

NOTE

FROM MASSIVE RESISTANCE TO QUIET EVASION: THE STRUGGLE FOR EDUCATIONAL EQUITY AND INTEGRATION IN VIRGINIA

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This fifty-year retrospective on Virginia's 1971 constitutional revision argues that state constitutional language has both the power and promise to effect policy change in the area of educational equity.

In the years after Brown, Virginia dramatically resisted efforts to integrate. Then the Commonwealth embraced a moderate stance on integration, as part of its 1971 constitutional revision, to end de jure segregation and provide a "quality" education for "all children." Looking to new quality standards produced by a Board of educational experts, Virginia optimistically turned to the technocracy movement, hoping to take education out of politics. New aspirational language was meant to deepen the legislature's commitment to public schools and repair Massive Resistance's damage to public schools.

Looking back fifty years later, however, it is clear that this constitutional revision, while successfully meeting its goals around Massive Resistance, did not address underlying problems it is often assumed to have solved, such as inadequate funding or persistent de facto segregation. Other states' journeys battling the same issues have looked different, and these differences highlight some of the strengths and weaknesses of Virginia's approach.

This Note ultimately argues that the 1971 constitutional revision never intended to solve these problems, and thus, the work for educational

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advocates right now is not to come up with more clever litigation, but to convince Virginians to agree on a fairer school system—perhaps through a new constitutional revision. In the context of new public concern about racial justice following George Floyd’s death and the Coronavirus crisis, I argue that Virginia today may finally be ready to finish the work started in 1971.

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INTRODUCTION

In the first years of Virginia's existence, Thomas Jefferson proposed a radical idea: Widespread public education, for the purpose of preserving democracy.¹ His vision is today enshrined in the Commonwealth's Bill of Rights, which declares "[t]hat free government rests, as does all progress, upon the broadest possible diffusion of knowledge," and that the Commonwealth thus should give its people the opportunity to develop their talents through "an effective system of education throughout the Commonwealth."² He proposed a public education system for all, funded by taxes—a revolutionary idea at the time.³

Virginia's leaders did not adopt Jefferson's plan for public education.⁴ In fact, it was not until after the Civil War, at the behest of a compromise with Congress for readmission to the Union⁵ (and, as at least one scholar has suggested, primarily a result of advocacy by ex-slaves⁶), that Virginia reluctantly began to build a universal public education system.

By the middle of the twentieth century, public education had been quietly adopted as a staple of Virginian life, but it was neither a priority nor a value statement—unequal, segregated, and never particularly well-funded.⁷ Virginia's most famous public education moment—its participation in "Massive Resistance" in the years following *Brown v. Board of Education*—instead showed the Commonwealth's willingness to sacrifice its children's education to hold onto the racist ideals of its past.⁸ Perhaps no state was party to more high-profile segregation litigation in those years than Virginia, and unfortunately on the wrong side of history.⁹

But in 1971, Virginia's leaders finally sought to change this relationship to public education by enacting major constitutional changes

¹ 2 A.E. Dick Howard, Commentaries on the Constitution of Virginia 879 (1974).

² Va. Const. art. I, § 15.

³ Howard, *supra* note 1, at 879–80.

⁴ *Id.* at 880.

⁵ Derek W. Black, The Constitutional Compromise to Guarantee Education, 70 *Stan. L. Rev.* 735, 783 (2018).

⁶ James D. Anderson, The Education of Blacks in the South, 1860–1935, at 4–5, 15–16 (1988).

⁷ See, e.g., Richard G. Salmon, The Evolution of Virginia Public School Finance: From the Beginnings to Today's Difficulties, 36 *J. Educ. Fin.* 143, 146–48 (2010).

⁸ See *infra* Part I.

⁹ See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (incorporating *Davis v. Cty Sch. Bd.*); *Griffin v. Cty. Sch. Bd.*, 377 U.S. 218 (1964); *Green v. Cnty. Sch. Bd.*, 391 U.S. 430 (1968), *Richmond Sch. Bd. v. Bd. of Educ.*, 412 U.S. 92 (1973) (*per curiam*).

to the Commonwealth's education article.¹⁰ This note analyzes the work the 1971 revision has done in Virginia's public grade schools during the years since from both a legal and policy perspective. The note ultimately concludes that the results achieved—the primacy and complexity of the Standards of Quality in Virginia's public schools; the new balance of power between the Board of Education, the General Assembly, and local school boards; and the eradication of de jure segregation while preserving options for de facto segregation—were close to what the 1971 revisers intended. The revision solidified a technocratic approach to educational inputs in the Commonwealth, and it ensured an increased centralization of funding structures and decision-making that would reject any future attempts at racial segregation through local school closures. Looking back on the era that saw Virginia's "Massive Resistance" swept away and a newfound optimism about effective, non-partisan policymaking fall into place, I conclude that the revision of the education article was a success of its time.

However, today Virginia's schools face persistent problems of equity. Though on average, Virginia's public schools produce high quality results, that quality is not experienced equally by all students. In fact, Virginia's poor students receive significantly less funding than their wealthier counterparts,¹¹ despite having significantly more need, and they perform considerably worse according to the National Assessment of Educational Progress (NAEP).¹² Nor is segregation gone. Though de jure segregation and public school defunding have been successfully eradicated, de facto segregation is now on the rise. The number of hyper-segregated, highly impoverished schools has nearly doubled in Virginia since 2003.¹³

¹⁰ See *infra* Part II.

¹¹ Bruce D. Baker, Danielle Farrie & David Sciarra, *Is School Funding Fair? A National Report Card 11* (7th ed. 2018), <https://drive.google.com/file/d/1BTAjZuqOs8pEGWW6oUBotb6omVw1hUJI/view> [<https://perma.cc/T2JL-23SB>].

¹² See Achievement Gaps Dashboard, Nation's Rep. Card, https://www.nationsreportcard.gov/dashboards/achievement_gaps.aspx [<https://perma.cc/9EMX-V2MD>] (last visited June 2, 2020) (follow "Dashboard" hyperlink; then search "Virginia" for the Jurisdiction field, "Eligible for National School Lunch Program" for the "Student Group 1" field, and "Not eligible for National School Lunch Program" for the "Student Group 2" field) (comparing achievement gaps in Virginia between students who are and who are not eligible for the National School Lunch Program).

¹³ Chris Duncombe & Michael Cassidy, *Increasingly Separate and Unequal in U.S. and Virginia Schools*, Commonwealth Inst. (Nov. 4, 2016), <https://www.thecommonwealth>

While many scholars and advocates argue that such inequities comprise state constitutional violations best fixed by a court, I conclude that this is simply not so in Virginia. The 1971 revision of the Virginia Constitution was not meant to solve these problems.¹⁴ In fact, Virginia's voters have never had a state-wide discussion of educational equity and integration, nor have they been forced to make a commitment to such values.

As our nation has been rocked by protests against racial injustice and ravaged by a new pandemic that has wreaked havoc on communities of color, in particular, issues of race and inequity have been shoved to the forefront of public dialogue in a way few of us have before confronted. The time is ripe for Virginia to finally finish the work begun fifty years ago. A new constitutional amendment to Virginia's education article could facilitate this conversation. In 1971, Virginia's leaders wanted to make education a priority for the first time and decided to take the first step away from active segregation. Today, it is time to reshape our education article yet again, with a vision of equity and excellence that will finish the journey away from segregation and finally step toward a shared, fair shot at the future for our children.

I. A BRIEF HISTORY OF EDUCATION IN VIRGINIA UNDER THE 1902 CONSTITUTION

The years leading up to the 1971 Constitutional Revision in Virginia saw tumultuous political change throughout the country and the Commonwealth. The end of World War II provided the impetus the United States needed to address racism and segregation, and with the *Brown v. Board* rulings, the Civil Rights movement, and new federal legislative changes, the social reality of the country seemed to be rapidly changing. Though easily characterized as a response to those ongoing changes, Virginia's 1971 constitutional revision—particularly the Education Article's amendment—was not merely a formal statement of the Commonwealth's new values. It also put in place a new policy structure that had long-term empirical impacts on schools throughout the state.

[institute.org/2016/11/04/increasingly-separate-and-unequal-in-u-s-and-virginia-schools](https://www.virginialawreviewinstitute.org/2016/11/04/increasingly-separate-and-unequal-in-u-s-and-virginia-schools)
[<https://perma.cc/C6R2-NY9Q>].

¹⁴ In fact, it is not clear that education policy is designed to solve such problems by itself—a holistic approach that includes addressing income inequality, healthcare, and housing is likely needed. Such an argument, however, is outside the scope of this Note.

A. After a Slow Reconstruction-Era Start, Public Education in Virginia Under the 1902 Constitution was Explicitly Segregated and Often Poorly Funded.

Though Virginia first passed legislation creating public funds for education of the poor in 1810, it was not until 1870 that Virginia created a statewide public school system.¹⁵ Like in many states, public education in Virginia is rooted—and always has been—in the State Constitution. Virginia was one of the last states to rejoin the union after the Civil War, and Congress explicitly conditioned Virginia's admission on providing “school rights and privileges” in the state constitution.

The 1870 Constitution was a Reconstruction-era document that espoused progressive ideals of education through its “uniform system of public free schools.”¹⁶ It was primarily a structural document: it created a superintendent of public instruction position, provided for taxation for public schools, and even set a timeline for the rollout of schools across “all the counties” of Virginia in the next six years.¹⁷ Though the first superintendent, W. H. Ruffner, struggled to obtain state funds for the public schools, he managed to convince the local school leaders he had appointed to start their new public schools across Virginia based solely on the hope of the new constitutional tax.¹⁸ Miraculously, the system grew anyhow, with state expenditures exceeding \$1 million in 1900 and localities nearly matching that amount.¹⁹

In many ways, the 1902 Constitution built on this structure rather than rolling it back. Its primary structural change was to professionalize public school leadership by adding actual educators to the Board of Education.²⁰ But the 1902 Constitution also constitutionalized a more important change, mandating that “[w]hite and colored children shall not be taught in the same school.”²¹ This language would become an important target of the next constitutional revisers.

Virginia's public education system slowly grew under the framework of the 1902 Constitution, though it remained persistently underfunded,

¹⁵ Howard, *supra* note 1, at 880–81; Salmon, *supra* note 7, at 144–45.

¹⁶ Howard, *supra* note 1, at 881 (citing Va. Const. of 1870, art. VIII, § 1).

¹⁷ *Id.* at 881–82 (citing Va. Const. of 1870, art. VIII, § 3).

¹⁸ Salmon, *supra* note 7, at 146.

¹⁹ *Id.*

²⁰ Howard, *supra* note 1, at 882.

²¹ Va. Const. of 1902, art. IX, § 140.

and of course, segregated.²² Following other states, Virginia developed a “foundation” style funding scheme in the 1920s and slowly increased its state contribution to public schools over the coming decades.²³ Still, funding inequities were common between districts of different wealth, and inequities were even worse between the parallel Black and white school systems.²⁴ In many ways, this struggle for equality of opportunity was a result of other elements of the 1902 Constitution—the restrictive provisions on voting.

*B. The 1902 Constitution Facilitated Massive Resistance by
Disenfranchising Opponents and Allowing a Radical Movement to
Form.*

The 1902 Constitution disenfranchised a huge proportion of the populace. The document instituted a poll tax excluding a majority of the potential electorate from the political process,²⁵ as well as a literacy test that voter registration officials could use to disenfranchise Virginians of color.²⁶ Scholars estimate that only 11.5% of the voting age electorate actually participated in elections—both primary and general—all the way through World War II.²⁷

This exclusion allowed the so-called “Byrd machine,” the Democratic political structure led by U.S. Senator Harry F. Byrd, Sr., to consolidate and maintain strict power over the state’s government.²⁸ Though the party’s rhetoric emphasized local control and fiscal efficiency, its legacy today is primarily defined by its defense of white supremacy.²⁹ In the

²² Salmon, *supra* note 7, at 146–48.

²³ *Id.* at 147–48.

²⁴ *Id.*

²⁵ Va. Const. of 1902, art. II, § 21; Douglas Smith, “When Reason Collides with Prejudice”: Armistead L. Boothe and the Politics of Desegregation in Virginia, 1948–1963, 102 *Va. Mag. Hist. & Biography* 5, 6 (1994).

²⁶ Va. Const. of 1902, art. II, § 19; Wythe W. Holt, Jr., The Virginia Constitutional Convention of 1901–1902: A Reform Movement Which Lacked Substance, 76 *Va. Mag. Hist. & Biography* 67, 96 (1968).

²⁷ Smith, *supra* note 25, at 6.

²⁸ *Id.* See generally J. Harvie Wilkinson, III, *Harry Byrd and the Changing Face of Virginia Politics 1945–1966* (1968) (describing the political structures supporting Byrd and the changing role of Byrd’s organization in Virginia politics).

²⁹ See, e.g., Richard F. Weingroff, Senator Harry Flood Byrd of Virginia—the Pay-As-You-Go Man, U.S. Dep’t of Transp., <https://www.fhwa.dot.gov/infrastructure/byrd.cfm> [<https://perma.cc/Y9Z8-MVDY>] (last visited June 4, 2021) (describing Byrd’s gubernatorial platform as a plan “to institute the best methods of efficiency and economy in State affairs”); Massive Resistance, Va. Museum Hist. & Culture, <https://www.virginiahistory.org/>

years after *Brown v. Board of Education*, the Byrd machine famously clung to segregation, choosing a disastrous set of policies that still have repercussions today.

First, Governor Thomas B. Stanley commissioned a group to study the impact of *Brown* on Virginia and to consider how best to evade the decision's holding.³⁰ The resulting "Gray Commission Report" included recommendations "[t]hat no child be required to attend an integrated school" and "[t]hat local school boards be authorized to expend funds designed for public school purposes" to send (white) children to (segregated) private schools.³¹ This would soon morph into the even more radical policy of "Massive Resistance," as enshrined in the now infamous 1956 Southern Manifesto and the ensuing school-closing laws.³² Any school in Virginia that attempted to integrate would be closed, white students would be given public funds to attend segregated private schools, and a statewide Pupil Placement Board would take over school assignment, to preserve segregation.³³ With the help of the 1902 Constitution, radical white supremacy took over Virginia's schools.

C. Virginia Courts Interpreted the 1902 Constitution to Endorse Pro-segregation School Closures.

When Virginia's statewide school closing plan was overturned in 1959 as a violation of the state constitution,³⁴ it was only the first step in what became a decades-long fight over race, class, and public schools in Virginia. The court had not overruled the practice of allotting public funds for children to attend segregated private schools,³⁵ and subsequent legislative changes devolved much of the policymaking around such

collections-and-resources/virginia-history-explorer/civil-rights-movement-virginia/massive [https://perma.cc/CXA6-CRS3] (last visited Sept. 1, 2020) (describing Byrd's leadership of Massive Resistance).

³⁰ J. Rupert Picott, *The Status of Educational Desegregation in Virginia*, 25 *J. Negro Educ.* 345, 346 (1956).

³¹ *Id.* at 346–47 (citing Gray Commission, *Public Education Report of the Commission to the Governor of Virginia* 9, 11 (1955)).

