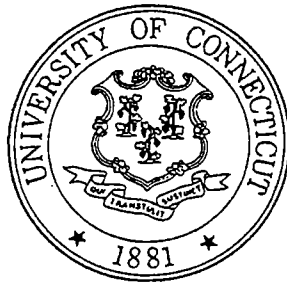


CONNECTICUT LAW REVIEW



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Posed by *Sheff v. O'Neill*—and a Proposed Solution

Michael A. Rebell and Robert L. Hughes

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MICHAEL A. REBELL AND ROBERT L. HUGHES*

The core dispute between the forceful majority and the vituperative dissent in the 4-3 *Sheff v. O'Neill*¹ decision is over remedies. Both sides agree that the level of educational achievement among Hartford's students, who are ninety-five percent African-American and Latino, is deplorable, and that it threatens the economic stability and long-range viability of our democratic system.² They disagree on who should solve this problem—or indeed, whether a solution is even possible.

Justice Borden's opinion for the dissent bluntly claims that remedying the problems raised by this case would be "extraordinarily difficult

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1. 238 Conn. 1, 678 A.2d 1267 (1996).

2. The majority opinion recognizes that the educational deprivation which the largely poor and minority schoolchildren in Hartford endure "potentially has an impact on 'the entire State and its economy—not only on its social and cultural fabric, but on its material well-being, on its jobs, industry, and business.'" *Id.* at 44, 678 A.2d at 1290 (quoting *Abbott v. Burke*, 575 A.2d 359, 411 (1990)). The dissent similarly acknowledges that "racial and ethnic isolation in our public schools is harmful" and that "the health of the economy of our State requires an educated workforce, which includes 'the urban poor as an integral part of our future economic strength.'" *Id.* 57-58, 678 A.2d at 1296 (also quoting in part from *Abbott* 575 A.2d. at 411).

or perhaps even impossible."³ Chief Justice Peters's decision for the majority had no illusions about "the daunting, if not intractable, difficulties of crafting a remedial solution to the problem of de facto racial and ethnic segregation in the public schools of Hartford."⁴ Nevertheless, the court declared that it must uphold the constitutional rights of the plaintiffs so that "appropriate remedies can be found and implemented... before another generation of children suffers the consequences of a segregated public school education"⁵ because "our oath, our office, and the constitutional rights of the schoolchildren of Hartford, require no less of us in this case."⁶ In sum, the dissenters' response to what may be "the most significant ruling by this court in this century,"⁷ is a skeptical appraisal of the court's—and perhaps society's—abilities to solve the deep-rooted problems of urban education, while the majority, in essence, takes the position that, despite the formidable remedial challenges, the stakes for the plaintiffs and for the future functioning of our democratic system are simply too great to ignore the continuing plight of the urban minorities.⁸

3. *Id.* at 56, 678 A.2d at 1295. The dissent agrees with the trial court's conclusion that: [T]here are no educational strategies or initiatives that could fully deal with the larger issues of poverty, unemployment, housing, health, substance abuse, parental neglect, and crowded and substandard housing that are associated with the concentration of poverty under which the plaintiffs suffer The majority's mandate, therefore, will require the State to devise a strategy to compel integration that . . . will not significantly ameliorate the underlying educational deficiencies of which plaintiffs complain, and with respect to which educators, social scientists, and desegregation planners could not offer standards or guidance.

Id. at 130, 678 A.2d at 1330.

4. *Id.* at 46, 678 A.2d at 1291.

5. *Id.* at 46, 678 A.2d at 1290.

6. *Id.* at 47, 678 A.2d at 1291. The Supreme Court of New Jersey took a similar stance, when, after noting the difficulties of solving the problems of urban education, it nevertheless held that the state constitution required the allocation of additional resources and sustained remedial efforts. "Obviously, we are no more able to identify what these disadvantaged students need in concrete educational terms than are the experts. What they don't need is more disadvantage" *Abbott v. Burke*, 575 A.2d 359, 401-402 (N.J. 1990). "If the claim is that these students simply cannot make it, the constitutional answer is, give them a chance. The Constitution does not tell them that since more money will not help, we will give them less; that because their needs cannot be fully met, they will not be met at all." *Id.* at 403.

7. *Sheff*, 238 Conn. at 88, 678 A.2d at 1310 (Borden, J., dissenting).

8. The educational deprivations discussed in *Sheff* are, of course, related to larger problems of a growing urban underclass, *see, e.g.*, WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED: THE INNER-CITY, THE UNDERCLASS, AND PUBLIC POLICY* (1987), and of increasing income disparities and class divisions within American society as a whole, *see, e.g.*, LESTER C. THURLOW, *THE FUTURE OF CAPITALISM: HOW TODAY'S ECONOMIC FORCES SHAPE TOMORROW'S WORLD* (1996). Some accept or even extol these developments. *See, e.g.*, RICHARD J. HERRNSTEIN & CHARLES A. MURRAY, *THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE* (1994); WILLIAM A. HENRY, III, IN

We agree with the majority's stance on this critical issue. Courts have a responsibility to interpret, formulate, and proclaim basic constitutional values, whatever the difficulties involved in implementing them.⁹ For the courts to turn their backs on the denial of educational opportunity for poor and minority children in the nation's cities would be especially egregious when all agree that "[i]n these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education."¹⁰ Bringing large numbers of low-achieving students up to adequate performance levels is a daunting, though far from impossible, task.¹¹ Especially when core societal

DEFENSE OF ELITISM (1994). Others call for renewed efforts to counter these trends. See, e.g., BENJAMIN R. BARBER, *AN ARISTOCRACY OF EVERYONE: THE POLITICS OF EDUCATION AND THE FUTURE OF AMERICA* (1992); JEAN BETHKE ELSHTAIN, *DEMOCRACY ON TRIAL* (1995); MICKEY KAUS, *THE END OF EQUALITY* (1992); CHRISTOPHER LASCH, *THE REVOLT OF THE ELITE AND THE BETRAYAL OF DEMOCRACY* (1995).

9. "The rightful place of courts in our political system turns on the existence of public values and on the promise of those institutions—because they are independent and because they must engage in a special dialogue—to articulate and elaborate the true meaning of those values." Owen Fiss, *Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 51 (1979); see also Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 677 (1983) ("The essence of constitutional law is that it is an idealizing activity."); GORDON L. CLARK, *JUDGES AND THE CITIES: INTERPRETING LOCAL AUTONOMY* 40 (1985) ("In point of fact, it is the legal apparatus that makes possible social cohesion in a world of conflicting values and differing world views."). For a detailed empirical analysis of the courts' role in articulating basic constitutional principles, see MICHAEL A. REBELL & ARTHUR R. BLOCK, *EDUCATIONAL POLICY MAKING AND THE COURTS: AN EMPIRICAL STUDY OF JUDICIAL ACTIVISM* 200-202 (1982) (hereinafter "EDUCATIONAL POLICY-MAKING AND THE COURTS"); see also RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* (1977); LAWRENCE M. FRIEDMAN, *TOTAL JUSTICE* (1985); MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* (1982).

10. Sheff, 238 Conn. at 43, 678 A.2d at 1289 (quoting *Brown v. Board of Education*, 347 U.S. 483, 493 (1954)); see also *Plyler v. Doe*, 457 U.S. 202, 221 (1982) ("We have recognized the public schools as our most vital civic institution for the preservation of a democratic system of government."); *Horton v. Meskill*, 172 Conn. 615, 654, 376 A.2d 359, 377 (1977) (Bogdanski, J., concurring) ("[E]ducation is the very essence and foundation of a civilized culture: it is the cohesive element that binds the fabric of society together.")

11. The Carnegie Corporation has recently issued a report which reviews the literature regarding the educational potential of "at risk" children and many projects which have successfully demonstrated that they can learn at high cognitive levels. The report concludes that:

[I]t is entirely feasible to reverse the widespread pattern of educational underachievement among elementary school children Poverty and other circumstances of birth do raise the odds against many children's educational success, but virtually all of America's children can learn and achieve to much higher levels than they are reaching today given the right combination of challenge, attention, and teaching from families, schools and communities.

CARNEGIE CORPORATION OF NEW YORK, *YEARS OF PROMISE: A COMPREHENSIVE LEARNING STRATEGY FOR AMERICA'S CHILDREN* 130 (1996); see also ROBERT E. SLAVIN ET AL., *EFFECTIVE PROGRAMS FOR STU-*

values are at stake and the political process has come to an impasse, democratic societies need a vision to inspire sustained initiatives.¹² The demise of religious, communal, and other traditional institutions in our society has accelerated the trend to look to the courts for such principled vision.¹³

The *Sheff* dissenters' blunt disavowal of the court's responsibility to remediate the problems of segregation and its effect on urban education reflects a skepticism voiced by many jurists and many scholars about the effectiveness of judicial remedies in institutional reform litigations.¹⁴ Although we believe that this critical view is overstated, judicial intervention in desegregation and other major public policy controversies has raised serious concerns about the legitimacy of the courts' involvement and the effectiveness of their efforts. At issue is both the propriety, under constitutional separation of powers doctrines, of the courts' role *vis a vis* the legislative and executive branches and a concern whether the courts are capable of achieving meaningful reform of complex governmental institutions, particularly when there is intense public resistance.

Rather than confronting directly these challenges, the *Sheff* majority finessed the issue. It deferred totally to "the legislature and the executive branch to put the search for appropriate remedial measures at the top of their respective agendas,"¹⁵ without providing any guidance to the other branches on how this difficult task should be approached or what, if any, further role the court would play in this process. Justice

DENTS AT RISK (1989) (surveying methods to prevent and remediate poor achievement); HENRY M. LEVIN, *ECONOMICS OF SCHOOL REFORM FOR AT-RISK STUDENTS* (National Academy of Sciences 1994) (specific investments in at-risk children yield high returns to society); JOHN T. BRUER, *SCHOOLS FOR THOUGHT: A SCIENCE OF LEARNING IN THE CLASSROOM* (1993) (describing techniques of "cognitive science" which enable all children to develop higher-order reasoning and learning skills); ROBERT ROTHMAN, *MEASURING UP: STANDARDS, ASSESSMENTS, AND SCHOOL REFORM* (1995) (discussing emphasis on higher-order skills in new state education standards).

12. "The challenge for republican politics is to form or reform the moral character of citizens, to strengthen their attachment to the common good. The public life of a Republic must serve a formative role, aimed at cultivating citizens of a certain kind." MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 127 (1996); see also THUROW, *supra* note 8 (arguing that democratic capitalist society requires "a vision of something better" and that the demise of socialism and its competitive stimulus to capitalist society poses a serious challenge for contemporary America).

13. See Michael A. Rebell, *Judicial Activism and the Courts' New Role*, *SOC. POL'Y* 24 (Spring 1982).

14. See *infra* notes 21-22, 30-32 and accompanying text.

15. *Sheff*, 238 Conn. at 46, 678 A.2d at 1290.

Borden excoriates the majority for this hands-off approach:

I confess that, if I were a member of either the Executive or Legislative branch of our government, I would have but the slightest glimmering of what kind of legislation would comport with the majority's mandate, because the opinion articulates no principle or standard upon which to base such legislation. Confining my discussion here to the Hartford metropolitan area, I can find no principle or standard in the majority opinion by which to measure the level of racial and ethnic integration of the African-American and Hispanic schoolchildren that will be constitutional.¹⁶

We believe that the courts have a responsibility not only to articulate important values in hard cases like *Sheff*, but also to insure their implementation. Without judicial guidance and oversight, the legislative and executive branches can not realistically be expected to solve these confrontational problems—which come to the courts' attention in the first place largely because the other branches fail to deal with them. The courts' proper role, within the separation of powers scheme, is to use judicial authority to ensure that the other branches carry out their appropriate institutional functions. In order to deal successfully with highly controversial political issues that intersect with core democratic values, as in *Sheff*, we also believe that the courts need to create new mechanisms to involve the public-at-large in confronting the critical values at stake.

This article describes in detail how the Connecticut Supreme Court could order an effective remedy, incorporating a statewide public engagement process, by drawing on the state's recent experience with extensive public participation in formulating regional education and community improvement plans. Before doing so, however, we first analyze in Sections I and II the limitations of the remedial doctrines which have been relied upon to date by federal and state courts in desegregation and other institutional reform cases. Section III then discusses a

16. *Id.* at 128, 678 A.2d at 1329 (Borden, J., dissenting). Justice Borden further illustrates this point by stating that the opinion leaves open such critical questions as: whether the remedy must be state-wide or district-wide; whether each individual school must be integrated and what the acceptable percentage of racial integration would be; and whether integration, if it includes "ethnic" as well as "racial" dimensions, must require balancing the statewide numbers of students from all ethnic groups—and even all religious groups—throughout the State. *Id.* at 128-29, 678 A.2d at 1329-30.

new remedial approach which promotes effective solutions to systemic constitutional violations by engaging the legislative and executive branches, and the public-at-large, in a sustained, purposeful problem-solving process. The final section illustrates the proposed "efficacy plus engagement" remedial approach by applying it to the remedial challenges posed by *Sheff v. O'Neill*.

