RACE AND MONEY, COURTS AND SCHOOLS: TENTATIVE LESSONS FROM CONNECTICUT

PETER D. ENRICH*

INTRODUCTION

The idea of universal, free public education has long been a powerful force in American ideology. It gives content to the fundamental American creed of equality of opportunity. It draws upon our prevalent optimism about individual potential, our notion that, with the proper support, any child can achieve anything. It envisions a vital crucible for the distinctively American ideal of creating a single people from the diverse strands of our population.

From its inception, free public education has been conceived, almost universally in the United States, as an obligation of the individual states. Virtually every state constitution recognizes education as a central state responsibility.[1] Yet, almost as universally, the actual task of funding and operating the public schools has been delegated to local communities, drawing in large measure on local resources.

The result of this devolution of authority has been a reality that falls far short of the ideal. Because of the residential segregation—by both race and class—that has become an increasingly predictable feature of the American geography, our public school systems have come to be sharply divided along lines of color and socioeconomic status. Additionally, because of the dependence on local funding sources for school budgets, the resources available to schools serving these very different populations have also become starkly divergent, with relatively generous funding for affluent suburban districts and meager support for many urban and rural districts.[2] To complete the vicious cycle of inequality, the resultant disparities in school resources and quality exert a powerful influence on residential location decisions and on real estate values, exacerbating the patterns of residential segregation.

By the latter part of the Twentieth Century, the result in virtually every state was that our system of public education had become, not a force for equality, opportunity, and inclusion, but rather one of the central mechanisms that reinforced and reproduced from generation to generation America's tacit caste system of race and class. Poor children and children of color are predominantly channeled into underfunded, underperforming schools where their opportunities

---

* Professor, Northeastern University School of Law. A.B., Yale College; J.D., Harvard Law School. I am indebted to the able research assistance of Keir Bickerstaffe, Erica Crews, Jessica Faige, Margaret Fox, Karin Gechter, and Rebecca Stallman.

1. *See* Peter D. Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 105-06 & n.16 (1995); Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, 1997 B.Y.U. EDUC. & L.J. 1, 3 ("All fifty state constitutions contain an education clause designed to establish some form of educational system.").

2. For a vivid description of these inequalities and their impacts, see JONATHAN KOZOL, SAVAGE INEQUALITIES (1991).

for educational achievement and advancement are severely restricted.[3] Children from well-to-do white families almost universally receive their schooling in adequately endowed public or private schools, which serve as natural stepping stones to post-secondary education and to economic success. Thus, the opportunities for each succeeding generation are largely dictated by the circumstances of their parents.[4]

Concurrent with the growing recognition of the chasm between the ideal and the reality of American public education, the latter half of the Twentieth Century also marked the emergence of another striking phenomenon—the surprising prospect that the legal system, the Constitution, and the courts could offer powerful tools for attacking and remedying social inequalities. Starting in the 1950s, Chief Justice Warren's Supreme Court issued an array of decisions, sweeping across broad swaths of the legal landscape, challenging entrenched systems of hierarchy and subordination.[5] A whole generation of reformers and social activists (my generation, in fact) learned to think of law and the judicial system, not as a central conservative bulwark of the established order,[6] but as a primary pathway for recognition and redemption of the rights of the downtrodden and disenfranchised.

The system of public education was one of the primary institutional targets of this judicial revolution, with *Brown v. Board of Education* and its progeny[7] providing perhaps the most resonant model for the redemptive potential of the courts and the Constitution. The early desegregation cases held out the promise that law could be used to restore the public school system to its rightful role as the guarantor of equality and opportunity for all. Indeed, this promise shone so bright that, even when a series of Supreme Court decisions in the early 1970s eviscerated the Federal Constitution as a tool for education reform,[8] activists simply redirected their energies to state courts and state constitutions in the

---

3. *See, e.g.*, Diana Jean Schemo, *Neediest Schools Receive Less Money, Report Finds*, N.Y. TIMES, Aug. 9, 2002, at A10 (describing study by the Education Trust, finding systematic underfunding of schools serving poor and minority children); David Dante Troutt, *Ghettoes Revisited: Antimarkets, Consumption, and Empowerment*, 66 BROOK. L. REV. 1, 23-24 (2000).

4. *See* KOZOL, *supra* note 2, at 104-06 (describing poor students' recognition of the caste system within which they are educated).

5. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964) (applying one person, one vote standard to state legislative apportionment); Gideon v. Wainwright, 372 U.S. 335 (1963) (requiring court appointed counsel in all felony prosecutions); Engel v. Vitale, 370 U.S. 421 (1962) (forbidding prayer in school).

6. *Cf.* ARNOLD M. PAUL, CONSERVATIVE CRISIS AND THE RULE OF LAW (1976) (discussing this more familiar role of law in American society).

7. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954); Cooper v. Aaron, 358 U.S. 1 (1958); Griffin v. County Sch. Bd., 377 U.S. 218 (1964); Green v. County Sch. Bd., 391 U.S. 430 (1968).

8. *See, e.g.*, Milliken v. Bradley, 418 U.S. 717 (1974); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973). *See also* Washington v. Davis, 426 U.S. 229 (1976) (building on Jefferson v. Hackney, 406 U.S. 535 (1972) and Keyes v. Sch. Dist., 413 U.S. 189 (1973) to conclude that the Equal Protection Clause only applies to intentional discrimination).

continuing pursuit of judicial transformation of the education system.

Those state court efforts have met with impressive, if far from universal, success. Since 1970, courts in half of the states have found that their decentralized systems of public education did not satisfy state constitutional norms of equity or adequacy.[9] These decisions suggest the continuing efficacy of law and litigation as the tools of social reform. However, in most of these cases, the judicial triumph marked the beginning, not the end, of institutional change.[10] Courts characteristically limit their decisions to a finding that the existing system fails to satisfy constitutional obligations. The burden of forging a constitutional alternative falls to the legislative and executive branches, and they, too often, approach this judicially assigned task with attitudes ranging from caution and confusion to resentment and resistance.[11] While the legislative responses in some states have been swift and substantial,[12] in a number of others the process has dragged on for years, resulting in an ongoing and unproductive

---

9. For a description of the reported cases decided up to 1993, see the Appendix to Enrich, *supra* note 1, at 185-194 (identifying fifteen states—Alabama, Arizona, Arkansas, California, Connecticut, Kentucky, Massachusetts, Montana, New Hampshire, New Jersey, Tennessee, Texas, Washington, West Virginia, and Wyoming—finding unconstitutionality, and seventeen—Colorado, Georgia, Illinois, Maryland, Michigan, Minnesota, Nebraska, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Virginia, and Wisconsin—declining to find unconstitutionality). Subsequent to 1993, five more states (Idaho, New York, Ohio, Vermont, and South Carolina, three of which were previously in the "constitutional" column) have joined the ranks of those with reported decisions imposing constitutional standards on their state's systems, while four (Florida, Louisiana, Maine, and Rhode Island) have joined the ranks of those with decisions declining to find unconstitutionality. In addition, the website maintained by the Advocacy Center for Children's Educational Success with Standards (ACCESS) identifies five more states (Alaska, Kansas, Missouri, New Mexico, and North Carolina) in which unreported lower court decisions finding unconstitutionality have not been appealed. *See* ACCESS website, *at* http://www.ACCESSednetwork.org/states/index.htm (last visited Jan. 20, 2003).

10. Of course, in some cases, the judicial victory itself was far from the first step in the interplay between litigation and political action. In Massachusetts, for example, the pendency of a legal challenge to the state's school funding system was a major impetus to two dramatic reforms of the system before the suit was addressed by the courts in *McDuffy v. Secretary of Executive Office of Education*, 615 N.E.2d 516 (Mass. 1993).

11. For a recent example of resistance, see Maeve Reston, *N.H. Nervously Awaits Reforms*, BOSTON GLOBE, Nov. 17, 2002, at B7 (discussing New Hampshire's incoming governor's support of a constitutional amendment to limit the state supreme court's ability to weigh in on the school-funding system); James Vaznis, *School Funding Key Issue*, BOSTON GLOBE, June 30, 2002, at A1 (describing Republican support for such a constitutional amendment and the difficult road to passing it).

12. Kentucky and Massachusetts provide examples of speedy and substantial responses. For a description of developments in Kentucky, see Molly A. Hunter, *All Eyes Forward: Public Engagement and Educational Reform in Kentucky*, 28 J.L. & EDUC. 485, 498-99 (1999). In Massachusetts, reform legislation was signed within days after the state's Supreme Judicial Court declared the unconstitutionality of the pre-existing system. *See* Enrich, *supra* note 1, at 176.

interplay between the courts and the "political"[13] branches.[14] The result, notwithstanding the string of judicial victories, continues in many states to be an educational system riven by deep social, economic, and racial divisions.[15]

One of the central questions raised by this history is the plausibility of my generation's hopeful vision of the law as a transformative force with which to right societal injustices. In part, this is a question about the degree to which courts will have the courage or the inclination to apply constitutional ideals to entrenched institutional structures.[16] But a second aspect of the question may raise more profound concerns about the viability of my generation's hopes: even when the courts do take up the mantle of social justice, to what extent can the interventions of this "least dangerous branch"[17] actually catalyze meaningful institutional change?

The answer to this question is neither simple nor univocal, even when the focus is limited to the single example of school reform.[18] Among the states whose school systems have been found constitutionally flawed, both the ensuing political processes and the ultimate scope of the resultant reforms vary across a very wide range. It seems that these variations reflect no simple discernible pattern, but rather the workings of multiple contingent features of the individual situations. The appropriate question, then, is not *whether* judicial interventions can be transformative, but rather when and under what specific circumstances. The answers, if any, are likely to be found only by a close examination of particular instances.

The purpose of this article is to seek hints at the answers to these questions

---

13. While it is customary to refer to the legislature and executive as the "political" branches, it is important to recall that, by contrast to the lifetime appointments of federal judges, many state court judges are elected and serve for fixed terms, and hence are far more "political" than their federal counterparts. *See* 34 THE BOOK OF THE STATES 209-11 (2002) (describing judicial selection systems in the fifty states).

14. For two dramatic examples, consider the cases of New Jersey (see, for example, Paul L. Tractenberg, *The Evolution and Implementation of Educational Rights Under the New Jersey Constitution of 1947*, 29 RUTGERS L.J. 827 (1998)), and Texas (see, for example, J. Steven Farr & Mark Trachtenberg, *The* Edgewood *Drama: An Epic Quest for Education Equity*, 17 YALE L.& POL'Y REV. 607 (1999)). *See also* Charles Benson, *Definitions of Equity in School Finance in Texas, New Jersey and Kentucky*, 28 HARV. J. ON LEGIS. 401 (1991).

15. *See* Schemo, *supra* note 3.

16. *See* Karen Swenson, *School Finance Reform Litigation: Why Are Some State Supreme Courts Activist and Others Restrained*, 63 ALB. L. REV. 1147 (2000) (seeking empirical explanation for different approaches and outcomes in different states' courts).

17. THE FEDERALIST No. 78, at 436-37 (Alexander Hamilton) (Isaac Kramnick ed., 1987). Hamilton explained, "The judiciary, on the contrary, has no influence over either the sword or the purse, no direction either of the strength or the wealth of the society." *Id.*

18. *Cf.* Douglas S. Reed, *Twenty-Five Years after* Rodriguez*: School Finance Litigation and the Impact of the New Judicial Federalism*, 32 LAW & SOC'Y REV. 175, 205-14 (1998) (offering a general framework through which to assess forces influencing variable impacts of school finance cases).

through a case study of a single state's experience with educational reform litigation. I use Connecticut as my example because its history in this area over the past thirty years has been peculiarly rich, involving two quite different legal challenges to the educational status quo: first *Horton v. Meskill*,[19] which challenged the resource disparities between rich and poor Connecticut school districts, and second *Sheff v. O'Neill*,[20] which focused on the racial and economic segregation fostered by Connecticut's school districting. In each case, the state supreme court found a violation of the state constitution; yet, the two cases have produced two quite distinct institutional responses. By exploring these two cases, and particularly the ways in which the political process has responded to them, some tentative lessons may emerge about the efficacy of the courts and constitutional law as instruments of social reform.

In the ensuing section, I depict some of the legal context from which the Connecticut cases arise, with particular attention to the key preceding developments in federal constitutional law. In the next three sections, I offer a brief history of the Connecticut cases and the responses to them: Part II discusses *Horton*; Part III addresses *Sheff* ; and Part IV considers some significant recent developments, including renewed litigation in *Sheff* and the initiation of a new suit revisiting the issues from *Horton*.[21] Finally, in Part V, I attempt to distill some tentative lessons from Connecticut's experience.