³² Charles H. Ford & Jeffrey L. Littlejohn, *Reconstructing the Old Dominion: Lewis F. Powell, Stuart T. Saunders, and the Virginia Industrialization Group, 1958–65*, 121 *Va. Mag. Hist. & Biography* 147–48 (2013).

³³ *Va. Museum Hist. & Culture*, *supra* note 29.

³⁴ *Harrison v. Day*, 106 S.E.2d 636, 646 (Va. 1959).

³⁵ *Id.* at 647.

decisions to counties, foreshadowing local fights to come.³⁶ When counties were ordered to integrate their schools in 1959, Prince Edward County took the unique step to not appropriate any money for public schools for the next five years, closing the schools entirely.³⁷ Instead, the county continued to offer tuition grants for students to use at private schools.³⁸ Only white students had access to such schools.³⁹ The Supreme Court would reject this practice in 1964 as a violation of the federal Equal Protection Clause,⁴⁰ but first, under Virginia state law, the case followed a very different line of argument—one that severely weakened the 1902 Virginia Constitution’s commitment to public education.

In litigating its practices, Prince Edward County hoped to validate its method of closing its local school system as a way of resisting integration, perhaps making it easier for other localities to do the same.⁴¹ The Supreme Court of Virginia was willing to help. Justice Buchanan, joined by all but one member of the Court, determined that both the laws and Constitution of Virginia “leave to [localities] the determination of the number and character of the schools they were willing to operate”—even if that number was zero.⁴²

In turning to the Commonwealth’s obligations to provide an education if a locality did not, the court found none. Justice Buchanan declined to order the General Assembly to follow the apparent mandate of Section 129.⁴³ Instead, the court held that the definition of “efficient system” did

³⁶ The Closing of Prince Edward County Schools, Va. Museum Hist. & Culture, <https://www.virginiahistory.org/collections-and-resources/virginia-history-explorer/civil-rights-movement-virginia/closing-prince> [<https://perma.cc/FX34-5RQ5>] (last visited Sept. 1, 2020).

³⁷ *Id.* See generally Kristen Green, *Something Must Be Done About Prince Edward County* (2015) (recounting the struggle for integration in the county).

³⁸ Va. Museum Hist. & Culture, *supra* note 36; see also *Griffin v. Cty. Sch. Bd.*, 377 U.S. 218, 231 (1964) (explaining that this policy existed “for one reason, and one reason only: to ensure . . . that white and colored children in Prince Edward County would not, under any circumstances, go to the same school”).

³⁹ *Griffin*, 377 U.S. at 230.

⁴⁰ *Id.* at 232. Note that this litigation is actually an extension of the *Brown v. Board* litigation from Prince Edward County. Interestingly, the equality at issue was not equal treatment of races but equal treatment of students in different counties in Virginia. The Court, however, also saw the practice as a thinly veiled attempt at continuing the segregation outlawed by *Brown*. See *id.* at 220–21.

⁴¹ *Cty. Sch. Bd. v. Griffin*, 133 S.E.2d 565 (Va. 1963).

⁴² *Id.* at 565, 578.

⁴³ Va. Const. of 1902, art. IX, § 129 (“The General Assembly shall establish and maintain an efficient system of public free schools throughout the State.”).

not require the operation of *any* schools, in fact. The court decided that Section 129 “leaves to the judgment of the General Assembly the manner and means of its execution”⁴⁴ In other words, Section 129’s supposed mandate was unenforceable.⁴⁵ The result in Virginia—even though the case was later overturned on federal grounds—was the evisceration of Section 129’s power to ensure public education.⁴⁶ As interpreted by the courts, the old language of the 1902 Constitution of Virginia specifically allowed efforts to defund, close, and deny integrated schools to students.

D. The End of Massive Resistance Accompanied a Growing Interest in Technocracy and Public Education.

Massive Resistance eventually fell apart, less because of changing opinions on race than because increasing numbers of middle-class whites began to realize the economic cost of an unstable school system and advocate for the restoration of public schools.⁴⁷ Additionally, three major changes in the voting electorate took hold in the 1960s, ending the radical Democratic grip on Virginia and opening the way for a more moderate approach to integration. First, the Supreme Court invalidated Virginia’s poll tax,⁴⁸ a decision that greatly expanded the electorate of Virginia to include formerly disenfranchised voters, many of whom opposed the Byrd Machine and would eventually vote for more moderate policies.⁴⁹

⁴⁴ *Griffin*, 133 S.E.2d at 573.

⁴⁵ *Id.* at 577–78 (“It is for the General Assembly first to determine whether the failure of a locality to cooperate and assume its responsibility renders the system inefficient. It doubtless has the power to shape its appropriations for public schools under § 135 of the Constitution to correct an inefficiency in its established system, but that is in the area of legislative discretion, not in itself a constitutional requirement. The question of the efficiency of the system and whether it meets the constitutional requirement of § 129 becomes a matter of law only if it clearly appears that the system has broken down and adherence to it amounts to a disregard of constitutional requirements.”).

⁴⁶ Hullihen W. Moore, *In Aid of Public Education: An Analysis of the Education Article of the Virginia Constitution of 1971*, 5 U. Rich. L. Rev. 263, 266–67 (1971).

⁴⁷ See Ford & Littlejohn, *supra* note 32, at 149; James H. Hershman, Jr., *Massive Resistance Meets Its Match: The Emergence of a Pro-Public School Majority*, in *The Moderates’ Dilemma: Massive Resistance to School Desegregation in Virginia* 104 (Matthew D. Lassiter & Andrew B. Lewis eds., 1998).

⁴⁸ The Twenty-Fourth Amendment to the U.S. Constitution passed Congress in 1962 and was ratified in 1964, banning poll taxes for federal elections. Virginia was one of four states that tried to keep a state election poll tax in place, but was sharply admonished by the Supreme Court for doing so in *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 666 (1966).

⁴⁹ James R. Sweeney, *Southern Strategies: The 1970 Election for the United States Senate in Virginia*, 106 Va. Mag. Hist. & Biography 165, 166 (1998).

Second, Congress passed the Voting Rights Act of 1965, which helped diversify Virginia's electorate and provide broader access to the voting franchise beyond the Byrd machine's base.⁵⁰ Finally, the Supreme Court decision in *Baker v. Carr* (and ensuing cases) required state legislatures to apportion districts fairly: one person, one vote.⁵¹ This new districting policy, combined with urbanization, slowly pushed the Byrd organization—which relied on rural elites—out of power. By 1968, the long-dominant Byrd faction had “disintegrated,” making way for a new era of Virginia governance by more moderate leaders of both parties.⁵² This developed alongside increasing interest in public education, as the General Assembly debated new investments in schools and higher education.⁵³ It was the perfect time for a constitutional revision.

II. THE 1971 CONSTITUTIONAL REVISION AND CHANGES TO THE EDUCATION ARTICLE

The Virginia Constitution's amendment process is not simple. Each change must be approved in three separate votes: twice by the General Assembly during two separate sessions that have been separated by a delegate election, and then once by the populace in a statewide referendum.⁵⁴ Thus, the process of approval takes several years, not to mention the time required for research and drafting.

The 1971 constitutional revision was first initiated by Governor Mills Godwin in 1968.⁵⁵ An appointed commission, approved by the General Assembly and staffed with researchers, spent much of that year

⁵⁰ See, e.g., Markus Schmidt, The Voting Rights Act of 1965—How America Did Overcome, *Rich. Times-Dispatch* (Aug. 1, 2015), https://richmond.com/news/local/government-politics/the-voting-rights-act-of-1965---how-america-did-overcome/article_7d47ec7d-bf98-5014-8e25-5c72b2617a39.html [https://perma.cc/8XM5-MYFD].

⁵¹ *Baker v. Carr* held that federal courts could review state redistricting choices, paving the way for *Reynolds v. Sims*, the case requiring state legislatures to apportion on a roughly equal population basis. *Baker v. Carr*, 369 U.S. 186, 197–98 (1962); *Reynolds v. Sims*, 377 U.S. 533, 575–77 (1964). See also, Sweeney, *supra* note 49, at 166 (“[T]he United States Supreme Court undermined the controlling influence of rural areas in the apportionment of state legislatures.”).

⁵² Sweeney, *supra* note 49, at 165–66.

⁵³ M. Caldwell Butler, A Republican Looks at the 1968 Virginia General Assembly, 45 U. Va. News Letter 1 (Inst. Gov't, Charlottesville, Va.), Sept. 15, 1968.

⁵⁴ A.E. Dick Howard, Adopting a New Constitution: Lessons from Virginia, in 1 *State Constitutions for the Twenty-first Century: The Politics of State Constitutional Reform* 77 (G. Alan Tarr & Robert F. Williams eds., 2005).

⁵⁵ *Id.* at 74.

developing proposals that were ultimately handed off to the General Assembly in 1969.⁵⁶ In a special session, the General Assembly adopted many of those recommendations and reworked others.⁵⁷ Following a delegate election that fall, the General Assembly voted again in 1970,⁵⁸ ultimately passing the majority of recommendations on to voters. Four main amendment questions would go to referendum that fall.⁵⁹

Commentators have noted that the amendment process in Virginia is as much a political one as a legal one. Professor A.E. Dick Howard, the executive director of the revision commission, describes the work he did to gather public support as similar to any other political campaign. Not only did the campaign committee he led seek to build general “awareness that there was in fact a revision underway[,]”⁶⁰ but also pushed a slogan: “vote ‘yes’” in order to “[b]ring government closer to the people.”⁶¹ The activities were similar too: seeking endorsements, building talking points, establishing field offices, navigating press and media, printing brochures and other materials, purchasing advertising space, fundraising, and even conducting polls.⁶² And like any other political campaign, this work made a difference. Ultimately, the four proposals were adopted, several by an overwhelming margin: the main body of the constitution was approved by 72% of voters—a real mandate.⁶³

A. Much of the 1902 Education Article Remained.

The drafters of the new constitution preserved much of the structure of public education in Virginia. They rearranged the educational provisions from 1902 in a more logical way, and they modernized the language, but plenty of content remained the same. For example, they maintained the constitutional status of the Board of Education, as well as its primary responsibilities, though its leadership provisions were simplified.⁶⁴ They also maintained provisions on free textbooks for the poor,⁶⁵ the position

⁵⁶ Id. at 74–75.

⁵⁷ Id. at 76–77.

⁵⁸ Id. at 77.

⁵⁹ Id.

⁶⁰ Id. at 82.

⁶¹ Id. at 83.

⁶² Id. at 78, 80–83.

⁶³ Id. at 85.

⁶⁴ Compare Va. Const. of 1902, art. IX, §§ 130, 132, with Va. Const. art. VIII, §§ 4–5.

⁶⁵ Compare Va. Const. of 1902, art. IX, § 139, with Va. Const. art. VIII, § 3.

of Superintendent of Public Instruction,⁶⁶ and the Literary Fund.⁶⁷ Additionally, the revised language simplified requirements of local school governance, partly in order to improve mechanics of the district consolidation process (an important consideration at the time, as small districts were seen as inefficient⁶⁸).⁶⁹

B. Symbolic Changes, Such as the Repeal of Mandated Segregation and Addition of New Bill of Rights Language, May Represent the Most Important Revisions.

Arguably the most salient change was the repeal of the infamous Section 140, finally taking mandated school segregation out of the Constitution of Virginia.⁷⁰ Though it had no legal power at the time of the revision, its repeal was crucial to the revisers' use of symbolic language to convey new Virginia values. The revisers, however, focused little on this provision in their commentary. While they may have been concerned about segregation's impact on quality schools for all children (for example, they noted that "consolidation of school divisions [should] be placed in the hands of a body that is somewhat insulated from the political pressures" produced by such decisions),⁷¹ their bigger concern was repairing the public system more generally. This focus was likely a wise choice, as it echoed the concerns of moderate middle-class parents who had rallied against Massive Resistance in 1959 to stop school closings.⁷² To the Commission, Virginia's "commitment to public education was shaken, and the importance of constitutional protections for public

⁶⁶ Compare Va. Const. of 1902, art. IX, § 131, with Va. Const. art. VIII, § 6.

⁶⁷ Compare Va. Const. of 1902, art. IX, §§ 134–135, with Va. Const. art. VIII, § 8.

⁶⁸ Report of the School Division Criteria Study Commission to the Governor and the General Assembly of Virginia, S. Doc. No. 5, at 7 (1973). This focus on district size and efficiency was a reflection of the technocratic movement of the time. Emmy Lindstam, Support for Technocratic Decision-Making in the OECD Countries: Attitudes Toward Apolitical Politics 5–6 (May 2014) (B.A. thesis, University of Barcelona) (on file with University of Barcelona).

⁶⁹ Compare Va. Const. of 1902, art. IX, §§ 133, 136, with Va. Const., art. VIII, § 7. While district consolidation was a controversial issue on the subject of integration in many ways, the provision ultimately at issue here was only technical—solving the problem of multiple school boards in one county. The originally proposed Section 5(a), unrelated, suggested that the Board have sole power to draw division lines, excluding the General Assembly from the consolidation process. Howard, *supra* note 1, at 920–21. As ultimately passed, the General Assembly sets limits on this power. Va. Const., art. VIII, § 5(a).

⁷⁰ Va. Const. of 1902, art. IX, § 140.

⁷¹ Comm'n on Const. Revision, *The Constitution of Virginia: Report 256–57* (1969).

⁷² Hershman, *supra* note 47, at 104.

schools” had become apparent.⁷³ It would be this careful choice of language that would help the ultimate constitutional revision pass.

Additionally, the revisers added language from Jefferson’s Bill for the Diffusion of Knowledge to Virginia’s Bill of Rights, for the first time incorporating education into that article of the Constitution. Though this language has since been interpreted as merely “aspirational,”⁷⁴ it nonetheless highlights the Commonwealth’s values regarding public education. The Committee on Constitutional Revision noted that “[p]lacing such language in the Bill of Rights signalizes the relation of an educated citizenry to other fundamental values and underscores the thrust of the revised Education article”⁷⁵ These combined symbolic additions were meant to highlight the new importance of education to Virginia and to buttress the State’s commitment—even if only aspirational—to quality education for all children.

*C. The Legislative Commitment to Education Was
Repaired and Strengthened.*

Section 1—the new version of the language litigated by *Griffin*—now stated both a duty and a goal for the General Assembly.⁷⁶ Where the previous constitution had required the legislature to establish an “efficient system” of schools “throughout the State,”⁷⁷ the new provision was more broadly applicable and specifically worded, requiring a “system of free public elementary and secondary schools for all children of school age throughout the Commonwealth”⁷⁸ Though the provision did require “all children” to have access to education, an important choice of language in the new era of integration, it left out express words of equality or integration.⁷⁹ Notably, the language seems to imply an individual right, where the previous document focused more on a state obligation.

The second clause of the section was merely exhortatory, describing that the General Assembly shall “seek to ensure that an educational

⁷³ Comm’n on Const. Revision, *supra* note 71, at 254.

