COURTS & KIDS:
PURSUING EDUCATIONAL EQUITY THROUGH THE STATE COURTS (UNIVERSITY OF CHICAGO PRESS, 2009)

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2015 SUPPLEMENT

Chapter Two

In describing the state courts' active new role following the U.S. Supreme Court's decision in *Rodriguez v. San Antonio Independent School District*,[1] this chapter emphasized the dramatic change in the outcome of challenges to state education finance systems that occurred beginning in 1989. From that year through the time of the book's publication in 2009, plaintiffs, who had lost over two-thirds of the cases in the preceding decade, prevailed in more than two-thirds of the final liability or motion to dismiss decisions of the state's highest courts. This dramatic turnabout was attributed to the shift in plaintiffs' legal strategy from an emphasis on equal protection claims to a substantially increased reliance on adequacy claims; the text also stated that the burgeoning standards-based reform movement had a significant impact on the capacity of the courts to craft effective remedies in these cases.

From late 2009 through the end of March, 2015, there were eleven major rulings of state supreme courts in cases involving challenges to state education funding systems. Plaintiffs prevailed in five of these cases (Arizona, Connecticut, Louisiana, South Carolina, and

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[1] 411 U.S. 1 (1973).

Washington), and defendants prevailed in five (Colorado, Indiana, Missouri, Rhode Island, and South Dakota). Summary descriptions of these cases are set forth in the following chart:

Highest Court Rulings Favoring Plaintiffs	**Highest Court Rulings Favoring Defendants**
1. *Conn. Coal for Justice in Educ. Funding, Inc. v. Rell*, 990 A.2d 206, 206 (Conn. 2010) (reversing trial court's dismissal of adequacy claims, and holding that allegations of a lack of suitable educational opportunities raised constitutional cognizable claims;Trial is scheduled for fall, 2015) 2. *McCleary v. State*, 269 P.3d 227 (Wash. 2012) (affirming trial court's finding that the state had failed to make adequate provision for the education of all children in the state in violation of the state constitution) 3. *Cave Creek Unified School District v. Martin*, 308 P.3d 1152 (Ariz. 2013) (ordering state to comply with enacted referendum that requires the legislature to include adjustments for inflation to foundation funding levels for K–12 public schools) 4. *Louisiana Federation of Teachers v. the State of Louisiana*, 118 So.3d 1033 (La. 2013) (holding that state voucher system, which diverted funds earmarked for public education to private schools, violated constitutional requirement to allocate to the public schools all funds determined by the state education department to be necessary to provide a minimum foundation program to public school students)	1. *Bonner v. Daniels*, 907 N.E.2d 516 (Ind. 2009) (affirming trial court's dismissal of school funding action, before trial, on political question/ separation of powers grounds) *2.* *Comm. for Educ. Equal. v. the State of Missouri*, 294 S.W.3d 477 (Mo., 2009) (*en banc*) (holding that because of Art. IX, § 3(b), which provides that "no less than [25] percent of the state revenue… shall be applied annually to the support of the free public schools" plaintiffs' attempt to read an additional adequacy requirement into the general constitutional requirement that the state "establish and maintain free public schools" was rejected) 3. *Davis. v. the State of South Dakota*, 804 N.W.2d 618, 627 (S.D. 2011) (finding that the state constitution guaranteed children a right to an education, but that insufficient evidence had been presented at trial to warrant a finding that the state's funding scheme violated the state's constitution) 4. *Lobato v. the State of Colorado*, 304 P.3d 1132 (Colo. 2013) (reversing lower court's ruling and holding that the evidence produced at the trial was insufficient to establish that there was no rational relationship between the state's education finance system and the

5. *Abbeville Cnty. Sch. Dist. v. the State of South Carolina*, 767 S.E.2d 157 (S.C., 2014) (holding that state's educational funding scheme, as a whole, denied students in plaintiffs' school districts the constitutionally required opportunity to receive a minimally adequate education, and upholding in part and reversing in part trial court's ruling)	constitutional mandate to provide for a uniform system of free public schools throughout the state) 5. *Woonsocket Sch. Comm. v. Chafee*, 89 A.3d 778 (R.I. 2014) (although agreeing that the "current funding system is not beneficial to students in certain districts," nevertheless affirming trial court's dismissal of plaintiff's action on political question/ separation of powers grounds)

In a number of these cases, the state supreme courts were applying to current challenges constitutional precedents that had been established in earlier adequacy cases. Thus, in the *McCleary* case that it decided in 2012, the Washington Supreme Court reiterated the importance of the constitutional right it had established in 1978 in *Seattle School District No. 1 v. State*[2] and applied that precedent to current funding issues; in its recent *Abbeville* ruling, the South Carolina Supreme Court applied to evidence adduced at trial the definition of an adequate education that it had articulated 15 years earlier in response to a motion to dismiss in the same case.[3] Similarly, in Rhode Island the court held in 2014 that changed facts, including the impact of the adoption of standards-based reforms, did not justify a reconsideration of its position, articulated in 1995 in *City of Pawtucket v. Sundlun*,[4] that challenges to the state education funding system were nonjusticiable political questions.

[2] 585 P. 2d 1 (Wash. 1978).

[3] Abbeville County School District v. State, 515 S.E.2d 535 (S.C. 1999).

[4] 662 A. 2d 40 (R.I. 1995).

Seven other state supreme courts issued rulings on adequacy claims that were matters of first impression. Five of them, Colorado, Indiana, Missouri, and South Dakota, ruled in favor of the defendants.[5] Most of these state supreme court decisions were made either on motions to dismiss before any evidence had been presented to establish the extent to which students were being denied adequate services (Indiana), or by rendering interpretations of the constitutional text that obviated the need to closely review the evidence that had been adduced after a lengthy trial (Colorado and Missouri).[6] Only in South Dakota did the state supreme court include a detailed discussion of the trial evidence in its decision.[7]

In three states (Arizona, Connecticut, and Louisiana), the new adequacy rulings favored the plaintiffs. In Arizona, where a number of constitutional rulings on different adequacy issues had been issued in previous years, the state supreme court, in the latest case, affirmed the voters' right to increase school funding by mandating annual inflationary increases through a referendum process. The Connecticut Supreme Court held that there was a qualitative dimension

[5] Colorado had decades earlier issued an equity decision in which the defendants prevailed (Lujan v. Board of Education, 649 P. 2d 1005 (Colo. 1982).

