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# COURTHOUSES VS. STATEHOUSES?

William S. Koski\*

SCHOOLHOUSES, COURTHOUSES, AND STATEHOUSES: SOLVING THE FUNDING-ACHIEVEMENT PUZZLE IN AMERICA'S PUBLIC SCHOOLS. By *Eric A. Hanushek & Alfred A. Lindseth*. Princeton and Oxford: Princeton University Press. 2009. Pp. xviii, 411. \$29.95.

COURTS & KIDS: PURSUING EDUCATIONAL EQUITY THROUGH THE STATE COURTS. By *Michael A. Rebell*. Chicago and London: University of Chicago Press. 2009. Pp. xiii, 192. \$35.

## INTRODUCTION (OR, THE HYPE)

Just over twenty years ago, the Kentucky Supreme Court declared the commonwealth's primary and secondary public-education finance system—indeed, the entire system of primary and secondary public education in Kentucky—unconstitutional under the “common schools” clause of the education article in Kentucky's constitution.<sup>1</sup> That case has been widely cited as having ushered in the “adequacy” movement in school-finance litigation and reform, in which those challenging state school-funding schemes argue that the state has failed to ensure that students are provided an adequate education guaranteed by their state constitutions.<sup>2</sup> Since the *Rose* decision in Kentucky, some thirty-three school-finance lawsuits have reached final decisions in thirty-one states.<sup>3</sup> For plaintiffs, the campaign has been relatively successful in court, as school-funding schemes in twenty-two

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\* Eric & Nancy Wright Professor of Clinical Education and Professor of Law, Stanford Law School; Professor of Education (by courtesy), Stanford University School of Education. I am grateful to Michael Rebell, Rick Hanushek, and Al Lindseth for their thoughtful comments and sporting willingness to review this Review. Also, a disclaimer: I am hardly an innocent observer in the public-education-reform debates, as I currently serve as co-counsel for more than sixty school-children and their families who are plaintiffs in the recently filed *Robles-Wong v. California* school-finance litigation in which the plaintiff coalition—which also includes nine California school districts, the California School Boards Association, the Association of California School Administrators, and the California Congress of Parents, Teachers, and Students—is asking the court to declare unconstitutional the state's public-education finance system.

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

2. See, e.g., Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 108–09 (1995) (stating that certain arguments assert that, given the existing school-financing structure, the state has not satisfied its obligation to provide for a system of public schools); William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219, 219–22, 235–36 (1990) (discussing *Rose* and its implications for future finance reform litigation).

3. See *Education Adequacy Liability Decisions Since 1989*, NAT'L ACCESS NETWORK (June 2010), <http://www.schoolfunding.info> (follow “LITIGATION” hyperlink; then follow “School Funding ‘Adequacy’ Decisions by Outcome” hyperlink).

states have been declared unconstitutional.<sup>4</sup> Recently, however, a few courts seem to be taking a more cautious approach, either declining to become embroiled in school-finance lawsuits or declaring the school-finance systems constitutional and relinquishing jurisdiction.<sup>5</sup> Yet the pace of litigation appears unabated.<sup>6</sup> In light of the overall success of the adequacy movement in court, the wariness with which some courts have begun to approach the matter, and the continued press for school reform through the courts, it is fair to say that the adequacy-finance-litigation movement has matured and it is time to take stock of it. Two recent books—Eric Hanushek and Al Lindseth's *Schoolhouses, Courthouses, and Statehouses*<sup>7</sup> and Michael Rebell's *Courts & Kids*<sup>8</sup>—do just that. And they reach very different conclusions (at least on the face of it).

If one were to stage a bout between contenders for the school-finance-reform-litigation heavyweight championship, it would be nearly impossible to find a better match than Rebell vs. Hanushek and Lindseth.<sup>9</sup> In the plaintiffs' corner and fighting for an appropriate role for the courts is Michael Rebell. A professor at Columbia University's Teachers College, Rebell is a battle-tested veteran of school reform litigation, having sued the New York Public Schools in the 1980s for its failure to ensure that children with dis-

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4. *Id.*

5. See, e.g., *Hancock v. Comm'r of Educ.*, 822 N.E.2d 1134 (Mass. 2005) (declaring the state's reformed educational-finance-and-service-delivery system constitutional some twelve years after striking the old system down); *Okla. Educ. Ass'n v. State*, 158 P.3d 1058 (Okla. 2007) (refusing to intervene on separation-of-powers and nonjusticiability grounds and finding that educational-finance policy is reserved for the Oklahoma legislature); see also John Dinan, *School Finance Litigation: The Third Wave Recedes*, in *FROM SCHOOLHOUSE TO COURTHOUSE* 96, 96 (Joshua M. Dunn & Martin R. West eds., 2009) ("Numerous state court rulings of the past several years indicate, however, that the school-finance-litigation movement may have peaked, in that many judges are now disinclined to undertake continuing supervision of school finance policies."); *Forum: Many Schools are Still Inadequate: Now What?*, *EDUC. NEXT*, Fall 2009, at 39, 41 (reporting Hanushek and Lindseth as stating that, while "judicial remedies have played a significant role in school finance in the past, that era is drawing to a close"). While there can be no doubt that the pace of plaintiff victories in educational-finance litigation has slowed in the last four years or so, it may be too early to discern any long-term trend in judicial willingness to participate in educational-finance litigation and is certainly too early to declare the demise of adequacy litigation. Indeed, as Rebell has argued, the judiciary may be in a period of cautious reflection in which it is contemplating what effective role it may play in reforming failing schools and school systems. *Forum: Many Schools are Still Inadequate: Now What?*, *supra*, at 44.

6. Currently, there are eight educational-finance-reform cases pending in the state courts. *Education Adequacy Liability Decisions Since 1989*, *supra* note 3.

7. Eric A. Hanushek is the Paul and Jean Hanna Senior Fellow at the Hoover Institution of Stanford University. Alfred A. Lindseth is of counsel at the Atlanta-based law firm Sutherland Asbill & Brennan LLP.

8. Michael A. Rebell is the Executive Director of the Campaign for Educational Equity at Teachers College, Columbia University, and Professor of Law and Educational Practice at Columbia Law School.

9. I hasten to note that the authors did not write their books for the specific purpose of debating each other. Thus, the prizefight metaphor may be an imperfect fit. That said, the authors frequently discuss each other's work, and the issues they address are remarkably aligned, so I'm going with the metaphor (apologies to those who disfavor sports metaphors).

abilities had access to an appropriate education<sup>10</sup> and, more recently, having successfully challenged New York's failure to provide a sound, basic education to the children of low-income communities in the state (Rebell, pp. xii–xiii). Outside of the courtroom, Rebell has advanced the adequacy movement by developing his theory of “public engagement” in the education-reform process (Rebell, pp. 97–103), studying the role of courts in institutional (school) reform,<sup>11</sup> and establishing a network of researchers, policy-thinkers, and lawyers to collaborate in advocating school-finance reform.<sup>12</sup>

In *Courts & Kids*, Rebell makes the case for the authority and responsibility of the courts to protect the constitutional rights of children who have been denied a sound, basic education. Rebell believes not only that it is incumbent upon state supreme courts to recognize and enforce the educational rights of children (Rebell, Chapter Two), but also that courts in educational-finance litigations have been effective in enhancing equality of educational opportunity for all children (Rebell, Chapter Three). Looking to the future of judicial involvement in educational policy, however, Rebell proposes a nuanced model—what he calls the “successful remedies” model (Rebell, p. 57)—of judicial engagement that establishes a “functional separation of powers” among the three branches of government, “in which the judicial, legislative, and executive branches working together can deal effectively with difficult social policy issues like providing a meaningful educational opportunity for all children” (Rebell, p. 7).

