Abbott v. Burke: Reaffirming New Jersey's Constitutional Commitment to Equal Educational Opportunity

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NOTE

ABBOTT V. BURKE: REAFFIRMING NEW JERSEY’S CONSTITUTIONAL COMMITMENT TO EQUAL EDUCATIONAL OPPORTUNITY

I. INTRODUCTION

Ever since the ratification of the United States Constitution over two hundred years ago, “America has . . . been regarded as the land of opportunity—of equal opportunity.” And for over one hundred years, the states have sought to imbue education with this principle of equal opportunity by establishing public school systems open to all children. In fact, the people who fought so hard and argued so elo-


2. All fifty state constitutions contain explicit provisions that require the state to establish and maintain public school systems open to all children. The degree of imperative in these constitutional commands varies substantially from state to state. For a complete listing of these provisions, see Allen W. Hubsch, Education and Self-Government: The Right to Education Under State Constitutional Law, 18 J.L. & EDUC. 93, 134-40 (1989). For an analysis of these provisions with respect to their use in public school finance reform litigation, see William E. Thro, Note, To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation, 75 VA. L. REV. 1639 (1989).

Generally, state voters approved these constitutional amendments during the latter half of the nineteenth century. But prior to [this] great reform, education was a private affair for both rich and poor. The elite went to truly private schools and the poor were left essentially with the
quently to gather support for the creation of public schools originally intended that these schools would “permit the poor to compete” in society and would be their “strongest hope for rising in the social scale.” As Professors Coons, Clune, and Sugarman explain in their book, Private Wealth and Public Education, “the sine qua non of a fair contest system—of equality of opportunity—is equality of training. And that training is what public education is primarily about.”

Nearly every American would endorse the general principle that all children—rich and poor, black and white—deserve an “equal educational opportunity.” But there is a “vast gulf” between this noble

charity school (financed by the rich) and the rate-bill school (the rate-bill was a tuition-like device which “taxed” the parents of attending children). Not only were both inadequate, they became infamous . . . . The system of private education had become closely identified with a stratified, elitist society, essentially an aristocracy.

COONS, supra note 1, at 47. See infra notes 4, 6.

3. COONS, supra note 1, at 4; see also infra note 6.

4. See COONS, supra note 1, at 5. As Thaddeus Stevens once explained so well: [Public education] is objected to because its benefits are shared by the children of the profligate spendthrift equally with those of the most industrious and economical habits. It ought to be remembered, that the benefit is bestowed, not on the erring parents, but the innocent children. Carry out this objection and you punish children for the crimes or misfortunes of their parents. You virtually establish castes and grades founded on no merit of the particular generation, but on the demerits of their ancestors; an aristocracy of the most odious and insolent kind—the aristocracy of wealth and power.


5. Id. at 3; see also David Chang, The Bus Stops Here: Defining the Constitutional Right of Equal Educational Opportunity and an Appropriate Remedial Process, 63 B.U. L. REV. 1, 3 n.2 (1983) (contending that “[t]rue ‘merit’ can be rewarded only when the process gives an equally fair chance to each person.”).

6. See COONS, supra note 1, at 1, 6. “Equality of educational opportunity” does not mean uniform schools; it merely means “equality of opportunity through education,” and an equal chance to succeed. Or, as Coons, Clune, and Sugarman put it, “[t]he crucial value to be preserved is the [equal] opportunity to succeed, not the uniformity of success.” Id. at 3; see also Abbott v. Burke, 575 A.2d 359, 368 (N.J. 1990) (Abbott II) (holding that the New Jersey Constitution’s “thorough and efficient education” clause requires that the state provide all students with an “equal educational opportunity”). Practically, this means that “poorer disadvantaged students must be given [an equal] chance to be able to compete with relatively advantaged students” and to contribute to the society populated by both. Id. at 372; Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (contending that, “[t]oday, education is perhaps the most important function of state and local governments . . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”) (emphasis added); Paul D. Carrington, Financing the American Dream: Equality and School Taxes, 73 COLUM. L. REV. 1227 (1973) (stating that “[t]he right to equal educational opportunity is the American Dream incarnate as constitutional law. That every child should have a fair opportunity to rise above his humble
principle and the dismal reality that children in property-poor school districts receive grossly inferior educational opportunities. As the Supreme Court of New Jersey recently pointed out, "[t]oday the disadvantaged are doubly mistreated: first, by the accident of their environment and, second, by . . . [public school systems that provide them with] . . . an inadequate education."

When the states began to create public school systems over one hundred years ago, they divided their territory into hundreds of geographical sub-units, local school districts. States also granted the local school board of each district the authority to levy taxes that would provide funding solely for the public schools within each district's boundaries. But this territorial division into local school districts invariably created gross and substantial disparities among districts in the total amount of property wealth located within those districts.

Historically, most public school funding has been provided by ad
valorem taxes levied upon the property located within each district, with the state government merely supplementing these local property taxes.12 By using school financing formulas13 that placed a "heavy

12. According to one prominent education finance expert, in 1985 local property taxes amounted to forty-five percent of the total revenue raised for public education in America. Charles S. Benson & Kevin O'Halloran, The Economic History of School Finance in the United States, 12 J. Educ. Fin. 495, 506 (1985). In the 1920s and 1930s that figure was over eighty percent, and until the 1970s that figure was over fifty percent; see also JOHN D. PULLIAM, HISTORY OF EDUCATION IN AMERICA 90 (1969) (noting that, "[b]etween 1930 and 1960, the percentage of locally raised public school funds dropped from about 83 to 55 percent."). This is one of the characteristics that made the foundation plan system of financing public education so inequitable. See COONS, supra note 1, at 63-95.

13. In 1923, George D. Strayer and Robert M. Haig wrote a report entitled Financing of Education in the State of New York. COONS, supra note 1, at 63 n.1. In this report, "there were two pages 'almost hidden' toward the end" that formed the "conceptual basis" of what later became known as the foundation plan. Id. Until 1960, nearly every state employed some version of the Strayer and Haig foundation plan as the method of financing for its public schools. Id. In their report, Strayer and Haig explained the philosophical basis of the public school financing plan that they proposed. Id. at 64. Distilled to its essence, the philosophical goal of the foundation plan is equal educational opportunity; the practical goal of the foundation plan is for the state to determine and support some minimum level of public school funding that will provide all students with a "basic and substantial educational offering." Id. at 68. However, the actual operation of the foundation plan has deliberately fallen far short of the lofty rhetoric. Id. This large gap between the rhetoric and reality of the foundation plan has caused a perpetuation of what Coons, Clune, and Sugarman call "the equalization myth," the myth that all dollars distributed under the foundation plan are equalizing. Id.

The basic mechanics of the foundation plan are relatively simple and easy to understand. Under the Strayer-Haig approach, the state first establishes a dollar level (called the foundation level) of per-pupil funding, which it guarantees to every school district. In order to qualify for this funding guarantee, a district must impose a minimum property tax rate (called the minimum participation rate or MPR) upon its residents. The state also determines what the minimum participation rate will be. If a local district that taxes its property at the MPR raises an amount of school funding that is lower than the guaranteed foundation level, the state will pay to the district the difference between the guaranteed foundation level of per-pupil funding and what the district actually raised by levying at the MPR. Id. For example, if the guaranteed foundation level of funding is $500 per pupil and the MPR is 1% ($1 per $100 of property wealth), a district that taxes at the MPR but raises only $300 per pupil (because its property wealth is $30,000 per pupil) will receive $200 per pupil in state foundation aid. But this simplified description of the foundation plan provides only a glimpse of the tip of the iceberg. Lurking beneath the surface is a system that deliberately discriminates against property-poor districts on the basis of their relative poverty. Id. at 97-160; see also Infra note 21 and accompanying text. The primary cause of the discriminatory nature of the foundation plan is the concept that the guaranteed foundation level of per-pupil funding is the minimum level of school funding that a district will provide for its students. Under the foundation plan, local school districts are permitted, and even encouraged, to exceed the foundation level of per-pupil funding by taxing their property at a rate greater than the MPR. According to Coons, Clune, and Sugarman, "the crux of the problem lies within that part of the [foundation] formula which guarantees local incentive" to exceed the foundation level of funding. Id. at 65. Furthermore, states that employ the foundation plan almost always set the guaranteed foundation level far below what local districts need to provide their
reliance on local [property] taxes to fund the [public school] system,"14 states created gross disparities between the amount of funding available to students who attended school in property-wealthy15 districts and the amount of funding available to students who attended schools in property-poor districts.16 Because the wealthiest districts

students with a “basic and substantial” education. Id. at 68. Therefore, while, in theory, states encourage districts to exceed the foundation level by raising additional property taxes, in practice, they effectively compel districts, especially poor ones, to exceed the foundation level by “[supporting those] poor district[s] to a woefully low level” of funding. Id. at 114. As Coons, Clune, and Sugarman point out, “[t]he wealthier districts . . . will have a far easier time raising the additional money . . . .” This so not only because the wealthier districts have far more wealth to tax, but also because marginal utility increases the burden of a seemingly fair and proportional tax upon poorer districts. See infra note 49 and accompanying text. By permitting, encouraging, and even compelling all districts to tax at a level greater than the MFR, the state permits wealthier districts to exploit their property wealth advantage—all to the detriment of children living in property-poor districts.


15. “Wealthier and poorer are useful terms but should be clearly understood to refer in this context to relative amounts of per-pupil tax base—not to the financial status of students, families, or voters.” Treacy & Frueh, supra note 10, at 289. In other words, property-wealthy districts are those that have relatively high amounts of per-pupil property value in their district and property-poor districts are those that have relatively low amounts of per-pupil property value in their district. Clearly, two factors determine a district’s per-pupil property value: the district’s total student population and its total amount of taxable property value. For example, assume that one county within a state has three school districts. District A has a student population of 1,000 and its property value totals $500 million; District B has a student population of 2,000 and its property value totals $100 million; and District C has a student population of 1,000 and its property value totals $30 million. Even though District A has the same number of students to educate as District C, its per-pupil property wealth is ten times larger than District C’s ($500,000 vs. $50,000). Consequently, the residents of District C would have to pay taxes at a rate ten times higher than that which the residents of District A would have to pay in order to provide District C’s students with the same amount of local school funding. Furthermore, District B and District C have the same amount of per-pupil property wealth because District B has twice as many students to educate.

16. For example, during the 1984-85 school year in New Jersey, the poorest district in the state had a per-pupil property value of $22,322, while the wealthiest district had a per-pupil property value of $7.8 million—in other words, the wealthiest district had 350 times as much taxable per-pupil wealth as the poorest district. Abbott v. Burke, 575 A.2d 359, 378 (N.J. 1990) (Abbott II). Also, during the same school year, per-pupil funding ranged from a state low of $932 to a state high of $10,103; at the same time, none of the poorest districts spent more than $2,634 per pupil, while none of the wealthiest districts spent less than $4,055 per pupil. Id. at 387. Furthermore, during that same 1984-85 school year, the residents of three of the state’s poorest districts, Camden, East Orange, and Jersey City, paid local taxes at the respective rates of $9.44 (per $100 of property valuation), $9.57, and $8.02. Id., Brief for Plaintiffs, Appendix, Table 8. Since the state’s average tax rate was $3.17, Camden’s tax rate was 297.8% of the state average, East Orange’s tax rate was 301.9% of the state average, and Jersey City’s tax rate was 253% of the state average. Id. By comparison, the average tax rate of the 108 wealthiest districts was $2.36, or 74.4% of the state average. Id. Thus, while New Jersey’s wealthiest districts taxed at rates five to ten times
within a state frequently have hundreds of times the property wealth of the poorest districts, those wealthiest districts can tax their property at far lower rates than poorer districts, yet still have far greater amounts of school funding. Therefore, "[t]o the extent that extra

lower than the poorest districts, those wealthiest districts had anywhere from five to ten times more per-pupil school funding as those poorest districts. See id. at 387.

Unfortunately, this is not a new phenomenon in New Jersey. For instance, during the 1971-72 school year, while the state average per-pupil property valuation was $41,026, five of the state's poorest districts, Camden, Newark, Jersey City, Trenton, and Paterson, had respective per-pupil property valuations of $19,187, $19,815, $26,786, $20,724, and $23,232. During the same year, while the state average local tax rate was $3.66 (per $100 of equalized property valuation), the tax rates of these five districts were, respectively, $5.76, $6.39, $6.40, $6.65, and $5.23. At the same time, the state average per-pupil funding amount was $1,009, and the per-pupil funding amounts provided by these five poor districts were, respectively, $843, $1,121, $897, $1,013, and $857. Paul L. Tractenberg, Robinson v. Cahill: The "Thorough and Efficient" Clause, 39 LAW & CONTEMP. PROBS. 312, 316 (1974).

Interestingly, Newark, with a per-pupil tax base of less than half of the state average ($41,026 vs. $19,815), had a per-pupil funding amount in 1971-72 that exceeded the state average ($1,009 vs. $1,121). Newark was able to achieve this level of funding because its residents paid a school tax rate that was nearly twice as high as the state average ($2.12 vs. $3.66). Thus, Newark is the perfect example of a property-poor school district that taxes itself at a rate far higher than the state average but still cannot provide its students with anything better than an average amount of per-pupil funding.

This distressing trend continues to this day. According to the New York Times, "data issued by the [New Jersey] Department of Education in March [1991] showed the average . . . expenditure per pupil [for the 1990-91 school year] was $8,210 in the state's richest districts, $4,594 in the poorest." Jerry Gray, Jersey Plan for Schools Gets Lost in the Politics, N.Y. TIMES, Nov. 3, 1991, § 4, at 16. Thus, a simple comparison between the average per-pupil expenditures in the wealthiest and poorest districts reveals the following: during 1984, the wealthiest districts had, on average, 43% more per-pupil school funding than the poorest districts; during 1990, this figure had increased to 79%. Clearly, the per-pupil expenditure disparity between New Jersey's wealthiest and poorest districts is still growing at a substantial rate.

17. See supra note 16. This phenomenon exists in nearly every state. For instance, in Texas, the wealthiest district has a per-pupil property value of $14 million, while the poorest district has a per-pupil property value of about $20,000—a 700 to 1 differential. In other words, the wealthiest district in Texas has 700 times as much property wealth to tax as the poorest district. Also, the 300,000 students in Texas's poorest districts have less than 3% of the state's total property wealth to fund their education—a differential of greater than eight to one. See Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 392 (Tex. 1989). Without the bare minimum foundation funding that Texas was providing, the poorest districts in Texas would have to tax at a rate eight times higher as the wealthiest districts in order to provide their schools with equal funding. Unfortunately, this is the same eight to one property wealth ratio that existed in 1973, when the United States Supreme Court upheld the constitutionality of Texas' "chaotic and unjust" public school financing scheme in San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 59 (1973). See Rodriguez, 411 U.S. at 67 (White, J., dissenting). To make matters worse, at the time Rodriguez was decided, Texas had placed a statutory ceiling on tax rates of $1.50 per $100 of equalized property valuation. Therefore, even if the poorest districts wished to
dollars can purchase educational resources,” school financing systems based primarily upon local property taxes provide students in property-wealthy districts with enormous educational advantages compared with the educational opportunities offered to their peers in property-poor districts.18

According to Professors Coons, Clune, and Sugarman, modern public school financing systems “represent the very worst basis upon which to distribute public education, if our hope is to increase the ability of the poor to compete. At least this is true to the degree that poor people live in poor districts.”19 In fact, to the extent that poor people live in poor districts, modern public school financing systems amount to a complete perversion of the purpose for which public education systems were first created: to provide all students, especially those in poor families, with equal educational opportunity.20 Under both currently and formerly employed public school finance systems, the poverty of the parent has been imposed upon the mind of his offspring.21

During the past twenty-five years, courts in almost half of the states have heard lawsuits in which plaintiffs have contended that those states have violated their constitution’s education clause22 or equal protection clause, or both, by permitting property-wealthy districts to provide their students with vastly superior educational opportunities.23 And courts in nearly half of these states have agreed with
the plaintiffs in such lawsuits, and have held the states’ then-existing public school financing schemes to be unconstitutional. During the past two years alone, the supreme courts of Kentucky, Montana, New Jersey, and Texas have all held that their states’ public school funding systems violate their state constitutions’ education clauses. Currently, there are twenty-two active lawsuits challenging various states’ public school financing systems, compared with only eight active lawsuits two years ago.

This Note will examine: (1) the first-generation public school finance reform case in New Jersey, Robinson v. Cahill, as well as the separation-of-powers implications of the New Jersey Supreme Court’s attempt to remedy the constitutional violation discovered in Robinson I; (2) whether a different separation-of-powers concept—the political question doctrine—should bar judicial review of the issues raised by public school finance reform litigation, in light of the dismissal for nonjusticiability of the most recent suit filed in New York; and (3) Abbott v. Burke, the New Jersey Supreme Court’s most recent public school finance reform decision, and how the court has attempted to avoid the separation-of-powers dilemma that it faced in Robinson v. Cahill.

a full listing of these state cases, see Abbott v. Burke, 575 A.2d 359, 372-73 (N.J. 1990) (Abbott II).

24. Id.
31. See infra notes 167-225 and accompanying text.
32. See infra notes 91-166 and accompanying text.
34. See infra notes 226-385 and accompanying text.
II. **Robinson v. Cahill, New Jersey’s Recalcitrant Legislature, and the Public School Education Act of 1975**

According to article eight, section four, paragraph one of the New Jersey Constitution, “[t]he Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all children in the State between the ages of five and eighteen years.” While the people of New Jersey added this provision to their constitution as an amendment in 1875, no branch of state government had ever “spelled out the content of the educational opportunity” that the “thorough and efficient” clause requires, at least not before 1973.