⁷⁴ *Scott v. Commonwealth*, 443 S.E.2d 138, 142 (Va. 1994).

⁷⁵ Comm’n on Const. Revision, *supra* note 71, at 99.

⁷⁶ Howard, *supra* note 1, at 896.

⁷⁷ Va. Const. of 1902, art. IX, § 129.

⁷⁸ Va. Const. art. VIII, § 1.

⁷⁹ *Id.* Note that the Commission did not discuss this choice directly in their commentary. Comm’n on Const. Revision, *supra* note 71, at 254–56.

program of high quality is established and continually maintained.”⁸⁰ As a result, there was no constitutionally-articulated standard for that system of education, “efficient” or otherwise. This choice of language was not quite true to the initial recommendation of the advisers, who had suggested a more enforceable “to ensure” instead of “seek to ensure.”⁸¹ But it was an intentional choice of the General Assembly and Governor, who wanted to shy away from potential litigation. At the time, school funding litigation around the country was starting to gain momentum—often based on state constitutional clauses with similar language. In fact, Virginia had already seen its first, albeit unsuccessful, federal school funding case: *Burruss v. Wilkerson*.⁸² Both the Governor and General Assembly were uncomfortable with courts being arbiters of what “quality” might mean under the new constitution, worried that such “subjective” language might invite lawsuits that give the court the power to “take away future General Assemblies’ right to determine what is high quality”⁸³

Still, Section 1 signified a valuable shift in the General Assembly’s commitment to public schools. The mandate for schools for “all children,” instead of an “efficient system,” repudiated the Court’s holding in *Griffin* and renewed the General Assembly’s commitment to education. The language would definitively prevent future attempts at Massive Resistance-style shutdowns, though it would not open the floodgates to equity litigation either.

In addition to these changes, the revisers strengthened the provision on compulsory education in Section 3.⁸⁴ The prior compulsory education provision had explicitly left enactment to the “discretion” of the General Assembly, and by 1959 was no longer truly in force, as part of Massive Resistance efforts.⁸⁵ Though the new provision has been criticized as unenforceable,⁸⁶ its mandatory language represents a further rejection of Massive Resistance and repair of its harms.

⁸⁰ Va. Const. art. VIII, § 1.

⁸¹ Comm’n on Const. Revision, *supra* note 71, at 257–58.

⁸² 310 F. Supp. 572 (W.D. Va. 1969).

⁸³ Howard, *supra* note 1, at 895–96.

⁸⁴ Compare Va. Const. of 1902, art. IX, § 138, with Va. Const. art. VIII, § 3 (describing compulsory education standards). In 1971, the drafters included that the “appropriate age” of compulsory education was “to be determined by law.” *Id.*

⁸⁵ Moore, *supra* note 46, at 278–79.

⁸⁶ *Id.* at 280–81.

D. New "Standards of Quality" Would Be Designed by the Board of Education.

Section 2 filled in some of the enforcement power lacking in Sections 1 and 3 by requiring the Board of Education to prescribe "standards of quality," presumably to ensure a certain adequacy of education across the state.⁸⁷ The General Assembly would have the power to revise these standards, then would have both the obligation to determine the needed funds for the standards and the power to allocate those costs between localities and the state.⁸⁸ Localities would not be allowed to opt out of funding their schools—the new provision was self-enforcing.⁸⁹ Indeed, if the "all children" language of Section 1 was not clear, the language mandating localities pay for their schools made it so. The General Assembly's new power to dictate funding distribution reflected a change in the balance of power: the increased centralization of decision-making at the state level.

The language of "standards of quality" in Section 2 reflected an important movement of the twentieth century: an optimistic embrace of the idea that the future form of government was not going to be a partisan one, but rather a government for the people by the policy experts—the technocrats.⁹⁰ The Board's constitutional status as an expert body of education policy advisors reflects the vision of the technocrat movement. Indeed, the complexity of the standards themselves (which today run more than 14,000 words⁹¹), demonstrates the prevalence of technocratic theory in the field of education. Of all the education provisions revised, this proved to have the most significant long-term policy impacts on the ground.

III. FROM 1971 TO 2021: THE LONG-TERM RESULTS OF REVISION

Looking back, the 1971 revision of the Virginia Constitution's Education Article had two primary goals, one retrospective and one prospective. The retrospective goal was to definitively reject Massive

⁸⁷ Va. Const. art. VIII, § 2.

⁸⁸ *Id.*

⁸⁹ Moore, *supra* note 46, at 276–77.

⁹⁰ For a literature review of technocracy that highlights the widespread optimism in the 1960s and 70s that "technocracy appeared to be a feasible future form of government[.]" see Lindstam, *supra* note 68.

⁹¹ The standards are currently found in the Code of Virginia. See Va. Code Ann. §§ 22.1-253.13:1–22.1-253.13:9 (2020).

Resistance. Because the old constitution had been used to support the movement and had been given a segregationist gloss, the revisers knew they would need to change much of the Education Article's language in order to achieve their goal of an education article that emphasized quality for "all."⁹²

Prospectively, Virginia's leaders embraced the optimism of the new American technocracy movement:⁹³ they intended to take education policy out of politics and put it into the hands of expert administrators, who could improve the quality of the service being offered. Where the Virginia public school system in previous decades had been often inconsistent, underfunded, and subject to great local variability, the new constitution encouraged increased professionalism in the system, implied by its stated vision of "[s]tandards" and "quality."⁹⁴ It allowed for greater centralization of power over both funding and standards, which would lead to a decrease in variability, and hoped to put more power in the Board of Education than the General Assembly to insulate hard decisions from politics.

A. The Revision Symbolically and Legally Rejected Massive Resistance.

The revisers' immediate retrospective goal was to definitively reject the Massive Resistance movement through a new statement of constitutional values. This included deleting language that mandated school segregation and adding new language to the Bill of Rights, as well as repairing the legal damage Massive Resistance had done to the prior constitution by replacing certain provisions.

True to the revisers' intent, this goal was successful. The combined removal of the old § 140 and addition of a new mandate requiring localities to share funding means that since 1971, no school district has been shut down in protest of integration, and all school districts have received both state and local funding every year. De jure segregation as understood by 1971 revisers is a thing of the past, and the public schools are far more stable than they were in the 1950s.

⁹² It is important to clarify that this Note speaks of retrospectively rejecting Massive Resistance as a different object than prospectively achieving integration. Modern readers may struggle to differentiate the two, seeing all forms of segregation as equally bad. However, to a 1971 reviser, spurning Massive Resistance was a very different political choice than embracing racial integration.

⁹³ See Lindstam, *supra* note 68, at 5 and accompanying text.

⁹⁴ Va. Const. art. VIII, § 2.

However, the goal of the 1971 revision was not to achieve equality, successfully integrate schools, or even to embrace the holding of *Brown*. Rather, the goal is much better perceived as a shift to the new American suburban mentality.⁹⁵ Rather than actively pursue integration or racial equality, school systems all over the country redirected their focus to the pursuit of a quality education system *as a whole*, but particularly for the middle class. As Professor Jim Ryan puts it in his book on Virginia schools, education policy in the years since *Brown*, and particularly from the 1970s, has reflected one primary value: “the sanctity of suburban schools”⁹⁶

In many ways, the goal of the 1971 revision centered more on Virginia’s national economic reputation and an outward statement of values than on any practical attempt at justice or equality for poor Black students. Journalistic coverage of the potential impacts of Massive Resistance at the time highlighted the very real possibility that without strong public schools—segregated or not—business leaders would be paying higher taxes, the State would lose lucrative federal contracts, and many municipalities would fall into budget deficits.⁹⁷ Facing the economic dangers of a dysfunctional public school system, elite power brokers found themselves in a moderate political position, attempting to end Massive Resistance.⁹⁸ Many middle-class parents joined them, thinking that integrated public schools were not nearly as bad as no public schools, even if they preferred little racial integration and almost no socioeconomic integration.⁹⁹

Of course, the changes in 1971 still mattered. For both white business elites, middle-class parents, and Black equality advocates, the new

⁹⁵ See, e.g., James E. Ryan, *Five Miles Away, A World Apart: One City, Two Schools, and the Story of Educational Opportunity in Modern America* 1–8 (2010).

⁹⁶ *Id.* at 13.

⁹⁷ *Virginia Magazine* highlighted the sudden (perhaps imagined) threat the public felt of “increasing budget deficits, higher local taxes, and the withdrawal of government spending streams that had lifted so many parts of the Old Dominion from structural underemployment[.]” including a concern that the federal government would withdraw its Naval Base and other investments from the state. Ford & Littlejohn, *supra* note 32, at 149–51. *Business Week* predicted a massive rise in local property taxes, and Dr. Loren A. Thompson called Massive Resistance an “Education Crisis” that was “the main reason that Virginia was falling behind other states in attracting new industries and businesses.” *Id.* at 154. In other words, negative press coverage about the state predicted economic harm to white elites, a prospect that moderates wanted to avoid.

⁹⁸ *Id.* at 149, 152–54.

⁹⁹ Hershman, *supra* note 47, at 104–05.

constitutional revision represented an exciting new statement of values from which the State's new education policy choices could be made. Segregation would no longer have constitutional status. The State's leaders had symbolically rejected it, for the first time in Virginia's long history. Education would be provided for "all children,"¹⁰⁰ a commitment that again, diverged significantly from Virginia's slow start to universal public education and its holding in *Griffin*. And the Virginia Constitution—now repaired—placed education high on Virginia's priority list.

*B. The Revision Optimistically Embraced Technocratic
"Standards of Quality" Drafted by Policy Experts, but Today
Budgetary and Political Constraints Remain.*

The primary prospective goal of the 1971 constitutional revisers was to improve the quality of Virginia schools. They did this in a unique way, by mandating a process by which the Board of Education, an apolitical group of policymakers, would draft standards of quality that were then submitted to the General Assembly for revision, approval, and funding.¹⁰¹ By mandating a specific process, the revisers hoped to improve funding for public education by putting it higher on the legislature's priority list and to improve the quality of services by delegating standard-drafting and general public school supervision to a non-political body of experts.¹⁰² In actuality, Virginia's schools are still overwhelmingly controlled by the General Assembly. The General Assembly revises the standards of quality and draws up the budget, allocating funding requirements to localities and placing mandates on the Board.¹⁰³ This power is particularly weighty in Virginia, which has a non-activist court culture.¹⁰⁴

1. Enthusiasm About the New "Standards of Quality" Rose and Fell in the Years Following Constitutional Passage.

The standards of quality generated plenty of excitement at the time of their initial drafting. A Virginia Attorney General's opinion from 1973

¹⁰⁰ Va. Const. art. VIII, § 1.

¹⁰¹ Va. Const. art. VIII, § 2.

¹⁰² Howard, *supra* note 1, at 901.

¹⁰³ Va. Const. art. VIII, §§ 2, 5(e); Howard, *supra* note 1, at 901–04.

¹⁰⁴ *Infra* notes 110–14 and accompanying text.

optimistically wrote that once the General Assembly had calculated the costs of the standards:

[T]he General Assembly, if it is to comply with the mandate of the Constitution, should take into account . . . actual costs and should apportion the costs on an equitable basis . . . [to] ensure that those localities lacking sufficient resources to enable them to meet the costs of the Standards will receive such supplements from the State as are necessary to offer educational programs of the prescribed quality.¹⁰⁵

However, during the economic downturn of the mid-1970s, the Attorney General's office backed off from this strong stance on "actual costs" and "equitable" provision of funds, conceding that the Governor may order necessary funding cuts without other legislative approval, which may pull funding from the standards, because the Constitution of Virginia only requires that the General Assembly "'seek' to establish and maintain a quality program."¹⁰⁶ Similarly, as the new trend of school finance litigation began to play out in nearby states, the Attorney General was reluctant to find fault with Virginia's funding formula.¹⁰⁷ Since the formula was "realistic in relation" to actual educational costs in the Commonwealth and "rationally" designed to establish an educational system, the funding system complied with both the Virginia and federal Constitutions.¹⁰⁸

2. *The Court Has Been Deferential on School Funding and Quality.*

Virginia's courts have also generally perceived it beyond the scope of their role to question the General Assembly's policy choices or criticize budgets.¹⁰⁹ This deference was particularly visible in the context of education in *Scott v. Commonwealth*, a 1994 case in which a number of students and districts challenged Virginia's statewide school funding scheme as unequal under the State Constitution.¹¹⁰ The facts of the case were shocking: the court found that in some districts combined state and

¹⁰⁵ 1972–73 Op. Va. Att'y Gen. 353.

¹⁰⁶ 1975–76 Op. Va. Att'y Gen. 313.

¹⁰⁷ 1980–81 Op. Va. Att'y Gen. 79–85.

¹⁰⁸ *Id.*

¹⁰⁹ Acts of the Virginia legislature are granted a "presumption of constitutional validity." *Sch. Bd. v. Parham*, 243 S.E.2d 468, 472 (Va. 1978). For the court to declare a statute unconstitutional requires a clear violation. A mere "shadow [of a doubt about constitutionality] is not enough." *Lipscomb v. Nuckols*, 172 S.E. 886, 889 (Va. 1934).

¹¹⁰ *Scott v. Commonwealth*, 443 S.E.2d 138, 139 (Va. 1994).

local spending amounted to 2.5 times what it was in others.¹¹¹ In some divisions, teacher salaries were nearly 40% higher than in others, and in the wealthiest districts, spending on instructional materials came to over *ten times* higher than in the poorest districts.¹¹² Nonetheless, after declaring that it was using a strict scrutiny standard, the Virginia Supreme Court concluded that “nowhere does the [Virginia] Constitution require equal, or substantially equal, funding or programs among and within the Commonwealth’s school divisions.”¹¹³ Thus, the court declined to review the equality of the General Assembly’s funding scheme, leaving accountability for complex funding up to voters alone.

3. The Involvement of the Board of Education Has Varied over Time.

As the Commonwealth got further in time from the constitutional revision, excitement about the standards waned, and the commitment to expert—rather than political—school leadership began to decline. In the first several years after the new Constitution’s passage, the Board of Education had issued the standards of quality directly in their annual report during odd-numbered years.¹¹⁴ The General Assembly then accepted those standards, revised them, and passed the revised standards as uncodified acts in force for the two years of the budget biennium.¹¹⁵ In 1984, the General Assembly codified the standards for the first time.¹¹⁶ In response, the Board’s involvement in rewriting the standards appears to have declined in the 1980s and 1990s. In 2002, members of the Joint Legislative and Audit Review Commission lamented that the standards had hardly changed in decades.¹¹⁷ Perhaps in an effort to mandate greater attention by the Board, the legislature then enacted a new process, requiring the Board to make recommendations every two years to the

¹¹¹ *Id.* at 140.

¹¹² *Id.*

¹¹³ *Id.* at 142. Note that *Scott* did leave open the possibility of an adequacy challenge; the Court indicated that students might have an individual right to a certain level of education. *Id.* (“[T]he Students do not contend that the manner of funding prevents their schools from meeting the standards of quality.”).

¹¹⁴ Va. Code Ann. § 22-19.1 (1973) (describing the issuance procedure).

