IN THE SUPREME COURT OF PENNSYLVANIA

NO. 46 MAP 2015

WILLIAM PENN SCHOOL DISTRICT, *et al.*,

Appellants,

v.

PENNSYLVANIA DEPARTMENT OF EDUCATION, *et al.*,

Appellees.

BRIEF AMICI CURIAE of Law School Professors

Robert Williams, Distinguished Professor of Law and Associate Director, Center for State Constitutional Studies, Rutgers University School of Law;

Seth Kreimer, Kenneth W. Gemmill Professor of Law, University of Pennsylvania;

Wendell E. Pritchett, Presidential Professor of Law, University of Pennsylvania;

Robert J. Reinstein, Clifford Scott Green Professor of Law, Temple University Beasley School of Law

as Amici Curiae in Support of Appellants William Penn School District, et al.

Robert Williams
Distinguished Professor of Law
Sarah Ricks, Pa. Bar No. 60421
Clinical Professor of Law
Rutgers University Law School
217 N. 5th Street
Camden, NJ 08102
(856) 225-6400

Seth Kreimer, Pa Bar No. 26102
Professor of Law
The Law School
3501 Sansom Street
Philadelphia, PA 19104
(215) 898-7447

Counsel for Amici

TABLE OF CONTENTS

INTRODUCTION…….....1

ARGUMENT.....1

I. The *Marrero* Court Failed to Address the Text, History and Structure Demonstrating that Article III, Section 14 Imposes Enforceable Duties on the Legislature……3

II. The *Marrero* Court's Analysis of the Political Question Doctrine Has Been Superceded by Subsequent Cases from this Court..……..18

III. The *Marrero* Court's Analysis of the Education Clause Is a Minority Position In State Constitutional Law and Should be Reexamined in Light of Better Reasoned and More Applicable Decisions from other State Supreme Courts..……24

A. State Supreme Courts Construing Directly Comparable Constitutional Provisions Requiring the Establishment of a "Thorough" and "Efficient" System of Education Have Unanimously Rejected Arguments for Abstention Since *Marrero*…….……...25

B. The Majority of State Supreme Courts Construing Other State Education Clauses Have Properly Rejected Calls for Abstention…….27

C. The Minority of State Supreme Courts that Have Abstained from Enforcing Educational Mandates Under State Constitutions Since Marrero Have Relied on Permissive Constitutional Wording Entirely Absent from the Pennsylvania Constitution…….37

CONCLUSION…… 43

TABLE OF AUTHORITIES

Cases **Page**

Abbeville Cnty. Sch. Dist. v. State
767 S.E.2d 157(S.C. 2014)……...…….. 28, 33, 34

Abbott v. Burke
20 A.3d 1018 (N.J. 2011) 27

Ayala v. Phila. Bd. of Pub. Educ.
305 A.2d 877 (Pa. 1973)..... 12

Bd. of Pub. Educ. v. Ransley
58 A. 122 (Pa. 1904)..... 8

Bd. of Educ. v. W. Va. Bd. of Educ.
639 S.E.2d 893 (W.Va. 2006)..... 27

Bonner v. Daniels
907 N.E.2d 516 (Ind. 2009);..... 40

Brigham v. State
889 A.2d 715 (Vt. 2005)..... 31, 33

Buckwalter v. Borough of Phoenixville
985 A.2d 728 (Pa. 2009)..... 4

Campaign for Fiscal Equity, Inc. v. State
801 N.E.2d 326 (N.Y. 2003)..... 29

Campaign for Fiscal Equity, Inc. v. State
861 N.E.2d 50 (N.Y. 2006)..... 29

Campbell Cnty. Sch. Dist. v. State
181 P.3d 43 (Wyo. 2008) 27

City of Phila. v. Com.
838 A.2d 566 (Pa. 2003)..... 17

Claremont Sch. Dist. v. Governor
703 A.2d 1353 (N.H. 1997) 36

C*laremont Sch. Dist. v. Governor*
794 A.2d 744 (N.H. 2002) 30

Columbia Falls Elementary Sch. Dist. No. 6 v. State
109 P.3d 257 (Mont. 2005) 30, 33

Comm. for Educ. Equal. v. State
294 S.W.3d 477 (Mo. 2009) 28

Com. ex rel. Corbett v. Griffin
946 A.2d 668 (Pa. 2008) 23

Com. v. Edmunds
586 A.2d 887 (Pa. 1991)……..……24

Com. v. Hartman
17 Pa. 118 (1851)…….6, 14

Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell
990 A.2d 206 (Conn. 2010)…….16, 25, 29, 33, 34, 36

Consumer Party of Pa. v. Com.
507 A.2d 323 (Pa. 1986)……...16, 17, 23

Council 13, AFSCME, AFL-CIO ex rel. Fillman v. Rendell
986 A.2d 63 (Pa. 2009) 19, 23

Danson v. Casey
399 A.2d 360 (Pa. 1979) 10

Davis v. State
804 N.W.2d 618 (S.D. 2011)……...….25, 27

DeRolph v. State
780 N.E.2d 529 (Ohio 2002) 26

Ex parte James
836 So. 2d 813 (Ala. 2002)..... 42

Fair Sch. Fin. Council of Okla. Inc. v. State
746 P.2d 1135 (Okla. 1987)..... 42

Firing v. Kephart
466 Pa. 560 A.2d 833 (Pa. 1976)..... 4

Ford v. Sch. Dist. of Kendall Borough
15 A. 812 (Pa. 1888)..... 12

Gannon v. State
319 P.3d 1196 (Kan. 2014)……25, 28, 32, 35

Grimaud v. Com.
865 A.2d 835 (Pa. 2005)..... 19

Hancock v. Comm'r of Educ.
822 N.E.2d 1134 (Mass. 2005)..... 30

Hoke Cnty. Bd. of Educ. v. State
749 S.E.2d 451 (N.C. 2013) 31

Hoke Cnty. Bd. of Educ. v. State
599 S.E.2d 365 (N.C. 2004)……31

Holt v. 2011 Legislative Reapportionment Comm'n
38 A.3d 711 (Pa. 2012)..... 22

Holt v. Legislative Redistricting Comm'n
614 364 A.3d 711 (Pa. 2012)..... 5

Horton v. Meskill
172 Conn. 615 (Conn. 1977) 16

Hosp. & Health Sys. Ass'n of Pa. v. Com.
77 A.3d 587 (Pa. 2013)..... 19, 20, 21, 23

Hussein v State
973 N.E. 2d 752 (N.Y. 2012)..... 29

Idaho Schs. for Equal Educ. Opportunity v. State
129 P.3d 1199 (Idaho 2005) 30

Idaho Schs. For Equal Educ. Opportunity v. State
76 P.2d 913 (Idaho 1998) 30

Ieropoli v. AC&S Corp.
577 A.2d 919 (Pa. 2004)..... 4

In re Bruno
101 A.3d 635(Pa. 2014)..... 4, 24

In re Com., Dep't of Transp.
515 A.2d. 899 (Pa. 1986)..... 16

In re Teachers' Tenure Act Cases
197 A.344 (Pa. 1938)..... 43

In re Walker
36 A. 148 (Pa. 1897) 8

Jubelirer v. Rendell
953 A.2d 514, 528 (Pa. 2008).....4, 22

Jubelirer v. Singel
162 A.2d 352 (Pa. Commw. Ct. 1994) 23

Kahn v. Griffin
701 N.W.2d 815 (Minn. 2005)..... 26

Kanawha Cnty. Pub. Library Bd. v. Bd. of Educ. of Kanawha
745 S.E.2d 424 (W. Va. 2013)..... 27

King v. State
818 N.W.2d 1 (Iowa 2012).....39, 40

Lake View Sch. Dist. No. 25 v. Huckabee
257 S.W.3d 879 (Ark. 2007) 31, 33

Lobato v. People
218 P.3d 358 (Colo. 2009)..... 29

Lobato v. State
304 P.3d 1132 (Colo. 2013)..... 29

Londonderry v. State
907 A.2d 988 (N.H. 2006) …….30

Londonderry Sch. Dist. v. State
157 N.H. 734 (N.H. 2008)..... 30

Marbury v. Madison
5 U.S. 137 (1803).....20, 21, 33

Marrero v. Com.
739 A. 2d 110 (Pa. 1999).....1, 3, 18

Marrero by Tabales v. Com.
709 A.2d 956 (Pa. Commw. Ct. 1998)..... …3

Md. State Bd. of Educ. v. Bradford
875 A.2d 703 (Md. 2005)..... 26

McCleary v. State
269 P.3d 227 (Wash. 2012).....28, 33

McDuffy v. Sec'y of Exec. Office of Educ.
615 N.E.2d 516 (Mass. 1993)..... 14

Mesivtah Eitz Chaim of Bobov, Inc. v. Pike Cnty. Bd. of Assessment Appeals
44 A.3d 3 (Pa. 2012).....4, 15, 22

Minsinger v. Rau
84 A. 902 (Pa. 1912)..... 10

Montoy v. State
62 P.3d 228 (Kan. 2003)……..……....28

Montoy v. State
112 P.3d 923 (Kan. 2005)……...28

Montoy v. State
120 P.3d 306 (Kan. 2005)……28

Montoy v. State
138 P.3d 755 (Kan. 2006)..... 28

Nebraska Coal. for Educ. Equity & Adequacy v. Heineman
731 N.W.2d 164 (2007)…….40, 41

Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.
176 S.W.3d 746 (Tex. 2005).....30, 32, 36

Okla. Educ. Ass'n v. State ex rel. Okla. Legislature
158 P.3d 1058 (Okla. 2007)..... 41

Parker v. Com.
6 Pa. 507 (Pa. 1847) …….6

Pa. AFL-CIO v. Com.
757 A.2d 917 (Pa. 2000)..... 19

Pa. Sch. Bds. Ass'n v. Com. Ass'n of Sch. Adm'rs., Teamsters Local 502
805 A.2d 476 (Pa. 2002)..... 19

