

**Socioeconomic Segregation and the Cost of Inequality:
In Search of a New Paradigm for Education Reform in New Jersey**

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I) Introduction

Since the early 1970s, finance reformers have argued that the unequal distribution of educational resources is primarily responsible for producing and perpetuating persistent inequalities in achievement and opportunity in New Jersey's schools. Even though it is indisputable that in some sense "money matters,"¹ the problem vexing education reformers continues to be the mutually reinforcing contingencies of race, class, and place. Textbooks, teachers, supplies, and facilities all cost money, and a community that lacks the funds to furnish its schools with these basic educational tools will not be able to provide education of the same quality as a school that has them. But school finance litigation, which was designed to equalize school finances in the interest of equalizing educational opportunity and achievement, has not had the intended effect of raising the academic performance of poor and minority groups to the levels typically attained by more affluent and white segments of the population.²

The fight over school financing was never solely about money. The focus on school financing is predominantly a result of pragmatic strategic emphasis, not strict logical necessity. School funding is, by and large, the best judicially remediable proxy for describing inequality generally speaking. The reasons for the reliance on this proxy—this fiction of school funding as a panacea for equalizing educational equality—have been well documented. Jurisdictional fragmentation, home rule, and the ideology of localism cause and maintain extreme variations in taxable property wealth, perpetuate segregation by race and class, and ensure that socioeconomic

¹ See generally, *Does Money Matter in Education?*, THE ALBERT SHANKER INSTITUTE (2012).

² NEW JERSEY DEPARTMENT OF EDUCATION, http://www.nj.gov/education/news/2012/0209_gap.htm (Statement of acting commissioner Chris Cerf on the Persistence of the New Jersey Achievement Gap).

integration in the classroom—a far more useful metric for determining the presence of educational inequality³—is as rare as socioeconomic integration in the community itself.⁴

The barriers to equalizing educational opportunity and achievement are not only social and economic, but also legal in origin. Further, New Jersey’s options for crafting a pragmatic reform agenda—one which would address inequality of educational opportunity as the fundamentally social, economic, and geographic problem it is—are extremely confined. The simple redistribution of money (the strategy exemplified by *Abbott*), even in conjunction with dramatic school governance reforms, experimentation with charter schools, tenure reform, curricular redesign, technological upgrades and additional afterschool programs (to name a few) has proven to be woefully inadequate with respect to raising poor and minority student achievement. Inter-district remedies, after *Milliken*, are a virtual impossibility. The ability to diversify school racial and socioeconomic demographics through affordable housing policy—through the landmark framework established through the *Mt. Laurel* and Fair Housing Act, has fallen prey to loopholes and other forms of legislative mismanagement that have stunted its revolutionary potential.

Thus, we appear to be at an impasse. The State is in need of a paradigm shift in education reform that strikes at the root cause of educational inequality, and does not simply attempt to mask it—unsuccessfully—with top-down redistributions of money. This paradigm shift must address the socioeconomic segregation which lies at the root of educational inequality, and must not continue to wage a proxy war on that inequality through the policy vehicle of “school finance.”

³ See *infra* part IV(A).

⁴ See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 Colum. L. Rev. 1, 100 (1990) (describing historical trends in school finance litigation).

The political viability of a more direct, legislatively crafted, socioeconomically integrative remedy hinges on the state legislature, as well as the public at large, understanding the sheer enormity of the costs of the current education finance framework. As such, this paper will serve not only to describe and critique the limitations boundaries of school finance litigation, but to shed light on these costs and imagine ways in which available resources could be better mobilized in pursuit of socioeconomic integration in both classrooms and communities. It would be far less expensive, and far more equitable, to pursue education reform through strategies which address educational inequality as a symptom of socioeconomic isolation, and not simply one of its causes.

Part II of this article will describe the history and legacy of *Abbot* litigation. Part III will critique it from the standpoint of both equity and efficiency. Part IV will more thoroughly examine the cost of the reforms won by *Abbott*, and explore options for a paradigm shift in education policy that pursues socioeconomic integration, not financial equalization, as its primary goal. Part V is a short conclusion.

II) School Finance Litigation

A) School Finance Litigation Generally

Finance litigation emerged in the early 1970s as a means for addressing disparities in educational funding which result from stark disparities in local property wealth. Because local property taxes are the dominant source of revenue for funding schools in many states, and because the amount of taxable local property wealth can be vastly different from one municipality to another, disparities in school funding frequently occur.⁵ In *Serrano v. Priest*, an

⁵ John Augenblick, John Myers, & Amy Anderson, *Equity and Adequacy in School Funding*, 7 FINANCING SCHOOLS 64-65 (1997), http://futureofchildren.org/futureofchildren/publications/docs/07_03_04.pdf.

early school finance lawsuit, plaintiffs argued that California's school finance system (which, true to form, relied heavily on local property taxes to generate revenue) was unconstitutional under the Equal Protection clause of the Fourteenth Amendment of the United States Constitution and the equal protection clause of the California constitution.⁶ In contrast to the district court's holding in *McInnis v. Shapiro*,⁷ in which the court denied that Illinois's inequitable finance system denied poor children the equal protection of the laws, in *Serrano* the Supreme Court of California held that California's school funding system did in fact do so.⁸ The California court consequently required the legislature to create a new finance framework that would ensure that funding disparities among districts were eliminated.

Plaintiffs' victory in *Serrano* opened the floodgates for litigation at the state level.⁹ In the following legislative year, eleven states reformed their school finance systems as a consequence of litigation and thirty-one states had school finance cases pending.¹⁰ Indeed forty-five states have seen the constitutionality of their public school finance systems challenged in state courts, and plaintiffs have been victorious in twenty-eight (approximately two-thirds) of those challenges.¹¹ This has created a veritable school finance reform 'movement' that is national in scope, even if the effects of each victory are limited to the state in which each originated. While each state's particular fiscal and educational circumstances differ, finance reformers in every state have had a common goal and a common methodology—to equalize educational opportunity

⁶ 5 Cal.3d 584, 589-90 (1971).

⁷ 293 F.Supp. 327, 336 (1968). *McInnis* was the first school finance case to challenge the constitutionality of a state's school finance system.

