

# **The BENCHmark of Education: State Courts' Responsibility to Effectively Mandate Constitutional Educational Funding**

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## **I. INTRODUCTION**

There is a problem with the educational funding system in the United States of America. The problem is illustrated by staggering disparities between educational spending among the states, with expenditures per pupil ranging from \$6,753 in Idaho to \$17,397 in Wyoming.<sup>1</sup> This inconsistency results in wildly varying educational quality,<sup>2</sup> which is especially detrimental in a global society where students from all over the world compete for jobs and admission to universities. While telling as to the rooted discrepancies in school funding on a national level, disparities in per pupil spending between states may be pointless; the United States Supreme Court in 1973 ruled that education is not a fundamental interest under the Constitution, effectively limiting the ability for nationwide reform.<sup>3</sup>

Accordingly, the onus falls on the states to craft and control an educational funding system. Indeed, although specific language varies, nearly every state's constitution requires the state to provide an adequate or basic education to its students.<sup>4</sup> With this in mind, the educational funding problem in America may be better illustrated by the funding disparity *within each state*. In the five states with

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<sup>1</sup> Bruce D. Baker, David G. Sciarra, Danielle Farrie, *Is School Funding Fair? A National Report Card, 3rd Edition*, The Educational Law Center, <http://www.schoolfundingfairness.org>, February 5, 2014 [hereinafter the "Report Card"].

<sup>2</sup> Studies conclusively show a correlation between funding and quality of education. See *The Report Card*.

<sup>3</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 7 (1973).

<sup>4</sup> Michael A. Rebell, *Safeguarding the Right to a Sound Basic Education in Times of Fiscal Constraint*, 75 Alb. L. Rev. 1855, 1864 (2012).

the least progressive funding systems, poorer districts receive at least 20% less funding than the wealthier districts.<sup>5</sup> Many state supreme courts<sup>6</sup> have ruled that such spending inequality violates the provisions in their respective state constitutions guaranteeing its citizens an adequate education.<sup>7</sup>

While such rulings are a meaningful step in the right direction, political gridlock among state legislative branches, especially in light of the recent economic downturn of 2008, fail to make progress towards remedying the injustice.<sup>89</sup> A good case study is the decades long struggle in New Jersey. While continuously ruling in favor of educational funding reform, the New Jersey Supreme Court well-intentioned ideological holdings and orders did little to practically solve the problem.<sup>10</sup> Instead, judicial congestion, narrow factual rulings, and a tentative legislature deprived millions of students their constitutional right for decades.<sup>11</sup> As succinctly stated by Professor Michael A. Rebell,

“there is an increasing pattern of judicial reluctance to confront the executive and legislative branches by using technical and procedural justifications to avoid deciding cases on the merits or to limit remedies in cases that are decided.”<sup>12</sup>

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<sup>5</sup> *The Report Card*.

<sup>6</sup> For example, the New Jersey Supreme Court’s decision in *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973), discussed in detail *infra*, constitutes such a ruling.

<sup>7</sup> “Since 1989, the highest courts in twenty-three states have issued decisions affirming or enforcing [the right to a basic education].” Rebell, *Safeguarding*, 75 Alb. L. Rev. at 1864-5.

<sup>8</sup> *See The Report Card*.

<sup>9</sup> “Unfortunately, the response of most governors and legislatures to current budgetary pressures has been to focus on their responsibility to balance the state budget while ignoring the fact that they have a similar constitutional obligation to ensure that all students continue to receive meaningful education opportunities.” *Id.* at 1863-4.

<sup>10</sup> *See*, Kyle E. Gruber, *Bringing Home the Bacon: A Case for Applying the New Jersey Urban School Funding Remedy from Abbott v. Burke to Poor Rural School Districts*, 2 Colum. J. Race & L. 167 (2012).

<sup>11</sup> *See*, Gruber, *Bring Home the Bacon*, 2 Colum. J. Race & L. 167.

<sup>12</sup> Rebell, *Safeguarding*, 75 Alb. L. Rev. at 1856.