Pa. State Ass'n of Cnty. Comm'rs v. Com.
52 A.3d 1213 (Pa. 2012)..... 19

Pa. State Ass'n of Jury Comm'rs v. Com.
78 A.3d 1020 (Pa. 2013)..... 4

Pennsylvanians Against Gambling Expansion Fund, Inc. v. Com.
877 A.2d. 383 (Pa. 2005).....17, 19

Powell v. McCormack
395 U.S. 486 (S. Ct. 1978)..... 21

Robinson Twp. v. Com.
83 A.3d 901 (Pa. 2013).....5, 14, 19, 22, 24

Seattle Sch. Dist. No. 1 v. State
585 P.2d 71 (Wash. 1978) 14, 33

Sheff v. O'Neill
678 A.2d 1267 (Conn. 1996)..... 24

Skeen v. State
505 N.W.2d 299 (Minn. 1993) 26

State v. Campbell Cnty. Sch. Dist.
32 P.3d 325(Wyo. 2001).....37

State v. Lewis
789 N.E.2d 195 (Ohio 2003) 26

Stilp v. Com.
588 Pa 539 A.2d 918 (Pa. 2006)..... 4

Sweeney v. Tucker
473 Pa. 493, 375 A.2d 698 (Pa. 1977).....20, 21

Thornburgh v. Lewis
504 Pa. 206 A.2d 952 (Pa. 1983)..... 19

Wilson v. Sch. Dist. of Phila.
195 A. 90 (Pa. 1937).....6, 10

Woonsocket Sch. Comm. v. Chafee
89 A.3d 778 (R.I. 2014)..... 38

Zauflik v. Pennsbury Sch. Dist.
104 A.3d 1096 (Pa. 2014)..... 4

Constitutional Provisions

Ala. Const. art. XIV, § 256 42

Ark. Const. art. XIV, § 1..... 31

Col. Const. art. IX § 2…….29

Conn. Const. art. VII § 1…….29

Idaho Const. art. IX, § 1…… 30

Ind. Const. art. XIII, §1…….. 40

Iowa Const. art. 9, 2nd, § 3…… 39

Kan. Const. art. VI, § 6…… ..28

Mass. Const. pt. II(c)(5), § 2…… 30

Mo. Const. art. IX, § 1(a) 28

Mont. Const. art. X, § 1…….30

Neb. Const. art. I, § 4; art. VII, § 1…….….40

N.C. Const. art. I, § 15; art. 9, § 2(1)……..…31

N.H. Const. pt. 2 art. 83……..30

N.Y. Const. art. XI § 1…… .29

Okla. Const. art. , § 5; art. , § 32; art. III, § 1……41, 42

Pa. Const. art. III, §14……..3, 5, 7, 10, 13

Pa. Const. art. V § 1……19

Pa. Const. art. VII, § 1 (1790)..... 5, 7

Pa Const. art. VIII, § 2 15

Pa. Const. art. X, § 1 (1874) 8, 10, 12

Pa. Const. art. XI, § (1874)……..9

R.I. Const. art. XII, § 1……..38

S.C. Const. art. XI, § 3…….28

Tex. Const. art. VII § 1……..30

Vt. Const. c. II, § 68…….30

Wash. Const. art. IX, § 1……..28

Other Authorities

Debates of the Convention to Amend the Constitution of Pennsylvania, Vol.II (1873)……..9,10,11,12

Frank P. Grad, The State Constitution: Its Function and Form for Our Time, 54 Va.L.Rev. 928 (1968)……....15

Louis Henkin, Is there a "Political Question" Doctrine?, 85 Yale L.J. 597 (1976) .. 21

Pa. Legislative Journal, House, January 30, 1967 13

Pennsylvania Bar Association, Pennsylvania Constitutional Revision Handbook (1966)..... 13

Pennsylvania Economy League, Comparison of Proposed New Constitutional Provisions with Pennsylvania's Present Constitution (April 1965) 13

Robert F. Williams, The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents, 27 Okla. City U.L. Rev. 189 (2002)..... 4, 14

Rosalind L. Branning, *Pennsylvania Constitutional Development* (1960)... 10, 16, 17

Thomas G. Saylor, Prophylaxis in Modern State Constitutionalism: New Judicial Federalism and the Acknowledged Prophylactic Rule, 59 N.Y.U. Annual Survey of Am. L. 283 (2003)……...4, 24

Woodside, Pennsylvania Constitutional Law 17

INTRODUCTION

We are law professors at schools of law in Pennsylvania and New Jersey. We are specialists in federal and state constitutional. In our professional capacities, we have researched, studied, or written about state constitutional law and public law issues of the kind this Court now faces-- involving the judiciary and its relationship to the legislative and executive branches of government. We will not rehearse the parties' arguments on the merits of their substantive claims, but rather will confine ourselves to their justiciability. As friends of the Court, we offer the benefits of our experience, our expertise, and our academic perspective. We write as individual amici in this case, not as representatives of the schools we serve.

ARGUMENT

In *Marrero v. Commonwealth*, 739 A. 2d 110 (Pa. 1999), the Pennsylvania Supreme Court concluded that the "thorough and efficient" claims pressed by the plaintiffs were not justiciable. For reasons fully discussed by the plaintiffs, the current case presents a quite different factual matrix. *Amici* write to emphasize reasons not to extend *Marrero's* conclusion beyond its limits, and, indeed, to revisit the underlying reasoning of *Marrero* itself.

First, the text, structure and history of Pennsylvania's Education Clause (Article III, Section 14) point toward the proposition that Pennsylvania's

constitutional mandate of a "thorough and efficient system of public education" imposes judicially enforceable obligations on the legislature.

Second, this Court's proper analysis of the "political question" doctrine since *Marrero* casts doubt on the conclusion that the doctrine can legitimately stand as a flat bar to the adjudication of claims of the legislature's constitutional duties regarding education.

Third, the *Marrero* Court's analysis is a minority position in state constitutional law, and should be reexamined in light of the better reasoned and more applicable decisions from other state supreme courts.

If the petitioners' claims are meritorious in substance, the Pennsylvania courts may appropriately issue a declaratory judgment to that effect and, in due course, consider and enter any further injunctive relief that may be warranted. In determining the scope of an appropriate injunction to enforce the petitioners' rights, the courts may take account of any efforts by the executive or legislative branches to redress constitutional flaws in the current system. But the judicial branch retains authority to articulate and elaborate the scope of the petitioners' rights and the respondents' duties. The rights of the children of Pennsylvania regarding education are not left by our Constitution to the whims of the legislature.

I. The *Marrero* Court Failed to Address the Text, History and Structure Demonstrating that Article III, Section 14 Imposes Enforceable Duties on the Legislature.

In *Marrero*, Chief Justice Flaherty's opinion accepted the Commonwealth Court's conclusion that "'we are precluded from addressing the merits of the claims underlying the instant action as the resolution of those issues [has] been solely committed to the discretion of the General Assembly under Article 3, Section 14 of the Pennsylvania Constitution.'" *Marrero v.Commonwealth*, 739 A.2d at 113 (quoting *Marrero by Tabales v. Commonwealth*, 709 A.2d 956, 966 (Pa. Commw. Ct. 1998)).

The *Marrero* opinion did not address the text, the history or structure of Article III, Section 14, contenting itself with the conclusory statement that the "summary of the rationale of Commonwealth Court discloses no error, but rather a conscientious adherence to precedent[.]" 739 A.2 at 114.

As this Court has remonstrated repeatedly in the decade and a half since *Marrero*, an analysis of the meaning of a provision of the Pennsylvania Constitution requires more than this cavalier treatment. In construing the Pennsylvania Constitution, this Court has stated:

> "[o]ur ultimate touchstone is the actual language of the Constitution itself." *Stilp v. Commonwealth*, 588 Pa 539, 905 A.2d 918, 939 (Pa. 2006) (*citing Firing v. Kephart*, 466 Pa. 560, 353 A.2d 833, 835-36 (Pa. 1976)). The language of the Constitution "must be interpreted in its popular sense, as understood by the people when they voted on its adoption." *Id*. (*quoting Ieropoli v. AC&S Corp*., 577 Pa. 138, 842 A.2d 919, 925 (Pa. 2004)).

Jubelirer v. Rendell, 953 A.2d 514, 528 (Pa. 2008).[1]

Yet the *Marrero* opinion referred neither to the words of the Education Section, which are unambiguously mandatory, nor to its history and the context in which it was adopted. These important guideposts cast doubt on *Marrero's* conclusion that the Legislature has unreviewable authority to — according to petitioners' allegations– take unreasonable actions which eviscerate and evade its

---

[1] *Accord, e.g*., *Pennsylvania State Ass'n of Jury Comm'rs v. Commonwealth*, 78 A.3d 1020, 1032 (Pa. 2013); *Mesivtah Eitz Chaim of Bobov, Inc. v. Pike County Bd. of Assessment Appeals*, 44 A.3d 3, 6-7(Pa. 2012); *Buckwalter v. Borough of Phoenixville*, 985 A.2d 728, 730 (Pa. 2009); *In re Bruno*, 101 A.3d 635, 659 (Pa. 2014) ("the polestar of constitutional analysis undertaken by the Court must be the plain language of the constitutional provisions at issue."); *Zauflik v. Pennsbury Sch. Dist*., 104 A.3d 1096, 1124 (Pa. 2014) (*quoting Bruno, 101 A.3d 635*). *See also*, Thomas G. Saylor, Prophylaxis in Modern State Constitutionalism: New Judicial Federalism and the Acknowledged Prophylactic Rule, 59 N.Y.U. Annual Survey of Am.L. 283, 290-91 (2003) ("[T]here is some degree of consensus that the overarching task is to determine the intent of voters who ratified the constitution. In furtherance of this aim, courts reference, inter alia, text; history (including 'constitutional convention debates, the address to the people, [and] the circumstances leading to the adoption of the provision'); structure; underlying values; and interpretations of other states.") (footnotes omitted) (quoting Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents*, 27 Okla. City U.L. Rev. 189, 194-95 & 200 (2002)) (state constitutions, ratified by electorate, are characterized as "voice of the people," which invites inquiry into "common understanding" of provision).

duty. In these circumstances it is appropriate to revisit *Marrero's* conclusion.[2] We, therefore, canvass both the text and history which the *Marrero* Court ignored.

