

NOTES

MAINTAINING EDUCATIONAL ADEQUACY IN TIMES OF RECESSION: JUDICIAL REVIEW OF STATE EDUCATION BUDGET CUTS

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This Note examines judicial review and oversight of state educational adequacy remedies in light of education budget cuts proposed during the recent recession. Educational adequacy litigation has been relatively successful in establishing children's affirmative right to education under state constitutions, but due to separation of powers concerns, most state courts have been quite deferential to legislatures in reviewing remedies for constitutional violations. This leaves many schools underfunded and under-resourced in spite of successful adequacy litigation—a problem that is aggravated during times of recession, when many states face pressure to cut education budgets. This Note examines these issues using functional separation of powers theory, comparative analysis of state and federal government functioning, and pragmatic considerations related to remedial compliance. It argues that state courts should apply heightened judicial review to ensure remedial compliance and particularly to review state education budget cuts that may disrupt educational adequacy remedies. In this way, state courts can be more vigilant in maintaining educational adequacy.

INTRODUCTION

Education, as “perhaps the most important function” performed by government,¹ has often been the focus of charged legal and political debates, particularly in constitutional law. While school desegregation litigation focused largely on federal constitutional claims, the most prominent recent litigation in educational rights has been the

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¹ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“[E]ducation is perhaps the most important function of state and local governments.”); *see also* Campaign for Fiscal Equity, Inc. v. State (*CFE II*), 801 N.E.2d 326, 350 (N.Y. 2003) (Smith, J., concurring) (“It is commonly said that education is the State’s most important responsibility.”).

movement for educational adequacy under state constitutions.² Educational adequacy litigation began in the 1970s and 1980s, as civil rights lawyers began to heed Justice Brennan's call to look to state constitutions for future litigation in pursuit of individual rights.³ For those litigating educational rights, the education clauses of state constitutions⁴ became the focal point. Almost all state constitutions have such clauses, dating back to the nineteenth-century common-school movement or the eighteenth-century revolutionary ideals of republican citizenship.⁵ Litigators have drawn on these clauses to argue that the state has an obligation to provide an adequate education to all children—a minimum floor of resources and opportunities that, if not met, would amount to a violation of the children's constitutional rights.⁶

One can examine educational adequacy cases in terms of three stages: justiciability, trial, and remedial.⁷ The first stage, justiciability, examines whether there is a valid cause of action under the given state

² For an overview of state educational adequacy litigation, see generally MICHAEL A. REBELL, *COURTS AND KIDS: PURSUING EDUCATIONAL EQUITY THROUGH THE STATE COURTS* (2009) [hereinafter *COURTS AND KIDS*]; MICHAEL A. REBELL & JESSICA R. WOLFF, *CAMPAIGN FOR EDUC. EQUITY, LITIGATION AND EDUCATION REFORM: THE HISTORY AND THE PROMISE OF THE EDUCATION ADEQUACY MOVEMENT* (2006), available at http://www.schoolfunding.info/resource_center/adequacy-history.pdf.

³ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); see also Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999) (discussing standards of review that state courts should apply in assessing whether state constitutional obligations are being met).

⁴ See, e.g., N.Y. CONST. art. XI, § 1 (“The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.”).

⁵ *COURTS AND KIDS*, *supra* note 2, at 18; REBELL & WOLFF, *supra* note 2, at 3.

⁶ See *COURTS AND KIDS*, *supra* note 2, at 15–21 (describing history of educational rights litigation under state constitutions). *Adequacy* litigation is different from *equity* litigation: Whereas equity litigation focuses on equalizing schooling resources between, say, urban and suburban school districts, adequacy litigation does not address inequalities between school districts. Instead, it aims to raise the baseline level of funding and resources provided to poor school districts. However, some commentators have problematized the distinction between adequacy and equity. See, e.g., *id.* at 21 (discussing use of term “adequacy” to describe litigation based in education clauses of state constitutions); James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1225 (2008) (noting that “continued focus on disparities in the supposed era of adequacy suits . . . calls into question . . . categories used to describe school finance cases”).

⁷ The trial stage is discussed generally by Michael A. Rebell, *Education Adequacy, Democracy, and the Courts*, in *ACHIEVING HIGH EDUCATIONAL STANDARDS FOR ALL* 218, 232–39 (Timothy Ready, Christopher Edley, Jr., & Catherine E. Snow eds., 2002). Rebell discusses the remedial stage generally in *COURTS AND KIDS*, *supra* note 2, at 42–84.

constitution's education clause.⁸ Essentially, plaintiffs must survive a motion to dismiss the case by arguing that the clause provides individuals the right to adjudicate educational adequacy. The second stage, the trial stage, involves a trial on the merits to determine whether the state is meeting its obligation to provide an adequate education. In this stage, plaintiffs present their case that the state is providing an inadequate education: This could include evidence of deficient facilities and resources, teacher and personnel shortages, overcrowding, and other problems.⁹ The state, of course, defends against these claims and argues that it is providing an adequate education.

The third stage, remedial compliance, occurs only if a constitutional violation is found at the trial stage. In its trial ruling, the court provides some guidance to the state as to how to remedy the violation. The state legislature devises a remedy, which may then be challenged by plaintiffs. If the court agrees that the remedy is inadequate, the legislature must devise another remedy, perhaps with further guidance from the court. Moreover, even if the court rules that the state's remedy is adequate, judicial oversight may continue throughout implementation, and plaintiffs can mount a challenge that the remedy is not being implemented properly.¹⁰

In recent years, educational adequacy litigation has been relatively successful in establishing children's constitutional right, under state constitutions, to a minimally adequate education. Since 1989, courts have recognized such a right in twenty of the twenty-nine states where the issue has been litigated.¹¹ The larger challenge has been the remedial stage: compliance with remedies in states where the highest court has found a constitutional violation.

Here, separation of powers presents a dilemma for state courts¹² because, while courts can set constitutional standards, the determina-

⁸ See, e.g., *Campaign for Fiscal Equity, Inc. v. State (CFE I)*, 655 N.E.2d 661, 665 (N.Y. 1995) (holding that, as threshold matter, New York Constitution's education clause requires "a sound basic education").

⁹ See *Rebell*, *supra* note 7, at 232-39 (discussing constitutional standards for educational adequacy applied by state courts and arguments made by plaintiffs to demonstrate constitutional violations).

¹⁰ See *COURTS AND KIDS*, *supra* note 2, at 42-84 (discussing remedial stage of various educational adequacy cases).

¹¹ *Id.* at 17, 134 n.12 (describing dramatic increase in successful educational adequacy litigation since 1989). For the most current information on educational adequacy cases, see National Access Network, *Litigation*, <http://www.schoolfunding.info/litigation/litigation.php3> (last visited Dec. 18, 2009).

¹² The earlier question of justiciability, at the motion to dismiss stage, is also a separation of powers issue. However, the separation of powers issue at the justiciability stage is not as complicated as that in the remedial stage. See *infra* Part II.A (discussing justiciability and separation of powers theory).

tion of specific remedies and the allocation of funds for these remedies are typically legislative or executive functions. If civil rights litigators bring a follow-up action and charge that a state has not provided an adequate remedy, state courts can declare the remedy unconstitutional, as has happened several times in the New Jersey case of *Abbott v. Burke*.¹³ Ultimately, however, most state courts have determined that they cannot actually design remedies, as doing so would commandeer a legislative and executive function.¹⁴ Constrained by these separation of powers concerns, state courts may rule on the constitutionality of remedies proposed by the legislature and the executive, but even these are reviewed under deferential standards. The result is often protracted litigation, in which the state's proposed remedies are repeatedly rejected by the courts.

Other commentators have examined how separation of powers concerns have stymied the implementation of educational adequacy remedies.¹⁵ However, these issues become more complicated and salient during times of recession, when states consider making spending cuts in many areas, including education. Reacting to the current financial crisis, over twenty states, including California, Kansas, Maryland, Massachusetts, New York, and Rhode Island, implemented K–12 education budget cuts for 2009.¹⁶ These budget cuts raise an unresolved question for the remedial stage of educational adequacy

¹³ 575 A.2d 359 (N.J. 1990) (holding New Jersey's school finance system unconstitutional with respect to poorer urban school districts). This was only the initial finding of a constitutional violation; subsequent orders in *Abbott* held various legislative funding schemes unconstitutional. *See, e.g.*, *Abbott v. Burke (Abbott III)*, 643 A.2d 575 (N.J. 1994) (declaring Quality Act unconstitutional); *Abbott v. Burke (Abbott IV)*, 693 A.2d 417 (N.J. 1997) (declaring Comprehensive Educational Improvement and Financing Act unconstitutional). For a full history of the *Abbott* litigation, see Education Law Center, History of *Abbott*, <http://www.edlawcenter.org/ELCPublic/AbbottvBurke/AbbottHistory.htm> (last visited Jan. 20, 2010).

¹⁴ *See, e.g.*, *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 214 (Ky. 1989) (deferring to "wisdom of the General Assembly" for "specifics of the legislation"); *Campaign for Fiscal Equity, Inc. v. State (CFE III)*, 861 N.E.2d 50, 57 (N.Y. 2006) ("The role of the courts is not, as Supreme Court assumed, to determine the best way to calculate the cost of a sound basic education in New York City schools, but to determine whether the State's proposed calculation of that cost is rational.").

¹⁵ *See, e.g.*, Sonja Ralston Elder, Note, *Standing up to Legislative Bullies: Separation of Powers, State Courts, and Educational Rights*, 57 DUKE L.J. 755 (2007) (discussing state courts' reluctance to compel legislatures to design specific educational adequacy remedies).

