Michigan Journal of Race and Law

Volume 15

2010

Sliding Towards Educational Outcomes: A New Remedy for High-Stakes Education Lawsuits in a Post-NCLB World

Christopher A. Suarez
Yale Law School

SLIDING TOWARDS EDUCATIONAL OUTCOMES: A NEW REMEDY FOR HIGH-STAKES EDUCATION LAWSUITS IN A POST-NCLB WORLD

*Christopher A. Suarez**

Sheff v. O'Neill *ushered in a new wave of education reform litigation that may challenge the constitutionality of* de facto *segregation under state education clauses, but its remedy has been inadequate. This Note proposes a new desegregation remedy—the sliding scale remedy—to address socioeconomic isolation in this unique constitutional context. The remedy employs varying degrees of equity power depending on students' academic outcomes. It balances concerns over local control and separation of powers with the court's need to effectuate rights, establishes a clear remedial principle, and ensures that states and school districts focus on students as they implement remedies.*

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* Yale Law School, J.D. Candidate 2011; Massachusetts Institute of Technology, S.B. 2006. My thanks to Professor John Simon for his supervision of this Note; to Christopher Leone of the Hartford School Choice office for his insights and comments; and to Jane Metcalf and the staff of the *Michigan Journal of Race & Law* for their excellent editorial assistance.

INTRODUCTION

After over fifty years of litigation meant to correct instances of de jure segregation, the rise of de facto segregation has rendered the legacy of *Brown*[1] all but meaningless. In 1996, however, a new frontier opened up in the battle for educational equity. For the first time, a court ruled that de facto segregation could violate a state constitution's education clause.[2] The Connecticut Supreme Court held in its historic *Sheff v. O'Neill* decision that extensive levels of ethnic and racial isolation in Hartford's public schools unconstitutionally deprived students of substantially equal educational opportunities.[3] Although the state constitution entitled the plaintiffs to relief, the court politely punted the sticky issue, "afford[ing] the legislature, with the assistance of the executive branch, the opportunity, in the first instance, to fashion the remedy that will most appropriately respond to the constitutional violations that we have identified."[4] This raises a key question: will *Sheff* fulfill its constitutional legacy, or will it simply be a *Brown II* déjà vu?[5]

Thirteen years after the *Sheff* ruling, little has changed in Hartford. Hartford's low-income and minority schoolchildren continue to struggle academically; the number of children attending schools with reduced levels of racial and economic isolation is far below plaintiffs' current 2013 goal;[6] and the state legislature has never mandated that any of Hartford's surrounding towns take action. All remedial efforts thus far have been voluntary, and the state has not taken full responsibility for its students' educational outcomes.[7]

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1. Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding that de jure segregation of students in schools is unconstitutional and that separate is inherently unequal).

2. *See* Sheff v. O'Neill, 678 A.2d 1267 (Conn. 1996).

3. *Id.*

4. *Sheff*, 678 A.2d at 1271.

5. *See* Brown v. Bd. of Educ. (II), 349 U.S. 294 (1955) (holding that district courts needed to act with "all deliberate speed" to effectuate the *Brown* ruling).

6. *See infra* Part II.

7. *Cf.* William S. Koski, *Educational Opportunity and Accountability in an Era of Standards-Based School Reform*, 12 STAN L. & POL'Y REV. 301 (2001) (arguing that student and

Connecticut is not alone.[8] Throughout the country, a "reluctance to utilize fully the courts' inherent institutional strengths" has resulted in a "mixed record of success in both federal and state institutional reform litigations."[9] Although the *Sheff* plaintiffs and their attorneys have "vowed to continue their legislative efforts to force greater changes in the racial and economic segregation of Connecticut's schoolchildren,"[10] this will-power has not been enough. These problems need new remedies.[11]

When *Sheff* was decided in 1996, the No Child Left Behind Act (NCLB) was five years away from passage.[12] Although some states had made preliminary efforts to measure the educational outcomes of their students through standardized tests,[13] there was not a nationwide push for accountability.[14] Back then, the tests were not "high-stakes" and states felt no meaningful pressure to adopt them.[15]

Today, however, we live in a world of standards-based accountability. All states currently provide tests to gauge the academic progress of their students,[16] and these tests provide data that informs both public policy and

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school accountability to the state is not enough and that states and schools should be held similarly accountable to students, parents, and communities).

8. *See, e.g.*, Montoy v. State, 138 P.3d 755 (Kan. 2006); Campaign for Fiscal Equity v. State, 861 N.E.2d 50 (N.Y. 2006). In these school funding lawsuits, the high court in each state deferred to their respective legislatures to prescribe remedies.

9. Michael A. Rebell & Robert L. Hughes, *The Remedies Problem Posed by* Sheff v. O'Neill*—and a Proposed Solution*, 29 CONN. L. REV. 1115, 1144 (1997).

10. DOUGLAS S. REED, ON EQUAL TERMS: THE CONSTITUTIONAL POLITICS OF EDUCATIONAL OPPORTUNITY 170 (2001).

11. As one commentator recently noted, "[w]e need to rethink the kinds of remedies that might work in the education context." Adam Shinar, *School Finance Litigation: A Never-ending Play* LAW AND EDUCATION BLOG, Oct. 29, 2009, *available at* http://lawandeducation.wordpress.com/2009/10/29/school-finance-litigation-a-neverending-play/.

12. *See* The No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002).

13. *See* ERIC A. HANUSHEK & ALFRED A. LINDSETH, SCHOOLHOUSES, COURTHOUSES, AND STATEHOUSES: SOLVING THE FUNDING-ACHIEVEMENT PUZZLE IN AMERICA'S PUBLIC SCHOOLS 72 (2009) (graphically demonstrating the gradual increase in state accountability systems from 1993 onward).

14. *Cf.* Michael Heise, *Adequacy Litigation in an Era of Accountability*, SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY 262, 267 (2007) ("When many states initiated efforts to articulate desired student academic proficiency in the early- and mid-1980s they did so without the specter of federal liability under NCLB or exposure to adequacy lawsuits.").

15. *Cf.* Andrew Rudalevige, *Adequacy, Accountability, and the Impact of the No Child Left Behind Act*, *in* SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY 243, 248 (Martin R. West & Paul E. Peterson eds., 2007) (noting that NCLB is about measuring results and that NCLB's forerunner, the Improving America's Schools Act, was executed far more slowly at the state level than NCLB).

16. *See, e.g.*, FREDERICK M. HESS & MICHAEL J. PETRILLI, NO CHILD LEFT BEHIND 31 (Peter Lang Primer ed., 2006) (highlighting that NCLB requires all states to create academic standards and devise tests that assess those standards).

the law.[17] While many scholars have criticized the accuracy and legitimacy of standardized tests, and NCLB has flaws that I will not thoroughly discuss here,[18] standardized testing provides courts with a tool to ensure educational accountability.

Even in this post-NCLB world, however, the current incarnation of the *Sheff* remedy does not focus on educational outcomes—the best proxy for educational opportunity[19]—at all. Instead, it provides benchmark targets that attempt to minimize the racial, ethnic, and economic isolation of Connecticut students.[20] Thus, the remedy has focused on the means and not the desired ends of the litigation.[21] This has been a similar problem in school finance lawsuits, where court remedies have focused on

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17. *See* Heise, *supra* note 14, at 267 (noting that NCLB obligates all states to participate in the National Assessment for Educational Progress (NAEP) to receive federal funds, and that this mandate provides a check against state efforts to lower state-level standards).

18. The most significant flaw in NCLB for the purposes of this Note is the fact that it allows states significant flexibility to choose their own testing and accountability mechanisms. *See* HESS, *supra* note 16, at 31–32. The problem with this is that it has created a "race to the bottom" in which some states have lowered their academic standards to meet academic requirements. *See* Marissa Silber, *A Response to Failed Implementation: Why No Child Left Behind Has Not Been Reauthorized*, prepared for the Midwest Political Science Association (Apr. 2009), at 22–23. If states employ such tactics, it may undermine the usefulness of the remedy proposed in this Note unless NCLB is strengthened such that state standards are normed against a uniform, national standard (such as those assessed in the NAEP).

19. *See infra* Part I. There is significant debate on the question of whether or not equal educational opportunities are the same as equal educational outcomes. Although some definitions of equal educational opportunity focus on equality of inputs to the educational system (labor, equipment, capital), "[m]ore recently, attention is turning to outputs (e.g., what schools produce, such as types of achievement and graduates) and outcomes (e.g., lifetime accomplishments, such as earnings or health status) that are variously related to what schools do." *See Robert Berne & Leana Stiefel, Concepts of School Finance Adequacy: 1970 to the Present, in* EQUITY AND ADEQUACY IN EDUCATION FINANCE: ISSUES AND PERSPECTIVES 11–12 (Helen F. Ladd et al. eds., 1999). Courts have also recognized the connection between equal educational opportunity and student outcomes. In a New Jersey school finance case, the court "sought to equalize not money, but achievement." REED, *supra* note 10, at 84–85.

20. *See* Stipulation and Order, Sheff v. O'Neill, No. X03-89-0492119S (New Britain Sup. Ct. Jan. 22, 2003) [hereinafter Phase I Stipulation] (providing a timetable for reducing racial, ethnic, and economic isolation so that at least 30 percent of minority students in Hartford will be in less isolated conditions by 2007); *see also* Stipulation and Proposed Order, Sheff v. O'Neill, No. HHD-X07-CV89-4026240-S (Hartford Sup. Ct. April 4, 2008) [hereinafter Phase II Stipulation] (noting that the phase I settlement goal was not met and increasing the goal of reduced isolation to 41 percent of Hartford students by 2013).

21. Eric Hanushek, a frequent critic of school finance litigation, argues that "[t]he ultimate objective of an adequacy remedy is to help children, who are the focus of the case because either their schools lack resources or their achievement is unacceptable." HANUSHEK, *supra* note 13, at 145. Resources provided to school districts as a result of court victories are merely means to the end of providing better education to kids. *Id.*

specific funding levels.[22] In addition to sidetracking the courts' remedial focus on educational outcomes, these means-focused remedies exacerbate separation of powers concerns as they force courts to search for the "right" amounts of funding or the "right" racial and socioeconomic balance of students.[23] As I argue in this Note, an effective remedy in any school litigation case must be as ends-focused—through the use of student performance on standardized tests, for example—as it is means-focused.[24]

One of the political challenges of the *Sheff* ruling is that it is premised on the assumption that quality, integrated schools will promote academic achievement among all students. Many scholars have found this to be true.[25] However, many Connecticut citizens—and particularly suburban parents—do not believe that an infusion of low-income, minority children into their school districts will promote the academic achievement of their children.[26] Thus, an effective remedy should focus on the achievement of suburban students as much as it focuses on the achievement of disadvantaged urban students. From a constitutional standpoint, moreover, effective remedies should ensure the academic achievement of all students. This is the only way to ensure that remedies will be both politically and legally tenable.

Using *Sheff* as a case study, this Note proposes a new remedial framework for courts facing education reform lawsuits. I call this framework the sliding scale remedy.[27] The framework acknowledges that state legislatures and executive actors should initially be empowered to design their own remedies,[28] but it also structures threats to use equity power when constitutional standards are not met.[29] These threats are grounded in

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22. *See* Robynn K. Sturm & Julia A. Simon-Kerr, *Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education*, at 29–31 (2008), *available at* http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1078&context=student_papers.

23. *See id.*

24. *Cf.* Koski, *supra* note 7, at 315 (concluding that courts should craft remedies that "promise to improve schools and the teaching and learning that goes on inside those schools").

25. *See* discussion *infra* Part IV.C. This parallels an assumption in school funding litigation—in particular, the assumption that "money matters."

26. *See, e.g.*, KATHRYN MCDERMOTT, CONTROLLING PUBLIC EDUCATION: LOCALISM VERSUS EQUITY 28 (1999) (noting that parents in New Haven's surrounding suburbs were concerned about the "contagion from New Haven" spreading to their districts).

27. For a basic overview of the sliding scale remedy, *see infra* Part II.A.

28. *See, e.g.*, Sturm, *supra* note 22 (discussing how separation of powers concerns have threatened to drive state courts out of education reform lawsuits due to threats of funding-focused remedies).

29. *But see* the Texas *Edgewood* litigation, in which the court's injunctive threat was not graduated. Rather, it was a simple threat to shut down the entire public school system. *Id.* at 43. This threat was never carried out despite the court's determination that the school system was inadequate on three separate occasions. *Id.*

a clear remedial principle—academic outcomes.[30] Although the remedy discussed in this Note is specific to efforts that seek to improve academic outcomes through ethnic and socioeconomic integration, the principles behind the remedy can apply to all forms of education litigation.[31]

Regardless, some have argued that the future of education lawsuits will eventually be patterned after *Sheff*.[32] In particular, "*Sheff* could inspire similar lawsuits against other states in which districts are segregated into rich and poor, but have been exempt from desegregation litigation due to there being no history of de jure segregation."[33] At least twenty-eight states have acknowledged that the right to an "adequate" or "equitable" education exists in their states, making those states potential breeding grounds for future *Sheff*-like suits.[34] In fact, two such suits have concluded since the filing of the initial *Sheff* complaint.[35] A recent study of education adequacy litigation, moreover, argues that separation of powers concerns may be stemming the tide of adequacy litigation challenges which primarily emphasize resources and funding.[36] Although challenges to school

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30. Academic outcomes, in fact, were one of the primary concerns of the *Sheff* plaintiffs. *See* Sheff *Plaintiffs' Statement of Principles* (Sept. 1996) (on file with author).

> The plan must include an accountability system for monitoring implementation of the *Sheff* remedy that assesses efforts, inputs *and results*, including the academic expectations, commitment to excellence and sensitivity of staff, but ultimately measures the *purpose of the remedy*—school quality and school integration—*by student performance in academic competence and social attitudes.* (emphasis added). *Id.*

31. *See infra* Part II.C. (addressing how the sliding scale remedy could apply within the school finance context).

