Abbott v. Burke:
A Model for Reform Through State Court Litigation

Winsome G. Gayle
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Professor Margo Schlanger

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I. *Introduction*

On February 5, 1981, the Education Law Center, attorneys for New Jersey public school children in four of the most impoverished cities in the state, filed a complaint against several state officials, demanding a "thorough and efficient"[1] education. Nearly two decades later, the state's Department of Education is in the process of implementing significant changes ordered by the New Jersey Supreme Court. The story of Abbott v. Burke presents us with the difficulties of institutional reform litigation on the state level. The focus of this paper highlights the case's journey through the New Jersey Supreme Court, and considers the elements necessary to successfully effectuate such a litigation.

Abbott v. Burke is a complex case, taking place throughout the course of approximately two decades. In my view, the case represents a success for the plaintiff class. The decisions of the New Jersey Supreme Court has lead to the implementation of progressive educational policies and the infusion of funds into poor communities throughout New Jersey. The case, most importantly, changed the dialogue in the state surrounding issues of education. The dialogue initially centered on whether property-poor school districts should be compared to wealthier districts when considering education funding. The dialogue now centers on the varied ways to implement means of improving schools in the property-poor districts. The interesting question in Abbott, is: how did the plaintiffs achieve this

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[1] This was based on the following provision in the New Jersey Constitution governing public school 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 this State between the ages of five and eighteen years." NJ Const. (1947) Art. VIII, § 4, para. 1.

success? Essentially, how can a politically disenfranchised group get the attention of the state's top policymakers?

The Lessons of Abbott: Abbott is a model for conducting a successful state institutional reform litigation. In conducting interviews of various participants in the case and school administrators,[2] and reviewing some of the literature surrounding the case, it became evident that Abbott's success depended on a multitude of factors. These factors should be viewed in the context of two background issues, which are essentially descriptive elements of Abbott. First, the length and complexity of the case was unavoidable. Second, Abbott was highly contested and political. Each of the following factors will be expounded upon throughout the paper; but it should be noted initially that some are unique to New Jersey:

(1) It is necessary for such cases to be conducted at the highest level of the State judiciary. Educational reform was simply not possible without the involvement of the New Jersey Supreme Court.

(2) The success of Abbott was highly dependent on the Court's commitment to the issues of reform. The plaintiffs had an easier task due to the progressive history of the Court.

[2] Interview with Professor Paul Tractenberg, Rutgers Law School and founder of the Education Law Center, Newark, NJ, January 19, 1999; Interview with David Sciarra, Director of the Education Law Center and Attorney for the Plaintiffs, January 26, 1999; Telephone interview with Nancy Kaplan, Assistant Attorney General of New Jersey, March 18, 1999; Telephone interview with Dr. Ronald F. Larkin, Superintendent, New Brunswick, New Jersey, March 26, 1999; Telephone interview with Dr. Larry Leverett, Superintendent, Plainfield, New Jersey, March 26, 1999; Telephone interview with Jacqueline McConnell, Department of Education, Special Assistant for School Improvement, March 26, 1999; Telephone interview with Dr. Leo Klagholz, Commissioner of Education from 1994 to 1999, October 21, 1999.

(3) Despite its progressive history, the Court's instinct for self-preservation prolonged the case. The Court's notions of self-preservation led to its continued deference to the other branches, notwithstanding repeated failures to follow the court's directives. As a result, the court exercised great restraint in ordering any specific remedies, refraining from doing so for a number of years. When the court did engage in remedial action, it did so with much hesitance and as a last resort.

(4) The Court's deference, and corresponding hesitance to address issues of remedy, stemmed from state-specific concerns regarding the relationship between the judiciary and the other branches of government. In contrast, the accommodationist relationship of the judiciary to the executive and legislature in New Jersey motivated the court to eventually require a more specific remedy. This flexible relationship positioned the court as a policy-maker, ensuring its activism.

(5) Finally, the plaintiffs were able to sustain a long-term litigation such as Abbott. The plaintiffs' attorneys in Abbott were uniquely situated to sustain such a litigation, and continue to play a relevant part in the implementation process.

Whether these factors can be replicated in other areas is debatable. However, Abbott's position as one of the most far-reaching educational reform decisions, provides us with valuable information as to how one can achieve

success at the state level. The above factors are important considerations of progress in other areas requiring state court attention.

Abbott as an Institutional Reform Litigation:

The Court in Abbott dealt with many of the concerns of institutional reform litigation. Specifically, the court struggled with issues of legitimacy and judicial capacity. These issues are encompassed within general concerns surrounding the institutional reform litigation, due to the differences of such litigations to traditional forms of litigation. Institutional reform litigations, also known as structural reform cases, are distinguishable from traditional litigation in various ways. First, the institutional reform litigation focuses on social wrongs instead of isolated wrongdoings.[3] Second, the institutional reform litigation addresses the concerns of a class or group, not individuals.[4] The group's primary connection is the institution which they are challenging. Third, such litigations seek prospective relief, that is, relief that substantially changes ("reforms") the challenged institutions. Such litigations also appeal to an activist judicial role.

In several important aspects, many of the characteristics of institutional reform litigation were present in Abbott. Abbott focused on disparities in funding and the resulting problems in the adequacy of public school education for students in impoverished communities. Abbott also concentrated on a victimized *group* independent of the lawsuit, that is, students in property-poor school

[3] Owen Fiss, *The Forms of Justice*, 93 HARV. L. R. 18 (1979).
[4] *Id.* at 18-22.

districts.[5] Finally, the Abbott plaintiffs sought prospective relief to displace the perceived threat to the state's constitutional guarantee of a particular level of education, and to institute a higher level of education for students in property-poor communities.

Pure application of the typology of institutional reform litigations to Abbott is limited to the above descriptions. Abbott indeed involved a victimized group that challenged a seemingly entrenched social condition. However, other aspects of such litigations are only partially present in Abbott. While judicial activism[6] played an important role in Abbott, the court's level of activism was significantly curtailed by its continued deference throughout the course of the litigation. The court exercised activism grudgingly, refraining from enunciating a specific remedy for over sixteen years. This is evident in the court's many decisions to simply refrain from retaining jurisdiction through much of the case. To this extent, Abbott can be understood more as a hybrid case, combining traditional aspects of litigation with the more far-reaching aspects of institutional reform litigation.

The deferential stance of the court throughout a significant portion of the case is striking. Indeed, the court made consistent efforts to diminish its involvement in any remedy. The court's hesitance can be explained as a response to many of the criticisms of institutional reform litigation, questioning the

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[5] The class was defined as follows in Abbott I, 495 A.2d 376, 380, n.1: "The class includes all children residing and attending public school in the school districts of Camden, East Orange, Irvington, and Jersey City." This was later extended in Abbott II to include students in property-poor districts identified as "Special Needs Districts." *See infra* Part IV.

[6] One noted aspect of the institutional reform litigation is the court's active role in developing and ensuring the enforcement of a remedy. *See id*; *see also* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. R. 1281.

legitimacy and competence of judicial involvement in such complex and entrenched social issues as education. One such criticism by Colin Diver, suggests that the court's very involvement in such politically charged areas undermines its legitimacy.[7] Donald Horowitz, another critic, has questioned the very capacity of judges and the courts to engage in such issues, considering the constraints of the judicial method,[8] generalist judicial training,[9] and the adjudicative process.[10] These criticisms have not curtailed the flow of cases challenging educational systems, prisons, and other complex public institutions. But the Abbott court's cautious approach to the issue of education reform can be viewed as a response to such concerns.

Indeed, many of the criticisms concerning legitimacy and competency were leveled directly at the New Jersey Supreme court due to its Mount Laurel decisions. In the Mount Laurel cases, the court struck down the use of municipal exclusionary regulations as barriers to development of low-income housing in suburban areas.[11] Following local resistance to its initial decision, the court then specified a procedural system to adjudicate zoning cases throughout the state

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[7] Colin S. Diver, *The Judge As Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L.REV. 43, 106 (1979).

[8] DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 22-23 (1977) Horowitz argues that the requirement of judges to answer questions leads them make ad hoc decisions that are not good for policy-making. Additionally, judges are drawn to dangerous reductionists conclusions.

[9] *Id.* at 31. Horowitz argues that judges are forced to rely on experts because as generalists they lack the necessary information to make informed judgements. This reliance is further complicated by the judge's lack of experience and skill in interpreting the expert information.

[10] *Id.* at 51.

[11] Southern Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713, cert. denied, 423 U.S. 808 (1975) (Mount Laurel I).

and promulgated a set of rules governing the process.[12] Chief Justice Robert Wilentz even went so far as to hand-pick the specialized trial judges who would effectuate the procedural policies.[13] The court's expansive ruling subjected it to much criticism, even jeopardizing the position of Chief Justice Wilentz.[14] Comparatively, the court exercised significant restraint in Abbott. One hypothesis of the court's motivation is that the court's caution countered its bold moves in the Mount Laurel cases.

Regardless of the critiques leveled at the court, it made a significant contribution to state-based institutional reform litigations. Although no significant improvements reached the name plaintiffs,[15] it created a progressive understanding of the state's constitutional requirement to provide public education. It also led to the implementation of significant improvements in the property-poor districts.

Outline of Paper. As mentioned above, I will endeavor to explain the factors in Abbott that are informative to conducting state based challenges to seemingly intractable areas of social reform. Section II of the paper will address the problem of financing public school education in New Jersey. Section III

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[12] Southern Burlington County NAACP v. Township of Mount Laurel, 456 A.2d 390 (1983) (Mount Laurel II).

[13] CHARLES M. HAAR, SUBURBS UNDER SEIGE: RACE, SPACE, AND AUDACIOUS JUDGES, 55 (1996).

[14] *Id.* at 149. (A state constitutional provision allowed the governor to reappoint justices after seven years. Chief Justice Wilentz was barely reconfirmed by the state Senate.).

[15] Raymond Abbott, the main name plaintiff, never received the benefits of the court's rulings. "'Raymond's name is on the lawsuit, but it has nothing to do with him,' [his mother] said. 'My rejoicing is for all the children in the 28 cities. We could have a Picasso or a president among them and, until this ruling, we've been writing them off before they started.'" Robert Hanley, *Plaintiff Regards Schools Ruling From a New Jersey Jail*, N.Y. TIMES, June 12, 1990, at B1.

discusses the history of educational finance litigation, considering some of the differences in Abbott. Section IV will provide a synopsis of Robinson v. Cahill, the predecessor case to Abbott. It will also discuss the relevant history of Abbott v. Burke, and noteworthy moments in the case. Section V will detail the five factors that make Abbott a case worthy of analysis as a leader in state institutional reform litigation. Finally, Section VI will consider the implementation of the court's orders.

II. *Financing Public School Education: The New Jersey Problem*

The plaintiffs in Abbott presented a paradoxical picture of public school education in New Jersey. While the state overall was in the ranks of states spending a significant amount on education, correspondingly significant gaps existed in the spending and quality of education between property-rich and property-poor districts.[16] Much of New Jersey's problems resulted from the suburbanization that is so widespread throughout the nation. With mostly whites moving out of the cities, urban areas became increasingly populated by minorities. Investment in urban areas also decreased, resulting in a polarization of affluent suburbs and financially constrained cities.[17]

Gaps in spending and the quality of education resulted from the method of school funding used in New Jersey, as well as unique problems facing

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[16] WILLIAM A. FIRESTONE ET AL., FROM CASHBOX TO CLASSROOM: THE STRUGGLE FOR FISCAL REFORM AND EDUCATIONAL CHANGE IN NEW JERSEY, 20 (1997).

