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

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2019 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 July 1, 2009 through July 31, 2019, there were 28 rulings of state supreme courts or unappealed lower court decisions in cases involving constitutional challenges to state education funding systems. Plaintiffs prevailed in 16 of these cases (Arkansas, California (2), Kansas (2), Minnesota, New Hampshire, New Jersey (2), New Mexico, New York, North Carolina,

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

Pennsylvania, South Carolina, and Washington (2)), and defendants prevailed in twelve (California, Colorado (2), Connecticut, Florida, Indiana, Michigan, Mississippi, Missouri, Rhode Island, South Dakota and Texas). Thus, plaintiffs prevailed in 57% of the major cases decided over the last decade. Summary descriptions of these cases are set forth in the following chart[2]:

Highest Court or Final Rulings Favoring Plaintiffs	Highest Court or Final Rulings Favoring Defendants
1. *Abbott v. Burke* (2011). The New Jersey Supreme Court invalidated budget cuts to the 31 poor urban "Abbott" districts, implemented in response to the Great Recession of 2008, and ruled that funding for the 31 Abbott districts must be funded at the level called for by the state funding formula that had been approved by the Court. 2. *Hoke Cty Bd of Edu v. State* (2011). A North Carolina trial court decision affirmed by Court of Appeals held that the state cannot enforce the portion of the 2011 Budget Bill that limited admission of 'at-risk' four-year-olds to the state's prekindergarten program in order to reduce costs of the program. After the governor and the legislature amended the statute to comply with this order, the North Carolina Supreme Court declared the case to be moot. 3. *Cal. Sch. Bds. Ass'n v. State,* (2011). The California Court of Appeals upheld a claim that the state constitution requires the legislature to reimburse school districts for the costs they incur in complying with new state mandates. The State did not appeal. 4. *McCleary v. State*, (2012). The Washington Supreme Court affirmed a	1. *Bonner v. Daniels* (2009). The Indiana Supreme Court affirmed the trial court's dismissal of a school funding complaint on political question/ separation of powers grounds. 2. *Comm. for Educ. Equal. v. the State of Missouri*(Mo., 2009). The Missouri Supreme court, *en banc* held 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* (2011).The South Dakota Supreme Court held 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* (2013). The Colorado Supreme Court held that evidence produced at trial was insufficient to establish that there was

[2] The text and more extensive discussions of these decisions can be found at www.schoolfunding.info.

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.

5. *Deer/Mt. Judea School District v. Kimbrell*, (2013). The Arkansas Supreme Court reversed dismissal of claims that the state had failed to carry out the extensive accountability and reporting requirements established in the Court's previous adequacy decision.

6. *Abbeville Cnty. Sch. Dist. v. the State of South Carolina*, (2014). The South Carolina Supreme Court held that the state's educational funding scheme, as a whole, denied students in plaintiffs' school districts the constitutionally required opportunity to receive a minimally adequate education.

7. *Gannon v. State of Kansas*(2014-16). In a series of "equity orders," the Kansas Supreme Court invalidated wealth-based disparities in the state's education funding scheme that prorated and reduced supplemental general state aid payments to which certain school districts were otherwise entitled.

8. *City of Dover v. State of New Hampshire* (2017). The Superior Court held that a statutory cap on annual funding increases that precluded school districts from receiving funds deemed necessary to provide an adequate education was unconstitutional; the state did not appeal.

9. *Abbott v. Burke* (2017). The New Jersey Supreme Court rejected Governor Chris Christie's motion to have the state supreme court freeze state aid at current levels while the state considers a new approach to state aid and to grant the Commissioner of Education unlimited authority to over-ride terms of teacher

no rational relationship between the state's education finance system and the constitutional mandate to provide for a uniform system of free public schools throughout the state.

5. *Woonsocket Sch. Comm. v. Chafee*. (2014). The Rhode Island Supreme Court affirmed the trial court's dismissal of plaintiff's adequacy claims on political question/ separation of powers grounds.

6. *S.S. v. State of Michigan* (2014). The Michigan Court of Appeals granted the state defendants' motion to dismiss an action alleging that the education clause in the state constitution and a "right to read" statute entitled students to education services geared to ensuring that they achieve minimum levels of literacy. The Court held that the issues were nonjusticiable and that education is not a fundamental interest under the state constitution. There was no further appeal.

