Another Failing Grade: New Jersey Repeats School Funding Reform

THE LITIGATION LANDSCAPE

Like a hurricane wreaking havoc on an unsuspecting coastline, litigation challenging the fairness and effectiveness of state school funding systems has brought financial and political turmoil to more than half of the states in the Union.[1] At the forefront of a two decade-old reform movement, New Jersey has experienced the most concerted and painful effort to resolve the crisis of matching a tolerable financial input from wealthier, suburban taxpayers with a satisfactory educational output from poorer, urban students.[2]

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[1] *See* William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 598 n.3 (1994) (providing a recent list of the decisions involving constitutional challenges to state education funding systems in 29 states).

[2] *See* Richard D. Ballot, Note, 21 SETON HALL L. REV. 445, 445 (1991) (characterizing New Jersey's debate over school funding reform as "volatile and heavily politicized"). Plaintiffs seeking to invalidate state education funding systems began attacking their validity under state constitutional provisions respecting the right to an education after the United States Supreme Court foreclosed federal constitutional challenges to state funding systems in *San Antonio Independent School District v. Rodriguez*. Mark Jaffe & Kenneth Kersch, *Guaranteeing a State Right to a Quality Education: The Judicial-Political Dialogue in New Jersey*, 20 J.L. & EDUC. 271, 274, 275-76 (1991) (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, *reh'g denied*, 411 U.S. 959 (1973)).

Prior to *Rodriguez*, federal courts had reached varying conclusions as to the existence of such claims. *Compare* McInnis v. Shapiro, 293 F. Supp. 327, 336 (N.D. Ill. 1968), *aff'd sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969) (affirming per curiam a lower court opinion that the Equal Protection Clause of the Fourteenth Amendment demands neither correlation between district expenditures and pupil needs nor equalized state expenditures among all school districts) *and* Burruss v. Wilkerson, 310 F. Supp. 572, 573, 574 (W.D. Va. 1969) (rejecting Equal Protection challenge and noting lack of judicial capacity to apportion education funds among state's neediest districts), *aff'd* 397 U.S. 44 (1970) *with* Serrano v. Priest, 487 P.2d 1241, 1244 (Cal. 1971) (holding California state funding system violated Equal Protection Clause for discriminating against poorer students by tying the quality of a district's educational program to its ability to generate local property tax revenues); *see generally* Jonathan M. Purver, *Validity of Basing Public School Financing System on Local Property Taxes*, 41 A.L.R.3D 1220 (1972) (discussing the validity of financing public education with local property taxation).

In *Rodriguez*, the United States Supreme Court ruled in a five-to-four decision that the plaintiffs had failed to sustain a cause of action under the Equal Protection Clause for violation of a fundamental constitutional right to education or for discrimination against a suspect constitutional class. *Rodriguez*, 411 U.S. at 18. Plaintiffs, Mexican-American elementary and secondary students attending urban San Antonio district schools, argued that the Texas funding system created significant disparities in district expenditures by relying upon local property taxation to finance one-fifth of those expenditures. *Id.* at 4-5, 9, 11. The inability of property-poor districts to gener-

The debate between the New Jersey State Legislature and the New Jersey Supreme Court over the financing and management of the state's education system continues to lead the nation in the legal evolution of the school finance issue.[3]

The flash point for this raging debate lies in the Thorough and Efficient Clause (T&E Clause) of the New Jersey State Constitution, which imposes upon the legislature the responsibility to guarantee a "thorough and efficient" education for every child in the state.[4] Although the people's branch of government bears the

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ate tax ratables to finance local tax contributions under the state system created the disparities among districts. *See id.* at 16.

Justice Powell, writing for the Court, concluded that the Texas system did not "operate to the peculiar disadvantage of any suspect class." *Id.* at 28. In particular, the Court found no evidence of discrimination against any identifiable class of "poor" students. *Id.* at 25. Furthermore, the Court determined that the Texas system did not "result[ ] in the absolute deprivation of education." *Id.* Thus, the Court held that no express or implied fundamental constitutional right to education existed and that no citizen enjoys a constitutional guarantee of the "most *effective* speech or the most *informed* electoral choice." *Id.* at 35, 36.

Because the Court considered the claim as a challenge to the state's political decision to utilize local property tax revenues to finance its school system, it applied the traditional rational basis standard of review. *See id.* at 40. Justice Powell asserted that the Texas system rationally preserved adequate educational opportunity for its children, while allowing local participation in and control over district taxation and spending. *Id.* at 49. Resigned to the implausibility of significant fiscal changes and the certainty of turmoil in state education systems from a sweeping decision, and respectful of the legislative primacy in state taxation and education affairs, the Court upheld the Texas system. *Id.* at 56, 58, 59.

Within two weeks after *Rodriguez*, New Jersey became the first state to invalidate its financing scheme based solely upon its own constitutional guarantee of educational opportunity. *See* Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 [hereinafter *Robinson I*], *cert. denied sub nom.* Dickey v. Robinson, 414 U.S. 976 (1973). For a discussion of *Robinson I*, see *infra* notes 24-41 and accompanying text.

[3] *See* Ronald T. Hyman, *School Finance Litigation in New Jersey*, 66 EDUC. L. REP. 531, 531 (1991). By 1991, New Jersey school funding reform required two "rounds" of litigation. *See id.* at 531-32 n.5; *infra* note 5 (identifying the two "rounds" of litigation).

[4] N.J. CONST. art. VIII, § 4, ¶ 1. The people of New Jersey amended the State Constitution in 1875 to include this specific guarantee of a "thorough and efficient" education: "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 the ages of five and eighteen years." *Id.*

In *Rodriguez*, the United States Supreme Court affirmed the integral role that education plays in American society. *See Rodriguez*, 411 U.S. at 29-30. Specifically, the Court stated that:

> the great expenditures for education . . . demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping

burden of fulfilling this duty, the legislative provision of a "thorough and efficient" system has endured exacting judicial scrutiny from the New Jersey Supreme Court.[5]

> him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Id. (quoting Brown v. Board of Educ., 347 U.S. 483, 493 (1954)).

Originally, the *Robinson* court defined a "thorough and efficient" education as "that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market." *Robinson I*, 62 N.J. at 515, 303 A.2d at 295. The court later broadened the scope of that mandate to provide for an education that would enable all children "to participate fully in society, in the life of one's community, . . . to appreciate music, art, and literature, and . . . to share all of that with friends." Abbott v. Burke, 119 N.J. 287, 363-64, 575 A.2d 359, 397 (1990) [hereinafter *Abbott II*].

[5] *See* Hyman, *supra* note 3, at 531-32 (summarizing actions taken by the New Jersey Supreme Court during the two "rounds" of litigation over school funding reform); *see generally* Ballot, *supra* note 2 (explaining the issues arising from the *Robinson* litigation and *Abbott II*).

The first round of litigation began in 1970, when officials, residents, and taxpayers of five New Jersey municipalities alleged that the state's school funding system violated the Federal and State Equal Protection Clauses and the state education clause. Robinson v. Cahill, 118 N.J. Super. 223, 227, 229, 287 A.2d 187, 189, 190 (Law Div. 1972), *supplemented by* 119 N.J. Super. 40, 289 A.2d 569 (Law Div. 1972), *aff'd*, 62 N.J. 473, 303 A.2d 273, *cert. denied sub nom.* Dickey v. Robinson, 414 U.S. 976 (1973). Specifically, the plaintiffs challenged the State School Aid Law of 1954. *Id.* at 229, 287 A.2d at 190 (citing N.J. STAT. ANN. § 18A:58-1 (West 1968) [hereinafter 1954 Act], *amended by* State School Incentive Equalization Aid Law, ch. 234, sec. 1, 1970 N.J. Laws 823, 823 (1970) (effective July 1, 1971) (codified at N.J. STAT. ANN. §§ 18A:58-1 to -18.1 (West 1975) [hereinafter Bateman Act]), *repealed by* Public School Education Act of 1975, ch. 212, sec. 54, 1975 N.J. Laws 871, 894 (effective July 1, 1976) (codified at N.J. STAT. ANN. §§ 18A:7A-1 to -52 (West 1989)). After holding that the Bateman Act could not satisfy the mandate of a "thorough and efficient" education, the court gave the legislature until December 31, 1974, to enact a constitutionally legitimate funding scheme. *Robinson I*, 62 N.J. at 519, 303 A.2d at 297; Robinson v. Cahill, 63 N.J. 196, 198, 306 A.2d 65, 66 [hereinafter *Robinson II*], *cert. denied sub nom.* Dickey v. Robinson, 414 U.S. 976 (1973); *see infra* notes 24-42 and accompanying text (analyzing *Robinson I* and *Robinson II*). The legislature neglected to approve a new system by that deadline, however, prompting the court to schedule oral argument to decide how it should remedy the failure of the legislature to fulfill its constitutional duty. Robinson v. Cahill, 67 N.J. 35, 36, 37, 335 A.2d 6, 6, 7 (1975) [hereinafter *Robinson III*].

Subsequently, the court redistributed the most inequitable allocations of state education aid for the 1976-77 school year under the Bateman Act's incentive equalization formula, conditioning its remedy upon the passage and implementation of a new funding scheme by October 1, 1975. Robinson v. Cahill, 67 N.J. 333, 339 A.2d 193, *republished in* 69 N.J. 133, 144 n.4, 149, 155, 351 A.2d 713, 718 n.4, 721, 724 (1975) [hereinafter *Robinson IV*]; *see infra* notes 46-58 and accompanying text (examining *Robinson IV*). On the eve of that deadline, the legislature responded by enacting the Public School Education Act of 1975, which the court declared facially valid based upon its structural components. Robinson v. Cahill, 69 N.J. 449, 454, 467, 355 A.2d 129, 131, 139 (1976) [hereinafter *Robinson V*] (citing Public School Education Act of

In *Robinson v. Cahill* (*Robinson I*),[6] the New Jersey Supreme Court first pronounced that the legislature had inadequately financed the state's educational system under the court's conception of a "thorough and efficient" education.[7] The decision resulted in repeated entreaties from the court for legislative action.[8] Only af-

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1975, N.J. STAT. ANN. §§ 18A:7A-1 to -52 (West 1989) [hereinafter *Chapter 212*], *repealed by* Quality Education Act of 1990, ch. 52, sec. 90, 1990 N.J. Laws 587, 646 (effective July 1, 1990), *amended by* Act of March 14, 1991, ch. 62, 1991 N.J. Laws 200 (codified as amended at N.J. STAT. ANN. §§ 18A:7D-1 to -37 (West Supp. 1994)); *see infra* notes 59-64 and accompanying text (discussing *Robinson V*). Despite its ruling of constitutionality, the court retained jurisdiction in *Robinson V* to ensure that the legislature appropriated adequate funding for the implementation of Chapter 212. *Robinson V*, 69 N.J. at 468, 355 A.2d at 139. Consequently, when the legislature failed to comply with the court's funding requirement, the court enjoined the operation of the state's school funding system until the legislature arranged for a suitable funding mechanism. Robinson v. Cahill, 70 N.J. 155, 160, 161, 358 A.2d 457, 459, 459-60 (1976) [hereinafter *Robinson VI*]. The court eventually lifted its order after the legislature complied with its funding demand. Robinson v. Cahill, 70 N.J. 464, 465, 360 A.2d 400, 400 (1976) [hereinafter *Robinson VII*].

After 10 more years of worsening expenditure disparities, students from poor, urban districts launched a second challenge to the state's school funding system in *Abbott v. Burke*. Abbott v. Burke, 100 N.J. 269, 277-78, 495 A.2d 376, 380 (1985) [hereinafter *Abbott I*]; *Abbott II*, 119 N.J. at 334, 575 A.2d at 382-83. In *Abbott I*, the court established the factual and legal issues of the suit before determining the need to remand the case for a more developed record through administrative proceedings. *Abbott I*, 100 N.J. at 296, 301, 495 A.2d at 390, 393; *see infra* notes 71-76 and accompanying text (summarizing *Abbott I*). In *Abbott II*, the court invalidated the counter-equalizing state aid provisions of Chapter 212 because the legislature had not allocated sufficient funding to the state's 28 poorest districts to support the T&E mandate. *Abbott II*, 119 N.J. at 383, 575 A.2d at 407; *see infra* notes 77-93 and accompanying text (analyzing *Abbott II*).

Governor James Florio and the legislature immediately enacted the Quality Education Act of 1990 to redistribute state aid to those districts. Quality Education Act of 1990, ch. 52, 1990 N.J. Laws 587 [hereinafter QEA], *amended by* Act of March 14, 1991, ch. 62, 1991 N.J. Laws 200 [hereinafter QEA II] (codified as amended at N.J. STAT. ANN. §§ 18A:7D-1 to -37 (West Supp. 1994)); *see infra* notes 97-114 (describing the enactment and amendment of the QEA). Nevertheless, like its predecessor, the QEA failed to assure substantial parity in funding between the state's poorest and wealthiest districts, which resulted in its invalidation by the New Jersey Superior Court, Chancery Division, in 1993, a decision affirmed by the New Jersey Supreme Court in 1994. Abbott v. Burke, No. 91-C-00150, 1993 WL 379818, at *14 (N.J. Super. Ct. Ch. Div. Aug 31, 1993), *aff'd*, 136 N.J. 444, 446-47, 643 A.2d 575, 576 (1994) [hereinafter *Abbott III*]. *See infra* notes 115-82 and accompanying text (analyzing the trial court decision invalidating the QEA) and notes 183-211 and accompanying text (analyzing the New Jersey Supreme Court's affirmance of the decision in *Abbott III*).

6 62 N.J. 473, 303 A.2d 273, *cert. denied sub nom.* Dickey v. Robinson, 414 U.S. 976 (1973). *See infra* notes 24-41 and accompanying text (explaining *Robinson I*).

7 *Robinson I*, 62 N.J. at 519, 303 A.2d at 297. *See supra* note 4 (describing the New Jersey Supreme Court's evolving conception of a "thorough and efficient" education).

8 *See Robinson II*, 63 N.J. at 198, 306 A.2d at 66 (requesting the legislature to enact reform); *Robinson IV*, 69 N.J. at 155, 351 A.2d at 724 (calling for "appropriate legislative action" to prevent redistribution of non-equalizing state aid).

ter the court enjoined the expenditure of state education aid, thereby closing the public schools, did Governor Brendan Byrne win sufficient funding for the implementation of a new education reform measure, the Public School Education Act of 1975 (Chapter 212).[9]

Nevertheless, the chronic underfunding of urban education catalyzed another constitutional challenge to the reformed system in *Abbott v. Burke* (*Abbott I*).[10] Five years later, in *Abbott II*, the court invalidated Chapter 212 as applied to the state's twenty-eight poorest urban districts and heightened the constitutional demands placed upon public funding by the state constitution's guarantee of a "thorough and efficient" urban education.[11] To resolve the inadequacies in urban educational funding, Governor James Florio introduced the Quality Education Act of 1990 (QEA), which the legislature enacted on July 3, 1990.[12] Nevertheless, the legislature's subsequent amendment (QEA II), and a trial court's recent invalidation of this reform effort, motivated the supreme court in *Abbott II* to impose even greater demands upon elected officials.[13]

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9 *Robinson VI*, 70 N.J. at 160, 358 A.2d at 459 (footnote omitted); Joshua Seth Lichtenstein, Note, Abbott v. Burke: *Reaffirming New Jersey's Constitutional Commitment to Equal Educational Opportunity*, 20 HOFSTRA L. REV. 429, 447-48 (1991) (footnotes omitted) (explaining that the legislature supplied full funding for Chapter 212 by enacting New Jersey's first state income tax one week after the court closed the public schools); *see* N.J. STAT. ANN. §§ 18A:7A-1 to -52 (West 1989) (codifying Chapter 212), *repealed by* QEA, N.J. STAT. ANN. §§ 18A:7D-1 to -36 (West Supp. 1993), (codified as amended at N.J. STAT. ANN. §§ 18A:7D-1 to -37 (West Supp. 1994)); *see infra* notes 42-69 (describing the events leading to the passage of Chapter 212).

10 *See Abbott I*, 100 N.J. at 286, 495 A.2d at 385 (citing plaintiffs' claim that the Chapter 212 funding formula had exacerbated funding disparities between rich and poor districts) (citation and footnote omitted).

11 *Abbott II*, 119 N.J. at 295, 575 A.2d at 363; *see id.* at 394-97, 575 A.2d at 412-14 (identifying the state's 28 poorest urban districts covered by the court's remedy). The chief justice declared that "under the present system the evidence compels but one conclusion: the poorer the district and the greater its need, the less the money available, and the worse the education. That system is neither thorough nor efficient." *Id.* at 295, 575 A.2d at 363. *See infra* notes 77-93 and accompanying text (analyzing *Abbott II*).

12 Jaffe & Kersch, *supra* note 2, at 292; James L. Plosia, Jr., *School Finance Reform in New Jersey: Is the End in Sight?*, N.J. LAW., July 1993, at 12, 16; *see* QEA, ch. 52, 1990 N.J. Laws 587 (codified as amended at N.J. STAT. ANN. §§ 18A:7D-1 to -37 (West Supp. 1994)); *infra* notes 97-114 and accompanying text (describing the enactment and amendment of the QEA).

13 *See* QEA II, Act of March 14, 1991, ch. 62, sec. 41, 1991 N.J. Laws 200, 231 (codified as amended at N.J. STAT. ANN. §§ 18A:7D-1 to -37 (West Supp. 1994)) (amending the QEA to create the QEA II); Abbott v. Burke (*Abbott III*), 136 N.J. 444, 446-47, 447, 643 A.2d 575, 576, 577 (1994) (holding unconstitutional the QEA and requiring progress toward parity in each of three school years leading to 1997-98 court deadline); *infra* notes 115-211 and accompanying text (analyzing the constitutional deficiencies of the QEA).

Legislative noncompliance has led some to interpret the doctrine of separation of powers as permitting the judiciary to challenge legislative authority over school funding policy.[14] To the contrary, the *Robinson I* and *Abbott II* cases demonstrate that judicial focus upon monetary relief as a means of directing legislative activity has afforded urban children little real relief.[15] The history of school funding reform in New Jersey indicates that urban children will not enjoy "equal educational opportunity" until the New Jersey Supreme Court acknowledges its inability to overcome the political process through judicial mandates of fiscal equality.[16]

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[14] *See, e.g.*, Lichtenstein, *supra* note 9, at 484-85 (footnotes omitted) (concluding that *Abbott*'s holding "reduces the likelihood that the Supreme Court of New Jersey will face another separation-of-powers confrontation with the Legislature, as it did in *Robinson v. Cahill*, because the limited scope of its holding necessarily limits the scope of the remedy that it has ordered").

Under the doctrine of separation of powers, our constitutional system confers a distinct continuum of authority upon each of the three branches of the federal and state governments. *See* BLACK'S LAW DICTIONARY 1365 (6th ed. 1990). Consequently, the Executive Branch enforces the laws that the Legislative Branch creates, while the Judicial Branch adjudges the legitimacy of these exercises of authority according to either the Federal or State Constitution. *Id.* The framers of the New Jersey Constitution considered the doctrine so essential to the proper conduct of state government that they incorporated its principles of governance into the document they created. *See* N.J. CONST. art. III, ¶ 1. Thus, the New Jersey Constitution provides: "The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution." *Id.*

The New Jersey Supreme Court has interpreted the doctrine of separation of powers as "'contemplat[ing] that each branch of government will exercise fully its own powers without transgressing upon powers rightfully belonging to a cognate branch.'" Communications Workers of America v. Florio, 130 N.J. 439, 449, 617 A.2d 223, 228 (1992) (quoting Knight v. Margate, 86 N.J. 374, 388, 431 A.2d 833, 840 (1981)). Consequently, the doctrine instructs that "[e]ach branch of government is counseled and restrained by the constitution not to seek dominance or hegemony over the other branches." General Assembly of New Jersey v. Byrne, 90 N.J. 376, 383, 448 A.2d 438, 441 (1982) (quoting *Knight*, 86 N.J. at 388, 431 A.2d at 840). By the same token, the doctrine does not mandate the "complete insulation of the branches from each other." *Id.* at 382, 448 A.2d at 441. Instead, the doctrine anticipates "*cooperative accommodation* among the three branches of government." *Communications Workers*, 130 N.J. at 449, 617 A.2d at 228 (emphasis added) (citations omitted). To require the "mutually-exclusive, water-tight compartment[alization of government] would 'render government unworkable.'" *Id.* at 449-50, 617 A.2d at 228 (quoting Massett Bldg. Co. v. Bennett, 4 N.J. 53, 57, 71 A.2d 327, 329 (1950)).

[15] *See Abbott II*, 119 N.J. at 335, 575 A.2d at 383 (noting that "a 3,000 pupil district in a poorer area has a budget of $8.6 million, while a relatively wealthy suburban district with 3,000 pupils has a budget of $12.1 million"). In fact, the *Abbott II* court reported, "on the average, in 1984-85, a group of richer districts with 189,484 students spend 40% more per pupil than a group of poorer districts with 355,612 students." *Id.* at 334, 575 A.2d at 383.

[16] *See* Ballot, *supra* note 2, at 471 (concluding that judicial restraint remains prefer-

Instead, the court may better serve urban children by pursuing a more pragmatic course of judicial intervention that avoids the sweeping directives of greater state educational expenditures that have characterized previous school funding decisions.[17] A more effective strategy calls upon the court to promote constitutional compliance by addressing the effectiveness of current funding in satisfying the constitutional mandate of the T&E Clause.[18]

This Comment illustrates that the New Jersey Supreme Court has failed to effect meaningful school funding reform because the court has misperceived its relationship with the legislature by underestimating the realities of the political process that govern reform. Part I describes the historical evolution of current judicial-legislative relations in the contexts of *Robinson* and *Abbott*. Part II discusses the immediate enactment and hastened amendment of the QEA as a typical political response by the legislature to the

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able when the Judiciary attempts to enforce fiscal equality in the "inherent[ly] political" arena of school funding reform). The concept of "equal educational opportunity" refers to the state's duty to offer its children the "equal chance to succeed" as members of society based upon the "equality of opportunity through education." Lichtenstein, *supra* note 9, at 430 n.6 (citation omitted). Equality in this context serves to guarantee opportunity, not success. *Id.* (citation omitted).

17 *See* Tricia E. Bevelock, Note, *Public School Financing Reform: Renewed Interest in the Courthouse, But Will the Statehouse Follow Suit?*, 65 ST. JOHN'S L. REV. 467, 488 (1991) (finding that the Judiciary lacks the independent authority to compel legislative compliance with its mandates and thus remains resigned "to setting forth the standards, criteria, and goals with which the legislature must comply").

18 *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 56 n.111, *reh'g denied*, 411 U.S. 959 (1973). The *Rodriguez* Court recognized that

> [a]ny alternative that calls for significant increases in expenditures for education, whether financed through increases in property taxation or through other sources of tax dollars, such as income and sales taxes, is certain to encounter political barriers. At a time when nearly every State and locality is suffering from fiscal undernourishment, and with demands for services of all kinds burgeoning and with weary taxpayers already resisting tax increases, there is considerable reason to question whether a decision of this Court nullifying present state taxing systems would result in a marked increase in the financial commitment to education.

Id. (citations omitted). *See also* Abbott v. Burke (*Abbott III*), 136 N.J. 444, 451, 643 A.2d 575, 578 (1994) (expressing judicial "concerns about the need for supervision of the use of additional funding for the special needs districts").

In *Rodriguez*, the Court professed that "practical considerations . . . play no role in the adjudication of the constitutional issues presented here," thus explicitly stating the inherent "traditional limitations on this Court's function." *Rodriguez*, 411 U.S. at 58. The Court determined that "[t]he consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various States . . . ." *Id.* Thus, in the Court's judgment, "the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them." *Id.* at 59.

court's school funding decisions. Part III analyzes the trial court's decision invalidating the QEA for its failure to satisfy the supreme court's *Abbott II* mandate. Part IV considers the affirmance of the trial court's decision by the New Jersey Supreme Court in *Abbott III*. Part V characterizes the court's renewed challenge to the political process in *Abbott III* as laying the foundation for another constitutional confrontation with the legislature. Finally, Part VI suggests a more pragmatic approach to school funding reform.

I. TWO DECADES OF JUDICIAL-LEGISLATIVE RELATIONS

The New Jersey Constitution empowers and entrusts ultimate responsibility to the legislature to guarantee each child a "thorough and efficient" education.[19] Since the codification of the T&E Clause, the legislature has actively delegated this authority to its constituent local school districts.[20] As a result, these local districts have assumed a disproportionate share of the financial burden of public education through local, *ad valorem* property taxation.[21] Over time, the systemic dependence upon inequitable property taxation exploited the lack of definitive state standards for evaluating local administration of the state educational system.[22] In 1973,

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19 N.J. CONST. art. VIII, § 4, ¶ 1; *see also* Robinson v. Cahill (*Robinson I*), 62 N.J. 473, 508-09, 303 A.2d 273, 291 (footnote omitted) (concluding that state responsibility for public education "has never been doubted"), *cert. denied sub nom.* Dickey v. Robinson, 414 U.S. 976 (1973).

20 *See* Landis v. Ashworth (School District No. 44), 57 N.J.L. 509, 510, 31 A. 1017, 1018 (1895) ("School districts are formed for the purpose of aiding in the exercise of that governmental function which relates to the education of children . . . ."); *see infra* note 33 (analyzing *Landis*); *see also Robinson I*, 62 N.J. at 502, 303 A.2d at 288 (affirming the view that local governments serve as an administrative "arm" by which the state may more effectively carry out its constitutional and statutory duties).

21 *See Robinson I*, 62 N.J. at 516, 303 A.2d at 295. By the time the court decided *Robinson I*, the state had reduced its contributions toward local education to 28% of district expenditures. *Id.* Under an *ad valorem* system of taxation, a local government raises money by levying a tax on the value of the real or personal property within its jurisdiction. BLACK'S LAW DICTIONARY 1218 (6th ed. 1990). The government typically levies the tax as a uniform rate due per thousand dollars of property value. *Id.* One commentator has asserted that

> [b]y using school financing formulas that placed a "heavy reliance on local [property] taxes to fund the [public school] system," states created gross disparities between the amount of funding available to students who attended school in property-wealthy districts and the amount of funding available to students who attended schools in property-poor districts.

Lichtenstein, *supra* note 9, at 432-33 (footnotes omitted) (alterations in original).