In *Robinson v. Cahill* (*Robinson I*), decided in April of 1973, the Supreme Court of New Jersey ruled that the state’s then-existing system of financing public elementary and secondary schools vio-

35. N.J. Const. art. VIII, § 4, para. 1.
39. At the time the state supreme court decided *Robinson I*—in fact, until the 1976-77 school year—New Jersey employed a relatively straightforward “foundation” plan to finance its public schools. See supra note 14. Under this plan, the New Jersey Legislature set the guaranteed foundation level at $400 per pupil. *Robinson I*, 303 A.2d at 296. In addition, it set the minimum participation rate (or MPR—the minimum local property tax rate that a school district had to impose on its residents in order to qualify for state foundation aid) at 10.5 mills (1.05C) per dollar of taxable property value (a figure that is always listed in per pupil terms; see supra note 15) within the school district. *Id.* Simply stated, under this foundation plan, the state would guarantee to each local school district at least $400 per pupil in school funding, provided that the school district imposed upon its residents a tax of not less than 1.05C per dollar of taxable property valuation. *Id.* If a district that taxed its residents at the MPR of 1.05C per dollar raised less than $400 per pupil, the state would give it the difference between $400 per pupil and the amount it actually raised in local property taxes. For instance, if such a district raised only $200 per pupil, taxing at the MPR (because it had a very low amount of property wealth—approximately $20,000 per pupil), it would receive state foundation aid of $200 per pupil. The state aid would guarantee that this district had at least $400 per pupil to spend in its public schools. On the other hand, if a district raised more than $400 per pupil taxing at the MPR, it received no foundation aid from the state.

When the *Robinson* court described this guaranteed foundation level of $400 per pupil as “grossly outdated,” it was being very kind. *Id.* In fact, the $400 per pupil guarantee was absurdly low and did not even approach the amount of funding needed to provide students with a quality education. Those districts that wanted to provide their students with more than
this "grossly outdated," bare minimum amount of school funding—and all districts certainly did—had to raise additional funds entirely at the local level by increasing the property tax rate. But because rich districts typically have far more taxable property wealth than poor districts, they will be able to exceed the $400 per pupil foundation level more easily than the poor districts. In other words, because of its greater taxable property wealth, a richer district can impose a lower tax rate than a poorer district when both want to raise the same amount of school funding. In many cases, wealthier districts impose substantially lower tax rates than poorer districts, but still have far more school funding available to them. Thus, "even though the poor districts characteristically tax high they are unable to catch up, so great is their relative poverty." COONS, supra, note 1, at 143.

To demonstrate concretely these seemingly vague propositions, we can compare the statistics of two New Jersey school districts—Princeton and Trenton—for the 1971-72 school year with some of the evidence presented to the trial court in Robinson v. Cahill, 287 A.2d 187, 220 (N.J. 1972), modified and aff’d, 303 A.2d 273, cert. denied, 414 U.S. 976 (1973). Both Princeton and Trenton are located in Mercer County. In 1971, while Trenton’s taxable property wealth was $20,724 per pupil, Princeton’s was $88,073 per pupil; thus, in terms of per-pupil property value, Princeton was more than four times as wealthy as Trenton. Id. For the 1971-72 school year, both districts imposed a local property tax greater than the MPR of 10.5 mills or 1.05¢ per dollar of taxable property value. In fact, Trenton’s local school tax rate was 28 mills or 2.8¢ per dollar of taxable property wealth and Princeton’s local school tax rate was 17.1 mills or 1.71¢ per dollar of taxable property wealth. Id. But at the MPR, Princeton raised $924.77 per pupil ($88,073 per pupil x .0105), while Trenton raised only $217.60 per pupil ($20,724 per pupil x .0105). Because the amount of money Princeton collected by taxing at the MPR clearly exceeded the $400 per pupil guaranteed foundation level, Princeton received no state foundation aid. On the other hand, because Trenton collected significantly less than the $400 per pupil guaranteed foundation level by taxing at the MPR, it received $182.40 per pupil in state foundation aid ($217.60 + $182.40 - $400). Clearly, the state foundation aid to Trenton reduced the substantial per-pupil funding disparity between these two school districts from $707.17 per pupil to $524.77 per pupil, at least for the 1971-72 school year.

Unfortunately, because the guaranteed foundation level of $400 per pupil was abysmally low and did not provide sufficient educational funding, both Princeton and Trenton had to exceed the MPR by imposing additional local property taxes. While Trenton, the poorer of the two, more than doubled its local school property tax rate to 28.0 mills (where the MPR represents the first 10.5 mills), Princeton increased its local school property tax rate by a much smaller margin—6.6 mills—to 17.1 mills. Id. And yet, because of its substantially greater per-pupil property wealth ($88,073 vs. $20,724), Princeton’s much smaller local property tax increase of 6.6 mills yielded its residents more per-pupil funding ($581.28) than Trenton’s significantly greater local property tax increase (17.5 mills) yielded to the residents of Trenton ($362.67 per pupil). In other words, even though the residents of Trenton made a much greater financial sacrifice by paying a substantially higher local property tax rate (28.0 mills in Trenton vs. 17.1 mills in Princeton), the schools in Trenton had 50% less funding than the schools in Princeton ($1,521 per pupil in Princeton vs. $1,013 per pupil in Trenton). Id. These figures include state-distributed "minimum support aid." See infra note 64.

This result is disturbing because “[i]t is difficult to perceive how children residing in poor districts . . . deserve less in terms of public education.” COONS, supra note 1, at 9. But less is precisely what the children of Trenton have received—not because they deserve less, but rather because they happen to live in a poorer district. Under New Jersey’s foundation plan, as well as the foundation plans of most other states, “[i]n a race for better schools, . . . the poor districts are doomed to failure by their poverty.” Id. at 22. At the same time, this comparison between Princeton and Trenton reveals the central flaw of the
labeled the “thorough and efficient” clause of the state constitution. In so ruling, the supreme court modified and affirmed the lower court’s judgment, which had held that the public school financing system violated the equal protection clauses of the state and federal constitutions, as well as the “thorough and efficient” clause. While the supreme court agreed that the system was unconstitutional, it ruled that the system violated the “thorough and efficient” clause, not the state or federal constitution’s equal protection clause.

The state supports local school districts to an abysmally low foundation level, forcing all districts to raise additional school funding with increased local property taxes. Property-wealthy districts have a far easier time raising additional school funding. As a result, the residents of property-wealthy districts like Princeton will always be able to provide their children with superior educational opportunities compared with the residents of property-poor districts like Trenton. In short, foundation plans like New Jersey’s “are designed systematically to discriminate on the basis of wealth.”

California’s funding system violated the Equal Protection Clause of both the federal and state constitutions); Serrano v. Priest, 487 P.2d 1241 (Cal. 1971) (holding that California’s funding system violated the Equal Protection Clause of both the federal and state constitutions); Van Dusart v. Hatfield, 334 F. Supp. 870 (D. Minn. 1971) (holding that Minnesota’s public school funding system violated the Equal Protection Clause of the Fourteenth Amendment). In each of these cases, the plaintiffs made the same basic claim—that these public school funding systems discriminated against a suspect class of poor persons, and that these funding schemes infringed upon the fundamental right to education.

However, on March 23, 1973, the United States Supreme Court flatly rejected this type of equal protection challenge to the Texas public school funding scheme and reversed the District Court’s ruling that the scheme was unconstitutional. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). By a 5-4 vote, the Supreme Court ruled that gross inter-district, per-pupil funding disparities produced by Texas’s system of financing its public schools did not violate the Equal Protection Clause of the Fourteenth Amendment for two reasons: (1) education is not a fundamental right; and (2) it had not been shown that the Texas system discriminated against any definably suspect class of poor persons because plaintiffs failed to demonstrate that the residents of property-poor districts were poor themselves. Therefore, because no fundamental right or suspect class was involved, the five-justice majority upheld the constitutionality of the Texas funding system under a highly deferential application of the rational basis test. In his dissenting opinion, Justice White revealed the
In order to rule upon the constitutionality of the public school financing system, the New Jersey Supreme Court first had to interpret the "thorough and efficient" clause—something that state legislative and executive officials had never bothered to do. After examining the history surrounding the adoption of the 1875 amendment by the residents of New Jersey, the court concluded "that an equal educational opportunity for children was precisely in mind." The supreme court then defined "equal educational opportunity:" "The Constitution's guarantee must be understood to embrace 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." Ultimately, the supreme court concluded that the Legislature had not satisfied its constitutional duty to provide all students with a "thorough and efficient" education, solely on the basis of gross disparities in per-pupil expenditures among property-wealthy and property-poor districts, because it had "been shown no other flaws in the majority's analysis, and he did so in a very convincing manner. See Rodriguez, 411 U.S. at 63-73 (White, J., dissenting).

The Supreme Court of New Jersey handed down its opinion in Robinson I only twelve days after the United States Supreme Court handed down its opinion in Rodriguez. The New Jersey court affirmed the trial judge's holding that New Jersey's public school financing system was unconstitutional, but modified the rationale for this holding in light of the United States Supreme Court's decision in Rodriguez. In fact, Chief Justice Weintraub, the author of the unanimous opinion in Robinson I, devoted a substantial portion of his opinion to a detailed discussion of Rodriguez. See Robinson I, 303 A.2d at 279-82. Primarily because of the United States Supreme Court's rejection of the federal equal protection claim in Rodriguez, the New Jersey Supreme Court ruled that the state's system of financing public schools—which produced gross expenditure disparities between property-wealthy and property-poor districts, see Robinson I, 287 A.2d at 218-22—violated the New Jersey Constitution's "thorough and efficient" clause, but not the state or federal Equal Protection Clause. In fact, the New Jersey Supreme Court modified the constitutional basis of the lower court's ruling in order to shield its decision from any possible hostile review by the United States Supreme Court. Gibbons, 125 N.J. L.J. 1663 (1990) (surmising that the New Jersey court's decision in Robinson I would presumably be shielded from United States Supreme Court review by the "adequate and independent state grounds" rule). See Herb v. Pitcairn, 324 U.S. 117 (1945). By doing so, the New Jersey Supreme Court became the first in the nation to base its opinion that the state's system of funding public schools was unconstitutional solely upon the state constitution.

43. See supra note 37 and accompanying text.

44. Robinson I, 303 A.2d at 294. The term "equal educational opportunity" is widely misunderstood. It does not mean that all students should receive the same education; instead, it simply means that all children deserve "equality of opportunity through education." COONS, supra note 1, at 6. In other words, "[t]he crucial value to be preserved is the [equal] opportunity to succeed, not the uniformity of success." Id. at 3. See supra notes 1-6 and accompanying text.

45. Robinson I, 303 A.2d at 295.
viable criterion for measuring compliance with the constitutional mandate." The primary symptom of the old financing system’s constitutional deficiency was the gross disparities in per-pupil expenditures; the primary cause of this constitutional deficiency was the “discordant correlation . . . between the educational needs of the school districts and their respective tax bases,” created by New Jersey’s “substantial reliance . . . upon local taxation” to fund the state’s public schools. This substantial reliance upon local taxation had “[saddled] New Jersey with one of the highest local property tax rates in the nation,” a form of taxation that is “regressive” because of the effect of marginal utility.

Two months later, in June of 1973, the court decided to give the Legislature a reasonable opportunity to comply with the constitutional mandate of the “thorough and efficient” clause; therefore, it postponed the issuance of any remedial order until January 1, 1975. By doing

46. Id.
47. Id. at 297.
48. Robinson v. Cahill, 351 A.2d 713, 717 (N.J. 1975) (Robinson IV). As noted earlier, this “substantial reliance . . . upon local taxation” was, until the 1970s, the norm for most, if not all, states funding their public education systems with the foundation plan. See supra notes 12 and accompanying text. At the time of Robinson I, local property taxes accounted for 67% of New Jersey’s public school expenditures, with the state providing only 28% of the total (federal aid accounted for the other 5%). Robinson I, 303 A.2d at 276.
49. Ronald Sullivan, Jersey’s High Court Tells State to Alter School Aid Pattern, N.Y. Times, May 24, 1975, at A1; see also Robinson v. Cahill, 355 A.2d 129, 155, n. 18 (N.J. 1976) (Robinson V) (Conford, P.J.A.D., t/a, concurring in part) (quoting the Report of the New Jersey Tax Policy Committee’s assertion that New Jersey’s property tax “is by all measures either the highest or near-highest in the nation. It is harshly regressive.”) (emphasis added).

Marginal utility is the concept “that the poor districts are actually making [a] greater effort than the rich when they have the same tax rate.” COONS, supra note 1, at 222. In essence, “the marginal utility effect makes a tax which is otherwise proportional really regressive.” Id. at 221. According to Coons, Clune, and Sugarman, “[i]t is easier to give 5% of one’s income to charity if one earns $100,000 a year than if $1,000. Even though the dollar sacrifice is proportional, (and in absolute terms much greater for the richer person), the demands on the other 95% are less for the richer man. He must give up fewer necessities—food, clothing, shelter—to make the [5%] contribution.” Id. at 43-44 n.6. Therefore, if both the poorer and richer districts tax their property at 2%, marginal utility increases the burden upon the residents of the poorer district, assuming that poor people live in poor districts. Moreover, the marginal utility burden upon the residents of poorer districts discourages them from raising taxes to match the per-pupil funding levels of the wealthier districts because they will have to give up far more of life’s necessities to do so.

so, the supreme court displayed a considerable amount of patience, judicial self-restraint, and deference to the Legislature’s “fundamental and primary” constitutional role in providing for the education of New Jersey’s children. The court’s deferential attitude in Robinson II clearly demonstrated its sensitivity to the fundamental separation-of-powers issue lurking beneath the surface. But because it was highly unlikely that the New Jersey Legislature would heed the pleas of the poorer districts for an equitable funding system that would significantly reduce the gross disparities in per-pupil expenditures, the practical—though certainly unintended—effect of the court’s deference was a four-year period of delay during which the state’s schoolchildren received no remedy for the substantial violation of their fundamental constitutional right to a “thorough and efficient” education.

By January of 1975, the New Jersey Legislature had failed to enact any law aimed at remedying the constitutional violation discov-

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52. See infra notes 167-225 and accompanying text. The separation of powers doctrine finds explicit expression in the New Jersey Constitution: “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.”

Robinson v. Cahill, 351 A.2d 713, 736 (N.J. 1975) (Robinson IV) (Mountain & Clifford, JJ., dissenting (quoting N.J. CONST. art. 1H1, para. 1). However, it is undoubtedly true that, “today the doctrine of separation of powers cannot be said to require a complete compartmentalization along triadic lines. More and more courts have come to recognize that where a practical necessity exists, a blending of powers will be countenanced, but only so long as checks and balances are present to guard against abuses.”

Robinson IV, 351 A.2d at 737 (Mountain & Clifford, JJ., dissenting) (emphasis in original). After all, “[t]he danger is not blended power. The danger is unchecked power.”

53. According to Chief Judge Gibbons, “[n]either in 1973, nor at any time since, was it likely that a legislative majority would be sympathetic to urban pleas for a more progressive tax which could eliminate disparities in per-pupil expenditures” between property-wealthy and property-poor districts. Ironically, this is so primarily because, “as a result of Reynolds v. Sims, 377 U.S. 533 (1964), the reapportionment decision of the Warren Court, [the New Jersey Legislature] came under increasing domination by [the] representatives of suburban areas” during the 1960s. Gibbons, supra note 42, at 1663; see also COONS, supra note 1, at xx. (stating that little in the way of a more equitable funding system could “be expected from the political process in its [current] legislative mode.”).

The Robinson plaintiffs and, in fact, all New Jersey schoolchildren, did not begin to receive any remedy until the 1976-77 school year, more than four years after the trial court’s original determination that the then-existing public school financing system was unconstitutional. See Robinson v. Cahill, 355 A.2d 129 (N.J. 1976) (Robinson V) (upholding the facial constitutionality of the Public School Education Act of 1975, N.J. STAT. ANN. §§ 18A:7A-1 to -52 (West 1989)).
ered in *Robinson I*. And yet, despite the Legislature's failure to comply with *Robinson I* after nearly two years, the supreme court continued to display considerable deference to the Legislature, and to the separation-of-powers principle, by further extending the deadline. At the same time, the court scheduled oral argument for March 18, 1975, to determine what relief was appropriate, as well as what forms of relief it had the authority to order.

By the end of May, however, the court had clearly begun to lose its patience with the Legislature's recalcitrance:

The Court has now come face to face with a constitutional exigency involving, on a level of plain, stark and unmistakable reality, the constitutional obligation of the Court to act. Having previously identified a profound violation of [the plaintiffs'] constitutional right to a "thorough and efficient" education, based upon default in a legislative obligation imposed by the organic law in the plainest of terms, we have more than once stayed our hand, with appropriate respect for the province of other Branches of government. In [the] final alternative, we must now proceed to enforce the constitutional right involved.

Clearly, after "pausing in deference to the doctrine of separation of powers" for over two years, the court concluded that "[t]he need for immediate and affirmative judicial action" to remedy the constitutional violation was apparent. And yet, even as it finally acted to remedy the "profound" violation of plaintiffs' fundamental right to a "thorough and efficient" education, the New Jersey Supreme Court continued to act with "restraint" and deference towards the Legislature. While it was certainly within the realm of the court's equitable powers to enjoin the distribution of all state education funding under the 1970 Act found unconstitutional in *Robinson I*, the court chose not to do so because of the "harmful impact on vital educational programs" that would have resulted. Instead, the court chose a less drastic alternative: it ordered state executive officials to distrib-

55. *Id.*
56. *Id.* at 7.
58. *Id.* at 717.
59. *Id.* at 720.
60. *Id.* at 724.
61. *Id.* at 720.
62. *Id.*
ute certain types of state aid found to violate the "thorough and efficient" clause—a total of approximately $300 million in state funding—in accordance with the 1970 Act's incentive equalization formula for the 1976-77 school year, so as to reduce the gross disparities in per-pupil expenditures between property-wealthy and property-poor districts. Furthermore, based upon its reluctance to interfere

63. Id. at 722.

64. Id. at 721-22. Specifically, if the Legislature failed to enact remedial legislation by October 1, 1975, the supreme court had ordered that state executive officials redistribute "minimum support aid" and "save-harmless funds" through the 1970 Act's "incentive equalization aid formula" so as to reduce the gross disparities in per-pupil expenditures between property-wealthy and property-poor districts.