⁸ MATTHEW H. BOSWORTH, *COURTS AS CATALYSTS: STATE SUPREME COURTS AND PUBLIC SCHOOL FINANCE EQUITY* 29 (2001).

⁹ Paul L. Tractenberg, *Robinson v. Cahill: The "Thorough and Efficient" Clause*, 1974 L. & CONTEMP. PROBS. 312, 312-13 (1974).

¹⁰ Bosworth, *supra* note 8, at 31.

¹¹ Jeffrey S. Sutton, *San Antonio Independent School District and Its Aftermath*, 94 VA. L. Rev. 1963, 1974 (2008).

by equalizing educational funds, and to pursue this equalization through judicial, not legislative avenues.

In 1973, shortly after the California court's decision in *Serrano*, the seminal Texas school finance case *San Antonio Independent School District v. Rodriguez*¹² was granted certiorari by the Supreme Court.¹³ The plaintiffs in *Rodriguez* framed their argument around two San Antonio school districts in Bexar County: Alamo Heights, which was able to allocate \$594 per student, and Edgewood, which was able to allocate only \$356 per student. These choice inequalities, far from being peculiar to Bexar County or to San Antonio, were indicative of a far more general trend. For the 1967-68 school year, the ten wealthiest school districts in Texas were able to provide an average of \$610 per student, while the four poorest districts were able to provide an average of only \$63 per student—a disparity of nearly ten to one.¹⁴ As in *Serrano*, the plaintiffs in *Rodriguez* sought to address these local funding inequalities by arguing that they were unconstitutional under the Equal Protection clause of the 14th amendment.

There were two fundamental constitutional questions at stake in *Rodriguez*, the answers to which were dispositive of plaintiff's claims. The first question was whether the poor (or at least residents of poor school districts) constituted a suspect classification of individuals whose discrimination claim against the state would receive the benefit of strict scrutiny.¹⁵ The second question was whether a fundamental right to education could be found in the United States Constitution. In its 5-4 decision, the Court answered both of these questions in the negative and, after scrutinizing Texas's system of school finance under the far less exacting rational basis standard, upheld its constitutionality.

¹² 411 U.S. 1 (1973).

¹³ Bosworth, *supra* note 8, at 31.

¹⁴ Sutton, *supra* note 11, at 1964-65.

¹⁵ *Rodriguez*, 411 U.S. at 28, 35.

What makes *Rodriguez* a landmark case in the history of school finance reform litigation (aside from its status as the first school finance lawsuit to reach the Supreme Court) is the precedent it set for future litigation at the state and federal level. *Rodriguez* crystallized what is at stake in reforming America's public school finance systems, and revealed that the Court's equal protection jurisprudence was considerably less progressive (which is to say, considerably narrower) than finance reformers' conception of what it ideally would have been. Poverty alone was deemed insufficient to trigger strict scrutiny, and education was held not to be a fundamental Constitutional right. As a result of the Court's decision in *Rodriguez*, plaintiffs would have to rely on state constitutional provisions to make their claims, and school finance litigation would have to continue to flow through the floodgates first burst open by *Serrano*.

B) School Finance Litigation (and Legislation) in New Jersey

New Jersey is considered by many to be the exemplar of state level school finance litigation. Like every other state which found itself wrapped up in finance litigation since the 1970s, New Jersey shares a similar set of basic facts: regional stratification of property wealth due, at least in part, to fragmented local governance and reliance on local property taxes; the consequent inability for property-poor school districts to raise funds per capita comparable to those raised by more affluent, typically suburban districts; and, of course, the decision of reformers to seek relief through the court. New Jersey is unique among states involved in finance litigation, however, for three reasons. First, the unprecedented degree to which the New Jersey Supreme Court dared to 'meddle' in traditionally local affairs. Second, the enormous amount of money that was ultimately redistributed over the course of four decades of litigation. Finally, the immense difficulty the court had in bringing the legislature into compliance with its rulings. The history of school finance litigation in New Jersey consists of over twenty discrete

court decisions over the course of two separate but interrelated lawsuits—*Robinson v. Cahill*, and *Abbott v. Burke*—and produced no less than four redistributive statutory frameworks.

Robinson v. Cahill has been called a “landmark of progressive school finance reform” and “an exemplar of contemporary state judicial activism,” for several reasons.¹⁶ First, in *Robinson I*, the New Jersey Supreme Court conceded that

the rudimentary scheme of local government is implicated by the proposition that the equal protection clause dictates statewide uniformity. As to any service to which equal protection is found to apply, it would follow that if the moneys are raised by local taxation in a way which permits a different dollar expenditure per affected resident, the program is invalid as to the beneficiaries unless a State aid program fills in the gap.¹⁷

Second, it conceded (as did the Supreme Court in *Rodriguez*) that there were in fact large disparities between local needs and local economic capacities, and that “statewide there is no correlation between the local tax base and the number of pupils to be educated.”¹⁸ Finally, even though it ultimately rejected the plaintiffs’ equal protection claim on the basis that directly equalizing local funding capacities would have ‘convulsive implications’ on the structure of local governance which would require that “our political structure...be fundamentally changed,”¹⁹ it still invalidated the New Jersey school financing system by relying on the state constitution’s education clause, which guarantees every student a “thorough and efficient” education.²⁰

¹⁶ Briffault, *supra* note 4, at 31.

¹⁷ *Robinson v. Cahill*, 62 N.J. 473, 482 (1973). Chief Justice Weintraub added: “[A]lthough it is not urged upon us that every federal statute must abide by that precept, we see no reason why that constitutional mandate would not also prevail at the federal level if the basic premise is sound. Thus a federal program which provides funds on a matching or conditional basis with State or local option to participate or to choose a level of participation would be invidious as to those unequally benefited. That of course has not been the prevalent assumption.” *Id.*

¹⁸ *Id.* at 501.

¹⁹ *Id.* at 494.

²⁰ “The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this State between the ages of five and eighteen years.” N.J. Const. (1947) Art. VIII, § 4, para. 1.

