wave of school finance challenges and why federal and state equal protection clauses were thus so frequently invoked.”<sup>57</sup> Unfortunately, because the Court has held that education is not a fundamental right under the Constitution, disparate *funding* lawsuits alleging violations of equal protection have thus far not been successful.<sup>58</sup> However, all states have education clauses in their state constitutions.<sup>59</sup> After the Supreme Court foreclosed on the possibility of using federal equal protection law to guarantee

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54. See, e.g., *William Penn Sch. Dist. v. Pa. Dep’t of Educ.*, 170 A.3d 414, 429 (Pa. 2017) (“Districts with lower wealth per student values are unable to raise the same per capita funding through local property taxes as districts with higher values.”).

55. See Jill Ambrose, Note, *A Fourth Wave of Education Funding Litigation: How Education Standards and Costing-Out Studies Can Aid Plaintiffs in Pennsylvania and Beyond*, 19 B.U. PUB. INT. L.J. 107, 107 (2009).

56. While *Brown*’s holding itself is universally accepted today, the Court’s reasoning is still disputed. See generally BALKIN, *supra* note 53 (in which several scholars partook in an exercise to re-write the *Brown* and *Bolling v. Sharpe* opinions using their preferred methods of constitutional interpretation).

57. Ann L. Martin, Comment, *Been There, Done That: What Next? Looking Back and Ahead at Litigation Prospects for School Funding Reform in Pennsylvania*, 15 WIDENER L.J. 815, 833–34 (2006).

58. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16–18 (1973). *But see* Gary B. v. Whitmer, 957 F.3d 616, 652 (6th Cir.) (holding that students in the low-performing Detroit public school system have a fundamental right to basic education, which includes access to literacy), *vacated and reh’g granted*, 958 F.3d 1216, *appeal dismissed per stipulation*, No. 18-1855/1871, 2020 U.S. App. LEXIS 18312 (6th Cir. June 10, 2020) (en banc). Many praised the Sixth Circuit’s short-lived opinion in *Whitmer*—unfortunately, the subsequent order for a rehearing and settlement signifies that the order likely has no precedential value. See Mark Walsh, *Federal Appeals Court Order Ends Detroit ‘Right to Literacy’ Case*, EDUC. WK.: SCH. L. (June 12, 2020, 3:42 PM), [https://blogs.edweek.org/edweek/school\\_law/2020/06/federal\\_appeals\\_court\\_order\\_en.html](https://blogs.edweek.org/edweek/school_law/2020/06/federal_appeals_court_order_en.html).

59. *The State Role in Education Finance*, NAT’L CONF. ST. LEGISLATURES, <https://www.ncsl.org/research/education/state-role-in-education-finance.aspx> (last visited Oct. 17, 2020).

funding in public schools in *Rodriguez*,<sup>60</sup> litigators began filing lawsuits in state courts, basing their arguments on state constitutional grounds.<sup>61</sup> While some plaintiffs have had success at the state level with school funding lawsuits, others have not.<sup>62</sup> Pennsylvania is among the states where these lawsuits have thus far not affected the state-wide public education funding scheme.<sup>63</sup>

### B. Public Education Funding in Pennsylvania

Because it is often the case that “education is paid for with the amount of money available in a district, which doesn’t necessarily equal the amount of money required to adequately teach students,” funding disparities between relatively wealthy and poor districts persist in every state.<sup>64</sup> Pennsylvania school districts have been plagued with such disparities for decades. Typically, the richest school districts are in suburban areas with a high proportion of white students.<sup>65</sup> Inversely, the poorest districts in Pennsylvania are those in rural and urban areas and are comprised of high proportions of children living in poverty and minorities.<sup>66</sup> Poorer districts have a lower tax base (though

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60. Justice Marshall stated in his dissenting opinion that the Court had effectively decided that “a State may constitutionally vary the quality of education which it offers its children in accordance with the amount of taxable wealth located in the school districts within which they reside.” *Rodriguez*, 411 U.S. at 70 (Marshall, J., dissenting).

61. Christine M. O’Neill, *Closing the Door on Positive Rights: State Court Use of the Political Question Doctrine to Deny Access to Educational Adequacy Claims*, 42 COLUM. J.L. & SOC. PROBS. 545, 552 (2009).

62. *Id.* at 552–55; *William Penn Sch. Dist. v. Pa. Dep’t of Educ.*, 170 A.3d 414, 451 n.55 (Pa. 2017).

63. *See infra* Part II.

64. Semuels, *supra* note 10.

65. *See Harris, supra* note 3 (explaining the stark divides occurring across the country between school districts, wherein predominantly white schools receive adequate funding and nearby predominantly minority schools receive significantly less funding).

66. *See* Joan Benso & Ed Albert, Opinion, *Small, Rural School Districts Don’t Receive Fair Share of State Funds*, MORNING CALL (May 30, 2017, 10:23 AM), <https://www.mcall.com/opinion/mc-rural-schools-funding-pennsylvania-benso-albert-yv-0528-20170527-story.html>; *see also* Jacqueline Palochko, Sarah M. Wojcik & Michelle Merlin, *Segregation in Pennsylvania Schools: How a ZIP Code Determines the Quality of a Child’s Education*, MORNING CALL (Oct. 31, 2019, 7:29

not necessarily a lower tax percentage) and as such contribute less money to schools within the district.<sup>67</sup> In Pennsylvania, a school district's affluence, as measured by household income and property values, directly affects the amount of money the district is able to spend on a per-pupil basis.<sup>68</sup>

The problem is that many local districts struggle year after year to meet their budgetary needs.<sup>69</sup> Funding is not the be-all and end-all of education,<sup>70</sup> but children attending schools in districts that do not have the baseline budget to provide students with their unique educational needs will always be at a disadvantage. For example, when school buildings have structural problems, properly educating children attending those schools will be difficult. In a survey of twenty-three of thirty-two school buildings in Philadelphia, investigators found "dampness, mold, or water damage in more than a third of the rooms."<sup>71</sup> In addition, the presence of asbestos in older Philadelphia public schools continues to be a concern. In 2019 alone, six public schools in Philadelphia had to be closed due to "imminent hazards' caused by damaged asbestos."<sup>72</sup>

In 2015, the Washington Post reported that Pennsylvania has the most inequitable spending per pupil in the country.<sup>73</sup> That

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PM), <https://www.mcall.com/news/education/mc-nws-education-poverty-20191030-uexghohk6jdoxovj56hsuxxrwe-story.html> (demonstrating that Pennsylvania school districts with low local tax bases are disproportionately deprived of educational resources).

67. *William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 170 A.3d 414, 429 (Pa. 2017).

68. See Palochko, Wojcik & Merlin, *supra* note 66.

69. See Andrea Sears, *PA School Budget Increases Called Positive but Insufficient*, PUB. NEWS SERV. (Feb. 5, 2020), <https://www.publicnewsservice.org/2020-02-05/education/pa-school-budget-increases-called-positive-but-insufficient/a69124-1>; see generally Petition for Review, *supra* note 11 (describing the impact of budget cuts on school districts, and districts' persistent inability to provide adequate educational services to students due to these constraints).

70. See Martin et al., *supra* note 31 ("[A]llocating equal funding for every student does not guarantee that all students will have a rigorous educational experience.").

71. *William Penn Sch. Dist.*, 170 A.3d at 430.

72. Kristen A. Graham & Wendy Ruderman, *Asbestos Closes Two More Philly Schools, the 5th and 6th So Far this Year*, PHILA. INQUIRER, <https://www.inquirer.com/news/asbestos-philadelphia-schools-environmental-crisis-carnell-mcclure-20191220.html> (Dec. 20, 2019).

