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Courthouse, Statehouse, or Both? Redefining Institutional Roles in School Finance Reform

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INTRODUCTION

For decades, state courts have participated in lawsuits alleging that the school finance systems in their jurisdictions are unconstitutional under state education clauses. Since 1989, plaintiffs have prevailed in twenty out of twenty-nine of these lawsuits.[1] As a result, courts have had the opportunity to pronounce sweeping financial remedies to address the constitutional violations.

Whether or not these lawsuits have been beneficial to children is debatable. Two recent books—*Schoolhouses, Courthouses, and Statehouses*,[2] by Eric Hanushek and Alfred Lindseth, and *Courts & Kids*,[3] by Michael Rebell—provide different perspectives on the issue. This Review describes and analyzes the most critical differences between the authors' arguments.

In Part I, this Review discusses the authors' divergent views on the effectiveness of past judicial remedies in school finance litigation cases. Hanushek and Lindseth argue that cost-studies, which provide the basis for school finance remedies, are flawed and that the financial remedies awarded by courts have not significantly improved student achievement. Rebell, on the other hand, holds an optimistic view of cost studies and believes that student achievement has been positively impacted by these lawsuits.

These perspectives lay the foundation for Part II, which highlights the authors' respective visions of the role courthouses and statehouses should play in subsequent school finance reform efforts. Hanushek and Lindseth see a mini-

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1. MICHAEL A. REBELL, COURTS & KIDS: PURSUING EDUCATIONAL EQUITY THROUGH THE STATE COURTS 17 (2009).

2. ERIC A. HANUSHEK & ALFRED A. LINDSETH, SCHOOLHOUSES, COURTHOUSES, AND STATEHOUSES: SOLVING THE FUNDING-ACHIEVEMENT PUZZLE IN AMERICA'S PUBLIC SCHOOLS (2009).

3. REBELL, *supra* note 1.

mal role for courts in a system of performance-based funding that holds schools accountable for student outcomes, while Rebell champions accountability through the courts.

Despite their differences, the authors find common ground on several fronts. Rebell, Hanushek, and Lindseth are concerned about the educational achievement of all children. Both sets of authors are worried about human capital and our nation's ability to compete in a global marketplace.[4] And both authors do not believe that simply throwing money at the problem will be effective.[5]

Part III attempts to harmonize the authors' proposals by offering a remedial framework in which both courts and legislatures are afforded significant responsibility over school finance remedies. While legislatures are given substantial leeway at the outset of a remedy's implementation, this discretion is subject to students' attaining academic achievement goals set by courts. The proposed framework ensures legislative accountability while largely vitiating separation of powers concerns. It sets a clear remedial principle that will guide legislative decision-making while focusing the attention of future reform efforts on students.

I. The Effectiveness of Remedies in School Finance

The two books are divided sharply on the effectiveness of judicial remedies in school finance cases. Because each book's central thesis is premised on an assumption that judicial remedies have—or have not—produced adequate academic achievement outcomes for children, this Part describes fundamental tensions between the books in two areas: the value of "costing-out" studies that drive remedial decision-making and the extent to which judicial remedies actually have improved these academic achievement outcomes.

A. The Value of Costing-Out Studies

When states are sued for providing inadequate or inequitable educational opportunities under state constitutions, plaintiffs frequently rely on "costing-out" studies.[6] These studies employ professional researchers who use statistical

4. *Id.* at 6; Hanushek & Lindseth, *supra* note 2, at 1-2 (noting that American students are no longer competitive and that they are falling behind children from other developed nations in international achievement rankings).

5. Hanushek & Lindseth, *supra* note 2, at 6 ("A major impediment to effective school reform is that financial decisions have historically been separated from policy decisions about how to improve student outcomes."); Rebell, *supra* note 1, at 7 ("[Courts] need to make clear that compliance is not just a matter of doing better or of adding more money but of achieving a concrete end—a sound basic education—that has specific input and outcome characteristics.").

6. The plaintiffs in the Massachusetts *Hancock* case, for example, provided cost studies to the trial court. *See, e.g.*, Robert M. Costrell, Massachusetts' *Hancock*

methodologies to estimate the cost of providing a constitutionally adequate level of education.