After three subsequent *Robinson* decisions, the NJ legislature passed the Public School Education Act of 1975 (also known as Chapter 212) in response to the court's ruling in *Robinson*.²¹ Chapter 212 increased the amount of funding that would be provided by the state from 28% to 40%, but it did not specify from where the increased funding would come.²² Further, despite its decision to “push the state legislature hard to assume a greater role in funding and monitoring local public schools,” the court's insistence on preserving the sanctity of local autonomy produced a system in which additional funding “went to rich districts as well as poor ones, and was contingent on levels of local spending, not measures of local need.”²³ It consequently did not have the intended equalizing effect on low wealth, high need districts.²⁴ In the final *Robinson* decision (*Robinson V*), after the creation of the state's first ever income tax to ensure that Chapter 212 would be “constitutionally financed,” the New Jersey court declared Chapter 212 to be facially constitutional.

Although the Court's conditional acceptance of Chapter 212 marked the end of the *Robinson* line of litigation, it was just the beginning of the New Jersey finance litigation saga. Finance litigation was resumed in 1981 under the banner of *Abbott v. Burke*. In *Abbott*, plaintiffs challenged the constitutionality of Chapter 212 under the “thorough and efficient” clause of the New Jersey constitution. *Abbott* resulted in a shift in the nature of the court's demands on the legislature. In *Robinson V*, “instead of basing the decision on per pupil spending disparities as a proxy for educational quality, the Court relied on educational content directly”—the educational

²¹ Emily Pas, *Thorough and Efficient? Education Finance Reform in New Jersey* 12.

²² *Id.* at 7.

²³ Briffault, *supra* note 4, at 33.

²⁴ *Id.* at 33-35.

content being the standards and goals established by the legislature in Chapter 212 itself.²⁵ Six years after the creation of Chapter 212, the litigants in *Abbott* asked the court to revisit the question of Chapter 212's constitutionality. In doing so, they began the attack (or rather, the decades-long siege) on the legislative responses to the court's initial decision in *Robinson* and its subsequent decisions in the *Abbott* line of cases.

Noting that the students in property poor districts “have not been able to achieve any level of equality in that society with their peers from the affluent suburban districts,” the court sustained plaintiff's challenge to Chapter 212.²⁶ In *Abbott II*, districts which had demonstrated that the quality of education offered in their schools (measured not simply by spending disparities, but by “curriculum and program offerings”) was inferior to education offered in more affluent districts were designated as Abbott districts.²⁷ These Abbott districts subsequently became the focal point of increasingly intense reform efforts. Since the state failed to provide “clear measures of substantive adequacy” to the court, the court was obliged, as it was during the early *Robinson* litigation, to again compel the equalization of educational opportunity ‘by proxy’.²⁸ In *Abbott II*, the court ruled that “in order to meet the additional needs of students in the poor Abbott districts, the state must guarantee per pupil funding in those districts equal to per pupil funding in the state's 108 wealthiest districts.”²⁹ The court's exact language was as follows:

[T]he Act must be amended, or new legislation passed, so as to assure that poorer urban districts' educational funding is substantially equal to that of property-rich districts. “Assure” means that such funding cannot depend on the budgeting and taxing decisions of local school boards. Funding must be certain, every year. The

²⁵ Pas, *supra* note 21, at 8.

²⁶ *Id.* at 10.

²⁷ *Id.* at 11.

²⁸ *Id.* at 12.

²⁹ *Id.*

level of funding must also be adequate to provide for the special educational needs of these poorer urban districts and address their extreme disadvantages. . . . The funding mechanism is for the Legislature to decide. However, it cannot depend on how much a poorer urban school district is willing to tax.³⁰

In response to the court's decision in *Abbott II*, the legislature passed the Quality Education Act (QEA) of 1990 the following month. Although the QEA increased state spending even further, political pressure from middle-class taxpayers swayed the legislature into designing a funding system which, mathematically speaking, would fail to achieve full funding equity between Abbott and affluent districts.³¹ As a result of *Abbott III*, the QEA, like Chapter 212 before it, was struck down by the court as unconstitutional "because it failed to guarantee funding parity between the Abbott districts and the wealthiest districts, and no alternative method of guaranteeing a thorough and efficient education was offered."³²

Subsequent to the QEA being struck down by the court, the legislature passed the Comprehensive Educational Improvement and Financing Act (CEIFA), which "purported to link funding with outcome standards for all districts" through a more thorough operationalization of the Core Curriculum Standards initially adopted in 1997.³³ In *Abbott IV*, the court found that the state had again failed to fulfill the requirements of its own legislation, and consequently declared CEIFA, like the two legislative attempts at court compliance before it, unconstitutional.³⁴ As in *Abbott II*, the "the court concluded that it was once again without a 'constitutional measuring stick' to determine the level of resources needed to ensure equal educational opportunity in poor urban communities other than the inputs of the state's wealthy districts."³⁵ As a result, it once

³⁰ *Abbott v. Burke*, 119 N.J. 287, 386-87 (1990) (*Abbott II*).

³¹ Pas, *supra* note 21, at 13.

³² Pas, *supra* note 21, at 14.

³³ Margaret E. Goertz & Michael Weiss, *Assessing Success in School Finance Litigation: The Case of New Jersey* 13 (2009).

³⁴ *Id.*

³⁵ *Id.* at 14.

again had to adjudicate educational opportunity ‘by proxy,’ and demanded the legislature to provide bona fide parity aid for the 1997-1998 school year to ensure that the funding gap between Abbott districts and wealthy suburban districts would be closed, and therefore meet the court’s constitutional requirement. This time, the legislature did in fact provide parity aid. In the 2007-08 school year, “the parity benchmark was \$12,872 per pupil, and Abbott districts received \$1.04 *billion* in parity aid, or about \$3,700 per pupil.³⁶ Plaintiffs did not relent in their demands for full equality of educational opportunity, however, and even this additional infusion of state parity funding was ultimately found to be insufficient to convince the court that parity in *opportunity* had also been reached. Like the three legislative attempts at compliance before it, CEIFA was declared unconstitutional by the court.³⁷

The School Finance Reform Act (SFRA) of 2008 filled the legislative vacuum created by the declaration of CEIFA’s unconstitutionality, and its architects made several arguments in support of its efficacy, efficiency, and constitutionality. First, in an attempt to bring down what many (particularly then-governor Jon Corzine) perceived to be the astronomical cost of ensuring parity of funding, SFRA replaced the ‘full parity’ funding requirement of CEIFA with “one formula applicable to all districts in the state.”³⁸ In doing so, it would abolished the formal Abbott distinction altogether in favor of a more widely applicable funding formula.³⁹ Second, SFRA was claimed to fulfill the court’s long-standing requirement that the legislature adequately specify what a substantive “thorough and efficient” education entails by linking the state’s Core Curriculum Content Standards to the funding required to meet those standards statewide. Finally, since “one-half of all low-income students and students of color [live] outside of Abbott

³⁶ *Id.* (emphasis added).