7. *Dwyer v. State of Colorado,* (2016). The Colorado Supreme Court held that a constitutional provision that called for an annual inflation increase in education funding did not preclude across the board budget cuts so long as the applicable "negative factor" did not apply to "base" funding but only to other factors such at-risk students, low enrollment and cost of living for staff.

8. *Morath v. The Texas Taxpayer and Student Fairness Coalition* (2016). The Texas Supreme Court rejected plaintiffs' adequacy claims and held that the constitutional requirement to establish and make suitable provision for the support and maintenance of an efficient system of public free schools is satisfied if the state achieves a

collective bargaining agreements and teacher seniority layoff laws.

10. *William Penn SD v. Pennsylvania Department of Education*. (2017). Overruling two prior decisions of its predecessors, the Pennsylvania Supreme Court held that there are judicially manageable standards for determining whether the state's funding system is currently providing students a "thorough and efficient education" and that plaintiffs should have an opportunity at trial to prove that current funding levels are inadequate.

11. *NYSER v. State* (2017). The New York Court of Appeals denied the State's motion to dismiss a complaint that alleged that the state is violating its constitutional obligation to ensure that every school has sufficient funding to provide all students a meaningful educational opportunity. The Court also held that plaintiffs could not assert claims on a general state-wide basis, but must prove that in particular districts students today are not receiving the opportunity for a sound basic education.

12. *Cruz-Guzman v. State* (2018). In denying a motion to dismiss, the Minnesota Supreme Court held that adequacy language in the state's education clause has a "qualitative" dimension that courts can use to assess whether students are receiving an adequate education. Among other things, plaintiffs are arguing that that a "segregated education is *per se* an inadequate education.

13. . *Martinez v. State of New Mexico* (2018), A New Mexico District Court ruled that the state's education finance system violated the Education Clause, "general diffusion of knowledge.

9. *Coalition for Quality Education et al. v. State of California* and *Robles-Wong v. State of California*) (2016). The California Supreme Court declined to hear plaintiffs' appeal from the state Court of Appeals' decision that denied adequacy claims because there was "no explicit textual basis from which a constitutional right to a public school education of a particular quality may be discerned."

10. *Clarksdale Municipal School District v. Mississippi* (2017). The Mississippi Supreme Court held that the state legislature is not constitutionally required to fully fund the Mississippi Adequate Education Program despite the specific language in MS Code §37-151-6, stating "the Legislature shall fully fund the Mississippi Adequate Education Program." It held that the legislature has significant discretion under the relevant constitutional provision, which states "[t]he Legislature shall, by general law, provide for the establishment, maintenance and support of free public schools upon such conditions and limitations as the Legislature may prescribe."

11. *Coalition for Educational Funding v. Rell* (2018). The Connecticut Supreme Court affirmed the trial court's determination that Connecticut has provided its students "minimally adequate educational resources," but it reversed the lower court's further determination that the state's educational policies in regard to the specifics of the school funding formula, were so irrational that they

the Equal Protection Clause and the Due Process Clauses of the state constitution The judge issued a declaratory judgment requiring the state to take "immediate steps to ensure that New Mexico schools have the resources necessary to give at-risk students the opportunity to obtain a uniform and sufficient education that prepares them for college and career." The State did not appeal. 14. *McCleary v. State* (2014-2018). In 2014, the Washington Supreme Court held the state in contempt for failing to comply with its previous adequacy order and subsequently issued a series of compliance orders that culminated in a June 2018 ruling that held the State had now complied with the 2012 decision and order. 15. *Gannon v. State of Kansas* (2014- 2019). In a series of adequacy orders, the Kansas Supreme Court held that the State's education funding system did not meet constitutional adequacy requirements. It then issued a series of compliance orders before it finally judged the state in compliance in June, 2019. 16. *California Sch. Bds Association v. Cohen* (2019). In 2016, the California Superior Court held that the State had manipulated the system established by Proposition 98 that requires public schools to receive stable funding aligned with the state's economic growth. In July 2019, the parties reached a settlement that calls for all California public schools to receive a repayment of $686 million due to prior year underpayments.	were depriving students in low wealth districts of a minimally adequate education. The Supreme Court held that these issues involved matters of educational policy that should be determined by the legislature, not by the court. 12. *Citizens for Strong Schools, Inc v. Florida State Board of Education* (2019). The Florida Supreme Court affirmed the lower courts' determination that "the terms 'efficient' and 'high quality' in the state constitution's revised education clause are no more susceptible to judicial interpretation than 'adequate' was under the prior version of the education provision, and that to define these terms would require 'an initial policy determination of a kind for non-judicial discretion.