¹¹⁵ See, e.g., 1972 Va. Acts 1032–36.

¹¹⁶ See 1984 Va. Acts 1572–76, 1655–59.

¹¹⁷ Joint Legislative Audit & Review Comm’n of the Va. Gen. Assembly (“JLARC”), Review of Elementary and Secondary School Funding 27 (2002), <http://jlarc.virginia.gov/pdfs/reports/Rpt277.pdf> [<https://perma.cc/W8VG-AN4S>].

General Assembly.¹¹⁸ The dynamic created by this statute seems to have had the opposite effect, relegating the Board to more of a position of ‘recommender,’ though the current Board has sought to reverse the trend.¹¹⁹ Since 2002, the Board has virtually dropped off the radar of Virginia legal scholars. Prior to the Attorney General’s opinion addressed to Delegate Stanley in January 2019, the standards of quality had not been addressed in a Court opinion or an Attorney General report in nineteen years.¹²⁰

However, the Board today is not powerless. For example, much of the Board’s energy in the last twenty years has gone into assessment and accreditation, state accountability structures that can have wide ranging impacts from improving schools to exacerbating segregation.¹²¹ Additionally, the Board can leverage its platform in service of certain policy positions that might not otherwise have political support. In 2019, for example, the Board drafted and passed a new set of standards of quality, pushing hard for significantly more funding for disadvantaged children.¹²² The media coverage of the vote emphasized the huge financial ask, which was nearly a billion dollars.¹²³ While the Board’s request was ultimately watered down in part by budgetary haggling, the General

¹¹⁸ Va. Code Ann. § 22.1-18.01 (2020).

¹¹⁹ See Va. Bd. of Educ., October 2019 Meeting Update 3 (2019), https://www.vsba.org/images/uploads/October_2019_Meeting_Report.pdf [<https://perma.cc/SM4R-JCQS>].

¹²⁰ See Va. Att’y Gen., Opinion Letter (Jan. 4, 2019), <https://www.oag.state.va.us/files/Opinions/2019/18-046-Opinion-to-Senator-Stanley-Issued.pdf> [<https://perma.cc/DPG8-JJXK>]; 2002 Op. Va. Att’y Gen. 54 n.29.

¹²¹ Justin Mattingly, Schools Across Virginia, Richmond Region, Fare Better Under New Accreditation Standards, *Rich. Times-Dispatch* (Sept. 27, 2018), https://www.richmond.com/news/local/education/schools-across-virginia-richmond-region-fare-better-under-new-accreditation/article_ecaddfcd-9a08-534d-960f-9ab5266fc3cb.html [<https://perma.cc/4WSB-R7X2>] (demonstrating the Board’s effort to use data to evaluate schools more accurately); Va. Bd. of Educ., Comprehensive Plan: 2018–2023, at 4–6 (2017), <https://www.doe.virginia.gov/boe/plan/comprehensive-plan.pdf> [<https://perma.cc/P9ZC-9ESH>]; Va. Bd. of Educ., 2013 Annual Report on the Condition and Needs of Public Schools in Virginia app. A, at 36–37 (2013), https://www.doe.virginia.gov/boe/reports/annual_reports/2013_appendix_a_sol_history.pdf [<https://perma.cc/7M78-HTXQ>].

¹²² See, e.g., Davis Burroughs, Virginia Board of Education Seeks Nearly \$1 Billion in New K–12 Funding, *Va. Dogwood* (Oct. 17, 2019), <https://vadogwood.com/2019/10/17/virginia-board-of-education-seeks-nearly-1-billion-in-new-k-12-funding/> [<https://perma.cc/BJ4W-C22Y>] (describing the Board’s 2019 political push for expanded at-risk funding in service of “equitable outcomes” for disadvantaged children).

¹²³ *Id.*

Assembly did approve a significant increase in equity funding as a result of the Board's ask.¹²⁴ In other words, though the Board has not pulled education out of politics, the Board can use its political role to help make schools a priority.

4. Ultimately, the Standards Have Continually Struggled with Inadequate Funding.

The standards of quality were implemented through the establishment of a new funding formula based on several calculations: a “Basic State Aid” calculation of what it would cost to comply with the standards of quality, and a “Local Composite Index” measuring a locality's ability to share school costs.¹²⁵ However, almost immediately after implementation, state political candidates began to face calls to “*fully fund*” the standards of quality and increase state funding.¹²⁶ In response, the Joint Legislative Audit and Review Commission (“JLARC”) made several technical recommendations. But the recommended changes, once adopted, made the formula more complex, which further obfuscated how much the State spent, preventing public accountability.¹²⁷

The State's revised calculation methods have not been without controversy. For example, the new formula employed a linear weighted average to calculate costs—which means that the State's calculation of how much it costs to educate a child in Virginia probably substantially underestimates how much it costs to educate a child in more expensive parts of the state, thus ignoring one of the main drivers of inequality.¹²⁸ Though Virginia added an At-Risk Add-On fund in the 1990s (shortly after the *Scott* case) to improve funding for poor students, it has not been sufficient.¹²⁹ In 2001, JLARC criticized the funding scheme's inadequate support and unequal distribution.¹³⁰ Unfortunately, the legislature's

¹²⁴ Justin Mattingly, *It Was a Landmark Year for Education Funding in Virginia—Until COVID-19*, Rich. Times-Dispatch (Apr. 24, 2020), https://richmond.com/news/virginia/it-was-a-landmark-year-for-education-funding-in-virginia—until-covid-19/article_c50665a6-172d-5f56-a1b0-43240cfff68d.html [<https://perma.cc/J4F9-5WH9>].

¹²⁵ Professor Salmon suggests that the complexity of this formula was a direct response to *Burruss v. Wilkerson* and an attempt to avoid equal rights litigation over school funding. Salmon, *supra* note 7, at 151.

¹²⁶ *Id.* at 152.

¹²⁷ *Id.* at 152–53.

¹²⁸ *Id.* at 153.

¹²⁹ Va. Code Ann. § 22.1-199.1 (2020).

¹³⁰ JLARC, *supra* note 117, at iv–vi; Salmon, *supra* note 7, at 155.

response was distracted at best. When the 2008 financial crisis hit, funding was further cut, and never truly restored. Even as of 2019, legislators continued to discuss “lifting the cap” on support staff that was put in place over a decade before.¹³¹ The coronavirus’s destruction of state budgetary revenues will only worsen the problem.¹³²

Today, Virginia’s state share of funding ranks forty-first out of fifty-one states or territories, and its roughly 39% share falls significantly below the national average of 47%.¹³³ Such low state funding results in large disparities between wealthy and poor districts. For example, in 2018, one district (Norton, Virginia) spent less than half as much money per student as another (Arlington).¹³⁴ Virginia has consistently received “D” and “F” grades for the disparately low funds received by high poverty districts compared to peer districts,¹³⁵ despite the massive need posed by educating children in concentrated poverty.

C. The Race-Blind Attempt at Educational Quality for “All Children” that Passed in 1971 Failed to Address One of the Biggest Obstacles to Equal Schools: Integration.

Though the racial integration of schools drove the events behind Virginia’s constitutional revision, its revisers avoided virtually all

¹³¹ Schuyler VanValkenburg, Jeff Bourne & Mike Mullin, A Student Who Is Safe Is a Student Who Is Safe to Learn, *Rich. Times-Dispatch* (Mar. 31, 2019), https://www.richmond.com/opinion/columnists/vanvalkenburg-bourne-and-mullin-column-a-student-who-is-safe/article_db7679dc-4f32-50fc-901e-deeac5550033.html [<https://perma.cc/6WUT-GVAS>].

¹³² Daniella Cheslow, In Shadow of Coronavirus, Virginia Lawmakers to Freeze New Spending in State Budget, *WAMU* 88.5 (Apr. 22, 2020), <https://wamu.org/story/20/04/22/in-shadow-of-coronavirus-virginia-lawmakers-to-freeze-new-spending-in-state-budget/> [<https://perma.cc/58FH-9UXM>].

¹³³ Nat’l Educ. Ass’n, *Rankings of the States 2018 and Estimates of School Statistics 2019*, at 33 (2019), <https://www.nea.org/sites/default/files/2020-06/2019%20Rankings%20and%20Estimates%20Report.pdf> [<https://perma.cc/3KFT-GFQ6>].

¹³⁴ Editorial, Did the Virginia Supreme Court Show School Districts How to Sue Over Disparities?, *Roanoke Times* (Oct. 20, 2018), https://roanoke.com/opinion/editorials/editorial-did-the-virginia-supreme-court-show-school-districts-how-to-sue-over-disparities/article_f3e07697-879d-50d1-9ac9-573b741856c7.html [<https://perma.cc/LF7H-HFMP>].

¹³⁵ Baker et al., *supra* note 11, at 11; Bruce Baker, Danielle Farrie, Theresa Luhm & David G. Sciarra, *Is School Funding Fair? A National Report Card* 5 (5th ed. 2016); Bruce D. Baker, David G. Sciarra & Danielle Farrie, *Is School Funding Fair? A National Report Card* 16 (3d ed. 2014); Bruce D. Baker, David G. Sciarra & Danielle Farrie, *Is School Funding Fair? A National Report Card* 14 (2d ed. 2012); Bruce D. Baker, David G. Sciarra & Danielle Farrie, *Is School Funding Fair? A National Report Card* 32 (2010).

discussion of the topic.¹³⁶ The 1971 revision does not explicitly mention race, but rather calls for “quality” schools for “all children,” subtly including those formerly excluded by de jure segregation in the new vision of a quality school system.¹³⁷ The revisers’ language reflected many white Americans’ hopes after *Brown*: if policymakers removed the barrier of de jure segregation and improved the quality of all schools, then outcomes should improve for formerly disadvantaged children somehow, and at no cost to white families’ comfort and self-segregation.¹³⁸ Despite this hope, neither integration nor “quality for all” has been realized.

1. The Battle over Segregation Continued in the 1970s with Busing and “White Flight”

In the years following the 1971 constitutional revision, segregation continued, though more quietly than in prior years. Most districts saw integration as a thing to be avoided as much as possible. Only by federal court order would districts reluctantly integrate, and then only as much as required, which might be a bare token amount.¹³⁹ Most Virginia districts integrated through “freedom-of-choice” plans, which required parents to actively apply (and receive approval) to transfer their children to other-race schools.¹⁴⁰ Such plans didn’t actually result in much integration, since no white families requested transfers to Black schools and few Black families applied to white schools, perhaps because of fear or harassment, or perhaps because transfers were often rejected.¹⁴¹ But after the Supreme Court held in *Green v. County School Board* that desegregation plans needed to actually integrate schools or they were not valid,¹⁴² much of the debate on integration shifted to busing plans and district consolidation.

Richmond is a good example. In 1961 through 1965, eleven Black students in Richmond brought suit over the freedom of choice plan after

¹³⁶ Comm’n on Constitutional Revision, *supra* note 71, at 254.

¹³⁷ Va. Const. art. VIII, § 1.

¹³⁸ Ryan, *supra* note 95, at 5.

¹³⁹ *Id.* at 55–109.

¹⁴⁰ *Id.* at 56; *Green v. Cty. Sch. Bd.*, 391 U.S. 430, 433–35 (1968); U.S. Comm’n on Civil Rights, *Southern School Desegregation, 1966–67*, at 45–47 (1967), https://www.crmvet.org/docs/ccr_sch_desegregation_south_6707.pdf [<https://perma.cc/89N8-RAPJ>].

¹⁴¹ Ryan, *supra* note 95, at 56; *The Memphis 13* (Daniel Kiel 2012), <https://thememphis13.com> [<https://perma.cc/B65A-VV7G>].

¹⁴² *Green*, 391 U.S. at 437–41.

their applications for transfer were denied.¹⁴³ Unmoved, both the Fourth Circuit and district court upheld the plan; the Fourth Circuit concluding that “[a] state or a school district offends no constitutional requirement when it grants to all students uniformly an unrestricted freedom of choice as to schools attended,” even if those choices result in continued segregation.¹⁴⁴ But five years later, buttressed by the ruling in *Green*, the plaintiffs returned to court.¹⁴⁵

Richmond’s numbers at that time clearly did not meet *Green*’s more stringent standards for a unitary school district, so the new judge ordered the district to develop a busing plan.¹⁴⁶ The school board and the district court went back and forth in the years following, first debating and implementing various busing plans.¹⁴⁷ Ultimately the district court judge issued an order to consolidate Richmond with nearby school districts.¹⁴⁸ On appeal, the Fourth Circuit overturned the ruling, alleging that remaining school and residential segregation had mysterious origins that did not justify holding the school boards responsible.¹⁴⁹ The Supreme Court affirmed, per curiam, in a four-four tie with Justice Lewis Powell, previously a Richmond School Board chair, recused.¹⁵⁰

Meanwhile, in Richmond as elsewhere, the litigation that led to busing orders caused a mass exodus of white families to suburbs. In the fall of 1970, some four thousand white students in Richmond, about a tenth of the district’s total population, left in response to the initial busing order.¹⁵¹ By 1971, Black students comprised 70% of Richmond Public Schools.¹⁵² This increased the urgency of consolidation for many who realized that busing within a city district would mean nothing if white families can simply leave.

¹⁴³ Ryan, *supra* note 95, at 72.

¹⁴⁴ *Bradley v. Sch. Bd.*, 345 F.2d 310, 316 (4th Cir. 1965).

¹⁴⁵ Ryan, *supra* note 95, at 73; *Bradley v. Sch. Bd.*, 416 U.S. 696, 701 (1974) (“[O]n March 10, 1970, petitioners filed with the District Court a motion for further relief in the light of the opinions of this Court in *Green* . . .”).

¹⁴⁶ Ryan, *supra* note 95, at 74; *Bradley v. Sch. Bd.*, 317 F. Supp. 555, 578–79 (E.D. Va. 1970).

¹⁴⁷ Ryan, *supra* note 95, at 74–82.

¹⁴⁸ *Id.* at 82–84; *Bradley v. Sch. Bd.*, 338 F. Supp. 67, 105 (E.D. Va. 1972).

¹⁴⁹ *Bradley v. Sch. Bd.*, 462 F.2d 1058, 1066 (4th Cir. 1972) (“We think that the root causes of the concentration of [B]lacks in the inner cities of America are simply not known . . .”).

¹⁵⁰ *Rich. Sch. Bd. v. Bd. of Educ.*, 412 U.S. 92, 93 (1973).

¹⁵¹ Ryan, *supra* note 95, at 78, 80.

¹⁵² *Id.* at 80.

A few years later, the Supreme Court finally addressed the busing and consolidation question. In its 1974 opinion, *Milliken v. Bradley*, the Court (newly filled by Nixon appointees) set striking limits on district courts' abilities to fashion remedies for segregation, limiting any court orders to the single school district in which a violation was found and ending all busing across district lines.¹⁵³ The Court expressly denied de facto school segregation to be a problem caused by legal injustice.¹⁵⁴ In short, the Court put its stamp of approval on a new method for maintaining age-old segregation: keep kids within district lines. Hamstrung by the limitations of busing within urban districts that were overwhelmingly non-white, the movement for integration withered.¹⁵⁵

Virginia's leaders must have cheered the *Milliken* decision because shortly thereafter they passed a law freezing all school district lines from 1978 in place, except by joint resolution of the General Assembly and agreement of the local school board.¹⁵⁶ The statute is still on the books in Virginia today,¹⁵⁷ separating children into school districts and zones that allow some families to choose their schools and leave others where they were before integration supposedly occurred.