I. SETTING THE STAGE: THE LEGAL CONTEXT FOR THE CONNECTICUT SCHOOL CASES

In the iconography of progressive judicial activism, perhaps the most hallowed place belongs to *Brown v. Board of Education*, and for good reason.[22] In *Brown*, the Supreme Court confronted one of the most vivid and entrenched instruments of American inequality, the explicit and deliberate racial segregation of public schools. The Court directly acknowledged segregation's profound social impacts and firmly declared its incompatibility with constitutional norms. Over the ensuing years, the Court's bold and forthright challenge to school segregation served as the shining example that unleashed the capacity of the federal courts and the Constitution as the agents of egalitarian social transformation.

At the same time, *Brown* placed a special focus on issues of educational

---

19. The *Horton* plaintiffs brought constitutional challenges that resulted in two pertinent Connecticut Supreme Court cases. First was *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977) (*Horton I*). Second, after the legislature's attempt to correct the constitutional wrongs found in *Horton I*, the *Horton* plaintiffs' challenge to the legislative remedy led to *Horton v. Meskill*, 486 A.2d 1099 (Conn. 1985) (*Horton III*). *See also Horton v. Meskill*, 445 A.2d 579 (Conn. 1982) (*Horton II*) (addressing procedural issues that are outside the scope of this Article).

20. 678 A.2d 1267 (Conn. 1996).

21. Johnson v. Rowland, No. X03-CV-04921035 (Conn. D. Ct.).

22. 347 U.S. 483 (1954). For a detailed history of *Brown*, see RICHARD KLUGER, SIMPLE JUSTICE (1975).

rights. It was, of course, as much a case about schools as about race. The *Brown* Court underscored, in ringing language, the centrality of educational opportunity to American values and aspirations:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[23]

In the long string of school segregation cases that followed in *Brown*'s wake, the Court repeatedly reaffirmed the seriousness of its commitment to break down the barriers that segregation posed to equal educational opportunity.[24] These cases sent two powerful messages: first that the courts were ready and able to redress deep-seated social injustices, and second that public education was an institution of special importance in addressing issues of equality and opportunity. While courts had long provided a forum for a variety of disputes about school districting and school funding,[25] the desegregation cases introduced and encouraged a far more radical and transformative role for the courts in addressing issues of educational opportunity.

There can be little question that *Brown* and its progeny had a profound practical impact on schools and other segregated institutions in much of the country.[26] However, in the years following *Brown*, the limitations of the desegregation cases became increasingly evident. Some of the limitations

---

23. *Brown*, 347 U.S. at 493. This passage has been quoted over and over in later federal and state school cases. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 111 (1973) (Marshall, J., dissenting); Sheff v. O'Neill, 678 A.2d 1267, 1289 (Conn. 1996); Rose v. Council for Better Educ., 790 S.W.2d 186, 190 (Ky. 1989); Serrano v. Priest, 487 P.2d 1241, 1256-57 (Col. 1971).

24. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Griffin v. County Sch. Bd., 377 U.S. 218 (1964).

25. *See, e.g.*, Garrett v. Colbert County Bd. of Educ., 50 So. 2d 275 (Ala. 1950); Moore v. Bd. of Educ. 193 S.E. 732 (N.C. 1937).

26. The most dramatic impacts were, of course, in the South, where de jure segregation had been the norm. *See* GARY ORFIELD & SUSAN E. EATON, DISMANTLING DESEGREGATION 14-15 (1996). However, the impacts were by no means confined to that region. *See, e.g.*, Missouri v. Jenkins, 495 U.S. 33 (1990) (approving extensive remedies for segregation of Kansas City, Missouri school system); Keyes v. School Dist., 413 U.S. 189 (1973) (requiring desegregation of the Denver school system); ANTHONY LUKAS, COMMON GROUND (1986) (tracing the practical impacts of the Boston school desegregation case).

emerged in the doctrinal evolution of the applicable constitutional principles. Others reflected the depth of societal resistance to judicially imposed change. Together they resulted in changes that were far more difficult and far less sweeping than the proponents of desegregation initially hoped.

On the doctrinal side, perhaps the critical weakness of the desegregation strategy arose with the judicial distinction between de jure and de facto segregation. While the early school cases all involved clear instances of de jure segregation, the Court's focus was on the segregation, not its source.[27] In fact, it was not until nearly twenty years later that the Court, in *Keyes v. School District No. 1*,[28] actually decided that the Fourteenth Amendment only applied where there was a finding of a governmental "*purpose* or *intent*" to segregate.[29] Yet, prior to *Keyes*, the Court's rulings had raised substantial doubts about the availability of constitutional remedies to rectify the school segregation due to housing patterns and municipal boundaries that predominated outside of the South.[30]

The most problematic corollary arising from the narrowing of constitutional remedies to cases of intentional segregation was the unavailability of desegregation remedies that extended across school district lines, in the absence of a showing that the lines had been drawn with a discriminatory purpose.[31] The Court's decision in *Milliken v. Bradley* meant that the Fourteenth Amendment could offer no meaningful relief for Detroit's starkly segregated schools, nor for those of many other metropolitan areas where racial separation in the schools was effectively reinforced by political boundaries between cities and suburbs. By limiting scrutiny to cases of deliberate segregation, the Court rendered the Fourteenth Amendment's protections meaningless for vast numbers of students of color attending segregated, often inferior, schools.

Even in the cases where de jure segregation was proven, judicial relief proved disappointing. The intransigence and foot-dragging of local officials ensured that most Southern schools remained sharply segregated for many years after *Brown*, although more meaningful progress was achieved after passage of

---

27. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 7 (1958) (focusing on obligation "to eliminate racial segregation from the pubic schools"); *Brown*, 347 U.S. at 495 (holding simply that "[s]eparate educational facilities are inherently unequal," without any mention of presence or absence of discriminatory intent).

28. 413 U.S. 189, 205 (1973).

29. *Id.* (emphasis in original). Even then, the Court reached its conclusion over the strenuous objection of Justice Powell, who preferred to focus on the fact of racial segregation, not its cause. *See id.* at 224 (Powell, J., concurring).

30. *See, e.g.*, UNITED STATES COMMISSION ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 262 (1967) ("[C]ourts have not been so ready to declare adventitious school segregation unconstitutional. Thus, the result of most judicial decisions thus far has been to leave the question of remedying racial imbalance to the legislative and executive branches of the Federal and State Governments.").

31. *See* Milliken v. Bradley, 418 U.S. 717, 745 (1974).

the 1964 Civil Rights Act.[32] Throughout the nation, reluctance to adopt or require busing and similar strategies, combined with the phenomenon of "white flight" from the urban districts where most students of color remained, rendered the challenges of segregation increasingly intractable.[33] Thus, despite some successes, *Brown*'s promise of transformed educational opportunities for minority children went largely unfulfilled.[34]

One response to disappointment over the efforts at school desegregation was the emergence of a new litigation strategy, focusing on money rather than race. Starting in the mid-1960s, a flurry of lawsuits were filed challenging, not the assignment of students to schools, but the allocation of dollars to school districts.[35] The central argument of these cases, some of which were initiated by the same groups that had been behind the desegregation cases,[36] was that systems of school funding that depended heavily on local property taxes (as was the case in virtually every state) violated the Constitution's equal protection guarantee, because these systems provided dramatically disparate support for a critical governmental function in different school districts, based solely on the relative wealth of those districts.[37] The pattern that these cases painted, in state after state, revealed rich school districts with property wealth many times that of their poorer neighbors supporting education spending and services radically superior to those of the poorer districts (which commonly included the urban school systems serving the preponderance of minority children).[38] The primary goal was

---

32. *See* ORFIELD & EATON, *supra* note 26, at 7 ("By 1964, only one-fiftieth of Southern black children attended integrated schools."); Frank M. Johnson, Jr., *School Desegregation Problems in the South: An Historical Perspective*, 54 MINN. L. REV. 1157 (1970).

33. *See, e.g.*, UNITED STATES COMMISSION ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS 115 (1967) (discussing obstacles to effective remedies for racial isolation); KLUGER, *supra* note 22, at 765-66 (discussing resistance to busing); Mark G. Yudof, *Equal Educational Opportunity and the Courts*, 51 TEX. L. REV. 411, 470-72 (1973) (discussing the bleak prospects for future integration).

34. *See, e.g.*, ORFIELD & EATON, *supra* note 26, at 1-22 (tracing the disappointing record of efforts at desegregation from *Brown* to the 1990s); Robert L. Carter, *Public School Desegregation: A Contemporary Analysis*, 37 ST. LOUIS U. L.J. 885 (1993) (discussing failings of desegregation movement).

35. *See, e.g.*, Serrano v. Priest, 487 P.2d 1241 (Cal. 1971); Van Dusartz v. Hatfield, 334 F. Supp. 870 (D. Minn. 1971); McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd mem. sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969).

36. *See* Enrich, *supra* note 1, at 121 n.97 (discussing role of civil rights and anti-poverty organizations in the early education financing cases).

37. *See, e.g.*, Rodriguez v. San Antonio Indep. Sch. Dist., 337 F. Supp. 280 (W.D. Tex. 1972), *rev'd*, 411 U.S. 1 (1973); Serrano v. Priest, 487 P.2d 1241 (1972).

38. *See, e.g.*, *Rodriguez*, 337 F. Supp. at 282 (contrasting rich and poor districts in San Antonio). The correlations between property wealth and family income (and race) were, however, less than perfect, due to the fact that many urban districts included substantial commercial property with high values. *See* Michael J. Churgin et al., Note, *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 YALE L.J. 1303 (1972).

to secure better funding for these poorer districts and to thereby provide equal educational opportunities even for those students relegated to economically or racially isolated schools.

The rise of these funding-based equal protection cases reflected several trends, in addition to frustration with the disappointing results of the desegregation cases.[39] One important development was the shift in focus among civil rights advocates from fighting segregation to empowering people of color, a shift that suggested that integration of schools was less important than providing minority students with opportunities for educational excellence.[40] Another important development was the emergence of the "War on Poverty" as a central focus of progressive efforts, a development which kindled enthusiasm for establishing a constitutional prohibition against discrimination on the basis of wealth.[41] A third was the accumulation of a wide range of Supreme Court case law that appeared to provide critical precedential support for extending equal protection arguments to educational inequalities based on resources, not on race.[42]

After some early successes,[43] the constitutional assault on education funding ran aground with the Supreme Court's 1973 decision in *San Antonio Independent School District v. Rodriguez*.[44] In *Rodriguez*, a sharply divided Court set a limit to the reach of its equal protection jurisprudence by restricting the most rigorous judicial scrutiny to cases impinging on either a fundamental constitutional right or an insular minority. It went on to find that neither educational rights nor the interests of poor communities triggered such scrutiny. As a result, the Court concluded that a state's interest in providing local communities with control over their own schools could justify a system of local districts reliant on local funding, notwithstanding the inequities such a system might cause.[45] While it is fascinating to speculate how different our educational and legal systems might have been if one vote on the Court had switched,[46] the *Rodriguez* ruling

---

39. For a general discussion of the factors influencing this trend, see Enrich, *supra* note 1, at 115-128.

40. *See id.* at 123 & nn.105-06 and sources cited therein.

41. *See* Eric A. Hanushek, *When School Finance "Reform" May Not Be Good Policy*, 28 HARV. J. ON LEGIS. 423, 424 (1991) (noting that "[s]chool finance reform tended to be viewed as another element of the War on Poverty"). *See generally* JEROLD S. AUERBACH, UNEQUAL JUSTICE 268-72 (1976) (tracing rise of the poverty law movement).

42. *See generally* ARTHUR E. WISE, RICH SCHOOLS, POOR SCHOOLS: THE PROMISE OF EQUAL EDUCATIONAL OPPORTUNITY (1968) (articulating the multiple strands of the equal protection argument); Enrich, *supra* note 1, at 116-21.

43. *See, e.g.*, *Rodriguez*, 337 F. Supp. 280; Van Dusartz v. Hatfield, 334 F. Supp. 870 (D. Minn. 1971); Serrano v. Priest, 487 P.2d 1241 (Cal. 1972); Milliken v. Green, 203 N.W.2d 457 (Mich. 1972), *vacated and rev'd*, 212 N.W.2d 711 (Mich. 1973).

44. 411 U.S. 1 (1973).

45. *Id.*

46. Such speculation is particularly intriguing in light of the fact that only one of the five Justices in the slender *Rodriguez* majority (Justice Stewart) was on the Court in 1968 when the suit

effectively brought an end to the effort to challenge school district funding under the Federal Constitution.