In the defendants' (read: states') corner and fighting against court intervention in matters of school finance are Eric Hanushek and Al Lindseth. Hanushek is a senior fellow at the Hoover Institution at Stanford University and is widely regarded as a leading figure in the study of the economics of education.<sup>13</sup> Perhaps more salient, Hanushek has testified on behalf of state defendants in numerous educational-finance-reform litigations.<sup>14</sup> Hanushek is a leading proponent of performance-based school funding and accountability and is known for his position that “differences in either the absolute [public education] spending level or spending increases bear little or no

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10. Rebell, p. xii; see also *Jose P. v. Ambach*, 557 F. Supp. 1230, 1232 (E.D.N.Y. 1983) (listing Rebell as counsel in school reform case).

11. See MICHAEL A. REBELL & ARTHUR R. BLOCK, *EDUCATIONAL POLICY MAKING AND THE COURTS* (1982) (describing and analyzing the role of courts in educational policymaking); MICHAEL A. REBELL & ARTHUR R. BLOCK, *EQUALITY AND EDUCATION* (1985) (analyzing the relative effects of judicial, legislative, and executive intervention in educational policy and practice).

12. Rebell was among the founders of both the Campaign for Educational Equity at Teachers College and the National Access Network, which provides a forum for those interested in educational equity advocacy. See *Michael Rebell to Lead Campaign for Educational Equity at Teachers College*, TEACHERS COLLEGE – COLUMBIA UNIVERSITY (June 9, 2005), <http://www.tc.columbia.edu/news/article.htm?id=5184>.

13. *Eric Hanushek*, HOOVER INSTITUTION, <http://www.hoover.org/fellows/10150> (last visited Nov. 21, 2010).

14. See *Court Testimony*, ERIC A. HANUSHEK, <http://edpro.stanford.edu> (follow “Experience” hyperlink; then follow “Court Testimony” hyperlink) (last visited Nov. 21, 2010) (listing cases in which Hanushek has testified).

consistent relationship to differences in student achievement” (Hanushek & Lindseth, p. 54). Lindseth, a partner with the Atlanta-based law firm Sutherland Asbill & Brennan, has represented states in school-finance lawsuits in various states, including New York, Florida, and North Dakota, and over the last twenty-five years has advised governors, elected officials, and state education leaders on topics related to school finance and reform (Hanushek & Lindseth, p. xv).

Although the two books were not explicitly written to debate each other, Hanushek and Lindseth’s *Schoolhouses, Courthouses, and Statehouses* offers the counterpunch to Rebell’s optimism regarding judicial intervention in matters educational. Hanushek and Lindseth start with the dual arguments that public education in the United States, on measures ranging from global competitiveness to a yawning achievement gap, “faces real problems” (Hanushek & Lindseth, p. 23) and that “increased spending [on public education] has yielded little in terms of improved student achievement” (Hanushek & Lindseth, p. 50). They then focus their ire on the courts, who they argue have overreached and assumed an “all-encompassing” (Hanushek & Lindseth, p. 83), constitutionally inappropriate (Hanushek & Lindseth, p. 84), and institutionally ineffective (Hanushek & Lindseth, pp. 118–70) role in educational policymaking. And they reserve some criticism for the methodologies used by expert consultants in designing and “costing out” educational-finance reforms, arguing that such methods only “give the illusion of providing valid, useful, and reliable information.”<sup>15</sup> Rather than the continued press for reform through the courts or the use of scientifically suspect costing-out studies to drive school-finance reform, Hanushek and Lindseth propose a “performance-based” school-funding model that directly links funding to improved student performance (Hanushek & Lindseth, Chapter Eight).

But the authors do not disagree on everything. In Part I of this Review, I identify those areas of educational-finance policy and reform in which the authors are in agreement. Part II highlights the authors’ areas of difference and critiques the arguments they advance for their respective causes. In Part III I explore two areas—Hanushek and Lindseth’s substantive school reform proposals and Rebell’s institutional choice and process arguments—in which the authors appear to be talking past each other, though not incompatibly.

Part IV concludes by proposing a new grand bargain that recognizes the authors’ convergence over several key issues, agrees to disagree on one or two issues, and calls for reasonable concession on both sides. Is it possible that these longtime partisans could find common ground in the educational-finance-and-policy-reform discussions and move forward? Could we ever call this fight a draw?

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15. Hanushek & Lindseth, p. 178; see also Eric A. Hanushek, *Science Violated: Spending Projections and the “Costing Out” of an Adequate Education*, in *COURTING FAILURE: HOW SCHOOL FINANCE LAWSUITS EXPLOIT JUDGES’ GOOD INTENTIONS AND HARM OUR CHILDREN* 257 (Eric A. Hanushek ed., 2006) [hereinafter *COURTING FAILURE*].

## I. AREAS OF AGREEMENT (OR, THE GLOVE TAP)

Let there be no doubt that the authors share one common value: all have a bona fide concern about the achievement of American students and the importance of that achievement both to the success and well-being of the individual and to the economic progress of the nation, the functioning of our civic institutions, and the continued cohesion of our society. Hanushek and Lindseth's focus on the economic well-being of citizens and the nation couldn't be more clear: "A good education has always been the key to enabling even the poorest of our citizens to achieve the American Dream," and the quality of a person's education "has an impact on the whole of society, affecting not only the standard of living enjoyed by our citizens, but also the fairness of our economic and social systems" (Hanushek & Lindseth, p. 10). Perhaps more surprising is the authors' agreement that it is not only the absolute achievement of American students that matters, but also the relative achievement of subgroups of children: as Hanushek and Lindseth put it, "[a] major problem facing the nation is the significant achievement gap between middle-class and white children on the one hand and poor and minority children on the other" (Hanushek & Lindseth, p. 10).

