

# ESSAY

## SHEFF, SEGREGATION, AND SCHOOL FINANCE LITIGATION

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*In this Essay, Professor Ryan uses a recent decision by the Connecticut Supreme Court, Sheff v. O'Neill, to explore both the limits and the possibilities of school finance litigation, and to begin an examination of the relationship between school finance and desegregation. Using Sheff as his starting point, Professor Ryan contends that school "finance" litigation need not, and perhaps should not, be solely about money. He suggests that Sheff and the experience of the Hartford schools provide strong evidence of the limited efficacy of increased expenditures in racially and socioeconomically isolated schools. Professor Ryan then explains how the underlying right recognized in school finance cases—the right to an adequate or equal education—can support alternative claims for relief. Specifically, he suggests that these rights can support such nonmonetary remedies as racial and socioeconomic integration and school choice.*

The majority . . . has transformed a laudable educational philosophy into a constitutional mandate.<sup>1</sup>

### INTRODUCTION

Commentators have devoted a great deal of attention to school desegregation and school finance litigation, but, oddly, the two topics have rarely been considered in tandem. The lack of comparative analysis is surprising for a number of reasons: Desegregation and school finance share a long and intertwined history; both ostensibly have sought to improve the educational opportunities of poor and minority students; both have failed to realize fully that goal; and evidence generated about school desegregation (such as the efficacy of increasing expenditures in racially isolated districts) is often relevant to assessing school finance issues, and vice versa. Despite these various points of intersection, commentators typically categorize school finance litigation and school desegregation separately, and there is rarely communication across academic studies of these areas.

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<sup>1</sup> Sheff v. O'Neill, 678 A.2d 1267, 1297 (Conn. 1996) (Borden, J., dissenting).

Perhaps this tendency to categorize the cases and issues into separate analytical boxes, one marked "school finance" and the other "desegregation," explains why *Sheff v. O'Neill*<sup>2</sup> has been largely underappreciated, if not misunderstood. In *Sheff*, a sharply divided Connecticut Supreme Court declared that de facto school segregation violates the state constitution and called on the legislature to rectify the severe racial and ethnic isolation of the Hartford public schools.<sup>3</sup> The Court reached this controversial holding by reading two provisions in the Connecticut Constitution together: the education clause, which guarantees "'free public elementary and secondary schools in the state,'"<sup>4</sup> and the segregation clause, which guarantees that no person shall "'be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil rights because of . . . race [or] ancestry.'"<sup>5</sup> In an earlier decision regarding school funding, *Horton v. Meskill*,<sup>6</sup> the court had held that the education clause requires the legislature to guarantee "all public schoolchildren [the right to] a substantially equal educational opportunity," and that unequal school financing violates that right.<sup>7</sup> In *Sheff*, the court reasoned that the education clause is "informed" by the segregation clause, and concluded "that the existence of extreme racial and ethnic isolation in the public school system deprives schoolchildren of a substantially equal educational opportunity."<sup>8</sup>

A number of commentators have described the decision as "a landmark in school *desegregation* law,"<sup>9</sup> and indeed it is. *Sheff* repre-

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<sup>2</sup> 678 A.2d 1267 (Conn. 1996).

<sup>3</sup> See *id.* at 1270-71. During the 1991-1992 school year, a little over one-quarter of the Connecticut student population were from minority groups, while 92.4% of the students in Hartford were members of minority groups—predominantly African American and Latino. See *id.* at 1287. By contrast, only 7 of the 21 surrounding suburban districts had a minority student enrollment above 10%. See *id.* at 1289.

<sup>4</sup> *Id.* at 1270 n.1 (quoting Conn. Const. art. XIII, § 1).

<sup>5</sup> *Id.* at 1270 n.2 (quoting Conn. Const. art. I, § 20).

<sup>6</sup> 376 A.2d 359 (Conn. 1977).

<sup>7</sup> *Sheff*, 678 A.2d at 1280-81 (discussing *Horton*, 376 A.2d at 374).

<sup>8</sup> *Id.* at 1281.

<sup>9</sup> John C. Brittain, *Why Sheff v. O'Neill Is a Landmark Decision*, 30 Conn. L. Rev. 211, 211 (1997) (emphasis added) (footnote omitted); see also *id.* at 217 ("Legally speaking, *Sheff v. O'Neill* is to Connecticut what *Brown v. Board of Education* was to the south and the rest of the nation."); Kevin Brown, *The Implications of the Equal Protection Clause for the Mandatory Integration of Public School Students*, 29 Conn. L. Rev. 999, 1000 (1997) ("The recent opinion by the Supreme Court of Connecticut in *Sheff v. O'Neill* may spark the most far reaching state endeavor aimed at desegregating public schools." (footnote omitted)); Wesley W. Horton, *Neutral Principles of Law and Sheff v. O'Neill*, 30 Conn. L. Rev. 219, 220 (1997) ("*Sheff v. O'Neill* is one of the most important cases ever decided by the [Connecticut] Supreme Court." (footnote omitted)); Tom Beimers, Note, *A Wrong Still in Search of a Remedy: Educational Adequacy After Sheff v. O'Neill*, 82 Minn. L. Rev. 565, 566 (1997) ("*Sheff v. O'Neill* is a landmark desegregation case.").

sents the first attempt in over twenty-five years by any court, state or federal, to remedy de facto segregation.<sup>10</sup> And the decision comes at a time when federal courts, with the United States Supreme Court's prodding,<sup>11</sup> are moving in exactly the opposite direction, dismantling desegregation decrees and returning previously segregated school systems to local and state control.<sup>12</sup>

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<sup>10</sup> There have been no attempts to address de facto segregation since 1973 when the Supreme Court refused to abandon the de jure/de facto distinction in *Keyes v. School Dist. No. 1*, 413 U.S. 189, 208-09 (1973); see also *id.* at 219-20 (Powell, J., concurring) (urging court to abandon distinction between de jure and de facto segregation). Prior to *Keyes*, some federal district courts had reasoned that *Brown v. Board of Educ.*, 347 U.S. 483 (1954), rendered de facto segregation unconstitutional. See generally Frank I. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 Calif. L. Rev. 275, 276 n.5 (1972). On the state level, aside from *Sheff*, only one other state supreme court decision has declared de facto segregation in violation of a state's constitution. In 1963, the California Supreme Court concluded that de facto segregation in the Los Angeles Unified School District violated the California Constitution. See *Crawford v. Board of Educ.*, 551 P.2d 28, 42 (Cal. 1976). The impact of the decision was short-lived, as California voters subsequently adopted an initiative amending the state constitution that effectively prohibited busing except as a remedy for de jure segregation. See Cal. Const. art. I, § 7; see also Rachel F. Moran, *Milo's Miracle*, 29 Conn. L. Rev. 1079, 1096 (1997) (discussing *Crawford* and subsequent constitutional amendment).

<sup>11</sup> See *Missouri v. Jenkins*, 515 U.S. 90 (1995) (holding that court's authority to remedy school segregation is not unlimited); *Freeman v. Pitts*, 503 U.S. 467 (1992) (approving incremental decrease of court's supervision of desegregation decrees); *Board of Educ. v. Dowell*, 498 U.S. 237 (1991) (establishing test to determine unitary status and dissolve desegregation decrees).

<sup>12</sup> See, e.g., *Dowell v. Board of Educ.*, 778 F. Supp. 1144, 1196 (W.D. Okla. 1991) (dissolving desegregation order and terminating federal court jurisdiction over school district). See generally *Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education* (Gary Orfield et al. eds., 1996) [hereinafter *Dismantling Desegregation*]. The *Sheff* decision is unusual in another respect, insofar as a predominant number of desegregation cases after *Milliken v. Bradley*, 418 U.S. 717 (1974) [hereinafter *Milliken I*], came to focus on remedial and compensatory programs of the sort authorized by *Milliken v. Bradley*, 433 U.S. 267 (1977) [hereinafter *Milliken II*]. See Susan E. Eaton et al., *Still Separate, Still Unequal: The Limits of Milliken II's Monetary Compensation to Segregated Schools*, in *Dismantling Desegregation*, supra, at 143, 144 (noting that after *Milliken II*, schools were free to include compensatory education programs in desegregation remedies). Because *Milliken I* closed off the suburbs and inner-city schools became increasingly populated by minority students, significant integration became impossible, and the fight in many cases turned to money and the extent to which a state could be held responsible for financing part of a "desegregation" plan. See *id.* at 144-45; see also *Jenkins*, 515 U.S. at 2048-56 (holding that district court order requiring increase in teacher salaries and funding for particular programs exceeded court's remedial authority); Joseph Berger, *Judge Orders State to Help Yonkers Pay for Integration*, N.Y. Times, Feb. 6, 1998, at B5 (reporting district court decision holding state responsible for portion of integrated housing plan costs); Lisa Frazier, *Judge Ends Busing in Prince George's; Settlement to Be Scrutinized till 2002*, Wash. Post, Sept. 2, 1998, at A1 (describing court-approved settlement to build additional schools while ending mandatory busing); *Court Backs Refusal by U.S. to Aid Chicago School Plan*, N.Y. Times, Sept. 27, 1984, at A16 (describing Seventh Circuit ruling that consent decree did not require federal government to provide \$29 million to Chicago schools). In one respect, then, desegregation cases have in recent years begun to resemble

What almost all commentators have missed, however, is that *Sheff* is equally significant, if not more so, for what it reveals about school finance litigation.<sup>13</sup> *Sheff* demonstrates that school "finance" cases need not, and perhaps should not, be about money. In so doing, the decision reveals both the limits and possibilities of school finance litigation. *Sheff* provides concrete proof that increasing expenditures, the traditional goal of school finance litigation, may be ineffective in improving student achievement, and thus demonstrates the limitations of school finance litigation as currently pursued. At the same time, *Sheff* shows how the underlying right recognized in school finance cases—the right to an adequate or equal education—need not be defined solely in monetary terms, and instead can support alternative theories of the elements necessary to ensure an adequate or equal education.

The alternative theory adopted by *Sheff* is not a new one, but rather the quite old notion that an equal educational opportunity requires some measure of racial and ethnic balance. Rather than ordering resources to be distributed evenly, which had already been accomplished (at least with regard to Hartford and its surrounding suburbs), *Sheff* ostensibly requires that students be distributed evenly among school districts on the basis of race and ethnicity. The Connecticut Supreme Court's reliance on desegregation to overcome the inadequacies of school finance reform underscores the continuing faith in the benefits of desegregation. It also brings the long relationship between desegregation and school finance litigation full circle: Whereas school finance litigation was initiated to compensate for the shortcomings of school desegregation, *Sheff* represents an attempt to use desegregation to overcome the inadequacies of school finance reform.<sup>14</sup>

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school finance cases, with poor, urban, minority districts seeking additional financial assistance from the State under the guise of *Milliken II* relief. *Sheff* turns this trend on its head: Plaintiffs in an ostensible school "finance" case, rather than seeking (only) additional resources, also sought increased integration.

<sup>13</sup> The sole and quite limited exception is a student note, which relies on the concurring opinion in *Sheff* to suggest that state education clauses should be interpreted to guarantee an adequate education, and that an adequate education presupposes education in integrated schools. See Beimers, *supra* note 9, at 599-600 (discussing *Sheff*, 678 A.2d at 1294 (Berdon, J., concurring)).

<sup>14</sup> School finance litigation began in the late 1960s and early 1970s, at a time when the slow pace of desegregation was causing some civil rights activists to question the efficacy of desegregation as a tool to improve the educational opportunities of minority students. See Derrick Bell, A Model Alternative Desegregation Plan, in *Shades of Brown* 125, 130, 134-36 (Derrick Bell ed., 1980) (advocating school systems comprised mostly of minorities); Richard F. Elmore & Milbrey Wallin McLaughlin, Reform and Retrenchment: The Politics of California School Finance Reform 21-32 (1982) (describing early history of school finance litigation); see also James Gordon Ward, Implementation and Monitoring of Judi-

As I have suggested, these points have been missing from the commentary thus far. This Essay seeks not only to fill this gap in the *Sheff* commentary, but also to begin a larger project of examining the substantial but rarely studied relationship between school desegregation and school finance litigation. In the pages that follow, I hope to establish three points regarding *Sheff* and the broader issues of school finance and desegregation, and this Essay is organized accordingly.

Part I discusses the limited efficacy of school finance litigation, using *Sheff* as the basis for discussion. The facts and history of *Sheff* provide sobering proof that simply equalizing expenditures, even at a relatively high level, may not be sufficient to improve the academic achievement of low-income students. This Part also places *Sheff* within the broader debate concerning the impact of expenditures upon achievement, and it suggests that *Sheff* adds an instructive case study to the statistical social science research regarding the relationship between school funding and academic performance. Indeed, I will argue that the evidence presented by *Sheff* should prod school finance advocates to reexamine the remedial goals of the litigation they are currently pursuing.

Part II suggests that school "finance" litigation need not be limited to funding, again using *Sheff* as the starting point for my argument. As explained below, the key to understanding the broader possibilities of school finance litigation is to recognize that the right to an adequate or equal education is an affirmative right, which creates a corresponding obligation on the part of the state to provide a constitutionally sufficient education to all students. For courts to enforce these rights, as nearly twenty state supreme courts have done already,<sup>15</sup> they necessarily must endorse some definition of an equal or

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cial Mandates: An Interpretive Analysis, in *The Impacts of Litigation and Legislation on Public School Finance* 225, 233 (Julie K. Underwood & Deborah A. Verstegen eds., 1990).

<sup>15</sup> School finance cases have been decided in 38 states. Eighteen state supreme courts have struck down school finance schemes as violative of state equal protection and/or state educational provisions mandating equal or adequate educational opportunities. See *Alabama Coalition for Equity, Inc. v. Hunt*, 624 So. 2d 107 (Ala. 1993) (advisory opinion directing state senate to follow trial court order holding state finance scheme unconstitutional); *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806 (Ariz. 1994) (invalidating system for funding school facilities); *Dupree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90 (Ark. 1983) (holding that financing scheme violated state equal protection provision); *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976) (holding that legislative scheme had to ensure that funding would vary no more than \$100 per pupil); *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977) (holding that state equal protection clause requires substantial equality in funding education, which was found to be fundamental right); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 215 (Ky. 1989) (invalidating "whole gamut" of state's education system, including its financing structure, on grounds that system violated equality and quality requirements derived from constitutional provision regarding establishment of "efficient system of common schools"); *McDuffy v. Secretary of Executive Office of Educ.*,

615 N.E.2d 516 (Mass. 1993) (holding that property tax-based financing scheme violated state education clause); *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684, 690 (Mont. 1989) (holding that substantial funding disparities meant that "State has failed to provide a system of quality public education granting to each student the equality of educational opportunity guaranteed" under Montana constitution); *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353 (N.H. 1997) (striking down school finance scheme); *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973) (invalidating school finance scheme on ground that it violated "thorough and efficient" education clause, which requires equal provision of constitutionally mandated educational opportunity); *DeRolph v. State*, 677 N.E.2d 733 (Ohio 1997) (holding that school finance system violated "thorough and efficient" education provision of state constitution); *Tennessee Small Sch. Sys. v. McWherter*, 851 S.W.2d 139 (Tenn. 1993) (holding that state finance scheme, which resulted in funding disparities and was justified only by local control of education, violated rational basis test derived from state equal protection clause); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989) (holding that finance scheme violated state's "efficient system" education clause); *Brigham v. State*, 692 A.2d 384 (Vt. 1997) (holding that state finance scheme violated education and common benefits clauses of state constitution); *Washakie County Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310 (Wyo. 1980) (holding state finance scheme in violation of state equal protection clause); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978) (invalidating school finance scheme on ground that education clause requires provision of basic education, and requiring state legislature to define scope of basic education and to provide necessary funds); *Pauley v. Bailey*, 324 S.E.2d 128 (W. Va. 1984) (holding that educational standards set by state board of education were insufficiently specific to satisfy constitutional mandate); *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va. 1979) (holding that school financing scheme must be adequate, based on "thorough and efficient" education clause, and equal, based on equal protection clause).