Rodriguez did not, however, put an end to legal challenges to school funding inequities. Instead, it simply shifted the focus of such challenges away from the Federal Constitution and onto state law. Even before *Rodriguez* was decided, a number of the early cases, while litigated primarily under federal constitutional law, reached decisions that were based, at least in part, on findings of violations of state constitutional rights.[47] Within days after the *Rodriguez* decision, the New Jersey Supreme Court, in an opinion evidently crafted before *Rodriguez*'s outcome was known,[48] struck down the state's locally funded system exclusively on the basis of the state constitution's provision mandating "a thorough and efficient system of free public schools."[49] Building on these foundations, advocates in many jurisdictions turned to their state constitutions and state courts to continue the legal struggle for equality in educational funding.[50] The shift from challenges focused on race to those focused on money was undeterred by the loss of a federal constitutional basis; it simply proceeded in a different, state-based forum.

II. *HORTON V. MESKILL*: CONNECTICUT TACKLES FUNDING INEQUITIES

Connecticut's system of school funding was one of the first to be challenged in a post-*Rodriguez* lawsuit grounded primarily in the state constitution. *Horton v. Meskill*, which was filed in November 1973, just a few months after the *Rodriguez* decision, still included a count grounded in the Federal Equal Protection Clause, but its central claims rested on Connecticut's own equal protection provisions[51] and on the state constitution's recently enacted provision assuring that "[t]here shall always be free public elementary and secondary schools in the state."[52] As in the earlier cases focused on the Federal

---

was filed. Its outcome largely depended on the accidents of death and retirement while the case proceeded through the courts.

47. *See, e.g.*, Serrano v. Priest, 487 P.2d 1241 (Cal. 1971), *aff'd*, 557 P.2d 929 (Cal. 1976) (affirmed solely on state constitutional grounds). The Michigan Supreme Court reached a similar decision, resting on both state and federal constitutional reasoning, in *Milliken v. Green*, 203 N.W.2d 457 (Mich. 1972), *rev'd*, 212 N.W.2d 711 (Mich. 1973) (reversed the state constitutional holding on rehearing, after the Supreme Court's decision in *Rodriguez* (and after changes in the composition of the Michigan court)).

48. *See* Robinson v. Cahill, 303 A.2d 273, 279 (N.J. 1973).

49. *Id.* at 295.

50. Among the early post-*Rodriguez* cases were *Seattle School District No. 1 v. State*, 585 P.2d 71 (Wash. 1978); *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979); *Board of Education v. Walter*, 390 N.E.2d 813 (Ohio 1979); and *Horton I*, 376 A.2d 359 (Conn. 1977), to which we turn our attention below. *See* Enrich, *supra* note 1, at 185-94, for a complete list of the state constitutional cases decided between 1973 and 1993.

51. CONN. CONST. art. I, §§ 1 & 20.

52. CONN. CONST. art. VIII, § 1. The provision goes on to say, "[t]he general assembly shall

Constitution, plaintiffs' central argument was that Connecticut's heavy reliance on local property taxes to fund public education violated the rights of students in poorer districts to an equal educational opportunity.

Then and now, Connecticut's demographics, like those of many other states, reflect sharp variations between rich and poor communities. While Connecticut as a whole has consistently been one of the most affluent states,[53] its wealth is heavily concentrated in its suburban communities. Many of the state's more rural areas and its major urban centers (particularly Hartford, New Haven, and Bridgeport) contain populations that are dramatically poorer[54]—and in the case of the cities, dramatically different in their racial composition as well.[55] Cities and towns also have significant variations in the value of their taxable property bases,[56] although these variations often do not correlate perfectly with the

---

implement this principle by appropriate legislation." This provision was added to the state constitution by a 1965 constitutional convention. *See Horton I*, 376 A.2d at 376-77 (Bogdanski, J., concurring).

53. In 1980, Connecticut's per capita income ranked it second among the states (after Alaska). In both 1990 and 2000, Connecticut ranked first. U.S. BUREAU OF ECON. ANALYSIS, SURVEY OF CURRENT BUSINESS (2001).

54. For example, in 1970, when the statewide per capita income was $3900, *see* 1970 U.S. Census, Vol.9, Table 57, the per capita incomes in Bridgeport, New Haven, and Hartford were, respectively, $3233, $3181, and $3113, while incomes in the wealthy suburbs of Greenwich and Westport were $7833 and $7102. *See id.*, Tables 89, 107. In 2000, the statewide per capita income was $28,766, whereas the per capita incomes in Bridgeport, New Haven and Hartford had only grown to $16,306, $16,393, and $13,428 respectively, and those in Greenwich and Westport had risen to $74,346 and $73,664. *See* U.S. Census Bureau, Census 2000 Summary File 3. In 1970, poor rural areas often had per capita incomes even below those of the urban centers, *see* 1970 U.S. Census, Vol. 8, Table 118 (listing per capita incomes for, e.g., Canterbury and Griswold of $2954 and $2944), whereas by 2000, these rural areas were doing substantially better than the cities, although still less well than the state median. *See* U.S. Census Bureau, Census 2000 Summary File 3 (listing Canterbury at $22,317 and Griswold at $21,196). *See also* Carole Bass, *A Whiter Shade of* Sheff*? The New Face of Connecticut School Reform*, HARTFORD ADVOCATE, Apr. 30, 1998 (describing continuing gap between low welfare populations in most of the state and high welfare rates in a handful of communities).

55. *See* Sheff v. O'Neill, 678 A.2d 1267, 1272-73 (Conn. 1996) (documenting stark disparities in minority school enrollment percentages between Hartford (92.4%) and neighboring communities (typically below 10%)). In 1970, Connecticut's total population was 93.5% white, whereas Hartford, New Haven and Bridgeport were, respectively, 70.8%, 72.6% and 82.7% white. *See* 1970 U.S. Census, Vol. 8, Tables 18, 23. By 2000, the statewide population was 81.6% white, the percentages for Hartford, New Haven and Bridgeport had dropped to 17.8%, 35.6% and 30.9%. *See* U.S. Census Bureau, Census 2000 Redistricting Data (Public Law 94-171) Summary File. Whereas the non-white population was almost entirely African-American in 1970, *see* 1970 U.S. Census, Vol. 8, Table 18, by 2000 it was made up of roughly equal percentages of Latinos (9.4% of state population) and blacks (9.1%), with a smaller representation (2.4%) of Asian-Americans. *See* U.S. Census Bureau, Census 2000 Redistricting Data (Public Law 94-171) Summary File.

56. *See Horton I*, 376 A.2d at 366-67 (describing 1972-73 property wealth per pupil ranging

differences in incomes of their residents.[57] In Connecticut (like many of its New England neighbors, but unlike much of the rest of the country), each city or town constitutes its own school district.[58] Thus, the economic and racial divisions among the municipalities are reflected in the disparities among school systems as well.

The *Horton* case was brought on behalf of students in the town of Canton, a community located some ten miles outside of Hartford with a 1970 population of less than 7000.[59] Although not one of the state's poorest communities, Canton's taxable property wealth of $38,415 per pupil in 1972-73 was substantially below the state average of $53,639, and dramatically below the $100,000 range characteristic of the wealthiest school districts.[60] In this period, the state of Connecticut provided only a relatively meager twenty to twenty-five percent of school funding (far below the then national average of forty-one percent), and, unlike most other states which distributed a significant share of their funds under formulae designed to mitigate differences in local district wealth, Connecticut allocated the vast bulk of state funds through flat per-pupil grants.[61]

As a result, Connecticut presented a relatively stark version of the characteristic pattern challenged in all of the school funding cases: the poorer districts, while taxing themselves more heavily, were able to provide significantly less funding for their schools than were their wealthier neighbors.[62] Canton provided a clear, though not an extreme, example. Its school tax rate of 21.9 mills compared to a state average of 14.6 mills, and to a typical rate of 11.1 mills for the wealthiest communities, while its per pupil spending of $945 fell

---

from $170,000 in wealthy communities to $20,000 in poor districts).

57. *See* Churgin et al., *supra* note 38, at 1327-28 (calculating the weak correlations between poverty levels and low property values, chiefly due to high commercial valuations in communities where the poor reside).

58. *See* CONN. GEN. STAT. § 10-240 (2002).

59. *See* 1970 U.S. Census, Conn. 8-116, Table 31 (listing Canton's population as 6,868, more than ninety-nine percent white). By 2000, Canton's population had grown to 8840, ninety-six percent of which was white. 2000 U.S. Census, Canton data, Table DP-1, http://factfinder.census.gov.

60. *See Horton I*, 376 A.2d at 366-67. At the same time, Canton was substantially better endowed than the poorest communities, with per pupil valuations in the $25,000 range. *Id.* Measured by income, rather than by wealth, Canton in 1970 was almost precisely at the state median. *Compare* 1970 U.S. Census, Conn. 8-175, Table 57 (Conn. average family income of $13,795), *with* Conn. 8-116, Table 118 (Canton average family income of $14,022). By 2000, Canton's household incomes had moved significantly above the statewide figures. *Compare* 2000 U.S. Census, Conn. data, Table DP-3, http://factfinder.census.gov (Conn. median family income of $65,521), *with* Canton data, Table DP-1, http://factfinder.census.gov (Canton median family income of $80,553).

61. *Horton I*, 376 A.2d at 366. Connecticut's approach to distribution of state aid ranked it last among all the states in terms of its equalizing effects. *See id.* at 368.

62. *Id.* at 367.

substantially short of the statewide average of $1055, and dramatically short of the $1245 typically spent in the wealthiest districts.[63] These spending differences translated into significant differences in the abilities of the school systems to provide educational opportunities to their students, differences which the courts quantified in terms of sharply differential spending, inter alia, on teacher salaries, and on special education services.[64]

Faced with the clear evidence of these sharp disparities, the *Horton* trial court ruled, in late 1974, that Connecticut's school funding system violated the state constitution.[65] The state's supreme court affirmed this decision in 1977 by a four-to-one margin.[66] The supreme court reasoned that, under the state constitution, even if not under the Federal Constitution, "the right to education is so basic and fundamental that any infringement of that right must be strictly scrutinized."[67] Because the right to education is fundamental, it follows that "pupils in the public schools are entitled to the equal enjoyment of that right," and, hence, that the existing funding system, with its clear pattern of inequalities, "cannot pass the test of 'strict judicial scrutiny' as to its constitutionality."[68] The court did not spell out the extent to which its conclusion rested on the state constitution's specific mandate for free public schools, as opposed to its general guarantees of equal protection. Whatever the precise source, it found within the state constitution a "requirement that the state provide a substantially equal educational opportunity" to children in all of the state's public schools, regardless of the resources of the communities in which those schools may be located.[69]

The court then concluded its opinion with a relatively brief but careful discussion of remedies. Like virtually every other court to find a state's school funding system unconstitutional, the Connecticut court placed the primary responsibility for designing a constitutional system on the legislature, observing that this allocation was particularly appropriate where the state constitution expressly assigned the legislature the responsibility for implementing the state's

---

63. *Id.* at 367-68. Again, Canton's situation was considerably less bleak than that of the state's poorest communities, where the average school tax rate was 26.3 mills, and the average spending was only $813 per pupil. *Id.* at 368.

64. *Id.*

65. Horton v. Meskill, 332 A.2d 113 (Conn. Super. Ct. 1974).

66. *Horton I*, 376 A.2d at 359.

67. *Id*. at 373. In reaching this conclusion, the court drew support, not only from Connecticut's long history of state oversight of public education, *id.* at 373-74, and from the different functions and texts of the state and federal constitutions, *see id.* at 372 (noting the extent to which the *Rodriguez* decision rested on federalism concerns), but also from Justice Marshall's dissent in *Rodriguez* and from the school funding decisions in California and New Jersey, *id.* at 373, although, as the dissent pointed out, *id.* at 379 (Loiselle, J., dissenting), the majority was far from clear about the precise reasoning that it extracted or relied upon from these cases.

68. *Id.* at 374-75.

69. *Id.* at 375.

educational duties.[70] Nonetheless, the court proceeded to offer the legislature some broad suggestions about how to proceed. First, it referenced a number of remedial approaches adopted in other states, specifically characterizing them as "means of achieving substantial equality of opportunities for learning,"[71] and thereby hinting strongly that any of them would suffice to meet the court's constitutional standard.[72] Second, it expressly endorsed the trial court's findings that a constitutional solution need neither abandon the use of the property tax as a source of income for education funding nor diminish the extent of local control of education.[73] Finally, the court emphasized that the constitutional requirement was only for "substantial equality,"[74] and specifically that "absolute equality or precisely equal advantages are not required and cannot be attained except in the most relative sense."[75] Whatever the precise meaning of this somewhat bizarre turn of phrase, the court went on to spell out that deviations from perfect equality could be justified by a wide range of factors, including "economic and educational factors" affecting education costs, "course offerings of special interest in diverse communities," imperfect correlations between "dollar input and quality of educational opportunity," "individual and group differences," and "local conditions."[76] The list was long enough, and varied enough, to offer the legislature a wide range of latitude in which to devise a remedial strategy.