³⁷ Pas, *supra* note 21, at 17.

³⁸ Goertz & Weiss, *supra* note 33, at 28.

³⁹ <http://www.state.nj.us/education/archive/abbotts/chrono/>. (see “November 2007”).

districts,” the legislature contended that “SFRA will ensure that all disadvantaged students, regardless of where they live, have access to the same special programs and services that were available in the Abbott districts.” In short, it was argued that SFRA would actually create a more just and equitable funding system than any other previously proposed.⁴⁰

The court was swayed by these arguments. In May 2009, after remanding the case to a special master, the court upheld the constitutionality of SFRA.⁴¹ Nevertheless, the *Abbott* plaintiffs continued to pressure and criticize the legislature’s attempts at compliance, arguing that “SFRA suffers from the same constitutional flaws as other funding laws rejected by the Supreme Court, including CEIFA.”⁴² Further, plaintiffs contended that “the state provided no evidence for eliminating the Abbott designation although the conditions of extreme poverty, racial isolation, low community wealth, municipal overburden, and educational inadequacy persist in the current Abbott districts.”⁴³ The court did not necessarily disagree with the plaintiffs’ claims, but decided that “SFRA deserves the chance to prove in practice that, as designed, it satisfies the requirements of our constitution.”⁴⁴ It mandated that supplemental state funding continue to be provided to the districts previously possessing the Abbott designation for three years, at which time the court would review the efficacy of SFRA and make another determination as to its constitutionality. It has since been so confirmed, and remains the governing law.⁴⁵

⁴⁰ Goertz & Weiss, *supra* note 33, at 32-34.

⁴¹ *Id.* at 28.

⁴² *Id.* at 34.

⁴³ *Id.*

⁴⁴ *Abbott v. Burke*, 199 N.J. 140, 175 (2009) (Abbott XX).

⁴⁵ <http://www.state.nj.us/education/sff/>

III) A Critique of School Finance Litigation in New Jersey

A) Whether *Abbott* Succeeded in Equalizing Educational Funding in New Jersey

In their paper *Assessing Success in School Finance Litigation: The Case of New Jersey*, Margaret Goertz and Michael Weiss make use of a unique framework for evaluating the efficacy of New Jersey's court-ordered reforms which divides all of the state's school districts into seven "wealth septiles."⁴⁶ This seven-part socioeconomic division provides an analytic framework that more finely indicates how resources were distributed to low, middle, and high wealth districts, in addition to Abbott districts as a discrete class within low income districts as a whole. Goertz and Weiss explain that

[I]n 1984-85, when the first *Abbott* decision was handed down, the Abbott districts spent a few hundred dollars per pupil more than the low-wealth, non-Abbott districts, but over \$800 dollars per pupil less than the middle-wealth districts, and nearly \$2,200 per pupil less than the high-wealth communities. At the same time, a \$2,500 per pupil spending gap separated the low-wealth and high-wealth districts. This changed dramatically by 2007-08 when the Abbott districts were spending \$1,300 per pupil *more* than the high-wealth districts and considerably more than both the low-wealth non Abbott (\$4,000) and middle-wealth non-Abbott (\$3,000) districts. The large increase in spending in the Abbott districts was due in large part to the infusion of parity and supplemental aid since 1998.⁴⁷

These funding trends remain at substantially similar levels today. This radical shift in the 'fiscal pecking order' of New Jersey's schools went beyond strict equality, and instead sought to provide funding sufficient to meet the admittedly greater needs of inner city youth. In meeting and exceeding the court's mandate for full funding parity between poor and wealthy school districts in *Abbott II*, the state acknowledged that urban, low wealth communities have greater educational needs (just as they have, for instance, greater needs for law enforcement,

⁴⁶ Goertz & Weiss, *supra* note 33 at 17.

⁴⁷ *Id.* at 18.

transportation, and housing) than less densely populated, less impoverished suburban districts. Thus, there is a relatively straightforward answer to the question of whether funding was in fact equalized as a result of school finance litigation: yes, it was—and then some. Obviously, however, this is not where the questioning ends.

B) Whether Substantially Equalized Funding Succeeded in Closing the Racial and Socioeconomic Achievement Gap in New Jersey

The court's fixation on equalizing educational resources between the poorest and wealthiest school districts had a considerably less positive impact on equalizing educational opportunity than most finance reformers would like to admit. After forty years of school finance litigation it has become clear that "the issue is no longer whether school districts with high proportions of poor children receive adequate funding, but whether that funding is used to improve academic achievement."⁴⁸ Just as New Jersey is an exemplar of school finance litigation in the United States, the city of Newark is an exemplar and microcosm of *Abbott* reform efforts within New Jersey itself. As such, it will serve as a case study for evaluating the impact of New Jersey's attempts to equalize educational opportunity.

Abbott districts⁴⁹ as a whole saw marginal academic progress over the past decade or so of finance reform efforts, but this progress has been inconsistent and variable by grade and subject. While students living in Abbott districts have made significant performance on New Jersey's 4th grade mathematics exam, closing the achievement gap between Abbott districts and high wealth districts by approximately 23 points from 1999 to 2007, for instance, the

⁴⁸ GORDON MACINNES, IN PLAIN SIGHT: SIMPLE, DIFFICULT LESSONS FROM NEW JERSEY'S EXPENSIVE EFFORTS TO CLOSE THE ACHIEVEMENT GAP 29 (2009).