¹⁶ *See* NICHOLAS JOHNSON, PHIL OLIFF, & JEREMY KOULISH, CTR. ON BUDGET AND POLICY PRIORITIES, MOST STATES ARE CUTTING EDUCATION (2008), <http://www.cbpp.org/12-17-08sfp.htm> (noting that twenty states have cut education budgets and that six others, including New York, have proposed budget cuts); Jennifer Medina, *School Budgets To Be Cut by 5 Percent Next Year*, N.Y. TIMES, May 20, 2009, at A27, available at http://www.nytimes.com/2009/05/20/nyregion/20schools.html?_r=2&ref=education# (noting that New York's public school budget would be cut by five percent in 2009–10).

litigation: How should courts respond when the state attempts to cut funds for educational schemes put in place to remedy constitutional violations?

In New York, where the successful educational adequacy litigation of *Campaign for Fiscal Equity v. State*¹⁷ resulted in remedial legislation, Michael Rebell, the chief litigator in that case, has questioned the constitutionality of education budget cuts.¹⁸ Rebell acknowledges that “[t]imes are hard, and New York cannot avoid reckoning with its budget crisis” but argues that “reducing appropriations to . . . schools below the actual amount spent this year would be unconstitutional.”¹⁹

No state court has directly addressed the legal status of education budget cuts that may affect constitutional adequacy remedies in the current recession.²⁰ States such as New Jersey have had ongoing litigation to achieve educational adequacy,²¹ and educational adequacy is in litigation or remedial stages in numerous other states.²² In these states, the recession and accompanying budget cuts may complicate state court efforts to ensure remedial compliance and raise important questions about the scope of judicial review of modifications to existing remedies.²³

While commentators have generally addressed the separation of powers dilemma in the implementation of educational adequacy remedies,²⁴ the issue of budget cuts underscores a more practical question:

¹⁷ 801 N.E.2d 326 (N.Y. 2003).

¹⁸ Michael Rebell, *Slashing the City Schools Budget Is Illegal, Unfair and Unwise*, N.Y. DAILY NEWS, Dec. 19, 2008, http://www.dailynews.com/opinions/2008/12/19/2008-12-19_slashing_the_city_schools_budget_is_ille.html.

¹⁹ *Id.*

²⁰ Very recently, Schools for Fair Funding did file a challenge against education budget cuts in Kansas in an effort to reopen the case of *Montoy v. State*. See Dawne Leiker, *School Districts Want Finance Suit Reopened*, HAYS DAILY NEWS, Jan. 12, 2010, available at <http://www.hdnews.net/Story/SFFF011210>. However, as of press time, the Kansas courts had not addressed this claim. See also Michael A. Rebell, *Safeguarding the Right to a Sound Basic Education in Times of Fiscal Constraint* 24 n.43 (Working Paper 2/4/10, 2010), available at http://devweb.tc.columbia.edu/manager/symposium/Files/134_SafeguardingSBE.pdf (“Plaintiffs claim . . . that the substantial educational funding reductions experienced by Kansas’s schools over the past year violate the court’s prior orders in the *Montoy* case, and Article 6 of the Kansas constitution.”).

²¹ See, e.g., *Abbott v. Burke (Abbott XIX)*, 960 A.2d 360 (N.J. 2008); *Abbott v. Burke (Abbott II)*, 575 A.2d 359 (N.J. 1990). See *infra* notes 165–72 and accompanying text for a discussion of the *Abbott* litigation.

²² See REBELL & WOLFF, *supra* note 2, at 1 (noting that adequacy litigation has been brought “in almost all of the states”).

²³ See Rebell, *supra* note 20, at 33 (“Where a court has articulated or approved a particular funding level as being constitutionally appropriate . . . the burden of proof to justify reducing those levels should be even more exacting.”); Rebell, *supra* note 18 (arguing education budget cuts which impact educational adequacy are unconstitutional).

²⁴ See, e.g., Elder, *supra* note 15 (discussing state courts’ reluctance to review legislatures’ educational adequacy remedies due to separation of powers concerns).

how to operationalize separation of powers doctrine into standards of judicial review. How should courts review education budget cuts that may affect constitutional remedies? Should they use a more deferential standard of review that presumes the adequacy and constitutionality of remedies devised by the state? Alternatively, are there circumstances where more stringent judicial review is appropriate? How are all of these questions impacted by the notion of separation of powers employed by state courts?

In light of these questions, this Note argues for a more functional approach to separation of powers during the remedial stage of educational adequacy jurisprudence. Functional separation of powers precepts allow for flexible judicial review that is more responsive to particular social and political circumstances than that under strict, formal separation of powers tenets.²⁵ When applied to states where a constitutional adequacy remedy is in place, such a functional approach supports more stringent judicial review of education budget cuts, particularly in times of recession when there is political pressure to reduce spending.

Part I provides a theoretical overview of separation of powers. It defines the continuum between “formal” and “functional” notions of separation of powers and provides a general description of each. This Part then draws on existing academic work to analyze differences between state and federal governments and to illustrate why state courts should be less concerned than federal courts about encroaching on legislative power.²⁶ Employing this analysis, this Part argues that a more functional view of separation of powers is particularly appropriate for state governments and, as a consequence, for educational adequacy jurisprudence.

Part II applies separation of powers theory to selected educational adequacy cases in Kentucky, Kansas, and Ohio and relates this theory to the standards of review employed in these cases. It aims to illustrate the formal/functional separation of powers continuum at the various stages of educational adequacy litigation, as manifested through the standard of review applied in these cases. In doing so, this Part builds upon existing scholarship to present a more detailed analysis of the link between a state court’s approach to separation of powers and the standards of judicial review it applies in reviewing court-mandated educational adequacy remedies.

²⁵ See *infra* Part I.A (describing functional separation of powers).

²⁶ See Hershkoff, *supra* note 3 (discussing how concerns about democratic legitimacy, federalism, and separation of powers do not apply to states as they apply to federal courts); Elder, *supra* note 15 (arguing that state courts should be more vigilant in compelling legislatures to guarantee individual rights).

Part III then applies the preceding analysis to the prospect of judicial review of education budget cuts, focusing on New York as an example. This Part draws from a functional perspective on separation of powers to argue for heightened judicial review of any budget cut that may affect an adequacy remedy. In doing so, it delves into the mechanics of judicial review and draws a relationship between standards of review and the history of the litigation at hand. This Part distinguishes between remedial design—the initial creation of an adequate remedy by a state—and remedial compliance—the process of ensuring that the state is complying with the constitution in implementing or changing an established remedy. I argue that even if deferential judicial review is appropriate for the former, heightened judicial review should be applied to the latter, either in the form of an affirmative burden on the state to show that the budget cut does not disrupt the established remedy or through an independent judicial inquiry to determine the effects of reduced spending on the established remedy.

I

THEORETICAL OVERVIEW OF SEPARATION OF POWERS

A. *Formal Versus Functional Views of Separation of Powers*

Scholars have taken varying approaches to the doctrine of separation of powers. One perspective is the formal view, which emphasizes bright line distinctions between the functions of the various branches of government and posits that each branch should be “entirely free from the control or coercive influence, direct or indirect, of either of the others.”²⁷ This approach assumes that the powers and functions of the three branches are clearly delineated and do not shift in response to changing historical and political conditions.²⁸

In contrast to the formal view, a functional conception of separation of powers emphasizes efficiency of function rather than strict separation.²⁹ The functional approach aims “to allocate the tasks of government to those organs most likely to perform them well”³⁰ and recognizes that the allocation of power between branches of government must remain somewhat fluid in order to respond to changing

²⁷ Bruce G. Peabody & John D. Nugent, *Toward a Unifying Theory of the Separation of Powers*, 53 AM. U. L. REV. 1, 13 (2003). The formal view is also known as “negative” separation of powers. Jonathan Feldman, *Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in an Era of Positive Government*, 24 RUTGERS L.J. 1057, 1060 (1993).

²⁸ Peabody & Nugent, *supra* note 27, at 13.

²⁹ Feldman, *supra* note 27, at 1060.

³⁰ Burt Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363, 372 (1982).

political conditions. Rather than creating bright lines between the workings of the different branches of government, a functional view of separation of powers “stress[es] the ‘ambiguities of the distribution of powers’ and embrace[s] flexible principles governing what authority each branch of government can properly exercise.”³¹ From this perspective, “the separation of powers is an evolutionary system which can assume a variety of legitimate forms alongside developments in the state.”³²

This Note conceptualizes the formal/functional distinction as a continuum rather than a dichotomy. This continuum is defined by the degree of flexibility that courts permit in delineating the roles of the various branches of government. For example, the formal/functional distinction is really about whether a court has drawn bright lines between legislative and judicial functions (a more formal approach), or whether it has indicated that those lines are dynamic and changing (a more functional approach).³³

B. Separation of Powers and Judicial Review

Formal and functional approaches to separation of powers have different implications for standards of scrutiny in judicial review of legislative and executive action. As noted, the formal view tends to delineate legislative, executive, and judicial functions strictly and thus lends itself to more deferential review of functions traditionally deemed to be outside the judicial sphere. The roles of the courts, the executive, and the legislature are strictly defined, and formal jurisprudence presumes that historical and political context should not affect or change these roles. Thus, once a given function, such as state budgeting, has been identified as legislative, a court adhering to a formal view of separation of powers is unlikely to review the legislature’s exercise of that function with much scrutiny.

Conversely, the functional view posits that the system of checks and balances between the three branches of government may fluc-

³¹ Peabody & Nugent, *supra* note 27, at 13 (noting that functional view highlights “the essential functions of each branch within an adaptable system of checks and balances” (internal quotation marks omitted)).

³² *Id.* at 14; see also Linda D. Jellum, “Which Is To Be Master,” *the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 875 (2009) (“[F]unctionalists balance Constitutional and pragmatic concerns, recognizing that government needs flexibility to create new power-sharing arrangements to address the evolving needs of the modern century.”).