2. Ultimately, Segregation Has Worsened, Due to a Lack of Commitment to Integration.

After *Milliken*, things slowly began to worsen for children of color, whether measured by integration, funding, or outcomes. Federal courts lowered the bar repeatedly for what a unitary (integrated) school district

¹⁵³ 418 U.S. 717, 752–53 (1974).

¹⁵⁴ *Id.* at 745.

¹⁵⁵ Kimberly Jenkins Robinson, Resurrecting the Promise of *Brown*: Understanding and Remediating How the Supreme Court Reconstitutionalized Segregated Schools, 88 N.C. L. Rev. 787, 817–19 (2010).

¹⁵⁶ See Va. Code Ann. § 22.1-25(A)(1)–(3) (2016) (“1. The school divisions as they exist on July 1, 1978, shall be and remain the school divisions of the Commonwealth until further action of the Board of Education taken in accordance with the provisions of this section except that when a town becomes an independent city, the town shall also become a school division. 2. No school division shall be divided or consolidated without the consent of the school board thereof and the governing body of the county or city . . . 3. No change shall be made in the composition of any school division if such change conflicts with any joint resolution . . . of the General Assembly . . .”). Note that this statute strips the Board of its constitutional power to draw division lines in ways that best promote the standards of quality. See Angela Ciolfi, *Shuffling the Deck: Redistricting to Promote a Quality Education in Virginia*, 89 Va. L. Rev. 773, 808–13 (2003).

¹⁵⁷ See Va. Code Ann. § 22.1-25(A)(1)–(3) (2016).

looked like, releasing most previously segregated school districts from court supervision.¹⁵⁸ This means that for most schools and districts, integration was at its high point around the late 1980s and has declined since.¹⁵⁹ In 2007, the Supreme Court epitomized its jurisprudence on the topic in *Parents Involved in Community Schools v. Seattle School District No. 1*.¹⁶⁰ Seattle and St. Louis, like many other progressive-minded localities, had voluntarily created their own local integration schemes, using a student's race as a factor in deciding his school assignment. This, the Court found, was illegal under *Brown*.¹⁶¹ According to the Court, *Brown* did not require integration. It required race-blindness.¹⁶²

It is much more empirically clear today than it was in 2007 that this race-blind legal system allows past inequalities to worsen significantly, rather than making space for such wrongs to right themselves. Today, the combination of rising income inequality¹⁶³ and rising de facto segregation¹⁶⁴ leaves the entire legacy of *Brown* under significant threat.

In Virginia, we can see this play out. Both racial status and socioeconomic status work together to trap certain children in a cycle of trauma and poverty. Today, poor Black students in Virginia are nearly two times more likely to be in a high-poverty, mostly-minority school (what is known as a hyper-segregated) school than they were twenty years ago, and nearly a fifth of all Black students in Virginia are stuck in such schools.¹⁶⁵

¹⁵⁸ See Robinson, *supra* note 155, at 811–39 (arguing that the Court has validated resegregation in schools).

¹⁵⁹ See, e.g., Genevieve Siegel-Hawley, Jennifer Ayscue, John Kuscera & Gary Orfield, *Miles to Go: A Report on School Segregation in Virginia, 1989–2010*, at v (2013) (describing increases in Virginia's hyper-segregated schools since 1989).

¹⁶⁰ 551 U.S. 701, 747–48 (2007).

¹⁶¹ *Id.*

¹⁶² *Id.* at 748 (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

¹⁶³ Juliana Menasce Horowitz, Ruth Igielnik & Rakesh Kochhar, Pew Rsch. Ctr., *Most Americans Say There Is Too Much Economic Inequality in the U.S., but Fewer than Half Call It a Top Priority 19–22* (2020), <https://www.pewsocialtrends.org/2020/01/09/trends-in-income-and-wealth-inequality/> [<https://perma.cc/BGG6-DPM8>].

¹⁶⁴ Duncombe & Cassidy, *supra* note 13, at 1.

¹⁶⁵ *Id.* This does not account for Black children who are relegated to lower-tracked classrooms or face other intra-school segregation. See Karolyn Tyson, *Tracking, Segregation, and the Opportunity Gap: What We Know and Why It Matters*, in *Closing the Opportunity Gap: What America Must Do to Give Every Child an Even Chance* 170, 180 (Prudence L. Carter & Kevin G. Welner eds., 2013).

3. *The Inequities Faced by Black Virginians Today Go Beyond Education.*

The problem is not merely the segregation of classrooms. It's a failure of our society to share responsibility for all harms to childhood, over what has now become the course of generations. Black Virginians today—many of whom are the descendants of enslaved people¹⁶⁶—face the worst of all non-educational factors, exacerbating inequities during childhood. Blacks are overrepresented today amongst Virginians who experience extreme poverty,¹⁶⁷ food insecurity,¹⁶⁸ evictions,¹⁶⁹ health problems,¹⁷⁰ crime victimization,¹⁷¹ and criminal enforcement.¹⁷² Black family wealth remains at a significant disadvantage because of an inability to purchase homes for generations.¹⁷³ Today, members of Virginia's minority groups,

¹⁶⁶ Audra D.S. Burch, James Monroe Enslaved Hundreds. Their Descendants Still Live Next Door., N.Y. Times (July 7, 2019), <https://www.nytimes.com/2019/07/07/us/politics/monroe-slavery-highland.html> [<https://perma.cc/LZ6R-KYHL>].

¹⁶⁷ Household Income in Virginia, Statistical Atlas, <https://statisticalatlas.com/state/Virginia/Household-Income> [<https://perma.cc/VY6A-ABBS>] (last visited June 1, 2020) (showing that Black families in Virginia are twice as likely as the general population to be represented in the lowest three income brackets).

¹⁶⁸ Food Rsch. & Action Ctr., Poverty, Hunger, Health, and the Federal Nutrition Programs: A Profile of the Southern Region 13–14 (2020), <https://frac.org/wp-content/uploads/FRAC-Poverty-Hunger-Health-and-the-Federal-Nutrition-Programs-2020.pdf> [<https://perma.cc/8W6U-7PKP>].

¹⁶⁹ Kathryn Howell, RVA Eviction Lab, Eviction and Educational Instability in Richmond, Virginia 3 (2020), https://rampages.us/rvaevictionlab/wp-content/uploads/sites/33937/2020/02/RVAEL_Eviction-and-Educational-Instability-in-Richmond.pdf [<https://perma.cc/EU4J-Z7BP>] (showing significantly higher eviction rates in school districts with large Black student populations).

¹⁷⁰ Food Rsch. & Action Ctr., *supra* note 168, at 16–18.

¹⁷¹ Dep't of State Police, Crime in Virginia 2019, at 54 (2020), https://www.vsp.virginia.gov/downloads/Crime_in_Virginia/Crime_In_Virginia_2019.pdf [<https://perma.cc/4TAJ-UHUA>] (finding that 45% of violent crimes with known victims in Virginia in 2019 had Black victims, while Black Virginians only make up 20% of the Virginia population); Vera Inst., Incarceration Trends in Virginia 1 (2019), <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-virginia.pdf> [<https://perma.cc/VWX9-LSGD>].

¹⁷² In 2019, Blacks—who make up only 20% of the Virginia population—made up 42% of all arrests. Dep't of State Police, *supra* note 171, at 70–71. Additionally, they represent over half of Virginia's prison population. Vera Inst., *supra* note 171, at 1.

¹⁷³ Prosperity Now Scorecard, State Outcome & Policy Report: Virginia 4 (2021), <https://scorecard.prosperitynow.org/data-by-location#state/va> [<https://perma.cc/AE77-ZQRK>] (last visited Sept. 20, 2020) (select “download state outcome & policy report,” then search “Virginia” in the state field, and select “download PDF”) (showing that while 72% of white families in Virginia own homes, fewer than half of Black families own homes); see also Ta-Nehisi Coates, The Case for Reparations, Atlantic (June 2014),

including Black Virginians, are still rejected for homeownership loans at a higher rate than white Virginians, even amongst the same income groups.¹⁷⁴ Blackness is far more likely than income to determine whether a family will be evicted from a Virginia apartment.¹⁷⁵

All of these factors work together in Virginia's school system to block the racial equity for which the *Brown* Court hoped, and which the 1971 constitutional revision is often assumed to have achieved. For example, in Virginia, even when holding income constant, Black students persistently fall behind their white peers in skills assessments.¹⁷⁶ The gap does not close over the grades¹⁷⁷ (by some measures it worsens¹⁷⁸). The gap results in worse diploma outcomes,¹⁷⁹ poorer college readiness scores,¹⁸⁰ and—ultimately—inferior employment opportunities.¹⁸¹

<https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> [<https://perma.cc/76HH-BJ2J>] (describing historic attempts to deprive Black families of property).

¹⁷⁴ Va. Dep't of Hous. and Cmty. Dev., Analysis of Impediments to Fair Housing Choice in the Commonwealth of Virginia 36 (2018), <https://www.dhcd.virginia.gov/sites/default/files/Docx/consolidated-plan/analysis-of-the-impediments-to-fair-housing.pdf> [<https://perma.cc/XE39-CB8J>].

¹⁷⁵ Benjamin F. Teresa, RVA Eviction Lab, The Geography of Eviction in Richmond: Beyond Poverty (2020), https://rampages.us/rvaevictionlab/wp-content/uploads/sites/33937/2020/02/RVAEL_Geographies-of-Eviction.pdf [<https://perma.cc/G5TF-K7QT>].

¹⁷⁶ See Achievement Gaps Dashboard, *supra* note 12 (comparing Black eligible students in Virginia with white eligible students).

¹⁷⁷ *Id.*

¹⁷⁸ Virginia Early Childhood Foundation found, for example, that Black students who showed up to school kindergarten-ready fell behind significantly faster than their white or Asian peers. By third grade, the number of Black children from the same cohort not meeting literacy benchmarks had more than doubled. Va. Early Childhood Found., Virginia's Biennial School Readiness Report Card 6 (2018), <https://www.vecf.org/wp-content/plugins/pdf-viewer/stable/web/viewer.html?file=https://www.vecf.org/wp-content/uploads/2018/10/VECF2018BiennialSchoolReadinessReport.pdf> [<https://perma.cc/AZ48-TTAS>].

¹⁷⁹ Class of 2020 Diplomas and Completion, Va. Dep't of Educ. Sch. Quality Profiles, <https://schoolquality.virginia.gov/virginia-state-quality-profile#desktopTabs-4> [<https://perma.cc/YEL2-TGR8>] (last visited Sept. 1, 2020).

¹⁸⁰ College Board, SAT Suite of Assessments Annual Report: Virginia 3, 8, 13 (2019), <https://reports.collegeboard.org/pdf/2019-virginia-sat-suite-assessments-annual-report.pdf> [<https://perma.cc/K927-KKYA>]; The ACT, The Condition of College & Career Readiness 2019, Virginia Key Findings 7 (2019), <http://www.act.org/content/dam/act/unsecured/documents/cccr-2019/Virginia-CCCR-2019.pdf> [<https://perma.cc/A6DN-7ZKY>].

¹⁸¹ Statistical Atlas, *supra* note 167 (showing Blacks twice as likely as the general population to be represented in the lowest three income brackets).

The one twist in this story is the downfall of rural America. Today, it is not only Black students¹⁸² who are siloed into under-resourced schools but a new group of white children in the rural parts of Virginia, whose parents previously worked in industries that no longer operate today. These economically depressed communities have been ravaged by the opioid epidemic and other healthcare crises.¹⁸³ Those children do not face the same obstacles of historical segregation that Black children do, but they represent a new part of the coalition for educational equity and shared childhood, in a society that sorely needs it.

IV. COMPARING VIRGINIA'S EXPERIENCE TO OTHER STATES': HOW DOES THE BATTLE FOR SUSTAINABLE EDUCATIONAL EQUITY WORK ELSEWHERE?

Virginia is unique in its constitutional commitment to “standards of quality,” the constitutional status of its Board of Education, and its deferential court culture. Other states have attempted the battle for sustained educational equity in other ways—some fighting in courts, some using their constitution, some focusing on legislation and funding formulas. For the purposes of this Note, this Part considers New Jersey

¹⁸² This Note does not discuss the 1960s federal immigration laws, mostly because Virginia's Hispanic population remains quite small today, and most immigrants to the state of other races are fairly well-off (Virginia's Asian population is one of the wealthiest groups in the country). Demographic and Economic Profiles of Hispanics by State and County, 2014: Virginia, Pew Rsch. Ctr., <https://www.pewresearch.org/hispanic/states/state/va> [<https://perma.cc/JK4K-5D9S>] (last visited Mar. 14, 2021); Zinie Chen Sampson, Virginia's Asian Population Grows, *Free Lance-Star* (May 28, 2011), https://fredericksburg.com/local/virginias-asian-population-grows/article_ae0fc9e6-8af4-5dec-a7c7-35257f4a0f30.html [<https://perma.cc/DR33-3MCE>]. However, many of the disparities noted above are also true for the small but growing Hispanic community in Virginia, which has been hit especially hard by Coronavirus. Mechelle Hankerson, ‘My Community Doesn't Have a Voice’: Are Virginia Schools Meeting the Needs of an Increasing Hispanic Population?, *Va. Mercury* (Sept. 16, 2019), <https://www.virginiamercury.com/2019/09/16/my-community-doesnt-have-a-voice-are-virginia-schools-meeting-the-needs-of-an-increasing-hispanic-population/> [<https://perma.cc/D5BH-3SDR>]; Kate Masters, Latinos Shoulder a Disproportionate Share of COVID-19 Cases. Advocates Want More Representation in Contact Tracing., *Va. Mercury* (June 26, 2020), <https://www.virginiamercury.com/2020/06/26/latinos-shoulder-a-disproportionate-share-of-covid-19-cases-advocates-wants-more-representation-in-contact-tracing/> [<https://perma.cc/G33E-H8PB>].

¹⁸³ Southwestern Virginia has been hit particularly hard by the opioid epidemic but also faces other economic and healthcare struggles. For an excellent read on the region, see generally Beth Macy, *Dopesick: Dealers, Doctors, and the Drug Company that Addicted America* (2018).

and Wyoming as case studies for constitutional, cultural, and legislative factors that differ from Virginia, and perhaps can serve as counterpoints for the Commonwealth.

A. New Jersey: An Activist Court, an Understated Constitution.

New Jersey is the site of famous school funding litigation. In 1973, the Supreme Court of New Jersey was one of the first to hold that a state constitution required equal educational opportunity, derived from language that mandated a “thorough and efficient” system of education.¹⁸⁴ But in the 1980s, the *Abbott v. Burke* litigation began, which spanned decades and covered a variety of detailed education policy topics, from funding to pre-kindergarten to content requirements.¹⁸⁵ Throughout the *Abbott* cases, the court repeatedly agreed with plaintiffs that the education they were receiving was neither equal nor adequate compared to their wealthier (and often whiter) peers. In response, the court had no qualms about making detailed, policy-based holdings.