32. *See* Stephen J. Caldas & Carl L. Bankston III, *A Re-Analysis of the Legal Political, and Social Landscape of Desegregation from* Plessy v. Ferguson *to* Parents Involved in Community Schools v. Seattle School District No. 1, 218 B.Y.U. ED. & L.J. 217, 249–50 (2007); *see also* RICHARD D. KAHLENBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 171 (2001) (arguing that the *Sheff* ruling is a highly relevant precedent for the economic segregation argument because it departs from the de jure segregation requirements of racial segregation challenges); Molly S. McUsic, *The Future of* Brown v. Board of Education*: Economic Integration of the Public Schools*, 117 HARV. L. REV. 1334, 1365 (2004) (arguing that one of the most promising legal avenues to attain economic integration will be through the use of modified school integration remedies); *See* James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 308–09 (1999) (noting that school "finance" plaintiffs should consider arguing for socioeconomic or racial integration, or both).

33. Caldas, *supra* note 32, at 249.

34. National Access Network, "Equity" and "Adequacy" School Funding Court Decisions (June 2008), *available at* http://www.schoolfunding.info/litigation/equityandadequacytable.pdf.

35. *See* Paynter v. State, 797 N.E.2d 1225 (N.Y. 2003) (holding that plaintiffs had failed to state a claim under the state constitution's education article when arguing that poverty and minority concentration deprived plaintiffs of adequate educational opportunity). In *NAACP v. State*, a Minneapolis case, the parties reached a settlement agreement calling for an inter-district transfer plan to relieve racial and economic isolation. *Minneapolis Branch of the NAACP v. State*, No. 95-014800 (Minn. Dist. Ct. 1995).

36. *See* Sturm, *supra* note 22.

funding systems likely will continue for the foreseeable future,[37] the study argued that "plaintiffs must find a way to recharacterize both the right and the remedy so that they cannot be boiled down to a demand for increased funding."[38] Assuming that *Sheff*-like lawsuits become the wave of the future, the use of sliding scale remedies will become increasingly relevant.

This Note proceeds as follows. In Part II, the current *Sheff* remedy is discussed in detail. Part III introduces the sliding scale remedy proposed in this Note. Part IV then addresses several challenges that opponents of the sliding scale remedy could raise. These challenges include the remedy's effect on local control of school districts, issues of White flight that may result from the remedy's implementation, the validity of the "harm and benefit" thesis that posits that desegregated schools promote academic outcomes, and federal legal challenges to the remedy from cases such as *Milliken* and *Parents Involved*. Part V discusses several unique advantages of the sliding scale remedy—the remedy establishes a clear remedial principle for future courts, maximizes the use of the court's agenda-setting power, and re-centers the focus of the court remedy on students as it reduces moral hazard problems both within school districts and the state.

I. THE REMEDY IN THE *SHEFF* CASE

The *Sheff* litigation arose in response to a climate of severe inequity in Connecticut. In 1988, a committee appointed by Connecticut's education commissioner released *A Report on Racial/Ethnic Equity and Desegregation in Connecticut's Public Schools*.[39] This report noted that "two Connecticuts" had emerged—one that boasted the highest per capita income in the United States yet contained two of its top ten poorest cities.[40] In response to this report, a citizens' group called the Connecticut

37. Recent cases decided by state supreme courts indicate that school funding challenges remain relevant in state constitutional jurisprudence. *See, e.g.*, Lobato v. State, 218 P.3d 358, 370 (Colo. 2009) No. 08SC185 (Co. Oct. 19, 2009), (holding that plaintiffs may challenge the constitutionality of the state's school funding system). The *Lobato* court specifically noted that "[i]mportant differences exist between federal and state constitutional law on judicial power and the separation of powers." *Id.* at 29. Another school funding challenge, in fact, was recently decided in the Connecticut Supreme Court. *Connecticut Coalition for Justice in Educ. Funding v. Rell*, No. 18032 (Conn. Mar. 30, 2010) (holding that a right to both an equitable and "suitable" education exists in the Connecticut constitution and that plaintiffs are entitled to challenge a school funding system to the extent that it does not protect those rights).

38. Sturm, *supra* note 22, at 51–52. Socioeconomic integration is suggested as one such non-monetary remedy. *Id.* at 52.

39. CHRISTOPHER COLLIER, CONNECTICUT'S PUBLIC SCHOOLS: A HISTORY, 1650–2000, 635 (2009).

40. *Id.*

Coalition for Educational Equity emerged and plaintiffs banded together to file the *Sheff* lawsuit.[41]

The plaintiffs' complaint emphasized the negative impact segregated conditions could have on all children—Black, White, or Hispanic. The complaint underscored the negative impact of racial isolation, localized and concentrated poverty, and lack of academic attainment on children throughout the Hartford region.[42] Indeed, plaintiffs from the more affluent town of East Hartford were also represented because, as the complaint noted, "the racial, ethnic, and economic isolation of Hartford metropolitan school districts [deprives those children] of the opportunity to associate with, and learn from, the minority children attending school in the Hartford school district."[43] The Connecticut Supreme Court ultimately agreed that these conditions violated the Connecticut Constitution. The Court held that, since "the state has an affirmative obligation to monitor and to equalize educational opportunity,[44] the state's awareness of existing and increasing severe racial and ethnic isolation imposes upon the state the responsibility to remedy 'segregation . . . because of race [or] . . . ancestry. . . .' "[45]

As previously noted, however, the *Sheff* majority deferred entirely to the state legislature to construct a remedy.[46] In response, the Connecticut General Assembly produced a remedy that emphasizes voluntary school choice between Hartford and its surrounding school districts. The legislation was codified in Public Act 97-290,[47] and has since been supplemented by two settlement agreements.[48] The original legislation provided for a "state-wide inter-district public school attendance program,"[49] which would later be called the Open Choice program. This program allows students from Hartford to attend suburban schools on a space-available basis. The legislation also called for the creation of other programs such as inter-district magnet schools and other after-school and weekend programs that allow students to attend schools that are less ethnically and racially isolated.[50] Although Theodore Sergi, the commissioner

41. *Id.* at 636.

42. *Id.* at 640.

43. Wesley W. Worton, John Brittain et al., *Complaint in Sheff v. O'Neill*, EQUITY & EXCELLENCE IN EDUC., Spring 1994, at 5 (internal quotations omitted).

44. In *Horton v. Meskill*, 376 A.2d 359 (Conn. 1966), the Connecticut Supreme Court first expressed that a right to an equitable education exists under the Connecticut Constitution.

45. *Sheff* 678 A.2d at 1282–83 (internal quotations omitted).

46. *Id.* at 1271.

47. An Act Enhancing Educational Choices and Opportunities, Pub. Act No. 97-290, 1997 Conn. Acts 1113 (Spec. Sess.) (codified as amended in scattered sections at Conn. Gen. Stat. § 10-4 et seq. (2009)).

48. *See* Phase I Stipulation, *supra* note 20; Phase II Stipulation, *supra* note 20.

49. 1997 Conn. Pub. Acts 97-290 § 3(b).

50. 1997 Conn. Pub. Acts 97-290 § 2(a).

of education, noted that "[i]t would be bad public policy ... to forget about our responsibility for students learning how to read, write, and compute as we worry about the responsibility [for promoting racial and ethnic integration],"[51] the legislation does not enumerate specific academic outcomes or integration requirements that must be met.[52]

The programs proposed in the legislation were limited in scope, and initial commentary predicted that they would not reach enough students.[53] These predictions remain valid. Although the Connecticut State Department of Education recently noted that progress has been made on the *Sheff* mandate—roughly twenty-seven percent of Hartford's students now attend school in a racially diverse setting[54]—most of these students are attending magnet schools.[55] This would not be a problem if magnet schools could provide a sustainable solution to the problem, but they cannot.[56] Under the current *Sheff* agreement, at least 41% of Hartford students must be in racially diverse settings by 2013.[57] A Connecticut judge recently held that the state is not in breach of the settlement,[58] but the *Sheff* plaintiffs have alleged that the state's calculations to gauge compliance are invalid.[59]

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51. Rick Green, *Adamant Defense Livens Up* Sheff *Case; Commissioner Says State is Complying*, HARTFORD COURANT, Sept. 19, 1998, at A1.

52. *But see* 1997 Conn. Pub. Acts 97-290 § 3(b) (listing improved academic achievement among the purposes of the program created under the legislative remedy).

53. According to McDermott, for example, the settlement would only affect "about one thousand students out of a total of five hundred thousand statewide." MCDERMOTT, *supra* note 26, at 48. Although the focus of the lawsuit is on Hartford and not the entire state, this still represents a low proportion of Hartford's student population.

54. Grace E. Merritt, *State Says City Making Strides*, HARTFORD COURANT, Nov. 19, 2001, at B3.

55. *See id.* (stating that 3,200 of 5,200 minority students being educated in racially diverse settings are attending magnet schools).

56. Several prominent individuals have expressed this concern. Linda Schofield, a Connecticut state representative, notes that the magnet solution represents a "path of the least bang for the biggest buck," and that Open Choice should be more thoroughly funded. Linda Schofield, Op-Ed, *No New Need For Magnet Schools: Why Not Fill Empty Seats in Suburban Schools First?*, HARTFORD COURANT, Feb. 7, 2010, at C1. Elizabeth Feser, Windsor's current superintendent, notes that she has begun to become "disillusioned with magnet schools as a solution for Sheff." Robert A. Frahm, *Reality Thwarts Theory in Desegregation Campaign*, CONN. MIRROR, Feb. 8, 2010, *available at* http://www.ctmirror.org/story/reality-thwarts-theory-desegregation-campaign. Philip Tegeler, staff coordinator for the *Sheff* movement, has highlighted the fact that there are long waiting lists for children to get into the magnet schools and that "[t]here is a pressing need to expand the open choice program." Grace E. Merritt, *Judge Rejects Sheff Plaintiffs' Claim*, HARTFORD COURANT, Feb. 26, 2010, at B6.

57. *See Phase II Stipulation*, *supra* note 20, § II.C.4 (noting that a material breach of the settlement will not occur if the 41% goal is met by 2013).

58. *See* Merritt, *supra* note 56.

59. *Id.*

In the long run, more use of Open Choice would therefore be appropriate. But over the past several years, only between 1,500 and 2,000 students have been served by the Open Choice program.[60] Growth of this program has remained stagnant due to the "lack of seats offered by suburban districts and the inadequacy of support services for students and teachers involved in the program."[61] The state, moreover, fails to provide adequate funding to the suburbs who accept Hartford students into their districts.[62]

This has created a lot of tension. In the fall of 2009, Hartford's superintendent of schools stated that he was "frustrated" by the lack of state and regional commitment for implementation of the racial-equity provisions in the *Sheff* settlement.[63] Although a lot of "lip service" has been paid, he noted that little is being done outside of Hartford to assist in the remedy's implementation.[64] This has even been true with the magnets. After a long battle with the state[65]—including a threat by Hartford to cancel all transportation to the magnets[66]—the state legislature finally appropriated the funds necessary to bus and educate Hartford's magnet students for the 2009-10 school year.[67]

To the extent that magnets have been supported by the state, they have allowed students to attain academic success.[68] For example, The Metropolitan Learning Center—a global-studies themed magnet school—reports that 98–100% of its students say that they will go on to college

60. *See* Connecticut State Board of Education, *District Efforts to Reduce Racial, Ethnic and Economic Isolation in 2004–2006*, February 2007. The program also allows suburban students to attend schools in a nearby urban center. *Id.* There are currently about 1,200 Hartford students in the Open Choice program. Merritt, *supra* note 56.

61. *Id.* at 10.

62. "Unfortunately, suburban public schools have historically limited the number of Hartford children they are willing to take through the Open Choice program, because they are paid so little by the state for each child they take. Simsbury, for example, gets $3,040 per student, while the average cost to educate a student in Simsbury is $12,181." Schofield, *supra* note 56.

63. Steven Goode, *School Chief Lauds Gains: Adamowski Cites Progress, Challenges*, HARTFORD COURANT, Oct. 15, 2009, at A3.

64. *Id.*

65. Jeffrey B. Cohen, *Hartford Receives Less Than Requested $12,000 for Each Suburban Student*, HARTFORD COURANT, Oct. 3, 2009, at A2 (noting that the State Senate's appropriation of $12,000 was $1,054 short of Hartford's request and that Hartford had made efforts to rally parents to ensure that the state would appropriate additional funds).

66. Steven Goode, *Magnet Transport Contract at Risk*, HARTFORD COURANT, Nov. 17, 2009, at B1.

67. Steven Goode, *State Funds Magnet Transportation*, HARTFORD CITYLINE, Nov. 18, 2009, available at http://blogs.courant.com/cityline/2009/11/state-funds-magnet-school-tran.html.

68. As of 2007, approximately 15,000 students were attending interdistrict magnet schools in the *Sheff* region. Connecticut State Board of Education, *supra* note 60, at 3.

after graduation.[69] The Montessori Magnet School, meanwhile, has met adequate yearly progress[70] (AYP) seven of the past eight school years.[71] However, only sixteen percent of Hartford's students are able to attend its twenty inter-district magnet schools.[72] Two of these schools, moreover, are not meeting the racial diversity goals of *Sheff*.[73]

Overall, therefore, the results of the voluntary remedies have been disappointing. First, participation in inter-district magnet and Open Choice programs have fallen short of goals established by the litigants.[74] More importantly, the academic outcomes of students in Hartford continue to lag behind the rest of the region well after the *Sheff* remedy was implemented. Tables 1 and 2 summarize the academic progress of Hartford students in relation to three of its surrounding districts in the *Sheff* region over the past three years (using state-reported data).