³³ Jellum, *supra* note 32, at 875 (“Whereas formalism uses a bright-line-rule approach to categorize acts as legislative, judicial, or executive, functionalism uses a factors approach, balancing the competing power interests with the pragmatic need for innovation.”).

tuates, depending on the nature of the legislative action being reviewed and the historical and political context. As a consequence, a functional approach to separation of powers may result in higher standards of judicial review, because the role of the courts is not strictly delimited. If the political process prevents the legislature from ensuring that a constitutional right is fully realized, court intervention could be appropriate, even if it interferes with a conventional legislative function such as budgeting.³⁴

C. *State Versus Federal Separation of Powers*

In addition to the distinctions between the formal and functional views, the different political structures and processes of state and federal governments have important implications for separation of powers. Many legal scholars have argued that the concept of separation of powers should apply differently to federal and state law. For example, Professor G. Alan Tarr notes that state legislatures enjoy plenary power, unlike Congress, whose limited powers are enumerated specifically in Article I of the Constitution.³⁵ Limits on the plenary power of state governments have developed through a dynamic constitutional amendment process that has allowed the allocation of power in state government to evolve and adapt to changing conditions.³⁶ This suggests that the separation of powers in state government is inherently flexible and therefore well-suited to a functional separation of powers analysis.

Additionally, many of the institutional concerns that support strictly formal limitations on judicial review in the federal context are not present in the state court context.³⁷ In contrast to federal courts, state courts have direct political accountability because many state judges are elected, and even those who are appointed often do not serve for life. Some state courts render advisory opinions,³⁸ and because state constitutions are more easily amended than the Federal Constitution, state high court rulings on constitutional matters are not as rigid or final as Supreme Court decisions.³⁹

³⁴ See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962) (holding that reapportionment of legislative districts, traditionally legislative function, presented justiciable question for courts).

³⁵ G. Alan Tarr, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329, 329–30 (2003).

³⁶ *Id.*

³⁷ See Hershkoff, *supra* note 3, at 1170 (“If, by the conventional wisdom, federal courts are remote from the people, state courts are populist; if federal courts are independent of the elected branches, state courts are interdependent; if federal courts are final in their constitutional decisionmaking, state courts are conditional.”).

³⁸ *Id.* at 1165.

³⁹ *Id.* at 1162–63.

Perhaps because of these diminished institutional concerns, state courts generally operate more flexibly and have wider latitude in defining the judicial role than do federal courts. For instance, state courts may function as “common law generalists,” a role that “gives the judge an explicit role in policymaking” that federal courts, wary of intruding on legislative powers, might be more reluctant to assume.⁴⁰ These characteristics suggest a more functional approach to separation of powers in the practice of state courts,⁴¹ even if such an approach is not reflected in state constitutional doctrine.

There are other arguments in favor of a more functional approach to the separation of powers in state courts. Formal separation of powers doctrine derives largely from a negative rights conception (freedom from state interference) that is prevalent in federal constitutional law.⁴² In contrast, state constitutions contain not only the negative rights that the Federal Constitution guarantees but also affirmative, positive rights, such as the right to adequate education. Scholars have noted that the formal/negative approach ignores the prospect of using judicial review to realize positive rights that are guaranteed by state constitutions.⁴³ Professor Helen Hershkoff argues more specifically that the positive rights conferred by state constitutions, such as the right to an adequate education, necessitate that state courts adopt more robust standards of judicial review.⁴⁴ Because positive rights require legislative action to be realized, court supervision may be more justified than it is in cases involving negative rights, which require only noninterference rather than affirmative legislative action.⁴⁵

Other commentators have made similar points about the differences between federal and state separation of powers.⁴⁶ Also, the Kansas Supreme Court, in *Montoy v. State (Montoy III)*, noted that federalism is not a concern for state governments and need not con-

⁴⁰ *Id.* at 1164.

⁴¹ *See id.* at 1175–83 (discussing multiplicity of roles played by state courts).

⁴² *See, e.g.,* Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) (“[T]he Constitution is a charter of negative rather than positive liberties.”).

⁴³ *See* Feldman, *supra* note 27, at 1075 (arguing that failure of federal separation of powers doctrine to address positive rights poses “stumbling block” for state courts); Hershkoff, *supra* note 3, at 1138 (arguing that state courts must be able to use judicial review to ensure government is meeting its positive constitutional commitments).

⁴⁴ Hershkoff, *supra* note 3, at 1138; *see also id.* at 1170–75 (arguing for stronger state judicial review of constitutional welfare claims).

⁴⁵ Elder, *supra* note 15, at 766–68.

⁴⁶ *See, e.g.,* Stanley H. Friedelbaum, *State Courts and the Separation of Powers: A Venerable Doctrine in Varied Contexts*, 61 ALB. L. REV. 1417, 1421 (1998) (noting that separation principles in state constitutions stem from different “institutional pattern” than federal government).

strain judicial oversight of remedies: “[U]nlike federal courts, state courts need not be constrained by federalism issues of comity or state sovereignty when exercising remedial power over a state legislature”⁴⁷

Academic commentators have also levied broad critiques of formal separation of powers doctrine that apply to both state and federal governments.⁴⁸ For example, Professors Bruce Peabody and John Nugent note that the formal approach “fail[s] to recognize that complexities of the modern administrative state require flexibility in delegating and sharing separated powers.”⁴⁹ Perhaps for many of these reasons, the Supreme Court has held that federal separation of powers precepts are not binding on the states.⁵⁰

Nevertheless, state courts have tended “to interpret state constitutions as having the same meaning as the federal Constitution,” a phenomenon termed “lockstep interpretation.”⁵¹ Professor Robert Schapiro argues that by applying the federal standard of judicial deference across the board, state courts effectively negate the power of state constitutions as independent sources of judicial review.⁵² Rather than developing their own separation of powers jurisprudence based on state law, history, and local political circumstances, state courts have been content to borrow and apply federal doctrine and its more formal separation of powers precepts.⁵³ When faced with separation of powers questions, state courts often cite federal separation of powers cases and frameworks as if they are similarly applicable at the state level.⁵⁴

Such “lockstep interpretation” is apparent in educational adequacy jurisprudence.⁵⁵ For example, in *Committee for Educational*

⁴⁷ 112 P.3d 923, 931 (Kan. 2005).

⁴⁸ See, e.g., Peabody & Nugent, *supra* note 27, at 15.

⁴⁹ *Id.*

⁵⁰ See *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957) (“[T]he concept of separation of powers embodied in the United States Constitution is not mandatory in state governments.”).

⁵¹ Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 693 (2000).

⁵² See *id.* (describing state court application of federal standards of judicial deference as “an extreme expression of judicial passivity”).

⁵³ See *id.* at 692 (describing “the reluctance of state courts to interpret their constitutions independently of the federal Constitution”).

⁵⁴ See Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 954 (2008) (“State supreme courts seldom have been asked to address separation of powers issues. When they have, they often have borrowed from the U.S. Supreme Court’s analysis of the federal separation of powers.”).

⁵⁵ See generally Elder, *supra* note 15 (discussing separation of powers in educational adequacy cases).

Rights v. Edgar, the Supreme Court of Illinois ruled that the state constitution's Education Clause was nonjusticiable due to "considerations of separation of powers . . . [which,] [i]n federal courts, . . . find expression in the so-called 'political question' doctrine."⁵⁶ Similarly, in *City of Pawtucket v. Sundlun*, the Rhode Island Supreme Court held that school finance was nonjusticiable after reviewing United States Supreme Court separation of powers jurisprudence and citing the Federalist Papers.⁵⁷

Even state courts that have found education clauses to be justiciable have invoked federal separation of powers doctrine in doing so. In rejecting the state's nonjusticiability argument in *Neeley v. West Orange-Cove Consolidated Independent School District*, the Texas Supreme Court made its decision by "[a]ssuming that the same tests" that "demarcate the separation of powers in the federal government under the United States Constitution . . . serve equally well in defining the separation of powers in the state government under the Texas Constitution."⁵⁸

"Lockstep interpretation" by these state courts represents a more formal approach to separation of powers, as it incorporates the more rigidly defined boundaries between branches of the federal government. In contrast, a functional approach to separation of powers would take into account the dynamic roles of different branches within state governments, rather than extrapolating those roles from federal doctrine and practice.⁵⁹ Such an approach is particularly appropriate in the context of state courts, which occupy a more flexible role in state government and do not present the institutional concerns that arise in the federal context. In Part II, I turn to the specific context of educational adequacy litigation and examine how formal and functional approaches to separation of powers affect the level of judicial review afforded in the different stages of adequacy litigation.

⁵⁶ 672 N.E.2d 1178, 1191 (Ill. 1996).

⁵⁷ 662 A.2d 40, 57–59 (R.I. 1995).

⁵⁸ 176 S.W.3d 746, 778 (Tex. 2005). In *Neely*, the Texas Supreme Court, while holding educational adequacy to be a justiciable question, rejected the plaintiff's claims that the state was providing an inadequate education. *Id.* at 778, 789–90.

⁵⁹ See Peabody & Nugent, *supra* note 27, at 13 (noting that functional separation of powers "embrace[s] flexible principles governing what authority each branch of government can properly exercise").

II

SEPARATION OF POWERS AND STANDARDS OF REVIEW IN
EDUCATIONAL ADEQUACY JURISPRUDENCEA. *Justiciability and Separation of Powers Theory*

Separation of powers is an overarching constitutional theme in educational adequacy jurisprudence, first emerging in the justiciability determination, as the court decides whether a state constitution's education clause actually provides a right of action, whether there are judicially manageable standards with respect to educational adequacy, and whether the courts can provide a remedy at all.⁶⁰ Some state high courts, such as the Supreme Court of Illinois, have ruled that their education clause implicates a nonjusticiable political question.⁶¹ However, most state courts that have considered the issue have answered in the affirmative: Education clauses are in fact justiciable.⁶² While the justiciability issue is also a backdrop for this Note, it will not be considered in detail here: Other commentators have addressed it extensively.⁶³

B. *Trial Stage: Guidance for Remedies*

The trial stage of educational adequacy litigation does not itself create a separation of powers issue. It is the judiciary's function to determine whether the state violates its constitution by failing to provide children with an adequate education.⁶⁴ Nevertheless, trial rulings in educational adequacy jurisprudence are relevant to the separation

⁶⁰ Cf. *Baker v. Carr*, 369 U.S. 186, 210 (1962) ("The nonjusticiability of a political question is primarily a function of the separation of powers.").