The constitutional mandate that the General Assembly establish a "thorough and efficient system of public education" currently contained in Article III, Section 14 originates in the Pennsylvania Constitution of 1874. Before adoption of the 1874 Constitution, the Pennsylvania Constitution of 1790 had directed the legislature to establish free schools for the poor "as soon as conveniently may be," Pa. Const. art. VII, § 1 (1790).[3] This wording was understood as permissive and lay largely fallow until the mid-1830s, when, as this Court has observed, "After

---

[2] *See Robinson Twp. v. Commonwealth*, 83 A.3d 901, 946 (Pa. 2013) (plurality opinion)

> [I]n circumstances where prior decisional law has obscured the manifest intent of a constitutional provision as expressed in its plain language, engagement and adjustment of precedent as a prudential matter is fairly implicated and salutary. *See Holt v. Legislative Redistricting Comm'n*, 614 Pa. 364, 38 A.3d 711, 759 n.38 (Pa. 2012) ("As a function of our system of government, this Court has the final word on matters of constitutional dimension in Pennsylvania. Our charter . . . is not easily amended and any errant interpretation is not freely subject to correction by any co-equal branch of our government, other than this Court. For this reason, we are not constrained to closely and blindly re-affirm constitutional interpretations of prior decisions which have proven to be unworkable or badly reasoned.").

[3] "Of public schools. Section I. The legislature shall, as soon as conveniently may be, provide, by law, for the establishment of schools throughout the state, in such manner that the poor may be taught gratis." Pa. Const. art. VII, § 1 (1790). The provision was reenacted virtually verbatim in the Constitution of 1838; the only change was that the title to Article VII read "Public schools" rather than "Of public schools."

Thaddeus Stevens' and Governor Wolf's famous crusade for education, our schools became an integral part of our governmental system, as a state institution[.]" *Wilson v.School Dist*., 195 A. 90, 94 (Pa. 1937).

The process of framing a state system of public education for all which began under the administration of Governor George Wolf in 1834 was accompanied by substantial debate,[4] and the adoption of common schools was ultimately made a matter of local option.[5] A decade and a half later, the Legislature made a common school system mandatory in all municipalities, and this Court firmly rebuffed a challenge to the constitutionality of that action. While the 1790 Constitution's Education Article – reenacted in 1838— directed only a system in which "the poor may be taught gratis," "as soon as conveniently may be," this Court's opinion in *Commonwealth v. Hartman*, 17 Pa. 118, 119-20 (Pa. 1851) held unanimously that the Pennsylvania legislature had plenary authority to act beyond that minimum:

---

[4] For a truncated account, along with the text of the 1835 address of Thaddeus Stevens to the Pennsylvania House of Representatives, *see* The Famous Speech of Hon. Thaddeus Stevens Of Pennsylvania in Opposition to the Repeal of the Common School Law of 1834, in the House of Representatives of Pennsylvania, April 11, 1835 (Thaddeus Stevens Memorial Assn of Philadelphia 1904) available at http://babel.hathitrust.org/cgi/pt?id=inu.30000108889456;view=1up;seq=13.

[5] *See Parker v. Commonwealth*, 6 Pa. 507, 523-25 (Pa. 1847) (describing 1836 statute providing "the question of establishing common schools shall be decided by the qualified voters of the district").

> We are of opinion that there is nothing in that law, certainly nothing in that part of it to which our attention has been particularly called, which, in the slightest degree, contravenes the constitution. It is to be remembered, that the rule of interpretation for the state constitution differs totally from that which is applicable to the constitution of the United States.... Congress can pass no laws but those which the constitution authorizes either expressly or by clear implication; while the Assembly has jurisdiction of all subjects on which its legislation is not prohibited....
>
> The constitution, in sect. 1 of article VII., provides that "the legislature shall, as soon as conveniently may be, provide by law for the establishment of schools throughout the state *in such manner that the poor may be taught gratis*." It seems to be believed that the last clause of this section is a limitation to the power of the legislature, and that no law can be constitutional which looks to any other object than that of teaching the poor gratis. The error consists in supposing this to define the *maximum* of the legislative power, while in truth it only fixes the *minimum*. It enjoins them to do thus much, but does not forbid them to do more. If they stop short of that point, they fail in their duty; but it does not result from this that they have no authority to go beyond it.

Id.

Hartman thus recognized three important points: First, that the Pennsylvania Constitution did impose a duty on the legislation regarding education; second, that duty was of limited force and scope; and third, that the Legislature had inherent authority to exceed the duty. In short, the words of the Constitution constrain the legislature, but are not needed to empower it.

The results of this permissive constitutional system, however, proved unsatisfactory to the People of Pennsylvania. In the Constitution of 1874, they expanded the constitutional duty from a direction that education be provided “to

the poor gratis" "as soon as conveniently may be" to the current unqualified imperative that the Legislature "shall establish" a "thorough and efficient system of education" for all children. As this Court observed in *In re Walker*, 36 A. 148, 149 (Pa. 1897):

> The school system had then been in operation for forty years, yet statistics demonstrated that a large percentage of even Pennsylvania born children grown to manhood or womanhood under the public school system were illiterate. The school laws as administered had not accomplished nearly to the full extent the purpose of its founders. Hence the mandate of the new constitution.[6]

The framers of the 1874 Constitution viewed the mandate to educate the children of Pennsylvania as a crucial obligation of government, and they phrased their work in mandatory and unqualified terms. Gone were the limits of the obligation to "the poor," and banished was the permissive language allowing the legislature to act "as soon as conveniently may be." As proposed by the Convention and adopted by the People, Article X, Section 1 provided:

---

[6] *Accord Board of Pub. Educ. v. Ransley*, 58 A. 122, 123 (Pa. 1904) ("By the constitution of 1790 the people of this commonwealth imposed upon the legislature the positive duty of establishing schools throughout the state for the free education of the poor....What was first a constitutional requirement, that the legislature should establish schools for the education of the poor 'gratis,' in time became a universal demand for free education for all classes . . . . By our present constitution the legislature is to provide for the education of all the children of the commonwealth through 'a thorough and efficient system of public schools.'").

> The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public schools, wherein all the children of this Commonwealth above the age of six years may be educated, and shall appropriate at least one million dollars each year for that purpose.

Pa. Const. art. X, § 1 (1874).[7]

In introducing the provisions of the new Education Article to the Constitutional Convention of 1872-3, Mr. Darlington observed that "If we are all agreed upon any one thing, it is that the perpetuity of free institutions rests, in a large degree, upon the intelligence of the people, and that intelligence is to be secured by education." II Debates of the Convention to Amend the Constitution of Pennsylvania 421 (1873). Unlike the prior constitutional provisions which exhorted the legislature to establish a system of school to educate the poor "as soon as conveniently may be," the 1874 Constitution required that the General Assembly "shall provide for the maintenance and support of a thorough and efficient system of public schools wherein all the children of this Commonwealth above the age of six years may be educated," and mandated that the legislature appropriate a sufficient amount of money adequate to the purpose.

The change in the text of the state constitutional provision concerning

[7] The Framers of the 1874 Constitution knew well how to frame language conferring unrestrained discretion on the Legislature. Immediately following the Education Article, Article XI provided: "The freemen of this Commonwealth shall be armed, organized and disciplined for its defence when and in such manner as may be directed by law." Pa. Const. art. XI, § 1(1874).

education, from the discretionary and limited 1790 and 1838 versions, to the mandatory and substantive standard of a "thorough and efficient" education adopted in the 1874 Constitution is a direct textual commitment to qualitative and quantitative standards in the constitution itself. As one noted commentator observed, the constitutional convention, and the people of the Commonwealth "broadened" the educational mandate. Rosalind L. Branning, *Pennsylvania Constitutional Development* 107 (1960).[8] There is every indication that the broadening was intended to be a meaningful constraint on the legislature.

The proceedings of the 1872-3 convention make clear that the delegates were aware that the provisions of the Education Article were binding and not merely aspirational. The delegates rejected a proposal that the Article require a "uniform" system of education out of concern that it would preclude flexibility to meet local needs. *See* II Debates of the Convention 422-26.[9] This concern, of

---

[8] *Accord Wilson v. School Dist*., 195 A. 90, 94 (Pa. 1937) ("The Constitution of 1874 fortified it and directed the legislature to maintain 'a thorough and efficient system of public schools': Article X, Section 1. The school system, or the school districts, then, are but agencies of the state legislature to administer this *constitutional duty*.") (emphasis added); *Minsinger v. Rau*, 84 A. 902-3 (Pa. 1912) ("The constitution *requires* the legislature to provide and support a thorough and efficient system of schools for the education of the children of the Commonwealth.") (emphasis added).

[9] This Court noted the rejection of the requirement of uniformity in declining to impose a mandate of uniformity under Article III, Section 14. *Danson v. Casey*, 399 A.2d 360, 367 (Pa. 1979) ("In originally adopting the

course, betokened an understanding that the constitutional duties imposed would be mandatory rather than hortatory.[10]

Opponents of the uniformity mandate voiced the belief that it should not be adopted because the mandate of a "thorough and efficient system of education" would "accomplish all that is necessary to accomplish" II Debates of the Convention at 423 (remarks of Mr. Landis) and because the unamended obligation to establish a "thorough and efficient system" was adequate to mandate "an opportunity to every child in the Commonwealth to get an equal chance for a good and proper education" *id* at 424 (remarks of Mr. Simpson). This Court, by contrast, confronts allegations that the challenged system denies any chance for a "good and proper" education to large numbers of the children of

---

'thorough and efficient' amendment to the Pennsylvania Constitution of 1873 [sic], the framers considered and rejected the possibility of specifically requiring the Commonwealth's system of education be uniform. II Debates of the Convention to Amend the Constitution of Pennsylvania, 422-26 (1873) . . . .As long as the legislative scheme for financing public education 'has a reasonable relation' to '[providing] for the maintenance and support of a thorough and efficient system of public schools' the General Assembly has fulfilled its constitutional duty to the public school students of Philadelphia.") (citation omitted).