In general, state aid to local school districts can be characterized in one of three ways: equalizing, nonequalizing, or anti-equalizing. COONS, supra note 1, at 97-116. Equalizing state aid is money that, when given to local districts, decreases funding disparities between wealthier and poorer districts. In other words, equalizing state aid is funding that helps "poor districts overcome their poverty barrier." Id. at 98. In the comparison made earlier between the Princeton and Trenton school districts, see supra note 39, the $182 per pupil in foundation aid given to Trenton for the 1971-72 school year was equalizing state aid because it reduced the large funding disparity between the wealthier district (Princeton) and the poorer one (Trenton).

Unlike equalizing aid, nonequalizing state aid is money given to local districts that neither increases nor decreases funding disparities between property-wealthy and property-poor districts. Id. Non-equalizing state aid is money that increases the per-pupil expenditure level of all districts by the same amount. The "minimum support aid" distributed under the 1970 Act declared unconstitutional in Robinson I was nonequalizing flat grant aid. A flat grant is merely a uniform "amount of dollars per pupil" given to all districts. Id. at 55. For the 1971-72 school year, minimum support aid in New Jersey was $100 per pupil for all districts. See Robinson v. Cahill, 287 A.2d 187, 190-91 (N.J. Super. 1972) (subsequent history omitted). Thus, to continue the comparison of Princeton and Trenton as an example, during the 1971-72 school year, Princeton had 4,025 enrolled pupils and Trenton had 17,501. Id. at 220. Therefore, for that school year, Princeton received $402,500 in minimum support aid and Trenton received $1,750,100 in minimum support aid. Clearly, with this type of flat grant aid, the only factor that determines how much "minimum support aid" a district receives is the number of enrolled pupils. Thus, Trenton received more minimum support aid than Princeton solely because it had more pupils to educate.

But if nonequalizing flat grant aid such as the minimum support aid distributed under the 1970 Act appears not to have discriminated against poorer districts, why did the supreme court in Robinson IV order the redistribution of that aid through the Act's incentive equalization formula for the 1976-77 school year? According to Coons, Clune, and Sugarman, "[t]he evil of foundation plan dollars that are nonequalizing . . . [is] . . . clear. If this [state's] foundation plan were to distribute all its dollars in an equalizing manner it could more nearly approach a fair system while using the same amount of state money; state aid which is nonequalizing in its effect could be redistributed so that it is equalizing under a plan with a higher [guaranteed] foundation level." COONS, supra note 1, at 102-03 (emphasis added). This is precisely what the supreme court sought to do in Robinson IV: had the court's order taken effect, it would have raised the guaranteed foundation level by 60%—without increasing the state share of public school funding. Robinson IV, 351 A.2d at 721.

Thus, the problem with nonequalizing flat grant aid such as minimum support aid is
with the Legislature’s primary role in providing for the education of New Jersey’s schoolchildren, as well as its continued adherence to the separation-of-powers doctrine reflected in that reluctance, the supreme court gave the Legislature four additional months to enact remedial legislation before its order would become effective on October 1, 1975.65

Finally, on September 29, 1975, only two days before the court’s October 1 deadline, and almost four years after the trial court had first ruled that the educational financing scheme of the 1970 Act was unconstitutional, the Legislature passed the Public School Education Act of 1975,66 which was “a substantial legislative reform in [the] state supervision of local schools.”67 In addition, the 1975 Act contained a new funding equalization mechanism, enacted to reduce substantially the gross disparities in per-pupil expenditures between rich and poor districts.68 New Jersey’s recalcitrant Legislature, which had stubbornly refused to comply with the constitutional mandate that it provide all schoolchildren with a “thorough and efficient” education, finally acted to remedy the unconstitutional status quo.

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not that it increases funding disparities between wealthier and poorer districts, but rather that it fails to decrease those disparities. When a state like New Jersey already does so little (or at least did so little prior to 1976) to help local school districts pay for public education, see supra note 48, it is outrageous that any state aid dollars are given to wealthier districts, especially when those districts clearly do not need such money. Id. at 108. Instead of giving $402,500 in minimum support aid to a relatively wealthy district like Princeton, the state could have given that money to a district that desperately needs it, like Trenton.

65. Robinson IV, 351 A.2d at 718 n.4. It is interesting to note that, despite the magnitude and unprecedented scope of the court’s prospective injunction issued in Robinson IV, advocates of school financing reform were clearly disappointed that the court did not order the redistribution of all state aid to local districts—about $617 million for the 1976-77 school year—through the 1970 Act’s incentive equalization formula. Sullivan, supra note 49, at 1, 59. New Jersey’s governor at the time, Brendan Byrne, advocated the enactment of a state income tax for the first time to help pay for the increase in state aid required under the Public School Education Act of 1975. Id. Governor Byrne encountered fierce resistance from the Legislature, which strongly opposed the passage of any state income tax. Id. During the oral argument for Robinson IV, Governor Byrne personally asked the court to redistribute all $617 million in state aid to local districts through the incentive equalization formula. He did so to obtain the means with which he might coerce the Legislature into enacting both a fairer school finance formula and the more progressive income tax to pay for it. Id. The supreme court’s decision in Robinson IV not to redistribute all state aid, but only about half, certainly disappointed Governor Byrne. Id.


A number of parties challenged the constitutionality of the 1975 Act immediately following its passage. But in *Robinson V*, decided in January, 1976, a divided New Jersey Supreme Court ruled that the 1975 Act was "in all respects constitutional on its face, ... assuming it is fully funded." Unfortunately, the supreme court's decision in *Robinson V* did not end this constitutional confrontation, because the Legislature refused to fund fully the state aid provisions of the 1975 Act. In particular, the Legislature refused to provide the additional $378 million required by the 1975 Act because of its steadfast opposition to the enactment of a state income tax, which Governor Byrne strongly supported. The Governor saw a state income tax not only as an important step in reforming New Jersey's "regressive and unfair tax system," but also as a fairer method of collecting the revenue that would help provide the substantially increased portions of state aid to local districts required under the 1975 Act. When it became clear that the Legislature would not, of its own volition, fund the 1975 Act, the supreme court held yet another oral argument in March of 1976 on "an order to show cause why certain specific relief, or other relief, including injunctive relief, should not be mandated." The court had a number of different types of injunctive relief at its disposal. It could have empowered the state Board of Education to levy additional property taxes, enjoined the collection of local property taxes and replaced them by authorizing the Board of Education to levy a uniform state tax, ordered the state to take money from other state agencies and use that money for education, or it could have enjoined the payment of any money for education under the unconstitutional funding system—in effect, closing the state's schools. Most people considered the last option—closing the state's schools until the Legislature funded the 1975 Act—the most drastic, and unlikely, option that the court could have chosen.

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70. *Id*. at 139 (emphasis added).
72. *Id*.
73. Sullivan, *supra* note 49, at 1, 59; see generally *supra* note 49.
75. See *Robinson VI*, 358 A.2d at 170 (Pashman, J., dissenting).
77. *Id*. At the time, it seemed highly unlikely that the court would choose its most drastic option and close the state's schools because it had continuously provided the Legisla-
To the surprise of nearly everyone familiar with Robinson v. Cahill, the New Jersey Supreme Court did just that. On May 13, 1976, it enjoined state or local officials from distributing any money for education (with very limited exceptions) beginning July 1, if the Legislature failed, by that date, to provide full funding for the 1975 Act. By doing so, the court abruptly abandoned its deferential attitude and placed “the school crisis squarely in the lap of the Legislature.” The court’s tone changed dramatically; it clearly had lost its patience with the Legislature’s recalcitrance: “The continuation of the existing unconstitutional system of financing the schools into yet another school year cannot be tolerated. It is the Legislature’s responsibility to create a constitutional system . . . . The Legislature has not yet met this constitutional obligation. Accordingly, we shall enjoin the existing unconstitutional method of public school financing.” Of course, the Court’s injunction would take effect on July 1, 1976, only if the Legislature failed to act.

To the surprise of almost no one familiar with Robinson v. Cahill, the Legislature did not comply with the mandate of Robinson VI: it failed to enact full funding for the 1975 Act before July 1. Because of that failure, the supreme court’s conditional injunction automatically took effect and the state’s schools were closed. Like Hamlet endlessly pondering how to avenge his father’s murder, the New Jersey Legislature endlessly pondered whether to tax or not to tax. In the meantime, it produced plenty of rhetoric but no positive action. Finally, on July 7, the Assembly broke the deadlock and passed a bill containing the state’s first income tax. When the Sen-

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79. Waldron, supra note 76, at 23.
80. Robinson VI, 358 A.2d at 459.
81. Id. at 460.
82. Alfonso Narvaez, Jersey Schools Closed by Court Order, N.Y. TIMES, July 1, 1976, at A1.
83. Id. On June 30, 1975, the day before the New Jersey Supreme Court’s injunction was to take effect, a special 11-judge federal court refused to stay the supreme court’s injunction. Id. By a 9-2 vote, the special federal court, which consisted of all federal judges assigned to the state, concluded that it “should not force New Jersey to perpetuate an unconstitutional system” of financing public education. Id. at 32.
ate quickly followed suit on July 8, Governor Byrne immediately signed the bill into law. After more than a dozen attempts to pass an income tax and years of "intense resistance" to it, the Legislature finally enacted the bills that would provide full funding for the Public School Education Act of 1975. At the Governor's request, the supreme court lifted its injunction on July 9, officially ending its constitutional confrontation with the Legislature.

III. **Separation of Powers vs. Checks and Balances: When Must the Courts Act?**

A. **Separation of Powers**

1. Political Questions

More than any other first-generation public school finance reform dispute, the marathon litigation that comprised *Robinson v. Cahill* repeatedly forced the Supreme Court of New Jersey to grapple with profound separation-of-powers issues. At the center of the separation-of-powers conflict in *Robinson* was the question of what authority, if any, the supreme court possessed to remedy the violation

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87. *Id.* at B2.
88. *Id.* at A1.
89. *Id.*
91. For purposes of this Note, a first-generation case such as *Robinson v. Cahill* is defined as a case in which a court rules upon the constitutionality of the state's then-existing public school financing scheme for the first time. In other words, the specific issue raised—whether the current system of school financing complies with the constitutional mandate—is one of first impression in the jurisdiction. As the supreme court noted in *Abbott v. Burke, New Jersey "is the only state involved in a second round on this issue." Abbott v. Burke, 575 A.2d 359, 373 (N.J. 1990) (Abbott I).
93. *See*, e.g., *Robinson II*, 306 A.2d 65 (N.J. 1973) (deferring to the Legislature's primary responsibility to provide for the education of New Jersey's schoolchildren by postponing the issuance of any remedial order until January 1, 1975); *Robinson III*, 335 A.2d 6 (N.J. 1975) (postponing again the issuance of a remedial order); *Robinson IV*, 351 A.2d 713 (N.J. 1975) (ordering redistribution of minimum support aid and save-harmless funds through the 1970 Act's incentive equalization provision for 1976-77 school year because, in the face of continued legislative inaction, supreme court had no alternative); *Robinson VI*, 358 A.2d 457 (N.J. 1976) (enjoining all state and local officials from expending any funds on public education after June 30, 1976 if the Legislature failed to provide full funding for the Public School Education Act of 1975).
of plaintiffs’ fundamental right to a “thorough and efficient” education when the New Jersey Constitution specifically imposed upon the Legislature the duty to provide for the education of the state’s school-children. 94 No one involved in Robinson v. Cahill, however, seriously questioned the authority of the supreme court to rule upon the constitutionality of the then-existing statutory scheme for financing public education in New Jersey. 95

But the defendants in a number of other public school finance cases did just that. Specifically, the defendants in those other cases argued that public school finance reform disputes presented a nonjusticiable “political question,”96 one that the judiciary should not entertain because of “the difficulty and complexity of education issues and the controversial nature of tinkering with the goals of public education” established by the Legislature.97 Those defendants also pointed to “constitutional language apparently favoring exclusive legislative responsibility for education.”98 In short, they argued that the separation-of-powers principle embodied in the “political question” doctrine 99 barred the judiciary from considering the constitutionality of legislatively enacted public education finance systems.

Until December of 1991, every court to which defendants presented this “political question” argument patently rejected it.100 But in Reform Education Financing Inequities Today (R.E.F.I.T.) v. Cuomo,101 the most recent constitutional challenge to New York’s

94. See supra note 35 and accompanying text.
97. Hubsch, supra note 2, at 115.
98. Id.
99. See Baker, 369 U.S. at 217 (holding that the nonjusticiability of a political question is “essentially a function of separation of powers.”).
100. Hubsch, supra note 2, at 115-16. See McDaniell v. Thomas, 285 S.E.2d 156, 157 (Ga. 1981) (stating, “[w]e know of no sister State which has refused merits treatment to such issues, and we would regard our own refusal to adjudicate plaintiffs’ claim of constitutional infringement an abdication of our constitutional duties.”) (quoting Board of Educ., Levittown v. Nyquist, 443 N.Y.S.2d 843 (1981); see also Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 87 (Wash. 1978) (concluding that “the judiciary has the ultimate power and the duty to interpret, construe and give meaning to words, sections and articles of the constitution” because “[i]t is emphatically the province and duty of the judicial department to say what the law is”) (citing United States v. Nixon, 418 U.S. 683, 703 (1974) and Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803))).
"chaotic and unjust"102 system of financing public education,103 the trial judge granted defendants' motion to dismiss the complaint because the plaintiffs' claims raised a nonjusticiable political question.104 While the trial judge never actually stated in so many words that he was granting the defendants' motion to dismiss because the complaint presented a nonjusticiable question, the implication is unmistakable and clear.105 For a number of reasons, it is likely that the trial judge incorrectly granted the defendants' motion to dismiss the complaint in R.E.F.I.T. v. Cuomo.106

104. R.E.F.I.T., 578 N.Y.S.2d at 974-76.
105. Near the end of his opinion, Justice Roberto quoted extensively from the footnote that ends the Court of Appeals' opinion in Board of Educ., Levittown v. Nyquist, the first challenge to New York's system of financing public education. R.E.F.I.T., 578 N.Y.S.2d at 976. In that footnote, the Court of Appeals, speaking through Judge Jones, provided some of the reasons why it rejected plaintiffs' claims that New York's system of financing public education violated the education clause of the state's constitution. In particular, Judge Jones stated that complaints about the inequities of the state's public school financing scheme "are properly to be addressed to the Legislature for its consideration and weighing in the discharge of its obligation to provide for the maintenance and support of our State's educational system. Primary responsibility for the provision of fair and equitable educational opportunity within the financial capabilities of our State's taxpayers unquestionably rests with that branch of our government." Board of Educ., Levittown v. Nyquist, 439 N.E.2d 359, 369 n.9 (N.Y. 1982) (emphasis added). Justice Roberto identified this footnote as the "philosophical underpinning of the Levittown decision." R.E.F.I.T., 578 N.Y.S.2d at 976. The clear implication of the quoted portion of the footnote is that it is for the New York Legislature to decide how best to provide for the education of the state's schoolchildren. Undoubtedly, this is true—which is why the education article, (N.Y. Const. art. XI, § 1) unequivocally places that duty upon the Legislature. But as I will show below (see infra notes 107-162 and accompanying text), it does not follow that the plaintiffs' claims in R.E.F.I.T. v. Cuomo present the court with a nonjusticiable political question.
106. To begin with, there is little, if anything, in Board of Educ., Levittown v. Nyquist, 439 N.E.2d 359 (N.Y. 1982) (the 1982 decision of the New York Court of Appeals rejecting claims that the New York system of financing public schools violated the Equal Protection Clause of the federal or state Constitution, or the education clause of the state constitution) to support Justice Roberto's ruling that R.E.F.I.T. v. Cuomo is not justiciable. First, in Levittown, the Court of Appeals ruled upon the merits of the plaintiffs' claims. This clearly indicates that legislative actions taken pursuant to the education clause of the New York Constitution "are not automatically immune from judicial review." Powell v. McCormack, 395 U.S. 486, 519 n.40 (1969). Second, the actual language of the court's opinion in Levittown unequivocally supports the proposition that R.E.F.I.T. v. Cuomo presents a justiciable controversy:

With full recognition and respect, however, for the distribution of powers in educational matters among the legislative, executive and judicial branches, it is nevertheless the responsibility of the courts to adjudicate contentions that actions taken by
According to Professor Tribe, "one should not accept lightly the proposition [of the "political question" doctrine] that there are provisions of the Constitution which the courts may not independently interpret, since it is plainly inconsistent with Marbury v. Madison's basic assumption that the Constitution is judicially declarable law." Clearly, then, if "we make the initial assumption that judicial review plays a legitimate role in a constitutional democracy,"

the Legislature and executive fail to conform to the mandates of the Constitutions which constrain the activities of all three branches. *Levittown*, 439 N.E.2d at 363. Third, the Court of Appeals explicitly defined the constitutional standard of the education clause as being one that guarantees "fair and equitable educational opportunity" to the state's children. *Id* at 369, n.9. Clearly, then, there is no "lack of judicially discoverable and manageable standards for resolving" the issue raised in *R.E.F.I.T.*—whether New York's current system of financing public education violates the state constitution's education clause. *Baker v. Carr*, 369 U.S. 186, 217 (1962). Unfortunately, Justice Roberto found otherwise: "We cannot possibly infer a true standard from the broad language of the education article, adopted in 1894." *R.E.F.I.T.*, 578 N.Y.S.2d at 973. For a more complete response to Justice Roberto's finding about the inability to "infer a true standard from the broad language of the education article," see infra notes 151-62 and accompanying text.