In a number of these cases, the state supreme courts were applying constitutional precedents established in earlier adequacy cases to current challenges, and in some cases expanding the previously-established rights. Thus, in its 2012 *McCleary* case decision, the Washington Supreme Court reiterated the importance of the constitutional right it had established in 1978 in *Seattle School District No. 1 v. State*[3] and expanded that definition in applying it to current funding issues. In its 2014 *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. [4] The Kansas Supreme Court, in its 2017 decision, substantially strengthened the adequacy definition it had applied in previous decisions by fully adopting the demanding "Rose" standard that had been developed by the Kentucky Supreme Court in 1989 [5] and that has been followed by a number of other state supreme courts.

Several established important new precedents. In its *McCleary* decision, the Washington Supreme Court held that the state must "amply provide for the education of all Washington children as the [s]tate's first and highest priority before any other [s]tate programs or operations." The New Mexico District Court in its Marinez decision found that pre-school, after-school and summer school programs have been shown to provide proper supports for at risk students; and that a 10% extra weighting for "at rick" student in the funding formula is not sufficient. In Pennsylvania, the state supreme court overruled prior decisions of its predecessors

[3] 585 P. 2d 1 (Wash. 1978).

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

[5] *See*, Rose v. Council for Better Educ.,790 S.W. 2d 186, 212 (KY, 1989)

who had held on two occasions that the adequacy of education funding under the state constitution's thorough and efficient clause was non-justiciable.[6]

On the other hand, in several cases (the 2013 *Lobato* decision in Colorado, and the 2018 *Rell* decision in Connecticut) state supreme courts that had denied motions to dismiss these same cases, and had declared that there is a right to an adequate education under the state constitution,[7] now held after trial that the plaintiffs had not presented sufficient evidence to prove that the current education finance system was inadequate. In two states (California and Texas), courts that had in the past upheld equity challenges to state funding systems[8] declined to uphold new adequacy challenges to the current systems. In Rhode Island, the court held in 2014 that changed facts, including the adoption of standards-based reforms, did not justify a reconsideration of the position it articulated in 1995,[9] that challenges to the state education funding system constituted nonjusticiable political questions.

Six of the state supreme court rulings that favored the defendants were made on motions to dismiss before any evidence had been presented to establish the extent to which students were being denied adequate services (California (Coalition), Colorado (*Dwyer*), Florida, Indiana, Michigan and Mississippi.

The Reduction in Plaintiffs' Percentage of Victories

[6] Danson v. Casey, 399 A.2d 360 (1979), and Pennsylvania Association of Rural and Small Schools v. Ridge, 737 A.2d 246 (1999.)

[7] See, Lobato v. State, 218 P. 3d 358 (2009) and Conn. Coal for Justice in Educ. Funding, Inc. v. Rell, 990 A.2d 206 (2010.)

[8] *See*, Serrano v. Priest, 557 P.2d 929 (CA. 1977); Edgewood Ind't. Sch. Dist. v. Kirby, 777 S.W.2d 391(TX. 1989) (Tex.1989)

[9] See, City of Pawtucket v. Sundlun 662 A. 2d 40 (R.I. 1995).