[6] The Colorado Supreme Court applied a rational basis test that "makes it possible to uphold a school finance system despite the realities of the education provided and without regard to the arbitrariness of the system's design. ……rational basis review is a conceptually inapposite tool for assessing the constitutional adequacy of education systems." Note, *Education Law – School Finance – Colorado Supreme Court Upholds State's School Finance System as Rationally Related to the "Thorough and Uniform" Mandate of the Colorado Constitution's Education Clause*, 127 HARV. L. REV. 803,806 (2013). The Missouri decision held that the constitutional provision that requires "no less than 25 percent of state revenue" to support the public schools defines the limit of the state's obligation, whatever the actual extent of student needs.

[7] The South Dakota court applied a "beyond a reasonable doubt" standard in analyzing the evidence (*see*, 804 N.W. 2d at 841), a standard that also may be a "conceptually inapposite tool for assessing the constitutional adequacy of education systems." Note, Education Law, *supra* note6 at 806.

to the constitution's education clause in upholding plaintiffs' right to proceed to trial,[8] while the Louisiana court ruled in plaintiffs' favor on the specific adequacy issue presented by their challenge to the state's voucher legislation.

Three additional cases that involved attempts to establish new constitutional rights to a sound basic education were decided by lower courts during this period; these adequacy issues have not yet been reviewed by the state's highest court. The change in plaintiffs' fortunes that was evident in the rulings of state supreme courts is also reflected in these pending cases. Plaintiffs have prevailed so far in one of these cases (Florida), while the defendants proved successful so far in the other two (California and Michigan). Summary descriptions of these cases are set forth in the following chart:

Pending Rulings in New Cases Favoring Plaintiffs	**Pending Rulings in New Cases Favoring Defendants**
1. *Haridopolos v. Citizens for Strong Schools, Inc.*, 103. So. 3d 140 (Fla. 2012) (declining to consider "writ of prohibition" filed by state defendants, thereby allowing action challenging the state's funding system as inequitable and inadequate to proceed to trial. Trial is scheduled for March, 2016.)	1. *Robles-Wong v. the State of California*, WL 3322890, (Cal. Super. Ct. 2011) (granting in this case, and in related case of *Campaign for Quality Education v. the State of California*, defendants' motion to dismiss equity and adequacy challenges to California's system for financing public education for failure to state a claim upon which relief could be granted, These cases are currently on appeal)

[8] The Connecticut Supreme court had earlier upheld plaintiff's position in an equity case, Horton v. Meskill, 376 A.2d 359 (1977).

	2. *S.S. v. the State of Michigan* (Mich. Ct. App. 2014) (granting state defendants' motion to dismiss action alleging that the Highland Park School District had failed to provide certain underperforming students with special assistance required by education clause in state constitution and a "right to read" statute because the issues were nonjusticiable and because education is not a fundamental interest under the state constitution)

Overall, then, there was a significant pendulum swing from more than two-thirds of the final adequacy decisions favoring plaintiffs in the period from 1989 through mid-2009 to a pattern in which 50% of the final decisions and 67% of the pending cases favored defendants in the last six years. Combining the results of all highest state court adequacy decisions since 1989 indicates that plaintiffs' overall percentage of states in which they have won major victories in the highest state court dropped from 69% in the period 1989-2009 to 61% of all cases from 1989 through March, 2015.

The impact of the great recession of 2008 was undoubtedly a major factor in this striking change in the outcomes of adequacy litigations.[9] The federal American Recovery and Reinvestment Act[10] provided immediate financial relief to the states' education budgets and delayed for a year or two the recession's impacts on state budgets. By 2010, however, shortfalls in state revenues led to substantial spending reductions in most states, including shortfalls in

[9] Another possible explanation might be that the earlier challenges took place in states where the constitutional language, precedents, and/or evidence were more favorable to plaintiffs and that advocates had chosen to proceed first in states where they anticipated more favorable results for their challenges.

[10] American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 181–84.

educational expenditures, which generally constitute the largest item in the state budget. As New York's governor bluntly put it in, " To achieve necessary State savings …[and] with education funding representing over 34 percent of State Operating Funds spending and the State continuing to face massive budget gaps, reductions in overall School Aid support are required." [11]

These reductions in state funding caused schools throughout the country to shorten their hours, raise class sizes, cut back on curriculum offerings, forgo repair and maintenance of facilities, and curtail purchases of books and instructional supplies. Although the economy as a whole appears to have largely recovered from the 2008 recession, most state budgets are still constrained and the post-recession political climate evidences a widespread reluctance to raise taxes or otherwise expand state revenues. A recent study by the Center on Budget and Policy Priorities found that despite increased costs stemming from inflation, demographic changes, and rising needs, 60% of the 47 states it surveyed were providing less per-student aid for education in 2014 than they had in 2007-2008.[12] Thirty percent of the states are still spending 10% less and four states (Alabama, Arizona, Idaho, and Oklahoma) have education funding levels that are more than 15% below their spending in the earlier period.[13]

These substantial, continuing cutbacks in state education funding have obviously led many parents, school districts, and teachers unions to seek relief from the courts, especially since the reductions appear to have heightened inequities in many state education finance systems and

[11] Statement of Governor David Patterson, New York State Executive Briefing Book 2010-2011, Education and Arts, p.25, available at https://www.budget.ny.gov/pubs/archive/fy1011archive/eBudget1011/fy1011littlebook/Education.html.

[12] Michael Leachman& Chris Mai, *Most States Still Funding Schools Less than Before the Recession*. Center on Budget and Policy Priorities (2014), available at http://www.cbpp.org/files/9-12-13sfp.pdf.

