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Question of balance: Deciding between two ideas of education

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What's really before the state high court in Abbott – and why it's properly there.

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AS FOUNDER and first director of the Education Law Center and a 40-year education law and policy professor, I've been praised and pilloried for the Abbott litigation and sharply questioned about why it seems to be constantly before the state Supreme Court.

The case is there once again, with great attention and controversy. Everyone needs to understand why the court has an essential and legitimate role to play in giving content to the state's education clause and in assuring that it is enforced. There is a great deal of misinformation in the media and the public discourse, which needs to be corrected.

The explanation isn't simple, however. Einstein once said he tried to make everything as simple as possible, but not simpler.

Some might say a complicated explanation is beyond the public's ability or interest to understand — that we have become a sound-bite society, capable of being manipulated by those who shout loudest and most often, who convert complex ideas and issues into over-simplified, emotional and easy to remember phrases.

An easily manipulated public is hardly a new perception. In 1922, Walter Lipmann, the noted journalist and author, wrote about what he called the "phantom public": "The facts exceed their curiosity." In other words, just give me the sound bites, because I'm not really interested in the facts.

I have more faith in the public than that, however. So, I'm going to explain as succinctly as I can what's really before the state's highest court in the Abbott litigation and why it's properly there. Our children and our state desperately need you to devote a

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few minutes of your attention to these facts. What you do with them thereafter is up to you.

The facts begin not 40 years ago when the Abbott litigation started with the case of Robinson v. Cahill, but almost 140 years ago. In the early 1870s, the Legislature and people of New Jersey began to consider an amendment to the state's constitution to add an education clause.

In 1873, a constitutional commission proposed a version that would have committed the state to provide its students with "rudimentary instruction … not to fit or prepare scholars for college."

This came before the Legislature at a time of severe global economic crisis — what historians call the Panic of 1873 — that lasted until 1879. The Legislature rejected that limited aspiration and adopted a clause that committed the state to provide its students with a "thorough and efficient system of free public schools for the instruction of all the children in the state between the ages of 5 and 18 years."

The constitutional amendment process then — and now — required that two successive legislatures and the public approve amendments. And that's what happened with the education provision in 1874 and 1875.

The legislators understood that the provision they were adopting reflected a lofty goal. They also understood that its key words, "thorough and efficient," were not self-executing and would require legislative, executive and judicial interpretation.

So did the governor then. In 1876, a year after the amendment became part of New Jersey's Constitution, Gov. Joseph Bedle put it this way in his first annual message to the Legislature: "As a whole, the amendments will be of incalculable advantage; yet, some will need judicial construction before their meaning is definitely settled. It is our duty, however to ascertain, as far as we are able, what seems to be their proper scope, and to enforce them by appropriate legislation. As questions of difficulty arise, the courts alone must be depended upon for final determination." (emphasis added.)

For most of the intervening years, it has been the legislative and executive branches that have sought to define the scope of the

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education clause and to enforce it by statutes and regulations. The four thick volumes of statutes and the two even thicker volumes of regulations attest to how actively they have pursued their roles. But occasionally, the courts' "final determination" has proven necessary.

In 1895, outlying rural districts complained that they weren't fiscally capable of providing the same level of public education as the wealthier cities — in that case free high school — and that this violated the education clause. More than 75 years later, the shoe was on the other foot — poor urban districts complained that they could not provide their students with the same educational opportunities as wealthier suburban districts were offering their students and that that violated the education clause. So was born Abbott v. Burke.

Those who oppose the court's involvement do so for a variety of reasons, but probably the main one is that school funding requires an appropriation of public funds and that is a legislative, not judicial, function. It's certainly true that only the Legislature can appropriate funds. But that doesn't mean that neither the executive nor judicial branch has an important role.

After all, it's the governor's budget cuts,

proposed to the Legislature, that are at the center of the current Abbott litigation. It's the governor, not the Legislature, who is heard from regularly on the subject and who is behaving as the defendant in the case.

In fact, what the court is being asked to do on behalf of students throughout the state is to enforce the School Funding Reform Act adopted by the Legislature in 2008, not some funding formula devised by the court. And just two years ago, in open court and on the record, the state committed itself to fully fund its own formula as a condition of its being found constitutional by the court.

The last point is extremely important. Although generally the Legislature may change its collective mind about statutes it has adopted and amend or repeal them, that's not true when the statute carries out a constitutional obligation as this one explicitly does.

And although the appropriation of public funds is a legislative function, the court has a role to play in assuring that constitutional

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obligations are funded. The state conceded that less than two weeks ago in the oral argument in Abbott.

Justice Barry Albin asked the state's lawyer, Peter Verniero, whether the state could use the fiscal crisis as an excuse for not providing 10 percent of indigent criminal defendants with free access to lawyers, and Verniero conceded it could not.

The unspoken follow-up question is whether the state can use the budget crisis to justify underfunding the Legislature's education formula by almost 20 percent. The answer seems obvious unless we consider the constitutional rights of our children to be worth less than the rights of indigents charged with crimes. And the court has repeatedly characterized educational rights as fundamental, at the very top of the rights hierarchy.

In fact, isn't it conceivable that underfunding our schools now might increase our future spending on criminal defense of indigents, on prisons and on social services for the unemployed?

So what's the state to do about its budget crisis and the conflict between the governor's budget proposal and the state-determined cost of providing our children

with their fundamental right to a high-quality education?

Ultimately, I suppose, the Legislature and the people of New Jersey could consider a constitutional amendment. We could dredge up the old, rejected language of "rudimentary instruction" and decide that's the best we can do for our children now.