Hanushek and Lindseth devote an entire chapter to critiquing the scientific validity of these studies.[7] Their most fundamental criticism is that the studies do not ensure funds are spent efficiently.[8] Because the cost estimates frequently are based on the professional judgment of survey participants who are encouraged to "dream big" in constructing an education system, they are equivalent to "shopping sprees" in which professionals "order everything their hearts desire, not the minimums actually needed to provide an adequate education."[9] The authors also note the arbitrary nature of calculations in the studies,[10] the absurd results that have emerged from them,[11] and the extremely wide variance in cost estimates across different states.[12] Finally, Hanushek and Lindseth argue that the studies do not show that the cost estimates necessarily will result in academic achievement gains for students.[13]

Hanushek and Lindseth present these arguments cogently and forcefully.[14] Rebell agrees with them to some extent, noting that "[c]ost studies, to the maximum extent possible, should, of course, base their funding estimates on the cost of providing services efficiently and in accordance with current best prac-

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CASE AND THE ADEQUACY DOCTRINE 9-12 (2006), *available at* http://www.hks.harvard.edu/rappaport/downloads/final_hancock.pdf (discussing the professional judgment and successful schools studies presented in *Hancock v. Commissioner of Education*, 822 N.E.2d 1134 (Mass. 2005)). In Missouri, the Missouri Education Coalition for Adequacy (MECA) released the results of a cost study in 2003 prior to litigation efforts in *Committee for Educational Equality v. State*, 294 S.W.3d 477 (Mo. 2009). *See* Nat'l Access Network, Missouri Costing-Out Study Finds $913 Million More Is Needed (Oct. 23, 2003), http://www.schoolfunding.info/states/mo/10-23-03costingout.php3.

7. HANUSHEK & LINDSETH, *supra* note 2, at 171-216.

8. *Id.* at 173.

9. *Id.* at 178-79. Hanushek and Lindseth also point out that the participants who serve on the panels and help the researchers to estimate costs are themselves educators, so this fact furthers their bias toward providing more funding. *Id.* at 180.

10. *Id.* at 189 (discussing the "weightings" that should be added to funding formulas for at-risk and special needs students).

11. *Id.* at 183 (noting that "a study concluded that an average increase in funding of $4,874 per student was needed in Missouri's top twenty-five performing school districts, compared to only $2,551 in its twenty-five lowest performing districts").

12. *Id.* at 198.

13. *Id.* at 173.

14. Whatever Hanushek and Lindseth wish to say about the unreliable nature of cost studies, however, these studies are frequently commissioned—outside the context of litigation—by state governments seeking to reshape their own school finance systems.

tices."[15] Regardless of these studies' methodological flaws, however, Rebell contends that the transparency of costing-out procedures represents a "vast improvement over past practices under which funding allocations were often determined through backroom political deals and had no bearing on actual costs or student need."[16]

Rebell also notes the important role courts have played to ensure the integrity of costing-out studies. Courts, in his view, should embrace this role as they did in Ohio and Texas, where the judiciary unearthed biases and methodological flaws in costing-out studies.[17] Although the studies are not perfect, he argues that judicial oversight has "provided guidance to the development of practice in the field as a whole."[18] Thus, courts will, on Rebell's account, facilitate the improvement of these studies over time. This point is one of pure disagreement among the authors, as Hanushek and Lindseth believe that improvement in studies is facilitated more appropriately by "the continuing dialog within disciplines, the scientific peer review system, and the mores of science work."[19] For them, the judicial process "lacks scientific checks and balances."[20] As this Review argues in Part III, there is merit to both books' arguments. Although the studies have their methodological faults and should not be a primary engine of reform efforts, there is a point at which costing-out studies may be employed usefully to guide legislatures that have been ineffective at implementing school finance reforms.

B. Student Achievement Outcomes

Does money matter? According to Hanushek and Lindseth, it does, but only if the money is spent efficiently and used for programs that are shown empirically to improve student achievement.[21] Building on their arguments about costing-out studies and the inefficient spending that results from their application, Hanushek and Lindseth paint a picture of remedial outcomes resulting from school finance suits that have failed schoolchildren.

Tracing the student achievement test scores of students in Kentucky, Wyoming, New Jersey, and Massachusetts—the four states with the longest court-ordered remedies in place—Hanushek and Lindseth attempt to demon-

15. REBELL, *supra* note 1, at 66.

16. *Id.* at 65.

17. *Id* at 66. *But see id.* at 67 (criticizing the New York Court of Appeals for failing to review a thorough record regarding allegations of improper weightings and manipulations of a cost study).

