Political Question Doctrine in the Keystone State: A Legal Analysis of Pennsylvania School Funding in Light of *William Penn School District v. Pennsylvania Department of Education*

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Pennsylvania is one of several states in which the courts have historically neglected to rule on the constitutionality of school funding, instead relying on the political question doctrine to deny justiciability of cases.[1] In 2016, the Pennsylvania Supreme Court received appeal, in *William Penn School District. v. Pennsylvania Department of Education,*[2] challenging the established political question doctrine and the constitutionality of the current school funding formula.[3] Nearly fifteen years since *Marerro v. Commonwealth*,[4]

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[1] Scott Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 Ala. L. Rev. 701, 741 (2010) (noting "At this writing, the highest courts of twenty-six states have addressed education finance constitutional challenges at least partly founded on theories of adequacy, and they have issued rulings as to justiciability or have adjudicated the merits and either issued or abstained from issuing a remedy.") *See also* Christine 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 (2009).

[2] William Penn School Dist. v. Pennsylvania Dept. of Educ., 114 A.3d 456 [318 Ed. Law Rep. [383]] (Pa. Commw. Ct. 2015).

[3] Marrero v. Commonwealth, 739 A.2d. 110 [139 Ed.Law Rep [533]] (Pa. 1998).

[4] *Id.*

appellants now build an argument that challenges the political question doctrine that denied justiciability in *Marerro*.

This paper analyzes the political question doctrine and the recent developments in Pennsylvania school funding litigation. Part I provides a legal background of the political question doctrine as applied to school finance litigation. Part II reviews the equal protection and education article challenges raised by petitioners in the pending case, *William Penn School District* v. *Pennsylvania Department of Education,* and Part III concludes with speculation on the future of school funding litigation and the political question doctrine in Pennsylvania.

Part I: Judicial Review and Non-Justiciable Political Questions

In *Marbury v. Madison*, the Supreme Court underscored the principle of judicial review in American jurisprudence.[5] Courts frequently cite *Marbury* in support of a court's power to review a legislative, administrative, or lower court decision. Despite this, there are instances in which a court declines to exercise this power. Instead of ruling on a case's merits, judges may instead declare that the legal question presented before them amounts to a non-justiciable political question. In layman's terms, by issuing such a ruling, courts are essentially saying "take this concern somewhere else." As one commentator has noted, "the political question doctrine is one of the methods for abstaining from the exercise of judicial review . . .[p]rovid[ing] the courts with a means to avoid deciding a case on its

[5] Marbury v. Madison, 5 U.S. 137 (1803).

merits"[6] This "method of abstention" is used with surprising frequency in school finance cases. Professor Scott Bauries notes "about a third of courts [addressing challenges to state finance systems] have dismissed cases asking for such enforcement on grounds of non-justiciability" noting that "[b]ecause affirmative duty provisions are directed at state legislatures and because their terms are so subjective, these legislatures are vested with complete and unreviewable discretion."[7]

The Supreme Court Weighs in on the Issue of Non-Justiciable Political Questions

In 1962 the U.S. Supreme Court addressed the political question doctrine in *Baker v. Carr*.[8] This case, a Section 1983 challenge, argued that a Tennessee statute that "[a]pportion[ed] the members of the General Assembly among the State's 95 counties. . ."[9] amounted to an unconstitutional violation of petitioners' equal protection rights. The U.S. District Court for the Middle District of Tennessee was sympathetic to petitioners' arguments, noting that:

> [T]he Court entirely agrees . . . with [t]he plaintiffs' argument that the legislature of Tennessee is guilty of a clear violation of the state constitution and of the rights of the plaintiffs. . . It also agrees that the evil is a serious one which should be corrected without further delay. "[10]

However, despite this strong language, the court declared that the judiciary was not the correct venue for petitioners' concerns, stating "[r]emedy in this situation clearly does not lie with the courts. It has long been recognized and is accepted doctrine that there are

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[6] Michelle L. Sitorius, *Nebraska Coalition for Educational Equity & Adequacy v. Heineman – The Political Question Doctrine: A Thin Black Line Between Judicial Deference and Judicial Review*, 87 Neb. L. Rev. 793, 794 (2009).
[7] Scott Bauries, *The Education Duty*, 47 Wake Forest L. Rev. 705, 730(2012).
[8] Baker v. Carr, 369 U.S. 186 (1962).
[9] *Id.* at 187.
[10] Baker v. Carr, 179 F.Supp. 824, 828 (M.D. Tenn. 1959).

indeed some rights guaranteed by the Constitution for the violation of which the courts cannot give redress."[11]

On appeal, the U.S. Supreme Court disagreed with the lower court's ruling and remanded the case back to the Middle Tennessee District court. The High Court noted that "[t]he mere fact that the suit seeks protection of a political right does not mean it presents a political question."[12] The Court opined that:

> The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the 'political question' label to obscure the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.[13]

The Court identified a small group of "analytical threads"[14] that could *properly* be considered non-justiciable political questions by courts. These included matters of "foreign relations,"[15] "dates of duration of hostilities,"[16] "validity of enactments,"[17] or "the status of Indian tribes."[18] After outlining categories which clearly could be considered political questions, the Court opined that "unless one of these formulations is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence."[19] The Court continued, noting:

> But it is argued that this case shares the characteristics of decisions that constitute a category not yet considered, cases concerning the Constitution's guaranty, in Art. IV,

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[11] *Id.*
[12] Baker v. Carr, 369 U.S. 186, 209 (1962).
[13] *Id.* at 210-11.
[14] *Id.* at 211.
[15] *Id.*
[16] *Id.* at 213.
[17] *Id.* at 214.
[18] *Id.* at 215.
[19] *Id.* at 217.