Two state supreme courts have held that their state constitutions guarantee an adequate education and have remanded cases to trial courts for a determination of whether the particular state scheme violates that right. See *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661 (N.Y. 1995); *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997).

Another 17 state supreme courts have upheld their respective state financing schemes against challenges. See *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005 (Colo. 1982) (rejecting challenge; holding that education is not fundamental right under federal or state constitutions and that state education clause does not require uniform expenditure levels); *Coalition for Adequacy and Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400 (Fla. 1996) (ruling against plaintiffs because they failed to provide standard for determining adequacy that would not raise severe separation of powers questions); *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981) (upholding state financing scheme, concluding that "adequate education" clause requires more than minimum education, but legislature must determine content of adequate education); *Thompson v. Engelking*, 537 P.2d 635 (Idaho 1975) (upholding finance scheme against state equal protection and education clause challenge); *People ex rel. Jones v. Adams*, 350 N.E.2d 767 (Ill. 1976) (upholding financing scheme against array of challenges); *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758 (Md. 1983) (rejecting challenge based on state equal protection and "thorough and efficient" clause; holding that education clause does not require equality and that education is not fundamental right); *East Jackson Pub. Sch. v. State*, 348 N.W.2d 303 (Mich. 1984) (upholding finance scheme on ground that education is not fundamental right); *Milliken v. Green*, 212 N.W.2d 711 (Mich. 1973) (upholding financing scheme against challenge based on state constitution's equal protection clause); *Skeen v. State*, 505 N.W.2d 299 (Minn. 1993) (rejecting challenge to financing scheme based on state equal protection and education clauses); *Gould v. Orr*, 506 N.W.2d 349 (Neb. 1993) (dismissing claims that spending disparities violated state constitutional rights on grounds that plaintiffs failed to allege that disparities caused educational inadequacies); *Board of Educ. v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982) (upholding scheme on ground that education clause is not mandate of equality,

adequate education. Until *Sheff*, courts uniformly followed school finance plaintiffs' own definition of the underlying constitutional rights and generally equated sufficient funding with a constitutional school system. But there is little reason why the definition need be limited to funding; providing adequate or equal funding may be one method by which the state can fulfill its constitutional duty, but it surely is not the only way—and, indeed, it may not even be a particularly effective way.

In making this argument, I hope to clarify an apparent misconception in the commentary on the *Sheff* decision. The court in *Sheff* relied on a conjoint reading of the education and segregation clauses in the Connecticut Constitution, and held that the latter prohibited de facto segregation in the field of education. Only two other state constitutions contain segregation clauses. The consensus among commentators appears to be that *Sheff*, because of its reliance on a relatively rare segregation clause, is of limited importance and will remain an exceptional approach to guaranteeing equal educational opportunities through the courts.<sup>16</sup> I argue that the court's reliance on the segregation clause was unnecessary and suggest that, properly understood, *Sheff* reveals that the educational rights recognized in school finance cases are theoretically much broader than advocates and courts have defined them. I conclude this Part by offering three examples of the types of claims and remedies that these educational rights could support: racial or socioeconomic integration and school choice. My purpose here is not to suggest that any particular alternative would

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and that education is not fundamental right); *Fair Sch. Fin. Council v. State*, 746 P.2d 1135 (Okla. 1987) (rejecting challenge based on state equal protection and education clauses); *Coalition for Equitable Sch. Funding v. Oregon*, 811 P.2d 116 (Or. 1991) (rejecting challenges based on state constitutional provisions on grounds that recent constitutional amendment regulating local property taxation presupposes use of local revenues to fund schools); *Olsen v. State*, 554 P.2d 139 (Or. 1976) (rejecting challenge based on state equal protection clause); *Danson v. Casey*, 399 A.2d 360 (Pa. 1979) (rejecting challenge based on state equal protection and "thorough and efficient education" clauses); *Richland County v. Campbell*, 364 S.E.2d 470 (S.C. 1988) (rejecting challenge based on state's education and equal protection clauses); *Scott v. Commonwealth*, 443 S.E.2d 138 (Va. 1994) (upholding finance scheme against challenge based on state education clause, despite finding that education is fundamental right); *Kukor v. Grover*, 436 N.W.2d 568 (Wis. 1989) (rejecting challenge based on state equal protection and education clauses).

<sup>16</sup> See, e.g., Gerald E. Frug, *City Services*, 73 N.Y.U. L. Rev. 23, 53 & n.94 (1998) (stating that "[d]ecisions like *Sheff v. O'Neill* are unlikely to become common elsewhere in the country" in part because "only two other states have, like Connecticut, an explicit state constitutional prohibition against segregated education"); Moran, *supra* note 10, at 1096 (stating that *Sheff* is unlikely to have significant impact because of "unique" constitutional language and difficulty of implementation); see also Christine H. Rossell, *An Analysis of the Court Decisions in Sheff v. O'Neill and Possible Remedies for Racial Isolation*, 29 Conn. L. Rev. 1187, 1189 (1997) (arguing that majority incorrectly interpreted segregation clause to prohibit de facto segregation).

prevail in court, but rather simply to establish that alternatives do exist and that they deserve consideration.

The third and final Part uses *Sheff* to explore the historical relationship between desegregation and school finance litigation, drawing parallels between *Sheff* and *Brown*, as well as some parallels between the response of the Connecticut legislature to *Sheff* and the reaction of southern legislatures to the equalization suits brought by the NAACP prior to *Brown*. As I explain, the court's opinion in *Sheff* represents not so much a bold step forward as it does a return to the idea underlying the NAACP's assault on *Plessy*—namely, that desegregation represents the best hope for improving the educational opportunities of poor, minority students.<sup>17</sup> The legislature's reaction, in turn, is equally evocative of the past: Just as southern legislatures increased expenditures in African American schools to avoid desegregation, so too is the Connecticut legislature, with apparently the same motivation, diverting substantial resources into Hartford and other urban districts. The Essay concludes by providing some tentative thoughts regarding the choices confronting plaintiffs as they return to court to challenge these legislative responses.

## I

### *SHEFF* AND THE LIMITS OF SCHOOL FINANCE LITIGATION

One of the first questions worth asking about *Sheff* is why the case was even filed. In *Horton*, the Connecticut Supreme Court construed the state's education clause to impose upon the legislature an obligation to provide students with substantially equal educational opportunities.<sup>18</sup> Because plaintiffs in *Horton* challenged the state's school finance scheme, the legislative obligation identified in *Horton* was defined exclusively in monetary terms, and the legislature subsequently set about equalizing school resources. As a result of the state's revised school finance scheme, which provided the most state aid to the neediest school districts, students in Hartford received a

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<sup>17</sup> See, e.g., Mark V. Tushnet, *The NAACP's Legal Strategy Against Segregated Education, 1925-1950*, at xi (1987) (describing pre-*Brown* litigation strategies); Robert L. Carter, *Public School Desegregation: A Contemporary Analysis*, 37 St. Louis L.J. 885, 894, 896 (1993) (arguing that recent Supreme Court decisions have hampered school integration to detriment of black students); Robert L. Carter, *Reexamining Brown Twenty-Five Years Later: Looking Backward into the Future*, 14 Harv. C.R.-C.L. L. Rev. 615, 617 (1979) ("[T]he basic postulate of our strategy and theory in *Brown* was that the elimination of enforced, segregated education would necessarily result in equal education."); see also Richard Kluger, *Simple Justice* 543-81 (1977) (describing NAACP's desegregation strategies and goals).

<sup>18</sup> See *Horton v. Meskill*, 376 A.2d 359, 374 (Conn. 1977).

disproportionate share of state educational resources.<sup>19</sup> Indeed, “in the 1990-91 and 1991-92 school years, overall per pupil state expenditures in Hartford exceeded the average amount spent per pupil in the twenty-one surrounding suburban towns.”<sup>20</sup> Plaintiffs did not, and could not, contend that the State was depriving them of an equal share of resources.<sup>21</sup>

Plaintiffs thus did not file *Sheff* because earlier school finance litigation had been unsuccessful in equalizing resources; rather, plaintiffs filed *Sheff* because equalizing resources was not enough. Despite spending more per pupil than the average expenditures in suburban districts, Hartford schools were not successful in bridging the academic gap between Hartford students and suburban students.<sup>22</sup> Plaintiffs attributed the poor performance of the Hartford students to several factors: de facto racial segregation, the concentration of low-income students in Hartford schools, and insufficient resources.<sup>23</sup> Plaintiffs accordingly argued that the State had to alleviate the racial and socioeconomic isolation of the Hartford schools or, in the alternative, devote additional “educational resources”—presumably more money—to the Hartford schools.<sup>24</sup>

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<sup>19</sup> See *Sheff*, 678 A.2d at 1273 (stating that “state financial aid is distributed so that the neediest school districts receive the most aid”).

<sup>20</sup> *Id.* The parties stipulated that per-pupil expenditures in Hartford were \$8,126, compared to an average of \$7,331 spent per pupil in the surrounding suburbs. See Michael A. Rebell & Robert L. Hughes, *Efficacy and Engagement: The Remedies Problem Posed by Sheff v. O’Neill—and a Proposed Solution*, 29 Conn. L. Rev. 1115, 1142 n.109 (1997) (citing Plaintiffs’ and Defendants’ Revised Stipulation of Facts ¶ 74). Other school districts did not enjoy similar success, according to an analysis by Douglas S. Reed, who found that, after *Horton*, Connecticut fared poorly in improving the equitable distribution of resources. See Douglas S. Reed, *Twenty-Five Years After Rodriguez: School Finance Litigation and the Impact of the New Judicial Federalism*, 32 Law & Soc. Rev. 175, 191 (1998).

<sup>21</sup> See *Sheff*, 678 A.2d at 1286 n.41 (discussing plaintiffs’ stipulation that “the state formula for distributing state aid to local school districts ‘provide[s] the most state aid to the neediest school districts’”).

<sup>22</sup> See *id.* at 1273 (noting that academic performance of Hartford students fell “significantly below that of schoolchildren from the twenty-one surrounding suburban school districts”); see also James S. Liebman, *Implementing Brown in the Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform*, 76 Va. L. Rev. 349, 392-93 (1990) (observing that increase in resources after school finance litigation failed to improve academic performance of Hartford students).

<sup>23</sup> *Sheff*, 678 A.2d at 1281. As discussed in Part II.A, the court chose only to address the claim regarding racial (and ethnic) segregation. Although it is hard to tell from the face of the court’s opinion in *Sheff*, plaintiffs appeared to contend that, despite receiving more than equal funding, Hartford schools needed additional resources to bring their schools up to par with the suburban schools. Plaintiffs presumably focused on the consequence of historical disparities of funding on things like school facilities, which would not necessarily be solved simply by equalizing per-pupil spending.

<sup>24</sup> See *Sheff*, 678 A.2d at 1286.

Viewed within the context of school finance litigation, plaintiffs' claims in *Sheff* were quite remarkable. Plaintiffs essentially admitted that successful school finance reform did not make a significant difference in the academic achievement of Hartford students. The performance of Hartford students on achievement tests, as compared to their suburban counterparts, supported plaintiffs' implicit admission. This aspect of *Sheff*—the fact that the case sprang not from the failure but from the success of earlier school finance litigation—has received scant recognition in the academic literature, which is curious given the ongoing and heated debate regarding the relationship between expenditures and academic achievement.

Social scientists and education policy researchers continue to spar over the question of whether increasing expenditures will lead to educational gains for students. The leading proponent of the “money-does-not-matter” camp is Eric Hanushek, who has written a series of articles suggesting that there is no systematic relationship between expenditures and student achievement.<sup>25</sup> Hanushek's findings, as one might expect given the stakes, have been called into question by other social scientists, who criticize his methodology and offer their own studies, which tend to support the common-sense intuition that there must be some relationship between per-pupil expenditures and academic achievement.<sup>26</sup>

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<sup>25</sup> See Eric A. Hanushek, *Making Schools Work: Improving Performance and Controlling Costs* xxvii (1994) (“[E]xpanding resources first, and looking for reform second is highly unlikely to lead to an improved [school] system . . .”); Eric A. Hanushek, *The Impact of Differential Expenditures on School Performance*, 18 *Educ. Res.* 45, 49-50 (1989) (stating that there is “strong and consistent evidence that expenditures are not systematically related to student achievement”); Eric A. Hanushek, *When School Finance “Reform” May Not Be Good Policy*, 28 *Harv. J. on Legis.* 423, 426-41 (1991) (analyzing relationship between test scores and school expenditures over two decades). Hanushek is essentially an academic descendant of James Coleman, whose controversial 1966 report found little if any relationship between school expenditures and academic achievement. See James S. Coleman et al., *Equality of Educational Opportunity* 21-22 (1966) (observing that variations in facilities and curricula account for little variation in achievement measured by standardized tests); see also Christopher Jencks et al., *Inequality: A Reassessment of the Effect of Family and Schooling in America* 253-55 (1972) (reanalyzing Coleman's data and reaffirming his conclusions).

<sup>26</sup> See, e.g., David Card & Alan B. Krueger, *Does School Quality Matter? Returns to Education and the Characteristics of Public Schools in the United States*, 100 *J. Pol. Econ.* 1, 3 (1992) (finding that schools with lower pupil/teacher ratios and higher teacher salaries result in more students pursuing higher education); Ronald F. Ferguson, *Paying for Public Education: New Evidence on How and Why Money Matters*, 28 *Harv. J. on Legis.* 465, 465-67 (1991) (arguing based on empirical studies that funding is linked to student performance via teacher quality); Rob Greenwald et al., *The School Funding Controversy: Reality Bites*, *Educ. Leadership*, Feb. 1996, at 78, 78-79 (disputing Hanushek's findings by using more recent empirical data).

School finance litigation, of course, is based on the assumption that money does matter. Such litigation, which has been brought in almost every state, typically proceeds on one of two theories: either that the state constitution guarantees equal resources, or that the state constitution guarantees adequate resources.<sup>27</sup> Equalization suits, by their nature, do not seek more than the substantial equalization of education resources. Adequacy suits, in contrast, do not focus on equality of resources but on securing sufficient resources to provide every student an adequate education.<sup>28</sup> While such suits theoretically could result in a disproportionate amount of resources devoted to the neediest districts,<sup>29</sup> such a result has been rare in the past and seems unlikely to occur in the future, given the legislative resistance to equalizing resources.<sup>30</sup>

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<sup>27</sup> For examples of "equalization" suits, see *Serrano v. Priest*, 487 P.2d 1241, 1263 (Cal. 1971) (holding that California school financing system violated equal protection clause of state constitution); *Horton v. Meskill*, 376 A.2d 359, 374 (Conn. 1977) (holding that "in Connecticut, elementary and secondary education is a fundamental right" and that "pupils in public schools are entitled to the equal enjoyment of that right"); *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684, 690 (Mont. 1989) (holding that "the State has failed to provide a system of quality public education granting to each student the equality of educational opportunity guaranteed under [the Montana Constitution]"); *Brigham v. State*, 692 A.2d 384, 397 (Vt. 1997) (holding that "the current educational financing system in Vermont violates the right to equal educational opportunities under . . . the Vermont Constitution"). For examples of adequacy suits, which range from what I would call genuine adequacy to minimal adequacy, see *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 190 (Ky. 1989) (discussing plaintiffs' allegations of inadequacy); *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661, 665 (N.Y. 1995) (discussing legislature's "duty to ensure the availability of a sound basic education to all the children in the State"); *DeRolph v. State*, 677 N.E.2d 733, 745 (Ohio 1997) (finding funding system did not provide adequate resources). For a discussion of the historical progression of school finance suits, and an analysis of the difference between equity and adequacy suits, see generally Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 *Vand. L. Rev.* 101, 104-83 (1995); Michael Heise, *State Constitutions: School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 *Temple L. Rev.* 1151, 1153-66 (1995).