73. This data comes from the National Center for Education Statistics, and the figures reported by the Washington Post are "based on poverty data from the U.S. Census Bureau and financial information reported by school districts." Brown, *supra* note 2. Moreover, the Post

same year, the Pennsylvania General Assembly commissioned a Basic Education Funding Committee to address this problem.<sup>74</sup> The funding formula is the product of about two years' worth of research conducted by the Basic Education Funding Commission, in which the Commission held fifteen hearings and heard testimony from over one hundred interested parties.<sup>75</sup> It demonstrates an understanding that the neediest districts, i.e., the districts with the poorest students, the most English language learners, and the most students with learning disabilities, ought to receive a greater share of the statewide education funding than districts that are differently situated.<sup>76</sup>

In June 2016, the Pennsylvania legislature—recognizing the reality of stark funding differences among Pennsylvania districts, and “[a]fter operating without a systematic school district funding mechanism for most of the [previous] twenty-five years”<sup>77</sup>—passed a school funding formula, Act 25 of 2016.<sup>78</sup> As passed, the Basic Education Funding formula (the “BEF formula”) “does not allocate a specific dollar amount to each school district;” rather, it “determines each district’s share of the amount of funding available to distribute from the state.”<sup>79</sup> The BEF formula accounts for factors like median household income, local tax effort, the district’s poverty concentration, number of English language learners, and enrollment.<sup>80</sup> The petitioners in *William Penn School District v. Pennsylvania Department of Education* have challenged the BEF formula as

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reported that in Pennsylvania, “per-pupil spending in the poorest school districts is 33 percent lower than per-pupil spending in the wealthiest school districts.” *Id.*

74. Joe Markosek (D), House Appropriations Comm., *PA’s Fair Funding Formula Explained* (Jan. 10, 2018) [hereinafter *BEFC Primer*].

75. BASIC EDUC. FUNDING COMM’N, REPORT AND RECOMMENDATIONS 4 (Pa. 2015) [hereinafter *BEFC REPORT*].

76. *Id.*

77. COLLINS, *supra* note 15, at 1.

78. Kevin McCorry, *Joining Vast Majority of States, Pa. Adopts School Funding Formula*, WHYY (May 25, 2016), <https://whyy.org/articles/joining-vast-majority-of-states-pa-adopts-school-funding-formula/>.

79. *BEFC Primer*, *supra* note 74.

80. *Id.*

unconstitutional,<sup>81</sup> but, historically, Pennsylvania litigants have not had much success in challenging various legislative funding schemes.

## II. SCHOOL FUNDING LITIGATION IN PENNSYLVANIA: THEN AND NOW

Generally, school funding lawsuits in Pennsylvania have alleged violations of the state constitution's Education Clause and equal protection guarantees. As many commentators have noted, public school finance lawsuits are currently in the "third wave," with the first two "waves" occurring from 1971–1973 and 1973–1989, respectively.<sup>82</sup> These lawsuits called for the interpretation of state constitutional education provisions.<sup>83</sup> *Danson*, which occurred during the second wave, and *Marrero*, a prominent third-wave lawsuit, provide the two main instances in which the Pennsylvania Supreme Court upheld legislative funding schemes reliant on local property taxes to fund public schools in Pennsylvania.<sup>84</sup> Though plaintiffs in Pennsylvania have filed several lawsuits alleging constitutional violations regarding state and local education funding in the commonwealth, plaintiffs thus far have been unsuccessful.<sup>85</sup>

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81. Petition for Review, *supra* note 11, at 120–22.

82. THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES 740, 740 n.52 (Ken Gormley, Jeffrey Bauman, Joel Fishman & Leslie Kozler eds., 2004) [hereinafter PENNSYLVANIA CONSTITUTION TREATISE] (citing William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J. L. & EDUC. 219, 219 (1990)). See also Ambrose, *supra* note 55, at 108–09 (describing the legal basis for claims brought in each wave and the response from courts).

83. PENNSYLVANIA CONSTITUTION TREATISE, *supra* note 82, at 740.

84. Ambrose, *supra* note 55, at 116.

85. Each time plaintiffs' challenges to Pennsylvania's education funding legislation reach the Pennsylvania Supreme Court, the court has held the matter to be non-justiciable. See *Danson v. Casey*, 399 A.2d 360, 363 (Pa. 1979) ("[I]t is clear that appellants have failed to state a justiciable cause of action."); *Marrero v. Commonwealth*, 739 A.2d 110, 113–14 (Pa. 1999) ("[T]his court is . . . unable to judicially define what constitutes an 'adequate' education or what funds are 'adequate' to support such a program. These are matters which are exclusively within the purview of the General Assembly's powers, and they are not subject to intervention by the judicial branch of our government."); *Pa. Ass'n of Rural & Small Schs. v. Ridge*, No. 11 M.D. 1991, 1998 Pa. Commw. Unpub. LEXIS 1, at \*12–13 (Pa. Commw. Ct. July 9, 1998) ("Because

Only time will tell whether *William Penn School District v. Pennsylvania Department of Education* will finally provide a successful outcome.

#### A. *Danson v. Casey*

In *Danson v. Casey*, the Philadelphia School District (the “District”) sought an injunction against the State Treasurer and State Secretary of Education to prohibit the distribution of state funds to any school district other than Philadelphia in order to make up for a shortage of funding.<sup>86</sup> The District argued that the funding shortage contributed to Philadelphia students “receiving a truncated and limited program of educational services.”<sup>87</sup> The petitioners’ claims were founded on both the Pennsylvania Constitution’s Education Clause and Article III, section 32, which had been identified as an equal protection provision of the Pennsylvania Constitution,<sup>88</sup> yet the opinion lacked any equal protection analysis.<sup>89</sup> In a five-two decision, the Pennsylvania Supreme Court held that the petitioners “failed to state a justiciable cause of action,”<sup>90</sup> stating that appellants had failed to allege they had “suffered any legal harm from its projected financial deficit.”<sup>91</sup> In a footnote to its decision, the court noted:

Appellants argue that we should follow the lead of other jurisdictions where challenges to school financing schemes have been successful. Essential

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*Marrero* holds that once the General Assembly establishes a ‘system’ of public education, what is ‘thorough and efficient’ education and whether it violates the Equal Protection provisions is non-justiciable, PARSS-complaint [sic] is likewise non-justiciable.”, *aff’d*, 737 A.2d 246 (Pa. 1999).

86. *Danson*, 399 A.2d at 362.

87. Russell Gerney, *Equal Protection Under the Pennsylvania Constitution*, 42 DUQ. L. REV. 455, 469 (2004).

88. Unlike the U.S. Constitution, the Pennsylvania Constitution “has no specific Equal Protection Clause.” *Id.* at 456. Beginning with the 1974 case *Estate of Cavill*, Article III, section 32 of the Pennsylvania Constitution has been identified as an equal protection clause. *Id.* at 463.

89. *Id.* at 469.

90. *Danson*, 399 A.2d at 363.

91. *Id.* at 365.

to those decisions, however, was evidence that the particular state's financing system resulted in some school districts having significantly less money than other districts, causing gross disparities in total and per child expenditures throughout the state. No such allegation has been made in this case.<sup>92</sup>

The court's language in the first and second parts of the opinion suggests that appellants failed to state a justiciable cause of action on the grounds of a lack of standing for failure to state a judicially cognizable injury.<sup>93</sup> Confusingly, after deciding the case was non-justiciable, the court nevertheless applied the rational basis review test, established in the *Teachers Tenure Act Cases*,<sup>94</sup> to uphold the challenged legislative scheme.<sup>95</sup> The court found that the financing scheme had a reasonable relation to the Education Clause because the "statutory scheme [did] not 'clearly, palpably, and plainly violate the Constitution.'"<sup>96</sup> The court seemed to foreclose any future challenges to legislative funding schemes with the last sentence of its opinion: "This Court . . . may not abrogate or intrude upon the lawfully enacted scheme by which public education is funded, not only in Philadelphia, but throughout the Commonwealth."<sup>97</sup>

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92. *Id.* at 365 n.10 (citations omitted).

93. *See id.* at 365 ("Nowhere do appellants allege that any Philadelphia public school student is, has, or will, suffer any legal injury as a result of the operation of the state financing scheme.").

94. This test as applied to the Education Clause provides that "[i]n considering laws relating to the public school system, courts will not inquire into the reason, wisdom or expediency of the legislative policy with regard to education, but whether the legislation has a reasonable relation to the purpose expressed in Article X, Section 1 . . ." *In re Teachers' Tenure Act Cases*, 197 A. 344, 352 (Pa. 1938).

95. *Danson*, 399 A.2d at 367.

96. *Id.* (quoting *Tosto v. Pa. Nursing Home Loan Agency*, 331 A.2d 198, 205 (Pa. 1975)); accord *Martin*, *supra* note 57, at 825.

97. *Danson*, 399 A.2d at 367.