[17] *See* CHARLES M. HAAR, SUBURBS UNDER SEIGE, at 5-6. "The old central cities were hollowed out as white upper-income households moved to the detached, single-family homes in the suburbs. Two worlds loom – residentially segregated minority areas with poor-quality schools, inadequate public facilities, few job opportunities, and high crime and delinquency rates, and a suburban

impoverished school districts. New Jersey, as in most states,[18] derives its funding for schools partly based on some level of property taxes within each local school district, as well as a combination of state and federal funds. The predominant use of local property taxes to fund school districts worked to the disadvantage of property-poor districts.[19] Property-poor districts taxing themselves at a higher rate were still unable to generate adequate income.[20] This baseline problem, insufficient revenue raising capacity, was compounded by municipal overburden. Property-poor urban districts with fewer funds also had to contend with a greater need for non-education public services such as police and fire protection and road maintenance.[21]

The resulting disparities of the funding system for property-poor school districts gained New Jersey an honorable mention in Jonathan Kozol's book on the failure of public education.[22] Kozol visited Camden, New Jersey in 1990, during the course of Abbott. He witnessed a number of deficiencies: students attempting to learn without the necessary textbooks, students in science labs with

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sphere whose ... ways of life are more expensive and expansive, safer, and more conducive to sound individual development."

[18] Joseph S. Patt, *School Finance Battles: Survey Say? It's All Just a Change in Attitudes*, 34 HARV. C.R.-C.L. REV. 547, 551 (1999).

[19] Margaret E. Goertz, *The Finances of Poor School Districts*, THE CLEARING HOUSE, November 1994, at 74 ("Wealthy suburban communities in New Jersey typically have per-pupil property tax bases that are ten times the size of those in neighboring cities.").

[20] *See* Robert E. Slavin, *After the Victory: Making Funding Equity Make a Difference*, 33 Theory in Practice 98, 98 (No.2) (Spring 1994) ("Before the funding equity decision in New Jersey, the impoverished East Orange district had one of the highest tax rates in the state, but spent only $3000 per pupil, one of the lowest per-pupil expenditures in the state."

[21] *Id.* at 99.

[22] SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS (1991).

improper equipment, and myriad scarcities affecting primarily poor minorities.[23] Similarly, the court in Abbott cited numerous gaps in the quality of public school education in property-poor districts, especially as compared to suburban districts. For example, in science education the court contrasted the prestigious town of Princeton with a number of urban schools. While Princeton's high school had 7 science labs, many urban schools where relegated to using labs built in the 1920s and 1930s:[24] in East Orange teachers wheeled a science cart into a 30 x 6ft science area as a substitute science laboratory.[25] Extra-curricular activities fared no better: East Orange High School's track team was forced to practice in the second floor hallway.[26] Physical facilities were in great disrepair in the poorer districts, presenting grave safety hazards and impossible learning environments.[27] The startling level of these disparities belied any notion of a desirable, much less adequate education in the property-poor districts. Regardless of their positions taken in the course of the litigation, none of the people I interviewed denied the existence of a problem.[28]

An additional problem faced by the property-poor school districts was their lack of political clout. For one, statewide voters are unwilling to pay higher taxes

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[23] *Id.*

[24] *Abbott v. Burke*, 575 A.2d 359, 395 (1990).

[25] *Id.*

[26] Id. at 396.

[27] In 1986, a Paterson school gymnasium floor collapsed *Id.* at 397. In an Irvington school "children [reportedly] attend[ed] music classes in a storage room and remedial classes in converted closets." *Id.* at 397. One Paterson elementary school converted its boiler room into a lunch room and held remedial classes in a former bathroom. *Id.*

[28] In a telephone interview with Leo Klagholz, the Commissioner of Education from 1994 to 1999, on October 21, 1999, Mr. Klagholz noted that all sides thought there was a need for reform.

to support funding for these districts.[29] Suburban districts also have more political clout with state legislatures, adding to the political powerlessness of the plaintiff class.[30]

While most acknowledge the existence of a problem in New Jersey and other states, many dispute the solution. Debates continue over the very cause of the disparities: were the disparities due to insufficient funds or mere mismanagement? The implications of equality in funding were also uncertain: does an adequate education require equality of funding at all? Concerns also persisted about leveling-down wealthier districts, that is, pure funding equality could lead to less funding for those districts. Further uncertainty existed over the content of an adequate education. A number of scholars in law and educational policy have tackled these issues, many acknowledging the importance of money while realizing that it is not the sole factor.[31] These contested issues pervaded the arguments of the defendants and plaintiffs in Abbott. Although cast as a decision about school financing, Abbott was really a hybrid decision, weighing adequacy considerations while recognizing the importance and indispensability of funding. This dual characteristic of the court's approach added to Abbott's complexity.

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[29] *See e.g. infra* Section IV material on the Quality Education Act.

[30] Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072, 1078-79 (1992) (arguing that the political powerlessness of plaintiffs, due to the disproportionate influence over the legislative process and voter unwillingness to pay higher taxes for remedies, was one answer to the legislative inability to formulate a remedy:)

III. *A Brief History of School Finance Litigation*

School financing litigation has been categorized as being comprised of three or four "waves."[32] The wave classifications, while not wholly descriptive of Abbott, do provide a useful historical perspective of education finance litigations.

A. *First Wave: Federal Equal Protection Arguments*

The first wave, starting in the late 1960s and ending in 1973, consisted of claims based upon the Equal Protection Clause of the 14th Amendment. Plaintiffs in this first wave argued that education was a fundamental right safeguarded by the U.S. Constitution. The solution presented by plaintiffs to financial disparities between property rich and property poor districts was that of equalization.[33] They maintained that the same amount of money should be spent on education for all children's education regardless of their district's wealth, or alternatively, that all children were entitled to equal educational opportunities.[34]

These first wave arguments are characterized by the *Serrano v. Priest*[35] (*Serrano I*) decision in California. In Serrano, the plaintiffs challenged the disparity resulting from the local property tax system of financing public school education. Plaintiffs argued that the financing scheme discriminated against the students in poor districts. The California Supreme Court held that the finance

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[31] *See e.g.* Martha Minow, *School Finance: Does Money Matter?*, 28 HARV. J. on LEGIS. 395, 400 (1991) ("money matters for sheer fairness"); Slavin, *After the Victory* (recognizing that money is important, the remaining question is how it should be used).

[32] *See generally* William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, B.C.L. Rev. 597 (May 1994); Kevin Randall McMillan, *The Turning Tide: The Emerging Fourth Wave of School Finance Reform Litigation and the Courts' Lingering Institutional Concerns*, 58 Ohio St. L.J. 1867.

[33] *Id.* at 601.

[34] *Id.* at 601.

scheme's classification of students on the basis of wealth was unconstitutional under the 14th Amendment. The court considered wealth classification as a suspect classification[36] requiring a showing of a compelling state interest to justify such classification. The court also considered education as "fundamental" to "'free enterprise democracy'--that is, preserving an individual's opportunity to compete successfully in the economic marketplace, despite a disadvantaged background."[37]

The first wave ended with *San Antonio Independent School District v. Rodriguez* in 1972.[38] In *Rodriguez*, the United States Supreme Court upheld Texas' school financing scheme which was based on local property taxes. The Court reasoned that education was not within the category of fundamental rights guaranteed by the Constitution and protected under the Equal Protection clause. The Court also rejected arguments that the financing scheme worked to the disadvantage of any suspect class which would require strict judicial scrutiny and justification by a compelling state interest.[39] The Court then reviewed the financing scheme under a rational basis analysis, holding that local property taxes supported the legitimate state purpose of encouraging local school control. *Rodriguez* essentially sounded the "death knell" for first wave claims.[40]

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[35] 487 P.2d 1241 (Cal. 1971).
[36] *Id.* at 1254. The found this to be the case even in the absence of a discriminatory purpose.
[37] *Id.* at 1259.
[38] 411 U.S. 1 (1972).
[39] Id. at 28. The Court refrained from extending this scrutiny to what it viewed as "a large, diverse, and amorphous class, unified only by the common factor of a residence in districts that happen to have less taxable wealth than other districts."
[40] McMillan, supra note 32, at 1870. The Court questioned its legitimacy and competence in devising educational policies. "[T]his case also involves the most persistent and difficult questions

B. *Second Wave: State Equal Protection Challenges*

Although *Rodriguez* foreclosed federal equal protection claims, it left room for a second wave of arguments based on state equal protection claims. Plaintiffs in this second wave, demarcated from 1972 to 1989, echoed the arguments of the first wave in state constitutional terms. Interestingly, Robinson v. Cahill, the predecessor case to Abbott, is said to mark the start of the second wave. Although the New Jersey Supreme Court considered the state's equal protection clause, its decision was based on the state's education clause.

As is inevitable with state-based challenges, the second wave cases led to varied results. While plaintiffs were successful in some states,[41] many more states rejected equality arguments.[42] The second wave became disfavored as a continued method of challenging state funding disparities. Robinson itself refrained from relying on equal protection, recognizing the expansive implications on other areas of state services. The state equal protection arguments have given way to adequacy claims based on state education provisions.

C. *Third Wave: Adequacy Challenges & State Education Clauses*

The third wave of education cases have been classified as a "quality suit."[43] Plaintiffs in this wave argue that children in poorer districts are being denied some minimum level of education mandated by the state's constitution.

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of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. Education, perhaps even more than welfare assistance, presents a myriad of 'intractable economic, social, and even philosophical problems.'" 411 U.S. at 42 (quoting Dandridge v. Williams, 397 U.S. 471, 487 (1970)).

[41] See, e.g., Serrano v. Priest, 557 P.2d 929 (Cal. 1976) (Serrano II).

[42] Thro, supra note 32, at 603.

Third wave arguments are based entirely on particular state constitutional education provisions. Plaintiffs in this wave requested that state courts evaluate the meaning of such clauses and determine the level of education required by the education provision(s).

The nature of the court's duties with respect to this wave, that of interpreting a state constitutional provision, added to its legitimacy. However, problems have arisen in this wave concerning the complexity of delineating the aspects of an adequate education. Issues of competency have arisen, questioning the courts ability to resolve educational issues.[44] Concerns have also arisen about the limits of the courts' powers in intruding upon the traditional legislative sphere of appropriating funds to finance court orders.[45] Consequently, the continued reliance on third wave arguments is uncertain.[46]

Robinson and Abbott fit squarely within the third wave. The court's decisions were premised on its determination of New Jersey's education clause. However, the above "wave" classifications fall short of categorizing the Abbott decisions. First, adequacy arguments were always at the forefront of Abbott. Secondly, while issues of equality were not raised on the basis of state equal protection clauses in Abbott, the court repeatedly stressed the importance of equal funding for regular education between property-rich and property-poor

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[43] *Id.* at 603.

[44] McMillan, supra note 32, at 1893.

[45] *Id.* at 1891.

[46] McMillan suggests that another wave is emerging combining constitutional clauses. He concludes that regardless of the basis of the arguments "it is clear that school finance reformers have had everything but smooth sailing. The tumultuous history of challenges to school finance

districts. Concurrently, the court also refused to limit its focus on equal funding, but also considered the additional needs of students in property-poor districts. One thing is clear: Abbott has been faced with the issues of legitimacy and competency that run throughout all the waves. Additionally, Abbott is indicative of the state-based nature of educational reform litigations. As such, it merits our attention as one of the most successful cases in this area.

IV. ***The Case***

A. *Abbott in Context: Robinson v. Cahill*

Abbott v. Burke is a practical continuation of the Robinson line of cases that started in 1970. To understand Abbott, we must first consider, albeit briefly, what occurred in Robinson. In many ways, Abbott mirrors Robinson. However, what will be clear is that Robinson was in some sense more disruptive than Abbott.