Emblematic of the maturation of school-finance litigation and research, the authors also appear to agree that "money matters," so long as it is spent efficiently on the appropriate resources. For years, a standard state defense against constitutional challenges to their school-finance systems and a routine subject of judicial inquiry was that plaintiffs could not prove causation because there was no evidence that educational spending affected student achievement.<sup>16</sup> While it appears that the cost-quality debate has been settled in the broadest sense—few would seriously contend that educational resources have no effect on student outcomes—the debate has shifted to the more nuanced questions of which educational resources affect student attainment and achievement and how we can design a school-finance system that ensures the efficient use of funds.<sup>17</sup>

Further evidence of the coming-of-age of school-finance policy research and advocacy is the agreement among the camps that additional educational resources must be allocated to students of greater need and that school-finance formulas should account for those needs. While Rebell has long been a proponent of so-called "vertical equity" in school funding (i.e., ensuring that differently situated students receive different funding based on

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16. Rebell notes that "[t]he courts have also grappled extensively with the question of whether money matters in education." Rebell, p. 34. He goes on to state that twenty-nine of the thirty state supreme court cases that directly considered the issue of whether money matters either explicitly or implicitly found that "funding affects educational opportunity and achievement." Rebell, p. 34.

17. The authors appear to differ on the degree of policy reform necessary to ensure better use of funding. While Hanushek and Lindseth advocate for a comprehensive package of interlocking policy reforms that would aim to ensure that funding be tied to performance and thereby increase efficient spending, Rebell does not believe that Hanushek and Lindseth's fundamental reform package would ever be adopted and accordingly would not hold funding reform hostage to the passage of that package.

their greater need), Hanushek and Lindseth also propose a “needs-adjusted base funding” system (Hanushek & Lindseth, p. 253) that “link[s] funding to individual students, with extra funding provided based on environmental factors” (Hanushek & Lindseth, p. 251), including the needs of “students with special needs, with economic disadvantages, and with language deficits.”<sup>18</sup> This is no small point of convergence, because current funding systems may provide earmarked, categorical funding to support diverse learning needs. As Hanushek and Lindseth note, however, “[c]ategorical funding sometimes relates to individual needs . . . but more often relates to specific uses of funds, such as smaller class sizes, the use of guidance counselors, or the purchase of new textbooks” (Hanushek & Lindseth, p. 253). Put simply, a needs-based base-funding system would better target those students requiring additional resources, while providing added spending flexibility to local school administrators. Of course, thorny issues concerning which needs should be recognized and how much those needs should affect the base-funding formula remain, but the agreement to recognize student needs is a significant achievement.

Beyond the consensus that money well spent matters, equally noteworthy is the apparent agreement that money alone may not be enough. Over the past decade or so, a good deal of Hanushek’s educational-policy work has concentrated on outcomes-based, performance-based state and district policies that reward teachers and administrators for improving student achievement and attainment, while sanctioning those who fail.<sup>19</sup> *Schoolhouses, Courthouses, and Statehouses* is the summation of that work and calls for a comprehensive performance-based funding scheme that goes far beyond funding to outcomes-based assessment and accountability for performance coupled with greater parental and local administrative decision-making autonomy and flexibility (Hanushek & Lindseth, Chapter Eight). In many respects, contemporary educational policymaking has been sympathetic to Hanushek’s vision. The standards-based reform movement, which calls for the establishment of outcomes-based educational content standards for what all children should know and be able to do in certain core subject areas, the alignment of assessments and performance reporting to those standards, and the further alignment of curriculum, teacher training,

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18. Hanushek & Lindseth, p. 254. More succinctly, they acknowledge that “[s]chool funding policies must recognize the underlying heterogeneity of students and their educational challenges and ensure that all schools have the means to succeed.” Hanushek & Lindseth, p. 218.

19. See ERIC A. HANUSHEK WITH CHARLES S. BENSON ET AL., *MAKING SCHOOLS WORK* (1994) (describing and recommending a performance-based system for school reorganization); Eric A. Hanushek & Margaret E. Raymond, *Sorting Out Accountability Systems*, in *SCHOOL ACCOUNTABILITY* 75 (Williamson M. Evers & Herbert J. Walberg eds., 2002) (arguing for a system of school accountability); Eric A. Hanushek & Margaret E. Raymond, *Does School Accountability Lead to Improved Student Performance?*, 24 *J. POL’Y ANALYSIS & MGMT.* 297 (2005); Eric A. Hanushek, *Outcomes, Incentives, and Beliefs: Reflections on Analysis of the Economics of Schools*, 19 *EDUC. EVALUATION & POL’Y ANALYSIS* 301 (1997) (highlighting key aspects of educational policy analysis); Eric A. Hanushek, *Applying Performance Incentives to Schools for Disadvantaged Populations*, 29 *EDUC. & URB. SOC’Y* 296 (1997) (suggesting a performance-based system for the reorganization of schools).

and professional development and other educational policies with the standards, has taken hold of all state capitals.<sup>20</sup> With the addition of accountability systems, such as those developed to satisfy the federal No Child Left Behind Act,<sup>21</sup> school districts, schools, administrators, teachers, and students are now subject to sanctions (and sometimes rewards) based on their performance on such standards-based tests. While Hanushek and Lindseth's proposal would go further toward tying funding to performance, there is no doubt that outcomes-based accountability has become embedded in educational policy.

Rebell has by no means ignored this development and appears to have embraced certain aspects of it. His "successful remedies" model for educational reform litigation demands both the establishment of "challenging academic content and performance standards that define in concrete terms the content of a sound basic education"<sup>22</sup> and the development of "instructional programs and accountability mechanisms that will provide all students with meaningful educational opportunities" (Rebell, p. 57). Although Rebell appears to advocate for standards, programs, and accountability, and would require courts to police legislative school reform efforts to ensure that challenging outcomes standards are established and effective programs and accountability systems are implemented, he is much less specific on the policy details, particularly on what he means by "accountability systems," than Hanushek and Lindseth. Rather, Rebell argues for a process-based system of court-overseen school reform instead of specific substantive educational policies like those Hanushek and Lindseth propose.

With those broad areas of consensus in hand, let the fight commence with the obligatory tap of the gloves at center ring.

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20. See MILBREY W. McLAUGHLIN & LORRIE A. SHEPARD, *IMPROVING EDUCATION THROUGH STANDARDS-BASED REFORM 1-2* (1995); Jennifer A. O'Day & Marshall S. Smith, *Systemic Reform and Educational Opportunity*, in *DESIGNING COHERENT EDUCATION POLICY: IMPROVING THE SYSTEM* 250, 270 (Susan H. Fuhrman ed., 1993) (describing standards-based reform as "[t]he approach most often suggested" to the problem of inequitable distribution of educational resources).

21. No Child Left Behind Act, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified at 20 U.S.C. §§ 6301-6578).

22. Rebell, p. 57. Indeed, Rebell argues that "new state standards [have] provided the courts with practical tools for developing judicially manageable approaches for dealing with complex educational issues" and have "provided judges with workable criteria for crafting practical remedies in these litigations." Rebell, p. 20. It should be noted that the extent to which state content standards have influenced judicial decision making has been debated. See James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1224 (2008) ("[T]he nascent conventional wisdom about the relationship between standards and school finance litigation is wrong not just once but twice.").



## II. AREAS OF DISAGREEMENT (OR, THE FIGHT)

Right at the bell the fighters come out swinging.<sup>23</sup> The authors disagree vehemently on whether the judiciary has a legitimate and effective role to play in the reform of public schooling. In this Part, I will first assess the competing positions regarding judicial intervention in educational policy-making and then consider the disagreement on the extent to which current educational research can and should guide the inquiry on educational reform.