22 *See Robinson I*, 62 N.J. at 516, 303 A.2d at 295 (explaining that the state shifted its financing burden to local districts without "spell[ing] out the content of the educational opportunity the Constitution requires").

the New Jersey Supreme Court embarked upon its two-decade-long effort to equalize education funding expenditures by holding that these deficiencies violated the T&E Clause.[23]

A. *Round One:* Robinson v. Cahill

According to the supreme court in *Robinson I*, the T&E Clause obligates the legislature to provide equal educational opportunity for all students.[24] In calling for equality, however, the court legitimized reliance upon a property tax system whose inequality has fostered the constitutional deficiency.[25]

The *Robinson I* court encountered a state education system administered under the State School Incentive Equalization Aid Law (Bateman Act).[26] The system relied upon local, *ad valorem* property taxation to finance two-thirds of the state education budget.[27] In its unanimous decision, the supreme court instantly recognized state-financed, local budgetary disparities as a product of differences in local property value.[28]

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[23] *See id.* at 519, 303 A.2d at 297 ("We see no basis for a finding that the 1970 Act, even if fully funded, would satisfy the constitutional obligation of the State."); *see* A. Thomas Stubbs, Note, *After* Rodriguez: *Recent Developments in School Finance Reform*, 44 TAX LAW. 313, 317 (1990) (highlighting that the New Jersey Supreme Court decided *Robinson I* within one month of the United States Supreme Court's landmark ruling in *Rodriguez*). *See supra* note 2 (analyzing *Rodriguez*).

[24] *Robinson I*, 62 N.J. at 513, 303 A.2d at 294.

[25] *See id.* at 512, 303 A.2d at 293; Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV 1072, 1073 (1991) (footnote omitted) ("School finance inequities stem from the reliance of state finance systems on local property taxes."). Two primary factors, the district's tax rate and the value of its taxable property, determine "the amount of revenue produced by local property taxes within a school district." *Id.* (footnote omitted). Districts comprised of highly-valued property may tax that property at lower rates to derive the same amount of revenue for educational spending that "property-poor" districts can raise only through higher tax rates. *Id.* (footnote omitted). As more middle-class and wealthy individuals relocated to the suburbs from urban areas, the reduced demand for urban properties caused a decline in urban property values. *Id.* at 1074 n.12. This decline, in conjunction with "municipal and educational overburden" and the dramatic increases in property tax rates caused by increasing demands for social and special education services by urban residents and children, has resulted in the endemic inequality of educational spending between urban and suburban districts. *Id.* at 1074; *see infra* note 83 (describing municipal overburden).

[26] *Robinson I*, 62 N.J. at 516, 303 A.2d at 296 (citing 1954 Act, N.J. STAT. ANN. § 18A:58-1 (West 1968) (amended 1970) (repealed 1976)).

[27] *Id.* at 480, 303 A.2d at 276 (citing Robinson v. Cahill, 117 N.J. Super. 223, 231, 287 A.2d 187, 191 (Law Div. 1972)). The trial court determined that local taxes supplied 67% of education funding as compared with a 28% contribution by the state and 5% by the federal government. *Robinson*, 118 N.J. Super at 231, 287 A.2d at 191.

[28] *Robinson I*, 62 N.J. at 481, 303 A.2d at 276-77; *see* Lichtenstein, *supra* note 9, at 433 n.15 ("Clearly, two factors determine a district's per-pupil property value: the district's total student population and its total amount of taxable property value.").

Nevertheless, refusing to find that the T&E Clause entitled taxpayers to expect an equalized tax burden, the court concluded that the legislature could place financial responsibility for its system on local property taxation.[29] The court opined that the T&E Clause had never mandated a statewide tax, but rather had envisioned local financial support for education.[30] Consequently, the supreme court continued, the legislature could depend upon unequal, local property taxation to finance education so long as the state offered a "thorough and efficient" education.[31] This finding, however, has significantly hindered the realization of the T&E Clause's mandate of equal educational opportunity.[32]

The *Robinson I* court affirmed that the T&E Clause required a system of public education ensuring effective citizenship.[33] To the

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29 *See Robinson I*, 62 N.J. at 513, 303 A.2d at 294. The court concluded that the T&E Clause could not have intended taxpayer equality because local districts possessed the delegated authority to finance their instructional needs, which under *Landis* could vary within a prescribed constitutional range. *Id.* at 514, 303 A.2d at 294 (citing Landis v. Ashworth (School District No. 44), 57 N.J.L. 509, 512, 31 A. 1017, 1018 (1895)).

30 *Id.* at 511-12, 303 A.2d at 293.

31 *See id.* at 513, 303 A.2d at 294. The court declared that

> [w]hether the State acts directly or imposes the role upon local government, the end product must be what the Constitution commands. A system of instruction in any district of the State which is not thorough and efficient falls short of the constitutional command. Whatever the reason for the violation, the obligation is the State's to rectify it. If local government fails, the State government must compel it to act, and if the local government cannot carry the burden, the State must itself meet its continuing obligation.

Id.

32 *See* Abbott v. Burke (*Abbott II*), 119 N.J. 287, 337-38, 575 A.2d 359, 384 (1990).

33 *Robinson I*, 62 N.J. at 514, 303 A.2d at 294-95 (quoting *Landis*, 57 N.J.L. at 512, 31 A. at 1018). In *Landis*, a Cumberland County taxpayer challenged the authority of her local school district to levy taxes "exclusively upon the persons and property within it." *Landis*, 57 N.J.L. at 510, 31 A. at 1018. In rejecting the claim, the New Jersey Supreme Court first dispensed with the plaintiff's direct assault upon the organizational form of a school district by holding that the state legislature could confer upon its citizens the power to incorporate into a school district for the purpose of education. *Id.* at 510, 511, 31 A. at 1018 (citation omitted).

The plaintiff then alternatively argued that by allowing local school districts to determine their own tax rates, the state had validated "different degrees of instruction" that violated the legislature's duty "to see that the same facilities for education are furnished to every child in the state." *Id.* at 511-12, 31 A. at 1018. The court retorted that the state constitution did not demand equality of instruction, for the logical result of such an interpretation would require secondary education either everywhere or nowhere. *Id.* at 512, 31 A. at 1018. Instead of selecting all or nothing, the court explained that the T&E Clause:

> impose[d] on the legislature a duty of providing for a thorough and efficient system of free schools, capable of affording to every child such instruction as is necessary to fit it for the ordinary duties of citizenship;

extent that the luxury of secondary education in the nineteenth century had evolved into a necessity in the twentieth century, the court held that the T&E Clause imposed upon the legislature the constitutional duty to offer a "contemporary" education that prepared each child to function "as a citizen and as a competitor."[34] Under this standard, the supreme court concluded that such a level of educational opportunity included high school education.[35]

To determine the capacity of the property tax-based financing scheme to support this level of educational opportunity, the court examined the system's "dollar input."[36] Although agreeing that equalized funding could not guarantee equalized instruction, the court nevertheless deemed money to be the only judicially manageable measure of constitutional compliance.[37] Using its financial

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> and such provision our school laws would make, if properly executed, with the view of securing the common rights of all before tendering peculiar advantages to any.

Id.

Therefore, the court approved the "power of the legislature to provide, either directly or indirectly, in its discretion, for the further instruction of youth in such branches of learning as, though not essential, are yet conducive to the public service." *Id.*; *see* Ballot, *supra* note 2, at 459 (footnote omitted) (concluding that *Landis* permitted local districts to offer high school education under the T&E Clause although its offering remained a rarity across New Jersey in 1895).

[34] *Robinson I*, 62 N.J. at 515, 303 A.2d at 295. The court interpreted *Landis* as establishing an evolving standard of minimum educational opportunity. *See id.* (concluding that because high school education had not yet become a common element of state instruction, the *Landis* Court excluded it from those "common rights" to which students in the late 19th century were entitled). The *Robinson* Court read the absence of any limitation in the *Landis* standard to invite the inclusion of secondary education as a necessary element of preparing children as citizens and competitors in 20th century American society. *See id.* ("And *Landis* of course did not say the common rights were those of 1875 or 1895."); Ballot, *supra* note 2, at 476 (footnote omitted) (proffering that the *Robinson* court "cleverly transmuted" *Landis* to establish a minimum level of educational opportunity instead of its stated acceptance of inequality).

[35] *See Robinson I*, 62 N.J. at 515, 303 A.2d at 295. The court declared that "[t]oday, a system of public education which did not offer high school education would hardly be thorough and efficient." *Id.*

[36] *Id.* at 515-16, 303 A.2d at 295. The court assessed the constitutionality of the Bateman Act with the understanding that the T&E Clause did not require equality of expenditures among districts. *Id.* at 514, 303 A.2d at 294 (citing *Landis*, 57 N.J.L. at 512, 31 A. at 1018). Specifically, the court interpreted *Landis* as permitting funding disparities provided that all students enjoyed equal education opportunity. *Id.* (citing *Landis*, 57 N.J.L. at 512, 31 A. at 1018).

[37] *Id.* at 481, 515-16, 303 A.2d at 277, 295. Acknowledging the effects of local district conditions, the court analyzed the Bateman Act according to the relationship between educational quality and spending because the legislature had already attempted to equalize educational opportunity with increased state aid. *Id.* at 481, 303 A.2d at 277. Moreover, the court claimed to lack any other method of measuring constitutional compliance. *Id.* at 515-16, 303 A.2d at 295. Consequently, the court accepted the existence of a "significant connection between the sums expended and

yardstick, the supreme court found that in neglecting to substantively define the mandate of the T&E Clause, the legislature had denied local districts the ability to "achieve statewide equality of educational opportunity."[38] Consequently, unless the legislature required local funding to achieve the court's new standard, local districts could never guarantee the satisfaction of the legislature's constitutional duty.[39]

Despite concerns that the property tax system could not effectuate equality, the court deferred to the legislature for a resolution of the funding crisis.[40] Professing respect for the necessity of a working government, the court sought oral argument on the form of the remedy it should issue to the *Robinson* plaintiffs.[41] Therefore, in *Robinson II*, the court retained jurisdiction of the case, withholding its judgment for eighteen months in the hope that the legislature would voluntarily accede to the judiciary's conception of the T&E Clause.[42]

Accepting the baton of social reform from the court, in 1974 Governor Brendan Byrne proposed a new progressive state income

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the quality of the educational opportunity." *Id.* at 481, 303 A.2d at 277. According to one commentator, in the absence of an alternative, the court utilized funding disparities as its constitutional measure as a "stopgap" until the legislature provided the content of the T&E Clause. Lichtenstein, *supra* note 9, at 472 (footnote omitted).

38 *Robinson I*, 62 N.J. at 516, 303 A.2d at 295.

39 *Id.* at 519, 303 A.2d at 297. The court questioned how the elements of the Bateman Act ensured adequate funding for education, even if fully funded. *Id.* The Bateman Act gave districts foundation aid on a per pupil basis weighted to cover expenses for each level of educational instruction. *Id.* at 517, 303 A.2d at 296. In addition, each district also received minimum support aid and equalization aid to enable all districts to reach a minimum level of educational opportunity. *Id.* at 517, 518, 303 A.2d at 296. The court rejected the statute's application because the legislature had not designed it "to guarantee that local effort plus the State aid will yield to all the pupils in the State that level of educational opportunity which the 1875 amendment mandates." *Id.* at 519, 303 A.2d at 297.

40 *See id.* at 520, 303 A.2d at 297 ("[I]t may be doubted that the thorough and efficient system of schools required by the [T&E Clause] can realistically be met by reliance upon local taxation."); *see also* Lichtenstein, *supra* note 9, at 441-42 (footnotes omitted) (quoting Abbott v. Burke (*Abbott II*), 119 N.J. 287, 304, 575 A.2d 359, 367 (1990)) (contending that in withholding an immediate remedy, the court "displayed a considerable amount of patience, judicial self-restraint, and deference to the Legislature's 'fundamental and primary' constitutional role in providing for the education of New Jersey's children"). Thus, the court "bared its teeth, threatening the legislature with judicial action." Jaffe & Kersch, *supra* note 2, at 284.

41 *Robinson I*, 62 N.J. at 520-21, 303 A.2d at 298.

42 Robinson v. Cahill, 63 N.J. 196, 198, 306 A.2d 65, 66 (*Robinson II*), *cert. denied sub nom.* Dickey v. Robinson, 414 U.S. 976 (1973). With an eye toward the removal of minimum aid and the "save-harmless provision" from the Bateman Act, the court decided in June of 1973 to grant the legislature until December 31, 1974, to enact a new reform measure to become effective by July 1, 1975. *Id.*

tax to ensure that the state financed all districts at a guaranteed minimum funding level.[43] Unfortunately, but not unsurprisingly given the legislative apportionment of political power between suburban and urban areas, state senators balked at imposing increased taxation upon their suburban constituents.[44] Due to the inability of the legislature to enact school funding reform, the Supreme Court of New Jersey, in *Robinson III*, sought to enforce its mandate by setting oral argument for March, 1975.[45] While issuing a remedy to the plaintiffs in *Robinson IV* based upon that argument, Chief Justice Richard Hughes repeatedly emphasized that the court had paid due respect to the doctrine of separation of powers.[46] The chief justice expressed the majority's view that the Judi-

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43 Jaffe & Kersch, *supra* note 2, at 284 (footnotes omitted).

44 Lichtenstein, *supra* note 9, at 442 n.53 (quoting John J. Gibbons, *Like its Lineage,* Abbott *Is a Product of the Times,* 125 N.J. L.J. 1645, 1663 (June 21, 1990) (identifying the hostility of the suburban-dominated legislature toward redistributive school finance reforms designed to benefit urban districts)). Judge Gibbons asserted that a Warren Court reapportionment decision opened up to suburban areas state legislative power that urban areas had traditionally enjoyed, thus foreclosing the likelihood of popular progressive remedies for the social ills plaguing our urban communities. Gibbons, *supra,* at 1663. Moreover, "[t]his inequality of political power is exacerbated by the fact that the status quo provides greater benefits to propertied districts, thereby placing the burden of change or redistribution upon the plaintiff." *Unfulfilled Promises, supra* note 25, at 1079. Suburban taxpayers do not perceive "a better-educated [urban] citizenry" as benefitting themselves sufficiently to justify increased state taxation to finance urban educational opportunity. *See id.* at 1080. Therefore, although both houses of the legislature approved Governor Byrne's school funding reform plan to increase each district's guaranteed tax base from $38,000 to $106,000 per pupil, the state senate refused to approve a new state income tax to finance the increased funding. Jaffe & Kersch, *supra* note 2, at 284 (footnote omitted).

45 Robinson v. Cahill (*Robinson III*), 67 N.J. 35, 36, 37, 335 A.2d 6, 6, 7 (1975). The court scheduled oral arguments on how and to what extent it should order changes in the state's funding scheme. *Id.* at 38, 335 A.2d at 7.

46 *See, e.g.,* Robinson v. Cahill (*Robinson IV*), 69 N.J. 133, 140, 351 A.2d 713, 716 (1975). The court emphasized that "we have more than once stayed our hand, with appropriate respect for the province of other Branches of government." *Id.* Further, the court explained, "[w]e decided that in view of the time-exigency (and with continued deference to the separation of powers, we must note) the Court would not disturb the present statutory scheme . . . but would receive further briefs and hear argument . . . concerning appropriate remedial action by the Court." *Id.* at 143, 351 A.2d at 718. *See supra* note 14 (explaining the separation of powers doctrine).

The *Robinson IV* court divided over the issue of whether its order appropriating state education funds constituted a breach of the doctrine. *See Robinson IV,* 69 N.J. at 154, 351 A.2d at 724; *id.* at 178, 180, 351 A.2d at 737, 738 (Mountain & Clifford, JJ., dissenting). The majority proclaimed the court's authority to "act, even in a sense seem to encroach, in areas otherwise reserved to other Branches of government." *Id.* at 154, 351 A.2d at 724 (citation omitted). By contrast, the dissent argued that the doctrine no longer "require[s] a complete compartmentalization along triadic lines . . . . [A] blending of powers will be countenanced, *but only so long as checks and balances are present to guard against abuses,*" which do not exist to control the judicial

ciary maintained a duty to evaluate the constitutionality of legislative efforts toward compliance with the T&E Clause.[47] The *Robinson IV* court indicated that the Judiciary would abandon its limited constitutional role to wield its own mandate for reform in the absence of legislative will.[48]

The New Jersey Supreme Court couched its provisional remedy for the 1976-77 school year as a warranted exercise of judicial action to prevent further legislative neglect of the enforcement of a fundamental right to education under the T&E Clause.[49] Although considering an order to enjoin all state funding under the unconstitutional system, the court decided that such a "curtailment" had not yet become necessary.[50] Instead, the court adopted a few of the redistributive reforms that Governor Byrne had originally proposed.[51]

Governor Byrne urged the redistribution of all state aid under the Bateman Act's incentive equalization formula because the Act had effectively guaranteed local school districts a minimum level of per-pupil financing.[52] The formula accomplished this objective by providing additional state aid to those districts incapable of attaining the guaranteed minimum level of funding.[53] Consequently, Governor Byrne asked the supreme court to appropriate all state funding accordingly.[54]

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appropriation of State funds. *Id.* at 178, 180, 351 A.2d at 737, 738 (Mountain & Clifford, JJ. dissenting).

47 *Id.* at 145, 351 A.2d at 719 ("In other words, the Court's function is to appraise compliance with the Constitution, not to legislate an educational system, at least if that can in any way be avoided.").

48 *See id.* at 140, 351 A.2d at 716 (quoting American Trial Lawyers Ass'n v. New Jersey Supreme Court, 66 N.J. 258, 263, 330 A.2d 350, 353 (1974) (quoting Robinson v. Cahill (*Robinson I*), 62 N.J. 473, 303 A.2d 273, *cert. denied sub nom.* Dickey v. Robinson, 414 U.S. 976 (1973))) (additional citations omitted).

49 *Robinson IV*, 69 N.J. at 146-47, 351 A.2d at 720. The court declared that "[t]he need for immediate and affirmative judicial action at this juncture is apparent, when one considers the confrontation existing between legislative action, or inaction, and constitutional right." *Id.*

50 *Id.* at 147, 147-48, 351 A.2d at 720.

51 *Id.* at 148, 351 A.2d at 720. The *Robinson IV* court issued a conditional remedy effective until the 1976-77 school year if the legislature failed to fashion a constitutional system by that year. *Id.* at 144, 351 A.2d at 718 (footnote omitted). Under the court's order, the state would appropriate aid under the Bateman Act's equalization aid provision instead of under the Act's minimum aid and "save-harmless" provisions. *Id.* at 150, 351 A.2d at 721-22.

52 *Id.* at 149, 351 A.2d at 721 (citing Bateman Act, ch. 234, sec. 5, 9, 1970 N.J. Laws 823, 828, 829-30 (1970) (codified as amended at N.J. STAT. ANN. §§ 18A:58-5, -6.3 (West 1975) (repealed 1976))).

53 *Id.*

54 *Id.*; *see* Lichtenstein, *supra* note 9, at 445 n.65 (noting that Governor Byrne

The court, however, focused its remedy only on "minimum support" assistance and "save-harmless" funds, agreeing with the Governor and the *Robinson* plaintiffs that the apportionment of these moneys directly inhibited the state's ability to equalize educational opportunity.[55] The court crafted a compromise requiring the establishment of a higher guaranteed equalized valuation shared by all districts, but affording Governor Byrne and the legislature time to devise a new financing system.[56] Although believing in the appropriateness of exercising its authority, the court fashioned a remedy subject to the responsiveness of the legislature.[57] Despite the dissent's preference for stronger relief, the *Robinson IV* court exercised the power of the purse on behalf of the legislature because of its failure to develop a constitutional financing mechanism for state education.[58]

Two days before the October 1, 1975, deadline for court-ordered redistribution of all state funds, the legislature enacted the Public School Education Act of 1975 (Chapter 212).[59] After receiv-

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wanted all $617 million in state funding redistributed under the incentive equalization formula). In particular, Governor Byrne proposed that the court's remedial order should have redistributed more than $550 million in state aid, including: (1) $234 million in minimum support aid; (2) $7.6 million in save-harmless aid; (3) $27 million in building aid; (4) $64 million in atypical pupils aid; (5) $46 million in transportation aid; and (6) $172 million in state pension fund contributions for school employees. *Robinson IV*, 69 N.J. at 148, 351 A.2d at 720.

55 *Robinson IV*, 69 N.J. at 149, 351 A.2d at 721; *see* Lichtenstein, *supra* note 9, at 444 n.64 (citation omitted) (explaining that minimum support aid consisted of "none-qualizing flat grant aid" given by the state to all districts regardless of educational need); Bateman Act, ch. 234, sec. 15, 1970 N.J. Laws 823, 832-33 (1970) (codified as amended at N.J. STAT. ANN. § 18A:58-18.1 (West 1975) (repealed 1976)) (creating "save-harmless" aid by providing that no district would receive less state aid in the first fiscal year under the Bateman Act than in the prior year).

56 *See Robinson IV*, 69 N.J. at 150, 151, 351 A.2d at 721-22, 722.

57 *Id.* at 155, 351 A.2d at 724. The court characterized its redistribution of minimum support and save-harmless funds as "constitutionally minimal, necessary and proper." *Id.*

58 *Id.* at 155, 351 A.2d at 724; *see id.* at 162, 351 A.2d at 728 (Pashman, J., concurring in part and dissenting in part) (footnotes omitted) (arguing that the court should have retained jurisdiction and remanded the case to the State Board of Education for the development of, and assessment of district compliance with, state educational quality standards). The court enjoined state officials "from disbursing minimum support and save-harmless funds" and directed the officials "to distribute and disburse said funds in accordance with the incentive equalization aid formula." *Id.*; *see also* Jaffe & Kersch, *supra* note 2, at 285 (indicating that the legislature viewed the court's remedy as encroaching upon its spending authority). Complaining that the court should have redistributed all state aid under the formula, Justice Pashman viewed this redistribution as but "a step, albeit a small one, toward the accomplishment of such interim relief." *Robinson IV*, 69 N.J. at 160, 351 A.2d at 727 (Pashman, J., concurring in part and dissenting in part).

59 Lichtenstein, *supra* note 9, at 445; *Chapter 212*, N.J. STAT. ANN. §§ 18A:7A-1 to -52

ing Governor Byrne's invitation to review the reform measure, the *Robinson V* court affirmed the constitutionality of Chapter 212, assuming that the legislature would fully fund its implementation.[60] The court noted that the legislature had specifically defined the elements of a "thorough and efficient" education and instituted a monitoring system for strict district compliance with these goals.[61]

(West 1989), *repealed by* QEA, ch. 52, sec. 91, 1990 N.J. Laws 587, 646 (effective July 1, 1990) (codified as amended at N.J. STAT. ANN. §§ 18A:7D-1 to -37 (West Supp. 1994)).

60 Robinson v. Cahill (*Robinson V*), 69 N.J. 449, 467-68, 355 A.2d 129, 139 (1976); Jaffe & Kersch, *supra* note 2, at 287 (footnote omitted).

61 *Robinson V*, 69 N.J. at 456-57, 458-59, 355 A.2d at 132-33, 133-34. The court concluded that the language of Chapter 212 evidenced "a perceptive recognition on the part of the Legislature of the constantly evolving nature of the concept being considered." *Id.* at 457-58, 355 A.2d at 133; *see* N.J. STAT. ANN. § 18A:7A-4 (West 1989). The statute reads:

> The goal of a thorough and efficient system of free public schools shall be to provide to all children in New Jersey, regardless of socioeconomic status or geographic location, the educational opportunity which will prepare them to function politically, economically and socially in a democratic society.

N.J. STAT. ANN. § 18A:7A-4 (West 1989); *see also* N.J. STAT. ANN. § 18A:7A-5 (West 1989). The statute provides that:

> A thorough and efficient system of free public schools shall include the following major elements, which shall serve as guidelines for the achievement of the legislative goal and the implementation of this act:
> a. Establishment of educational goals at both the State and local levels;
> b. Encouragement of public involvement in the establishment of educational goals;
> c. Instruction intended to produce the attainment of reasonable levels of proficiency in the basic communications and computational skills;
> d. A breadth of program offerings designed to develop the individual talents and abilities of pupils;
> e. Programs and supportive services for all pupils especially those who are educationally disadvantaged or who have special educational needs;
> f. Adequately equipped, sanitary and secure physical facilities and adequate materials and supplies;
> g. Qualified instructional and other personnel;
> h. Efficient administrative procedures;
> i. An adequate State program of research and development; and
> j. Evaluation and monitoring programs at both the State and local levels.

N.J. STAT. ANN. § 18A:7A-5.

The court then recognized the following legislative finding as particularly persuasive:

> Because the sufficiency of education is a growing and evolving concept, the definition of a thorough and efficient system of education and the delineation of all the factors necessary to be included therein, depend upon the economic, historical, social and cultural context in which that education is delivered. The Legislature must, nevertheless, make explicit provision for the design of State and local systems by which such

Moreover, the supreme court accepted the legislature's attempt to equalize minimum state aid by financing education at a guaranteed valuation per pupil.[62] Consequently, the court approved the continued provision of minimum aid under Chapter 212 because the law significantly reduced its amount and its effect on overall aid disparities.[63] Despite these improvements, the court retained jurisdiction over the case, foreshadowing its most critical confrontation with the legislature to date by setting April 6, 1976, as the next deadline for enactment of full funding for the new system.[64]

Once the *Robinson V* court validated continued reliance upon the state's inherently unequal property tax system, the legislature persisted in employing that system rather than adopting Governor Byrne's state income tax proposal.[65] Undaunted by the legislature's delay, in *Robinson VI* the court enjoined all state education

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> education is delivered, and should, therefore, explicitly provide after 4 years from the effective date of this act for a major and comprehensive evaluation of both the State and local systems, and the sufficiency of education provided thereby.

Robinson V, 69 N.J. at 457, 355 A.2d at 133 (quoting N.J. STAT. ANN. § 18A:7A-2(a)(4) (West 1976)).

The court also appreciated that the legislature had created a process by which to monitor and evaluate the progress of each school toward meeting the new scheme's defined goals. *Id.* at 458-59, 355 A.2d at 133-34. The court highlighted the following provision:

> For the purpose of evaluating the thoroughness and efficiency of all the public schools of the State, the commissioner, with the approval of the State board and after review by the Joint Committee on the Public Schools, shall develop and administer a uniform, Statewide system for evaluating the performance of *each* school. Such a system shall be based in part on annual testing for achievement in basic skill areas, and in part on such other means as the commissioner deems proper in order to (a) determine pupil status and needs, (b) ensure pupil progress, and (c) assess the degree to which the educational objectives have been achieved.

Id. (quoting N.J. STAT. ANN. § 18A:7A-10 (West 1976)).

62 *Robinson V*, 69 N.J. at 465-66, 355 A.2d at 137.

63 *Id.* at 467, 355 A.2d at 138. The court prefaced its conclusion by acknowledging that Chapter 212 more than doubled (to "341 in 1975 and 368 in 1976" from 157 under the Bateman Act) the number of districts reaching the minimum guaranteed level of equalized valuation. *Id.* at 465 n.4, 355 A.2d at 137 n.4.

64 *Id.* at 468, 355 A.2d at 139; *see* Ballot, *supra* note 2, at 463 (footnote omitted) (noting that the court "clarified that spending disparities were relevant only to the extent that the new Act did not afford a thorough and efficient education upon its full implementation"). The court concluded that "[t]he fiscal provisions of the Act are to be judged as adequate or inadequate depending upon whether they do or do not afford sufficient financial support for the system of public education that will emerge from the implementation of the plan set forth in the statute." *Robinson V*, 69 N.J. at 464, 355 A.2d at 136.