The *Abbott* litigation highlights the most compelling difference between Virginia and New Jersey: its court. The Supreme Court of New Jersey’s history of ruling progressively on contemporary issues¹⁸⁶ derives from the reformist principle that “courts should adopt new rules for new conditions.”¹⁸⁷ The court’s strength is partly a structural feature; a 1947 constitutional revision reshaped the New Jersey courts, uniting them all under one procedural, standardized system when they had previously been split up.¹⁸⁸ This also strengthened their chief justice’s authority and

¹⁸⁴ *Robinson v. Cahill*, 303 A.2d 273, 291 (N.J. 1973) (citing N.J. Const. of 1844, art. IV, § 7 (1875)).

¹⁸⁵ State Profiles: New Jersey, Educ. L. Ctr., <https://edlawcenter.org/states/newjersey.html> [<https://perma.cc/8FF5-G72R>] (last visited Sept. 1, 2020).

¹⁸⁶ See, e.g., *Borough of Neptune City v. Borough of Avon by the Sea*, 294 A.2d 47, 51, 56 (N.J. 1972) (holding that municipalities may not charge for beach use, due to the public trust doctrine); *S. Burlington Cty. NAACP v. Twp. of Mount Laurel*, 336 A.2d 713, 724–25 (N.J. 1975) (holding that municipalities cannot use zoning laws to prohibit affordable housing for middle- and low-income residents); *State v. Shack*, 277 A.2d 369, 372–75 (N.J. 1971) (holding that migrant workers can have access to necessary services despite traditional property law rules).

¹⁸⁷ J. Peter Byrne, *Are Suburbs Unconstitutional?*, 85 *Geo. L.J.* 2265, 2274 (1997) (reviewing Charles M. Haar, *Suburbs Under Siege: Race, Space, and Audacious Judges* (1996) and David L. Kirp, John P. Dwyer & Larry A. Rosenthal, *Our Town: Race, Housing, and the Soul of Suburbia* (1995)).

¹⁸⁸ N.J. Const. art. VI; *id.* at art. XI, § IV (describing the new court’s structure and transition plan).

capacity.¹⁸⁹ Immediately thereafter, one of the court's primary reformers, Arthur Vanderbilt, Dean of the New York University Law School, became the first chief justice of the new state supreme court.¹⁹⁰ He was the other main driver of the court's strength.¹⁹¹ His efforts to reform the court's efficiency and standardizing its procedures were matched by his legal work, battling for the court's power against the New Jersey Legislature.¹⁹² Under Chief Justice Vanderbilt, the court became a common law innovator,¹⁹³ setting the stage for the later plaintiff-friendly rulings in education litigation.

By contrast, New Jersey's legislature is considered by scholars to be "weak" or "timid."¹⁹⁴ Some of this is a geographic reality: New Jersey's position between grand East Coast cities makes its own municipalities seem small and uninteresting by comparison, weakening their political weight.¹⁹⁵ Particularly on issues of local law—zoning, beach use, or schools—the legislature seemed uninterested in addressing problems.¹⁹⁶ This disinterest left space for the court to step in; and by contrast to Virginia's court, New Jersey's court believed its role was to do so.

Unlike Virginia, New Jersey is consistently highly rated for its equitable school funding (likely a result of the significant holding in the *Abbott* litigation).¹⁹⁷ It is ranked near the top of the country for its effort to fund its schools and the way those funds are distributed: more to those localities and students who need resources, and less to localities who do

¹⁸⁹ *Id.* at art. VI, § VII.

¹⁹⁰ Byrne, *supra* note 187, at 2274.

¹⁹¹ Arthur T. Vanderbilt, Law Library: American Law and Legal Information, <https://law.jrank.org/pages/11066/Vanderbilt-Arthur-T.html> [<https://perma.cc/Q3LC-798C>] (last visited July 5, 2021).

¹⁹² *Id.* See, e.g., *Winberry v. Salisbury*, 74 A.2d 406, 414 (N.J. 1950) (holding, in an opinion by Chief Justice Vanderbilt, that the New Jersey Constitution gives power to the courts, not the legislature, to decide rules affecting procedure in the state's courts).

¹⁹³ Many first-year law students will remember reading *State v. Shack* in their property class. The case is an example of the court's innovative take on property law. See *State v. Shack*, 277 A.2d 369, 372–75 (N.J. 1971).

¹⁹⁴ Byrne, *supra* note 187, at 2274.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* See *Educ. L. Ctr.*, *supra* note 185.

¹⁹⁷ Bruce D. Baker & Sean P. Corcoran, *Ctr. for Am. Progress, The Stealth Inequities of School Funding: How State and Local School Finance Systems Perpetuate Inequitable Student Spending* 5 (2012) [hereinafter *CAP Report*]; see also Baker et al., *supra* note 11, at 11 (showing New Jersey ranking among the top states in funding distribution in 2015 and Virginia ranking among the lowest); Ryan, *supra* note 95, at 160 (describing high-poverty schools in New Jersey as "generously funded" due to "school finance litigation").

not.¹⁹⁸ On average, per capita spending in a poorer district of New Jersey is 120% the spending in a wealthy district—exactly what research tells us is needed.¹⁹⁹ But it would be a mistake to assume that this has solved all the state's equity problems.²⁰⁰ New Jersey's achievement gap is still significant,²⁰¹ and its schools are more segregated on a Black-white basis than Virginia's.²⁰² Perhaps this is partly because New Jersey's main driver of inequality—like in Virginia—is its wealthier districts.²⁰³ Still, New Jersey's outcomes on education are impressive. The state ranks near the top of the nation in both reading and math outcomes.²⁰⁴ On average, New Jersey's efforts are making a difference.

In contrast to Virginia, and perhaps surprising given the successful litigation, the New Jersey Constitution is not particularly committed to education. In fact, the entire constitutional section on schools is subsumed within the article on “Taxation and Finance.”²⁰⁵ In all, the constitution includes a brief mention of the state school fund, and a mere sentence on the legislature's educational mandate: “The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the state between

¹⁹⁸ Baker et al., *supra* note 11, at 16–17; see also CAP Report, *supra* note 197, at 5 (displaying New Jersey's school funding system from 2007 to 2009).

¹⁹⁹ Baker et al., *supra* note 11, at 11.

²⁰⁰ New Jersey is probably recently famous for the debacle of education reform in Newark Schools, in which millions of dollars were raised, but the classrooms never saw the money. See Dale Russakoff, *Schooled*, *New Yorker* (May 12, 2014), <https://www.newyorker.com/magazine/2014/05/19/schooled> [<https://perma.cc/5TST-B7KM>].

²⁰¹ Race and Ethnic Achievement Gaps, Stan. Ctr. for Educ. Pol'y Analysis, <https://cepa.stanford.edu/educational-opportunity-monitoring-project/achievement-gaps/race/> [<https://perma.cc/R3CH-WG2C>] (last visited June 2, 2020).

²⁰² U.S. Dep't of Educ., *School Composition and the Black-White Achievement Gap 24* (2015), https://nces.ed.gov/nationsreportcard/subject/studies/pdf/school_composition_and_the_bw_achievement_gap_2015.pdf [<https://perma.cc/DM6C-MCMZ>] [hereinafter *School Composition*].

²⁰³ Like Virginia, New Jersey has some of the best-ranked public schools in the nation. See, e.g., U.S. News Best High Schools Rankings, U.S. News & World Rep., <https://www.usnews.com/education/best-high-schools/rankings-overview> (last visited Mar. 20, 2020) (listing a school in Northern Virginia as the best public high school in the nation).

²⁰⁴ State Performance Compared to the Nation, Nation's Rep. Card, <https://www.nationsreportcard.gov/profiles/stateprofile?chort=1&sub=MAT&sj=AL&sfj=NP&st=MN&year=2019R3> [<https://perma.cc/JH8Y-SXAG>] (last visited June 9, 2021) (choose “Grade 4,” toggle between “Mathematics” and “Reading,” and select “Average scale scores” and “2019”).

²⁰⁵ N.J. Const. art. VIII, § IV.

the ages of five and eighteen years.”²⁰⁶ There is no mention of textbooks, mandated standards, or even state educational governance. This simple language supports the conclusion of Professor Ryan and other scholars that sometimes a state’s court culture matters more to school finance litigation outcomes than the actual constitutional language.²⁰⁷

B. Wyoming: Tiny Rural State, or Model for Virginia?

Perhaps one of the most unexpected stars in school funding commitment and equity is Wyoming. Ranked near the top of states in its state funding levels, its funding effort, and the equity of its funding scheme,²⁰⁸ Wyoming appears to represent the epitome of school funding activists’ goals for other states. Its achievement gap is one of the smallest in the country,²⁰⁹ and in both reading and math its students seem to do very well.²¹⁰

In fact, the Wyoming Constitution appears to expressly require this. The Education Article of the constitution explicitly requires an “equitable” funding scheme,²¹¹ and it leaves no argument unavailable to plaintiffs in its mandate to the legislature to

provide for the establishment and maintenance of a complete and uniform system of public instruction, embracing free elementary schools of every needed kind and grade, a university with such technical and professional departments as the public good may require and the means of the state allow, and such other institutions as may be necessary.²¹²

The document itself is remarkable; the language above dates from the original document’s ratification in 1889, as does language banning “distinction or discrimination” in schools on the basis of “sex, race or color.”²¹³ Interestingly, Wyoming, like Virginia, also tries to remove education from state politics. It does so by vesting governance of the

²⁰⁶ *Id.*

²⁰⁷ Ryan, *supra* note 95, at 146.

²⁰⁸ Baker et al., *supra* note 11, at 10–11, 16, 17.

²⁰⁹ Stan. Ctr. for Educ. Pol’y Analysis, *supra* note 201.

²¹⁰ Fourth-grade reading ranks third in the nation, and fourth-grade math ranks seventh. In eighth grade, rankings drop slightly. Nation’s Rep. Card, *supra* note 204.

²¹¹ Wyo. Const. art. VII, § 8.

²¹² *Id.* at art. VII, § 1.

²¹³ *Id.* at art. VII, § 10. Wyoming is known as the ‘equality state’ because it was the first state to grant women suffrage, and did so from its inception. *Id.* at art. VI, § 1.

state's schools in a "superintendent of public instruction" whose duties shall be "prescribed by law," similar to Virginia's Board of Education,²¹⁴ and by banning the legislature or state superintendent of schools from prescribing textbooks (presumably leaving such decisions for localities).²¹⁵

In addition to its strong constitutional language, Wyoming has a court that has been willing to delve into school finance litigation. In 1980, around the same time the *Abbott* litigation was first filed, a group of students and school districts filed suit in *Washakie County School District No. 1 v. Herschler*, arguing that the funding scheme—based primarily on local ad valorem (property) taxes—was denying them equal educational opportunity and a constitutionally required "uniform" school financing system.²¹⁶ The district court, seeing the *Washakie* case primarily as a political question that went to no clearly defined state law, dismissed it.²¹⁷ But the Wyoming Supreme Court reversed, finding that a funding scheme that would provide more parity was certainly a complex problem that involved policy judgments, but it was "not a problem that cannot be solved."²¹⁸ Showing a relative willingness to cooperate between the two branches, the court worked with a legislative committee to eventually approve an "interim" funding scheme that was more equitable, involving some redistribution between districts and additional taxation by the State.²¹⁹

Fifteen years later, the State's funding scheme—which had not been fully revised—faced another challenge.²²⁰ This time the court addressed complex problems of education funding in detail. Addressing the current formula's estimated divisor values, the various discretion granted to localities and the way the State attempted to equalize that discretion, and the problem (shared by districts across the country) of capital expenses for localities that had no more bonding capacity,²²¹ the court delved into the math and came out in favor of the plaintiffs, finding the current funding scheme unconstitutional and setting standards and requirements

²¹⁴ Id. at art. VII, § 14.

²¹⁵ Id. at art. VII, § 11.

²¹⁶ 606 P.2d 310, 314, 320 (Wyo. 1980).

²¹⁷ Id. at 314–15.

²¹⁸ Id. at 315 n.3.

²¹⁹ *Campbell Cty. Sch. Dist. v. State*, 907 P.2d 1238, 1246–47 (Wyo. 1995).

²²⁰ Id. at 1238, 1247–48.

²²¹ Id. at 1249–50.

for a new one.²²² While Virginia's court searched for the word "equality" in the state constitution's education article,²²³ Wyoming's court worked the visionary language of its constitution into the complex math of school funding.²²⁴

Perhaps this is an unfair comparison, because Wyoming, compared to Virginia and New Jersey, has a tiny, relatively homogenous population.²²⁵ Around 85% of Wyoming residents are white, and most live in comparatively rural settings.²²⁶ This homogeneity is so stark that Wyoming is left off of some segregation studies because there simply are not enough non-white children to get an accurate sample size.²²⁷ Wyoming also has a very different culture. For all of its homogeneity, the State proudly tells anyone who will listen that "the equality state" was the first state to grant women the right to vote, and that nondiscrimination on the basis of race has been in their constitution since the state's original founding.²²⁸ Wyoming was never a slave state, never saw Jim Crow laws, and never had segregated schools to integrate after the *Brown* litigation.²²⁹

But Wyoming's value as a comparator should not go unseen. Virginia's educational problem areas are in its urban areas, where poor people of color are concentrated, *and* in its rural areas, where poor white people are

²²² Id. at 1279–80.

²²³ *Scott v. Commonwealth*, 443 S.E.2d 138, 142 (Va. 1994). *Scott* occurred just one year before *Campbell County*. The difference in the level of analysis and detail in the opinions is remarkable.

²²⁴ *Campbell Cty. Sch. Dist.*, 907 P.2d at 1279.

²²⁵ Virginia has a population of over 8 million, while Wyoming's population has yet to cross 600,000. Race and Ethnicity in Wyoming, Statistical Atlas, <https://statisticalatlas.com/state/Wyoming/Race-and-Ethnicity> [<https://perma.cc/4VW8-UFJW>] (last visited June 5, 2020); see Population of Wyoming, Stat. Atlas, <https://statisticalatlas.com/state/Wyoming/Population> [<https://perma.cc/6W7D-XC9E>] (last visited June 5, 2020).

²²⁶ Race and Ethnicity in Wyoming, Stat. Atlas, <https://statisticalatlas.com/state/Wyoming/Race-and-Ethnicity> [<https://perma.cc/4VW8-UFJW>] (last visited June 5, 2020); see Population of Wyoming, Statistical Atlas, <https://statisticalatlas.com/state/Wyoming/Population> [<https://perma.cc/6W7D-XC9E>] (last visited June 5, 2020).

²²⁷ U.S. Dep't of Educ., *supra* note 202, at 23 n.21, 24–25.

²²⁸ See *supra* note 213 and accompanying text.