### A. *The Courts, the Legislatures, and School Reform*

In the wake of the so-called “third wave” of school-finance litigation and the success of the adequacy argument in state supreme courts, the once white-hot debate over “judicial activism” in educational policymaking and practice (think desegregation litigation) has rekindled. In the last four years alone at least five full volumes have been published on the subject,<sup>24</sup> most of which are skeptical, if not highly critical, of court intervention. *Courts &*

23. Witness this testy—though respectful—exchange in the journal *Education Next*. In response to Rebell’s critique of their performance-based funding proposal, Hanushek and Lindseth assert that “[n]otwithstanding his obfuscation, Michael Rebell’s solution is essentially more of the same,” while Rebell replies to Hanushek and Lindseth with the following: “If I didn’t know that Rick Hanushek was an outstanding economist and that Al Lindseth was a master litigator, I would think from some of the provocative phrases they use in their writings that they were sensationalist journalists, looking to attract readers with shocking but misleading headlines and catchphrases.” *Forum: Many Schools are Still Inadequate: Now What?*, *supra* note 5, at 46.

24. FROM SCHOOLHOUSE TO COURTHOUSE, *supra* note 5; COURTING FAILURE, *supra* note 15; SCHOOL MONEY TRIALS (Martin R. West & Paul E. Peterson eds., 2007); and the two works discussed in this Review.

For earlier critiques of judicial intervention in educational policy making, see DAVID J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW (1995); RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); LINO A. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND SCHOOLS (1976); Nathan Glazer, *Towards an Imperialist Judiciary?*, 41 PUB. INT. 104 (1975).

More recently, Professors William Simon, James Liebman, and Charles Sabel have developed a theory of democratic governance, which they dub “democratic experimentalism,” in which the judiciary may play the role of first destabilizing the institutional status quo (that has not served the needs and interests of disadvantaged children) and then working toward reform through ongoing stakeholder negotiation, evolving measures of performance that address dynamic conditions on the ground, and transparency to the stakeholders and the public. See James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183, 207, 278–83 (2003); Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1016–28, 1098 (2004); see also Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) (discussing the theory of democratic experimentalism in the context of schools); Kathleen G. Noonan et al., *Legal Accountability in the Service-Based Welfare State: Lessons from Child Welfare Reform*, 34 LAW & SOC. INQUIRY 523 (2009) (setting forth Quality Service Review as an experimentalist solution to child welfare administration). To date, although the literature surrounding the judicial role in experimentalist governance is modest, it has drawn significant criticism in David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PA. L. REV. 541 (2008). For a recent discussion of judicial experimentalism in educational policymaking, see William S. Koski, *The Evolving Role of the Courts in School Reform Twenty Years After Rose*, 98 KY. L.J. 789 (2009–2010). But see R. Craig Wood, *Justiciability, Adequacy, Advocacy, and the “American Dream”*, 98 KY. L.J. 739 (2009–2010).

*Kids vs. Schoolhouses, Courthouses, and Statehouses* could serve as closing arguments in that rekindled debate. While Rebell recognizes that courts alone cannot produce meaningful educational reform (Rebell, p. 88), he nonetheless calls for a robust role for the courts in educational policy-making—a “functional” separation-of-powers model that recognizes and capitalizes on the relative institutional strengths of the three branches of government (Rebell, Chapters Four & Five). Citing “the courts’ principled approach to issues and their long-term staying power” (Rebell, p. 55), as well as their “inherent constitutional responsibilities” (Rebell, p. 57), Rebell calls for a judicial role in ensuring the development and implementation of educational reform measures (Rebell, p. 57). In contrast, while Hanushek and Lindseth don’t completely reject any role for the courts,<sup>25</sup> they argue for a bare minimalist approach: “[I]f the court abuses its power and intrudes in areas reserved to the other branches, there is no ‘check’ within the constitution itself to bring the courts back into the fold. . . . Therefore, the potential of judicial ‘tyranny’ from adequacy suits is very real . . . .” (Hanushek & Lindseth, p. 99).

As for who won this judicial activism debate, it depends on what one means by “winning.” Without settling the matter, this Section analyzes the authors’ respective arguments by testing them against four (sometimes overlapping) objections to judicial intervention in social policymaking: (1) separation of powers requires courts to defer to the political branches in educational policymaking; (2) conceptual indeterminacy dooms efforts of courts to intervene in educational policymaking; (3) courts lack the institutional capacity to design and implement effective school reform; and (4) judicial intervention has not been successful as an empirical matter.

### 1. *The Separation-of-Powers Objection*

As the authors all note, a number of courts in the past two decades have declined to review the merits of plaintiffs’ claims that their states’ school funding schemes are unconstitutional under separation-of-powers principles or the political question doctrine.<sup>26</sup> Hanushek and Lindseth do not discuss the extensive scholarly treatments of the countermajoritarian dilemma, opting instead to simply quote Hamilton’s *Federalist No. 78* for the abstract principle that the judiciary possesses neither the power of “the sword [n]or

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25. Hanushek & Lindseth, pp. 285–87. Hanushek and Lindseth recognize that courts “could empower legislators to address politically sensitive problems that otherwise would likely remain as obstacles to effective school reform,” Hanushek & Lindseth, p. 285, and that courts possess relative strengths in evidence gathering, but the authors would have that function focused on making specific findings of mismanagement, waste, inefficiency, and other harmful external influences when declaring a state’s educational system unconstitutional, Hanushek & Lindseth, pp. 285–86. Having done that, “the court’s work is complete, and the fashioning of an appropriate remedy is for the legislative and executive branches.” Hanushek & Lindseth, p. 287.

26. Hanushek & Lindseth, pp. 100–05; Rebell, pp. 22–24. Rebell counts seven states that dismissed cases on separation of powers, political question, or judicial manageability grounds. Rebell, pp. 22–23.

the purse.”<sup>27</sup> For that reason, their theoretical argument against court involvement seems thin, particularly compared to Rebell’s more robust treatment of the subject. Rebell grounds his argument in favor of court intervention in a critique of the doctrinal underpinnings of the political question doctrine (Rebell, pp. 23–25) and, relying on John Hart Ely’s famous case for judicial review,<sup>28</sup> a relatively robust theoretical case for the judiciary’s authority and obligation to enforce positive state constitutional rights, such as the right to a “sound basic education” and to “correct malfunctions of the political process” where minority rights are compromised at the hands of electoral majorities (Rebell, pp. 50–52). To the extent that the primary objection to judicial intervention in educational policymaking is one of political theory and legal doctrine, Rebell would have the better of the matter, but that is hardly the authors’ only concern about the courts.