⁶¹ See, e.g., *Lewis E. v. Spagnolo*, 710 N.E.2d 798, 802 (Ill. 1999); *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d at 1189.

⁶² See *COURTS AND KIDS*, *supra* note 2, at 17, 22–23 (noting that of twenty-nine different state educational adequacy cases since 1989, only "seven states . . . have held for defendants at the basic liability stage in sound basic education" and that "[i]n most cases when defendants raise these justiciability arguments, the courts reject them out of hand").

⁶³ See generally Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006) (assessing discretionary nature of justiciability doctrine and potential for constitutional underenforcement); Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976) (arguing that there may be no basis for abstention from judicial review of political questions); Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031, 1059–61 (1984) (criticizing traditional rationales for avoiding judicial review in political question doctrine). Additionally, it should be noted that state courts that have ruled educational adequacy is nonjusticiable take the view that education, under the state constitution, is a legislative (and possibly executive) responsibility in which the courts have no role. This is a quintessentially formal approach to separation of powers.

⁶⁴ Plaintiffs have been quite successful at the trial stage of educational adequacy litigation since 1989, winning twenty of the twenty-two cases that have gone to trial. See *COURTS AND KIDS*, *supra* note 2, at 17, 22–23 (noting that "[a]lmost all of the defendant

of powers dilemma because they provide initial guidance for legislatures on how to remedy constitutional violations.⁶⁵ They also illustrate that state courts grant broad deference to legislatures to devise remedies, seemingly applying a formal approach to the separation of powers.

Language from the hallmark case of *Rose v. Council for Better Education, Inc.*⁶⁶ illustrates the application of a more formal approach. In *Rose*, the Supreme Court of Kentucky ruled that a “child’s right to an adequate education is a fundamental one under [Kentucky’s] Constitution” and that “[t]he General Assembly must protect and advance that right.”⁶⁷ *Rose* underscored the scope of legislative duty by noting that “the financial burden entailed in meeting [constitutionally mandated education provisions] in no way lessens the constitutional duty” and that “[t]he taxpayers of this state must pay for the system, no matter how large, even to the point of being ‘unexpectedly large or even onerous.’”⁶⁸ The *Rose* court then laid out seven “capacities” that schools must provide for a constitutionally adequate education.⁶⁹

However, the Kentucky court was clear about the limits of its role.⁷⁰ The *Rose* court acknowledged that it deferred to the “wisdom of the General Assembly” for “the specifics of the legislation”⁷¹ and noted that “[i]t is textbook law that enactments of the General Assembly have a strong presumption of constitutionality.”⁷² The court limited its own role to determining the “criteria, standards and goals which must be met”⁷³ and “the constitutional validity . . . of what the legislative department has done.”⁷⁴

victories . . . [in educational adequacy] litigations since 1989” have occurred on justiciability grounds, rather than at trial).

⁶⁵ See *Rebell*, *supra* note 7, at 232–39 (discussing trial rulings in educational adequacy litigation, many of which articulate criteria for adequate education).

⁶⁶ 790 S.W.2d 186 (Ky. 1989).

⁶⁷ *Id.* at 212; see also KY. CONST. § 183 (“The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the State.”).

⁶⁸ 790 S.W.2d at 208.

⁶⁹ *Id.* at 212 (stating that Kentucky’s educational system “must have as its goal to provide each and every child” with a range of capacities encompassing sufficient verbal skills, social and civic knowledge, self knowledge, knowledge of mental and physical wellness, “grounding in the arts,” and skills needed to select and compete for careers of students’ choices).

⁷⁰ *Id.* at 212 (noting that court can “only decide the nature of the constitutional mandate” and must leave specifics to legislative branch).

⁷¹ *Id.* at 214.

⁷² *Id.* at 209.

⁷³ *Id.* at 214.

⁷⁴ *Id.* (quoting *Johnson v. Commonwealth*, 165 S.W.2d 820, 823 (Ky. 1942)).

The language espoused by the *Rose* court thus dealt with the separation of powers dilemma by creating a formal distinction between judicial and legislative domains. The judicial domain encompassed the “nature of the constitutional mandate”—the general goals and standards that the judiciary determines as part of its function of interpreting the Kentucky Constitution’s Education Clause.⁷⁵ The legislative domain, in contrast, included the “specifics of the legislation”—the particular means enacted to meet those goals and standards.⁷⁶ As discussed earlier, this type of formal distinction is typical in state separation of powers jurisprudence.⁷⁷

C. Remedial Compliance: A Functional View

At the remedial stage of educational adequacy litigation, the separation of powers dilemma is the scope of judicial power to compel legislative remedies. In its trial ruling, the court provides guidance on the standards or goals that the legislature must satisfy to remedy the constitutional violation. The legislature then designs and implements the adequacy remedy. The remedial process can be ongoing, since plaintiffs or other parties with standing can challenge any legislature’s remedy as unconstitutional, as in the *Abbott* case.⁷⁸ As a result, during the remedial stage there is extended interplay between the judicial and legislative branches, which may raise separation of powers concerns.

Many state courts have taken a deferential approach to the remedial process, eventually granting the legislature the power to deter-

⁷⁵ *Id.* at 212.

⁷⁶ *Id.* at 214. Additionally, the *Rose* court’s decision was influenced by the Kentucky Constitution’s explicit and relatively strong separation of powers provisions, which emphasize formal distinctions between the branches of government. See KY. CONST. § 27 (“The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another.”); KY. CONST. § 28 (“No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted.”). However, Kentucky is not unusual with regard to the separation of powers provisions in its constitution. Thirty-three other state constitutions have “strict” separation of powers clauses, which “include[] not simply the division of power, but a further instruction that one branch is not to exercise the powers of the others.” F. Scott Boyd, *Legislative Checks on Rulemaking Under Florida’s New APA*, 24 FLA. ST. U. L. REV. 309, 327 n.104 (1997). These include numerous states other than Kentucky, such as Arkansas, Idaho, Massachusetts, Montana, New Jersey, South Carolina, and Wyoming, *id.*, where plaintiffs have prevailed in educational adequacy litigation. COURTS AND KIDS, *supra* note 2, at 134 n.12.

⁷⁷ See *supra* notes 53–57 and accompanying text.

⁷⁸ See *infra* notes 165–72 and accompanying text for a discussion of *Abbott*.

mine adequacy remedies. For example, in *DeRolph v. State*, the Supreme Court of Ohio initially found a constitutional violation and repeatedly found the state's remedies inadequate.⁷⁹ In its first two decisions, the Ohio court took a deferential stance toward the legislative remedy, finding the existing school finance scheme unconstitutional but “provid[ing] no specific guidance as to how to enact a constitutional school-funding system.”⁸⁰ Then in its third decision, apparently concerned about the “uncertainty and fractious debate” spurred by the court's continued role in the *DeRolph* litigation,⁸¹ the court changed course and ordered the legislature to make specific modifications to its school finance plan,⁸² notwithstanding the separation of powers concerns raised by several justices.⁸³ The majority was not “completely comfortable” with this decision,⁸⁴ however, and vacated it upon reconsideration.⁸⁵ In vacating the specific remedial orders of *DeRolph III*, the court reiterated the constitutional directives of *DeRolph I* and *II* but declined to mandate any particular legislative remedy.⁸⁶ In a final follow-up action, the Supreme Court of Ohio deferred completely to the General Assembly, ruling to “end

⁷⁹ *DeRolph v. State (DeRolph I)*, 677 N.E.2d 733, 747 (Ohio 1997) (declaring state's public school finance system unconstitutional); *DeRolph v. State (DeRolph II)*, 728 N.E.2d 993, 1020 (Ohio 2000) (finding state's efforts toward compliance inadequate to fulfill constitutional mandate to provide adequate education); *DeRolph v. State (DeRolph III)*, 754 N.E.2d 1184, 1200–01 (Ohio 2001) (ordering specific modifications to proposed school-funding plan to achieve constitutionality and terminating court's jurisdiction), *vacated on reconsideration*, *DeRolph v. State (DeRolph IV)*, 780 N.E.2d 529, 530 (Ohio 2002) (directing General Assembly “to enact a school-funding scheme that is thorough and efficient” and “focused on the core constitutional directive of *DeRolph I*: a complete systematic overhaul of the school-funding system” (internal quotation marks omitted)). For further discussion of educational adequacy litigation in Ohio, see Elder, *supra* note 15, at 777–78. See generally Larry J. Obhof, *DeRolph v. State and Ohio's Long Road to an Adequate Education*, 2005 BYU EDUC. & L.J. 83.

⁸⁰ *DeRolph IV*, 780 N.E.2d at 530 (describing court's decisions in *DeRolph I* and *II*).

⁸¹ *DeRolph IV*, 780 N.E.2d at 530; *DeRolph III*, 754 N.E.2d at 1190.

⁸² *DeRolph III*, 754 N.E.2d at 1200–01.

⁸³ See *id.* at 1204–09 (Douglas, J., concurring) (noting that “respect for separation of powers has led us to scrupulously avoid crafting a school-funding remedy in *DeRolph I* and *II*” but defending court's actions under its power to sever legislative provisions that offend constitution); *id.* at 1241 (Sweeney, J., dissenting) (characterizing majority's decision as “quite a departure in philosophy from our past opinions, in which we adamantly stated that we would not instruct the General Assembly on how to remedy the system”); *id.* at 1245 (Cook, J., dissenting) (“By ordering particular legislative action—based on its own concept of what is necessary to guarantee educational quality—the majority has made an initial policy determination that the judiciary is ill equipped to make and that is characteristic of nonjusticiability.”).