As stated above, over-all, plaintiffs won 57% of their challenges to state education finance systems in the period 2009-2019, compared to a 67 % victory margin in the period from 1989 through mid-2009. The impact of the Great Recession of 2008 was undoubtedly a major factor in this change in the outcomes of adequacy litigations. 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 drops in educational expenditures, which generally constitute the largest item in the state budget. As New York's governor bluntly put it, "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]

Although the economy as a whole has now largely recovered from the 2008 recession, many state budgets are still constrained, and the post-recession political climate evidences a widespread reluctance to raise taxes or otherwise expand state revenues. A study by the Center on Budget and Policy Priorities found that as of 2016, 24 states were still providing less total state and local funding for education, inflation –adjusted, than in 2008. In eight states, the cuts exceed 10%; they are as high as 18% in North Carolina and Nevada and 23% in Arizona and Florida.[12]

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

[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 and Eric Figueroa, *K-12 School Funding Up in Most 2018 Teacher-Protest States, But Still Well Below Decade Ago* (2019), retrieved from https://www.cbpp.org/research/state-budget-and-tax/k-12-school-funding-up-in-most-2018-teacher-protest-states-but-still. The report states that protests

These continuing reductions in state education funding have 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 of the state education finance systems and to have increased the detrimental impact on low income and high need students.[13] The reduction in plaintiff successes in the outcomes of the major adequacy cases since 2009 may indicate that many courts are less willing to proclaim substantial new rights or expand rights to an adequate education in this climate. It also may be, however, that fewer courts are proclaiming new rights because the vast majority of state courts have examined the meaning of their state constitution's education clauses over the past few decades and there are simply fewer new constitutional paths to plough. It is also worth noting that if we look at the won-loss record for the latter half of the past decade being analyzed in this supplement, during the five-year period from 2015-2019, the plaintiffs' victory record is higher. During this period, they won 9 of 14 cases (64%), perhaps indicating that as the immediate impact of the Great Recession wanes, judges may be becoming less reluctant to issue rulings that impact state budgets.

Looking at this data from another perspective, it is noteworthy that a substantial number of the cases decided by the state courts over the past decade have been compliance litigations that have sought to enforce previous court rulings, rather than claims to establish new rights. The results of these post-recession compliance cases are striking. Eight of the 28 cases decided since

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by teachers and others in 2018 helped lead to substantial increases in school funding in Arizona, North Carolina, Oklahoma, and West Virginia, four of the 12 states that had cut school "formula" funding most deeply over the last decade. Despite last year's improvements, however, formula funding remains well below 2008 levels in these states.

[13] A study of the impact on equity in school funding of recent changes in state aid to education found that fair school funding regimes are on the decline in the majority of states, as only 11 states had "progressive" funding formulas in 2015, compared to 22 in 2008, and that 17 states had "regressive" funding patterns. Bruce D. Baker, Danielle Faree, abd David Sciarra, Is School Funding Fair: A National Report Card, 7th ed (2018), retrieved from https://drive.google.com/file/d/1BTAjZuqOs8pEGWW6oUBotb6omVw1hUJI/view.

2009 have been claims that the state defendants have violated the right to an adequate education established in previous court rulings, *and plaintiffs have won seven out of eight, or 88%, of these decisions*.

The plaintiff compliance victories occurred in Arkansas, Kansas (2), New Jersey (2), New York, North Carolina, and Washington. The premium that many of these courts placed on ensuring full compliance with their previous rulings is exemplified by the fact that between 2016 and 2019, the Kansas Supreme Court issued no less than seven compliance rulings, several of which threatened to shut down the entire state education system if the state legislature did not appropriate the full amount of funding required by the Court. The Washington Supreme Court actually held the state in contempt and imposed monetary fines until compliance was finally achieved in 2018. The one defendant victory in a compliance case was the Texas Supreme Court's decision in *McGrath v. The Texas Taxpayer and Student Fairness Coalition*, a case that was precipitated by cuts to state funding stemming from the 2008 recession; the *McGrat*h ruling was the seventh time since the 1980s that the Texas Supreme Court had considered legal challenges to the state's education finance system.