Using New Jersey as a case study, this paper asserts that state supreme courts must craft more specific, all-encompassing remedies in order to combat legislative and political gridlock and help solve problems with educational funding. The next section discusses the New Jersey litigations as they relate to educational funding. Section III explains how teeth-less, albeit well-intentioned New Jersey Supreme Court decisions contributed to the problem and asserts that specific, all encompassing remedies can help create an equitable educational funding system. Finally, Section IV offers a brief conclusion.

## **II. ORDER, BUT NO REMEDY IN NEW JERSEY**

New Jersey's decades-long struggle to establish a funding system that adheres to its state constitution illustrates the need for state courts to issue strong, specific rulings in regards to an issue so crucial to the success the country like educational funding. The three-part saga in New Jersey – starting with *Robinson* and its progeny, continuing with the *Abbott* decisions, and raging on to this day in the *Bacon* line of cases – constitutes a case study showing the necessity for a judicial branch that aggressively upholds educational rights.

### **A. *Robinson* Attempts to Fix Funding**

The Garden State's funding woes began in 1973. After the United States Supreme Court declared that access to education was not a fundamental right under the U.S. Constitution,<sup>13</sup> plaintiffs unhappy with the quality of education filed lawsuits alleging breaches of state constitutional rights, as most state constitutions contain a

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<sup>13</sup> See *Rodriguez*, 411 U.S. at 7.

clause pertaining to education.<sup>14</sup> In 1973, the New Jersey Supreme Court heard such a case in *Robinson v. Cahill* (“*Robinson I*”).<sup>15</sup> In striking down the state’s education funding system, the Court held that the current system did not provide a “thorough and efficient” school system as mandated by the New Jersey Constitution.<sup>16</sup> Of significance, this landmark decision went a step further and found the “thorough and efficient” clause under the state constitution called for an “equal educational opportunity” for all students.<sup>17</sup> Finally, the Court made clear that, should such an inequality exist, the state has violated the constitution and is responsible for a remedy.<sup>18</sup>

Efforts to implement legislation in the wake of *Robinson I* revealed the first rumblings of well-intentioned court decisions followed by legislative inefficiency that still plagues the issue today. After *Robinson II* firmly held that New Jersey violated its constitutional duty to provide a “thorough and efficient” education,<sup>19</sup> legislative inaction caused the court to grant more time for a legislative remedy in *Robinson III*.<sup>20</sup> The legislature continued to stall, forcing the Court to step in once again in *Robinson IV* and approve a provisional remedy that required an increase of per pupil spending of fifty percent.<sup>21</sup> The New Jersey legislature finally enacted the Public School Education Act of 1975 (the “1975 Act”)<sup>22</sup> to comply with *Robinson IV*.

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<sup>14</sup> See, Gruber, *Bring Home the Bacon*, 2 Colum. J. Race & L. at 171-2; see, also, Rebell, *Safeguarding*, 75 Alb. L. Rev. at 1864-5.

<sup>15</sup> *Robinson v. Cahill* (“*Robinson I*”), 303 A.2d 273 (N.J. 1973).

<sup>16</sup> *Robinson*, 303 A.2d at 285.

<sup>17</sup> *Id.* at 294.

<sup>18</sup> *Id.*

<sup>19</sup> *Robinson v. Cahill* (“*Robinson II*”), 306 A.2d 65 (N.J. 1973).

<sup>20</sup> *Robinson v. Cahill* (“*Robinson III*”), 335 A.2d 6, 7 (N.J. 1975).

<sup>21</sup> *Robinson v. Cahill* (“*Robinson IV*”), 351 A.2d 713, 720-22 (N.J. 1975).

<sup>22</sup> N.J. STAT. ANN. § 18A:7A-1 (repealed 1996).

However, in finding the 1975 Act facially constitutional in *Robinson V*, the Court warned that in the absence of funding, the legislation would be meaningless.<sup>23</sup>

The New Jersey Supreme Court's foreshadow would prove clairvoyant, as politics as usual tainted the funding process. The 1975 Act continued to rely heavily on local government funding via property taxes – a practice that clearly favors wealthier districts – while supplementing it with additional state funds.<sup>24</sup> The additional state funding came at a price, however, as state politicians demanded accountability in the form of standardized test scores.<sup>25</sup> This process immediately put school districts most desperate for additional funding at a disadvantage. Furthermore, the amount of supplemental state funding received by districts was a function of property tax, so even if poorer districts taxed at a higher rate, they received less state aid than wealthy districts that taxed less.<sup>26</sup> As a result of the misguided funding system, the gap in per pupil expenditures between wealthy and poor districts continued to widen,<sup>27</sup> paving the way for the next battle in the war for equal funding.