65 *See Robinson V*, 69 N.J. at 464, 355 A.2d at 137; Lichtenstein, *supra* note 9, at 446 (footnotes omitted).

appropriations as of July 1, 1976, unless the legislature designed a suitable funding mechanism to implement Chapter 212.[66] One week after the court closed the schools, the legislature finally approved a two percent state income tax to finance Chapter 212.[67] After the legislature responded to the exercise of judicial authority, the court withdrew its order in *Robinson VII*.[68] Therefore, testing "taxpayer endurance," the court coerced from the legislature a vigorously opposed state income tax to finance school funding reform.[69]

B. Round Two: Abbott v. Burke

While validating Chapter 212, the *Robinson V* court reminded the legislature that failure to properly finance its newly-enacted funding scheme might one day force the court to reconsider the issue of the scheme's validity.[70] In 1985, the court readdressed that question when urban students challenged the effectiveness of Chapter 212 toward narrowing the funding gaps between poorer urban and wealthier suburban districts.[71]

In *Abbott I*, the court proffered that it would assess Chapter 212's progress toward equal educational opportunity by comparing urban and suburban district compliance with the law's education goals.[72] In its analysis, the court determined that an evaluation of the quality of education, as measured by Chapter 212, involved an assessment of the financing of education.[73] In other words,

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66 Robinson v. Cahill (*Robinson VI*), 70 N.J. 155, 160, 161, 358 A.2d 457, 459, 459-60 (1976). The court did not invoke a variety of other less powerful remedial measures, including the levying of additional suburban property or state income taxes and the appropriation of state moneys to boost educational spending. Lichtenstein, *supra* note 9, at 446 (footnotes omitted).

67 Lichtenstein, *supra* note 9, at 447-48 (footnotes omitted); Jaffe & Kersch, *supra* note 2, at 288.

68 Robinson v. Cahill (*Robinson VII*), 70 N.J. 464, 465, 360 A.2d 400, 400 (1976).

69 *See Robinson VI*, 70 N.J. at 164, 165, 358 A.2d at 462 (Mountain, J., dissenting) (asserting that the court's injunction "indirectly command[ed] that a tax be imposed").

70 *See* Robinson v. Cahill (*Robinson V*), 69 N.J. 449, 467, 355 A.2d 129, 138, 139 (1976).

71 Abbott v. Burke (*Abbott I*), 100 N.J. 269, 277, 282, 495 A.2d 376, 380, 383 (1985).

72 *See id.* at 296, 495 A.2d at 390. The court established these parameters for its constitutional inquiry:

> the thorough and efficient education issues call for proofs that, after comparing the education received by children in property-poor districts to that offered in property-rich districts, it appears that the disadvantaged children will not be able to compete in, and contribute to, the society entered by the relatively advantaged children.

Id.

73 *Id.* at 293, 495 A.2d at 389.

whereas the *Robinson V* court had only considered whether the state had offered a minimum educational opportunity, the *Abbott I* court simplified judicial review to an inquiry of whether both urban and suburban students materially enjoyed the same ability "to compete in, and contribute to, the society entered by the relatively advantaged children."[74]

Instead of immediately adjudicating the controversy, however, the court offered the legislature another opportunity to rectify the obvious funding discrepancies that had developed under the new system.[75] Expressing its preference for a more comprehensive factual record, the court remanded *Abbott I* to the Commissioner of Education.[76]

In *Abbott II*, the court expanded its *Robinson V* holding that the T&E Clause required all districts to provide a minimum level of substantive education.[77] According to the court, the financing system supporting Chapter 212 imperiled the constitutionality of educational opportunity offered by a district when the district's level of substantive education fell below that of other districts.[78] To meet

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74 *Id.* at 296, 495 A.2d at 390; Lichtenstein, *supra* note 9, at 473 (stating that "the *Abbott I* court effectively abandoned the *Robinson V* court's focus upon an absolute minimum substantive level of educational offering, in favor of a new concept of *comparative* equal educational opportunity").

75 Robert F. Williams, *With* Abbott, *Justices in for the Long Haul*, 125 N.J. L.J. 1645, 1664 (June 21, 1990) ("In remanding the matter to the commissioner of education, the Court gave both the Legislature and the executive time to respond to the obvious inequities in the application of the legislative system the Court had approved on its face in the *Robinson* litigation.").

76 *Abbott I*, 100 N.J. at 301, 303, 495 A.2d at 393, 394.

77 *See* Abbott v. Burke (*Abbott II*), 119 N.J. 287, 306, 363-64, 575 A.2d 359, 368-69, 397 (1990) (citing Robinson v. Cahill (*Robinson I*), 62 N.J. 473, 515, 303 A.2d 273, 295, *cert. denied sub nom.* Dickey v. Robinson, 414 U.S. 976 (1973)) (explaining that the *Robinson I* decision served as the general basis for the holding in *Robinson V*, which established the state's obligation to guarantee a minimum level of educational opportunity). In *Abbott II*, the court refined the constitutional standard as requiring the state to provide children with "the ability to participate fully in society, in the life of one's community, the ability to appreciate music, art, and literature, and the ability to share all of that with friends." *Id.* at 363-64, 575 A.2d at 397.

To explain the evolution of the constitutional mandate, Chief Justice Robert Wilentz opined that the foundation of the T&E Clause lay in equality. *Id.* at 304, 575 A.2d at 367. The chief justice observed that in *Robinson I*, the court had turned to dollar inputs as the only readily manageable standard available with which to render its judgment as to constitutional equality. *Id.* at 305, 575 A.2d at 368 (citing *Robinson I*, 62 N.J. at 515-16, 303 A.2d at 295). The chief justice then clarified that the *Robinson I* court intended its conceptualization of equality to require the state to provide all students with "a certain level of education, that which equates with thorough and efficient." *Id.*

78 *Id.* at 307, 575 A.2d at 369. The court then concluded that the *Robinson I* court had not interpreted the T&E Clause as mandating equality of per-pupil expenditures among districts. *Id.* at 306, 575 A.2d at 368. Therefore, the court declared, dollar

the court's new standard of review, therefore, the legislature had to demonstrate that its education system guaranteed the same quality of education in the poorest districts as in the wealthiest districts.[79]

Under Chapter 212, school districts received state "equalization aid" to compensate for local property tax revenues that failed to provide a guaranteed tax base.[80] The supreme court realized, however, that Chapter 212 actually exacerbated funding disparities.[81] The court faulted the provision of "counter-equalizing" minimum aid to wealthier districts as encouraging increased spending in suburban districts beyond a level that their poorer counterparts could attain.[82] In addition, the court cited the inherent inability of poorer districts to raise revenues for themselves through greater property taxation because the high costs of social services had already overburdened most urban communities.[83] Chief Justice Rob-

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disparities remained significant only to the extent that they impacted a given district's substantive educational opportunities. *Id.* at 309, 575 A.2d at 370.

79 Jonathan Banks, Note, *State Constitutional Analyses of Public School Finance Reform Cases: Myth or Methodology?*, 45 VAND. L. REV. 129, 151 (1992) (footnote omitted); *see Abbott II*, 119 N.J. at 309-10, 575 A.2d at 370 (reminding that if money could rectify the lack of substantive education in a given district, then the state would have to ensure greater spending); Ballot, *supra* note 2, at 477 (footnote omitted) (characterizing the court's school funding holdings as "necessarily driven by a limited evidentiary tool of spending disparities").

In selecting the poorest and richest districts for its expenditure comparison, the court relied upon their socioeconomic differences as reflected by their District Factor Groupings (DFGs). *Abbott II*, 119 N.J. at 338, 575 A.2d at 384-85. The New Jersey Department of Education (DOE) arranged the DFGs by comparing seven factors: "(1) per capita income level, (2) occupation level, (3) education level, (4) percent of residents below the poverty level, (5) density (the average number of persons per household), (6) urbanization (percent of district considered urban), and (7) unemployment (percent of those in the work force who received some unemployment compensation.)" *Id.*, 575 A.2d at 385. The DOE then separated the districts into 10 groups, with approximately 50 districts in each group ranging from lowest (A) to highest (J) socioeconomic standing. *Id.* at 339, 575 A.2d at 385. The court identified 28 of the 29 urban districts, those classified as DFG A or B, as eligible for its remedy. *Id.* at 386, 575 A.2d at 408; *see id.* at 394-97, 575 A.2d at 412-14 (identifying the state's 28 poorest districts).

80 *Abbott II*, 119 N.J. at 324, 575 A.2d at 378.

81 *Id.* at 334, 575 A.2d at 382; *see* Ballot, *supra* note 2, at 451 (footnotes omitted) (asserting that equalization aid "could not compensate for the fact that some school districts would tax the GTB [guaranteed tax base] at higher rates to reflect a greater local emphasis on education. Thus, the ability of districts to freely set tax rates and budget priorities of their own choosing ensured continued disparities in per pupil spending").

82 *Abbott II*, 119 N.J. at 382, 575 A.2d at 406. According to one commentator, minimum aid constituted nothing more than "a blatant subsidy for the wealthy." Lichtenstein, *supra* note 9, at 478 (footnote omitted).

83 *Abbott II*, 119 N.J. at 355, 357, 575 A.2d at 393, 394. The court listed "police and fire protection, road maintenance, social services, water, sewer, garbage disposal, and similar services" among the governmental needs that constitute municipal overbur-

ert Wilentz thus concluded for a unanimous court that *Abbott* had resurrected the *Robinson* dilemma: "the poorer the district and the greater its need, the less the money available, and the worse the education."[84]

Upon expanding its definition of the T&E Clause mandate to require that districts provide an educational opportunity that prepared each child for citizenship, employment, and effective participation as a member of society, the supreme court held that the evidence proved the existence of a constitutional deficiency.[85] Given this heightened standard of review, the court recounted serious structural problems, inferior instructional factors, and nearly one dozen curricular inadequacies to graphically illustrate the inequality that prevented competition between different socioeconomic classes.[86] Furthermore, despite the presence of socioeconomic factors that worsen the plight of urban children, the court determined that the legislature must contribute even greater education aid for these students.[87]

Citing the "significant disparity of spending," the supreme court declared unconstitutional the counter-equalizing minimum aid given to wealthy suburban districts under Chapter 212.[88] Although the court permitted the phasing-in of a new financing

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den. *Id.* at 355, 575 A.2d at 393. The court found the existence of municipal overburden an important factual consideration because none of the poorer urban districts had sought to substantially increase local property taxes to finance educational improvements during the 10 years of Chapter 212's operation. *Id.* at 357, 575 A.2d at 394.

84 *Id.* at 344, 575 A.2d at 387.

85 *Id.* at 363-64, 368, 575 A.2d at 397, 399.

86 *See, e.g., id.* at 362-63, 575 A.2d at 397 (citing the collapse of a gym floor and the instruction of remedial students in a bathroom in Paterson as two of numerous structural shortcomings); *id.* at 367, 369, 575 A.2d at 399, 400 (observing that "when districts are ranked by socioeconomic status (SES), the percentage of teachers with advanced degrees rises from 29% in the lower SES districts to 52% in the higher" and that "every district in DFG A and all but two districts in DFG B failed to meet the State standard for the High School Proficiency Test (HSPT)" in 1985-86); *id.* at 359-62, 575 A.2d at 395-97 (citing the inadequate computer science, science, foreign language, music, art, industrial-arts, physical education, and basic skills programs offered in urban districts); *see* Patricia A. Brannan & Paul A. Minorini, *Adverse Impact on Educational Opportunity in Cases Challenging State School Financing Schemes*, 65 EDUC. L. REP. 279, 283-84 (1991) (summarizing detailed curricular deficiencies).

87 *Abbott II*, 119 N.J. at 374-75, 575 A.2d at 403. The court acknowledged that only significant improvements in substandard housing, lackluster employment opportunity, and inadequate child care and welfare services might improve urban education. *Id.* at 375, 575 A.2d at 403. Despite this reality, the court decided that "even if not a cure, money will help, and . . . these students are constitutionally entitled to that help." *Id.*

88 *Id.* at 383, 575 A.2d at 407.

scheme to take effect by the 1991-92 school year, the *Abbott II* court essentially directed the legislature to shift state funds from the state's richest to its twenty-eight poorest urban districts until the abject inequalities between them subsided.[89]

To afford urban children a "thorough and efficient" education, the court again deferred to the legislature to devise a financing system that would ensure "substantially equal" funding for poor and wealthy districts alike without dependence upon local property taxation.[90] At the same time, the court permitted the legislature to continue its reliance upon local property taxation to finance its system.[91] As a result, *Abbott II* handcuffed suburban spending to urban expenditures by demanding that the state spend the same money in poorer districts that a wealthy community would spend in its own district.[92] Furthermore, the court reminded the legislature that "changing circumstances" might still compel the Judiciary to mandate complete equality of financing between rich and poor districts.[93]

Some commentators have applauded the supreme court's comparative analysis as a prudent methodology by which to effect constitutional compliance without violating the doctrine of separation of powers.[94] This analysis, however, threatens to impose mediocrity upon suburban districts through the enforcement of the

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89 *Id.* at 385, 388, 389, 575 A.2d at 408, 410; *see* Jaffe & Kersch, *supra* note 2, at 291 (highlighting that the court's remedy compelled the state to provide $440 million more in state aid to its poorest districts); *Abbott II*, 119 N.J. at 394-97, 575 A.2d at 412-14 (identifying the state's 28 poorest, urban districts covered by the court's remedy).

90 *Abbott II*, 119 N.J. at 385, 386, 575 A.2d at 408, 409 ("The Act must be amended, or new legislation passed, so as to assure that poorer urban districts' educational funding is substantially equal to that of property-rich districts.").

91 *See id.* at 388, 575 A.2d at 409 (concluding that the legislature "may determine the division between state aid and local funding and allow school districts such leeway as is consistent with the constitutional obligation, or it may mandate the local share; again, however, funding in poorer urban districts cannot depend on the budgeting and taxing decisions of local school boards").

92 *See* Richard Lehne, *The Unanswered Question: Who Pays for* Abbott?, 125 N.J. L.J. 1645, 1665 (June 21, 1990).

93 *Abbott II*, 119 N.J. at 358, 575 A.2d at 395.

94 *See, e.g.*, Lichtenstein, *supra* note 9, at 489 (footnote omitted) ("While the *Abbott* court certainly wanted to avoid another constitutional confrontation with a recalcitrant legislature, it also wanted to ensure that future legislatures could not undercut its remedy by plainly couching that remedy within its comparative-equal-educational-opportunity interpretation of the 'thorough and efficient' clause."); Jaffe & Kersch, *supra* note 2, at 295 (contending that "the *Abbott II* court's deference to a legislative solution turned out to be restrained, sagacious, and correct"). *But see* Ballot, *supra* note 2, at 475 (indicating that the court interfered with the democratic process in *Abbott II*, but avoided a separation of powers crisis when the Governor introduced legislation extending beyond the court's directive).

court's interpretation of the T&E Clause's mandate.[95] Consequently, for as long as the court insists upon comparing dollar inputs between rich and poor districts to assess constitutional compliance, the continued affirmation of the use of a property tax-based financing system will foster the same political turmoil that has repeatedly prevented successful school funding reform.[96]

II. POLITICAL TURMOIL AND THE LEGISLATIVE RETREAT FROM REFORM

Governor James Florio anticipated that *Abbott II* would catalyze legislators to enact a new school funding system.[97] On May 24, 1990, the Governor announced his plan to increase school funding to $4.5 billion through a $1.25 billion state income tax hike.[98] Thus, when the court rendered *Abbott II* on June 5, 1990, and the legislature had to close a $440 million shortfall between New Jersey's wealthiest and poorest districts, the Governor came prepared to infuse over $400 million in extra state aid into the poorest districts.[99] Through his plan, Governor Florio offered 356 school districts $970 million in new financing to comply with *Abbott II*.[100] Avoiding another political stalemate, the legislature approved $1 billion in new education spending financed by a $1.3 billion state income tax hike.[101]

Unfortunately, as soon as the legislature appropriated the new financing as part of a more comprehensive reform measure known as the Quality Education Act of 1990 (QEA), public hostility toward reform grew unrelenting.[102] For example, the new funding scheme drew fire from suburban voters who were saddled with un-

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95 *See* Ballot, *supra* note 2, at 479 ("If the legislature does in fact impose spending ceilings on wealthy school districts, good schools will ironically be made worse to create the fiscal illusion that bad schools have somehow been made better.").

96 *See infra* notes 97-211 and accompanying text (substantiating this conclusion by analyzing the evolution and demise of the QEA and QEA II).

97 Joseph F. Sullivan, *New Jersey Ruling to Lift School Aid for Poor Districts*, N.Y. TIMES, June 6, 1990, at A1.

98 Jaffe & Kersch, *supra* note 2, at 292 (footnote omitted).

99 *Id.* at 293 (footnote omitted).

100 Sullivan, *supra* note 97, at B4; *see* Stubbs, *supra* note 23, at 335 (footnotes omitted) (explaining specific progressive changes in New Jersey state income tax calculations under the governor's plan).

101 Jaffe & Kersch, *supra* note 2, at 294; Stubbs, *supra* note 23, at 336 (footnote omitted).

102 *See* Jaffe & Kersch, *supra* note 2, at 296; QEA, ch. 52, 1990 N.J. Laws 587 (codified as amended at N.J. STAT. ANN. §§ 18A:7D-1 to -37 (West Supp. 1994)); *infra* notes 103-07 and accompanying text (describing the various interest groups that opposed the implementation of the QEA).

expectedly high property tax increases from the direct redistribution of state aid to poorer urban districts.[103] Democratic legislators magnified suburban voters' losses by raising $2.8 billion in new state taxes, $1.3 billion of which financed urban educational improvements under the QEA.[104] The financial ramifications of the QEA impacted a variety of voting interests, especially senior citizens.[105] Representatives for some southern New Jersey school districts complained of losing state aid even though a large percentage of their population consisted of senior citizens living on fixed incomes.[106] State teachers also chided the Florio Administration for a QEA provision transferring from the state to local districts responsibility for over $800 million in teacher pension contributions.[107] Thus, while *Abbott II* drained funds from suburban districts, the QEA simultaneously threatened to explode their budgets with pension obligations.[108] As a result of the hostile voter reaction to the Florio tax and school reform plans, United States Senator Bill Bradley narrowly averted defeat in his 1990 re-election bid.[109]

Recognizing the public scorn for the QEA, Democratic legislators quickly moved to reverse the allocation of state funds from urban school programs to suburban property tax relief by enacting

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103 *See* Chris Mondics, *Assembly OKs School-Aid Cut for Tax Relief*, RECORD (Hackensack), Mar. 12, 1991, at A-5 [hereinafter Mondics, *Assembly*]; Chris Mondics, *Democrats Short on Votes for Tax Relief Bill*, RECORD (Hackensack), Jan. 30, 1991, at A-3 [hereinafter Mondics, *Democrats*]; Joe Donnelly, *State May Ease Towns' Tax Levy*, RECORD (Hackensack), Dec. 12, 1990, at A-3.

104 *See* Mondics, *Assembly*, *supra* note 103, at A-1; Mondics, *Democrats*, *supra* note 103, at A-3.

105 *See* Jay Romano, *Elderly Worry About School Tax Revisions*, N.Y. TIMES, Sept. 9, 1990, at 12:1 (describing estimate of New Jersey branch of American Association of Retired People (AARP) that at least 60,000 low-income senior citizens resided in districts losing state aid under the QEA because the reform measure failed to consider income disparities within districts in its distribution calculations).

106 *See id.* (offering the views of Ocean County officials respecting the impact of potential aid cuts for their communities).

107 Peter Kerr, *Trenton Seeks to Tailor Florio School Plan to Court Order*, N.Y. TIMES, June 7, 1990, at B1. Although not textually incorporated into the QEA, the legislature did provide for the transfer of responsibility for teacher pensions as part of its school funding reform efforts. *See* N.J. STAT. ANN. § 18A:22-8(v) (West Supp. 1993), *repealed by* Act of May 24, 1993, ch. 117, sec. 1, 1993 N.J. Laws 296 (codified at N.J. STAT. ANN. § 18A:22-8 (West Supp. 1994)). Opponents of the QEA included the New Jersey Education Association (NJEA), the state teachers' union. Robert Hanley, *Move to Change School-Aid Law Gains*, N.Y. TIMES, Dec. 30, 1990, at 12:17.

108 Priscilla Van Tassel, *Schools Preparing For Changes in Financing*, N.Y. TIMES, Sept. 2, 1990, at 12:4.

109 Jaffe & Kersch, *supra* note 2, at 296 n.106; David Blomquist, *A Humbled Florio Gets the Message*, RECORD (Hackensack), Nov. 8, 1990, at A-1, A-20.

the QEA II on March 14, 1991.[110] Under the QEA II, the legislature withheld nearly $360 million from education spending, almost two-thirds of which the QEA had directed toward the state's poorest urban school districts.[111] The revised QEA delayed shifting teacher pension costs onto local districts for two years while Governor Florio's newly-chartered Quality Education Commission reassessed the proposal.[112] In addition to this delaying tactic, the legislature also incorporated into the QEA II a spending cap provision to control the growth of suburban spending beyond a maximum level.[113] In effect, therefore, the legislature provided less funding under the QEA II than originally appropriated, a political retreat from its earlier effort to effectuate meaningful school funding reform.[114]

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110 *Id.* at 296; *see* QEA, ch. 52, 1990 N.J. Laws 587, *amended by* Act of March 14, 1991, ch. 62, 1991 N.J. Laws 200 (codified as amended at N.J. STAT. ANN. §§ 18A:7D-1 to -37 (West Supp. 1994)). The 1991 amendment reduced total state education aid from $4.25 billion to $4.1 billion. N.J. STAT. ANN. § 18A:7D-3, Introductory Statement (West Supp. 1994). *Compare* N.J. STAT. ANN. § 18A:7D-1, *Senate Education Committee Statement* (West Supp. 1994) (fixing the QEA's original maximum foundation amount per elementary pupil for the 1991-92 school year at $6,835) *with* N.J. STAT. ANN. § 18A:7D-3, *Introductory Statement* (West Supp. 1994) (reducing the original amount to $6,640 per pupil under the QEA II).

111 Brenna B. Mahoney, Note, *Children At Risk: The Inequality of Urban Education*, 9 N.Y.L. SCH. J. HUM. RTS. 161, 192 (1991) (footnote omitted).

112 Kathleen Bird, Abbott *Lawyer Set to Challenge QEA Overhaul*, 127 N.J. L.J. 809, 811 (Mar. 28, 1991); *see* N.J. STAT. ANN. § 18A:7D-6(e) (West Supp. 1994) (footnote omitted) (providing that "[f]or the 1991-92 and 1992-93 school years, each district's maximum foundation budget shall be reduced by the amount of the anticipated pension and social security aid payable to the school district for the budget year pursuant to sections 29 and 30 of P.L.1991, c.62").

113 *See* Priscilla Van Tassel, *Money Still Heads List of Concerns as Schools Open*, N.Y. TIMES, Sept. 1, 1991, at 12:4 (describing the budgetary problems caused by the equity cap) [hereinafter Van Tassel, *Money*]; *see also* N.J. STAT. ANN. § 18A:7D-28(c) (West Supp. 1994). The provision mandates:

> [a]nnually through the 1995-96 school year for each special needs district, the commissioner shall calculate an equity spending cap which shall provide for a percentage increase in the district's budget that, if sustained for each year through the 1995-96 school year, would result in the per pupil budget of the special needs district equalling the average per pupil budget of the districts included in the Department of Education's district factor groups I and J. The equity spending cap shall also allow for those budget items included in the net budget, but excluded from the local levy budget, to grow annually at the PCI [average annual percentage increase in per capita income] or CPI [consumer price index], as appropriate. To ensure equity, the commissioner shall also adjust the calculation of the equity cap, when necessary, to account for the payment of teacher pension and social security aid.

N.J. STAT. ANN. § 18A:7D-28(c) (West Supp. 1994). *See infra* notes 164-65 and 193-94 and accompanying text (explaining the constitutional deficiency of the equity cap).

114 Bird, *supra* note 112, at 811. Marilyn Morheuser, counsel for the *Abbott* plaintiffs

After the 1991 state legislative elections resulted in devastating Democratic losses and veto-proof Republican majorities in both houses, Governor Florio acquiesced to "a largely Republican-inspired revision" of the QEA II.[115] Six months earlier, though, reform advocates responded to the amendment of the QEA by appealing to the New Jersey Supreme Court to assert jurisdiction and declare the QEA II facially invalid because of the legislature's noncompliance with the court's *Abbott II* mandate.[116] In their motion for emergent relief, the *Abbott* plaintiffs proffered that the reduction in and inequitable distribution of state aid under the QEA II had deprived urban districts of expenditures "substantially equivalent to those of more affluent districts."[117] In September, 1991, a sharply divided court voted to remand the case to Superior Court Chancery Division Judge Paul Levy, authorizing the judge to compile a complete factual record of the case.[118]

Explaining that the New Jersey Supreme Court had already issued a remedial order in *Abbott II*, Judge Levy ruled prior to trial that the State would bear the burden of affirmatively proving that the QEA had satisfied the constitutional mandate of a "thorough and efficient" education.[119] At trial, the State's "resident expert on

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called the QEA II "an out-and-out destruction, of what QEA gave us" and argued that "giving across-the-board relief to property taxpayers, including those homeowners who live in the wealthiest districts in the state . . . . would be called buying votes." *Id.* at 811, 838. *See* Stephen Barr, *Widening Gulf in School Spending Seen*, N.Y. TIMES, May 5, 1991, at 12:1 (citing the plaintiffs' assertion that the loss of funding under the QEA II would result in "an even wider gulf . . . in per-pupil spending" between 29 of New Jersey's 30 poorest districts and 108 wealthiest districts).

115 Jerry Gray, *Florio Agrees to Revisions in School Act*, N.Y. TIMES, Dec. 14, 1992, at B1, B4. In the elections, Republicans emerged with large pluralities in both the State Senate (27-13) and the General Assembly (58-22). *Id.* at B4; *see* Public School Reform Act of 1992, ch. 7, 1993 N.J. Laws 14 [hereinafter 1992 Act] (codifying changes in the QEA II made by Governor Florio and the Republicans); *see infra* notes 223-26 and accompanying text (describing those changes).

116 Kathleen Bird, Abbott *Revisited: It's Deja Vu All Over Again*, 128 N.J. L.J. 540, 540 (June 20, 1991) (citing Abbott v. Burke (*Abbott II*), 119 N.J. 287, 575 A.2d 359 (1990)).