[13] *Id.*

to have increased the detrimental impact on low income and high need students.[14] The dramatic turnabout in the outcomes of the major adequacy cases since 2009, discussed above, would appear to indicate that these efforts have been largely unsuccessful. But the highest courts' new case decisions do not tell the whole story of judicial rulings in the post-recession environment. To understand fully whether and to what extent the changed economic climate has influenced judicial attitudes and long-term outcome trends, we need also to analyze the status of the many compliance rulings based on pre-existing court rulings that have been brought in the wake of the recession.

These post-recession compliance cases had strikingly different results. There have been 13 court decisions so far that have challenged post-recession reductions in state funding that were alleged to have violated the right to an adequate education established in previous court rulings, *and plaintiffs have won every one of these decisions*. Five of these cases (California (3), New Jersey, and North Carolina) are final decisions of the state's highest court or unappealed or settled lower court decisions. The other eight (Arkansas, California, Kansas, New York (3), Texas, and Washington) are lower court decisions that are on appeal or involve preliminary motions and/or are cases in which final adjudications are still pending. Summary descriptions of these cases are set forth in the follow chart:

Compliance Rulings Favoring Plaintiffs	**Compliance Rulings Favoring Defendants**
1. *Reed v. the State of California*, Case No.	

[14] A recent study that reviewed school district data from 1933 to 2011 to determine the impact of recent changes in state aid to education on equity in school funding found that fair school funding regimes are on the decline in the majority of states. Bruce Baker, *Evaluating the Recession's Impact on State School Finance Systems.* EDUCATION POLICY ANALYSIS ARCHIVES, *22*(91) (2014), available at http://epaa.asu.edu/ojs/article/view/1721.

BC 434420 (Cal. Super. Ct. 2010) (granting preliminary injunction barring the Los Angeles school district (LAUSD) from laying off more teachers at three affected middle schools in the district because the plaintiff-students had met their burden in showing a "likely denial of equal educational opportunity." In April 2014, the LAUSD had reached a settlement with the parties that provides for teacher and principal pay increases and increased services and staff development in 37 identified high need schools)* 2. *Abbott v. Burke (XXI),* 20 A.3d 1018 (N.J. 2011) (ordering the state to restore funding to amounts called for by formula in 31 high-need, urban school districts) 3. *Cal. Sch. Bds. Ass'n v. State*, 121 Cal. Rptr. 3d 696 (Cal. Ct. App. 2011) (upholding claim that the state constitution requires the legislature to reimburse school districts for the costs they incur in complying with new state mandates.) 4. *Hussein v. the State of New York*, 973 N.E.2d 752 (N.Y. 2012) (affirming the appellate division's denial of the state's motion to dismiss plaintiff's action alleging that children in certain small city school districts were being denied the opportunity of a sound basic education in violation of the state constitution. Trial concluded in March, 2015 *sub. nom* Maisto v. State of New York) 5. *Doe v. the State of California,* Case No. BC 44 5151 (Cal. Super. Ct. 2012) (denying state defendants' motion to dismiss class action alleging that school districts were charging illegal fees for educational programs because the	

responsibility to ensure that all schoolchildren in the state received a free education as required by the constitution ultimately rested with the state. Plaintiffs withdrew the lawsuit after the state legislature enacted AB1575 which establishes a statewide accountability system for preventing illegal school fees)* 6. *Hoke Cnty. Bd. of Ed. v. the State of North Carolina*, No. 95-CVS-1158 (N.C. Ct. App. 2012) (affirming lower court's ruling that the state could not enforce portions of the 2011 budget bill that would have undermined universal pre-K program by limiting enrollments; subsequently, the North Carolina Supreme Court ruled that the issue was now moot since the legislature had substantially amended the statutes that the lower courts had found to be unconstitutional. 749 S.E.2d 451 (N.C., 2013) 7. *Deer/Mt. Judea School District v. Kimbrell*, 430 S.W.3d 29 (Ark. 2013) (reversing and remanding portion of lower court's decision that dismissed certain of plaintiffs' claims as barred by *res judicata* and holding that the state had an on-going obligation to ensure that students received a "substantially equal opportunity for an adequate education") 8. *Gannon v. the State of Kansas*, 319 P.3d 1196 (Kan. 2014) (remanding for the district court panel to apply the "Rose" standard for assessing constitutional adequacy, and affirming the panel's finding that the funding scheme violated the equity requirement in the Kansas constitution; on Dec. 30, 2014, the district court again ruled in plaintiffs' favor, finding that under the "Rose" standard, the state was in violation of constitutional	

requirements; that decision is now on appeal to the state supreme court) 9. *Cruz v. the State of California*, Case No. RG14727139 (Cal. Super. Ct. 2014) (issuing temporary restraining order to address the "shocking, unprecedented and unacceptable" deprivations of educational opportunity at a high school in the Los Angeles School District)* 10. *McCleary v. State of Washington*, S. Ct. No. 84362-7 (Wash. 2014) (finding the state in contempt for failing to submit a "complete plan for fully implementing its program of basic education for each school year between now and the 2017-2018 school year") *11*. *Aristy-Farer v. State of New York*, Civ. No. 100274/2013 (N.Y. Co. S. Ct. 2014). (denying motion to dismiss complaint challenging state's withholding of $290 million in state aid because school district and union did not reach agreement on a new professional evaluation system by state-imposed deadline date. This case has now been consolidated with *NYSER v. State of New York*) 12. *New Yorkers for Students' Educational Rights (NYSER) v. the State of New York*, 2014 WL 6453786 (N.Y.Sup.) (denying state's motion to dismiss plaintiffs' action challenging state's failure to adequately fund education for in accordance with constitutional sound basic education requirements) 13. *Texas Taxpayer & Student Fairness Coalition v. Williams*, WL 4254969, (Tex. D. Ct. 2014) (finding that the legislature had "failed to meet its constitutional duty to suitably provide for Texas public schools because the school finance system is structured, operated and funded so that it cannot provide a	

constitutionally adequate education for all Texas schoolchildren") *These California rulings are based in part on the California Supreme Courts' equal educational opportunity rulings in *Serrano v. Priest*, 557 P.2d 929 (CA 1976), that the lower courts have broadly read to include an adequacy dimension.	