⁴⁹ Although the formal "Abbott" distinction was abandoned in 2008 in the SFRA, I still utilize the designation because studies prior to 2008 necessarily relied on it. It is also clearer than constantly referring to them as "ex-Abbott" districts, when as a practical matter their status is functionally the same.

achievement gap between Abbott students and high wealth students taking the 8th grade reading exam remained essentially flat over the same time period. Further, despite the huge amount of state funding that they have received, Abbott districts across the board retain considerably lower test scores than the even the students in low wealth non-Abbott districts, who have not had the benefit of additional state funding.⁵⁰

The city of Newark is a prime example of the equivocal progress made by Abbott districts generally speaking. Newark's particular demographic realities have made it particularly difficult to produce positive results, however. Newark's approximately 40,000 students constitute 3.2% of the state's total population of public school students, but they are more than twice as likely to be poor than other students in the state. There are nearly twice as many English language learners in Newark than in the state as a whole. Seventy-two percent of Newark's students are eligible for free or reduced price school lunches—nearly three times higher than the state as a whole—and over 90% of the students enrolled are nonwhite.⁵¹ Unsurprisingly, these distressing socioeconomic realities have had a profound impact on student performance. In the spring of 2006,

about 58.6 percent of Newark's third-graders scored at or above proficiency levels in reading on the language arts literacy portion of the NJ ASK, compared with 82.4 percent of third-graders statewide—a gap of 23.8 percentage points. Fourth-graders showed similar patterns. Some 59.7 percent of Newark's fourth-graders read at or above proficiency levels on the state tests in 2006, compared with 80 percent of fourth-0graders statewide—a gap of 20.3 percentage points. At the eight-grade level of the GEPA, there was a gap of 29.3 percentage points: 44.9 percent of Newark's eight-graders scored at or above proficiency levels, compared with 74.2 percent of their peers statewide. And, 53.5 percent of the city's students scored at or above proficiency levels on the HSPA at the 11th-grade

⁵⁰ Goertz & Weiss, *supra* note 33, at 24-26.

⁵¹ *Raising Student Achievement in the Newark Public Schools*, COUNCIL OF THE GREAT CITY SCHOOLS, 22 (2007) (hereinafter "*Raising Student Achievement*") <http://cgcs.schoolwires.net/cms/lib/DC00001581/Centricity/Domain/35/Publication%20Docs/Newark.pdf>.

level, compared with 83.5 percent of 11th graders statewide—a gap of 30 percentage points.⁵²

The question of whether Newark’s high spending has successfully ‘bought’ improvements in student achievement is a highly controversial one. While some organizations, such as the Schott Foundation, identify New Jersey as a trailblazer in closing racial achievement gaps for being one of the few states in the nation with a significant black male enrollment and a black male graduation rate of greater than 70%,⁵³ others, such as the Lexington Institute, argue that “there was virtually no difference in the average scores for New Jersey eight graders” from 2005 to 2009, “with more than 80 percent of black eighth graders below proficiency in reading.”⁵⁴ These statistics are not inconsistent with one another, but they are indicative of very different trends of performance.

Other organizations, such as the Council of the Great City Schools, offer a more mixed evaluation. From 2000 to 2006, the CGCS indicated that the achievement gap between Newark students in particular and New Jersey students in general for the 4th grade language arts section of the NJASK was closed by approximately 10%; for the mathematics section of the same test, it was closed by nearly 20%.⁵⁵ For the 8th Grade GEPA examination the corresponding gains were 6.9% and 12.3%, respectively.⁵⁶ Scores for the 11th Grade HSPA examination, however, have not followed this trend. From 2000 to 2006, the respective HSPA gaps *widened* by nearly 20%

⁵² *Id.* at 24.

⁵³ *Given Half a Chance: The Schott 50 State Report on Public Education and Black Males*, SCHOTT FOUNDATION FOR PUBLIC EDUCATION 4, 7 (2008).

⁵⁴ Lori Drummer and Don Soifer, *Reform WITH RESULTS for New Jersey Schools*, LEXINGTON INSTITUTE 3 (2010).

⁵⁵ *Raising Student Achievement*, *supra* note 51, at 26-30.

⁵⁶ *Id.*

for language arts and 3.2% for mathematics.⁵⁷ Other indicators of progress have been similarly mixed. Of the 533 advanced placement exams taken by Newark students in 2006, for instance, only 66, or a little over 8%, received a score of 3 or greater.⁵⁸ On the other hand, dropout rates fell from 9.07% to 3.11% from 1999-2000 to 2005-2006, and graduation rates rose from 60.8% in 2003-2004 to 73.6% in 2005-2006.⁵⁹

Newark has had at best a mixed track record of progress, and its dramatic increase in spending has clearly not had a similarly dramatic effect on closing student achievement gaps and equalizing educational opportunity between Newark's students and other, more fortunate students in the state.

C) Costs

Huge amounts of money have been levied and redistributed by the state over the course of the past decade in an effort to combat these persistent achievement gaps and the gaps in educational opportunity they signify. Although Newark's per pupil expenditures has been calculated to be as high as \$23,141 per pupil (for the 2007-2008 school year),⁶⁰ the State Department of Education's calculations indicate that, for the 2011-2012 school year, Newark's expenditure was \$17,025 per pupil. As critics of Newark's spending habits and of the *Abbott* litigation in general are quick to point out, even this more conservative estimate is much higher than the average per pupil K-12 expenditure in New Jersey, other Abbott districts in the state, and the nation as a whole. For the 2006-2007 school year, these groupings spent \$12,184,

⁵⁷ *Id.*

⁵⁸ *Id.* at 31-32.

⁵⁹ *Id.* at 32.

⁶⁰ *Money for Nothing: A Report on the Performance of the Newark Public School District, EXCELLENT EDUCATION FOR EVERYONE (E3) 14 (2008)*, <http://www.nje3.org/schoolwatch/moneyfornothing.pdf>.

\$15,235, and \$9,683 per pupil, respectively.⁶¹ Between 1975 and 2007, state aid for education increased by \$7.3 billion, or 336%. The vast majority of this state aid went directly to Abbott districts,⁶² and the single greatest Abbott beneficiary has been the Newark city school system.