### **B. Abbott's Fight for Urban Districts Spans Three Decades**

In response to the problems funding the 1975 Act, the Education Law Center (ELC) filed *Abbot I* in 1981.<sup>28</sup> The ELC claimed that the funding scheme as

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<sup>23</sup> *Robinson v. Cahill* (“*Robinson V*”), 355 A.2d 129, 132-7 (N.J. 1976).

<sup>24</sup> Gruber, *Bring Home the Bacon*, 2 Colum. J. Race & L. at 174.

<sup>25</sup> *Id.* at fn. 29; citing Barbara G. Salmore & Stephen A. Salmore, *New Jersey Politics and Government: The Suburbs Come of Age*, 315-18 (2008).

<sup>26</sup> *Id.* at 176; citing, *A Short History of School Finance Litigation in New Jersey, 1970 – 2009: The 1980s: Abbot v. Burke*, DEBORAHYAFFE.COM, <http://www.deborahyaffe.com/finance/index.html>.

<sup>27</sup> *See Id.* at 175-6 (“[P]er pupil expenditures in the wealthiest group was \$1,681 in 1975-76, while the poorest group spent \$1,372; a difference of \$309. In 1979-80, however, the wealthiest group of districts spent \$2,529 per-pupil, compared to \$1,924 per-pupil in the poorest group: a difference of \$605”).

<sup>28</sup> *Abbott v. Burke* (“*Abbott I*”), 495 A.2d 376 (N.J. 1985).

constructed did not provide a “through and efficient” education to urban school districts, relying on “overwhelming statistical evidence” of the disparate funding between the city and suburban schools.<sup>29</sup> In its landmark *Abbott II* decision, the New Jersey Supreme Court held that the funding scheme was unconstitutional in regards to urban school districts.<sup>30</sup> In crafting a remedy, the Court again deferred to the legislature to “assure that poorer urban districts’ educational funding is substantially equal to that of the property rich districts,” only providing additional guidance by mandating that the equalized funding may not rely on local property taxes.<sup>31</sup>

Like in *Robinson*, the legislature did not warm to the task. The New Jersey Supreme Court struck down the legislature’s first attempt – the Quality Education Act – as unconstitutional in *Abbott III* and set a deadline for remedial compliance.<sup>32</sup> Predictably, legislature’s second attempt – the Comprehensive Educational Improvement and Financing Act (“CEIFA”) – did not fare much better. In striking down the CEIFA in *Abbott IV*, the New Jersey Supreme Court reasoned that the funding scheme merely succeeded in provided urban school districts with the absolute minimum quality education, while failing to address the unconstitutionally inequitable disparity between wealthy and poor districts.<sup>33</sup>

The Court decided *Abbott IV* in 1997, twelve years after *Abbott I* decision. After more than a decade of legislative failure, the New Jersey Supreme Court was

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<sup>29</sup> Gruber, *Bring Home the Bacon*, 2 Colum. J. Race & L. at 175.

<sup>30</sup> *Abbott v. Burke* (“*Abbott II*”), 575 A.2d 359, 384 (N.J. 1990).

<sup>31</sup> *Abbott II*, 575, A.2d at 408-9.

<sup>32</sup> *Abbott v. Burke* (“*Abbott III*”), 643 A.2d 575 (N.J. 1994).