I. FEDERAL REMEDIAL DOCTRINE

A. *The New Model of Institutional Reform Litigation*

Beginning in 1954 with the U.S. Supreme Court's landmark school desegregation decision, *Brown v. Board of Education*,¹⁷ the federal courts have become increasingly involved in remedial oversight of basic functions of state and local governments. This unprecedented judicial remedial involvement accelerated in the 1960s and 1970s as numerous judicial decrees implemented the desegregation mandate, and others called for reform of such institutions as state mental health facilities,¹⁸ prison systems,¹⁹ and housing projects.²⁰ This new judicial role was vigorously attacked in some quarters as unwarranted "judicial activism" which was said to reflect the arrogance of "an imperial judiciary"²¹ and to violate established canons of the separation of powers.²² Defenders of judicial intervention replied that constitutional rights need vigilant

17. 347 U.S. 483 (1954).

18. See e.g., *Wyatt v. Stickney*, 344 F. Supp. 373 (M.D. Ala. 1972) *aff'd in part*, *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *New York State Ass'n of Retarded Children v. Rockefeller*, 357 F. Supp. 752 (E.D.N.Y. 1973). For a case study analysis of the latter case, see DAVID J. ROTHMAN & SHEILA M. ROTHMAN, *THE WILLOWBROOK WARS: A DECADE OF STRUGGLE FOR SOCIAL JUSTICE* (1984).

19. See *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd in relevant part sub nom Newman v. Alabama*, 559 F.2d 283 (5th Cir. 1977); *Rhem v. Malcolm*, 371 F. Supp. 594, 377 F. Supp. 995 (S.D.N.Y. 1974), *aff'd and remanded*, 507 F.2d 333 (2d Cir. 1974), *on remand*, 389 F. Supp. 964, *amended*, 396 F. Supp. 1195 (S.D.N.Y. 1975), *aff'd*, 527 F.2d 1041 (2d Cir. 1975), *Rhem v. Malcolm*, 432 F. Supp. 769 (S.D.N.Y. 1977). For a case study analysis of the *Pugh* case, see LARRY W. YANKLE, *REFORM AND REGRET: THE STUDY OF FEDERAL JUDICIAL INVOLVEMENT IN THE ALABAMA PRISON SYSTEM* (1989).

20. *Hills v. Gautreaux*, 425 U.S. 284 (1976).

21. See, e.g., Nathan Glazer, *Toward an Imperial Judiciary*, 41 PUB. INTEREST 104 (1975); RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977); PHILIP B. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* (1970).

22. See Glazer, *supra* note 21 at 106; KURLAND *supra* note 21 at 203 (criticizing judges for acting as "platonic guardians").

judicial protection, especially when governmental institutions assume a major role in citizens' lives.²³ They emphasized the need to give meaning to the public values of the Constitution, especially in situations where the legislature has failed to provide fair and effective representation to "discrete and insular minorities."²⁴

Probably the most influential defense of the new judicial role was that advanced by Professor Abram Chayes in his article entitled *The Role of the Judge in Public Law Litigation*.²⁵ Chayes related the growth of judicial involvement in the reform of public institutions to the broader expansion of governmental activities in the welfare state era. Over the years, he claimed, this expansion led both to an increase in regulations with concomitant judicial review, and to an easing of traditional judicial limitations such as standing rules and doctrines of justiciability. Chayes contrasted the traditional role of courts as "umpires" in private disputes with their the new regulatory role in the welfare state era, and postulated that whereas the traditional lawsuit is "bipolar" (*i.e.*, a contest between two individuals or entities with diametrically opposed interests), "retrospective" (*i.e.*, concerning already completed events), and involves an "interdependence between right and remedy", the "new model" public law is multi-polar (involving numerous parties and points of view), "forward-looking", and often has important consequences for many persons, including absentees. In short, "[t]he subject matter of the lawsuit is not a dispute between private individuals about private rights, but a grievance about the operation of public policy."²⁶

The culmination of the new public law litigation, according to Chayes, is the remedial decree.²⁷ Unlike the final decree of a tradition-

23. For a detailed discussion of the "judicial activism debate," see REBELL & BLOCK, *supra* note 9, at Ch. 1.

24. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); see, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980); Fiss, *supra* note 9, at 6, (referring to 304 U.S. at 152 n.4); see also OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* (1978); Frank M. Johnson, *The Role of the Federal Courts in Institutional Litigation*, 32 ALA. L. REV. 271 (1981); ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* Ch. 4 (1970); Terry Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162 (1977).

25. See Abraham Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) [hereinafter Chayes, *The Role of the Judge*]; see also Abram Chayes, *Forward: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1992); cf. Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980) (describing how procedures and remedies used in institutional reform litigations have analogues in older judicial traditions).

26. Chayes, *The Role of the Judge*, *supra* note 25, at 1302.

27. See *id.* at 1298-1302; see also Special Project, *The Remedial Process in Institutional Re-*

al litigation which required an unsuccessful defendant simply to pay a stated amount or take a specific action, the remedial decree in the new model provides for a "complex, ongoing regime of performance."²⁸ Frequently, this involves the court in prolonged supervision of the implementation of new policies and practices designed to overcome the problems exposed by the case. In contrast to the traditional "corrective" role of judicial remedies, the remedial approach in the new model of public law litigation has become increasingly "equitable."²⁹

Chayes' historical and analytical perspective on this new model of litigation still did not satisfy many of the critics, especially those whose primary concern was with the courts' institutional capacity to carry out successfully these broad new remedial tasks. They claimed that courts lack necessary institutional capacity to craft effective remedies because judges do not have available to them implementation techniques used by legislators, such as sanctions, incentives, and subsidies. They also contended that judges lack coherent guidelines for resolving policy conflicts and that, therefore, they fail to undertake a comprehensive policy review or to consider the overall implications and consequences of their orders.³⁰ Additional troubling aspects of the remedial decree in institutional reform litigations, from this point of view, are its "long duration and wide impact,"³¹ and the fact that the remedy has extensive "consequences for third parties."³²

form Litigation, 78 COLUM. L. REV. 784 (1978); Lloyd C. Anderson, *The Implementation of Consent Decrees in Institutional Reform Litigation*, 1986 U. ILL. L. REV. 725 (1986); William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635 (1982); David I. Levine, *The Authority for the Appointment of Remedial Special Masters in Federal Institutional Reform Litigation: The History Reconsidered*, 17 U.C. DAVIS L. REV. 753 (1984).

28. Chayes, *The Role of the Judge*, *supra* note 25, at 1298.

29. See Kent Roach, *The Limits of Corrective Justice and the Potential of Equity in Constitutional Remedies*, 33 ARIZ. L. REV. 859 (1991).

30. See, e.g., DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977); JEREMY RABKIN, *JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY* (1989); CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* 45 (1996); PETER H. SCHUCK, *SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS* Ch. 7 (1983).

31. Robert F. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 710 (1978).

32. *Id.* Nagel also notes that:

[t]he clearest example, perhaps, of widespread third party consequences is a decree that necessarily requires substantial expenditures; such an order leads either to increased general taxes or to fewer resources being available for alternative programs. When the welfare and behavior of virtually every resident of a state or city might be affected by a judicial remedy, both the depth and breadth of the intrusion into the functions of the executive and legislative branches are most obvious.

Defenders of this new remedial role retorted that the courts' lack of established organizational mechanisms is a virtue, not a vice, because it permits a flexible response, which can be tailored to the needs of the particular situation.³³ Moreover, empirical analyses of what judges actually do in institutional reform cases indicates that judges make limited use of extensive reform decrees, often utilizing less intrusive "self-executing injunctions"³⁴ and that in those cases where extensive reform decrees are issued, the judges tend to solicit the active participation, resources, and organizational mechanisms of the parties' attorneys and the parties themselves.³⁵ Finally, proponents of the courts' expanded remedial role asserted that the critics of judicial activism approach the issue myopically by focusing on the institutional limitations of the judicial branch, while ignoring the institutional shortcomings of the legislative and executive branches in promoting sound reform. From a comparative functional perspective, the courts, in fact, have substantial strengths *vis-a-vis* the other branches in areas such as fact-gathering and compliance monitoring.³⁶

Id. at 711; see also Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715 (1978); Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949, 965 (1978).

33. Chayes, *The Role of the Judge*, *supra* note 25, at 1309; see also Robert D. Goldstein, *A Swann's Song for Remedies: Equitable Relief in the Burger Court*, 13 HARV. C.R.-C.L. L. REV. 119 (1978).

34. REBELL & BLOCK, *supra* note 9, at 210.

35. *Id.* at 211. A recent survey of 29 judges who had been involved in desegregation cases largely confirmed these conclusions. When asked how the remedy was devised, 25% of the judges said they devised it alone, 46% worked with the attorneys for the parties, 29% with the parties, 18% with a master, and 18% with a task force. See Barbara Flicker, *The View From the Bench: Judges and Desegregation Cases*, in JUSTICE AND SCHOOL SYSTEMS 365, 377-78 (Barbara Flicker ed., 1990).

36. For a detailed case study analysis of the comparative strengths and weaknesses of the legislative, executive, and judicial branches in assuring equal educational opportunities, see MICHAEL A. REBELL & ARTHUR R. BLOCK, EQUALITY AND EDUCATION: FEDERAL CIVIL RIGHTS ENFORCEMENT IN THE NEW YORK CITY SCHOOL SYSTEM, Ch. 9 (1985); see also William Clune, *Courts and Legislatures as Arbitrators of Social Change*, 93 YALE L.J. 763, 776 (1984) (reviewing REBELL & BLOCK, *supra* and concluding that "courts discharge the task of compensating for flaws in the democratic process in a highly responsible manner"); Howard I. Kalodner, *Overview of Judicial Activism in Education Litigation*, in JUSTICE AND SCHOOL SYSTEMS 365, 377-78 (Barbara Flicker ed., 1990) (noting differing degrees of effectiveness of judicial interventions depending on extent of defendants' and public's resistance and nature of the social policy issue at stake). For additional discussions of comparative institutional analysis, see Neil Komesar, *In Search of a General Approach to Legal Analysis: A Comparative Institutional Alternative*, 79 MICH. L. REV. 1350 (1981); Neil Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 CHI. L. REV. 366 (1984); Mark G. Yudof, *Plato's Ideal and the Perversity of Politics*, 81 MICH. L. REV. 730 (1983); see also Fritz Scharpf, *Judicial Review and the Po-*

While the controversy in academia and in the popular press about the federal courts' new role remains unresolved after four decades of debate, the courts continue to intervene extensively in school desegregation, de-institutionalization, and prison reform cases—and in numerous new areas, like special education³⁷ and bilingual education.³⁸ Chayes' contention that the courts' expanded role is a fundamental judicial reaction to deep-rooted social and political trends seems to be borne out by the fact that the activist stance initiated during the Warren Court era has persisted to a large extent through the Burger and Rehnquist years, and that conservatives no less than liberals now tend to look to the courts as a matter of course to remedy legislative or executive actions of which they disapprove.³⁹ Whether the courts have been effective in resolving the constitutional and statutory violations they have identified in these institutional reform litigations remains, however, a highly controversial question. A major problem in this regard is that insufficient attention has been focused on the need to formulate a "coherent normative theory of public remedial process."⁴⁰

litical Question: A Functional Analysis, 75 YALE L.J. 517 (1966).

37. See *Jose P. v. Ambach*, 557 F. Supp. 1230 (E.D.N.Y. 1983); *Vaughn G. v. Amprey*, No. MSG-84-1911 (D. Md. 1988) (Consent decree). Judicial intervention in some areas has been invited, rather than resisted, by the legislative branch. For example, in the Individuals with Disabilities Education Act, Congress set forth a detailed set of substantive and procedural rights and explicitly established a new area of court jurisdiction for individual suits, regardless of the amount of controversy. 20 USC § 1415(e)(2) (1994).

38. See, e.g., *Lau v. Nichols*, 414 U.S. 563 (1974); *ASPIRA v. Board of Educ.*, 394 F. Supp. 1161 (S.D.N.Y. 1975); *Castenada v. Pickard*, 648 F.2d (5th Cir. 1981). For an overview of the applicable law and of the courts' role in bilingual education cases, see Michael A. Rebell & Anne W. Murdaugh, *National Values and Community Values: Part II: Equal Educational Opportunity for Limited English Proficient Students*, 21 J. LAW & EDUC. 335 (1992).

39. For example, mainstream educational organizations whose members in the past had denounced judicial activism now tend to proclaim legal rights and legal processes as a matter of course, see NATIONAL COUNCIL OF STATE SCHOOL ADMINISTRATORS, ELEMENTS OF A MODEL STATUTE TO PROVIDE EDUCATIONAL ENTITLEMENTS FOR AT-RISK STUDENTS (1989), and conservative education advocates now press for parents' rights amendments to state constitutions. See *Colorado Voters Reject Parents' Rights Amendment*, SCH. LAW NEWS, November 15, 1996, at 1; see also, e.g., *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996) (cutting back federal enforcement powers over the states under the Indian Gaming Regulatory Act); *Hopwood v. Texas*, 95 F.3d 53 (5th Cir. 1996) (declaring unconstitutional law school's policy of granting racial preferences in its admissions policy); *Roselyn Union Free Sch. Dist. No. 3 v. Hsu*, 85 F.3d 835 (2d Cir. 1996) (allowing school religious club to require its officers to be Christians), cert. denied, 117 S. Ct. 608 (1996); *Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. 779 (W.D. Va. 1996) (declaring unconstitutional the Violence Against Women Act); BRUCE ACKERMAN, WE THE PEOPLE 40 (1991) (describing how, since the New Deal, "an activist regulatory state is finally accepted as an unchallengable constitutional reality").

40. Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L. J. 1355,

B. Desegregation and the Courts

The doctrinal standards that have guided the federal district courts' involvement in these new model cases has been developed by the U.S. Supreme Court, largely in the context of its school desegregation cases. It was, of course, in *Brown v. Board of Education* that the Court first confronted the difficulties of framing a remedy in a case of this type which has "wide applicability" and presents "problems of considerable complexity."⁴¹ Recognizing the significance and the lack of clear precedent for the remedial challenges raised by that case, the Court, at the end of 1954, asked the parties to present further arguments on a number of specified remedial questions, and took another year to deliberate on how it should actually implement the desegregation mandate.

In *Brown v. Board of Education* ["*Brown II*"], the Court held that: "In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs."⁴² Consistent with this emphasis on flexible equitable principles, the Court decided not to issue a detailed remedial decree of its own, but to vest in the local district courts the prime responsibility for fashioning remedies which would apply these general equitable principles to the range of complex educational and social policy considerations which arise in diverse local settings. Accordingly, it remanded *Brown* and its three related cases to the district courts "to enter such orders . . . as are necessary and proper to admit to public schools on a racially non-discriminatory basis with all deliberate speed the parties to these cases."⁴³ The Supreme Court held that the district courts could consider a broad range of issues from transportation and revision of attendance areas to personnel matters, but it provided no substantive guidelines on how these tasks should be

1358 (1991). Sturm proposes a model of public remedial decision-making built on participation, impartiality, and reasoned decision-making as a first step in this direction. In Michael A. Rebell and Robert L. Hughes, *Schools, Communities, and the Courts: A Dialogic Approach to Education Reform*, 14 *YALE L. & POL'Y REV.* 99 (1996), we applied and extended the type of conceptual framework she proposed to the educational context and formulated a "community engagement dialogic" model for promoting community participation in the resolution of schooling controversies. The present article further develops these contexts and extends them to the context of highly-charged state-wide litigations like *Sheff*.

41. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495-99 (1954).

42. *Id.* at 299 (footnotes omitted).

43. *Id.* at 300.

carried out.

After giving the district courts a decade of relatively free rein to carry out this mandate, however, the Supreme Court recognized that few Southern school districts had, in fact, been substantially integrated,⁴⁴ and it began in the mid-60s to confront actively political resistance to desegregation. In 1964, the Court authorized strong steps to counter a local scheme to close the public schools and permit white students to attend private segregated schools with public funding; in doing so, it held that the "petitioners' constitutional rights will no longer be denied them. The time for mere 'deliberate speed' has run out"⁴⁵ A few years later, in rejecting the use of a "freedom of choice" plan, the Court emphasized the need for demonstrable results: it required from each local school board a desegregation plan "that promises realistically to work and promises realistically to work now."⁴⁶ In its next major desegregation ruling, *Swann v. Charlotte-Mecklenburg Board of Education*,⁴⁷ the Court specified that the nature of the desegregation remedy is to be determined by the scope of the constitutional violation. It then promulgated a series of specific desegregation standards, including the use of numerical guidelines regarding the racial balance of students in local schools, busing, and the re-drawing of attendance zones.

In 1974, the Court's pattern of strong insistence on effective remedies to undo the effects of segregation was substantially qualified by its refusal to approve a metropolitan area remedy in *Milliken v. Bradley*,⁴⁸

44. During the 1963-64 school year, only 1.17% of black children attended schools with white children in the 11 southern states. See *United States v. Jefferson County Bd. of Educ.*, 372 F.2d 836, 854 (5th Cir. 1966). The Supreme Court's hands-off approach during the initial years of desegregation may, of course, have contributed to this result. See Robert Carter, *The Warren Court and Desegregation*, 67 MICH. L. REV. 237, 243 (1968) (arguing that the "all deliberate speed" remedial approach was designed to slow implementation and avoid a southern revolt.) For a discussion of the earliest desegregation cases, see Robert McKay, *With All Deliberate Speed: A Study of School Desegregation*, 31 N.Y.U. L. REV. 991 (1956).

45. *Griffin v. County Sch. Bd.*, 377 U.S. 218, 234 (1964).

46. *Green v. County Sch. Bd.*, 391 U.S. 430, 439 (1968).

47. 402 U.S. 1 (1971). For general overviews of the development of desegregation law, see GARY ORFIELD, *MUST WE BUS?* (1978); J. HARVEY WILKINSON, *FROM BROWN TO BAKKE* (1979); see also REBELL & BLOCK, *EQUALITY AND EDUCATION*, *supra* note 36, at Ch. 2 (discussing the shift from "equality of opportunity" to "equality of result" in courts' remedial decisions in desegregation cases).

48. 418 U.S. 717 (1974) [hereinafter "*Milliken I*"]. *Milliken I* was the Court's second major desegregation ruling affecting a school district outside the South. The prior year, it had held in the Denver desegregation case, *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973), that de facto segregation in a school system that never operated under a constitutional or statutory

the Detroit school desegregation case. In *Milliken*, the trial court, concluding that a remedy limited to Detroit's municipal boundaries would be ineffective, ordered a metropolitan area desegregation scheme involving 53 suburban districts.⁴⁹ The Supreme Court held that the district court's remedial order exceeded the "scope of the violation" because there had been no evidence that the suburban districts were responsible for any segregative acts and that the proposed remedy would traverse the "deeply-rooted . . . tradition [of] local control over the operation of schools."⁵⁰

As the lower courts and the dissenting Justices in *Milliken I*⁵¹ pre-

scheme that mandated or permitted segregation was not unconstitutional.

49. In 1970, the Detroit public school system's student body was 64% black, while the metropolitan area as a whole was 81% white. The District Court had found that if the scope of the remedy was limited to the Detroit city limits, the best result that could be achieved would "leave many of its schools 75-90% black." *Milliken I*, 418 U.S. at 765. The Sixth Circuit Court of Appeals agreed with the District Court, concluding that "the only feasible desegregation plan involves the crossing of the boundary lines between the Detroit school district and adjacent or nearby school districts" and that a remedial order limited to the Detroit school district "cannot correct the constitutional violations herein found." *Id.* at 766-67.

In fact, these courts were prescient: today, following the Supreme Court's refusal to authorize an interdistrict remedy, Detroit public school students are 89.9% African-American and 93.7% non-white. Interview with Dr. Charmaine Johnson, Research, Evaluation, and Testing Department, Board of Education of the Detroit School District (October 17, 1996). Other large cities which lack metropolitan area desegregation plans are similarly segregated. Chicago's public school students are 54.5% African-American and 89.2% non-white. Interview with Lorraine Krapec, Department of Compliance, Office of Accountability, Chicago Board of Education (Oct. 3, 1996) (reporting Fall 1995 enrollment). Los Angeles' students are 14.3% African-American and 88.7% non-white. Interview with Department of Communications, Board of Education, Los Angeles Unified School District (quoting from FALL 1995 ETHNIC SURVEY REPORT, Board of Education, Los Angeles Unified School District (1996)). Washington D.C.'s students are 88% African-American and 96% non-white. Digest of Education Statistics, U.S. Department of Education 1995 (reporting enrollment for Fall 1993).

50. *Milliken I*, 418 U.S. at 765. In many other circumstances, however, courts have issued remedies which directly affected third parties who were not found liable for a violation:

Remedies for long-standing discrimination, however, often . . . impose[] substantial burdens directly on non-wrong doers—job applicants and employees who did not engage in employment discrimination but are disadvantaged under employment quotas or retroactive seniority requirements or families subject to a busing remedy because of the actions of government officials to whom they have given neither votes nor support

Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 604 (1983).

51. Writing in dissent, Justice Marshall argued that *Milliken I* represented a turning point in judicial efforts to address racial segregation: although the Court recognized that there had been a constitutional violation of schoolchildren's equal protection rights, it "provided no remedy at all for the violation proved in this case, thereby guaranteeing that Negro children in Detroit will receive the same separate and inherently unequal education in the future as they have been unconstitutionally afforded in the past." *Milliken I*, 418 U.S. at 782 (Marshall, J., dissenting).

dicted, after the metropolitan area plan was rejected, no other viable remedy was put in place. Upon remand, the trial court in *Milliken* fashioned a new "Detroit-only" remedial plan which emphasized a range of 13 "compensatory and remedial programs" designed to eliminate the effects of the dual system.⁵² This compensatory education program was, however, short-lived, and did little to eradicate the educational deficits of Detroit's now overwhelmingly minority student population.⁵³

In its second *Milliken* decision, the Supreme Court summarized its remedial doctrine in the following three-pronged form:

In the first place, like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation Second, the decree must indeed be remedial in nature, that is, it must be designed as nearly as possible "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct" Third, the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution⁵⁴

The remedial doctrine in *Milliken II*, although set forth as a recapitulation of prior precedents, was, in fact, a new statement of remedial

52. In addition to provisions for magnet schools and vocational programs, the program included multi-ethnic and bilingual curriculum designs, school-community relations, parental involvement, in-service sensitivity training for teachers, counseling and career guidance for students and a new non-biased testing program. See *Milliken v. Bradley*, 433 U.S. 267, 271-76 (1977) [hereinafter "*Milliken II*"].

53. GARY ORFIELD ET AL., *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* Ch. 6 (1996). The authors report that in 1992-93, Detroit's seventh- and eighth-grade students were three times less likely to meet the State's satisfactory standard in math than students elsewhere in the State and seven times less likely by the tenth and eleventh grades. *Id.* at 155-58. They conclude that:

Blatant educational inferiorities remain in the Detroit public schools. Today, school officials acknowledge the poor conditions of the system, stating that the *Milliken* programs might have had some positive effect, but conceding that the programs simply did not prove to be the systemic remedy needed by urban Detroit.

Id. at 155. They found that similar *Milliken II* programs in Little Rock, Arkansas, Prince George's County, Maryland, and Austin, Texas also proved unsuccessful. Their overall conclusion was that equal educational opportunity for urban minority students requires "a combination of successful racial integration and well-designed permanent, accountable, and effective education compensation measures." *Id.* at 178.

54. *Milliken II*, 433 U.S. at 280-81 (footnotes omitted).

principles which was inconsistent with prior holdings and which added a substantial degree of ambiguity to the courts' overall remedial stance. The reference to flexible equitable principles had been at the heart of the Court's remedial doctrine since *Brown II*, but the notion of restoring victims to their prior position had not been a central aspect of *Brown* and most other desegregation decrees, where the remedies were fully implemented only years after the original plaintiffs had graduated, and many of the victims of discriminatory conduct clearly were not made whole.⁵⁵ Most significant, however, was the addition of the new, third element—the admonition to “take into account the interests of state and local authorities.” This standard, newly added to the Court's remedial doctrine by *Milliken II*, directly contradicted the Court's prior emphasis on effectiveness, which the Court had strongly stated in *Green* and *Swann*.

The interests of state and local authorities had always, of course, been one of the factors that needed to be taken into account in the equitable balancing of the various interests that needed to be considered in framing a desegregation decree. The problem with the *Milliken II* formulation, however, was that consideration of these interests was not listed as merely one of several factors to be considered in the equitable balancing, but, rather, it became a preeminent factor which, in effect, trumped the ultimate goal of achieving an effective remedy.⁵⁶

Milliken II, therefore, represented a marked shift away from the Court's prior emphasis on equity and efficacy, toward a deference to local school officials in the face of continuing problems of racial segregation. In recent years, the Supreme Court has further qualified the

55. Indeed, because of Eleventh Amendment strictures against federal courts imposing money judgments against the states, see *Edelman v. Jordan*, 415 U.S. 651 (1974), the traditional “make whole” remedy (i.e., money damages) is precluded in most institutional reform cases brought in federal courts. Generally speaking, courts in these cases can only issue affirmative injunctions to rectify the underlying condition, rather than monetary awards to compensate for past injuries. See also Daniel L. Rotenberg, *Private Remedies for Constitutional Wrongs—A Matter of Perspective, Priority, and Process*, 14 HASTINGS CONST. L. Q. 77 (1986) (discussing differences and interplays between private and public remedies in constitutional cases).