B. *Marrero v. Commonwealth*

Nearly two decades after the court handed down its ruling in *Danson*, the legislature's funding scheme was challenged again. In February 1997, several students and their parents, alongside the Philadelphia School District and others, filed a petition for a declaratory judgment, and claimed once again that the General Assembly violated the Education Clause of the Pennsylvania Constitution.<sup>98</sup> The petitioners in *Marrero v. Commonwealth* argued that "because the School District operates in an urban environment, it is required to educate a disproportionate number of the state's students who live in poverty, and its students have unique educational needs, which require the expenditure of greater financial resources."<sup>99</sup> They alleged that Pennsylvania's failure to "provide adequate funding for the Philadelphia School District,"<sup>100</sup> in light of those greater financial needs, violated the constitutional mandate that the commonwealth "provide for the maintenance and support of a thorough and efficient system of public education."<sup>101</sup> Petitioners sought declaratory relief that the then-current statutory scheme for apportioning funding was unconstitutional.<sup>102</sup>

Both the legislative and executive branch respondents filed preliminary objections on several grounds, including that plaintiffs' requests for relief were nonjusticiable under the separation of powers and political question doctrines because the relief sought was the sole purview of the Pennsylvania General Assembly.<sup>103</sup> The commonwealth court began its justiciability analysis by noting that the Pennsylvania Supreme Court precedent provides that "[a] challenge to the Legislature's exercise of a power which the Constitution

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98. See *Marrero v. Commonwealth*, 709 A.2d 956, 957–58 (Pa. Commw. Ct. 1998), *aff'd*, 739 A.2d 110 (Pa. 1999).

99. *Id.* at 958.

100. *Marrero v. Commonwealth*, 739 A.2d 110, 111 (Pa. 1999).

101. PA. CONST. art. III, § 14.

102. *Marrero*, 709 A.2d at 957–58.

103. *Id.* at 959–60.

commits exclusively to the Legislature presents a nonjusticiable ‘political question,’”<sup>104</sup> and that Pennsylvania has “adopted the . . . standards articulated by the United States Supreme Court in *Baker v. Carr*.”<sup>105</sup>

Next, the commonwealth court provided a detailed history of the amendment of the Pennsylvania Constitution to include the Education Clause in its current form, and stated that, “as presently enacted, Article 3, Section 14 of the Pennsylvania Constitution places an affirmative duty upon the General Assembly to provide for a ‘thorough and efficient system of public education.’”<sup>106</sup> The court quoted *Lisa H. v. State Board of Education*, a 1982 case that was affirmed by the Pennsylvania Supreme Court, to emphasize that the *Danson* precedent provides that this mandate “does not confer an individual right upon each student to a particular level or quality of education, but, instead, imposes a constitutional duty upon the legislature to provide for the maintenance of a thorough and efficient system of public schools throughout the Commonwealth.”<sup>107</sup> The commonwealth court sustained the objections and dismissed the case, specifically finding that “the separation of powers doctrine prohibits the judicial branch from deciding [their] claims” and that their claims were also barred by the political question doctrine.<sup>108</sup>

On appeal, referred to as *Marrero II*, the Pennsylvania Supreme Court affirmed the commonwealth court’s dismissal of the suit, finding no error was made in holding that the case was nonjusticiable on the basis of the political question doctrine. The court further held that what constitutes an

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104. *Id.* at 960 (quoting *Sweeney v. Tucker*, 375 A.2d 698, 705 (Pa. 1977)).

105. *Id.* Rooted in the federal separation of powers doctrine, the political question doctrine holds that the court must respect other branches of government and vice versa; i.e., courts must refrain from engaging in political decision-making. This doctrine relates to the relationship between the *federal* judiciary and the other branches of the *federal* government, yet it has crept into several state courts’ jurisprudence. For further discussion, see *infra* Part II.C.

106. *Marrero*, 709 A.2d at 961 (quoting PA. CONST. art. III, § 14).

107. *Id.* at 961–62 (quoting *Lisa H. v. State Bd. of Educ.*, 447 A.2d 669, 673 (Pa. Commw. Ct. 1982)).

108. *Marrero v. Commonwealth*, 739 A.2d 110, 113–14 (Pa. 1999).

adequate education or adequate funding of education “are matters which are exclusively within the purview of the General Assembly’s powers, and they are not subject to intervention by the judicial branch” of the Pennsylvania government.<sup>109</sup> This definitive statement of the Pennsylvania Supreme Court has been in place for nearly twenty years, and now a new set of petitioners seeks to challenge the funding scheme in *William Penn School District v. Pennsylvania Department of Education*.<sup>110</sup>

### C. State Court Usage of the Justiciability Doctrines

The Pennsylvania Supreme Court has, up until 2017, repeatedly held that education funding lawsuits are non-justiciable.<sup>111</sup> In cases where the Pennsylvania Supreme Court reached the claims’ merits, and where it was alleged that the funding scheme constituted a violation of equal protection,<sup>112</sup> the court has held that a rational basis review prevented it from addressing the legislatures’ decisions on how to fund public schools.<sup>113</sup> This has caused some scholars to argue that a strict scrutiny review ought to be applied to education funding lawsuits because the positive right to a “thorough and efficient” education is provided for in the state constitution.<sup>114</sup> Yet, the issue of whether there is a positive individual right to an education in Pennsylvania is one of the issues currently being

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109. *Id.*

110. *See* William Penn Sch. Dist. v. Pa. Dep’t of Educ., 170 A.3d 414, 417 (Pa. 2017).

111. *See infra* Part II.D.

112. While the Pennsylvania Constitution does not have an Equal Protection Clause, the Pennsylvania Supreme Court has identified sections of the Constitution that provide equal protection under the law; these are Article I, sections 1, 17, 26, and 28, and Article III, section 32. *See* Gerney, *supra* note 87, at 456. In fact, only fifteen states have equal protection clauses. ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 209 n.109 (2009).

113. *Danson v. Casey*, 399 A.2d 360, 367 (Pa. 1979) (holding that the system of financing public schools did not violate the Pennsylvania Constitution because the system bore a “reasonable relation” to providing for the schools’ “maintenance and support”).

114. *See generally* Noreen O’Grady, Comment, *Toward a Thorough and Efficient Education: Resurrecting the Pennsylvania Education Clause*, 67 TEMP. L. REV. 613, 618 (1994) (arguing that Pennsylvania courts ought to invalidate the then-current education funding legislation, and that applying strict scrutiny would yield this result).

litigated in *William Penn*.<sup>115</sup> Because the United States Supreme Court has held there is no constitutional right to education, the federal courts are “closed to questions of educational adequacy.”<sup>116</sup> Some argue, in light of this, “it is irresponsible and impermissible for state courts to abstain from their responsibilities to hear these cases.”<sup>117</sup> Yet, a number of state courts, including Pennsylvania, have used the political question, standing, and separation of powers doctrines to do just that.

Despite, and perhaps because of, the Pennsylvania Constitution’s clear language in its Education Clause, the Pennsylvania Supreme Court rejected the plaintiffs’ education clause claims in *Marrero II* by “rel[ying] on years of political question decisions.”<sup>118</sup> Only seven states have used the political question doctrine to reject state law education funding claims presented in lawsuits.<sup>119</sup> Pennsylvania is the only one of those seven states to have adopted the federal *Baker v. Carr* factors in assessing whether an issue is a non-justiciable political question.<sup>120</sup> In *Sweeney v. Tucker*, the Pennsylvania Supreme Court reiterated that the principle of separation of powers means that “no branch should exercise the functions exclusively

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115. See *infra* Part II.D.

116. O’Neill, *supra* note 61, at 560.

117. *Id.*

118. *Id.* at 573.

119. *Id.* at 560–76 (discussing how Illinois, Florida, Rhode Island, Alabama, Oklahoma, Nebraska, and Pennsylvania use political question doctrine, separation of powers, or a history of political question doctrine jurisprudence outside of education to reject claims regarding disparities in funding for education).