## 2. The Standards Objection

Rebell contends that courts, which must interpret constitutional terms such as “adequate” or “sound basic” education in their states’ education articles, are capable of applying these concepts in school reform litigations (Rebell, pp. 17–18). Others, like Hanushek and Lindseth, counter that such language provides courts with no clear principles or standards to guide the development of school reform policies.<sup>29</sup> As Frank Michelman famously argued, such conceptual indeterminacy can stymie judicial intervention because reform proceeds without coherence or clear objectives.<sup>30</sup> Indeed the quest for a unified theory of equality of educational opportunity has bedeviled scholars, judges, and lawyers since the inception of equity-finance-

27. See Hanushek & Lindseth, p. 97 (quoting THE FEDERALIST NO. 78, at 412 (Alexander Hamilton) (J.R. Pole ed., 2005)).

28. JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

29. Hanushek & Lindseth, pp. 118–28. For a discussion of the courts’ deployment of constitutional language in education finance reform cases, see William S. Koski, *Of Fuzzy Standards and Institutional Constraints: A Re-examination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 SANTA CLARA L. REV. 1185 (2003).

30. See Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969). John Coons wrote:

The standards problem is essentially one of achieving intelligibility. If the present state financing systems are condemned, it is not enough simply to declare them invalid. If the court hopes to generate the consensus necessary to meaningful change it must identify with reasonable clarity the locus and nature of the constitutional defect. Society cannot or will not respond to canons incapable of communication. . . . Unless the court can find an effable essence, its judgments tend to be ad hoc and unpredictable, qualities which in the school finance case will evoke nothing but criticism of the court and evasion by the legislatures.

JOHN E. COONS ET AL., PRIVATE WEALTH AND PUBLIC EDUCATION 290–91 (1970); see also Martin R. West & Joshua M. Dunn, *The Supreme Court as School Board Revisited*, in FROM SCHOOLHOUSE TO COURTHOUSE, *supra* note 5, at 15 (“And when courts do engage in policymaking, they should strive to contain the pernicious effects of litigation by offering clear standards that minimize legal uncertainty.”).

reform litigation through to the modern adequacy movement.<sup>31</sup> In response to this “standards objection,” neither book attempts a comprehensive theory of educational opportunity; rather, both look at the same guideposts for reform and draw different conclusions.

Hanushek and Lindseth argue that the complex educational research, policy, and practice questions that must be answered to come up with an operational definition of “adequacy” doom the entire judicial educational-policy-making enterprise (Hanushek & Lindseth, pp. 118–28). What are the appropriate educational outcomes? What educational resources are correlated with educational outcomes? How much of those resources is enough? None of these is answerable with any degree of certainty, they argue. Consequently, courts cannot and should not be involved in dictating a standard for adequacy. Not to worry, responds Rebell: legislatively authorized state content standards “put into focus the fundamental goals and purposes of our system of public education” (Rebell, p. 20), and those standards provide courts with the politically recognized specific expectations and outcomes measures needed to develop appropriate remedies in school reform cases (Rebell, p. 59). But those standards are frequently mere aspirations (Hanushek & Lindseth, p. 119), are not intended to guide constitutional decision making (Hanushek & Lindseth, p. 120), and cannot be reliably linked with specific educational resources to be of any remedial guidance,<sup>32</sup> Hanushek and Lindseth reply.

So, this standards debate ultimately resolves itself into a debate over whether legislatively mandated standards for what all children should know and be able to do can, as a matter of judicial command, reliably guide educational-resource distribution. In Chapter Seven of their book, Hanushek and Lindseth unequivocally say “no,” while Rebell argues that in the complex world of educational governance and policy, it is appropriate for courts to use those standards as guideposts for continuous improvement, even if scientific certainty is elusive. More on this in a moment.

### 3. *The Judicial Capacity Objection*

Hanushek and Lindseth argue that, as institutions and decision-making bodies, courts have neither the expertise nor the capacity to design and implement effective remedies for educational failure. Building on their argument that there are no workable standards for judicial remedies, they forcefully argue that the courts therefore tend toward “spending remedies

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31. See COONS ET AL., *supra* note 30 (proposing a scheme to equalize educational quality between children of disparate socioeconomic backgrounds); ARTHUR E. WISE, *RICH SCHOOLS POOR SCHOOLS* (1968) (considering whether states offering uneven educational opportunities systemwide violate the Equal Protection Clause); David L. Kirp, *The Poor, the Schools, and Equal Protection*, 38 HARV. EDUC. REV. 635 (1968) (arguing that states are constitutionally obliged to ensure children equal educational outcomes); William S. Koski & Rob Reich, *When “Adequate” Isn’t: The Retreat From Equity in Educational Law and Policy and Why It Matters*, 56 EMORY L.J. 545 (2006) (claiming equality, not adequacy, should be the goal of educational policy).

32. See Hanushek & Lindseth, chapter 7 (concluding that the cost and methods required to make education adequate are unknown).

because they believe they will work and because they are the easiest to monitor and enforce” (Hanushek & Lindseth, p. 138). They go on to criticize generalist judges for their lack of educational-policy expertise, their limited access to information in a trial setting, and their reliance on distorted adversarial evidentiary presentations to develop remedies (though some of those presentations are hardly adversarial, Hanushek and Lindseth point out quite sagely; instead, they are wink-and-nod agreements to plunder the state treasury) (Hanushek & Lindseth, pp. 139–41).

Rebell meets this objection head-on in two different ways. He first points out that modern courts have developed processes and organizations to both formulate and administer complex reform decrees (Rebell, pp. 9–14). Courts have become adept at sifting through complex and contradictory social science evidence. Indeed, given the access to information parties enjoy during the discovery phase, two scholars have argued that judicial investigation into complex educational-finance issues may, at times, exceed the investigations of researchers.<sup>33</sup> Although Rebell does not specifically mention it, I note that even after the remedial decree is handed down (whether by consent or judicial fiat), courts employ numerous administrative structures to monitor and enforce their remedial schemes. These include monitoring committees that may be composed of party representatives, magistrates, and masters, who may be charged with resolving disputes or tweaking remedial schemes; and monitors who evaluate progress toward compliance with those decrees.

Rebell’s second response to the capacity objection is, to be blunt, “compared to what?” This is the heart of his case for a principled and pragmatic judicial role in educational policymaking and governance—that courts possess unique institutional attributes that make them well suited to making certain types of educational-policy decisions, particularly when compared to the legislative and executive branches (Rebell, pp. 48–55). This comparative institutional analysis reveals that courts have the staying power to pursue educational reform, a notoriously long and arduous process (Rebell, p. 50). He further argues that the judiciary’s relative political independence makes it more likely to advance equitable remedies in the face of majoritarian politics. And the courts’ rational, analytic, and evidence-based decision-making method make them well suited to guiding rational, long-range reform efforts. Of course, this process must be done in “colloquy” with the political branches (Rebell, p. 52), particularly legislatures, which are better suited to making the delicate tradeoffs on specific policies; and executive agencies, which are better suited to day-to-day implementation on the ground. “When disputes arise on whether specific mechanisms are, in fact, meeting constitutional requirements, judicial fact-finding mechanisms should be invoked” (Rebell, p. 55). In other words, there is a proper judicial role in Rebell’s functional separation-of-powers model of public education reform.

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33. See Clive R. Belfield & Henry M. Levin, *The Economics of Education on Judgment Day*, 28 J. EDUC. FIN. 183, 205 (2002) (arguing that courts’ rulings may offer direction to researchers).