117 Mahoney, *supra* note 111, at 193 (footnote omitted).

118 Kathleen Bird, *QEA Suit Remanded*, 129 N.J. L.J. 269, 276 (Sept. 26, 1991). Chief Justice Wilentz and Justices Handler, Pollock, and Garibaldi rejected the plaintiffs' motion and remanded the case to Chancery Division Judge Paul Levy for immediate consideration. *Id.* Justices Clifford, O'Hern, and Stein dissented, asserting that the supreme court should "have retained jurisdiction pending completion of [the] record." *Id.*

119 Ronald J. Fleury, Abbott *Trial Date Set*, 130 N.J. L.J. 1041, 1048 (Mar. 30, 1992); *see* Abbott v. Burke (*Abbott III*), No. 91-C-00150, 1993 WL 379818, at *3 (N.J. Super. Ct. Ch. Div. Aug. 31, 1993), *aff'd*, 136 N.J. 444, 643 A.2d 575 (1994) (citation omitted) (recognizing that "when certain legislation is required under a remedial decree, the burden falls on the legislative body to show that the new legislation meets the requirements of the decree"). Therefore, Judge Levy instructed the defendants that they

school financing" conceded that spending parity depended upon gubernatorial and legislative adjustments to the funding formula.[120] In rebuttal, the State contended that its system complied with *Abbott II* by progressing toward spending parity.[121] The State's witness confirmed, however, that in 1992, seven of the state's thirty poorest districts received twenty-three million dollars less than the QEA's equity spending cap allowed and would therefore have to raise local property taxes to reach that minimum level of district financing.[122] Furthermore, the witness indicated that Governor Florio failed to rectify these deficiencies despite having knowledge of their existence.[123] With this evidentiary background, Judge Levy considered the plaintiffs' primary challenges to the state's financing scheme.[124]

III. THE MAKING OF *ABBOTT III*

In analyzing the constitutionality of the QEA, Judge Levy explained that the supreme court in *Abbott II* ordered the legislature to achieve parity by creating a new system for financing state education.[125] The judge opined that *Abbott II* required that any new plan must assure "substantially equal" funding between the state's wealthiest suburban districts (I&JDs) and poorest urban districts,

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> must persuade the court that the Legislature has provided certain funding for the poor urban districts, not dependent on local budget and tax determinations, that there is adequate funding to provide for special education needs in each poorer urban district, that it has considered the problem of municipal overburden in these districts and that a complete new funding mechanism is in place, although its implementation may be phased in.

Abbott III, 1993 WL 379818, at *3.

120 Kathleen Bird, *Adversary's Expert Boosts School-Funding Plaintiffs*, 131 N.J. L.J. 833, 835 (July 13, 1992).

121 *Id.* at 857. The State argued that since 1990-91, it had given the 30 poorest urban districts $500 million more in education aid, while decreasing aid to New Jersey's 108 wealthiest districts by $7 million. *Id.*

122 *Id.*

123 *Id.*

124 *See Abbott III*, 1993 WL 379818, at *5 (summarizing the plaintiffs' claims that the QEA, as applied, violated *Abbott II* because it could not achieve substantial parity by the 1995-96 school year without a "highly unlikely" recommendation by the Governor, and appropriation by the legislature, of an additional $450 million for the special needs districts, and could not "adequately provide for the special educational needs" of their pupils).

125 *Id.* at *2, *3 (citing Abbott v. Burke, (*Abbott II*), 119 N.J. 287, 322, 575 A.2d 359, 377 (1990)). Judge Levy explained that although the plaintiffs had complained about the loss of school funding under the QEA II, the court would only analyze the "final version of the QEA." *Id.* at *14 n.2.

known as 'Special Needs Districts' (SNDs).[126] Furthermore, Judge Levy recalled that the legislature had to satisfy poor districts' "special educational needs" and resolve the inequities of urban education.[127] Moreover, the judge observed, the legislature had to accomplish these tasks without forcing poor districts to attain parity through reliance upon local property taxation.[128] Consequently, Judge Levy recognized, the legislature possessed the difficult burden of proving that the QEA's funding formula provided adequate educational funding for poor urban districts.[129]

According to its terms, the judge recounted, the QEA indicated that the legislature understood the deficiencies of Chapter 212's financing scheme.[130] In particular, the legislature appreciated that any new financing system had to correlate actual budgetary needs with state income tax revenues to guarantee a level of urban funding substantially equal to expenditures in the wealthiest districts.[131] To rectify these inequities, the legislature employed a weighted foundation aid formula designed to reduce foundation aid contributions to wealthy districts in favor of increased state aid to poorer the Special Needs Districts.[132]

To afford time for poorer districts to achieve the spending levels of the wealthier districts, the statute imposed an equity spending cap.[133] Over a five-year period, as wealthy districts lost minimum support aid from the state (state transition aid), the legislature also expected the QEA to alleviate "municipal overburden"

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126 *Id.* at *2 (quoting *Abbott II*, 119 N.J. at 385, 575 A.2d at 408). Judge Levy proffered that *Abbott II* had required parity in terms of the substantive educational opportunity between poor and wealthy districts. *Id.* at *3. Judge Levy compared funding in the "Special Needs Districts" (SNDs) (those having district factor groupings of A or B) to I&JDs (those having district factor groupings of I or J). *Abbott III*, 1993 WL 379818, at *5; *see supra* note 79 (describing the classification of district factor groupings); *infra* note 135 (providing the statutory basis for the SND classification).

127 *Id.* at *2.

128 *Id.*

129 *Id.* at *3.

130 *Id.* at *4 (citing N.J. STAT. ANN. § 18A:7D-2 (West Supp. 1993)). According to Judge Levy, the legislature found three reasons for the QEA's failure to ensure a "thorough and efficient" education. *Id.* First, the judge delineated, Chapter 212 could not provide a "thorough and efficient" education because it relied upon local property taxation without considering local wealth. *Id.* Second, the law used year-old budget figures to calculate state aid. *Id.* Finally, the legislature had fully funded implementation of the law in only three of its 14 years of operation. *Id.* Consequently, the legislature enacted a new financing system designed to appropriate greater state aid relative to the district's local property values and income as determined by current-year budgetary needs. *Id.*

131 *Id.*

132 *Id.* at *5 (citing N.J. STAT. ANN. § 18A:7D-13 (West Supp. 1993)).

133 *Id.* (citing N.J. STAT. ANN. § 18A:7D-28(c) (West Supp. 1993)).

by providing poorer districts with "at-risk" aid and preserving their pre-QEA local property tax rates.[134] The legislature arranged financing for the SNDs through increases in the state income tax.[135] Therefore, Judge Levy upheld the facial validity of the QEA to the extent that each of its components addressed the demands placed by the *Abbott II* court upon the legislature.[136]

In assessing the constitutionality of the implementation of the QEA, the trial court adopted the New Jersey Supreme Court's *Abbott II* analysis and compared spending figures from suburban and urban districts.[137] Because the QEA took effect in 1991, Judge Levy compared spending figures from the first two school years of its operation with the final two school years under Chapter 212.[138] This approach directly answered the *Abbott* plaintiffs' assertion that the QEA was unconstitutional as applied by the state.[139]

In their motion, the *Abbott* plaintiffs complained that the QEA could not assure parity of regular educational expenditures between the SNDs and the I&JDs because the Governor and the legislature would not likely approve a $450 million adjustment in state aid for the SNDs by the 1995-96 school year.[140] The *Abbott* plaintiffs also argued that urban children could not expect a similar appropriation to reverse deficits in at-risk aid to meet their special educational needs.[141] Interpreting *Abbott II* as preferring a legislative solution to the inequities of school funding, Judge Levy declared that *Abbott II* imposed "no absolute remedial commands."[142]

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134 *Id.* (citing N.J. STAT. ANN. §§ 18A:7D-7, -31 (West Supp. 1993)). *See supra* note 83 (discussing the problem of municipal overburden).

135 *Abbott III*, 1993 WL 379818, at *5 (citing N.J. STAT. ANN. §§ 18A:7D-3, -15(b) (West Supp. 1993)). The legislature defined SNDs as those districts with low socioeconomic factors as determined by the State Department of Education's District Factor Grouping System. N.J. STAT. ANN. § 18A:7D-3 (West Supp. 1994).

136 *Abbott III*, 1993 WL 379818, at *5. Judge Levy held that

> the Legislature has satisfied the basic structural requirements of the prescribed remedy by providing a new funding mechanism, with guaranteed certain aid each year for the poor urban districts, increasing spending in those districts until it is equivalent to spending in the more affluent districts, providing for the special educational needs of the poorer districts in order to correct their disadvantages and designed to consider tax overburden in those districts.

Id.

137 *See id.* at *3, *5 (noting that, in *Abbott II*, "the emphasis was on achieving parity between these two types of districts" and suggesting the comparison of SNDs and I&JDs).

138 *Id.* at *6.

139 *See id.* at *5.

140 *Id.*

141 *Id.*

142 *Id.* at *6. Judge Levy noted, for example, that *Abbott II* required that the legisla-

To comply with *Abbott II*, the judge explained, the QEA restrained suburban spending until urban districts attained fiscal parity.[143] The QEA calculated "foundation aid" on a per-pupil basis from a maximum annual school aid expenditure by the legislature.[144] Foundation aid provided a district with money to offset a state-calculated average per-pupil amount of staff, instructional, and facility expenses incurred by all districts.[145] The legislature would appropriate foundation aid to compensate for differences between a district's budgetary needs (maximum foundation budget) and its ability to finance those needs through local prop-

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ture make funding certain, but did not establish specific funding levels to rectify enumerated deficiencies in the state's educational system. *Id.* In addition, the state could call upon, but not rely upon, local funding. *Id.* Finally, the state had to implement a new funding system, but could phase in its implementation. *Id.*

143 *Id.*

144 *Id.* at *7 (citing N.J. STAT. ANN. § 18A:7D-6(b) (West Supp. 1993) (footnote omitted)). The state expected its total education appropriations through increased income tax revenues to rise from $4.1 billion in 1991-92 to $4.2905 billion in 1992-93 and $4.527 billion in 1993-94. *Id.*

145 *Id.* Foundation aid paid for textbooks, classroom supplies, teacher salaries, administrative costs, maintenance, utilities, tuition, and until 1992, teacher pensions. *Id.* For the 1991-92 school year, the legislature fixed the foundation aid amount at $6,640 per elementary school pupil. *Id.* (citing N.J. STAT. ANN. § 18A:7D-6(b) (West Supp. 1993) ("The State foundation amount for the 1991-92 school year shall equal $6,640.00, and thereafter shall equal the product of the State foundation amount for the prebudget year and the sum of 1.0 and the PCI [the average annual percentage increase in state per capita personal income]."). Based upon a pension reevaluation, the state reduced the foundation amount from $7,026 to $6,742 for the 1992-93 school year. Plaintiffs-Appellants' Brief on Appeal at 9, Abbott v. Burke (*Abbott III*), 136 N.J. 444, 643 A.2d 575 (1994) (No. 37,457).

The state fixed the amount for the 1994-95 school year at the same level as funding for the 1993-94 school year, which the legislature established as a district's 1992-93 amount multiplied by 1.04. Act of June 30, 1994, Pub. L. No. 1994, ch. 67, sec. 1, 1994 N.J. Laws 289; 1992 Act, ch. 7, sec. 2(d), 1993 N.J. Laws 14, 14; *see infra* notes 223-226 (discussing the 1992 Act). In addition, the legislature guaranteed that all SNDs would receive $115 million in addition to their prior foundation aid levels. Public School Reform Act of 1992, ch. 7, sec. 2(e), 1993 N.J. Laws 14, 14. More recently, Governor Christine Todd Whitman's proposed state budget for the 1995-96 school year portends mixed results for local districts; while the governor's "budget promises nearly 5 percent more aid for public schools in the coming year, almost half of the school districts in the state actually would see a drop in their funding." Neal Thompson, *Aid Hike Misses Half of Schools*, RECORD (Hackensack), Jan. 22, 1995, at A-23. As a result, 323 districts will receive increased aid, but 280 districts will lose aid under the Whitman budget proposal. *Id.* In fact, subsequent data gauge the total funding increase at $122.3 million. Dunstan McNichol, *Loss of Funds Could Increase Property Taxes*, RECORD (Hackensack), Jan. 26, 1995, at 1. Consequently, non-SNDs will compete for a nominal share of $22 million of the remaining state aid increase. Neal Thompson, *Schools Falling 'Further and Further Behind'*, RECORD (Hackensack), Jan. 26, 1995, at 1.

erty taxation (local fair share).[146]

By weighting different pupil, grade, and program categories, the QEA guaranteed the requisite assistance for each student as the student progressed through school.[147] According to the QEA's calculations, multiplying each weighted category by its pupil enrollment yielded a district's total "foundation aid units."[148] A district derived part of its maximum foundation budget by multiplying these units by the state-calculated per pupil foundation amount.[149] When added to another per-pupil fixed amount for facilities, a district could ascertain its total maximum foundation budget.[150] To achieve spending parity, the QEA incorporated an additional five percent "special needs weight" into the maximum foundation budget calculations of all SNDs to maximize the calculations of their regular educational grade categories and, thus, their foundation budgets.[151]

Upon calculating its maximum foundation budget, a district then determined its local fair share to obtain its foundation aid entitlement.[152] A district derived its local fair share from property

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146 *Abbott III*, 1993 WL 379818, at *7 (citing N.J. STAT. ANN. § 18A:7D-4 (West Supp. 1993)).

147 *Id.*; *see* N.J. STAT. ANN. § 18A:7D-6(a) (West Supp. 1994) (delineating the grading system).

148 *Abbott III*, 1993 WL 379818, at *7 (citing N.J. STAT. ANN. § 18A:7D-6(a) (West Supp. 1993)); *see id.* at *8 (providing a chart illustrating that fictitious, property-rich I&J District A, comprising an educational system of 2,811 pupils, earned 2,816.04 foundation units after multiplying its varying student populations by their respective weights).

149 *Id.* at *7 (citing N.J. STAT. ANN. § 18A:7D-6 (West Supp. 1993)) (footnote omitted); *see id.* at *8 (multiplying District A's 2,816.04 foundation units by the state-derived foundation aid amount of $6,640 for 1991-92 to ascertain a base foundation aid amount of $18,698,506).

150 *Id.* at *7 (footnote omitted); *see id.* at *8 (calculating District A's maximum foundation budget [MFB] at $18,499,283 [including $300,777 in facilities aid calculated by multiplying a base figure by the total student population, but adjusting for $500,000 in pension costs]); N.J. STAT. ANN. § 18A:7D-6(b) (West Supp. 1994) ("The facilities aid amount for the 1991-1992 school year shall equal $107.00, and thereafter shall equal the product of the facilities aid amount for the prebudget year and the sum of 1.0 and the PCI.").

151 *Abbott III*, 1993 WL 379818, at *5; *see id.* at *8 (using the same formula to calculate the maximum foundation budget at $19,220,917 for fictitious, property-poor SND B, educating the same number of students as District A). District B enjoyed an MFB of almost $1 million more than District A because its SND distinction entitled it to a 5% additional weighing for each regular education foundation aid unit category above its normal weighing. *See id.* at *8; N.J. STAT. ANN. § 18A:7D-6(a) (West Supp. 1994) (establishing the special needs weight of 1.05 for calculations of the foundation aid formula of an SND).

152 *Abbott III*, 1993 WL 379818, at *9; *see* N.J. STAT. ANN. § 18A:7D-7 (West Supp. 1994) (providing the formula for calculating a district's local fair share).

taxes by multiplying its total equalized valuation with a state-produced value multiplier.[153] The QEA ensured that the local fair share reflected a district's aggregate income by stipulating that the district would multiply its most recent annual adjusted gross income by another state-produced income multiplier.[154] By multiplying these two products and dividing the result in half, a district realized its local fair share.[155] Moreover, the QEA mandated that the state lower the local fair share of an SND if the SND's income was disproportionate to average statewide property values.[156] From this complex mathematical analysis, a district, upon subtracting its local fair share from its maximum foundation budget, obtained its complement of state foundation aid.[157]

Through a detailed examination of this formula, Judge Levy recognized that to effect parity, the special needs weight added to the maximum foundation budgets of the SNDs must "interact with the equity spending cap" targeted at those budgets.[158] The judge determined, however, that the legislature had never studied the

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153 *Abbott III*, 1993 WL 379818, at *9 (citing N.J. STAT. ANN. §§ 18A:7D-8, -33 (West Supp. 1993)). The calculation requires data from the State Division of Taxation on equalized valuation and generation of a value multiplier (calculated at .0116 for the 1991-92 school year) from the State Department of Education. *Id.*; *see* N.J. STAT. ANN. § 18A:7D-8 (West Supp. 1994) (describing the Commissioner of Education's determination of the value multiplier).

154 *Abbott III*, 1993 WL 379818, at *9 (citing N.J. STAT. ANN. §§ 18A:7D-3, -9 (West Supp. 1993)). The State Department of Education also generated an income multiplier (calculated at .0447 for 1991-92) by which the district multiplied its adjusted gross income to derive its local fair share. *Id.* (citing N.J. STAT. ANN. § 18A:7D-9 (West Supp. 1993) (defining the district's adjusted gross income)); *see* N.J. STAT. ANN. § 18A:7D-8 (West Supp. 1994) (describing the Commissioner of Education's determination of the income multiplier).

155 *Abbott III*, 1993 WL 379818, at *9 (citing N.J. STAT. ANN. § 18A:7D-7 (West Supp. 1993)). In Judge Levy's example, District *A*, with $1.3265 billion in total equalized valuation and $275 million in aggregate income, had a local fair share (LFS) of $22,950,825 [($1.3265 billion valuation X .0116 value multiplier) + ($275 million income X .0447 income multiplier) = 34,772,400 + 11,129,250 = 45,901,650 / 2]. *Id.* Under the same formula, District *B*'s LFS equalled $7,880,777, calculated by assuming valuation equalling $775,123,444 and aggregate income totaling $151,456,888. *Id.*

156 *Id.* (citing N.J. STAT. ANN. § 18A:7D-7 (West Supp. 1993)).

157 *Id.* at *7, *9 (footnote omitted). Judge Levy determined that District A received no state aid because its LFS ($22,950,825) exceeded its MFB ($18,499,284). *Id.* at *9. By contrast, the QEA entitled SND District B to $11,340,140 in foundation aid to compensate for the difference between its MFB ($19,220,917) and its inadequate LFS ($7,880,777). *Id.*

158 *Id.* at *9, *10 (citing N.J. STAT. ANN. § 18A:7D-28(c) (West Supp. 1993)); *see supra* note 113 (providing the equity spending cap provision). According to the plaintiffs, "the maximum foundation budget and the equity cap calculation of a local levy budget are totally different and unrelated annual calculations." Plaintiffs' Trial Brief at 34-35, Abbott v. Burke (*Abbott III*), 1993 WL 379818 (N.J. Super. Ct. Ch. Div. Aug. 31, 1993) (No. 91-C-00150). The plaintiffs argued that although the maximum foun-

SNDs' actual needs in order to calibrate the QEA's five percent weighting provision intended to address those needs.[159] Although the QEA gave Governor Florio the discretionary authority to augment this amount to meet unsatisfied needs, Judge Levy asserted that the statute limited the Governor's action to April 1 of each even-numbered year.[160] Because the Governor had not recommended in April, 1992, that the legislature increase the five percent special needs weight, the judge continued, the QEA could not reduce funding inequities before the 1995-96 school year.[161] Judge Levy stated that to attain fiscal parity between the SNDs and the I&JDs, the Governor would have had to increase the weight from five to twenty-four percent, or risk a $450 million disparity.[162] Judge Levy thus concluded that the SNDs would achieve parity only through substantial local property tax hikes in violation of the *Abbott II* mandate.[163]

Characterizing the equity spending cap as the "tool" by which the QEA equalized spending, Judge Levy recognized that the cap did not order the SNDs to maximize their spending.[164] While the QEA authorized increases in SNDs' maximum foundation budgets

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dation budget "conditionally assures a funding level," the equity spending cap only allows a spending level, neither of which have "been in sync." *Id.* at 35.

159 *Abbott III*, 1993 WL 379818, at *10. Judge Levy considered the special needs weight an "arbitrarily assigned number." *Id.* The plaintiffs had argued that the QEA correlated neither the per-pupil foundation aid amount nor the special needs weight with spending parity. Plaintiffs' Trial Brief at 31, *Abbott III* (No. 91-C-00150). In fact, upon examining the language of the statute governing the special needs weight, the plaintiffs concluded that "[s]ection 13 is devoid of any standard for parity." *Id.* at 32-33.

160 *Abbott III*, 1993 WL 379818, at *9, *10 (quoting N.J. STAT. ANN. § 18A:7D-13 (West Supp. 1993) (providing that "on or before April 1 of each . . . even numbered year, the Governor . . . shall recommend to the Legislature any revision in the schedule of foundation weights . . . which is deemed proper")).

161 *Id.* at *10. According to the plaintiffs, the legislature could have satisfied its constitutional mandate by fully funding the state's poorer urban districts to a level of parity or by phasing in a new financing system to effect parity over time. Plaintiffs' Trial Brief at 36, *Abbott III* (No. 91-C-00150). The plaintiffs asserted that parity had "not been 'introduced in stages' to fully 15 of the 30 districts." *Id.* at 37.

162 *Abbott III*, 1993 WL 379818, at *10. The next opportunity for the Governor to request a special needs weight adjustment would have been April 1, 1994. *Id.* Even if the legislature had agreed, however, no school budget would have reflected the change until the 1995-96 school year. *Id.* According to the court, the $450 million gap would arise by 1995-96, assuming 1992-93 foundation unit and enrollment figures and a three percent increase in both foundation and facilities aid during that school year. *Id.*

163 *Id.*

164 *Id.* The *Abbott* plaintiffs criticized the equity spending cap for *permitting*, rather than *assuring* a level of spending at which the SNDs would, rather than might, spend to achieve parity. Plaintiffs' Trial Brief at 33-34, *Abbott III* (No. 91-C-00150).

to reach the current average spending level of the I&JDs, the judge noted, the equity spending cap would force those districts to rely upon their local fair shares unless the foundation aid formula supplied additional state aid to reach the cap level.[165] Acknowledging as "almost impossible" the gubernatorial recommendation and legislative appropriation of a more than four hundred percent increase in the special needs weight to finance spending at the level of the equity spending cap, Judge Levy held that the QEA could not assure fiscal parity by the 1995-96 school year.[166]

Furthermore, Judge Levy identified a comparable deficiency in the at-risk weighting employed by the QEA to address the special educational needs of the SNDs.[167] The judge noted that the QEA calculated at-risk aid for each SND by multiplying the state's foundation aid contribution by the district's at-risk units.[168] Judge Levy explained that the number of children eligible for free meals or milk under the National School Lunch Act and the Child Nutrition Act of 1966, multiplied by a state-prescribed at-risk weight, determined the total number of at-risk units.[169] Although designed to alleviate the costs of poverty, Judge Levy asserted, at-risk aid never satisfied the actual needs of the SNDs because the at-risk weighting suffered from the same arbitrary valuation that had plagued its special needs companion.[170] The judge pointed out that at-risk funds

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165 *Abbott III*, 1993 WL 379818, at *10. In fact, 13 of the state's 30 SNDs suffered from inadequate funding during the 1992-93 school year. *Id.* at *14 n.5. The *Abbott* plaintiffs objected to the State's proffer that the QEA had effected a "'movement toward parity,'" because the scheme's local levy budgets assumed that the SNDs would spend up to cap. Plaintiffs' Trial Brief at 39, *Abbott III* (No. 91-C-00150). In reality, however, the plaintiffs cited seven SNDs that could spend up to cap only by raising $23 million through local taxation. *Id.* Consequently, the plaintiffs charged that the QEA failed to make adequate funding certain, but rather left the SNDs "to spend to cap by lifting themselves by their own bootstraps, *i.e.* by increasing local property taxes." *Id.* at 52.

166 *Abbott III*, 1993 WL 379818, at *11.

167 *Id.* at *12 (citation omitted).

168 *Id.* at *11.

169 *Id.* (citing N.J. STAT. ANN. §§ 18A:7D-3, -20 (West Supp. 1993)) (footnote omitted); *see* N.J. STAT. ANN. § 18A:7D-3 (West Supp. 1994) (incorporating by reference into the statutory calculation of at-risk aid, the National School Lunch Act, 42 U.S.C. § 1751 (West 1988), and the Child Nutrition Act of 1966, 42 U.S.C. § 1771 (West 1988)).

170 *See Abbott III*, 1993 WL 379818, at *12 (noting that "the Legislature did not perform a study of the additional costs associated with providing services to at-risk students"). The *Abbott* plaintiffs complained that the legislature had abdicated its constitutional duty imposed by *Abbott II* to address special educational needs:

> Under the *Abbott II* remedial decree, the State must prove that funding is adequate to meet the special educational needs of the poorer urban districts. The State has failed to meet this constitutional standard, both

never matched current budget needs because the QEA applied the at-risk weights to the district's pupil population from the preceding school year.[171] Moreover, Judge Levy stated, as with the special needs weight, the Governor had failed to recommend improvements in the at-risk weight in 1992, thus precluding any increases in at-risk aid to the SNDs until at least the 1995-96 school year.[172] The judge asserted that, in the meantime, as at-risk aid dropped from prior years because of the reduction in the foundation aid amount under the QEA, the law would enable the SNDs to offer only pre-existing remedial programs without permitting upgrading or updating.[173] Consequently, Judge Levy ruled that without those adjustments of the at-risk weight in 1994, at-risk aid could not adequately finance the costs of remedial programs and facilities to satisfy the special educational needs of the SNDs.[174]

Judge Levy credited the legislature with enacting a funding mechanism that established districts' local fair shares independent from budgetary considerations.[175] As a result, the judge determined that the funding mechanism did not violate *Abbott II* on its face because the foundation aid formula determined budgetary needs while ameliorating differences between those demands and the local fair share.[176] Nevertheless, Judge Levy asserted that the implementation of the QEA failed to reconcile the problem of municipal overburden.[177]

The judge explained that municipal overburden "occurs when

> by its failure to conduct a study of the programs needed and the cost of those programs; and by its failure to assure that the at-risk weights will be revised in response to such a study.

Plaintiffs' Trial Brief at 41, *Abbott III* (No. 91-C-00150).

171 *Abbott III*, 1993 WL 379818, at *12 (citing N.J. STAT. ANN. § 18A:7D-25 (West Supp. 1993)).

172 *Id.* (citing N.J. STAT. ANN. § 18A:7D-13 (West Supp. 1993)). The *Abbott* plaintiffs attacked the sufficiency of at-risk aid on the ground that "[s]ince no study has issued, and since no adjustments in the at-risk weights have been proposed for the 1993-94 or 1994-95 school years, there is no possibility of increasing the weight until the 1995-96 school year." Plaintiffs' Trial Brief at 43, *Abbott III* (No. 91-C-00150). Thus, the plaintiffs once again castigated Section 13 of the QEA because it "relies impermissibly upon executive and legislative discretion" to increase the at-risk weight to address special educational needs in the SNDs. *Id.*

173 *Abbott III*, 1993 WL 379818, at *12. By way of example, the judge described the difficulties of the Jersey City school system in maintaining at-risk programs with QEA at-risk funds. *See id.*

174 *Id.* at *12, *13.

175 *Id.* at *13 (citation omitted).

176 *Id.* (citing N.J. STAT. ANN. § 18A:7D-4 (West Supp. 1993)).