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69. *See* Anita Wadhwa, *Crossing the Line & Closing the Gap: Interdistrict Magnet Schools as Remedies for Segregation, Concentrated Poverty and Inequality* 5 (Charles Hamilton Houston Inst. For Race and Justice at Harvard Law Sch., Working Paper, 2009), *available at* http://www.charleshamiltonhouston.org/assets/documents/publications/Wadhwa_CrossingtheLine.pdf.

70. Adequate Yearly Progress refers to the percentage of the children that must score "proficient" on state math and reading assessments in a given year. *See Hess*, *supra* note 16, at 33–34. The state sets this bar and must raise it to 100% by 2013–14 under the No Child Left Behind Act. *Id.* at 34.

71. Wadhwa, *supra* note 69, at 7.

72. Connecticut State Board of Education, *supra* note 60, at 9. In addition, only eighteen percent of New Haven's students are able to attend its twenty inter-district magnet schools. *Id.* Although New Haven was not explicitly part of the *Sheff* litigation, its plight is relevant because the legislative remedy was intended to address the problem of racial and economic isolation throughout the state since, presumably, similar conditions to those in Hartford could be declared unconstitutional under the *Sheff* precedent.

73. See Robert A. Frahm, *Reality Thwarts Theory in Desegregation Campaign*, CT MIRROR, Feb. 8, 2010, *available at* http://www.ctmirror.org/story/reality-thwarts-theory-desegregation-campaign. These two schools are Capital Prep and Pathways to Technology. At Capital Prep, ninety percent of the students are members of minority groups. However, students there "do perform well on statewide tests and routinely graduate and go on to four-year colleges." *Id.*

74. *See* Phase II Stipulation, *supra* note 20 (noting that the goals set forth by the Phase I Stipulation were not met as of the date of its expiration).

TABLE 1: COMPARATIVE NCLB PROFICIENCY OF ELEMENTARY STUDENTS
Connecticut Mastery Test Results (Grade 4)

	Math			Reading		
Town	*2006–07*	*2007–08*	*2008–09*	*2006–07*	*2007–08*	*2008–09*
Hartford	42.5	49.9	53.9	28.3	32.6	36.8
West Hartford	89.5	88.9	92.8	80.7	82.3	86.8
Avon	95.1	96.3	94.5	91.4	89.3	92.3
Windsor	75.6	78.9	77.7	66.9	63.4	69.6

*Data gathered from www.cmtreports.com (last accessed March 8, 2010)
Numbers represent the percentage of students who meet the state proficiency bar

TABLE 2: COMPARATIVE NCLB PROFICIENCY OF HIGH SCHOOL STUDENTS
Connecticut Aptitude Performance Test Results (Grade 10)

	Math			Reading		
Town	*2006–07*	*2007–08*	*2008–09*	*2006–07*	*2007–08*	*2008–09*
Hartford	43.4	46.7	45.4	49.8	52.2	52.6
West Hartford	86.9	88.5	90.8	87.9	91.1	94.4
Avon	96.6	95.6	94.4	95.7	95.6	95.6
Windsor	76.7	79.4	76.6	81.3	74.6	77

*Data gathered from www.captreports.com (last accessed March 8, 2010)
Numbers represent the percentage of students who meet the state proficiency bar

Interestingly, the advent of NCLB and mandated accountability reporting came around the same time as the *Sheff* remedy's adoption. This presented the opportunity to test the viability of purely voluntary desegregation remedies, and this achievement data indicates that, although some progress has been made, the voluntary remedies have done little to equalize the educational opportunities between Hartford and its suburbs.[75]

It is unsurprising that the voluntary choice experiment has been unsuccessful. Rather than focusing on students and their achievement, the remedy has solely focused on minimizing racial and economic isolation through demographic targets and percentile ranges.[76] The voluntary nature of Open Choice, moreover, provides suburban districts with few incentives to accept Hartford students.[77] The sheer creation of inter-district magnet schools may not be enough, furthermore, given that these

75. The data says nothing about the utility of desegregation as a remedy in general, however. Only a fraction of Hartford students have been able to participate in Open Choice and inter-district magnet programs.

76. *See* Phase II Stipulation, *supra* note 20.

77. *See* James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2068 (2002) (noting that states do not usually oversee capacity issues in school districts).

schools may simply be creaming Hartford's top students "off the top."[78] Inter-district magnet and choice schools cannot advance the academic outcomes of students who do not choose to attend those schools.

Theoretically, Public Act 97-290 holds the state accountable for the academic outcomes of Hartford students. The statute lists academic achievement as one of its purposes.[79] The implementation plan required by the statute must have "appropriate goals and strategies to achieve resource equity and equality of opportunity, *increase student achievement*, reduce racial, ethnic and economic isolation, improve effective instruction and encourage greater parental and community involvement in all public schools of the state."[80] And the Act further calls on the State Board of Education to significantly reduce disparities in student achievement over future years of the implementation plan.[81] But more could and should be done to improve the academic outcomes of ethnically and economically isolated students who reside in Hartford.

II. DEFINING THE SLIDING SCALE REMEDY

While most states have used the NCLB law and testing regime to enforce school districts' and students' accountability to the states, the sliding scale remedy holds states accountable for the educational results of students in affected districts. This remedy may be applied to the Connecticut context and may also be applied by virtually any state-level court that wishes to remedy a similar constitutional violation.

A. *Overview of the Remedy*

The starting point of the sliding scale remedy leverages the agenda-setting power of courts to encourage the state to undertake voluntary efforts—both at the executive and legislative level—to address the constitutional violation. Initially, the remedy simply acts as a form of declaratory relief. If well-defined outcomes are not ultimately met, however, the remedy shifts to progressively stronger forms of injunctive relief.[82]

The sliding scale remedy is a flexible remedy that moves along a continuum. At the left end of the continuum are voluntary remedies

78. *See* KAHLENBERG, *supra* note 32, at 129 ("Because magnets normally rely on the motivation of parents to apply—and because balancing is based on race, not class—they tend to attract middle-class whites and the most advantaged blacks.").

79. 1997 Conn. Pub. Acts 97-290 § 3(b).

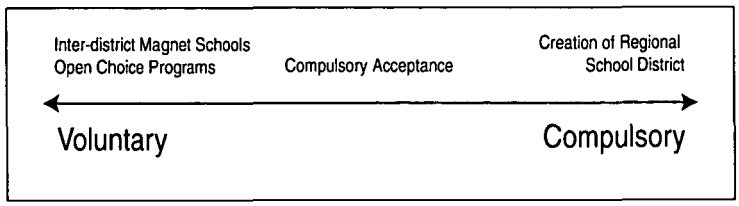
80. 1997 Conn. Pub. Acts 97-290 § 4(a) (emphasis added).

81. *Id.*

82. *Cf.* REED, *supra* note 10, at 170–71 (arguing that using declaratory relief in conjunction with the threat of injunctive relief focuses the attention of legislatures in meaningful ways).

much like those currently implemented under *Sheff*—inter-district magnet schools and Open Choice programs that aspire to integrate students from communities of different racial and socioeconomic compositions. The middle of the continuum entails "compulsory acceptance"—in which the court may enjoin suburban school districts to accept students from socioeconomically disadvantaged regions of the community. If necessary, the sliding scale remedy would allow state courts to mandate creation of a regional school district throughout a greater metropolitan area. The scope of the remedy is assessed periodically, and the remedy may shift left or right on the continuum in any given period.

FIGURE 1: SCHOOL DISTRICT CONSOLIDATION CONTINUUM



Academic outcomes are what ultimately drive movement along this remedial continuum. When a state court determines that students are deprived of adequate educational opportunities—based on either socioeconomic or ethnic isolation—the court must consistently monitor those results to gauge the appropriate scope of the remedy.[83] If the court finds disparities in educational opportunities between Hartford and its suburbs, it has an obligation to use its equity power to reduce those disparities. The easiest way to monitor progress in this area is through test scores. While the court has an obligation to wield its equity power in these contexts, however, the remedy also considers the performance of suburban students—their educational outcomes must not be significantly diminished as a result of the court's injunctive measures.

B. *The Remedial Landscape*

This Part briefly outlines four remedial possibilities that may occur when a court employs the sliding scale remedy. All of the discrete possibilities are dependent on student academic outcomes over the course of a

83. Allowing the remedy to operate based on a growth model with a reasonably high long-term target is optimal for both the state and the plaintiffs. In *Hancock v. Commissioner of Education*, 822 N.E.2d 1134, 1153–54 (Mass. 2005), State defendants conceded that progress towards state proficiency standards is the constitutional standard in Massachusetts. *See* Robert M. Costrell, *The Winning Defense in Massachusetts, in* SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY 278, 278–81 (Martin R. West & Paul E. Peterson eds., 2007).

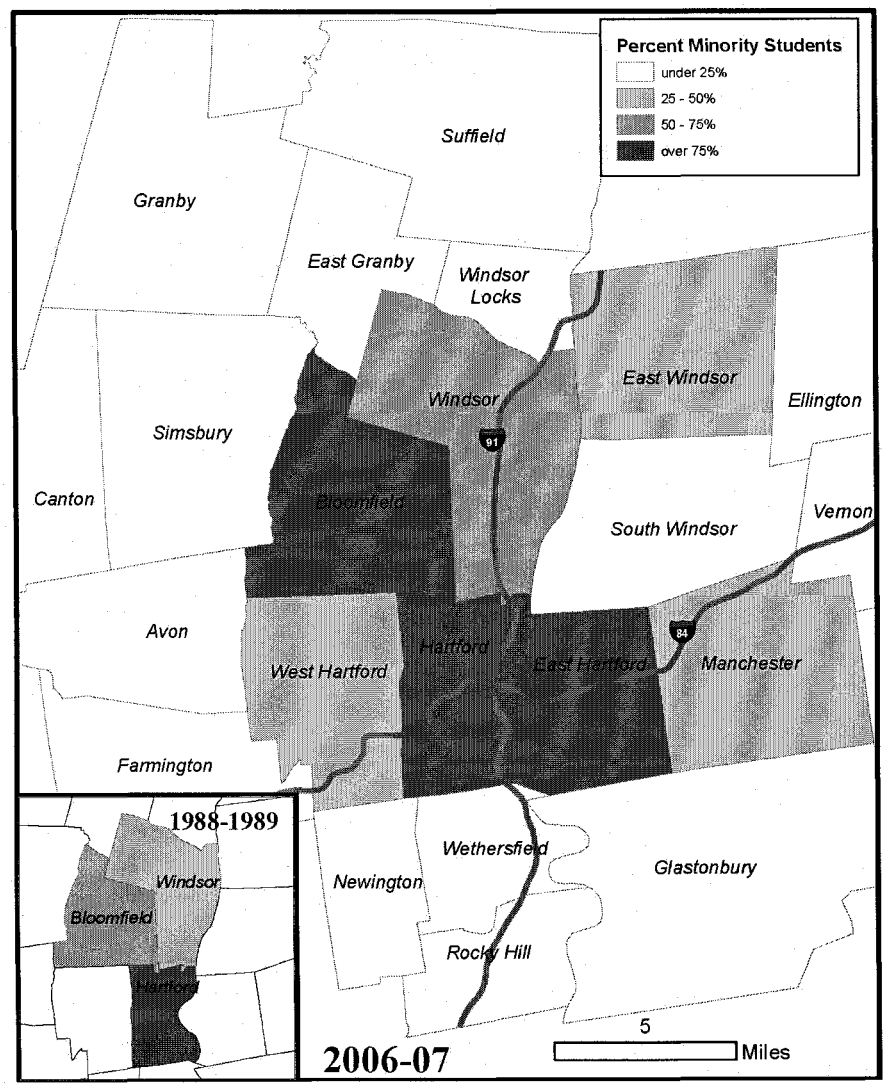
remedy's implementation. The court first sets a reasonable, annual growth target on the state's standardized test (the CMT and CAPT tests for Connecticut).[84] The court also sets a target proficiency percentage for the entire region.[85] As part of the remedy, the state designates surrounding school districts as participating districts, much as the state legislature did under *Sheff*.[86]

84. When I discuss growth targets, I refer to the percentage of students who are meeting state standards on the relevant state test. The percent of students who meet the "Proficiency" target is reported to the Federal Government under NCLB to determine the extent to which the state has met adequate yearly progress (AYP). This could also be designed as an average raw score (or percentage correct) on the test, so as to ensure that teachers focus on the achievement of all students.

85. To simplify discussion, I suggest one overarching proficiency target. Of course, this proficiency target can incorporate performance in different subjects such as reading, math, and science.

86. JACK DOUGHERTY ET AL., MISSING THE GOAL: A VISUAL GUIDE TO SHEFF VS. O'NEILL SCHOOL DESEGREGATION 3 (2007) (listing the twenty-two towns that comprise the *Sheff* region).

MAP 1: RACIAL COMPOSITION OF THE 22-DISTRICT SHEFF REGION OF METROPOLITAN HARTFORD, 1988–89 (INSET) AND 2006–07[87]



87. From JACK DOUGHERTY ET AL., MISSING THE GOAL: A VISUAL GUIDE TO SHEFF VS. O'NEILL SCHOOL DESEGREGATION 2 (2007) (reprinted with permission).

FIGURE 2: REMEDIAL POSSIBILITIES BASED ON STUDENT OUTCOMES

Urban Student Outcomes \ Suburban Student Outcomes	+	-
+	*Purely Voluntary Remedy* (Open Choice, Inter-District Magnet Schools, and other Voluntary Initiatives)	*Purely Voluntary Remedy* (Levels of Participation by Suburban Districts Can Be Adjusted)
-	*Sliding-Scale Remedies Apply* (Compulsory Acceptance and/or Creation of Regional School District)	*Crisis Situation* (State Takeover and/or Additional Legislative Action Should Be Taken)

Figure Two illustrates the four remedial possibilities in more detail.[88] First, whenever the outcomes of urban students are improving, remedies are purely voluntary and all districts are free to make adjustments based on their particularized needs. The court orders injunctive relief, however, when suburban student outcomes remain above proficiency target levels either for brief or sustained periods *and* urban students are not achieving at adequate levels (bottom-left quadrant). This may lead to compulsory acceptance requirements or the creation of a regional school district. Finally, achievement of all students may be inadequate for a sustained period of time. In these rare instances, the court would declare a crisis situation and delegate further action back to the state legislature with specific guidance.