18. *Id.* at 66.

19. HANUSHEK & LINDSETH, *supra* note 2, at 212.

20. *Id.* at 213.

21. *See id.* at 57 (noting that "money, if spent appropriately, can have a significant effect").

strate the overall ineffectiveness of judicial remedies.[22] They show that, from 1992 to 2007, National Assessment of Educational Progress (NAEP) achievement scores in those states did not grow much more than achievement scores in the nation as a whole.[23] These comparisons show—with the exception of Massachusetts—that states implementing judicial remedies have not realized academic gains as great as one would hope.[24]

Even though Hanushek and Lindseth's methodology is fairly simplistic,[25] Rebell's response to this analysis is largely unsatisfying. He also refers to NAEP score increases in Massachusetts as well as some additional increases in New Jersey, but he does not illustrate how these score increases were an independent result of judicial remedies.[26] Although Rebell effectively argues that "test score measures . . . cannot . . . serve as the sole or even the major indicator of the success or failure of a judicial intervention,"[27] he does not present any other types of empirical evidence to illustrate that court-ordered remedies have been successful. Just as Hanushek and Lindseth fail to provide a meaningful alternative to costing-out studies in their critique, Rebell fails to provide a meaningful alternative method of assessing judicial remedies.

But Rebell likely would argue that he does not necessarily need to provide a purely scientific measure of remedial success. Although outcome indicators such as increased spending on education or higher test scores are important, provision of a sound basic education, to him, is about something more.[28] Rebell's conception of a remedy's success depends on a more subjective judgment. In particular, judges should look beyond "inherently limited" indicators of student outcomes and instead consider whether their remedy furthers "the effective use of the standards, resources, and other inputs into the [education] system and whether the systems in place are likely to prepare students to function productively in a modern, diverse society."[29] Should courts, as a matter of pol-

22. *Id.* at 145-70.

23. *Id.* at 166-70 figs.6.10, 6.11, 6.12, 6.13 & 6.14.

24. *Id.* at 170.

25. The analysis, for example, largely fails to control for state-by-state differences that may affect student outcomes irrespective of the court-sponsored interventions. Hanushek and Lindseth do use state-to-state comparison data to bolster their findings for Wyoming, however. *Id.* at 151-57. Their analysis also only considers a single test score as a measure of educational outcomes. Educational outcomes can be defined much more broadly, and the analysis may not appropriately measure other effects of the lawsuit relative to the rest of the nation.

26. REBELL, *supra* note 1, at 35.

27. *Id.*

28. *Id.* at 37.

29. *Id.* at 37-38.

icy, make these admittedly broad judgments?[30] In the next Part, this Review discusses each book's conception of the institutional roles that statehouses and courthouses should play in education finance reform.

II. Visions for Institutional Roles

Based on their distinctive views of how separation of powers and institutional competency determines a framework for meaningful school finance reform, the authors maintain very different perspectives on the roles that legislatures and courts should play in future reform efforts.

A. Performance-Based Funding Through State Legislatures

Hanushek and Lindseth largely view school finance as a political question for the legislature to decide, noting that "[t]he decisions that go into establishing and funding an education system are *political and not legal* in nature."[31] They are concerned about judicial activism, since, "if 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."[32] Hanushek and Lindseth also point out that judges are relatively unaccountable for outcomes relative to legislators. Specifically, judges do not need to answer to the electorate to the extent legislators do.[33]

Meanwhile, education clauses within state constitutions are "couched in very general terms" and merely require that the state "provide *some form of free public education.*"[34] Therefore, this right is a narrow one according to Hanushek and Lindseth. Combining that conception with the fact that financial appropriations—including school finance allocations—are typically the *legislature's* responsibility under state constitutions,[35] it is no surprise that they disagree sharply with Rebell on the courts' need to regulate this area.[36]

30. *See infra* Part III (critiquing Rebell for mandating court oversight over educational inputs as well as output results).

31. Hanushek & Lindseth, *supra* note 2, at 100 (emphasis added).

32. *Id.* at 99. The authors even go so far as to label this "judicial 'tyranny.'" *Id.*

33. *See id.* at 98.

34. *Id.* at 95. Some state constitutions' education clauses are very general. *See, e.g.*, Miss. Const. art. VIII, § 201 ("The 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."). Other state constitutions, however, provide more specific language. Ill. Const. art. X, § 1, cl. 2 ("The State shall provide for an *efficient* system of *high quality* public educational institutions and services.") (emphasis added).