177 *Id.* at *14. *See supra* note 83 (describing the urban dilemma of municipal overburden).

the total local tax rate significantly exceeds the statewide average tax rate."[178] Absent positive corrections in the special needs weights to prevent "the shortfall in spending created by the lack of a connection between the foundation formulas and the equity spending cap formulas," Judge Levy realized that the QEA could not assure parity between the SNDs and the I&JDs.[179] The judge noted that this would exacerbate the problem of municipal overburden.[180] Therefore, on September 2, 1993, Judge Levy issued an order invalidating the QEA for its failure to assure "substantial, timely parity" between the SNDs and the I&JDs.[181] Judge Levy highlighted the necessity of additional judicial intervention by the New Jersey Supreme Court.[182]

IV. *ABBOTT III*: THE FAILING GRADE

Within one year after Judge Levy invalidated the QEA, the New Jersey Supreme Court also concluded that the reform measure could not assure parity between rich and poor districts by the 1995-96 school year.[183] In *Abbott III*, the court acknowledged that the QEA had sought parity by instructing SNDs to spend more money on education per year than the I&JDs.[184] The court ac-

178 *Abbott III*, 1993 WL 379818, at *14.

179 *Id.* The *Abbott* plaintiffs attributed the QEA's failure to address the issue of municipal overburden to its "linking of special needs districts' tax rates to the statewide average school tax rate." Brief for Plaintiffs at 63, *Abbott III* (No. 91-C-00150). The plaintiffs theorized that the cap placed upon total state aid by the QEA would force local districts to raise property taxes to finance education. *Id.*

180 *See Abbott III*, 1993 WL 379818, at *14 (indicating that lack of state funding for the SNDs would result in their increased dependence upon local property taxation for financing); *supra* notes 160-66 and accompanying text (identifying the failure of the Governor and legislature to adjust the special needs weight as the source of disparity). In sum, the plaintiffs argued that the QEA's reliance upon local property taxation to rectify shortfalls between state funding and district spending violated the court's demand that the legislature alleviate municipal overburden. Plaintiffs' Trial Brief at 64, *Abbott III* (No. 91-C-00150).

181 *Abbott III*, 1993 WL 379818, at *14; Jeffrey Kanige, *Will the Cycle Be Unbroken?*, 135 N.J. L.J. 81, 104 (Sept. 6, 1993).

182 *Abbott III*, 1993 WL 379818, at *14.

183 Abbott v. Burke (*Abbott III*), 136 N.J. 444, 446-47, 643 A.2d 575, 576 (1994) (citing N.J. STAT. ANN. §§ 18A:7D-1 to -37 (West Supp. 1994)).

184 *Id.* at 448, 643 A.2d at 577 (quoting N.J. STAT. ANN. § 18A:7D-2(b)(5) (West Supp. 1994)). Arguing that "[t]he goal of 'substantial parity' set by the Court in *Abbott II* has not yet been fully achieved, but is in sight," the State professed to the court that the QEA's "dominant characteristic . . . is fidelity to the dictates of *Abbott II*." Defendants' Brief at 1, 6 (citations omitted), Abbott v. Burke (*Abbott III*), 136 N.J. 444, 643 A.2d 575 (1994) (No. 37,457). According to the State, "[t]he fundamental issue before the Court is whether the Legislature and Governor can be relied upon, without further judicial intervention, to make the statutory adjustments needed to complete the achievement of parity." *Id.* at 9 n.*. Although the plaintiffs argued that the

cepted the QEA's progress toward narrowing the funding gap that had divided the SNDs and the I&JDs,[185] but opined that although the QEA approved a level of state funding to guarantee parity, the legislature never afforded the SNDs sufficient financing to enable them to attain that level.[186]

State had not adjusted special needs funding through its statutory weight, the State advised the court to examine the law and its progress toward parity as proof of constitutional compliance. *Id.*

Rejecting the State's definition of the issue as one of trust, the *Abbott* plaintiffs narrowed the focus of the court to one simple inquiry: "Does the Quality Education Act meet the explicit constitutional mandates of *Abbott II*?" Plaintiffs-Respondents' Reply Brief at 2, Abbott v. Burke (*Abbott III*), 136 N.J. 444, 643 A.2d 575 (1994) (No. 37,457). The plaintiffs contended that because the supreme court "mandated specific action by the Legislature in *Abbott II*, it is the State which must demonstrate that the legislation complies with the Court order and that it remedies the constitutional violations." *Id.* at 5.

185 *See Abbott III*, 136 N.J. at 447, 643 A.2d at 576. The court noted that the infusion of $700 million into urban districts under the QEA had enabled the SNDs to spend at approximately 84% of the level of regular education expenditures in the I&JDs. *Id.* Given that the pre-QEA percentage had hovered around 70-75%, the court concluded that the reduction in disparity "constitute[d], within a framework of commitment to parity, a constitutionally legitimate response of the other branches of government to our ruling in that case." *Id.* According to the *Abbott* plaintiffs, the legislature had reduced the funding disparity between the SNDs and the I&JDs from $565.5 million in 1991-92 to $473.3 million in 1992-93 and to $446.9 million in 1993-94. Plaintiffs-Appellants' Brief on Appeal at 15 nn.21, 22, 17 (citation and footnote omitted), Abbott v. Burke (*Abbott III*), 136 N.J. 444, 643 A.2d 575 (1994) (No. 37,457).

The State highlighted that the QEA operated from a conceptually simple approach: "QEA provides poor urban districts with greatly increased state aid, thus 'pushing' them towards parity, while at the same time imposing spending caps on non-SND districts to prevent those districts from 'running away' from the SNDs." Defendants' Brief at 7, *Abbott III* (No. 37,457). The State proffered that the approach had successfully reduced the "'relative spending gap' between the two groups" by 45% over three years. *Id.* at 10. The QEA had achieved this objective based upon adequate levels of funding made available when the legislature tied state aid increases to inflation as supported by the state income tax. *Id.* at 13 (citations and footnote omitted). The State also claimed that the QEA had alleviated the problem of municipal overburden by permitting SNDs to use pre-QEA tax rates during the phase-in period and by ensuring that the SNDs shouldered local fair shares tied to the statewide average school tax rate. *Id.* at 14, 15 (citations omitted). Ultimately, the State based the progress of the QEA toward parity on its determination that "23 of the 30 SNDs were squarely on course (or ahead of schedule) for the achievement of parity by the end of the scheduled phase-in" and that "the remaining seven were 'off course' by a total of only $15 million—*i.e.*, less than 1% off course." *Id.* at 18, 18-19 (citations omitted). For the 1993-94 school year, the QEA would contribute 43% ($2 billion out of $4.69 billion) of all state aid to the SNDs, thus evidencing that "[t]he legislative and executive branches, in their post-*Abbott II* actions, have demonstrated a firm commitment to fulfilling every mandate issued by the Court." *Id.* at 23, 24-25 (citations omitted).

186 *Abbott III*, 136 N.J. at 448, 643 A.2d at 577. The *Abbott* plaintiffs argued to the supreme court that "[o]fficial action and inaction in the implementation of the QEA has further assured that substantial equality in spending for regular education between SN districts and I&J districts would not be phased in." Plaintiffs-Appellants'

The supreme court discounted the effectiveness of the QEA's equity spending cap because it did not mandate that SNDs finance educational opportunity at the spending level of the I&JDs.[187] Instead, the court asserted, the viability of the QEA rested upon its funding machinery.[188] That machinery, noted the court, calculated a district's maximum foundation budget by adding state foundation aid payments to local fair share contributions.[189] To the extent that the QEA tied the local fair share to each district's financial capacity, the court recognized that a district's maximum foundation budget rendered that element as the most critical cog to the operation of the statutory scheme.[190]

Brief on Appeal at 12, *Abbott III* (No. 37,457). The plaintiffs attributed the SNDs' declining state aid to reductions in maximum foundation budgets intended to finance property tax relief. *Id.* (citation omitted). In addition, the plaintiffs identified the failure of the Governor to recommend an increase in the SNDs' special needs weight as contributing toward funding disparities. *See id.* at 13 (citation omitted). The State countered that the executive and legislative response to *Abbott II*, which had included the enactment of the QEA, the appropriation of 50% more state aid to the SNDs, and the reduction of the "'relative' parity gap by 45%," demonstrated "more-than-good-faith compliance." Defendants' Brief at 37-38, *Abbott III* (No. 37,457). On this basis, the State requested that the supreme court allow the executive and legislative branches to exercise their better-equipped judgment as to the state's ability to increase funding and the SNDs' ability to effectively use such funding. *Id.* at 40.

In their reply, the plaintiffs argued that the legislature could have instituted a funding system "incorporating automatic, nondiscretionary statutory adjustments to enable the SN districts to phase-in constitutionally required parity with certainty and to assure adequate funding for at-risk programs." Plaintiffs-Respondents' Reply Brief at 12, *Abbott III* (No. 37,457). The plaintiffs then defined the absence of a connection between funding and spending and the provision of only discretionary adjustments in both statutory weights as evidencing the legislature's "lack of political will" to comply with *Abbott II*. *Id.* (citations omitted). Furthermore, the plaintiffs cited the long history of school funding reform as proof that the court should not accept the State's "promises of future action." *Id.* at 12-13, 13. For example, the plaintiffs criticized the State for asking the court to await the recommendations of the Education Funding Reform Commission (EFRC) respecting the adjustments of the statutory weights, when the Governor had ignored Department of Education recommendations to increase those weights in 1992. *Id.* at 14 (citation omitted); *see infra* notes 226-47 (describing the EFRC and its outcome). As a result, the plaintiffs again called for the court to invalidate the QEA. Plaintiffs-Respondents' Reply Brief at 31, *Abbott III* (No. 37,457).

187 *Abbott III*, 136 N.J. at 448-49, 643 A.2d at 577 (citing N.J. STAT. ANN. § 18A:7D-28(c), -(d) (West Supp. 1994)). *See supra* note 113 (providing the equity spending cap).

188 *Abbott III*, 136 N.J. at 449, 643 A.2d at 577. According to the court, "the funding provisions of the QEA dictate whether the special needs districts can afford the spending levels permitted by the equity spending cap." *Id.*

189 *Id.* (citing N.J. STAT. ANN. § 18A:7D-4 (West Supp. 1994)). *See supra* notes 144-51 (explaining the calculation of the maximum foundation budget).

190 *Abbott III*, 136 N.J. at 449, 643 A.2d at 577. Because the QEA included income considerations in the calculation of the local fair share, the court posited that the

After reviewing the calculation of a maximum foundation budget, the court conceded that the SNDs benefitted from the addition of a special needs weight, which the Governor and legislature could "theoretically" adjust upward to ensure parity.[191] In reality, however, the court agreed with the State's expert witness that the discretionary authority given to the Governor and legislature to adjust funding through the statutory weighting mechanism could never guarantee parity.[192]

Adopting Judge Levy's position, the supreme court identified the "basic flaw in the QEA's design" as the failure of the equity spending cap to work in tandem with the maximum foundation budget through the special needs weight.[193] The court observed that the equity cap prevented the I&JDs from spending more money than the SNDs, but also reasoned that the statutory weight achieved greater funding for SNDs only if the Governor and legislature so agreed.[194] Consequently, given the discretionary nature

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legislature designed the statutory scheme to resolve the problem of local budgetary decisions becoming dependent upon local property taxation. *Id.* (citations omitted).

191 *Id.* at 449, 449-50, 643 A.2d at 577-78 (citations omitted).

192 *Id.* at 450-51, 643 A.2d at 578. The court reasoned that the fact that the Governor had never encouraged the legislative authorization for an increase in the weight substantiated the testimony of the State's trial witness that "'without the assurance of the Governor recommending an [increase in] the special needs weight . . . there is no specific assurance that parity would be achieved.'" *Id.* at 451, 643 A.2d at 578 (alteration in original). *See supra* notes 120-23 and accompanying text (describing the damaging admissions made at trial by the State's expert witness).

The State objected to the trial court's apparent conclusion that because the Governor and the legislature had not adjusted the special needs and at-risk weights in 1992, they would therefore not adjust them in the future. Defendants' Brief at 26-27, *Abbott III* (No. 37,457). The State cited several factors "militating against adjustment of the statutory weights in 1992," including: state budget problems, concerns about the effectiveness and accountability of increased state aid to the SNDs, the inability to calibrate the weight after only one year of operation, the need for stability in state aid, and the progress made by the QEA toward effecting parity. *Id.* at 27-28.

193 *Abbott III*, 136 N.J. at 450, 643 A.2d at 578. In SNDs, "the foundation weight for each grade category [was] to be multiplied by the *special needs weight*, legislatively set at 1.05." *Id.* (citation omitted). Despite this weight, the *Abbott* plaintiffs contended that "[t]he absence of a nexus between the maximum foundation budget and equity cap calculation . . . renders the achievement of parity dependent upon local taxing decisions." Plaintiffs-Appellants' Brief on Appeal at 23, (*Abbott III*) (No. 37,457). As evidence of their claim, the plaintiffs noted that 13 of 30 SNDs decided to levy taxes at less than the equity spending cap level. *Id.* at 24 (citation omitted).

194 *Abbott III*, 136 N.J. at 450, 643 A.2d at 578. The *Abbott* plaintiffs characterized both the maximum foundation budget and the equity spending cap as limitations placed upon SND spending. Plaintiffs-Appellants' Brief on Appeal at 38, *Abbott III* (No. 37,457). The plaintiffs explained to the supreme court that during 1991-92 and 1992-93, the QEA required the reductions of many SNDs' maximum foundation budgets because they exceeded the equity spending cap. *Id.* at 38-39. Foundation aid contributions to those districts did not maximize district spending because the legisla-

of the weight, the supreme court refused to accept less than a complete assurance of adequate funding for the SNDs through the implementation of the QEA.[195]

The *Abbott III* court announced several means through which the legislature could cure the funding disparities and avoid further judicial intervention.[196] To ensure compliance with these instructions, the supreme court retained jurisdiction with a pledge to reas-

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ture appropriated "$229 million statewide and $81.6 million" from SNDs to property tax relief under the QEA II before allocating state aid. *Id.* at 38-39. In addition, the QEA forced seven SNDs with maximum foundation budgets below the cap to raise local taxes in order to reach the cap's spending level. *Id.* at 39. Consequently, the plaintiffs attacked the QEA as failing to assure that SNDs spent funds at the cap's maximum level. *Id.*

195 *Abbott III*, 136 N.J. at 451, 643 A.2d at 578. The court concluded that

> [b]ecause the QEA's design for achieving parity depends fundamentally on the *discretionary* action of the executive and legislative branches to increase the special needs weight, which in turn would increase the maximum foundation budget and the amount of foundation aid in the special needs districts to the levels required for parity, the statute fails to *guarantee* adequate funding for those districts.

Id. The *Abbott* plaintiffs blamed SNDs' reduced maximum foundation budgets on the equity spending cap calculation. *See* Plaintiffs-Appellants' Brief on Appeal at 39-40, *Abbott III* (No. 37,457). Although six districts taxed above their local fair shares in 1992-93 and still failed to reach the cap's spending level, the Governor did not exercise his discretion to recommend an increase in the special needs weight to maximize foundation aid contributions to the SNDs. *Id.* at 40. As a result, the plaintiffs concluded that the QEA forced SNDs to raise local taxes in order to attain the cap level. *Id.* (citation omitted). Given this explanation, the plaintiffs requested that the supreme court invalidate the QEA on its face, for relying upon discretionary actions to *assure* funding, and as applied, based upon the failure of the Governor to act and the legislature to appropriate adequate state foundation aid. *Id.* at 35-36.

196 *See Abbott III*, 136 N.J. at 447-48, 643 A.2d at 576-77. The court indicated that it would not intervene if the legislature approved legislation that assured substantial equivalence of per-pupil expenditures between SNDs and I&JDs by 1997-98. *Id.* at 447, 643 A.2d at 576. In addition, the court expected the legislature to continue progress toward parity in each school year until that time. *Id.*, 643 A.2d at 577. The court considered a "'law assuring substantial equivalence'" as one that would

> by its own terms automatically achieve substantial equivalence in per pupil regular education expenditures without depending on the discretionary actions of officials and, to the extent local fair shares or their equivalent are required, will automatically, and without procedural delay, result in the raising of funds for such shares.

Id. at 448, 643 A.2d at 577.

The *Abbott* plaintiffs advised that "[b]y establishing an explicit set of remedies, the Court can make it more likely that the Legislature will act responsibly." Plaintiffs-Appellants' Brief on Appeal at 56, *Abbott III* (No. 37,457). The remedies that they proffered included: declaring the QEA and the 1992 Act (its successor) unconstitutional; retaining jurisdiction and appointing a special master to implement *Abbott II*'s mandates; establishing specific remedies and timelines for that implementation; and, identifying the consequences of continued noncompliance. *Id.* at 55-56; *see infra* notes 223-25 (discussing the 1992 Act); *see infra* note 257 (advocating the use of a special master in this instance).

sert its authority should the legislature fail to effectuate substantial equivalence of regular education and special education expenditures between the SNDs and the I&JDs by the 1997-98 school year.[197] In the meantime, the court warned the legislature that the *Abbott* plaintiffs could return to court "at any time" if legislative efforts indicated "less than a reasonable likelihood of achieving compliance by 1997-1998."[198] The court demanded that the legislature reduce the sixteen percent funding disparity between the SNDs and the I&JDs during both the 1995-96 and 1996-97 school years.[199] Specifically, the court established a September, 1996, deadline for the enactment of a new statutory scheme to remedy the SNDs' regular and special educational needs and to assure approximately 100% equivalence in per-pupil expenditures between the SNDs and the I&JDs.[200]

The supreme court justified its decision in *Abbott III* by affirming its view in *Abbott II* that the state must offer each child educated in an SND an equal educational opportunity, one comparable to that received by a child instructed in an I&JD.[201] Although noting its own incapacity to fulfill this task, the court ordered the legislature to equalize state funding as the means of effecting this goal.[202] Moreover, the court discussed two particular issues for the legislature to consider as part of the new reform measure.[203]

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197 *Abbott III*, 136 N.J. at 447-48, 643 A.2d at 576-77.

198 *Id.*, 643 A.2d at 577. Although the *Abbott* plaintiffs accepted 1997-98 as a final deadline for the full implementation of a new funding scheme, they stressed the need to set September, 1995, as the deadline for the enactment of such a system. Plaintiffs-Appellants' Brief on Appeal at 57, *Abbott III* (No. 37,457).

199 *Abbott III*, 136 N.J. at 447, 643 A.2d at 577. The *Abbott* plaintiffs invited the supreme court to instruct the legislature to "assure that a specific amount of the disparity in each district resulting from spending in 1994-95 will be cured each year." Plaintiffs-Appellants' Brief on Appeal at 57, *Abbott III* (No. 37,457).

200 *Abbott III*, 136 N.J. at 447-48, 643 A.2d at 577. *See supra* note 184 (stating that the QEA had improved regular education expenditures among the SNDs to approximately 84% of I&JDs' spending). The *Abbott* plaintiffs asked the supreme court to "establish December 1, 1994, as an absolute deadline by which a constitutionally sufficient legislative response must be in place." Plaintiffs-Appellants' Brief on Appeal at 57 (footnote omitted), *Abbott III* (No. 37,457). The plaintiffs submitted that "[t]he only way to assure the constitutionally mandated certainty of funding for SN districts is for this Court to require both that sources of parity funding be mandated and that funding be provided on the basis of current year enrollment." *Id.* at 60.

201 *Abbott III*, 136 N.J. at 454, 643 A.2d at 580.

202 *Id.* at 455, 643 A.2d at 580. In its pursuit of parity, the court pledged to "do only that which we are capable of doing, we will assure the opportunity for this substantially equivalent education by ordering substantially equivalent funding: it is up to the State to assure that the money is spent well and not wasted." *Id.*

203 *Id.* at 451, 643 A.2d at 578. The court expressed its "specific concerns about the

First, the court questioned the absence of any method under the QEA by which the state could ensure the efficient use of increased spending in the SNDs.[204] The court found that no monitoring program existed to evaluate the use of greater funding under the educational improvement plans filed by the SNDs.[205] Recognizing the public interest in the beneficial application of state monies for the education of children in the SNDs and the state's interest in the efficient use of its funding, the supreme court suggested that the state improve its supervision and regulation of those districts.[206]

Second, the court underscored its concerns for the actual special educational needs of the SNDs.[207] The court observed that the legislature had established an at-risk weight under the QEA to accommodate those needs without correlating the weight with existing needs.[208] The court noted that even after the legislature ordered the Commissioner of Education to conduct a study of the special needs of the SNDs, the Commissioner took no action.[209] Although referring programmatic decisions to the state, the court noted that the Director of the Department of Education's Division of Urban Education had identified several means to address those specific needs.[210] In closing, the court expressed its motivation for

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need for supervision of the use of additional funding for the special needs districts, and the need for the State to identify and implement supplemental programs and services targeted to the needs of school children in the special needs districts." *Id.*

204 *Id.*

205 *Id.* at 451-52, 643 A.2d at 578-79 (citing N.J. STAT. ANN. § 18A:7D-32 (West Supp. 1994)).

206 *Id.* at 452, 643 A.2d at 579. While advocating the adoption of stricter regulation for the administration of state funding in the SNDs, the court denied itself the authority to mandate such laws or to recommend their enforcement through a larger bureaucracy. *Id.*

207 *Id.* (citation omitted).

208 *Id.* at 453, 643 A.2d at 579. In light of the failure of the Department of Education to analyze the SNDs' special educational needs, the *Abbott* plaintiffs requested that the court order the legislature to double the level of at-risk aid for the SNDs pending an assessment of their programmatic needs and costs. Plaintiffs-Appellants' Brief on Appeal at 46-47, 58 (footnote omitted), *Abbott III* (No. 37,457). Given the increase in categorical aid (from $540 million to $960 million) and the establishment of at-risk aid (contributing $182 million out of $292 million to SNDs), the State insisted that the legislature had addressed special educational needs in the SNDs. Defendants' Brief at 48 (footnote omitted), *Abbott III* (No. 37,457).

209 *Abbott III*, 136 N.J. at 453, 643 A.2d at 579 (citing Act of Aug. 13, 1991, ch. 259, 1991 N.J. Laws 1051).

210 *Id.* at 452, 453, 643 A.2d at 579. As with its advice about state management practices, the court claimed neutrality with respect to the merits of particular supplemental programs for SNDs' students. *Id.* at 453, 643 A.2d at 579. Nevertheless, the court listed "pre-school programs, all-day kindergarten, health services, comprehensive guidance and counseling, smaller class sizes for early grades, summer school and

citing these concerns: "the actual achievement of educational success in the special needs districts."[211]

V. THE LEGISLATURE REPEATS REFORM

In *Robinson I*, the New Jersey Supreme Court first linked state educational spending with educational quality in local districts.[212] By the time of *Abbott II*, the court started to mandate substantially equivalent funding between poor and rich districts.[213] Nevertheless, these efforts to foster educational opportunity through a monetary-based solution have not resolved the inequality of educational financing and opportunity plaguing urban education.[214] For example, in *Robinson I*, the court interpreted the T&E Clause as imposing an affirmative constitutional duty upon the legislature to establish a minimum level of educational opportunity that prepared all children for citizenship and marketplace competition.[215] By ratifying the legislature's reliance upon local property taxation to meet this constitutional duty, however, the court has allowed the legislature to position financial responsibility for educational opportunity upon local districts.[216] Although the court issued an injunction in *Robinson VI* that closed state schools until the legislature finally appropriated financing for Chapter 212 through the state's first income tax, funding disparities actually accelerated during the next decade due to continued inadequate funding.[217]

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outreach for dropouts" as programs the Director of the Division of Urban Education considered "beneficial or essential for special need district students." *Id.*

211 *Id.* at 454, 643 A.2d at 580.

212 Bevelock, *supra* note 17, at 473-74 (quoting Robinson v. Cahill (*Robinson I*), 62 N.J. 473, 481, 303 A.2d 273, 277, *cert. denied sub nom.* Dickey v. Robinson, 414 U.S. 976 (1973)).

213 *Id.* at 490 (citing Abbott v. Burke (*Abbott II*), 119 N.J. 287, 384, 575 A.2d 359, 408 (1990)).

214 *See id.* at 489 (footnotes omitted) (contending that "[t]he conclusion that the system, which was enacted in response to *Robinson I*, actually resulted in increased disparities strongly indicates that judicial decisions alone will not solve the problems causing inadequate public education"); *supra* notes 86 (describing the shortcomings of urban education identified by the *Abbott II* court); 89 (reciting the *Abbott II* court's order to eliminate a $440 million discrepancy between the SNDs and the I&JDs); 185 (noting that the *Abbott III* court found a 16% disparity despite its order in *Abbott II*); 210 (recounting the *Abbott III* court's suggestions for resolving programmatic deficiencies in the SNDs).

215 *Robinson I*, 62 N.J. at 513, 515, 303 A.2d at 294, 295. *See supra* notes 24-41 and accompanying text (discussing *Robinson I*).

216 *See Robinson I*, 62 N.J. at 512, 513, 303 A.2d at 293, 294 ("It seems clear that the [T&E Clause] has not been understood to prohibit the State's use of local government with local tax responsibility in the discharge of the constitutional mandate.").

217 Jaffe & Kersch, *supra* note 2, at 292, 294; *see supra* notes 42-69 and accompanying text (describing the evolution and effect of the court's injunction). *See Abbott II*, 119

After the *Abbott II* court adopted fiscal parity as its requirement for the provision of equal educational opportunity for rich and poor students, Governor Florio signed a new comprehensive redistributive financing scheme into law in 1990.[218] In 1991, however, the Democratic legislature shifted $360 million allocated for urban school aid under the QEA to property tax relief in an effort to quell voter anger over the $2.8 billion tax increase that the Governor had proposed and the legislature had enacted the year before.[219] As a result, the amendment reduced the substantive effectiveness of the QEA but failed to prevent a Republican legislative sweep in November, 1991.[220]

Meanwhile, the court voided the QEA for its incapacity to achieve parity other than through the discretionary actions of the Governor and the legislature.[221] This analysis of the evolution and implementation of the QEA confirms that the political process has precluded progress toward fiscal parity and has prompted this most recent example of judicial intervention in the school funding reform arena.[222]

N.J. at 334, 575 A.2d at 383 (stating that the approximate $900 difference in per-pupil spending between the state's poorest and wealthiest districts in 1975-76 more than doubled to almost $2,100 by 1984-85); N.J. STAT. ANN. § 18A:7D-2(a)(5) (West Supp. 1994) (acknowledging that the "ability of all school districts to plan for and provide a thorough and efficient education has been further diminished because the State has appropriated adequate funds to fully implement the formula in only three of the fourteen years in which the formula has been operative").

218 *Abbott II*, 119 N.J. at 383, 385, 575 A.2d at 407, 408; Jaffe & Kersch, *supra* note 2, at 292, 294 (footnotes omitted). *See supra* notes 77-93 and accompanying text (analyzing the *Abbott II* decision) and notes 102-09 and accompanying text (describing the public hostility toward the QEA).