<sup>28</sup> See, e.g., *Rose*, 790 S.W.2d at 213 (defining "efficient" as including adequacy); *Campaign for Fiscal Equity*, 655 N.E.2d at 666 ("The State must assure that some essentials are provided."); *DeRolph*, 677 N.E.2d at 741 (emphasizing need for adequate resources).

<sup>29</sup> For a fuller explanation of this point, see generally Julie K. Underwood, *School Finance Adequacy as Vertical Equity*, 28 *U. Mich. J. L. Reform* 481 (1995). Equalization suits could also support a claim for disproportionate resources, if one conceives of equality in vertical rather than horizontal terms. Under the principle of horizontal equity, all students are treated identically; the principle of vertical equity recognizes that students have different needs and should be treated according to their individual needs. In theory, the difference between adequacy and equality suits would be negligible if plaintiffs sought and courts enforced vertical equality. In practice, however, most equalization suits—aside from New Jersey's—have operated on the basis of horizontal equality. See *id.* at 514-17.

<sup>30</sup> For discussion of legislative recalcitrance in the face of a court order, see *Rebell & Hughes*, *supra* note 20, at 1138-39 (citing examples when various state legislatures failed to take adequate measures after state court deferred to legislature's judgment); see also Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 *Harv. L. Rev.* 1072,

*Sheff* does not and cannot resolve the debate over the extent to which money matters, but it does offer an important case study regarding the relationship between expenditures and achievement. It reveals that equalizing resources will not necessarily close or narrow the achievement gap between urban and suburban schools, even when the equalization is at a relatively high level. (In 1991-92, Hartford schools were funded at a level of \$8126 per pupil, which exceeded not only the average expenditures in the surrounding suburban districts, but significantly exceeded the national average of \$5500 per pupil.<sup>31</sup>) *Sheff* thus should be a sobering lesson for those dedicated to school finance reform, because school finance litigation, for the reasons just described, is at best likely only to equalize resources between poor, urban schools like Hartford and their suburban counterparts. The first point to recognize about *Sheff*, therefore, is that it stands as concrete proof of the limited efficacy of traditional school finance litigation.

School finance advocates, as the saying goes, should accordingly be careful what they wish for, because they may get it—and little else. Experience has demonstrated that when equal or adequate educa-

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1078-81 (1991) (proposing that legislature's reluctance to develop school finance remedies may arise from influence of property-rich districts and collective-action problems of voter resistance to raising taxes). New Jersey is something of an exception, in that 28 poor urban districts, as a result of litigation, are entitled not only to the same amount of resources that are available in the highest spending districts, but are also entitled to funding for "supplemental" programs. See *Abbott v. Burke*, 710 A.2d 450, 455 (N.J. 1998) (affirming lower court's decision that required funding for supplemental programs); *Abbott v. Burke*, 693 A.2d 417, 421 (N.J. 1997) (ordering State to "study, identify, fund, and implement the supplemental programs required to redress the disadvantages of public school children in the special needs districts").

<sup>31</sup> See National Urban Education Goals: Baseline Indicators, 1990-1991, at 85 (Council of Great City Schools ed., 1992) (presenting detailed accounting of conditions, characteristics, and achievements of urban schools). Other examples of the limited efficacy of simply increasing funds include Kansas City, where a district court used a desegregation decree to infuse over a billion dollars of funds into the Kansas City, Missouri, School District between 1987 and 1995. See *Missouri v. Jenkins*, 515 U.S. 70, 75-80 (1995); Alison Morantz, Money and Choice in Kansas City, Major Investments with Modest Returns, in *Dismantling Desegregation*, supra note 12, at 242. Despite the massive increase in expenditures, achievement levels in Kansas City remained disappointingly low. See *id.* at 256-61. New Jersey is another example, where the increased expenditures on the 28 poor, urban districts have yet to translate into marked academic improvement. See Paul L. Tractenberg, *A Tale of Two States: A Comparative Study of School Finance & Educational Reform in California and New Jersey 91-97* (Dec. 5, 1997) (unpublished manuscript, on file with author). These examples do not prove, of course, that money is irrelevant. It is quite possible that sustaining high levels of expenditures over time, and spending it more wisely, would eventually translate into academic improvement. But the dearth of counterexamples indicating that increased expenditures have been effective in improving academic performance, and the plaintiffs' own recognition in *Sheff* that nonmonetary remedies were needed, suggest that money may not be the (only) answer.

tional opportunities are defined in strictly monetary terms, as they have been prior to *Sheff*, legislative battles following court decisions naturally focus on money.<sup>32</sup> Plaintiffs fortunate enough to secure victories in both the court and the legislature, and who receive additional resources, may find themselves in a weak position to request additional nonmonetary remedies.<sup>33</sup> Because such nonmonetary remedies may be equally if not more important than additional resources, *Sheff* suggests that it may be time to reassess the goals of school finance litigation.

Were there no alternatives to the traditional approach to school finance litigation, these points might be disregarded as academic musings. As explained below, however, *Sheff* reveals that there are indeed alternatives. Although expanding the traditional remedies of school finance litigation to encompass nonmonetary alternatives may be difficult politically, redistributing resources, the traditional function of school finance litigation, is also a daunting political feat. And the practical difficulties that alternative remedies may encounter do not diminish the salient fact that such alternatives are within the scope of the educational rights already recognized by state courts in school finance cases.

## II

### *SHEFF* AND THE POSSIBILITIES OF SCHOOL "FINANCE" LITIGATION

While showing that the traditional approach used in school finance litigation may be something of a dead end, *Sheff* also reveals that alternative and perhaps more effective routes to the same goal—the provision of an adequate or equal education—may be available. Put simply, *Sheff* demonstrates, albeit indirectly, that school finance litigation need not be solely concerned with the redistribution of re-

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<sup>32</sup> See, e.g., Rebell & Hughes, *supra* note 20, at 1138-39 (discussing legislative battles in New Jersey and Texas).

<sup>33</sup> The dynamic I am suggesting is similar to one described by Michael Seidman. In *Brown* and *Miranda*, 80 Calif. L. Rev. 673 (1992), Professor Seidman observed that once plaintiffs in *Brown* succeeded in having separate schools declared unequal, they were in a poor position to complain about schools that, although no longer legally separate, were nonetheless still unequal in fact. See *id.* at 717. It is also analogous to observations made by Laurence Tribe and Lawrence Sager, who contend that the failure of federal courts to declare certain state actions unconstitutional tends to relieve governmental actors of responsibility for addressing still existing problems. See Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 Harv. L. Rev. 1, 33-34 (1989) (observing courts' legitimate problem when they announce that government bears no responsibility for racially discriminatory practices by officials); see also Lawrence G. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212, 1227 (1978) (stating that public officials should not feel free to ignore constitutional norms when federal judiciary fails to enforce them at "margins").

sources. This lesson of *Sheff* has been obscured by the court's reliance on the segregation clause and the common assumption that such reliance was necessary to the outcome. While the court obviously did rest its decision on the segregation clause, I will try to show why the court could have reached the same result by relying exclusively on the education clause and thus why other state supreme courts could reach the same result in the absence of a segregation clause in their respective state constitutions.

I will begin with a brief discussion of the court's opinion and the conventional wisdom regarding the opinion, advanced by both *Sheff* critics and sympathizers. I then argue that any state court that has recognized the right to an adequate or equal education would be justified, upon a proper showing, in ordering nonmonetary remedies. I end this Part by sketching three examples of claims that could be made under the guise of securing an equal or adequate education. Specifically, the rationale of school "finance" cases could support claims seeking racial integration, socioeconomic integration, or school choice.

### A. *The Opinion and Conventional Wisdom*

The *Sheff* majority began its analysis by emphasizing that the Connecticut Constitution, as interpreted in *Horton*, imposes an affirmative obligation upon the legislature to provide students substantially equal educational opportunities.<sup>34</sup> The court then addressed whether this obligation extends to remedying de facto segregation. The court recognized that the right to a substantially equal education is not limited to school financing, which suggests that the court at least glimpsed the possibility that the education clause alone could justify

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<sup>34</sup> See *Sheff*, 678 A.2d at 1277 (reasoning that "defendants' argument, derived largely from principles of federal constitutional law, founders on the fact that article eighth, § 1, and article first, §§ 1 and 20, impose on the legislature an affirmative constitutional obligation to provide schoolchildren throughout the state with a substantially equal educational opportunity"). The affirmative nature of the constitutional right, the court reasoned, rendered the issue of state action largely irrelevant. See *id.* at 1277-80. Because the legislature is obligated to provide an education that is substantially equal, the legislature's failure to act, according to the court, constitutes state action. See *id.* at 1277. This, of course, is no different from saying that there is no state action requirement. The court was not willing to make this point explicitly, however, and instead confused the issue somewhat by relying on the fact that the state had notice of the racial and ethnic isolation in the Hartford schools. See *id.* at 1280. The court further muddled the waters by suggesting first that the fact that the legislature "did not affirmatively create" such isolation was irrelevant, but later suggesting that the state, by adhering to district lines drawn in 1909, was responsible for the racial and ethnic isolation. Compare *id.* at 1280, with *id.* at 1289. The court's waffling on the state action issue, although an interesting sidelight, is not important for the purposes of this Essay.

addressing de facto segregation—provided it could be established that such segregation deprives students of equal educational opportunities. Rather than complete this line of analysis, however, the court turned to the segregation clause for support.<sup>35</sup>

The court toyed briefly with the notion that the plain language of the constitution might prohibit de facto segregation, reasoning that the term “segregation” is neutral about intent.<sup>36</sup> Perhaps realizing the broad implications of reading the segregation clause to prohibit all de facto segregation with regard to the exercise of all civil and political rights, the court quickly abandoned this notion and scaled back its claim. “Whatever this language [‘segregation’] may portend in other contexts,” the court stated, “in the context of public schools, where the legislature has an affirmative obligation to provide substantially equal educational opportunity, the constitutional language prohibits de facto segregation.”<sup>37</sup> In this summary fashion, the court held that the segregation clause reaches de facto segregation in schools, while at the same time suggesting that the clause applies only to de jure segregation in other contexts.<sup>38</sup>

The court went on to suggest that “[s]ound principles of public policy” supported its holding, quoting from numerous court opinions extolling the socializing benefits of an integrated education.<sup>39</sup> The

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<sup>35</sup> See *id.* at 1281 (stating that “[f]or the purposes of present litigation, we decide only that the scope of the obligation expressly imposed on the state by article eighth, § 1, is informed by the constitutional prohibition against segregation contained in article first, § 20”).

<sup>36</sup> See *id.* at 1282.

<sup>37</sup> *Id.* (referring to language of segregation clause).

<sup>38</sup> The court then reviewed the history of the 1965 Constitutional Convention, and, perhaps not surprisingly, concluded that the drafting history of the constitution supported its holding. See *id.* at 1283. In its historical review, the court found support in the seemingly inconclusive fact that the segregation and education clauses were adopted during the same Convention in 1965. See *id.* at 1283-84. The court also found support in what can be described as, at best, ambiguous statements of delegates, including a statement indicating that the constitution should “unequivocally oppose the philosophy and the practice of segregation,” *id.* at 1283 n.33 (quoting delegate Chase G. Woodhouse), and another suggesting that the constitution should provide “total protection against discrimination,” *id.* at 1284 n.36 (quoting delegate James J. Kennelly). Finally, the court noted that, at the time of the Convention, it was “jurisprudentially unclear” whether *Brown* “would be limited to de jure segregation.” *Id.* at 1284 n.37. The court apparently was untroubled by the absence of any direct proof whatsoever that the delegates, by including the single term “segregation,” meant to prohibit de facto segregation in the public schools—and only in the public schools. See *id.* at 1283-84.

<sup>39</sup> *Id.* at 1285. The court quoted, among others, the following excerpt from a New Jersey Supreme Court opinion: “If children of different races and economic and social groups have no opportunity to know each other and to live together in school, they cannot be expected to gain the understanding and mutual respect necessary for the cohesion of our society.” *Id.* (quoting *Jenkins v. Township of Morris Sch. Dist.*, 279 A.2d 619, 627 (N.J. 1971)).

court emphasized, however, that the result reached was commanded not by policy, but by the text of the constitution: "We . . . hold that, *textually*, [the education clause], as informed by [the segregation clause] requires the legislature to take affirmative responsibility to remedy segregation in our public schools, regardless of whether that segregation has occurred de jure or de facto."<sup>40</sup>

In reaching its holding, the court sidestepped several additional claims brought by plaintiffs. Specifically, the court declined to address whether the concentration of low-income students in the Hartford schools, or the alleged "disparities in educational resources," would themselves represent constitutional violations.<sup>41</sup> It was sufficient for purposes of disposing of the case, the court reasoned, to decide only the racial and ethnic isolation claim.<sup>42</sup> The court also sidestepped plaintiffs' claim that Hartford students were not receiving the resources necessary to obtain a minimally adequate education, by pointing out, in something of a non sequitur, that plaintiffs did not allege that lack of sufficient funding deprived them of substantially equal educational opportunities.<sup>43</sup>

The upshot of the court's opinion was to declare Connecticut's districting laws, which made school districts coterminous with municipal boundaries and required students to attend schools in the districts where they lived, unconstitutional.<sup>44</sup> Beyond that declaration, the court decided to allow the legislature time to "take appropriate legislative action."<sup>45</sup> It provided nothing more specific with regard to a remedy, urging only that the legislative and executive branches "put the search for appropriate remedial measures at the top of their respective agendas."<sup>46</sup> As the dissent observed, the majority thus appeared to strike down the state's entire municipality-based school-districting scheme, in effect in Connecticut since 1909, without articulating any remedial guidelines or principles.<sup>47</sup>

The majority's opinion drew a good deal of criticism, including a lengthy and acerbic dissent.<sup>48</sup> The dissent and scholarly critiques fo-

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<sup>40</sup> *Sheff*, 678 A.2d at 1283 (emphasis added); see also *id.* at 1285 (noting that "the provisions" of constitution require state to remedy de facto segregation).

<sup>41</sup> *Id.* at 1281.

<sup>42</sup> See *id.*

<sup>43</sup> See *id.* at 1286 n.41.

<sup>44</sup> See *id.* at 1289 (concluding that "the school districting scheme, as codified . . . and as enforced with regard to these plaintiffs is unconstitutional").

<sup>45</sup> *Id.* at 1290 (quoting *Horton v. Meskill*, 376 A.2d 359, 376 (Conn. 1977)).

<sup>46</sup> *Id.*

<sup>47</sup> See *id.* at 1295-96 (Borden, J., dissenting).