Robinson was brought in 1970 by residents, taxpayers and various municipal officials of Jersey City, Paterson, Plainfield, East Orange, and Camden County, challenging the constitutionality of the financing system for public elementary and secondary schools.[47] The case targeted the system of finance, which relied heavily on local funds to finance public schools:[48] 67% of school

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systems reflect the depth, uncertainty, and complexity of this most expansive area of institutional reform." Id. at 1903.

[47] Robinson v. Cahill, 287 A.2d 187, 189 (1972). The case was not a class action in the current understanding of such suits. The case was brought against several state officials including William T. Cahill, New Jersey's Governor at the time.

[48] Originally challenged the State School Aid Law of 1954, L. 1954, c.85, amended by N.J. STAT. ANN. § 18A:58-1. The suit was amended to challenge the Bateman Act, State School Incentive Equalization Aid Law, L. 1970, c. 234, N.J. STAT. ANN. § 18A:58-1, which took effect during the course of the litigation (July 1, 1971). 287 A.2d 187.

funding was by local taxation.[49] Robinson resulted in significant clashes between the court and the state legislature, and eventually resulted in the state's first income tax.[50]

Robinson I Robinson first gained the New Jersey Supreme Court's attention after Superior Court Judge Botter declared the educational funding system unconstitutional on equal protection grounds (state and federal[51]), and other state constitutional grounds. Judge Botter noted that while New Jersey's public school system ranked high in terms of nationwide expenditures on schools,[52] glaring disparities were evident in poorer districts.[53] Judge Botter further noted that disparities in per pupil expenditures, teacher salaries, and other areas, were not due to a lack of effort on the part of the poorer districts.[54] Judge Botter concluded that the system discriminated against students in districts with low property wealth and "discriminate[d] against taxpayers by imposing unequal burdens for a common state purpose."[55] Judge Botter also held that the system

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[49] Federal aid accounted for 5% of public school costs and state aid accounted for the remaining 28%. 287 A.2d at 191.

[50] Paul L. Tractenberg, *The Evolution and Implementation of Educational Rights Under the New Jersey Constitution of 1947*, 29 RUTGERS L.J. 827, 904 (1998).

[51] The trial court's decision came down two months before the U.S. Supreme court's landmark decision in *San Antonio Independent School District v. Rodriguez*. There the court scrutinized challenges to Texas' educational system under a rational basis standard, effectively foreclosing educational challenges based on the federal constitution's equal protection clause. 411 U.S. 1.

[52] Judge Botter noted that 1970-71 figures ranked New Jersey as third in the nation in per pupil expenditure, sixth in average salaries of secondary school teachers, and eighth in average salaries of elementary school teachers. 287 A.2d at 199, citing Research Division, National Education Association, Rankings of the States, 1971.

[53] The court cited evidence of disparities regarding teacher certification, noting that a higher percentage of teachers in wealthier districts had advanced degrees. 287 A.2d at 200. The court also pointed out inadequate facilities in the poorer districts and the lack of basic supplies such as updated textbooks in those districts. Id. at 200-202.

[54] *Id.* at 194. These districts had higher tax rates, but less funding for education. *Id.* at 198

[55] *Id.* at 217.

failed to meet the standard for a "thorough" education as required in the State Constitution.[56]

The New Jersey Supreme Court affirmed this decision in Robinson I.[57] The court, however, based it's decision on the New Jersey Constitution's "thorough and efficient education" clause[58] ("T&E clause") instead of federal and state equal protection guarantees relied on in the lower court. The court's opinion was decided one year after the U.S. Supreme Court's decision in *Rodriguez*,[59] which rejected the compelling state interest analysis for inequalities in education and on the basis of wealth. With respect to the state constitutional argument, the court expressed restraint,[60] based on its consideration of the wide-scale implications of requiring state obliged services to be treated as a fundamental right. Such a requirement, the court reasoned, would encompass numerous services and would be impossible to maintain.[61] The court also entertained, although it did not conclusively reach, the notion that local control of education may be a compelling state interest.[62]

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[56] Judge Botter defined "thorough" as embodying "the concept of completeness and attention to detail. It means more than simply adequate or minimal." *Id.* at 211. This was a lesser basis for the decision. The opinion relies more heavily on the equal protection justifications. Interestingly, the New Jersey Supreme court in Robinson I and the Abbott decisions would base its opinions primarily on the "thorough and efficient" clause.

[57] Robinson v. Cahill, 303 A.2d 273 (1973).

[58] "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 this State between the ages of five and eighteen years." NJ Const. (1947) Art. VIII, § 4, para. 1

[59] 411U.S. 1 (1972).

[60] "We hesitate to turn this case upon the State equal protection clause. The reason is that the equal protection clause may be unmanageable if it is called upon to supply categorical answers in the vast area of human needs, choosing those which must be met and a single basis upon which the State must act." 303 A.2d 273.

[61] *Id.* at 285.

[62] *Id.* at 286.

Although the court in Robinson I rejected the equal protection arguments, it fleshed out the meaning of the T&E clause, thereby expanding New Jersey's educational commitment. The court defined the T&E clause as requiring equal educational opportunity which "must be understood to embrace that educational opportunity which is needed in the contemporary setting to equip a child for his [or her] role as a citizen and as a competitor in the labor market."[63] The court also held that the delivery of education was ultimately the State's responsibility, meaning that local failure to provide this level of education had to be modified at the state level.[64] Utilizing this standard, the court held that the State failed to fulfill its obligation to educate all children ages five to eighteen as mandated by the Constitution, due to the significant differences in dollar input per pupil.[65] In focusing on per pupil dollar input, the court made clear that mere differences in dollar input was not in itself problematic, noting that disadvantaged students may require more input.[66] The court's flexible definition of the T&E clause, as well as its refusal to restrict education to issues of funding, played a substantial role in Abbott. These themes would lead to an expansive notion of public education in New Jersey.

Robinson II and Robinson III Robinson II was a barebones decision dealing with the issue of remedy. The court reiterated its earlier opinion that

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[63] *Id.* at 295.
[64] *Id.* at 294. The court noted that the State's responsibility was to amend any violation no matter what the cause. "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.
[65] 303 A.2d at 294.
[66] *Id.* at 297-298.

whatever relief was reached had to be prospective[67] and decided to delay further action until December 31, 1974,[68] giving the Legislature an opportunity to adopt appropriate measures.[69] The court again extended the Legislature's time to act in Robinson III.[70] The court set a date[71] for oral arguments to consider what relief should be granted, whether the court had the power to order changes in the financing scheme, and other issues concerning relief.[72]

Robinson IV to the Public School Education Act of 1975

Approximately four months after Robinson III,[73] the court in Robinson IV authorized a provisional remedy applicable to the 1976-77 school year.[74] Robinson IV recommended significant increases in per-pupil funding.[75] Chief Justice Hughes, writing for the court, described the court's action as "the constitutional obligation of the court to act,"[76] considering that "[the court has] more than once stayed [its] hand."[77] The court, however, refrained from extending its order beyond the upcoming school year, reasoning that it was "inappropriate

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[67] . 306 A.2d 65 (1973), cert. denied sub nom 414 U.S. 976.
[68] *Id.* at 66. Robinson II was decided on June 19, 1973. Therefore the court gave the Legislature over a year to take some remedial action. The time was even longer, because the legislature had to make whatever action it took effective by July 1, 1975.
[69] The court also retained jurisdiction. *Id.*
[70] 335 A.2d 6 (1975) (mem.) (January 23, 1975).
[71] March 18, 1975.
[72] 335 A.2d 7. The court limited this inquiry to the upcoming school year, leading Judge Pashman to write the first dissenting opinion on the Robinson cases. Judge Pashman considered it the court's affirmative duty to respond immediately to the constitutional problems, despite potential confusion and unpopularity. *Id.* at 10.
[73] Robinson IV was decided on May 23, 1975.
[74] 351 A.2d 713 (1975). The case was decided on May 23, 1975.
[75] Alternatively, Judge Pashman, concurring in the court's decision to take action, but dissenting on the extent of the court's action, noted that the changes were not very dramatic. "...we are effecting only about a 3% change in the overall allocation of educational resources." Id. at 730.
[76] 351 A.2d at 716.
[77] *Id.*

for the court ... to undertake, a priori, a comprehensive blueprint for 'thorough and efficient' education, and to seek to impose it on the other branches of government."[78] The court also declined to order increased spending in a number of areas including facilities aid, transportation, and aid to atypical students.

Robinson IV is in many ways a harbinger of what was to come in Abbott. None of the Justices doubted the power of the court to decide the constitutionality of the education finance system in Robinson I. The parties repeatedly sought the attention of the court to determine whether its initial ruling was being complied with.[79] The court's decision in Robinson IV to take additional steps led to internal confusion and dissent.[80] Uncertainty was evident in the court's consideration of implementing a "thorough and efficient" education in light of the Legislature's failure to do so. Between Robinson I and Robinson IV, the court waited for the executive and legislative branches to take action. By Robinson IV, the court recognized the inevitability of its further involvement, at some level, in determining a remedy for the underscored violation. The tension then evolved regarding the appropriate role for the court: distancing themselves from the remedial process,

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[78] *Id.* at 718.

[79] 351 A.2d 713, 718 ("numerous motions for intervention and for relief and directions by the court were filed by various parties both before and after December 31, 1974.").

[80] *Id.* at 730 (Pashman, J. concurring in part and dissenting). In his dissenting opinion, Judge Pashman criticized the court's failure to engage in a more comprehensive redistribution of funds. The court's initial reluctance to take any remedial measures, as well as its decision to do so regardless of its hesitancy, drew much criticism. On the court, Judge Pashman partially dissented to the limited extent of the court's decision. Judges Mountain and Clifford dissented to the court's involvement in appropriating funds on the basis of separation of powers. Their main argument was that the court should not engage in the province of appropriations which was clearly reserved for the legislature. *Id.* at 736-740. "The power to appropriate is *singularly* and *peculiarly* the province of the Legislature." They found it especially problematic that the court had not really fleshed out the meaning of a "thorough and efficient" education. *Id.* at 735.

walking the tight rope of reviewing legislative obligations, or taking over that obligation. These core issues of institutional reform litigation are first raised in Robinson IV. These issues would later have bearing in Abbott: questions of the appropriate role of the court, when the court should defer to the legislature, and how much deference should be given considering the repeated failure of the legislature to make any changes.

The legislature enacted the Public School Education Act of 1975,[81] making the court's order moot. The court upheld the Act as facially constitutional in Robinson V[82] over plaintiffs objections that substantial financial disparities would persist. The court expressed its approval that for the first time the state articulated a standard for a "thorough and efficient" education that applied to all students in the state.[83] The court also approved of the Act's procedural mechanism for implementation of these standards and financial commitment to effectuating them.[84]

The End of Robinson? The court's involvement did not end with its approval of the 1975 Act in Robinson V. Five months after its decision, the Legislature had not approved funding for the Act.[85] In Robinson VI,[86] the court ruled that public schools should be closed unless the legislature appropriated sufficient funds to remedy the constitutional wrong. Once more the court drew

[81] c.212, L.1975, N.J.S.A. 18A:&A—1 et seq.
[82] 355 A.2d 129 (1976) (per curiam).
[83] *Id.*
[84] *Id.*
[85] Robinson v. Cahill, 358 A.2d 457.
[86] *Id.*

internal criticism.[87] The injunction went into effect during the summer, July 1, 1976, due to the Legislature's failure to appropriate any funding to the 1975 Act. The Legislature struggled with the thought of enacting a state income tax, eventually adopting the State's first income tax which would supposedly aid in fully funding the Act.[88] The court dissolved its injunction on July 9, 1976,[89] and momentarily ended its involvement in New Jersey's public education financing system.