The Court in *Danson*, unlike this Court was not confronted with a complaint charging that the legislative action is a gross dereliction and not "reasonably related" to effective education of large numbers of Pennsylvania's children.

[10] So, too, where the delegates believed a matter like the choice of school books was "a question for the Legislature," *id*. at 432 (remarks of Mr. Broomall), they declined to include a provision in the Constitution.

Pennsylvania.

The delegates to the Constitutional Convention explicitly adopted the requirement the Legislature appropriate at least $1,000,000 to schools--- a sum adequate in 1874 to provide the assistance necessary to ensure education in "localities where children prevail to a greater extent than wealth." II Debates at 436 (remarks of Mr. Lear); *see id*. at 436-39 (rejecting amendment offered by Mr. Boyd that "The legislature shall appropriate such amount as they deem proper each year, to be annually distributed.") Like the expansion of legislative duty to "thorough and efficient education" for all children, the million dollar mandate was important and binding when it was adopted.[11] In the next decades, the million dollar mandate passed into irrelevance and was removed from the Constitution in

[11] *See Ford v. Kend Bor Sch. Dist*, 15 A. 812, 815(Pa. 1888) ("The constitution provides, Article X., § 1:"The general assembly shall provide for the maintenance and support of a thorough and efficient system of public schools, wherein all the children of this commonwealth above the age of six years may be educated; and shall appropriate at least one million of dollars each year for that purpose." Here is not only an injunction upon the legislature to provide a system of public education for all the children of the commonwealth, over the age of six years, but to appropriate for that purpose the magnificent sum of not less than one million of dollars. The appropriation may exceed that sum to any amount; to an amount sufficient to cover the entire expenses of the system, but at all events, that sum must be so appropriated."), *overruled on other grounds by Ayala v. Philadelphia Bd. of Pub. Educ.*, 305 A.2d 877 (Pa. 1973).

1968 as obsolete.[12] But in 1968, the People of Pennsylvania reenacted in Article III, Section 14 the unqualified command that the legislature "shall provide for the maintenance and support of a thorough and efficient system of public education."

The conclusion that this duty is a mandatory and enforceable command is reinforced by understanding the context in which the 1873 Constitutional Convention proposed and the people approved the new constitution. Given that context, it would be impossible to imagine that the Convention, or the people of the Commonwealth, intended by mandating that the legislature "shall establish" a "thorough and efficient system of education" to commit the question of what constitutes a "thorough and efficient" education solely and unreviewably to

---

[12] The 1968 amendment was presented to the voters as a provision that "Articles Three, Ten and Eleven of the Constitution relating to legislation be consolidated and amended to modernize provisions relating to the powers, duties and legislative procedures." (Notice of Special Election Tuesday May 16, 1967). *See* Pa. Legislative Journal, House, January 30, 1967, p.80 (remarks of Mr. Beren) (revised education provision Article III Section 14 "updates the constitution by replacing the obsolete requirement that . . . at least $1 million be spent for that purpose."); Pennsylvania Bar Association, Pennsylvania Constitutional Revision Handbook 28 (1966) ("The Legislature's duty as to education would be broadened . . . . Also, the ridiculous provision that the Commonwealth shall appropriate at least one million dollars a year for maintaining the public schools would be eliminated."); Pennsylvania Economy League, Comparison of Proposed New Constitutional Provisions with Pennsylvania's Present Constitution, 26 (April 1965) ("Proposed amendment would eliminate the mandate for appropriations of at least one million dollars a year (meaningless today).")

legislative logrolling and caprice.

First, as noted above, a decade and a half before the 1874 Constitution this Court had concluded unanimously that before the amendment the legislature had a plenary authority to adopt legislation. *Commonwealth v. Hartman*, 17 Pa. 118, 119-20 (1851). Therefore, the only purpose that the People could understand to have been served by extending the Constitutional mandate from a duty to educate "the poor" "gratis" to a duty to establish a "thorough and efficient" system of education for the benefit of all children would have been a purpose of binding the legislature to a higher standard. No constitutional language was required to authorize the legislature to establish a system of common schools.

As the plurality opinion observed in *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013):

> "very nearly everything that may be included in a state constitution operates as a restriction on the legislature, for both commands and prohibitions directed to the other branches of the government or even to the individual citizen will operate to invalidate inconsistent legislation[.]"[13]

Id. at 947 (*quoting* Robert F. Williams, The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents, 27 Okla. City U. L. Rev. 189, 200-08

[13] *See, e.g.*, *McDuffy v. Sec'y of Exec. Office of Educ.*, 615 N.E.2d 516, 527 n.23 (Mass. 1993) ("[I]f 'legislatures and magistrates' have a constitutional duty to educate, then members of the Commonwealth have a correlative constitutional right to be educated." (citing *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978)).

(2002)) (*quoting* Frank P. Grad, The State Constitution: Its Function and Form for Our Time, 54 Va. L. Rev. 928, 964-65 (1968)).

The plurality opinion in *Robinson Twp.* concluded that "[b]y calling for the 'preservation' of these broad environmental values, the Constitution again protects the people from governmental action that unreasonably causes actual or likely deterioration of these features." *Robinson Twp.*, 83 A.3d at 953. Just so, the obligation to establish a thorough and efficient system of education protects the people from actions which unreasonably cause the education system to deteriorate into failure rather than efficiency.

This Court has in parallel circumstances been sensitive to the fact that specific additions to Constitutional text are important indications that the People have not granted "non-reviewable authority to the General Assembly[.]" *Mesivtah Eitz Chaim of Bobov, Inc. v. Pike County Bd. of Assessment Appeals*, 44 A.3d 3, 8 (Pa. 2012). The Court in *Mesivtah Eitz Chaim* observed that when the Constitution of 1874 added Article VIII, § 2 authorizing exemption from taxation of "institutions of purely public charity," the provision

> was not designed to grant, but limit, legislative authority to create tax exemptions. To eliminate judicial review of the constitutionality of the General Assembly's creations would defeat this purpose. The General Assembly could, by statute, define any entity whatsoever as an "institution of purely public charity" entitled to exemption from taxes[.]

Id. at 8.

Just so, in this case, the explicit addition in 1874 of an obligation to establish a "thorough and efficient" system of education would be defeated if the legislature has non-reviewable discretion to define those terms.[14]

Second, the primary impetus for the 1872-3 Constitutional Convention was distrust of the legislature and the imperative of considering proposals for reforming and checking the legislative branch itself. As Rosalind L. Branning concluded:

> The Pennsylvania constitution of 1874...was drafted in an atmosphere of extreme distrust of the legislative body ....It was the product of a convention whose prevailing mood was one of reform...and, overshadowing all else, reform of legislation to eliminate the evil practices that had crept into the legislative process. Legislative reform was truly the dominant motif of the convention and that purpose is woven into the very fabric of the constitution.[15]

This Court has observed that the Constitution of 1874 was adopted during a "time of fear of tyrannical corporate power and legislative corruption," *Pennsylvanians*

---

[14] Compare *Connecticut Coalition for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 235 (Conn. 2010) ("'[W]hen the constitution says free education it *must be interpreted in a reasonable way. A town may not herd children in an open field to hear lectures by illiterates.*'") (*quoting Horton v. Meskill*, 172 Conn. 615, 655 (Conn. 1977) (Loiselle, J., dissenting)).

[15] R. Branning, *Pennsylvania Constitutional Development* 37 (1960). *See In re Commonwealth, Dep't of Transp*., 515 A.2d. 899, 901 (Pa. 1986) (*quoting* Branning on the point as a "leading commentator"); *Consumer Party of Pa. v. Commonwealth*, 507 A.2d 323, 333 (Pa. 1986) (same).

Against Gambling Expansion Fund, Inc. v. Commonwealth, 877 A.2d. 383, 394 (Pa. 2005):

> The Constitutional Convention of 1872-73 was convened to reform corrupt legislative behavior, and to this end, the result was the constitutional strictures contained in Article III. *See* R. Branning, Pennsylvania Constitutional Development 37 (1960).[16]

To conclude, as the *Marrero* Court appears to have assumed, that the 1873 Constitutional Convention and the People of Pennsylvania would include strong and direct commands in the Education Section, but then leave all discretion as to compliance with those commands solely to the legislature makes no sense either textually or contextually.

[16] *See also City of Philadelphia v. Commonwealth*, 838 A.2d 566, 585-86 (Pa. 2003) (stating that the Pennsylvania Constitution of 1874"was drafted in an atmosphere of extreme distrust of the legislative body and of fear of the growing power of corporations, especially the great railroad corporations. It was the product of a convention whose prevailing mood was one of reform . . .." (quoting R. Branning, Pennsylvania Constitutional Development 56 (1960) ((citations omitted); *Consumer Party of Pa. v. Commonwealth*, 507 A.2d 323, 333 (1986) (also quoting Branning and stating " a blanket doctrine of abstention . . .would erode the safeguard that has been erected and invite the evils that the Constitution of 1874 was designed to eradicate."). *See* Woodside, Pennsylvania Constitutional Law 295 ("The General Assembly and its enactment of laws was substantially changed in the Constitution of 1874. . . . Most of the evils which existed in the General Assembly of Pennsylvania and in the Congress of the United States were examined with the idea of correcting them in the new Constitution").

II. The *Marrero* Court's Analysis of the Political Question Doctrine Has Been Superseded by Subsequent Cases from this Court.

Rather than address the question of whether the Legislature had complied with its obligations under Article III, Section 14, Justice Flaherty's opinion in *Marerro* –again without substantial discussion -- accepted the proposition advanced by the Commonwealth Court that it was confronted with a nonjusticiable political question because of "a 'textually demonstrable constitutional commitment of the issue to a coordinate political department,' *i.e.*, the General Assembly,'" and "'a lack of judicially manageable standards for resolving the instant claims,'" *Marrero v. Commonwealth*, 739 A.2d 110, 113 (Pa. 1999) (citations omitted).