While per-pupil expenditures are a crucial metric for determining funding equity between districts, they tend to obscure the full magnitude of redistribution in a more comprehensive sense. When one keeps in mind the degree to which racial and socioeconomic achievement gaps have not budged since the initiation of Abbott's funding remedies, the sheer amount of money spent is startling. The 2013-2014 K-12 projected state school aid going to Essex County is \$1,174,284,692, \$983,631,482 of which is equalization aid.⁶³ Newark's share of this funding is \$714,315,679, \$645,243,822 of which is equalization aid.

Tracking expenditures over a wider range of time provides an even more dramatic picture. Without adjusting for inflation, from 1997 to 2015, the total amount of state aid provided to Newark amounts to \$10,518,189,469—ten and a half billion dollars. The majority of this vast number constituted state equalization aid. This enormous sum, which does not even take state funding prior to 1997, local funding sources, or charitable donations into account, is equal to the entire yearly GDP of Nicaragua.⁶⁴ Put another way, every single one of the 92,303 households in Newark⁶⁵ could have received \$113,953.⁶⁶ School finance reform in New Jersey

⁶¹ *Id.*

⁶² Goertz & Weiss, *supra* note 33, at 16. Funding levels have persisted at substantially similar levels in the ex-Abbott districts after the formal designation was abandoned.

⁶³ NEW JERSEY DEPARTMENT OF EDUCATION, 2013-14 State Aid Summaries, <http://www.state.nj.us/education/stateaid/1314/>.

⁶⁴ *Nicaragua at a Glance*, THE WORLD BANK, <http://www.worldbank.org/en/country/nicaragua>.

⁶⁵ UNITED STATES CENSUS BUREAU, *State & County QuickFacts*, <http://quickfacts.census.gov/qfd/states/34/3451000.html>.

⁶⁶ The argument is not that this would be a politically viable or even sensible thing to do. But

has been a largely “piecemeal response to a systemic problem.”⁶⁷ Most rational minds would agree that there are better ways that the state could have spent \$10.5 *billion* dollars to improve the educational opportunities afforded to Newark’s public school students. Even if this is granted, however, the problem remains: how best can the contingencies of race, class, and place be overcome to equalize educational opportunity?

New Jersey’s experience with finance reform litigation—especially the Newark experience—has provided “a test to determine if more money produced better results.”⁶⁸ By all reasonable accounts, it has failed this test. Spending of this magnitude should not result in such an inconsistent and ambivalent record of progress. The only answer to the question of whether Newark’s spending has ‘bought’ educational progress may be that it is simply not the right question to ask. Despite the partial and occasionally even unprecedented progress that Newark (and by extension, the state as a whole) has made as a result of its commitment to school finance litigation, neither evaluative prong of New Jersey’s reforms—whether or not they equally distributed funds, and whether or not they actually equalized educational opportunity (as indicated by relative student achievement)—has been wholly and incontrovertibly met. A new approach is needed.

IV) A New Paradigm: School Socioeconomic Integration

A) Why Socioeconomic Integration?

Socioeconomic integration seeks to accomplish what mere financial equalization was unable to do: narrow the achievement gap by providing poor students with access to preexisting, high quality learning environments in which mutually reinforcing peer socialization and learning

⁶⁷ Gary W. Ritter & Sherri C. Lauver, *School Finance Reform in New Jersey: a Piecemeal Response to a Systemic Problem*, 28 J. EDUC.. FINANCE 575, 575 (2003).

⁶⁸ MacInnes, *supra* note 48, at 1.

by example can take place.⁶⁹ Equalizing school funding is certainly not irrelevant to equalizing educational opportunity, but the extant research demonstrates that the efficacy of every dollar spent is predicated on socioeconomic facts that cannot be touched by infusions of cash alone. Profound differences in housing stability,⁷⁰ parental social capital,⁷¹ and school socialization,⁷² among others—differences which often arise as a direct result of regional residential segregation by race and class—are often the driving forces behind persistent gaps in student achievement.⁷³

Because “school peers transmit social norms, educational values, and even academic skills through interactions at school, which in turn influence other students’ attitudes and behaviors and ultimately their cognitive development, attainment, and other educational outcomes,” the degree the which a school is socioeconomically integrated serves as an accurate

⁶⁹ See Stephanie Aberger et. al., *Closing the Student Achievement Gap: The Overlooked Strategy of Socioeconomic Integration* at 16.

⁷⁰ See generally Maya Brennan, *The Impacts of Affordable Housing on Education: A Research Summary*, CENTER FOR HOUSING POLICY (2001).

⁷¹ Robert K. Ream and Gregory J. Palardy, *Reexamining Social Class Differences in the Availability and the Educational Utility of Parental Social Capital*, AM. EDUC. RES. J. 238, 251 (2008) (“[T]he highest social class grouping, in comparison with the middle- and working-class grouping and in particular the lowest [socioeconomic status] grouping, is . . . by definition advantaged in material and human capital resources.”).

⁷² See Jessica McCrory Calarco, “*I need Help!*” *Social Class and Children’s Help-Seeking in Elementary School*, 76 AM. SOC. REV. 862, 863.

⁷³ E.g., Gary Orfield & Chungmei Lee, *Why Segregation Matters: Poverty and Educational Inequality*, THE CIVIL RIGHTS PROJECT 5-9 (2005), http://bsdweb.bsdtvt.org/district/EquityExcellence/Research/Why_Segreg_Matters.pdf; Tama Leventhal & Jeanne Brooks-Gunn, *The Neighborhoods They Live in: The Effects of Neighborhood Residence on Child and Adolescent Outcomes*, 126 PSYCHOLOGICAL BULLETIN 309, 315-17 (2000) (surveying a number of studies which “found links between neighborhood high [socioeconomic status] and educational attainment.”); Eric Jensen, *How Poverty Affects Classroom Engagement*, 70 EDUCATIONAL LEADERSHIP 24 (2013), <http://www.ascd.org/publications/educational-leadership/may13/vol70/num08/How-Poverty-Affects-Classroom-Engagement.aspx>. The author identifies seven reasons which explain the poor academic performance of students from low income households (health and nutrition, vocabulary, effort, hope and the “growth mind-set,” cognition, relationships, distress), all of which are at least partially reducible to the socioeconomic environment in which they were raised.