The sliding scale remedy provides incentives that will encourage voluntary compliance by suburban school districts and the state in ways that will improve educational outcomes for students both inside and outside of Hartford.[89] Under the remedy, it will be in the state's best interest to improve the quality of education *within* Hartford as it expands options for voluntary integration.[90] If Hartford's academic outcomes improve while voluntary remedies are being utilized, Hartford students will be meeting reasonable, court-mandated AYP targets and suburbs will largely maintain local autonomy. However, to the extent that the state fails to take action on its own to encourage greater performance in the Hartford school district, the court must act to reduce racial and economic isolation of Hartford's students.

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88. When examining the four quadrants in the figure a plus sign means that, in a given year, either (a) students are currently at or above the court's proficiency target or (b) students have grown at a proficiency rate at or above the court's growth rate. A minus sign means that (a) students who are below the court's proficiency target have not grown at the court's growth rate or that (b) students who were originally above the court's proficiency target dropped below the proficiency target.

89. *See, e.g.*, *infra* Part IV.B.

90. *See* discussion *infra* Part IV.C.

1. Purely Voluntary Remedy (Urban and Suburban Outcomes Met)

Initially, the remedy focuses on voluntary measures such as inter-district magnet schools and voluntary choice programs. Open Choice and inter-district magnet schools would be offered in the metropolitan area, and suburbs would have the option to accept students from Hartford and send their students to inter-district magnet schools. Districts may take any additional voluntary steps that serve the purpose of improving achievement of students in the region and reducing racial and economic isolation.

As the program unfolds, the court gauges the academic performance of the racially and economically isolated region (in this case, Hartford) and compares it to the growth goal stipulated by the court. This assessment is done in relation to a baseline that is calculated in year one. In the hypothetical scenario presented in Figure 3, the growth goal has been set at 5%.[91] In each year that Hartford meets its growth goal, the court *will not* apply additional equity power and the remedy will continue to be entirely voluntary.

FIGURE 3: HYPOTHETICAL WHERE PURELY VOLUNTARY PROGRAMS WOULD BE ALLOWED[92]

Growth Goal = 5%	Target = 80% Proficiency in Both Reading and Math								
Year	1	2	3	4	5	6	7	8	9
Suburban District	80%	82%	78%	81%	80%	82%	84%	82%	85%
Hartford	53%	59%	*63%*	68%	73%	78%	80%	81%	81%
Court Action	Baseline	Proceed	Warning	Proceed	Proceed	Proceed	Proceed—at or Above Goal	Proceed—at or Above Goal	Proceed—at or Above Goal

Note that, as Figure Three illustrates, Hartford's testing outcomes generally meet or exceed the growth goal. It is only between years two and three that Hartford does not meet its growth goal (4% as opposed to 5%). In this year, the court issues a formal warning to the state and suburban districts. Such a warning will indicate that, if the state—in concert with school districts—fails to improve achievement of racially and socio-

91. A growth goal of 5% means that, in a given year, 5% more students will meet the "Proficient" standard on the Connecticut Mastery Test (CMT) and the CAPT. Note that the setting of the growth goal can be reasonably constructed based on expert testimony, and that my choice of 5% is simply illustrative. Additionally, 5% growth could be defined as a 5% growth in average raw score (or percent correct).

92. Note that the achievement proficiency for Hartford is calculated based on the achievement of students *from* Hartford, whether or not they are served in suburban districts. The achievement proficiency for suburban districts is calculated based on the achievement of students *from* the suburban districts. In each district, data for Hartford and suburban students' achievement should be disaggregated.

economically isolated students, additional equity power may be exercised down the line. In this hypothetical, however, the percentage of students who meet the proficiency standard sufficiently grows from years three to seven such that the target proficiency goal of 80% is ultimately met. As long as Hartford students are at or above this target proficiency level, the need for further intervention is no longer necessary because educational opportunities—as measured by outcomes—for students in Hartford are sufficiently equalized relative to those students' peers in their region.

This illustrative hypothetical represents an ideal situation in which, under the sliding scale remedy, courts would not need to further enjoin Hartford's surrounding school districts that have chosen to participate in a voluntary regime. In the purely voluntary open choice/inter-district magnet school world that exists today, however, we have seen that the educational outcomes of Hartford students have remained far behind state averages.

2. Compulsory Inter-District Acceptance (Urban Outcomes Not Met, Suburban Outcomes Met)

In some cases, the state's efforts may fail to produce the outcomes prescribed by the court. The court would execute its threat to use additional equity power to ensure that the outcomes are met in the long term. Thus, although the remedy remains largely voluntary (with respect to its programmatic aspects), the court may force the hand of the state to ensure that these programs are being fully utilized to drive student achievement. Figure Four illustrates a hypothetical where this may be necessary.

FIGURE 4: HYPOTHETICAL WHERE COURT ENJOINS STATE TO COMPEL INTER-DISTRICT ACCEPTANCE

Growth Goal = 5%	Target = 80% Proficiency in Both Reading and Math								
Year	1	2	3	4	5	6	7	8	9
Suburban District	80%	82%	84%	85%	*78%*	81%	81%	80%	82%
Hartford Overall	53%	*55%*	*57%*	63%	66%	*70%*	*72%*	*77%*	80%
Court Action	Baseline	Proceed	Warning	Proceed	Proceed	Proceed	Proceed—at or Above Goal	Proceed—at or Above Goal	Proceed—at or Above Goal

Maintaining an annual growth goal of 5% along with a target of 80%, this example shows how the equity power of the court may need to be expanded or contracted over time. In year two of this hypothetical, the state receives a warning because Hartford students have not met the growth goal. In year three, the court enjoins the state to compel its suburban districts to accept a specified number of socioeconomically

isolated students from Hartford.[93] This happens if two conditions are met:

1. Hartford students do not meet their annual growth goal.
2. The suburban districts' students have achieved at a level at or above the previous year.[94]

Because these conditions are met in year three, suburban districts are in a position that enables them to accept an incremental number of Hartford students. Thus, suburban districts in this hypothetical would be compelled to accept Hartford students.[95] These students would be assigned based on an individualized assessment that ensures that each student is placed in settings that are less *socioeconomically isolated* than their current setting.[96] Students who are in the most severe contexts of racial and economic isolation will have priority over less isolated students in receiving these transfer opportunities.

In year five, however, the academic outcomes of the suburban districts in this hypothetical decline below the target proficiency level. In that year, the court would *reduce* the number of students who must be offered spaces to attend school in the suburban districts. When achievement is declining in suburban districts, these districts are not in a position to accept more students. Nevertheless, the court still must compel the state to send students to those districts that have maintained or improved their performance in year three. Additionally, the state must account for its failure to ensure that the performance level of suburban students is being maintained.

Continuing through the remaining years of the hypothetical, Hartford's suburban districts will again be compelled to accept additional low-income Hartford students in years six and seven. This is because, in both years, the achievement of the suburban districts remains above the target as the achievement of Hartford students fails to meet the court-ordered growth rate. In year eight, however, Hartford student achievement has progressed to a point where there is no need for further judicial intervention. At year nine, Hartford students have reached the achievement

93. Because the sliding scale remedy is gradual, this specified number of students should be at a reasonable level (not unduly burdensome to districts).

94. This assumes that the suburban district's proficiency is above the court-determined proficiency target (in this case, 80%). If suburban districts are below the target proficiency, they must be growing at a rate commensurate with the growth rate to have "achieved at a level at or above the previous year."

95. For simplicity, I focus my discussion on suburban districts as a whole. The court may consider the academic performance of individual suburban districts in deciding the preferred order in which suburbs must accept Hartford students. However, student assignments should be distributed as uniformly as possible across the metropolitan region.

96. This would entail a holistic assessment of racial, ethnic, and economic demographics of each individual student and the overall context of their current school setting.

proficiency target. Thus, the court does not mandate any additional levels of compulsory acceptance.

On a final note, the compulsory acceptance requirements for suburban districts would be entirely marginal under the sliding scale remedy. Thus, if West Hartford were required to accept fifty Hartford students in 2015 but, based on its academic improvements, this requirement was reduced to twenty in 2016, it would not be allowed to transfer thirty students back to Hartford. All of the fifty students who were accepted in 2015 must have the right to remain in West Hartford, but West Hartford would be able to accept fewer students in 2016.

3. Creation of a Regional School District (Urban Outcomes Not Met, Suburban Outcomes Met Over Sustained Period)

In instances where students who reside in suburban school districts continue to achieve at or above established benchmarks while urban students fail to make progress, the sliding scale remedy may eventually compel the court to enjoin the state to create a metropolitan school district in an urban area. This option would be viewed as a last resort, but would reflect the spirit of the *Sheff* ruling. As noted in the *Sheff* dissent, one implication of the majority opinion was that a remedy would require a "statewide realignment of school districts."[97]

Should a metropolitan district be necessary, it may be a result of suburban districts' failure to support the achievement of urban students. By the time this injunctive option will have been considered, the court will have already mandated that many city students attend high-performing suburban schools. If the students who are compulsorily accepted into suburban districts fail to improve their achievement levels at this point (and suburban students are still achieving at high levels), suburban districts have likely neglected to undertake the efforts necessary to improve the achievement of Hartford students. This failure of suburban districts to "play their part" would justify a more intrusive remedy.

Meanwhile, if suburban districts have done their part in educating students who are mandated to attend schools in their district and the academic achievement of socioeconomically isolated students continues to stagnate, this indicates one of two possibilities. The first possibility is that the urban district may be operating efficiently with its resources but, even with that efficiency, it simply cannot overcome the challenges of socioeconomic isolation. In this case, a larger, regional district may be the only way that the state could fulfill its constitutional obligation. The second possibility is that the urban district is not operating efficiently. In that case, the court may compel the state to improve the efficiency of the urban district before taking the step to require regionalization.

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97. *Sheff*, 678 A.2d at 1332 (Borden, J., dissenting).

If the court determines that school district consolidation is the most efficient step, it should force the legislature's hand. School district consolidation can produce positive academic outcomes. Although Christopher Berry found that the gains in educational outcomes that result from increasing school district size can be reduced by the effects of having larger schools within those districts,[98] Sebold and Dato (1981) found a positive relationship between student outcomes and district size for Califonia high schools, and Ferguson and Ladd (1996) discovered a positive relationship for elementary schools in Alabama.[99] District consolidation may be "the elephant in the room" for some, but it may be economically inefficient to maintain small local schools in rural or suburban towns.[100] A recent study also found that school district regionalization in Arkansas would produce a 34% cost savings per student due to reduced inefficiencies in spending on teacher salary, supply costs, and total costs.[101]

4. Crisis: State Takeover and Legislative Response (Urban Outcomes Not Met, Suburban Outcomes Not Met Over Sustained Period)

In the worst-case scenario, the sliding scale remedy may fail to produce adequate academic achievement for *both* suburban students and socioeconomically isolated students for a sustained period of time. In particular, the achievement of suburban districts may decline while the achievement of socioeconomically isolated students fails to improve (or perhaps sinks below the proficiency target). In these instances, the court would not be allowed to compel additional participation by suburban districts. This would constitute a crisis situation of a far broader nature that may necessitate significant state action. Whatever the reason—inadequate state funding, poor management of districts by the state, or some other exogenous factor—the state needs to take steps above and beyond socioeconomic desegregation to improve educational quality. In such instances the court should provide the state legislature with comprehensive remedial principles based on a full and complete definition of a "meaningful educational opportunity."[102] Courts should be "specific in their findings about mismanagement, waste, inefficient practices, constraints imposed by collective bargaining agreements, state tenure laws,

98. *See* Christopher R. Berry, *School District Consolidation and Student Outcomes: Does Size Matter*, *in* BESIEGED: SCHOOL BOARDS AND THE FUTURE OF EDUCATION POLITICS 56, 76 (William G. Howell ed., 2005).

99. *Id.* at 65.

100. *See, e.g.*, HANUSHEK, *supra* note 13, at 284.

101. *See* Marvin E. Dodson III & Thomas A. Garrett, *Inefficient Education Spending in Public School Districts: A Case for Consolidation?*, 22 CONTEMP. ECON. POL'Y 270, 279 (2004).

102. For a good discussion of principles that could encompass such a definition, see Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C.L. REV. 1467 (2007).

and so on . . . ."[103] Providing these clear principles and specific findings would provide useful guidance and leverage to the state legislature as it determines the next course of action.[104] And, in the spirit of the sliding scale remedy, the court should threaten specific remedial actions that will be imposed on the legislature if it fails to abate the crisis.

C. *A Brief Note on Sliding Scale Remedies in the School Funding Litigation Context*

As Kahlenberg has noted in his volume advocating socioeconomic integration of schools, "[m]oney clearly does matter, but breaking up concentrations of poverty—which will also tend to equalize funding—matters much more."[105] The sliding scale remedy attempts to address this problem. Nevertheless, courts could consider applying an analogous remedy in the school funding litigation context. Such a remedy could, for example, award additional finances to low-performing districts which continue to improve academically yet lag behind the academic targets set by the state. Many school finance systems do not focus either directly or effectively on student achievement goals, and Hanushek argues for stronger accountability mechanisms for school funding regimes.[106]

An analogous school funding sliding scale remedy would not specify a specific target funding amount. Like the sliding scale remedy for school desegregation, it would adjust funding levels based on student outcomes. In school finance litigation suits, remedies have usually focused on specific levels of school funding,[107] and courts have often relied on "costing out" studies to guide them in determining appropriate levels of funding that are associated with a particular remedy. Costing out studies are limited in their ability to aid courts in constructing remedies, however, because it is extremely difficult to determine which levels of funding will ensure particular educational outcomes, and there is a disagreement among scholars on the degree of funding necessary to ensure outcomes are met.[108] Just as we cannot know which socioeconomic balances will produce ideal outcomes in classrooms, we also may not know exactly how much funding—along with how it is provided—will produce outcomes in a particular context.