56. The Court's “scope” holding in *Milliken I* categorized the interests of state and local officials as a liability principle that would precede and preclude remedial deliberations. The recapitulation of remedial doctrine in *Milliken II*, however, drew the concept of respecting the prerogatives of local officials into the remedial realm, and gave this factor enhanced significance. Since *Milliken II*, the Court has not clarified in the remedial context when or how the interests of state and local officials should be taken into account. Cf. *Missouri v. Jenkins*, 495 U.S. 33 (1990) (upholding authority of district court to order local officials to levy taxes to fund a desegregation decree).

efficacy thrust of its remedial doctrine by articulating an ambiguous standard for determining when segregation has been eliminated and judicial oversight may be terminated. After wrestling with the termination question for several decades,⁵⁷ the Court announced in *Board of Education v. Dowell*⁵⁸ that the standard for termination of judicial oversight is "whether the Board ha[s] complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable." This holding obviously begs the critical question, since it does not define the "vestiges of past discrimination" to be eliminated and leaves to the unfettered discretion of the district judge the determination of what is "practicable" in regard to specific solutions.⁵⁹

In sum, then, the Supreme Court's initial emphasis on effective results in *Green* and *Swann* produced a record of significant accomplishment in regard to the elimination of de jure segregation in most Southern school districts,⁶⁰ but its ambiguous post-*Milliken* stance has permitted compromised compliance and has "cramped the potential for both effective judicial and political responses to racial isolation."⁶¹ As

57. See *Freeman v. Pitts*, 503 U.S. 467, 474 (1992); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976); *Riddick v. School Bd. of Norfolk*, 784 F.2d 521, 534 (4th Cir. 1986), cert. denied, 479 U.S. 938 (1986).

58. 498 U.S. 237, 249-50 (1991).

59. See David I. Levine, *The Latter Stages of Enforcement of Equitable Decrees: The Course of Institutional Reform Cases After Dowell, Rufo, and Freeman*, 20 HASTINGS CONST. L. Q. 579, 625 (1993). The Court's most recent major remedial decision in a desegregation case, *Missouri v. Jenkins*, 115 S. Ct. 2038, 2055 (1995), invalidated a District Court order because, among other things, its requirements for teacher salary increases to improve "desegregative attractiveness" and its use of student achievement scores to determine whether vestiges of segregation were eliminated were "simply too far removed" from the scope of the violation.

60. One major analysis of the federal courts' role in desegregation cases concluded:

The overwhelming majority of documented desegregation efforts in large districts up to 1976 (81%) came about at least partly because of a suit or a court order... Segregation declined under court orders from an average of 74 in 1968 (on a scale of 1-100, with 100 being total segregation) to an average of 15 in 1972. Although the total remains slightly higher, the change was much greater than in HEW cases (from 59 to 9) or state or local cases (32 to 12). Courts reached half of all highly-segregated students in 1968, compared to 16 percent for HEW and 24% for state and local actors.

JENNIFER L. HOCHSCHILD, *THE NEW AMERICAN DILEMMA: LIBERAL DEMOCRACY AND SCHOOL SEGREGATION*, 134-135 (1984). For a discussion of the role of the Civil Rights Act of 1964 in school desegregation, see GARY ORFIELD, *THE RECONSTRUCTION OF SOUTHERN EDUCATION* (1968). See also Note, *The Courts, HEW, and Southern School Desegregation*, 77 YALE L.J. 321, 339-356 (1977); James Dunn, *Title VI, The Guidelines and School Desegregation in the South*, 53 VA. L. REV. 42 (1967) (arguing that HEW regulations had a significant impact on the overall form of judicial remedial orders, particularly in the Fifth Circuit).

61. Gene Sperling, Note, *Judicial Rights Declaration and Entrenched Discrimination*, 94 YALE

a result, the American Institute for Research's ("AIR") 1992 survey of 600 school districts showed that the "dissimilarity" index, which measures racial imbalance, was reduced from sixty-seven in 1968 (the year *Green* was decided) to fifty-one in 1972 (a year after *Swann*), and to forty-three in 1980, but has declined only slightly in the years since.⁶² The decline in effective desegregation has been even more dramatic in the major metropolitan areas in the North and West, where the potential for effective desegregation remedies were directly dashed by *Milliken II*.⁶³

A certain amount of "interest balancing" clearly is desirable and necessary in the formulation of remedial decrees, and "social interests other than the victims' interests cannot be totally ignored when a court fashions an injunctive remedy."⁶⁴ Nevertheless, the large gaps between rights and remedies⁶⁵ which characterize the U.S. Supreme Court's

L.J. 1741, 1753 (1985) [hereinafter "*Judicial Rights Declaration*"].

62. The A.I.R. survey is discussed at length in DAVID H. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW Ch. 4 (1995). Armor also reports that the exposure index (which measures the number of black students exposed to white students) increased from 43% in 1968 to 54% in 1972, but then fell to 47% in 1989. The exposure index for Hispanic students fell even more dramatically from 70% in 1968 to 51% in 1989. *Id.* at 112. In another recent survey, almost 60% of a group of attorneys involved in desegregation litigation expressed general dissatisfaction with the results of the litigation, and almost half of the plaintiffs' attorneys expressed frustration with the results in their own cases. See Paul L. Tractenberg, *The View from the Bar: An Examination of the Litigator's Role in Shaping Educational Remedies*, in JUSTICE AND SCHOOL SYSTEMS 390, 406-407, *supra* note 35. See also Michael Finch, *Fairness and Finality in Institutional Litigation: The Lessons of School Desegregation*, 4 GEO. MASON C. R. L. J. 109 (1994); Mark Yudof, *Implementation Theories and Desegregation Realities*, 32 ALA. L. REV. 441 (1981).

63. For statistics on current racial imbalance in major metropolitan areas, see *supra* note 49. The difficulties in fashioning effective desegregation remedies in the wake of *Milliken II* are well illustrated by Chicago's experiences. There, after the school system's percentage of white students had declined in the years from 1970-71 to 1982-83 from 34.6% to 16.3%, the Board of Education adopted a desegregation plan which defined as a "stable mixed school," a building that had a present and projected white enrollment of 15-30%. In order to attempt to stabilize white enrollment, the plan also allowed schools which were 70% white to be defined as "integrated" in a system that had fewer than 20% whites overall. See *United States v. Board of Educ. of Chicago*, 554 F. Supp. 912 (N.D. Ill. 1983).

64. Gewirtz, *supra* note 9, at 593.

65. Barry Friedman has pointed out that:

What emerges from a study of the law of remedy and enforcement, however, is the picture of a system in which there is tremendous flexibility in the fit between right and remedy and, therefore, a system in which rights receive far less respect than the rhetoric would suggest. Indeed, close examination reveals a system in which failure to comply with, if not outright defiance of, judicial remedies is tolerated to a certain degree.

Barry Friedman, *When Rights Encounter Remedies: Enforcing Federal Remedies*, 65 S. CALIF. L.

current stance in desegregation and other institutional reform contexts frustrate the legitimate expectations raised by *Brown* and other constitutional and statutory pronouncements and thereby exacerbate social conflict.

II. STATE REMEDIAL DOCTRINE

Although the Supreme Court's emphasis in *Milliken II* on "the interests of state and local authorities"⁶⁶ responded indirectly to the criticisms of the federal courts' remedial interventions in state legislative and executive domains, its remedial doctrine has never directly addressed the separation of powers concerns raised by critics of new model litigations. On the contrary, the Court has held that "the separation of powers principle . . . has no applicability to the federal judiciary's relationship to the States."⁶⁷ State courts, by way of contrast, have repeatedly articulated separation of powers as well as institutional competency concerns. The inappropriateness of judicial intervention into the legislative or executive domains has been extensively cited as a prime reason for denying relief to plaintiffs in many institutional reform litigation and for deferring broadly to the other branches to formulate the content of a remedy in those cases in which courts have found constitutional violations.

New York exemplifies this pattern. Its highest court, the Court of Appeals, has declared certain controversial public policy issues to be non-justiciable because "the court as a policy matter . . . will abstain from venturing into areas if it is ill-equipped to undertake the responsibility and other branches of government are far more suited to the task."⁶⁸ In explaining its reasons for rejecting plaintiffs' suit to enforce a noise control ordinance against the New York City Transit Authority,

REV. 735, 738 (1992). Friedman argues strenuously for lessening the gap between rights and remedies. For a contrary view, see SCHUCK, *supra* note 30, at 25-28 (1983) (arguing that "rights and remedies are utterly different legal phenomena" and that every violation of a right does not necessarily justify a remedy).

66. 433 U.S. 267, 281 (1977).

67. *Elrod v. Burns*, 427 U.S. 347, 352 (1976). *See also Baker v. Carr*, 369 U.S. 186, 210, 229-37 (1962) (stating that separation of powers and political question doctrines should be applied deferentially when "it is the relationship between the judiciary and the coordinate branches of the federal government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.'").

68. *Jones v. Beame*, 45 N.Y.2d 402, 408-09 (1978).

the Court of Appeals stated that "plaintiffs sought to interpose the court into the management and operation of public enterprises" in a manner which required the resolution of "questions of judgment, discretion, allocation of resources, and priorities inappropriate for resolution in a judicial arena."⁶⁹

Even when state courts have accepted jurisdiction of public policy controversies and found for the plaintiffs, they have tended to defer broadly to legislative prerogatives at the remedy stage. Thus, the Supreme Court of Arkansas stated in a major fiscal equity decision that the drafting of a new education finance scheme is a "difficult and perilous quest" that is particularly within the legislature's rather than the judiciary's sphere of "institutional competency."⁷⁰ Even the Kentucky Supreme Court, which invalidated as unconstitutional the entire state educational system, stated that "[W]e [do not] intend to substitute our judicial authority for the authority and discretion of the General Assembly."⁷¹ The Connecticut Supreme Court's decision in *Sheff* to allow the legislature broad, unstructured discretion to formulate a remedy is, therefore, consistent with this general state court approach.

This marked tendency of the state courts to defer to the legislative and executive branches is primarily due to their greater "sensitivity to the constitutional authority of coordinate branches of government"⁷² In the federal courts, the classical separation of powers doctrine does not specifically apply to most institutional reform decisions because they involve actions of state and local officials under the authority of the Federal Supremacy Clause,⁷³ and not the "coordinate" federal Congress or the President. The heightened political responsiveness of state supreme court judges may also result from the fact that most state

69. *Abrams v. New York Transit Auth.*, 30 N.Y.2d 990, 992 (1976). See also, *Jiggett v. Grinker*, 553 N.E.2d 570, 572 (N.Y. 1990) (explaining that "[b]road policy choices, which involve the ordering of priorities, and the allocation of finite resources, are matters for the executive and legislative branches of government"); *Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005, 1018 (1982) (refusing to "venture into the realm of social policy under the guise that there is a fundamental right to education.").

70. *Dupree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 95 (Ark. 1983).

71. *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 189 (1989). The Kentucky court also referred to separation of powers concerns at least three other times in the course of its opinion. See *id.* at 211, 212, 214. Nonetheless, the Kentucky court did articulate specific guidelines and goals for the Legislature to follow in fashioning a constitutionally acceptable remedy. See discussion *infra* note 122.

72. *Sheff*, 238 Conn. at 46, 678 A.2d at 1290. The Court also noted its concern with "the complexities of developing a legislative program" *Id.*

73. U.S. CONST. art. VI, § 2 ("This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land").

court judges are elected and, therefore, have more difficulty resisting popular pressures that may be adverse to the declaration of individual and minority rights, and that state constitutions are easier to amend than the federal constitution.⁷⁴

Despite their strongly-stated separation of powers concerns and their electoral vulnerability, however, state courts have taken strong, principled stands on critical constitutional issues—sometimes acting more forcefully, even in the face of strong public resistance, than have the federal courts.⁷⁵ Generally, such forceful state court action occurs in areas like welfare and education, about which many state constitutions contain substantive entitlements that are lacking in the federal constitution.⁷⁶ Several state supreme courts have issued strong affirmative de-

74. Note, *Unfulfilled Promises: State Finance Remedies and State Courts*, 104 HARV. L. REV. 1072, 1084 (1991). The authors of this Note state further that:

[S]tate judges are likely to be more keenly attuned to local political pressures. Although the degree of sensitivity will vary from state to state, the potential for voter backlash against the judicial branch arising from extremely unpopular decisions may inhibit state courts from mandating remedies that fully vindicate school finance plaintiffs' rights.

Id. at 1085 (footnote omitted). For further analyses of both the differences between state and federal courts and the structural and political influences on state judges, see George D. Brown, *Binding Advisory Opinions: A Federal Courts Perspective on the State School Finance Decisions*, 35 B.C. L. REV. 543 (1994) (noting that appointed state judges are, as deferential to the legislatures on whom they depend for salaries and budgets as are elected judges); Bert Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (comparing technical competence and deference to the legislative branches of state and federal judges); Note, *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1350-67 (1982) [hereinafter "Developments"]; Justice Robert F. Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington's Experience*, 65 TEMP. L. REV. 1153 (1992) (stating that state court constitutional jurisprudence is still in an early stage and is open to influence by lawyers and academics).