²²⁹ Wyoming did not become a state until 1890, after slavery was outlawed in the United States. The state constitution began with statements of racial equality. See Wyo. Const. art. I, § 2. This is not to say that Wyoming avoided all discrimination, but rather, it was never as entrenched as was the case in Virginia. See, e.g., Kim Ibach & William Howard Moore, *The Emerging Civil Rights Movement: The 1957 Wyoming Public Accommodations Statute as a Case Study*, 73 *Annals of Wyo.* 2, 3 (2001).

increasingly underemployed and facing health problems.²³⁰ These rural Virginians might not find Wyoming's geography so different from their own. And though Virginia has a different history with race than does Wyoming, Virginia's political culture and values have changed drastically in the last twenty years.²³¹ It seems perfectly plausible to think that Virginia's constitution could call for nondiscrimination and substantially "uniform" or "equal" treatment and that Virginia's future courts could be a place for plaintiffs to vindicate their causes when those rights are not realized in the State's scheme. Wyoming may be more of a model than we realize.

C. Comparing Virginia

New Jersey used statutes, budget changes, and aggressive litigation to improve its schools, despite having outdated and vague educational provisions in its constitution. However, Wyoming more closely reflects Virginia's own process of developing constitutional language that will generate public conversation amongst all branches of government. Rather than rely on an unusually strong court, like New Jersey's, Wyoming has used judicial, constitutional, and political culture to achieve its goals. As far as public support for court-mandated changes, Wyoming's public rhetoric about "[a]dequate funding" goes alongside their rhetoric about "great schools"²³²

However, this is undoubtedly far easier to do in a less populated state that has little diversity and plenty of shared experience. Compared to Wyoming, Virginia's population is decidedly larger, more diverse, and

²³⁰ One of the biggest advocates for education funding in Virginia is rural Republican State Senator Bill Stanley, who has recognized that there are striking similarities in the needs of rural and urban school districts. Amy Friedenberger, 'Facing a Dire Need' for Funding for School Construction, Virginia Lawmakers Pitch Proposals, *Roanoke Times* (Jan. 18, 2020), https://www.roanoke.com/news/education/facing-a-dire-need-for-funding-for-school-construction-virginia-lawmakers-pitch-proposals/article_fd9ef54a9-5d7d-b780-b87a44d8a0fa.html [<https://perma.cc/6GYC-T3TM>]; see also Macy, *supra* note 183 (describing life in rural Virginia).

²³¹ Sabrina Tavernise & Robert Gebeloff, How Voters Turned Virginia from Deep Red to Solid Blue, *N.Y. Times* (Nov. 9, 2019), <https://www.nytimes.com/2019/11/09/us/virginia-elections-democrats-republicans.html> [<https://perma.cc/X8Q6-LXNK>].

²³² See, e.g., Wyoming Education Ranked 6th in Nation by the National Education Quality Report, *KULR8 News* (Sept. 5, 2019), https://www.kulr8.com/news/wyoming-education-ranked-th-in-nation-by-the-national-education/article_e2dcc056-d036-11e9-a031-9f508f484af7.html [<https://perma.cc/2WMW-4BBF>] (quoting State Superintendent of Public Instruction Jillian Balow).

more socioeconomically unequal. But it may highlight where Virginia can go next. If Virginia wants to overcome its history of slavery, Jim Crow, and segregated schools, it needs to do even *more* than Wyoming has done, not less.

In comparison to these other states, Virginia stands out for its reliance on the legislature to self-enforce its constitution's promises.²³³ Unlike either Wyoming or New Jersey, Virginia's court has been unwilling to wade into complex school funding issues.²³⁴ Even if it does not have a court boldly innovating like New Jersey, Virginia's court could have moderately mediated opposing positions with a deep dive into math, like Wyoming, to help the state arrive at a more equitable medium.²³⁵

Unlike New Jersey, Virginia's constitution is committed in some detail to educational quality. The level of detail is similar to Wyoming, but the focus is different: in Wyoming, the constitution focuses more on uniformity and nondiscrimination,²³⁶ while in Virginia it focuses more on structures of governance.²³⁷

Unlike either New Jersey or Wyoming, Virginia faces political opposition to equitable schools. Though the most aggressive form of Massive Resistance ended years ago, there is still plenty of quiet evasion: many parents in the Richmond area, for instance, send their children to private schools rather than integrate them into public school settings.²³⁸ School division lines from the days of *Milliken v. Bradley* have been preserved, instead of redrawn, to protect inequities instead of combat them.²³⁹

But perhaps most different from Wyoming, Virginia's income distribution is decidedly disparate, with Black families disproportionately

²³³ See *supra* Section III.B.

²³⁴ See *supra* notes 111–115 and accompanying text.

²³⁵ See *supra* notes 216–232 and accompanying text.

²³⁶ See *supra* notes 211–212 and accompanying text.

²³⁷ See *supra* Part II.

²³⁸ Richmond's private school attendance rate, around 30%, is significantly higher than the national average. Libby Germer, A Public History of Public Housing: Richmond, Virginia, Yale Nat'l Initiative to Strengthen Teaching in Pub. Schs. (last visited Sept. 23, 2020), https://teachers.yale.edu/curriculum/viewer/initiative_15.03.05_u [<https://perma.cc/XDQ2-HRL2>]. The national average in the United States has consistently hovered around 10%. Jack Jennings, Proportion of U.S. Students in Private Schools is 10 Percent and Declining, *Huffington Post* (Mar. 28, 2012, 12:31 PM), https://www.huffpost.com/entry/proportion-of-us-students_b_2950948 [<https://perma.cc/TZ9Z-S534>].

²³⁹ Va. Code Ann. § 22.1-25(A) (2016). See also Ciolfi, *supra* note 156, at 807 (suggesting the unconstitutionality of current division in lines in Virginia because they do not promote or realize the standards of quality).

represented in extreme poverty.²⁴⁰ For southern states like Virginia, with a deep history of slavery's legacy, the state government's failure to fully repair past harms continues to haunt the halls of school buildings today. Worse, the group of students affected is growing, not shrinking, including more poor children of every race each year.²⁴¹ Change is needed.

V. ADDRESSING THE REMAINING INEQUITIES IN SCHOOLS TODAY: THE POWER OF A NEW CONSTITUTIONAL CONVERSATION

In this Note, we have considered Virginia's ugly history with mixed-race schooling,²⁴² and examined the historic constitutional revision in 1971 that firmly ended pro-segregation resistance while looking toward a new strategy to achieve school quality for all children.²⁴³ We have looked at the empirical impacts of those changes in policy terms.²⁴⁴ We have then compared Virginia's educational history with other states that have different stories.²⁴⁵ We are left with the question: now what?

Those Virginian children who struggled to receive adequate and equal educations prior to *Brown* are uncannily similar to the children who struggle to receive adequate and equal educations today. They are poor, they are often children of color, and their parents, who typically lack much educational attainment, may feel unwelcome in primarily white and middle-class spaces.²⁴⁶ Their families tend to lack political power and reside in communities of concentrated poverty. These children are thus more likely to be relegated to high poverty schools with overwhelmingly minority populations—segregated schools.²⁴⁷

²⁴⁰ See supra note 167 and accompanying text.

²⁴¹ See supra Section III.C; Duncombe & Cassidy, supra note 13.

²⁴² See supra Part I.

²⁴³ See supra Part II.

²⁴⁴ See supra Part III.

²⁴⁵ See supra Part IV.

²⁴⁶ In fact, it is unclear if those in the *middle* are doing particularly well. While federally required data highlights children below the federal poverty level as a group, it aggregates all other children together, hiding the wide disparities in outcomes between the middle and the very rich. See Daniel Markovits, *The Meritocracy Trap: How America's Foundational Myth Feeds Inequality, Dismantles the Middle Class, and Devours the Elite* 124–33 (2019). We may be missing important trends in achievement and education amongst middle- and working-class children. Though school reformers may still be focused on the plight of the poor, increasing attention to the middle—and better disaggregating data—may shed light on even more concerning trends.

²⁴⁷ Duncombe & Cassidy, supra note 13, at 1.

Across the country, litigators, scholars, and policymakers have taken a litany of approaches to address the rise in de facto segregation and the persistence of achievement disparities in education along both socioeconomic and racial lines. As recounted in the stories from other states, litigators have sued school districts and state departments of education over funding inequities.²⁴⁸ Policymakers have attempted to find new pedagogical techniques, zoning plans, or school choice plans that will somehow fix the educational struggles of poor children despite their difficult home situations.²⁴⁹ Some scholars have argued that educational inequities are a result of accountability failures, stemming from the tangled system of school governance,²⁵⁰ or problems with funding formulas.²⁵¹ Still, others argue that if the federal courts would declare a federal right to education, sorely needed federal equity funding would follow.²⁵² Unfortunately, while these efforts have had small successes, on the whole, both segregation and achievement gaps persist in much the same form today as they did years ago. The promise of *Brown*—and the hope of Virginia’s 1971 constitutional revision—still remains unfulfilled.

So what can be done? Perhaps instead of hoping for counter-majoritarian efforts like expert boards of policymakers or court enforcement of vague constitutional promises, there is a simpler reason why Virginia—like other states—has failed to achieve a sustainable form of educational equity: most people still do not support it.²⁵³ It is probable

²⁴⁸ Ryan, *supra* note 95, at 149–50.

²⁴⁹ This Note does not address charter schools because Virginia has very few, and the movement hasn’t gained much ground in the Commonwealth. Virginia’s Public Charter Schools, Va. Dep’t of Educ., https://www.doe.virginia.gov/instruction/charter_schools/charter_schools.shtml [<https://perma.cc/4YD3-W3LZ>] (last visited June 9, 2021) (listing only 8 charter schools operating in the state); Editorial, A Chance for Charter Schools To Finally Break Through in Virginia, Wash. Post (Feb. 14, 2017), https://www.washingtonpost.com/opinions/a-chance-for-charter-schools-to-finally-break-through-in-virginia/2017/02/14/82e6539e-efd6-11e6-b4ff-ac2cf509efe5_story.html [<https://perma.cc/4PZG-BTBB>] (discussing the political difficulties).

²⁵⁰ For the full debate on school governance, see *Who’s in Charge Here? The Tangled Web of School Governance and Policy* (Epstein ed., 2004).

²⁵¹ See, e.g., CAP report, *supra* note 197, at 17.

²⁵² See generally, e.g., Kimberly Jenkins Robinson, *A Federal Right to Education: Fundamental Questions for Our Democracy* (2019); While advocacy for increased federal help has certainly resulted in more standardized testing and more litigation, as of 2018, federal dollars made up less than 8% of school revenue. Nat’l Educ. Ass’n, *supra* note 133, at 8. For the same reason that a low state share of funding results in greater inequities between districts, a low national share contributes to large inequities between state spending on students. See, e.g., Markovits, *supra* note 246, at 126–27.

²⁵³ I am not the first scholar to suggest this. See, e.g., Ryan, *supra* note 95, at 1–14.

that our educational realities reflect people's preferences. In fact, this may be a lesson to cull from Virginia's constitutional experience: looking back on the historical context and policy results of Virginia's 1971 Constitution, the long-term results of the revision have been remarkably true to the goals represented—ending de jure segregation and enshrining a structure for quality assurance but avoiding any enforcement that might force the legislature's hand against popular suburban will. The revision did not fix all educational inequities because that is not what voters intended it to do.

This is an uncomfortable, but informative, truth because it means that the path to justice requires as a first step neither fiercer litigation nor more innovative policymaking, but simple conversations with our neighbors. And one of the best ways to mobilize and develop political support is to do exactly what this Note recounts: to build a public conversation around a constitutional amendment.

Constitutional revision proposals are a powerful medium for creating conversations around our values. In Virginia, for a constitutional amendment to pass, it must be voted through the General Assembly two years in a row and then put to the voters.²⁵⁴ Because constitutional revisions require the support of both the public and political leaders, once passed, the intended policy has a high likelihood of implemented success. Just like Virginia's 1971 constitutional revision, a new revision could represent the public's changed hopes, beliefs, or moral values and could energize public servants who are eager to realize its vision. And with the right structural shift or statement of values, the revision could have a real effect on outcomes.

This does not mean that a constitutional revision is a quick fix. Rather, as the comparator states show, the best likelihood of success occurs when there is a confluence of factors to draw on: constitutional language that gives space to plaintiffs' arguments and to policymakers, a court to which plaintiffs can bring counter-majoritarian cases for enforcement when popular will fails to adequately pursue equity, a stable enough culture to handle initial pushback from the politically powerful, and a popular set of values that supports lawmaking and makes voters feel involved in the creation of school quality.

²⁵⁴ See *supra* Part II.

A. Potential Elements of the Conversation

There are a number of options for attacking the key areas of educational inequity. While the integration of classrooms is likely the most important of these changes, Virginia's leaders should not simply look backward to history's battles, but should also consider forward-looking policy shifts that would make an impact.

1. Reevaluating Current Funding Strategies

School funding in America overwhelmingly relies on property taxes. Though this is a very stable form of revenue,²⁵⁵ it is also incredibly regressive.²⁵⁶ Those who are poorer and live in less desirable housing must tax themselves at a significantly *higher* rate than those who are wealthier and live in more upmarket housing, in order to raise the same amount.²⁵⁷ Plus, those who are poorer typically live in areas of concentrated poverty, which can increase the cost of education significantly, meaning that to achieve the same outcome, such communities would need to tax themselves at an impossibly high rate.²⁵⁸ One important question Virginians should ask is whether it is really fair to let localities benefit from their own rise and fall in property values, instead of sharing equally in property value across the state, as a community. Perhaps our constitutional taxing and school funding scheme should be rewritten.

The issue is not simply funding for operating expenses. One of the biggest gaps in school finance comes from the Commonwealth's refusal to consider capital expenses—like school renovations, or internet and computer systems—as important elements of the state educational funding scheme.²⁵⁹ In struggling districts of high concentrated poverty,

²⁵⁵ Alisa Chang & Jonaki Mehta, *Why U.S. Schools Are Still Segregated—And One Idea To Help Change That*, NPR (July 7, 2020), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/07/07/888469809/how-funding-model-preserves-racial-segregation-in-public-schools> [<https://perma.cc/SY6Y-KXFL>].

²⁵⁶ See CAP Report, *supra* note 197, at 1–2.

²⁵⁷ See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 14–16 (1973); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 392–93 (Tex. 1989); David G. Hinojosa, *Rodriguez v. San Antonio Independent School District: Forty Years and Counting*, in *The Enduring Legacy of Rodriguez: Creating New Pathways to Equal Educational Opportunity* 24–40 (Charles J. Ogletree, Jr. & Kimberly Jenkins Robinson eds., 2015).

²⁵⁸ Hinojosa, *supra* note 257, at 37–38.