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103. HANUSHEK ET AL., *supra* note 13, at 283.

104. *See id.*

105. KAHLENBERG, *supra* note 32, at 84.

106. HANUSHEK, *supra* note 13, at 260.

107. *See, e.g.*, Christopher E. Adams, Comment, *Is Economic Integration the Fourth Wave in School Finance Litigation?*, 56 EMORY L.J. 1613, 1614–15 (2007);

108. *Id.* at 1626; *see also* Eric A. Hanushek, *The Alchemy of "Costing Out" an Adequate Education* (Sept. 2006) (revised version of working paper prepared for 2005 conference *Adequacy Lawsuits: Their Growing Impact on American Education*, Kennedy Sch. of Govt., Harvard Univ.), *available at* http://www.uark.edu/ua/der/EWPA/Research/School_Finance/Alchemy_Costing_Out/Alchemy_Costing_Out.pdf.

III. CHALLENGES TO THE SLIDING SCALE REMEDY

Some may challenge the sliding scale remedy on various grounds. First, states have long traditions of local control of their school systems. Thus, any court-mandated desegregation could be viewed as a violation of separation of powers within the state. Second, some may argue that the sliding scale remedy could induce significant White flight from suburban school districts. Third, some may challenge the premise that desegregation efforts can promote academic outcomes. Finally, some may argue that the sliding scale remedy is unconstitutional in light of relevant federal precedents. This Part addresses each of these concerns in turn.

A. *The Challenge of Localism*

Because the sliding scale remedy may either compel suburban school districts to accept students from urban communities or lead to the creation of a metropolitan school district, some may express concerns that the sliding scale remedy unreasonably infringes school districts' traditional autonomy. In this Part, I address the legal significance of this issue and its relevance in creating obstacles to the sliding scale remedy. While local control principles would undoubtedly create *political* obstacles to reform, the extent to which local control creates *legal* obstacles to reform is actually minimal. In fact, the state's obligation to address affirmative constitutional rights always prevails. The federalist principles that govern the U.S. Supreme Court's relationships with states are not the same principles that guide state supreme courts' relationships with their corresponding localities.

Local control is often used to sustain impediments to educational equality. First, local control provides incentives for districts to use exclusionary zoning and other practices to ensure that relatively affluent communities may exclude the less wealthy.[109] Through minimum lot sizes, limitations on multifamily dwellings, and mandatory-attached two car garages, municipalities are able to exclude low-cost housing and therefore low-income students.[110] In addition, wealthier school districts have incentives to zone in ways that maximize the local tax base while minimizing the local tax rate.[111] Left unchecked, local control allows for the perpetua-

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109. Richard Briffault, *The Role of Local Control in School Finance Reform*, 24 CONN. L. REV. 773, 803 (1992).

110. *See* McUsic, *supra* note 32, at 1365.

111. *See, e.g.*, Briffault, *supra* note 109, at 803–04 (arguing that towns zone in ways that maximize property values and limit the number of school age children who may live in the district because this reduces the town's education burden); Daniel R. Mandelker, *Racial Discrimination and Exclusionary Zoning: A Perspective on Arlington Heights*, 55 TEX. L. REV. 1217 (1977).

tion of de facto segregation by both race and class, denying low-income students from adjoining towns equal educational opportunities.

In this regard, purely local control of school districts undermines the need of the state to fulfill its constitutional obligation. To the extent that local control can be harmonized with the state's need to fulfill its obligation to ensure that its children receive substantially equal educational opportunities, there may not be a need to utilize educational remedies that restrict local control. If a particular state fails to meet its constitutional obligation, has attempted to work with local districts, and school districts fail to cooperate, however, "the courts should not rely on local control to deny rights to equal educational opportunity or constitutionally adequate education based on state constitutional provisions."[112]

When states have been sued for inadequate or inequitable school funding schemes, the state has always had the burden of showing that its constitutional obligations are met.[113] Because state constitutions confer educational obligations, the buck stops with the state.

Courts recognize this. In some instances, state courts have been deferential to state takeovers of school districts.[114] As of 2002, twenty-four states had laws authorizing state education agencies to displace a school board and take over the operation of a school district, and from the late 1980's to the mid-2000's there were nearly fifty school district takeovers in nineteen states.[115] As one scholar admits, "[t]o the extent that courts have accepted the local control argument, it has functioned as a shield to sustain state policy, not as a sword to alter policy in a more pro-local direction."[116]

Additionally, school districts do not have the same degree of autonomy as other forms of local government. Typical state constitutions that confer home rule authority on particular localities refer to *municipalities or cities*, not school districts—and some state constitutions specifically disclaim the applicability of home rule to school districts.[117] These localities are ultimately creatures of the state and, despite their high degree of

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112. Briffault, *supra* note 109, at 811.

113. Several state courts have made this determination. *See, e.g.*, Roosevelt Elem. Sch. Dist. No. 66 v. Bishop, 877 P.2d 806, 813 (Ariz. 1994); Rose v. Council for Better Educ., 790 S.W.2d 186, 211 (Ky. 1989); Claremont Sch. Dist. v. Governor, 635 A.2d 1375, 1378 (N.H. 1993); Tenn. Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 140–141 (Tenn. 1993).

114. *See, e.g.*, Contini v. Bd. of Educ. Of Newark, 668 A.2d 434 (N.J. Super. Ct. App. Div. 1995); In re Trenton Bd. of Educ., 431 A.2d 808 (N.J. 1981).

115. Richard Briffault, *The Local School District in American Law*, *in* BESIEGED: SCHOOL BOARDS AND THE FUTURE OF EDUCATION POLITICS 24, 34 (William G. Howell ed., 2005).

116. Briffault, *supra* note 115, at 51.

117. *See* Briffault, *supra* note 115, at 32. The Illinois constitution explicitly states that local units of government do not include school districts. ILL. CONST., art. VII, sect. 1. The New York constitution's home rule article states that the home rule power shall not " restrict or impair any power of the legislature concerning the maintenance, support, or administration of the public school system." N.Y. CONST., art. IX, sect. 3.

power, they "cannot complain when the state reclaims its delegated powers."[118] Others have indicated that, although school districts are commonly provided with de facto legal autonomy over their affairs,[119] states can expand or contract that autonomy at any time.[120]

Nevertheless, local control of schools is a "legitimate state objective" in Connecticut's jurisprudence.[121] Further, a long-standing norm of home rule makes school regionalization or consolidation proposals politically untenable in Connecticut.[122] But local control was not the overriding consideration in *Sheff*. In fact, although the *Sheff* court acknowledged that "the [school] districting scheme presently further[ed] the legitimate nonracial interests of permitting considerable local control and accountability in educational matters,"[123] the constitutional interest of the plaintiffs was of greater significance.[124]

By some accounts, local control is a mere social construction—a mythical fiction of sorts.[125] Christopher Collier, the longtime Connecticut historian, once said that "[t]he towns are not now, and never have been since the founding of this state, autonomous in any respect."[126] Susan Eaton argues that "the myth of local control engendered a convenient, distracting detour around central matters in equal education—place, race, and class."[127]

Federal constitutional law, meanwhile, places few limits on the state's authority to prescribe boundaries of school districts and municipalities.[128] A school district's residents do not have federal constitutional claims against a particular state if the state chooses to redraw a district's boundaries and, for this reason, "state governments have broad authority to create

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118. Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1901–02 (2001).

119. *See* Briffault, *supra* note 115, at 26.

120. Briffault, *supra* note 115, at 28.

121. *See, e.g.*, Horton v. Meskill, 376 A.2d 359 (Conn. 1977) (holding that Connecticut school funding system was unconstitutional and that equalization of funding would not inhibit local control).

122. *See, e.g.*, Collier, supra *note* 39, at 632–33 (explaining that efforts in 1969 to pass a bill that would authorize the Department of Education to redraw district boundary lines to remedy racial imbalances was derailed after the Commissioner of Education claimed to be a "champion of local control").

123. *Sheff*, 678 A.2d at 1288.

124. *Id.* at 1289 ("Despite the initiatives undertaken by the defendants to alleviate the severe racial and ethnic disparities among school districts, and despite the fact that the defendants did not intend to create or maintain these disparities, the disparities that continue to burden the education of the plaintiffs infringe upon their fundamental state constitutional right to a substantially equal educational opportunity.").

125. *See, e.g.*, SUSAN EATON, THE CHILDREN IN ROOM E4: AMERICAN EDUCATION ON TRIAL 142–43 (2006) (describing how local control is a legal fiction in Connecticut).

126. *Id.* at 142.

127. *Id.* at 142–43.

128. *See, e.g.*, Kies v. Lowrey, 199 U.S. 233 (1905).

alter, or abolish school districts; revise their powers; and restructure or even eliminate their boards."[129] District boundary changes have only been struck down by federal courts when "modifications deliberately impacted adversely on the *racial* balance of students, impeded a remedy for de jure segregation, or intentionally helped a religious group."[130] Although we will see that *Milliken v. Bradley* prescribes limits on the federal equity power to redress violations of the Federal Constitution, this case does not place significant limitations on sliding scale remedies which address state constitutional violations.[131]

The practice of local autonomy is currently being reconciled with the legal theory of state power over education.[132] For example, state authority over charter schools has provided the state with a means of exercising control over local districts. Additionally, NCLB has placed more control in the hands of the state as it sets statewide standards and holds students and districts accountable for successfully attaining them. Because the state is now accountable at the federal level, it may decide to exercise more or less authority over local school districts depending on the performance of various districts.

Notwithstanding the sliding scale remedy's provisions that limit local control, the remedy is narrowly tailored to enable local school districts to maintain local control to a reasonable extent. Districts are given the opportunity to create voluntary solutions long before equity power is imposed on them. However, these districts need to be part of the solution—not part of the problem—to maintain the local control they so desire. Legally, local control shouldn't present roadblocks to state constitutional remedies, although such considerations may be an overriding interest in federal constitutional remedies.[133]

B. *White Flight*

White flight can be a significant problem when school districts desegregate. Professor Rossell has noted that between 45% and 56% of Whites leave a school district after the first year of a desegregation order.[134] Controlled choice plans which eliminate district boundaries and allow all families to rank preferred school choices can also be problematic

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129. Briffault, *supra* note 115, at 29. *See also* CHARLES J. RUSSO, REUTTER'S THE LAW OF PUBLIC EDUCATION 169–70 (7th ed. 2009) ("Acting pursuant to their plenary power, state legislatures can set district boundaries, abolish local school units, and/or redistrict states regardless of pre-existing boundaries . . . .").

130. *See id.* at 171 (emphasis added).

131. *See* discussion *infra* Part III.D.1.

132. Briffault, *supra* note 115, at 54.

133. *See* discussion of *Rodriguez* and *Milliken infra* Part IV.D.1.

134. Christine H. Rossell, *An Analysis of the Court Decisions in* Sheff v. O'Neill *and Possible Remedies for Racial Isolation*, 29 CONN. L. REV. 1187, 1208 (1997).

because they may produce significant White flight when students from White families do not receive their first-choice school.[135]

Any remedy that affects the racial composition of schools in a predominately White area runs the potential risk of inducing flight. For example, White parents may be concerned that the quality of their children's education may be adversely impacted by the presence of minority students. They may fear that "students in a newly integrated setting may interact poorly with each other (and with their teachers), contributing to a strained or hostile atmosphere and poorer education; parents of both races may even fear violence."[136]

In constructing a remedy one must be mindful of the social costs of White flight. Therefore, an effective remedy maximizes integrative and educational outcomes while ensuring that the perceived social costs to suburban Whites are not large enough to induce flight.[137] If Whites do not perceive that they will be adversely affected by a remedy, they will be far less likely to leave.

The sliding scale remedy is designed to minimize the impact of White flight. Because it is tied to the educational outcomes of all students, the remedy will ensure that the degree of equity power enforced on a suburban district will be directly related to the achievement of students in that district. Thus, suburban districts that struggle to educate their own students will be less constrained by the remedy than those districts that successfully educate their students. The remedy is also gradual, which gives suburban districts and parents time to adjust to their new circumstances instead of being "scared away" by the immediacy of a more abrupt remedy. Financial incentives, finally, could be designed to run with the students who enter the suburban districts, encouraging suburban participation.

The messaging of the sliding scale remedy is critical to successfully mitigate concerns of White flight. Parents of suburban children must first be told that the remedy is initially voluntary. Second, they must be told that the only time a court may impose additional remedial pressure on their school district is when their children are still achieving at or above previous levels. Meanwhile, if the achievement of urban students adequately improves, little to no judicial intervention may be necessary. No compulsory remedies will be imposed on suburban districts if they work with the state to determine voluntary desegregation plans that serve everyone's best interest.

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135. *Id.* at 1225. *See also* Christine H. Rossell & David Armor, *Magnet Schools and Desegregation*, MAGNET SCHOOLS AND DESEGREGATION, QUALITY AND CHOICE (1994); and Christine H. Rossell, *Controlled Choice: Not Enough Choice, Too Much Control?*, 31 URB. AFF. REV. 43 (1995).

136. Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 633 (1983).

137. *Cf. Id.* at 652–56 (discussing the provision of educational incentives as a tool to improve Whites' assessment of integration).