The striking difference between plaintiffs' 100% success rate in cases alleging noncompliance with past rulings and their 50% win rate in new constitutional cases indicates that in times of fiscal constraint, courts will adhere to the well-established doctrine that cost considerations cannot affect the enforcement of established constitutional rights, but, at the same time, they will exercise substantial "institutional caution" about creating new rights that will likely have a substantial impact on the state's budget.[15]

The U.S. Supreme Court has specifically held that "[f]inancial constraints may not be used to justify the creation or perpetuation of constitutional violations."[16] State courts have also consistently upheld this doctrine generally,[17] and specifically in education adequacy litigations.

[15] Significantly, all six of the highest court rulings favoring defendants in recent years were decided on separation of powers grounds or by applying very narrow constitutional standards to the evidence adduced at trial. *Cf.* discussion at pp. 22-27 of the main text.

[16] Rufo v. Inmates of Suffolk Cnty. Jail, 502 U.S. 367, 392 (1992) (addressing defendants' request to modify a consent decree remedying unconstitutional conditions of confinement for pretrial detainees). *See als,* Watson v. City of Memphis, 373 U.S. 526, 537 (1963) ("[V]indication of conceded constitutional rights [to park desegregation] cannot be made dependent upon any theory that it is less expensive to deny than to afford them."); Shapiro v. Thompson, 394 U.S. 618, 633 (1969) ("The saving of welfare costs cannot justify an otherwise invidious classification").

[17] *See, e.g.*, Klostermann v. Cuomo, 463 N.E.2d 588 (N.Y. 1984) (rejecting state's claim that they lacked funds to provide adequate services to mental health patients and stating that the state's position was "particularly unconvincing when uttered in response to a claim that existing conditions violate an individual's constitutional rights")*;* Braam *ex rel.* Braam v. State, 81 P.3d 851, 862–63 (Wash. 2003) (upholding foster children's rights to basic services and reasonable safety, and stating "this court can order expenditures, if necessary, to enforce constitutional mandates") (quoting Hillis v. State of Wash., Dep't of Ecology, 932 P.2d 139 (Wash. 1997)); Blum v. Merrell Dow Pharm., Inc., 626 A.2d 537, 548 (Pa. 1993) ("[F]inancial burden is of no moment when it is weighed against a constitutional right.").

As the Kentucky Supreme Court put it, "the financial burden entailed in meeting [educational funding requirements] in no way lessens the constitutional duty."[18]

Accordingly, when considering claims that students were being denied constitutionally required programs and services as a result of post-recession budget cuts, courts in states where the highest state court had previously established a constitutional right to the opportunity for a sound basic education consistently enforced those rights, despite the fiscal constraints that the state was experiencing. However, where the state's highest court had not previously ruled that there was a constitutional right to a sound basic education, the courts in many (but not all) states were reluctant to do so during this time of state fiscal constraint. This judicial disinclination to create new constitutional rights may reflect a reluctance to directly confront the appropriations authority of the executive and legislative branches during difficult economic times.

"Institutional caution" also appears to have influenced the scope of the remedies issued by some of the courts that have enforced constitutional rights in compliance situations. In some of these cases, the courts have used procedural or technical devices to avoid reaching the merits of constitutional claims or to limit substantially the scope of the remedies they order if they do reach the merits on compliance claims. For example, in its 2011 *Abbott v. Burke* decision, the New Jersey Supreme Court, which had in the past issued a number of strong compliance rulings, ordered the governor and the legislature to rescind substantial budget cuts for 31 poor urban districts, but it refused, on technical grounds, to include the rest of the state's school districts in the funding restoration order, including many other poor districts, in the rest of the state.

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[18] Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 208 (Ky. 1989). The Wyoming Supreme Court articulated the applicable constitutional requirement in even stronger language. It held that "all other financial considerations must yield until education is funded." Campbell Cnty. Sch. Dist. v. State, 907 P.2d 1238, 1279 (Wyo. 1995).

Similarly, in *Cal. Sch. Bds. Ass'n v. State*,[19] he court held that the state had violated a constitutional requirement to reimburse school districts for the costs they incur in complying with new state mandates, but it reversed the lower court's grant of injunctive relief and advised the plaintiffs to seek permission to refuse to implement future mandates through a separate judicial process.[20]

Chapter Three

A major study by the National Bureau of Economic Research (NBER) published in January, 2015 discusses (1) whether court orders requiring states to reform their educational finance systems play a significant role in increasing school funding levels for low-income students and (2) whether these cases also increase these pupils' opportunities for high school graduation and adequate wages during adulthood.[21] The study considered the impact of state supreme court decisions in 28 states between 1971 and 2010. It concluded that school finance reforms stemming from court orders have tended both to increase state spending in lower-income districts and to decrease expenditure gaps between low- and high-income districts.

This study differentiated between equity and adequacy cases in its analysis of the impact of judicial decisions on education finance. It concluded that equity-based court-mandated reforms successfully reduced spending gaps between high- and low-income areas, but they accomplished this mostly by redistributing existing levels of funding. Adequacy-based litigations

[19]121 Cal. Rptr. 3d 696, 702–04 (Cal. Ct. App. 2011).

[20] These cases and the patterns of post-recession judicial decisions are discussed in more detail in Michael A. Rebell, *Safeguarding the Right to a Sound Basic Education in Times of Fiscal Constraint*, 75 ALB. L. REV. 1855 (2012).

[21] C. Kirabo Jackson, Rucker Johnson, and Claudia Persico, The Effects of School Spending on Educational and Economic Outcomes: Evidence from School Finance Reforms, NBER Working Paper No. 20847 (2015), available at http://www.nber.org/papers/w20847.

also effectively reduced spending gaps, but they tended to do so by increasing school spending over all and without reducing spending levels in higher spending districts.