> s 4, of a republican form of government . . . we shall discover that the Guaranty Clause claims involve those elements which define a 'political question,' and for that reason and no other, they are nonjusticiable. In particular, we shall discover that the nonjusticiability of such claims has nothing to do with their touching upon matters of state governmental organization.[20]

After presenting a thorough analysis of relevant Guaranty Clause caselaw, the Court concluded that "[t]he nonjusticiability of claims resting on the Guaranty Clause which arises from their embodiment of questions that were thought 'political' can have no bearing upon the justiciability of the equal protection claim presented in this case."[21] Thus, the Court held that petitioners' case "[e]ntitled . . . appellants . . . to a trial and a decision"[22] and reversed and remanded the case to the District Court. In *Baker,* the Court made it clear that questions involving political issues should not, simply by virtue of the political nature of the challenge, be disregarded as non-justiciable political questions by lower courts.[23]

State courts, however, have sometimes taken a different approach, leaving school funding petitioners with no viable way to challenge school funding formulae via the judicial system. One scholar has noted: "Justiciability restrictions on the state level are less than those limiting federal courts. State common law courts quite properly 'hear an array of questions that would be nonjusticiable under federal law.'"[24]

The Practical Effect of Political Question Holdings on School Funding Petitioners: The Example of Illinois

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[20] *Id.* at 217-18.
[21] *Id.* at 228.
[22] *Id.* at 237.
[23] Even before the lower court heard the case the General Assembly of Tennessee enacted new legislation "reapportioning legislative seats." *Baker v. Carr*, 206 F. Supp. 341, 344 (M.D. Tenn. 1962).
[24] Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions,* 73 Alb. L. Rev. 1459, 1518, citing Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 Harv. L. Rev. 1833, 1863-65 (2001).

One area of the law in which courts have repeatedly found issues of law to be political questions is in school funding litigation. This can be a particularly troubling holding for petitioners seeking reform in states where the legislature has failed to act on concerns related to state funding for public education. For example, Illinois courts have repeatedly declined to rule on the constitutionality of the state's funding system, instead referring petitioners to the General Assembly for relief.[25] Despite this, petitions to the state legislature to effect significant change to the state funding system have largely fallen upon deaf ears. Citing financial difficulties, very few – if any – changes to a broken education funding system have been effectuated.

In 1996 the Illinois Supreme Court heard the case *Committee v. Edgar*, a class action lawsuit involving 37 of the state's more property-poor school districts.[26] Petitioners in *Edgar* argued that the current state funding scheme for public education resulted in significant disparities between property-poor and property-wealthy Illinois school districts. Petitioners presented evidence showing that during the 1989-90 school year "the average tax base in the wealthiest 10% of elementary schools was over 13 times the average tax base in the poorest 10%."[27] This had the practical effect of allowing property-wealthy school districts to raise significantly more money, per-pupil, at far lower tax rates as compared to property-poor school districts.

Petitioners' central argument in *Edgar* was that the funding system created conditions whereby property-poor school districts – no matter how much they taxed

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[25] *See* Christine Kiracofe, *When State Constitutional Arguments Fail: Challenging School Finance Inequities under the Illinois Civil Rights Act*, 273 Ed. Law Rep. 479 (2012).
[26] Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178 [114 Ed. Law Rep [576]](Ill. 1996).
[27] *Id.* at 1182.

themselves – could never reach the level of per-pupil funding achieved by their property-wealthy counterparts. Conversely, children attending schools in property-wealthy school districts received far more money per-pupil, despite the fact that their parents were taxed at lower (and sometimes significantly lower) rates than those in property-poor districts.

Reading between the lines, the court's decision in *Edgar* suggested some judicial discomfort with the state's system of educational funding. The court's decision was prefaced with the statement that its decision "[i]n no was represent[ed] an endorsement of the . . . system of financing public schools in Illinois."[28] Despite this implied discomfort, the state high court declined to rule on the funding system's constitutionality, holding that "the process of reform must be undertaken in a legislative forum rather than in the courts."[29]

In *Lewis E. v. Spagnolo*, the Illinois Supreme Court was once again asked by petitioners to weigh in on the constitutionality of the state funding system.[30] This case, heard three years after the court's non-decision in *Edgar*, involved plaintiffs from the East St. Louis School district in southwestern Illinois. Petitioners in *Spagnolo* argued that the Illinois education financing formula did not provide students in this district with even a minimally adequate education.[31] Once again, just as it had ruled three years prior, the Illinois Supreme court held that petitioners' claims amounted to a non-justiciable political

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[28] Christine Kiracofe, *When State Constitutional Arguments Fail: Challenging School Finance Inequities under the Illinois Civil Rights Act*, 273 Ed. Law Rep. 479, 489 (2012), citing Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1196 [114 Ed. Law Rep [576]] (Ill. 1996).
[29] *Id.*
[30] Lewis E. v. Spagnolo, 710 N.E.2d 798 [141 Ed. Law Rep. [222]] (Ill. 1999).
[31] *Id.* at 800.

question, stating "[q]uestions relating to the quality of a public school education are for the legislature, not the courts, to decide."[32]

The Illinois General Assembly did not need petitioners in *Edgar* or *Spagnolo* to point out deficiencies with the state funding formula. While the issues raised in these cases were slightly different, petitioners' arguments were essentially the same: the state funding formula was broken and needed to be fixed. In fact, the general assembly was well aware that per-pupil funding in the state was far less than was actually needed to provide an adequate education to Illinois' students.