35. Hanushek & Lindseth, *supra* note 2, at 96.

36. *See infra* Section II.B.

Hanushek and Lindseth's primary proposal relies on performance-based funding. Arguing that "[a]ccountability for performance should be substituted for restrictions on local decision-making,"[37] they support a school funding system that provides financial rewards to school districts, administrators, and teachers when student outcomes improve.[38] Unlike current state funding systems that micromanage local district efforts by allocating funds toward specific purposes,[39] the authors argue that the state should not define the ground-level strategies undertaken by individual districts.[40] They are optimistic that such a performance-based system will remove some of the inefficiencies in the current system, such as those arising from teacher tenure policies.[41] Legislatures are best equipped, according to Hanushek and Lindseth, to implement school finance reform because "they have the authority to address a wide range of problems" and the ability to design innovative solutions.[42] By including the judiciary, court-ordered remedies run the risk of adding funds to schools without ensuring higher achievement.[43]

Hanushek and Lindseth thus believe that courts should have a narrow role in school finance reform. But they do extol the court's evidence-gathering power, for when it is used to focus attention on the problems facing schools, policymakers "will be playing with a full deck and will be more likely to take appropriate action to address waste and mismanagement."[44] If courts exercise jurisdiction and find that a school funding system is unconstitutional, they "should make specific findings of fact" regarding "mismanagement, waste, inefficiency, and harmful external influences" of the system.[45] After doing so, however, "the court's work is complete, and the fashioning of an appropriate remedy is for the legislative and executive branches."[46] Thus, if courts were simply to declare funding systems unconstitutional and take no further action, Hanushek and Lindseth would be less concerned. The historical record indicates,

37. HANUSHEK & LINDSETH, *supra* note 2, at 218.

38. Note, however, that these financial rewards are on top of a base funding system that will be provided to districts based on their needs. *Id.* at 251-60. This base funding formula, interestingly, faces some of the same challenges as cost studies.

39. *See id.* at 227 (discussing categorical grants which restrict district funding to specific purposes).

40. *Id.* at 226.

41. *Id.* at 229.

42. *Id.* at 264.

43. *Id.* at 266.

44. *Id.* at 285.

45. *Id.* at 286.

46. *Id.* at 287.

though, that courts have maintained long-term oversight in the past, and this fact worries them most.[47]

B. *Comparative Institutional Competence and Court Oversight*

Rebell supports a much stronger role for the courts in school finance reform. Responding to Hanushek and Lindseth's separation of powers concerns, Rebell highlights a quote from Martin Redish:

> Once we make the initial assumption that judicial review plays a legitimate role in a constitutional democracy, we must abandon the political question doctrine, in all of its manifestations. The doctrine inherently implies that one or both of the political branches may continue conduct that could conceivably be found unconstitutional, without any examination or supervision by the judicial branch.[48]

Thus, even though it is true that a court overstepping its constitutional role may be engaging in unchecked tyranny, a court that fails to uphold constitutional principles allows majority coalitions in state legislatures to wield their own form of tyrannical power.

Rebell also responds to Hanushek and Lindseth's judicial accountability critique. Federal judges are not *directly* accountable to the electorate, Rebell concedes, but "thirty-nine of the fifty states elect some or all of their judges either in garden-variety partisan elections or in a variant of a retention election."[49] Here, Rebell perhaps overreaches. His figure demonstrates that state court judges are more accountable to the electorate than federal judges, but the reality is that all judges—federal or state—operate with relatively high degrees of autonomy compared to legislators.[50] Rebell in fact admits that courts are "independent bod[ies] that are relatively insulated from political pressure."[51] He cannot have his cake and eat it, too.

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47. Their argument is more or less an empirical claim, for, although school finance plaintiffs often argue that they merely seek a judgment on the constitutionality of the statutory framework governing school finance, plaintiffs subsequently seek court orders requiring the legislature to increase funding to specific levels. *See id.* at 102.

48. REBELL, *supra* note 1, at 24 (quoting Martin H. Redish, *Judicial Review and the "Political Question,"* 79 NW. U. L. REV. 1031, 1059-60 (1984)).

49. *Id.* at 47.

50. *Cf.* Phillip L. DuBois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 SW. L.J. 31, 39 (1986) (suggesting that the judicial functions of state courts and federal courts differ, which explains the differential balance between accountability and independence at the state court level). Additionally, judicial candidates probably are not scrutinized as extensively by the electorate as legislative candidates.