In the second part of the paper, the authors discussed the positive effects of court-ordered funding reforms on students' long-term success. The researchers found that a 20 percent increase in annual per-pupil spending for K-12 low income students leads to almost one more year of completed education. In adulthood, these students experienced 25 percent higher earnings, and a 20 percentage-point decrease in adult poverty. The authors posit that these results could reduce at least two-thirds of the achievement gap of adults who were raised in low- and high-income families.

The authors note, however, that the spending changes they analyzed occurred during a period in which average school funding levels were much lower than they are at present. It is possible, therefore, that increases in education spending could have diminishing marginal impacts, meaning that that to obtain learning gains of the same magnitude, even higher increases in spending might be required.

Chapter Five

Two of the recent major state supreme court decisions, *Abbeville Cnty Sch. Dist. v. State of South Carolina* and *McCleary v. State of Washington*, illustrate important aspects of the comparative institutional approach for implementing successful remedies in education adequacy cases that is proposed in the text.

The South Carolina Supreme Court appeared to have a difficult time in deciding how to rule in the *Abbeville* case: it took six years after the initial oral argument on the appeal in 2008 to issue its final ruling in this case, which had originally been filed in 1993. A three-judge majority,

held, over the dissent of two of their colleagues, that the current state aid system failed to provide students in the plaintiff districts with a minimally adequate education. Writing in a politically conservative state during a time of fiscal constraint, the majority obviously thought long and hard about the remedy, and about the proper roles of the court in the remedial process.

In their decision, the majority first declared that "The principle of separation of powers directs that the legislature, not the judiciary, is the proper institution to make major educational policy choices." [22] To ensure that the legislature would follow through on its policy-making responsibilities, however, the court emphasized the remedial experiences in other states and cited as "particularly instructive"[23] the sound basic education decisions in New York[24] and Wyoming.[25] What these two cases had in common was a strong emphasis on ensuring adequate funding for whatever remedies the legislature chose to adopt and the necessity of undertaking a detailed cost study.

The court also advised the legislature to

> [T]take a broader look at the principal causes for the unfortunate performance of students in the Plaintiff Districts, beyond mere funding. Fixing the violation identified in this case will require lengthy and difficult discussions regarding the wisdom of continuing to enact multiple statutes which have no demonstrated effect on educational problems, or attempting to address deficiencies through underfunded and structurally impaired programming.[26]

[22] 767 S.E. 2d at 176..

[23] *Id*. at 176-178.

[24] CFE v. State of New York, 801 N.E. 2d 326 (NY 2003).

[25] Campbell County School District v. State, 907 P.2d 1238 (Wyo.1995)

[26] 767 S.E. 2d at 178.

While holding the defendants legally liable for constitutional violations, the court also stated that "fault in this case—and more importantly, the burden of remedying this constitutional deficiency—does not lie solely with the Defendants." [27] Justifying their unusual stance in assigning remedial responsibilities to the plaintiffs as well as the defendants, the court noted,

> Time and again in the Plaintiff Districts, priorities have been skewed toward popular programs. Athletic facilities and other auxiliary initiatives received increased attention and funding, while students suffered in crumbling schools and toxic academic environments. Additionally, the Plaintiff Districts' administrative costs divert funds from the classroom. The Defendants and the Plaintiff Districts must work together to set balanced priorities, and consider and apply the benefits of consolidation or cross-consolidation, which may abate those administrative costs that unnecessarily detract from resources desperately needed by students in their districts.[28]

In short, then, the South Carolina Court went to great lengths to spell out what needed to be done, but it did so in a manner that both deferred to the legislature's prerogative to decide how the problems should be solved and also went beyond the usual adversary system parameters to indicate that the plaintiff districts needed to take some responsibility for ensuring constitutional compliance. To promote a positive dialogue among the parties that might accomplish these ends, the court ordered the plaintiffs and defendants to present a joint plan that will set forth specific, planned remedial actions.[29]

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[27] *Id* at 169.

[28] *Id* at 178-179.

[29] *Id* at 179. Responding to the court order, early in 2015, the Speaker of the State House of Representatives established a bipartisan Education Policy Review and Reform Task Force composed of legislators, business representatives, and educators, including several from the plaintiff districts to devise a solution. See Chris Cos, *Education reform task force holds first meeting*, GSA BUSINESS, February 24, 2015, available at http://gsabusiness.com/news/53806-education-reform-task-force-holds-first-meeting?rss=0

The Washington Supreme Court in its 2012 *McCleary* decision alsoadopted a remedial approach that also was consistent with the first two prongs of the *Castanada* process discussed at pages 70-71 of the main text. That is, they deferred fully to the legislature's policy decisions on how to remedy the problem but insisted on an approach to implementation that ensured that the reforms would be adequately funded and put into effect as soon as reasonably possible.

Specifically, after issuing an extensive decision that found that the state's funding formulas did not deliver the level of resources needed to provide all students with an opportunity to meet the state's education standards, the court accepted the "sweeping" reform plan the legislature had adopted in recent statutes, based on the cost analysis and program reforms recommended by a legislative task force, and it also accepted the legislature's commitment to phase in the programmatic reforms and associated substantial cost increases over a six-year period.

To ensure that the plan would be fully implemented within this time frame, the court retained jurisdiction to monitor compliance and indicated that it would take a proactive stance to ensure that the state adhered to the six-year schedule. The legislature then formed a joint select committee that would communicate with the court on an on-going basis about the state's efforts to achieve constitutional compliance. The state pledged to submit an annual report at the conclusion of each legislative session through 2018 that would inform the court of actions taken in furtherance of constitutional compliance. The court then ordered the state to also provide plaintiffs with copies of the annual reports and allowed plaintiffs to serve written comments in response to them and to request further action by the court if they felt that the state's actions were insufficient.