Of course, this argument assumes that parents' primary concern in choosing a school district is the academic achievement of their students, and that concerns about achievement are a primary motivation for White flight. If mandatory integration remedies are imposed or even threatened upon a suburban school district, it is possible that parents may choose to move outside of the *Sheff* region out of concerns relating to the racial or socioeconomic status of students who will go to school with their children.

Test scores have always been a significant determinant of parents' school choices, however.[138] Although studies have found that demographic considerations may have a greater impact on property values than test scores,[139] one of these studies notes that "the findings may reflect the fact that people make judgments about school quality using easily available signals."[140] Indeed, one scholar has directly stated that "[r]ace, being so readily apparent, becomes a proxy for school quality that easily tips the choice between otherwise equivalent schools and neighborhoods to live in."[141]

Parents may have found race to be a useful proxy for school quality in the past, but this could change. As student achievement data becomes increasingly transparent, the increased emphasis on test scores by parents as they choose a place of residence "may reflect increasing public awareness of the availability of information on school test scores, along with possibly greater saliency of test scores following the passage of the federal 'No Child Left Behind' Act of 2001."[142] And, despite potential concerns that racism may limit Connecticut parents' desire to send their children to an integrated school, a recent study revealed that "many white parents (55%) did voice a willingness to enroll their child in a quality integrated setting."[143]

By its design, the sliding scale remedy could show parents that academic achievement and socioeconomic integration are not mutually

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138. *See, e.g.*, Patrick Welsh, *It's No Longer Uncool to Do Well in School*, WASHINGTON POST, Mar. 14, 1999, at B01 (noting that middle-class parents traditionally ask about test scores when considering neighborhoods and visiting schools); *see also* John M. Clapp et al., *Which School Attributes Matter? The Influence of School District Performance and Demographic Composition on Property Values*, 63 J. URBAN ECON. 451, 464 (2008) (finding that student test scores appear to have increased in importance for explaining housing prices in Connecticut in recent years, while the importance of minority composition has declined).

139. *See, e.g.*, Jack Dougherty et al., *School Choice in Suburbia: Test Scores, Race, and Housing Markets*, 115 AM. J. ED. 523 (2009) (finding that, while both test scores and race explain home prices, race is more influential); *see also* Clapp, *supra* note 138, at 463 (generally concluding that people in Connecticut were more concerned about changes in geographic attributes than the changes in test scores when deciding how much to pay for homes).

140. Clapp, *supra* note 138, at 464.

141. Andrew J. Gold, *In the Aftermath of* Sheff*—Considerations for a Remedy*, 29 CONN. L. REV. 1043,1048 (1997).

142. Clapp, *supra* note 138, at 464.

143. Bilal Sekou, *I Support School Integration, But. . . :* Sheff v. O'Neill *More than Ten Years Later and No End in Sight*, 42 EQUITY & EXCELLENCE EDUC. 97, 105 (2009).

exclusive ideals. If this occurs, it is even more likely that parents will be amenable to integrated schools. When the Connecticut Center For School Change held public fora throughout the state to discuss its proposal to create a regional school district, "[o]ne message that came through very strongly from [its] process is that before [parents] will support changes in the status quo, the public must be able to see a connection between educational reforms and improved educational quality."[144]

Yet, "if further studies continue to show that suburban home buyers are motivated more by racial preferences than by higher test scores, then it may call into question the underlying premise for expanding school choice."[145] If this is true, however, one advantage of the sliding scale remedy is its gradualism. Because urban students would be incrementally integrated into suburban districts under the sliding scale remedy, the remedy could serve to build more tolerance for integrated schools than would be possible with a more abrupt remedy. More parents who may have originally been more concerned with race than student achievement outcomes may value diversity as being useful for their kids. Even if a small minority of parents were to remain intolerant and leave the district for purely racial reasons, this effect would be minimized by the design of the remedy.

C. *Validity of "The Harm and Benefit Thesis"*

For the sliding scale remedy to work well, integrated schools must produce better academic outcomes for students. Although social science research has been divided on this issue,[146] many studies have found that integrated schools produce academic benefits for the socioeconomically disadvantaged. This includes a recent study that examined the impact of Connecticut's interdistrict magnet schools on student achievement.[147] A sixteen-year longitudinal study of Black children who took part in a voluntary city-suburban busing program, moreover, concluded that "those who graduated from desegregated schools were more likely to attend college, to complete more years of college, to hold higher status jobs, and to work in more desegregated work environments than those students who

144. *See* Gordon A. Bruno and Kathryn A. McDermott, *Beyond the Unexamined Remedy: Moving Toward Quality, Integrated Schools*, at 2 (July 2000) (on file with author).

145. *See* Dougherty, *supra* note 139, at 545.

146. *See* DAVID J. ARMOR, FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW (1995).

147. The study found that attendance at an interdistrict magnet school has positive effects on the math and reading achievement of urban students. *See* Robert Bifulco, Casey D. Cobb, & Courtney Bell, *Can Interdistrict Choice Boost Student Achievement? The Case of Connecticut's Interdistrict Magnet School Program*, 31 EDUC. EVAL. & POL'Y ANAL. 323 (2009).

attended segregated schools in Hartford."[148] Several other scholars have noted the positive effects of desegregation on academic achievement.[149]

Nevertheless, some studies of desegregation and achievement have found little or no change in achievement or other educational outcomes for White students.[150] The NAACP noted in its brief in *Freeman v. Pitts* that, although "desegregation is generally associated with moderate gains in the achievement of black students," "achievement of white students is unaffected."[151]

Some are also not convinced that the academic benefits of integration outweigh the harms. Unfortunately, "[i]n spite of voluminous research and writing on this topic, there is still *no definitive study* of the relationship between school desegregation and academic achievement, and no group of studies has generated consensus among social scientists who have conducted reviews of the research literature."[152] In a recent study involving teachers in the Lafayette, Louisiana school district that desegregated in response to a 2000 court order, teachers noted concerns that the desegregation resulted in increased discipline problems and that the court's "attempt to redistribute the social advantages of the 'haves' to the district's 'have nots,' appear[ed] to have been a zero-sum game."[153]

However, Raleigh, North Carolina recently implemented a socio-economic integration plan which resulted in significant gains for both

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148. ARMOR, *supra* note 146, at 70.

149. For a good overview of studies that support the positive effects of integrated schooling on educational outcomes, see Derek Black, Comment, *The Case for the New Compelling Government Interest: Improving Educational Outcomes*, 80 N.C. L. REV. 923, 943–954 (2002); Carl Bankston III & Stephen J. Caldas, *The American School Dilemma: Race and Scholastic Performance*, 38 SOC. Q. 423, 428 (1997) (showing racially integrated settings are linked to improved achievement for Black high school students); Jomills Henry Braddock II & James M. McPartland, *The Social and Academic Consequences of School Desegregation*, *in* EQUITY AND CHOICE 5, 63–68 (1988) (showing both long and short term consequences of racially diverse primary and secondary schools and colleges, including improved race relations, increased academic achievement, and preparation for diverse work settings); Thomas D. Cook, *What Have Black Children Gained Academically From School Integration? Examination of the Meta-Analytic Evidence*, *in* SCHOOL DESEGREGATION AND BLACK ACHIEVEMENT 6, 41 (T. Cook et al. eds., 1984) (concluding that desegregation has a positive effect on reading scores).

150. ARMOR, *supra* note 146, at 71.

151. Brief of the NAACP et al. as Amici Curiae Supporting Respondents app. 51, Freeman v. Pitts, 503 U.S. 467 (1992) (No. 89-1290) (quoting W. Hawley and M. Snylie, *The Contribution of School Desegregation to Academic Achievement and Racial Integration*, in ELIMINATING RACISM: PROFILES IN CONTROVERSY 284–85 (Phyllis A. Katz & Dalmas A. Taylor eds., 1988).

152. ARMOR, *supra* note 146, at 76 (emphasis added).

153. Stephen J. Caldas, Carl L. Bankston III, & Judith S. Cain, *Social Capital, Academic Capital, and the "Harm and Benefit" Thesis: Evidence From a Desegregating School District*, *in* THE END OF DESEGREGATION? 121, 143 (2003).

Whites and African Americans.[154] Moreover, Project Concern, a precursor to Open Choice, illustrated that Hartford students who went to suburban schools and voluntarily chose to stay in those schools had significantly higher rates of college enrollment and significantly lower rates of dropping out than Hartford kids who were not in the program.[155] Although David Armor has noted that "those who withdrew from the program were having more academic and behavioral problems than the stay-ins,"[156] this only underscores the need for transparency in communicating the educational attainment of those students who transfer to reduced-isolation settings. Under the sliding scale remedy, parents will be able to see the effects reduced isolation has on the academic achievement of their children from year to year.

The gradual and voluntary nature of the sliding scale remedy will maximize the benefits of the harm and benefit thesis while tempering some of the concerns that have been raised. If integrated settings produce the outcomes that many scholars believe they will, districts can and will continue to apply the remedy. If integrated settings do not facilitate progress towards adequate academic outcomes for all students over the long run, courts will not compel further integration. Any adverse impact on districts will be marginal because the court evaluates progress on a periodic basis.

D. *Federal Legal Challenges*

Because states that adopt the sliding scale remedy will be doing so to ensure that they are meeting their affirmative obligations under state constitutions, most challenges to the sliding scale remedy must come from federal constitutional precedents and decisions. Although some of the relevant precedents that are triggered by the sliding scale remedy may present obstacles, I argue that sliding scale remedies would pass constitutional muster.

1. *Rodriguez*, *Milliken*, and the "Scope of the Remedy"

San Antonio Independent School District v. Rodriguez declared that there is no federally recognized constitutional right to an education.[157] Beyond

154. Alan Finder, *As Test Scores Jump, Raleigh Credits Integration by Income*, N.Y. TIMES, Sept. 25, 2005, at 1("In Wake County, only 40 percent of black students in grades three through eight scored at grade level on state tests a decade ago. Last spring, 80% did. Hispanic students have made similar strides. Overall, 91 percent of students in those grades scored at grade level in the spring, up from 79 percent 10 years ago."), *available at* http://www.nytimes.com/2005/09/25/education/25raleigh.html.

155. Gold, *supra* note 141, at 1048.

156. ARMOR, *supra* note 146, at 109.

157. San Antonio Independent Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

limiting the scope of federal authority over education, the ruling emphasized the importance of local control of public school systems.[158] For example, the court expressed concern that "other systems of school financing, which place more of the financial responsibility in the hands of the State, will result in a comparable lessening of desired local autonomy. . . . [W]ith increased control of the purse strings at the state level will go increased control over local policies."[159]

Although the *Rodriguez* decision revealed the Court's normative support for local control, however, it did not limit the state's authority to limit local autonomy over school districts.[160] The court simply deferred to the state's choice to promote local control of education. Thus, *Rodriguez* does not say anything about the equity power state courts may assert within their states.

Another Supreme Court case that circumscribes limits to state-wide educational remedies is *Milliken v. Bradley*.[161] The *Milliken* court determined that the existence of de jure segregation in metropolitan Detroit was not a sufficient reason to impose an inter-district remedy on its surrounding suburbs because the state did not affirmatively create the interdistrict segregation.[162] Because it is extremely difficult to demonstrate that the state acted to produce segregated conditions, the *Milliken* precedent created a significant roadblock in the quest to create inter-district remedies in school desegregation cases.

It is the *Milliken* case, in fact, that encouraged the voluntary remedy in *Sheff*.[163] The *Milliken* court endorsed local autonomy much more strongly than the *Rodriguez* court: "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process."[164]

As the *Milliken* court acknowledged, however, "a *federal* remedial power may be exercised 'only on the basis of a constitutional violation' and, '[as] with any equity case, the nature of the violation determines the

158. *See* discussion in Briffault, *supra* note 115, at 40–41.

159. *Rodriguez*, 411 U.S. at 51–53.

160. *But see supra* Part III.A. (describing how the state has the authority to expand or contract local control over districts as it pleases).

161. Milliken v. Bradley, 418 U.S. 717 (1974).

162. *See id.* at 757.

163. The *Sheff* court, in fact, acknowledged that the state did not "intentionally segregate racial and ethnic minorities in the Hartford public school system." 678 A.2d at 1274. The state's districting statute of 1909 was the "*single most important factor* contributing to the present concentration of racial and ethnic minorities in the Hartford public school system." *Id.*

164. *Milliken*, 418 U.S. at 741–42.

scope of the remedy.' "[165] Because the federal constitutional violation in *Milliken* was solely the de jure existence of segregated schools within inner-city Detroit, the remedy was confined to Detroit.[166] In *Sheff*, however, a state constitutional violation—de facto existence of racial and ethnic isolation throughout Greater Hartford—was the issue that deprived children of substantially equal educational opportunities.[167] Because the state constitutional problem of segregation extends beyond Hartford, so can the remedy.[168]

Because the sliding scale remedy would apply only to state constitutional decisions, state courts would not be constrained in applying these remedies. Inter-district remedies imposed by state courts would not create the federalism concerns that arise when such remedies are created by federal courts.[169] As long as a remedy is constructed in a way that does not violate the Federal Constitution, the state has every right to mandate an inter-district remedy. The only inter-district solution that would explicitly violate the Federal Constitution would be a purely race-based classification scheme.[170] Because the classification scheme applied under the sliding scale remedy would be primarily socioeconomic, there is no constitutional violation.

Even if one argued that the "scope of the remedy" standard should be strictly applied to any inter-district remedy, moreover, the sliding scale remedy is designed so that scope of the remedy *is* entirely dependent on the scope of the violation. The state and its subsidiary school districts are given an opportunity to address the violation as soon as they are told that the violation exists. If they do not, the continued existence of the violation is that much more egregious, warranting broader remedies over time. Once suburban school districts know a violation exists, inaction could be construed to represent a form of affirmative effort to perpetuate the constitutional wrong. Assuming a legal duty attached to the state upon the

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165. *Id.* at 738 (quoting *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1,16 (1972)(emphasis added)).