75. The *Sheff v. O'Neill* decision is, of course, a prime example. There, the Connecticut Supreme Court was willing to take the affirmative stance on metropolitan-area desegregation from which the U.S. Supreme Court retreated in *Milliken I*. Cf. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (citing and applauding state supreme courts that have construed their state constitutional rights to provide more protection than the federal constitution, especially in criminal procedure areas, such as search and seizure, right to counsel and inadmissibility of illegally obtained evidence); see also *Southern Burlington County NAACP v. Township of Mt. Laurel*, 336 A.2d 713 (N.J. 1975) (finding that a municipality has the "moral obligation . . . to provide housing for its resident poor . . ."), followed by *Mt. Laurel II*, 391 A.2d 935 (N.J. 1978); *Developments*, *supra* note 74, at 1367-83.

76. Bert Neuborne, in *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881 (1989), argues that the efforts to derive positive rights, such as education, from the federal constitution failed for four reasons: 1) lack of textual basis; 2) lack of positive rights tradition; 3) lack of a capacity for flexibility and local tailoring; and 4) lack of democratic imprimatur. He argues that state constitutions provide more fertile ground for the enforcement of

crees to uphold constitutionally established welfare rights.⁷⁷ Affirmative state court constitutional stances have been even more widespread in the area of fiscal equity reform in education. A large number of state supreme courts have invalidated inequitable school finance statutes in the wake of the U.S. Supreme Court's refusal to do so.

The development of state court doctrines regarding fiscal equity reform in recent years is, in fact, a remarkable chapter in the history of state court constitutional development. In 1973, the United States Supreme Court, declaring that education was not a fundamental interest under the federal constitution in *San Antonio Independent School District v. Rodriguez*,⁷⁸ refused to remedy gross disparities in the educational resources available to Texas children. Similar gross resource disparities have also been the rule in virtually every other state education finance system because of the tradition of local funding of education in the United States. After the U.S. Supreme Court dismissed the Texas case, similar litigations were brought under state constitutions in more than forty jurisdictions, and the state courts have developed a substantial range of doctrinal responses.

In the early post-*Rodriguez* cases, the state supreme courts tended to deny relief to plaintiffs for reasons similar to those cited by the U.S. Supreme Court.⁷⁹ Other state supreme courts—in increasing numbers in

positive rights because of their specific affirmative textual position and because of the "enhanced democratic pedigree" of state courts which results from the fact that state court judges are elected, state constitutions are easier to amend, and many state constitutions explicitly provide for judicial review. See also Jonathan Feldman, *Separation of Power and Judicial Review of Positive Rights Claims: The Role of State Courts in an Era of Positive Government*, 24 RUTGERS L. REV. 1057 (1993) (comparing the history of the separation of powers doctrine in the federal and state constitutions and distinguishing "positive" separations of powers from "negative" separations of powers).

77. See, e.g., *Tucker v. Toia*, 371 N.E.2d 449 (N.Y. 1977) (invalidating state statute which requires lengthy delays in provision of welfare benefits under state constitutional provision mandating assistance to the poor); *Butte Community Union v. Harris*, 745 P.2d 1128 (Mont. 1978) (invalidating state statute providing limited coverage for certain welfare recipients under state constitutional provision which mandated assistance to the poor).

78. 411 U.S. 1 (1973).

79. See, e.g., *McDaniel v. Thomas*, 285 S.E.2d, 156, 167 (Ga. 1981) (holding that education is not a fundamental right, after concluding that this same holding in *Rodriguez* "does not bind state courts" but "provides some guidance to the states"); *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758, 786 (Md. 1983) (citing *Rodriguez* for the proposition that the vital importance of education does not render it a fundamental right); *Fair Sch. Fin. Council of Oklahoma, Inc. v. State*, 746 P.2d 1135 (Okla. 1987) (finding that the state constitution does not guarantee "equal expenditures per child"); *Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27, 43-44 (1982) (relying, in part, on the *Rodriguez* Court's deference to legislative institutional competence in educational policy matters). From a doctrinal point of

recent years—have, however, decided to invalidate their state education finance schemes, in spite of the federal precedent. In Kentucky⁸⁰ and West Virginia,⁸¹ the courts have gone so far as to declare entire state education systems unconstitutional. To date, plaintiffs have, in fact, prevailed in final decisions or major procedural pronouncements of the state's highest court, or in unappealed trial court decisions, in eighteen states.⁸² Defendants have prevailed in seventeen final substantive decisions of the state Supreme Courts.⁸³ In three states, recent decisions of

view, state court adherence to federal constitutional doctrine on this point is somewhat incongruous, since the U.S. Supreme Court's position in *Rodriguez* was premised on the absence of an explicit or implicit right to education in the federal constitution (411 U.S. 1, 33-35 (1973)), whereas education is specifically guaranteed in most state constitutions.

80. See *supra* note 71. For general discussions of the Kentucky case, see Ronald G. Dove, Jr., *Acorns in a Mountain Pool: The Role of Litigation, Law, and Lawyers in Kentucky Education Reform*, 17 J. EDUC. FIN. 83 (1991); and Jacob E. Adams, Jr., *School Finance Reform and Systematic School Change: Reconstituting Kentucky's Public Schools*, 18 J. EDUC. FIN. 318 (1993).

81. *Pauley v. Kelly*, 225 S.E.2d 859 (W.Va. 1979). The West Virginia Chief Justice's views regarding this case are set forth in RICHARD NEELY, *HOW COURTS GOVERN AMERICA* Ch. 7 (1981).

82. The cases in which plaintiffs have prevailed in the highest state court are: *Dupree v. Alma Sch. dist. No. 30*, 651 S.W.2d 90 (Ark. 1983); *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971) *aff'd*, 557 P.2d 929 (Cal. 1976); *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977); *Rose v. Council for Better Educ.*, 790 S.W.2d 186 (Ky. 1989); *McDuffy v. Secretary*, 615 N.E.2d 516 (Mass. 1993); *Helene Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684 (Mon. 1989); *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973) and *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990); *Small Sch. Sys. v. McWhitten*, 851 S.W.2d 139 (Tenn. 1993); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *Brigham v. State No. 96-502* (Vt. 1997); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978); *Pauley*, 255 S.E.2d at 859; *Washakie County Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310 (Wyo. 1980) and *Campbell County Sch. Dist. v. State*, 907 P.2d 1238 (Wyo. 1995). See also *Harper v. Hunt*, Appendix to the Opinion of the Justices, 624 So.2d 107 (Ala. 1993) (unappealed trial court decision); *Unified Sch. Dist. No. 228 v. State*, 885 P.2d 1170 (Kan. 1994) (upholding constitutionality of new, more equitable, statute enacted in response to lower court opinion); *Committee for Educ. Equality v. State*, 878 S.W.2d 446 (Mo. 1994) (dismissing appeal of a judgment declaring finance system unconstitutional since Legislature had passed a new funding statute that had not been reviewed by the lower court); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375 (N.H. 1993) (Declaratory Judgment remanded for trial); and *Bismark Public Sch. Dist. No. 1 v. North Dakota Legisl. Assembly*, 511 N.W.2d 247 (N.D. 1994) (holding finance system unconstitutional but not by requisite "super majority" vote).

83. The cases in which defendants have prevailed in the highest state court are: *Mateanuska-Susitna Borough Sch. Dist. v. State*, No. 4470 (Alas. 1997); *Lujan v. Bd. of Educ.*, 649 P.2d 1005 (Col. 1982); *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1982); *Committee for Educ. Rights v. Edgar*, 672 N.E.2d 1178 (Ill. 1996); *School Administrative Dist. No. 1 v. Cmsr.*, 659 A.2d 854 (Me. 1995); *Hornbeck v. Bd. of Educ.*, 458 A.2d 758 (Md. 1983); *Milliken v. Green*, 212 N.W.2d 711 (Mich. 1973); *Skeen v. State*, 505 N.W.2d 299 (Minn. 1993); *Gould v. Orr*, 506 N.W.2d 349 (Neb. 1993); *Britt v. North Carolina State Bd. of Educ.*, 357 S.E.2d 432, *aff'd mem.*, 361 S.E.2d 71 (N.C. 1987); *Fair Sch. Finance Council of Okla., Inc. v. State*, 746 P.2d 1135 (Okla. 1987); *Board of Educ., Cincinnati v. Walter*, 39 N.E.2d 813 (Ohio

the highest courts have distinguished prior decisions for defendants or found for plaintiffs on other grounds.⁸⁴ Overall, plaintiffs have prevailed in almost two-thirds (fifteen of twenty-three) of the decisions since 1989, indicating a strong trend in their favor in recent years.⁸⁵

State courts in a majority of these highly-charged fiscal equity cases appear to have taken strong stands for the same reason that the Connecticut Supreme Court majority acted in *Sheff*: a perception that values critical to the functioning of a democratic society are at stake, which must be acknowledged and upheld, even if specific methods for remedying the problems are not immediately apparent. The continuing denial of sufficient educational resources to the states' neediest schoolchildren, like the intensifying segregation and concomitant educational deprivation suffered by Hartford's African-American and Latino schoolchildren, touch upon core "democratic imperatives" which even many cautious state courts are reluctant to ignore.⁸⁶

Although recognizing a constitutional responsibility to take jurisdic-

1979); *Coalition for Equitable Sch. Funding Inc. v. State*, 811 P.2d 116 (Or. 1991); *Danson v. Casey*, 399 A.2d 360 (Pa. 1979); *City of Pawtucket v. Sundlun*, 662 A.2d 40 (R.I. 1995); *Richland County v. Campbell*, 364 S.E.2d 470 (S.C. 1988); *Scott v. Commonwealth*, 443 S.E.2d 138 (Va. 1994); and *Kukor v. Grover*, 436 N.W.2d 568 (Wis. 1989).

84. See *Campaign for Fiscal Equity, Inc. v. State of New York*, 655 N.E.2d 661 (N.Y. 1995) (distinguishing *Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982)); *Idaho Schools for Equal Educ. Opportunity v. Evans*, 850 P.2d 724 (1993), (distinguishing *Thompson v. Engelking*, 537 P.2d 635 (Idaho 1975)); and *Roosevelt Elementary Sch. Dist. v. Bishop*, 877 P.2d 806 (Ariz. 1994). New challenges to state education finance systems which seek to distinguish or reverse prior state Supreme Court rulings are currently pending in Ohio and North Carolina. In Maryland, the trial court entered a consent order providing additional funding for plaintiffs on November 26, 1996. See *Bradford v. Maryland Bd. of Educ.*, No. 943 40058 (Md. 1996).

85. Many of the recent cases have been based on allegations of a denial of a minimum adequate education, rather than on allegations of disparities in the availability of resources under state equal protection clauses. See Molly McUsic, *The Use of Education Clauses in School Finance Litigation*, 28 HARV. J. LEGIS. 307 (1991). For an overview of the law in this area, see Michael A. Rebell, *Fiscal Equity in Education: Deconstructing the Reigning Myths and Facing Reality*, 21 NYU REV. OF L. AND SOC. CHANGE 691 (1994-95).

86. For example, the New York Court of Appeals, despite its general reluctance to consider controversial public policy issues justiciable, see discussion *supra* p. 25, has accepted jurisdiction of fiscal equity claims. See *Levittown v. Nyquist*, 57 N.Y.2d 27, 39 (1982). Citing *Rodriguez*, the Court upheld the rationality of the system, despite its inequities, but the Court also noted that no one had alleged that any students were not receiving the "sound basic education" guaranteed by the State Constitution. See *id.* at 59. Thirteen years later, when plaintiffs representing New York City public school students did allege that a substantial number of students were being denied the constitutionally guaranteed level of education, the Court denied a motion to dismiss and remanded the case for trial. *Campaign for Fiscal Equity, Inc. v. State*, 655 N.E.2d 661 (N.Y. 1995). The authors of the present article are counsel for the plaintiffs in the CFE case. See also cases cited *supra* note 84.

tion of these controversies, however, most state courts continue to be extremely deferential to their legislatures at the remedial stage. In contrast with most federal district courts which tend to issue substantive decrees in new model cases,⁸⁷ the prevalent judicial approach in state fiscal equity cases has been to declare the existing system unconstitutional and to issue a general mandate for reform which leaves remedial responsibility almost entirely in the legislature's hands.⁸⁸

Judicial deference in these cases often results not in prompt, effective legislative solutions, but rather in political impasse, contempt motions, and new rounds of litigation. In Arkansas, for example, the supreme court's deference to the legislature in its 1983 decision⁸⁹ led to only minor improvements in the school funding system. In 1992, property poor school districts initiated another fiscal equity suit in which the trial court held that the funding system, as of 1994, violated the constitution because it "fail[s] to provide a 'general, suitable and efficient system of free public schools.'"⁹⁰ The West Virginia Supreme Court's failure to oversee implementation of its extensive constitutional order has resulted in its dictates being largely ignored.⁹¹ In New Jersey and

87. Desegregation decrees issued by the federal district courts generally prescribed detailed remedial requirements on local school districts, *see e.g.*, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 311 F. Supp. 265 (1970), and, at times, on the state legislatures. *See, e.g.*, *Lidell v. Board of Educ. of City of St. Louis*, 801 F.2d 278 (8th Cir. 1986) (mandating state funding of specific aspects of local desegregation plans). *See also* EDUCATIONAL POLICY-MAKING AND THE COURTS, *supra* note 9 (details of most remedial decrees in educational policy disputes other than desegregation were based on plans negotiated by the parties).