In its monitoring of the state's progress in meeting its own goals over the past three years, the court has demonstrated both patience and determination. Although the state has annually increased funding for education since the court issued its order, it has not done so at a pace that is calibrated to reach full compliance by 2018. Accordingly, in January 2014, the court found the legislature's annual report to be constitutionally unacceptable. It ordered the state to submit a complete plan for fully implementing its program of basic education for each school year between the current year and 2018 by April 30, 2014. On September 1, 2014 – in an extremely rare move for any court – the Washington Supreme Court ruled unanimously that the state was in "contempt of court." Although thereby demonstrating a resolve to ensure sufficient progress toward compliance, the court did not immediately impose any sanctions. Instead, it decreed: "If by adjournment of the 2015 legislative session, the State has not purged the contempt by complying with the court's order, the court will reconvene to impose sanctions and other remedial measures as necessary." [30] At the time of this writing, the governor and the legislature were taking active steps to increase education funding substantially and to comply with the court's order during the 2015 legislative session.[31]

A set of litigations that raise important sound basic education issues, although not issues that directly involve funding, began with a June 2014 trial court ruling in *Vergara v. State of*

[30] McCleary v. State of Washington, Sup. Ct. No. 84362-7, p.5 (September 11, 2014), available at http://www.scribd.com/doc/239448673/Court-order-on-McCleay-9-11-14

[31] Joseph O'Sullivan, *State GOP budget allocates education money without new taxes,* SEATTLE TIMES, April 1, 2015, available at http://www.seattletimes.com/seattle-news/politics/state-gop-budget-funds-education-holds-line-on-taxes/.

California.[32] There, the trial judge preliminarily enjoined the operation of California's teacher tenure, dismissal, and seniority-order lay-off statutes on equal protection grounds. Shortly thereafter, two groups of New York plaintiffs filed similar suits that challenged New York's teacher tenure, dismissal, and seniority lay-off statutes. Those cases were consolidated, and, in March 2015, the trial judge issued an order in *Davids v. State of New York*[33] that denied the motions to dismiss the case filed by the state, the City of New York, and the teacher's unions. In *Davids*, the plaintiffs' claims, and the judge's decision allowing the case to proceed to trial, are primarily based on the sound basic education provision of the New York State constitution.

The trial judge in California, noting that all sides to the litigation agreed that "competent teachers are a critical, if not the most important, component of success of a child's in-school educational experience," found that "1-3% of teachers in California are grossly ineffective."[34] The New York plaintiffs have also claimed that the teacher tenure and dismissal statutes allow ineffective teachers to remain in their classrooms and that these statutes have a "direct effect" on a student's right to receive a sound basic education.[35] Stating that under the Court of Appeals' ruling in *CFE v. State of New York,*[36] children are entitled to "minimally adequate teaching of reasonably up-to-date basic curricula…by sufficient personnel adequately trained to teach those subject areas," the judge in *Davids* held that the plaintiffs had stated a cause of action that would permit them to proceed to trial and to attempt to prove the facts that they had alleged.

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[32]2014 WL 6478415 (Cal. Super. Ct. 2014.) This decision is currently on appeal.

[33] Index No. 10115/14 (S.Ct. Richmond County, March, 2015). This decision is also currently on appeal.

[34] Vergara, *supra*, note 32 at 4.

[35] Davids, *supra*, note 33 at 15.

[36] 655 N.E. 2d 661 (N.Y. 2d, 1995).

The *Vergara* and *Davids* cases raise significant issues about the role of the courts in education-policy cases in general, and in sound basic education cases in particular. The court's preliminary ruling in *Davids* held that sound basic education claims may be based not only on claims of insufficient funding, but also on denial of "resources and educational supports to make basic learning possible."[37] Certainly a lack of competent teachers on a systemic basis would fit that criterion. But the evidence that the *Vergara* trial court accepted as sufficient to establish a constitutional violation was leagues short of meeting that standard. If indeed only one to three percent of teachers in California are ineffective, then, on its face, this would seem to be a *de minimus* shortfall that does not rise to a constitutional level.[38] Furthermore, there was no showing in *Vergara* that the existence of these ineffective teachers was caused by the tenure and dismissal statutes, rather than by any or all of the factors cited by the defendants such as low salaries, poor working conditions, and low status that may be discouraging competent people from entering or remaining in the teaching profession.

From a comparative institutional perspective, courts do not have the resources, the capacity or the expertise to delve into the details of every educational-policy problem and to devise remedies for them. Constitutional sound basic education claims should be litigated only

[37] Davids, *supra*, note 33 at 14. The New York Court of Appeals has specifically held that the constitutional right to the opportunity for a sound basic education would be denied if the state "provides deficient inputs—teaching, facilities and instrumentalities of learning—which lead to deficient outputs such as test results and graduation rates; and, second, that this failure is causally connected to the funding system. Paytner v. State of New York, 797 N.E.2d 1225, 1228 (N.Y. 2003); *see also*, New York Civil Liberties Union v. State, 824 N.E.2d 947, 950 (N.Y. 2005) (valid cause of action may be based on a "failure of the State to provide "resources"—financial or otherwise…").

[38] *See*, Serrano v. Priest, 557 P.2d 929, 939 (Cal. 1976) (requiring "substantial" disparities and "substantial disadvantages"); *see also, e.g*. Horton v. Meskill, 486 A.2d 1099, 1106 (Conn. 1985) ("The plaintiffs must make a prima facie showing that the disparities….are more than de minimis in that the disparities continue to jeopardize the plaintiffs' fundamental right to education); CFE II, 801 N.E. 2d at 350 (requiring systemic violation and large disparities).

when major, systemic patterns of resource deprivation and/or denial of meaningful educational opportunities truly are at issue. If, in fact, there are large numbers of ineffective teachers in California, New York, or any other state, the courts should review those facts and order appropriate relief. But such an inquiry should properly examine *all* of the likely causes of deficient teaching, and not one limited aspect of the system such as tenure statutes, which arguably might not only protect some number of ineffective teachers, but might also induce as many or more highly effective teachers to enter and remain in the system. Both at the liability and the remedy stages of a sound basic education litigation, courts should deal with the major causes of systemic constitutional violations and their solutions and not with limited issues that might lead to partial, and possibly counter-productive, solutions.[39]

Chapter Six[40]

The "Institutional caution" displayed in many of the 27 sound basic education court decisions since the 2008 recession that are discussed above in relation to Chapter Two pose additional "Practical Realities" that must be confronted. The tendency of the state courts since the recession of 2008 to decline to declare that students have an enforceable right to a sound basic education in new cases and to limit the scope of the remedies in the some of the cases in which they enforce existing rights is troublesome.