51. REBELL, *supra* note 1, at 50 (quoting Aileen Kavanagh, *Participation and Judicial Review: A Reply to Jeremy Waldron*, 22 LAW & PHIL. 451, 466-67 (2003)).

Nevertheless, both authors are entitled to their positions on these matters, and the separation of powers debate between them underscores the divergence in their normative views about the scope of education clauses in state constitutions. As noted, Hanushek and Lindseth believe that state education clauses are phrased generally and provide for narrow rights.[52] Rebell, in contrast, emphasizes that these rights are positive and must be protected affirmatively.[53] According to him, state constitutions' education clauses "contain language that requires the state to provide students with some *substantive level of basic education.*"[54] This statement illustrates his commitment to a belief that the *Brown I*[55] ideal of equal educational opportunity can be achieved through courts.[56]

Instead of emphasizing the primacy of the legislature, *Courts & Kids* proposes a school finance reform model that leverages the relative institutional strengths of *each branch* of government.[57] Based on his past research, Rebell argues that courts are best equipped to articulate the broad principles that should govern education remedies, while legislatures and administrative agencies are best equipped to articulate policies and implementation needs.[58] Courts also possess a degree of "staying power" that legislatures do not enjoy, and this structure enables the judiciary to provide long-term guidance and commitment to reaching desired educational goals.[59]

In summary, Rebell's remedial proposal places the responsibility on courts to ensure that state legislatures are held accountable for constitutional requirements.[60] Courts play four distinct roles in overseeing the remedial process: (1) ensuring that states have adopted challenging academic standards; (2) requiring states to determine the cost of providing an adequate education; (3) guaranteeing that states "develo[p] and implemen[t] instructional programs and accountability mechanisms"; and (4) "assess[ing] the extent to which student performance has improved as a result of reform efforts."[61] Courts do not prescribe specific policies, but they should review the states' performance as necessary.[62]

52. *See supra* Section II.A.

53. REBELL, *supra* note 1, at 47.

54. *Id.* at 17-18 (emphasis added).

55. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

56. *See* REBELL, *supra* note 1, at 3.

57. *See id.* at 42-55.

58. *Id.* at 53.

59. *Id.* at 54-55.

60. *Id.* at 56-84.

61. *Id.* at 57.

62. *Id.* ("[T]he court should make clear that the legislative and executive branches will retain the power and duty to develop appropriate policies and practices in each of these areas," and courts will only "review their performance as necessary

To that end, courts should stand ready to intervene at any point and should maintain jurisdiction over extended periods of time.[63]

III. Toward a Common Vision

Notwithstanding the authors' viewpoints on the roles institutions should play in future school finance reform efforts,[64] Rebell and Hanushek and Lindseth ultimately agree in principle that these efforts must ensure accountability for the educational outcomes of students.[65]As Part II illustrated, however, Rebell believes that courts should oversee accountability, while Hanushek and Lindseth believe that legislatures should institute their own accountability processes. This Review considers both proposals somewhat problematic because, although Rebell's proposal ensures judicial oversight of state legislatures, it rests on a subjective set of remedial principles articulated by judges and thus could undermine significantly the legislature's ability to determine what resource *inputs* best promote student achievement.[66] Hanushek and Lindseth's proposal, meanwhile, fails to hold legislatures adequately accountable for their policies regarding public schools. They lend little credence to the base case in which solitary legislative and executive branch efforts *never* result in improved educational outcomes—if the courts do not provide accountability in that case, who will?

This Review proposes that, after a court declares a school funding system unconstitutional, courts defer to the legislature—at least initially—and give it the opportunity to address inadequacies within the current system. The courts'. articulating specific inefficiencies in the current system, as Hanushek proposes, or articulating the basic elements of a "sound basic education,"[67] as Rebell proposes is not inherently problematic. These measures would provide guideposts for the legislature as it takes its first crack at fashioning a remedy.

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to ensure that reasonable efforts are being made and acceptable results are being achieved.").

63. *Id.* at 82-83 (noting that courts should make clear that there will be prompt judicial procedures to resolve disputes and that funding litigation requires continued court involvement).

64. *See supra* Parts I, II.