In his opinion, Justice Roberto identified as the "philosophical underpinning of the *Levittown* decision," *R.E.F.I.T.*, 578 N.Y.S.2d at 976, the deference that the Court of Appeals showed to the Legislature, whose "primary responsibility" it is to provide the state's children with a "fair and equitable educational opportunity." *Levittown*, 439 N.E.2d at 369 n.9. While this is undoubtedly true, it appears that Justice Roberto did not heed the admonition of Professor Martin Redish with respect to judicial deference to the expertise—in this case, the educational expertise—of the legislature:

"It is vital to distinguish between appropriate "substantive" deference—in which the judiciary, while retaining power to render final decisions on the meaning of the constitutional limits, nevertheless takes into account the need for expertise or quick action—and unacceptable total "procedural" deference, where the court concludes simply that resort to the judiciary constitutes the wrong "procedure," because the decision is exclusively that of the political branches.

Martin H. Redish, *Judicial Review and the "Political Question,“* 79 Nw. U. L. Rev. 1031, 1048-49 (1985). While the Court of Appeals did defer to the expertise of the Legislature in *Levittown*, it exercised what Professor Redish has termed "substantive" deference by specifically reserving the right to strike down any legislatively enacted educational scheme that produces "gross and glaring inadequacy." *Levittown*, 439 N.E.2d at 369. In his opinion granting the defendants' motion to dismiss the complaint for nonjusticiability, Justice Roberto mentioned this deference exercised by the Court of Appeals in *Levittown*. See *R.E.F.I.T.*, 578 N.Y.S.2d at 973. But by dismissing the complaint for nonjusticiability, Justice Roberto exercised "procedural" deference, which Professor Redish maintains the judiciary should never do.


108. Redish, supra note 106, at 1059. According to Professor Redish, the legitimate role "of unrepresentative judicial review [in a constitutional democracy] is to assure that the Constitution restrains majority will." *Id* at 1045. Otherwise, "[i]f the majoritarian branches could act as final arbiters of the limits of their own power, there would have been little purpose in imposing supermajoritarian constitutional limitations in the first place." *Id* at 1045-
the “political question” doctrine must be viewed as a narrow exception to the general rule of *Marbury v. Madison* that the Constitution is judicially declarable law. In fact, according to the United States Supreme Court, unless at least one of the six formulations of the “political question” doctrine—which the Court authoritatively clarified and catalogued in *Baker v. Carr*—“is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question’s presence.” Therefore, we must examine individually the two formulations of the “political question” doctrine that most readily apply to public school finance reform cases—the “textually demonstrable constitutional commitment of [an] issue to a coordinate political department” and the “lack of judicially discoverable and manageable standards for resolving it”—as well as general considerations of non-justiciability.

a. Textually Demonstrable Constitutional Commitment

One primary argument in favor of the position that public school finance reform cases present courts with nonjusticiable political questions is that “constitutional language apparently favoring exclusive legislative responsibility for education” amounts to a “textually demonstrable constitutional commitment” to the legislature of any dispute about the equity of the state’s educational financing system. In other words, because most education clauses in state constitutions speak only to the legislature’s duty and responsibility to “provide” for education, the state constitution itself demonstrates a commitment to the legislature.

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109. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (holding that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”).
110. 369 U.S. 186, 217 (1962). According to the Court, prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.
111. *Id.*
112. *Id.*
114. Hubsch, supra note 2, at 115.
the education of the state’s schoolchildren,\(^{116}\) while none mentions any authority in the judiciary to review the constitutionality of the legislature’s chosen method of providing for education, there must be no such authority vested in the judiciary. When examined more closely, it becomes clear that this argument “represents a fundamentally flawed view of the concept of judicial review.”\(^{117}\)

According to Professor Redish,

> [It] is difficult to construe a constitutional provision as excluding judicial review on the basis of the facts that (1) the courts are not mentioned, and (2) other branches are mentioned . . . because the power of the judiciary to engage in judicial review is not explicitly mentioned in any constitutional provision.\(^{118}\)

In other words, “no constitutional provision describing legislative or executive power expressly [provides for] judicial power to review the constitutionality of the exercise of those powers.”\(^{119}\) So “the mere fact that a constitutional provision expressly refers to the exercise of power by the political branches but not to the review role of the judicial branch cannot justify an abdication of the review function since judicial review is nowhere mentioned in the Constitution.”\(^{120}\)

If the lack of any explicit mention of judicial review in the education clauses of state constitutions\(^{121}\) turns the questions raised in public school finance reform cases like \(R.E.F.I.T. \text{ v. Cuomo}\)\(^{122}\) into nonjusticiable political questions, “virtually every challenge to the constitutionality of a statute would be a political question.”\(^{123}\) In effect, the political question doctrine, the narrow exception to the general rule of \(Marbury \text{ v. Madison}\) that “the Constitution is judicially declarable law,” would swallow the general rule of judicial re-
To suppose that the judiciary has no authority to determine whether legislative enactments that provide for public school financing comply with or violate constitutional mandates "is to suppose that, under the sanction of the constitution, [the legislature] might defeat the constitution itself."\(^{125}\)

While no state court has ruled that "constitutional language apparently favoring exclusive legislative responsibility for education"\(^{126}\) amounts to a "textually demonstrable constitutional commitment"\(^{127}\) to the legislature of any dispute about the equity of the state's educational financing system, the defendants in *Powell v. McCormack*\(^ {128}\) presented virtually identical arguments (albeit in an entirely different context) to the United States Supreme Court. In *Powell*, the defendants argued that the seemingly unambiguous language of Article I, Section 5—that "Each House [of Congress] shall be the Judge of the ... Qualifications of its own Members"\(^ {129}\)—plainly was, on its face, a "textually demonstrable constitutional commitment"\(^ {130}\) to the House of Representatives that "automatically" precluded "judicial review"\(^ {131}\) of the House's decision to exclude Adam Clayton Powell from taking the seat in Congress to which he was duly elected.\(^ {132}\) The Supreme Court rejected the defendants' argument that a "textually demonstrable constitutional commitment"—even one as apparently clear as the one in Article I, Section 5—"automatically" precluded "judicial review":

> In order to determine whether there has been a textual commitment to a co-ordinate department of the Government, we must interpret the Constitution. In other words, we must first determine what pow-

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125. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 329 (1816); see also Redish, *supra* note 106, at 1050 (stating that, "in general the judiciary must have the final say as to the constitutionality of the activities of the political branches, primarily for the reason that the political branches should not be permitted to sit in final judgement on the constitutionality of their own actions."); United States v. Nixon, 418 U.S. 683, 703-04 (1974); Powell v. McCormack, 395 U.S. 486, 518-22 (1969).
132. Powell was being investigated for misappropriation of House funds and for abusing the process of New York courts. *Id.* at 492. Based upon the evidence supporting these allegations, the House passed a resolution excluding Powell from taking his congressional seat in the 90th Congress. *Id.*
er the Constitution confers upon the House through Art. I, § 5, before we can determine to what extent, if any, the exercise of that power is subject to judicial review.\textsuperscript{133}

Furthermore, because the Supreme Court is the “ultimate interpreter of the Constitution,”\textsuperscript{134} it is the final arbiter of “whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed.”\textsuperscript{135} According to Professor Redish, “perhaps the only constitutional provision that actually may be thought to provide a textual basis for excluding judicial review is article I, § 5 . . . .”\textsuperscript{136} Assuming that is true, \textit{Powell v. McCormack}’s holding “that actions allegedly taken pursuant to Art. 1, § 5, are not automatically immune from judicial review”\textsuperscript{137} essentially eviscerated the “textually demonstrable constitutional commitment” formulation of the political question doctrine, at least where judicial review of the federal constitution is concerned.

Of course, \textit{Powell v. McCormack} is not binding authority upon the state courts when they interpret and rule upon claims made under state constitutional provisions. But its rationale is readily applicable to the resolution of the political question issue—at least the “textually demonstrable constitutional commitment”\textsuperscript{138} formulation of the political question doctrine—described earlier\textsuperscript{139} and implicitly raised in \textit{R.E.F.I.T. v. Cuomo}:\textsuperscript{140} whether state “constitutional language appa-

\begin{itemize}
\item \textsuperscript{133} Id. at 519. According to the Court, “[i]f examination of § 5 disclosed that the Constitution gives the House judicially unreviewable power to set qualifications for membership and to judge whether prospective members meet those qualifications, further review of the House determination [to exclude Powell] might well be barred by the political question doctrine.” \textit{Id.} at 520. However, after conducting an extensive examination of the historical precedents of Section 5, \textit{Id.} at 522-47, the Court concluded that “the ‘textual commitment’ formulation of the political question doctrine [did] not bar federal courts from adjudicating [Powell’s] claims” because “Art. I, § 5, is at most a ‘textually demonstrable commitment’ to Congress to judge only the [standing] qualifications expressly set forth in the Constitution.” \textit{Id.} at 548. Therefore, because all parties agreed that Powell met the standing qualifications—age, citizenship, and residency—set forth in Art. I, § 2, and because he “was duly elected by the voters of the 18th Congressional District of New York,” the Supreme Court ruled that “the House was without power to exclude him from its membership.” \textit{Id.} at 550.
\item \textsuperscript{134} Id. at 521 (quoting \textit{Baker v. Carr}, 369 U.S. 186, 211 (1962)).
\item \textsuperscript{135} \textit{Id.}
\item \textsuperscript{136} Redish, \textit{supra} note 106, at 1036 n.37.
\item \textsuperscript{137} \textit{Powell}, 395 U.S. at 519 n.40.
\item \textsuperscript{138} \textit{Baker v. Carr}, 369 U.S. 186, 217 (1962).
\item \textsuperscript{139} \textit{See supra} notes 114-17 and accompanying text.
\item \textsuperscript{140} \textit{See supra} notes 101-06 and accompanying text.
\end{itemize}
ently favoring exclusive legislative responsibility for education”\textsuperscript{141} amounts to a “textually demonstrable constitutional commitment”\textsuperscript{142} that automatically bars judicial review of the method the legislature has chosen to finance public education.

Article I, Section 5, the constitutional provision at issue in \textit{Powell}, clearly contains some type of textually demonstrable commitment to Congress of the power to judge the “qualifications of its own members.”\textsuperscript{143} But on its face, Section 5 does not say what “qualifications” each House of Congress has the power to judge. Had the Supreme Court ruled in \textit{Powell} that the mere existence of a “textually demonstrable constitutional commitment of the issue to a coordinate political department”\textsuperscript{144} automatically precluded judicial review of Congressman Powell’s claim, had it not examined the scope and degree of Article I, Section 5’s textually demonstrable commitment, but instead assumed that Section 5 automatically granted the House “unreviewable discretion”\textsuperscript{145} to judge any and all qualifications of its members, the House of Representatives would have been left as the final judge of the constitutionality of its own action to exclude Powell from the 90th Congress. This result would have been clearly intolerable, because “[i]f the majoritarian branches [of government] could act as final arbiters of the limits of their own power, there would [be] little purpose in imposing supermajoritarian constitutional limitations in the first place.”\textsuperscript{146}

For the same reasons, it would be clearly intolerable to let state legislatures have “unreviewable discretion”\textsuperscript{147} to determine if their actions comply with constitutional mandates. In particular, the education provisions of most state constitutions impose an \textit{affirmative duty}\textsuperscript{148} upon the legislature to establish or provide for the type of edu-

\textsuperscript{141}. Hubsch, \textit{supra} note 2, at 115.
\textsuperscript{142}. \textit{Baker}, 369 U.S. at 217.
\textsuperscript{143}. U.S. \textit{CONST.} art. I, § 5, cl. 1.
\textsuperscript{144}. \textit{Baker}, 369 U.S. at 217.
\textsuperscript{145}. \textit{Tribe}, \textit{supra} note 107, at 104.
\textsuperscript{146}. Redish, \textit{supra} note 106, at 1045-46. \textit{See supra} note 125 and accompanying text. It is equally important to note that, if Article I, Section 5, does give each House of Congress “unreviewable discretion,” \textit{Tribe}, \textit{supra} note 107, at 104, to exclude a member for any reason—a position flatly rejected in \textit{Powell}—Article I, Section 5, would frequently conflict with the unequivocal mandate in Article I, Section 2, that “[t]he House of Representatives shall be composed of members \textit{chosen} every second year by the people of the several States.” (emphasis added). Taken to its extreme, Congress, and not “We the People,” would have ultimate power to decide who sits in Congress—a concept completely inconsistent with the very idea of a representative democracy.
\textsuperscript{147}. \textit{Tribe}, \textit{supra} note 107, at 104.
\textsuperscript{148}. \textit{See}, e.g., \textit{Rose} v. Council For Better Educ., 790 S.W.2d 186, 211 (Ky. 1989)
cation specified by that provision—whether it be "thorough and efficient" or some other specification. While the role of legislatures in providing for, or establishing, the constitutionally mandated type of educational system undoubtedly must be "fundamental and primary," it simply does not follow that a constitutional mandate that imposes an affirmative duty upon the legislature to provide for the education of the state's children also grants the legislature "unreviewable" authority to determine when it has complied with that constitutional mandate.

b. Lack of Judicially Discoverable or Manageable Standards

The other primary argument in favor of the position that public school finance reform cases present courts with nonjusticiable political questions is that "the constitutional provisions which litigants would invoke as guides to resolution of the issue do not lend themselves to judicial application." In other words, state constitutional education provisions "do not lend themselves to the development of workable, generalizable standards of construction" that would help courts resolve the issues presented in public school finance reform cases. As Professor Redish demonstrates, this "absence-of-standards" rationale cannot be taken seriously. Where in the Equal Protection Clause of the Fourteenth Amendment does it mention "strict scrutiny" or "rational basis?" Where in the Due Process Clause of the Fourteenth Amendment does it mention "fair play and substantial justice?" Obviously, the Constitution mentions none of these well (stating that "[t]he sole responsibility for providing the system of common schools is that of our General Assembly. It is a duty—it is a constitutional mandate placed by the people on the 138 members of that body who represent those selfsame people.") (emphasis added); see also Robinson v. Cahill, 358 A.2d 457, 459 (N.J. 1976) (Robinson VI) (noting that the constitutional mandate, the "thorough and efficient" clause, places a "responsibility" and an "obligation" upon the Legislature to create a "thorough and efficient" public school system).

149. See supra note 35 and accompanying text.
151. Tribe, supra note 107, at 99; see also Redish, supra note 106, at 1046 (stating that "[p]erhaps the most widely cited ground in support of the prudential [version of the political question] doctrine is the view that certain constitutional provisions do not lend themselves to the development of workable generalizable standards of construction.").
152. Redish, supra note 106, at 1046.
153. Id. at 1046-50.
known phrases, but courts have managed to use them to apply such vague terms as "equal protection of the laws" and "due process of law." As Professor Redish points out, "[c]ourts are often called upon to apply generalized and ambiguous abstract principles to specific factual situations, even when the application of those principles is unclear." If a court wants to construe the education clause of a state constitution, it can, because "[u]ltimately, any constitutional provision can be supplied with working standards of interpretation." One need only look to public school finance reform cases recently decided by the Supreme Court of New Jersey or the Supreme Court of Texas for guidance and inspiration on how to construe education clauses. Also, equal educational opportunity—the concept central to both cases—would provide an excellent guidepost.

c. General Considerations of Justiciability

According to the United States Supreme Court, "[i]n deciding generally whether a claim is justiciable, a court must determine whether 'the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded.'" As established earlier, "the duty asserted" in this case—the affirmative duty of the legislature to provide for the education of the state's children as mandated by the state constitution's education clause—can be judicially identified. Similarly, the judiciary can determine whether the legislature has breached its constitutionally imposed duty to provide for the education of the state's children in the manner specified by the education clause.

158. Redish, supra note 106, at 1050.
159. Id. at 1047 (emphasis in original); see also id. at 1046-47 (noting that, "whenever the Court truly desires, it can find workable—if not perfect—standards of application in interpreting exceedingly vague constitutional language.").
162. See supra notes 1-6 and accompanying text.
164. See supra notes 151-62 and accompanying text; see also supra notes 43-45 and accompanying text.
165. See supra notes 107-50 and accompanying text. See, e.g., Robinson v. Cahill, 303 A.2d 273 (N.J.), cert. denied, 414 U.S. 976 (1973) (Robinson I) (holding that the New Jersey Legislature did not satisfy its constitutional duty to provide all schoolchildren with a "thorough and efficient" education).
However, in the context of public school finance reform litigation, the question of "whether protection for the right asserted can be judicially molded" presents a far more complex separation-of-powers issue than the political question issue discussed above. In order to understand fully the complexities of this issue, a further examination of the separation-of-powers doctrine and its relationship to the doctrine of checks and balances is necessary.

B. Separation of Powers vs. Checks and Balances

Under one widely accepted definition of separation of powers, "[o]ne branch [of government] is not permitted to encroach on the domain or exercise the powers of another branch." In other words, "each [branch of government] ... must not interfere with the functioning of the others." According to Justice Brandeis, "[t]he doctrine of the separation of powers was adopted ... not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."

