

1-1-2002

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## Recommended Citation

Justin R. Long, *Enforcing Affirmative State Constitutional Obligations and Sheff v. O'Neill*, 151 U. Pa. L. Rev. 277 (2002). doi: [10.2307/3313011](https://doi.org/10.2307/3313011)

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ENFORCING AFFIRMATIVE STATE CONSTITUTIONAL  
OBLIGATIONS AND *SHEFF V. O'NEILL*

JUSTIN R. LONG<sup>†</sup>

INTRODUCTION

While the United States Constitution is largely a grant of powers to a narrowly limited national legislature,<sup>1</sup> the state constitutions typically act to constrain legislatures imbued with plenary power.<sup>2</sup> Similarly, federal courts have jurisdiction sharply restricted by federal constitutional limits,<sup>3</sup> while state courts have broad common-law-making authority.<sup>4</sup> These distinctions are particularly acute in litigation over the affirmative obligations state constitutions impose on state legislatures.

The United States Congress *may* make laws affecting interstate commerce,<sup>5</sup> patents,<sup>6</sup> or federal property,<sup>7</sup> for example, but it is diffi-

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<sup>1</sup> See, e.g., *United States v. Lopez*, 514 U.S. 549, 552 (1995) (declaring Congress's authority to be limited to its enumerated powers).

<sup>2</sup> See, e.g., Opinion of the Justices, No. 346, 665 So. 2d 1357, 1359 (Ala. 1995) ("While the legislature's broad governmental power is plenary in character, it is not absolute and is subject to the express restrictions of the state constitution."); see also Robert F. Williams, Comment, *On the Importance of a Theory of Legislative Power Under State Constitutions*, 15 QUINNIPIAC L. REV. 57, 60 (1995) (noting that state legislatures have plenary power while Congress has only enumerated powers).

<sup>3</sup> See, e.g., *Seminole Tribe v. Florida*, 517 U.S. 44, 65 (1996) (explaining that federal courts cannot be granted jurisdiction beyond that awarded in Article III of the U.S. Constitution).

<sup>4</sup> See Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 875 (1991) (discussing the persistent vitality of state courts' common law capacities).

<sup>5</sup> U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power to "regulate commerce").

<sup>6</sup> U.S. CONST. art. I, § 8, cl. 8 (permitting Congress to establish patents).

<sup>7</sup> U.S. CONST. art. IV, § 3, cl. 2 (authorizing Congress to regulate government property).

cult if not impossible to imagine a cause of action against the United States because of a congressional decision not to enter these fields. The federal legislature *shall not* make laws abridging freedom of speech,<sup>8</sup> imposing bills of attainder,<sup>9</sup> or granting aristocratic titles,<sup>10</sup> among other things; where Congress violates these prohibitions, the courts remain largely available to vitiate the forbidden action.<sup>11</sup>

In contrast, in addition to imposing permissive and negative obligations like those found in the U.S. Constitution, state constitutions typically impose various affirmative constitutional obligations on state legislatures: they *shall* balance the budget,<sup>12</sup> protect the environment,<sup>13</sup> reapportion electoral districts,<sup>14</sup> or provide free public education.<sup>15</sup> When the states operating under such affirmative obligations

<sup>8</sup> U.S. CONST. amend. I (precluding Congress from impairing free speech).

<sup>9</sup> U.S. CONST. art. I, § 9, cl. 3 (barring bills of attainder).

<sup>10</sup> U.S. CONST. art. I, § 9, cl. 8 (prohibiting the granting of titles of nobility).

<sup>11</sup> *But cf.* Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1326 (1984) (arguing that even negative rights can be thought of as imposing affirmative obligations on government since, in the modern administrative state, "all rights are to some extent positive, for the government is often in a position to deal mortal blows to the exercise of rights by simply ceasing to intervene").