⁸⁴ *Id.* at 1189.

⁸⁵ *DeRolph IV*, 780 N.E.2d at 530.

⁸⁶ *Id.*

any further *DeRolph* litigation in *DeRolph v. State*.⁸⁷ In doing so, the Ohio high court resorted to formal separation of powers precepts, limiting its function to assessing constitutionality and leaving the remedial stage to the legislature alone.

State courts in Arkansas⁸⁸ and Montana⁸⁹ have also shown reluctance to oversee remedial compliance in any vigilant manner, limiting their function to assessing constitutionality. This is inherently a more formal notion of the separation of powers.

The Kansas Supreme Court, however, has taken a more active, functional approach to remedial oversight. After an initial decision holding that the state had violated its constitutional obligation to provide an adequate education,⁹⁰ the court, in *Montoy v. State (Montoy III)*, ruled that a state funding bill passed in response to the court's earlier decision was unconstitutional.⁹¹ In contrast to the deference shown by many other state courts, *Montoy* placed an affirmative burden on the state to show that its remedy was effective.⁹²

With respect to separation of powers, the court in *Montoy III* also rejected the state's argument for deference to the legislature, emphasizing the case's remedial posture:

[J]udicial monitoring in the remedial phase can help check political process defects and ensure that meaningful relief effectuates the court's decision. . . . [W]hen these defects lead to a continued constitutional violation, judicial action is entirely consistent with separation of powers principles and the judicial role. Although state constitutions may commit educational matters to the legislative and executive branches, if these branches fail to fulfill such duties in a constitutional manner, the Court too must accept its continuing constitutional responsibility . . . for overview . . . of compliance with the constitutional imperative.⁹³

⁸⁷ State *ex rel. State v. Lewis (DeRolph V)*, 789 N.E.2d 195, 202–03 (Ohio 2003) (granting writ of prohibition to prevent trial court from exercising further jurisdiction in *DeRolph*).

⁸⁸ Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 511 (Ark. 2002) (noting, after finding constitutional violation, that “[i]t is not this court’s intention to monitor or superintend the public schools of this state”).

⁸⁹ Helena Elementary Sch. Dist. No. 1 v. State, 784 P.2d 412, 413 (Mont. 1990) (acknowledging constitutional violation but “declin[ing] to retain jurisdiction in this matter”).

⁹⁰ *Montoy v. State (Montoy II)*, 102 P.3d 1160, 1163 (Kan. 2005).

⁹¹ *Montoy v. State (Montoy III)*, 112 P.3d 923, 937 (Kan. 2005).

⁹² *See id.* at 929 (“Typically a party asserting compliance with a court decision ordering remedial action bears the burden of establishing that compliance.”).

⁹³ *Montoy III*, 112 P.3d at 931 (emphasis omitted) (internal quotation marks omitted) (quoting Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072, 1087–88 (1991)).

By explicitly factoring political process defects into its analysis of the proper scope of judicial review, the *Montoy* court essentially espoused a functional view of separation of powers. It also incorporated a flexible notion of checks and balances and considered contextually dependent arrangements of power in determining the appropriate judicial role.⁹⁴ The court noted that “[a]n active judicial role in monitoring remedy formulation is well-rooted in the courts’ equitable powers,”⁹⁵ thus relying on state courts’ flexible policymaking role to support its functional approach to separation of powers.⁹⁶

It is important to note, however, that *Montoy* is the exception: Many state courts have been unwilling to hold legislatures to such high standards of review with respect to budgeting issues.⁹⁷ Typically, these courts exhibit more deference to legislative findings and decisionmaking,⁹⁸ reflecting a lower standard of review and more formal lines between the legislative and judicial functions. In the current recession, states in the remedial stage of adequacy litigation face pressure to reduce education funding.⁹⁹ State courts’ approach to separation of powers, and consequent level of deference to the political branches of government, will become even more significant in ensuring constitutional adequacy remedies. Part III focuses on the prospect of judicial review of education budget cuts, employing New York’s *CFE* case and proposed education budget cuts as a hypothetical example.

⁹⁴ *Id.* at 931 (“[W]hen in its calm and deliberate judgment, free from the influences frequently responsible for legislative enactments, [the Court] determines rights guaranteed by [the Constitution’s] provisions have been encroached upon it has . . . recognized its duty and obligation to declare those enactments in contravention of constitutional provisions.” (emphasis omitted) (quoting *Berentz v. Bd. of Comm’rs of Coffeyville*, 152 P.2d 53, 56 (1944)).

⁹⁵ *Id.* (quoting *Unfulfilled Promises: School Finance Remedies and State Courts*, *supra* note 93, at 1088).

⁹⁶ See *supra* notes 40–41, *infra* notes 115–19 and accompanying text (noting that state courts’ role as “common law generalists” and their concomitant policymaking authority make state courts more amenable to functional approach to separation of powers).

⁹⁷ See *supra* notes 87–89 and accompanying text (describing decisions of state high courts to limit judicial function to assessing constitutional validity); see also *COURTS AND KIDS*, *supra* note 2, at 67 (“[M]ost courts have made clear that the policy determinations that enter into the revision of a complex state education finance system should be undertaken by the political branches. They generally assume that their main responsibility is . . . [limited to] . . . declaring the old system unconstitutional and deferring to the legislature . . .”).

⁹⁸ *Id.*

⁹⁹ See *supra* note 16 and accompanying text (noting that over twenty states either implemented or proposed education budget cuts for 2009).

III

JUDICIAL REVIEW OF EDUCATION BUDGET CUTS

A. *CFE and Proposed New York Budget Cuts*

The well known New York case of *Campaign for Fiscal Equity v. State (CFE)*, in conjunction with the proposed education budget cuts in New York, illustrates the questions raised by the prospect of state education budget cuts that may affect constitutional adequacy remedies.¹⁰⁰ This case is unusual in that the court directly addressed budgetary figures and deemed the state's specific determination of \$1.93 billion in additional annual operating funds, adjusted for inflation, to be the constitutional minimum for an adequate education in New York City schools.¹⁰¹

In the first stage of *CFE I*, New York's high court, the Court of Appeals, found the state constitution's Education Article¹⁰² to be justiciable.¹⁰³ It ruled that the state must "offer all children the opportunity of a sound basic education . . . [consisting] of the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury."¹⁰⁴ In the trial stage, the Court of Appeals ruled that the state was in violation of its constitutional duty to provide this education to children in New York City public schools.¹⁰⁵ Specifically, the Court of Appeals held "that New York City schools provide deficient teaching because of their inability to attract and retain qualified teachers,"¹⁰⁶ that they have deficient libraries and computers,¹⁰⁷ and that plaintiffs provided "sufficient proof" that large class sizes have a negative effect on learning in the public schools.¹⁰⁸ The court also found that "outputs," such as graduation rates and test scores, indicated that children in New York City public schools were receiving an inadequate education.¹⁰⁹

In the remedial stage of the *CFE* litigation, the court examined the state's determination, by Governor George Pataki's New York State Commission on Education Reform, that the annual cost of an

¹⁰⁰ *CFE III*, 861 N.E.2d 50 (N.Y. 2006).

¹⁰¹ *Id.* at 57.

¹⁰² N.Y. CONST. art. XI, § 1 ("The legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.").

¹⁰³ *CFE I*, 655 N.E.2d 661, 665 (N.Y. 1995).

¹⁰⁴ *Id.* at 666.

¹⁰⁵ *CFE II*, 801 N.E.2d 326 (N.Y. 2003).

¹⁰⁶ *Id.* at 334.

¹⁰⁷ *Id.* at 336.

¹⁰⁸ *Id.* at 335.

¹⁰⁹ *Id.* at 336-40.

adequate education for New York City public schools amounted to \$1.93 billion in additional operating funds (2004–05 dollars), adjusted annually for inflation and the Geographic Cost of Education Index (GCEI).¹¹⁰ The state had devised a remedy to address the constitutional deficiencies based on this cost estimate. When the *CFE* plaintiffs challenged the state's remedy as inadequate, the trial court appointed an independent blue ribbon panel of referees to investigate.¹¹¹ The panel recommended a significantly higher figure, \$5.63 billion in additional operating funds (2004–05 dollars), as a constitutional minimum to provide an adequate education in New York City public schools.¹¹² Rather than deferring to the state's determination, the trial court adopted the judicially appointed panel's estimate of the minimal cost for a constitutionally adequate education.¹¹³ The Appellate Division vacated the trial court's adoption of the panel's findings, but did not defer to the state's proposal either. Instead, it directed the state to recalculate the cost of providing an adequate education, considering the referees' findings and other data.¹¹⁴

The Court of Appeals, however, was completely deferential to the state. It affirmed the Appellate Division's reversal of the trial court's remedy but held that the state's contested determination of the annual cost of an adequate education for New York City schools constituted "the constitutionally required funding for the New York City School District."¹¹⁵ Any additional funds allocated by the governor or legislature, beyond the annual \$1.93 billion in additional operating

¹¹⁰ *CFE III*, 861 N.E.2d 50, 52 (N.Y. 2006) ("The State estimated [the cost of providing children with a sound basic education] to include a minimum of \$1.93 billion, in 2004 dollars, in additional annual operating funds."). Governor Pataki had appointed the New York State Commission on Education Reform to determine the reforms necessary to "ensure that all children in New York State have an opportunity to obtain a sound basic education." *Id.* at 53. The figure of \$1.93 billion was derived by this commission from criteria set by the New York State Board of Regents. *Id.* at 55 ("Applying the GCEI and the Board of Regents approach to identifying successful schools, the spending gap for New York City, in 2004 dollars, was \$1.93 billion."). The Court of Appeals stated in *CFE III* that "Governor Pataki and the [New York] Senate endorsed the approach that generated a minimum figure of \$1.93 billion as the estimated spending gap in operating expenses for New York City." *Id.* However, the court also noted that "[u]ltimately, the legislation [dictating that the costs of providing a sound basic education should be determined using the Board of Regents approach] was not enacted." *Id.*

¹¹¹ *Id.* at 55–56.