In 1997, the Illinois General Assembly hired the education consulting firm of Augenblick & Meyers to conduct a statewide costing-out study to determine the amount of per-pupil funding (foundation level) needed to result in "[t]wo-thirds or more of the non-at-risk children pass[ing] standardized tests" while controlling for district spending "at or below economic cost factors."[33] Essentially, the state wanted to know how much it would cost, per-pupil, for a district to educate at least 66% of non-at-risk students to the point that they could pass standardize tests in the most cost-effective way possible. This metric has been used for nearly two decades by the state-mandated Education Funding Advisory Board tasked with making foundation level proposals to the Illinois General Assembly.[34]

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[32] Christine Kiracofe, *When State Constitutional Arguments Fail: Challenging School Finance Inequities under the Illinois Civil Rights Act*, 273 Ed. Law Rep. 479, 489 (2012), citing Lewis E. v. Spagnolo, 710 N.E.2d 798, 800 [141 Ed. Law Rep. [222]] (Ill. 1999).

[33] Christine Kiracofe, *When State Constitutional Arguments Fail: Challenging School Finance Inequities under the Illinois Civil Rights Act*, 273 Ed. Law Rep. 479, 489-90 (2012), citing CTR. FOR TAX AND BUDGET ACCOUNTABILITY, ILLINOIS' SCHOOL FUNDING FORMULA AND GENERAL STATE AID 1, 5 (2006).

[34] The Illinois Education Funding Advisory Board was established by Illinois Public Act 90-548 and is composed of five non-partisan board members from education, business, and the general public. This Board is tasked with making recommendations to the General

The parameters of the metric set by the General Assembly were flawed; the No Child Left Behind Act, then in effect, mandated that *all* children should be able to meet state standardized test benchmarks no later than 2014. Despite this, for every year since fiscal year 2003 the state has knowingly underfunded education by setting a foundation level below the level which is necessary for 66% of non-at-risk students to pass standardize tests. Thus, funding petitioners in Illinois are left in a quagmire. When they bring their concerns before the Illinois Supreme Court they are told that the concerns they raise are political questions, and thus must be addressed to the legislature instead of the courts. However, the legislature continues to knowingly underfund education and has made no significant changes to the state funding formula in years. This creates a proverbial catch twenty-two: the courts direct petitioners to the legislature, and the legislature leaves no other option for petitioners than taking their concerns to courts.

Considering the Justiciability of School Funding in Colorado:

***Lobato v. State (Lobato II)*[35]**

Like Illinois, justiciability was at issue in a 2005 challenge to the Colorado system of financing public schools. Petitioner Anthony Lobato, a parent of two Colorado public school children, in addition to forty-six other parents and taxpayers, joined with fourteen school districts in the state to challenge the adequacy of the state finance system under the Colorado Constitution.

Assembly, applying the Augenblick and Meyers metric, for what the state foundation level should be.

[35] Lobato v. State, 304 P.3d 1132 [295 Ed. Law Rep. [791]] (Colo. 2013).

In March 2006 a Colorado district court judge granted defendants' motion to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim.[36] Defendants' motion to dismiss argued, in part, that petitioners' claim "[p]resents a non-justiciable political question and the Colorado Constitution commits the determination of educational adequacy to the legislative branch."[37] Regarding this claim, the court found that "the current financing scheme is in accord with the minimum mandates of Amendment 23,[38] does not pose a constitutional question, and is therefore non-justiciable."[39] On appeal, the Colorado Court of Appeals affirmed the trial court decision.[40] Thus, for the four years between 2005-09 (when the Colorado Supreme Court would reverse the lower court decisions), Colorado petitioners found themselves in very much the same position as their Illinois counterparts: challenges to the state funding system were deemed to be a non-justiciable political question and as such any claims regarding the adequacy of the system would not be considered by the courts.[41]

However, Colorado petitioners seeking to have courts recognize their challenge to the state financing system as justiciable scored a significant victory in 2009. On appeal, the Supreme Court of Colorado reversed the lower courts' decisions and remanded the case,

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[36] Lobato v. State of Colorado, 2006 WL 4037485 (Colo. Dist. Ct., Trial Order, 2006).
[37] *Id.*
[38] *Id.* Amendment 23 was adopted by the state in 2000 and "set the minimum level of state funding for public education."
[39] *Id.*
[40] Lobato v. State, 216 P.3d 29 [248 Ed. Law Rep. [891]] (Colo. App. 2008).
[41] For a thorough discussion of justiciability in adequacy litigation between 2005-08, *see* Julie Simon-Kerr & Robynn Sturm, *Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education*, 6 Stan. J. Civ. Rts. & Civ. Liberties 83 (2010).

stating "we reverse the court of appeals' holdings that the plaintiff school districts lack standing to sue the state and that the plaintiffs have alleged a non-justiciable claim."[42]

On remand, the trial court found, in part, that the state's "[c]urrent public school financing system is not rationally related to the . . . constitutional mandate to provide a 'thorough and uniform' system of public schools"[43] and thus enjoined the state from "continuing to execute the current . . . system."[44] On appeal, in *Lobato II,*[45] the Colorado Supreme Court reaffirmed the justiciability of petitioners' claim. Applying the rational basis test, the court found the state funding formula to be permissible under the "thorough and uniform" clause of the state's education article.[46]