<sup>12</sup> *See, e.g.*, MONT. CONST. art. VIII, § 9 (requiring that the state's expenditures not exceed its revenues); *see also* Donald B. Tobin, *The Balanced Budget Amendment: Will Judges Become Accountants? A Look at State Experiences*, 12 J.L. & POL. 153, 155 (1996) (noting that "forty-eight of the fifty states have some type of balanced budget restriction"). The Montana provision was recently construed as an affirmative obligation in *Nicholson v. Cooney*, 877 P.2d 486, 491 (Mont. 1994) (holding, *inter alia*, that the constitutional obligation to balance the budget "places a restriction on the legislature").

<sup>13</sup> *See, e.g.*, HAW. CONST. art. XI, § 1 (declaring that "the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources"); *see also* Roland M. Frye, Jr., *Environmental Provisions in State Constitutions*, 5 *Envtl. L. Rep. (Envtl. L. Inst.)* 50,028 (1975) (describing state constitutional protections of natural resources).

<sup>14</sup> *See, e.g.*, MASS. CONST. amend. art. CI (outlining the legislature's responsibility to apportion voting districts); *see also* Jeffrey G. Hamilton, Comment, *Deeper into the Political Thicket: Racial and Political Gerrymandering and the Supreme Court*, 43 *EMORY L.J.* 1519, 1542, 1552-64 (1994) (noting that state legislatures generally have primary control over voting districts, subject to federal constitutional constraints).

<sup>15</sup> *See, e.g.*, N.J. CONST. art. VIII, § 4, cl. 1 (requiring the legislature to provide a "thorough and efficient" public education); *see also* Kelly Thompson Cochran, Comment, *Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 *N.C. L. REV.* 399, 408 (2000) (showing that all fifty states have constitutional provisions providing for public education).

For a more crabbed view of state constitutional affirmative obligations, consider Justice Norcott's opinion in *Moore v. Ganim*, 660 A.2d 742, 760-64 (Conn. 1995), denying a claim that Connecticut had an affirmative constitutional obligation to provide for

fail to comply, state courts are faced with the challenge of enforcing constitutional provisions against their own legislatures.

This Comment will attempt precisely to identify the difficulties of judicial enforcement of affirmative constitutional obligations and will suggest that taking procedural formalities more seriously may result in effective enforcement. This issue will be examined through the lens of ongoing school desegregation efforts under the Connecticut Constitution.

Part I of this Comment will discuss the history of Connecticut's constitutional litigation concerning school desegregation and outline problems with enforcing the state supreme court's landmark 1996 desegregation case, *Sheff v. O'Neill*.<sup>16</sup> While the facts and law of this case will be addressed with specific attention to the Connecticut context, the issues uncovered illuminate problems of nationwide concern.

Part II will examine possible implied affirmative obligations in the Federal Constitution and consider how federal courts have enforced those obligations. More significantly, this Part will review efforts by some of Connecticut's sister states to enforce their own affirmative constitutional obligations.

Part III will discuss broad problems inherent in judicial action mandating legislative conduct. Among these problems is the possibility that state legislatures may refuse to comply with their courts' decrees, a potentially serious threat to the legitimacy of state constitutionalism. As a solution, this Comment argues that state courts seeking to enforce affirmative obligations should make bold, morally confident decrees, but in close technical conformity with traditional concepts of civil procedure and legal formalism.

## I. CONNECTICUT'S *SHEFF* LITIGATION

Developing an understanding of the *Sheff* case and its effects on Connecticut requires attention to a narrative beginning long before

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its indigent citizens. Although Connecticut's constitution includes explicit obligations to balance the budget, protect the environment, and reapportion electoral districts, the *Moore* court thought that provisions relating to the public schools and state university were "the only constitutional provisions, recognized to date, that impose affirmative obligations on the part of the state to expend public funds to afford benefits to its citizenry." *Id.* at 761.