In order to determine whether an action taken by one branch violates the separation-of-powers principle embodied within the very structure of the Constitution, the United States Supreme Court defines the separation-of-powers limits upon the scope of one branch's authority by comparatively articulating the powers that the Constitution confers upon the other branches. For instance, in Kilbourn v. Thompson, a case involving the scope of congressional power to hold an uncooperative witness in contempt, "the Supreme Court demonstrated how the nature of one branch's function is used to mark the limit of another branch's function: '[T]he House of Representatives not only exceeded the limit of its own authority, but assumed a pow-

166. Specifically, that issue concerns what remedy, if any, a court may grant to plaintiffs once it concludes that the current public school financing scheme is unconstitutional in light of the indisputable fact that "[t]he Legislature's role in education is fundamental and primary." Abbott v. Burke, 575 A.2d 359, 367 (N.J. 1990) (Abbott II).
170. Nagel, supra note 168, at 667. (explaining that "[s]eparation of powers means that the powers delegated to each branch of the . . . government are measured in part by contrast to the powers delegated to the other branches.")
171. 103 U.S. 168 (1880).
er which could only be properly exercised by another branch of the
government, because it was in its nature clearly judicial.”172 Similarly, in Youngstown Sheet & Tube Co. v. Sawyer,173 the Steel Seizure case, the Supreme Court invalidated a presidential order that directed the Secretary of Commerce to take control of the country’s steel mills and ensure that they continued operation because President Truman’s order “amount[ed] to lawmaking, a legislative function which the Constitution has expressly confided to the Congress.”174 Also, under the political question doctrine,175 the judiciary should not exercise its otherwise valid authority to adjudicate a case or controversy if one or more of the six formulations of that doctrine “is inextricable from the case at bar.”176 According to Justice Brennan, who wrote for the Court in Baker v. Carr, “[t]he nonjusticiability of a political question is primarily a function of the separation of powers.”177 But it is important to keep in mind that, as demonstrated earlier, the political question doctrine does not bar the judiciary from exercising its power of judicial review to determine whether a public school finance system violates the state’s constitution.178

By contrast, “the doctrine of checks and balances buttresses the conceptual distinctions among the functions of government by providing for direct intervention by each branch into the functioning of the others; power can be checked only if it is shared.”179 In other words, “[t]he different governmental departments must necessarily affect the internal operations of the other branches because the checks imposed by the Constitution cannot be effective unless they have an ‘external’ impact.”180 But this assertion seems clearly inconsistent with the previous assertion that “each [branch of government] must

172. Nagel, supra note 168, at 667 n.43 (quoting Kilbourn v. Thompson, 103 U.S. 168, 192 (1880)); see also INS v. Chadha, 462 U.S. 919, 960 (1983) (Powell, J., concurring in the judgment) (stating that, “[w]hen Congress finds that a particular person does not satisfy the statutory criteria for permanent residence in this country it has assumed a judicial function in violation of the principle of separation of powers.”).
174. Id. at 582.
175. See supra notes 107-62 and accompanying text; see also Tribe, supra note 107, at 97-107.
178. See supra notes 91-166 and accompanying text.
180. Id. at 693-94.
not interfere with the functioning of the other."181 In fact, the inconsistency appears to be so fundamental that reconciliation of these principles might seem impossible. How is a branch of government supposed to act when, while the separation-of-powers principle instructs it "not [to] interfere with the functioning of the other" branches, the checks-and-balances doctrine instructs it to intervene directly "into the functioning of the others?"

In part, the answer to this question is that, while the concepts of separation of powers and checks and balances are "contradictory in substance," they are nonetheless usually "consistent in purpose."182 Unfortunately, the apparent contradiction between these two concepts has sometimes resulted in confusion as to which concept should achieve what purpose.183 For example, in Board of Education v. Walter,184 the Supreme Court of Ohio upheld the constitutionality of that state's public school financing scheme. In concluding that the case presented a justiciable controversy and was not barred by the political question doctrine, the court held that "[o]ne of the basic functions of the courts under our system of separation of powers is to compel the other branches of government to conform to the [Constitution]."185 But as the decisions of other state high courts make clear, this assertion "represents a fundamentally flawed view of the concept of judicial review."186 As the Supreme Court of Wyoming correctly pointed out in Washakie County School District No. One v. Herschler,187 judicial review "is a power vested in the courts as one of the checks and balances contemplated by the division of government into three departments."188 While it is easy to confuse the concepts of separation of powers and checks and balances189 and to employ them interchangeably, courts should not do so. Sometimes, the concepts are contradictory in both purpose and operation.190

181. Id. at 682 (citation omitted).
182. Id. The ultimate purpose of both concepts is to prevent the "tyrannical use of pow-
er." Id.
183. Id. "It is almost an American tradition . . . to confuse the doctrines . . . ." Id.
184. 390 N.E.2d 813 (Ohio 1979).
185. Id. at 823 (quoting State v. Masterson, 183 N.E.2d 376, 379 (Ohio 1962)).
188. Id. at 318 (emphasis added).
189. See supra note 183 and accompanying text.
190. The best example of this is Powell v. McCormack, 395 U.S. 486 (1969). In Powell, the United States Supreme Court ruled that, even though Article I, Section 5, was a textually demonstrable constitutional commitment that granted to each House of Congress the authority
C. A Revisionist Review of Robinson v. Cahill

In Robinson IV,191 the Supreme Court of New Jersey confronted a situation in which separation of powers and checks and balances pulled in opposite directions. As the court correctly noted, its “function is to appraise compliance with the Constitution, not to legislate an educational system . . . .”192 In Robinson I,193 the court concluded that the then-existing system of financing New Jersey’s public schools194 did not comply with the mandate of the “thorough and efficient” clause—that the Legislature provide all children with “equal educational opportunity.”195 But “[t]he Legislature’s role in education is fundamental and primary.”196 Therefore, in Robinson II,197 the supreme court correctly recognized, and showed respect for, this principle. By declining to issue a remedial order in Robinson II,198 .

to judge the qualifications of its own members, it did not automatically preclude judicial review of Congress’s exercise of that authority. Clearly, the separation-of-powers principle—that one branch of government “is not permitted to encroach on the domain of another,” see supra note 167 and accompanying text—would mandate that the Supreme Court view Congressman Powell’s claim as a nonjusticiable political question. Otherwise, the Court would be interfering with a “textually demonstrable constitutional commitment” of authority to Congress.

On the other hand, had the Court accepted the arguments of the defendants in Powell and ruled that Article I, Section 5, granted each house of Congress “unreviewable discretion,” TRIBE, supra note 107, at 104, to judge the qualifications of its members, the House of Representatives would have been left as the final judge of the constitutionality of its own action to exclude Adam Clayton Powell from the 90th Congress. Taken to its extreme, “unreviewable discretion” would mean unchecked authority to exclude otherwise duly elected members of Congress, a scenario utterly inconsistent with the most fundamental notion of our government—that “We the People” choose those who will represent us. See supra note 146. Therefore, the Supreme Court in Powell v. McCormack had to choose between not interfering with the House of Representatives’ exercise of its Article I, Section 5, authority—the choice mandated by strict adherence to separation of powers—or interfering with the ability of the House of Representatives to be the final judge of the constitutionality of its own actions—the choice mandated by strict adherence to checks and balances. The Court either had to adhere to separation of powers—and surrender a portion of its judicial review authority—or it had to adhere to checks and balances—and reaffirm its role “as ultimate interpreter of the Constitution.” Powell v. McCormack, 395 U.S. 486, 521 (1969) (quoting Baker v. Carr, 369 U.S. 186, 211 (1962)).

192. Id. at 719.
194. See supra note 39.
198. Id. at 66.
the court “allow[ed] the fullest scope to the exercise of the Legislature's legitimate power,” giving the Legislature almost two years to enact remedial legislation. Had the court ordered into effect a detailed public school finance scheme so as to ensure that all students received the constitutionally mandated “thorough and efficient” education, it would have been unduly encroaching upon—in fact, usurping—the Legislature's constitutional authorization to do so; it would have been acting as New Jersey's unelected “super-legislature.”

Because the court's authority to craft a remedy designed to cure the constitutional violation found in Robinson I (for which it normally has wide discretion) would have significantly and substantially interfered with the Legislature's authority under the “thorough and efficient” clause, the New Jersey justices correctly recognized that respect for separation of powers required that its authority to provide this specific plaintiff with a remedy yield to the Legislature's constitutional authority and duty to provide all students with a “thorough and efficient” education.

Conversely, deference to the Legislature in that situation would not have significantly or substantially interfered with the court's plenary authority to adjudicate cases and controversies because deference of this type would not limit the ability of the courts to determine when a constitutional right has been violated. However,

201. However, the “this specific plaintiff vs. all students” rationale loses some of its persuasive power in the context of a class action such as Abbott v. Burke. See Abbott v. Burke, 495 A.2d 376, 380 n.1 (N.J. 1985) (Abbott I).
202. Initially, the court must defer because it must assume that the Legislature will comply with the constitutional mandate and remedy the unconstitutional status quo. After all, legislators, like judges, do take oaths to uphold the constitution. This assumption is akin to the presumption of validity that accompanies most legislative acts. See Robinson v. Cahill, 355 A.2d 129, 132 (N.J. 1976) (Robinson V). Until it becomes clear that the assumption is false and that the Legislature will not comply with the constitutional mandate, the court must defer to the Legislature's “fundamental and primary” role in providing for the “maintenance and support of a thorough and efficient system” of public education for every child in the state. N.J. CONST. art. VIII, § 4, para 1.
203. At this juncture, it is important to make a vital distinction between what Professor Redish has termed “substantive deference” and what he has termed “procedural deference.” Redish, supra note 106, at 1048-49. According to Professor Redish, “substantive deference”—in which the judiciary, while retaining power to render final decisions on the meaning of the constitutional limits, nevertheless takes into account the need for expertise or quick action—is an “appropriate” form of deference that the judiciary sometimes shows to the legislative and executive branches of government. Id. at 1048. On the other hand, Professor Redish views what he termed “procedural deference” as an “unacceptable” form of deference because it involves a situation “where the court concludes simply that resort to the judiciary
judicial authority," Redish, supra note 106, at 1060. As Professor Redish points out, "the grave potential dangers to individual liberty that would result from a total judicial abdication make clear that the courts must exercise some meaningful review, if only to provide a floor of constitutionally acceptable governmental behavior." Id. at 1051.

A contrast between Robinson v. Cahill and R.E.F.I.T. v. Cuomo, 578 N.Y.S.2d 969 (Sup. Ct. 1991) will illuminate why this distinction is so vital. In Robinson I, the Supreme Court of New Jersey concluded that the state's then-existing system of public school financing violated the "thorough and efficient" clause of the New Jersey Constitution. See supra notes 38-49 and accompanying text. But in Robinson II and Robinson III, the supreme court postponed the issuance of any remedial order so as to give the Legislature ample time to rectify the unconstitutional status quo. See supra notes 49-55. By doing so, the court displayed a considerable amount of substantive deference to the Legislature, at least as Professor Redish has defined that concept. See Redish, supra note 106, at 1048-49. In effect, the court issued a declaratory judgement in Robinson I that the public school financing system was unconstitutional. But in Robinson II, the court, apparently realizing that the Legislature possessed a greater institutional capacity and more expertise to create an educational system that complied with the "thorough and efficient" clause, retained jurisdiction of the matter but postponed the issuance of any remedy for almost two years. Robinson II, 306 A.2d at 66. By retaining jurisdiction in Robinson II without issuing any remedial order then and there, the court apparently took "into account the need for [the Legislature's] expertise" in educational matters, but it also retained the power to issue any remedial order necessary to vindicate the constitutional rights of New Jersey's schoolchildren—their fundamental right to a "thorough and efficient" education. Professor Redish's definition of "appropriate" substantive deference accurately describes the actions taken by the Supreme Court of New Jersey in Robinson I, Robinson II, and Robinson III.

By contrast, the trial court in R.E.F.I.T. v. Cuomo simply dismissed the plaintiffs' claims as being nonjusticiable. R.E.F.I.T., 578 N.Y.S.2d at 976. As demonstrated earlier, this dismissal cannot be justified on political question grounds. See supra notes 107-62 and accompanying text. It also cannot be justified as the only course of action permitted by the Court of Appeals' decision in Board of Educ., Levittown v. Nyquist. See supra note 106. In fact, while the Court of Appeals did defer to the expertise of the Legislature in Levittown, it exercised substantive deference, not procedural deference, by specifically reserving the right to strike down any legislatively enacted educational scheme that produced "gross and glaring inadequacy." Levittown, 57 N.Y.2d at 48. In addition, the Court of Appeals never held in Levittown that education financing was the exclusive responsibility of the Legislature; on the contrary, it merely held that education financing was the "primary responsibility" of the Legislature. Id. at 49 n.9. On the other hand, the decision of the trial court in R.E.F.I.T. v. Cuomo, granting the defendants' motion to dismiss for nonjusticiability, amounted to an exercise of "procedural" deference, the type of deference that Professor Redish has deemed "unacceptable." Redish, supra note 106, at 1049. The "underlying philosophy," R.E.F.I.T., 578 N.Y.S.2d at 976, of Levittown, that the New York Legislature bore the "primary responsibility" for crafting a "fair and equitable educational" system, Levittown, 57 N.Y.2d at 49 n.9, "at most establish[ed] a . . . need for substantive deference, not for the total abdication of judicial authority," Redish, supra note 106, at 1051 (emphasis in original), that the trial court
this last assertion holds true only as long as the Legislature in fact
provides the plaintiff with a remedy for the violation of his or her
constitutional right. (Of course, the New Jersey Legislature refused to
do so until well after Robinson IV was decided.) If, initially, the
court’s power to “appraise [legislative] compliance with the Constitu-
tion,” its power of judicial review is not threatened by deferring
to the Legislature’s authority and duty under the “thorough and
efficient” clause, that power becomes threatened if the Legislature
fails or refuses to remedy the violation of plaintiff’s constitutional
right. The Legislature’s failure or refusal to provide a sufficient reme-
dy would become, in effect, a denial of the existence of the violation
of the right, or even of the right itself. After all, what good would it
do to say that one has a legal right if the law will not afford a reme-
dy for a violation of that right? Thus, by failing or refusing to
remedy a constitutional violation, especially one of its own doing, the
Legislature completely usurped the plenary authority of the judiciary
to review the constitutionality of legislative enactments.

In order to prevent the Legislature’s violation of the plaintiffs’
constititutional right to a “thorough and efficient” education from
persisting indefinitely, the court was forced to provide a provisional
remedy in Robinson IV. Clearly, “[t]he extraordinary action [taken by
the Robinson IV court] was grounded in the undeniable principle
that when legislative inaction threatens to abridge a fundamental right
such as education, the judiciary must afford an appropriate reme-
dy,” even when, by providing that remedy, the court interferes


205. See supra note 95.

206. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (noting that “[t]he govern-
ment of the United States has been emphatically termed a government of laws, and not of
men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy
for the violation of a vested legal right.”).

207. In fact, the longer the Legislature delayed in remedying the “profound” violation of plaintiffs’ constitutional right to a “thorough and efficient” education, the more it encroached
upon the judiciary’s plenary authority both to determine whether a plaintiff properly before it
enjoys a constitutional right and whether a legislative enactment has abridged that constitu-
tional right.

208. See supra notes 61-65 and accompanying text.

209. Abbott I, 495 A.2d at 382; see also I. Skelly Wright, The Role of the Supreme
Court in a Democratic Society—Judicial Activism or Restraint?, 54 CORNELL L. REV. 1, 9
(1968). (stating that, “[i]f substantial rights are at stake which the legislative process cannot
or will not vindicate, the task of doing so unfortunately, but inevitably, passes to the
courts.”).
with "the activities of another branch of government." In other words, the supreme court had to check the Legislature's continuing abridgement of plaintiffs' fundamental constitutional right, and thus the ability of the Legislature to abridge the constitution itself, by embarking on a course of events that the separation-of-powers principle counseled it not to do. Robinson IV presented the court with a direct confrontation between separation of powers and checks and balances, and the court wisely chose the latter.

Judge Skelly Wright, in the course of applauding some of the Warren Court's most controversial decisions, once wrote:

[W]here the choice is between the Court struggling alone with a social issue and the legislature dealing with it expertly, legislative action is to be preferred. All too often, however, the practical choice has been between the Court doing the job as best it can and no one doing it at all. Faced with these alternatives, the Court must assume the legislature's responsibility. If the legislature simply cannot or does not act to correct an unconstitutional status quo, the Court, despite all its incapacities, must finally act to do so. For "nature abhors a political vacuum as much as any other kind," and if the legislatures do not live up to their constitutional responsibilities, the Court must act to fill the vacuum.

Clearly, "[j]udicial deference can go just so far." But that still does not tell us just how far it can or should go. According to Professor Redish, "[t]he level of . . . deference will . . . vary, depending on the severity of both the asserted emergency and of the loss of liberty involved." In Robinson v. Cahill, "the loss of liberty involved"—the denial to New Jersey's schoolchildren of their fundamental right to a "thorough and efficient" education—grew more and

210. Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 87 (Wash. 1978). See Robinson IV, 351 A.2d at 724 (stating that, "[t]his Court, as the designated last-resort guarantor of the Constitution's command, possesses and must use power equal to its responsibility. Sometimes, unavoidably incident thereto and in response to a constitutional mandate, the Court must act, even in a sense seem to encroach, in areas otherwise reserved to other Branches of government." (citing Powell v. McCormack, 395 U.S. 486 (1969) (emphasis added)).

211. "[T]he true principle that should guide the allocation of power [among the three branches of government] is not the principle of separation of the three kinds of power but is the principle of check. The danger is not blended power. The danger is unchecked power." Robinson v. Cahill, 351 A.2d 713, 737 (N.J. 1975) (Robinson IV) (Mountain & Clifford, JJ., dissenting) (emphasis added).