In light of the less than prompt responses to *Brown v. Board of Education*'s call for desegregation "with all deliberate speed,"[77] it seems more than a bit ironic that the Connecticut court, more than twenty years later, adopted that same phrase (without acknowledgment of either the source or the irony) to characterize the state's obligation to develop a constitutional system of education financing.[78] In fact, however, the political branches in Connecticut proved far more responsive to the constitutional flaws in the state's education funding system, than were the southern states to the unconstitutionality of segregation.

Indeed, it is noteworthy that, even before the suit was brought or decided, the legislature and executive had taken some initial steps to acknowledge and address the problems of school funding inequality. In 1972, a Governor's Commission on Tax Reform issued a report on local government, schools, and the property tax, which highlighted the "dual inequity" of higher taxes and lower spending in

---

70. *Id.* (citing CONN. CONST. art. VIII, § 1 ("There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation.")).

71. *Id.*

72. *Id.* at 375 & n.15.

73. *Id.* at 375-76. This passage echoes the opinion's earlier recitation of the trial court's specific findings concerning the flexibility of potential remedies. *See id.* at 369.

74. The standard of "substantial" equality is restated at least three times in the closing paragraphs of the decision. *See id.* at 375-76.

75. *Id.* at 376.

76. *Id.*

77. Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955).

78. *Horton I*, 376 A.2d at 361.

the poorer towns and noted the proliferation of constitutional challenges to property-tax based funding systems across the nation.[79] In 1973, the legislature established a Commission to Study School Finance and Equal Educational Opportunity, which concluded that the existing financing system was "inherently inequitable" and proposed a specific reform program to the legislature.[80] After the trial court's 1974 decision in *Horton* finding the current funding system unconstitutional, the legislature promptly responded with a modest package of reforms, increasing the size of the state's uniform per-student grants from $215 to $250 and establishing a new, lottery-funded program of "educational equalization grants."[81] This latter program marked the first use in Connecticut of a "guaranteed tax base" formula, which allocated state aid in inverse relation to property wealth and district per capita income.[82] The program was so modest in size and so constrained in its methodology that it, in fact, did little more than to provide per-pupil grants of a few additional dollars to all but the wealthiest districts.[83] However, its approach would prove a model for subsequent, more serious reforms. Although both the trial court and the state supreme court were quick to find these measures constitutionally insufficient, it appears (judging from the frequency with which they are cited in the courts' opinions) that these first, tentative steps by the political branches reinforced the resolve of the Connecticut judiciary to tackle these challenging issues, both by underwriting the courts' findings of severe and problematic inequalities and by signaling a legislative readiness to respond to a judicial mandate.

Indeed, once the state supreme court issued its *Horton I* ruling in 1977, the response was reasonably swift and substantial. In 1979, the legislature enacted a sweeping reform of Connecticut's education funding system, with two principal components. The first element established a per-pupil minimum expenditure requirement for all districts, benchmarked at the current spending level in relatively high-spending districts.[84] The second element, the guaranteed tax base

---

79. *See* Horton v. Meskill, 332 A.2d 113, 114-15, 117 (Conn. Super. Ct. 1974) (citing and quoting 2 Report of Governor's Commission on Tax Reform (Dec. 1972)); *Horton I*, 376 A.2d at 367.

80. *Horton I*, 376 A.2d at 376.

81. *Id.* at 369.

82. *See id.* at 369 & n.11. Connecticut's "guaranteed tax base" approach is a variant of the "power equalization" approaches, which were widely advocated and not infrequently adopted around the country as the most effective remedy to school funding inequities.

83. For a discussion of its detailed workings, see *id.* at 369 n.11. The key constraint on the methodology was a cap on the funding provided to any district, which had the effect of providing identical per-pupil grants (ranging from $12.50 to $15 in different years) to virtually every district with property wealth below the top fifteen percent of districts.

84. *See* Horton III, 486 A.2d 1099, 1101 & n.3 (Conn. 1985). The minimum expenditure requirement was pegged at the spending level of the school district at the seventy-fifth percentile of students, ranked by spending per pupil. In calculating the required spending, additional funding of one-half the per-pupil amount was specified for each poor child (those receiving welfare assistance) in the district's schools.

(GTB) grant formula, transformed the way in which the state provided financial support to its school districts.

The GTB formula, an outgrowth of the 1974 equalization grant approach, shifted Connecticut from its former program of uniform per-pupil grants to a version of the "power equalization" methodology advocated nationally by school finance reformers as the best way to equalize educational opportunity while respecting local autonomy.[85] Such power equalization methods were prominent among the approaches referenced in *Horton I*'s litany of effective remedies adopted in other jurisdictions.[86] Under a power equalization approach, each district determines its own level of local property tax effort, and the state then provides each relatively poor district with the additional revenue that its chosen tax rate would have yielded if its property wealth had equaled some higher statewide standard. Thus, each district retains the power to determine its own level of tax support for its schools (consistent with satisfying the minimum expenditure requirement), but the resources that the district has available to spend are determined not by its property wealth, but only by its chosen tax rate.

In Connecticut's GTB version of power equalization, each district was allocated state aid measured by comparing it to one of the wealthiest districts in the state, using a measure of wealth that reflected both property values and per capita incomes, with a further adjustment to reflect the greater costs of educating very poor children (again identified as those who were receiving welfare).[87] At the same time, in a nod to the interests of the wealthier districts, the legislation guaranteed that each district would continue to receive state assistance at least equal to what it had received under the prior flat per-pupil grant system. In light of the high costs of the new program, the 1979 legislation proposed to phase in both the minimum expenditure requirement and the full-funding of the GTB grants over a five-year period, with full implementation scheduled for the 1983-84 school year.[88] However, over the next few years, fiscal pressures led the legislature to repeatedly modify various features of the program, delaying full phase-in of the GTB by two additional years and adjusting its formulae to reduce its costs.

The effects of these reforms were significant, although less dramatic than their proponents must have hoped. The share of education costs borne by the state rose sharply, and the local share dropped commensurately. Whereas the state covered only 29.8% of school costs in 1978, its share had risen to 42.9% by 1984 and continued to grow in the ensuing years.[89] The disparities between

---

85. For further background concerning the power equalization approach and its history, see Enrich, *supra* note 1, at 111 & nn.41-42.

86. *See Horton I*, 376 A.2d at 375 & n.15; *see also id.* at 372 n.12 (noting that, in the years after *Rodriguez*, eleven states had enacted some type of power equalizing formula).

87. For more of the details, see *Horton III*, 486 A.2d at 1101-02 & n.2.

88. *Id.* at 1107. Full funding of the program was estimated to require $443 million annually by the time of full implementation. *See id.* at 1104 n.7.

89. *Id.* at 1108 n.17. The ensuing years up to 1989-90 show continuing growth in the state's share. *See* Conn. Gen. Assembly, Office of Fiscal Analysis website, *at* http://www.cga.state.

spending in the wealthier and poorer districts diminished, although they remained substantial. In 1973-74, the school district at the ninety-fifth percentile of per-pupil expenditures spent 86.9% more than the district at the fifth percentile, but by 1983-84 the disparity had declined to 70.1%.[90]

The *Horton* plaintiffs did not initially challenge the constitutionality of the 1979 reforms, but, when the legislature in 1980 began to back away from full and prompt implementation,[91] the plaintiffs returned to court for a determination of whether the modified reform package satisfied the constitutional requirements. The trial court found that the 1979 legislation would have been constitutionally adequate but that a number of the subsequent modifications could not survive the court's strict scrutiny; the court ordered implementation of the program stripped of these unconstitutional adjustments.

On appeal, the state supreme court chose a more measured approach. In an opinion authored by Chief Justice Ellen Peters, the supreme court approved the trial court's endorsement of the 1979 reforms, but declined to decide the constitutionality of the subsequent amendments. Instead, the court focused on the standards that should be applied in assessing whether school financing legislation survived strict judicial scrutiny and remanded the case to the trial court for assessment of the post-1979 amendments under its newly announced standards. Drawing on its recognition in *Horton I* of the "sui generis" character of school financing challenges, the court concluded that the "compelling state interest" standard that it ordinarily deployed in strict-scrutiny contexts was too rigid for school funding cases.[92] Instead, it proclaimed a new three-step standard, modeled on the federal courts' approach in equal protection challenges to

---

ct.us/ofa/documents/MajorIssues/2001/PublicElementarySecondaryEducationExpenditures Connecticut.htm (last visited Jan. 20, 2003) (using a slightly different metric but showing growth in state share from 37.74% in 1983-84 to 45.52% in 1989-90).

90. *Horton III*, 486 A.2d at 1108 & n.16. While the court concluded from these statistics that the legislation had narrowed the gaps in funding capacity "significantly," a closer examination of the data, *see id.* at 1107 n.15, reveals that the gap had been substantially less than 87% in all but one of the years between 1973-74 and the enactment of the reform legislation, and had shown no further improvement after the first year of the GTB program's introduction. Other statistical measures of changes in the disparities showed even less impressive results. For example, the ratio of spending between the highest and lowest spending school districts, after dipping slightly in the first few years of the GTB program, had grown back to its pre-GTB levels by 1983-84. *See also* Reed, *supra* note 18, at 191-92 (measuring the modest gains in equality of resources achieved in Conn. in the years after 1977). The end of this section of this Article contains a discussion of subsequent trends in these statistics.

91. Indeed, by one measure, the backsliding in the early 1980s wiped out all of the progress toward equalization that had been achieved in the late 1970s, although further progress was achieved in the following years. *See* Reed, *supra* note 18, at 192.

92. *Horton III*, 486 A.2d at 1105. While borrowing the "sui generis" label from *Horton I*, the *Horton III* court makes no attempt to build on, or even to reference, *Horton I*'s discussion of why school finance cases are so different from other equal protection challenges, nor to explain why these differences call for a different methodology for strict scrutiny.

legislative reapportionment plans. In essence, if a financing plan (a) results in "more than de minimis" disparities in educational expenditures, the disparities must be shown (b) to result from "advancement of a legitimate state policy" and (c) to not be so large as "to emasculate the goal of substantial equality."[93]

Having articulated this new standard, the court deployed it with evident political sensitivity.[94] With regard to the 1979 legislation, the court concluded that the trial court's analysis, while grounded on a different standard, sufficed to establish constitutionality, although the supreme court's discussion of the third prong of its test (whether the remaining disparities are too great) was palpably strained by the fact that the trial court had not addressed this issue. In turning to the post-1979 amendments, rather than attempting to apply its new standard, the court simply remanded the issues to the trial court with no suggestion about the outcome. The evident strategy was to maintain pressure for continued reform without directly confronting the legislature. The overall message—to the parties, to the trial court and to the political branches—was that valuable progress had been made, but that the courts had to continue to oversee the process, under a standard that sought to balance flexibility with a continued commitment to the goal of substantial equality of opportunity.

The next significant move came from the legislature, which, in 1988, again completely overhauled the state's approach to education financing, replacing the GTB formula with a new "Educational Cost Sharing" (ECS) methodology. This new system abandoned the GTB's power equalization approach, with its objective of placing all districts on an equal footing in their ability to provide funding for education, in favor of a foundation funding system, which instead focuses on ensuring that each district has the resources to provide an adequate educational opportunity to its students.[95] At the heart of the ECS formula is the identification of a foundation cost, representing the minimum amount needed to provide an adequate education for a typical student.[96] The 1988 plan set the foundation cost at a specified dollar figure but called for annual adjustments to peg the foundation to the spending levels of a relatively high-spending district in a recent year. The foundation cost is then multiplied by a district's student population (with additional weights for poor students as well as for those with limited English proficiency or with low scores on state tests) to determine the foundation budget for the district. The district's ECS grant from the state is then calculated as a percentage of the foundation budget, with the percentage set to reflect the relative abilities of different districts to cover education costs from

---

93. *Horton III*, 486 A.2d at 1106-07.

94. *See* Hon. Ellen A. Peters, *Getting Away from the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543, 1563-64 (1997) (describing "political digestibility" as a key benchmark for judicial approaches to issues raising separation-of-powers concerns).