Modern public law litigation is far from the ham-handed command-and-control model of judicial intervention that was often justly criticized during the desegregation era.<sup>34</sup> Courts have learned from that experience and have developed both the internal administrative mechanisms and a proper awareness of their institutional limitations that permit them to play a productive role in institutional reform. This is the coming-of-age of school reform litigation in which courts—fulfilling their obligation to ensure that constitutional values, not merely political and economic expediency, are considered in educational policymaking—are playing the more modest role of destabilizing the status quo, reprioritizing the legislative agenda, and providing the political branches with guidance on how to move educational policy in a more equitable direction. Courts act as catalysts and facilitators in what then becomes a political process in which the previously disempowered communities and actors find a place at the table. This experimentalist—or in Rebell’s terms, “functional”—role for the courts is not the outdated and caricatured image of courts and the judicial process that many court critics deploy.

Moreover, Hanushek and Lindseth—though hardly overstating the effectiveness of legislative reform<sup>35</sup>—do not fully acknowledge the failures of the legislative and executive branches in ensuring equal and meaningful educational opportunities for all children. Rather, in claiming the superiority of the legislative process in developing remedies for school failure, they state that courts “do not have staff members with educational expertise at their disposal, in contrast to legislative bodies, which through their various senate and house committees and their permanent staffs, can draw upon a wide range of experience and expertise in complex education policy and finance issues” (Hanushek & Lindseth, p. 139). Two responses: (1) this, as noted, fails to recognize the fact-finding capabilities of courts, and (2) it appears to stylize the actual workings of harried, sometimes part-time state legislators and their overtaxed staffers. Beyond their staffing argument, and a modest defense of the legislative school appropriations process,<sup>36</sup> Hanushek and Lindseth have not made the case that legislatures and executive branches alone will ensure appropriate educational policies most of the time.

Perhaps equally important, state court judges in many school reform litigations appear to be keenly aware of their comparative institutional

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34. See Sabel & Simon, *supra* note 24 (discussing the evolution of the experimentalist model of public law litigation from the older idea of bureaucratic judicial intervention). It’s also worth noting that many criticisms of the judiciary’s intervention in social policymaking are better aimed at the federal courts and simply don’t apply to either state supreme courts or the different form and function of state constitutions.

35. In Chapter Three, “The Political Responses,” Hanushek and Lindseth describe the uneven success of legislatively driven school reform in the last few decades. Hanushek & Lindseth, chapter 3.

36. See Hanushek & Lindseth, pp. 264–66. One might also question their claim that “[e]ach state knows the base cost of operating K-12 schools from prior budgets.” Hanushek & Lindseth, p. 265. In many states, such as California, the legislatures have never made rigorous determinations in their prior budgets regarding the “base cost” of public education and therefore base current and irrational budgets on past irrational budgets.

strengths and know when to stay the course and when to stand aside to allow the political system to operate. Take, for example, the Massachusetts litigation.<sup>37</sup> In 1993, the court struck down the commonwealth's school finance system and the legislature responded with a robust set of reforms, including "large infusions of money into property-poor districts along with the introduction of rigorous standards, graduation exams, and overall accountability" (Hanushek & Lindseth, p. 167). This policy reform resulted in achievement gains, particularly among Hispanic students (Hanushek & Lindseth, pp. 168–70). In 2005, when the court was again asked to review the constitutionality of the finance system, it cited the achievement gains, and refused to intervene.<sup>38</sup> One interpretation of this is that the court found its proper role in educational-policy reform.<sup>39</sup>

#### 4. *The Judicial Ineffectiveness Objection*

Twenty years into the adequacy movement and some forty years into school-finance-reform litigation generally, it is fair to ask whether judicial involvement works. Here the authors diverge not only on their presentation and interpretation of evidence, but also on the standard for success.

Following in the tradition of "judicial impact" research in school finance,<sup>40</sup> Hanushek and Lindseth analyze observable educational outcomes—primarily fourth grade reading and math and eighth grade math achievement on the National Assessment of Educational Progress ("NAEP")—in four states that were subject to judicial decisions striking down the states' respective school-finance systems sufficiently long ago such that any results would have taken hold (Hanushek & Lindseth, Chapter Six). In three of those four states—Kentucky, Wyoming, and New Jersey<sup>41</sup>—they show that, from

37. *Hancock v. Comm'r of Educ.*, 822 N.E.2d 1134 (Mass. 2005); *McDuffy v. Sec'y of the Exec. Office of Educ.*, 615 N.E.2d 516 (Mass. 1993).

38. *Hancock*, 822 N.E.2d at 1138–39.

39. Oddly enough, Hanushek and Lindseth effectively concede the success of judicially sparked reforms in Massachusetts, Hanushek & Lindseth, pp. 168–70, while Rebell laments the court's failure to stay the course and intervene a second time, Rebell, pp. 78–80.

40. Due to the complexity of establishing appropriate metrics for whether judicial intervention works, the knotty methodological problems in isolating the effects of courts, and the unclear causal paths through which judicial intervention and the threat of judicial intervention operate, the literature on judicial impact in educational-policy reform remains largely inconclusive and only tentatively conclusive in regard to specific outcomes. For an excellent discussion of the research-design challenges in examining the nature and effects of judicial intervention in educational-finance policy, see Bruce D. Baker & Kevin Welner, *School Finance and Courts: Does Reform Matter, and How Can We Tell*, 113 *TCHRS. C. REC.* (forthcoming 2011).

41. New Jersey is the lightning rod for the educational-finance-reform-litigation debate. Commencing with the *Robinson v. Cahill* litigation of 1973, 355 A.2d 129 (N.J. 1976), through the *Abbott* litigation that has consumed the better part of three decades, see, e.g., *Abbott ex rel. Abbott v. Burke*, 1 A.3d 602 (N.J. 2006); *Abbott ex rel. Abbott v. Burke*, 575 A.2d 359 (N.J. 1990); *Abbott v. Burke*, 495 A.2d 376 (N.J. 1985), New Jersey has witnessed near-continuous judicial involvement in educational policymaking and educational finance, with the courts not only calling on the legislature to reform funding equity and adequacy, but in some instances ordering that specific programmatic reforms be adopted. Hanushek & Lindseth, pp. 109–11, 157–66. Such judicial intervention evokes strong reactions, ranging from supporters' touting of test-score gains, judicial tenacity, and new

1992 to 2007, achievement did not grow any faster (and, in some places, grew slower) than the nation as a whole.<sup>42</sup> In Massachusetts, the fourth state, they acknowledge the quicker pace of growth among white and Hispanic students, while pointing out the mixed success of African American students (Hanushek & Lindseth, pp. 166–70). While one could quibble with the methodological choices they made,<sup>43</sup> Hanushek and Lindseth are very clear about their definition of “success” (raised achievement), while applying reasonable methods to available data to determine the extent of success. Their reliance on student achievement as an outcome measure is also based on the compelling case they make in Chapters One and Two for the link between achievement and various important life outcomes for individuals and the well-being of the nation generally. Even so, demonstrating that judicial intervention in three states did not unequivocally improve NAEP scores in fourth grade reading and math and eighth grade math cannot be dispositive on the question of court efficacy. Nor does it address the question whether litigation or threatened litigation has catalyzed reform in literally dozens of states—reform that has enhanced and may further enhance educational outcomes.