²⁵⁹ Friedenberger, *supra* note 230; JLARC Report to the Governor and the General Assembly of Virginia, *Efficiency and Effectiveness of K-12 Spending*, S. Doc. No. 11 (2015).

this gap is so severe it creates safety and health issues.²⁶⁰ Both urban and rural districts alike struggle mightily to simply operate their schools on dwindling municipal budgets, which means funding cash-intensive expenses like new buildings or secure technology networks is nearly impossible. As an example, Richmond's current need for renovation and construction is so large it would take the *entire city operating budget*.²⁶¹ Most schools in Richmond have not been renovated at all since the last state influx into school construction, over fifty years ago. When the author of this Note worked for Richmond Public Schools in 2018, the central office still used a computer software system *from the early 1990s* to manage financials (black screen, green type).²⁶² Virginians need to consider whether state assistance for schools should actually include the buildings, information systems, and capital needed to educate children in safe, healthy, and dignified settings. These could be included in the legislature's mandate.

Finally, Virginia should consider more legally powerful constitutional accountability for its funding formula. Under the current constitution, the legislature has been allowed to keep the base amount for school operations unrealistically low,²⁶³ and the base formula itself does not

²⁶⁰ Editorial, Lots of Virginia Schools are Outdated. Why That Matters., Roanoke Times (Aug. 15, 2018), https://roanoke.com/opinion/editorials/editorial-lots-of-virginia-schools-are-outdated-why-that-matters/article_cc2a3cbe-f65c-5453-86f6-22c4e846d353.html [https://perma.cc/8NV9-TS6C]; Debbie Truong, 'Borderline Criminal': Many Public Schools Teeter on the Edge of Decrepitude, Wash. Post (May 25, 2019, 4:55 PM), https://www.washingtonpost.com/local/education/borderline-criminal-thats-the-condition-of-decrepit-public-schools/2019/05/25/bad60064-556f-11e9-814f-e2f46684196e_story.html [https://perma.cc/9FA5-L3J2]; Brendan King & Chelsea Rarrick, Richmond Teachers Believe Moldy Classrooms are Making Them Sick, CBS 6 News Rich. (Oct. 3, 2016, 11:37 AM), <https://www.wtvr.com/2016/10/02/richmond-teachers-believe-moldy-classrooms-are-making-them-sick/>.

²⁶¹ As of 2018, Richmond's required construction budget hovered around 800–900 million dollars. Truong, *supra* note 260. The annual operating budget of Richmond city in that year was about 700 million dollars. City of Rich., Adopted Annual Fiscal Plan for Fiscal Year 2018 (2018) http://www.richmondgov.com/Budget/documents/BiennialPlans/2018_AdoptedAnnualFiscalPlan.pdf [https://perma.cc/M94Q-K8A5].

²⁶² Cf. Editorial, *supra* note 260 (describing analogous conditions). See also Zachary Reid, 100 Years Ago, Richmond's Students Faced a Situation Similar to Today's: Crumbling Facilities, Rich. Times-Dispatch (Apr. 30, 2016), https://richmond.com/news/local/100-years-ago-richmonds-students-faced-a-situation-similar-to-todays-crumbling-facilities/article_712a5f52-f50d-5bec-a09f-40221195a5be.html [https://perma.cc/M3AT-6DCK] (noting the racial disparities in crumbling school buildings).

²⁶³ Ryan, *supra* note 95, at 129 ("By all accounts, [the foundation amount] is unrealistically low."); see also Salmon, *supra* note 7, at 155–61 (concluding that Virginia's school funding is inadequate).

consider student need or concentrated poverty,²⁶⁴ in direct contradiction of research that indicates that educating children in high poverty settings is far more expensive than children in healthy economic circumstances.²⁶⁵ We could impose stronger safeguards in the constitution.

2. *Expanding Public Education's Coverage*

In the last twenty years, research on early childhood education has grown at an incredible pace. New discoveries show that the quality of education a child receives in the first five years impacts that child's life even into adulthood.²⁶⁶ Yet Virginia still has only a spotty pre-kindergarten system, cobbled together from state programming, federal Head Start, and some local, private, and home care options.²⁶⁷ While in recent years policymakers have worked to expand it, Virginia has yet to promise public universal pre-kindergarten, or even childcare.²⁶⁸

This is despite the overwhelming data suggesting long-term social benefits to early childhood programming, such as reduced crime rates and improved health scores,²⁶⁹ as well as short-term improvements in parental

²⁶⁴ The Local Composite Index formula is contained in the biennial budget language. 2020 Va. Acts 153–55. Note that Virginia does have a separate budget line item called the At-Risk Add-On (created shortly after the *Scott* case), which provides additional funds for disadvantaged students. Va. Code Ann. § 22.1-199.1 (2020). However, it has also suffered from budgetary limitations. See, e.g. Chris Duncombe & Chad Stewart, *Virginia Can Choose Equity for School Funding During Economic Crisis* (2020), <https://www.thecommonwealthinstitute.org/wp-content/uploads/2020/06/Virginia-Can-Choose-Equity-for-School-Funding-During-Economic-Crisis.pdf> [https://perma.cc/9UEC-5MRU] (describing the un-allotment of At-Risk funds during economic downturns).

²⁶⁵ Ryan, *supra* note 95, at 157–70; CAP Report, *supra* note 197, at 1–2.

²⁶⁶ Early Childhood Education, Ctrs. for Disease Control & Prevention (“CDC”), <https://www.cdc.gov/policy/hst/hi5/earlychildhoodeducation/index.html> [https://perma.cc/GE3V-QZRD] (last visited Aug. 5, 2016); Tamara Halle et al., *The Research Base for a Birth Through Eight State Policy Framework Child Trends* (2013), <https://www.childtrends.org/wp-content/uploads/2013/12/2013-20ResearchBase.pdf> [https://perma.cc/D42D-7L75].

²⁶⁷ Preschool, Va. Dep’t of Educ., <http://www.doe.virginia.gov/early-childhood/preschool/index.shtml> [https://perma.cc/N9YB-4VWH] (last visited Sept. 2, 2020) (showing public options available for needy students; note that non-qualifying students must find private options, which range from home settings to official preschools or daycares); Allison H. Friedman-Krauss et al., *The State of Preschool 2018: State Preschool Yearbook 162–63* (2019) (showing that Virginia’s public state preschool program still has limited access, ranking poorly across the board).

²⁶⁸ See Friedman-Krauss et al., *supra* note 267, at 162–63.

²⁶⁹ CDC, *supra* note 266.

work hours and family stability.²⁷⁰ More importantly, such programming improves equity by putting kids on similar footing for kindergarten readiness.²⁷¹ Much like in New Jersey, Virginia's constitution could delineate a specific age range of students for which the state's public schools are responsible, and could expand that age range, as researchers recommend, to include younger children, including setting aside a funding source for this program, as it does for higher education.

Virginia could also address other gaps that cause inequities through policies such as a year-round education plan,²⁷² a full-day school day or universal after-school programming,²⁷³ or universal childcare from zero to Pre-K.²⁷⁴ These policies, which help stabilize Virginian families and prevent learning losses, can strengthen a school community and improve student achievement.

3. *Committing to Integrated Classrooms and Equal Schools*

Lastly, Virginia should consider a new constitutional amendment on integration and school equality, enshrining not just equality as a value, but putting legal teeth behind the need for a shared experience of

²⁷⁰ Id.; see also Press Release, Learning Pol'y Inst., What Does the Research Really Say About Preschool Effectiveness? (Jan. 31, 2019), <https://learningpolicyinstitute.org/press-release/what-does-research-really-say-about-preschool-effectiveness> [https://perma.cc/JAY7-229Z] (reaffirming that children enrolled in preschool reap both short- and long-term benefits). Sarah Jane Glynn, Jane Farrell & Nancy Wu, The Importance of Preschool and Child Care for Working Mothers, Ctr. for Am. Progress (May 7, 2013), <https://www.americanprogress.org/issues/education-k-12/reports/2013/05/08/62519/the-importance-of-preschool-and-child-care-for-working-mothers/> [https://perma.cc/2US8-3C3K]; Kelsey Piper, Early Childhood Education Yields Big Benefits—Just Not the Ones You Think, Vox (Oct. 16, 2018, 9:00 AM), <https://www.vox.com/future-perfect/2018/10/16/17928164/early-childhood-education-doesnt-teach-kids-fund-it>.

²⁷¹ CDC, *supra* note 266.

²⁷² David M. Quinn & Morgan Polikoff, Summer Learning Loss: What Is It, and What Can We Do About It?, Brookings (Sept. 14, 2017), <https://www.brookings.edu/research/summer-learning-loss-what-is-it-and-what-can-we-do-about-it/> [https://perma.cc/4G76-MYYR]; Jaclyn Zubrzycki, Year-Round Schooling Explained, EducationWeek (Dec. 18, 2015), <https://www.edweek.org/leadership/year-round-schooling-explained/2015/12> [https://perma.cc/7B9Q-FUD7].

²⁷³ Afterschool Alliance, What Does the Research Say about Afterschool? (Nov. 2017), http://afterschoolalliance.org/documents/What_Does_the_Research_Say_About_Afterschool.pdf [https://perma.cc/G2ZU-63AB]; Benefits for Youth, Families, & Communities, Youth.Gov, <https://youth.gov/youth-topics/afterschool-programs/benefits-youth-families-and-communities> [https://perma.cc/X57N-CMXG] (last visited Sept. 1, 2020).

²⁷⁴ Piper, *supra* note 270 (explaining why benefits accrue more the closer a program starts to birth).

education in the Commonwealth. While recent proposals have called for simple statements of equality,²⁷⁵ which are important, we should also think bigger about how to integrate our current system along both racial and socioeconomic lines, how to enforce an integration program against pro-segregation pushback, and how to maintain the integration long-term. Virginia's school division lines should be redrawn with fewer divisions that consolidate metropolitan areas, and funding should be made equitable across the state.²⁷⁶ Additionally, this integration should happen not just at the division level, but at the school level, and most importantly, at the classroom level.²⁷⁷

Integrating schools is no easy task, even in 2020. Our Commonwealth has many hard conversations still in store in order for parents to truly understand and trust each other—enough to send our children to school together. Can we have compassion for families who struggle to pay bills? Can white parents accept and overcome their biases about children of color, particularly poor urban students of color?²⁷⁸ Can all parents see the value in friendships between their children and children of different backgrounds?

What is clearer is that parents *should* embrace these things. An education should teach our children that good citizens share struggles and successes together. It should teach our children that good people do not silo ourselves away from our neighbor's problems. Research shows that in integrated classrooms, our children become better citizens, less racist, and more compassionate.²⁷⁹ Additionally, their academic experiences

²⁷⁵ Editorial, Will Virginia Finally Mandate Equal Schools?, *Roanoke Times* (Jan. 24, 2020), https://roanoke.com/opinion/editorials/editorial-will-virginia-finally-mandate-equal-schools/article_804e788e-0606-528a-8d90-b048f3300ddc.html [https://perma.cc/6757-QFLY].

²⁷⁶ Ciolfi, *supra* note 156, at 820; Chang & Mehta, *supra* note 255.

²⁷⁷ Tyson, *supra* note 165, at 169–70.

²⁷⁸ Kimberly A. Goyette, Danielle Farrie & Joshua Freely, This School's Gone Downhill: Racial Change and Perceived School Quality Among Whites, 59 *Soc. Probs.* 155, 166–71 (2012) (describing how white parents perceive their school quality to be declining simply as a result of greater numbers of Black children attending the school, regardless of actual metrics); Chase M. Billingham & Matthew O. Hunt, School Racial Composition and Parental Choice: New Evidence on the Preferences of White Parents in the United States, 89 *Soc. Educ.* 99, 99 (2016) (finding that the “proportion of [B]lack students in a hypothetical school has a consistent and significant inverse association with the likelihood of white parents enrolling their children in that school”).

²⁷⁹ The Benefits of Socioeconomically and Racially Integrated Classrooms, Century Found. (Apr. 29, 2019), <https://tcf.org/content/facts/the-benefits-of-socioeconomically-and-racially-integrated-schools-and-classrooms/>.

benefit—significantly.²⁸⁰ Parents just have to face the fear of sending our kids through the door.

We also know that if parents have the time to adjust to integrated education, they do. We have seen this in Louisville,²⁸¹ Hartford,²⁸² Omaha,²⁸³ and Charlotte.²⁸⁴ If a new program can withstand a few years of pro-segregation pushback, the community settles.²⁸⁵ And with enough time, the community develops buy-in and ownership, a sense of pride in the program.²⁸⁶ Wealthy parents no longer focus on buying houses near “good schools,” but develop concerns about whether their child is meeting “children of different backgrounds” and broadening their horizons. This, after all, is what being educated truly means.

It is time for Virginia to take the final step away from segregation and commit to a public school system that is truly integrated, one where children’s fates are bound up with other children’s fates, and where the self-segregation of the elite is as politically and socially unacceptable as it is unavailable by law. And if we are brave, we will finally write it into our state’s constitution, for generations to come.

CONCLUSION

Fifty years ago, Virginia’s voters and political leaders decided to amend the Education Article of the Virginia Constitution. The resulting shift in power, policy, and values was meant to improve the quality of Virginia’s schools and improve the state’s commitment to those schools.

²⁸⁰ Id. (finding that students in integrated classrooms are less likely to drop out, more likely to enroll in college, and on average have higher test scores).

²⁸¹ Alana Semuels, *The City that Believed in Desegregation*, Atlantic (Mar. 27, 2015), <https://www.theatlantic.com/business/archive/2015/03/the-city-that-believed-in-desegregation/388532/> [<https://perma.cc/XU4N-DJ5V>]; see also John Eligon, *Busing Worked in Louisville. So Why Are Its Schools Becoming More Segregated?*, N.Y. Times (July 28, 2019), <https://www.nytimes.com/2019/07/28/us/busing-louisville-student-segregation.html> [<https://perma.cc/LGN7-8HE2>] (noting that a Louisville school district is one of the nation’s most racially integrated).

²⁸² John Brittain, Larkin Willis & Peter W. Cookson Jr., *Sharing the Wealth: How Regional Finance and Desegregation Plans Can Enhance Educational Equity*, (2019), https://learningpolicyinstitute.org/sites/default/files/product-files/Sharing_The_Wealth_REPORT.pdf [<https://perma.cc/86NL-6LVJ>].

²⁸³ Id.

²⁸⁴ Ryan, *supra* note 95, at 112–14.

²⁸⁵ See, e.g., *id.* at 112.

²⁸⁶ Id. at 113 (describing a stump speech by President Reagan against busing and comprehensive integration in schools where the “crowd greeted these statements with silence” and the local paper called integration the district’s “proudest achievement”).

In many ways, it was a success: the era of Massive Resistance and de jure segregation was definitively closed, and Virginia's Board of Education today informs the funding and policies that guide Virginia's schools, instead of education governed purely by political whim. Virginia's schools today rank fifth in the nation in outcomes overall.

The success of the 1971 constitutional revision can inform advocates today who are concerned about new educational problems that remain unsolved—problems of equity and racial justice that persist. Instead of hoping for litigation to fix the problem or federal intervention to fund a change, advocates could work on mobilizing Virginian public opinion to support a state constitutional revision that better reflects modern values and informs both voters and potential implementers of new priorities. With several possible options, it is time to work on a constitutional document that will improve education for a new generation and fix the problems of today.