219 Kathleen Bird, *Senate Seeks to Enter Latest Round in* Abbott, 128 N.J. L.J. 841, 862 (July 18, 1991).

220 *See* Wayne King, *Trenton G.O.P. Shifting School Aid to Suburbs*, N.Y. TIMES, Aug. 30, 1992, at 40 (attributing 1991 Democratic losses to tax increases). The elections resulted in a veto-proof majority for the Republicans in 1992. Gray, *supra* note 115, at B4.

221 Abbott v. Burke (*Abbott III*), 136 N.J. 444, 451, 643 A.2d 575, 578 (1994); *see supra* notes 116-211 (analyzing the constitutionality of the QEA).

222 *See* Van Tassel, *Money*, *supra* note 113, at 12:1 (characterizing the QEA II's funding shifts, which hit the SNDs the hardest, as "an effort to appease voters who were furious over the tax increase that accompanied the [original] loss" of state aid under the QEA); Bird, *supra* note 112, at 811 (attributing the *Abbott III* litigation to the QEA II, which diverted state aid from urban districts to property tax relief); Matthew Reilly, *School Funding Law Ruled Unconstitutional by Court*, STAR-LEDGER (Newark), July 13, 1994, at 1, 15 (concluding that before the QEA became effective, the legislature amended the law "—following a public outcry against the income tax increases—to siphon off a half-billion dollars in education money for property tax relief. That action, in large part, led to the latest challenge to constitutionality of the Quality Education Act.").

Following their electoral victory, the Republicans dealt with this seemingly insoluble conflict by enacting the Public School Reform Act of 1992 (1992 Act).[223] Under the 1992 Act, the legislature committed $300 million in additional state education spending to both rich and poor districts.[224] While urban districts received more than $115 million in additional aid, the 1992 Act increased state aid to suburban districts by $46 million and permanently restored responsibility for teacher pensions to the state.[225] Like their Democratic counterparts, the Republicans bypassed reform in favor of a one-year funding proposal intended to allow time for a bipartisan commission to recommend a permanent solution to the funding crisis.[226]

The fifteen-member Education Funding Reform Commission (EFRC) was the product of a compromise between Democratic Governor Florio and the Republican legislature to keep the school funding issue out of the 1993 gubernatorial campaign.[227] The

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223 1992 Act, ch. 7, 1993 N.J. Laws 14. Republicans mostly represent affluent, suburban voters, on whose behalf their veto-proof legislative majorities should have allowed them to "enact whatever legislation they want[ed]." King, *supra* note 217, at 40; *see* Gray, *supra* note 115, at B1, B4 (noting that the 1992 Act favored suburban districts by forestalling cuts in state aid for one year, contributing more state aid to both urban and suburban districts, and raising the spending cap controlling suburban spending).

224 Plosia, *supra* note 12, at 17.

225 *Id.* According to the *Abbott* plaintiffs, the 1992 Act "gutted any semblance of certainty in the funding of maximum Statewide school aid or maximum State foundation aid." Plaintiffs-Appellants' Brief on Appeal at 50, *Abbott III* (No. 37,457). Consequently, they invited the supreme court to invalidate the measure along with the QEA. *Id.* at 55; *see supra* note 196 (listing the remedies requested by the plaintiffs). The State rebutted that the 1992 Act created some future uncertainty to provide current funding stability. Defendants' Brief at 51, *Abbott III* (No. 37,457).

226 Interview with Albert Burstein, Chairman, Education Funding Reform Commission (EFRC), in Hackensack, N.J. (Mar. 31, 1994). According to Mr. Burstein, one-time Bergen County state legislator, Assembly Majority Leader, co-author of Chapter 212, and Chairman of the EFRC, the state legislature statutorily empowered the EFRC to recommend reforms that would address criticisms of the redistributive "Robin Hood" approach to state spending under the QEA. *Id.*; *see* 1992 Act, ch. 7, sec. 3, 1993 N.J. Laws 14, 15 (providing the EFRC's statutory charge). Specifically, the legislature instructed the EFRC to devise a method to accelerate the reduction of pupil spending disparities under *Abbott II* without denying state assistance to middle-income suburban foundation aid districts. Interview with Albert Burstein, *supra*. Under the QEA, these districts lost considerable aid because each SND drew its aid allotment before any other district received its share, which quickly decreased the funding available to the suburban districts. *Id.*; *see* Mary McGrath, *Middle-Class Districts Feeling the Squeeze*, RECORD (Hackensack), May 25, 1994, at A-10.

227 Interview with Albert Burstein, *supra* note 226. Anticipating political cover from the recommendations made by the independent bipartisan organization, the legislature created the EFRC as a "stopgap" measure to deflect attention from the highly contentious issue of education funding during the 1993 New Jersey gubernatorial and legislative elections. *Id.* Chairman Burstein explained that its statutory authority gave

1992 Act required the EFRC to recommend a permanent funding mechanism by November 15, 1993, one week after the gubernatorial and legislative elections.[228] Chartered for ten months, the EFRC engaged in a thorough investigation of school funding reform.[229] Eventually, however, the EFRC deadlocked over four dif-

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the EFRC its balanced bipartisan flavor. *Id.* The statute prescribed that Governor James Florio would appoint six Democratic members; Republican State Senate President Donald DiFrancesco and Republican General Assembly Speaker Charles "Chuck" Haytaian each would appoint three Republican members, totalling six Republican members in all; and the New Jersey Association of Public Schools (NJAPS), a conglomeration of educational interest groups including the New Jersey School Boards Association (NJSBA) and the New Jersey Education Association (NJEA), would recommend three appointees to the Governor, yielding a politically balanced commission with 15 members in all. *Id.*; *see* 1992 Act, ch. 7, sec. 3, 1993 N.J. Laws 14, 15 (explaining the composition of the EFRC).

228 Plosia, *supra* note 12, at 17; *see* 1992 Act, ch. 7, sec. 3, 1993 N.J. Laws 14, 15 (stipulating the EFRC's deadline). Chairman Burstein stated that the inclusion of a specific post-election date in the language of the statute demonstrated the volatile nature of the school funding issue and thus the joint political necessity of avoiding the issue during an intensely politicized election year. Interview with Albert Burstein, *supra* note 226.

229 Interview with Albert Burstein, *supra* note 226; 1992 Act, ch. 7, sec. 3, 1993 N.J. Laws 14, 15. Chairman Burstein expected a single comprehensive recommendation from the EFRC sometime in April, 1994. Interview with Albert Burstein, *supra* note 226. Instead, the final plan consisted of both a majority and a minority report. *See Education Funding Review Commission's Report to the Governor and the Legislature: Financing New Jersey's Public Schools* 7, 18 (July 1994) [hereinafter EFRC Report]. The EFRC issued its recommendations after an investigation conducted through a multi-faceted approach based upon the specific needs and interests of the Commission's members. Interview with Albert Burstein, *supra* note 226.

Seven members lacked expertise in the issue of school financing. *Id.* Consequently, the EFRC first received testimony from executive agency and legislative services officials regarding the QEA II's funding and legal aspects in order to reduce the "disparity of terminology and concepts" among members. *Id.* The EFRC then heard testimony from national and state education finance experts before proceeding to consideration of various specific reform proposals. *Id.* Interestingly, the EFRC experimented with these proposals through hypothetical simulations designed to ascertain their outcomes. *Id.* For example, Chairman Burstein stated that the EFRC used different scenarios substituting potential tax levies, funding figures, and foundation amounts to measure their potential costs and benefits to local districts and the state. *Id.*

The Chairman also expressed some frustration, however, with the refusal of some Commission members to tailor the EFRC Report to political reality. *Id.* In particular, the Chairman cited the apparent predetermination of a suitable funding measure by the three NJAPS appointees. *Id.* Ignoring the political reality of the defeated QEA, the NJAPS-affiliated members proposed a "High Foundation Aid" Plan that increased state aid to SNDs beyond QEA levels. *Id.* Under the proposal, a "lavish program of state expenditures" would reduce reliance upon local property taxes and industrial and commercial property owners, who pay much of these revenues, by dramatically shifting the fiscal burden of education to the state. *Id.* Although the proposal's advocates never specified a funding source to support it, the three NJAPS members remained committed to its ratification throughout the EFRC's investigatory process. *Id.*

ferent reform proposals before finally issuing a majority report on April 13, 1994.[230]

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230 Interview with Albert Burstein, *supra* note 226; *see generally* EFRC Report, *supra* note 229. Members of the EFRC divided over four prospective reform proposals: two divergent proposals by NJAPS and Chairman Albert Burstein, a middle-range proposal by Vice-Chairwoman Margaret Goertz, and a subsequent, simplified proposal by member Thomas Geyer. Interview with Albert Burstein, *supra* note 226.

Under the NJAPS Plan, each district would receive minimum foundation aid totalling about $8,000 per student, with local districts raising 75 cents for every $100 of assessed property value to pay for additional assistance. *Id.* Poorer districts would then receive additional state aid under the plan, estimated to provide $1 billion in tax relief. *Id.* The plan would increase the state's financial responsibility from 42% to nearly 70%, accompanied by an expensive $1.8 to $2.0 billion price tag beyond current spending levels. *Id.*

Meanwhile, under the Burstein Plan, SNDs would gauge their spending according to the I&JDs' average spending, currently proposed at $6,500 in foundation aid per pupil. *Id.* The plan would require districts providing a poor quality of education to raise their spending through increased state aid rather than local property taxation. *Id.* The plan would then entitle local districts to raise additional financing, at their own discretion, through local property taxation above a state-guaranteed property tax base at their own discretion. *Id.* In addition, SNDs would receive special assistance to deal with their unique problems with municipal overburden. *Id.* The plan would excuse those districts that perform well from spending more money to maintain facial parity. *Id.* Costing about $600 million, Burstein considers his proposal a politically palatable approach that ensures "incremental" reform and encourages public support by stressing greater fiscal accountability among districts. *Id.* Most important of all, Chairman Burstein cites his plan as "'a bare-bones approach' that would satisfy the court [*Abbott II*] mandate." Mary McGrath, *N.J. School-Funding Panel at Odds Over Goals*, RECORD (Hackensack), Feb. 17, 1994, at A-6.

Vice-Chairwoman Margaret Goertz effected a compromise that won eight votes and became the EFRC's majority report. *See* EFRC Report, *supra* note 229, at 17. The Goertz Plan seeks to rely upon a higher foundation aid level of $7,600 per pupil, as under the NJAPS Plan, while guaranteeing a minimum local property tax base for revenues above the state-prescribed minimum, as under the Burstein Plan. Interview with Albert Burstein, *supra* note 226. Chairman Burstein remains skeptical of the compromise package due to its high foundation costs, infringement on local control through its limitation on additional local property taxation to 10% of total costs, and lack of municipal overburden assistance. *Id.* The Chairman remains even more critical of a simplified funding plan proposed in late March, 1994, by member Thomas Geyer and submitted as a minority report by four members. *Id.*; *see* EFRC Report, *supra* note 229, at 18. The Geyer plan apportions pro rata all $12 billion of state and local funding by pupil population. Interview with Albert Burstein, *supra* note 226; *see* EFRC Report, *supra* note 229, at 19 (describing the Geyer Plan). The Chairman criticized the Geyer proposal for its likely "squeeze down" effect on districts now spending beyond their aid complements under the plan, as well as its potential consequences for education as a whole. Interview with Albert Burstein, *supra* note 226.

Chairman Burstein stated that the EFRC Report lacked "a healthy majority." Interview with Albert Burstein, Chairman, Education Funding Reform Commission (EFRC), in Hackensack, N.J. (Nov. 21, 1994). The Chairman indicated that some members who believed that the EFRC "had to have some report" result from its work decided to "go along" with the NJAPS Plan because it gained a plurality. *Id.* He agreed that the outcome mirrored the legislative process in that the NJAPS members "voted for their own interests," and that, in retrospect, these "self-interested predilections had doomed the Commission to failure from the beginning." *Id.*

A bare majority of the EFRC concluded that the best funding system involved a QEA-styled "two-tiered formula" providing each district with a high foundation contribution and a guaranteed tax base.[231] Although the proposal preceded *Abbott III* by three months, the EFRC complied with its "substantial equivalence" requirement by setting the per-pupil foundation level for the SNDs at the average of expenditures in the I&JDs.[232] The proposal determined that the new system should ensure parity by phasing in the equalization of expenditures by the 1997-98 school year.[233]

The EFRC still considered property wealth to be the fairest gauge of local funding capacity despite the fact that district income figures could only estimate that capacity.[234] Therefore, the proposal obligated each district to support its own "required local effort" by assessing a tax of "$1.08 per $100 of equalized valuation."[235] For property-rich districts already raising their foundation amounts at a lower tax rate, the proposal permitted the flexibility to lower or to maintain existing spending.[236] For property-poor districts like the SNDs, the proposal pledged state aid, in excess of local property taxes, to finance educational spending at a valuation level guaranteed by taxing at the $1.08 rate.[237] In addition, the EFRC recommended that the state update its SNDs by qualifying them according to their geographic location and financial need under the 1990 census so as to provide additional at-risk funding to those children of greatest need.[238]

In a separate recommendation, the EFRC asserted that all dis-

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231 EFRC Report, *supra* note 229, at 7, 17.

232 *Id.* at 7. The EFRC projected the 1994-95 I&JD average at $7,756 per pupil. *Id.* Meanwhile, all other districts would receive $6,980 per pupil, 90% of the I&JD average. *Id.*

233 *Id.* at 9. The EFRC proposed to phase in aid for all other districts over four years. *Id.* at 10.

234 *Id.* at 9.

235 *Id.* at 10. The majority report argued that because almost 60% of all students resided in districts with higher tax rates, the $1.08 rate would "provid[e] property tax relief to a substantial number of taxpayers." *Id.*

236 *Id.*

237 *Id.* at 11. The plan sought to ensure minimum guaranteed local taxation by permitting local budget referenda only in districts that spend more than the state-guaranteed foundation level. *Id.*

238 *Id.* at 12, 13, 13-14. 1990 census figures indicated that seven more districts would qualify as SNDs and two districts would lose that classification. *Id.* at 13. The EFRC also noted that the current SND classification excluded poor rural districts, which "struggle[d] with the problems of poverty" to the same extent as their urban neighbors. *Id.* Moreover, the EFRC recommended that the legislature double the at-risk weight applied to increase assistance to students in SNDs, which had not been adjusted since 1991-92. *Id.* at 11-12, 12.

tricts should prove to the state their compliance with performance goals established in their annual operational plans.[239] The EFRC argued that fiscal accountability through more effective state monitoring would translate into greater popular support and respect for public education.[240] Consequently, the proposal advised the State Department of Education to focus its resources on implementing the newly-revised evaluation regulations.[241] Moreover, the EFRC urged the legislature to encourage local districts to use more efficient methods of satisfying the constitutional mandate of a "thorough and efficient" education.[242]

Nevertheless, whether the product of a court order or a reform proposal, the effectiveness of any approach toward achieving fiscal parity remains exclusively dependent upon the political process.[243] Decisions rendered by the New Jersey Supreme Court man-

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239 *Id.* at 14. The EFRC considered these operational plans as "vehicle[s] for tying together the fiscal resources available to the district with the educational goals and benchmarks the district is attempting to achieve." *Id.*

240 *Id.* The EFRC concluded that "the linking of resources and expenditures through such a plan as a piece of the monitoring process may serve to increase public confidence in the fiscal accountability of school districts and consequently public support for educational expenditures." *Id.* Chairman Burstein posited that the EFRC's greatest contribution to the school funding debate would be its consensus on the issue of monitoring. Interview with Albert Burstein, *supra* note 230. He emphasized that any new reform measure must provide for periodic evaluations of local districts by the Department of Education. *Id.*

241 EFRC Report, *supra* note 229, at 14 (citing N.J. ADMIN. CODE tit. 6, §§ 8-4.1 to 4.12 (1994)).

242 *Id.* at 15, 16. The EFRC recommended that the state develop incentive programs for districts, including coordinating services, but that districts should not suffer financially for noncompliance. *Id.* Chairman Burstein stressed that the state must recognize local districts that achieve cost-effective results through a reward-oriented system. Interview with Albert Burstein, *supra* note 230.

243 *See* Bevelock, *supra* note 17, at 487-88 (footnote omitted) (concluding that courts "cannot command enactment of specific legislation to ensure that schools possess the wherewithal to implement improvements"); Kathy Barrett Carter, *School Ruling Seen as Likely to Spur Tax Increase*, STAR-LEDGER (Newark), Sept. 2, 1993, at 1, 47 (quoting Chairman Burstein as viewing a confrontation between the court and the legislature as the "worst outcome"). The Chairman preferred a "bipartisan consensus" to leaving the court to resolve the issue, because "[c]ourts can't fine-tune legislation. They can only act with a club." *Id.* at 47; *see* Interview with Albert Burstein, *supra* note 226 (elucidating Chairman Burstein's agreement with the proposition that the EFRC had to issue politically feasible and acceptable recommendations to effect lasting reform). The Chairman posited that if a reform measure meets legislative approval, it will also earn public respect because public officials listen to their constituents. Interview with Albert Burstein, *supra* note 226. Chairman Burstein contended that reform that gradually shifts funding among districts and convinces taxpayers of its ability to provide meaningful educational opportunity for urban children should qualify for public support. *Id.* For example, he argued that the public attacked the QEA because it has "see[n] no measurable change in the outcome[s] of urban students" despite dramatic increases in state spending in urban districts. *Id.* In

dating equalized educational opportunity through equalized state spending have not prompted the New Jersey State Legislature to guarantee SNDs the funding essential for achieving that objective.[244] Consequently, the EFRC and the court would have best served our children by encouraging the legislature to enact reasonable alternatives to the fiscally and politically convulsive approach of root-and-branch reform.[245] Instead, the EFRC recommended,

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other words, "[p]eople are reasonable [and] want to see things for kids" because they consider education as "opening the door" to economic opportunity. *Id.* Any reform measure must therefore prove to people that the state uses money given to urban children "for classroom purposes," or reform will not occur. *Id.*; *see also* Mark G. Yudof, *School Finance Reform: Don't Worry, Be Happy*, 10 REV. LITIG. 585, 585 (1991) (characterizing the 1990s legislative process currently dominating school finance reform as "grinding, reification-destroying reality").

244 *See* Abbott v. Burke (*Abbott II*), 119 N.J. 287, 385, 575 A.2d 359, 408 (1990) ("We find that in order to provide a thorough and efficient education in these poorer urban districts, the State must assure that their educational expenditures per pupil are substantially equivalent to those of the more affluent suburban districts, and that, in addition, their special disadvantages must be addressed."); *supra* notes 81-84 and accompanying text (explaining the constitutional deficiency of Chapter 212).

In *Abbott III*, the court reasoned:

> [b]ecause the QEA's design for achieving parity depends fundamentally on the *discretionary* action of the executive and legislative branches . . . the statute fails to *guarantee* adequate funding for those districts. Accordingly, the conclusion is unavoidable that the QEA does not comply with *Abbott*'s mandate that the required level of funding for the special needs districts "cannot be allowed to depend on the ability of local school districts to tax; . . . [and] must be guaranteed and mandated by the State [at the level of the property-rich districts] . . . ."

Abbott III, 136 N.J. at 451, 643 A.2d at 578 (quoting *Abbott II*, 119 N.J. at 295, 575 A.2d at 363). *See supra* notes 158-66 and 186-95 and accompanying text (analyzing the constitutional deficiencies of the QEA); *see also* Bill Sanderson & Mary McGrath, *Advocates: Fund Schools Equally—or Close Them*, RECORD (Hackensack), Apr. 26, 1994, at A-3 (quoting *Abbott* plaintiffs' attorney Marilyn Morheuser as saying "that the Legislature suffered a 'lack of political will' to provide enough money for the law, and that poor districts are still too dependent on property taxes"). Therefore, "the pursuit of school finance reform inevitably becomes a struggle between state and local officials to avoid political accountability for tough and unpopular tax policies." Yudof, *supra* note 243, at 591.

245 *See Unfulfilled Promises*, *supra* note 25, at 1085 ("The likelihood that this tension [between popular accountability and judicial authority] will be resolved in favor of school finance plaintiffs ultimately depends upon the dynamic created between a court's willingness to exercise its remedial power and increased popular and legislative support for the remedy."); Yudof, *supra* note 243, at 588 ("The logic of the situation, from a legislative perspective, is to eschew perfection of fiscal neutrality [between districts] and to reshape the objective to conform to political and fiscal realities."); *id.* at 592-93 ("The most viable approach is a hybrid one: Enact a law that achieves a high degree of fiscal neutrality while ensuring that the opponents of increased state taxes, redistricting, and recapture [reappropriation of state funds via guaranteed state foundation aid] do not lose too much in the new reform measure."). *But see* William H. Clune, *New Answers to Hard Questions Posed by* Rodriguez: *Ending the Separation of School Finance and Educational Policy by Bridging the Gap Between Wrong and*

and the court required, the implementation of reform measures that demanded more money from suburban taxpayers to achieve parity.[246]

Upon receiving the EFRC Report, the Whitman Administration summarily rejected the $1.5 billion in additional state spending called for by the proposal in its first year of operation.[247] Governor Whitman has insisted upon fulfilling her campaign promise to cut state income taxes by thirty percent over three years and has expressed her determination to meet the *Abbott III* remedy by obtaining greater accountability for existing state education spending.[248]

Remedy, 24 CONN. L. REV. 721, 722 (1992) (criticizing fiscal neutrality for its failure to guarantee effective educational spending of increased state assistance to poor districts and advocating a three-part, court-imposed remedy involving substantial equalization of spending for 95% of all districts, compensatory aid to combat the effects of poverty, and performance-oriented policies intended to correlate spending with performance). Clune posited that "both legislative resistance against substantial amounts of compensatory aid and system resistance to outcome-oriented policies" support the argument for direct judicial involvement in the reform process. *Id.* at 752. Instead of operating under these strained relations, however, Clune advocated that "courts and legislatures cooperate to develop policies aimed at improving educational services." *Id.* at 753.

246 *Abbott III*, 136 N.J. at 455, 643 A.2d at 580 (pledging to "assure the opportunity for this substantially equivalent education by ordering substantially equivalent funding"); EFRC Report, *supra* note 229, at 7 (complying with *Abbott II* by establishing "substantially equal" funding between SNDs and I&JDs through a foundation aid level calculated at the average foundation aid level of the I&JDs [$7,756]). *See* Matthew Reilly, *Panel Urges Major State Aid Boost to Equalize School District Spending*, STAR-LEDGER (Newark), July 21, 1994, at 21 (noting that the EFRC plan would increase state educational spending "from $11.1 billion, the 1993-94 level, to $16.9 billion by the 1999-2000 school year," increasing the state's share of costs from 41.6% to 54.8%). One commentator concluded:

> [i]n sum, what we have here is a court-driven mechanism to channel ever increasing sums to the cities, a mechanism with no effective system of accountability, a mechanism that foments resentment in blue-collar towns and affluent suburbs alike, and that, in the cities, gives rise to a "What have you done for me lately?" mind-set.

James Ahearn, *Reality Check in the Fight over N.J. School Funding*, RECORD (Hackensack), June 12, 1994, at A-30.

247 *See* Matthew Reilly, *Panel Urges Big School Aid Hike but Plan Gets Chilly Reception*, STAR-LEDGER (Newark), Apr. 14, 1994, at 1 (quoting Carl Golden, Governor Whitman's director of communications, as asserting that "this administration is not about to embrace another $1.5 billion in spending"). Meanwhile, EFRC Vice-Chairwoman Margaret Goertz, who served as primary author of the majority report, expected that "additional state spending would have to be funded through an increased state tax, a new state tax, or diversion of existing state revenues." *Id.* Consequently, the Governor's pledge to cut taxes, not raise them, "consigned [the EFRC Report] to political oblivion the day it was submitted." James Ahearn, *State Property Tax Would Even Out School Spending*, RECORD (Hackensack), June 15, 1994, at B-11.

248 Joe Donohue, *Whitman Stands by Her Promise to Cut Income Tax by 30 Percent*, STAR-LEDGER (Newark), July 13, 1994, at 14; *see* Dan Weissman, *Whitman Goes for 'Max' With*

Meanwhile, the unyielding demands placed upon the legislature by the court in *Abbott III* have made more likely another *Robinson VI*-styled confrontation over the pace of school funding reform.[249] Qualifying the substantial increases in state aid to the SNDs under the QEA as "a constitutionally legitimate response" to *Abbott II*, the court established the 1997-98 school year as the deadline for "substantial equivalence."[250] Within that deadline, the court required that the legislature demonstrate a "reasonable likelihood" of eliminating a sixteen percent funding disparity between the SNDs and the I&JDs during both the 1995-96 and 1996-97 school years.[251] In other words, the court expects the legislature to persevere in its laboring attack on the fiscal disparities plaguing the SNDs by closing the gap during each of the next three years.[252]

At the same time that the supreme court ordered greater state spending, however, Governor Whitman and the Republican legislature had already approved the return of a fifteen percent state income tax cut to suburban voters and had narrowly balanced the state's fiscal year 1995 budget.[253] With Governor Whitman advo-

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15 Pct. Tax Cut Pitch, STAR-LEDGER (Newark), Jan. 24, 1995, at 1 (reporting that Governor Whitman will honor her tax cut pledge one year ahead of time by seeking a full 15% state income tax reduction in 1995); Ron Marsico, *Whitman Stresses Need for Accountability on Aid*, STAR-LEDGER (Newark), July 13, 1994, at 1 (reporting Whitman's insistence upon accountability in state spending in urban districts); Mary McGrath, *Cramming for Big Tests: School Funding vs. Tax Relief*, RECORD (Hackensack), Jan. 10, 1994, at A9 ("Whitman says she can satisfy the court mandate by efficiencies within the education budget.").

249 *See* Mary McGrath, *Wrestling Over School Financing*, RECORD (Hackensack), May 1, 1994, at A-31. McGrath wrote:

> [t]he political climate today may be even less favorable to change than in 1976, when then-Gov. Brendan Byrne, a Democrat, was sympathetic to increasing aid for urban districts. Byrne simply couldn't get a plan through the Legislature. Whitman, by contrast, was elected on her promise to cut the state income tax by 30 percent over three years and is opposed to increased state spending on schools.

Id.; *see generally* Matthew Reilly, *Many Parallels Exist with '76, When Top State Court Shut Down Schools*, STAR-LEDGER (Newark), Apr. 25, 1994, at 12 (comparing the history of school funding reform in 1976 with the current political climate).

250 *Abbott III*, 136 N.J. at 447, 643 A.2d at 576.

251 *Id.*, 643 A.2d at 577.