proxy for the likelihood that students of a lower socioeconomic status will rise to the achievement levels of their generally better prepared peers.⁷⁴ For example: working class students typically have a “limited sense of entitlement to assistance from teachers,” and navigate the classroom environment differently based on differing patterns of socialization and confidence interacting with superiors.⁷⁵ Further, a child’s exposure to violence or other similarly harmful experiences can compound and exacerbate their ability to adapt to the norms of the school environment, thereby perpetuating a cycle of psychological and exacerbating the disparities attributable to social capital already present.⁷⁶ Of course, background factors such as parental educational attainment are also relevant, as are access to financial aid.⁷⁷

The idea that socioeconomic status is largely determinative of educational outcomes is not new. The “Coleman Report,” commissioned by Congress in 1964 and authored in 1966, concluded that the socioeconomic composition of a school “had the strongest association with student achievement of any school factor, suggesting the [socioeconomic status] of one’s classmates matters more than school facilities, curriculum, per pupil expenditures, teacher quality, and racial composition and that segregating low [socioeconomic status] children in schools creates an inherently inequitable learning context.”⁷⁸ In other words, because students who come from lower socioeconomic backgrounds tend to have less educational influence coming from the home, and are therefore more reliant on their peers to learn how to succeed in

⁷⁴ See Gregory Palardy, *High School Socioeconomic Segregation and Student Attainment*, 50 *Am. Educ. Res. J.* 719-720 (2013).

⁷⁵ See Jessica McCrory Calarco, “*I need Help!*” *Social Class and Children’s Help-Seeking in Elementary School*, 76 *AM. SOC. REV.* 868-70.

⁷⁶ See Jo Sparkes, *Schools, Education and Social Exclusion*, CENTRE FOR ANALYSIS OF SOCIAL EXCLUSION, at 20-23 (1999), http://eprints.lse.ac.uk/6482/1/Schools_Education_and_Social_Exclusion.pdf.

⁷⁷ Palardy, *supra* note 66 at 722.

⁷⁸ *Id.* at 719-720. (“[Socioeconomic status] is perhaps the most robust predictor of educational outcomes such as achievement and attainment.”)

school, “integrating public schools is likely necessary for addressing the negative effect of being segregated in a low [socioeconomic composition] school.”⁷⁹

The best way to remedy the harm caused by socioeconomic segregated schools is, unsurprisingly, to socioeconomically integrate the classroom. Poor, minority students who are educated alongside their middle-class peers perform at higher levels as long as middle-class students constitute a rough majority in terms of school population.⁸⁰ Individuals and organizations interested in truly equalizing educational opportunity, and not simply equalizing educational funding, should therefore pursue policies and reforms that identify socioeconomic *integration* as their end goal.

B) Barriers to Pursuing School Socioeconomic Integration

1) The Entrenchment of *Abbott*

One of the greatest limitations to pursuing an overt policy of school socioeconomic integration (concerns of political viability aside) is the degree to which the “school finance” paradigm still dominates New Jersey’s courts. While there is some talk of pursuing socioeconomic integration within the scholarly literature,⁸¹ that literature has yet to truly impact litigation strategies in practice. In New Jersey especially, *Abbott*’s roots run deep. Education Law Center, which has served as legal counsel for *Abbott* litigation for over thirty years, arguably has an interest in perpetuating a line of litigation which it has successfully, dutifully,

⁷⁹ *Id.* at 744.

⁸⁰ David Rusk, *To Improve Poor Children’s Test Scores, Move Poor Families*, THE ABELL REPORT 6 (1998), <http://www.abell.org/sites/default/files/publications/ARjunjul98.pdf>; Mark Anderson, *Socioeconomic Integration Equals Better Academic Outcomes*, Schools as Ecosystems (February 12, 2013), <http://schoolecosystem.blogspot.com/2013/02/socioeconomic-integration-equals-better.html>.

⁸¹ See generally, Christopher Adams, *Is Economic Integration the Fourth Wave in School finance Litigation?*, 56 EMORY L.J. 1613 (2007).

and (presumably) lucratively participated in for over thirty years.⁸² There is, in other words, great experience and expertise in the area of school *finance* litigation which does not want to see itself wasted. The doctrines are tested, the judges' general dispositions are known, and the results have been real. Socioeconomic integration remains largely untested waters in the field, and, as a result, it will be inherently more risky to litigate. This is not to say that such litigation will never occur, or should not occur, but simply that the entrenchment of the paradigm of fiscal equalization—a paradigm which *Abbott* epitomizes—represents a real impediment to the pursuit of a new paradigm for recognizing the primacy of socioeconomic integration in the classroom, rather than simply the utilitarian proxy of financial resources allocated to the schools.

2) The Persistence of Residential Socioeconomic Segregation

For New Jersey, the state's Supreme Court holdings in the *Mt. Laurel* line of litigation has been to residential socioeconomic integration what *Abbott* line of litigation has been to equalization of educational opportunity: a perceived panacea with now limited utility. The history of *Mt. Laurel* litigation is long and, because it is relatively well-known, will not be recounted here.⁸³ What is important about *Mt. Laurel* with respect to the pursuit of socioeconomic integration in the classroom is not the “Mount Laurel doctrine” itself—the obligation of each New Jersey municipality to take on its fair share of affordable housing—but rather the lasting impact that the legislatively crafted loopholes and circumnavigations have had on its effective implementation.⁸⁴

⁸² *Abbot v. Burke* Overview, EDUCATION LAW CENTER, <http://www.edlawcenter.org/cases/abbott-v-burke.html>.

⁸³ See, e.g., Alan Mallach, *The Mount Laurel Doctrine and the Uncertainties of Social Policy in a Time of Retrenchment*, 63 Rutgers L. Rev. 849 (2011).

⁸⁴ The most prominent of these loopholes was the creation of “regional contribution agreements,” or RCAs, which allowed affluent municipalities to shift their burden for providing a fair share of affordable housing to other, typically urban and already impoverished municipalities.