To the extent that one can generalize about trends in court decisions, plaintiffs' 88% success rate in cases alleging noncompliance with past rulings may indicate that even in times of fiscal constraint, courts will still adhere to the well-established doctrine that cost considerations cannot affect the enforcement of established constitutional rights. The U.S. Supreme Court has held that "[f]inancial constraints may not be used to justify the creation or perpetuation of constitutional violations."[14] State courts have also consistently upheld this doctrine,[15] and

[14] 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 alos,* 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

specifically in education adequacy litigations. As the Kentucky Supreme Court put it, "the financial burden entailed in meeting [educational funding requirements] in no way lessens the constitutional duty."[16]

On the other hand, "institutional caution" appears at times to have influenced the scope of remedies issued by some of the courts enforcing constitutional rights in compliance situations, especially during the immediate recession and post-recession years. 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 remedies ordered 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.[17]

Chapter Three

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than to afford them."); Shapiro v. Thompson, 394 U.S. 618, 633 (1969) ("The saving of welfare costs cannot justify an otherwise invidious classification").

[15] *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.").

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

[17] 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).

My updated analysis of the "money matters" debate in the state court cases (p. 34 of the main text) found that overall from 1973 through the end of 2016, the state courts throughout the United States considered the relationship between education expenditures and student outcomes in 40 cases. In 34 of them, the courts determined that there was a substantial correlation between expenditures and student outcomes. [18] In the other six cases, courts expressed uncertainty or some degree of skepticism about the proposition, but none of them definitively held that there is no such correlation.[19]

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. [20] 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

[18] Michael A. Rebell, *The Courts' Consensus: Money Does Matter for Educational Opportunity* in 674 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE (October, 2017.)

[19] *Ibid.*

[20] 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. They found that a 20% 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% 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.

Similarly, a 2016 study of the impact of state aid increases on student achievement as measured by representative samples of scores on the National Assessment of Educational Progress (NAEP) found that the "reforms cause increases in the achievement of students in these districts, phasing in gradually over the years following the reform, [21] and other recent studies have also concluded that the implied effect of school resources on educational achievement is large."[22]

[21] Julien Lafortune, Jesse Rothstein, and Diane W. Schzenbach. School finance reform and the distribution of student achievement. National Bureau of Economic Research Working Paper 22011 (2016.).

[22] See, e.g., Phuong Nguyen-Hoang and John Yinger, *Education finance reform, local behavior, and student performance*. 39 J. EDUC. FIN. 297(2013); Joshua Hyman. 2017. *Does Money Matter in the Long*

Chapters Four and Five

One of the recent major state supreme court decisions illustrates important aspects of the comparative institutional approach for implementing successful remedies in education adequacy cases that is proposed in the text. The Washington Supreme Court in its 2012 *McCleary* decision adopted a remedial approach that was consistent with the first two prongs of the *Castaneda* 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 implementation approach that involved continuing judicial oversight to ensure that the reforms would be adequately funded and put into effect in accordance with a definitive timeline.

Specifically, after issuing an extensive decision that found 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 adopted by the legislature in recent statutes, as well as the cost analysis and program reforms recommended by a legislative task force. It also accepted the legislature's commitment to phase in the programmatic reforms and associated substantial cost increases over a six-year period, despite the plaintiffs' request that the remedy be implemented more promptly.

Run? Effects of School Spending on Educational Attainment .9 AM. ECO. J. : ECO POL'Y, 256 (2017) (finding that students exposed to 10% more spending were three percentage points more likely to enroll in college); Christopher A. Candeleria and Kennth A. Shores, *Court-Ordered Finance Reforms in the Adequacy Era: Heterogeneous Causal Effects and Sensitivity* 14 J. EDUC. FIN & POL'Y 31 (2019) (study of court-ordered finance reforms between 1989 and 2010 finds 6.8 % to 11.5% increase in graduation rates for the highest poverty quartile of students.) *See also*, C. Kirabo Jackson, *Does School Spending Matter? The New Literature on an Old Question*, (2018), available at https://works.bepress.com/c_kirabo_jackson/38/ (discussing significance of recent studies that employ larger data-sets and use quasi-experimental methods and discussing the older literature and its limitations.)