95. For a general discussion of foundation funding approaches, see Enrich, *supra* note 1, at 112.

96. For details of the Connecticut ECS system, see Conn. General Assembly, Legislative Program Review and Investigations Comm., Connecticut's Public School Finance System 3-11 (2001) [hereinafter LPR & IC Report].

local property taxes. In particular, this "base aid ratio" is calculated by comparing the wealth of each district (measured by its property wealth, household income, and several other factors) to a "guaranteed wealth level," which was initially set at twice the wealth of the median town. As with the former GTB system, the ECS approach also included a minimum expenditure requirement for each district, in addition to provisions that provide some continuing assistance to even the wealthiest districts.

By setting a relatively generous foundation level and a relatively high guaranteed wealth level, the ECS formula continued to have a substantial equalizing effect on Connecticut's school districts. By 1991-92, the school district at the ninety-fifth percentile of spending per student was only spending forty-nine percent more than the district at the fifth percentile, compared to an eighty-seven percent disparity on the eve of the initial *Horton* decision.[97] In its early years, the ECS system appears to have satisfied the proponents of funding equity, at least well enough to forestall further litigation challenging funding equity. Yet, as was the case with the GTB approach, subsequent legislative adjustments (to which we will return below) have significantly undermined the ECS formula's equalizing power and have allowed funding gaps to widen again in recent years, inviting new *Horton*-based legal challenges.[98]

So, how successful was the response to *Horton*? The two major waves of legislative reform unquestionably resulted in a substantially increased state role in school financing—and in a commensurately decreased reliance on local property taxes—and the state funds were allocated under formulae that significantly reduced the gaps between rich and poor districts (unlike the pre-*Horton* per pupil allocations). At the same time, each of the reform efforts was sharply scaled back by subsequent legislative adjustments, and the spending disparities between high-spending and low-spending districts have remained sizeable. Indeed, in a number of other states, courts have taken the opposite path from *Horton III* and have found that similar reforms, which allowed patterns of persisting but diminished disparities, failed to satisfy constitutional demands.[99] The Connecticut court chose a different course, granting constitutional approval to limited reforms while attempting to maintain judicial pressure for continued efforts. However, it is interesting to note that, by a decade after *Horton III*, Chief Justice Peters, its author, was recharacterizing the court's cautious decision as if it had taken the bolder step of finding the scaled-back reforms unconstitutional.[100]

---

97. Author's calculations from data provided by the Connecticut Department of Education.

98. *See infra* Part IV.

99. *See, e.g.*, Abbott v. Burke, 643 A.2d 575 (N.J. 1994); DeRolph v. State, 677 N.E.2d 733 (Ohio 1997); Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d 491 (Tex. 1991).

100. *See* Sheff v. O'Neill, 678 A.2d 1267, 1277 (Conn. 1996) (describing *Horton III* as "requiring further remedial action"); *id.* at 1288 (describing *Horton I* as finding fiscal disparities "constitutionally unacceptable").

III. *SHEFF V. O'NEILL*: CONNECTICUT TACKLES RACIAL ISOLATION

Whatever the conclusion about *Horton*'s efficacy, one thing is clear: the *Horton* case was never intended nor expected to address the problems of Connecticut's large urban school districts attended by the preponderance of the state's poor minority students. Indeed, even before the *Horton* suit was filed, a widely cited Note in the *Yale Law Journal* documented that, at least in Connecticut, the urban districts with the poorest students were often not the districts with the least property wealth, nor with the least funding for education.[101] Throughout the 1970s and 1980s, average per pupil spending in the state's urban centers hovered around the statewide average, and per pupil spending in Hartford in particular was consistently well above the state norm.[102] The funding reforms enacted in response to *Horton* were designed to give special attention and financial support to districts with disproportionate numbers of low-income students or others at risk of academic failure and in need of extra services, thereby further strengthening the relative financial positions of the state's urban districts.[103] Unequal funding was not the primary issue for these schools.

Nonetheless, the state's urban schools faced profound problems, problems typical of those found in cities across the country serving predominantly poor and largely minority student populations. In the schools of the state's three largest cities—Hartford, New Haven, and Bridgeport—performance on state standardized tests was abysmal, and starkly worse than performance in other districts.[104] Dropout rates were likewise troubling and dramatically out of line with statewide levels.[105] The disparities and failings were so stark that Governor

---

101. Churgin et al., *supra* note 38. The Note played a central role in Justice Powell's dissection of the wealth-as-a-suspect-class argument in *Rodriguez*. *See* 411 U.S. at 22-24. For other cases citing the Note, see *Lujan v. Colorado State Board of Education* 649 P.2d 1005, 1021 (Colo. 1982); *Horton I*, 376 A.2d at 361; and *Robinson v. Cahill*, 355 A.2d 129, 185 (N.J. 1976).

102. Author's calculations from data provided by Connecticut State Department of Education. For example, in 1977-78, statewide average spending was $1670 per pupil, while spending in the urban centers (the communities that were subsequently classified by the State Department of Education into Education Reference Group ("ERG") I, a classification reflecting socioeconomic status) averaged $1793 and Hartford spent $2100. By 1986-87, the respective numbers were $4521 statewide, $4527 in ERG I, and $4983 in Hartford. In fact, in many of these years, Hartford's per pupil spending was above the average for ERG A, the wealthiest and highest spending grouping of suburban communities.

103. *Sheff*, 678 A.2d at 1277.

104. *Id.* at 1273. In 1993-94, less than 4% of eighth-grade students in the urban districts achieved passing scores on the three statewide mastery exams, as contrasted to 22.4% statewide, and to more than half of students in the top socioeconomic cluster. *See* Strategic School District Profiles, *available at* http://www.csde.state.ct.us/public/der/ssp/index.htm (last visited Apr. 25, 2003).

105. In 1993-94, Bridgeport, Hartford, and New Haven reported dropout rates of 10%, 16%, and 8% respectively, as contrasted with a statewide rate of 4.8%. Not surprisingly, in ERG A (the

Weicker focused on them in his 1993 State of the State Message, observing that "there are two Connecticuts when it comes to the education of our children, Connecticuts separated by racial and economic divisions. There is a Connecticut of promise, as seen in its suburbs, and a Connecticut of despair as seen in its poverty-stricken cities."[106] The children attending these failing urban schools were, as Governor Weicker observed, predominantly poor; in 1993-94, more than seventy percent of them were eligible for free or reduced-price school meals.[107] They were also overwhelmingly students of color; in 1993-94, eighty-five percent of New Haven's, eighty-eight percent of Bridgeport's, and ninety-four percent of Hartford's school populations were minority group members, predominantly Latino and African-American.[108] These economically and racially isolated populations confronted Connecticut's urban school districts with challenges that they could not meet,[109] notwithstanding the financial resources with which the districts were provided.

This bleak pattern repeats itself in urban schools in many parts of the country, and in a number of states, parties have sought to use school funding litigation to address it.[110] In Connecticut, however, where the successful *Horton* case had left the urban schools' problems largely untouched, a novel litigation strategy arose when *Sheff v. O'Neill* was filed in 1989 on behalf of a group of students in the Hartford area.[111] Instead of focusing on the adequacy or equity of the resources provided to Hartford's schools in comparison to those of its neighbors, the *Sheff* plaintiffs directly challenged the racial and economic isolation of Hartford's school children, arguing that this de facto segregation deprived them of their rights under Connecticut's constitution. For Hartford's poor and minority children, the earlier shift from race-based lawsuits to money-based suits had proved of no value. Consequently, in *Sheff*, they chose to give

---

top socioeconomic tier) dropout rates were consistently below one percent. *See* Strategic School District Profiles, *supra* note 104.

106. Sheff v. O'Neill, 1995 WL 230992, at *20 (Conn. Super. Ct. Apr. 12, 1995) (quoting Governor Lowell P. Weicker, State of the State Message for Connecticut (Jan. 6, 1993)).

107. *See* Strategic School District Profiles, *supra* note 104. This contrasts to a statewide average of 23.5%. *See also Sheff*, 1995 WL 230992, at *6 (citing evidence in a 1988 report that Hartford, New Haven, and Bridgeport respectively ranked second, sixth and eighth among cities nationally with the highest child poverty rates).

108. *See* Strategic School District Profiles, *supra* note 104.

109. The *Sheff* court catalogues some of the familiar challenges: a high proportion of children from single-parent homes, a high proportion of children who are not native speakers of English, and a low proportion of students who continue to attend the same school from one year to the next. *See Scheff*, 678 A.2d at 1273.

110. *See, e.g.*, Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661 (N.Y. 1995); DeRolph v. State, 677 N.E.2d 733 (Ohio 1997); Abbott v. Burke, 643 A.2d 575 (N.J. 1994).

111. Plaintiffs included both white and minority students in the Hartford schools, as well as two white students from the neighboring suburban West Hartford schools. The central claim was that segregation of the school systems worked a constitutional deprivation on both white and minority students in both privileged and underprivileged districts. *Sheff*, 678 A.2d at 1271-72.

race-based claims another try.

This strategy was encouraged by at least two considerations. First was the simple fact of the stark disparities between the academic experiences and outcomes of children in the Hartford schools and those of students in the surrounding suburbs, disparities which appeared to make a compelling case for a denial of the "substantially equal educational opportunity" that *Horton* had found was the constitutional right of all Connecticut children.[112] After all, nothing in the *Horton* rulings had suggested that equality of *funding* was all that the constitution required, and the contrasts between educational opportunities in the Hartford and suburban schools offered powerful evidence that, regardless of arguable funding parity, nothing like equality of educational opportunity had been achieved.

The second factor encouraging the *Sheff* approach was the distinctive wording of the Connecticut Constitution's equal protection provision, which since 1965 had provided that "[n]o person shall be denied the equal protection of the law *nor be subjected to segregation or discrimination* in the exercise or enjoyment of his civil or political rights because of religion, race, color, ancestry or national origin."[113] The Connecticut Constitution's explicit prohibition against segregation provided a clear difference from the Federal Equal Protection Clause, a difference that invited a construction broader than the focus on de jure segregation that had limited the reach of the federal clause.

Reflecting these two foundations, the *Sheff* complaint focused on two distinct claims.[114] First, it asserted that the extreme racial and economic isolation of Hartford's student population, contrasted against the sharply different composition of the neighboring school districts, constituted de facto segregation, and that such de facto segregation, at least in the context of the fundamental right to an education, constituted a per se violation of the Connecticut Equal Protection and Anti-Segregation Clause, regardless of the nature or extent of any variations in the quality of the education delivered in the segregated schools. Second, it claimed that, due to its racial and economic isolation and the insufficiency of its resources, the Hartford school district was failing to provide educational opportunities to its students that were substantially equal to those provided in other districts, as was required under the state constitution's education and equal protection clauses. The first of these claims depended on few facts beyond the simple reality of racial isolation, whereas the second depended on a factual showing of the educational shortcomings of the Hartford school district that resulted from its racial and economic isolation.[115]

---

112. Horton I, 376 A.2d 359, 376 (Conn. 1977).

113. CONN. CONST. art. I, § 20 (amended 1974 & 1984) (emphasis added). Subsequent amendments added sex and physical or mental disability to the list of impermissible bases for segregation or discrimination. *See Sheff*, 678 A.2d at 1282 (noting that only a handful of other state constitutions contained any similar express prohibition against segregation).

114. For a careful explication of the *Sheff* complaint, see 678 A.2d at 1299-1303 (Borden, J., dissenting).

115. The complaint encompassed two other counts as well, one asserting a failure of the

After six years of procedural wrangling and development of a substantial factual record, the trial court held in favor of the defendants, on the ground that the plaintiffs had failed to establish the requisite state action causing the alleged harms. Indeed, the trial court devoted much of its lengthy opinion to a discussion of the numerous ways in which the state had taken notice of and acted to remedy the problems that arose from the isolation and poverty of the urban districts.[116] After remanding the case to the trial court for development of complete findings of fact, the state supreme court reversed in a four-to-three decision again authored by Chief Justice Peters.[117] The court concluded that, in light of the state's affirmative constitutional obligation to provide an equal educational opportunity for all the state's children, a causal connection to specific state action was not a precondition for judicial scrutiny of the alleged constitutional deprivations suffered by the plaintiff students.[118] The court then proceeded to the merits of the constitutional claims (which the trial court had never reached) and found in favor of the plaintiffs.

The court rested its decision on a murky blend of the plaintiffs' two main claims, concluding that "the existence of extreme racial and ethnic isolation in the public school system deprives schoolchildren of a substantially equal educational opportunity."[119] The court was careful not to accept plaintiffs' argument that racial segregation, even de facto segregation, constituted a per se constitutional violation, presumably out of concern both for the potentially sweeping precedential effect of such a ruling and for the weak support for such a claim in the constitutional text. At the same time, it avoided the need to rely on factual findings about the inferior quality of the education delivered to Hartford students. Instead, the court focused on the direct "educational impairment" that, in fact, resulted from the segregation prevalent in the Hartford-area schools, particularly the lost educational opportunities from lack of interactions across racial and ethnic lines. The court held that this impairment constituted a violation of the students' constitutional rights, as defined jointly by the education and anti-segregation clauses.[120]

The result of this approach is an opinion that often seems oddly evasive. The court spent far more time and energy explaining why discriminatory intent and

---

Hartford schools to provide a minimally adequate education and the other asserting a violation of the state constitution's due process guarantees. *See Sheff* 678 A.2d at 1271-72. However, the primary focus of the litigation was on the first two counts.