Like Illinois and Colorado, the political question doctrine has also been applied to school finance cases in Pennsylvania. The state's high court was first called upon to address the constitutionality of Pennsylvania's school funding clause a few years after the landmark school funding case *San Antonio v. Rodriguez*,[47] in *Danson v. Casey.*[48] In *Danson*, petitioners argued that school funding for the Philadelphia public school system violated state constitutional mandates. Petitioners initially claimed that inadequate state funding would necessitate the closure of Philadelphia public schools before the planned end of the 1976-77 school year. When "the predicted early closing did not occur. . ." the district

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[42] Lobato v. State, 218 P.3d 358, 362 [249 Ed. Law Rep. [881]] (Colo. 2009).
[43] *Id.* at 363.
[44] Lobato v. State (Lobato II), 304 P.3d 1132 [295 Ed. Law Rep. [791]] (Colo. 2013) at ¶ 6.
[45] Lobato v. State (Lobato II), 304 P.3d 1132 [295 Ed. Law Rep. [791]] (Colo. 2013)
[46] For an overview of the *Lobato II* decision, *See* Recent Case, *Colorado Supreme Court Upholds State's School Finance System as Rationally Related to the "Thorough and Uniform" Mandate of the Colorado Constitution's Education Clause,* 127 Harv. L. Rev. 803 (2013).
[47] San Antonio v. Rodriguez, 411 U.S. 1 (1973). [In Rodriquez, the U.S. Supreme Court ruled for the state in a school funding challenge that largely foreclosed the possibility of petitioners challenging state funding schemes being successful in Federal court].
[48] Danson v. Casey, 399 A.2d 360 (Pa. 1979).

amended its petition, claiming instead that the district would only be able to offer students a "truncated and uniquely limited program of educational services."[49] The Pennsylvania high court declined to discuss the merits of the case, finding instead that "[a]ppellants have failed to state a justiciable cause of action."[50]

The state's school funding system was challenged again in *Marrero v. Commonwealth*,[51] nearly two decades after *Danson*. Petitioners in *Marrero* represented the city of Philadelphia, joined by district students and parents as well as the Philadelphia Branch of the NAACP. This group petitioned the Commonwealth Court of Pennsylvania, arguing "[b]ecause the School District operates in an urban environment, it [should be] 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."[52] Petitioners argued that the state's failure to provide adequate funding for Philadelphia public schools in light of these unique district characteristics violated the state constitution. Addressing the issue of whether or not petitioners' questions were political in nature (as the state supreme court had held years earlier in *Danson*), the court utilized criteria established by the U.S. Supreme Court, in *Baker v. Carr:*[53]

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or lack of judicially manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision

[49] *Id.* at 419.
[50] *Id.* at 420.
[51] Marrero v. Commonwealth of Pennsylvania, 709 A.2d 956 [125 Ed. Law Rep. [1270]] (Pa. 1998).
[52] *Id.* at 959.
[53] Baker v. Carr, 369 U.S. 186 (1962).

> already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[54]

Referencing the state supreme court's previous decision in *Danson*, the Commonwealth court noted that state law "[p]laces the responsibility for the maintenance and support of the public school system squarely in the hands of the legislature."[55] The court continued, noting:

> [T]his court will not inquire into the reason, wisdom, or expediency of the legislative policy with regard to education, nor any matters relating to legislative determinations of school policy or the scope of educational activity . . . [determining what constitutes an adequate 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 our government.[56]

Thus, just as the state supreme court had done nearly two decades before, the *Marrero* court found that school funding raised a non-justiciable political question and dismissed petitioners' claim with prejudice.

One year after the decision in *Marrero*, the state supreme court reaffirmed its position on the non-justiciability of school finance challenges.[57] The court dismissed petitioners' equity challenge to the school funding system in *Pennsylvania Association of Rural and Small Schools v. Ridge*.[58] This was the third time in two decades that Pennsylvania judges affirmed their stance of school finance challenges raising non-justiciable political questions reserved to the state legislature.

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[54] Baker v. Carr, 369 U.S. 186, 217 (1962) as cited by Marrero v. Commonwealth of Pennsylvania, 709 A.2d 956, 960 [125 Ed. Law Rep. [1270]] (Pa. 1998).
[55] Marrero v. Commonwealth of Pennsylvania, 709 A.2d 956, 965 [125 Ed. Law Rep. [1270]] (Pa.1998).
[56] *Id.* at 965-66.
[57] School Funding Info, *Pennsylvania: Overview of Litigation History*, available online at: http://schoolfunding.info/litigation-map/pennsylvania/#1484027471823-39225d8b-5561 (last accessed August 16, 2017).
[58] Pennsylvania Ass'n of Rural and Small Schools v. Ridge, 737 A.2d 246 (Pa. 1999).

Part II: *William Penn School District v. Pennsylvania Department of Education* and the Challenge Against Political Question Doctrine

School funding reform petitioners' most recent case is *William Penn School District v. Pennsylvania Department of Education* (*William Penn*).[59] Petitioners in *William Penn* consisted of a group of six school districts, parents of district schoolchildren, a Pennsylvania rural and small school association, and the state chapter of the NAACP. The timing of the litigation may have been politically motivated. As School Funding Info., a Project of the Campaign for Educational Equity at Columbia Teachers College, notes, the case was filed "on the heels of the election ousting Republican incumbent Tom Corbett in favor of his challenger, Democrat Tom Wolf, for Pennsylvania governor."[60] Petitioners in *William Penn* raised both equity and adequacy challenges, asserting that school funding in the state has a differential, negative effect on Pennsylvania schoolchildren in property-poor school districts.