But both the world and the jurisprudence of this Court have moved on in the last decade and a half, and that movement casts shadows over *Marrero*'s conclusion that the Pennsylvania judiciary is barred from enforcing the obligations imposed by the Education Section.

In the years since *Marrero*, the executive and legislative branches of Pennsylvania's government have regularly argued to this Court that efforts to enforce their obligations under the Pennsylvania Constitution involve a lack of respect for their independent status, and an improper injection of judicial review into "political questions." Those arguments have been rebuffed with equal

regularity.[17]

This Court's latest account of the "political question" doctrine came in *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 927-29 (Pa. 2013), addressing the contentious constitutional challenge to legislation authorizing unrestrained exploitation of the Marcellus shale. The Court's analysis is worth quoting at length:

> The judicial power of the Commonwealth is not vested in the General Assembly, but in a unified judicial system, which includes the Commonwealth Court and, ultimately, this Court, which presides over our branch of government. *See* Pa. Const. art. V, § 1.
>
> In application, the Court has recognized that "[i]t is the province of the Judiciary to determine whether the Constitution or laws of the Commonwealth require or prohibit the performance of certain acts. That our role may not extend to the ultimate carrying out of those acts does not reflect upon our capacity to determine the requirements of the law." *Council 13*, 986 A.2d at 75 (*quoting Thornburgh v. Lewis*, 504 Pa. 206, 470 A.2d 952, 955 (Pa. 1983)).

---

[17] *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013); *Hospital & Health Sys. Ass'n of Pa. v. Commonwealth*, 77 A.3d 587 (Pa. 2013); *Pennsylvania State Ass'n of County Comm'rs v. Commonwealth*, 52 A.3d 1213 (Pa. 2012); *Council 13 v. Commonwealth*, 986 A.2d 63 (Pa. 2009); *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 877 A.2d 383, 393 n.6 (Pa. 2005); *Pennsylvania AFL-CIO v. Commonwealth*, 757 A.2d 917 (Pa. 2000).

This Court has accepted the argument only twice, once in a case involving the internal procedures by which the legislature considers constitutional amendments, *Grimaud v. Commonwealth*, 865 A.2d 835 (Pa. 2005), and once in a case based on *Marrero* itself. *Pennsylvania Sch. Bds. Ass'n v. Commonwealth Ass'n of Sch. Adm'rs., Teamsters Local, 502*, 805 A.2d 476, 491 (Pa. 2002) (holding in the alternative that the trial court erred because "in examining the merits of this claim, the trial court clearly delved into the soundness of the policy set forth by the Legislature").

> This is not a radical proposition in American law. *See, e.g.*, *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137, 166, 2 L. Ed. 60 (1803) ("where a specific duty is assigned by law [to another branch of government], and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy"). Indeed, "[o]rdinarily, the exercise of the judiciary's power to review the constitutionality of legislative action does not offend the principle of separation of powers," and abstention under the political-question doctrine is implicated in limited settings. *See Hosp. & Health Sys. Ass'n of Pa. v. Commonwealth*, 621 Pa. 260, 77 A.3d 587, 596 (Pa. 2013) ("HHAP") (*quoting Sweeney v. Tucker*, 473 Pa. 493, 375 A.2d 698, 705 (Pa. 1977))....
>
> The applicable standards to determine whether a claim warrants the exercise of judicial abstention or restraint under the political question doctrine are well settled. Courts will refrain from resolving a dispute and reviewing the actions of another branch only where "the determination whether the action taken is within the power granted by the Constitution has been entrusted exclusively and finally to the political branches of government for 'self-monitoring.'"(citation omitted).

Justice Saylor dissented from this aspect of the *Robinson* opinion, joined by Justice Eakins. But in the year before, in *Hospital & Health Sys. Ass'n of Pa. v. Commonwealth*, 77 A.3d 587 (Pa. 2013) Justice Eakins joined Justice Saylor's opinion for a Court unanimous on this point in rejecting a claim that the "political question" doctrine precluded consideration of a constitutional challenge to a statutory arrangement by which the Legislature and the Governor agreed that "$100 million be transferred from the MCARE Fund to the General Fund."

> "Ordinarily, the exercise of the judiciary's power to review the constitutionality of legislative action does not offend the principle of

> separation of powers." *Sweeney v. Tucker*, 473 Pa. 493, 508, 375 A.2d 698, 705 (1977) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803)); *see also Powell v. McCormack*, 395 U.S. 486, 549, 89 S. Ct. 1944, 1978, 23 L. Ed. 2d 491 (1969) ("Our system of government requires that . . . courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility.")….[N]on-justiciable political questions ... occur where the determination of whether the government acted appropriately has itself been "entrusted exclusively and finally to the political branches of government for self-monitoring." *Sweeney*, 473 Pa. at 509, 375 A.2d at 706 (*quoting* Louis Henkin, Is there a "Political Question" Doctrine?, 85 Yale L.J. 597, 599 (1976)).

Id. at 596-97.

The *Marrero* abstention can be sustained, therefore, only if this Court concludes that the obligation to adopt a "thorough and efficient system of education" has been "entrusted exclusively and finally" to the legislature "for self-monitoring."

As demonstrated above, in 1874, the People of Pennsylvania amended the Education Article to impose new mandatory obligations on the Legislature. This is the precise opposite of matter "textually committed" to the self-monitoring capacity of a coordinate branch of government." *Hosp. & Health Sys. Ass'n of Pa. v. Commonwealth*, 77 A.3d at 598. And it is exceedingly implausible to believe that in historical context the People intended to tacitly rely on the Legislature's exclusive capacity for "self-monitoring."

We are left, then, only with the proposition that resolving challenges before this Court in defining the parameters of what can reasonably be characterized as a "thorough and efficient system of education" involve "judicially unmanageable standards." Since *Marrero,* this Court has found manageable the challenges of defining the nature of the Legislature's constitutional obligations to avoid unreasonable environmental degradation. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 949 (Pa. 2013) (plurality opinion) ("Articulating judicial standards in the realm of constitutional rights may be a difficult task…. The difficulty of the task, however, is not a ground upon which a court may or should abridge rights explicitly guaranteed in the Declaration of Rights"); of defining "purely public charities" under the Pennsylvania Constitution. *Mesivtah Eitz Chaim of Bobov, Inc. v. Pike County Bd. of Assessment Appeals,* 44 A.3d 3, 7 (Pa. 2012) ("'ultimate power and authority to interpret the Pennsylvania Constitution rests with the Judiciary, and in particular with this Court'") (citation omitted); of defining whether districts are "as nearly equal in population" "as practicable," and do not fragment political subdivisions unless "absolutely necessary" as required by the Pennsylvania Constitution. *Holt v. 2011 Legislative Reapportionment Comm'n,* 38 A.3d 711, 733, 738 (Pa. 2012) ("The proper construction of constitutional language (or statutory language for that matter) is a question peculiarly suited to the judicial function."); of defining "items." *Jubelirer v. Rendell,* 953 A.2d 514,

530-31 (Pa. 2008); and defining "infamous crimes." *Commonwealth ex rel. Corbett v. Griffin*, 946 A.2d 668, (Pa. 2008). And as highlighted in the next section, state courts in other jurisdictions with similar constitutional language have regularly developed manageable approaches to addressing claims of wanton legislative default and gross underfunding of educational obligations under state constitutions.

In *Hosp. & Health Sys. Ass'n of Pa. v. Commonwealth*, 77 A.3d 587, 598 (Pa. 2013) Justice Saylor properly observed:

> "we will not abdicate our responsibility to 'insure that government functions within the bounds of constitutional prescription . . . under the guise of deference to a co-equal branch of government. . . . [I]t would be a serious dereliction on our part to deliberately ignore a clear constitutional violation.'" *Jubelirer v. Singel*, 162 Pa. Cmwlth. 55, 66-67, 638 A.2d 352, 358 (1994) (*quoting Consumer Party*, 510 Pa. at 176-78, 507 A.2d at 332-333....Notably, in this respect, the political question doctrine does not exist to remove a question of law from the Judiciary's purview merely because another branch has stated its own opinion of the salient legal issue. *See Council 13, AFSCME, AFL-CIO ex rel. Fillman v. Rendell*, 604 Pa. 352, 373, 986 A.2d 63, 76 (2009).

As petitioners argue, the actions of the Pennsylvania legislature in establishing baselines for the elements and costs of thorough education make *Marrero*'s concern with "manageable standards" far less pressing. But even on its own terms, *Marrero*'s conclusory abdication under the political question doctrine deserves to be revisited.

III. The *Marrero* Court's Analysis of the Education Clause is a Minority Position in State Constitutional Law and Should be Reexamined in Light of Better Reasoned and More Applicable Decisions from other State Supreme Courts.

This Court has regularly and appropriately taken account the analyses of the high courts of sister states in construing its constitution.[18] In this case, decisions of these courts are important not only for their construction of their parallel provisions but as responses to the erroneous proposition that judicial enforcement of education clauses is barred by the purported lack of judicially manageable standards.

At the time *Marrero* was decided, its conclusion that state constitutional obligations regarding education were unenforceable was a minority position.[19] It

[18] The canonical *Edmunds* factors, *Commonwealth v. Edmunds*, 586 A.2d 887, 894 (Pa. 1991) include "relevant case law from other states," and this Court has noted that the "consensus" approach to state constitutional interpretation includes reference to "text; history (including 'constitutional convention debates, the address to the people, [and] the circumstances leading to the adoption of the provision'); structure; underlying values; and interpretations of other states." *In re Bruno*, 101 A.3d 635, 660 n.13 (Pa. 2014) *quoting Robinson Twp*., 83 A.3d at 944 (*quoting* Thomas G. Saylor, Prophylaxis in Modern State Constitutionalism: New Judicial Federalism and the Acknowledged Prophylactic Rule, 59 N.Y.U. Annual Survey of Am. L. 283, 290-91 (2003)).