116. Sheff v. O'Neill, 1995 WL 230992, at *10-*30 (Conn. Super. Ct. 1995).

117. 678 A.2d at 1271.

118. *Id.* at 1277.

119. *Id.* at 1281. *See id.* at 1286 (noting that the court's reasoning combined two of the plaintiffs' claims).

120. *Id.* at 1282-83. James Ryan has argued that the court could have reached its anti-segregation decision based on the education clause alone, given a proper factual showing. James E. Ryan, Sheff, *Segregation, and School Finance Litigation*, 74 N.Y.U. L. REV. 529, 541-42 (1999). This may well be true as a general statement, but the specific factual findings by the *Sheff* trial court made it less than a promising case for such a strategy.

explicit state action were unnecessary than it did in explicating the actual constitutional harm suffered by the plaintiff school children.[121] Although the court spoke at several points of the "devastating effects,"[122] the "negative consequences,"[123] and the "substantial[] impair[ment]" of educational opportunities[124] that result from racial and ethnic isolation, the court had little to say about the actual nature of these harms. In particular, the court declined to rely in any way upon the starkly inferior academic performance of Hartford's students, on the differences in educational opportunities offered in the urban and suburban schools, or on the chasm between promise in the suburbs and despair in the cities observed by Governor Weicker. Instead, at the only point where the court tried to spell out the harmful effects of segregation, it focused exclusively on the impairment of the schools' ability to inculcate the "shared values" of a multicultural society by bringing students of different backgrounds together.[125] For the most part, the court limited itself to repeated bare assertions of the harmfulness, wrongfulness, and unconstitutionality of segregation, coupled with reminders about the importance of education and the societal significance of deprivations of educational opportunity.

The explanation for this spare and conclusory treatment of what seems the central issue in the case can be found in the trial court's framing of the issues for the appeal. Its findings of fact effectively precluded the supreme court from attributing the real and substantial inequalities of educational opportunity between urban and suburban districts to the racial and ethnic isolation that plaintiffs sought to challenge. In particular, the trial court found the following: (1) the dramatic differences in test scores proven in the case could not be used to draw meaningful interdistrict comparisons or to draw conclusions about the quality of education in the Hartford schools;[126] (2) the Hartford school system provided its students with equal educational opportunities because it received resources commensurate with those received by other districts; and (3) poverty, and not racial or ethnic isolation, was the principal causal factor behind the lower academic achievement levels in the urban schools.[127] In the face of these findings, the court, while convinced of the severe harms flowing from the racial, ethnic, and economic isolation of Hartford's students, had a hard time articulating those harms. Disparities in resources were denied by the trial court, and disparities in achievement were attributed to poverty, not race, a factor that the court was unwilling to invoke as a trigger for its strict scrutiny.[128] Thus, the court was left to place the full weight of its ruling on the simple repugnance of segregation and its acknowledged impacts on opportunities for intercultural

121. *See* Ryan, *supra* note 120, at 543 (labeling the court's analysis as "summary").

122. *Sheff*, 678 A.2d at 1270.

123. *Id.* at 1273.

124. *Id.* at 1280. *See also id.* at 1282 ("educational impairment").

125. *Id.* at 1285.

126. *Id.* at 1305 (Borden, J., dissenting).

127. *Id.* at 1274.

128. *See id.* at 1287.

learning.[129]

This constrained analysis of the constitutional harms had important, if unstated, implications when the court turned to remedial questions. If the deprivation of equal educational opportunity resulted, not from the inferior education received by urban schoolchildren, but from the simple fact of their racial isolation, then a remedy must focus, not on improvement or equalization of educational opportunities, but on the elimination of segregation. In its brief discussion of remedies, the majority's opinion avoided any concrete suggestions about the substance of a constitutional approach. Instead, the court, expressly modeling its approach on *Horton I*, limited the initial judicial role to a declaration of unconstitutionality, instructing the trial court to retain jurisdiction while allowing the legislative and executive branches an opportunity to "search for appropriate remedial measures."[130] Unlike *Horton I*, however, the court offered no hints about the parameters of a constitutional remedy, no references to strategies adopted elsewhere that would satisfy the constitutional mandate, and no assurances about types of approaches that might suffice or about others that would not be necessary.[131] This time, the court truly left the political branches to their own wisdom, urging them only to act with urgency.[132]

The response, as with *Horton I*, was impressively swift. Within three weeks of the court's ruling, Governor Rowland appointed an Education Improvement Panel, whose mission was to respond to the *Sheff* decision and to come up with "a broad range of options for reducing racial isolation in [the] state's public schools" and for addressing other educational goals.[133] The Panel was chaired by the state's Commissioner of Education and included key legislative leaders and other educational policy makers, advocates, and experts.[134] Six months later, in early 1997, the Panel issued its final report, containing fifteen specific recommendations. By June 1997, less than a year after the *Sheff* ruling, the

---

129. *See id.* at 1285 (noting the parties' agreement "that racial and ethnic segregation is harmful").

130. *Id.* at 1290. Not long after authoring the opinion, Chief Justice Peters reflected that this deference served "in substantial part, to defuse resistance" to the court's controversial decision. *See* Peters, *supra* note 94, at 1559.

131. See *supra* notes 72-76 and accompanying text for a discussion of these aspects of *Horton I*'s remedial discussion.

132. *Sheff*, 678 A.2d at 1290.

133. Governor's Exec. Order No. 10 (July 25, 1996), *reprinted in* Education Improvement Panel, Report to the Governor and General Assembly (Jan. 22, 1997). While the Executive Order does not expressly limit the range of options to be considered by the Panel, it does express the Governor's goal of finding a solution "based on voluntary measures emphasizing local and parental decision making as opposed to state-imposed mandates such as 'forced bussing.'" While the *Sheff* ruling was the impetus behind the Panel's formation, the Governor's Order tied the goal of reducing racial isolation to three other, potentially competing goals: "improving teaching and learning, enhancing a sense of community and encouraging parental involvement."

134. *See* Sheff v. O'Neill, 733 A.2d 925, 927 (Conn. Super. Ct. 1999) (*Sheff II*) (describing composition of the panel).

Connecticut legislature enacted a series of measures based on the Panel's recommendations.[135]

The speed of the response, however, may have been more impressive than its substance.[136] Many of the measures recommended by the Panel and adopted by the legislature—such as expansion of early childhood and adult education, increased funding for targeted programs, and a restructuring of the governance of the Hartford schools—were directed, not at responding to racial isolation, but at more generic issues of educational quality. In sharp contrast both to the *Sheff* opinion's focus on the state's districting as the primary source of the unconstitutional segregation[137] and to the *Sheff* plaintiffs' demand for a redrawing of the state's school district boundaries to eliminate racially segregated school systems,[138] the Panel and the legislature limited themselves to "voluntary" strategies for reducing racial imbalance. For example, the legislation subsidized and encouraged the creation of interdistrict magnet schools, with special programs designed to draw a diverse student body from a wide geographical area; substantially expanded, and increased state support for, an existing "open choice" program allowing students to elect to attend schools outside of their own districts; and authorized and funded interdistrict cooperative programs to bring urban and suburban students together for specific educational experiences, such as joint field trips, classroom exchanges, or inter-school visitations. The legislation also included other elements intended to assess and address racial and ethnic isolation, such as a minority staff recruitment program and a requirement that the state and all school districts establish plans for reducing racial, ethnic and economic isolation and monitor their progress in achieving their goals.

In essence, the state responded to *Sheff*'s mandate with a package of initiatives reflecting the current vogues in education reform—measures to expand preferred programs (such as technology and early reading), to enhance parental choice, and to increase district and school accountability.[139] In light of the

---

135. 2001 Conn. Acts 97-4 (Spec. Sess.); 1997 Conn. Acts 256 (Reg. Sess.); 1997 Conn. Acts 290 (Reg. Sess.). These legislative actions were supplemented by a number of others over the ensuing years, many of which are cited in the sources cited in the following footnote.

136. For discussions of the content of the legislation, see *Sheff II*, 733 A.2d at 927-937; Kathryn A. McDermott et al., *Have Connecticut's Desegregation Policies Produced Desegregation?*, 35 EQUITY & EXCELLENCE IN EDUC. 18 (2002); Judith Lohman & Alan Shepard, *Sheff vs.O'Neill Response—K-12 Programs* (Conn. Office of Legislative Research Report 2002-R-0107).

137. *See Sheff*, 678 A.2d at 1274.

138. *See id.* at 1328 (Borden, J., dissenting) (discussing remedies sought by plaintiffs); *see also* CONNECTICUT CENTER FOR SCHOOL CHANGE, THE UNEXAMINED REMEDY (1998) (offering a detailed blueprint for consolidation of the Hartford-area school districts into a single consolidated district to meet the *Sheff* mandate).

139. *See Sheff II*, 733 A.2d at 943 (describing state's response as "a comprehensive, interrelated, well funded set of programs and legislation designed to improve education for all children, with a special emphasis on urban children, while promoting diverse educational environments"); Lohman & Shepard, *supra* note 136, at 1 (dividing legislative response into "two

prevailing wisdom, these measures marshaled significant state resources in directions generally expected to positively impact educational outcomes. Some even promised to increase the mobility of students across district lines. Yet, none of these measures either altered district boundaries or imposed any requirements that would directly reduce racial, ethnic and economic isolation.

Disappointed by the absence of more aggressive remedies, the plaintiffs returned to court to challenge the adequacy of the legislative response. The trial court ruled on this challenge in March 1999, before many of the legislative measures had been fully implemented, and the court's ruling was not appealed.[140] The court, after an extended and enthusiastic recounting of the many programs and measures adopted in response to *Sheff I*, concluded that it was simply too early to seriously consider a claim that the state's remedial measures were insufficient, without giving them a chance to work.[141] With regard to plaintiffs' argument that the types of measures adopted by the state were incapable of producing sufficiently rapid and substantial desegregation and that only a mandatory pupil reassignment plan would suffice, the court concluded, on the basis of an expert's testimony, that voluntary approaches were preferable to mandatory ones because they "promote integration of more lasting duration with a minimum of opposition and disruption."[142]

Unfortunately, the passage of time has only confirmed the *Sheff* plaintiffs' fears that the state's remedies were unlikely to promote significant integration at all. In the intervening years, the legislature has continued to fine-tune the initiatives adopted in 1997 and has provided substantial resources for the programs.[143] Nonetheless, in each of Connecticut's three urban centers, the concentration of students of color in the schools was higher in 2000-01 than it had been in 1993-94.[144] A recently published comprehensive study of the desegregative effects of Connecticut's efforts concluded that, while the programs allowed several thousand students to attend schools outside their home communities, these measures had "almost no measurable effect on overall levels

---

major areas: (1) expanding interdistrict and voluntary school choice programs and (2) establishing programs aimed at improving student achievement, particularly in poor urban school districts").

140. *Sheff II*, 733 A.2d at 925.

141. *Id.* at 938.

142. *Id.* at 942. The expert Christine Rossell's testimony focused on the risks of "white flight" in response to mandatory reassignment plans. *Id.* at 940-41. The conclusion the judge derived from her testimony was that "in the area of school desegregation, slow and steady wins the race." *Id.* at 940.

143. *See* Lohman & Shepard, *supra* note 136.

144. Author's calculations from Conn. Dept. of Educ. district profiles. Hartford went from 93.8% minority students to 94.3%, New Haven from 84.7% to 88.7%, and Bridgeport from 87.6% to 87.9%. (2000-01 is the most current year for which such data are available.) In Hartford and Bridgeport, but not New Haven, the 2000-01 figures reflect an improvement of less than a percentage point over the comparable figures in 1996-97 (when Hartford was 95.2% minority, Bridgeport 88.7% and New Haven 87.3%).

of integration."[145] In part, this disappointing result reflected the fact that many of the voluntary transfers actually decreased racial integration, rather than increasing it, as students transferred to schools where they would be less racially isolated.[146]

While the *Sheff* remedies appear to have done little to remedy the *Sheff* wrongs, they have not been without their positive effects. The state has dedicated substantial resources (over $160 million annually in recent years) to the programs enacted in response to *Sheff*, and much of that money has gone to Connecticut's troubled urban districts.[147] In the post-*Sheff* years, per pupil spending in the urban districts, which had remained close to the state average in prior years, has risen substantially above the average,[148] and a recent national study identified Connecticut as one of the few states where per pupil spending in the highest poverty districts compared satisfactorily to spending in the lowest poverty districts, even allowing for the added costs of serving at-risk student populations.[149] Perhaps reflecting these infusions of resources, both performance on standardized tests and high-school dropout rates have shown significant improvement over recent years in Connecticut's urban districts, although, on each of these measures, the cities' performance remains starkly worse than that of their suburban neighbors.[150] The two separate worlds identified by Governor Weicker remain very much separate, and very different in the educational opportunities that they provide.