120. *Id.* at 573 (citing *Sweeney v. Tucker*, 375 A.2d 698, 706 (Pa. 1977)). In *Baker v. Carr*, the Supreme Court announced a set of factors that federal courts should apply when contemplating whether a political question is present. 369 U.S. 186, 217 (1962). These factors include: (1) a constitutional commitment of the issue to a political department, (2) a lack of judicially discoverable and manageable standards for resolving the issue, (3) impossibility of deciding an issue without making a policy determination which would be inappropriate for judges to make, (4) where the court would be unable to undertake an independent resolution without indicating a lack of respect due to coordinate branches of government, (5) an unusual need for unquestioning adherence to a political question already made, and (6) where there is a potential for different answers to one question by different departments. *Id.*

committed to another branch.”<sup>121</sup> The court held that challenges “to the Legislature’s exercise of a power which the Constitution commits exclusively to the Legislature presents a nonjusticiable ‘political question,’”<sup>122</sup> then discussed and applied the *Baker* factors. Pennsylvania state courts subsequently used the *Sweeney* holding to find many different matters nonjusticiable.<sup>123</sup>

One critic of the state usage of the political question doctrine as applied to state law matters stated:

This line of cases conflates separation of powers and political question issues, sometimes citing back to *Baker* and other times citing only the Pennsylvania Constitution. Most of these cases deal with traditional politics. . . . On the other hand, the Pennsylvania Supreme Court has ruled frequently that political matters are justiciable.<sup>124</sup>

Others argue that because the political question doctrine and other justiciability principles were born of federal principles—for example, federalism and the constitutionally mandated separation of powers among the *federal* branches—there is no need for the doctrines to extend to state courts.<sup>125</sup> For example, one scholar noted: “The fundamental differences between state and federal courts and their constitutions demonstrate the illegitimacy of state courts following federal court political question doctrine.”<sup>126</sup> For one, state constitutions offer positive protections of their citizens’ rights, whereas the United States

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121. *Sweeney*, 375 A.2d at 705.

122. *Id.*

123. See O’Neill, *supra* note 61, at 574 n.181 (explaining that “*Sweeney* was cited only twice for these principles in the 1980s, becoming more popular later.” (citing *Grimaud v. Commonwealth*, 865 A.2d 835 (Pa. 2005); *Perzel v. Cortes*, 870 A.2d 759 (Pa. 2005); and *Commonwealth v. Stern*, 701 A.2d 568 (Pa. 1997))).

124. *Id.* at 574.

125. See *id.* at 577–79.

126. *Id.* at 577–78.

Constitution establishes negative liberties.<sup>127</sup> This is particularly salient in the area of education, as all state constitutions have embedded the positive right to education, whereas the United States Constitution has not.<sup>128</sup> Furthermore, federal judges are appointed for life, whereas many state judges are elected, which weakens the oft-cited justification for the political question doctrine that judges are not politically accountable to the people like legislators are.<sup>129</sup> This argument is particularly persuasive in Pennsylvania, where state court judges at all levels have been elected in partisan elections since 1968.<sup>130</sup>

Additionally, state courts are not bound by the United States Constitution's Article III case and controversy requirement—"they could even offer binding advisory opinions while leaving it to state legislatures to develop and implement their own remedies."<sup>131</sup> Justice Brennan himself, the author of the majority opinion in *Baker v. Carr*, subsequently wrote "state courts that rest their decisions wholly or even partly on state law need not apply federal principles of standing and justiciability that deny litigants access to the courts."<sup>132</sup>

The Pennsylvania Supreme Court could have taken these arguments into consideration in its 2017 decision in *William Penn School District v. Pennsylvania Department of Education* when it overruled the commonwealth court's dismissal, which was grounded in *Marrero II* and *Danson*.<sup>133</sup> Instead, the court attempted to wipe the slate clean of its own prior justiciability

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127. See PAUL BREST, SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR & REVA B. SIEGEL, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASE AND MATERIALS* 1693 (7th ed. 2018) (citing EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS* (2013)).

128. See *id.*

129. See O'Neill, *supra* note 61, at 576 ("[S]tate court judges are elected and politically accountable.").

130. See *William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 170 A.3d 414, 419 n.7 (Pa. 2017).

131. O'Neill, *supra* note 61, at 579.

132. William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 501 (1977).

133. *William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 114 A.3d 456, 464 (Pa. Commw. Ct. 2015) ("[B]ecause *Marrero II* and *Danson* preclude our review of Petitioners' claims in this matter as nonjusticiable political questions . . . Petitioners' petition for review is dismissed.").

analysis in Education Clause litigation, “coming to the conclusion that, especially because of a general lack of reasoned analysis in the prior opinions, [those cases] did not have much precedential value.”<sup>134</sup> Rather than reconsidering its past use of the political question doctrine and reliance on a federal standard, the court focused on the *Baker* factors and came to the conclusion that the claims are justiciable.<sup>135</sup> The court effectively overruled the portion of *Marrero II* that had, twenty years prior, held this exact type of lawsuit to be a nonjusticiable political question.

D. *William Penn School District v. Pennsylvania Department of Education*

In 2014, several Pennsylvania school districts, parents of school-aged children, the Pennsylvania Association of Rural and Small Schools (PARSS), and the NAACP Pennsylvania State Conference (collectively, “Petitioners”) filed a lawsuit seeking declaratory and injunctive relief against the Pennsylvania Department of Education, state legislators, the Governor, the Pennsylvania State Board of Education, and the Secretary of Education (collectively, “Respondents”).<sup>136</sup> In *William Penn School District v. Pennsylvania Department of Education*, Petitioners’ stated goal is to “hold the General Assembly responsible for and accountable to its constitutional mandate.”<sup>137</sup> Alleging violations of the Pennsylvania

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134. THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES, 2020 CUMULATIVE SUPPLEMENT 191 (Ken Gormley, Jeffrey Bauman, Joel Fishman & Leslie Kozler eds., 2020) “The *Teachers’ Tenure Act Case*, *Danson*, and *Marrero II* necessarily inform our consideration regarding the justiciability of Petitioners’ Education Clause and equal protection claims. But to rely uncritically upon their analyses and holdings would be to rest our decision upon an unstable three-legged stool.” *William Penn Sch. Dist.*, 170 A.3d at 445.

135. *William Penn Sch. Dist.*, 170 A.3d at 445 (“For what little developed reasoning there is to be gleaned from our prior three cases, we must conclude that the slate relative to the instant challenges is, if not clean, then at least relatively unadorned by any harmonious rule of law that controls the instant matter. Thus, in addressing Petitioners’ claims in this case, we must consider anew the *Baker* factors as to each claim.”).

136. See generally Petition for Review, *supra* note 11.

137. *Id.* at 2.

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Constitution's Education Clause and Equal Protection provisions, plaintiffs seek numerous remedies, including that the court find that the Education Clause requires the commonwealth to:

adopt a school-financing arrangement that is reasonably calculated to ensure that all students in Pennsylvania have an opportunity to obtain an adequate education that will enable them to meet state academic standards and participate meaningfully in the economic, civic, and social activities of our society; [and]

... provide school districts with the support necessary to ensure that all students in Pennsylvania have [this] opportunity . . . .<sup>138</sup>

Petitioners have also asked the court to strike down the BEF formula, and declare:

that the existing school-financing arrangement fails to comply with the mandate of the Education Clause; [and]

... that Article III, Section 32 of the Pennsylvania Constitution imposes upon Respondents an obligation to adopt a school-financing arrangement that does not discriminate against students based on the amount of incomes and taxable property in their school districts . . . .<sup>139</sup>

Furthermore, Petitioners have asked the court to enter permanent injunctions that would require the commonwealth to cease distributing education funds in the current manner, including through the BEF formula, and to establish a new system of funding public schools.<sup>140</sup> Petitioners cite evidence of

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138. *Id.* at 120.

139. *Id.* at 121.

140. *Id.* at 122.

the disparities in per-pupil funding across school districts,<sup>141</sup> and contend that the current method of funding violates the Equal Protection Clause of the Pennsylvania Constitution because “it turns the caliber of public education into an accident of geography: Children in property- and income-poor districts are denied the opportunity to receive even an adequate education, while their peers in property- and income-rich districts enjoy a high-quality education.”<sup>142</sup>

The occurrence of funding disparities is not a phenomenon new to Pennsylvania—neither is the filing of lawsuits challenging the state’s education funding schemes.<sup>143</sup> Pennsylvanians have been complaining of this very kind of inequity and lack of access to adequate education for decades, so much so that there have been at least three “waves” of school financing litigation over the past five decades.<sup>144</sup> The obvious question is: what makes *William Penn* different? Why are these plaintiffs any more likely to succeed than their predecessors? And, most importantly: How is striking down the current funding scheme ultimately going to benefit students?

It is against the backdrop of *Marrero*, *Danson*, and other failed school funding lawsuits that the Pennsylvania Supreme Court viewed the most recent challenge to the commonwealth’s public school funding scheme.<sup>145</sup> The Pennsylvania Department of Education (“Department”) and other Respondents argued that Petitioners’ claims were nonjusticiable political questions that were beyond the scope of judicial branch authority.<sup>146</sup> Relying on precedential Pennsylvania case law, namely the *Danson* and *Marrero* cases, Respondents argued that mandating

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141. At the time of filing, public spending across Pennsylvania school districts ranged from approximately \$9,800 to \$28,400 per student. *Id.* at 5. Petitioners cite “low state share and high dependence on local taxes” as evidence for this inequality in spending. *Id.* at 111.