<sup>33</sup> *Abbott v. Burke* (“*Abbott IV*”), 693 A.2d 417, 427 (N.J. 1997).

fed up.<sup>34</sup> As a result, the Court ordered an “unprecedented remedial measure”<sup>35</sup> by *requiring* equal per-pupil spending between the wealthy and poor school districts, in contrast to the strategy of merely declaring a scheme unconstitutional and asking the legislature to fix it as employed in earlier *Abbott* and *Robinson* decisions.<sup>36</sup> The Court even went a step further after remanding to conduct a study to determine the specific needs of the urban district: the Court in *Abbott V* ordered specific entitlements to the urban districts, such as elementary school reform, fully funded kindergarten and preschool, and new facilities.<sup>37</sup> In essence, the New Jersey Supreme Court’s *Abbott IV* and *Abbott V* rulings depoliticized the legislative process by tying the hands of lawmakers by ordering a specifically crafted remedy.<sup>38</sup>

### **C. Court Earns an “A” in *Abbott*, But Needed An “A+”**

The New Jersey Supreme Court’s aggressive remedies in *Abbott* finally started to close the funding gap between poor, urban districts and wealthy districts, but still failed to go far enough to quell the issue for good. From the first decision and onward, the *Abbott* litigation focused only on *urban* districts. The extensive statistical evidence provided by the ELC in *Abbott I* came from studying schools in

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<sup>34</sup> “Thus, the State has had seven years to comply with a remedy intended to address, albeit partially, a profound deprivation that has continued for at least twenty-five years. [...] [The] continued deprivation of the constitutional right to a thorough and efficient education necessitate[s] a remedy.” *Abbott IV*, 693 A.2d at 443, 439.

<sup>35</sup> Gruber, *Bring Home the Bacon*, 2 Colum. J. Race & L. at 184.

<sup>36</sup> *Abbott IV*, 693 A.2d at 439.

<sup>37</sup> *Abbott v. Burke* (“*Abbott V*”), 710 A.2d 450, 473 (N.J. 1998).

<sup>38</sup> Despite the victory, the state still continued to drag its feet by failing to implement the order properly, *Abbott v. Burke* (“*Abbott VI*”), 748 A.2d 82 (N.J. 2000), and forcing the court to require them to fund the remedy. *Abbott v. Burke* (“*Abbott VII*”), 751 A.2d 1032 (N.J. 2000). *See*, Gruber, *Bringing Home the Bacon*, 2 Colum. J. Race & L. at fn. 103. These subsequent *Abbott* decisions reinforce the thesis that courts must step in to craft strong, specific remedies.

the city.<sup>39</sup> Indeed, the *Abbott* remedies only applied to twenty-eight poor urban districts, chosen as a result of an analysis by the New Jersey Department of Education.<sup>40</sup> Importantly, two criteria from the analysis, density and urbanization, baselessly turned the attention to city districts while ignoring needy, rural districts.<sup>41</sup>

This led to a new chapter of the New Jersey funding saga: the *Bacon* litigation. In *Bacon*, a group of needy rural school district alleged that the state's educational funding system was also unconstitutional as it applied to them, making similar arguments to those proffered by the *Abbott* plaintiffs.<sup>42</sup> The rural school districts ultimately prevailed when the Court deemed the funding received by these districts unconstitutional,<sup>43</sup> but the problems in actually remedying the constitutional violations – as demonstrated in *Abbott* – remain. Indeed, the *Bacon* litigation rages on to this day.

### **III. Lesson Learned: Aggressive Judicial Remedies = Constitutionally Adequate Education**

New Jersey has taken strides to ensure that every student receives a constitutionally adequate education, but the process was not easy. It took nearly two decades for the court to force the hand of the legislature in *Abbott*, and even then, the facts of the case limited the remedy and extended the problem. The lesson

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<sup>39</sup> “From the beginning, the plaintiffs’ focus was on correcting the injustice of a constitutionally inadequate education provided to students in *urban* school districts. This focus has carried throughout the entirety of the *Abbott* litigation history.” Gruber, *Bringing Home the Bacon*, 2 Colum. J. Race & L. at 175 (emphasis included).

<sup>40</sup> *Id.* at 178.

<sup>41</sup> *Id.*; “The ELC picked the most compelling, extreme circumstances to establish their legal case, and the unfortunate consequence of this strategy was the disregard for dissimilar school districts with similarly failing schools.” *Id.* at 180.

<sup>42</sup> *Bacon v. N.J. Dep’t of Educ.*, 2002 WL 31232958 (N.J. Adm. Sept. 23, 2002).