212. Wright, supra note 209, at 6.


214. Redish, supra note 106, at 1051.
more substantial with every deadline that the Legislature neglected and ignored.215 This ever-increasing loss of liberty, coupled with the severe "constitutional exigency"216—the Legislature's continued failure or recalcitrant refusal to remedy the unconstitutional status quo—finally forced the court to take affirmative remedial action in Robinson IV.217 Clearly, after "pausing in deference to the doctrine of separation of powers" for over two years,218 the court concluded that "[t]he need for immediate and affirmative judicial action [to remedy the constitutional violation was] apparent."219

And yet, the justices of the New Jersey Supreme Court expressed three strikingly different views in Robinson IV as to when it should have abandoned its deferential attitude and acted affirmatively to remedy the "unconstitutional status quo."220 They had little more than common sense to guide them. The majority of the court concluded that the then-existing state of affairs, marked by the recalcitrant Legislature's inaction, "was sufficiently serious to justify the action" that it finally undertook,221 but that earlier action would not have been justified or warranted. Justice Pashman, who concurred in part only, concluded that, after seeking "to render every possible deference to the primacy in this field granted to the Legislature by the Constitution," the court had "long since reached the point beyond which continued toleration by this court of the status quo would implicate the court itself in these constitutional violations."222 Therefore, Justice Pashman would have ordered "relief both broader in scope and calculated to implement more directly the mandates of the ['thorough and efficient'] clause as construed by our prior decisions in this case."223 At the opposite extreme, Justices Mountain and Clifford concluded that continued strict adherence to separation of powers would have been the wisest course of action: "[W]e cannot at the present time forsee a state of affairs or set of circumstances which would justify [the majority's] encroachment upon the prerogative of

215. See supra note 207.
216. See supra note 50 and accompanying text.
217. See supra notes 57-65 and accompanying text.
219. Id. at 720.
220. Wright, supra note 209, at 6.
221. Robinson IV, 351 A.2d at 738.
222. Id. at 725.
223. Id.
another branch of government." Obviously, there are no easy answers and it is impossible to say that any one of these three views was wrong. Perhaps the best solution to the difficult separation-of-powers problem inherent throughout Robinson v. Cahill would have been to avoid the problem altogether. As will be demonstrated presently, the Supreme Court of New Jersey has attempted to do just that, and has likely succeeded, in Abbott v. Burke.

IV. ABBOTT V. BURKE

As this Note has thus far attempted to demonstrate, the most difficult barrier that advocates of public school finance reform have faced in first-generation cases is judicial deference to educational systems enacted by state legislatures pursuant to explicit constitutional commands. In fact, a number of state supreme courts have upheld the constitutionality of education financing systems that they readily acknowledged to be grossly inequitable and in need of substantial reform. Those courts have done so primarily because of this deference to state legislatures. Even in cases in which plaintiffs have successfully demonstrated the unconstitutionality of a state's public school financing scheme, "[t]he gap between a favorable judicial decision and a favorable remedy has been a wide one," as the protracted Robinson v. Cahill litigation made so clear.

224. Id. at 739.
225. See supra notes 91-94.
226. See supra note 91.
227. Throughout the remainder of this Note, and unless indicated otherwise, the term "deference" refers to substantive deference, not procedural deference. See supra note 203.
228. Hubsch, supra note 2, at 115.
230. See Rodriguez, 411 U.S. at 59 (stating that "the ultimate solutions must come from [state legislatures] and from the democratic pressures of those who elect them."); see also Lujan, 649 P.2d at 1025; McDaniel, 285 S.E.2d at 165; Thompson, 537 P.2d at 648.
232. See supra notes 35-90 and accompanying text. The Robinson plaintiffs waited almost five years before receiving a remedy for the violation of their fundamental constitutional rights to a "thorough and efficient" education. While the trial court first declared New Jersey's then-existing public school financing scheme unconstitutional in January, 1972, the legislature failed to provide fully funded remedial legislation until the 1976-77 school year. See Robinson v. Cahill, 287 A.2d 187 (N.J. Super. Ct. Law Div. 1972) (subsequent history
Therefore, the inevitable question has become: what can courts do in public school finance reform litigation to avoid the problem caused by judicial deference, and to ensure that plaintiffs promptly receive an adequate remedy for a violation of their constitutional rights, while still adhering to and respecting the separation-of-powers limitations upon their remedial power in the context of education? The remainder of this Note will examine how the Supreme Court of New Jersey answered this question in *Abbott v. Burke*.

A. Procedural History

In 1981, a number of schoolchildren from Camden, East Orange, Jersey City, and Irvington, four of New Jersey's poorest districts, brought an action in Superior Court, alleging that the Public School Education Act of 1975 violated the "thorough and efficient" clause as it had been applied. In *Abbott v. Burke* (*Abbott I*), the Supreme Court of New Jersey ruled that plaintiffs' action should be considered initially by the appropriate state administrative agency (the Department of Education) rather than by a trial court.

omitted); see also supra notes 82-90 and accompanying text.

See supra notes 167-225 and accompanying text.


See supra note 35 and accompanying text.

Abbott v. Burke, 575 A.2d 359, 363 (N.J. 1990) (*Abbott II*). As noted earlier, the supreme court found the 1975 Act constitutional on its face in *Robinson V*, 355 A.2d 129 (N.J. 1976). But substantial doubts, expressed by three members of the court in *Robinson V*, that the 1975 Act would satisfy the constitutional mandate of the "thorough and efficient" clause as applied practically ensured an as-applied challenge to the constitutionality of the 1975 Act. See *Robinson V*, 355 A.2d at 139 (Hughes, C.J., concurring); 355 A.2d at 143 (Conford, P.J.A.D., t/a, dissenting in part); 355 A.2d at 163 (Pashman, J., dissenting).


Under N.J. STAT. ANN. section 18A:6-9, the state's Commissioner of Education has "plenary authority 'to hear and determine all controversies and disputes arising under the school laws . . . .'" *Abbott I*, 495 A.2d at 393 (quoting N.J. STAT. ANN. § 18A:6-9 (West 1989)). According to the *Abbott I* court, "the school laws include the Public School Education Act of 1975, and . . . a controversy now awaits resolution." Id. The court ruled that this action should initially be considered by the Department of Education ("DOE") rather than by a superior court judge for two primary reasons: (1) the DOE has "the particular training, acquired expertise, actual experience, and direct regulatory responsibility" in education matters; and (2) administrative hearings would serve to develop a far more fully informed factual record "than could be developed in Superior Court." Id. at 392. According to one commentator:

*Abbott I* in 1985 reflected substantial deference to both the legislative and executive branches. In remanding the matter to the commissioner of education, the
While the state Commissioner of Education normally presides over the hearing of controversies that involve the "school laws," the supreme court in *Abbott* I ruled that, because the Commissioner was the primary-named defendant, he had to transfer the initial hearing of the case to an impartial administrative law judge ("ALJ").

Almost one hundred days of hearings before the ALJ resulted in an enormous and elaborate factual record. Because the *Abbott* plaintiffs were students living and attending school in four poor urban districts, their factual presentations to the ALJ focused almost exclusively upon the wretched state of education in those districts. Their factual presentations also focused upon the extreme disparities between the educational opportunities available to students in more affluent suburban districts and the opportunities available to students in the poor urban districts. After considering the evidence presented, "the ALJ found that evidence of substantial disparities in educational inputs (such as course offerings, teacher staffing, and per-pupil expenditures) were related to disparities in school district wealth." Therefore, the ALJ concluded "that the plaintiffs' districts, and others, were not providing [their students with] the constitutionally mandated thorough and efficient education; that the inequality of educational opportunity statewide itself constituted a denial of a thorough and efficient education; that the failure was systemic; and

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243. *Id.*
244. *Id.*
that the [1975 Act] and its funding were unconstitutional."\(^{246}\)

The state’s Commissioner of Education, the primary defendant in this action, completely rejected the ALJ’s factual findings, legal conclusions, and recommendations as to the type of funding scheme that would achieve "substantial equality of educational opportunity throughout the state."\(^{247}\) He concluded that "the Act guaranteed a thorough and efficient education by virtue of the school districts’ [theoretically] unlimited power to raise funds to satisfy their constitutional obligation, the Commissioner’s power to require them to do so, and the Commissioner’s power to take over\(^{248}\) the operation of any district that [was] fail[ing]."\(^{249}\) Furthermore, he concluded that any failure to provide students with a thorough and efficient education "was district-specific and remediable under the existing funding system."\(^{250}\)

The state Board of Education reviewed the Commissioner’s factual and legal conclusions and agreed with them "in almost all respects."\(^{251}\) Ultimately, the Board of Education concluded that "the Act as implemented was constitutional as applied throughout the entire state."\(^{252}\) Plaintiffs appealed the Board’s decision directly to the Supreme Court of New Jersey, which certified the appeal directly, bypassing the Appellate Division.\(^{253}\)

### B. The Supreme Court’s Evolving Interpretation of the Thorough and Efficient Clause

In Robinson I,\(^{254}\) the supreme court, for the first time,\(^{255}\) defined the amount and type of education that New Jersey’s students were entitled to under the explicit mandate of the constitution’s “thorough and efficient” clause. As noted earlier, the Robinson I court concluded that the “thorough and efficient” clause requires the State to provide all students with “equal educational opportunity,"\(^{256}\)

\[\text{References}\]

246. Id.
247. Id. at 364-65.
250. Id.
251. Id.
252. Id.
253. Id. at 359.
255. See supra note 43 and accompanying text.
256. See supra note 44 and accompanying text.
that the constitutional command of equal educational opportunity requires the State to provide each and every child with "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."\textsuperscript{257} However, in Robinson I, the supreme court explicitly held that the constitutional command does not require state-wide equality of educational expenditures;\textsuperscript{258} it permits per-pupil funding disparities among districts, but only as long as those disparities do "not become a device for diluting the State's mandated responsibility" to provide all students with equal educational opportunity.\textsuperscript{259} Ultimately, the Robinson I court concluded that the Legislature had not satisfied its constitutional duty to provide all students with a "thorough and efficient" education solely on the basis of gross disparities in per-pupil expenditures among property-wealthy and property-poor districts, because it had "been shown no other viable criterion for measuring compliance with the constitutional mandate."\textsuperscript{260} Thus, the Robinson I court clearly implied that its decision to examine the constitutional mandate of the "thorough and efficient" clause solely in terms of educational funding disparities was essentially a stopgap, a viable method of measuring the State's compliance with the constitutional mandate only until the State substantively defined the content of a "thorough and efficient" education.\textsuperscript{261}

In sections 4 and 5 of the Public School Education Act of 1975, the Legislature finally provided a comprehensive substantive definition of the level of education mandated by the "thorough and efficient" clause.\textsuperscript{262} Additionally, in Robinson V\textsuperscript{263} the supreme court confirmed what it had implied in Robinson I: the "thorough and efficient" mandate was "a requirement of a specific substantive level of education,"\textsuperscript{264} the level of education that would give each child an equal opportunity to compete in the labor market and to fulfill his or her role as a citizen.\textsuperscript{265} The court unequivocally concluded that per-

\textsuperscript{257} See supra note 45 and accompanying text.
\textsuperscript{258} Robinson I, 303 A.2d at 294.
\textsuperscript{259} Id. at 298.
\textsuperscript{260} See supra note 46 and accompanying text.
\textsuperscript{261} Robinson I, 303 A.2d at 295; see also Abbott v. Burke, 575 A.2d 359, 369 (N.J. 1990) (Abbott II).
\textsuperscript{263} 355 A.2d 129 (N.J. 1976).
\textsuperscript{264} Abbott II, 575 A.2d at 368.
\textsuperscript{265} Robinson I, 303 A.2d at 295. Specifically, the Robinson V court found that "each pupil shall be offered an equal opportunity to receive an education of such excellence as will
pupil expenditure disparities—the sole basis for its holding in *Robinson I* that the “thorough and efficient” mandate was not being met—were relevant only if those disparities impacted upon the substantive level of educational offering. Therefore, even though the funding mechanism of the 1975 Act was virtually certain to produce substantial per-pupil funding disparities between property-wealthy and property-poor districts, the *Robinson V* court found that the 1975 Act, examined as a whole, was facially constitutional. As Chief Justice Wilentz noted, “[t]he change of focus from the dollar disparity in *Robinson I* to substantive educational content in *Robinson V* is clear; it was the main theme underlying the court’s determination [in *Robinson V*] that the Act was [facially] constitutional.”

In *Abbott I*, in which the supreme court decided that the original hearing of the controversy should be conducted by an administrative law judge and not by a trial court judge, the court modified and clarified its interpretation of the “thorough and efficient” clause in two fundamental ways. First, the *Abbott I* court effectively abandoned the *Robinson V* court’s focus upon an absolute minimum substantive level of educational offering, in favor of a new concept of comparative equal educational opportunity. *Abbott I*’s clarification as to what types of proofs were relevant to “the thorough and efficient education issues” meant that, if a comparison of those educational opportunities received by poorer disadvantaged students and those received by relatively advantaged students made it clear that the former would not be able to compete in, and contribute to, the society entered by the

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266. *Abbott I*, 495 A.2d at 384.
268. *Id.* at 369.
270. *Id.* at 139.
272. *See supra* notes 239-40 and accompanying text.
latter, those poorer disadvantaged students have been denied a “thorough and efficient” education, because they have been denied equal educational opportunity.\textsuperscript{273} In the process, the Abbott I court substantially modified the definition of equal educational opportunity provided by the Robinson V court, which had found that “each pupil shall be offered an equal opportunity to receive an education of such excellence as will meet the constitutional standard.”\textsuperscript{274} While the Robinson V definition of equal educational opportunity focused exclusively upon educational “inputs,” the revised Abbott I definition shifted the focus of the analysis to include both educational “inputs” and “outputs.”\textsuperscript{275} Second, the supreme court added a new “gloss” to the constitutional mandate in Abbott I, “that the State not only had the power to spend” more on the education of poorer disadvantaged students than on the education of relatively advantaged students in light of the poorer students’ greater needs, “but that it might be \textit{required} to do so.”\textsuperscript{276}

Finally, in Abbott II, in which the supreme court ruled that the 1975 Act violated the “thorough and efficient” clause as it had been applied to the State’s poorer urban districts,\textsuperscript{277} the court synthesized the major aspects of its previous interpretations of the constitutional mandate. The court combined Robinson I’s concept of equal educational opportunity,\textsuperscript{278} and Robinson V’s focus upon substantive educational offering\textsuperscript{279} with Abbott I’s “new element”\textsuperscript{280} of comparative equal educational opportunity\textsuperscript{281} and, in the process, clarified its interpretation of the “thorough and efficient” clause. Specifically, the Abbott II court concluded “that the requirement of a thorough and efficient education . . . mean[s] that poorer disadvantaged students must be given a chance to be able to compete with relatively advantaged students.”\textsuperscript{282}

The importance of the supreme court’s synthesis in Abbott II of its previous interpretations of the “thorough and efficient” clause

\textsuperscript{274} Robinson V, 355 A.2d at 134; see also supra note 266.
\textsuperscript{275} See supra note 265.
\textsuperscript{277} Id. at 363.
\textsuperscript{278} See supra notes 43-45 and accompanying text.
\textsuperscript{279} See supra notes 263-64 and accompanying text.
\textsuperscript{280} Abbott II, 575 A.2d at 372.
\textsuperscript{281} See supra notes 272-73 and accompanying text.
\textsuperscript{282} Abbott II, 575 A.2d at 372.
cannot be overstated; that synthesis provides the structure of analysis for the entire opinion. Not only do all of the court’s factual analyses flow from its synthesis of the previous interpretations of the “thorough and efficient” clause, but so does the remedy that the court provided for the Abbott plaintiffs. Ultimately, this synthesis is an essential element in the reaffirmation of New Jersey’s constitutional commitment to the original conception of equal educational opportunity.

C. The Funding Scheme of the 1975 Act

1. The Guaranteed Tax Base Funding Scheme

The funding scheme of the 1975 Act provides school districts with several different types of state aid. Equalization aid is the most important type, and it accounts for the largest portion of funds that the state distributes to local districts. According to the supreme court, “equalization aid attempts to obliterate the enormous disparity between rich and poor for school tax purposes.” The 1975 Act’s funding scheme attempts to equalize the taxing power of school districts—that is, the ability of a poor school district to raise as much school funding as a relatively wealthy district when both impose the same local property tax rate—but it does so only to a limited extent. Specifically, the funding formula empowers all school districts to raise tax dollars as if their tax bases, in terms of per-pupil property value, were 134% as large as the state’s average tax base. This hypothetical tax base is referred to as the guaranteed tax base or GTB. Each year, any given school district chooses its tax rate as if the total value of that district’s real property were equal to the GTB. In other words, the Act ensures each district that,

283. See id. at 367 (concluding that “[i]n order to pass on plaintiffs’ contentions, we must once again, in the context of this case, define the scope and content of the constitutional provision. That definition is critical to our determination of a remedy.”) (emphasis added).

284. See supra notes 1-6 and accompanying text.

285. For example, during the 1984-85 school year, equalization aid totaled $1.24 billion, Abbott II, 575 A.2d at 378, while the next largest amount of aid was $315 million in categorical aid. Id. at 380.

286. Id. at 378.

287. Id. at 377. For a description of a funding scheme that provides for complete equalization of taxing power, see COONS, supra note 1, at 200-09.