88. *See* William E. Camp and David C. Thompson, *School Finance Litigation: Legal Issues and the Politics of Reform*, 14 J. EDUC. FIN. 221, 237 (1988) (courts have consistently left mechanism of funding to legislature unless forced to do otherwise).

89. *Dupree*, 651 S.W.2d at 90.

90. *Lake View Sch. Dist. No. 25 of Phillips County v. Tucker*, No. 92-5318 (Chancery Ct., Pulaski County, Ark. 1994). In *Lake View*, the court stayed the effects of its decision two years to give the State time to implement a constitutional system but declined to specify the elements of such a system. *See also* *Tucker v. Lake View Sch. Dist. No. 25 of Phillips County*, 917 S.W.2d 530, 531 (Ark. 1996) (appeal of Chancery court opinion dismissed due to 2-year stay and lack of final remedial decree).

91. *See* *Pauley v. Bailey*, 324 S.E.2d 128 (W.Va. 1984); Jeanette A. Sites & Richard Salmon, *West Virginia's School Finance: A Look at the Past and Present*, 17 J. EDUC. FIN. 318 (1992); J.L. Flanigan, *West Virginia's Financial Dilemma: The Ideal School System in the Real World*, 15 J. EDUC. FIN. 229, 234 (1989).

Similarly, the Montana Supreme Court's deferral to the Legislature in 1989 led several years later to two follow-up litigations. One of these cases was filed by the still-unhappy plaintiffs, *see* *Helena Elem. Sch. Dist. No. 1 v. State of Montana*, No. BDV-91-1334 (1st Jud'l Dept.), and another by rural school districts which claimed that the new legislative program discriminated against them. *See* *Montana Rural Educ. Assoc. v. State of Montana*, No. BDV-91-2065 (1st Jud'l Dept.).

Texas there has been progress toward fiscal equity goals, but only after a lengthy series of state supreme court compliance orders—nine so far in New Jersey and three in Texas—which have included threats to close down the entire state public school system.⁹²

The Connecticut Supreme Court was one of the first of the state highest courts to invalidate a state education finance system, and, following the general tendency of the state courts, it also deferred to the legislature at the remedial stage. In *Horton v. Meskill*,⁹³ it held that the right to education is fundamental under the Connecticut Constitution and that the existing system, because it was based primarily on local property taxes without regard to the extensive disparities in the tax bases of the various local districts, was unconstitutional. Rather than issuing a detailed remedial order, the court in *Horton I* explicitly stayed its hand, “to give the legislative department an opportunity to act.”⁹⁴

Although broadly deferring remedial responsibility to the legislature, the court’s opinion in *Horton I* did, however, provide a number of guiding principles and standards for the General Assembly. Responding to the dissent’s fears that fiscal equity reform would require strict equality in local expenditures and would cause the state to assume all responsibility for the financing of education,⁹⁵ the majority in *Horton I* specified that neither absolute equality nor the abandonment of meaningful local choice would be required by its decision.⁹⁶

92. In New Jersey, after a number of years of legislative inaction and several contempt motions, the Supreme Court threatened to shut down all the schools during the 1976-77 school year if the new reform act was not fully funded, and did so for a short period of time during the summer session. *Robinson v. Cahill*, 358 A.2d 457 (N.J. 1976) (enjoining expenditures, except debt service, as of July 1 in this May 13 decision); and *Robinson v. Cahill*, 360 A.2d 400 (N.J. 1976) (rescinding the injunction on July 9, after legislative action). See generally, RICHARD LEHNE, *THE QUEST FOR JUSTICE: THE POLITICS OF SCHOOL FINANCE REFORM* (1978); Mark Jaffe & Kenneth Kersch, *Guaranteeing a State Right for Quality Education, The Judicial Political Dialogue in New Jersey*, 20 J.L. & EDUC. 271 (1991).

The vehemence of these inter-branch confrontations is reflected in the following comments of the Chairman of the Texas Legislative Conference Committee:

[D]o you truly believe the Supreme Court of Texas has the guts to shut the school system down? . . . Well, I want to state here publicly and send them a message across there, I don't believe they have the guts to do it The question is whether we have the guts to challenge the Supreme Court to shut the schools down.

Carrolton Farmer's Branch Indep. Sch. Dist v. Edgewood Indep. Sch. Dist., 826 S.W.2d 486, 514 (Texas 1992).

93. 376 A.2d 359, 374-75 (Conn. 1977) [hereinafter “*Horton I*”].

94. *Id.* at 375. The *Sheff* decision specifically cited *Horton I* on this point. See *Sheff*, 238 Conn. at 45-46, 678 A.2d at 1290.

95. See *Horton I*, 172 Conn. at 661, 376 A.2d at 380.

96. See *Id.* at 651-652, 376 A.2d at 375-376. The Court also drew attention to a range of

The court's guiding principles in *Horton I* did not, however, avoid further litigation. Eight years after the Connecticut Supreme Court's original decision, plaintiffs returned to attack the constitutionality of the new education finance system which the legislature had adopted.⁹⁷ The trial court in *Horton III* found that the new statutory scheme, based on a guaranteed tax base formula and minimum local expenditure requirement, "provided a constitutionally appropriate mechanism to reduce statewide disparity in educational resources."⁹⁸ It also concluded, however, that the salutary effects of the statutory scheme were undermined by the legislature's delay in implementing fully the new system and by the availability of an optional curriculum for secondary school students.⁹⁹ The Connecticut Supreme Court did not rule directly on the lower court's conclusions. Its decision clarified the meaning of the applicable constitutional standard,¹⁰⁰ and remanded the case to the trial court to reconsider whether the legislative actions and inactions at issue would still be considered unconstitutional under the proper standard.¹⁰¹

The trial court never had occasion to reconsider its findings because the legislature further revamped the state's education finance system shortly after the court issued its decision.¹⁰² Apparently in response to

remedies which had been adopted in other states and took judicial notice of the fact that the General Assembly had already established a "Commission to Study School Finance and Equal Educational Opportunity." This body had issued a final report which called the present system inherently inequitable and "recommended a specific program to correct the situation."

97. See *Horton v. Meskill*, 195 Conn. 24, 486 A.2d 1099 (1985) [hereinafter *Horton III*]. In *Horton v. Meskill*, 187 Conn. 187, 445 A.2d 579 (1982) [hereinafter *Horton II*], the court had upheld the denial of intervenor status to a number of school boards and municipalities. Other school boards and individuals, including the Hartford Board of Education, had been permitted to intervene, although, in some cases, only for remedial purposes. See *Horton III*,—195 Conn. at 26, 486 A.2d at 1100.

98. *Horton III*, 195 Conn. at 30, 486 A.2d at 1102.

99. See *id.* at 1102.

100. See *id.* at 1106. In contrast to federal equal protection doctrine which, in cases involving "fundamental interests" requires a defendant to show a "compelling state interest to justify any actions infringing on the right at issue," the Connecticut Supreme Court held that, under its fundamental interest approach, the State's burden is to justify funding disparities "as incident to the advancement of a legitimate state policy" which "as a whole, further[s] the policy of providing significant equalizing state support to local education." *Id.* This "fundamental interest" standard seems closer to the "middle ground" equal protection standard established by the Supreme Court in cases involving gender equity and illegitimacy issues, see, e.g., *Graig v. Borden*, 429 U.S. 190 (1976); *Lalli v. Lalli*, 439 U.S. 259 (1978), than to federal strict scrutiny requirements.

101. See *Horton III*, 195 Conn. at 45, 486 A.2d at 1110.

102. The Education Enhancement Act of 1986 began in 1986-87 and ended in 1988-89. The passage of time and adoption of a new state-defined core curriculum had also rendered the

indications that the previous reforms had resulted in much of the increased state aid being siphoned off to reduce local taxes rather than to enhance education,¹⁰³ the legislature adopted a new percentage equalizing formula approach,¹⁰⁴ adopted a grant program based on a statewide minimum salary scale for teachers,¹⁰⁵ and beefed up the "minimum expenditure requirement" ("MER").¹⁰⁶ This MER requirement led to further litigation against cities such as New Haven, which had difficulty in maintaining their local share requirement in light of declining local tax revenues.¹⁰⁷

Although the *Horton* decision has apparently reduced the disparity in educational expenditures among Connecticut's school districts,¹⁰⁸ at

optional high school curriculum issue moot. See *id.* at 40, 486 A.2d at 1108.

103. See George P. Richardson and Robert E. Lamite, *Improving Connecticut School Aid: A Case Study With Model-Based Policy Analysis*, 15 J. EDUC. FIN. 169, 171 (1989).

104. See CONN. GEN. STAT. ANN. § 10-262(f)-(h) (West Supp. 1996).

105. See *id.* § 10-257(b). Urban districts benefitted substantially from this program. For example, in 1988-89, Hartford received \$4.58 million in teacher salary aid and New Haven received \$7.27 million. See *id.* §10-257(c).

106. See *id.* § 10-262j (West Supp. 1996). The MER calculations are based on a state-established foundation expenditure level per pupil, with extra weightings for children from low-income families and for those who score below the remedial standards of the Connecticut Mastery Tests. A local district must spend at least the local share of that amount, or the local share it spent the previous year, whichever is higher.

107. See *New Haven v. State Board of Educ.*, 638 A.2d 589 (Conn. 1994) (upholding State Department of Education order requiring City of New Haven to provide additional \$2 million to the New Haven Board of Education).

108. "Success" is a difficult concept to define when dealing with dynamic, ongoing social reform processes. For example, the Connecticut Supreme Court in *Horton III* reported that the disparity in per pupil expenditures between the town at the 95th percentile and that at the 5th percentile had declined from 86.9% in 1983-84 to 70.1% in the 1993-94 school year. 195 Conn. at 40 n.16, 486 A.2d. at 1108 n.16. In the fiscal equity context, though, it is not clear whether success means equal inputs, equal outcomes, or equal opportunity in light of differential needs. See ROBERT BERNE AND LEANNE STIEFEL, *THE MEASUREMENT OF EQUITY: SCHOOL FINANCE* (1984).

A specific measure of success in this area, which is widely utilized by social scientists, is overall increases in state spending for education. By this measure, one analyst has found Connecticut's post-*Horton* performance wanting, since he concluded that after accounting for inflation, enrollment, and other variables the court decision was "associated with declines in state education funding." Michael Heise, *The Effect of Constitutional Litigation on Education Finance: More Preliminary Analyses and Modeling*, 21 J. EDUC. FIN. 195, 212 (1995). Heise's analysis, however, exemplifies the shortcomings of conclusions drawn by social scientists who sometimes seem unaware of the extent and implications of legal processes. He notes, for example, that in Connecticut, "education spending changed notably in 1984 and 1987," but discounts this development because "there is no reason to attribute these changes to the 1977 court decision." *Id.* at 207. The period 1984-1987, however, encompassed the court decisions and legislative response in *Horton III* which, as noted above, put the Legislature on notice that delays in fully funding the new constitutional scheme might not be tolerated. The sharp in-

the present time, more than two decades after the Connecticut Supreme Court's initial *Horton* ruling, the problem of adequate and equitable resources for urban schoolchildren has still not been solved. From this perspective, *Sheff* can be considered a further act in the as yet unresolved *Horton* drama. One of the plaintiffs' major contentions in *Sheff* was that minority students in Hartford were not receiving the minimally adequate education guaranteed by the state constitution because the State is not providing the minimum resources necessary to meet the needs of these students.¹⁰⁹ Although both the trial court and the supreme court majority, for different reasons, declined to address this issue,¹¹⁰ it is clear that both racial segregation and resource inadequacies continue to fuel a vicious cycle that denies equal educational opportunities to minority students.¹¹¹ Thus, the history of *Horton*, like that of

crease in state expenditures at that time might well, therefore, be directly attributable to the court decision.

For a general overview of the largely inconclusive social science literature in this area, see John Dayton, *Examining the Efficacy of Judicial Involvement in Public School Funding Reform*, 22 J. EDUC. FIN. 1 (1996). A particularly interesting study in this area is G. Allen Hickrod, et. al., *The Effect of Constitutional Litigation on Education Finance: A Preliminary Analysis*, 18 J. EDUC. FIN., 180, 189 (1992), which concluded after studying 42 states in which fiscal equity litigations had been filed that "it is not the legal outcome of the case that is critical, but, rather, the act of pressing this suit and the pressure this suit brings on the state legislative body" that results in the implementation of reforms.