Implications of Robinson: Abbott was brought as a challenge to the 1975 Act that resulted from the Robinson cases. Some of the participants in Abbott were also present in Robinson.[90] As such, it is important to note some interesting aspects of Robinson. First, Robinson led to the institution of the state's first income tax, and involved the use of an injunction. The resulting implementation of an income tax shows the pervasive and groundbreaking effects of the decision. It highlights the core political nature of public education. Second, the court ruled that the "thorough and efficient" education clause obligates the state to provide education. Third, the court defined the "thorough and efficient" education clause in a broad and flexible manner, setting a standard that was based on adequacy as opposed to funding. While the court recognized the importance of funding, it also clearly required some level of competitiveness and preparedness in the labor

[87] Judge Mountain again questioned the legitimacy of the court's action. *Id.* at 461-62. (Mountain, J. dissenting). Judge Pashman objected to the seemingly counterproductive move, and encouraged the court to take a more proactive role considering the legislature's failure to do so. *Id.* at 462, 465 (Pashman, J. dissenting).

[88] Tractenberg, *Educational Rights*, supra note 5, at 904.

[89] The court dissolved its injunction in Robinson v. Cahill, 360 A.2d 400 (1976).

market as a standard. This reverberates throughout Abbott, and complicates attempts to categorize Robinson as a funding case.

B. Abbott: The Next Leg

According to the plaintiff's attorneys, Abbott is the continuation of Robinson.[91] The complaint was filed in 1981 in the Superior court on behalf of students in Camden, East Orange, Irvington, and Jersey City and others similarly situated. The defendants included the Commissioner of Education, Director of Budget and Accounting, the state Treasurer, and the state Board of Education. The plaintiffs initially sought a declaratory judgment that the finance provisions of the 1975 Act deprived the students of a "thorough and efficient" education as required by the State Constitution. The plaintiffs argued that the 1975 Act's reliance on local property taxes continued disparities between property poor and property wealthy districts in the adequacy of instruction, resources, and the deterioration of facilities.

Abbott I: A False Start

From the start, the case was very contentious. The state defendants, early on, asserted that the matter should not be argued in the courts, positing the Department of Education and the Legislature as the proper forums.[92] They moved to dismiss the case on the basis that administrative procedures should be exhausted. Two years after the complaint was filed, the trial court dismissed the

[90] For example, Professor Paul Tractenberg, founder of the Education Law Center, continued his crusade to reform the system in Abbott.
[91] Interview with Professor Paul Tractenberg.
[92] Priscilla Van Tassell, *2 Suits Attack Constitutionality Of Financing For Schools*, N.Y. TIMES, December 27, 1981, at Section 11NJ, 1,c.5.

case for failure to exhaust administrative remedies. The appellate division reversed the decision, holding that the constitutional question was beyond the education commissioner's power to decide.[93] The plaintiffs struggled to keep the case in court.

In Abbott I, the New Jersey Supreme Court agreed with the trial court that the administrative procedures in the Department of Education should be exhausted.[94] This proceeding entailed a hearing conducted by an administrative judge, and then reviewed by the Commissioner of Education. The court reasoned that this step was necessary to create an adequate factual record that should be reviewed by a tribunal that would have the requisite expertise and training.[95] The court also reasoned that there was simply insufficient evidence upon which to determine the constitutionality of the Act as applied.[96] In doing so, the court laid some positive guidelines for the plaintiffs, allowing the plaintiffs to introduce statewide evidence to challenge the Act.[97] This enabled the plaintiffs to later use comparisons between the suburban districts and the less wealthy urban districts, highlighting the stark disparities between the two.

The court expressed its hope that the factual development of the case would be expedited.[98] The court although seemingly sympathetic to the plight of the plaintiff class, nonetheless relegated the case to a long and drawn out administrative process. The case wound through the administrative process for

[93] 477 A2d 1278 (1984)
[94] 495 A.2D 376 (1985)
[95] *Id.* at 394.
[96] *Id.* at 394.
[97] *Id.* at 380, n.1.

five long years, during which time the inevitable happened: no change. Judge Lefelt, the administrative judge, held the Act unconstitutional as applied, noting extreme disparities of educational programs between property-rich and property-poor districts.[99] Commissioner Saul Cooperman in turn rejected Judge Lefelt's decision, stating instead that the Act was sufficient to meet the T&E standard. The Commissioner also determined that the Act authorized him to require districts to raise funds or to take over a district if that district failed to meet the standard. The State Board of Education then adopted the Commissioner's decision, but recommended that the Act's monitoring and corrective provisions be strengthened. The plaintiff's were virtually in the same position as when they originally filed the complaint. They had, however an arsenal of factual support for their arguments developed through the administrative record.

Abbott II: Setting a Standard

The case came before the Supreme Court again in Abbott II,[100] described by the plaintiffs' attorneys as the most critical stage: the liability stage and the standard-setting stage.[101] The court found the Act unconstitutional as applied to 28 property-poor school districts. The court noted the abundance of evidence showing the failure of the system with respect to these districts.

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[98] *Id.* at 394.
[99] No. EDU 5581-88 (OAL 1988).
[100] 575 A.2d 359 (1990)
[101] Interview with David Sciarra and Paul Tractenberg. David Sciarra described Abbott II as "groundbreaking."

In reaching its decision, the court grappled with the ongoing debate in the education field about funding equality and adequacy.[102] The court recognized the limitations of the equality argument, pointing to its probable leveling down effects.[103] The court also acknowledged the importance of funding in reaching an adequate level of education: "We are not satisfied that a thorough and efficient education is being provided in certain districts; therefore we cannot disregard expenditure disparity as irrelevant to whether such an education is being delivered."[104] The court thus rejected the either/or pull of arguments against funding parity and left the possibility open for providing students in property-poor districts with funding for unique services.[105] The court then adopted a leveling up approach, reconsidering the definition of the "thorough and efficient education" clause.[106] It reframed the provision to require placement of students from the property-poor districts at a level where they could compete with students from property-rich districts.[107]

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[102] 575 A.2d 366.

[103] *Id.* The court noted that if a state average is set at a state average, and strict limits are placed on exceeding the average, then leveling down would result. "[A] significant number of suburban districts would be compelled to substantially *decrease* their educational expenditures, in effect, to diminish the quality of education now provided to their students." *Id.*

[104] *Id.* at 374.

[105] Id. at 404. The court stated that it was unwilling to remove "funding from the constitutional obligation unless, we were convinced that the State was clearly right. ... The inconclusiveness of the research is conceded, at least to the extent of admitting that although money is not the main determinant of the quality of education no one is quite convinced what *is*, nor totally confident about what works." *Id.* The then goes on to cite a number of instances where money did make a difference in quality, noting the importance of evidence of high quality education in richer suburbs and the Commissioner's statutory power to require local school districts to increase their budgets.

[106] *Id.* at 367 ("First what a thorough and efficient education consists of is a continually changing concept.").

[107] *Id.* at 372. The court stated: "We said, in effect, that the requirement of a thorough and efficient education to provide '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,' [citing

The court used strong language in critiquing the system and defining the future path the state should take. The court described the plight of the students in urban schools as possibly intractable: "The extent of failure is so deep, its causes so embedded in the present system, as to persuade us that there is no likelihood of achieving a decent education tomorrow, in the reasonable future, or ever."[108] Yet, despite the difficulties, those students deserved of a real effort to change their situations: "[I]n New Jersey there is no such thing as an uneducable district, not under our Constitution."[109] The court also rejected arguments by the state that programs similar to those provided in the suburban districts were not constitutionally required. The court stated that while not ratifying any particular programs, some attention must be paid to what the suburban districts were doing. After all, "if these factors are not related to the quality of education, why are the richer districts willing to spend so much for them?" Finally, the court criticized the state's continued reliance on property tax as a substantial portion of its financing scheme.[110]

Robinson] meant that poorer disadvantaged students must be given a chance to be able to compete with relatively advantaged students." *Id.*

[108] 575 A.2d at 376"[F]or ten years and more there has been no thorough and efficient education in these districts... [T]hese districts are just too poor to raise the money they are theoretically empowered to." *Id.*

[109] *Id.* at 403.

[110] "These intractable differences of wealth and need between the poorer and the richer, and the "discordant correlations" within a poorer district between its students' educational needs and its ability to spend, are more than the present funding system can overcome." *Id.* at 384.

The court listed the districts that were to be the focus of the State's remedial efforts.[111] These districts were labeled "Special Needs Districts" (SNDs).[112] The court then outlined a three-step approach to redress the constitutional deficiency: 1) per pupil expenditures must be "substantially equivalent to those of the more affluent districts,"[113] 2) the "special disadvantages [of the SNDs] must be addressed,"[114] and 3) the state was required to address the inadequate facilities of these districts.

At the critical stage of ordering a remedy, however, the court followed the course of the first Robinson decisions. The court left it up to the Legislature to devise and implement any remedy.[115]

The court's combination of bold words and timid enforcement pleased and distressed the plaintiffs. David Sciarra considered the opinion "revolutionary" because the court set the benchmark for a "thorough and efficient" education at the level of the wealthier districts.[116] However, the decision was limited to this standard setting function. Professor Tractenberg described the opinion as fleshing out what a thorough and efficient education meant, although having "no

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[111] The districts, labeled "Abbott districts" would later include 29 school districts. New Jersey's major urban areas comprised the Abbott districts, including Camden, Newark, Elizabeth, Jersey City, Orange, and Trenton.

[112] *Id.* at 408-409. The court noted that other districts could be added if necessary. The SNDs were selected based on several indicators of poverty including per capita income, occupations levels, education levels, and percent of residents below the poverty line.

[113] *Id.* at 408.

[114] *Id.*

[115] "The Legislature may devise any remedy, including one that completely revamps the present system, in terms of funding, organization, and management, so long as it achieves a thorough and efficient education as defined herein for poorer urban districts. ... Despite the experience over these many years, we continue to believe that the Legislature will conform." Id. at 409-410.

[116] Interview with David Sciarra, ELC, January 26, 1999.

remedial teeth."[117] Abbott II left the plaintiff with a powerful opinion, but reliance on the state to devise a constitutionally permissible standard.

Despite the court's reticence, its decision met with public criticism. For example, state senator, John Dorsey of Morris County, said: "The court is requiring working-class people residing in middle-income communities who drive around in Fords to buy Mercedes for people in the poorest cities because they don't have cars."[118] The court granted the State great leeway in developing specific remedies. The court's refusal to enter the remedial process, allowed the political process to determine and implement permissible remedies. When the process did run its course, the powerlessness of the plaintiff class and the entrenchment of the unconstitutional school system was crystallized.

The court's faith in the political process was not without support, considering the political environment surrounding the case. Shortly before the court's decision, the newly elected governor, Democrat Jim Florio, expressed his desire to improve the urban schools, and indicated his willingness to push for increased financing as part of his education plan.[119] Almost immediately following the decision, Governor Florio and his newly appointed Commissioner of Education, John Ellis, pushed a massive redistribution plan through the state legislature, entitled the Quality Education Act (QEA).

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[117] Interview with Professor Paul Tractenberg.
[118] Kathleen Bird, *Abbott's Shrewd Activism, Deference*, N.J. LAW JOURNAL, June 14, 1990, at 1.
[119] Robert Hanley, *Florio Urges Added Aid In City Schools*, N.Y. TIMES, May 25, 1990, at B1, c.5.