289. Id. at 378.

290. Id.
regardless of its relative poverty, it will be able to collect an amount of revenue as if it were levying its tax upon the GTB. Ultimately, the local revenues that the district actually collects from the tax rate it imposes upon its actual tax base are supplemented by equalization aid from the state "in an amount that, when added to these local revenues, equals what the tax rate would have produced [had it been] applied to the GTB."\textsuperscript{291} In effect, the smaller a district’s tax base—that is, the lower its per-pupil property value—the more state equalization aid it will receive. Furthermore, those districts with tax bases larger than the GTB receive no equalization aid.\textsuperscript{292}

In effect, the GTB funding scheme reduces enormous property wealth disparities between richer and poorer districts for school funding purposes. Because the scheme guarantees poorer districts—those districts whose actual tax bases are smaller than the GTB—the ability to raise revenue for school funding as if their tax bases were equal to the GTB, it creates two classes of districts for school funding purposes: those districts with a tax base “equal” to the GTB and those districts with a tax base greater than the GTB.\textsuperscript{293} For the 1984-85 school year, the GTB amounted to $223,100—that is, 1.34 times the state’s average tax base of $186,000 per pupil—and the property wealth distribution of those districts with tax bases greater than the GTB ran from $223,667 per pupil to $7.8 million per pupil.\textsuperscript{294} For the same 1984-85 school year, approximately two-thirds of the state’s districts had tax bases equal to the GTB for school tax purposes and approximately one-third had tax bases greater than the GTB.\textsuperscript{295} Without the GTB equalizing scheme in operation, the state’s per-pupil tax bases would have ranged from a low of $22,322 to a high of $7.8 million.\textsuperscript{296} In other words, during the 1984-85 school year, the wealthiest district in the state had 350 times as much taxable property wealth per pupil as the state’s poorest district. Therefore, if the poorest district had not been equalized up to the GTB, and if both the wealthiest and poorest districts taxed their property at the same rate, the wealthiest district would have raised 350 times as much revenue.

\textsuperscript{291} Id.
\textsuperscript{292} Id.
\textsuperscript{293} Id. at 378.
\textsuperscript{294} Id.
\textsuperscript{295} Id. Before the 1975 Act took effect, equalization aid under the funding scheme declared unconstitutional in Robinson I only equalized approximately 30% of the state’s districts. Id. at 378.
\textsuperscript{296} Id. at 378.
for school funding as the poorest district.

One interesting aspect of the GTB funding scheme is that, unlike the foundation plan discussed earlier, the GTB scheme does not require districts to tax at any minimum rate in order to be eligible for equalization aid. What tax rate the district taxes at, and, subsequently, the total amount of school funding it has, are strictly for the district to decide. Theoretically, the state is indifferent as to whether a district spends $2,000 per pupil or $20,000 per pupil, as long as the district manages to provide its students with the constitutionally mandated "thorough and efficient" education.

The 1975 Act contains two important limitations upon the equalizing impact of the GTB funding scheme. First, "the amount of equalization aid a district receives in a budget year is based not on its budget for that year, the current year, but on the budget of the prior year." This limitation can have a severely negative impact upon the equalizing effect of the GTB funding scheme. Second, the Act contains a budget cap provision that restricts the amount by which a school district may increase its budget. This provision does not have a severe negative impact upon the equalizing effect of the GTB scheme because poorer districts are permitted greater increases, at least percentage-wise, than richer districts.

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297. See supra note 13.
299. Id.
300. Id. at 378.
301. Id.
302. Id. at 379. For instance, assume that a hypothetical district, District A, had a total school budget last year of $5 million, of which the state provided $2.5 million in equalization aid. These budget figures reveal that the state provides 50% of District A's budget; therefore, District A's actual, unequalized tax base is exactly one-half of the GTB. This year, District A wishes to increase its total school budget by 10% to $5.5 million. Had the state based its award of equalization aid to districts upon current-year budget figures instead of prior-year budget figures, District A would have had to raise only $250,000 locally in order to increase its total budget by $500,000 because the state would pay for 50% of the increase. But under the existing system of awarding equalization aid based upon prior-year budget figures, District A would have to raise the entire $500,000 increase from local sources, with no state equalization assistance. This system would discourage a poor district with an already high tax rate from making such annual increases in its school budget because it would have to bear the entire burden. Therefore, "[b]oth the Commissioner and the Board [of Education], in their decisions in this case, support[ed] legislative change to a current year funding system." Id.
303. Id.
304. Id. at 379.
2. Minimum Support Aid

The funding scheme of the 1975 Act provides minimum aid for those districts with a property valuation that exceeds the GTB; only those districts that receive no equalization aid receive minimum aid. Because minimum support aid is given only to richer districts, it is entirely anti-equalizing. In other words, this type of aid actually increases the already large disparities in per-pupil expenditures between richer and poorer districts. While the amount of minimum support aid is not as substantial as it was prior to the enactment of the 1975 Act, it still amounted to $163 million during the 1989-1990 school year—all of which went to wealthier districts. Even worse is the fact that the minimum aid provision of the 1970 Act, declared unconstitutional in Robinson I, was merely non-equalizing—that is, it neither increased nor decreased funding disparities between richer and poorer districts because all districts received the same per-pupil amount of minimum aid. The minimum aid provision of the 1975 Act, on the other hand, is a blatant subsidy for the wealthy. It is, in effect, a reward for being rich. Why is minimum support aid given to “rich” districts when a substantial number of “poor” districts are underfinanced? In fact, “[w]hy are any

305. Id.
306. Id. According to the supreme court, “[i]n 1985-86, 34.4% of New Jersey’s school districts, or 207 districts, were above the guaranteed tax base and received minimum aid.” Id. at 379 n.12.
307. Id. at 379. Another anti-equalizing type of state aid given under the 1975 Act is Teachers’ Pension Annuity Fund (TPAF) aid. Id. at 380. TPAF aid is invidiously anti-equalizing because “the richer districts tend to have more and better paid teachers per pupil than the poorer districts.” Id. In fact, TPAF aid is what Coons, Clune, and Sugarman have termed an anti-equalizing “revenue task unit” because, generally, the wealthier a district is, the more TPAF funding it will receive. Coons, supra note 1, at 74-75. Even though TPAF funding is a substantial portion of the state’s education budget—for instance, it amounted to $535.8 million in 1984-85—the Abbott court refused to disturb its distribution for practical reasons. Abbott II, 575 A.2d at 380.
308. Abbott II, 575 A.2d at 380; see also id. at 406 (concluding that the sole function of minimum aid “is to enable richer districts to spend even more, thereby increasing the disparity of educational funding between richer and poorer” districts).
309. Id. at 379-80.
310. See supra note 64.
311. For instance, during the 1984-85 school year, Englewood Cliffs, a district with a per-pupil property valuation of $1.24 million, received $135 per pupil in minimum aid. Also, Saddle River Borough, a district with a per-pupil property valuation of $1.23 million, received $177 per pupil in minimum aid during the same school year. Abbott II, 575 A.2d at 407.
312. Coons, supra note 1, at 124.
313. Robinson v. Cahill, 355 A.2d 129, 153 (N.J. 1976) (Robinson V) (Conford, P.J.A.D.,
dollars given to rich districts when the poor districts are not yet equalized? The answer must lie in expedience, as it surely does not lie in fairness.”314 Accordingly, in Abbott II, the supreme court held the minimum support aid provision of the 1975 Act unconstitutional because it increased funding disparities between richer and poorer districts, and because it “ha[d] no arguable educational or administrative justification.”315

D. Educational Funding Disparities Under the 1975 Act

The Abbott plaintiffs attempted to prove that the funding scheme of the 1975 Act worsened the per-pupil expenditure disparities between wealthier and poorer districts, compared with the disparities that existed prior to the enactment of the 1975 Act.316 The supreme court concluded that they had successfully done so, and proceeded to analyze and catalog those disparities.317 After analyzing those dis-

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314. COONS, supra note 1, at 125 (emphasis added).
316. Id. at 382.
317. Id. A brief summary of the court’s descriptions of these funding disparities would illuminate their importance in the court’s ultimate conclusion that the 1975 Act was unconstitutional as applied to the state’s poorer urban districts. See supra note 16.

The plaintiffs’ expert catalogued the state’s districts in terms of their per-pupil expenditure level for each year from 1975-76 through 1984-85. Abbott II, 575 A.2d at 382-83. According to her analysis, in 1975-76, the year before the 1975 Act took effect, those districts at the ninety-fifth percentile (again, solely in terms of per-pupil expenditure level) spent $1,974 per pupil while those districts at the fifth percentile spent $1,076—a difference of $898 per pupil. Id. Subsequently, in 1984-85, districts at the ninety-fifth percentile spent $4,755 per pupil while districts at the fifth percentile spent only $2,687—a difference of $2,068 per pupil. Id. Even when adjusted for inflation in terms of 1975 dollars, the expenditure disparity increase is still significant: it grew from $898 per pupil in 1975-76 to $1,135 per pupil in 1984-85. Id. The plaintiff’s expert measured the impact of this disparity by comparing large groups of wealthier and poorer districts. For instance, during the 1984-85 school year, a group of wealthier districts educating approximately 190,000 students spent 40% more per pupil than a group of poorer districts educating approximately 355,000. Id. In terms of per-pupil expenditures, these wealthier districts spent $4,029, while the poorer districts spent only $2,861. Id.

The plaintiffs’ expert also catalogued the state’s districts’ per-pupil expenditure levels in terms of septiles or sevenths, with Septile 7 including those districts with the highest per-pupil expenditure levels and Septile 1 including those districts with the lowest per-pupil expenditure levels. Id. at 387. Each septile in this analysis contained about one-seventh of the state’s students. Id. at 387. For the 1984-85 school year, per-pupil expenditure levels ranged from a low of $932 to $2,634 in Septile 1, but in Septile 7 the per-pupil expenditure levels ranged from a low of $4,055 to a high of $10,103. Id. at 388. Therefore, none of the lowest-spending districts in Septile 1 spent more than $2,634 per pupil, while none of the highest-spending districts in Septile 7 spent less than $4,055 per pupil. Coupled with these
parities, the court concluded that they generally showed that "the poorer the district—measured by [property] valuation per pupil, or by other indicators of poverty—the less the per-pupil expenditure; the poorer and more urban the district, the heavier its [local property tax rate], the greater the school tax burden . . . ." Finally, the court discussed the multiple relevancies of these statistical disparities, generally showing that the poorest districts had the least amount of school funding available and that the wealthiest districts had the greatest amount of school funding available.

To the extent educational quality is deemed related to dollar expenditures, it tends to prove inadequate quality of education in the poorer districts, unless we were to assume that the substantial differential in expenditures is attributable to an education in the richer districts far beyond anything that thorough and efficient demands; it indicates even more strongly the probability that the poorer districts' students will be unable to compete in the society entered by the richer districts' students; and by its consistency over the years, it suggests that the system as it now operates is unable to correct this. 319

319. Id. at 384 (emphasis added); see also id. at 407 (finding that per-pupil funding disparities between richer and poorer districts "strongly [support] and [are] . . . necessary element[s] of our conclusion that the education provided these students from poorer urban districts will not enable them to compete with their suburban colleagues or to function effectively as citizens in the same society.").
Thus, the Abbott court clearly viewed educational funding disparities between richer and poorer districts as highly relevant to the resolution of the ultimate issue before it: whether the 1975 Act afforded to students in poorer districts an education that would enable them to compete in, and contribute to, the society entered by their relatively advantaged peers from richer districts. If the Act did not afford students in poorer districts such an education, it violated the "thorough and efficient" clause by denying them equal educational opportunity.

E. The Substantive Comparison of Education Offered to Students in Affluent Suburban Districts and Poorer Urban Districts

The "primary basis" of the supreme court's decision in Abbott v. Burke was its comparative demonstration that the quality of education provided to students in poorer urban districts is grossly inferior to the quality of education provided to students in affluent suburban districts. By contrasting the educational opportunities

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320. Id. at 394.
321. These terms—"poorer urban" and "affluent suburban"—have specific, concrete connotations, especially in the context of this case. Based upon data prepared and provided by the plaintiffs, as well as the state Department of Education ("DOE"), the Abbott court crafted these two categories of school districts, categories that flowed directly from the court's synthesized interpretation of the "thorough and efficient" clause and effectively determined both the form and content of its opinion. See supra notes 277-82 and accompanying text.

The court began its categorization of school districts by discussing the importance and significance of socioeconomic status ("SES") in the factual analysis. SES is a numerical measurement consisting of seven factors—per-capita income level, occupation level, education level, percent of residents below the poverty line, population density, urbanization (percent of district considered urban), and unemployment level—that quantifies how a district's "social and economic background and environment" create advantages or disadvantages for the educational opportunity of its students. Abbott II, 575 A.2d at 384-85. Years earlier, the DOE had divided all the school districts into ten groups, what it termed District Factor Groups or DFGs, with each DFG containing about fifty districts. Id. The DFGs were then updated and ranked according to SES from lowest to highest, with DFG A consisting of those districts that had the lowest SES, and DFG J consisting of those districts that had the highest SES. Id. As the court pointed out in Abbott, "a student's SES is considered by many to be the most important factor in predicting test scores and other measures of performance." Id. at 385.

Next, the court discussed the origin and meaning of the term "urban district." Id. at 386. The DOE compiled this category based upon those communities labeled "urban aid districts" by the state Department of Community Affairs. Id. Urban aid districts are those that, because of their extreme poverty and need, qualify for substantial amounts of state aid—as measured by factors such as size or density of municipality, number of children in families on welfare, existence of public housing, as well as low property values and/or high tax rates. Id. at 386. According to the court, "[t]he more than urban districts are the poorest and
available to students in richer suburban districts with those available to students in poorer urban districts, the supreme court demonstrated the dramatic and severe disparities between those opportunities. The court compared several specific educational opportunities available to students in richer suburban districts with the grossly inferior opportunities available to students in poorer urban districts: "exposure to computers;" "science education;" "foreign language programs;" "[m]usic programs;" "[a]rt programs;" "[p]hysical education programs;" the unsafe, crumbling school facilities in poorer urban districts; the lack of any advanced academic courses in the curricula of the poorer urban districts, coupled with those districts' burden of teaching basic skills to an overwhelming number of students. In addition, the court examined other factors, such as teacher-to-student ratios, the average experience of the teaching staff, as well as the staff's average level of education.

To "[complete] the picture as to just how great the educational needs of these students in poorer urban districts are, the Abbott

most needy municipalities in the state." Id.

Finally, the court combined these two groups, low-SES DFGs (A and B) and "urban aid districts," and discerned their common members. Those districts in DFG A or B that qualified as urban aid districts were then grouped by the court into an entirely new category—"poorer urban districts." Id. at 386. According to the court, "[t]hese twenty-nine poorer urban districts are not only in the lowest SES classifications (DFGs A and B), but even their ranking within DFGs A and B is among the lowest." Id. at 387 (emphasis in original). Furthermore, "the overwhelming majority of students in districts with the lowest SES ranking in the state are from poorer urban districts" and "the overwhelming proportion of all minorities in the state are educated in these poorer urban districts." Id.

Conversely, while the poorer urban districts are generally those with the highest poverty indicators and the lowest SES in the state, the "richer suburban districts"—also known as the "affluent suburban districts"—are those suburban school districts "whose indicators of wealth—per-capita income, property values, and [SES]—are the highest" in the state. Id. at 382. Clearly, the court's categorization of the districts in this manner flows directly from its interpretation of the "thorough and efficient" clause in both Abbott I and Abbott II. See supra notes 272-82 and accompanying text.