65. *Compare* Rebell, *supra* note 1, at 38 (noting that a constitutionally adequate and "successful" educational system should be measured, in part, by the presence of accountability mechanisms that are designed to ensure that programs are properly implemented and funded on a sustainable long-term basis), *with* Hanushek & Lindseth, *supra* note 2, at 218 ("If the objective is improving outcomes, the system should focus on outcomes. Accountability for performance should be substituted for restrictions on local decision making.").

66. Although Rebell may argue that courts would not set specific policies, the concern is that their role could devolve into such a policymaking function over time.

67. Rebell, *supra* note 1, at 37.

Like Rebell, courts should have a role in which "the magnitude of actual judicial involvement in the implementation process will depend directly on the actions—or inactions—of the political branches in a particular state."[68] Unlike Rebell,[69] however, the extent to which courts exercise ongoing oversight should depend *solely* on educational outcomes.[70] That is, although courts initially may articulate principles and inputs that serve as the guideposts for the legislature, they should base subsequent decisions to exert equity power over the state only on output-based standards. In choosing output-based standards, courts could look to student scores on statewide tests or on the NAEP. Alternatively, courts could even set growth goals and target proficiency levels for students and use those measures to guide their remedial involvement.

The value of this approach is that it sets a clear remedial principle for legislatures.[71] As Rebell concedes, "[l]ack of judicial resolve and absence of a clear strategy for judicial oversight are often what provoke resistance."[72] Here, the strategy is simple: If students achieve outcome goals, legislatures may develop their own remedies. If students fail to achieve outcome goals, then the court gradually will wield more equity power, more oversight, and prescribe additional remedial provisions as needed. Legislatures will know when and why judicial involvement will occur. Rebell's framework is exceedingly complex and over-inclusive. If standards, costing-out studies, "effective instructional programs," and other *inputs* to the educational system are assessed by courts in addition to educational *outcomes*, this process will result in a high degree of subjectivity regarding both the time and manner of future court interventions.[73] This unpredictability should be avoided.

There are other unique benefits to this Review's proposal. Costing-out studies only would be employed when absolutely necessary. These studies are very expensive, and, given their scientific flaws and inability to guarantee student

68. *Id.* at 86.

69. *See supra* notes 60-63 and accompanying text.

70. This Review acknowledges Rebell's concerns that a "sound basic education" may be something more than that which could be measured by standardized tests. Tests can be designed, however, to measure comprehensively the skills children need to operate in a global economy. It may not be a perfect science, but it is one that will improve over time (just as Rebell argues is true for cost studies).

71. A focus on educational outcomes provides clear, judicially manageable standards. *See* Andrew Rudalevige, *Adequacy, Accountability, and the Impact of the No Child Left Behind Act, in* SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY 243, 247-48 (Martin R. West & Paul E. Peterson eds., 2007).

72. REBELL, *supra* note 1, at 87.

73. *See, e.g.*, Joshua Dunn & Martha Derthick, *Adequacy Litigation and the Separation of Powers, in* SCHOOL MONEY TRIALS, *supra* note 71, at 322, 333 (noting the arbitrariness of judicial intervention because courts will invalidate a system when it simply "strikes the court the wrong way, and it never has to explain precisely why it is inadequate").

outcomes, they should be mandated by courts only as a last resort if legislatures fail to perform. Additionally, this proposal's primary focus on academic outcomes might ensure that legislatures will focus on programs that improve student achievement. By setting clear and simple constitutional goals, courts can maximize their agenda-setting power,[74] which will allow them to realize the benefits of the interbranch dialogue that Rebell proposes.[75]

Due to its strong focus on court oversight based on educational outcomes, there are admittedly two critiques to this Review's proposal. First, one could argue that student outcomes do not reflect an appropriate legal standard for gauging educational adequacy under state constitutions. Hanushek and Lindseth allude to this concern.[76] At least one state supreme court, however, has acknowledged directly that education outputs can provide an appropriate legal standard under state constitution education clauses.[77] This critique also fails to acknowledge that state legislatures themselves—the very bodies that Hanushek and Lindseth seek to protect from judicial intrusion—are the institutions that set statewide proficiency standards. To the extent that state legislatures formally adopt state proficiency standards (and all have in some form since the passage of the No Child Left Behind Act (NCLB)[78])—there is a legal basis for such analysis.