<sup>48</sup> See *id.*; David J. Armor, *Facts and Fictions About Education in the Sheff Decision*, 29 Conn. L. Rev. 981, 984 (1997) (arguing majority wrongly adopted plaintiff's view that segregation causes educational disadvantage and that desegregation will improve educa-

cus primarily on the court's conjoint reading of the education and segregation clauses, and the critics argue that the court's interpretation is not simply unpersuasive but incoherent.<sup>49</sup> As these critics point out, it is implausible to suggest that the segregation clause outlaws de facto segregation with regard to the exercise of one right (the right to an equal educational opportunity), but not with regard to the exercise of all other civil or social rights to which the clause by its own language relates.<sup>50</sup> Although the critics surely have the stronger argument, what interests me more than the merits of the criticism is the fact that

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tional outcomes for minorities); Rossell, *supra* note 16, at 1204-29 (criticizing majority's focus on school-related remedies to problems of racial and ethnic isolation and poverty); Jeff Archer, Conn. Supreme Court Orders Desegregation for Hartford, *Educ. Wk.*, Aug. 7, 1996, at 6 (explaining that state officials were "quick to criticize" court's reasoning); George Judson, Hartford Court Bars Imbalance in the Schools, *N.Y. Times*, July 10, 1996, at A1 (describing Governor Rowland's hope that Connecticut legislature will amend constitutional clause at issue in *Sheff*); Jonathan Rabinovitz, Officials Urge Parents Not to Panic over School Ruling, *N.Y. Times*, July 10, 1996, at B6 (noting Rowland's opposition to forced busing).

<sup>49</sup> See *Sheff*, 678 A.2d at 1314-27 (Borden, J., dissenting) (maintaining that "[t]he text [of state constitution] provides no support for the majority's conclusion and the history of the 1965 convention squarely contradicts it"); Rossell, *supra* note 16, at 1189 (arguing that majority incorrectly interprets segregation clause to include de facto segregation). The critics further argue that the court improperly ignored the trial court's factual findings that poverty, and not racial or socioeconomic isolation, explained the poor performance of Hartford students. The critics suggest that the lack of any demonstrated link between racial and ethnic isolation and academic achievement in this case is fatal to the court's holding. See *Armor*, *supra* note 48, at 984 (describing missing link between racial isolation and achievement as "a fatal flaw in the logic of the majority"). The dissent goes so far as to suggest that had plaintiffs proved such a link, their constitutional claim "might have legitimately prevailed." *Sheff*, 678 A.2d at 1298 (Borden, J., dissenting). I discuss the significance of this link, as well as the significance of the link between socioeconomic isolation and academic achievement. See *infra* notes 88-97 and accompanying text.

<sup>50</sup> See *Sheff*, 678 A.2d at 1315 (Borden, J., dissenting) (calling majority's interpretation "utterly implausible" and arguing that it "tortures the text" of segregation clause). Contrary to the majority's review of the historical evidence, moreover, the critics contend that the drafting history suggests that inclusion of the term segregation was largely a symbolic gesture, one designed to make clear that the constitution's prohibition of discrimination and guarantee of equal protection included protection from intentional segregation. See *id.* at 1319-27 (reviewing drafting history); Rossell, *supra* note 16, at 1202 (same). In addition to citing statements of delegates that support this interpretation, the critics point to the fact that, at the time the provision was drafted, a number of cities and school districts in Connecticut were already isolated by race and ethnicity. Surely, the critics reason, had the delegates intended to render all such school districts unconstitutional, there would have been some mention of this desire. See *Sheff*, 678 A.2d at 1319-20 (Borden, J., dissenting) (discussing delegates' knowledge of housing patterns); Rossell, *supra* note 16, at 1202 (stating that testimony of delegates demonstrates unlikelihood of their intent to include de facto segregation in definition of segregation). But the historical record reveals not even a decent hint that de facto segregation, in schools and elsewhere, would be unconstitutional under the new constitution. Similarly, the record of the Convention with regard to the segregation clause contains only a single reference to education: One delegate offered education as an example of the contexts in which the segregation clause would operate. This is hardly sufficient evidence, the critics conclude, to support the notion that the dele-

it necessarily rests on the supposition that reliance on the segregation clause was necessary to the court's result. The critics all appear to assume, in other words, not simply that the segregation clause failed to support the outcome in the case, but that de facto segregation was beyond the reach of the constitution, period. As the dissent stated, "[t]here is no more basis today in our constitution for judicial intervention to impose such a mandatory educational theory than there was in the *Lochner* era for the judiciary to impose laissez faire economics."<sup>51</sup>

Like the critics, supporters of the decision also seem to assume that the court's reliance on the segregation clause was necessary to the result, and thus assert that the decision will not be replicated elsewhere because only two other state constitutions—Hawaii's and New Jersey's—contain segregation clauses. Professor Rachel Moran, for example, in her sympathetic account of the case suggests that *Sheff* is unlikely to be followed elsewhere, in part because of the court's reliance on "unique" constitutional language "specifically enjoining segregation."<sup>52</sup> Similarly, Professor Gerald Frug, in a more tepid assessment of the decision, suggests that "[d]ecisions like *Sheff v. O'Neill* are unlikely to become common elsewhere in the country," in part because "only two other states have, like Connecticut, an explicit state constitutional prohibition against segregated education."<sup>53</sup>

The conventional wisdom thus appears to be that *Sheff* will necessarily remain an outlier, with little to teach advocates in the forty-seven states whose constitutions do not contain segregation clauses. In my view, the conventional wisdom is wrong.

## B. Affirmative Rights and Red Herrings

### 1. The Right to an Adequate or Equal Educational Opportunity

The conventional wisdom ignores one crucial point: The right to an equal (or adequate) educational opportunity is an affirmative right.<sup>54</sup> The right necessarily imposes a correlative affirmative duty

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gates intended that the clause would prohibit de facto segregation in public schools, and only in public schools. See *Sheff*, 678 A.2d at 1320-22 (Borden, J., dissenting).

<sup>51</sup> *Sheff*, 678 A.2d at 1297 (Borden, J., dissenting); see also Armor, supra note 48, at 982 (stating that social merits of integration policies do not justify "the majority's unprecedented constitutional interpretation" or "the prospect of a massive court-imposed desegregation remedy").

<sup>52</sup> Moran, supra note 10, at 1096. Although almost no other state constitutions contain segregation clauses, Moran is mistaken in asserting that such clauses are "not present in other state constitutions." *Id.*

<sup>53</sup> Frug, supra note 16, at 53 & n.94.

<sup>54</sup> See *Sheff*, 678 A.2d at 1277; see also supra note 34. The discussion about the nature of the right to an equal education applies to the right to an adequate education. Both are

upon the legislature to provide an equal or adequate education.<sup>55</sup> Moreover, to the extent that courts endeavor to interpret and enforce the right, as twenty state supreme courts have done already, they necessarily must have some notion of what the right encompasses. This in turn requires a conception of what comprises an “education” in general, and what constitutes an “equal” or “adequate” educational opportunity in particular.

School finance plaintiffs have sought to translate recognition of the right to an equal or adequate education into increased resources, and thus they have defined the right (or at least the remedy) in terms of funding. Presented with no alternatives, courts striking down school finance systems generally have adopted plaintiffs’ conception of the constitutional right and have equated sufficient funding with a constitutional school system.<sup>56</sup> There is no reason, however, why the rights need be defined solely in monetary terms or remedied solely by

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affirmative rights, which impose a duty on the legislature, a duty subject to definition and enforcement by courts. Failure to recognize this point may have shaped Professor Rossell’s view on *Sheff*. Strongly critical of the decision, Professor Rossell seems to misapprehend that the right to equal educational opportunity is an affirmative right. She asserts that “[s]tate constitutions are composed of ‘negative rights’—that is, protections against state violations of the most basic human rights—rather than affirmative social engineering, like the prohibition against de facto segregation.” Rossell, *supra* note 16, at 1196. Although Professor Rossell is correct to point out that state constitutions do not contain “affirmative social engineering” provisions per se, they do contain affirmative rights. To the extent that courts seek to define and enforce affirmative rights, they are arguably performing their typical and required task of interpreting constitutional provisions; it is thus a bit of an exaggeration to accuse such courts of affirmative social engineering.

<sup>55</sup> I use the phrases “equal or adequate educational opportunity” and “equal or adequate education” interchangeably. I do so only for ease of reference. There are theoretical differences between the two, in that the latter could refer to outcomes. But courts have confined themselves to requiring states to assure the opportunity for an equal or adequate education, not that they guarantee particular outcomes. When I use the shorthand phrase of “equal or adequate education,” I am referring only to equal or adequate opportunities.

<sup>56</sup> Some courts have described, at times in great detail, the substantive components of an adequate education. The Kentucky, West Virginia, and Massachusetts high courts, for example, have included in their decisions a list of what they see as the essential elements of an adequate education. See *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 211-13 (Ky. 1989) (listing characteristics of “efficient” school); *McDuffy v. Secretary of Executive Office of Educ.*, 615 N.E.2d 516, 554 (Mass. 1993) (discussing characteristics of “educated child”); *Pauley v. Kelly*, 255 S.E.2d 859, 877 (W. Va. 1979) (listing eight elements of “efficient” school). That courts are willing to describe in such detail the components of an adequate education shows that not all decisions have been solely about money, although suffice it to say that plaintiffs tend to remain focused on seeking increased resources regardless of substantive definitions, and even the Kentucky, West Virginia, and Massachusetts decisions themselves suggest that additional resources would be necessary in order to provide an adequate education. More importantly, however, the fact that some courts have been quite explicit in defining an adequate education in substantive terms helps illustrate, as I explain below, how all courts must determine what constitutes an adequate or equal education when deciding school finance cases.

increasing funding, especially in light of the demonstrated inefficacy of increased expenditures.

A criticism made by the dissent of the majority's approach nicely illustrates my point. The dissent first expresses agreement that racial and ethnic isolation is harmful to all students and that eliminating such isolation is desirable as a matter of "educational policy."<sup>57</sup> But the dissent then suggests that transforming a desirable educational policy into a constitutional mandate is improper, accusing the majority of having "Lochnerized" the education and segregation clauses by "reading into them an educational theory that mandates racially and ethnically integrated schools."<sup>58</sup> What the dissent fails to appreciate, however, is that defining the right to an equal (or adequate) education necessarily entails embracing an "educational policy."<sup>59</sup> Indeed, requiring the State to equalize expenditures is nothing more, and nothing less, than enforcing an educational policy that equates the right to equal educational opportunity with equal resources.

Professor David Armor, a staunch and justifiably eminent critic of mandatory desegregation, makes a similar argument against the *Sheff* decision which also helps demonstrate my point. Professor Armor suggests that there is a consensus, among experts and the public, "that integration is a desirable policy goal, mainly for the social benefit of increased information and understanding about cultural and social differences among various racial and ethnic groups."<sup>60</sup> He then assumes, however, that such "social" benefits do not fit within any proper definition of "education" and asserts that the "social desirability of integration policies . . . is hardly a proper justification for the majority's unprecedented constitutional interpretation."<sup>61</sup> The obvious question is: Why not? For Professor Armor to be correct, he must articulate a definition of education and educational opportunity that excludes consideration of the socializing benefits of an integrated education. In my opinion, there is little persuasive reason why the definition of education must be limited in this way.

That courts necessarily "make" educational policy in articulating constitutionally guaranteed educational rights, finally, is perhaps best

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<sup>57</sup> *Sheff*, 678 A.2d at 1296 (Borden, J., dissenting).

<sup>58</sup> *Id.* at 1297.

<sup>59</sup> At least one court has recognized what the dissent in *Sheff* failed to acknowledge. In *Leandro v. State*, 488 S.E.2d 249 (N.C. 1997), the North Carolina Supreme Court essentially admitted that it was making decisions better left to education policy experts, but that it had no choice: Fulfilling its adjudicative responsibility, the court concluded, required giving content and expression to the state constitutional right to a "general and uniform" education. See *id.* at 259.

<sup>60</sup> Armor, *supra* note 48, at 982.

<sup>61</sup> *Id.*

illustrated by several state court decisions holding that students have a right to an adequate education. The high courts of Kentucky, West Virginia, Massachusetts, and North Carolina have been thorough and explicit in defining the content of an adequate education—listing no fewer than seven detailed aspects of an adequate education.<sup>62</sup> These courts obviously must have some notion of what counts as an education in order to explicate the right to an adequate education in such detail. To me, it is not at all self-evident why certain aspects of an adequate education—such as sufficient knowledge of one’s “mental health”—are included within the courts’ definitions, and others—such as sufficient exposure to those of different backgrounds and cultures—are excluded.

The *Sheff* majority appears to have recognized the potential scope of the education clause, insofar as it acknowledged that the constitutional right articulated in *Horton*—the right to an equal education—need not be limited to school financing.<sup>63</sup> Although the majority quickly retreated from this line of thought, and sought refuge in the segregation clause, my contention is that they need not have looked any farther than the education clause to support their holding. The court could have defined the right to an equal educational opportunity as one free from de facto racial and ethnic segregation, specifically relying on the notion (accepted by the dissent and commentators alike and supported by the trial court’s findings) that education in its fullest sense includes interracial and multiethnic exposure.<sup>64</sup> Alternatively, the court could have defined the right to an equal educational opportunity as one free from de facto racial and ethnic segregation on the ground that such segregation is accompanied by socioeconomic

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<sup>62</sup> See *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 211-13 (Ky. 1989) (listing nine aspects); *McDuffy v. Secretary of Executive Office of Educ.*, 615 N.E.2d 516, 554 (Mass. 1993) (listing seven aspects); *Leandro*, 488 S.E.2d at 255 (listing four aspects); *Pauley v. Kelly*, 255 S.E.2d 859, 877 (W. Va. 1979) (listing eight aspects).

<sup>63</sup> See *Sheff*, 678 A.2d at 1281. At least one other state supreme court, Montana’s, has made a similar observation. See *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684, 691 (Mont. 1989) (“[T]he financing of education is only one aspect of equal educational opportunity.”).

<sup>64</sup> The concurrence reasoned that an integrated education could be a component of the right to an adequate education. See *Sheff*, 678 A.2d at 1292-93 (Berdon, J., concurring) (reasoning that “in order to provide an adequate or ‘proper’ education, our children must be educated in a nonsegregated environment”); see also *Beimers*, supra note 9, at 599-602 (same). Remedying de facto segregation, on the ground that integrated schools offer a more complete education, would be consistent with the right to an “equal” education as long as some students were receiving an integrated education while others were not. Because the Federal Equal Protection Clause would prohibit the State from ensuring that no student received an integrated education, and some students will “naturally” receive an integrated education, there will probably always be uneven levels of integration without state intervention.

segregation, which, as the dissent and commentators agreed, harms the academic performance of disadvantaged students.<sup>65</sup>

Of course, to say that the court could have defined the right to an equal educational opportunity in one way or another is not to say that it should have or that it would be justified in doing so. In the next section, I hope to show why both racial and socioeconomic integration, as well as school choice, are justifiable components of a constitutional right to an adequate or equal education. Before sketching those claims, however, I would like to address one obvious objection to my interpretation of *Sheff*.