[39] This is not to say, of course, that state courts should not respond to particular problems that may arise under statutory or regulatory provisions concerning which they may have jurisdiction. Such cases do not involve the potential separation of powers issues raised by constitutional litigations, since in these situations, courts would be enforcing specific policies that have been adopted by the legislative and executive branches.

[40] MICHAEL PARIS, FRAMING EQUAL OPPORTUNITY: LAW AND THE POLITICS OF SCHOOL FINANCE REFORM (2010) provides an informative case study of the public engagement process that facilitated implementation of court-ordered reforms in Kentucky. (*See*, main text at 95-96). Paris also discusses an important role that courts play in promoting social reform through "legal translation" that often sets the terms of political debate and parameters of action. *Id* at 25-26.

Obviously courts must take economic and political realities into account, and the severe economic downturn that occurred in 2008 as well as the changed political and economic climate that has resulted from that event do justify reconsideration of prerecession spending levels. But this reconsideration should not, and need not, be done by neglecting or limiting the constitutional rights of millions of school children. During difficult economic times particularly, a firm judicial stance rather than "institutional caution" is needed to protect these rights. Sudden cutbacks in educational services have a devastating impact on educational opportunities, especially for high need students in poorly funded school districts.

The comparative institutional remedial approach advocated in this book provides a framework that will allow courts to uphold students' sound basic rights while, at the same time, permitting political branches to respond to increased fiscal constraints. An effective inter-branch dialogue can proceed during difficult economic times if all concerned keep in mind that constitutional compliance calls for the provision of constitutionally required resources, supports, and services --- but it does not sanctify any particular spending level. In other words, states may properly reduce educational appropriations during times of fiscal constraint if they can find valid ways to put into effect cost-efficient and cost-effective practices that will, in fact, provide the full range of resources, services, and supports that students need to obtain a sound basic education.

Cost reduction must be undertaken carefully, with a scalpel not a meat ax. Currently, policymakers tend to impose mandatory cost reductions—often through across-the-board percentage budget cuts—without sufficient regard for the impact that these cuts will have on students' core educational services. Constitutional requirements—at least those that apply to

educational appropriations[41]—dictate a very different course. When vital educational services are at issue, the state should be required to demonstrate how necessary services will be maintained despite a reduction in appropriations.

The U.S. Supreme Court has specifically held that although a state cannot deny important constitutional benefits for reasons of cost, economic factors may be considered, "for example, in choosing the methods used to provide meaningful access" to services[42] and in tailoring modifications to consent decrees.[43] The Court has emphasized, however, that cost constraints cannot allow remedies to fall beneath the threshold that would be required to vindicate the constitutional right.[44] Applied to the current situation, this means that although states cannot reduce educational services below appropriate sound basic education levels, they can respond to immediate fiscal exigencies by taking specific actions to provide the constitutionally mandated level of services more efficiently.

The states cannot, however, satisfy this obligation by merely telling school districts to "do more with less." This is precisely what most states have done in response to the 2008 recession. The extensive budget cuts most states put into effect generally were imposed without

[41]As discussed at pp. 24-25 of the main text, in most state constitutions, the affirmative constitutional obligations that apply to education do not generally apply to other social welfare areas such as housing, welfare, and health. Respecting students' rights to a sound basic education during difficult economic times will not, therefore, create a slippery slope, requiring similar treatment for all other social services.

[42] Bounds v. Smith, 430 U.S. 817, 825 (1977).

[43] Rufo v. Inmates of Suffolk Cnty. Jail, 502 U.S. 367, 392–93 (1992). *See also* Wright v. Rushen, 642 F.2d 1129, 1134 (9th Cir. 1981) (advising trial court in a prison reform case that the remedy should not be "unnecessarily expensive").

[44] In Rufo, while finding that costs "are appropriately considered in tailoring a consent decree modification," the Court emphasized that the modification in question could "not create or perpetuate a constitutional violation" and "should not strive to rewrite a consent decree so that it conforms to the constitutional floor." Rufo, 502 U.S. at 391–93. Similarly, the Court in Wright reaffirmed that "costs cannot be permitted to stand in the way of eliminating conditions below Eighth Amendment standards." *Wright*, 642 F.2d at 1134.

any serious analysis of their impact on students' educational opportunities.[45] The states clearly have an on-going responsibility to ensure that local school districts maintain a constitutionally appropriate level of resources, services, and supports even during difficult economic times, and the state has a commensurate responsibility to ensure that they have sufficient resources to do so.[46] The failure of most states to carry out this constitutional responsibility clearly calls for effective judicial review.

The courts' principled approach to constitutional issues, their ability to marshal and assess evidence, and their institutional advantages in remaining committed to an issue until it is appropriately resolved can be critical in this endeavor. Consistent with the *Castanada* approach discussed in chapter five, courts should allow executive agencies and legislatures broad discretion in determining how to reduce costs, so long as the political branches demonstrate that the methods that they have chosen do not reduce the availability of programs, services and supports below constitutionally-mandated levels.

An example of the type of procedures that states can adopt in order to ensure that adequate resources are actually provided to all students on a stable, permanent basis, is provided by the "Act 57" procedures enacted by the Arkansas legislature in response to the court's orders

[45] For a detailed discussion of how New York's governor and the legislature inappropriately responded to the 2008 recession by making such blanket cuts without undertaking any serious effort to eliminate costly, unnecessary state mandates and without considering cost-effective educational practices, see Rebell, *Safeguarding Sound Basic Education*, supra, note 20, at 1896-1905 and 1935-1956.