166. The city of Detroit, in fact, affirmatively created the segregated conditions within its schools. *See Milliken*, 418 U.S. at 717 (1974) ("The District Court, after concluding that various acts by the petitioner Detroit Board of Education had created and perpetuated school segregation in Detroit, and that the acts of the Board, as a subordinate entity of the State, were attributable to the State, ordered the Board to submit Detroit-only desegregation plans.")

167. *See Sheff*, 678 A.2d at 1281 ("[T]he existence of extreme racial and ethnic isolation in the public school system deprives schoolchildren of a substantially equal educational opportunity . . . .").

168. *See* KAHLENBERG, *supra* note 32, at 172.

169. *See* Missouri v. Jenkins, 515 U.S. 70, 98 (1995) (explaining that federal court remedies imposed on federal agencies do not raise "the same federalism concerns that are implicated when a federal court issues a remedial order against a State.").

170. *See infra* Part III.D.2.

decision in *Sheff*,[171] suburban acts of omission add to the scope of the violation.[172] Thus, as time passes, the *Milliken* standard could be read to allow for additional injunctive relief beyond the Hartford border.

The *Milliken* decision can also be distinguished insofar as that decision purely related to an inter-district remedy that intended to promote racial integration. As the court noted, such remedies require a showing that racially discriminatory acts of the state or local school districts, or of a single school district, have been a substantial cause of inter-district segregation.[173] What happens, however, if economically discriminatory acts of the state promote economic segregation? When economic segregation is what creates the state constitutional violation,[174] one could argue that the local policies of municipalities and their corresponding school districts affirmatively create those conditions.[175] In these cases there would be a strong argument for inter-district remedies, even under *Milliken*. Future cases that apply the sliding scale remedy may well address de jure socioeconomic segregation that occurs as a result of municipal zoning or other similar policies that deprive children from attaining equitable educational opportunities. Finally, the *Milliken* court expressed concern about the justiciability of the remedy:

> [T]he District Court will become first, a de facto 'legislative authority' to resolve these complex questions, and then the 'school superintendent' for the entire area. This is a task which few, if any, judges are qualified to perform and one which would deprive the people of control of schools through their elected representatives.[176]

The sliding scale remedy is justiciable. The court applies a judicially manageable standard, NCLB test scores, to gauge progress towards the

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171. If the legal duty flows to the state, this duty also flows to the school district. In Connecticut, school boards are not agents of the towns but are creatures of the state. *See* Norwalk Teachers' Ass'n v. Bd. of Educ., 83 A.2d 482, 485 (Conn. 1951).

172. *Cf. Sheff*, 678 A.2d at 1277 ("The defendants' argument, derived largely from principles of federal constitutional law, founders on the fact that article eighth, § 1, and article first, §§ 1 and 20, impose on the legislature an *affirmative* constitutional obligation to provide schoolchildren throughout the state with a substantially equal educational opportunity.").

173. *Milliken*, 418 U.S. at 745.

174. This was not what the *Sheff* court ruled, but it is a possibility in future cases. *Cf.* Richard D. Kahlenberg, *Socioeconomic School Integration*, 85 N.C. L. REV. 1545, 1591–92 (describing Southern Burlington County NAACP v. Twp. of Mount Laurel, 336 A.2d 713 (N.J. 1975) and other cases to illustrate that courts have interpreted state constitutions to require affirmative remedies of de facto economic segregation in the housing law context).

175. Through, for example, exclusionary zoning and other tactics. *See* discussion, *supra* Part III.A.

176. *Milliken*, 418 U.S. 717 at 743–44.

remedy.[177] All policymaking, at least on the front end, is delegated to states and municipalities. The court enjoins future action only to remedy the condition that created the constitutional violation, and this occurs only if the state fails to meet its legal duty. It is less likely that courts will need to intervene in policy matters if states and municipalities are given this opportunity.[178]

2. *Parents Involved* and the Sliding Scale Remedy

Parents Involved[179] has also had a significant impact on school integration plans. The case limited the degree to which race could be considered in assigning students to particular schools. Although the court's plurality opinion recognized that remedying the effects of past intentional discrimination is a compelling interest,[180] that compelling interest was not present in the cities involved in the litigation because those cities were not subject to court-ordered desegregation at the time of the ruling.[181] The plurality did acknowledge the compelling interest of diversity in education that was upheld in *Grutter v. Bollinger*,[182] but it interpreted this compelling interest narrowly to apply solely to higher education.[183]

However, in his controlling concurrence, Justice Kennedy argued that "[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue."[184] The main problem with the student assignment plans in *Parents Involved* was that they "employed . . . crude racial categories."[185] Race-conscious measures could be applied

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177. *See* discussion *infra* Part IV.A.; *see also* Koski, *supra* note 7, at 307 ("Armed with specific, clear, and meaningful standards that are the product of such an extensive political process, courts are better positioned to overcome their self-imposed obstacles to policy reform.").

178. *Cf. Jenkins*, 515 U.S. 70 (1995). Ironically, the Supreme Court ruled that the trial court's *intra-district* remedy was beyond its equity power because, in part, it forced the state to finance an excessive number of programs within the school district. *Id.* The trial court took this action, however, because it was unable to employ an *inter-district* remedy based on the *Milliken* precedent. *See* RUSSELL WEAVER ET AL., PRINCIPLES OF REMEDIES LAW 103–104 (2007). If districts are able to voluntarily take *inter-district* steps at the outset, this problem of an excessive structural remedy could be averted.

179. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

180. *Id.* at 720.

181. *Id.* at 720–21.

182. Grutter v. Bollinger, 539 U.S. 306 (2003) (holding that the University of Michigan Law School admissions program was constitutional under Fourteenth Amendment strict scrutiny because it was narrowly tailored to achieve the compelling state interest of diversity in higher education).

183. *Parents Involved*, 551 U.S. at 703.

184. *Id.* at 783 (Kennedy, J., concurring).

185. *Id.* at 786 (Kennedy, J., concurring).

to student assignments that seek to achieve diversity, but assignment determinations must be holistic and not be solely race-based.[186]

Because "commentary on *Parents Involved* generally agrees that the Court has either closed the door on or left only a narrow opening for using racial classifications in student assignment plans," districts are likely to increasingly rely on race-neutral approaches in their attempts to avoid racial isolation.[187] The Louisville school assignment plan ruled unconstitutional under *Parents Involved* was recently revised and now considers family income and education level in assigning students.[188] Although another lawsuit was filed challenging the constitutionality of that plan, the Louisville superintendent stated that he "looks forward to winning this time around" because they worked with attorneys from throughout the country to comply with Justice Kennedy's ruling.[189]

Although the current *Sheff* remedy sets race-based targets for student composition in Hartford area schools, Connecticut Attorney General Richard Blumenthal has argued that the current remedy is constitutional under *Parents Involved* because the Open Choice and inter-district magnet school assignment plans do not assign students to particular schools on the basis of race.[190] Rather, the plans use random lottery systems that choose students based on their residential communities.[191] According to Blumenthal, the ruling "struck down mandatory diversity programs containing rigid racial classifications assigning students based solely on race. *Sheff*

186. *Id.* at 788–89 (Kennedy, J., concurring). Kennedy states that "[r]ace may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered." *Id.* at 798.

187. *See* Kimberly Jenkins Robinson, *The Constitutional Future of Race-Neutral Efforts to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, 50 B.C. L. REV. 277, 293–94 (2009).

188. Andrew Wolfson & Deborah Letter, *New Suit Challenges Jefferson Student Assignment Plan*, LOUISVILLE COURIER-JOURNAL, July 2, 2009, *available at* http://www.courier-journal.com/article/20090702/NEWS0105/907020341/New+suit+challenges+Jefferson+student+assignment+plan.

189. *Id.* The lawsuit was recently dropped. *See* Chris Kenning, *Lawyer Says He Will Drop Student-Assignment Lawsuit Against JCPS*, LOUISVILLE COURIER-JOURNAL, Oct. 6, 2009.

190. The Connecticut Attorney General has implied an implementation plan focusing on economic isolation in addition to racial considerations could pass the constitutional test under *Parents Involved*. *See* 2007 Conn. AG LEXIS 36 (2007) ("Local districts can design plans which, as Justice Kennedy stated, are race conscious but do not result in a singular focus on individual students' racial classifications."). This highlights one of the more interesting distinctions between the *Sheff* ruling and the *Sheff* remedy. The *Sheff* ruling "conclud[ed] that the existence of extreme *racial and ethnic* isolation in the public school system deprives schoolchildren of a substantially equal educational opportunity . . . ." *Sheff* 678 A.2d at 1281 (Conn. 1996). The *Sheff* remedy as codified by statute, meanwhile, sought to "reduce *racial, ethnic, and economic* isolation." 1997 Conn. Pub. Acts 97-290 § 3(b).

191. *See* Wadhwa, *supra* note 69, at 1 (quoting a personal communication with Dr. Bruce Douglas, Executive Director of the Capitol Region Educational Council (CREC) October 20, 2008).

programs are voluntary and have flexible diversity goals instead of fixed quotas."[192] The *Sheff* plan would pass the strict scrutiny test more easily than the current Louisville plan because, although it has numerical goals to place students in reduced-isolation settings,[193] race is less of a factor in assigning students.

For the above reasons, the sliding scale remedy would not be unconstitutional under *Parents Involved*. First, purely voluntary plans during the declaratory phase of the remedy would be constitutional just as they are under the current *Sheff* implementation—they will be based on factors other than race, including economic status and place of residence. Similarly, compulsory assignments of urban students to suburban schools would not be on the basis of race. Rather, they would be based on the socioeconomic status of the student and the academic performance of urban and suburban school districts. If the court determines that a metropolitan school district must be created, student assignments within that district would not be on the sheer basis of race either.

IV. ADVANTAGES OF THE SLIDING SCALE REMEDY

This Part discusses additional benefits of the sliding scale remedy. First, the remedy applies a clear remedial principle that guides courts throughout its implementation. This will provide legislatures and policymakers with clear and consistent remedial standards. Second, unlike past remedies, the remedy maximizes the court's use of the agenda-setting power. Finally, the remedy encourages a razor-sharp focus on students while reducing moral hazard problems within school districts.

A. *Clear Remedial Principle*

One of the major critiques of the *Sheff* ruling is that it did not establish a clear remedial principle. Indeed, this was a critique of the *Sheff* majority by Justice Borden, who "[could] 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 [would] be constitutional."[194] Both federal and state courts that have fashioned desegregation remedies have done a poor job of articulating

192. Press Release, Conn. Attorney Gen.'s Office, ATTORNEY GENERAL STATEMENT ON U.S. SUPREME COURT RULING ON USE OF RACE IN SCHOOL DIVERSITY PROGRAMS (June 28, 2007), *available at* http://www.ct.gov/AG/cwp/view.asp?A=2788&Q=385300.

193. *See Milo Sheff, et al. v. William A. O'Neill, et al. Phase II Comprehensive Management Plan, Conn Dep't of Educ. News* (Conn. Dept. of Educ.), Jan. 6, 2009, *available at* http://www.courant.com/media/acrobat/2009-02/44855273.pdf [hereinafter Phase II Plan].

194. *Sheff*, 678 A.2d at 1329 (Borden, J., dissenting).

remedial principles "in a timely, consistent, and effective manner."[195] Thus, "they have failed to provide legislatures, administrators, and lower courts with clear, purposeful guidance."[196]

By focusing on educational outcomes, the sliding scale remedy articulates a clear, intelligible principle that guides efforts to address racial, ethnic, and economic isolation in schools. This will guide courts as they enforce remedial orders and oversee progress of efforts to mitigate constitutional violations. Because NCLB is all about frequent measurement of academic outcomes, "the law is a boon to the construction of the 'judicially manageable standards' that are so crucial to the adequacy argument."[197]

Because the sliding scale remedy sets reasonable, objective progress goals, courts will know when the use of additional equity power is or is not appropriate in particular contexts. By incorporating outcomes-based incentives into the remedy, the likelihood that remedies will simply throw money at problems or integrate in ways that do not produce results will be substantially reduced.[198]

Courts are likely to defer to standards that are established by state legislatures moving forward. Because its state legislature articulated clear educational standards, for example, the Kansas Supreme Court said that "the court will not substitute its judgment of what is 'suitable', but will utilize as a base the standards enunciated by the legislature and the state department of education."[199] Although Connecticut courts have not yet indicated that they will apply the Connecticut State Standards to its definition of an adequate education, the state legislature codified its state standards and testing requirements into the statutory framework.[200] Other states have similarly codified NCLB requirements into their own state statutes.[201] Thus, other courts could reasonably follow Kansas' lead.

In embracing the sliding scale remedy, however, courts will need to consider standardized achievement scores to guide their remedies.[202]

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195. Rebell, *supra* note 9, at 1151.

196. *Id.*

197. Rudalevige, *supra* note 15, at 247–48.

198. *See, e.g.*, HANUSHEK, *supra* note 13, at 217–18 (indicating that school finance has rarely been connected to incentives for improved student achievement, and that this has led to bad policy outcomes).

199. Unified Sch. Dist. No. 229 v. Kansas, 885 P.2d 1170, 1186 (Kan. 1994).

200. *See* CONN. GEN. STAT. § 10-14n (2009). According to the statute, "mastery testing pursuant to this section shall be in conformance with the testing requirements of the No Child Left Behind Act." *See* § 10-14n(g).

201. The Education Commission of the States has a No Child Left Behind Database that lists the relevant NCLB implementation statutes of each states. *See* NCLB Database, *available at* http://nclb2.ecs.org/NCLBSURVEY/NCLB.aspx?Target=SS.