The QEA met with immense resistance by property-rich school districts.[120] The resultant political turmoil forced Governor Florio to push for an amendment of the QEA. The QEA II, the amended legislation, shifted over $450 million originally intended for the SNDs to a property tax relief program.[121] Many state legislators enthusiastically supported this scaled-down version of the plan out of sheer political survival.[122] Some state commentators noted the inevitability of further court involvement and implored the court to take further action.[123]

The Education Law Center once more sought judicial relief on June 12, 1991, filing a motion with the court to maintain jurisdiction of the matter and find the new legislation facially unconstitutional. The court rejected the plaintiffs motion and remanded the case to the Superior Court.

Two years later, Judge Levy of the Superior court held the QEA II unconstitutional.[124] Judge Levy found the QEA II could not meet the requirements set in Abbott II. Judge Levy found that the QEA II arbitrarily determined the funds necessary for property-poor districts and was based on outdated information to

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[120] *See e.g.*, Robert Hanley, New Jersey's Wealthy School Districts Gird for Battle on Aid, N.Y. TIMES, September 1, 1990, Section 1; 23, c.2.

[121] Peter Kerr, *Democrats Urge Big Shift in Florio Plan*, N.Y. TIMES, January 8, 1991, at B1.

[122] *Id.* ("One Democratic Senate aide described the proposal as an attempt to emasculate the parts of the tax plan that shifted hundreds of millions of dollars in state aid from affluent school districts to poorer ones, and make Democratic candidates more attractive in November's legislative elections.")

[123] Editorials, *Blind* Faith, N.J. LAW JOURNAL, December 23, 1991, at 14 ("[W]e have no reason blindly to trust that the Department of Education will properly and efficiently manage the mandated reforms or be permitted to do so by our elected officials. If the department, the Legislature, and the governor fail to act, their failure may leave the judicial branch no choice but to impose its own accountability standards and, perhaps, an independent watchdog over the department.").

[124] 1993 WL 379818 (N.J.Super.Ch.).

calculate funding. The case wound its way up to the State Supreme Court again in Abbott III.

Abbott III: The State's Failure to Remedy

In Abbott III,[125] the court held the QEA II unconstitutional. The court in a per curiam opinion, held that the QEA II failed to assure substantially equivalent expenditures by the richer and poorer districts for regular education.[126] The legislation failed to include a monitoring mechanism to ensure that the funds directly benefited the special needs districts.[127] The QEA II further failed to study the supplemental needs of the special needs districts in calculating aid programs.[128]

The court stressed the importance of remedying the disparities affecting the special needs districts. The court reiterated the T&E requirement it announced in Abbott II, that children in the special needs district receive a "substantially equivalent" education to children in the wealthier districts.[129] The court restated its opinion that money was indispensable, although not the only solution.[130]

Although the court's language indicated its full commitment to improving the system, the court again declined to enter any remedial orders. Instead the court relied once more on the legislature and the executive to address the requisite improvements: "We anticipate that the legislative and administrative

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[125] 643 A.2d 575 (1994).
[126] *Id.* at 578.
[127] *Id.* at 579.
[128] *Id.* at 579.
[129] *Id.* at 580.

response to this decision will address fully the State's obligation to verify that the additional funding for the special needs districts mandated by *Abbott* significantly enhances the likelihood that the school children in those districts attain the constitutionally prescribed quality of education to which they are entitled."[131]

The court in Abbott III seemed to be developing a pattern of invalidating legislative responses to its decisions without outlining specific remedies.[132] The court made one significant change, however, suggesting its growing impatience with the State: It retained jurisdiction of the case. This marked a turning point in the case, because it enabled the plaintiffs to seek relief directly from the Supreme Court without going through the lower courts. The court's deference was coming to an end.

Abbott IV: The End of Deference

The court's repeated deference to the Department of Education and Legislature ended in Abbott IV. Abbott IV involved the Comprehensive Educational Improvement and Financing Act of 1996 (CEIFA),[133] another legislative attempt to comply with the court's directive to improve the education of SND students.

In April 1996, months before the passage of CEIFA, the Education Law Center had grown increasingly impatient with the progress of any reform, filing a

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[130] *Id.* at 580.
[131] *Id.* at 579.
[132] *See e.g.*, Note (Nicholas S. Warner), *Toward Parity in Education: Abbott v. Burke and the Future of New Jersey School Systems*, 5 TEM. POL. & CIV. RTS. L. REV. 183 (1996) (arguing that the decision has allowed the finance debate to continue indefinitely through its continuos circular invalidation of legislative responses to the court's decisions).
[133] N.J.S.A. 18A.7F-1 to -34.

motion that implored the court to intervene.[134] The motion sought an order from the court directing the State to reduce any remaining disparity between the SNDs and the wealthier districts by at least fifty percent. The State argued that the motion was premature and that the court could not grant relief because it lacked the power to authorize appropriation of funds.[135] In response the plaintiffs' attorneys expressed absolute doubt that the State would ever, on its own, improve the SNDs.[136] In September 1996, the court denied the motion without prejudice,[137] because new legislation was under consideration.

The State's response to Abbott III and the court's continued directives for improvement was to enact CEIFA.[138] At first blush, CEIFA seemed to be responding to much of the court's language in Abbott II and III that required the State to consider the educational needs of the students in the SNDs and ensure their fulfillment through funding. CEIFA set academic standards to be achieved by all students in seven areas including math, science, and social studies.[139] CEIFA also included a funding mechanism to ensure the programs' support, and funds for supplemental programs such as alternative schools. Upon closer

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[134] Plaintiffs' Brief in Support of Motion in Aid to Litigants' Rights, p.6, n. 3 (June 6, 1997) (recounting the plaintiffs' attempts to get earlier court intervention).

[135] Brief In Response to Plaintiffs' Motion in Aid of Litigants' Rights, May 17, 1996.

[136] "It is now clear that, absent immediate intervention, the State intends to prolong, and very likely exacerbate, the sever constitutional deprivation endured so long by plaintiff school children." Plaintiff's Reply Brief, 4, May 22, 1996.

[137] The court allowed the plaintiffs' to renew their motion if no remedial legislation by December 31, 1996.

[138] CEIFA was passed by the Legislature on December 19, 1996, and signed by Governor Christine Todd Whitman on December 20, 1996. Plaintiffs' Brief in Support of Motion in Aid to Litigants' Rights, 1 (June 6, 1997).

[139] Other areas were visual and performing arts, comprehensive health and physical education, language arts literacy, and world languages.

examination, however, CEIFA failed to address many of the court's concerns. It failed to address the improvement of facilities. The funding mechanism fixed the cost of delivering the core curriculum based on statewide per-pupil averages, but allowed wealthier districts to spend at the same level (a grandfather clause). Further lessening its appeal, CEIFA based its funding mechanism on a hypothetical school district that bore no relation to the actual needs of the property-poor districts. David Sciarra described CEIFA as "clearly unconstitutional" and was surprised that Governor Whitman signed the legislation.[140]

Plaintiffs again filed a motion for the court to intervene and order the elimination of the remaining disparity.[141] Plaintiffs also implored the court to designate a Superior Court Judge or Special Master to identify supplemental programs needed in the SNDs.[142] The court agreed with the Plaintiffs' on both counts, significantly changing its strategy from one of deference to activism.

In Abbott IV,[143] the court found CEIFA unconstitutional as applied to the Special Needs Districts. The court especially disapproved of CEIFA's use of a hypothetical model district.[144] The court found CEIFA's failure to consider extra services required for SNDs students and its failure to link actual needs to funding

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[140] Interview with David Sciarra.
[141] Plaintiffs' Brief in Support of Motion in Aid to Litigants' Rights, 1 (June 6, 1997).
[142] *Id.* at 60.
[143] 693 A.2d 417 (1997).
[144] "Not one of the twenty-eight SNDs conforms with the model district, and CEIFA does not provide the funding necessary to enable those districts to achieve conformity. The model district thus assumes, as the basis for its resource allocations and cost projections, conditions that do not, and simply cannot, exist in these failing districts." *Id.* at 430.

problematic.[145] The court also determined that CEIFA created a two-tiered system of regular education funding allowing wealthier districts to continuing raising funds above the suggested cap while fixing the poorer districts at significantly lower amounts.[146] But the holding that CEIFA was unconstitutional was nothing new in what seemed to be an established pattern of striking down politically feasible State responses.

What differentiated Abbott IV from the court's earlier decisions, was the court's order of a remedy. First, the court recognizing its limitations[147] and its duty to act,[148] ordered the State to increase regular education funding to ensure parity between the SNDs and the wealthier districts by the 1997-98 school term. In ordering this remedy, the court restated the relevance of per-pupil expenditures to students in the SNDs.[149] The court's order led to an infusion of funds[150] in the SNDs. The State complied, although cautiously and with much oversight.[151] Many

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[145] "Because CEIFA does not in any concrete way attempt to link the content standards to the actual funding needed to deliver that content, we conclude that this strategy, as implemented by CEIFA, is clearly inadequate and thus unconstitutional as applied to the special needs districts." *Id.* at 429

[146] *Id.* at 432 ("CEIFA effectively caps the poorer districts at an amount that by definition will be insufficient to provide a thorough and efficient education.").

[147] *Id.* at 439 ("The judicial remedy is necessarily incomplete; at best it serves only as a practical and incremental measure that can ameliorate but not solve such an enormous problem. It cannot substitute for the comprehensive remedy that can be effectuated only through legislative and executive efforts.")

[148] *Id.* at 439 ("The finiteness of judicial power, however, does not diminish the judicial obligation to vindicate constitutional rights.")

[149] *Id.* at 439-40 ("Increased funding at parity is our chosen interim remedy because it is beyond dispute that per-pupil expenditures remain a relevant and important element in the attempt to assure constitutionally sufficient educational opportunity.").

[150] The funds added up to millions of dollars. For example, Newark received $19 million, Jersey City $26.7 million, and Perth Amboy $10.9 million. Maria Newman, *court-Ordered Windfall Sends Schools on a Shopping Spree*, N.Y. TIMES, March 29, 1998, Section 1, at 33.

[151] Telephone interview with Dr. Larkin, Superintendent of New Brunswick, March 26, 1999. The Department of Education set out to send teams of auditors and former school officials to document

districts welcomed the millions of dollars in funds, using it to purchase basic supplies and hire new personnel.[152] For the first time, the court's orders had a perceivable impact on the property-poor districts.

Second, the court in Abbott IV set in motion a judicially supervised process to study the special needs of the students in the SNDs and identify necessary supplemental programs.[153] The court remanded the case to the Superior Court to supervise the necessary hearings and report back to the court. The court also suggested the appointment of a Special Master to aid in the hearings.[154] Finally, the court retained jurisdiction of the case, setting a date by which the results of the hearing should be presented. Essentially, the court ended its deference,[155] and placed Abbott squarely in the ranks of institutional reform cases.

Remand Hearings and Special Master

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use of the funds. John Mooney, *School Aid Coming with Strict Rules, Whitman Outlines Plan for Budget and Audits*, RECORD, May 28, 1997, at A1 ("'We will not send any district a blank check,' Whitman said at a news conference in Trenton. ... 'Where the money is spent must be specified and well-documented and be clearly shown to benefit the child in the classroom, not some bureaucrat in the district office,' Whitman said.").