[19] *E.g.*, *Sheff v. O'Neill*, 678 A.2d 1267, 1276 (Conn. 1996) (stating that state supreme courts have "overwhelmingly" reached the conclusion that "[j]ust as the

has remained so.[20] Without reviewing each element of the constellation of cases decided since *Marrero* in detail, *amici* wish to highlight both the qualitative and quantitative preponderance of the opinions refusing to abdicate the judicial duty of enforcing state constitutional mandates regarding education.

A. State Supreme Courts Construing Directly Comparable Constitutional Provisions Requiring the Establishment of a "Thorough" and "Efficient" System of Education Have Unanimously Rejected Arguments for Abstention Since *Marrero*.

Pennsylvania's 1874 Constitution is one of eight state constitutions adopted between 1851 and 1889 requiring their legislatures to establish "thorough and efficient" systems of education for their citizens. Cases from these states are most directly relevant to the proper construction of Article III, Section 14, because their courts construed mandatory constitutional commands using the same words as our Constitution. In addition, understandings of the voters who approved constitutional

---

legislature has a constitutional duty to fulfill its affirmative obligation to the children who attend the state's public elementary and secondary schools, so the judiciary has a constitutional duty to review whether the legislature has fulfilled its obligation.").

[20] *Gannon v. State*, 319 P.3d 1196, 1226 (Kan. 2014) ("Most state supreme courts have rejected the nonjusticiability argument"); *Davis v. State*, 804 N.W.2d 618, 641 n.34 (S.D. 2011) (*quoting Conn. Coalition for Justice in Educ. Funding, Inc. v. Rell*, 295 Conn. 240, 269 n. 24 (Conn. 2010). ("the vast majority of jurisdictions 'overwhelmingly' have concluded that claims that their legislatures have not fulfilled their constitutional responsibilities under their education clauses are justiciable.").

wording in these states were contemporaneous with those of the Pennsylvania voters who approved our Education Section. In none of these other states have courts interpreted the education provisions to be merely hortatory.

In the decade and a half since *Marrero*, in five of these states the courts have enforced the educational obligation against legislative defaults; in none of them has the state Supreme Court upheld a system proven--as the state system is alleged here---to be so severely deficient as to leave the school graduates entirely unequipped to meet basic standards of proficiency.

In chronological order of adoption of their constitutions, these directly comparable states are:

1) **Ohio** (adopted in 1851). *DeRolph v. State*, 780 N.E.2d 529 (Ohio 2002); *see State v. Lewis*, 789 N.E.2d 195 (Ohio 2003);
2) **Minnesota** (adopted in 1857). *Kahn v. Griffin*, 701 N.W.2d 815, 830 (Minn. 2005) (reiterating analysis concluding education was a fundamental right under Minnesota constitution). *See Skeen v. Minnesota*, 505 N.W.2d 299, 308 (Minn. 1993) (denying relief where "plaintiffs concede that they continue to receive an adequate education[,]");
3) **Maryland** (adopted in 1867). *See Maryland, State Bd. of Educ. v. Bradford*, 875 A.2d 703 (Md. 2005) (detailing litigation in Baltimore);

See http://www.aclu-md.org/uploaded_files/0000/0173/bradford_summary.pdf (describing consent judgment and enforcement in *Bradford*);

4) **West Virginia** (adopted in 1872). *See Kanawha County Pub. Library Bd. v. Bd. of Educ. of Kanawha*, 745 S.E.2d 424 (W. Va. 2013); *Board. of Educ. v. W. Va. Bd. of Educ., No. 33081*, 639 S.E.2d 893 (W. Va. 2006);
5) **New Jersey** (adopted in 1875). *See, e.g., Abbott v. Burke*, 20 A.3d 1018 (N.J 2011);
6) **Wyoming** (adopted in 1889). *See Campbell County Sch. Dist. v. State*, 181 P.3d 43 (Wyo. 2008); *State v. Campbell County Sch. Dist.*, 32 P.3d 325(Wyo. 2001);
7) **South Dakota** (adopted in 1889). *Davis v. State*, 804 N.W.2d 618, 641 (S.D. 2011) ("We are unable to conclude that the education funding system (as it existed at the time of trial) fails to correlate to actual costs or with adequate student achievement to the point of declaring the system unconstitutional.").

With all respect, it seems anomalous that this Court stands alone in concluding that the people's constitutional command that the Legislature "*shall* establish a thorough and efficient system of education" is hortatory or judicially unmanageable. *Amici* are unaware of information suggesting that this Court is uniquely unable to manage the elaboration of the required constitutional standards.

B. The Majority of State Supreme Courts Construing Other State Education Clauses have Properly Rejected Calls for Abstention.

Other states of the Union have adopted constitutions imposing obligations to provide education that are less directly analogous to the one before this Court. Since the *Marrero* decision over a dozen state Supreme Courts construing less directly analogous constitutional education provisions have turned back claims for

abstention under "political question" doctrines. In reverse chronological order those decisions and the wording of the state constitutional provisions follow.[21]

1) **Kansas.** *Gannon v. State*, 319 P.3d 1196 (Kan. 2014); *Montoy v. State*, 138 P.3d 755 (Kan. 2006) (finding compliance); *Montoy v. State*, 120 P.3d 306 (Kan. 2005); *Montoy v. State*, 112 P.3d 923 (Kan. 2005); *Montoy v. State*, 62 P. 3d 228 (Kan. 2003); Kan. Const. art. 6, § 6(b) ("The legislature shall make suitable provision for finance of the educational interests of the state.")

2) **South Carolina.** *Abbeville County Sch. Dist. v. State*, 767 S.E.2d 157 (S.C. 2014); S.C. Const. art. XI, § 3 ("The General Assembly shall provide for the maintenance and support of a system of free public schools open to all children in the state.")

3) **Washington.** *McCleary v. State*, 2014 Wash. LEXIS 898 (Wash. Sept. 11, 2014) (judgment of contempt);*McCleary v. State*, 269 P.3d 227 (Wash. 2012); Wash. Const. art. IX §

[21] In addition, in *Committee for Educ. Equal. v. State of Missouri*, 294 S.W.3d 477, 488 (Mo. 2009), the Court adjudicated on the merits a claim under Article IX, Section 1(a) of the Missouri Constitution which reads: "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of 2 1 years as prescribed by law." The Missouri court concluded on the merits that in light of specific funding mechanisms contained elsewhere in the Missouri constitution the provision imposed no additional substantive limits on the legislature's funding choices.

1("It is the paramount duty of the state to make ample provision for the education of all children residing within its borders")

4) **Colorado.** *Lobato v. State*, 304 P.3d 1132, (Colo. 2013) (reaffirming "political question" holding, determining that the state system "passed constitutional muster"); *Lobato v. People*, 218 P.3d 358 (Colo. 2009); Colo. Const. art. IX, § 2 ("The general assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state")

5) **New York.** *Hussein v State of New York*, 973 N.E. 2d 752, 752-53 (Ciparick, J., concurring) (N.Y. 2012); *Campaign for Fiscal Equity, Inc. v. State of New York*, 861 N.E.2d 50 (N.Y. 2006); *Campaign for Fiscal Equity v State of New Yor*k, 801 N.E. 2d 326, (N.Y. 2003); N.Y. Const. art. XI, § 1 ("The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.")

6) **Connecticut.** *Connecticut Coalition for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206(Conn. 2010); Conn. Const. art. VIII, § 1 ("There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation.")

7) **New Hampshire.** *Londonderry Sch. Dist. v. State*, 157 N.H. 734, 736 (N.H. 2008); *Londonderry v. State*, 907 A.2d 988 (N.H. 2006); C*laremont Sch. Dist. v. Governor*, 794 A.2d 744 (N.H. 2002); N.H. Const. pt. 2, art. 83("[I]t shall be the duty of the legislators and magistrates . . . to cherish the interest of literature and the sciences, and all seminaries and public schools")

8) **Montana:** *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 109 P.3d 257, 261 (Mont. 2005); Mont. Const. art. X, § 1 ("The legislature shall provide a basic system of free quality public elementary and secondary schools.")

9) **Idaho:** *Idaho Schs. for Equal Educ. Opportunity v. State*, 129 P.3d 1199 (Idaho 2005); *Idaho Schs. For Equal Educ. Opportunity v. State*, 97 P.3d 453 (Idaho 2004); *Idaho Schs. For Equal Educ. Opportunity v. State*, 76 P.2d 913 (Idaho1998); Idaho Const. art. IX, § 1("[I]t shall be the duty of the legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools.");

10) **Massachusetts:** *Hancock v. Comm'r of Educ*., 822 N.E.2d 1134 (Mass. 2005); Mass. Const. pt. II(C)(5), § 2("duty . . . to cherish the interests of literature and the sciences, and all seminaries of them; especially . . . public schools and grammar schools in the towns")

11) **Texas:** *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist*., 176 S.W.3d 746 (Tex. 2005); Tex. Const. art. 7, § 1 ("[I]t shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.'")

12)**Vermont:** *Brigham v. State*, 889 A.2d 715 (Vt. 2005); Vt. Const., c. II, § 68 ("[C]ompetent number of schools ought

to be maintained in each town unless the general assembly permits other provisions for the convenient instruction of youth");

13) **Arkansas:** *Lake View Sch. Dist. No. 25 v. Huckabee*, 243 S.W.3d 919 (Ark. 2006); *Lake View Sch. Dist. No. 25 v. Huckabee*, 220 S.W.3d 645 (Ark. 2005); *Lake View Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472 (Ark. 2002); *see Lake View Sch. Dist. No. 25 v. Huckabee*, 257 S.W.3d 879 (Ark. 2007) (holding that legislative changes brought state into compliance); Ark. Const. art. XIV, § 1 ("The State shall ever maintain a general, suitable and efficient system of free public schools");

14) **North Carolina** *Hoke County Bd. of Educ. v. State*, 599 S.E.2d 365 (N.C. 2004); *see Hoke County Bd. of Educ. v. State*, 749 S.E.2d 451, 455 (N.C. 2013) (reaffirming mandate in *Hoke*); N.C. Const. art. 1, § 15 & art. IX, § 2(1) ("[T]he people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right . . . . The General Assembly shall provide . . . for a general and uniform system of free public schools, which shall be maintained at least nine months in every year, and wherein equal opportunities shall be provided for all students.").