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 Court ordered the state 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 that six year period, the Court demonstrated both patience and determination. Although the state annually increased funding for education since the Court issued its order, it had not initially done so at a pace that was 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." [23]

In August 2015, the Court did impose sanctions. Finding that although some progress had been made, the State still had not adopted an acceptable "*plan* for achieving compliance by its own deadline of 2018," the Court imposed a "remedial assessment" of $100,000 per day on the State until such time as the State develops an acceptable compliance plan. In May 2016, the legislature submitted its annual report to the Court. The report acknowledged that although funding for education had increased by $4.6 billion since 2010, substantial additional funding was needed to meet the constitutional requirement that the state pay the full costs of a "basic education." The main outstanding issue was the need for the state to fully fund salaries for teachers and other school employees and to eliminate inequities caused by the need for local school districts to pay much of these costs from local property tax levies. In a decision issued in October 2016, the Court deemed this action to be insufficient, but noted that its contempt finding and sanctions, "at least spurred the legislature to take action in the 2016 session, committing itself to complete its task by the end of the 2017 session," the Court kept the monetary sanctions in place, established a briefing schedule for determining shortly after the end of the 2017 session whether compliance will have been achieved, and stated that upon reviewing the parties' submissions at that time, it will determine what, if any, additional actions to take.[24]

[23] 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

[24] For a more detailed discussion of these issues, copies of the courts' orders, and updated information on Further developments, see the Schoolfunding.info website, at http://schoolfunding.info/litigation-map/washington/#1485219774547-b5a4cfda-64c4.

In June 2017, Governor Jay Inslee signed into law a state budget that included a $7.3 billion increase over four years for education. The goal of the funding increase was to align state education funding with constitutional requirements. However, the state supreme court held in November 2017 that the new legislation would commit the state to full funding for teacher salaries as of the 2019-2020 school year, but not as of Sept. 1, 2018, as the Court had ordered. The court decided to continue imposing sanctions on the state for failing to comply with the court's order. It set a strict timetable for further submissions after the close of the 2018 legislative session and indicated that "upon reviewing the parties' submissions, the court will determine what, if any additional actions" it would take before the September 2018 deadline.

After the state did enact measures designed to fully implement the new salary allocation model by the 2018-19 school year during its 2018 session, the Court held in June 2018 that the state had now met all of its obligations under the Court's 2012 decision, and it terminated its jurisdiction of the case. The approximately $105 million in contempt penalties that had accumulated over the past few years were set aside in a special fund to support basic education.

Re-litigating Rodriguez?

As explained on pp.15-16 of the main text, the state courts' extensive involvement in education finance litigation stemmed initially from the U.S. Supreme Court's holding in *San Antonio Ind't Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) that education is not a "fundamental interest" under the U.S. Constitution. Once the doors to the federal courthouses were closed by the *Rodriguez* decision, the only litigation option for advocates of reform of state education finance systems was with the state courts. Now, however, two recently-filed federal cases are arguing that the Supreme Court's 1973 decision left open the possibility that there is a right to an

education adequate to prepare students to be capable citizens under the federal constitution, and they are asking the federal courts to re-consider the *Rodriguez* decision in that light.

In 2018, 14 students and parents filed a class action law suit asking the U.S. District Court in Rhode Island to declare that all students in Rhode Island---and implicitly all students throughout the United States---have a right under the U.S. Constitution to an education adequate to prepare them to be productive citizens, capable of effectively exercising their rights to vote, to serve on juries, to petition the government, and to participate in civic affairs. *Cook v. Raimondo (* D. R.I.: 1:18-civ-645).The *Cook* plaintiffs are also raising additional claims under the due process and privileges and immunities clauses of the Fourteenth Amendment, and under Art. 4, Section 4 of the U.S. Constitution that guarantees that there will be a "republican form of government" in each state.

The Rhode Island defendants(the governor, the legislative leaders, the commissioner of education and the State Board of Education) have moved to dismiss the complaint; the parties have briefed the issues and oral argument is expected to take place in the early fall of 2019 before Chief Judge William E. Smith. [25]

Another pending case in Michigan, *Gary B. v. Snyder*, 329 F.Supp.3d 344 (E.D. Mich, S.D., 2018) , is also asking the federal courts to rule on the education for citizenship issue left open in *Rodriguez.* That case emphasizes the importance of basic literacy as a pre-requisite for capable citizenship. This is a much narrower definition of what is necessary for citizenship than is being advanced by the Rhode Island plaintiffs who allege that preparation for capable

[25] For up-to-date information about this case and copies of the litigation papers, *see,* www.cookvraimondo.info. I am co-counsel for plaintiffs in this case. I have also written a book, MICHAEL A. REBELL, FLUNKING DEMOCRACY: SCHOOLS, COURTS AND CIVIC PARTICIPATION (2018) that discusses in depth the issues raised by this litigation.

citizenship includes not only basic literacy but also substantial civic knowledge, civic skills, civic experiences and civic values.