¹¹² *Id.* at 56.

¹¹³ *Id.* The blue ribbon panel in *CFE III* also recommended that the state provide \$9.179 billion in capital expenditures over five years and conduct new cost studies every four years to determine if the minimal cost of adequate education had risen. The trial court also ordered these remedies. *Id.*

¹¹⁴ *Id.* at 56–57 & n.4.

¹¹⁵ *Id.* at 60.

funds, “amounted to a policy choice to exceed the constitutional minimum”¹¹⁶ and could not be *judicially* mandated.

In ruling that the judiciary should defer to the state’s determination, the Court of Appeals in *CFE III* applied a rational basis standard of review, stating that the trial court had

erred by, in effect, commissioning a *de novo* review of the compliance question. The role of the courts is not . . . to determine the best way to calculate the cost of a sound basic education in New York City schools, but to determine whether the State’s proposed calculation of that cost is rational.¹¹⁷

The court noted that it had to balance its duty to define, protect, and order redress for constitutional violations against its “duty ‘to defer to the Legislature in matters of policymaking,’” especially in the realm of educational financing, which strikes upon “a core element of local control.”¹¹⁸ The court justified its deference by citing “the limited access of the Judiciary ‘to the controlling economic and social facts’” and the court’s “respect for the separation of powers.”¹¹⁹

However, one can readily raise questions about the court’s deference in this situation. First, it is clear that the judiciary *could* access economic and social facts; the trial court’s blue ribbon panel of referees illustrates that there were mechanisms by which the judiciary could gather and analyze the relevant data. Second, the Court of Appeals in *CFE III* adopted the figure of \$1.93 billion in additional operating funds in spite of the fact that the governor and the legislature did not come to any final agreement, and legislation proscribing this amount was not actually enacted.¹²⁰ Thus, in accordance with a more functional separation of powers theory, one could argue that the political process underlying the adoption of this figure did not warrant judicial deference.¹²¹ However, the Court of Appeals decision in *CFE III* relied largely on a formal application of separation of powers. The court drew a bright line with respect to the function of budgeting,

¹¹⁶ *Id.* at 57.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 58 (quoting *CFE II*, 801 N.E.2d 326, 345 (N.Y. 2003)).

¹¹⁹ *Id.* (quoting *In re 89 Christopher Inc. v. Joy*, 318 N.E.2d 776, 781 (N.Y. 1974)).

¹²⁰ *Id.* at 55. See *supra* note 110 for a more detailed discussion of how the state derived the figure of \$1.93 billion in additional operating funds. Also, Chief Judge Kaye’s partial dissent in *CFE III* noted that “the two houses of the Legislature and the Governor have not been able to agree upon a single unified plan for submission to this panel” and that “[o]n this record, the \$1.93 billion figure is not entitled to special deference.” *Id.* at 64–65 (Kaye, C.J., dissenting in part).

¹²¹ See *supra* notes 93–96 and accompanying text (discussing, in context of *Montoy v. State*, how functional separation of powers would not dictate judicial deference when there are political process defects).

stating that “[d]evising a state budget is a prerogative of the Legislature and Executive; the Judiciary should not usurp this power.”¹²²

Subsequent to *CFE III*, New York passed a new education budget in 2007,¹²³ which was to provide a funding increase of \$5.4 billion annually for New York City public schools, to be phased in over four years.¹²⁴ This would actually exceed the amount ordered by the Court of Appeals.¹²⁵ However, in December 2008, New York Governor David Paterson, in response to the recession and the state’s fiscal crisis, proposed cutting the education budget, eliminating teacher centers and other programs, and delaying funding increases for special programs such as universal prekindergarten.¹²⁶ The state was able to avoid some of these cuts by using available federal stimulus aid money;¹²⁷ nevertheless, for fiscal year 2010, the state did freeze education funding for some programs and delayed full phase-in of additional education funds for another three years.¹²⁸ Moreover, for the upcoming year, Governor Paterson has proposed \$1.1 billion in cuts to school aid and has proposed further delaying full phase-in of education funds another three years.¹²⁹ While the 2007 budget had planned funds to be fully phased in within four years, Paterson’s latest proposal for fiscal year 2011 extends this timeline to ten years.¹³⁰

¹²² *CFE III*, 861 N.E.2d at 58.

¹²³ See S. 2107-C, 2007 Leg., 230th Ann. Sess. (N.Y. 2007) (enacted version of 2007–08 New York State education budget).

¹²⁴ CAMPAIGN FOR FISCAL EQUITY & ALLIANCE FOR QUALITY EDUC., SUMMARY OF GOVERNOR SPITZER’S EDUCATION FUNDING REFORM LEGISLATION AS ADOPTED BY NEW YORK STATE LEGISLATURE 1, available at http://www.aqeny.org/cms_files/File/Microsoft%20Word%20-%201Summaryoffinal2007budgetdealFINALnj—be.pdf; Press Release, Eliot Spitzer, Governor, New York State Executive Chamber, Unprecedented Expansion of School Aid Tied to Accountability (Jan. 31, 2007), available at <http://www.ny.gov/governor/press/0131074.html>.

¹²⁵ See CAMPAIGN FOR FISCAL EQUITY & ALLIANCE FOR QUALITY EDUC., *supra* note 124, at 1 (noting that proposed funding increases to New York City public schools exceeded amount ordered by Court of Appeals).

¹²⁶ EXECUTIVE CHAMBER, STATE OF N.Y., 2009–10 EXECUTIVE BUDGET—BRIEFING BOOK 50–51 (2008), <http://publications.budget.state.ny.us/eBudget0910/fy0910littlebook/BriefingBook.pdf>. The proposed budget cut amounts to \$2.5 billion for the 2009–10 fiscal year. *Id.*; see also JOHNSON, OLIFF & KOULISH, *supra* note 16, at 2 (“The New York governor proposes nearly \$2 billion in cuts in education funding in [fiscal year] 2010.”); Rebell, *supra* note 18 (“Governor Paterson proposed \$2.5 billion in spending cuts to [the 2009–10] state education budget.”).

¹²⁷ See Rebell, *supra* note 20, at 27 n.50.

¹²⁸ *Id.* at 26–27.

¹²⁹ GOVERNOR DAVID A. PATERSON, NEW YORK 2010–11 EXECUTIVE BUDGET 21 (Jan. 19, 2010), available at <http://publications.budget.state.ny.us/eBudget1011/2010-11ExecutiveBudgetPresentation.pdf>; see also Rebell, *supra* note 20, at 27.

¹³⁰ Rebell, *supra* note 20, at 27; see also PATERSON, *supra* note 129, at 21.

The legislature will have to adopt a final education budget for fiscal year 2011 by April 1, 2010.¹³¹ According to Michael Rebell,¹³² it is uncertain whether the proposed budget cuts will drop education funding below the constitutionally required minimum amount (\$1.93 billion in additional operating funds, as sanctioned in *CFE III*).¹³³ Moreover, despite the holding in *CFE III*, Rebell raises some questions about how much funding is required to satisfy that constitutional minimum.¹³⁴ However, even if proposed budget cuts do not fall below the constitutionally determined minimum, the nature of the cuts could impact the programs and services that are part of the remedy. The real question is whether the budget cuts affect efforts to remedy the deficiencies noted in *CFE II*—the shortage of qualified teachers, deficiencies in libraries and computers, and large class sizes.¹³⁵ Moreover, with the continuing recession, continuing budget cuts remain a possibility and could further delay full implementation of the *CFE* remedy.¹³⁶

If budget cuts in New York and elsewhere do impact implementation of educational adequacy remedies, states will likely encounter a new round of litigation challenging the constitutionality of such cuts in funding.¹³⁷ The next section considers judicial review in this context.

¹³¹ Rebell, *supra* note 20, at 27.

¹³² See Rebell, *supra* note 20, at 33 n.59 (arguing that “Gov. Paterson’s proposed FY 2011 reductions may reduce actual total expenditures below [the constitutional minimum requirement of \$1.93 billion in additional operating funds (with inflation adjustments)]”).

¹³³ 861 N.E.2d 50, 60 (N.Y. 2006). As of the date of publication of this Note, the New York education budget for fiscal year 2011 had not been adopted.

¹³⁴ See Rebell, *supra* note 20, at 33 n.59 (arguing that “[t]here is substantial ambiguity in New York at the present time as to precisely what is the current constitutionally approved funding level”). Specifically, Rebell contends that the annual increase of \$5.4 billion adopted in 2007 is the “appropriate constitutional figure” because it was established “when the legislative and executive branches overcame their differences,” while the lower figure of \$1.93 billion in additional funds came about “at a time when [the governor] and the legislature were at impasse.” *Id.* at 33 n.59. Chief Judge Kaye, in partial dissent in *CFE III*, had echoed this latter point. 861 N.E.2d at 64–65 (noting that “the two houses of the Legislature and the Governor have not been able to agree upon a single unified plan for submission to this panel” and that “[o]n this record, the \$1.93 billion figure is not entitled to special deference”).

¹³⁵ See 801 N.E.2d 326, 333–36 (N.Y. 2003) (describing deficiencies in educational “inputs” found to violate constitution); see also Rebell, *supra* note 20, at 34–35 (arguing that governor’s budget proposal must show “that constitutionally appropriate services are actually being delivered to all students in each district”).