[152] *See e.g.*, Maria Newman, *Court-Ordered Windfall Sends Schools on a Shopping Spree*, N.Y. TIMES, March 29, 1998, Section 1, at 33 (Perth Amboy used its funds to purchase new books for every classroom, teacher training; hire two new vice principals (one for the high school and one for an elementary school) in charge of curriculum and instruction; pay teachers extra to conduct intensive reading classes after regular school hours; and purchase new computers.); Kelly Heyboer, *Parity Funds Bring Along Perks and Optimism in 'Need' Districts*, STAR-LEDGER, September 4, 1997, at 1 ("Sixth-grade teacher Lisa Catanzarite knows what parity funding means to her. Her classes won't laugh through their science lessons anymore because their tattered text books still feature pictures of people with bell bottoms and afros. New science books are on the way.").

[153] 693 A.2d at 444.

[154] *Id.* at 445.

[155] "Although it remains our hope that needed comprehensive relief eventually will come from those branches of government more suited to the task, there can be no responsible dissent from the position that the court has the constitutional obligation to do what it can to effectuate and vindicate the constitutional rights of the school children in the poverty-stricken urban districts." *Id.* at 445.

Judge King, a presiding Judge of the Appellate Division, was assigned to conduct the remand proceedings. Dr. Allan Odden, an education specialist of the University of Wisconsin, was designated as the Special Master. Judge King conducted hearings for several weeks in November and December of 1997. The hearings included review of a study that the Department of Education had completed in response to Abbott IV. The hearings also included testimony from several DOE administrators and Commissioner Klagholz. Plaintiffs presented education and sociology experts as witnesses. Plaintiffs also presented school administrators as witnesses, including superintendents and vice-principals.[156] Odden sometimes asked his own questions of the witnesses, [157] and met with both sides separately.[158] Both sides presented information on early childhood programs, after-school programs, alternative education programs, and a number of other supplemental programs.[159] Both Judge King and Professor Odden focused on recommended programs. [160] Professor Odden submitted a report to Judge King. Judge King then recommended a comprehensive program to the Supreme Court, including full-day kindergarten for five year olds and full-day pre-kindergarten for three and four year olds.

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[156] Proposed Findings of Fact, Conclusions, and Recommendations on Supplemental Programs, 5-7 (December 19, 1997). The plaintiffs also subpoenaed several Department of Education officials to testify.

[157] Telephone interview with Dr. Leo Klagholz, former Commissioner for the Department of Education, October 21, 1999.

[158] Telephone interview with Nancy Kaplan.

[159] Proposed Findings of Fact, Conclusions, and Recommendations on Supplemental Programs (December 19, 1997); Defendants' Proposed Findings of Facts (December 19, 1997).

[160] Interview with Dr. Leo Klagholz.

The recommendations were presented to the Supreme Court in Abbott V.[161] As in the lower court hearings, the parties disagreed on the extent of many of the supplemental programs. For example, the plaintiffs' wanted a full-day pre-kindergarten[162] as opposed to the one-half day recommended by the State. But they also agreed on programs such as kindergarten, school-to-work programs, and college transition programs. In sum, the court had to contend with an abundance of very specific education issues.

Abbott V: The Court's Comprehensive Remedial Plan

Justice Handler, writing for a unanimous court, ordered the state to implement a number of programs. Specifically, the court ordered the state to implement the whole school reform program proposed by the Commissioner in the remand hearing. Whole school reform combines the Success-for-All[163] program, which focuses on reading, writing, and language arts, with the Roots and Wings program, which focuses on math, social studies, and arts programs.[164] The court also directed that the state provide full-day kindergarten for five year olds, one-half day pre-kindergarten, a community services coordinator in middle and secondary schools, increased security in many schools, and a number of other supplemental programs. The court further directed that the State undertake plans to repair and build facilities.

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[161] 710 A.2d 450 (1998).

[162] Dr. Odden also recommended full-day pre-school for both three and four year olds.

[163] Success-for-all was developed by Dr. Robert Slavin, the state's expert in education. The state advocated one of five possible variations. The Commissioner was required by the court to allow districts to choose among the five variations, as long as they comported with DOE's guidelines.

[164] 710 A.2d 450.

Although Abbott V focused primarily on the implementation of supplemental programs, the court reiterated the importance of funding.[165] The court held that Abbott IV's authorization of parity funding for regular education should continue in addition to funding for supplemental programs.[166] The court warned that its approval of certain programs did not allow withdrawal of funding for existing programs and basic programs.[167] However, much of the funding above parity would be based on the district's demonstrated need to the Commissioner.[168] Despite its assertions about the importance of funding, the court stated its recognition that the legislature was ultimately responsible for funding.[169]

The court, in essence, outlined a comprehensive program which the Department of Education was to implement. The court did not portend to delineate every aspect of the new education programs. The Department was to devise guidelines and methods of implementation, and the court agreed with the Department's timetables for the programs.[170] Many programs also depended on district assessments of need.

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[165] "[E]ven though it is not feasible at this time to ascertain or mandate a specific funding level, adequate funding remains critical to the achievement of a thorough and efficient education." *Id.* at 469.

[166] 710 A.2d at 459.

[167] "Implicit in any determination that existing appropriations are sufficient is the condition that funds may not be withdrawn from or reallocated within the whole-school budget if that will undermine or weaken either the school's foundational education program or already existing supplemental programs." *Id.* at 469.

[168] *Id.* at 469.

[169] "The provision of adequate funding, however, ultimately remains the responsibility of the Legislature. ... [W]e anticipate that the Legislature will be fully responsive to that constitutional call." *Id.* at 469-470.

[170] Although most of the programs were to be implemented "as soon as feasible." The court agreed that implementation should start at a fast pace. For example, the court required the implementation of early childhood programs by September 1999. Implementation of whole school reform was suggested in stages, with most schools implementing some programs by September 2000.

Having outlined such significant remedial measures, the court immediately sought to retreat from its activism. Justice Handler expressed significant hope in correcting the system, and noted that the DOE expressed commitment to the need for substantive educational programs.

> Disputes inevitably will occur and judicial intervention undoubtedly will be sought in the administration of the public education that will evolve under these remedial standards. Nevertheless, because of the Commissioner's strong proposals for educational reform and the Legislature's clear recognition of the need for comprehensive substantive educational programs and standards, we anticipate that these reforms will be undertaken and pursued vigorously and in good faith. Given those commitments, this decision should be the last major judicial involvement in the long and tortuous history of the State's extraordinary effort to bring a thorough and efficient education to the children in its poorest school districts.[171]

The court also sought to distant itself from anticipated disputes about the implementation or modification of existing programs, additional programs, and funding. In that vein, the court directed that disputes take place within the DOE and the Office of Administrative Law if no resolution is reached.[172] Further involvement by the court would not be exercised until after the parties followed the full administrative procedure.[173] The court essentially withdrew from the matter.

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[171] *Id.* at 455.

[172] *Id.* at 473.

[173] The process is as follows: The Commissioner would first make a determination. If the school or district disagrees with the Commissioner's finding, the case would then be transferred to the Office of Administrative Law. The ALJ's recommendation could be accepted or rejected by the Commissioner. At that point, either the Commissioner or the school could then appeal to the Board of Education. The Board's decision could then be appealed to the Appellate Division (intermediate state court), and from there appealed to the state's Supreme Court. *Id.* at 473.

V. **Abbott as a Model of Effecting Institutional Change**

A. *Background Issues*

Abbott was a necessarily lengthy and complicated case. Such protracted litigations can be avoided if the legislature takes the court's cue to devise a constitutionally permitted remedy, following the initial recognition of a violation. However, such an alternative defeats the whole basis of structural reform litigations. The very nature of the contested issues required a prolonged dialogue between the court, the immediate participants, and the state's policymakers. By challenging core issues of educational finance and adequacy, the plaintiffs were ensured of a long process. The very subject matter of the case necessitated the drawn out nature of the case.

The case was also unavoidably political. Abbott dealt with seemingly intractable societal issues of race, class, and public school education. These issues touched members of the property-poor urban districts and property-rich suburban districts in a very personal manner. It is worth mentioning the obvious, that is, unlike a prison reform litigation or similar suits to improve a particular state facility, Abbott dealt with an issue that was not neatly contained. It affected a wide-variety of people: parents, students, administrators, and other state actors. At certain points throughout the case, several state legislators even went as far as recommending a constitutional amendment to eliminate the "thorough and efficient" clause.[174] This made settlement unlikely; although key education

[174] *See e.g.* Wayne King, *Shift in School Fund Plan Gains in Trenton*, N.Y. TIMES, June 30, 1992, at B4 (One sponsor of the amendment "said the object was to make the Legislature responsible for providing educational opportunity for all children in the state while removing the courts from the

officials supported the plaintiffs' cause, the court's involvement shielded them from political repercussions.[175] This characteristic of the case added to its complexity and lengthened the road to implementation.

B. *State Supreme Court Involvement*

Abbott had to be conducted at the highest state court level. This was necessary considering the core issues with which the court dealt. A key example of this, requires us to consider the course of the case between Abbott I and Abbott II. In Abbott I, the court relegated the case to a lengthy administrative process, which eventually led to a trial court review. This system was unworkable; it left the parties without any tangible resolution of the issues; the defendants continued to argue that the educational disparities were of no constitutional consequence, while the plaintiffs continued to argue that the system required fundamental change. The trial court simply could not resolve those issues without a declaration from the state's high court. The court, as a state institution comprising of a number of judges, added more legitimacy to the case than would one trial court judge. This was even more so due to the court's initial involvement in educational funding. The court's approval of the 1975 Act in the Robinson line meant that it was the only judicial body to which the defendants would adhere.

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school finance issue to the greatest extent possible."); *see also* Abby Goodnough, A *Constitutional End Run on Financing for Schools*, N.Y. TIMES, February 1, 1998, at Section 14NJ, 2.

[175] Telephone interview with Dr. Leo Klagholz, former Commissioner for the Department of Education, October 21, 1999. Dr. Klagholz stated that the politically charged atmosphere surrounding the case required the court's involvement for any real progress to take place. He also stated that he welcomed the court's action because it facilitated his desire to aid students in the poor communities.

C. *A Progressive Court*

The plaintiffs' attorneys were in a privileged position given the progressive history of the court. The court's commitment to such issues guaranteed the plaintiffs success.[176] More specifically, the court's expressed commitment to the concerns of property-poor students was evidenced in Robinson. The New Jersey Supreme Court was also well-known for its progressive decisions in a number of areas. Most notably, the Mount Laurel decisions indicated that the court was willing to tackle politically unpopular issues. Abbott's main advocate on the court, Chief Justice Wilentz, also indicated his willingness to make politically unpopular decisions.

> Chief Justice Wilentz knew that our responsibility to adjudicate society's most contentious legal issues made judges a lighting rod for criticism. He understood that judging was not a popularity contest, and that the acceptance of judicial authority to render unpopular decisions depended on public acceptance of the authority, competence, and independence of judges.[177]

D. *The Court's Notions of Self-Preservation*

Despite the court's expressed commitment to the concerns of the plaintiff class, the court exercised considerable deference throughout the case. With the exception of Abbott IV and V, the court sought to refrain from ordering any remedy

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[176] *See generally* Henry R. Glick, *Policy Making in Trial Courts, in* THE AMERICAN COURTS: A CRITICAL ASSESSMENT 87, 111 (John B. Gates & Charles A. Johnson eds., 1990) (noting the New Jersey Supreme Court's innovations in various areas, namely initiating the right-to-die cases.). One testament to the court's progressive bent was its initiation of internal studies regarding the use of the courts by historically under-represented groups. *See e.g.* New Jersey Supreme Court Task Force on Minority Concerns, *Differential Use of Courts by Minority and Non-Minority Populations in New Jersey*, (November 1993).