202. If courts are unwilling to do this, other, more holistic outcomes-based assessments of educational opportunities could be considered to guide the remedy, but this

Although such output measures have been considered to be "important guideposts for determining whether an education system is functioning well and whether further scrutiny is warranted, [] they are not seen as constituent elements of a constitutional definition of adequacy."[203] Courts have hesitated to directly use high-stakes tests in their assessments of adequacy.[204]

Assuming that courts fully adjudicate education lawsuits that challenge the racial, ethnic, and economic isolation of students, however, applying high-stakes test results to the remedial phase of the litigation would be quite beneficial from a separation of powers standpoint. Rather than "strik[ing] down the system because the system strikes the court the wrong way, . . . never ha[ving] to explain precisely why it is inadequate,"[205] application of the sliding scale remedy will provide a clear rationale that explains exactly why current, segregated conditions are problematic in a particular school system. Legislatures will then know, both *ex post* and *ex ante*, what they will need to accomplish over time to meet the standard. This transparency will enhance predictability of future lawsuits. Meanwhile, state legislators know that they are in control of the state standards. If they wish to modify those standards, they may do so, but they do so at the risk of political fallout to their constituencies, who will demand high standards of educational quality for their kids. If, for example, a legislature and state board of education set high standards and immediately lowered them after losing an adequacy lawsuit (the so-called "race to the bottom"), both the local and national community are likely to react in a negative way under a sliding scale remedy regime.[206]

Finally, the sliding scale remedy will not force courts to decide on an "optimal" racial or socioeconomic balance in a particular school district or region. Indeed, the social science research has not thoroughly addressed this question, and the only answers have emphasized that mi-

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Note presumes that high-stakes state standardized tests or NAEP scores will guide courts' implementation of the remedy.

203. *See* Michael A. Rebell, *Educational Adequacy, Democracy, and the Courts, in* ACHIEVING HIGH EDUCATIONAL STANDARDS FOR ALL 218, 242 (Timothy Ready et al. eds., 2002).

204. *See, e.g.*, Campaign for Fiscal Equity v. State, 655 N.E.2d 661, 666 (N.Y. 1995) ("Performance levels on such examinations are helpful but should also be used cautiously as there are a myriad of factors which have a causal bearing on test results."); Leandro v. State, 488 S.E. 2d 249, 2590–60 (N.C. 1997) (holding that the "level of performance of the children of the state and its various districts may be considered, but "they may not be treated as absolutely authoritative on this issue.").

205. Joshua Dunn & Martha Derthick, *Adequacy Litigation and the Separation of Powers, in* SCHOOL MONEY TRIALS: THE LEGAL PURSUIT OF EDUCATIONAL ADEQUACY 322, 333 (Martin R. West et al. eds., 2007).

206. Michael Heise implies that the race-to-the-bottom could adversely impact the success of adequacy suits—and their remedies—moving forward. *See* Heise, *supra* note 14, at 263 ("[O]ne unanticipated consequence of the interaction between adequacy litigation and NCLB is the growing pressure on states to lower student proficiency standards so as to reduce the state's exposure to adequacy litigation.").

norities need to be present at more than a token percentage to ensure positive outcomes.[207] Beyond the practical difficulties of setting reasonable racial balance targets, remedies that do not formally set these targets are less likely to face Supreme Court scrutiny in the wake of decisions such as *Parents Involved*. In this sense, a sliding scale remedy would receive less constitutional scrutiny than the current *Sheff* remedy.

B. *Maximizing the Court's Use of the Agenda Setting Power*

The sliding scale remedy is designed to ensure that the court maximizes its agenda-setting power. There are two techniques that allow courts to maximize this power. First, courts should make the outcomes of reform clear to give the legislature a "meaningful target."[208] Such meaningful targets ensure that the legislature can clearly define its own progress towards achieving outcomes and adjust its response as needed. Second, judges should make use of meaningful and respectful deadlines.[209] These deadlines consistently reiterate the sense of urgency necessary to ensure that remedial steps are taken. In addition, "[t]hreats of injunctive relief and retaining jurisdiction over a lawsuit make these deadlines much more credible."[210]

These agenda-setting criteria are met by the sliding scale remedy. In the sliding scale remedy, the clear outcomes of reform are the educational growth goals prescribed by the court, and the meaningful deadlines are represented by the periodic checkpoints that ensure that those outcomes are met. Meanwhile, the specter of injunctive relief—a regionalized school district, for example—looms in the background.

This agenda-setting power will be particularly acute in the state court decisions in which the sliding scale remedy is intended to apply. Although federalism and separation of powers concerns may limit the degree to which Article III courts impose remedial liability on the political concerns of states, these concerns do not limit state courts.[211] Unlike federal court decisions which limit debate and discussion at the state level, state-court decisions promote democratic discussion amongst the political branches and the people of a state.[212] State court judges are frequently viewed as "part of the political process" since they frequently serve for limited terms, are sometimes subject to recall elections, and are not insulated from political

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207. *See* Black, *supra* note 149, at 963.

208. REED, *supra* note 10, at 171 ("By remaining focused on goals and outcomes, without dictating means, judges simultaneously respect the policy-making authority of legislators and executives and increase the likelihood that the legislature will take the decision seriously.").

209. *Id.*

210. *Id.*

211. *See* Hershkoff, *supra* note 118, at 1902.

212. *Id.*

pressure.[213] Thus, "state court judges, free from the federalism constraints that bind their Article III counterparts, are [] accorded a greater judicial space in which to experiment and design innovative remedies . . . ."[214] The branches at the state level have blended and complementary functions.[215] State courts thus have every right to set and guide the legislative agenda.

C. *Focus on Students and Reduced Moral Hazard*

One of the problems with past educational adequacy and desegregation lawsuits is that they have provided districts with resources without ensuring that those school districts use them in ways that improve district efficiency. Since money doled out in the political process is not tied to educational outcomes, districts lack the incentives to place the resources where they will ensure the best educational outcomes for our children. This, for example, occurred in the Abbott districts of New Jersey, where chronically failing districts were given almost "unlimited access to resources and programs."[216] It also occurred in the Kansas City schools that were under the long-term remedial desegregation decrees that were challenged in *Missouri v. Jenkins*.[217] Although schools in that district had been under an eighteen-year desegregation order, student achievement in that district was still "at or below national norms at many grade levels."[218] And, although per-pupil expenditures in Kansas City were close to twice the statewide average, performance on statewide tests did not improve relative to peer school districts throughout the state.[219] It is thus unsurprising that few have documented increases in test scores that were a direct result of education finance lawsuits.[220]

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213. Paul W. Kahn, *State Constitutionalism and the Problems of Fairness*, 30 VAL. U. L. REV. 459, 472 (1996).

214. Hershkoff, *supra* note 118, at 1901.

215. *Id.* at 1904.

216. HANUSHEK, *supra* note 13, at 223–24. Using an analysis of NAEP student achievement data from 1992–2007, Hanushek found that "New Jersey students [were] still in roughly the same position as an earlier generation of students in 1992." *Id.* at 165–66.

217. *See* Missouri v. Jenkins, 515 U.S. 70 (1995). The Kansas City case is considered the best-known anecdote regarding the inefficacy of increased educational funding. Ryan, *supra* note 32, at 289 (1999).

218. 515 U.S. at 76. Although *Missouri v. Jenkins* ruled that student achievement was not to be used as a gauge to determine the proper scope of the desegregation remedy, this is solely because it was not relevant to the district's attainment of "partial unitary status." *Id.* The primary goal of the remedy was to restore plaintiffs to their *ex ante* position, not equalize educational opportunities in accordance with a state constitution provision.

219. *See* Ryan, *supra* note 32, at 290.

220. *See, e.g.*, HANUSHEK, *supra* note 13, at 146 ("Given the support adequacy litigation enjoys among professors in the nation's colleges of education, the absence of articles documenting test scores rising in response to more funding is striking.").

These problems have not arisen purely out of a lack of resources or support from courts, but at least partially as a result of two related issues. First, some school districts have lost sight of the fact that their purpose is to serve students. Second, dependence on court ordered funding and remedies has resulted in a moral hazard problem that has caused districts to use their resources in inefficient ways.

Several case studies illustrate how urban districts have, at times, failed to focus on their students.[221] One case study of the Newark public schools, for example, indicated that the school system places more importance on political connections than merit when appointing administrators.[222] Another in St. Louis concluded that "the St. Louis school board has taken better care of many of its employees than it has of the children whose life chances depend on the board's ability to lead."[223] Additional studies of the Houston, Sacramento, and Charlotte-Mecklenburg schools found that decision-making in the districts was often difficult due to their political climate, and that "almost none [of the decision-making] was focused on academic achievement."[224]

These anecdotes are strongly connected to the moral hazard problem commonly encountered in the insurance context. If we view education remedies as insurance policies that are meant to protect against inadequate educational opportunities, and the remedies are not time-limited, the marginal cost of the remedy to school districts that receive the benefits of the remedy is approximately zero. This marginal cost for the district is far below the marginal social cost to the state when it provides the remedial benefit, and thus the urban district will use "too much" of the remedial resources or engage in "too little care" with respect to those resources.[225]

To mitigate the moral hazard problem, the marginal "cost" of receiving the remedial benefit must be approximately equal to the marginal benefits that are being provided.[226] In the school remedy context, the "cost" to the district can be viewed as the value-added achievement of students that results from the school district's efforts.[227] If value-added academic outputs are not commensurate with the benefits provided to the

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221. *See* Ryan, *supra* note 32, at 294. *See also* JASON SNIPES ET AL., MDRC, FOUNDATIONS FOR SUCCESS: CASE STUDIES OF HOW URBAN SCHOOL SYSTEMS IMPROVE STUDENT ACHIEVEMENT 27 (2002) (explaining that direct political influence was likely to affect hiring decisions in the district), *available at* http://www.mdrc.org/publications/47/full.pdf.

222. *See* Ryan, *supra* note 32, at 294.

223. AMY STUART WELLS & ROBERT L. CRAIN, STEPPING OVER THE COLOR LINE: AFRICAN AMERICAN STUDENTS IN WHITE SUBURBAN SCHOOLS 130 (1997).

224. *See* SNIPES, *supra* note 221, at 21.

225. *See* RICHARD A. IPPOLITO, ECONOMICS FOR LAWYERS 350 (2005).

226. *Id.* at 353.

227. *Cf.* Rosalind Levacic, *Funding Schools by Formula*, *in* GOVERNANCE AND PERFORMANCE OF EDUCATION SYSTEMS 205, 230 (Nils C. Soguel & Pierre Jaccard eds., 2007) (discussing the moral hazard problem in the context of school funding formulas).

district, inefficiencies may result.[228] Because the sliding scale remedy holds districts in the entire region accountable to growth in academic achievement outcomes before exercising equity power, the sliding scale remedy helps to reduce some of these moral hazard problems.

The sliding scale remedy also creates incentives for relevant political actors to focus on students. If the student growth outcomes are not met in the urban district, suburban districts understand that additional equity power may be exercised against them. Thus, they have a strong incentive to cooperate with urban districts over voluntary solutions.

Meanwhile, urban districts and state politicians understand the risks of political backlash if they do not effectively work to improve the achievement of students within the racially, ethnically, and economically isolated districts. Because student achievement will be part of the court's remedial analysis, an urban district's failure to improve achievement of students who attend school within the district will be as transparent as the district's failure to improve achievement for those students who opt for open-choice or inter-district magnet programs. Thus, should the court be forced to wield additional equity power as a result of an urban district's failure to effectively provide an education with the resources it has inside the school district, state authorities—both of the executive and legislative branches—will not allow the district to continue to operate in that manner.

For this reason, internal inefficiencies within urban school districts are likely to lead to state takeovers or other measures by the state that will stimulate efforts by political leaders to maximize the efficiency of the urban school district. If the state's efforts to improve efficiency within the urban districts fail, this could simply support the claim that further efforts to reduce racial, ethnic, and economic isolation are necessary to ensure that efforts to improve academic achievement of urban students are successful. This would legitimize increased equity power exercised by courts under the sliding scale remedy.

It is worth reiterating that the sliding scale remedy focuses on the achievement of *suburban* as well as *urban* students as it provides these incentives for reform. Even if some moral hazard were to occur within urban school districts, there would not be significant "spillover" effects into suburban school districts since suburban districts will not be enjoined if their students are not achieving at high levels.

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228. One of the inherent challenges with any remedy—whether it be a school finance or desegregation remedy—is that it is virtually impossible to isolate the value-added effect of the school district on value-added outcomes. *Id.* However, using academic outcomes to guide the remedy will at least ensure that the school district faces some "cost" with respect to its value-added results. This is compared to the status quo, in which school districts benefiting from remedies effectively face no such costs.

CONCLUSION

I agree with Justice Marshall's statement that "unless our children begin to learn together, there is little hope that our people will ever learn to live together."[229] The remedy I propose in this Note will move us one step closer to that ideal. On the one hand, the remedy encourages states, once and for all, to show that socioeconomic integration can equalize outcomes—and therefore the opportunities—of socioeconomically isolated students. On the other hand, it also provides the states and local school districts with the opportunity to show that voluntary remedies—possibly those that promote little to no integration—can produce adequate outcomes for low-income students.

This latter course may not seem to be a step in the right direction. Either way, however, the remedy—if applied correctly—will show that the academic achievement of both suburban and urban students is possible. In the long term, this will help dismantle many of the current political and social barriers to integration. Not only will low-income students' increased academic performance ultimately afford them greater access to higher income neighborhoods, it will also convince many who currently reside in such neighborhoods that learning in an integrated setting is not as unfathomable as once thought. State constitutions can and should pave the way for the fulfillment of the *Sheff* ideal[230]—quality, integrated schools for all children.

229. *Milliken*, 418 U.S. at 783 (1974) (Marshall, J., dissenting).

230. *See, e.g.*, William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) ("State constitutions . . . are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.").