142. *Id.* at 5–6.

143. *See supra* Part II.

144. *See supra* text accompanying note 82.

145. *William Penn Sch. Dist. v. Pa. Dep’t of Educ.*, 170 A.3d 414, 445 (Pa. 2017) (“The *Teachers’ Tenure Act Case*, *Danson*, and *Marrero II* necessarily inform our consideration regarding the justiciability of Petitioners’ Education Clause and equal protection claims.”).

146. *Id.* at 432.

all students across the state receive equal funding would be too constrictive on the legislature, and would “offend the historical means and intended ends of the Education Clause.”<sup>147</sup>

1. *The commonwealth court’s decision*

The commonwealth court began its analysis by noting that “courts apply the *Baker v. Carr* analysis to determine whether judicial abstention under the political question doctrine applies.”<sup>148</sup> Finding themselves bound by precedent in *Danson* and *Marrero*, the commonwealth court’s opinion sustained the Respondents’ preliminary objections and dismissed the Petition for Review on the grounds that both the education clause and equal protection claims entailed non-justiciable political questions.<sup>149</sup> Essentially, the court held that this issue implicated the political question doctrine because the Pennsylvania Constitution delegates the power of maintaining a thorough and efficient education system specifically to the General Assembly, and the Education Clause does not actually grant anybody any individual rights.<sup>150</sup>

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147. *Id.* at 433.

148. *William Penn Sch. Dist. v. Pa. Dep’t of Educ.*, 114 A.3d 456, 462 (Pa. Commw. Ct. 2015), *rev’d*, 170 A.3d 414 (Pa. 2017) (citing to *Robinson Twp v. Commonwealth*, 83 A.3d 901, 928 (Pa. 2013); *Sweeney v. Tucker*, 375 A.2d 698, 711 (Pa. 1977)).

149. *William Penn Sch. Dist.*, 114 A.3d at 464. The court, however, did not undertake a *Baker v. Carr* analysis. *See id.* at 456.

150. *Id.* at 463–64. Rather, it is solely a mandate to the legislature to simply provide a system of education that it deems “thorough and efficient.” *Id.* (quoting *Marrero v. Commonwealth*, 739 A.2d 110, 113 (Pa. 1999)). To be fair to the commonwealth court’s interpretation, the *Robinson Township* court stated that the political question doctrine “derives from the principle of separation of powers . . . . Our constitution vests legislative power in the General Assembly, which . . . is charged with the passage of laws generally and, additionally, with the passage of specifically authorized legislation.” *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 926–27 (Pa. 2013) (citing PA. CONST. art. III, §§ 1–27). The Education Clause, indeed, is housed within the referenced article and sections. Petitioners seem to be asking the court to interpret the Education Clause out of this context: rather than framing it as a legislative mandate, state that “public education is a fundamental right guaranteed by the Pennsylvania Constitution for all school-age children . . . .” Petition for Review, *supra* note 11, at 120.

## 2. *The supreme court's reversal*

In 2017, the Pennsylvania Supreme Court reversed the commonwealth court's decision.<sup>151</sup> The court stated that while the commonwealth court initially "observed that this Court has relied upon the *Baker* considerations to ascertain whether the political question doctrine counsels in favor of abstention in a given case," the commonwealth court did not analyze these factors and instead found that the question of justiciability was controlled by the supreme court's decision in *Marrero*, "which relied primarily upon *Danson*."<sup>152</sup> The Pennsylvania Supreme Court noted the commonwealth court's presumption that *Marrero* held that the Education Clause "[does] not confer upon students an individual right to an education of any particular quality,"<sup>153</sup> but the court did not express an opinion on the issue. Some have interpreted this portion of the Pennsylvania Supreme Court's opinion as rejecting that presumption as inaccurate<sup>154</sup>—but all it appears to have done is to definitively state that Petitioners' claims are in fact justiciable.<sup>155</sup> The court seems to have questioned the applicability of stare decisis with regard to its previous holdings in *Danson* and *Marrero* by determining that badly reasoned precedent equates to non-binding precedent.<sup>156</sup> Whether education is a fundamental right

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151. See *William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 170 A.3d 414 (Pa. 2017).

152. *Id.* at 433.

153. *Id.*

154. See Marie Loiseau, Comment, *Revived Authority in Article I, Section 27 of the Pennsylvania Constitution: The Commonwealth's New Affirmative Duty to Protect the Atmosphere*, 91 TEMP. L. REV. 183, 205 (2018).

155. See *William Penn Sch. Dist.*, 170 A.3d at 418.

156. Regarding *Danson*, the court stated: "Given the absence of reasoned analysis, *Danson* has very little if any precedential value regarding Petitioners' equal protection challenge." *William Penn Sch. Dist.*, 170 A.3d at 443 (citing *Ario v. Reliance Ins. Co.*, 980 A.2d 588, 598 (Pa. 2002) (Castille, J., concurring) ("[Stare decisis] only applies to issues actually raised, argued and adjudicated, and only where the decision was necessary to the determination of the case." (citations omitted))).

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to which strict scrutiny shall apply is a matter the court chose to stave off for a future decision.<sup>157</sup>

The court held that in analyzing Pennsylvania state law claims, “the political question doctrine should be narrowly construed: the judiciary should abstain from hearing a case *only if* the resolution of that issue ‘has been entrusted exclusively and finally to the political branches of the government.’”<sup>158</sup> What resulted from the Pennsylvania Supreme Court’s application of the political question doctrine is a muddled combination: it “customarily reference[s]” the federal *Baker v. Carr* factors,<sup>159</sup> but also it “will not refrain from resolving a dispute which involves only an interpretation of the laws of the Commonwealth, for the resolution of such disputes is [its] constitutional duty.”<sup>160</sup>

Nevertheless, the Pennsylvania Supreme Court found that under the circumstances of this case, it has an “obligation to fulfill its duty as the ‘ultimate interpreter of the Constitution.’”<sup>161</sup> The result was that the Pennsylvania Supreme Court found the petitioners’ Education Clause and Equal Protection claims to be justiciable,<sup>162</sup> which is a complete reversal from its prior rulings in *Marrero* and its predecessors.<sup>163</sup> As it pertains to the Education Clause claim, the supreme court stated it is in part because Petitioners did not rely on a “straw man of funding equality or fixed standards,” as was found in the *Danson* and *Marrero* cases.<sup>164</sup> In addition, the court had other decisions to look to from states with similar constitutional

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157. *William Penn Sch. Dist.*, 170 A.3d at 461. Because the court stated that the parties had not fully briefed the issue and thus its ruling was limited to deciding whether the issues at hand are justiciable, it is very likely that this particular issue will become the subject of summary judgment motions.

158. Loiseau, *supra* note 154, at 205.

159. *William Penn Sch. Dist.*, 170 A.3d at 438.

160. *Id.* (quoting *Council 13 v. Commonwealth*, 986 A.2d 63, 76 (Pa. 2009)) (internal quotations omitted).

161. Loiseau, *supra* note 154, at 205.

162. *William Penn Sch. Dist.*, 170 A.3d at 418.

163. See discussion *supra* Part II.A–C.

164. *William Penn Sch. Dist.*, 170 A.3d. at 449.

provisions using the “thorough and efficient” language as is used in Article III, section 14 of Pennsylvania’s own constitution.<sup>165</sup> The court further noted it was “not bound to follow precedent when it cannot bear scrutiny, either on its own terms or in light of subsequent developments”<sup>166</sup> and found “irreconcilable deficiencies in the rigor, clarity, and consistency” in the preceding education funding lawsuits.<sup>167</sup>

In its unprecedented holding, the Pennsylvania Supreme Court reversed course from *Marrero II*: “We agree [with Petitioners] . . . that it is feasible for a court to give meaning and force to the language of a constitutional mandate to furnish education of a specified quality, in this case ‘thorough and efficient,’ without trammeling the legislature in derogation of the separation of powers.”<sup>168</sup> It appears that Pennsylvania has turned a corner: it has overcome the political question doctrine—at least as applied to education funding lawsuits.