¹³⁶ See Rebell, *supra* note 18 (“Of [the proposed \$2.5 billion in education spending cuts], \$1.8 billion represents a deferral of increases committed to the state’s children by the Legislature as a result of the Campaign for Fiscal Equity lawsuit that concluded in 2006”). In November 2009, Governor Paterson proposed more budget cuts and urged state legislators to enact them. Danny Hakim, *Paterson Presses Cuts, Saying New York Is ‘on the Brink’ in Fiscal Crisis*, N.Y. TIMES, Nov. 10, 2009, at A26, available at <http://www.nytimes.com/2009/11/10/nyregion/10paterson.html?scp=9&sq=education%20budget&st=cse>.

¹³⁷ See *supra* note 20 (discussing effort to reopen *Montoy v. State* in Kansas because of recent education budget cuts). Also, educational adequacy advocates in New York City,

Focusing on the role of courts in ensuring the protection of constitutional rights, it argues for stringent, rather than deferential, judicial review of budget cuts by the legislature when those cuts threaten a constitutional adequacy remedy already in place.¹³⁸

B. Budgeting, Judicial Review, and Constitutional Obligations

As *CFE III* and other cases illustrate, state courts are often extremely deferential to the budget determinations of the political branches. *CFE III* noted that a “‘formidable burden’ of proof [is] imposed on ‘one who attacks [a] budget plan,’” and that “[j]udicial intervention in the state budget ‘may be invoked only in the narrowest of instances.’”¹³⁹ I argue, however, that the realization of constitutional rights, which is perhaps the strongest argument for judicial intervention,¹⁴⁰ constitutes such an instance. Other scholars have made this point and argued that state courts’ separation of powers concerns are unwarranted in the enforcement of educational adequacy remedies.¹⁴¹ I develop this analysis further by first framing the issue through the lens of a functional separation of powers theory and then examining how financial exigency, such as the recession and resultant state budget cuts, impact the case for judicial intervention. Specifically, I contend that a functional separation of powers approach mandates heightened judicial scrutiny of, and potentially judicial intervention in, state budget cuts that affect educational adequacy remedies.

As previously noted, Professor Hershkoff argues that state courts have an important role to play in the realization of positive rights

including the Campaign for Fiscal Equity, have considered court challenges if further education budget cuts are enacted. See Hakim, *supra* note 136.

¹³⁸ See Rebell, *supra* note 20, at 33 (“Where a court has articulated or approved a particular funding level as being constitutionally appropriate . . . the burden of proof to justify reducing those levels should be even more exacting.”).

¹³⁹ 861 N.E.2d 50, 58–59 (N.Y. 2006) (quoting *Wein v. Carey*, 362 N.E.2d 587, 592 (N.Y. 1977)). It is important to note that in *CFE III*, the Court of Appeals of New York held that the state’s determination of \$1.93 billion was a constitutional minimum only because the trial court had erroneously challenged the state determination. See 861 N.E.2d at 59–60 (finding that trial court should have reviewed only whether state determination was reasonable and finding that \$1.93 billion was reasonable). If this had not occurred, the Court of Appeals may well not have reviewed the education budget and merely deferred to the legislative determination without commenting on it.

¹⁴⁰ See Elder, *supra* note 15, at 765 (“[T]here is widespread agreement that judicial deference reaches its limits when the other branches of government enact policies that violate people’s constitutional rights or, conversely, fail to enact policies needed to protect those rights.”).

¹⁴¹ See, e.g., *id.*

under state constitutions.¹⁴² While some have argued that positive rights are effectively not enforceable by courts because they relate to “open-ended social and economic concerns” such as education and social welfare,¹⁴³ as Professor Hershkoff notes, these concerns derive largely from the federal context and “do not easily transport into the state constitutional context, where judges are elected, positive rights are explicit, and courts have broad common law law-making power.”¹⁴⁴

Additionally, several features of state government justify greater judicial intrusion into budgeting matters and support a more functional separation of powers framework. State legislatures cannot always perform the sole fact-finding role in public policy because they do not have the institutional resources that Congress possesses, such as the Congressional Research Service and Congressional Budget Office.¹⁴⁵ State legislatures often meet “for only short and intermittent sessions,” and many state legislators work only part-time.¹⁴⁶ As a consequence, state legislatures may not be able to marshal the expertise required to craft legislation and programs that effectively realize positive constitutional rights. Thus, there is an institutional competence argument that state courts have a role to play in budgeting,¹⁴⁷ particularly when a constitutional right is at stake.

There is other New York case law to support a functional separation of powers theory—one that would espouse more stringent judicial review of education budget cuts that impact constitutional rights and remedies. The New York Court of Appeals has stated that judicial review of state budgets is warranted in some cases. In *Saxton v. Carey*, it found that while specific itemization within budgets is a legislative and executive function, it does not follow that “the budgetary process

¹⁴² Helen Hershkoff, *Positive Rights and the Evolution of State Constitutions*, 33 RUTGERS L.J. 799, 826–32 (2002); see also Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 893–901 (1989) (arguing that “principal reasons why the attempt to evolve positive rights from the federal Constitution failed are not present at the State level”).

¹⁴³ See Hershkoff, *supra* note 142, at 827 & n.125 (“Nearly all of the Constitution’s self-executing, and therefore judicially enforceable, guarantees of individual rights shield individuals only from government action.” (internal quotation marks omitted) (quoting LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 18-1 (2d ed. 1988))).

¹⁴⁴ *Id.* at 827.

¹⁴⁵ Hershkoff, *supra* note 3, at 1176.

¹⁴⁶ *Id.* at 1176–77 (quoting John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205, 1228 (1993)).

¹⁴⁷ See *id.* at 1177 (suggesting that state courts subject social welfare legislation to judicial review).

is per se always beyond the realm of judicial consideration.”¹⁴⁸ Rather, “courts will always be available to resolve disputes concerning the scope of that authority which is granted by the Constitution to the other two branches of the government.”¹⁴⁹ Similarly, in *New York State Bankers Ass’n v. Wetzler*, the Court of Appeals rejected the defendant’s argument that judicial review would amount to “an unwarranted judicial interference in the budgetary process,” basing this decision in part on the fact that the plaintiff’s claim involved the “merits of a constitutional question.”¹⁵⁰

Both federal and state courts have explicitly indicated that the financial exigencies that lead to budget cuts do not diminish constitutional rights. In *Tucker v. Toia*, New York’s Court of Appeals affirmed a lower court ruling that “the state may not refuse persons seeking public assistance in violation of their constitutional rights and justify such action solely on the ground of fiscal responsibility or necessity.”¹⁵¹ As noted earlier, the *Rose* court in Kentucky, in spite of its concerns about separation of powers, stated that “financial burden” does not abrogate a “constitutional duty.”¹⁵² Other federal and state courts have echoed this principle.¹⁵³

Moreover, in the ongoing educational adequacy case of *Abbott v. Burke*, the New Jersey Supreme Court ruled in 2002, during an extended remedial stage, that “the Court, although acknowledging the State’s fiscal crisis . . . [is] unwilling to prejudge the merits of [a school] district’s need-based appeal seeking a higher level of supplemental funding.”¹⁵⁴ Here, even a “fiscal crisis” did not justify delayed implementation of a constitutional remedy. Thus, state courts may compel legislative budgeting to the extent necessary for the state to fulfill constitutional obligations. This argument is further bolstered by the functional view that judicial intervention in budgeting and other traditional legislative functions is more warranted in the state court context because of state courts’ policymaking role and their potential

¹⁴⁸ 378 N.E.2d 95, 99 (N.Y. 1978) (evaluating challenge to New York’s 1978–79 state budget).

¹⁴⁹ *Id.*

¹⁵⁰ 612 N.E.2d 294, 296 (N.Y. 1993) (affirming bank’s constitutional challenge to audit fee).

¹⁵¹ 390 N.Y.S.2d 794, 803 (Sup. Ct. 1977), *aff’d*, 371 N.E.2d 449 (N.Y. 1977).

¹⁵² *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 208 (Ky. 1989).

¹⁵³ *See, e.g., Watson v. City of Memphis*, 373 U.S. 526, 537 (1963) (“[V]indication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them.”); *Blum v. Merrell Dow Pharms., Inc.*, 626 A.2d 537, 548 (Pa. 1993) (“[F]inancial burden is of no moment when it is weighed against a constitutional right.”).

¹⁵⁴ *Abbott v. Burke*, 798 A.2d 602, 604 (N.J. 2002).

to contribute to the more limited institutional capacity of state legislatures.¹⁵⁵

If, as I argue, state courts should have some limited power to intervene in matters of state budgeting, how should they respond to education budget cuts that affect constitutional remedies? To explore this question, the next section examines the proposed education budget cuts in New York and considers a hypothetical constitutional challenge to those budget cuts. I argue that in contrast to the deferential judicial review applied in *CFE III*,¹⁵⁶ the New York Court of Appeals should apply a heightened standard of review to budget cuts that might impact constitutional rights and remedies.

C. Budget Cuts and Judicial Review of Remedial Compliance

The prior section presented a general argument for robust judicial review of education budget cuts, rooted specifically in the protection of constitutional rights. The question specifically in New York, however, is why the Court of Appeals should apply a higher standard to the education budget cuts than it did to the original remedy. If the court deferred to the state's presumed expertise in designing the remedy and budgeting for it, why not defer with regard to the budget cut as well? This question also speaks generally to the issue of remedial compliance in educational adequacy litigation and how the history of remedial orders should affect judicial review after a constitutional violation has been established. This is a novel area for analysis that is taken up by this Note.

As noted earlier, one reason for a functional application of separation of powers is that it can be more responsive to political circumstances that affect power dynamics within various branches of government.¹⁵⁷ Legislatures and the executive are always subject to immediate political pressures, usually to a greater degree than the judiciary. Budgeting is an especially politically charged issue, particularly in times of recession. In times of financial exigency, the political

¹⁵⁵ See *supra* Part I.C (arguing that state courts are amenable to functional view of separation of powers).