Petitioners in *William Penn* attempted to differentiate their case from *Marrero* by tying "[t]he concept of an adequate education to state academic standards established by legislation and regulation."[61] In Count I, petitioners argued that the state has "[d]efined the content of the education system and the level of proficiency that the individual students

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[59] William Penn School Dist. v. Pennsylvania Dept. of Educ., 114 A.3d 456 [318 Ed. Law Rep. [383]] (Pa. Commw. Ct 2015).
[60] School Funding Info, *Pennsylvania: Recent Events*, available online at: http://schoolfunding.info/litigation-map/pennsylvania/#1484027471823-39225d8b-5561 (last visited Aug. 16, 2017).
[61] *Id.*

must attain in order to meet the requirements of the Education Clause."[62] Despite this, petitioners alleged that:

> [R]espondents have violated their constitutional duties by failing to provide sufficient resources to meet those standards because the current funding levels are irrational, arbitrary and not reasonably calculated to ensure that all students are provided with the required course of study or services or obtain the required proficiency in the subject areas.[63]

In Count II, petitioners argued that education is a fundamental state right and as such requires the state to ensure all students "[t]he same fundamental opportunity to meet academic standards and obtain an adequate education and prohibits Legislative Branch Respondents from irrationally enacting laws that benefit a select few."[64] Petitioners asserted that by discriminating against students in property-poor districts, the current funding scheme violates students' equal protection rights. *William Penn* petitioners asked the Commonwealth court to find:

> (1) public education is a fundamental right to all school-age children;
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> (2) the Education Clause requires Respondents to provide support to ensure that all students obtain an adequate education to meet state academic standards and meaningful participation in the civic, economic, social, and other activities of our society;
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> (3) the present funding system violates the Education Clause and the students' rights;
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> (4) the Equal Protection Clause requires Respondents to provide funding that does not discriminate based on income or taxable property;
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> (5) the present school funding system violates the Equal Protection Clause by providing students in school districts with high property values and incomes the opportunity to meet state standards and obtain an adequate education while

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[62] William Penn School Dist. v. Pennsylvania Dept. of Educ., 114 A.3d 456, 458-59 [318 Ed. Law Rep. [383]] (Pa. Commw. Ct. 2015), citing Petition for Review at ¶ 302.
[63] William Penn School Dist. v. Pennsylvania Dept. of Educ., 114 A.3d 456, 459 [318 Ed. Law Rep. [383]] (Pa. Commw. Ct. 2015), citing Petition for Review at ¶¶ 304-05.
[64] *Id.* at ¶¶ 308-10.

denying students in districts with low property values and incomes those same opportunities;

(6) the funding disparities between the school districts is not justified by any compelling governmental interest and is not rationally related to any legitimate government objective; and

(7) Respondents are violating Petitioners' constitutional rights by implementing the school financing arrangement."[65]

The state's response echoed *Danson* and *Marrero*, arguing that petitioners' claims are non-justiciable political questions. Although petitioners in *William Penn* attempted to distance their arguments in this case from previous unsuccessful state funding litigation, the Commonwealth court was not persuaded. Once again school funding was deemed a non-justiciable political question. The court noted "contrary to petitioners' assertions, the adoption of statewide academic standards and assessments and the costing-out study and subsequent appropriations since the Supreme Court's decision in *Marrero . . .* do not preclude its application in this case."[66] On April 21, 2015 the court dismissed the case and shortly thereafter petitioners appealed to the Pennsylvania Supreme Court.

On appeal, petitioners asserted that the lower court erred by dismissing appellants' equal protection and education article claims under the guise of the political question doctrine. Regarding the equal protection claim, appellants argued that the lower court's order is contrary to legal precedent. Petitioners noted that the Pennsylvania High Court, despite finding that *Danson* addressed a non-justiciable political question, "reached the

[65] William Penn Sch. Dist. v. Pennsylvania Dept. of Educ., 114 A.3d 456, 461 [318 Ed. Law Rep. [383]] (Pa. Commw. Ct. 2015), citing Petition for Review at ¶¶ 312-19.
[66] William Penn School Dist. v. Pennsylvania Dept. of Educ., 114 A.3d 456, 463 [318 Ed. Law Rep. [383]] (2015).

merits of an equal protection challenge to education funding."[67] Further, appellants argued that equal protection claims should always be justiciable "[b]ecause they involve individual rights that the judiciary has a fundamental duty to safeguard."[68]

Appellants buttressed their arguments by further asserting that, under *Baker*, the political question doctrine should never apply in equal protection claims. Petitioners argued that "none of the *Baker* factors support judicial abstention here . . ."[69] They further asserted that, despite the dozens of school funding cases in nearly every state in the nation, there has not been "[a] single decision in which another state court has found such a claim non-justiciable under *Baker*."[70] Regarding equal protection claims specific to the state of Pennsylvania, appellants noted that state courts "[r]outinely adjudicate equal protection claims in a variety of contexts to ensure that the legislature does not infringe on individual rights."[71]

In addition to their equal protection arguments, appellants also argued the Pennsylvania Supreme Court should reverse the commonwealth court decision finding petitioners' education article claims to be non-justiciable political questions. First, appellants argued that "[t]his Court has never adopted a *per se* rule that education funding challenges are non-justiciable."[72] Appellants argued that this is an incorrect interpretation of *Marrero*, stating plainly that "[M]arrero says no such thing."[73] Instead of holding that

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[67] *Brief of Appellants at 19, William Penn School District v. Pennsylvania*, No. 46 MAP 2015 *(Pa. April 15, 2015).*
[68] *Id.*
[69] *Id.* at 24.
[70] *Id.* at 25.
[71] *Id.* [Noting that the Pennsylvania Supreme Court has addressed equal protection claims related to "Sunday Trading Laws," for example].
[72] *Id.* at 27.
[73] *Id.*

school funding challenges in the state would be "[i]mmune from constitutional challenge under all circumstances" petitioners argued that the key issue in *Marrero* was the perceived lack of judicially manageable standards to evaluate petitioners' claims.