### 3. *The future of William Penn School District*

The *William Penn School District* case survived preliminary objections motions and a motion to dismiss the case as moot,<sup>169</sup> and as of now, is set to go to trial in early 2021.<sup>170</sup> Settlement of this case does not seem likely, as the Petitioners are only seeking

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165. “It is instructive that so many other states have found claims under their respective education clauses to be justiciable . . .” *Id.* at 453 (citing *Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 225 n.24 (Conn. 2010)). Those other states include West Virginia, Maryland, Minnesota, New Jersey, Ohio, Wyoming, and Illinois. *Id.*

166. *Id.* at 456.

167. *Id.* at 457.

168. *Id.*

169. The case was filed in November of 2014—subsequently, in 2016, Governor Tom Wolf enacted a fair funding formula for public schools. 24 P.S. PA. STAT. AND CONS. STAT. ANN. § 25-2502.53 (West 2020); see also *supra* notes 77–81 and accompanying text. The court sided with petitioners, holding that “[c]hanges in the formula do not render the questions presented moot, nor do they materially affect the substance of our ruling in the case’s present posture.” *William Penn Sch. Dist.*, 170 A.3d at 435.

170. *William Penn Sch. Dist. v. Pa. Dep’t of Educ.*, No. 587 M.D. 2014 (Pa. Commw. Ct. May 29, 2020) (order granting application for extension).

court-ordered legislative solutions.<sup>171</sup> It will almost surely be met with defendants' motions for summary judgment, and if the commonwealth court grants any of those motions, Petitioners are sure to once again appeal to the Pennsylvania Supreme Court. This case could very well drag on into 2021, depending on how the summary judgment phase plays out. Either court, or both courts, could decide that while the Petitioners met their initial burden at the pleadings phase, they failed to do so at the summary judgment juncture. Moreover, if the Petitioners do eventually get exactly what they want from the court, the legislature will be tasked with passing legislation to secure sufficient funding for schools that will ensure students in all districts are able to meet the state-imposed academic standards.

### III. EDUCATION AS A FUNDAMENTAL RIGHT

While there is no federally recognized constitutional right to education, some state constitutions explicitly proclaim that education is a fundamental right.<sup>172</sup> Florida's Education Clause begins: "The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders."<sup>173</sup> The Illinois Constitution provides that "the educational development of all persons to the limits of their capacities" is a "fundamental goal."<sup>174</sup> Where the state constitutions are not as explicit about education being a fundamental right, courts have recognized it

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171. See generally Press Release, Educ. Law Ctr., In Victory for Students, Court Rules that Pa. School Funding Lawsuit is Not Moot (Aug. 21, 2018), <https://www.elc-pa.org/2018/08/21/in-victory-for-students-court-rules-that-pa-school-funding-lawsuit-is-not-moot/> (describing petitioners' allegations that "the state's school funding system violates Pennsylvania's constitution.").

172. See Brennan-Gac, *supra* note 49, at 12.

173. FLA. CONST. art. IX, § 1(a).

174. ILL. CONST. art. X, § 1. It is worth noting, however, that despite this statement in its constitution, funding in Illinois is not equitable. See Martin et al., *supra* note 31 ("[H]igh-poverty-districts in Illinois receive 22 percent less in per-pupil funds in state and local dollars than the wealthiest school districts.").

as such in states such as California, Virginia, Connecticut, and Washington.<sup>175</sup>

It is an unsettled matter whether there is an individual, or fundamental, right to an education in Pennsylvania.<sup>176</sup> The Pennsylvania Constitution's Education Clause, found in Article III, section 14, obligates the General Assembly to "provide for the maintenance and support of a thorough and efficient system of public education."<sup>177</sup> In its 2015 *William Penn* decision, the commonwealth court held that Pennsylvania's Education Clause does not actually grant individual rights to school-age children; it is a mandate to the legislature to simply provide a system of education that it deems "thorough and efficient."<sup>178</sup> A somewhat different perspective on this issue holds that though "it is not necessarily clear from the text, the [Education Clause] reflects concerns about equality in the specific context of public education."<sup>179</sup> This view is taken from a historical understanding of how the wording of the Education Clause was amended in 1874, when the clause was changed to ensure that "all children were to be able to attend a thorough and efficient education system," rather than granting eligibility to the poor for free public education.<sup>180</sup>

While this historical perspective lends some credence to the concept that the drafters of this constitutional provision intended to inject notions of equality into the requirement for a system of public education in Pennsylvania, the other part of history that was ongoing at the same time should not be ignored: legalized segregation of schools. As of 1874, the year

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175. See Brennan-Gac, *supra* note 49, at 12 ("California started the ball rolling when its supreme court held in *Serrano v. Priest* (1976) that education is a fundamental right under its constitution. Courts in Connecticut, Washington, and West Virginia soon followed suit.").

176. See *William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 170 A.3d 414, 461 (Pa. 2017) ("[W]e do not read any of our prior cases as settling whether the Pennsylvania Constitution confers an individual right to education—and, if so, of what sort.").

177. PA. CONST. art. III, § 14.

178. See *William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 114 A.3d 456, 462 (Pa. Commw. Ct. 2015), *rev'd*, 170 A.3d 414 (Pa. 2017).

179. PENNSYLVANIA CONSTITUTION TREATISE, *supra* note 82, at 740.

180. *Id.* (emphasis added).

the Education Clause was changed, schools in Pennsylvania were still segregated pursuant to state law which “required school segregation in school districts with more than twenty black children.”<sup>181</sup> It was not until seven years after the Education Clause was amended that this statute was declared unconstitutional, repealed, and replaced by legislation “making it unlawful to discriminate on a racial basis in the administration of the public schools.”<sup>182</sup>

One of the remedies the *William Penn* plaintiffs seek is for the court to declare “that public education is a fundamental right guaranteed by the Pennsylvania Constitution to all school-age children residing in the Commonwealth.”<sup>183</sup> A declaration by the Pennsylvania Supreme Court that education is a fundamental right would be a good step forward and would be a productive result from the protracted litigation in the lawsuit.<sup>184</sup> However, if the court does not make this declaration, a constitutional amendment that more definitively evokes notions of equality and prescribes a fundamental right to education ought to be one part of the solution to Pennsylvania’s current inequitable education funding schemes, and it also could serve as a symbolic gesture in reconciling its history with racial segregation. The amendment should take the form of an addition to Article I, Declaration of Rights, and could declare:

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181. *Id.* at 740 (noting that the Education Clause was changed in 1874); *see also* Davison M. Douglas, *The Limits of Law in Accomplishing Racial Change: School Segregation in the Pre-Brown North*, 44 UCLA L. REV. 677, 690–92 (1997).

182. Douglas, *supra* note 181, at 690–92. Even still, segregation continued, because the “antisegregation legislation in Pennsylvania did not reflect a broad reordering of racial attitudes.” *Id.* at 691–92.

183. Petition for Review, *supra* note 11, at 120.

184. Petitioners filed this lawsuit in 2014. *See generally id.* As this Note goes to publication in 2020, the lawsuit is still pending. Petitioners allege that the “Pennsylvania Constitution establishes education as a fundamental right of every Pennsylvania student and, therefore, imposes a duty on the Commonwealth to ensure that all students have the same basic level of educational opportunity.” *Id.* at 119. Petitioners also seek for the Court to “[d]eclare that public education is a fundamental right guaranteed by the Pennsylvania Constitution to all school-aged children, residing in the Commonwealth.” *Id.* at 120.

### § 29. Right to education.

The education of children is a fundamental right of the people of the Commonwealth of Pennsylvania. It is, therefore, a paramount duty of the commonwealth to make adequate provisions for the education of all children residing within its borders.

By firmly declaring that education is a fundamental right, the state legislature would likely have an increased incentive to add a significant amount of funding to the commonwealth's basic education budget. A recent report led by Bruce Baker for the Albert Shanker Institute concluded that state efforts at equalizing funding disparities between districts are falling short: "while states currently spend an average of \$13,000 per pupil in high-poverty districts, states should be spending more than \$20,000 on those districts."<sup>185</sup> And yet, "[i]n many states, elected officials continue to resist school funding reform, even in the face of court orders, and governors in some states are fighting funding lawsuits rather than using the courts to leverage legislative action."<sup>186</sup> If legislators and the general public reach a consensus to prioritize public education, the issue could gain some much-needed political capital. Therefore, politicians would face pressure to distribute more funding to the neediest districts. Additionally, a declaration of education as a fundamental right would ensure that all funding schemes moving forward must pass strict scrutiny when challenged in court.<sup>187</sup>

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185. Daarel Burnette II, *Student Outcomes: Does More Money Really Matter?*, EDUC. WK. (June 4, 2019), <https://www.edweek.org/ew/articles/2019/06/05/student-outcomes-does-more-money-really-matter.html>.