¹⁵⁶ See *supra* text accompanying notes 115–19 (describing New York Court of Appeals' deference to legislature).

¹⁵⁷ See Peabody & Nugent, *supra* note 27, at 13–14 (“Functionalists . . . embrace flexible principles governing what authority each branch of government can properly exercise.”); *supra* text accompanying notes 29–32 (discussing functional approach to separation of powers).

branches may be tempted to cut back education budgets¹⁵⁸ rather than take politically unpopular actions such as raising taxes.¹⁵⁹

Additionally, “[p]ublic school financing is particularly susceptible to political market failure because children cannot vote, children in low-income families are especially underrepresented in statehouses, and voters generally resist attempts to send locally raised revenues to other localities.”¹⁶⁰ Those children who are most at risk for receiving inadequate education are often concentrated in a few high-poverty districts and thus have diluted political power to begin with.¹⁶¹ The economic exigency created by recession only renders it more difficult to attain educational adequacy through the political process.

For these reasons, a functional approach would favor heightened judicial review to ensure that the political process underlying education budget cuts does not negatively impact an established constitutional remedy.¹⁶² Under these circumstances, concerns about political process defects may effectively trump the state’s presumed expertise and authority regarding budgetary matters. This is particularly true where courts have access to tools that allow them to gather and analyze data as a legislature might. Thus, if an established constitutional remedy, such as the funding for adequate education approved in *CFE III*, is supplanted by a different legislative funding scheme, deferential review is no longer warranted. Rather, the court should subject the cuts to heightened review, either by placing an affirmative burden on the state to show that the budget cuts do not impact the established remedy¹⁶³ or by undertaking an independent judicial assessment of the matter.

In addition to concerns about the political process defects that often accompany budget cuts, a functional approach might also argue that the remedial history of a state’s education funding justifies heightened judicial review of changes, especially reductions, to education budgets. To understand why a remedial history might justify

¹⁵⁸ See JOHNSON, OLIFF & KOULISH, *supra* note 16 (noting that, excluding states that have cut collegiate budgets, twenty states have cut education budgets).

¹⁵⁹ Cf. Rebell, *supra* note 18 (“[T]here are better solutions [to New York’s budget crisis] than shackling our children’s future. One possibility would be to impose an extra tax on the wealthy in order to maintain adequate education funding levels.”).

¹⁶⁰ Elder, *supra* note 15, at 769.

¹⁶¹ *Id.* at 769–70 (noting that at-risk students “command fewer votes per child than their non-at-risk peers”).

¹⁶² For the analogous argument in *Montoy v. State (Montoy III)*, 112 P.3d 923 (Kan. 2005), see *supra* text accompanying notes 93–96. *Montoy* did not involve budget cuts, but it did underscore the importance of considering political process defects.

¹⁶³ See Rebell, *supra* note 20, at 33 (“Where a court has articulated or approved a particular funding level as being constitutionally appropriate . . . the burden of proof to justify reducing those levels should be even more exacting.”).

heightened review, New York courts need only look to the protracted history of educational adequacy litigation in their neighboring state of New Jersey.

The New Jersey Supreme Court first found a constitutional violation of children's right to an education in 1973, with its ruling in *Robinson v. Cahill*.¹⁶⁴ The court was not vigilant in compelling the state legislature to remedy the violation, however, and plaintiffs soon filed follow-on litigation.¹⁶⁵ The decades-long *Abbott v. Burke* litigation was initiated in 1981, and in 1990, after many years of litigation, the New Jersey Supreme Court found a constitutional violation with respect to selected urban school districts.¹⁶⁶ Still, the court remained deferential for several years; in 1994, it declared the legislature's funding bill to be unconstitutional but gave the legislature time and latitude to design another remedy.¹⁶⁷ However, in the late 1990s, the New Jersey court took a tougher stance: In *Abbott v. Burke (Abbott IV)*, it ordered immediate funding parity between urban and suburban school districts.¹⁶⁸

Subsequent rulings have continued this trend.¹⁶⁹ In its November 2008 ruling, the *Abbott* court acknowledged that deference to the legislature is the norm, citing judicial restraint and noting that "[o]rdinarily, a party challenging a legislative enactment bears the burden of . . . proving that the law is unconstitutional."¹⁷⁰ However, the New Jersey Supreme Court then focused on the history of the court's remedial orders—in particular, the court's repeated findings that the New Jersey legislature's proffered remedies were insufficient to pass constitutional muster—as a political context that justified deviation from the norm of legislative deference. The court refused to "ignore that [the funding bill's] passage came in the wake of the constraining circumstances of those prior remedial orders directed at the State."¹⁷¹ Thus, the *Abbott* court's functional approach—its consideration of the historical and political context of the education funding

¹⁶⁴ 303 A.2d 273 (N.J. 1973) (finding New Jersey funding scheme unconstitutional).

¹⁶⁵ See Elder, *supra* note 15, at 778–79 ("Regarding remedies, [*Robinson v. Cahill*] was reminiscent of *Brown v. Board of Education*'s 'all deliberate speed' requirement, vaguely stating that the legislature would need 'some time' to act and inviting parties back for further argument on the remedy issue." (citations omitted)).

¹⁶⁶ 575 A.2d 359 (N.J. 1990). For a full history of the *Abbott* litigation, see Education Law Center, History of *Abbott*, <http://www.edlawcenter.org/ELCPublic/AbbottvBurke/AbbottHistory.htm> (last visited Oct. 13, 2009).

¹⁶⁷ *Abbott v. Burke (Abbott III)*, 643 A.2d 575, 576–77 (N.J. 1994).

¹⁶⁸ 693 A.2d 417, 439 (N.J. 1997).

¹⁶⁹ See Education Law Center, *supra* note 166 (giving summary of numerous remedial orders issued in *Abbott*).

¹⁷⁰ *Abbott v. Burke (Abbott XIX)*, 960 A.2d 360, 363–64 (N.J. 2008).

¹⁷¹ *Id.* at 364.

bill and prior remedial orders in *Abbott*—led it to apply a higher standard of review than it might under other circumstances: “The burden of proof shall be on the State as it has been each time the State has advanced a new funding program that it has asserted to be compliant with the thorough and efficient constitutional requirement.”¹⁷²

The situation in *Abbott* differed from that in *CFE* in that New Jersey had a long history of limited compliance by the legislature, which motivated the court to review new funding programs more stringently. While the New York courts have not found repeated constitutional violations,¹⁷³ the *Abbott* litigation suggests another functional justification for heightened judicial review when an existing remedy is altered: to avoid a long, drawn out remedial stage of adequacy litigation. If the court finds a constitutional violation, perhaps it should show deference to the state in designing an initial remedy. Once a constitutionally adequate remedy is in place, however, a change to that remedy, such as a budget cut, risks placing the state in violation of the constitution again. This could lead to costly, ongoing litigation similar to that in *Abbott*.¹⁷⁴ Such litigation is costly not only in terms of the state’s judicial resources but also in potentially delaying the realization of children’s right to education. Thus, courts should employ a different separation of powers calculus when reviewing changes to existing constitutional remedies, employing a higher standard of review to these than to the state’s initial remedies. This is relevant to the situation in New York, where proposed budget cuts could alter the constitutional remedy approved in *CFE III*.

The distinction in standards of review for initial remedies and changes to existing, adequate remedies reflects a functional view of separation of powers that allows the role of the courts to adapt to changing circumstances. For the initial design of a remedy, the court can defer to the legislature’s expertise, reviewing for constitutionality under a standard that grants the legislature and the executive maximum discretion to devise the remedy as it sees fit. Once an adequate remedy is established, however, the court’s function changes not only to guarding constitutionality but also to avoiding further costly litigation and noncompliance. Thus, budget cuts and other changes to a constitutionally adequate remedy merit greater scrutiny: Either the state should have the burden of showing that the budgetary changes

¹⁷² *Id.* at 372.

¹⁷³ See *supra* text accompanying notes 103–17 (providing overview of *CFE* litigation).

¹⁷⁴ Of course in the *Abbott* litigation, there was no constitutionally adequate remedy; the state legislature’s funding bills were repeatedly deemed unconstitutional. See *supra* notes 167–72 and accompanying text.

do not affect the constitutional remedy, or the court should make an independent assessment to ensure that the remedy remains intact.¹⁷⁵

CONCLUSION

This Note has analyzed the remedial stage of educational adequacy litigation in terms of separation of powers, focusing on the differences between federal and state governments, the features of educational adequacy that warrant judicial oversight, and the factors that may impact the balance between judicial and legislative oversight of budgeting for adequacy remedies.

By employing a functional approach to the separation of powers and applying it to educational adequacy jurisprudence, this Note has argued for more stringent judicial review of education budget cuts whenever a constitutional adequacy remedy is in place. Such an approach allows courts to take into account not only basic issues such as the traditional functions of various branches of government but also broader contextual factors, such as recessions, which place pressure on the legislature and the executive to enact budget cuts that undermine the right to an adequate education. The political process issues raised by budget cuts, the constitutional rights at stake, and the fact that the state seeks to alter a remedy it initially designed all support more stringent judicial review of state budget cuts that may impact existing constitutional remedies. In practice, this means that state courts should either place an affirmative burden on the state to show that the budget cut does not impact the remedy or conduct their own assessment of the impact, perhaps through an independent panel similar to the one appointed by the lower court in *CFE III*.¹⁷⁶ Thus, either by providing *ex ante* incentives for states to make honest attempts at providing adequate remedies or by providing judicial review as a backstop to ensure *ex post* that constitutional minima are met, the functional, more stringent model of judicial review can help to ensure that the right to an adequate education is preserved, even in times of recession.

¹⁷⁵ This Note does not take a position on which of these two mechanisms is preferable.

¹⁷⁶ See *supra* notes 111–13 and accompanying text for further discussion of this example.