Rebell, however, in his second chapter—“Defining Success in Sound Basic Education Litigations”—does not specifically identify how success should be measured, but rather opts for a process orientation toward defining success. There he first rehashes the treadworn arguments over whether money matters (Rebell, pp. 30–34). (It does, if well spent.) He then criticizes the sole reliance on test scores as a measure of success (Rebell, pp. 35–37). (Agreed.) Then, as the suspense builds, he stops short of providing a specific definition of success:

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programs for the poor *Abbott* districts, see Alexandra Greif, *Politics, Practicalities, and Priorities: New Jersey's Experience Implementing the Abbott V Mandate*, 22 *YALE L. & POL'Y REV.* 615, 623 (2004) (describing responses to *Abbott* decisions), to detractors' belief that “New Jersey is a good example of the problems inherent in [judicial] remedies” because, “[a]s expected, this financial effort has led to more resources and programs for the schools but has done little to bring about higher achievement,” Alfred A. Lindseth, *The Legal Backdrop to Adequacy*, in *COURTING FAILURE*, *supra* note 15, at 63–64.

42. Hanushek & Lindseth, pp. 147–66. It should be noted that Rebell implicitly disputes Hanushek and Lindseth's conclusions regarding the Kentucky and New Jersey litigations and points to several studies that demonstrate achievement gains in both of those states following implementation of judicial remedies. Rebell, p. 35 & nn.28–30. In addition, Professors Baker and Welner employ different methodologies and data to suggest that the courts were more successful in Kentucky and New Jersey than Hanushek and Lindseth posit. Baker & Welner, *supra* note 40.

43. For instance: (1) except for Wyoming, they did not account for the effects of actual or threatened educational-finance litigations or funding increases in other states (which may have raised the aggregate NAEP scores of other states), other actors that may have influenced achievement within the four states (e.g., other policy choices), and differing characteristics of the states during the relevant time period; (2) the three test scores—fourth grade math and reading and eighth grade math—upon which they rely are limited and may not be appropriate measures where finance reform was targeted at only a subset of the state's students, as was the case in New Jersey; and (3) they may not have selected the appropriate or sufficient number of years that would reflect the effects of the school-finance judgments. Baker and Welner sharply criticize the methodologies and findings of Hanushek and Lindseth, arguing that their critique “illustrate[s] that [Hanushek and Lindseth's] relatively superficial approach is not robust or reliable and that different stories may easily be told with much the same data.” Baker & Welner, *supra* note 40, at 25.



[U]ltimately the measure of success for constitutional purposes—and indeed for all purposes—must be whether the state has succeeded in establishing and maintaining an educational system that provides meaningful educational opportunities to all students and graduates students who have the knowledge and skills needed to function as capable citizens and productive workers. And in the end, whether the state has provided its students with such a sound basic education is a judgment question that must be based not only on the available, but inherently limited, indicators of student outcomes but also on an assessment of the appropriateness and effective use of the standards, resources, and other inputs into the system and whether the systems in place are likely to prepare students to function productively in a modern, diverse society. (Rebell, pp. 37–38)

(Who could argue with that proposition, stated so vaguely?) Rather than providing specifics as to the measures of success, Rebell instead makes the case for a process orientation to these questions in which the judiciary serves as the body that makes specific determinations regarding the legislature's pursuit of the abstract outcomes he identifies. (Perhaps this is why he uses the gerund "Defining" in the title of the chapter, which suggests an ongoing process.) No doubt this is a productive proposal for approaching the process of remedying educational failure and a process orientation is quite comfortable territory for courts, but it does little to advance the specifics of how we gauge success.

This round cannot be called. Depending upon one's views of the judiciary's role, its capacity to develop and implement remedial measures, and the evidence of judicial efficacy, the authors present compelling cases to support either side.<sup>44</sup> What is most telling, however, is that neither book rejects judicial involvement wholesale. Rather, common ground might be found in defining a narrow and effective role for courts to play.

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44. The Supreme Court couldn't reach unanimity regarding these authors' works either. In last term's *Home v. Flores*, a decision concerning the remedial order in a lawsuit brought against Arizona under the federal Equal Educational Opportunities Act of 1974, Justice Alito's majority opinion cited *Schoolhouses, Courthouses, and Statehouses* approvingly and stated in dicta that "[t]he weight of research suggests that these types of local reforms, much more than court-imposed funding mandates, lead to improved educational opportunities." 129 S. Ct. 2579, 2604 & n.19 (2009). The majority also cited two other Hanushek works and stated that there is "a growing consensus in education research that increased funding alone does not improve student achievement," and "[e]ducation literature overwhelmingly supports reliance on accountability-based reforms as opposed to pure increases in spending." *Id.* at 2603 & n.18. In response, Justice Breyer's dissent cites Michael Rebell's *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1480 (2007), and states:

[The majority] does say, earlier in its opinion, that some believe that "increased funding alone does not improve student achievement," and it refers to nine studies that suggest that increased funding does not always help. I do not know what this has to do with the matter. But if it is relevant to today's decision, the Court should also refer to the many studies that cast doubt upon the results of the studies it cites.

*Home*, 129 S. Ct. at 2628 (Breyer, J., dissenting) (citations omitted).

### B. *The Role of Science in Decision Making*

What level of scientific certainty is necessary for remedial educational-policy decision making? The answer to this question appears to drive much of Hanushek and Lindseth's concern that courts and their typical remedies of no-strings-attached additional funding or specific programmatic mandates are not up to the task of fixing failing schools. *Schoolhouses, Courthouses, and Statehouses* provides a thoroughgoing critique of the state of educational research and, more specifically, the so-called "costing out" or "cost" studies that frequently are introduced in or ordered by school-finance-reform litigations. Put simply, Hanushek and Lindseth forcefully argue that "[w]hile science is potentially a source of reliable, objective information about programs and their expense, applying scientific methods to complex educational and funding decisions is fraught with problems" (Hanushek & Lindseth, p. 171). As a result, they are concerned that judges (and legislators!) presented with studies based on suspect methodologies, limited data, and biased authors will make bad policy decisions.