186. Sciarra, *supra* note 26.

187. *See supra* notes 112–14 and accompanying text. *See also* William Penn Sch. Dist. v. Pa. Dep't of Educ, 170 A.3d 414, 470 (Pa. 2017) ("Defendants suggested that Plaintiffs' claims under the Equal Protection Clause were legally insufficient because education is not a fundamental right subject to strict scrutiny").

## IV. FURTHERING THE QUEST VIA LEGISLATIVE ACTION

While some states have seen favorable decisions being passed down to education funding plaintiffs, and even if this is the direction Pennsylvania is headed in *William Penn*, as long as school districts' funding are driven by local property taxes, the inequities and the divides in educational opportunities and outcomes will persist. As Professor John Coons poignantly noted in 1970:

The primary dependence of public education upon the real property tax and the localization of that tax's administration and expenditure have combined to make the public school into an educator for the educated rich and a keeper for the uneducated poor. There exists no more powerful force for rigidity of social class and the frustration of natural potential than the modern public school system with its systematic discrimination against poor districts.<sup>188</sup>

Unfortunately, Pennsylvania never heeded this warning. Fifty years later, schools are still funded in this manner, and are worse off for it.<sup>189</sup> This Part offers two suggestions as to how Pennsylvania can make some changes—without relying on litigation—in order to start mitigating the effects of this reliance on property taxes.

*A. Merge Existing School Districts into Countywide Districts*

*William Penn* does not directly ask the court to change the way the Pennsylvania General Assembly allocates funding among the school districts, to “spread the wealth,” so to speak, by mandating that districts pool all local property taxes collected for purposes of funding schools on a state-wide level, nor does

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188. JOHN E. COONS, WILLIAM H. CLUNE, III & STEPHEN D. SUGARMAN, *PRIVATE WEALTH AND PUBLIC EDUCATION* xix (1970).

189. *See, e.g.*, Petition for Review, *supra* note 11, at 1–2.

it seek to change the way in which district lines are drawn.<sup>190</sup> Each of these proposals, which litigation on its own is unlikely to cause to come to fruition, would be certainly be complicated to configure and politically difficult to achieve. Yet, these would be more direct ways to ensure equitable funding across districts.

Rather, Pennsylvanian activists and legislators have, for years, been pushing a proposal that would eliminate school property taxes and would replace them with increases in personal income and sales taxes.<sup>191</sup> Most of the incentives for this proposal seem not to be equalizing educational outcomes; these efforts are aimed at fairness toward property owners.<sup>192</sup> This approach seems unlikely to have any lasting effect on the equity between school districts and is much more likely to lead to further deficits in education spending overall.<sup>193</sup>

In any event, the *William Penn* lawsuit does not seem likely to result in the Pennsylvania Supreme Court declaring the commonwealth's heavy reliance on property taxes to fund local school districts unconstitutional. At a minimum, Pennsylvania's 500 districts should be consolidated in an effort to utilize economies of scale and cut back on administrative costs.<sup>194</sup> States like Maryland and Florida have used this

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190. *Id.* at 120–23.

191. Editorial, *Finally, Pa. Gets Serious About Property Taxes*, DEL. CNTY. DAILY TIMES (Dec. 15, 2019), [https://www.delcotimes.com/opinion/editorial-finally-pa-gets-serious-about-property-taxes/article\\_426b77bc-1f31-11ea-8df4-973f3cd04c6f.html](https://www.delcotimes.com/opinion/editorial-finally-pa-gets-serious-about-property-taxes/article_426b77bc-1f31-11ea-8df4-973f3cd04c6f.html).

192. See Stephen Caruso, *Pennsylvania's Property Tax, Explained: A Moral Wrong, or the Building Block of Government Finance?*, PA. CAP.-STAR (Sept. 6, 2019), <https://www.penncapitalstar.com/working-the-economy/pennsylvanias-property-tax-explained-a-moral-wrong-or-the-building-block-of-government-finance/>.

193. See Bradley S. Dornish, *Is PA Ready to End (Most) Prop Tax Funding for Education?*, 20 LAWS. J., Jan. 5, 2018, at 1, 16, 20 (describing how eliminating the school property tax and replacing it with new income and sales taxes would mean that “education funding would still be more than \$5 billion a year short.”).

194. See Thomas A. DeLuca, *Do Countywide LEAs Allocate Expenditures Differently from Community-Centric LEAs? Evidence from National Center for Education Statistics Common Core Data*, 40 J. EDUC. FIN. 222, 242 (2015) (finding that states with single county LEAs experience administrative cost savings, but do not always allocate those savings to enhancing classroom instruction).

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countywide district approach,<sup>195</sup> and New Jersey is also considering a recommendation to eliminate about half of its almost 600 school districts.<sup>196</sup> This approach would be beneficial in Pennsylvania because it would enable local funds from counties to be more evenly spread between the schools within those counties.<sup>197</sup> Additionally, consolidating school districts in Pennsylvania would enable better resource allocation among schools, leading to potential improvements in the quality of the education.<sup>198</sup>

Indeed, Pennsylvania has a history of school district consolidation: in the 1950s, there used to be over 2,500 districts.<sup>199</sup> The General Assembly enacted two pieces of legislation in the 1960s that enabled those districts to consolidate into 528 districts by 1972.<sup>200</sup> The laws from the 1960s are still in place, but have only been used once in the last decade to consolidate two districts into one.<sup>201</sup> In 2007, a study was conducted that “considered the ‘optimal’ student census for [school] districts—3,000 per to reach the required economies of

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195. *Id.* at 223 (describing Maryland and Florida, among others, as states where each county encompasses a single LEA).

196. Stephen Stirling & Adam Clark, *Hundreds of N.J. School Districts Should Be Eliminated, Experts Say. Here’s the List*, NJ.COM, [https://www.nj.com/education/2018/08/hundreds\\_of\\_nj\\_school\\_districts\\_should\\_be\\_eliminat.html](https://www.nj.com/education/2018/08/hundreds_of_nj_school_districts_should_be_eliminat.html) (Jan. 30, 2019).

197. See DeLuca, *supra* note 194, at 242–43; see also Katherine Barrett & Richard Greene, *Why Schools Resist Consolidating*, GOVERNING (Oct. 2014), <https://www.governing.com/columns/smart-mgmt/gov-school-consolidation-wars.html>.

198. Barrett & Greene, *supra* note 197 (noting that the “benefits of school consolidation go beyond fiscal savings. There are educational improvements. Four districts with one small high school apiece may not have the resources to provide, say, a dedicated music teacher. But if the districts are unified, then it can quickly become affordable to hire one itinerant music teacher.”).

199. Colin McNickle, Opinion, *Here’s the Case for Consolidating Pa’s Public Schools*, PENN LIVE, [https://www.pennlive.com/opinion/2018/10/heres\\_the\\_case\\_for\\_consolidati.html](https://www.pennlive.com/opinion/2018/10/heres_the_case_for_consolidati.html) (Jan. 29, 2019).

200. Eric Montarti, *Does the Pa. School Consolidation Need an Overhaul?*, 18 ALLEGHENY INST. PUB. POL’Y (Oct. 17, 2018), <https://www.alleghenyinstitute.org/wp-content/uploads/2018/10/Vol18No39.pdf>.

201. See *id.* (noting that “[t]he current statutory language . . . permits two or more school boards to pass resolutions indicating a desire to combine. That is followed by an application to the state Board of Education which then approves or denies the application with recommendations. The Central Valley School District combination between the Monaca and Center school districts a decade ago was carried out under this language and brought the state’s district count to the current 500.”).

scale.”<sup>202</sup> After this study, the governor “suggested there be no more than 100 districts, a mixture of countywide and multi-municipal districts.”<sup>203</sup> The General Assembly should restart the process of merging school districts. It should update the school consolidation statutes, outline a process for districts to begin feasibility studies for district mergers, allocate a budget for doing so, and offer incentives for districts that merge.