[177] The Honorable Gary S. Stein, *A Tribute to Chief Justice Wilentz*, 49 RUTGERS L. REV. 641, 641 (1997).

to the education system. This, despite its many pronouncements that education in the property-poor districts was inadequate.

As a purely descriptive matter, the court's deference and its later activism partially fit within the "deferrer" and "catalyst" categories of Susan Sturm's[178] typology of judicial approaches to the remedial process. Sturm's deferrer, very much like the court throughout Abbott, "entrusts the defendants with the responsibility for the remedial process. ... The structure of judges daily experience and their faith in the judiciary's normative and symbolic power predispose them to believe that orders will be respected simply because they emanate from a court."[179] The catalyst creates a process that encourages the "parties to participate in a deliberative process to formulate and implement an effective remedy."[180] The court's use of a hearing and the appointment of a special master following Abbott IV can be seen as an attempt to get the parties to consider realistic means of reforming the system. The court's predominant stance, however, was that of the deferrer.

The court seemed wedded to this deferential position even in the face of repeated state failures. One way of understanding its deference is to view the court as making legitimizing moves. The court engaged in a series of legitimating moves that respected the separation of powers, gave credence to its later activism, and led to an overall beneficial result for the plaintiffs. These legitimizing steps are identifiable throughout the course of the case. The court's

[178] Susan Sturm, *Resolving the Remedial Delimma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805 (1990).
[179] *Id.* at 849-50.

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[178] Susan Sturm, *Resolving the Remedial Delimma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805 (1990).
[179] *Id.* at 849-50.

decision in Abbott I constituted such a legitimizing move. While the case was relegated to the administrative process for a number of years, the plaintiffs ultimately benefited as a result. Considered as a legitimizing step, it becomes clear that the court sought to allow the full development of the arguments.[181] The Education Law Center researched and presented voluminous evidence of disparities.[182] In addition, this collection of data added significant force to the plaintiffs' arguments.[183] In sum, Abbott I led to the development of a record of inadequacies that added merit to the court's ruling in Abbott II. The court's deference in Abbott I to III also added credence to its activism in Abbott IV and V. In Abbott II, the court gave the legislative and administrative branches an opportunity to develop a remedy. In Abbott III and in interim decisions to Abbott IV, the court again allowed the political process to find remedial solutions.

The court undoubtedly followed a deferential pattern through much of the case, although it criticized the state's progress in improving the condition of poor urban schools. The court's deference to the political process became more problematic as the case went through several rounds of invalidating legislative attempts to address the problems identified by the court. Regardless of the

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[180] *Id.* at 856.

[181] The court's decision have also stemmed from its original acceptance of the 1975 Act.

[182] Although the research was not complete, the Education Law Center garnered compelling evidence of disparities that was later cited by the court.

[183] *See e.g.* Lisa Brennan, *School Funding Advocates Say Fight to go on after Morhueser*, N.J. LAW JOURNAL, October 30, 1995, at 1. (Noting the vast amount of information the ELC gathered under Morhueser's leadership on per pupil spending, proportion of aid to localities, disparities in achievement scores, dropout rates, physical plant facilities).

strength of the court's opinions, all unanimous except Abbott IV,[184] state actors repeatedly failed to seriously correct the problems in the property-poor districts. Indeed, the court seemed to be involved in a continuous pattern of invalidating state attempts to correct the constitutional violation articulated by the court. As represented by Governor Florio's failed attempts at improving education in the property-poor districts, the political choices led the legislature and the administration to suggest compromised remedial solutions. These solutions, evidenced by the QEA II and CEIFA, were then found inadequate by the court.

The court's frustration[185] with this circular pattern of the case reached a highpoint in Abbott IV. As such, it seemed imperative that the court reinforce its authority by changing its deferential pattern. In Abbott IV, the court engaged in a self-preservative move. The court justified its order by pointing to it's earlier posture toward the State throughout the course of the litigation:

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[184] With the exception of Abbott IV all of the court's decisions were unanimous. A breakdown of the Justices in each decision follows: Abbott I: Justice Handler (author), Chief Justice Wilentz, and Justices Clifford, Pollock, O'Hern and Garibaldi joined the opinion. Abbott II: Chief Justice Wilentz wrote the opinion. J. Clifford, Handler, Pollock, O'Hern, Garibaldi, and Stein joined. Abbott III: a : per curiam opinion - CJ Wilentz, Justices Clifford, Handler, Pollock, O'Hern, Garibaldi, and Stein. Abbott IV: Justices Handler (author), Pollock, O'Hern, Stein and Coleman; Justice Garibaldi dissented, arguing that although CEIFA was not perfect it was a good start; and that the court should accord deference to the expertise of the legislative and administrative branches. Chief Justice Poritz did not participate because of earlier involvement as Attorney General in CEIFA. Abbott V: Justices Handler (author), Chief Justice Poritz, Pollock, O'Hern, Garibaldi, Stein, and Coleman.
Preschool Implementation Order: Chief Justice Poritz (opinion), O'Hern, Garibaldi, Stein (concurrence), Coleman, Long. Justice Verniero did not participate due to his participation as Attorney General in Abbott IV and V).

[185] The court's frustration was evident in at least one justices questions during the oral arguments that preceded Abbott IV. Justice Gary Stein reportedly asked "Why hasn't the state done what this court required? ... It seems so basic and fundamental that poor children need extra help." *See* David Glovin, *School Funding's Day in Court: Justices Grill Attorney General*, THE RECORD, March 5, 1997.

> That approach usually is both prudent and preferred in constitutional jurisprudence, and the Court has taken that approach in the past...[citing to Abbott I to III and Robinson I] In light of the constitutional rights at stake, the persistence and depth of constitutional deprivation, and in the absence of any real prospect for genuine educational improvement in the most needy districts, that approach is no longer an option.[186]

In Abbott V, the court again departed from its earlier deference, mandating significant reforms and prioritizing certain educational standards for implementation. Similar court intrusions into areas such as educational reform have been greatly criticized; issues of competency and capacity inevitably surface. The court proceeded down this thorny path by relying on the lower court hearing, and the resulting expert opinions and recommendations. Even this reliance is suspect, as some argue that courts have imperfect information to select one expert's evaluation over the other.[187] While this critique is warranted, the court exercised considerable restraint before entering into this arena. The court was also very careful to leave determination of most issues within the discretion of the Department of Education, and adopted most of the recommendations made by the Commissioner.[188] The court immediately retreated from further encroachment into the administration of education, withdrawing from the implementation process.[189] Although this does not necessarily make the court's action acceptable, it does put it in perspective. The court's action seemed

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[186] *Id.* at 445.

[187] *See e.g.* DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 22-23 (1977).

[188] Interview with Leo Klagholz and David Sciarra.

[189] "We must reach the point where it is possible to say with confidence that the most disadvantaged school children in the State will not be let out or left behind in the fulfillment of that constitutional promise. Success for all will come only when the roots of the educational system -- the local schools and districts, the teachers, the parents, and the children themselves -- embrace the educational opportunity encompassed by these reforms." 710 A.2d at 474.

necessary after years of continued findings of unconstitutionality. It provided all parties with some resolution and a system within which to work.

The court's initial deferential stance was superceded by the its increasing impatience with the state's progress. Both positions added to the court's legitimacy as a policy-making institution. The court's departure from this deferential posture, can be construed as a re-legitimizing move. The circular pattern that was developing throughout the case threatened to de-legitimize the court. The court's pronouncements of unconstitutionally seemed weaker with each new state failure. The political climate, namely the inability of the property-poor districts to realistically rally political support in the Legislature,[190] further warranted this activism. It became necessary for the court to re-legitimize itself by outlining a remedy.

The court's dual position is important to note. It shows that even a very progressive court will refrain from issuing wide-scale remedies unless it is left with no alternatives. When the court does go further than issuing general pronouncements, it is done as an attempt to preserve the court's position as a normative force in policy-making. I consider this to be a form of self-preservation. The following statement by Chief Justice Wilentz evidences this notion of self-preservation:

> We in the Judiciary have neither the sword nor the purse with which to rule. Our power exists only so long as we have the respect of the people, only so long as we are perceived as dispensing justice fairly, efficiently, and

[190] Governor Florio's attempts provides a good example of this problem. His effort to amend the condition of the property-poor districts met with such severe opposition that his plan had to be scaled down significantly. The resulting QEA II, which was more palatable to the public, did not pass constitutional muster.

> promptly. If we do not take hold of the means by which to accomplish this aim, if we do not take responsibility for the justice which we are charged with dispensing, if we allow others to deprive us of the means to do the job and do it well, then we cannot pretend to be independent. And that we must be.[191]

This notion of institutional preservation prolonged the case. This brings us back to the court's stance as a deferrer. The Abbott court's initial position was one of deference due to its integral belief that its pronouncements would lead other state actors to reform the system.

E. *Separation of Powers: An Accomodationist View*

The assumption that its pronouncements would lead to some change, evidences the court's posture in the state as a policy-maker. The court's activism, whether or not deemed as a way to preserve this position, did not seriously interrupt concepts of separation of powers. In New Jersey, the doctrine of separation of powers is written in the Constitution.[192] Despite this fact, the Court has taken a flexible approach to the doctrine, not considering it an "absolute division of powers, but a cooperative accommodation among the three branches of government."[193] This should not be dismissed as similar to the federal system where administrative law blurs of the lines traditionally demarcated in

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[191] Chief Justice Wilentz, Separation of Powers—Judicial Independence in the 1980s, Address at the Seton Hall University School of Law (April 30, 1982), *in* 49 RUTGERS L. REV. 835, 848-49. While primarily concerned with the court's administration of justice, this speech also indicates the Chief Justice's concern with maintaining the court's integrity by acting in the face of legislative inaction.

[192] "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." NJ Const. (1947) Art. III, para. 1.

[193] Honorable Marie L. Garibaldi, *The New Jersey Experience: Accommodating The Separation Between the Legislature and the Judiciary*, 23 SETON HALL L. REV. 3 (1992).

adjudicative, legislative, and executive powers. The court engages in a conscious dialogue between the other branches in their primary functions.

This is reflected in a number of decisions regarding the separation of powers clause. The court's initial jurisprudence on the clause seemed to connote protectionism of its own role. In *Winberry v. Salisbury*,[194] the court held that its rulemaking power was not subject to legislative override.[195] In later opinions, however, the court highlighted the flexibility of the clause. For example, in *Knight v. City of Margate*,[196] the court allowed some infringement of judicial powers; upholding a statute that restricted the business practices of municipal court judges. The court rejected arguments that the statute unconstitutionally infringed upon the court's authority over judges. In doing so, the court suggested that legislative action within the traditional province of the judiciary may be valid depending on the "legitimacy of the governmental purpose ... and the nature and extent of its encroachment ... ."[197] More generally, the court noted the interdependence of the branches, stating that the doctrine creates a "symbiotic relationship between the separate governmental parts."[198] Finally, in *Communications Workers of America v. Florio*,[199] the court clearly asserted an accomodationist notion of separation of powers, stating that there is no violation

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[194] 74 A.2d 406 (1950).
[195] The court was interpreting another state constitutional provision that allowed the court to make rules governing the administration of the courts.
[196] 431 A.2d 833 (1981).
[197] *Id.* at 842.
[198] *Id.* at 840.
[199] 617 A.2d 223 (1992).

of the separation of powers principle where cooperation is necessary and does not interfere substantially with the exclusive functions of the other branches.[200]

While this jurisprudence does not necessitate the court's far-reaching remedial actions in Abbott, it does put the Abbott decisions in context. Essentially, it demonstrates the court's receptiveness to policy-making. In a revealing article, Justice Garibaldi, provides insight into the court's conceptions of its quasi-legislative and executive functions.[201] Garibaldi, considered somewhat of a moderate on the Court,[202] argues that there comes a point when the Court is forced to act due to the legislature's failure to act or inability to resolve an issue. In such circumstances, the court serves as (1) catalyst, or (2) a shield to administrators and legislators seeking to avoid political problems.[203] "In New Jersey, however, the most significant method for passing lawmaking responsibilities on to the courts has been the legislature's simple failure to act. The stalemate sometimes results from deadlock, the inability to reach consensus on the issue, the fear of political repercussions, or simply the inability to resolve an extraordinarily difficult issue facing society."[204]

From the standpoint of the court, remedial action is required on an important issue when it is presented to the court and the legislature does not or

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[200] *Id.* at 234. The court, however, held that legislative restrictions on the executive's implementation of employee layoffs were unconstitutional

[201] Honorable Marie L. Garibaldi, *The New Jersey Experience: Accommodating The Separation Between the Legislature and the Judiciary*, 23 SETON HALL L. REV. 3 (1992).