Hanushek and Lindseth aim most of their punches at cost studies.<sup>45</sup> Those studies are frequently relied upon in crafting remedies in school-finance cases and are designed to systematically analyze the costs of the resources that are needed to ensure the provision of an adequate education or implement state standards effectively. Although Hanushek and Lindseth identify four distinct methodologies employed in cost studies, the basic divide is between professional-judgment models and those that employ statistical methodologies to estimate the costs of an adequate education. "Professional judgment" studies convene panels comprised of educators, administrators, and other experts to develop a basket of educational resources that would be necessary for a school or district to provide students with an adequate education and then place a price tag on those resources. Hanushek and Lindseth's primary objection to these studies is that they do not consider the source of the revenues for their model schools and therefore result in inefficiently high cost estimates (Hanushek & Lindseth, p. 178). Put simply, "[w]ith no incentive to be mindful of costs in coming up with their model school, panel members tend to go on a shopping spree and order everything their hearts desire" (Hanushek & Lindseth, p. 179). A variant, or sometimes add-on, to the professional judgment approach is the evidence-based approach in which expert consultants identify specific research-based programs and services for the model school that are necessary to achieve adequacy. But that method similarly leads to inefficient cost estimates (Hanushek & Lindseth, p. 186).

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45. Hanushek & Lindseth, pp. 173–200. Hanushek has critiqued cost studies elsewhere. See Hanushek, *supra* note 15, at 257; Eric A. Hanushek, *The Alchemy of "Costing Out" an Adequate Education*, in *SCHOOL MONEY TRIALS*, *supra* note 24, at 77. Rebell responds to many of those critiques and offers specific suggestions for improving cost studies in Michael A. Rebell, *Professional Rigor, Public Engagement and Judicial Review: A Proposal for Enhancing the Validity of Education Adequacy Studies*, 109 TCHRS. C. REC. 1303 (2006).

The second broad type of cost study—composed of the successful schools and cost function approaches—uses actual student achievement data and educational expenditure data to estimate the costs of achieving proficiency on state standards, while adjusting for the additional costs of educating children who either live in poverty or have language or special education needs. While somewhat warmer toward these methods, Hanushek and Lindseth argue that they too fail because of the inability to correlate spending with outcomes and because the “black box” nature of the statistical analyses do not identify any set of policies, personnel decisions, or the like, that contribute to success (Hanushek & Lindseth, pp. 191–92).

Beyond their critique of studies seeking to put a price tag on adequacy, Hanushek and Lindseth argue that it is inappropriate to base policy decisions that would mandate the use of particular educational programs or strategies on limited or unreliable research (Hanushek & Lindseth, pp. 200–11). Here they go after two of the sacred cows of educational-reform advocates—class size reduction and preschool. While they do not argue that these policies and programs are not helpful or essential, they do argue that the limited research into their efficacy and the failure to have implemented these strategies in an appropriate manner have created inefficiencies and even adverse, unintended consequences. Again, Hanushek and Lindseth caution against the misuse of available scientific evidence in the policymaking process.

Rebell, on the other hand, would not hold policymakers hostage to the scientific certainty that Hanushek and Lindseth would demand (Rebell, pp. 64–67). While acknowledging the imperfections of cost studies, he nonetheless argues that courts and legislatures should look to those studies because they are better than the alternative of doing nothing and maintaining the status quo of failure. Moreover, Rebell touts the transparency of the cost studies’ methodologies (a debatable proposition given the opacity of the cost-function and successful schools approaches) and argues that the courtroom crucible helps to ensure the integrity of these methods (Rebell, pp. 66–67). With that latter point, Hanushek and Lindseth would disagree, arguing that the legislative and judicial processes lack scientific checks and balances. They would prefer that cost studies and other policy research be subjected to “the continuing dialog within disciplines, the scientific peer review system, and the mores of science work” (Hanushek & Lindseth, p. 212).

This dispute may be an irresolvable culture clash over the appropriate choice of institutions. Rebell, a courtroom lawyer and advocate, is clearly more comfortable with the hurly burly of the courtroom and the legislative chamber and the outcomes of those processes. Indeed, his faith in the adversarial justice system makes him favor the policy “truth” that comes from that process over others. Hanushek (and I say only Hanushek here, as Lindseth is a lawyer) is a social scientist and is more comfortable with decision making based on the certainty that science demands. But even Hanushek is pragmatic in the end. He recognizes that policymaking will be

paralyzed if programmatic and funding decisions must await the final judgment of the peer review process. Instead, he proposes a performance-based funding model that would reward good policy and programs and weed out the poor performers and bad ideas.

### III. ARGUING PAST EACH OTHER (OR, THE BOB AND WEAVE)

In the fifteenth round of this prizefight, the contenders' punches ultimately miss each other. Having made their case that additional funds alone will not improve America's schools, Hanushek and Lindseth propose a comprehensive and substantive overhaul of educational funding that includes interlocking components aimed at the singular goal of improving student achievement, using economic incentives to get there (Hanushek & Lindseth, Chapter Eight). Although they provide detailed and specific policy proposals to accompany their performance-based funding model, Hanushek and Lindseth identify seven principles of finance and policy reform, many of which are explicitly supported by Rebell, including the establishment of outcomes-based standards and accountability, funding policies that account for student need, and new policies and programs that can be evaluated using ongoing data collection (Hanushek & Lindseth, p. 218). No doubt the differences are in the details, but the broad strokes find some agreement.

Hanushek and Lindseth throw a substantive punch, while Rebell bobs and weaves. He argues for no specific policy reforms. Instead, he proposes a process through which the three branches of government work in collaboration to remedy educational failure by establishing the goals of the educational system, adequate funding, and appropriate programs and accountability mechanisms that will be measured by student performance (Rebell, Chapter Five). Pursuant to this vision, the legislature would be left with the substantive task of establishing the goals, funding, and programs, while the judiciary would oversee the performance of the legislature and students over a period of time.

Hanushek and Lindseth duck this process punch, but they do recognize a role for the courts. Although they are clearly wary of court intervention in the form it has taken in the past—throwing money at the problem, in their view—it is clear that they support many of the components of this process and even call for courts to refocus themselves toward substantive school reform (Hanushek & Lindseth, pp. 281–83). The question remains on the extent to which they would allow the courts to participate in ensuring that legislatures fulfill their roles both with regard to policy reforms and funding adequacy.

### IV. CAN WE REACH AGREEMENT ON THE WAY FORWARD? (OR, CALLING IT A DRAW?)

In this championship brawl, there is a surprising amount of agreement—agreement on the need for outcomes-based standards and accountability, agreement on base-funding models that account for student needs, and

agreement on the need to spend money wisely. Yes, there are real disagreements on certain principles—whether the courts have a meaningful and ongoing role to play and the usefulness of costs studies, for instance. But it seems to me that what these fighters need is not a referee, but rather a mediator.

To that end, I propose a resolution for bringing this fight to a conclusive draw. If Michael Rebell can accept certain central tenets of the Hanushek-Lindseth performance-based funding model (a working list might include outcomes accountability, rewards for improved achievement, funding formulas that reduce “gaming,” and data-based program evaluation); and if Rick Hanushek and Al Lindseth can agree that a needs-based costing out of the base education will occur simultaneously with other reforms, and that the courts can supervise and hold the legislature accountable for reform and outcomes where there is unassailable evidence of educational failure, would the contenders agree to sit down and hash out this grand bargain in educational-finance-and-policy reform? Is there a chance that we can call this fight a draw? To Mssrs. Rebell, Hanushek, and Lindseth: consider this an open invitation from me to host this conversation at any time . . . winners take all.