## 2. *Why Rely on the Segregation Clause?*

A skeptical reader might ask why, if the segregation clause was not necessary to the result, did the court choose to rely on it? My supposition is that the court wanted to avoid the appearance of policymaking and that it especially wanted to avoid reliance on the social science evidence regarding the harms of racial, ethnic, and socioeconomic isolation. Had the court used only the education clause to remedy de facto racial and ethnic segregation, it either would have had to articulate a definition of education that included the socializing aspects of schools, or it would have had to demonstrate a link between racial and ethnic isolation and academic achievement. The former step would be depicted as policymaking and the latter would have required the court to draw on social science research regarding the academic benefits of desegregation, which, as described below, is more supportive than generally assumed but is nonetheless both voluminous and contradictory. Similarly, if the court wished to rely on the education clause to address socioeconomic isolation and the impact of

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<sup>65</sup> The dissent argued that the majority erred in reading the segregation clause to address de facto segregation, but the dissent nonetheless accepted that plaintiffs' case "would have been powerful" if they showed a link between racial and ethnic isolation and education. *Sheff*, 678 A.2d at 1298 (Borden, J., dissenting). Under the dissent's view, the only basis for relief had plaintiffs made such a showing presumably would have been the education clause, which simply guarantees equal educational opportunities and does not provide heightened protection for particular groups. It is therefore curious that the dissent acknowledges that "the concentration of poverty may adversely affect academic achievement," *id.*, but fails to recognize that this is precisely the sort of harm that—had it been connected to racial or ethnic isolation—the dissent would have found sufficient to grant relief under the education clause. Given that the education clause offers no basis for distinguishing between educational inequalities caused by racial, ethnic, or socioeconomic isolation, it would seem that the dissent should accept integration along socioeconomic lines. On this point, however, the dissent is silent. So, too, is David Armor, who acknowledges that concentrated poverty may hamper educational achievement, but fails to address whether integration along socioeconomic lines might be justified. See Armor, *supra* note 48, at 984, 988.

concentrations of poverty on academic achievement, it would also have had to rely on social science evidence to support its holding.

The court's reluctance to rely on social science evidence and to avoid the appearance of policymaking can be inferred from its refusal to address plaintiffs' socioeconomic segregation claim, and from the court's repeated insistence that the decision in *Sheff* was based on the text of the constitution.<sup>66</sup> The court's reluctance with regard to social science evidence can also be better understood, and is rendered more plausible, when one considers the example of *Brown*, a case clearly in the minds of the *Sheff* justices.<sup>67</sup> The Supreme Court in *Brown* cited to what it called "modern authorities" to support its holding that desegregation harms minority students.<sup>68</sup> Although most commentators agree that the Court's off-hand reference to social science studies on desegregation was not central to the Court's holding,<sup>69</sup> the reference unleashed criticism of the Court's methodology and intense scrutiny of the studies cited.<sup>70</sup> The scrutiny of those studies, in turn, laid the groundwork for what has now become a cottage industry within the social science field: assessing the harms and benefits of segregation and desegregation.<sup>71</sup> Faced with the *Brown* example, as well as with social scientists' evolving and occasionally contradictory views regarding desegregation, I suspect that the *Sheff* court was looking for a way to base its decision on authority less vulnerable to empirical inquiries.<sup>72</sup> The court found what it was looking for in the segregation

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<sup>66</sup> See *Sheff*, 678 A.2d at 1283 (stating that legislature is required to "take affirmative responsibility to regulate segregation in our public schools, regardless of whether that segregation has occurred de jure or de facto").

<sup>67</sup> See *id.* at 1289-90 (quoting extensively from *Brown*).

<sup>68</sup> See *Brown v. Board of Educ.*, 347 U.S. 483, 494 & n.11 (1955) (citing contemporary studies in psychology and social sciences on negative effects of discrimination).

<sup>69</sup> See Goodman, *supra* note 10, at 279 ("[C]onstitutional scholars, whatever their views as to the correctness of the [*Brown*] decision, have been reluctant to believe that the Court relied to any great extent on the 'modern authorities' cited in its opinion."); see also Michael Heise, *Assessing the Efficacy of School Desegregation*, 46 *Syracuse L. Rev.* 1093, 1099 (1996) (describing academic debate).

<sup>70</sup> See Mark G. Yudof et al., *Educational Policy and the Law 476-77* (3d ed. 1992) (listing multiple sources attacking social science evidence in *Brown* on methodological and interpretive grounds).

<sup>71</sup> See *id.* at 531-33 (listing multiple sources reflecting debate over harms and benefits of school segregation and desegregation).

<sup>72</sup> To be clear, this is not to say that the consensus among social scientists is chimerical. The point is simply that the social science evidence is sufficiently complicated and contradictory that, despite the surprising degree of consensus, it is easy to imagine that a court would be reluctant to rest its holding on such evidence. Of course, courts and advocates willing to expand the definition of an adequate or equal education to include racial or socioeconomic integration will have to overcome this reluctance if they wish to replicate the result in *Sheff*, as they will not (unless in New Jersey or Hawaii) have the benefit of a segregation clause.

clause, which allowed the court to render its conclusion—that de facto segregation must be remedied—impervious to any social science evidence that might call into question the wisdom of desegregation.

The unfortunate irony of the court's reliance on the segregation clause is that, while perhaps avoiding one pitfall of the Supreme Court's approach in *Brown*, it may have perpetuated another—namely, the implication that African American students must attend school with white students in order to receive an adequate or equal education.<sup>73</sup> A number of commentators, particularly critical race theorists, have argued that the Court's holding in *Brown* and its progeny, as well as the remedies ordered in those cases, rest on the notion that all-black schools are inherently inferior.<sup>74</sup> Such a view has also been advanced by Justice Thomas.<sup>75</sup> The *Sheff* decision, although it speaks of the benefits of integration to students of all racial and ethnic backgrounds, including white students, will inevitably be seen as endorsing the very notion found so controversial in the context of the Supreme Court's desegregation jurisprudence: "that blacks cannot succeed without the benefit of the company of whites."<sup>76</sup> Although all racial desegregation orders are, fairly or unfairly, vulnerable to this interpretation, it is interesting to note that had the court in *Sheff* instead ordered socioeconomic (rather than racial or ethnic) integration on the ground that it could help remedy the effects of concentrated poverty, such an implication could have been avoided.

The purpose of this long disquisition is simply to establish that it is quite plausible that the court relied on the segregation clause because it could. Most commentators, however, have equated convenience with necessity. My point is that courts and commentators alike should recognize that "making" education policy is unavoidable in cases recognizing a right to an adequate or equal education, and I would further suggest that, if courts are going to be in the business of making education policy through the enforcement of education

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<sup>73</sup> As judged by the comments of the dissent and commentators, the court also failed to avoid the appearance of judicial policymaking. See *Sheff*, 678 A.2d at 1297 (Borden, J., dissenting) ("The majority . . . has transformed a laudable educational philosophy into a constitutional mandate.").

<sup>74</sup> See, e.g., Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 Cornell L. Rev. 1, 5 (1992) (arguing that Court's remedies for de jure segregation rest on notion of black inferiority); Alex M. Johnson, Jr., *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 Calif. L. Rev. 1401, 1402-03 (1993) (arguing that Court's desegregation remedies fail to acknowledge and accommodate "the reality of the unique and separate African-American culture or nomos").

<sup>75</sup> See *Missouri v. Jenkins*, 515 U.S. 70, 118-20 (1995) (Thomas, J., concurring) (noting that desegregation seems to rest on idea that all-black schools are inferior).

<sup>76</sup> *Id.* at 119.

clauses, they might as well avail themselves of social science research in an effort to choose policies that are effective.

As for the *Sheff* decision itself, once it is understood that the segregation clause was an unnecessary prop in the court's decision and that the right to an equal or adequate education can be defined in nonmonetary terms, the significance of *Sheff* for school finance litigation becomes clear. *Sheff* reveals that the traditional equation of an adequate or equal education with adequate or equal resources is needlessly limited and perhaps even counterproductive, and that the underlying rights are capacious enough to include alternative definitions. Thus, the school finance advocates who believe that elements other than money are crucial to ensuring an adequate or equal education already possess the doctrinal tools to build claims seeking the provision of those elements. In the section that follows, I sketch three alternative claims that could be pursued.

### C. *Alternative Approaches*

Recognizing that educational rights can encompass more than just funding opens the door to alternative claims, but it leaves unanswered the question of what, aside from funding, should be included within the definition of an adequate or equal education. There are, of course, cynical (e.g., whatever a court wishes) and philosophical (e.g., whatever advances the true purpose of a sound democratic education) answers to this question. For the moment I would like to remain focused on the practical, as it seems clear that advocates seeking to expand or alter the definition of an adequate or equal education will have to articulate a limiting principle—i.e., a principle that courts (if so inclined or inhibited) could use to distinguish valid from invalid claims.

A practical answer may be found in the school finance decisions themselves. These decisions typically justify the redistribution of resources, or the requirement that a particular substantive goal be met, on one or both of two grounds: that doing so will improve academic achievement or that it will otherwise help schools prepare students to become productive and responsible citizens.<sup>77</sup> These standards can

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<sup>77</sup> See, e.g., *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 198 (Ky. 1989) ("Can anyone seriously argue that these [funding] disparities do not affect the basic educational opportunities of those children in the poorer districts?"); *McDuffy v. Secretary of Executive Office of Educ.*, 615 N.E.2d 516, 555 (Mass. 1993) ("These guidelines accord with our Constitution's emphasis on educating our children to become free citizens on whom the Commonwealth may rely to meet its needs and to further its interests."); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71, 94 (Wash. 1978) ("[T]he State's constitutional duty goes beyond mere reading, writing and arithmetic. It also embraces broad educational opportunities needed in the contemporary setting to equip our children for their role as citizens and as

serve as the guides, or limiting principles, in assessing alternative education claims. To be sure, the standards are vague, but they are not meaningless. And given that they are already used in school finance cases to justify funding remedies, it seems sensible that they should be used to judge alternative remedies.

Even if the standards themselves seem fuzzy, moreover, a crucial point to remember is that a benchmark for assessing alternative remedies already exists: Courts have already accepted that equalizing or increasing school funding enhances the quality of a student's education and/or indirectly helps schools prepare students to become productive and responsible citizens. The question advocates and courts should initially pose, then, is not whether an alternative remedy would generally enhance a student's education or prepare her to become a good citizen, but rather whether the alternative is more promising than the remedy of increasing expenditures. In other words, if advocates can show that an alternative approach is likely to be more effective than increasing expenditures, that should be sufficient to justify adopting that alternative.<sup>78</sup>

At least three alternative claims arguably fit the bill: racial integration, socioeconomic integration, and school choice. I will briefly sketch these claims below, in an effort to demonstrate only that they are viable alternatives to traditional school finance litigation. I develop the argument that racial and socioeconomic integration may be preferable alternatives to school finance reform in much greater detail in another paper.<sup>79</sup> For now, I am primarily interested simply in revealing the potential of school finance litigation and in establishing that plausible alternative claims could be made.

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potential competitors in today's market as well as in the market place of ideas."); *Robinson v. Cahill*, 303 A.2d 273, 295 (N.J. 1973) ("The Constitution's guarantee must be understood to embrace the educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market."); cf. *Ambach v. Norwick*, 441 U.S. 68, 76 (1979) (observing that public schools are especially important in "prepar[ing] individuals for participation as citizens"); *Wessman v. Boston Sch. Comm.*, 996 F. Supp. 120, 128 (D. Mass. 1998) (noting, in context of challenge to affirmative action policy of Boston Latin School, that "we are focusing on the obligation of a school district to determine what policies and practices will best prepare its children to succeed in a competitive and diverse society"), *rev'd sub nom. Wessman v. Gittens*, 160 F.3d 790, 809 (1st Cir. 1998) (holding that Latin School's admissions policy violates Fourteenth Amendment).

<sup>78</sup> That such a showing would justify pursuing alternative approaches does not, of course, guarantee that courts would do so. I assess below the likelihood that a court would actually endorse the claims I describe.

<sup>79</sup> See James E. Ryan, *Schools, Race, and Money*, *Yale L.J.* (forthcoming Fall 1999).

## 1. *Racial Integration*

Racial integration could be justified either on the ground that it can improve academic achievement or on the ground that it helps prepare students to function as citizens in an increasingly diverse society. As to the former, there is an ongoing debate regarding the educational benefits of desegregation, and, indeed, the trial court made findings in *Sheff* that racial and ethnic isolation were not responsible for the poor academic performance of students in Hartford.<sup>80</sup> Notwithstanding the trial court's specific findings regarding Hartford students, there is a good deal of evidence—and a greater degree of consensus among researchers than popularly reported—regarding the educational benefits of desegregation. There is general consensus, for example, that racial desegregation has led in the aggregate to moderate gains for black students and has had little impact on white students.<sup>81</sup> There is also consensus that some desegregation plans work better than others,<sup>82</sup> and that how a plan is structured influences its effect on student achievement.<sup>83</sup> And there is agreement, finally, that desegregation tends to improve the “life chances” of minority students.<sup>84</sup>

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<sup>80</sup> See *Sheff v. O'Neill*, No. S.C. 15255, 1995 Conn. LEXIS 249, at \*31, \*37 (Conn. Super. Ct. June 27, 1995).

<sup>81</sup> See, e.g., Willis Hawley & Mark A. Smiley, *The Contribution of School Desegregation to Academic Achievement and Racial Integration*, in *Eliminating Racism: Profiles in Controversy* 284-85 (Phyllis A. Katz & Dalmas A. Taylor eds., 1988); Liebman, *supra* note 22, at 356 & n.39 (discussing findings of Jencks & Mayer, and pointing out that Jencks has been skeptical about empirical benefits of integration). For an overview of the major studies done in this area, see generally Janet Ward Schofield, *School Desegregation and Inter-group Relations: A Review of the Literature*, 17 *Rev. Res. Educ.* 335 (1991).

<sup>82</sup> This fact is often construed as evidence against the effectiveness of desegregation, but I take the opposite view. If we know that some experiments work and others fail, the obvious next step is to determine why some worked and others failed. In an experiment to see whether water freezes when it is cold, for example, if water left overnight in a bucket froze 40 out of 70 winter nights, we would not conclude that trying to freeze water is futile. We would probably try to ascertain the temperature on the various nights in an effort to ascertain what temperature works to make water freeze. Although a similar process has occurred in the desegregation context, in that social scientists have identified factors in desegregation plans that are associated with success, see *School Desegregation: A Social Science Statement*, 14a-21a (1991) (Brief of Amicus Curiae for the NAACP Legal Defense and Education Fund at app., *Freeman v. Pitts*, 503 U.S. 467 (1992) (No. 89-1290)) (on file with the *New York University Law Review*) [hereinafter *Social Science Statement*], this research has largely been ignored in public policy debates regarding integration.

<sup>83</sup> See, e.g., *Social Science Statement*, *supra* note 82, at 16a-21a (noting several features of desegregation plans that tend to improve student achievement).

<sup>84</sup> See, e.g., Christine H. Rossell, *The Carrot or the Stick* 32-33 (1990) (concluding that empirical studies suggest “that producing the greatest interracial exposure for minority children—that is, the greatest percentage white in their classrooms—ultimately produces the greatest improvement in their life chances”); Amy Stuart Wells & Robert L. Crain, *Stepping over the Color Line: African-American Students in White Suburban Schools*

As for the justification that racial integration helps prepare both white and black students to function in a diverse society, there is also an ongoing debate as to the effects of integration on racial attitudes. But, again, there is also more consensus than generally understood. Social scientists tend to agree, for example, that if certain conditions are met—including having teachers who are properly trained and receptive to integration, implementing school policies and classroom practices that foster intergroup cooperation, avoiding tracking, and applying discipline procedures uniformly—desegregation plans can improve race relations.<sup>85</sup> The evidence regarding the long-term effects of desegregation also indicates that white and black graduates of integrated schools are more likely to work and live in integrated environments.<sup>86</sup> Finally, as Professor Armor has suggested, there appears to be a consensus that “integration is a desirable policy goal, mainly for the social benefit of increased information and understanding about cultural and social differences among various racial and ethnic groups.”<sup>87</sup>

I cite this evidence not in the hope of resolving the social science debate regarding the costs and benefits of desegregation, but simply to show that proof exists that racial integration can improve academic achievement and can also help prepare students to function productively in a diverse society. To bring a successful claim, advocates will have to marshal the evidence demonstrating the educational benefits of desegregation and perhaps make the more particularized showing that plaintiffs were apparently unable to make in *Sheff*. Alternatively, plaintiffs will have to convince a court that the socializing benefits of

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338-42 (1997) (showing that there are both long- and short-term benefits to minorities in desegregated schools).