While these courts construed constitutional texts that differ from the provision of the Pennsylvania Constitution before this Court, their analyses illuminate two broader issues of constitutional governance.

First these decisions highlight the fact that a proper conception of judicial

role does not preclude state courts from enforcing constitutional mandates. Rather, where the state constitution imposes duties on the legislature, the proper role of the courts is to enforce those duties.

The Kansas Supreme Court put the matter well in *Gannon v. State*, 319 P.3d 1196 (Kan. 2014):

> "The Constitution commits to the Legislature, the most democratic branch of the government, the authority to determine the broad range of policy issues involved in providing for public education. But the Constitution nowhere suggests that the Legislature is to be the final authority on whether it has discharged its constitutional obligation. *If the framers had intended the Legislature's discretion to be absolute, they need not have mandated that the public education system be efficient and suitable; they could instead have provided only that the Legislature provide whatever public education it deemed appropriate.* The constitutional commitment of public education issues to the Legislature is primary but not absolute."

Id. at 1219-20 (*quoting Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist*., 176 S.W.3d 746, 778 (Tex. 2005) (emphasis in original).

The Kansas court continued, "As with the Texas legislature, ours has received certain assignments....The word 'shall' in both Sections 1 and 6(b) of Article 6 reflects a constitutional duty.... And the people knew full well how to make the legislature's constitutionally assigned tasks simply discretionary, *i.e.*, 'the legislature may.'" *Id*. at 1220-21 (citations omitted).

Enforcing constitutional mandates is not judicial arrogation; it is a necessary part of constitutional self governance to prevent legislatures from trifling away the

rights that the people embedded in the Constitution. The failure to enforce educational duties imposed by the state Constitution is judicial abdication.[22]

[22] *E.g., Abbeville County Sch. Dist. v. State*, 767 S.E.2d 157, 163-64 (S.C. 2014) ("As Chief Justice John Marshall famously stated, '[I]t is emphatically the province and duty of the judicial department to say what the law is.' *Marbury v. Madison*, 5 U.S. 137, 138, 2 L.Ed. 60 (1803). This hallowed observation is the bedrock of the judiciary's proper role in determining the constitutionality of laws, and the government's actions pursuant to those laws."); *McCleary v. State*, 269 P.3d 227, 231 (Wash. 2012) ("The judiciary has the primary responsibility for interpreting article IX, section 1 to give it meaning and legal effect."); *Id.* at 266 (("We cannot abdicate our judicial duty to interpret and construe Const. art. 9, §§ 1 and 2 ...") (*quoting Seattle Sch. Dist. v. State*, 90 Wn.2d 476, 506 (Wash. 1978) (superseded by statute); *Connecticut Coalition for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 219 (Conn. 2010) ("Just as the legislature has a constitutional duty to fulfill its affirmative obligation to the children who attend the state's public elementary and secondary schools, so the judiciary has a constitutional duty to review whether the legislature has fulfilled its obligation."); *Lake View Sch. Dist. No. 25 v. Huckabee*, 220 S.W.3d 645, 654 (Ark. 2005) ("This court's refusal to review school funding under our state constitution would be a complete abrogation of our judicial responsibility and would work a severe disservice to the people of this state. We refuse to close our eyes or turn a deaf ear to claims of a dereliction of duty in the field of education."); *Brigham v. State*, 889 A.2d 715, 720 (Vt. 2005) ("Adjudicating cases involving alleged violations of plaintiffs' constitutional rights resulting from a legislative enactment does not undermine the legislative process, nor is it disrespectful of the other branches of government. Rather, the court abdicated its duty to uphold the Vermont Constitution by refusing to entertain plaintiffs' claims."); *Columbia Falls Elementary Sch. District No. 6 v. State*, 109 P.3d 257, 261 (Mont. 2005) ("In the case *sub judice*, the Legislature has addressed the threshold political question: it has executed Article X, Section 1(3), by creating a basic system of free public schools. As the final guardian and protector of the right to education, it is incumbent upon the court to assure that the system enacted by the Legislature enforces, protects and fulfills the right.").

Second, enforcing constitutional duties regarding education may require courts to develop standards, but those standards are not beyond the scope of judicial competence. As the Court observed in *Connecticut Coalition for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 223 (Conn. 2010), rejecting a defense of "unmanageable" standards:

> Although the plaintiffs' claims present a question of first impression in Connecticut, similar issues with respect to the substantive content of education clauses have been considered by courts in many of our sister states, some of which have articulated standards for determining whether a state's public schools satisfy minimum constitutional requirements.[23]

The recent discussion by the South Carolina Supreme Court in *Abbeville County Sch. Dist. v. State*, 767 S.E.2d 157, 163-64 and n.6 (S.C. 2014) similarly observes:

> Courts may experience difficulty in determining the precise parameters of constitutionally acceptable behavior; however, this imprecision does not necessarily signify that courts cannot determine when a party's actions, or the results of those actions, fall outside the boundaries of such constitutional parameters.....
>
> Article XI, section 3 of the South Carolina Constitution

[23] *See id.* at 254-55 (noting "broad terms" of standards adopted. "This breadth reflects, first and foremost, our recognition of the political branches' constitutional responsibilities, and indeed, greater expertise, with respect to the implementation of specific educational policies pursuant to the education clause. . ..The broad constitutional standard also reflects our recognition of the fact that the specific educational inputs or instrumentalities suitable to achieve this minimum level of education may well change over time, as a "constitutionally adequate public education is not a static concept removed from the demands of an evolving world.") (citations omitted)

> mandates the General Assembly to "provide for the maintenance and support of a system of free public schools open to all children in the state." Nothing in the text of the article precludes the judiciary from exercising its authority over the article's provisions, or intervening when the Defendants' laudable educational goals fall short of their constitutional duty. While the remedy in this case may affect future policy decisions regarding the State's education system, we disagree with the dissent that this controversy is non-justiciable. Rather, interpretation of the law—and evaluation of the government's acts pursuant to that law—are critical and necessary judicial functions.
>
> We profoundly disagree with the sentiment that because an area of law is constantly evolving, that area of law is somehow insulated from judicial review. For example, from the concise thirty-three words that comprise the Fourth Amendment to the United States Constitution, our nation's courts have developed a body of law recognizing the public's rights against law enforcement officers in a myriad of contexts. Despite the Fourth Amendment's explicit mention of "probable cause," courts readily recognize Terry stops supported instead by "reasonable suspicion" (as well as the subtle nuances of the boundaries and limitations of such stops), and have even applied the Fourth Amendment to GPS monitoring of vehicles, the technology of which would have been alien to the country's founding fathers. As such, the constant evolution of a particular area of law cannot serve as an indicator as to whether a controversy is justiciable.

So, too, the Kansas Supreme Court in *Gannon v. State*, 319 P.3d 1196, 1226-28 (Kan. 2014) (citations omitted) identified the appropriate scope of judicial standards:

> [O]ur Kansas Constitution clearly leaves to the legislature the myriad of choices available to perform its constitutional duty; but when the question becomes whether the legislature has actually performed its duty, that most basic question is left to the courts to answer under our system of checks and balances….
>
> * * *

> We also observe that courts are frequently called upon, and adept at, defining and applying various, perhaps imprecise, constitutional standards.
>
> * * *
>
> And like these general constitutional standards, the standards for determining compliance with a state constitution's education clause may be refined over time. *See Rell*, 295 Conn. at 317; *see also U.S.D. No. 229*, 256 Kan. at 258 ("'[T]he issue of suitability is not stagnant; past history teaches that this issue must be closely monitored.'"); *Claremont II*, 142 N.H. at 474 (A "constitutionally adequate public education is not a static concept removed from the demands of an evolving world.").

Likewise the Texas Supreme Court in *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 778-79 (Tex. 2005) properly noted:

> [C]onstitutional standards of adequacy, efficiency, and suitability ...import a wide spectrum of considerations and are admittedly imprecise, but they are not without content. At one extreme, no one would dispute that a public education system limited to teaching first-grade reading would be inadequate, or that a system without resources to accomplish its purposes would be inefficient and unsuitable. At the other, few would insist that merely to be adequate, public education must teach all students multiple languages or nuclear biophysics, or that to be efficient, available resources must be unlimited. In between, there is much else on which reasonable minds should come together, and much over which they may differ. The judiciary is well-accustomed to applying substantive standards the crux of which is reasonableness. This is not to say that the standards in article VII, section 1 involve no political considerations beyond the judiciary's power to determine. We have acknowledged that much of the design of an adequate public education system cannot be judicially prescribed. Litigation over the adequacy of public education may well invite judicial policy-making, but the invitation need not be accepted. The judiciary's choice is not between complete abstinence from article VII, section 1 issues, and being, in the State

> defendants' words, "the arbiter of education and policy, overseeing such issues as curriculum and testing development, textbook approval, and teacher certification". Rather, the judiciary's duty is to decide the legal issues properly before it without dictating policy matters. The constitutional standards provide an appropriate basis for judicial review and determination.[24]

In this case petitioners allege there is no dispute regarding appropriate education standards. The only question presented is whether the Legislature has provided a funding system reasonably related to achieving those standards. This is a question eminently subject to judicial evaluation.

C The Minority of State Supreme Courts that Have Abstained from Enforcing Educational Mandates Under State Constitutions Since *Marrero* Have Relied on Permissive Constitutional Wording Entirely Absent from the Pennsylvania Constitution.