Appellants' second argument revolved around the U.S. Supreme Court's holding in *Baker.* They asserted that the *Baker* factors do not support the lower court's decision regarding political doctrine questions. Petitioners argued for justiciability in light of the facts that: "(i) neither the text nor history of the Pennsylvania Constitution prevents the judiciary from enforcing the Education Clause, (ii) there are judicially manageable standards in place for resolving Petitioners' claims, and (iii) resolving those claims would require no public-policy judgments."[74] They underscored their argument for justiciability by highlighting the fact that many other states have "[c]rafted effective and noninvasive remedies . . . further demonstrating that courts are well equipped to resolve such [education article] claims."[75] Appellants noted that the only *Baker* factor that could be interpreted as favoring judicial abstention is the first one, stating that it would only apply in "[t]he rare circumstance where the text of the Pennsylvania Constitution entrusts the legislature with the power to self-monitor the constitutionality of its own actions."[76] This, appellants argued, is not so with the present case. The education article of the state constitution is entirely silent on the issue of whether the legislature is empowered to monitor compliance of its constitutionally mandated duty to "provide for the maintenance and support of a thorough and efficient system of public education."[77] This silence means that it is the duty of the judiciary to interpret the state education article language and

[74] *Id.* at 29.
[75] *Id.*
[76] *Id.*
[77] P.A. Const. art III, B. §14.

determine whether or not the legislature is meeting its constitutional burden. To underscore this assertion, appellants highlighted the history of the state's education article, arguing that the legislature has never been tasked with compliance monitoring in this area of the law.

Citing *Baker*'s second factor, appellants noted that judicial abstention is only appropriate "[w]hen there is a lack of judicially discoverable and manageable standards for resolving the petitioners' claims."[78] Appellants argued that state academic standards and assessments (adopted in 1999) coupled with the costing-out study commissioned by the legislature in 2007 provide the court with the requisite "[j]udicially discoverable and manageable standards."[79] For example, petitioners highlighted student performance on state assessments as a possible objective benchmark, noting that this has been the metric used by states like Washington, Kansas, and Idaho in similar school funding lawsuits.

Finally, appellants argued that "[e]ven if the *Baker* factors favored abstention, the Court should decline to apply the political-question doctrine because public education is a fundamental right and any separation-of-powers concerns must give way to protecting the hundreds of thousands of students who are being denied an opportunity to meet state standards."[80] Appellants suggested that if the court were to find that education is a fundamental state right, the court would not be able to declare school funding is a non-justiciable political question. To support their argument, appellants cited language from an earlier Pennsylvania Supreme Court decision in *Gondelman v. Commonwealth*[81] holding

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[78] *Brief of Appellants at 32, William Penn School District v. Pennsylvania*, No. 46 MAP 2015 *(Pa. April 15, 2015).*
[79] *Id.*
[80] *Id.*
[81] *Id.* at 43, citing Gondelman v. Commonwealth, 554 A.2d 896, 899 (Pa. 1989).

"[a]ny concern for a functional separation of powers is . . . overshadowed if the [legislation] impinges upon the exercise of a fundamental right."[82] Appellants' brief closed by highlighting the importance of Pennsylvania courts not deferring judgment on school finance issues by declaring them to be non-justiciable. They argued:

> By abandoning Pennsylvania's well-established equal-protection and political-question analyses, the lower court adopted a bright-line rule that the judiciary can never determine whether Pennsylvania's school funding scheme is equitable or adequate. That is not, and has never been, the law in Pennsylvania. Without judicial oversight, public education would cease to be a right, much less a fundamental one, and the legislature's constitutional duty could be avoided without consequence, no matter how extreme the dereliction . . . [t]o preserve the constitutional rights of all Pennsylvania children, this Court should reverse the lower court's Order and hold that Petitioners' equal protection and Education Clause claims are justiciable.[83]

Oral arguments in the case were heard by the Pennsylvania Supreme Court in September 2016. A year later, in September 2017, the court delivered an opinion overturning the lower court's decision regarding the political question doctrine and acknowledging the justiciability of appellants' education and equal protection claims. The case has been remanded to the lower trial Commonwealth court to hear the case on its merits.[84]

> The spirit of Chief Justice Marshall's cautionary refrain has informed the clear majority of state courts that have held it their judicial duty to construe interpretation-begging state education clauses like ours to ensure legislative compliance with their constitutional mandates, no matter the difficulties invited or, in many cases, confronted. We hold that our Education Clause, viewed in the overarching context of our cases taking up the question of abstention from political questions, compels the same result. To the extent our prior cases suggest a contrary result, they must yield.[85]

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[82] *Id.*
[83] *Id.* at 44.
[84] *Opinion*, William Penn School District v. Pennsylvania Department of Education, No. 46 MAP 2015 (Pa. September 28, 2017).
[85] *Id.* at 83-84.