Despite its essential merit, the *Mt. Laurel* doctrine has not served to socioeconomically integrate New Jersey's communities to the degree necessary to create a meaningful educational impact.⁸⁵ Because residence determines school district, and because school district is a major indicator of school quality, socioeconomic segregation by residence, even after *Mt. Laurel*, remains one of the greatest barriers to socioeconomic integration in the classroom. Indeed, residential segregation by class and race in New Jersey's schools remains extreme even after decades after the passage of New Jersey's Fair Housing Act in 1985.⁸⁶ If the Act had been enforced in accordance with its laudable intent, the state of residential socioeconomic segregation and the socioeconomic segregation in the classroom it entails might have been very different. But as the persistence of residential socioeconomic segregation demonstrates, the law did not accomplish its goal. As with *Abbott*, the *Mt. Laurel* framework paradoxically poses a formidable barrier to the implementation of a new paradigm for pursuing residential socioeconomic integration precisely because of its preeminence in the field. It may prove difficult to craft new legislation, or to put forward novel arguments through litigation, given *Mt. Laurel's* precedential baggage.

Foreseeably, this had the effect of further concentrating poverty and thwarting the fundamental purpose of New Jersey's Fair Housing Act. See Rachel Fox, *The Selling Out of Mount Laurel: Regional Contribution Agreements in New Jersey's Fair Housing Act*, 16 Fordham L.J. 535, (1987).

⁸⁵ See Damiano Sasso, *The Effect of the Mount Laurel Decision on Segregation by Race, Income and Poverty Status* 12 (2004) ("Mount Laurel II and the Fair Housing Act have shown only a slight impact on economic segregation measured by standard deviation and coefficients of variation of median family income across census tracts. . . . If we measure economic segregation using the standard deviation and coefficient of variation of poverty rates across census tracts, we are not able to detect any effect of the Mount Laurel regulations on the amount of economic segregation.").

⁸⁶ Paul Tractenberg, Gary Orfield, & Greg Flaxman, *New Jersey's Apartheid and Intensely Segregated Urban Schools: Powerful Evidence of an Inefficient and Unconstitutional State Education System*, INSTITUTE ON EDUCATION LAW AND POLICY 5-11 (2013), <http://ielp.rutgers.edu/docs/IELP%20final%20report%20on%20apartheid%20schools%20101013.pdf>.

3) The Difficulty of Implementing Interdistrict Remedies

A global limitation on the pursuit of paradigm shifts in education reform is the Supreme Court’s holding in *Milliken v. Bradley*. In *Milliken*, plaintiffs alleged that the Detroit public school system was racially segregated in violation of the fourteenth amendment. The Court rejected plaintiff’s equal protection claim because there was no evidence of de jure racial discrimination by Detroit’s surrounding suburbs, and any attempt to desegregate Detroit would necessarily compel suburban participation without suburban wrongdoing.⁸⁷ The Court declined to “impose a multidistrict, areawide remedy” to what it characterized as “a single-district de jure segregation problem”⁸⁸ because it did not believe intentional, state-sanctioned discrimination to be substantiated by the record.⁸⁹ Though the Court acknowledged extreme racial segregation between Detroit and the surrounding fifty-three school districts in question, it refused to impose an interdistrict remedy to address to address, ostensibly, “segregation found only in one district.”⁹⁰

The Supreme Court’s holding in *Milliken* has profoundly limits the universe of remedies that are cognizable under the fourteenth amendment. The problem of residential socioeconomic segregation is, by definition, a regional inter-district problem. After all, because school districts are spatially defined and often socioeconomically segregated, the pool from which a school’s population is drawn largely determines the socioeconomic composition of the classroom.

⁸⁷ Richard Briffault, *Our Localism: Part 1—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 94 (1990) (“[T]he Supreme Court relied on the formal legal disjuncture of a state from its localities to reject interdistrict busing as a remedy for unconstitutional segregation.”)

⁸⁸ *Milliken v. Bradley*, 418 US. 717, 721 (1974).

⁸⁹ *See id.* at 756 n.2 (“[The] conclusion [that “Negro children in Detroit had been confined by intentional acts of segregation to a growing core of Negro schools surrounded by a receding ring of white schools”] is simply not substantiated by the record. . . . [S]egregative acts within the city alone cannot be presumed to have produced . . . an increase in the number of Negro students in the city as a whole.”)

⁹⁰ *Id.* at 744.

Thus, remedies such as inter-district bussing, inter-district socioeconomic balancing among student populations, or some other system of socioeconomic redistribution may, at least on federal law grounds, likely come into conflict with *Milliken*. This limitation is not insurmountable, but it must be kept in mind.

V) Conclusion

It is not enough simply to poke methodological holes in New Jersey's sheep-like reliance on funding reform while pointing to the sociological literature. Such criticism is necessary, but admittedly insufficient. The best prospects for future reform may be through targeted impact litigation which seeks to reconceptualize the harm of attending socioeconomically segregated schools, and which urges courts to provide some form of injunctive relief (as opposed to monetary compensation) to families living in poor communities who do not have access to socioeconomically integrated schools. Ideally, socioeconomic integration in school would be achieved through socioeconomic integration in the community itself. But as the limitations associated with *Mt. Laurel* and *Milliken* show, this approach will likely be unsuccessful in the short term.

Another option, which has been put into practice in at least 80 school districts to date, is to pursue in-district socioeconomic balancing strategies.⁹¹ Such balancing strategies, typically accomplished through bussing programs, have been shown to improve graduation rates, increase student achievement, and to be *drastically* more cost effective than the school finance schemes they replace (or, rather, displace).⁹² Ultimately, the research is resoundingly clear: if the end of education reform is to reduce achievement gaps by race and class, then socioeconomic

⁹¹ Richard D. Kahlenberg, *From All Walks of Life: New Hope for School Integration*, AMERICAN EDUCATOR 3 (2013), <http://www.aft.org/pdfs/americaneducator/winter1213/Kahlenberg.pdf>.

⁹² *Id.* at 6.

integration must take the place of school finance as the dominant paradigm for education reform in New Jersey.