[46] As the New York Court of Appeals put it in rejecting the state's allegations of financial mismanagement by the New York City Board of Education in the *CFE* litigation, "both the Board of Education and the City are 'creatures or agents of the State,' which delegated whatever authority over education they wield. . . . Thus, the State remains responsible when the failures of its agents sabotage the measures by which it secures for its citizens their constitutionally-mandated rights." Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 343 (N.Y. 2003) [*CFE II*] (citations omitted). *See also* Lake View Sch. Dist. No. 25 v. Huckabee, 220 S.W.3d 645, 657 (Ark. 2005) ("[I]t is the *State* that must provide a general, suitable, and efficient system of public education to the children of this state under the Arkansas Constitution."); Campbell Cnty. Sch. Dist. v. State, 907 P.2d 1238, 1279 (Wyo. 1995) ("Supporting an opportunity for a complete, proper, quality education is the legislature's paramount priority . . . .").

in *Lake View School District No. 25 v. Huckabee*.[47] This statute requires the House and Senate education committees on an on-going basis to

> (1) Assess, evaluate, and monitor the entire spectrum of public education across the State of Arkansas to determine whether equal educational opportunity for an adequate education is being substantially afforded to the school children of the State of Arkansas and recommend any necessary changes;
>
> (2) Review and continue to evaluate what constitutes an adequate education in the State of Arkansas and recommend any necessary changes;
>
> (3) Review and continue to evaluate the method of providing equality of educational opportunity of the State of Arkansas and recommend any necessary changes;
>
> (4) Evaluate the effectiveness of any program implemented by a school, a school district, an education service cooperative, the Department of Education, or the State Board of Education and recommend necessary changes…
>
> (7) Review and continue to evaluate the amount of per-student expenditure necessary to provide an equal educational opportunity and the amount of state funds to be provided to school districts, based upon the cost of an adequate education and monitor the expenditures and distribution of state funds and recommend any necessary changes….[48]

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[47] Lake View Sch. Dist. No. 25 of Phillips Cnty. v. Huckabee, 91 S.W.3d 472 (Ark. 2002).

[48] ARK. CODE ANN. § 10-3-2102(a) (2012). The Arkansas Supreme Court emphasized the importance of these procedures for meeting that state's constitutional obligations:

> Without a continual assessment of what constitutes an adequate education, without accounting and accountability by the school districts, without an examination of school district expenditures by the House and Senate Interim Committees, and without reports to the Speaker of the House and the President of the Senate by September 1 before each regular session, the General Assembly is 'flying blind' with respect to determining what is an adequate foundation-funding level.

Lake View Sch. Dist. No. 25 of Phillips Cnty. v. Huckabee, 220 S.W.3d 645, 654–55 (Ark. 2005).

The state's latest major reports issued in response to the Act 57 requirements are Picus Odden & Associates, Desk Audit of the Arkansas School Funding Matrix and Developing an Understanding of the Potential Costs of Broadband Access for All Schools (2014), available at http://picusodden.com/wp-content/uploads/2014/09/9-5-2014-Picus-Odden-Asso.-AR-Desk-Audit-9-5-14a.pdf.; and Arkansas Bureau of Legislative Research, The Resource Allocation of Foundation Funding for Arkansas School Districts and Open-Enrollment Charter Schools. available at

The Arkansas procedures constitute a clear, common sense prescription for the steps a state needs to take in order to make an informed decision each time budget allocations for public education are reconsidered or changed. Such procedures are especially vital when the state is considering substantially reducing previously established funding levels. Judicial monitoring of the state's adherence to these procedures, especially during times of fiscal constraint, is appropriate and necessary. In Arkansas, both the legislature[49] and the court[50] recognized such judicial review would be proper.

As applied during a recession or a time of fiscal constraint, the general Arkansas approach might be phrased more particularly to emphasize that states need to adhere to the following specific procedures in order to ensure continued constitutional compliance with sound basic education requirements:

> (1) Develop legislative and regulatory provisions that will specify for school districts and schools the essential resources, services, and supports that are needed to implement sound basic education requirements and that cannot be eliminated, even in times of fiscal constraint;
>
> (2) Promote efficiency and realistic cost-effectiveness measures without undermining constitutionally required student services;
>
> (3) Undertake a cost analysis to determine on a regular basis an adequate funding level that takes into account any cost-effective practices that

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http://www.arkleg.state.ar.us/assembly/2013/Meeting%20Attachments/410/I12647/Resource%20Allocation%20Report%20BLR.pdf.

[49] The statute specifies that "[a]s a guidepost in conducting deliberations and reviews, the committees shall use the opinion of the Supreme Court in the matter of Lake View Sch. Dist. No. 25 v. Huckabee, 351 Ark. 31, 91 S.W.3d 472 (2002)." *Id.* § 10-3-2102(b).

[50] After finding that the legislature had not appropriately followed these statutory requirements for the previous two years, the court directed the state to follow these procedures in the future and emphasized that "[t]he amount of funding shall be based on need and not funds available." Lake View Sch. Dist, 220 S.W. 3rd at 654–55 n.4.

have been put into effect;

(4) Create fair funding formulas that ensure that all schools are provided adequate resources based on the actual current costs of providing educational services in a cost-effective manner; and

(5) Establish regular state-level adequacy assessment procedures and accountability mechanisms to ensure that the state is providing sufficient funding and that school districts are using such funds in a cost-effective manner so that all students in every school are in fact being provided the opportunity for a sound basic education.[51]

Adoption and adherence to the above procedures would establish permanent mechanisms for ensuring that all students are being provided the opportunity for a sound basic education on an on-going basis, whatever the current economic and political conditions in the state.

[51] These procedures are discussed in more detail in Rebell, *Safeguarding the Right to Sound Basic Education, supra*, note 20 .