Since *Marrero,* a minority of state Supreme Courts have refused to engage in the process of enforcing their constitutional mandates regarding education. All of these courts have explicitly relied on the permissive wording and specific history

---

[24] *See State v. Campbell County Sch. Dist*., 32 P.3d 325, 335-36 (Wyo. 2001) ("One need only examine the litany of case law, state and federal, interpreting the broad language of such constitutional provisions as the due process and equal protection provisions and establishing standards on which to invoke the rights enshrined in those fundamental laws to reject the disingenuousness of the "absence-of-standards" rationale. If one were to take seriously this rationale, a huge portion of judicial constitutional review would be without basis.").

of their constitutions – which differ radically from those of Pennsylvania ---in abstaining from enforcement, and most have emphasized that remedies might be available in a proper case. The cases which amici were able to identify are set forth below in reverse chronological order.

1) **Rhode Island** *Woonsocket Sch. Comm. v. Chafee*, 89 A.3d 778 (R.I. 2014) ; R.I. Const., art. XII, § 1

> ("The diffusion of knowledge, as well as of virtue among the people, being essential to the preservation of their rights and liberties, it shall be the duty of the general assembly to promote public schools and public libraries, and to adopt **all means which it may deem necessary and proper to** secure to the people the advantages and opportunities of education and public library services.")

(emphasis added).

The Rhode Island Supreme court observed that

> "given the context of the times in which it was adopted, article 12, section 1 does not appear to have imposed on the General Assembly any new, measurable, or judicially enforceable duties to support education beyond those then extant..... The duties that existed with regard to public education when the Constitution was ratified in 1842 were slim.... It was not until 1882, forty years after the adoption of the Constitution, that the General Assembly created a state system of education by mandating that every town establish a public school….The portion of the Education Clause concerning education was not substantively revised during the constitutional convention of 1986, despite numerous efforts to amend the language in order to provide what was thought to be a more equitable school funding system.

89 A.3d at 788-89 (citations omitted).

The Court added:

> This is not to say, however, that there could not be a situation in which the General Assembly violates its "constitutional mandate to support and promote education so as to warrant a judicial response." We agree with our prior holding in Sundlun that the Rhode Island Constitution imposes an affirmative duty upon the General Assembly to promote public schools. It is not our function, however, to explore hypothetical scenarios beyond the facts that are currently before us on review.

*Id.*at 792 (citation omitted).

2) **Iowa** *King v. State*, 818 N.W.2d 1, 10 (Iowa 2012); Iowa Const. art. IX, 2nd, § 3 ("The general assembly **shall encourage, by all suitable means**, the promotion of intellectual, scientific, moral, and agricultural improvement.") (emphasis added)

The Iowa court noted the historically limited understanding which surrounded the 1857 Constitution:

> at a time when the 1857 constitution was quite fresh in people's minds, we reached the conclusion that no aspect of the Iowa Constitution, including the education clause, authorized the legislature to provide for public schools (as opposed to merely funding them). Since the contemporary view of our court was that the education clause did not even allow the legislature to establish public schools, it seems difficult for us to conceive that the clause could have been seen as a source of enforceable minimum standards for such schools.

818 N.W.2d at 14.

It went on to observe:

> It bears emphasis that Iowa's education clause, unlike the constitutions of most other states, does not mandate free public schools. Nor does the education clause require that the state's public education system

> be "adequate," "efficient," "quality," "thorough," or "uniform." Our founders did not make these choices.

Id. at 20-21.[25]

3) **Indiana** *Bonner v. Daniels*, 907 N.E.2d 516, 520 (Ind. 2009); Ind. Const. art. XIII, § 1 ("[I]t shall be the duty of the General Assembly **to encourage, by all suitable means**, moral, intellectual, scientific, and agricultural improvement; and to provide, by law, for a general and uniform system of Common Schools, wherein tuition shall be without charge, and equally open to all.") (emphasis added).

   The Indiana court emphasized the text and constitutional history:

> Guided as we are by the text of the constitutional provision in the context of its history, we conclude that the Education Clause of the Indiana Constitution does not impose upon government an affirmative duty to achieve any particular standard of resulting educational quality.

907 N.E.2d at 522.

4) **Nebraska** *Nebraska Coal. for Educational Equity & Adequacy v. Heineman*, 731 N.W.2d 164 (2007); Neb. Const. art. I, § 4 ("Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the Legislature to pass **suitable laws . . . to encourage schools** and the means of instruction.") (emphasis added); Neb. Const. art. VII, § 1 ("The Legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years.")

---

[25] *See also King v. State*, 818 N.W.2d 1, 22-27 (Iowa 2012) ("we do not agree with the district court's conclusion that plaintiffs' equal protection claim presents a nonjusticiable political question"....the petition contains no allegations of disparate treatment. Plaintiffs do not allege that the defendants have allocated fewer funds to students attending school districts like West Harrison, Davenport, and Des Moines....We defer to another day the question whether education can amount to a fundamental right under the Iowa Constitution, thereby triggering heightened scrutiny. For present purposes, we conclude simply that the matters alleged in plaintiffs' petition, even if true, do not amount to a deprivation of such a right.").

The Nebraska court emphasized the local historic roots of its constitution, and its less exigent wording:

> In Nebraska's first state Constitution, the framers rejected the "thorough and efficient" language that is found in many other state constitutions....., the framers rejected language that would have required uniformity between schools....In 1972, the people explicitly left all funding of public schools to the Legislature's exclusive discretion. The 1875 constitution contained a separate section requiring "an equitable distribution of the income of the fund set [a]part for the support of the common schools, among the several school districts." This provision, however, was omitted from the Nebraska Constitution as part of 1972 amendments...The Nebraska Constitution now provides that all funds "for the support and maintenance of the common schools" shall be used "as the Legislature shall provide."
>
> Finally, in 1996, voters rejected a constitutional amendment that would have imposed qualitative standards on the type of education the Legislature must provide. The amendment would have made a "'quality education' . . . a fundamental constitutional right of each person" and a "'thorough and efficient education' . . . the 'paramount duty' of the state."

731 N.W. at 179-80 (citations omitted).

5) **Oklahoma** *Okla. Educ. Ass'n v. State ex rel. Okla. Legislature*, 158 P.3d 1058 (Okla. 2007); Okla. Const. art. I, § 5

> ("Provisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of the state and free from sectarian control; and said schools shall always be conducted in English: Provided, that nothing herein shall preclude the teaching of other languages in said public schools.");
>
> Okla. Const. art. X, § 32 ("For the purpose of providing buildings for school districts, there is hereby established a State Public Common School Building Equalization Fund in which shall be deposited (1) such monies as may be

> designated or provided for such purpose by the Legislature, other than ad valorem taxes, and (2) the proceeds of all property that shall fall to the State by escheat and penalties for unlawful holding of real estate by corporations; provided, that if such disposition and use of money from any such sources shall be declared invalid, the validity of other provisions of this section shall not be affected thereby. The State Public Common School Building Equalization Fund shall be administered by the State Board of Education, until otherwise provided by the Legislature. Such Fund shall be used to aid school districts in acquiring buildings, under such regulations as may be prescribed by the administering agency, unless otherwise provided by law, and **the amount paid therefrom to or for any school district shall be determined by a formula established by the Legislature**. The administering agency is authorized to accept grants-in-aid from the federal government for building purposes.") (emphasis added);
>
> Okla. Const. art. XIII, § 1 ("The Legislature shall establish and maintain a system of free public schools wherein all the children of the State may be educated.")

The Oklahoma Court held that the "Legislature's method in carrying out this duty is largely within its discretion." 158 P.3d at 1066. It relied on its earlier holding in *Fair Sch. Fin. Council of Okla., Inc. v. State*, which rejected the contrary holdings of other state Supreme Courts because, "These courts have relied greatly on the particular language and interpretive history of their respective constitutions[.]" 746 P.2d 1135, 1148 (Okla. 1987).

6)**Alabama** *Ex parte James*, 836 So. 2d 813 (Ala. 2002); Alabama Const. Art. XIV, Sec. 256:

> It is the policy of the state of Alabama to foster and promote the education of its citizens **in a manner and extent consistent with its available resources**, and the willingness and ability of the individual student, but

> **nothing in this Constitution shall be construed as creating or recognizing any right to education or training at public expense, nor as limiting the authority and duty of the legislature**, in furthering or providing for education, to require or impose conditions or procedures deemed necessary to the preservation of peace and order. (emphasis added).

The Alabama Court concluded that although it had previously found the state education system constitutionally deficient "any specific remedy that the judiciary could impose would, in order to be effective, necessarily involve a usurpation of that power entrusted exclusively to the Legislature." 836 So.2d at 819.

Given this Court's principle that in construing the Constitution of Pennsylvania, the actual language of the Constitution as understood by the People when they voted on its adoption must be its "touchstone" or "polestar,"[26] the decisions by these sister courts to abandon the enterprise of enforcement, in reliance on constitutions with different wording and distinctive history provide scant support for *Marrero.*

Conclusion

In *In re Teachers' Tenure Act Cases*, 197 A.344, 352 (Pa. 1938), this Court observed that in light of the Education Clause, the Legislature has no authority to adopt

> [L]aws which will ultimately weaken, if not destroy, the underlying constitutional purpose. To permit such legislative incursion would relegate our State back to the days when education was scarce and was secured only

[26] *See* authorities cited, *supra* note 1.

through private sources, as a privilege of the rich.

Under petitioners' allegations, the Pennsylvania legislature has adopted just such laws. If the allegations are true, this Court has authority to protect the constitutional purpose and the children of the Commonwealth.

Respectfully submitted,

Robert Williams,
Distinguished Professor of Law
Sarah Ricks, Pa. Bar No. 60421
Clinical Professor of Law
Rutgers University Law School
217 N. 5th Street
Camden, NJ 08102
(856) 225-6400

By: */s/ Seth Kreimer*
Seth Kreimer, Pa Bar No. 26102
Professor of Law
The Law School
3501 Sansom Street
Philadelphia, Pa. 19104
(215) 898-7447
Counsel for Amici

Dated: Sept. 17, 2015

CERTIFICATE OF COMPLIANCE

I, Seth Kreimer, do hereby certify pursuant to Pennsylvania Rule of Appellate Procedure 2135(d) that the foregoing Amici Brief complies with the required word count limits. Per the word processing system Microsoft Word, the brief contains 11,845 words.