252 *See id.*

253 Dunstan McNichol, *Whitman's Budget Wins Approval*, RECORD (Hackensack), June 30, 1994, at A-1, A-12 [hereinafter McNichol, *Whitman's Budget*]. During construction of the state budget, State Treasurer Bryan Clymer warned local districts about potential state aid cuts as part of the Governor's tax cutting program. Dunstan McNichol, *Cuts in School, Municipal Aid Looming?*, RECORD (Hackensack), Feb. 18, 1994, at A-1, A-14. Eventually, the legislature approved a $15.28 billion fiscal year 1995 budget that cut state income taxes another 10% after the Governor had signed a five percent cut into law earlier in the year. McNichol, *Whitman's Budget*, *supra*, at A-1, A-12. According to one survey, however, 75 of 91 North Jersey communities lost

cating reliance upon current state expenditures to achieve parity, a more efficient education system will require painstakingly thorough reviews of state regulations and local procedures.[254] By directing the legislature to enact a new funding mechanism by September, 1996, however, the court has limited the flexibility of the Department of Education to conduct an extensive review of those procedures. Consequently, the court's deadline has also narrowed the time frame for the legislature, a body known for its deliberate process, to study, evaluate, and adopt the Department of Education's recommendations as part of a new reform plan, thus creating another potentially serious confrontation between the court and the legislature.[255]

Fortunately, like the EFRC, the court in *Abbott III* wisely advised the legislature to focus on the need for more efficient administration of our schools.[256] Nevertheless, the court stubbornly

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school or municipal aid under the Whitman budget. Dunstan McNichol, *Taxes Up for Most Despite Whitman Cut*, RECORD (Hackensack), Aug. 21, 1994, at A-1. Although the State faces a $1.8 billion shortfall in its next fiscal budget, Governor Whitman recently informed local officials that she contemplates "no significant changes" in state education aid. Dunstan McNichol & Charles Young, *Whitman: Taxpayers Will Be Safe*, RECORD (Hackensack), Nov. 17, 1994, at A-1; *see supra* note 145 (forecasting "flat" state aid for the 1995-96 school year). Governor Whitman warned those officials, however, that she intends to "proceed with our tax cuts in the next budget as promised and on schedule," and that "[s]omething or someone has to give in this budget, but it's not going to be the taxpayers." *Id.*

254 *See* Robert J. Braun, *State Education Board to Conduct Full Review of School Regulations*, STAR-LEDGER (Newark), Sept. 8, 1994, at 22 [hereinafter Braun, *Regulations*] (noting that the State Board of Education voted to perform a "'comprehensive review'" of school regulations, which State Education Commissioner Leo Klagholz advocated as necessary to implement regulations that "promote a policy of ensuring the most effective and efficient education possible"); Kelly Richmond, *State Challenge: Coming Up with Millions Needed*, RECORD (Hackensack), July 13, 1994, at A-9 (citing Whitman's belief that New Jersey could better spend its money). Given Governor Whitman's stated viewpoint, "[h]er budget policies and efforts to cut taxes are on a collision course with school funding reality." *School Reform Requires More Than Money*, RECORD (Hackensack), Apr. 19, 1994, at B-12.

255 *See Abbott III*, 136 N.J. at 447-48, 643 A.2d at 577 (imposing a rigid timeline for legislative compliance with *Abbott III*). Although he considered *Abbott III* an "expectable decision," Chairman Burstein expressed concern that the supreme court had not allowed enough time for the Department of Education to implement a system that incorporates standards for district efficiency. Interview with Albert Burstein, *supra* note 230. In fact, the Chairman doubted whether the legislature could even develop a "bare bones" plan to comply with *Abbott III* because of the Governor's insistence upon tax cuts and the fact that efficiency "will not happen in one fell swoop." *Id.*; *see also* Charles Young, *GOP Bills Aim at Averting School Funding Crisis in '96*, RECORD (Hackensack), Sept. 7, 1994, at A-3 (describing proposals designed to effect legislative action toward devising a replacement school funding scheme before the court's September, 1996, deadline).

256 *See Abbott III*, 136 N.J. at 451, 643 A.2d at 578 (noting the court's "concerns about the need for supervision of the use of additional funding for the special needs

demanded more money for urban education instead of exercising its jurisdictional authority to engage the political branches in an investigation, discussion, and assessment of the efficacy of the methods by which the state and local districts expend moneys under the current system.[257] By noting "legitimate public concerns" regarding the effectiveness of current spending toward the "actual achievement of educational success in the [SNDs]," the court undermined the logic of its remedy that the state spend more money.[258] Contrary to its view that the court should not in-

districts"); *see supra* notes 239-241 and accompanying text (citing EFRC support for increased systemic efficiency). *See also Giving a Good Education to All of N.J.'s Children*, RECORD (Hackensack), Sept. 5, 1993, at RO-2 ("Perhaps the greatest flaw in the Quality Education Act has been the lack of a rigorous permanent monitoring system that would account for every penny of the increased state aid and would ensure that it benefitted students.").

257 *See Abbott III*, 136 N.J. at 455, 643 A.2d at 580 ("We will do only that which we are capable of doing, we will assure the opportunity for this substantially equivalent education by ordering substantially equivalent funding: it is up to the State to assure that the money is spent well and not wasted."). *Cf.* Abbott v. Burke (*Abbott II*), 119 N.J. 287, 295, 575 A.2d 359, 363 (1990) (noting "the convincing proofs in this record that funding alone will not achieve the constitutional mandate of an equal education in these poorer urban districts; that without educational reform, the money may accomplish nothing; and that in these districts, substantial, far-reaching change in education is absolutely essential to success").

In *Rodriguez*, the United States Supreme Court first noted the controversy over "the extent to which there is a demonstrable correlation between educational expenditures and the quality of education." San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 43 (footnote omitted), *reh'g denied*, 411 U.S. 959 (1973). *See supra* note 2 (analyzing *Rodriguez*). Statistical analyses indicate that "[t]here is no systematic relationship between school expenditures and student performance." Eric A. Hanushek, *When School Finance "Reform" May Not Be Good Policy*, 28 HARV. J. ON LEGIS. 423, 425 (1991) (footnote omitted). Relying upon flawed input-output relationships arguably distracts from considerations of district operations, goals, and performance standards, which more closely relate to educational opportunity. *Id.* at 449. Merit pay for teachers, for example, would more directly encourage student performance because of the direct relationship between incentive and performance. *Id.* at 450.

To test the validity of the relationship between spending and performance, the court could have appointed a special master. *See Unfulfilled Promises*, *supra* note 25, at 1086 (footnote omitted) (positing that "appointment of a special master or mediator might facilitate a speedier legislative remedy if a historically recalcitrant legislature needs the presence of an alternative remedy to spur legislative action").

258 *Abbott III*, 136 N.J. at 452, 454, 643 A.2d at 579, 580. *Compare Abbott II*, 119 N.J. at 388, 575 A.2d at 409 (indicating the court's acceptance of the clear necessity for conscientious local administration of urban education) *with id.* at 381, 575 A.2d at 406 (concluding that mismanagement "has not been a significant factor in the general failure to achieve a thorough and efficient education in poorer urban districts"). Is it plausible to view urban management practices as only part of the solution and not also part of the problem? *See* Ballot, *supra* note 2, at 470 (footnote omitted) ("Chief Justice Wilentz summarily dismissed the state's assertion that bureaucratic mismanagement, rather than per pupil spending disparities, was the cause of educational deficiency.").

volve itself in adjudicating the merits of substantive education policies for fear of tarnishing its own legitimacy, the court would have encouraged the operation of a "workable government" by requesting the political branches to demonstrate the efficiency of the state's regulatory scheme.[259] Given its prior efforts to investigate the relationship between financial capacity and educational opportunity, the court should have invited the parties to proffer an evaluative standard of review oriented toward the efficient, effective provision of educational opportunity rather than professed its inability to participate in school funding reform other than by ordering the legislature to expend additional taxpayer dollars in the SNDs.[260]

VI. CONCLUSION: THE PRAGMATIC COURSE FOR SCHOOL FUNDING REFORM

Two decades of protracted litigation have confirmed that school funding reform depends upon the political process, not upon broad court mandates for greater state spending. Although judicial decrees in *Robinson* and *Abbott* forced the legislature to produce comprehensive reforms, neither measure succeeded in equalizing educational expenditures.[261]

Since *Robinson*, the court has allowed the legislature to rely

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259 *See Abbott III*, 136 N.J. at 455, 643 A.2d at 580 (citation omitted) ("While our power is not limited to a money remedy . . ., given the State's record, and its strong commitment to public education, it would be an abuse of judicial power for this Court to assume the role assigned by law to the Commissioner and Department."); Youngstown Steel & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government."); *Unfulfilled Promises*, *supra* note 25, at 1085 ("The first prerequisite for effective school finance remedies is more vigorous judicial oversight of legislative remedial efforts and an increased willingness to use equitable tools to encourage the development of timely and constitutional finance schemes."); *id.* at 1087 (footnote omitted) (noting that the failure of the legislative process to produce an equitable remedy for school finance plaintiffs invites "judicial monitoring in the remedial phase [because it] can help check political process defects and ensure that meaningful relief effectuates the court's decision").

260 *Compare Abbott III*, 136 N.J. at 455, 643 A.2d at 580 (asserting that the supreme court "will not and should not assume any part of [the] responsibility" for substantive education) *with* Robinson v. Cahill (*Robinson III*), 67 N.J. 35, 37, 335 A.2d 6, 7 (1975) ("The court will hear oral argument on March 18, 1975 . . . on the following subjects as related to relief . . . The method of determination of the definition of 'a thorough and efficient system of free public schools,' of the *translation of that definition into financial terms and of the application thereof* . . . .") (emphasis added).

261 *See Abbott II*, 119 N.J. at 334, 575 A.2d at 382-83; *Abbott III*, 136 N.J. at 447, 643 A.2d at 576 (identifying deficiencies in per-pupil expenditures between the state's poorest and wealthiest districts under both Chapter 212 and the QEA).

upon local property taxation to finance education.[262] The inherently unequal nature of a property tax-based system precludes fiscal parity, however, because it permits legislators to impose costs upon property-poor districts, thus avoiding the redistribution of suburban wealth. Governor Whitman's intention to fulfill in 1995 her pledge to cut state income taxes by thirty percent will likely force the Republican legislature to perpetuate its dependence upon property tax-based financing until the court declares that system unconstitutional for its fundamental incapacity to achieve fiscal parity.[263] Consequently, the key to fiscal reform now lies in cultivating the support of suburban taxpayers for solutions that rectify current substantive educational deficiencies among all districts without mandating increased taxation or impairing suburban educational opportunity.

Despite its deadlines and requirements for legislative action, the *Abbott III* court offered a likely catalyst for establishing this popular support: the aggressive pursuit of greater fiscal accountability through more efficient management of state and local re-

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262 *See supra* notes 29-31, 91, and accompanying text (explaining that the court has consistently validated the use of local property taxation as an appropriate financing mechanism); *see also supra* notes 234-37 and accompanying text (noting that the EFRC ratified the use of local property taxation in its reform proposal).

263 *See* Charles Young, *Property Tax for Schools Losing Favor in Trenton*, RECORD (Hackensack), Sept. 28, 1994, at A-13 (discussing the results of a survey of North Jersey legislators, which found that 13 of the 24 who responded opposed eliminating the state's property tax-based school financing system and that only three fully advocated the abolition of such a system).

A recent study examining the past 40 years of property tax rates in New Jersey indicates, however, that Governor Whitman's "plan to hold the line on state aid to schools and municipalities" will result in property tax increases. Dunstan McNichol, *Study: Cuts in Aid Will Raise Taxes*, RECORD (Hackensack), Nov. 30, 1994, at A-1. According to Ernest C. Reock, professor emeritus at Rutgers University's Center for Government Services, "[t]he lesson is: There is a correlation between state aid programs and local property taxes." *Id.* The study concluded that property taxes have historically declined when the State appropriates significant assistance for education. *Id.* at A-12. The study explained that "[a]fter the introduction in 1976 of the state income tax, which was dedicated to property-tax relief, property-tax collections plunged to below 5 percent of total income in one year." *Id.* By contrast, preliminary data for 1994, Whitman's first year as Governor, reflected a 5% increase in property tax collections. *Id.*

Ultimately, school funding reform remains dependent in the long term upon the abandonment of the property tax as a primary financing mechanism. *See* Robert J. Braun, *Cost-Cutting Crusade Pits Urbs Against 'Burbs*, STAR-LEDGER (Newark), Feb. 5, 1995, at 50 (declaring that "[e]quity and rationality in school spending . . . . cannot occur until property taxes are eliminated as a source of revenue for schools, because property taxes both feed inequities and provide the justification for widely varying spending").

sources.[264] Because suburban taxpayers will still finance most state funding, they should expect local districts to verify the efficiency and validity of their management practices to the state. Placing an affirmative burden of proof of efficiency on local districts under the threat of greater state control will provide the incentive to consolidate services,[265] to police fraud,[266] and to reject wasteful and

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264 *See Abbott III*, 136 N.J. at 451, 643 A.2d at 578 (expressing a desire for improved state regulation of court-mandated increased funding in the SNDs).

265 *See* Robert J. Braun, *Klagholz Pushes Consolidation of Services to Cut School Costs*, STAR-LEDGER (Newark), Sept. 11, 1994, at 1 (detailing a plan by State Education Commissioner Leo Klagholz to save money through consolidated purchasing); *see also* Patrick Jenkins, *Whitman Outlines Proposal to Deregulate State's Schools*, STAR-LEDGER (Newark), Dec. 1, 1994, at 19 (noting that Governor Whitman has established an advisory committee to recommend means of coordinating and sharing purchasing, transportation, construction, and subcontracting services among school districts).

266 *See* Robert J. Braun, *Education Commissioner Defends State Takeover of School Districts*, STAR-LEDGER (Newark), June 2, 1994, at 1 (citing Commissioner Klagholz's belief that the state "'ought to continue to pursue aggressively the concept of state-operated school districts'" when districts perform poorly). By statute, the State Department of Education reserves the authority to take over a school district that fails to comply with state certification standards. Robert J. Braun, *State Expected to Retain Jersey City Schools*, STAR-LEDGER (Newark), Aug. 3, 1994, at 22 [hereinafter Braun, *State Expected*].

New Jersey law establishes a three-tiered monitoring process for ensuring district compliance with state pupil proficiency goals. N.J. STAT. ANN. §§ 18A:7A-14 to -15.1 (West 1989 & Supp. 1994). In Level I, the Commissioner of Education evaluates district compliance with pupil proficiency goals and certifies compliant districts for seven-year periods of operation. § 18A:7A-14(a)(1). Failure to meet those goals warrants the beginning of Level II monitoring, during which the county superintendent of schools empowers an external review team to conduct an investigation of district educational, financial, and other governing operations. § 18A:7A-14(a)(1), -(b)(1). The review team compiles a report on district deficiencies that local officials must use in the development of a corrective action plan for achieving compliance with the monitoring process. § 18A:7A-14(b)(1). Upon determining that those actions have not effected compliance, the Commissioner will order the district to enter Level III monitoring, which involves another round of investigations and corrective recommendations by an external review team. § 18A:7A-14(b)(2), -(c)(1). If the Commissioner determines that local conditions have precluded compliance, or that the district has not progressed sufficiently toward implementation of the corrective action plan(s), then he shall order a final "comprehensive compliance investigation" of district operations. § 18A:7A-14(c)(4), -(e). Finally, the Commissioner will present this report to the district with an order to show cause why a state takeover of district operations should not occur to guarantee compliance with state monitoring standards. § 18A:7A-14(e) (citing § 18A:7A-15). *See* F. Clinton Broden, Note, *Litigating State Constitutional Rights to an Adequate Education and the Remedy of State Operated School Districts*, 42 RUTGERS L. REV. 779, 798-99, 801 (1990) (citing N.J. STAT. ANN. §§ 18A:7A-14 (West 1989)) (arguing that the New Jersey State Takeover Statute, empowering the state to manage educational operations in local districts that fail the state's three-phased monitoring process, "strike[s] an excellent balance between the advantages of local control of school districts and the Legislature's constitutional responsibility to the children of New Jersey under the T&E Clause").

In October, 1989, the state first used this statute to assert control over a noncompliant local district when it took over operations of the Jersey City school district, the

state's second largest district. Braun, *State Expected, supra*, at 22. Five years later, despite improvements, the district remains under state control for having failed to achieve any of the state standards. *Id.* The State Education Department issued a report alleging that local officials engaged in "'major irregularities'" with district finances. Robert J. Braun, *Jersey City Schools Cited in Fiscal Probe*, STAR-LEDGER (Newark), May 23, 1994, at 1. Consequently, Commissioner Klagholz concluded that Jersey City requires "what could be a completely new governance system." Braun, *State Expected, supra*, at 22.

Meanwhile, the Commissioner issued to the Newark School Board an order to show cause why the state should not take over its 48,000-pupil school system and replace its administrative and elected officials. Robert J. Braun, *State to Attempt Takeover of Newark School District*, STAR-LEDGER (Newark), July 23, 1994, at 1. According to a five-volume, 1,798-page report released by the state,

> "[u]ncovered in the district were conflicts of interest, falsification of reports, willful violations of New Jersey's election and bidding laws, misused and mismanaged federal, local, and state monies, mismanaged personnel matters, loose control over cash, a significant backlog of capital improvement projects, and many other irregular and deficient practices."

Id.; *see generally* Robert J. Braun, *Costs are Among Highest Yet Schoolkids Still Suffer*, STAR-LEDGER (Newark), Oct. 29, 1993, at 1 (detailing examples of inefficient, fraudulent, and wasteful practices in the Newark school system); *see also Woeful Statistics*, STAR-LEDGER (Newark), Nov. 26, 1994, at 16 (reporting that Newark ranked poorly in academic and administrative performance as compared with 49 other large urban school districts in a national study by the Council of the Great City Schools). In September, 1994, Administrative Law Judge Stephen Weiss postponed until February 27, 1995, hearings on a possible state takeover of the Newark public school system. Robert J. Braun, *Newark Takeover Hindered*, STAR-LEDGER (Newark), Sept. 19, 1994, at 1, 13. The State has since sought to hasten its planned takeover by filing a motion for summary judgment, asking Judge Weiss to decide the takeover based upon the uncontested facts of the case. Robert J. Braun, *State Builds Case for Takeover of Newark Schools*, STAR-LEDGER (Newark), Feb. 19, 1995, at 1, 8. Although the motion has postponed the hearings until April 10, 1995, the State could assume control of the Newark district within weeks of a successful judgment on its motion. *Id.* at 1, 9.

According to a recent ruling by Judge Weiss, the Newark School Board cannot cite any actions taken after July 22, 1994 (the date of the issuance of the show cause order) to defend against the attempted state takeover. Robert J. Braun, *State Gains on Seizure of Newark Schools*, STAR-LEDGER (Newark), Jan. 9, 1995, at 1. The decision precludes the district from entering into evidence a $4 million plan to justify continued local control. *Id.* Equally damaging, the ruling prevents the district from arguing either the viability of prior state takeovers in Jersey City and Paterson or the efficacy of alternative actions in Newark. *Id.* Instead, Judge Weiss indicated that "the focus of the hearings would be 'relatively narrow,' concentrating solely on whether the state was 'arbitrary, unreasonable or capricious' in deciding that the Newark school board 'failed to take or is unable to take necessary corrective action.'" *Id.* at 7.

The delay in the state takeover had previously led Republican members of the state Senate Education Committee to lobby the Education Commissioner to stop the board from financing its $4 million plan to avoid a takeover. Robert J. Braun, *GOP Leaders Ask Klagholz to Block Newark Attempt to Avert Takeover*, STAR-LEDGER (Newark), Nov. 14, 1994, at 1. The Department of Education (DOE) had previously intervened to prevent the Newark Board from forwarding a "'request for proposals'" to consultants as part of its reform plan. *Id.* When New Jersey universities and colleges volunteered their services to enhance teacher training and student performance, the Newark Board summarily rejected the offers. *Id.* at 5. As a result, the legislators

inefficient practices.[267] Through these methods, the incentive to

stated that they would empower the DOE "with measures necessary to expedite the state takeover of New Jersey's largest school district." *Id.* at 1. In fact, one commentator urged Commissioner Klagholz to abandon the position of judge that the takeover statute imposes upon him and to assert his constitutional authority "to protect Newark's children and the state's taxpayers by imposing state control over the district." Robert J. Braun, *Takeover Law Needn't Tie Klagholz's Hands*, STAR-LEDGER (Newark), Nov. 25, 1994, at 31.

During recent testimony before the Joint Committee on the Public Schools, the Commissioner did advise legislators that the DOE had begun reviewing its experiences from the Jersey City and Paterson school district takeovers in order to improve the takeover process. Matthew Reilly, *Klagholz Cites Weaknesses in Way State Runs Schools It Has Taken Over*, STAR-LEDGER (Newark), Oct. 21, 1994, at 16. In January, 1995, Commissioner Klagholz presented his plan to reform the process to the State Board of Education, which had requested "policy recommendations to make the state takeover process more successful." *Id.*; Robert J. Braun, *State Officials Face Grim Alternatives in Urban Districts*, STAR-LEDGER (Newark), Jan. 8, 1995, at 43 [hereinafter, Braun, *Alternatives*].

The Commissioner had explained in his earlier testimony that the two prior state takeovers had demonstrated that the takeover statute offered the DOE neither detailed goals for state operation nor guidelines by which to reinstitute local control. Reilly, *supra*, at 16. With the Newark takeover in the offering, the Commissioner identified three goals that the DOE should follow during a state takeover: (1) "the design and implementation of a permanent local governance system;" (2) the "eliminat[ion of] the causes—management, finance and programming—of the district's inability to attain state certification;" and (3) the "enabl[ing of] districts to meet specific state standards required for certification." *Id.* The Commissioner emphasized that the state must maintain its responsibility to monitor all local districts, even if subjected to state takeover. *Id.*

The Commissioner's reform plan embraced each of the goals he outlined by incorporating

> greater state supervision of the 'good' people installed after a takeover; the development of strategic planning with specific academic goals; greater parental control; changes in the governance structure that will continue after the state has left, and the introduction of experimental ideas in the areas of instruction and use of facilities.

Braun, *Alternatives*, *supra*, at 43. Mr. Klagholz characterized the plan as consistent with the Whitman Administration policy of directing state fiscal and administrative resources to non-compliant districts. *Id.* at 44.

267 *See* Matthew Reilly, *Klagholz Cites State's Dismal Dollar Ranking*, STAR-LEDGER (Newark), Aug. 16, 1994, at 1 [hereinafter Reilly, *Klagholz Cites Ranking*] (noting remarks by State Education Commissioner Klagholz, while testifying before the state Assembly Education Committee, that the state needed to eliminate "unnecessary or even counterproductive" education mandates and create new mandates "to ensure the efficiency of the system"); *see also* Braun, *Regulations*, *supra* note 254, at 73, 74 ("The impulse to deregulate should be moderated by the need for continued accountability.").

Recently, however, the Commissioner of Education forfeited an opportunity to reform the costly inefficiency of the state's regulation of sending-receiving high school relationships. *See* Board of Educ. v. Board of Educ., OAL DKT. NO. EDU 3626-92, #68-3/92 (July 18, 1994) [hereinafter *Bloomingdale*]; N.J. STAT. ANN. § 18A:38-13 (West 1989). According to New Jersey law, a school district may contractually designate another district's high school to receive its high school pupils. § 18A:38-13. Upon seeking to sever a contractual arrangement with a receiving district, the send-

ing district must submit to the Commissioner of Education a feasibility study of the withdrawal. *Id.* For a district to obtain severance, the Commissioner must find from the study that the termination will not create a "substantial negative impact" upon the educational, financial, or racial conditions of the other district. *Id.*

For more than 90 years, the Board of Education of the Borough of Bloomingdale contracted with the Board of Education of the Borough of Butler to send its high school pupils to neighboring Butler High School under a sending-receiving agreement. *Bloomingdale*, OAL DKT. NO. EDU 3626-92, at 3. The communities shared several common characteristics, including a similar socioeconomic status and a close proximity to each other. *Id.* After an educational consulting firm determined that Bloomingdale could not effect severance without negatively impacting Butler, Bloomingdale decided to renegotiate its contract with Butler in 1989. *Id.* at 4-5. In early 1990, the Township of Pequannock, a wealthier community nearby, offered a seven-year renegotiable education contract to Bloomingdale for significant tuition discounts. *Id.* at 4, 5. The offer prompted Bloomingdale to reinvestigate the issue of severance through a second feasibility study and to file a petition with the Commissioner requesting severance. *Id.* at 5 (citation omitted).

Unhampered by administrative resistance to requests for information that had affected the conclusions of its first report, the consultant concluded that compared with Butler, Pequannock could provide "enhanced educational opportunities" to Bloomingdale pupils. *Id.* at 8 (quotation omitted), 9. In particular, the study cited Pequannock High School's "superior educational facilities, lower pupil/staff and pupil/teacher ratios, and the greater range of courses provided." *Id.* at 8 (quotation omitted). Moreover, the study indicated that through severance, Butler and Bloomingdale could expect to jointly save a minimum of $4 million from 1993-97 and more than $10 million if Butler students attended another district's schools. *Id.* at 10, 11. The study anticipated that no "substantial negative impact" would occur because Butler could offset monies lost from Bloomingdale by either downsizing its own system or by entering into a sending-receiving relationship with another community. *Id.* at 9, 10; *see id.* at 10 (highlighting Butler's four options). Significantly, the study realized that Bloomingdale taxpayers would sustain a $5,545,648 loss over five years unless permitted to accept Pequannock's discounted tuition rate. *Id.* at 10.

An Administrative Law Judge (ALJ) found that Bloomingdale, recognizing the effect that severance would have on Butler, predicated its case upon "theories of damage control." *Id.* at 20. The ALJ asserted that the "inconstancy" of the two reports prepared by Bloomingdale's consultant impaired the persuasiveness of those theories. *Id.* at 21. Consequently, the ALJ decided that severance would impose upon Butler "an end by slow death to a productive 80-year-old relationship." *Id.* Specifically, the ALJ observed that Butler students would lose curricular programs, extracurricular activities, and social capital, the "social networks and institutions generated through interaction of families and schools in Bloomingdale and Butler." *Id.*

In affirming the ALJ's findings, the Commissioner of Education acknowledged that "a number of positive impacts would accrue to Bloomingdale were severance to be granted." *Id.* at 26, 27. Nevertheless, the Commissioner concluded that "the controlling statute precludes the granting of severance where a substantial negative impact has also been found." *Id.* at 27 (citing N.J. STAT. ANN. § 18A:38-13 (West 1989)). Citing a recent precedent, the Commissioner explained that the positive benefits of severance for the sending district can neither counterbalance nor outweigh the negative consequences for the receiving district. *Id.* (quoting Board of Educ. v. Board of Educ., 257 N.J. Super. 413, 422, 608 A.2d 914, 918-19 (App. Div. 1992), *aff'd*, 132 N.J. 327, 625 A.2d 483 (1993) [hereinafter *Englewood Cliffs*]). Upon receiving the decision, the Board of Education of Bloomingdale exercised its statutory right to appeal the Commissioner's decision. *See* Board of Educ. of the Borough of Bloomingdale v. Board of Educ. of the Borough of Butler, SB 36-94, at 1 (Mar. 1, 1995) (affirming the

Commissioner's denial of Bloomingdale's petition for severance); N.J. STAT. ANN. § 18A:38-14 (West 1989) (authorizing appeals to the State Board of Education).