109. See Plaintiffs' Brief at 56-60, *Sheff v. O'Neil*, 238 Conn. 1, 678 A.2d 1267 (1996). The facts here are a bit complex. The parties stipulated that overall per pupil expenditures in Hartford were \$8,126 per pupil in 1991-92, compared to an average of \$7,331 per pupil in the 21 combined suburbs. See Plaintiffs' and Defendants' Revised Stipulation of Facts at ¶74, *Sheff*, 238 Conn. 1, 678 A.2d 1267. They further stipulated, however, that Hartford had paid its employees \$2,361 more per pupil in employee benefits than the State average from 1980-1992, *id.* at ¶ 107, and spent approximately \$2,000 less per pupil during that time period on a) pupil and instructional services, b) textbooks and instructional supplies, c) library books and periodicals, and d) equipment and plant operations than the State average for these items. *Id.* at ¶106. Although Hartford's net current expenditures ranked 20th out of 169 cities and towns in Connecticut in 1991-92, according to the State Department of Education's expenditure data, Plaintiffs' expert concluded that when these figures were calculated to measure proportional need and to exclude special grants, Hartford ranked 133rd out of 169. See GARY NATRIELLO, A DESCRIPTIVE STUDY OF THE EDUCATIONAL RESOURCES OF HARTFORD PUBLIC SCHOOLS AND DISPARITIES WITH OTHER DISTRICTS 157-158 (1992).

110. The trial court in *Sheff v. O'Neill*, No. 89-0360977S, 1995 WL 230992 (Conn. Super. Ct. April 12, 1995), held "that the plaintiffs have failed to prove that 'state action is a direct and sufficient cause of the conditions' which are the subject matter of plaintiffs' complaint... and that accordingly the constitutional claims asserted... need not be addressed." *Id.* at *29. The Supreme Court majority concluded that "[w]e need not decide, in this case, the extent to which substantial socioeconomic disparities in educational resources would themselves be sufficient to require the State to intervene in order to equalize educational opportunities." *Sheff*, 238 Conn. at 25, 678 A.2d at 1281.

111. See discussion *infra* at notes 62-63.

other state court fiscal equity litigations, indicates that extensive judicial deference to the legislature at the remedial stage does not lead to long-term solutions to these deep-rooted social problems.

III. EFFICACY AND ENGAGEMENT: A NEW REMEDIAL APPROACH

Examples of successful remedies in some federal school desegregation situations and promising results in certain state fiscal equity cases indicate that, contra the critics of judicial activism, courts can promote effective social reform.¹¹² On the other hand, the lack of meaningful desegregation in many major cities¹¹³ and the fact that many institution-

School inequality between suburbia and central city crucially reinforces racial isolation in housing, and the resulting segregation of the schools consistently inhibits progress toward funding a therapeutic answer for the elimination of school inequality. If we are to exorcise the evils of separateness and inequality, we must view them together, for each dimension of the problem renders the other more difficult to solve—racially separate schools inhibit elimination of school segregation.

John Silard & Barrie Goldstein, *Toward Abolition of Local Funding in Public Education*, 3 J. LAW & EDUC. 307, 324 (1974).

112. A 1987 federal government study of school desegregation examined all school districts with 50,000 or more students and a sample of districts with 15,000 to 50,000 students, 125 districts in all. See F. WALSH AND A. LIGHT, NEW EVIDENCE OF SCHOOL DESEGREGATION, U.S. COMMISSION ON CIVIL RIGHTS CLEARINGHOUSE PUBLICATION 92 (1987). The study not only found significant desegregation achievements, but also concluded that court-ordered desegregation plans were crucial to that success. For example, the defendant school district in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), showed the greatest degree of desegregation, while all ten of the most improved districts had "adopted one or more desegregation plans," most court-ordered. *Id.* at 40-41, Table 13. A separate list of the ten most integrated school districts by the mid-1980s included districts under court-ordered plans, such as Columbus, Ohio, see *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979), Wilmington-New Castle, Delaware, see *Buchanan v. Evans*, 423 U.S. 963, *aff'g mem.*, 393 F. Supp. 428 (D. Del. 1975), and Pasadena, California, see *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976). See also David R. James, *City Limits on Racial Equality: The Effects of City-Suburb Boundaries on Public School Desegregation, 1968-1976*, 54 AM. SOC. REV. 963, 969-70, 978 (1989) (finding that "court intervention had a strong desegregative effect"); Armor, *supra* note 62, at 208 ("... there is more racial balance and more interracial exposure than there would have been without any court interventions"); James S. Liebman, *Desegregating Politics: "All-out" School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1465-69 (1990) (discussing many places where desegregation has succeeded or is in progress) [hereinafter "Liebman"].

More recently, federal courts have recounted successful desegregation efforts in their opinions granting motions to terminate court jurisdiction over school districts that they have supervised for decades. See, e.g., *Arthur v. Nyquist*, 904 F. Supp. 112 (W.D.N.Y. 1995); *Keyes v. Sch. Dist. No. 1*, 902 F. Supp. 1274 (D. Col. 1995); *Coalition to Save Our Children v. State Bd. of Educ. of Delaware*, 901 F. Supp. 784 (D. Del. 1995).

See discussion, *infra* notes 130-133 regarding promising fiscal equity remedies in Kentucky and Kansas.

113. See Liebman, *supra* note 112, at 1470-79 (discussing places, including New York City,

al reform litigations have resulted in repeated non-compliance motions and are still on the active dockets of the federal and state courts, without satisfactory resolution, two decades or more after they were initiated,¹¹⁴ indicates that the courts' remedial efforts have not been consistently or sufficiently successful.

The mixed record of success in both federal and state institutional reform litigations stems, we believe, not from any inherent institutional incapacity, but rather from the lack of doctrinal clarity and from a reluctance to utilize fully the courts' inherent institutional strengths. Federal desegregation doctrine fails to emphasize consistently the need for effective results, while state courts defer excessively to the legislative or executive branches.

Both of these shortcomings can be ameliorated, we believe, by a remedial approach which clearly emphasizes the need for effective results,¹¹⁵ and does so in a manner that is appropriately respectful—but

Chicago, Philadelphia, Detroit, Los Angeles, and Atlanta where desegregation is "not alive"). For case studies of substantial public resistance to desegregation decrees in a number of major urban areas, see *THE LIMITS OF JUSTICE: THE COURT'S ROLE IN SCHOOL DESEGREGATION* (Howard I. Koladner and James J. Fishman ed. 1978).

114. See, e.g., *Missouri v. Jenkins*, 115 S. Ct. 2038, 2042 (1995) (initiated in 1977 and first remedial order issued in 1985 in *Missouri v. Jenkins*, 639 F. Supp. 19 (W.D. Mo.), *aff'd*, 807 F.2d 657 (8th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987)); *Brown v. Board of Educ.*, 978 F.2d 585 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2994 (1993) (initiated in 1951 by an African-American parent whose 8 year-old was bused twenty miles to a segregated school and continued by that former student on behalf of her two children in *Brown III*, *Brown v. Board of Educ.*, 84 F.R.D. 383 (D. Kan. 1979)); *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist. No. 1*, 56 F.3d 904 (8th Cir. 1995) (first decided in 1957 in *Aaron v. Cooper*, 143 F. Supp. 855 (E.D. Ark.) and liability for continuing segregation expanded to include 2 adjacent school districts in 1984 in *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 584 F. Supp. 328 (E.D. Ark.)); *Abbott v. Burke*, 643 A.2d 575 (N.J. 1995) (latest iteration of litigation initiated in 1973, as *Robinson v. Cahill*, 303 A.2d 273); *Campbell County Sch. Dist. v. State*, 907 P.2d 1238 (Wyo. 1995) (latest iteration of litigation initiated in 1971 as *Sweetwater County Planning Comm. for Organization of Sch. Dist. v. Henkel*, 491 P.2d 1234 (Wyo. 1971)).

One commentator has argued that the court's role in major social reform has been overstated and that desegregation and other major social reforms were affected by a broad range of political, social, and economic variables beyond the court's intervention. Gerald N. Rosenberg, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991). See also Michael J. Klarman, *The Puzzling Resistance of Political Process Theory*, 77 VA. L. REV. 747, 805-13 (1991) (arguing that emergence of a national political coalition, rather than court decisions, led to the demise of school segregation in the South); William A. Taggart, *Redefining the Power of the Federal Judiciary: The Impact of the Court-Ordered Prison Reform on State Expenditures for Correction*, 23 L. & SOC'Y REV. 241, 166 (1989) (finding that "courts have played a limited, if sometimes significant, role in shaping state expenditures").

115. Federal desegregation doctrine, in order to achieve this goal, would, of course, need to reconsider *Milliken* which, in essence, precludes meaningful desegregation for most large metro-

not excessively deferential—to the functions and prerogatives of the legislative and executive branches. When dealing with highly controversial constitutional values that implicate core democratic values, courts also need to take account of and engage the public-at-large in the formulation and implementation of substantive remedial guidelines. Thus, a remedial doctrine should be based on principles of both efficacy and engagement.

A. *Efficacy*

Although separation of powers concerns must, of course, be respected in the development of effective remedies, separation of powers should not be viewed in rigid, negative terms. The central fear of the framers of the Constitution was not a tight compartmentalization of responsibilities, but rather the avoidance of excessive concentration of power in one of the political branches. As James Madison put it, the key issue was whether “the whole power of one department is exercised by the same hands which possess the whole power of another department.”¹¹⁶

An appropriate separation of powers perspective, therefore, is one that respects the differing functional domains of the three branches of government and promotes among them a sustained “colloquy”¹¹⁷ on effective problem solving mechanisms. An appropriate colloquy would build on the insights of comparative institutional analysis¹¹⁸ which postulates that each of the three branches of government has specific insti-

politan areas. The Connecticut Supreme Court in *Sheff*, by invalidating de facto segregation in the Hartford metropolitan area, has, in essence, rendered the *Milliken* doctrine inoperative in the State of Connecticut and opened the way for the development of thorough-going, effective desegregation remedies.

116. THE FEDERALIST NO. 47 302-03 (James Madison) (Clinton Rossiter ed. 1961). See also THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 195 (1787) (“The concentrating of these in the same hands is precisely the definition of despotic government.”); Sharp, *The Classical American Doctrine of “The Separation of Powers”* 2 U. CHI. L. REV. 385 (emphasizing the “blending of powers among the three branches”); Edward Levi, *Some Aspects of the Separation of Powers*, 76 COLUM. L. REV. 371, 372-75 (fear of legislative, not judicial power, was framers’ prime concern).

117. See ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1962). Friedman, *supra* note 65, at 772, similarly calls for a remedial regime of “cooperation of powers” which would have “the branches work together to some extent.” For a discussion of a colloquy between state courts and legislatures on statutory issues, see Shirley S. Abrahamson & Robert L. Hughes, *Shall We Dance? Steps for Legislators and Judges in Statutory Interpretation*, 75 MINN. L. REV. 1045 (1991).

118. See discussion, *supra* note 36 and accompanying text.

tutional strengths and weaknesses in regard to remedial problem solving. The focus, therefore, should not be on particular judicial shortcomings, but on how the strengths of each of the branches can be jointly brought to bear to solve critical social problems.

In regard to remedying divisive social conflicts, the courts' institutional strength lies in their principled orientation and long-term staying power; the legislature's strong suit is its flexibility in establishing a social policy agenda and its comprehensive policy-making capability, and the executive's strength lies in its range of resources and capacity to respond directly to practical implementation needs.¹¹⁹ Thus, the proper role of the courts is to explicate and apply to remedial issues the constitutional values at issue and to establish stable implementation and monitoring processes that will ensure that these values are put into effect. The legislature's role is to develop specific implementation approaches which will effectuate the constitutional values in a manner that is consistent with other social needs and priorities, and the executive's function is to administer the implementation plan in a manner consistent with the constitutional values and legislative criteria.

In the context of an institutional reform litigation, the courts' overarching commitment to achieving effective results is essential. Left to their own devices, legislatures and executive agencies, even if they acknowledge the existence of inequities or inadequacies, are not likely to provide meaningful relief, since they tend to be answerable politically to the established power interests that benefit from the status quo.¹²⁰

119. For a detailed discussion of the comparative institutional strengths of the three branches of government, see MICHAEL A. REBELL & ARTHUR R. BLOCK, EQUALITY AND EDUCATION, *supra* note 36. See also ORFIELD, ET AL., *supra* note 53, at 350 ("Courts have some special strengths in removal from politics and the ability to stay with a complex issue long enough to implement change."); J. W. HURST, DEALING WITH STATUTES 2-3 (1982) (discussing breadth of legislative jurisdiction); Neil K. Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366, 371-372 (discussing flexibility and resources of the political branches); CHARLES LINDBLOOM, THE INTELLIGENCE OF DEMOCRACY (1965) (discussing the "mutual adjustment" mode of legislative decision making).

120. In *Levittown v. Nyquist*, 439 N.E.2d. 359 (N.Y. 1982), the New York Court of Appeals held that fiscal equity reform, which it acknowledged was clearly needed was a matter "peculiarly appropriate for formulation by the Legislative body." *Id.* at 369. After the trial court had declared the existing system unconstitutional, the Legislature had established a commission which had presented a detailed report and recommendations in February 1982, four months before the Court of Appeals' decision reversing the lower court's orders. Following the high court's reversal, the Legislature disbanded the Commission and ignored its recommendations. See MICHAEL A. REBELL ET AL., FISCAL EQUITY IN EDUCATION: A PROPOSAL FOR A DIALOGIC REMEDY, 71-72 (1995) (on file with authors).