<sup>85</sup> See, e.g., Social Science Statement, *supra* note 82, at 14a-21a (discussing conditions necessary for effective desegregation). If these conditions are not met, of course, there is evidence that desegregation plans can lead to a worsening of race relations. See, e.g., David J. Armor, *Forced Justice* 106, 113 (1995) (noting that desegregation and inter-racial exposure cannot improve race relations). Again, the fact that desegregation plans only improve race relations under certain conditions has been used as evidence that desegregation is an ineffective policy, see *id.*, but that seems to me the wrong conclusion. That certain conditions need to be met in order for desegregation to “work” does not mean that desegregation cannot succeed; it simply requires an assessment of whether those conditions are worth the time, cost, and effort to establish. In other words, the question seems not to be whether desegregation can work but rather whether those involved are willing to do the things necessary to make it work.

<sup>86</sup> See Armor, *supra* note 85, at 113 (discussing research on effects of desegregation on students’ choices of where to live and work); Social Science Statement, *supra* note 82, at 10a-14a (noting that black students attending desegregated schools tend to lead more integrated lives, and that white students can benefit from desegregated schools by learning to function in diverse society).

<sup>87</sup> Armor, *supra* note 48, at 982.

an integrated education deserve to be included within the definition of an adequate or equal education. Neither case, of course, will be easy to make, but both are viable. In addition, although the evidence regarding the benefits of desegregation is mixed, it is fair to say that this evidence is at least stronger than the evidence regarding the benefits of increasing expenditures. Given the comparative advantages, a plausible claim could be made that racial integration should be included within the definition of an equal or adequate education.

Indeed, in assessing the plausibility of a desegregation claim, it is instructive to recall the dissent's suggestion that plaintiffs "might have legitimately prevailed" if they had established a link between racial or ethnic isolation and academic performance.<sup>88</sup> The dissent strongly disagreed that the segregation clause prohibited de facto segregation,<sup>89</sup> which must mean that the dissent believed that plaintiffs might have prevailed, assuming they had established the necessary causal link, by relying solely on the education clause. The same implicit admission is found in Professor Armor's critique of *Sheff*, where he suggests that the absence of a link between racial or ethnic isolation and academic performance is fatal to the court's opinion.<sup>90</sup> It could only be fatal if the segregation clause did not reach de facto segregation; if it did, there would be no need to establish any link between isolation and poor performance, as the clause would presumably prohibit de facto segregation regardless of its academic impact. This in turn must mean for Armor, as for the dissent, that establishing the causal link—which, to repeat, is quite possible to do based on the existing social science research—would justify relief under the education clause, in Connecticut as well as in any other state that has recognized a right to an equal or adequate education.

## 2. Socioeconomic Integration

An equally viable, if not stronger claim could be made for socioeconomic integration.<sup>91</sup> A fairly large and consistent body of research indicates that integration along socioeconomic lines is one of the most effective educational strategies for improving the achievement of dis-

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<sup>88</sup> See *Sheff v. O'Neill*, 678 A.2d 1267, 1298 (Conn. 1996) (Borden, J., dissenting).

<sup>89</sup> See *id.* at 1314-27 (Borden, J., dissenting) (arguing that "[t]he text provides no support for the majority's conclusion, and the history of the 1965 convention squarely contradicts it").

<sup>90</sup> See Armor, *supra* note 48, at 984.

<sup>91</sup> The two claims obviously would overlap in a number of areas, like Hartford, where socioeconomic segregation roughly parallels racial and ethnic segregation. I treat them separately here only to explain how racial and socioeconomic integration could be defended independently of each other.

advantaged students.<sup>92</sup> Indeed, while the trial court in *Sheff* rejected a link between racial and ethnic isolation and academic performance, it found “that the concentration of poverty [within Hartford’s schools] may have adverse effects on achievement levels over and above the effects of family poverty.”<sup>93</sup> While the trial court’s finding was tentative, the numerous research studies, dating back to the famous Coleman Report in 1966, are more decisive and tend to show that disadvantaged students generally perform at higher levels when schooled with more advantaged students.<sup>94</sup>

As with desegregation, the evidence regarding socioeconomic integration does not establish that it will ineluctably lead to greater academic achievement for all involved. And, again, in order to succeed,

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<sup>92</sup> The evidence regarding the adverse impact of concentrated poverty on student achievement is generally more consistent than that regarding the impact of desegregation, insofar as most researchers agree both that a students’ peers affect achievement, see, e.g., Laurence Steinberg, *Beyond the Classroom* 138 (1996), and that educating a group comprised predominantly of low-income students is generally more difficult than educating a group of students from higher socioeconomic backgrounds, see *id.* at 146-49. (Indeed, that concentrations of low-income students require greater assistance to reach acceptable educational achievement levels is the basic rationale underlying Title I, the largest federal educational program, which provides money ostensibly to assist low-income students.) For a discussion of the social science research on this issue, see Andrew J. Gold, *In the Aftermath of Sheff—Considerations for a Remedy*, 29 Conn. L. Rev. 1043, 1047-56 (1997) (discussing effects of racial makeup in schools on individual student performance); Ryan, *supra* note 79, at pt. III.A; see also Lynn Olson & Craig D. Jerald, *The Challenges: Concentrated Poverty, Quality Counts ’98: The Urban Challenge*, *Educ. Wk.*, Jan. 8, 1998, at 14 (“Concentrated school poverty is consistently related to lower performance on every educational outcome measured.”). For evidence that integration along socioeconomic lines improves the educational performance of lower-income students, see Social Science Statement, *supra* note 82, at 12a-13a & n.22; Yudof et al., *supra* note 70, at 597 (“Children of low socioeconomic status appear[ ] to benefit significantly from exposure to more affluent and more highly motivated peers.”); James E. Rosenbaum, *Black Pioneers: Do Their Moves to the Suburbs Increase Economic Opportunity for Mothers and Children?*, 2 *Housing Pol’y Debate* 1179, 1193-1201, 1204 (1991) (concluding that minorities who moved to suburbs are more likely to have higher educational achievements); James E. Rosenbaum et al., *White Suburban Schools’ Responses to Low-Income Black Children: Sources of Successes and Problems*, 20 *Urb. Rev.* 28, 38-40 (1988) (finding that minority students’ grades remained constant or improved when minorities moved to more challenging, suburban schools, signifying increase in educational achievement). See generally Douglas S. Massey & Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* (1993) (examining causes and effects of racial segregation).

<sup>93</sup> *Sheff v. O’Neill*, No. S.C. 15255, 1995 Conn. LEXIS 249, at \*31-\*32 (Conn. Super. Ct. June 27, 1995). Both Armor and the dissent also accepted, in principle, that concentrated poverty can have adverse effects on educational performance. See *Sheff*, 678 A.2d at 1298 (Borden, J., dissenting) (acknowledging that concentration of poverty may adversely affect academic achievement); Armor, *supra* note 48, at 996 (asserting that evidence showed that socioeconomic conditions of students’ homes and neighborhoods account for educational disadvantages).

<sup>94</sup> See *supra* note 92 (citing studies regarding effects of racial and socioeconomic integration).

advocates will have to marshal the social science evidence demonstrating the educational benefits of socioeconomic integration. But the demonstrated educational benefits of socioeconomic integration certainly exceed those that have been found to accompany increasing expenditures.<sup>95</sup> If advocates and courts are seeking to use educational rights to improve academic achievement, socioeconomic integration surely deserves consideration as an alternative or complement to increased expenditures.

I am not suggesting, of course, that state courts will rush to embrace a definition of an equal or adequate education that includes the right to attend a school integrated along racial or socioeconomic lines. The continued popular opposition to forced busing, the waning federal court involvement in desegregation cases, the complexity and general misunderstanding of the social science evidence regarding desegregation, and the conservative temper of the times all present obstacles to any state court endorsement of racial or socioeconomic integration. I also recognize that implementing a right to racial or socioeconomic integration would present formidable challenges, which will differ from place to place depending on geography, demographics, and popular attitudes toward integration.<sup>96</sup>

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<sup>95</sup> See *supra* notes 25-26 (discussing evidence regarding efficacy of increased expenditures).

<sup>96</sup> In largely rural states, for example, it may be impractical to transport students long distances in order to achieve racial or socioeconomic integration. The practical difficulties implementation would pose may render the constitutional right largely aspirational in largely rural states, or in rural areas of states that contain metropolitan areas. It would not be at all impractical to implement such a right in the metropolitan areas that exist in the great majority of states; typical of these areas are inner-city school districts attended primarily by poor minority students, surrounded by a ring of suburban school districts attended primarily by middle-class white students. See, e.g., Gary Orfield, *The Growth of Segregation, in Dismantling Desegregation*, *supra* note 12, at 64-71 (generally addressing facets of "contemporary metropolitan educational inequalities"). That meaningful integration may be impossible to achieve in some states or areas, finally, does not seem sufficient reason to refuse to recognize a constitutional right; to the contrary, practical impossibility of fulfillment seems to be a potential difficulty with all affirmative rights. This may be a good reason not to include affirmative rights in constitutions, but once an affirmative right is included in a constitution, it does not seem justifiable to refuse to make any attempt to fulfill that right simply because doing so might not be completely successful.

Another potential problem, or open question, is whether a state can constitutionally pursue a race-specific policy in assigning students. See *Wessman v. Boston Sch. Comm.*, 996 F. Supp. 120, 127-32 (D. Mass. 1998) (addressing question in context of magnet schools using race-specific criteria), *rev'd sub nom. Wessman v. Gittens*, 160 F.3d 790 (1st Cir. 1998); *Cappacchoine v. Charlotte-Mecklenburg Bd. of Educ.*, 179 F.R.D. 177, 178-79 (W.D.N.C. 1998) (same); *Tito v. Arlington County Sch. Bd.*, No. 97-540-A, 1997 U.S. Dist. LEXIS 7932, at \*5-\*7 (E.D.V.A. May 13, 1997) (same); *Brown*, *supra* note 9, at 1039 (arguing that mandatory desegregation can pass constitutional strict scrutiny test). Taken together, the practical and constitutional problems associated with implementation suggest that a voluntary plan, which encourages but does not require integration, may be the most

Admittedly, then, one has reason to be skeptical that a state court would decide that the right to an adequate or equal education includes the right to attend an integrated school. But practical skepticism, it must be recognized, only arises after one acknowledges doctrinal and theoretical possibilities. Skeptics should also keep in mind that this is not likely the end of history, and that state courts are not the United States Supreme Court. A significant number of state courts have shown a strong and consistent commitment to judicial intervention in an effort to expand educational opportunities. Indeed, the fact that state supreme courts are still striking down school finance schemes, at a time when there is little evidence to support the hope that increased funding will make a difference academically, is testament to the strength of that commitment.<sup>97</sup> If evidence regarding the inefficacy of funding continues to mount and the problems of inner-city schools continue to rise, it is not unimaginable that state courts might be receptive to an argument that the right to an equal or adequate education requires integrating poor, urban, minority students with their wealthier, suburban, white counterparts.

### 3. *School Choice*

Even if such a broad-based definition of equal or adequate educational opportunity would be unsuccessful in most courts, there is a narrower and potentially more popular alternative suggested by *Sheff* that deserves mention. The right to an adequate or equal education could support a claim for public school choice. To understand how such a claim would operate, one need not look forward, but backward, to cases decided before *Brown*.

In the mid-1930s, and throughout the 1940s and early 1950s, the NAACP brought a number of suits seeking to equalize facilities, first among graduate schools and then among elementary and secondary schools.<sup>98</sup> The NAACP sought to press the “equal” component of the “separate-but-equal” doctrine and by so doing make Jim Crow too expensive to continue.<sup>99</sup> In cases such as *Sweatt v.*

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plausible and effective means of integrating students along racial and/or socioeconomic lines—a topic I return to at the end of this Essay.

<sup>97</sup> In the last two years alone, five state supreme courts have struck down their respective state’s school finance schemes: New Hampshire, Vermont, Ohio, Idaho, and North Carolina. For case citations, see *supra* note 15.

<sup>98</sup> See Kluger, *supra* note 17, at 186-94 (detailing NAACP’s effort to desegregate University of Maryland Law School); Tushnet, *supra* note 17, at 1-20, 49-137 (discussing NAACP’s desegregation efforts through 1950).

<sup>99</sup> See Kluger, *supra* note 17, at 134-37 (observing that white schools in southern states spent up to 10 times more than black schools in 1930s); Tushnet, *supra* note 17, at 13-20 (discussing early efforts of NAACP in helping sue states for unequal school expenditures).

*Painter*<sup>100</sup> and *McClaurin v. Oklahoma State Regents*,<sup>101</sup> the Supreme Court responded to the NAACP's challenge by concluding that the right to a separate-but-equal education was a personal right, and the Court defined that right as one to an equal educational opportunity.<sup>102</sup> Enforcement of the right required either that equal black schools be established, or, in the alternative, that minority students be admitted to all-white schools. In *Gebhart v. Belton*,<sup>103</sup> the Delaware Supreme Court applied this reasoning to elementary schools, requiring that black students be allowed to attend white schools in light of the fact that the black schools were inferior to the white ones.

A closely analogous claim could be made in the school "finance" context. Plaintiffs could argue that the right to an equal or adequate education requires either that inadequate or unequal schools be improved, or that the students be allowed to attend schools that are constitutionally sufficient. Just as the NAACP plaintiffs compared all-black schools with all-white ones in an effort to prove that the separate schools were not equal, plaintiffs in school "finance" cases could offer comparisons between their own schools and ones that they believe offer an adequate or sufficient education. Although there would be a number of practical hurdles to overcome, including space limitations in high-performing schools, such suits would at least coincide with the burgeoning and popular school choice movement.<sup>104</sup> They would also offer more immediate relief, albeit likely limited to fewer plaintiffs, than traditional school finance reform. As with pursuing a

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By the end of the 1940s, the NAACP had decided to attack segregation directly, by arguing that segregated schools could never be equal. See Kluger, *supra* note 17, at 293-94; Tushnet, *supra* note 17, at 135-37. But as *Gebhart v. Belton*, 91 A.2d 137 (Del. 1952), revealed, the NAACP still included in these cases the alternative claim that the white and black schools were unequal in fact. See *id.* at 140 (stating that one issue raised was whether segregated facilities were substantially equal).

<sup>100</sup> 339 U.S. 629 (1950).

<sup>101</sup> 339 U.S. 637 (1950).

<sup>102</sup> In *Sweatt*, 339 U.S. at 633-35, the Court described the constitutional right of black students as one to "substantial equality in . . . educational opportunities," and emphasized that such a right was "personal and present." Accord *McLaurin*, 339 U.S. at 642 (holding that student's personal right to equal protection was denied by segregated conditions).

<sup>103</sup> 91 A.2d 137 (Del. 1952).