*B. Eliminate the “Hold Harmless” Provision from the Basic Education Funding Formula*

The *William Penn* Petitioners seek a court declaration that the BEF formula, which had not even begun to take effect at the time of the lawsuit’s filing, is unconstitutional, and that the “existing school-financing arrangement violates Article III, section 32 of the Pennsylvania Constitution” because it denies “students who reside in school districts with low property values and incomes [the] same opportunities” as those students “who reside in school districts with high property values and incomes.”<sup>204</sup> This merely slaps a Band-Aid on the issue, rather than truly attacking the root cause of the problem. The BEF formula has the potential to be successful.<sup>205</sup> The Pennsylvania Supreme Court should not declare it to be unconstitutional at this early stage. What the Petitioners fail to address is the clear problem that would imminently be presented if the BEF formula is struck down: there would be no formula at all. Pennsylvania had no funding formula for the better part of three decades prior to enactment of this formula.<sup>206</sup> Why would

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202. McNickle, *supra* note 199.

203. *Id.*

204. Petition for Review, *supra* note 11, at 121.

205. See *BEFC Primer*, *supra* note 74, at 9 (“In only its third year, the fair funding formula has begun to address the ingrained inequities in PA’s school funding, but its impact has been limited since it only applies to a small portion of the commonwealth’s overall basic education funding.”); COLLINS, *supra* note 15, at 1 (noting that while the funding formula as enacted would likely lead to equitable funding over time, some critics have estimated that equitable funding would likely take decades).

206. See *supra* text accompanying note 73.

it be desirable to revert to the past? Rather than starting from scratch, and enduring additional years of a funding scheme where no formula exists, the BEF formula should be amended to distribute 100% of all state education money according to the formula.

Rather than wait to see how this lawsuit plays out and what happens if the funding formula is declared unconstitutional, the legislature and the governor should act *now*. The BEF formula is a step in the right direction because it acknowledges that state resources should be equitably distributed “according to various student and school district factors.”<sup>207</sup> However, the formula does not go nearly far enough to alleviate the glaring funding disparities across districts in Pennsylvania—and it essentially ignores that districts have varying levels of need based on student population and the district’s varying levels of property values based on neighborhood.<sup>208</sup> Perhaps the most glaring issue of all is that the formula continues the practice of “hold harmless.”

Hold harmless is “the practice of guaranteeing that a school district receives no less than the same amount of state basic education dollars that it received in the prior fiscal year”—in other words, this provision grandfathers funding amounts districts receive from year to year.<sup>209</sup> In Pennsylvania, education funding policy provides that once schools are granted a certain share of funding, they must continue to receive at least that share—notwithstanding whether their enrollments decline, their tax base is more than sufficient, or other school districts’

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207. BEFC REPORT, *supra* note 75, at 4.

208. For example:

A PTA at a well-off school might raise a million dollars or more to pay for additional teachers’ salaries, band or orchestra instruments, a new library, iPads for classrooms, field trips, or other initiatives. Other PTAs can’t afford things like that, which can give different schools, even those close to one another, vastly different resources.

Suzanne Cope, *The Power of a Wealthy PTA*, ATLANTIC (Nov. 5, 2019), <https://www.theatlantic.com/education/archive/2019/11/pta-fundraising-schools/601435/>.

209. BEFC REPORT, *supra* note 75, at 36.

needs are greater.<sup>210</sup> The formula's impact over the past three years has "begun to address the ingrained inequities in PA's school funding, but its impact has been limited since it only applies to a small portion of the commonwealth's overall basic education funding."<sup>211</sup> Only 9% of the total basic education funding was distributed under the BEF formula in the 2018–19 budget.<sup>212</sup> This is because the BEF Committee decided to maintain the hold harmless practice, making it so only *newly added* funding to the state education budget each year would be disseminated through the funding formula.<sup>213</sup> Until all funding is distributed through this formula, and until school district funding is not tethered to local property values, the inequities will persist.<sup>214</sup>

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210. *Id.*; LNP Editorial Board, Opinion, *Remedying the School Funding Gap Would Help to Fix the School Achievement Gap*, LANCASTER ONLINE (Oct. 30, 2019), [https://lancasteronline.com/opinion/editorials/remedying-the-school-funding-gap-would-help-to-fix-the/article\\_e5d04eb8-faa7-11e9-8cc6-63ed0c6e546e.html](https://lancasteronline.com/opinion/editorials/remedying-the-school-funding-gap-would-help-to-fix-the/article_e5d04eb8-faa7-11e9-8cc6-63ed0c6e546e.html). After examining the arguments for and against the hold harmless provision, the BEF Commission ultimately recommended that only new funding should not be subject to hold harmless. BEFC REPORT, *supra* note 75, at 68. The Commission seems to have made this recommendation because "eliminating the hold harmless clause would have a significant negative impact on many school districts across the Commonwealth that would be unable to make operational adjustments or generate revenue from other sources to make up for the loss of basic education funding." *Id.*

211. *BEFC Primer*, *supra* note 74, at 9.

212. F. Frank Ayata & Jeremy Anderson, *Pennsylvania, in 2018 State of the States*, 44 J. EDUC. FIN. 321, 322 (2019). This amounted to just \$538,700,000 of the \$6.09 billion BEF. *Id.* at 321–22. The amount flowing through the formula increased only slightly for the 2019–20 school year: less than \$700 million of the \$6.7 billion in BEF. LNP Editorial Board, *supra* note 210.

213. LNP Editorial Board, *supra* note 210. To illustrate, one local newspaper's editorial board explained:

Let's say you'd like to refinance your home's 6 percent, 30-year fixed-rate mortgage to lock in a new interest rate of, say, 4 percent. After you do the deal, you're told your new 4-percent rate will only apply to 10 percent of the \$200,00 mortgage. So you'd get the new rate on \$20,000. The other \$180,000 would continue to drum up interest at the 6 percent rate. You'd probably wonder how that's going to make any difference at all.

You might even say it wasn't fair.

Editorial, *PA's Fair Funding Formula for Basic Education Doesn't Live up to its Name*, BUCKS CNTY. COURIER TIMES (Mar. 7, 2019, 5:57 AM), <https://www.buckscountycouriertimes.com/opinion/20190307/editorial-pas-fair-funding-formula-for-basic-education-doesnt-live-up-to-its-name>.

214. The inequities in education funding do not occur solely on the basis of wealth—overall, "districts serving the most students of color also tend to receive less state and local funding than districts serving the fewest." EDUC. TRUST, *FUNDING GAPS: AN ANALYSIS OF SCHOOL FUNDING*

## CONCLUSION

Children’s ZIP codes should not dictate the quality of education they receive. Unfortunately, due to a variety of factors discussed in this Note, Pennsylvania school districts have been inequitably funded for decades, and they will remain this way until the legislature makes some major changes. Time is of the essence—“[t]he longer it takes to come up with a new funding system, the more children will be hurt by the system’s inadequacy and inequity . . . .”<sup>215</sup>

Thus far, the reform efforts that have focused on moving away from education funded by property taxes have been motivated by a desire to reduce the burden felt by property owners to fund education, and less with the objective of improving educational quality. What is actually needed is an intentional effort to improve equality of access to educational opportunities and in outcomes.<sup>216</sup> Petitioners in *William Penn* are asking the court to force lawmakers to focus on establishing a funding formula “that gives all students access to a quality education.”<sup>217</sup> The Pennsylvania General Assembly absolutely should take action toward this end. Yet, it remains unclear whether the Pennsylvania Supreme Court is willing or able to direct the legislature to make changes to the way education is funded, because the court, at least until very recently, has been reluctant to instruct the legislative branch on how to fulfill its constitutional obligations.

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EQUITY ACROSS THE U.S. AND WITHIN EACH STATE 10 (2018), <https://equity.cps.edu/tools/funding-gaps-an-analysis-of-school-funding-equity-across-the-u-s-and-within-each-state>.

Wealth disparities and racial makeup are not mutually exclusive concepts. *See, e.g.,* Michela Zonta, *Racial Disparities in Home Appreciation*, CTR. AM. PROGRESS (July 15, 2019, 12:01 AM), <https://www.americanprogress.org/issues/economy/reports/2019/07/15/469838/racial-disparities-home-appreciation/> (noting that “[s]egregation, disparate access to credit and homeownership, and the consistent devaluation of homes in black neighborhoods combine to constrict the ability of African Americans to build equity and accumulate wealth through homeownership.”).

215. Palochko, Wojcik & Merlin, *supra* note 66.

216. *See* Martin et al., *supra* note 31 (“School finance reform must focus on the quality of every school, from the excellence of the instruction to the rigor of the classes.”).

217. Palochko, Wojcik & Merlin, *supra* note 66.