In the 85-page opinion, the court addressed petitioners' political question arguments, noting that a textual commitment does not exist in the Pennsylvania Constitution that grants the sole discretion to interpret whether that duty delegated in the Education Clause is fulfilled.[86] In other words, the Pennsylvania Constitution does not explicitly vest the obligation and prerogative to self-monitor on the General Assembly:

> That the mandate charges the General Assembly with maintaining and supporting a 'thorough and efficient' system of public education' by no means implies that the legislature's efforts at doing so may be granted exclusively by that body without judicial recourse.[87]

Additionally, the court ruled that judicially manageable standards could be established without making an initial policy decision. The court rejected "[r]espondents' and the lower courts' artificially narrow account of how a court may go about reviewing Education Clause challenges."[88] In doing so, the court recognized that many other state courts, despite the difficulty, have reviewed similar education clause challenges and have interpreted the right to an education within those states granted by their education and equal protection clauses.

> [C]ourts in a substantial majority of American jurisdictions have declined to let the potential difficulty and conflict that may attend constitutional oversight of education dissuade them from undertaking the task of judicial review. Their methods of doing so, the standards and rigor they employ, and their degree of their deference to legislative determinations vary, as do the results of the cases they have considered. That a case is entertained on the merits hardly guarantees victory for either side. But it cannot be said that the inability to fashion a tidy, mechanical standard of review for such challenges has prompted many other states to abandon their judicial function[89].

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[86] *Id.* at 52-53.
[87] *Id.* at 53-54.
[88] *Id.* at 73.
[89] *Id.* at 69.

In its opinion, the court cited decisions from other states, including those in West Virginia, North Carolina, New York, Washington, Tennessee, Illinois, Ohio, New Jersey, Minnesota, and Oregon.

Appellants successfully convinced the court that the lower court erred in its decision that school funding involves a non-justiciable political question. Despite this victory, the path to a new funding system for Pennsylvania's children remains a long one. The Supreme Court decision sends the case back to the trial court where petitioners must convince the court that "[P]ennsylvania's school funding system is broken."[90] A victory at the trial court could mean the state legislature would be directed to "[c]reate a better system of funding which complies with the constitution."[91] However, litigants noted, "[i]t will initially be up to the legislature to make the decisions how to fix the system."[92]

Trying to "read the tea leaves" and guess which way the courts will go moving forward is difficult. The decision by the Supreme Court reversed decades of prior decisions, putting the trial court into new territory into which it has not previously ventured. Almost twenty years have passed since *Marrero* and only one of the seven justices who was part of that decision remains seated on the court today, in major part because of retirement and resignations from the Pennsylvania Supreme Court.[93] That justice authored one of the two dissenting opinions in *William Penn*. Thus, even though the

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[90] Fair Education Funding Lawsuit, *Oral Argument Recap*, September 15, 2016, available online at: https://edfundinglawsuit.wordpress.com/2016/09/15/oral-argument-recap/#more-263 (last accessed August 18, 2017).
[91] *Id.*
[92] *Id.*
[93] The seven justices of the Pennsylvania Supreme Court are initially elected statewide and serve ten year terms after which justices are 'up for retention' to the Court by the voters.

justices considered prior supreme court decisions, the recent decision in *William Penn* was made by an (almost) entirely different court.

While the case moves forward to the lower court, it is important to note that Pennsylvania lawmakers have already attempted to address many of the issues related to school funding raised in *William Penn.* In 2016, the General Assembly and the Governor enacted significant changes to the basic education funding law,[94] amending the school funding formula to include student-based factors such as enrollment change, poverty, median household income, and population of English Language learners. The new formula was a result of a bi-partisan, legislative commission that reviewed Pennsylvania's basic education funding formula.[95] The new formula distributes additional state funds, beginning with the 2015-16 school year. However, the enacted formula applies only to new moneys that might be appropriated in a given year and keeps in place districts' funding levels prior to the formula change. Thus, the funding formula benefits districts that have been considered underfunded to the extent that additional funds are appropriated. Whether or not this measure is "enough" to pass constitutional muster remains an issue the courts will likely address as the case moves forward.

Part III: The Future of School Funding Litigation in Pennsylvania

While appellants wait for the case to begin again in the Commonwealth trial court in *William Penn*, Pennsylvania school children disadvantaged by the state funding system continue to press lawmakers for funding reform. Appellants argue the inadequate or inequitable education offered to many Pennsylvania public schoolchildren is not a new

[94] Act of Jun. 1, 2016 (P.L. 252, No. 35).
[95] Act of Jun. 10, 2014 (P.L. 675, No. 51).

issue for the state. Some of the very same issues raised in modern funding litigation echo similar questions that have been presented before the General Assembly for more than 185 years. The origin of the funding discussion began when Pennsylvania first established a system of public education during the growing debate about states' roles in providing for a system of public education. During a debate in 1833, then Governor George Wolf noted that half of the 730,000 children in the state under twenty years old lacked any opportunity for public school instruction. In a message to the General Assembly, he urged members that "it is time, fellow-citizens, that the character of our State be redeemed from the state of supineness and indifference under which its most important interest, the education of its citizens, has so long been languishing."[96]

The General Assembly passed the Free Schools Act of 1834 soon thereafter, creating the birth of Pennsylvania's free public schools for poor children. And since this enactment, Pennsylvania has had a long history of caring for public education.[97] Regardless of the outcome in *William Penn*, the ultimate power for change in Pennsylvania, much like 185 years ago, lies within the General Assembly.