[202] *See* Heather MacGregor, *Garibaldi: A Centrist on Any Other Court*, 151 N.J.L.J. 224 (January 19, 1998). Incidentally, Justice Garibaldi authored the *Communications Workers* decision.

[203] Garibaldi, *The New Jersey Experience*, at 15. She provides the Mount Laurel case as an example of the latter argument.

[204] *Id.* at 13.

cannot fully address the issue. Abbott was a clear example of this. The Court provided the legislative and administrative branches with a number of opportunities to resolve the problems it noted. However, their repeated failures led the court to undertake educational reform. The court forged ahead regardless of its initial qualms, due to this notion of "cooperative accommodation." The court's initial deferential position attests to its hesitance to engage in such policy-making. But its notion of accommodation made the court more receptive to arguments for reforming public institutions. Although the Court did not resort to this action in the first instance, repeated warnings were followed by a more assertive requirement for change.

F. *Sustaining a Long-Term Litigation*

One of the key components to the success of Abbott was the ability of the plaintiff's attorney's to challenge state actors for almost twenty years. Abbott did not reach the implementation stage through settlement or a consent decree. In this respect, Abbott is very much a traditional litigation with the parties disputing every issue until the court issues its decision. Nancy Kaplan, one of the assistant attorney generals representing the state defendants, noted that the case never lent itself to settlement.[205] Commissioner Klagholz also thought the prospect of a settlement was grim due to political forces. He noted that although the Department of Education was generally supportive of a resolution, the political nature of the issue prevented any real settlement.[206] The plaintiffs' attorneys

[205] Telephone interview with Nancy Kaplan, March 18, 1999.
[206] Telephone interview with Dr. Leo Klagholz, October 21, 1999.

ability to sustain the case positioned them as an extra-governmental policy institution within the state's education system.

The plaintiffs were represented by the Education Law Center ("ELC"), a nonprofit organization founded in 1973, with the express mission of pursuing equal opportunities in education for poor children in urban areas. Professor Paul Tractenberg, the ELC's founder and a continued participant in Abbott, has expressed a basic distrust of the state to implement positive changes for poor students on its own initiative.[207] The ELC's leadership has similarly pursued the interest of poor children without any thought of compromise. Marilyn Morheuser, the center's director during most of Abbott, doggedly pursued the cause of poor school children; she was considered a crusader by many.[208] David Sciarra took over the position as director in 1995.[209] Mr. Sciarra equally considers the mission of ELC as being the "voice for children and students who attend public school, ... particularly urban public schools."[210] In addition, the ELC is ideologically supported by many of the superintendents in the special needs districts.[211]

This is not to say that the ELC made no political mistakes; indeed whether it did is irrelevant. Its selling point was its persistent presence. The tenacity of

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[207] Interview with Professor Paul Tractenberg.

[208] *See e.g.*, Lisa Brennan, *School Funding Advocates Say Fight to go on after Morhueser*, N.J. LAW JOURNAL, October 30, 1995, at 1 (Benjamin Clarke, a former deputy attorney general on the case said: "'She wore it on her sleeve that she was doing it for the kids. With most people, it would make you gag. But with her it was a fact. There aren't too many lawyers willing to put so much of themselves into a cause.'").

[209] Morhueser died of Cancer related causes in October 1995. Lisa Brennan, *School Funding Advocates Say Fight to go on after Morhueser*, N.J. LAW JOURNAL, October 30, 1995, at 1.

[210] Interview with David Sciarra, Education Law Center, January 26, 1999.

[211] Telephone interview with Dr. Ronald F. Larkin, Superintendent, New Brunswick, March 26, 1999; interview with Dr. Larry Leverett, Superintendent, Plainfield, March 26, 1999.

the ELC's leadership placed the concerns of parents and students in the property-poor districts in the public arena. The ELC occupied a noticeable space in New Jersey politics, as an institution representative of students in the property-poor districts. It took up a permanent presence, consistently showing its willingness to lobby for changes in the press, the legislature, as well as the court. The ELC became an educational institution in the state. Having such an institutional presence contributed to the success of the litigation.

VI. *Implementation*

The plaintiffs' attorneys welcomed the decision in Abbott V. Indeed David Sciarra applauded the decision's grounding in actual programs that would benefit SND students.[212] Many State participants also welcomed the decision. Dr. Klagholz, who resigned as Commissioner after setting up implementation regulations and initiating the implementation procedures,[213] thought the decision was vital to the improvement of the special needs districts.[214] A number of school administrators also welcomed the decision.[215] The Department of Education immediately issued preliminary regulations shortly after Abbott V,[216] describing in general terms the various elements of the court's order. In a memorandum

[212] Interview with David Sciarra.
[213] The office is now held by David Hespe, the state's former First Assistant Attorney General. Dr. Klagholz now teaches at Richard Stockton State College of New Jersey. Ron Marsico and Nick Chiles, *Klagholz to Leave as Commissioner of Education: Surprise Move to Teach College Effective April*, STAR-LEDGER, February 10, 1999, at 15.
[214] Telephone interview with Dr. Leo Klagholz.
[215] Telephone interview with Dr. Larkin, Superintendent of New Brunswick, March 26, 1999; Telephone interview with Dr. Leverett, Superintendent of Plainfield, March 26, 1999.
[216] *See* Chapter 19A: Implementation of Court Decision in Abbott v. Burke at http://www.state.nj.us/njded/abbotts/abbottregs2.htm.

program's implementation did not include all the aspects required by the court.[222] The Department of Education addressed the criticisms by pointing to the difficulties inherent in implementing such wide-scale reforms.[223] The Department also has had to contend with dissatisfaction in the school districts. Many school administrators complain that they were left out of the process of devising the reform programs.[224] These issues of accountability and quality still persist today.

The court, contrary to its expressed hope in Abbott V, has renewed its involvement in the case in the area of early childhood programs. A debate developed early into the implementation phase regarding the content of the court's early childhood education order. School officials contended that the decision required certified teachers to conduct the pre-school programs,[225] while the Department of Education grappled with the extent of these programs. The State's initial response, supported by Governor Whitman, suggested heavy use of child-care centers that lacked certified teachers. At the same time, other state

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[222] Associated Press, *Schools Starting Reforms: City Schools Among 72 Making Changes*, Trenton Times, September 24, 1998 (Critics noted that less than ½ of the schools were using the court approved model).

[223] Wendy Ruderman, (AP) *Education Reform Takes Time, Klagholz Cautions: But 319 Schools Face Deadlines*, THE RECORD, November 19, 1998, L07 (In a speech to Board of Education members the Commissioner stated that turning the schools around would take some time).

[224] Administrators in two districts, Elizabeth and Passaic, have gone so far as to seek an injunction blocking imposition of the new rules on their districts without public input into the content of those rules. In the first few months following Abbott V the Legislature allowed the Commissioner of Education to draft regulation without following the usual public process in an effort to meet the court's deadlines. The new Commissioner, Hespe, has faced much opposition in seeking to continue that expedited process. Thomas Martello, (AP), *Teachers, Two Districts Sue to Stop Imposition of School Rules*, THE RECORD, May 14, 1999.

[225] Jonathan Jaffe, *Elizabeth Wants to be Sure Early Schooling is Worth It, Officials All for Certified Teachers in Centers that Will Handle Young Students in the Fall*, STAR-LEDGER, February 21, 1999, at 40.

officials expressed support for use of certified teachers.[226] Approximately one year after Abbott V, the Education Law Center filed a motion with the court challenging the State's use of day-care staffers instead of certified teachers for preschool programs.[227] The court after entertaining arguments on the motion,[228] issued a decision clarifying its position on early childhood education. The court held that the state should use one certified teacher for every 15 students, implement substantial educational standards, and that the State may contract with day-care programs that comply with state regulations.[229] The court then withdrew once more from the case, reaffirming the jurisdiction of school matters in the Office of Administrative Law.

The court's foray into the implementation process indicates its continued commitment to righting the State's school system as applied to the poorer districts. At the same time, the court seeks to remove itself from the debate and seemingly hopes that its full-fledged involvement from Abbott IV through Abbott V will lead the other branches to implement real changes. However, the court's participation in the process makes its removal somewhat questionable. It is uncertain whether this was the court's last initiative during the implementation

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[226] *See e.g.* Lisa L. Colangelo, *Preschool Program Differences Remain*, ASBURY PARK PRESS, March 25, 1999, 4.
[227] David Glovin, *Group Asks Court to Enforce PreSchool Order*, THE RECORD, July 31, 1999, A3.
[228] Jean Rimbach, *State Lets Down Poor Students, Justices Told*, THE RECORD, October 14, 1999, A3 ("Justices raised a number of issues with attorneys, including the need for and availability of certified teachers; the state mandate that child-care centers be used; and the absence of curriculum standards for the programs").
[229] *Abbott v. Burke*, N.J. LAW JOURNAL, March 13, 2000 (Digest).

process, or whether the court will ignore its own advice and continue to play an active role.[230]

VI. ***Conclusion***

Abbott v. Burke was a successful litigation for students in the property-poor districts. The implementation process indicates that state actors are making efforts to comply with Abbott V; although there remains disagreements about the extent of the improvements required. At a minimum, Abbott successfully focused the attention of state policymakers on improving the schools in the property-poor districts.

Abbott provides us with a model for state institutional reform litigation. Most state-based challenges to institutions such as public school systems will necessarily be highly political and protracted. Abbott informs us that such litigations must be conducted at the highest level of the state judiciary. Additionally, the outcome of the litigation will depend on the court's commitment to progressive issues. Court specific concerns could derail such litigations. In Abbott, the court exercised much deference to the administrative branches, refraining from issuing any specific remedial orders. The court's notions of self-preservation, however, prompted it to change this practice after several failed state remedial attempts. Plaintiffs will necessarily encounter state-specific concerns regarding the relationship of the legislative and executive branches to the judiciary. In New Jersey, the court's jurisprudence on separation of powers, increased the likelihood that the court would order specific reforms. Finally,

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[230] At least one justice indicated some possibility of more involvement. "'How many more groups of children must we sacrifice? Justice James H. Coleman, Jr. asked Attorney General John J. Farmer, Jr., who argued the case for the state." Deborah Yaffe, *Justices Question Delays of Preschool in Urban Districts,* ASBURY PARK PRESS, October 14, 1999, A3.

plaintiffs in such litigations must be able to sustain a long-term litigation. The Education Law Center maintained such a permanent presence in the state as an advocate in educational reform, that it arguably acted as an extra-governmental educational institution. The combination of these factors contributed to the success of Abbott.