Indeed, early reactions to the Court's broad deferral order in *Sheff* are not encouraging in

Thus, once a constitutional value has been identified, it is the courts that must initiate and sustain an effective colloquy. In doing so, the courts should provide the legislative and executive branches with clear guidelines on expected directions and a workable framework for organizing and monitoring the results, but the judges should not fully formulate the substance of the remedy or micro-manage its implementation.¹²¹ Awareness of the courts' seriousness of purpose in pursuing meaningful results can induce the other two branches to carry out these functions in an effective manner.

The guiding principles which courts need to articulate at the remedial stage of an institutional reform litigation are related to, but distinct from, the constitutional or statutory principles announced at the liability stage of the litigation. These "remedial principles" should further explicate the abstract concepts, render them operational, and sometimes should include concrete guidelines for legislative and executive action. In addition, courts should articulate a specific implementation framework to ensure that the necessary reforms are promptly devised and effectively put into practice. The implementation framework should delineate the procedures and methodologies that the court uses to supervise the remedial process, and it should include the specific timelines. Many courts have, in the past, articulated such remedial principles and established such implementation frameworks. What has generally been lacking, however, is a remedial doctrine that consistently develops and applies these concepts and does so in a context that emphasizes efficacy in terms of concrete results.

An example of the articulation of a set of remedial principles is the seven-part definition of an "efficient education" set forth by the Kentucky Supreme Court in *Rose v. Council for Better Education*. After

this regard. Although Governor Rowland spoke strongly about obeying the Court's order and established a panel to develop recommendations for the 1997 legislative session, a number of legislators were reported to be strategizing to delay any response in hopes that the Court, after Chief Justice Peters' retirement, will reconsider or "soften the impact of the decision." Charges of "race-baiting" among legislators also quickly emerged. See Jonathan Rabinowitz, *Hartford School Integration Panel Formed: After 5-4 Ruling, [sic] Lawmakers Fear Stalling In Hopes of Reversal*, N.Y. TIMES, July 26, 1996, at B-2.

121. One commentator points out that:

Although . . . the legislature is properly entrusted to develop policies and allocate funds, this does not mean that the legislature is able to discern the constitutional parameters within which such decisions must be made. Positive constitutional guarantees support such parameters, and the judiciary is best able to define these parameters impartially.

Feldman, *supra* note 76, at 1087.

declaring that the State's public education system violated the education article of the state constitution, the Kentucky Supreme Court held that:

[A]n efficient system of education must have as its goal to provide each and every child with at least the seven following capacities:

- (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;
- (ii) sufficient knowledge of economic, social, and political systems to enable students to make informed choices;
- (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation;
- (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness;
- (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;
- (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and
- (vii) sufficient level of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.¹²²

122. *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 212 (Ky. 1989). See also *McDuffy v. Sec'y*, 615 N.E.2d 516, 554 (Mass. 1993) (citing with approval the *Rose* definition); *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 1378 (N.H. 1993). The New York Court of Appeals, in its recent decision in *Campaign for Fiscal Equity, Inc. v. New York*, 655 N.E.2d 661, 666 (N.Y. 1995), defined the "sound basic education" guaranteed by the state constitution in terms of "the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury." The Court further specified that "the State must assure that some essentials are provided," including "adequate physical facilities . . . minimal instrumentalities of learning... minimally adequate teaching of reasonably up-to-date curricula . . . by sufficient personnel adequately trained to teach those subject areas." *Id.* See also *Campbell Co. Sch. Dist. v. State*, 907 P.2d 1238, 1279 (Wyo. 1995) (setting forth for legislative consideration aspects of a "quality education" including small schools, uniform substantive curricula, appropriate provision for at-risk students, outcome standards and timely and meaningful assessment, based on trial testimony).

In the desegregation context, the U.S. Supreme Court articulated a number of important remedial principles in *Swann v. Charlotte-Mecklenberg Board of Education* when it stated that a) racial balance figures, but not racial quotas, may be used in a remedial order; b) that not every all black or all white school must be eliminated as an indispensable part of a remedial process of desegregation; c) attendance zones may be gerrymandered during the desegregation process; and d) busing may be used as part of a desegregation plan.¹²³

Swann also illustrates the use of concrete judicial guidelines for remedial follow-up by the other branches. After stating that racial balance figures, one race schools, gerrymandered attendance zones and busing may be used in desegregation plans, the Court indicated how each of these factors should be approached in practical terms. For example, in regard to racial balance figures, the Court held that:

The Constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole We see therefore that the use made of mathematical ratios was no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement.¹²⁴

Similarly, in regard to busing, the Court said that although “[n]o rigid guidelines as to student transportation can be given for the application to the infinite variety of problems presented in thousands of situations,” among the factors that should be weighed in any particular situation is whether “the time or distance of travel is so great as to risk the health of the children or significantly impinge on the educational process” and “the age of the students.”¹²⁵

Establishing an appropriate implementation framework was the central remedial concern of the U.S. Supreme Court in *Brown II*. Among the specific questions the Court posed to the parties for further briefing and argument at the end of *Brown I* were:

- a. Should this Court formulate detailed decrees in these cases;
- b. Should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;

123. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 22-29 (1971).

124. *Id.* at 24-25.

125. *Id.* at 29-31.

- c. Should this Court remand to the courts of first instance with directions to frame decrees in these cases, and, if so, what general directions should the decrees of this Court include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?¹²⁶

After extensive deliberation, the Court issued a decision in *Brown II* which rejected the first two possible judicial roles, formulating decrees on its own initiative or appointing a special master, and accepted the third approach of relying on the local federal district courts. Since that time, it has been the responsibility of the federal district courts to establish specific procedures for the creation of local district plans and for monitoring their implementation.¹²⁷ The district courts have adopted a wide variety of procedures to accomplish this mission. For example, the implementation framework adopted by the United States District Court for the Western District of North Carolina in the *Swann* case originally relied upon the defendant school board to propose a plan; when, after four opportunities, the board failed to submit an adequate document, the Judge appointed a national desegregation expert to advise the court. Once a final plan was adopted, the court established a specific time table for integration at each grade level and a procedure for considering modifications of the order during the implementation process.¹²⁸ In the Buffalo, New York desegregation case, by way of contrast, the court held dozens of hearings and meetings with the parties to help formulate a remedial plan, and later ordered the City to provide substantial additional funding to support the plan adopted by the Board of Education.¹²⁹

In regard to remedies in fiscal equity cases, as discussed above, state supreme courts generally establish a very loose implementation framework by vesting virtually untrammelled initial responsibility for formulating a remedial plan directly in the state legislature, while directing the trial court to retain jurisdiction to monitor the process with

126. See *Brown v. Bd. of Educ.*, 349 U.S. 294, 299 n.2 (1955).

127. The federal district courts have utilized a wide range of approaches for formulating local plans and overseeing their implementation, including the use of expert consultants, citizen panels, and monitoring committees. See discussion *infra* Part III. B.

128. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 311 F. Supp. 265, 269 (W.D.N.C. 1970).

129. See *Arthur v. Nyquist*, 547 F. Supp. 468 (W.D.N.Y. 1982).

limited guidance.¹³⁰ Some state courts, however, have devised specific, innovative mechanisms for formulating remedial plans. In Kansas, for example, the trial judge induced the parties to delay judicial proceedings pending legislative action,¹³¹ and invited the legislative and executive leaders to meet at an educational finance summit which he convened to discuss options for reform, with input from the State Board of Education.¹³² The October 1991 summit led to the formation of a Governor's Special Task Force and adoption of a comprehensive school finance reform statute in May 1992.¹³³

Although these examples illustrate how courts have articulated remedial principles and established implementation frameworks in some cases, the basic problem is that neither the federal nor the state courts tend to do so in a timely, consistent, and effective manner, and they have failed to provide legislatures, administrators, and lower courts with clear, purposeful guidance. Often the remedial principles they announce are limited in scope and/or they are issued years after their original liability decision, thus delaying effective implementation or allowing strong public resistance to develop.¹³⁴ In state fiscal equity cases, few

130. See discussion *supra* Part II.

131. See *Mock v. State*, No. 91-CV-1009 (Shawnee County District Court, slip op. (Oct. 14, 1991)). The Judge pressed the legislative and executive branches to enact a new school finance system by issuing an "Opinion of the Court on Questions of Law Presented in Advance of Trial" which strongly indicated that the then current school finance system would be found unconstitutional if the case proceeded to trial. For an analysis of Judge Bullock's opinion, see Phillip C. Kissam, *Constitutional Thought and Public Schools: An Essay on Mock v. State of Kansas*, 31 WASHBURN L.J. 474 (1992) (providing the slip opinion as an addendum to the article).

132. See CHARLES BERGER, *EQUITY WITHOUT ADJUDICATION: KANSAS SCHOOL FINANCE REFORM AND THE 1992 SCHOOL DISTRICT FINANCE AND QUALITY PERFORMANCE ACT 20* (May 19, 1996) (on file with the authors) [hereinafter "BERGER"].

133. School District Finance and Quality Performance Act, 1992 Kan. Sess. Laws, Ch. 280 (1996 Supp.). When the legislative process bogged down in the Senate in April 1992, the court held a pre-trial conference to remind the legislature and the executive that "the sole point in this case is *children* and their *right to an equal educational opportunity*," set a June 1 trial date, and raised the specter of closing the schools in the Fall of 1992. Berger, *supra* note 132 at 128. The content of the statute subsequently enacted followed closely the court's opinion with its focus on equity. See *Mock v. State*, No. 91-CV-1009, (Shawnee County District Court, slip op. October 13, 1991); KAN. STAT. ANN. §§ 72-6405 to -6440 (1995 Supp.). When the new state school finance system was challenged in *Unified Sch. Dist. No. 229 v. State*, 885 P.2d 1170 (Kan. 1994), the Kansas Supreme Court upheld the statute as constitutional in a unanimous opinion.

134. Lack of effective timelines has historically been a particular problem in federal desegregation cases, mainly because in *Brown II*, the U.S. Supreme Court's "all deliberate speed" adage failed to establish definite timelines for compliance actions. *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955). See also *Sheff v. O'Neill*, 678 A.2d 1267, 1290 (Conn. 1996). For a

appellate or trial courts have even attempted to establish clear implementation frameworks to guide legislative planning or administrative implementation. In deferring to state legislatures to formulate remedial plans, these state courts have also have tended to leave the timelines for compliance open-ended.¹³⁵

Deep-seated public opposition to desegregation, fiscal equity, and other highly controversial decisions undoubtedly has affected the courts' ability and willingness to ensure the implementation of effective remedies in these cases. Courts do not have unlimited political capital to expend and cannot consistently take stands that stir strong, sustained opposition.¹³⁶ Nevertheless, the courts can not, consistent with their role as articulators and guardians of constitutional values—and in order to maintain their own institutional integrity—be perceived as yielding to political resistance after they have articulated critical constitutional values. Moreover, courts can have substantial influence on public perceptions and public opinion and the stance they take can affect strongly the tides of public opinion.¹³⁷ We believe, therefore, that the courts need to acknowledge the importance of public opinion on these issues and to respond to that reality by devising better ways to understand and

detailed discussion of the pros and cons of the *Brown II* decision, see Gewirtz *supra* note 9, at 609-26.

135. *Edgewood* was an exception which proves the rule. See *Edgewood I*, 777 S.W.2d at 391. The Texas Supreme Court there established a tight, 7-month timeframe for legislative action, which the trial court later extended on its own initiative, an action which provoked the Supreme Court's wrath. See *Edgewood II*, 804 S.W.2d 491, 498 (Tex. 1991). The court's tight time requirements led to relatively prompt legislative action, although the Legislature's first two attempts at compliance were invalidated by the court before the third one was upheld. 893 S.W.2d 450 (Tex. 1995). Follow-up compliance decisions tend to contain specific timelines. See, e.g., *Herschler*, 606 P.2d at 340 (3 years); *Campbell County Sch. Dist. v. State*, 907 P.2d 1238, 1280 (Wyo. 1995) (1½ years); *Abbott v. Burke*, 575 A.2d at 410 (15 months).

136. See, e.g., ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* (1961) (relating the U.S. Supreme Court's strength to its sensitivity to deep-rooted popular perspectives); Colin S. Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 104 (1979) ("the very source of a judge's political power is ultimately its limitation. A judge's actions must conform to that narrow band of conduct considered appropriate for so anti-majoritarian an institution."); SUNSTEIN, *supra* note 39, at 178 (arguing that "constitutional law is a mixture of substantive principle and institutional constraint").

137. See e.g., Sperlberg, *supra* note 61, at 1764-65; *Little Rock Sch. Dist. v. Pulaski County Special Sch. Dist.*, 584 F. Supp. 328, 330-35 (E.D. Ark. 1984) (chronicling impact of *Brown I* on public officials and public opinion in Little Rock). See also *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). In *Roberts*, the United States Supreme Court upheld the Minnesota Supreme Court's ruling that the local Jaycee chapter could not deny women full membership under that State's human rights law. Although the ruling was effective only in Minnesota, the national Jaycees immediately changed their bylaws to allow women to become members. See *Jaycees Vote to Admit Women to Membership*, N.Y. TIMES, Aug. 17, 1984, at A8.