<sup>43</sup> *Bacon v. N.J. Dep’t of Educ.*, (N.J. State Bd. of Educ. Jan. 4, 2006), available at <http://www.state.nj.us/education/legal/sboe/2006/jan/sb4-03.pdf>.

learned from New Jersey is this: state courts must employ specific, all-encompassing remedies to ensure constitutionally adequate education.

### **A. Specific**

Of course, specific remedies – remedies that may come dangerously close to crossing the line between the duties and powers of the judiciary and legislature – should be the exception, not the rule. However, constitutional violations – especially those that relate to such a crucial interest like education – necessitate such a remedy. For one, a specific order from the court, as evidenced by New Jersey, takes the politics out of constitutional rights. In New Jersey, the legislature’s initial attempts to craft a remedy in *Abbott* saw schemes that continued to benefit wealthy districts, as constituents of those areas undoubtedly pressured their lawmakers. A strong remedy like in *Abbott IV* and *Abbott V* not only fosters equal educational opportunities, but also gives lawmakers an out; like a teenager refusing to take a drag of a cigarette because “my parents would kill me,” lawmakers can fix the problem and save face with their constituents by saying “I had no choice.” Lesson learned.

Specific remedies such as those in *Abbott IV* and *V* also allows for a non-convoluted solution process. In the initial *Abbott* decisions, the New Jersey courts painstakingly conducted fact-finding, studies, and analytics into the needs of school districts. This process likely gave the courts a strong idea of what an appropriate remedy would look like. However, instead of crafting a specific remedy, the courts merely declared the current system unconstitutional and passed the baton to a less-informed legislature.

Of course, congress likely conducts its own fact-finding and studies – and has access to the record – but a knowledgeable judiciary crafting a specific remedy takes out the middleman. Implementation and process would still be left to the legislature, but a court well-versed in the constitutional deficiencies could dictate the end results. New Jersey’s *Abbott V* remedy, mandating early education, after school programs, and new facilities serves as a case study that shows how a court system can order a specific remedy, still defer to the legislature, and avoid unnecessary subsequent litigation such as the “did we get this right?” challenges to legislative solutions in *Abbott II* and *III*. Lesson learned.

### **B. All-Encompassing**

Further, *all-encompassing* – not just merely specific – orders from the judiciary are crucial. The New Jersey Supreme Court did well at the end of *Abbott*, but in a case that emphasized not just minimum educational opportunities but *equal* educational opportunities, the Court gravely erred by failing to recognize the plight of the needy rural school districts as well. Other states struggling with constitutional education funding would do well to learn another lesson: these holdings should not be limited to specific groups or districts.

Of course, the entire point of equitable education funding is identifying districts that need more. With this in mind, identifying each needy district is surely no easy task. However, New Jersey shows that fact-finders should take more care in identifying these districts. The New Jersey Department of Education used density and urbanization to identify districts deserving a remedy, two criteria that have more to do with demographics than quality of education. This mistake spawned the

*Bacon* litigation and extended the problem for another decade. While difficult, the task of identifying each and every needy district is well worth it. Of course, more students will be helped more quickly, an obvious benefit. Less obviously, with an eye on the importance of judicial efficiency, taking more time up front to thoroughly investigate and identify constitutionally inadequate districts will save future headaches and court gridlock. In the case of New Jersey, it means no *Bacon*. It also avoids the possibility of subsequent lawsuits from students who received a deficient education during the legislative delay looking for a remedy. Lesson learned.

#### **IV. Class Is Out: A Conclusion**

The winding road to constitutionally adequate education funding has been walked by New Jersey. While the solutions are undoubtedly imperfect, the painstaking process of *Robinson*, *Abbott*, and *Bacon* take on great importance for states in similar plights. New Jersey proved that a strong state judiciary is crucial to fixing unconstitutional education funding systems. Where a legislature drags its feet, it is up to the state courts to uphold their constitution by crafting specific, all-encompassing remedies to force action. In doing so, state courts can not only swiftly ensure an adequate education for all within its state as individuals, but also do its part to keep America's youth competitive and knowledgeable.