The *Bloomingdale* decision demonstrates a fundamental misappraisal of the state's urgent need for greater efficiency of educational expenditures and of sending districts' comparable need for equality with receiving districts in the tuition negotiation process. For example, in arriving at their conclusions, neither the ALJ nor the Commissioner examined the impact of financial severance upon Bloomingdale's taxpayers or its education system. Appellate Brief for Petitioner at 5-6, Board of Educ. of the Borough of Bloomingdale v. Board of Educ. of the Borough of Butler, OAL DKT. NO. EDU 3626-92, AGENCY DKT. NO. 68-3-92 (July 18, 1994). Through severance, both Bloomingdale *and* Butler could realize significant savings from which both would benefit. *See Bloomingdale*, OAL DKT. NO. EDU 3626-92, at 10, 11. In as much as Bloomingdale already imposes an abnormally high equalized property tax rate upon its citizens, these savings would enable the district to make essential improvements in its own schools while reducing its local tax burden and need for additional state foundation aid. *See* Appellate Brief for Petitioner at 15-16 (citation omitted), *Bloomingdale* (OAL DKT. NO. EDU 3626-92) (detailing "the educational and structural deficiencies which have been plaguing the Bloomingdale district for several years but which have not been addressed because of the district's severe financial constraints"); *see also* Foundation Aid Districts Association, *State Aid Comparisons* 2 (July 1994) [hereinafter *Comparisons*] (ranking Bloomingdale as having the 9th-highest equalized tax rate among K-8 districts and 28th-highest equalized tax rate among the state's 578 districts [65.4% above the state-average]). In addition, the Butler Board of Education could guarantee its children the same (if not better) quality of education that it has provided, and offer its own taxpayers significant tax relief, either through consolidation of its middle and high school grades into a "'school within a school'" or through entrance into its own sending contractual relationship with another receiving district. *See* Appellate Brief for Petitioner at 21, 25 (quotation omitted), *Bloomingdale* (OAL DKT. NO. EDU 3626-92); *Comparisons*, *supra*, at 3 (ranking Butler 47th in statewide equalized tax rates, 56.52% above the state average). For as long as the state denies Bloomingdale the opportunity to withdraw its students, Butler will simply continue to monopolize the benefits of "an annual $2,500,000 subsidy from Bloomingdale without even forcing Butler to *examine* alternatives." Appellate Brief for Petitioner at 37 n.14, *Bloomingdale* (OAL DKT. NO. EDU 3626-92).

Furthermore, the Commissioner misapplied the *Englewood Cliffs* precedent to the *Bloomingdale* case. *See Bloomingdale*, OAL DKT. NO. EDU 3626-92, at 27 (quotation omitted). *Englewood Cliffs* dealt with the efforts of a primarily white district to terminate a sending-receiving relationship with a minority-dominated district. *Englewood Cliffs*, 257 N.J. Super. at 422-23, 426, 608 A.2d at 919, 920, 920-21. Englewood Cliffs justified severance on the grounds that their children would receive a better education in a "'superior academic environment'" apart from the deterioration of the Englewood system. *Id.* at 461, 608 A.2d at 941. The court rejected this argument, however, because it would have segregated black and white children between high schools in different districts. *Id.* The *Englewood Cliffs* court described the governing statute as requiring the Commissioner "to reach an 'equitable' determination—one that is fair to both districts." *Id.* at 462, 608 A.2d at 941 (citation omitted). In other words, the Commissioner could balance each factor, but not weigh "overall positive and negative impacts," because a "substantial negative impact in one category necessarily implicates an overall educational quality issue." *Id.*, 608 A.2d at 941, 942. Upon finding that a "substantial negative impact" existed from the reintroduction of segregated schools in Englewood, the court denied severance to Englewood Cliffs. *Id.* at 463-64, 482, 608 A.2d at 942-43, 952.

As part of his findings of fact, the ALJ stated that no racial implications would result from severance between Bloomingdale and Butler. *Bloomingdale*, OAL DKT.

NO. EDU 3626-92, at 8 (citation omitted). Consequently, one may readily distinguish the *Englewood Cliffs* decision against severance from the need for severance in *Bloomingdale.* Apart from its considerations of racial balance, *Englewood Cliffs* invites the Commissioner (and the State Board of Education via appeal) to balance financial and educational gains and losses to ascertain whether any substantial impact exists. *See Englewood Cliffs,* 257 N.J. Super. at 462, 608 A.2d at 941, 941-42. Contrary to *Englewood Cliffs,* therefore, when the trier of fact discovers no *compelling* negative impact, it must predicate its decision upon equity between the parties. *See id.,* 608 A.2d at 941 (citation omitted). To the extent that severance may afford both Bloomingdale and Butler the benefits of more efficient use of current resources as well as significant savings for reinvestment and tax relief, the State Board should have rectified the Commissioner's error and granted Bloomingdale the relief it sought. Nevertheless, the State Board affirmed the Commissioner's denial of the petition for severance, citing "the fiscal impact and educational consequences to Butler that would inevitably occur were it to lose half of its student body." *Bloomingdale,* SB 36-94, at 1, 1-2.

The Bloomingdale Board of Education responded to its lack of success in the adjudicatory process by aggressively pursuing a legislative resolution of its plight. *See* S. 1313, 206th N.J. Leg., 1st Sess. (1994); A. 2395, 206th N.J. Leg., 1st Sess. (both reforming the process of terminating a sending-receiving relationship). On October 13, 1994, the state Senate Education Committee unanimously voted to refer S. 1313 to the full Senate for its immediate consideration. S. 1313. On December 19, 1994, the New Jersey State Senate approved S. 1313 by a vote of 33-4. Office of Joseph L. Bubba, N.J. State Senator, Bill Votes for S. 1313 (Dec. 19, 1994) (on file with author). The bill, and its Assembly version, A. 2395, now await a hearing before the Assembly Education Committee. *See* S. 1313; A. 2395.

S. 1313 and A. 2395 restore balance to the sending-receiving relationship by satisfying the needs of both sending and receiving districts. For example, S. 1313 and A. 2395 empower a sending district that has contracted with a receiving district for five years to freely negotiate in the marketplace with another receiving district for a more competitive tuition rate and better quality education. *See* S. 1313 § 1(a)(1), -(2); A. 2395, § 1(a)(1), -(2) (establishing the eligibility of a sending district to terminate a sending-receiving relationship). Unlike the current statutory monopoly enjoyed by many receiving districts, marketplace competition will fulfill the rights of parents in sending districts to choose the cost and quality of the education that their children shall receive.

S. 1313 and A. 2395 ensure long-term stability for both districts by mandating that the sending district contract with another receiving district for a minimum of five years following termination of a pre-existing contractual relationship. *See* S. 1313 § 1(a)(2); A. 2395 § 1(a)(2). S. 1313 and A. 2395 also guarantee short-term stability for receiving districts by requiring that a sending district notify its receiving counterpart of its intention to sever the contractual relationship by "December 1 of the school year prior to the school year in which the termination is to occur." *See* S. 1313 § 1(b); A. 2395 § 1(b) (imposing the notification requirement). Importantly, S. 1313 and A. 2395 respect the need for racial balance expressed in *Englewood Cliffs* by precluding severance by any sending district against which "the Commissioner of Education, the State Board of Education, or [any] New Jersey court[ ]" has already denied a severance petition since January 1, 1988, based upon its racial impact. *See* S. 1313 § 1(a)(4); A. 2395 § 1(a)(4) (preserving the Commissioner's authority to prevent the termination of a sending-receiving relationship from resegregating public schools). Given the various concerns that S. 1313 and A. 2395 adequately address, the author, a member of the Bloomingdale Board of Education since 1992 remains confident that the legislature and Governor Whitman will enforce the right of parents, taxpayers, and children to control their own financial and educational destiny by enacting these bills into law. In sum, "Butler should not be allowed to hold Bloomingdale hostage

retain local control will promote increased efficiency and thus create significant savings. These savings might permit the legislature to reduce its educational spending by lowering the per-pupil foundation aid level.[268] As a result, the legislature could then redirect existing state funding toward the SNDs to satisfy the *Abbott* mandate without harm to suburban taxpayers or their children.[269]

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any longer." Appellate Brief for Petitioner at 37, *Bloomingdale* (OAL DKT. NO. EDU 3626-92).

268 *See* Reilly, *Klagholz Cites Ranking*, *supra* note 266, at 1 (noting that State Education Commissioner Klagholz questioned spending on "top-heavy administrative structures and . . . the implementation of questionable mandates" in light of an April, 1994, U.S. Department of Education report that demonstrated that New Jersey spent significantly more on education per pupil than any other state, but ranked 49th in proportion to money spent on classroom instruction); *see also* Tom Topousis, *Group Says N.J. Leads Nation in School Costs*, RECORD (Hackensack), Sept. 21, 1994, at C-7 (citing a report prepared by the American Legislative Exchange Council, a state legislator organization, finding that "[i]n New Jersey, per-student costs for the 1993-94 school year reached $9,429, almost double the national average of $5,314"). Interestingly, the report indicated that "most of the top 10 states in student performance . . . spent less than the national average per student in Grades K-12." *Id.*

269 *See* Interview with Albert Burstein, *supra* note 230. Chairman Burstein criticized the nexus between spending in the SNDs and the I&JDs that the supreme court created as part of its *Abbott II* remedy. *Id.* Characterizing the spending nexus as "not educationally sound," the Chairman worried that "clamp[ing] down" on spending by suburban districts would "mediocritize the entire school system." *Id.* The Chairman specifically identified middle-class "Foundation Aid Districts" who lost state aid to the SNDs under the QEA as the "new education underclass." *Id.*; *see also* Tom Topousis, *Not-Quite-Poor School Districts Feel Pinch*, RECORD (Hackensack), Aug. 8, 1994, at A-1 (illustrating the fiscal problems of "non-special needs districts").

A recent study has evaluated the impact of the QEA on poor urban, middle-income, and wealthy suburban districts. *See* Center for Educational Policy Analysis, *The Myth of Bottomless Pits and Crumbling Lighthouses: Two Years of New Jersey's Quality Education Act*, Sept. 1994, at 2 [hereinafter CEPA Study]. The study concluded that the QEA channeled funding into the SNDs for programmatic and capital improvements without imperiling wealthy districts, but still failed to ameliorate the spending gap between rich and poor districts. *Id.* at 1. The study examined the educational and fiscal operations of six SNDs, two foundation aid districts, and four wealthy, "transition aid" districts, and also relied upon a statewide survey of districts to support its conclusions. *Id.* at 2. According to the study, SNDs did not waste state aid like "bottomless pits," but rather used that assistance to physically upgrade their schools. *Id.* at 8. Furthermore, the SNDs increased social services and modernized educational programming by revising curricula according to modifications in the state's High School Proficiency Test. *Id.* The study found no evidence of a "leveling down" by so-called middle-income and wealthy "lighthouse districts" that lost state aid to the SNDs. *Id.* at 2, 8.

The study earned criticism, however, based upon the small sampling of districts that it employed. *School Funding Reforms Praised*, ASBURY PARK PRESS, Oct. 12, 1994, at A3. In fact, the authors of the study refused to identify the districts they analyzed. *Id.* Indeed, CEPA itself cautioned that "[t]hese findings must be interpreted carefully because of the small number of special needs districts in the sample and because they report only the direction of change, not its magnitude." CEPA Study, *supra*, at 6. Furthermore, the findings of a study completed for the Foundation Aid Districts Asso-

By reinforcing its management of local districts, the state might dilute local control, an element considered essential to fostering educational policy and public support.[270] Consequently, the legislature should guarantee suburban taxpayers that districts that prove their capacity to fulfill the constitutional mandate will retain maximum local control over policy-making.[271] For instance, the state should offer each local district the opportunity to safeguard its customary degree of local control by demonstrating the competitiveness of its fiscal and academic performance both within its own schools and through comparison with other districts.[272] Such an

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ciation (FADA) sharply contradict the findings reported in the CEPA Study. *See generally* Dr. Craig E. Richards, *Expert Testimony for Amicus Brief on Behalf of the Foundation Aid Districts Association*, Dec. 7, 1993. The Foundation Aid Districts Association (FADA) represents local districts who receive foundation aid from the State, but do not qualify as either an SND or an I&JD. *Id.*

In his study on behalf of the FADA, Dr. Richards calculated that "[a]bout 27 percent of Maximum State Aid was distributed to Other Foundation Aid Districts during 1992-93. By 1999-2000, only 1% of the Maximum State Aid will remain for Other Foundation Aid Districts." *Id.* at 1. Dr. Richards concluded that enforcement of the QEA and the parity requirement would leave foundation aid districts with "zero dollars" after the 1999-2000 school year. *Id.* Dr. Richards predicted that

> the effect of the QEA-II [would] be to force other foundation aid districts to reduce their spending while allowing the I & J districts to increase spending, resulting in growing disparities in per pupil spending for regular instruction between other foundation aid districts even as QEA-II seeks to close the gap between the Special Needs Districts and the I & J districts.

Id. at 7-8.

270 *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 49, *reh'g denied*, 411 U.S. 959 (1973) (alteration in original) (quotation omitted) (declaring that "'[l]ocal control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well'"). The *Rodriguez* Court drew this conclusion from "the opportunity [local control] offers for participation in the decisionmaking process that determines how those local tax dollars will be spent." *Id.* at 49-50. Consequently, the Supreme Court of the United States agreed that the belief of the people of Texas in the importance of local control constituted a rational justification for creating a system of inequitable financing. *Id.* at 53 n.109; *see also* Richard Briffault, *The Role of Local Control in School Finance Reform*, 24 CONN. L. REV. 773, 808, 809 (1992) (describing local control as "a desirable political involvement" whose "real value" involves "increasing the accountability of educators and administrators to parents and . . . providing parents and local residents with the opportunity for making collective decisions that have vital implications for the community and society as a whole," both of which "contribute to educational quality").

271 *See* Briffault, *supra* note 270, at 809 (suggesting that "[i]f local control really is the important value in our society that it is so often asserted to be . . . then state governors and legislators should be able to pass school aid measures incorporating that value and providing greater financial assistance while maintaining a place for local political control over public schools").

272 *See* Jenkins, *supra* note 265, at 1 (explaining that Governor Whitman has announced a state plan that will promulgate standards and accountability measures in eight subject areas, including "mathematics, English, science, social studies, world lan-

guages, art, health and physical education, and career education," and place responsibility on local districts to effectuate methods by which to satisfy these standards); Kimberly J. McLarin, *Whitman Plans Change in School-Fund Formula*, N.Y. TIMES, Feb. 17, 1995, at B4 (indicating that the Whitman Administration will "fashion a new school-financing formula that will be based on the true cost of the 'thorough and efficient' education required by the State Constitution"); Matthew Reilly, *Hearings to Define 'Thorough and Efficient' Goal*, STAR-LEDGER (Newark), Feb. 17, 1995, at 16 (discussing an interim report compiled by the State Department of Education investigating substantive educational elements and proposing that any new "funding plan should stress coherence, efficiency, quality, guaranteed funding and accountability"); Neal Thompson, *School Funding Question: What Price Quality?*, RECORD (Hackensack), Feb. 18, 1995, at A-3 (expressing Commissioner Klagholz's goal of achieving programmatic and fiscal parity by rewarding efficiency and performance rather than simply increasing urban aid).

Outlining his interpretation of the T&E mandate during a recent interview, Commissioner Klagholz stated that "he wants the state's obligation to schoolchildren defined as specifically as possible in terms of academic achievement—and then he wants to use the definition both as a measure of school success and fiscal accountability." Robert J. Braun, *Klagholz Wants Funding Tied to School Necessities*, STAR-LEDGER (Newark), Jan. 16, 1995, at 1, 5. In the Commissioner's view, the state should reward compliant districts with less regulation and penalize noncompliant districts with more state supervision. *Id.* at 5. Commissioner Klagholz questioned whether the definition of "thorough and efficient" should include band uniforms, administration, and facility repair, and posited that local districts should finance these non-essential items through local taxation. *Id.* Furthermore, the Commissioner suggested that the DOE would intervene in noncompliant districts more readily in the future so as to leave state takeover as a last resort. *Id.*; *see also* Robert J. Braun, *Education Chief Drafts Plan for 'Choice' of Schools*, STAR-LEDGER (Newark), Aug. 28, 1994, at 1 (identifying a variety of options under consideration by State Education Commissioner Klagholz for inclusion in a comprehensive five-year school improvement plan for New Jersey's schools expected to be unveiled by the end of 1994).

The Commissioner stated that he intends to instill parental choice through both inter-district and intra-district competition. *Id.* In addition, the Commissioner proposed a highly controversial pilot voucher program for state-run Jersey City schools, by which parents would receive subsidies and decide whether to spend those dollars at private or public institutions. *Id.* at 1, 13.

According to the Commissioner's plan, the state would have given vouchers to parents of Jersey City students entering the first and ninth grades. Robert J. Braun, *Pilot on School Vouchers Proposed for Jersey City*, STAR-LEDGER (Newark), Oct. 5, 1994, at 1 [hereinafter Braun, *Pilot*]. Parents of first grade students could have either redeemed those vouchers for tuition at a pre-existing private school in Jersey City or enrolled their children in public school. *Id.* at 21. Meanwhile, parents of ninth graders could have used the vouchers to send their children to any one of 44 pre-existing private high schools in Hudson County or to any public school of their choice. *Id.* "The amount of the voucher would be pro-rated according to family income; parents of so-called at-risk children would receive certificates more valuable than those provided to wealthier parents." *Id.* at 1. In substance, the plan called for the state to grant to parents vouchers worth at least $800, with another $500 available for low income students. Neal Thompson, *Tuition Voucher Bill Has Surprise Twist*, RECORD (Hackensack), Nov. 20, 1994, at A-1, A-14.

Originally, Governor Whitman planned to propose the voucher system in conjunction with another pilot project that would authorize teachers, parents, or other organizations to establish independently-operated "charter schools" exempted from many government regulations and created to instruct students in specific subjects. *Id.*

at A-14. Instead, acknowledging "'the real lack of enthusiasm' in both Republican and Democratic caucuses" for the initiative, Governor Whitman announced that she would issue an executive order to empanel "a 15-member task force to study vouchers for one year." Matthew Reilly, *Schundler Stews as the Governor Takes Steam Out of Voucher Plan*, STAR-LEDGER (Newark), Jan. 11, 1995, at 14. The Governor signed an executive order empowering the Advisory Panel on School Vouchers to "assist the Governor and Legislature in proposing legislation to implement a tuition school voucher program." Exec. Order No. 30, ¶ 2 (Jan. 10, 1995). The order directed that the legislation address three objectives:

> a. The proposal should be limited in scope and viewed as a pilot program so as to determine the feasibility and impact of expanding the program statewide;
>
> b. The proposal must recognize the fiscal constraints of the State and be consistent with budgetary limitations; and
>
> c. The proposal must include a mechanism and criteria to adequately and impartially evaluate the pilot program.

Id. ¶ 3. Governor Whitman also authorized the Advisory Panel to "examine the fiscal, legal and administrative issues that may arise concerning implementation of the pilot program." *Id.* § 4. The Governor argued that the task force would provide a forum for establishing bipartisan support for a trial voucher program to begin in Jersey City by September, 1996. Reilly, *supra*, at 14. Whitman's retreat signals, however, "the dominant theme in New Jersey politics, if not politics everywhere. What urban residents want and need always is a matter of secondary importance to those who make decisions in Trenton." Robert J. Braun, *Whitman Unwilling to Fight for School Vouchers*, STAR-LEDGER (Newark), Jan. 15, 1995, at 47.

State Education Commissioner Leo Klagholz explained that the voucher program consists of a "pilot project" requiring a "'reality test'" to evaluate its results under a controlled environment. Leo Klagholz, *Voucher Program Needs 'Reality Test'*, STAR-LEDGER (Newark), Oct. 9, 1994, at 73. The proposal limits the project to a five-year period. *Id.* Additionally, "a focus on entering first- and ninth-graders would provide the most genuine test of a voucher/school choice program because it would focus on those families who are about to select schools for their children to attend." *Id.* The Commissioner defended the propriety of the test by arguing that it would provide poor children with the same "immediate alternative" source of education to a potentially ineffective, unsafe neighborhood school that wealthier children already enjoy. *Id.* at 74. Moreover, the Commissioner praised the program for introducing "market accountability" to New Jersey's public school system. *Id.* Commissioner Klagholz advised that "[r]esponsible policy makers should stand apart from the competing interests and assure that an objective, balanced focus on the needs of children is properly achieved." *Id.*

Despite the Commissioner's call for objectivity, however, the proposal received an "icy response from the state Board of Education." Robert J. Braun, *Voucher Proposal Criticized*, STAR-LEDGER (Newark), Oct. 6, 1994, at 1 [hereinafter Braun, *Voucher*]. In addition, the New Jersey Parent Teacher Association (PTA) recently voted to make defeat of the voucher proposal a legislative priority. Kelly Richmond, *State PTA Opposes School Voucher Plan*, RECORD (Hackensack), Dec. 1, 1994, at A-3. More importantly, the proposal generated immediate opposition from New Jersey Education Association (NJEA) President Dennis Testa, who called the program "'a bad idea.'" Braun, *Voucher*, *supra*, at 26. In particular, Testa cited a number of objections to giving money to private schools, including their use of admissions criteria and failure to satisfy state monitoring standards. *Id.* These attacks have arisen during a "$10 million feel-good publicity campaign," designed by the NJEA to convince parents of the quality of public school education and to defeat the proposed voucher program legislation. Robert J. Braun, *Change Rubs Powers That Be the Wrong Way*, STAR-LEDGER

affirmative duty would encourage taxpayers and parents to vigilantly monitor for efficiency the spending and productivity of their local school boards.

To effectuate these contradictory goals of minimum local financing and maximum local control, the legislature must ensure that the Department of Education maintains sufficient staff and administrative resources to conduct its investigations.[273] The state must enforce its mandates for more efficient management and penalize those districts failing to demonstrate efficiency with less local autonomy.[274] As a result, urban and suburban districts would best

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(Newark), Oct. 7, 1994, at 27 [hereinafter Braun, *Change*]; Braun, *Pilot*, *supra* note 270, at 1; *see* Robert J. Braun, *Power Is the Real Issue Underlying the Debate over School Vouchers*, STAR-LEDGER (Newark), Oct. 9, 1994, at 73, 76 (concluding that "the idea of school vouchers is radical because . . . . it shifts power over education from the school establishment to parents who can vote with vouchers"). As Mr. Braun explained:

> The NJEA campaign has nothing at all to say to the parents and children of Newark or Jersey City; indeed, its pollyannish tone mocks the pain only those who live in desperation can feel. The press agents of the powerful are betting the majority of people—the white, the middle-class, the employed, the reasonably educated—simply will not care enough to demand radical change that will not necessarily benefit them directly. This myopic self-interest extends even to wanting to destroy the modest proposal offered by Education Commissioner Leo Klagholz to study the merits of a voucher-driven system. Employee organizations have no interest in determining whether a change in funding works because they don't want to know whether it will work.

Braun, *Change*, *supra*, at 27.

273 Albert Burstein, *School Funding Debate*, RECORD (Hackensack), July 17, 1994, at A-19, A-24. Chairman Burstein commented that reform may rectify the inconsistency existing between state funding and local control by correlating state monitoring with student performance. Interview with Albert Burstein, *supra* note 226. "As long as urban districts produce an unsatisfactory educational product," the Chairman asserted, they should be subjected to "more restrictions and state monitoring." *Id.*; *see* Robert J. Braun, *State Vows to Resume Monitoring of Schools*, STAR-LEDGER (Newark), Oct. 10, 1994, at 1, 9 (quoting State Education Commissioner Leo Klagholz as promising to institute a new monitoring process by April, 1995, that will focus on student performance). Klagholz indicated that the state had not monitored its districts in four years due to budget cuts and a lack of administrative resolve. *Id.* at 1.

274 *See* Matthew Reilly, *Whitman Vows Cuts for Top-Heavy Schools*, STAR-LEDGER (Newark), Jan. 24, 1995, at 13 (describing the Whitman Administration's plan to reduce state aid to districts that spend 30% more than the state average on administration, defined to include equipment and non-instructional expenses). Governor Whitman explained in her annual budget message to the legislature that "[i]f you waste money and run up huge bills, don't expect the state's taxpayers to pick up the tab." *Id.*

The State Department of Education (DOE) justified its carrot-and-stick approach by citing the fact that state taxpayers "have a right to expect that all school districts will use public dollars prudently and efficiently." *State Defends Proposal to Cut Aid to 70 Districts*, STAR-LEDGER (Newark), Feb. 5, 1995, at 49. The DOE argued that its approach did not prevent districts "from spending more than 30 percent above average." *Id.* Instead, the aid penalty "discontinues funding from state taxes paid by other communities." *Id.* Under this initiative, the state reduced education aid by over

serve their children's needs by proving the fiscal propriety and academic proficiency of their own management practices to the state. This process might then enable the state to demonstrate to suburban taxpayers, through reduced income tax contributions for urban districts and lowered local property taxes for suburban districts, that the system has spent state funds prudently.

As school funding reform enters its third decade, urban children remain educationally starved and non-competitive as compared to suburban students.[275] If the New Jersey Supreme Court had disavowed reliance upon local property taxation and avoided imposing constraining deadlines while encouraging the legislature to reassess the effectiveness of current levels of education spending, then perhaps urban children would have finally received the education they so desperately need. Instead, by threatening the political process with the prospect of another court decree mandating additional state spending under a property tax-dependent financing system, the court has preordained another battle with the legislature over school funding reform. The difference between constitutional confrontation and realistic reform will depend upon the court's acceptance of reform approaches that acknowledge and promote the efficient management and operation of our state education system as a politically feasible and constitutionally appropriate approach toward compliance with the *Abbott III* mandate.

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$11 million to 70 districts, including some of the state's most affluent suburban schools. Matthew Reilly, *Rich Schools Feel Bite as State Cuts Aid to Top-Heavy*, STAR-LEDGER (Newark), Jan. 26, 1995, at 1. By contrast, the state rewarded 179 efficient districts with $8 million. *Id.*; *see also* Reilly, *Klagholz Cites Ranking*, *supra* note 267, at 1 (discussing State Education Commissioner Klagholz's support for ACR-77, a proposed state constitutional amendment designed to "prohibit the state from requiring, by law, regulation or rule, any new or expanded program unless it provides the funding," excepting compliance with federal law, court rulings, or laws passed by two-thirds of each house of the legislature).

275 *See* Robert J. Braun, *Urban Students Pass Proficiency Test at Half the Rate of Other Students*, STAR-LEDGER (Newark), May 1, 1994, at 36 (detailing the poor performance by students in SNDs on the High School Proficiency Test [HSPT], given in 11th grade, as compared with students in other districts); Robert J. Braun, *Only 30% of Eighth-Graders Testing 'Competent' in Math*, STAR-LEDGER (Newark), June 2, 1994, at 1 (charting student performance on a state mathematics examination).