IV. SOME RECENT DEVELOPMENTS ON BOTH FRONTS

It appears to be the nature of controversies over educational opportunity that they do not end. The interests of the various affected parties are too intense and the volumes of resources at stake too large for final resolutions to be reached. In Connecticut, the struggles continue, both around the issues of financial equity addressed in *Horton* and around the issues of racial and economic isolation

---

145. McDermott et al., *supra* note 136, at 18.

146. *Id.* at 22-24. Some of the legislative reforms adopted in 2001 were designed to deter some of these "reverse" transfers, *see* Lohman & Shepard, *supra* note 136, at 3, although the efficacy (and constitutionality) of those measures remain open questions.

147. Lohman & Shepard, *supra* note 136, at 6-7.

148. Author's calculations from Connecticut Department of Education data. *See supra* note 102. By 2000-01, the districts in ERG I were spending an average of $10,334, compared to the statewide average of $8983. This trend actually began in the early 1990s in response to state programs enacted while *Sheff* was proceeding through the courts, although it appears to have accelerated in more recent years.

149. *See* THE EDUCATION TRUST, THE FUNDING GAP 3 (2002) (finding a spending gap in Connecticut, after adjusting for the extra costs of educating at-risk students, of only $6 per pupil). The report also identifies Connecticut as one of the states showing the greatest progress on this measure since a prior study in 1997.

150. Author's calculations from Connecticut Department of Education data. *See supra* note 102.

addressed in *Sheff*. Before we turn to the attempt to derive some lessons from the course of these two constitutional challenges, it may be helpful to bring their histories up to the present (or at least up to the time this article went to press).

When we left the *Horton* story some pages ago,[151] the legislature had responded to the court's signals in *Horton III* by enacting and starting to fund its foundation-based Educational Cost Sharing (ECS) formula, which the *Horton* plaintiffs had decided not to subject to further judicial scrutiny. As with its Guaranteed Tax Base (GTB) forebear, the original ECS formula was designed to have a substantial equalizing effect, by allocating large sums of state money to the less fiscally advantaged districts. But, as with the GTB program before it, as implementation of ECS went forward in the early 1990s, the legislature proved unable to come up with the full amount of anticipated resources and made a variety of adjustments to contain the program's costs, thereby diminishing its benefits to poorer communities.[152] The "guaranteed wealth level" against which districts' needs for state aid were measured was reduced from twice the median town's wealth to a multiple of 1.55.[153] And the foundation cost of educating a typical child, instead of being set annually by reference to the eightieth percentile district, was frozen and then limited to modest legislated increases.[154] Finally, districts' annual increases in aid were subjected to a series of caps and hold-harmless provisions that substantially diminished the formula's equalizing effect.[155]

The cumulative effect of these modifications was to allow growing variations in the amounts expended by high-spending and low-spending districts. In 1996, the districts in the best funded socioeconomic Educational Reference Group (ERG) were spending about fifty percent more than those in the lowest-spending ERG, but by 2000 this gap had grown to approximately eighty percent.[156] Meanwhile, the state's share of Connecticut school funding, which had reached a peak of 45.5% in 1989-90, had dropped back to 38.5% by 1996-97.[157]

In response to these retreats from the *Horton*-based goals of the ECS program, a coalition drawn from a dozen of the needier districts (including New

---

151. *See supra* notes 97-98 and accompanying text.

152. It is noteworthy that, during the same period when the legislature was stepping back from its ECS commitments, it was targeting new funding (although of far smaller magnitudes) to the urban school districts, which were the focus of the *Sheff* litigation then unfolding in the courts and drawing substantial political attention. To what extent *Sheff*'s pendency may have contributed to legislative neglect of the ECS approach is an interesting topic for speculation.

153. *See* LPR & IC Report, *supra* note 96, at 5. This change reduced formula costs by some $300 million annually.

154. *See id.* at 6. By 2001, the foundation level was set at $5891, while the eightieth percentile district was spending $7349 per pupil. A return to the original approach would have increased formula costs by some $370 million.

155. *See id.* at 8-9. The savings achieved by the caps ranged as high as $150 million in some years.

156. *See id.* at 11.

157. *See* Conn. Gen. Assembly, *supra* note 89.

Haven and Bridgeport, but not Hartford) brought a new lawsuit in 1998. *Johnson v. Rowland* challenged the funding system for failing to provide the substantially equal educational opportunities required by *Horton*.[158] The suit does not challenge the constitutionality of the ECS formula as originally adopted in 1988, but argues that the constellation of subsequent adjustments leaves Connecticut again with a funding system that deprives students in many districts of the educational resources to which they are constitutionally entitled. After repeated delays, motions and discovery, the case is scheduled to go to trial in 2003, but not before several of the plaintiff communities have withdrawn from the case because of its costs.[159]

Meanwhile, by December 2000, the *Sheff* plaintiffs decided that enough time had passed and enough experience had accumulated with the legislative remedial efforts to warrant a renewed judicial testing of the adequacy of those remedies. Developments subsequent to the superior court's 1999 ruling indicated little, if any, progress toward *Sheff*'s goals, and legislative interest appeared on the wane.[160] In April 2002, the case came to trial before Judge Julia Aurigemma, the same judge who had issued the 1999 ruling, and evidence and expert witnesses were presented over several days of hearings.

In the 2002 proceedings, the plaintiffs, however, were no longer arguing for mandatory reassignment or redistricting remedies. Instead, they focused their arguments around a plan, prepared for them by an expert witness, calling for dramatically increased state commitments to the voluntary programs already deployed by the state, arguing that sufficient commitments to these programs could achieve substantial progress towards desegregation of the Hartford schools over a four-year period.[161] Apparently, even the *Sheff* plaintiffs had concluded that their original goal of truly transforming Connecticut's system of independent municipal school districts, each with their distinct populations and resources, was beyond reach.

---

158. For background concerning the suit and the plaintiff communities, see Carole Bass, *A Whiter Shade of Sheff? The New Face of Connecticut School Reform*, HARTFORD ADVOCATE, Apr. 30, 1998. In general, the plaintiff communities were characterized by low median incomes, high poverty rates, and high property tax rates.

159. *See City Must Carefully Ponder School Suit*, BRIDGEPORT POST, June 19, 2002, *at* http://www.cnnpost.com.

160. *See* Rick Green, *Budget Hurts Sheff Efforts; No New School Plans Funded by Legislature*, HARTFORD COURANT, July 24, 2001, at A1 (evidencing lack of progress and quoting a *Sheff* plaintiffs' attorney as saying, "There is absolutely zero sense of urgency. This is not on their radar screen whatsoever. They are either ignoring it or thumbing their nose at the court and the kids whose constitutional rights were violated."). In fact, in the 2000-01 school year, only 753 of Hartford's 24,438 students were attending schools outside the district through the choice program, and only ninety-three suburban students were in the Hartford schools. Interview with Brian Mahoney, Conn. Dept. of Educ. (Aug. 9, 2001).

161. *See* Report of Leonard B. Stevens, Ed.D. (Jan. 2002), filed as Plaintiffs' Exhibit. *See also* Robert A. Frahm, *Sheff Plaintiffs Present New Concept*, HARTFORD COURANT, Apr. 17, 2002, at B1 (discussing plaintiffs' strategy).

After several weeks of hearings, the judge asked the parties to submit briefs on the scope of the court's remedial authority. But in midsummer, before the briefs were to be filed, the parties asked the court to suspend further proceedings to allow serious settlement discussions to go forward.[162] Then, in January 2003, after extensive negotiations, the parties announced their agreement to an interim settlement of the case.[163]

The agreement, which defers any further judicial intervention in the case for four years, largely reflects the voluntary desegregation plan proposed by the plaintiffs' expert.[164] The defendants agree to expand the Hartford-region magnet school programs, by adding at least two new magnet schools in each of the next four years at state expense. In addition, they agree to commit additional resources to expansion of the Hartford-region "open choice" program and to interdistrict cooperative programs.[165] The cost to the state of implementing the agreement over its four-year life is estimated at $45 million of operating costs, plus some $200 million in bonds to pay for construction of the eight magnet schools. The agreement sets a specific target—that at least thirty percent of Hartford's minority students are benefitting from desegregation due to one of these measures by the 2006-07 school year—but does not make that target legally enforceable. At the end of four years, the parties agree to consult together concerning next steps, with plaintiffs expressly reserving their right to seek judicial enforcement of the supreme court's *Sheff* ruling after June 2007.

The *Sheff* plaintiffs proclaim the interim agreement as a significant victory, especially its establishment of specific numerical goals for magnet schools, spending, and numbers of impacted minority students.[166] Yet, they also acknowledge that it falls far short of the dramatic reforms that were *Sheff*'s original objectives.[167] Many doubts remain. Given the dismal results of the prior efforts, it is far from clear that voluntary measures, which ultimately depend on families' choices about where to school their children, can achieve the scale of progress toward desegregation that the agreement contemplates. Moreover, even

---

162. *See* Rachel Gottlieb, *Sides Seek Sheff Pact; Serious Talks in School Desegregation Case*, HARTFORD COURANT, July 13, 2002, at A1.

163. *See* Robert Frahm, *Sheff Deadline: 2007; Settlement: A Four-Year Effort Begins to Help Undo Hartford's School Segregation*, HARTFORD COURANT, Jan. 23, 2003, at A1; [hereinafter Frahm, *Sheff Deadline: 2007*]; Paul von Zielbauer, *Hartford Integration Plan to Add 8 City Magnet Schools*, N.Y. TIMES, Jan. 23, 2003, at B5. For a description of the process of negotiation, see Robert Frahm, *In Sheff, A Truce, Then a Deal; Months of Talks, Blueberry Muffins, Pay Off In Settlement*, HARTFORD COURANT, Jan. 26, 2003, at A1.

164. *See* Stipulation and Order, Sheff v. O'Neill (Superior Court, No. X03-89-0492119S, dated Jan. 22, 2003).

165. For descriptions of these programs, see *supra* note 138 and accompanying text.

166. *See* Frahm, *Sheff Deadline: 2007*, *supra* note 163 (quoting lead plaintiff's mother); telephone interview with plaintiffs' attorney Philip Tegeler (Mar. 7, 2003).

167. *See, e.g.*, Oshrat Carmiel, *Milo Sheff's Long Legal Road; After Experience in Landmark School Desegregation Case, He Seeks New Role as Musician*, HARTFORD COURANT, Jan. 23, 2003. at A6; von Zielbauer, *supra* note 163.

if the thirty percent target is met, that leaves seventy percent of Hartford's minority students consigned to constitutionally deficient, segregated schools, surely an ironic achievement in pursuit of a goal of "substantially equal educational opportunity."[168] Finally, the agreement's remedies are targeted exclusively at Hartford's students, with no consideration for the largely comparable plights of the students in Connecticut's other urban centers. At best, the interim settlement marks a way station on the long path to vindication of the rights recognized in *Sheff*.

V. TENTATIVE LESSONS

So, the future of educational opportunity in Connecticut, concerning both money and race, still lies, in significant measure, in the state's courts. Nevertheless, to the extent that we can draw lessons from these unfinished stories, a tentative picture appears to emerge.

In large measure, the judicial response to the two challenges we have explored was similar. In each case, the Connecticut Supreme Court concluded that the challenged disparities among school districts—in the one case, disparities of financial resources, in the other, disparities of racial and ethnic composition—violated the constitutional requirement of substantially equal educational opportunities for all of Connecticut's children. And, in each case, the court left the task of determining how to remedy the unconstitutional disparities to the legislative and executive branches. Again, in each case, the political branches promptly responded, without the additional judicial prodding that has been necessary in some other jurisdictions.

But the character of the responses and their effects have been very different. The response to *Horton* took the form of two major overhauls of how the state supported the funding of local school districts, reforms which, at least for a significant period of time, substantially reduced the fiscal disparities challenged in the case. By contrast, the response to *Sheff* took the form of an array of measures largely tangential to the problem of racial isolation that lay at the heart of the case, and whose effects on the challenged disparities in district racial composition have been insignificantly small. In short, it seems that, while both lawsuits succeeded in the courts, only one of them succeeded in the real world of the schools.