Petitioners' original complaint highlights school funding advocates' concern about the impact that inequitable and inadequate state funding is having on students attending schools in economically disadvantaged school districts. For example, during the 2012-13 school year "[o]ver one-third of students in the state (*mostly from poor districts*) failed to

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[96] Governor George Wolf Annual Message to the Assembly - December 4, 1833. In G. E. Reed (Ed., 1901), *Papers of the Governors* (Vol. VI). Harrisburg, PA: Pennsylvania State Archives.
[97] *See* Louise Walsh & Matthew Walsh, *History and Organization of Education in Pennsylvania.* (1930), available online at https://hdl.handle.net/2027/mdp.39015008840095.

meet certain state academic standards"[98] [emphasis added]. A 2015 *Washington Post* article described the stark differences between high- and low-wealth school districts:

> At Martin Luther King High [in Philadelphia] . . . there aren't enough textbooks to go around. If teachers want to make a photocopy, they have to buy paper themselves. Though an overwhelming majority of students are living in poverty, no social worker is available to help. Private donations allow for some dance and music classes, but they serve just 60 of the school's 1,200 students. At Lower Merion High, **10 miles away** in a suburb of stately stone homes, copy paper and textbooks are available but are rarely necessary: Each student has a school-provided laptop. A pool allows for lifeguarding classes, and an arts wing hosts courses in photography, ceramics, studio art and jewelry making. The campus has a social worker.[99]

High wealth districts in Pennsylvania (from the same 2012-13 school year referenced by petitioners) spent $28,400 per pupil while students in property-poor districts received $9,800 in per pupil funding – just 35 cents on the dollar as compared to students in high-wealth districts.

The significant disparity in spending between high- and low-wealth districts in Pennsylvania, according to Governor Wolf and school funding advocates, is largely due to the fact that "[P]ennsylvania's 500 school districts rely more heavily than the national average on local property taxes. Though poor communities often tax themselves at higher rates than wealthier communities, their low tax base means they can't raise as much money as wealthier towns."[100] The exact same argument was made to explain the stark funding

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[98] School Funding Info, *Pennsylvania: Overview of Litigation History*, available online at: http://schoolfunding.info/litigation-map/pennsylvania/#1484027471823-39225d8b-5561 (last accessed August 16, 2017).
[99] Emma Brown, *Pennsylvania schools are the nation's most inequitable. The new governor wants to fix that*. The Washington Post, April 22, 2015, available online at: https://www.washingtonpost.com/local/education/pa-schools-are-the-nations-most-inequitable-the-new-governor-wants-to-fix-that/2015/04/22/3d2f4e3e-e441-11e4-81ea-0649268f729e_story.html?utm_term=.81fb9196ce87 (last accessed August 18, 2017).
[100] *Id.*

disparities between high- and low-wealth school districts in Illinois.[101] When school funding comes primarily through local sources, district wealth has a dramatic impact on per-pupil funding – especially in states with a large number of school districts.

In states like Illinois and Pennsylvania, it is difficult for low-wealth school districts to rectify funding issues by themselves: no tax rate is high enough, in many districts, to raise the per-pupil funding level to an adequate one to meet state standards. The only way that real change can be effectuated is through legislative action. However, when legislatures fail to act effectively (or at all, in some cases), the only remedy for concerned advocates is to file lawsuits asking courts to intervene and *require* legislatures to change the way they fund public schools. As Thaddeus Stevens, who was a prominent supporter of public schools, spoke on the floor of the Pennsylvania House chamber in 1835 to stop the repeal of the Free Schools Act:

> I trust that when we come to act on [the question of free public schools], we shall all take the lofty ground — look beyond the narrow space which now circumscribes our vision — beyond the passing, fleeting point of time on which we stand; and so cast our votes that the blessing of education shall be conferred on every son of Pennsylvania, shall be carried home to the poorest child of the poorest inhabitant of your mountains so that even he may be prepared to act well his part in this land of freemen.[102]

Pennsylvania's children deserve no less in 2017 than they did in 1835. However, defining the contours of an adequate and equitable education is certainly more complex than in 1835. As the court noted in *William Penn*, many other states have interpreted the

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[101] *See* Kelly Summers, Jon Crawford & Christine Kiracofe, *A Legal and Statistical Analysis of Illinois School Funding in Light of Pending Litigation in Chicago Urban League v. Illinois*, 309 Ed. Law Rep. 595 (2014).

[102] *The Selected Papers of Thaddeus Stevens*, *Volume 1: April 1814-August 1865* (1997); University of Pittsburgh Press.

"thorough and efficient" language in their constitutions.[103] Creating a system of public education that satisfies the court will result in a complex set of questions about inputs, outputs, and outcomes. Pennsylvania, like many states before it, will now have to consider issues related to educational adequacy and equity when it comes to school funding.[104] The path that the state is about to travel is a complex one and "victory" can be an elusive term. In some states, school funding challenges continue years or even decades after courts initially rule them unconstitutional. With the Pennsylvania Supreme Court's decision in *William Penn*, Pennsylvania joins many other states that continue to experience school funding litigation. Regardless of the ultimate outcome, the court's decision in *William Penn* reverses decades of non-justiciability and will certainly create a new era in Pennsylvania school funding litigation.

[103] *Supra, 89* (The court opinion notes that Pennsylvania's education clause has "through and efficient" language similar to the state constitutions in West Virginia, Maryland, Minnesota, New Jersey, Ohio, Wyoming, and Illinois.) at 66.
[104] Bruce Baker and Kevin Welner, *School Finance and Courts: Does Reform Matter, and How Can We Tell?*, Teachers College Record Vol. 113 No. 11 (2011) pgs. 2374–2414. (Reviewing the effect of implemented funding reforms in Kentucky, Massachusetts, Wyoming, and New Jersey after each state court ruled previous funding formulas to be unconstitutional).