In 2018, Judge Stephen J. Murphy III of the U.S. District Court in Michigan acknowledged that the issue of a right to an education for capable citizenship under the U.S. Constitution was left open by *Rodriguez,* but he granted the defendants' motion to dismiss the *Gary B.* complaint, without reaching the major equal protection claim because he ruled that plaintiffs had not alleged a requisite "comparator district" for equal protection purposes; he also discussed in detail and rejected the plaintiffs' substantive due process arguments. Plaintiffs have now appealed that decision to the U.S. Court of Appeals for the Sixth Circuit.

Chapter Six

Michael Paris, in 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.

The "institutional caution" displayed in some of the 27 sound basic education court decisions since the 2008 recession that are discussed above in the update to Chapter Two pose additional "Practical Realities" that must be confronted. The reluctance of some of the state courts since the recession of 2008 to declare that students have an enforceable right to a sound

basic education in new cases and to limit the scope of remedies provided in the some of the cases in which they do enforce existing rights is troublesome.

Obviously, courts must take economic and political realities into account, and the severe economic downturns like that which occurred in 2008 may justify reconsideration of prerecession spending levels. But this reconsideration should not, and need not, ignore or limit the constitutional rights of millions of school children. In fact, a firm judicial stance, rather than "institutional caution," is precisely what is needed to protect these rights in difficult times, especially for high need students in poorly funded school districts.

The comparative institutional remedial approach advocated in this book provides a framework that can allow courts to uphold students' sound basic rights while, at the same time, permitting the political branches to respond to 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 by focusing on cost-efficient and cost-effective practices that can reduce costs without denying students the essential resources, services, and supports that they need to obtain a sound basic education.

Cost reduction must be undertaken carefully, with a scalpel not a meat ax. Often, 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[26]—dictate a very different course. When vital educational services are

[26]As discussed at pp. 24-25 of the main text, in most state constitutions, the affirmative constitutional

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[27] and in tailoring modifications to consent decrees.[28] 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.[29] 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." 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

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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.

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

[28] 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").

[29] 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." 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, supra*, note 53, 642 F.2d at 1134.

that they have sufficient resources to do so.[30]

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 *Castaneda* 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 in *Lake View School District No. 25 v. Huckabee*.[31] 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

[30] 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 . . . .").

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

changes ….

(3) 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….[32]

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[33] and the court[34] recognized such

[32] 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).

[33] 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).

[34] 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

judicial review would be proper.

The National Commission on Equity and Excellence in Education has called upon all states to adopt procedures similar to those in the Arkansas statute in order to ensure continued constitutional compliance with sound basic education requirements. Specifically, they recommended that the states:

> (1) Identify and publicly report the teaching staff, programs and services needed to provide a meaningful educational opportunity to all students of every race and income level, including English language learners and students with disabilities;
>
> (2) Develop systems to ensure that districts and schools effectively and efficiently use all education funding to enable students to achieve state content and performance standards and to meet state constitutional requirements;
>
> (3) Periodically review, develop performance evidence and update their finance systems to respond to changes in academic standards, students demographics, program research, costs and other factors relevant to maintaining meaningful educational opportunities;
>
> (4) Create fair funding formulas that ensure that funding is equitable and publicly reported for all public schools in the state and district;
>
> (5) Establish regular state-level data and information systems to provide guidance and feedback to ensure that all students in every school are in fact being provided the opportunity for a sound basic education.[35]

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.

S.W. 3rd at 654–55 n.4.

[35] *See*, National Commission on Equity and Excellence in Education, For Each and Every Child-- A Strategy for Education Equity and Excellence 18-19 (U.S. Dep't of Education, 2013); *see also*, Rebell, *Safeguarding the Right to Sound Basic Education*, *supra*, note 18.