Before offering some cautious reflections about some of the factors that may lie behind these different outcomes, it may be useful to raise some brief cautions about the very existence of the purported differences. For one thing, the evidence is not as simple as the preceding description would suggest. Funding disparities have fluctuated widely in the years since *Horton I*, and while they certainly diminished during the early years, they have certainly revived, at least to some extent, more recently. It is unclear how much success or progress this

168. *See, e.g.*, Rachel Gottlieb & Daniela Altimari, *Reaction: What About the Kids Who Get Left Out?*, HARTFORD COURANT, Jan. 23, 2003, at A1; Paul von Zielbauer, *Change in Hartford*, N.Y. TIMES, Jan. 24, 2003, at B5 (describing concerns of experts and parents).

actually reveals. Conversely, in the case of *Sheff*, it can certainly be argued that the early data show some signs of modest achievements, and that, with time, the continuing pressure provided by the case may generate meaningful long-term change.

Moreover, it is less than self-evident that funding gaps or percentages of minority students are even the right metrics on which to focus. Presumably, the ultimate goal behind both litigation strategies was overall improvement of educational opportunities for underserved children, not equalization of resources or reduction of racial isolation. Indeed, the *Sheff* plaintiffs framed their initial suit to focus at least as much on the educational inadequacies of the Hartford schools as on their racial composition. Measuring the extent of movement toward this broader goal is, of course, far more difficult, but there is at least some indication that the responses to *Sheff*, whatever their effects on racial isolation, may nonetheless positively affect the quality of Connecticut's urban educational opportunities. In addition, the very existence of the *Sheff* case is a reminder that *Horton*'s successes in redistributing dollars did not satisfactorily remedy the failings of some of Connecticut's schools. Success and failure may not be as easily assessed as our tentative conclusions presumed.

With these caveats noted, it does nonetheless appear that the responses to the two suits were significantly different. The closing pages of this article explore some possible explanations for those differences, both in the ways the cases were treated by the courts, in the tactical choices made by the plaintiffs, and in the underlying nature of the issues the two cases presented.

One obvious, and likely significant, difference in the judicial treatment of the two cases is the breadth of consensus among the judges involved in each case. In *Horton I*, there was broad agreement among the trial and appellate judges, with the exception of the one justice dissenting from the final decision. While the supreme court in *Horton III* rejected the trial court's methodology for assessing the constitutionality of the legislative remedy, it did so in a way that largely supported the trial court's results and it remanded the case in a posture that clearly invited a reinstatement of the original finding of unconstitutionality. The overall message was univocal and clear.

By contrast, *Sheff* painted a picture of judicial division. The trial court judge's approach, both in its initial finding of no state action and in its subsequent efforts at outcome determinative fact-finding, was sharply repudiated by the supreme court majority's opinion. The supreme court itself was narrowly and stridently split in its four-to-three decision. The subsequent "slow and steady" ruling by a second trial court judge in the remedial proceeding had a tone strikingly at odds with the urgency of the supreme court's majority. Particularly in light of Chief Justice Peters' departure from the court shortly after she authored the *Sheff* majority opinion, it would not be surprising if the governor and legislature found less pressure for a robust response to *Sheff* than they had for *Horton*.[169]

---

169. *See* Bass, *supra* note 158 ("The 4-3 decision was the swan song of its author, then-Chief Justice Ellen Peters; her replacement was far more conservative. It seemed all too likely that the

The different responses also were likely influenced by the supreme court's quite different discussions of remedies in their initial rulings in the two cases. As we observed earlier, the *Horton* court, while emphatically deferring remedial choices to the political branches, was nonetheless careful to offer the legislature both guidance and reassurance about the types of remedies that it would find satisfactory. Indeed, the power-equalizing approach (and the accompanying minimum effort requirement) that the legislature selected fell neatly within the range of approaches that the court had invited. By contrast, the *Sheff* court's discussion of remedies, although largely borrowed from *Horton*, lacked any of the guidance or reassurance that *Horton* provided. The governor and legislators may well have been left wondering whether the court would only be satisfied by a radical student reassignment plan, or might accept more modest ameliorative steps, or perhaps had itself been unwilling to contemplate the unsettling range of available but problematic options.

This difference in the court's discussion of remedies in the two cases may be explained by—and its effects certainly were reinforced by—another palpable distinction between the two opinions, a difference in the clarity and precision with which the court characterized the unconstitutional harm that required correction. In *Horton*, the constitutional problem was clear and simple: the existing education financing system failed to provide each district with the resources necessary to "provide a substantially equal educational opportunity to its youth in its free public elementary and secondary schools."[170] Despite room for question about the standard of "substantial equality," the court left no doubt that the issue was the equality of resources and their impacts on educational opportunity.

No such clarity is available in *Sheff*. As we saw earlier, the court struggled throughout its opinion to find a satisfactory description of the constitutional problem. Is it the simple fact of significantly different proportions of minority students in different districts (or schools)? Or is it the extreme racial and ethnic isolation found in Hartford and the other urban districts? Or is it the starkly inferior educational opportunities of students in these urban districts, upon which the court focuses in its opening paragraph?[171] Or is it the lost opportunities for intercultural exposure and multicultural education that result from the patterns of segregation? No matter how many times one reads the opinion, these competing concerns continue to weave in and out of the court's reasoning.

Legislature would adopt only token changes, the Sheffs would go back to court and the new Supreme Court would refuse to put any teeth in the ruling."). Perhaps this is also where we find part of the explanation for the *Sheff* plaintiffs' somewhat surprising decision not to appeal the trial court's decision in *Sheff II* and the dramatic shift in their position in the more recent litigation and settlement negotiations. *See* Lynne Tuohy, *What if Case Had Returned to Court*, HARTFORD COURANT, Jan. 23, 2003, at A7.

170. 376 A.2d at 374-75.

171. The opening sentence of the opinion reads, "The public elementary and high school students in Hartford suffer daily from the devastating effects that racial and ethnic isolation, as well as poverty, have had on their education." *Sheff*, 378 A.2d at 1270.

No doubt, much of the explanation for this indefiniteness rests in the court's efforts to accommodate the trial court's constricting findings of fact. But the effect is to raise questions, not only about the cogency of the court's reasoning, but more importantly about how the constitutional wrongs can be righted, and indeed about whether the court itself had any sense of what sort of remedy it was anticipating. In light of the court's lack of clarity, it may come as little surprise when the governor, legislature, and trial court all feel free to place their own constructions on what the constitution requires.

Another direction in which to look for explanations for the different outcomes is the tactical decisions of the plaintiffs in the two cases. In particular, a number of the *Sheff* plaintiffs' choices were distinctly different from those of their *Horton* forebears and may have contributed to the disappointing legislative response. For one example, the *Sheff* case presented multiple, complex alternative theories of liability, which may have proven essential to the supreme court's ability to sidestep the trial court's fact-finding, but also invited the problematic ambiguity about the nature of the constitutional wrong that pervades the court's opinion. For another, there seems little question in hindsight that the *Sheff* plaintiffs returned to court too soon to challenge the legislature's remedial scheme, in marked contrast to the *Horton* plaintiffs' wise patience in waiting to seek further judicial intervention until the legislature's own actions had vividly demonstrated both the possibility of a substantial remedy and the degree to which it had failed to provide one. Once they had returned to court and lost in *Sheff II*, it is unclear why the plaintiffs chose not to appeal the decision and give the supreme court an opportunity to repeat its *Horton III* strategy, using its three-step test (and perhaps, a *Horton*-inspired remand) to keep pressure on the legislature for remedial measures that did not "emasculate the goal of substantial equality."[172] Finally, one wonders why the *Sheff* plaintiffs, in their latest trip to court, chose to abandon their demand for truly sweeping desegregative remedies, in favor of an expanded version of the legislature's voluntary measures. We will be left to speculate what successes a more tenacious approach might have achieved.

While these variations in the actions of the courts and the plaintiffs likely account for some of the difference in the outcomes of the two cases, I suspect that a larger share of the explanation may lie deeper—in our divergent societal attitudes towards issues of money and race. No one who watches or participates in the ongoing struggles over how we fund our public schools can doubt the intensity with which taxpayers, parents, and the decisionmakers who are elected by them care about how education dollars are distributed and controlled. But no one who has participated in American political life can honestly doubt that the emotions aroused by issues of race are even stronger, if sometimes more subterranean.[173] School funding cases, after all, ultimately only move dollars,

---

172. 486 A.2d at 1107 (quoting Mahan v. Howell, 410 U.S. 315, 326, *amended by* 411 U.S. 922 (1973)).

173. *See* Ryan, *supra* note 120, at 565-67 (contrasting political reactions to financing cases and desegregation cases); Reed, *supra* note 18, at 208-12 (identifying—and distinguishing—

and with relatively rare exceptions, they simply deliver additional dollars to poor districts, without depriving wealthier districts of the continuing ability to provide even more generous resources for themselves. Desegregation cases, however, actually threaten to change where and with whom our children go to school. In particular, they threaten to throw our children together (so goes the apparent, if sometimes less than conscious, fear) with racially different "others" who may endanger not only their education but their well-being.[174]

Much of the reason for the initial turn to school funding litigation a third of a century ago was despair over the inability to overcome the deep-seated resistance—in legislatures, courts, and private behavior—to school desegregation. The decision by the *Sheff* plaintiffs and their institutional allies (including the NAACP Legal Defense Fund and the ACLU) to return to a race-based strategy reflected, not only disappointment with the results of ostensibly successful funding litigation, but also a hope that, at least in an enlightened northern state like Connecticut at the end of the Twentieth Century, racial fears might give way to the goals of racial justice that were expressly embodied in Connecticut's constitution. The firm resistance to any but voluntary remedies, the limited (and often segregation enhancing) response to the voluntary programs that were offered, the extreme care with which the trial courts have sought to contain *Sheff*'s impact, and the celebratory glee with which Connecticut officials greeted the plaintiffs' trial court defeat,[175] all suggest that their hope may have been misplaced.

Indeed, Connecticut's recent history may contain an even gloomier lesson about the relationship between issues of money and race in the schools. The period during which the *Sheff* case has taken center-stage has also been the time in which the state appears to have backed away from its commitment to funding equity, scaling back its commitments to full-funding of the ECS program. In part, this back-sliding can be explained by the fiscal difficulties that confronted the state in the early 1990s, but even during the ensuing boom years, the retrenchment generally continued.

These boom years were also the years in which the pendency of, and then the decision in, *Sheff* directed some additional state resources to the poor urban "priority" districts (although far less than was being withheld from ECS funding). The troubling question that must be raised is whether a perception that state school funding was being used to support poor, minority children in inner-city schools tagged school aid with the race label and thereby undermined public support for continued dedication of state resources to the schools. Certainly, the proponents of *Johnson v. Rowland* were sensitive to this possibility in framing

---

economic self-interest and "symbolic racism" as key factors limiting the efficacy of judicial school finance decisions).

174. *See* Bass, *supra* note 158 ("*Sheff* scares a lot of people. It's the 'busing' case, the one that could send black kids to suburban schools – and, even scarier, send suburban white kids to the inner city.").

175. *See id.* (reporting that Gov. Rowland greeted the trial court's decision "with a public champagne celebration").

their case. They assembled a plaintiff roster primarily composed of white students and non-urban school districts, and, in publicizing the case, have been at pains to distance themselves from *Sheff*.[176] Still, the concern remains that, once school-funding initiatives have become identified with issues of race, they may take on baggage that diminishes their appeal. Perhaps *Sheff*, by focusing on race rather than money, has unearthed obstacles, not only to the accomplishment of its own objectives, but for the less threatening objectives of *Horton* as well.

Returning to the question with which we began, what do these histories of Connecticut's school cases reveal about the hopes for using the courts to pursue the ends of social justice? The tentative lessons are neither entirely cheerful nor entirely disheartening. The Connecticut Supreme Court has seized the opportunities provided by *Horton* and *Sheff* to proclaim a courageous, if at times somewhat cloudy, constitutional mandate for both racial and financial equality of educational opportunity—a mandate that directly confronts powerful established relationships of class and privilege. The court's mandate has catalyzed substantial changes in those established relationships, though more modest changes than the cases' proponents sought and, perhaps, anticipated. At the same time, these histories highlight the resistances that can undermine the power of judicial rhetoric, and they reinforce doubts about the capacity of litigation to overcome our most deep-seated societal biases. In addition, they suggest that specific choices of targets, tactics and timing, both by litigants and by courts, may make large differences in outcomes. Care and caution are called for; despair and disengagement are not.

176. *See id.*