323. Id. at 395.
324. Id. at 396.
325. Id.
326. Id.
327. Id. at 396.
328. Id. at 397.
329. Id. at 398.
330. Id. at 396-97.
331. Id. at 399.
332. Id. at 400.
court revealed the "shocking contrast"\textsuperscript{333} between the invariable failure of these students when taking the state's High School Proficiency Test (HSPT)—which merely measures the students' minimum basic skills—and the invariably high scores of over 90% achieved by students in richer suburban districts.\textsuperscript{334} Furthermore, it discussed a severe problem seemingly unique to these poorer urban districts—the inordinately high dropout rate.\textsuperscript{335} As the court sardonically notes, "[a] district cannot deliver a thorough and efficient education to a dropout."\textsuperscript{336}

In every measurable and discernable way, the evidence of these severe deficiencies in the quality of education provided to students in poorer urban districts,\textsuperscript{337} as well as the inability of the present system to address their special needs,\textsuperscript{338} demonstrates beyond any doubt that these students have not been receiving the constitutionally mandated "thorough and efficient" education that would "enable all students to function as citizens and workers in the same society." The court's factual analysis, both of the funding disparities between richer and poorer districts and of the shockingly deficient substantive education provided to students in poorer urban districts, makes it clear that these students cannot "compete with their suburban colleagues or . . . function effectively as citizens in the same society."\textsuperscript{339}

\textbf{F. The Abbott Holding}

In his opinion for the court, Chief Justice Wilentz revealed the court's holding at the very beginning.\textsuperscript{340} He left no doubt about the court's unanimous conclusions, because the evidence presented left no doubt. Specifically, the court found "that under the present system the evidence compels but one conclusion: the poorer the district and the greater its need, the less the money available, and the worse the education. That system is neither thorough nor efficient. We hold the

\begin{itemize}
\item \textsuperscript{333} Id.
\item \textsuperscript{334} Id.
\item \textsuperscript{335} Id. at 401.
\item \textsuperscript{336} Id.
\item \textsuperscript{337} Id. at 399-400.
\item \textsuperscript{338} Id. at 402.
\item \textsuperscript{339} Id. at 407; see also id. at 400 (concluding that "these students from [poorer urban districts] simply cannot possibly enter the same market or the same society as their peers educated in wealthier districts.").
\item \textsuperscript{340} Id. at 363.
\end{itemize}
Act unconstitutional as applied to poorer urban school districts.\textsuperscript{341} By so holding, the Supreme Court of New Jersey became the first court in the nation to hold a public school system unconstitutional \textit{only} as it had been applied to a fraction of the state’s districts, rather than as applied to all districts.\textsuperscript{342} In every previous school finance case—including \textit{Robinson v. Cahill}\textsuperscript{343}—courts had either upheld the constitutionality of an entire financing system despite their acknowledgement of substantial per-pupil funding disparities,\textsuperscript{344} or had struck down an entire system based on those disparities.\textsuperscript{345}

The \textit{Abbott} court’s innovative holding that the 1975 Act violated the “thorough and efficient” clause only as applied to the state’s twenty-eight poorer urban school districts\textsuperscript{345} should profoundly influence the second generation of public school finance reform litigation in a number of fundamental respects. First, courts will no longer have to tolerate the existence of substantial per-pupil funding disparities and uphold the entire financing scheme because of their separation-of-powers instinct to defer to the legislature’s “fundamental and primary” role in educational matters, nor should they.\textsuperscript{346} In other words, courts no longer need be so constrained in their options as to how they should examine the constitutionality of public school financing systems. They should carefully consider the option of holding a public school financing system—especially one laden with serious and severe inequities—unconstitutional only as it had been applied to some of the state’s districts, if the evidence presented would support such a holding, as it so clearly did in \textit{Abbott v. Burke}. Second, the as-applied holding may reduce the evidentiary burden upon plaintiffs attempting to prove that a state’s current public school financing scheme violates its constitution. Instead of having to provide convincing proof of both substantive educational and funding disparities for most or all of a state’s districts, plaintiffs can narrow the focus of their proof and focus only upon the most severe disparities and the most needy districts. Furthermore, the as-applied holding of \textit{Abbott}

\begin{itemize}
  \item \textsuperscript{341} \textit{Id.}
  \item \textsuperscript{342} See Tractenberg, \textit{supra} note 242, at 1664.
  \item \textsuperscript{343} See \textit{id.; see also supra} notes 229-30 and accompanying text.
  \item \textsuperscript{344} Tractenberg, \textit{supra} note 242, at 1664.
  \item \textsuperscript{345} By holding the 1975 Act unconstitutional only as it applied to 28 districts, the Supreme Court of New Jersey conversely upheld the constitutionality of the Act as it applied to the overwhelming majority—95%—of school districts. Richard Lehne, \textit{The Unanswered Question: Who Pays for Abbott?}, 125 N.J. L.J. 1665 (1990).
  \item \textsuperscript{346} \textit{Abbott II}, 575 A.2d at 367.
\end{itemize}
EQUAL EDUCATIONAL OPPORTUNITY

reduces the likelihood that the Supreme Court of New Jersey will face another separation-of-powers confrontation with the Legislature, as it did in Robinson v. Cahill, because the limited scope of its holding necessarily limits the scope of the remedy that it has ordered. The as-applied holding represents one unique aspect of the supreme court’s opinion; the court’s remedy in Abbott—which flowed directly from its interpretation of the “thorough and efficient” clause, from its detailed factual analyses, and from its as-applied holding—represents another.

G. The Abbott Remedy: Distrusting Democracy and Guaranteeing Virtual Representation to New Jersey’s Poorer Urban School Districts

In his book Democracy and Distrust, Professor John Hart Ely spells out his theory of how courts should interpret the United States Constitution. Professor Ely concludes that “[i]n a representative democracy value determinations are to be made by our elected representatives, and if in fact most of us disapprove, we can vote them out of office.” Consequently, courts, the most “undemocratic” branch of government, should not make value determinations, precisely because they are not directly accountable to the political processes. However, “judicial intervention becomes appropriate when the existing processes of representation seem inadequately fitted to the representation of minority interests, even minority interests that are not voteless.” Thus, Professor Ely concludes that courts should intervene to protect minorities when the majoritarian political processes mal-

347. See supra note 345.
348. According to the United States Supreme Court, “the scope of the remedy is determined by the nature and extent of the constitutional violation.” Milliken v. Bradley, 418 U.S. 717, 744 (1974) (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971)); see also Abbott II, 575 A.2d at 409 (stating, “[t]he record convinces us of a failure of a thorough and efficient education only in the poorer urban districts. We have no right to extend the remedy any further . . . .”).
349. In all likelihood, the Abbott court probably could not have avoided the separation-of-powers limits on its remedial authority that so restricted the Robinson court had it not narrowed the scope of its inquiry and found the 1975 Act unconstitutional only as it had been applied to New Jersey’s twenty-eight poorer urban school districts. The Abbott court had to choose a different approach because what good would it have done merely to repeat its course of actions in Robinson? See Tractenberg, supra note 242 at 1664.
350. JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).
351. Id. at 103.
352. Wright, supra note 209, at 22.
353. ELY, supra note 350, at 86.
function and systematically discriminate against some minority group.

Malfunction [of the political process] occurs when the process is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority . . . .

In one section of his book, Professor Ely examines extensively the concept of virtual representation as the manner in which the United States Constitution frequently protects the interests of those persons who are politically powerless—either because they actually lack the right to vote within a jurisdiction or because they are consistently out-voted by a hostile majority—and therefore cannot protect themselves. According to Ely, “the protective device of guaranteeing ‘virtual representation’ [proceeds] by tying the interests of those without political power to the interests of those with it and is based upon “the quite sensible assumption that an effective majority will not inordinately threaten its own rights,” but instead will act in its own best interests. Therefore, the concept of virtual representation suggests that, when the political majority acts in its own best interests, it will also be acting in the best interests of the minority.

The United States Constitution contains at least three provisions that explicitly or implicitly guarantee virtual representation to a minority group that actually or effectively lacks political power. One is the Privileges and Immunities Clause of Article IV, which “was designed to ensure a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.” The Privileges and Immunities Clause of Article IV does not convey any set of substantive rights or entitlements; it merely provides a guarantee “that whatever entitlements those living in a state see fit to vote themselves will generally be extended to visitors.” As Professor Ely explains, “by constitutionally tying the fate of [literal] outsiders to the fate of those [in-state residents] possessing political power, the framers en-

354. Id. at 103. (emphasis in original).
355. Id. at 82-88, 100-04.
356. Id. at 83.
357. Id. at 100.
358. U.S. CONST. art. IV, § 2.
359. ELY, supra note 350, at 83.
360. Id.
Similarly, the United States Supreme Court has interpreted the Commerce Clause of Article I, Section 8, to mean that a state [cannot] subject goods produced out of state to taxes it [does] not impose on goods produced locally. By thus constitutionally binding the interests of out-of-state manufacturers to those of local manufacturers represented in the legislature, it provide[s] political insurance that the taxes imposed on the former [will] not rise to a prohibitive or even an unreasonable level.

Clearly, one common thread between the Privileges and Immunities Clause and the Commerce Clause is that both provide virtual representation to actual, geographic outsiders.

However, as this country’s reprehensible history of discrimination against racial minorities so clearly demonstrates, “even [people who are] technically represented can find themselves functionally powerless and thus in need of a sort of ‘virtual representation’ by those more [politically] powerful than they.” The Constitutional provision that guarantees virtual representation to the “functionally powerless” is the Fourteenth Amendment’s Equal Protection Clause, which “quite plainly imposes a judicially enforceable duty of virtual representation” upon the States. Even though “the Equal Protection Clause confers no substantive rights and creates no substantive liberties,” (just like the Privileges and Immunities Clause), it clearly was designed to ensure that, “insofar as political officials had chosen to provide or protect [a substantive right or liberty] for some people (generally people like themselves), they had better make sure that everyone was being similarly accommodated or be prepared to explain pretty convincingly why not.”

In Abbott v. Burke (Abbott II), the Supreme Court of New
Jersey utilized this same principle of virtual representation to ensure that students in the state's twenty-eight poorer urban school districts promptly receive a fully adequate remedy that will begin to vindicate their fundamental constitutional right to a "thorough and efficient" education. Because of its synthesized interpretation of the "thorough and efficient" clause and because of its extensive analysis of the enormous substantive and funding disparities between the educational opportunities available to students in richer suburban districts and those available to students in poorer urban districts, the Supreme Court of New Jersey ordered the following remedy:

The [1975] Act must be amended, or new legislation passed, so as to assure that poorer urban districts' educational funding is substantially equal to that of the property-rich districts. "Assure" means that such funding cannot depend upon the budgeting and taxing decisions of local school boards. Funding [for the poorer urban districts] must be certain every year . . . . The Legislature may devise any remedy . . . so long as it achieves a thorough and efficient education as defined herein for poorer urban districts.

The Abbott court has clearly sought to prevent any further systematic financial disadvantaging of poorer urban school districts by interpreting the "thorough and efficient" clause to require that poorer urban districts and affluent suburban districts spend "substantially equal" per-pupil amounts of money on education. Whenever educational expenditures increase in affluent suburban districts, the state must ensure that poorer urban districts receive the same increase. According to one commentator,

the requirement that per-pupil spending in the poorer urban districts be "approximately equal" to the average per-pupil spending in the 100 affluent suburbs . . . places in motion a powerful dynamic. Every district and taxpayer in the state will now have an interest in the expenditure decisions of the affluent suburbs. The more the affluent suburbs spend per pupil, the more resources will become available to the poorer urban districts . . . . [Furthermore], it is almost certain that the largest share of the newest revenues will be raised in the large number of middle districts. Every time an affluent suburb increases its per-pupil expenditures, taxes in the middle

371. See supra notes 254-84 and accompanying text.
372. See supra notes 285-339 and accompanying text.
373. Abbott II, 575 A.2d at 408-09.
class districts will increase, yet the schools in those districts will get nothing in return.\textsuperscript{374}

The "powerful dynamic" that this commentator describes is virtual representation. As a result of \textit{Abbott}'s "substantially equal" requirement, new political alliances are likely to emerge,\textsuperscript{375} and the new alliance most likely to emerge is one between New Jersey's poorer urban districts and its affluent suburban districts, which will be aligned against the large bloc of middle class districts. And because of these shifting political alliances, the supreme court is much less likely to face a recalcitrant legislature—as it did during the protracted \textit{Robinson v. Cahill} litigation.\textsuperscript{376} The \textit{Abbott} court has fired a preemptive strike against any possible legislative stalemate with a powerful weapon—"the device of guaranteed virtual representation."\textsuperscript{377} By constitutionally "tying" the interests of residents in poorer urban districts to the interests of residents in affluent suburban districts, who possess far greater political power, the New Jersey Supreme Court has attempted to ensure that the interests of people who live in poorer urban districts will be "well looked after" by the Legislature.\textsuperscript{378}

When crafting this remedy, the \textit{Abbott} court clearly had one eye on the past (that is, on \textit{Robinson v. Cahill}) and one eye on the future. While the \textit{Abbott} court certainly wanted to avoid another constitutional confrontation with a recalcitrant legislature, it also wanted to ensure that future legislatures could not undercut its remedy by plainly couching that remedy within its comparative-equal-educational-opportunity interpretation of the "thorough and efficient" clause.\textsuperscript{379} In addition, the \textit{Abbott} court specifically explained that future legislatures cannot undercut its remedy by placing conditions, such as increases in local property tax rates, upon the poorer urban districts' receipt of the funding increases to which they are constitutionally entitled, because of the "substantially equal" requirement; rather, the state must ensure that the poorer urban districts automatically receive those funding increases. While in \textit{Robinson v. Cahill}, "those whom the Court ha[d] sought to protect [were] politically impotent,"\textsuperscript{380} the

\textsuperscript{374} Lehne, \textit{supra} note 345, at 1664.
\textsuperscript{375} Id.
\textsuperscript{376} See \textit{supra} notes 38-90 and accompanying text.
\textsuperscript{377} ELY, \textit{supra} note 350, at 84.
\textsuperscript{378} Id. at 83.
\textsuperscript{379} See \textit{supra} notes 279-84 and accompanying text.
\textsuperscript{380} Wright, \textit{supra} note 209, at 23.
Abbott court attempted to correct the malfunctioning legislative process in order to make certain, by way of "guaranteed virtual representation," that poorer urban districts are no longer "politically impotent." In Robinson IV, "the Court was . . . aiding a group that was unable to achieve effective legislative recourse" for the substantial violation of its fundamental right to a "thorough and efficient" education—to equal educational opportunity. With the Abbott II remedy, the court sought to ensure that poorer urban districts will, in the future, be able "to achieve effective legislative recourse" without further judicial intervention. In the process, the Abbott court did not violate the separation-of-powers limitations upon its remedial authority in the public education context, limitations implicit in its acknowledgement that the legislature's role in providing for the education of New Jersey's schoolchildren is "fundamental and primary." However, by interpreting the "thorough and efficient" clause to require that the State automatically provide students in poorer urban districts with levels of per-pupil education expenditures that are "substantially equal" to those levels provided by affluent suburban districts to their relatively advantaged student body, the court has ensured that "it—and not the Legislature—remains the ultimate expositor of the . . . constitution."

CONCLUSION

In Abbott v. Burke, the Supreme Court of New Jersey has reaffirmed that state's constitutional commitment to provide all children with equal educational opportunity. As the Abbott court has defined it, equal educational opportunity does not merely mean an equal opportunity to receive a "thorough and efficient" education; instead, it means an equal opportunity to compete in, and contribute to, society. It means an equal opportunity to succeed. Abbott v. Burke stands for the proposition that New Jersey's Constitution requires the state to provide poorer, disadvantaged students with that quantum of education that will give them the equal opportunity to participate fully in all aspects of society. As the supreme court put it, "the Constitution . . .

381. See supra note 354 and accompanying text.
382. ELY, supra note 350, at 84.
383. Wright, supra note 209, at 19.
385. Gibbons, supra note 42, at 1678.
requires that poor children be able to compete with the rich."\textsuperscript{386} This conception of equal educational opportunity is the one most consistent with the intentions of those people who originally fought for the creation of public school systems, that public schools open to all children would "permit the poor to compete" in society.\textsuperscript{387}

In Robinson v. Cahill, particularly in Robinson I, the supreme court unequivocally identified the original motivation for New Jersey's 1875 adoption of the "thorough and efficient" clause: to guarantee all children equal educational opportunity. But following Robinson I, the supreme court's attention focused primarily upon the profound separation-of-powers dispute created by the New Jersey Legislature's recalcitrant refusal to enact a "thorough and efficient" public education system. While the Robinson court's decision to defer initially to the Legislature's fundamental and primary role in education was undoubtedly correct, so was its decision in Robinson IV to partially abandon that deference and to provide a provisional remedy. The Legislature's last-minute adoption of the Public School Education Act of 1975 negated the need for that provisional remedy. But the profound separation-of-powers conflict did not end there. Instead, that conflict continued until the Legislature provided full funding for the 1975 Act, which it did only after the court effectively closed the public school system. All the while, New Jersey's schoolchildren were not receiving what the state Constitution entitled them to—a "thorough and efficient" education.

But the Robinson court never had to confront a different separation-of-powers issue, one that many other state supreme courts have confronted—whether actions challenging the constitutionality of public school financing schemes presented courts with nonjusticiable political questions. Until December, 1991, when the trial judge in R.E.F.I.T. v. Cuomo granted the defendant's motion to dismiss the most recent constitutional challenge to New York's public school financing scheme, no court had accepted the nonjusticiable argument. And an examination of the political question doctrine reveals that no court should accept the nonjusticiability argument. Neither the "textually demonstratable constitutional commitment" formulation of the political question doctrine nor the "lack of judicially discoverable or manageable standards" formulation provides a persuasive rationale for that

\textsuperscript{386} Abbott, 575 A.2d at 375.

\textsuperscript{387} COONS, supra note 1, at 4. See supra notes 1-6 and accompanying text; see also supra note 284 and accompanying text.
argument. While it is true that the education clauses of state constitutions do not provide for judicial review of legislatively enacted public school financing schemes, it is also true that no constitutional provision that bestows authority upon the legislative or executive branch of government provides for judicial review of the exercise of that authority. If the lack of any mention of judicial review in education clauses turns constitutional challenges to public school financing schemes into political questions, then virtually every challenge to the constitutionality of a statute would be a political question. And while it is also true that the language of most education clauses is general and vague, the language of other constitutional provisions, like the Due Process Clause or the Equal Protection Clause, provisions that courts have always applied in specific cases, are no less general and vague. Therefore, suggestions that the education clauses in state constitutions do not lend themselves to judicial application are disingenuous at best. If courts do not determine whether legislatively enacted public school finance schemes comply with constitutional mandates, who will? State legislatures themselves?

In Abbott, the Supreme Court of New Jersey clearly sought to avoid the separation-of-powers conflict that it faced throughout the Robinson v. Cahill litigation. Following its unique holding that the 1975 Act violated the New Jersey Constitution's "thorough and efficient" clause as it had been applied to the state's poorer urban districts, the supreme court provided those districts with a unique remedy—the requirement that poorer urban districts have a per-pupil amount of funding for public education that is "approximately equal" to the amount spent in wealthier suburban districts. Because of the "approximately equal" requirement, the state must automatically provide poorer urban districts with additional education funding every time wealthier suburban districts increase their educational expenditure levels. By thus constitutionally tying the interests of poorer urban districts to the interests of wealthier suburban districts, the supreme court has employed the device of guaranteed virtual representation to ensure that the New Jersey Legislature no longer shortchanges the students in those poorer urban districts, but instead provides them with equal educational opportunity.

Ironically, public school finance reform litigation has provided the judiciary, the most undemocratic branch of government, with the chance to reaffirm the quintessential democratic value—equal opportunity. For the sake of our country's future well-being, which will depend upon the quality of education our children receive, let us hope
that courts make the most of this chance.

Joshua Seth Lichtenstein