<sup>104</sup> I have been unable to find any systematic assessment of space availability in suburban districts, but it seems obvious that, even if running below capacity, suburban schools will not be able to absorb all urban students. Beyond that obvious point, it is difficult to generalize regarding space availability, as it varies a great deal from region to region. See Lynn Schnaiberg, *A Dose of Competition*, *Educ. Wk.*, Jan. 8, 1998, at 100. Arizona, for example, has an interdistrict school choice plan, but few inner-city Phoenix students can transfer to wealthier suburban schools because of space limitations. See Lynn Schnaiberg, *State by State: Arizona, Quality Counts '98: The Urban Challenge*, *Educ. Wk.*, Jan. 8, 1998, at 104. St. Louis and Indianapolis suburbs, on the other hand, have been receiving a large number of urban students for years. See *Armor*, *supra* note 85, at 46.

claim for racial or socioeconomic integration, pursuing a school choice claim might not be successful, but such a suit is certainly a theoretical and doctrinal possibility. And given the limits of traditional school finance reform, it is, like the other two claims, an option at least worth considering.

In sum, although reasons of sheer fairness may still support achieving a roughly equal or adequate distribution of educational resources,<sup>105</sup> there is surely cause to question the efficacy of increasing expenditures. There is also evidence to suggest that alternative policies, including the three I have just discussed, may be more beneficial to students. What *Sheff* helps reveal is that the doctrinal tools already exist to construct education claims based on those alternative policies, and the decision is, for that reason alone, quite instructive. *Sheff* is also significant, as the next Part describes, for what it reveals about the historical and ongoing relationship between school finance litigation and desegregation.

### III

#### DESEGREGATION AND SCHOOL FINANCE LITIGATION

Professor Christine Rossell asserts that *Sheff* is, “without a doubt, the most radical decision in the four decades of litigation over equality of educational opportunity.”<sup>106</sup> Professor Rossell’s assessment of *Sheff* is shared by other commentators, who have tended to focus on the novelty of the court’s addressing de facto segregation. In some ways, however, *Sheff* represents not so much a break from the past as a return to some fairly old ideas. Similarly, the legislative response to the *Sheff* decision is more reminiscent of the past than representative of a new approach to desegregation and education reform. The question for plaintiffs, addressed at the conclusion of this section, is how to react to this legislative response.

#### A. *Sheff and Brown*

Although the *Sheff* majority attempts to couch its decision in the constitutional text, the charade does little to obscure the underlying rationale of the result. The majority clearly must have believed that segregation, regardless of its cause, was “harmful” to the students in Hartford, over ninety percent of whom were either African American or Latino. Otherwise, it is difficult to understand why the majority

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<sup>105</sup> See, e.g., Martha Minow, *School Finance: Does Money Matter?*, 28 *Harv. J. on Legis.* 395, 398-99 (1991) (arguing that “sheer fairness” may justify equalizing expenditures).

<sup>106</sup> Rossell, *supra* note 16, at 1202.

would engage in such an adventurous reading of the Connecticut Constitution. The notion that segregation is harmful to minority students, and that integration is beneficial, is of course not a new idea. It formed the basis of the NAACP's legal challenges to school segregation, as well as the bases upon which the Court ruled in *Brown* and *Green*.<sup>107</sup>

What makes this reembrace of integration significant is the context in which the reversion occurred. Recall that Hartford students were funded at a higher level than the average suburban student. School finance litigation had achieved as much for students in Hartford as could reasonably be expected, more than has been achieved in most other "successful" school finance suits, and as much if not more than most school finance advocates would reasonably request or expect to receive. What plaintiffs argued, and what the *Sheff* majority accepted, is that this success was not enough, and what was needed was not (simply) more money, but integration.

The implicit recognition that school finance reform was insufficient to improve the educational opportunities for Hartford students, and the reembrace of integration, brings the relationship between school finance litigation and desegregation full circle. School finance litigation began at a time when desegregation was either stalled or proceeding slowly, and early school finance advocates—Derrick Bell among them—apparently viewed school finance litigation as a viable alternative to desegregation and as a means of improving educational opportunities for all poor students, regardless of race.<sup>108</sup> What *Sheff*

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<sup>107</sup> See *Green v. County Sch. Bd.*, 391 U.S. 430, 439 (1968) (outlining court's responsibilities in effectuating immediate and meaningful desegregation); *Brown v. Board of Educ.*, 347 U.S. 483, 493-94 (1954) (stating that segregation generates enduring sense of inferiority among African American students).

<sup>108</sup> See Tractenberg, *supra* note 31, at 21-27. The shift in focus from race to finances is apparent simply in the fact that the underlying right, equality of educational opportunity, was identical in both desegregation and school finance cases. Compare, e.g., *Brown*, 347 U.S. at 493 (holding that segregation deprives black students of their right to equal educational opportunity), with *Robinson v. Cahill*, 303 A.2d 273, 295 (N.J. 1973) (holding that funding disparities in New Jersey violated students' right to equal educational opportunity). In the latter, however, the right was defined exclusively in financial terms. See Arthur E. Wise, *Legal Challenges to the Future of School Finance*, 82 Sch. Rev. 1, 18 (1973) (stating that court in *Robinson* wrongly focused on tax funding to ensure school equality). See generally John E. Coons et al., *Private Wealth and Public Education* 11 (1970); Arthur E. Wise, *Rich Schools, Poor Schools* 143-59 (1968). At least in those instances where the right to equal educational opportunity was based on a state's education clause, and thus existed as an independent, affirmative right—one not dependent on the equal protection clause—there was no theoretical reason why it could not also have been defined to include an integrated school setting. The failure to push for this interpretation seems clearly to have been a conscious choice to avoid the issue of race. *Sheff* and other examples discussed in the text suggest that this may have been an unwise choice.

suggests is that school finance litigation was not—and is not—an adequate substitute for desegregation, at least where desegregation involves mixing students not only of different races but of different socioeconomic levels.

The evidence from Hartford is similar to evidence from other cities, where school districts have received an infusion of funds but have remained isolated by race and poverty. The most infamous example is Kansas City, where a district court, under the guise of *Milliken II* relief, ordered expenditures upward of a billion dollars in seven years. Despite this astonishing increase in funds, achievement levels in Kansas City remained disappointingly low, just as they have in Hartford. On the other side of the ledger, and as already discussed, social science research has shown significant gains in achievement for students who transfer, through a desegregation decree or otherwise, from a school of concentrated poverty into a school populated primarily by students from higher socioeconomic backgrounds.

*Sheff* also revives the notion, which seems almost quaint in today's climate where academic achievement is reflexively accepted as the only legitimate measure of education quality, that schools can perform an important socializing function. *Sheff* suggests, albeit obliquely, that exposing students of different races and ethnic backgrounds to each other, in the hope that such exposure will increase understanding and tolerance, is an important aspect of schools and a component that deserves inclusion when we, or courts, talk about "education."<sup>109</sup> This notion, like the idea that segregation harms students academically and psychologically, also stems from *Brown* and its progeny.<sup>110</sup> And it is a notion that has not been advanced—indeed it has been submerged—by school finance litigation, which through emphasizing monetary resources has helped confine considerations of educational opportunity to academic achievement.

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<sup>109</sup> See *Sheff v. O'Neill*, 678 A.2d 1267, 1294 (Conn. 1996) (Berdon, J., concurring) (reasoning that "[e]ducation . . . also includes the development of social understanding and social tolerance").

<sup>110</sup> See *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 472-73 (1982) (suggesting that diverse educational environment will tend to foster mutual respect among minority and majority children); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 486 (1979) (Powell, J., dissenting) (noting that "ethnic and social diversity in the classroom is a desirable component of sound education"); see also *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1970) (noting that school officials "might well conclude" that achieving racial balance in schools is necessary to "prepare students to live in a pluralistic society"); *Brown*, 347 U.S. at 494 (noting psychological effect of segregation upon minority students).

### B. *Sheff and Plessy*

What makes *Sheff* so controversial, so “radical,” is not that it embraces the principle of integration. After all, public opinion surveys indicate that there is “deep support” for integration, at least in theory.<sup>111</sup> *Sheff* is controversial because it calls for converting an admired theory into practice, which in turn requires (or will be perceived to require) sacrifice.<sup>112</sup> If *Sheff* is to be implemented, some parents in the suburbs surrounding Hartford will have to send their children to school in Hartford and others will have to receive Hartford students into their suburban schools. In some instances, this will entail a real sacrifice; in almost all instances, it will be perceived as a sacrifice.<sup>113</sup>

Here, too, *Sheff* and the legislative reaction to it reveal an interesting aspect of the relationship between school finance litigation and desegregation. Both school finance and school desegregation require suburban parents to sacrifice, the former money and the latter the ability to remain separate. School finance reform has been controversial, to be sure, and part of that controversy is the result of the financial sacrifice it requires on the part of suburban parents: It requires them to participate in the redistribution of education funds away from

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<sup>111</sup> See, e.g., Gary Orfield, Unexpected Costs and Uncertain Gains of Dismantling Desegregation, in *Dismantling Desegregation*, supra note 12, at 107 (discussing political history and public opinions surrounding busing issue); see also John G. Condran, Changes in White Attitudes Towards Blacks: 1963-1977, 43 Pub. Opinion Q. 463, 464, 466 (1979) (reporting survey findings through 1970s that consistently found that over 85% of whites surveyed believed white and black students should attend integrated schools).

<sup>112</sup> This fact may explain why reaction to the decision in Connecticut was decidedly more mixed than general polls regarding desegregation. A poll taken of Connecticut residents indicated that 47% of those surveyed supported the *Sheff* ruling, while 41% opposed it. See Robert A. Frahm, Residents as Divided as Court on *Sheff*; Courant-ISI Connecticut Poll, Hartford Courant, Aug. 16, 1996, at A1.

<sup>113</sup> See Moran, supra note 10, at 1098 (reporting that “a substantial number of Connecticut residents support the principle of integration but reject many of the traditional remedies for achieving it”). See generally David O. Sears & Harris M. Allen, Jr., The Trajectory of Local Desegregation Controversies and Whites’ Opposition to Busing, in *Groups in Contact, The Psychology of Desegregation* 123 (Norman Miller & Marilyn B. Brewer eds., 1984) (discussing white opposition to busing). I focus in the text on suburban parents largely because their opposition, as well as that of their legislators, has generally been more intense—and more effective—than that of minority urban parents and their legislators. I fully recognize, however, that many minority parents have become disenchanted with integration in general and busing in particular. But suburban parents are generally satisfied with their schools, while urban parents justifiably are not. From this I think it is reasonable to presume that Hartford parents would be more willing to send their children to suburban schools in the hopes of improving their children’s educational opportunities than suburban parents would be to send their children to Hartford schools, or even to receive a substantial number of Hartford students into suburban schools. This is not to say that the opposition of suburban parents to sending their children to schools in Hartford is absolute and intractable; as I explain below, creating magnet schools in Hartford would likely draw a decent percentage of suburban students into the Hartford district.

their school districts and toward poorer schools.<sup>114</sup> But the controversy engendered by school finance reform does not begin to match, in intensity or violence, the controversy caused by desegregation.<sup>115</sup> Indeed, I would suggest that part of the reason it has taken so long for advocates to use the right to an adequate or equal education to attack segregation is because school finance reform, though difficult to achieve politically, is easy by comparison to desegregation.

In this regard, it is useful to consider the differing reactions to *Milliken I* and *San Antonio Independent School District v. Rodriguez*.<sup>116</sup> *Milliken I* made it difficult, if not impossible, to include suburban districts in desegregation decrees. *Rodriguez* upheld, against an equal protection challenge, Texas's unequal finance scheme. *Rodriguez* was immediately followed by suits challenging school finance schemes on the basis of equal protection and education provisions in state constitutions. As far as I am aware, until *Sheff* no one filed a suit attempting to use a state constitution to get around the result in *Milliken I*. The failure to do so must have had something to do with the perceived practical and political difficulties with desegregation—difficulties that must not have seemed as formidable with regard to school finance reform.

That school finance reform is an easier pill to swallow than mandatory desegregation is demonstrated by the reaction (thus far) of the Connecticut legislature. The one remedy that would obviously address and satisfy the court's holding in *Sheff* would be mandatory racial integration between Hartford and the surrounding suburban schools. Yet the legislature and Governor have made it clear that mandatory integration is not an option.<sup>117</sup> Instead, the legislature has

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<sup>114</sup> See Dorothy A. Brown, *The Invisibility Factor: The Limits of Public Choice Theory and Public Institutions*, 74 Wash. U. L.Q. 179, 203-05 (1996) (applying public choice theory to predict wealthy districts' behavior toward New Jersey education finance reform); Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 Vand. L. Rev. 101, 111 (1995) (describing redistribution scheme).

<sup>115</sup> See, e.g., Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 Va. L. Rev. 7, 97-118 (1994) (providing examples of southern resistance to desegregation after *Brown*); Michael J. Klarman, *Civil Rights Law: Who Made It and How Much Did It Matter?*, 83 Geo. L.J. 433, 446-48 (1994) (reviewing Mark V. Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936-1961* (1994)).

<sup>116</sup> 411 U.S. 1 (1973)

<sup>117</sup> Governor John J. Rowland, for example, stated less than a week after the decision in *Sheff* was released that, "[a]s long as I'm governor, [busing] will not be one of the options." Robert A. Frahm, *Court Orders Desegregation, Rowland Rules Out Busing, Vows to Keep Local School Control*, Hartford Courant, July 10, 1996, at A1. Other government officials were equally adamant in rejecting mandatory busing or redrawing of district lines. See Moran, *supra* note 10, at 1097-98 (discussing negative reactions of Governor, Attorney General, and school board chairman). Some officials even predicted violence if mandatory desegregation were attempted. The Attorney General indicated his fear of the conse-

appointed a commission to study various options, requiring that the commission devise a five-year plan to address the court's holding. In the meantime, the legislature is considering a voluntary interdistrict school choice plan, which would allow a small percentage of students in Hartford, Bridgeport, and New Haven to transfer to suburban schools—if those schools agree to accept the transfers.<sup>118</sup> The legislature is also mandating that a large amount of money be spent on urban schools, in the hope, as one official described, that the schools will improve so much that suburban parents will choose to send their children there.<sup>119</sup>

It is difficult to detect any opposition, except from those intent on integration, to the legislature's plan to distribute additional aid to Hartford and other urban schools. Suburban legislators are not grumbling publicly about the futility of increased expenditures or about the lack of any proven connection between money and academic achievement. On the contrary, these legislators are defending the plan on the ground that—as if they were just discovering this for the first time—Hartford and other urban schools have real deficiencies, ones that money can help ameliorate. What this demonstrates, quite clearly, is that as between the redistribution of money and forced integration, the former is seen as the lesser sacrifice.<sup>120</sup>

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quences of forced desegregation, and one suburban school board official predicted “war” if students were bused outside of the school district. See *id.* at 1097-98.

<sup>118</sup> To encourage suburban schools to accept transfer students, the State plans to give districts \$2,000 for each student they accept, and it will also count each transfer as half a student for purposes of state aid for both the sending and receiving district. See Jeff Archer, State Policy Update, Quality Counts '98: The Urban Challenge, *Educ. Wk.*, Jan. 8, 1998, at 120. Although this was undoubtedly not the legislature's intention, that transfer students—most of whom will be minorities—will count as half a student for purposes of state aid is unfortunately evocative, as my students immediately pointed out to me, of the Federal Constitution's original Three-Fifths Clause. See U.S. Const. art. I, § 2, cl. 3, amended by U.S. Const. amend. XIV, § 2.