A second critique of this Review's proposal is that it could promote a "race to the bottom" among state legislatures in setting achievement standards, that is, lowering academic output goals to minimize the risk of constitutional liability. Although this problem has manifested to some extent in the years since

74. DOUGLAS S. REED, ON EQUAL TERMS: THE CONSTITUTIONAL POLITICS OF EDUCATIONAL OPPORTUNITY 171 (2001) ("By remaining focused on goals and outcomes, without dictating means, judges simultaneously respect the policy-making authority of legislators and executives and increase the likelihood that the legislature will take the decision seriously.").

75. Once courts declare remedial principles, Rebell advocates a dialogic inquiry between the political branches and a process of public engagement to promote reform. REBELL, *supra* note 1, at 87-97. Rebell is correct in claiming that courts should articulate their public values, but the public value should be far less complex than what he proposes.

76. HANUSHEK & LINDSETH, *supra* note 2, at 104 ("For judges sympathetic to extending *Brown but troubled by the vagueness of the education clauses*, the standards-based reform movement in education has served as the missing link to judicial intervention.") (emphasis added).

77. *See, e.g.*, Unified Sch. Dist. No. 229 v. Kansas, 885 P.2d 1170, 1186 (Kan. 1994) (indicating that "the court will not substitute its judgment of what is 'suitable', but will utilize as a base the standards enunciated by the legislature and the state department of education").

78. The Education Commission of the States has a No Child Left Behind Database that lists the relevant NCLB implementation statutes of each state. *See* Education Commission of the States, NCLB Database, http://nclb2.ecs.org/NCLBSURVEY/NCLB.aspx?Target=SS (last visited July 1, 2010).

NCLB's passage,[79] where states are under pressure to achieve complete proficiency by 2014, the fact that some states are settling for low academic standards is becoming increasingly apparent.[80] As this trend continues, it is more likely that legislators will be politically accountable for holding students to low expectations. Additionally, although courts would not assess the constitutionality of inputs to education systems under this proposal, they would be able to assess the constitutionality of output-based standards. Based on how a particular state supreme court interprets the scope of its jurisdiction's right to an education, courts could gauge whether or not the standards, if met, would prepare students adequately to be "capable citizens and productive workers" in an increasingly global world.[81] Alternatively, it could ensure that students are on the path to being "college and career-ready."[82]

CONCLUSION

Both *Courts & Kids* and *Schoolhouses, Courthouses, and Statehouses* contribute significantly to the limited literature on school finance remedies. Hanushek and Lindseth remain pessimistic about the role of courts in school finance reform but are optimistic that school finance systems that hold school districts accountable for outcomes will provide a strong impetus for future legislative reform efforts across the nation. Rebell is less optimistic about legislative action and identifies a broader role for courts, for he is confident that legislative solutions will be effective only if they are guided by the courts' employment of strong remedial principles and oversight. Neither book's proposal is perfect, and this Review argues for a compromise solution. To the extent that the proposals are not mutually exclusive, however, ideas from both books likely will be

79. *See, e.g.*, Jessica Calefati, *Obama Budgets for Changes to NCLB*, MOTHER JONES, Feb. 2, 2010, http://motherjones.com/mojo/2010/02/obamas-budget-proposes-changes-nclb (noting that NCLB led to the creation of a race to the bottom which caused states to "dumb down" standards).

80. *See, e.g.*, VICTOR BANDEIRA DE MELLO ET AL., U.S. DEP'T OF EDUC., MAPPING STATE PROFICIENCY STANDARDS ONTO NAEP SCALES: 2005-2007 (2009), *available at* http://nces.ed.gov/nationsreportcard/pdf/studies/2010456.pdf (mapping NCLB proficiency standards on state standardized tests to the standards on the NAEP and finding that the state standards vary widely in their rigor).

81. REBELL, *supra* note 1, at 6. Not all state courts necessarily would use this standard to assess the constitutionality of output-based measures. Courts, however, should have the freedom to gauge the adequacy of output-based measures based on the goals of each state's education clause.

82. Calefati, *supra* note 79. This, in fact, is the standard Secretary of Education Arne Duncan wishes to apply in the next reauthorization of No Child Left Behind. *See id.* ("Duncan hopes to replace this broken accountability system with one that measures whether schools are preparing students to graduate high school 'college and career-ready,' he said, a process that begins by maintaining students' grade-appropriate reading levels in elementary school.").

highly influential. As courthouses and statehouses continue to grapple with the challenge of reforming school finance systems, the healthy debate promoted by these and similar books will move us down the path to ensuring adequate educational opportunities for all children.