<sup>119</sup> See Jeff Archer, Desegregation Panel Offers 15 Proposals to Conn. Legislators, *Educ. Wk.*, Jan. 29, 1997, at 12 (discussing interdistrict focus of desegregation plan); Jeff Archer, New Chapters Written in Saga of Conn. Desegregation Case, *Educ. Wk.*, June 11, 1997, at 17 (same); Jonathan Rabinovitz, Rowland Backs Doubling Aid to City Schools, *N.Y. Times*, June 14, 1997, at A27 (describing Governor's pledge to support increased spending to improve urban education and end racial isolation). As the Governor's spokesman stated, “The governor and the legislature have argued that one of the best ways to address racial balance is to improve the quality of all schools so there isn't a wide disparity between urban and suburban districts.” Rick Green, *Sheff Case Goes Back to Court*, *Hartford Courant*, Mar. 6, 1998, at A3.

<sup>120</sup> This point is evidenced by the fact that the Supreme Court approved *Milliken II* relief after denying interdistrict relief in *Milliken I*, compare *Milliken v. Bradley*, 418 U.S. 717, 744-45 (1974) (refusing to approve interdistrict remedy), with *Milliken v. Bradley*, 433 U.S. 267, 290 (1977) (holding that compensation programs do not exceed scope of violations), as well as by the recent desegregation settlements in Maryland and Kansas, where the states have promised to devote substantial resources to predominantly minority dis-

In this regard, what is occurring in Connecticut is not dissimilar from what occurred in a number of southern states when the NAACP began pressing courts to make the second half of *Plessy's* separate but equal doctrine a reality.<sup>121</sup> Clearly trying to avoid integration, southern legislatures were struck by newfound generosity and beneficence toward black schools, and began increasing expenditures on those schools.<sup>122</sup> In some states, such as Georgia, the increase was quite dramatic.<sup>123</sup> So, too, in Connecticut: The legislature's recent plan to increase expenditures in urban schools is obviously not the result of new evidence about the educational and capital needs of those districts. It is the fear of integration that is motivating the legislature, just as it motivated southern legislatures prior to the Court's decision in *Brown*.

### C. Plaintiffs' Options

The difficult question that remains is what plaintiffs should do in response. Should they allow the threat of integration to hang over the legislature, and use that threat to extract more and more resources for urban schools like Hartford's?<sup>124</sup> Or should they press in court for a remedy that more directly responds to the holding in *Sheff*, i.e., a remedy that would result in greater integration than the proposed interdistrict choice plan? A number of scholars, particularly critical race theorists, dissatisfied with the progress and results of desegregation,

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tricts in exchange for an end to court-supervised desegregation. See Caroline Hendrie, Taxes, Transfer Program on the Table in St. Louis Desegregation Settlement, *Educ. Wk.*, Aug. 5, 1998, at 8 (describing state plan to increase funding to St. Louis school system to end federal court desegregation order); Funding for Md. Desegregation Deal Approved, *Educ. Wk.*, Apr. 22, 1998, at 18 (noting three-year spending plan to build schools needed to settle 26-year-old desegregation suit).

<sup>121</sup> See Kluger, *supra* note 17, at 347-48 (discussing South Carolina's efforts to increase funding to black schools); Tushnet, *supra* note 17, at 159 (noting that "unsympathetic whites would have found equalization easier to accept than desegregation").

<sup>122</sup> See, e.g., Kluger, *supra* note 17, at 347-48 (describing South Carolina legislature's decision, on eve of desegregation trial, to devote additional resources to equalize buildings, equipment, and facilities in Clarendon County); *id.* at 481-82 (describing similar phenomenon in Virginia). See generally John Donohue et al., *Social Action, Private Choice and Philanthropy: Understanding the Sources of Improvements in Black Schooling in Georgia, 1911-1960*, at 4 (unpublished manuscript, on file with author); Robert A. Margo, *Race & Schooling in the South, 1880-1950: An Economic History* (1990).

<sup>123</sup> See Donohue et al., *supra* note 122, at 5-6, tbl.1a, figs.1b, 1d & 6.

<sup>124</sup> Some are already suggesting that *Sheff* be used in this manner. See Jeff Rivers, *Waiting to See What Politicians Do, Not Say, After Sheff*, *Hartford Courant*, July 11, 1996, at A2:

For me, the hammer of court-mandated busing is a bargaining tool. It helps coerce politicians to do what they should already have done: work with parents, educators and community leaders to make it possible for all students to pursue a quality education without regard to who they are or where they live.

have speculated that the NAACP may have erred in attacking desegregation directly and have suggested that NAACP attorneys should have continued to press for equalization.<sup>125</sup> Adherents of this view, presumably, would advocate using *Sheff* and the threat of integration as a bargaining chip. Indeed, one of the fascinating aspects of *Sheff* is that it offers an opportunity to revisit the NAACP's fateful decision to attack segregation directly and the chance to follow the road not taken earlier.

Beyond its appeal as an opportunity to test an academic theory, however, the first option seems short-sighted. There is already evidence that spending a billion dollars over several years is insufficient to improve significantly the academic performance of low-income students.<sup>126</sup> It is difficult to imagine that the threat of integration in Connecticut could be used to secure as much for the Hartford schools, and easy to imagine that the more the remedial focus shifts toward resources, the smaller the threat of integration will become, which will eventually diminish the legislature's generosity—at a pace that will likely coincide with the court's diminishing patience with and attention to the issue.<sup>127</sup>

Integration among urban and suburban students would thus appear to offer a more promising alternative to spending more money, both in terms of increasing academic achievement and in broadening educational opportunities by exposing students to others from different racial and ethnic backgrounds. At the same time, however, it is difficult to imagine that a mandatory desegregation plan, requiring busing, would result in anything but disaster. The strong opposition to forced busing among white suburban parents and their representatives, and the disenchantment with forced busing among urban, minority parents, is a sure recipe for fights and flight.<sup>128</sup>

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<sup>125</sup> See Brown, *supra* note 74, at 6, 54-60 (1992); Robert L. Carter, A Reassessment of Brown v. Board, in *Shades of Brown*, 21, 28 (Derrick Bell ed., 1980) (noting harmful effects of focusing solely on integration and ignoring equality); Johnson, *supra* note 74, at 1402, 1409-32 (arguing that decision in *Brown* may have been a mistake because it slowed struggle for equality by African Americans).

<sup>126</sup> See *Missouri v. Jenkins*, 515 U.S. 90, 74-80 (1995) (noting that high expenditures aimed at improving academic performance have failed).

<sup>127</sup> This is not to say that plaintiffs could not or should not use the threat of forced integration to their advantage. Plaintiffs may be able to use the threat of court-ordered integration to extract an agreement to redraw district lines. See *infra* text accompanying notes 135-38.

<sup>128</sup> Fifty-nine percent of those polled in Connecticut opposed using busing as a remedy. See Frahm, *supra* note 112, at A1. In another survey, conducted by Rossell and Armor, 51% of white suburban parents indicated that they would "definitely or probably withdraw their child from the public schools if he or she were reassigned to a formerly minority school." Rossell, *supra* note 16, at 1210. This figure is consistent with the actual "no-show" figures from Los Angeles, where 56% of white students assigned to formerly minor-

A step toward a possible solution to this dilemma is found, ironically enough, in the work of Armor and Rossell.<sup>129</sup> Both Armor and Rossell argue that the most successful desegregation plans, in terms of racial stability, have been largely “voluntary,” where parents have been given incentives—typically through the establishment of magnet schools—to integrate.<sup>130</sup> Such plans, they contend, are preferable because: “(1) they produce dramatically less white and middle class black and Hispanic flight than mandatory reassignments; (2) they produce the same or more interracial exposure, and; (3) they are the preferred desegregation technique of parents of all races.”<sup>131</sup> With that said, Rossell admits that even voluntary plans have not proven “stunningly successful,” and if prior experience holds true in Connecticut, one could reasonably expect that at most fifteen to eighteen percent of the whites in the metropolitan area would transfer to magnet schools in Hartford and about the same percentage of black and Hispanic students would transfer from Hartford to suburban schools.<sup>132</sup> While this may fall short of the ideal levels of integration, the research fairly persuasively suggests that a mandatory plan would not result in much higher levels of integration, could result in less, and would almost certainly be met with a great deal of resistance.

The one additional component that I would suggest considering is the redrawing of district lines, so that school districts encompass part of Hartford and part of the suburbs—creating, in other words, a pie-like system of districts, with wedges emanating from the cities and extending to the suburbs.<sup>133</sup> The problem with strictly voluntary deseg-

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ity schools under a mandatory desegregation plan did not show up at the school to which they were assigned. See *id.* at 1210-11.

<sup>129</sup> It is ironic not only because Armor and Rossell are so critical of the outcome in *Sheff*, but because they both testified for the state in the case.

<sup>130</sup> See Armor, *supra* note 85, at 113 (noting that voluntary entrance into desegregated schools results in success for minority students); Rossell, *supra* note 84, at 32-33 (describing school district without mandatory reassignment and with greatest reduction in racial imbalance); Christine H. Rossell & David J. Armor, *The Effectiveness of School Desegregation Plans, 1968-1991*, 24 *Am. Pol. Q.* 267, 298 (1996) (concluding that most effective approach allows parents to stay at neighborhood schools while offering market incentives to motivate transfers to opposite race neighborhood).

<sup>131</sup> Rossell, *supra* note 16, at 1218-19. A survey conducted in Connecticut revealed that white, black, and Hispanic parents clearly preferred a voluntary transfer program to mandatory reassignments, although the percentages with regard to mandatory reassignments varied significantly by race—with 15% of white parents, 44% of black parents, and 35% of Hispanic parents expressing support. See *id.* at 1219.

<sup>132</sup> See *id.* at 1218 (discussing data).

<sup>133</sup> Another component worth considering would be to require suburban schools to accept urban transfer students to the extent there is space to accommodate them. But it seems worth waiting to see whether the current plan of providing incentives to accept transfers works, primarily because that approach is less coercive and thus less likely to generate opposition. If incentives prove to be effective, or at least as effective as one could

regation plans, which is also true of desegregation decrees that require busing and school finance remedies that require redistributing funds to needy districts, is that they fail to alter the structure of school districts. As a result, such plans usually are not self-sustaining. When judicial oversight ends, as is occurring in federal school desegregation cases, or when legislative support wanes, as it often does in school finance reform, minority and/or poor school districts are returned to the position from which they started—racially isolated and poorly funded.<sup>134</sup> The trick, then, is to fashion a remedy that will cause more permanent and self-sustaining change.

The decision in *Sheff* offers a unique opportunity to try a different approach, one that will take advantage of the lessons of voluntary integration, as well as the willingness of suburban legislators to devote more resources to minority school districts if doing so will prevent court-ordered integration. Plaintiffs should consider combining a request for the redrawing of district lines as suggested, with a concession that any integration within those districts should only occur voluntarily, pursuant to the plans described by Rossell and Armor.<sup>135</sup> Such an approach would not lead to any less integration than a voluntary plan that leaves district lines unchanged, and at the same time it would more closely and permanently tie the fate of urban schools to suburban schools.<sup>136</sup> Although it is true that Hartford schools currently receive more funds than suburban schools, such a circumstance does not seem especially stable. On the contrary, it seems quite vulnerable to the whim of suburban legislators, who may tire of devoting more resources to districts they do not represent. The benefit of combining urban and suburban schools in single districts is that suburban legislators would not be able to benefit their “own” suburban schools with-

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reasonably expect forced acceptance to be, there would be no reason to alter this aspect of the current plan.

<sup>134</sup> The Kansas City, Missouri, School District, subject of massive funding because of the Jenkins litigation, provides a perfect example of this point. After the Supreme Court's decision in *Jenkins*, the funding for the magnet schools established as a result of earlier decisions in the case has been reduced, and those schools are being pared back or eliminated. See Caroline Hendrie, *Missouri Seeks to End Court Oversight of K.C. Desegregation Plan*, *Educ. Wk.*, May 8, 1996, at 8.

<sup>135</sup> Such a plan could also allow for integration to occur outside of districts through the creation of magnet schools that would accept students from all districts.

<sup>136</sup> See Liebman, *supra* note 22, at 360-63 (explaining political process benefits of desegregation and arguing that it can create system of “virtual representation,” championed by figures from James Madison to Justice Jackson to Frank Michelman, which would ensure that majority cannot harm or benefit its own interests without doing the same to minority). See generally James S. Liebman, *Desegregating Politics: “All-Out” School Desegregation Explained*, 90 *Colum. L. Rev.* 1463 (1990).

out also benefiting the urban schools; the fates of urban and suburban schools and students, in other words, would be tied together.<sup>137</sup>

It is likely that suburban legislators, not to mention school administrators in the cities and suburbs, would balk at any suggestion that districts be redrawn, but the stick of *Sheff* and the carrot of voluntary integration may be sufficient to persuade the legislators to accept this compromise. In addition, it is helpful to point out that the State has taken over the control and administration of the Hartford school district.<sup>138</sup> This move should deflect opposition from Hartford school officials to the plan, if only because they may be able to participate in the control of a redrawn district. It should also help rebut the predictable argument that local control is too important a tradition to interfere with in the name of improving education for all students.

Whatever plan is ultimately adopted, it seems clear that the challenge for plaintiffs and the State alike will be to devise a plan that will result in as much integration as possible with as little apparent sacrifice as possible. Only by satisfying both goals will plaintiffs and the State be able to satisfy the relevant constituencies: the court, teachers and administrators, and the parents of both urban and suburban students. An incentive-based plan, which would both improve schools and lead to greater integration, may be the best, most viable, approach. To the extent such a plan can be coupled with newly drawn districts, which would blend not only students but finances and render it impossible for suburban parents and legislators to help their own children without also helping urban students, it may prove to be self-sustaining as well—a feat that few school finance or desegregation plans have managed to achieve.

### CONCLUSION

*Sheff* is in many ways a return to the future. It offers a solution to the plight of urban schools—integration—that many thought was approaching obsolescence. This proffered solution is significant not simply for nostalgia's sake, but because it highlights the shortcomings of

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<sup>137</sup> Eliminating boundaries between suburban and urban schools in this manner would advance many of the goals identified by Gerry Frug, in his work on the structure and relationship between cities and suburbs. See Frug, *supra* note 16, at 45-60. Although Professor Frug's vision is attractive, his article is fairly sketchy on possible means to achieve the ends he describes. See, e.g., *id.* at 95-96.

<sup>138</sup> See Richard Weizel, *For Hartford Schools, A New Chapter*, N.Y. Times, Apr. 27, 1997, at CN4 (discussing state legislature's takeover of Hartford school system); Jonathan Rabinovitz, *Connecticut Moves to Assume Control of Hartford Schools*, N.Y. Times, Apr. 12, 1997, at 1 (discussing state's planned takeover of Hartford school system); *Hartford Seeks State Role in Managing School District*, N.Y. Times, Mar. 11, 1997, at B4 (discussing Hartford's efforts to secure partial takeover of school system).

school finance reform. The inexorable fact that Hartford students were receiving more funds than the average suburban student, and still performing poorly, is one that school finance reform advocates should consider seriously. At the same time, the potential scope of the educational rights involved in school finance cases, revealed in *Sheff*, is a fact school finance reform advocates should take to heart. *Sheff* need not be a unique case.

What ultimately transpires in Connecticut is important because it will provide other state courts with evidence of whether de facto segregation—along racial or class lines—can be successfully addressed through education clauses in state constitutions. Given the elastic nature of education clauses, a successful example in Connecticut might inspire other courts to find the right to an integrated education within such clauses. In the meantime, parents and school finance advocates who have grown weary of waiting for finance reform to translate into tangible academic benefits should at least realize that they have other options to pursue.