<sup>16</sup> 678 A.2d 1267 (Conn. 1996) (holding that Connecticut has an affirmative constitutional obligation to eliminate de facto segregation in Hartford-area public schools).

seventeen schoolchildren sued their governor in 1989. School desegregation under the Connecticut Constitution implicates a complex socio-legal history extending back to the earliest days of the Connecticut Colony. While the characters and setting of this story are particular to the small state in question, the themes are far broader and more profound. Any government's relationship with its children is a sensitive and potentially controversial topic with inextricable moral concerns. Similarly, the effects of any law-inspired change in race relations extend well beyond law into morality and the society's very conception of itself.<sup>17</sup> When, as with school desegregation, the race-tinged relationship between a government and its children is formally defined by the government's founding document, official decisions are likely to be affective as well as rational and cultural as well as legal.<sup>18</sup> The three strands of Connecticut history described below—public schools, state constitutionalism, and race relations—entwine from the earliest colonial days through the latest court opinions to form the story studied here.<sup>19</sup>

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<sup>17</sup> See, e.g., Nelson Mandela, Acceptance Speech at the Nobel Peace Prize Award Ceremony, Oslo, Norway (Dec. 10, 1993) (predicting that the legal end of apartheid would change the whole South African society, "because we will have created a society which recognises that all people are born equal, with each entitled in equal measure to life, liberty, prosperity, human rights and good governance"), at <http://www.anc.org.za/ancdocs/speeches/nobelnm.html> (last visited Oct. 18, 2002).

<sup>18</sup> New England state constitutions have been described as especially expressive of the authoring communities' philosophical and moral values. See Daniel J. Elazar, *The Principles and Traditions Underlying State Constitutions*, 12 PUBLIUS 11 (1982) (positing that early New England constitutions "are basically philosophic documents" and that they "emphasize[] the constitution as a covenant establishing a civil society"), reprinted in ROBERT F. WILLIAMS, *STATE CONSTITUTIONAL LAW* 67, 68 (3d ed. 1999).

<sup>19</sup> On the use of storytelling in legal writing generally, see Shulamit Almog, *As I Read, I Weep—In Praise of Judicial Narrative*, 26 OKLA. CITY U. L. REV. 471, 473 (2001) ("[Narrative] has a way of penetrating and manifesting itself clearly and forcibly, even after being minimized, disguised, or obscured by the legal course of action."). Cf. Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381, 385 (1989) (examining the narrative aspects of two United States Supreme Court opinions on race relations and noting that "within the legal culture, where moralizing discourse is everywhere, narrative exists, and, indeed, narrative abounds.").

A. *The Early History of Public Education, Constitutionalism, and Race Relations in Connecticut*

Hartford was founded in 1635 by Reverend Thomas Hooker, who walked with his congregation south from their Massachusetts church,<sup>20</sup> located one block away from the site of what was soon to become the Bay Colony's first public university (today known as Harvard College).<sup>21</sup> Thus, even before the Connecticut Colony was organized, its founders were familiar with the value of state-sponsored schooling and came from a community committed to the ideal of public education. Within ten years of settlement upon the banks of the Connecticut River, the fledgling Hartford community hired a teacher, established a school tax, set a curriculum, and invited all community children to be educated regardless of their economic status.<sup>22</sup>

While the early Connecticut Colony was attending to the education of its youth, it also established a written framework of government, the *Fundamental Orders*.<sup>23</sup> Under the authority of the government established by the *Fundamental Orders*, a colonial diplomat obtained from King Charles II a royal charter that was highly favorable to the colonists.<sup>24</sup> By 1697, local reverence for the charter had grown so strong that when King James II sent a military governor from Boston to Hartford to revoke it, local officials hid the charter in a nearby oak tree rather than surrender it.<sup>25</sup> Connecticut's affection for its

<sup>20</sup> See SONDRÁ ASTOR STAVE, *ACHIEVING RACIAL BALANCE: CASE STUDIES OF CONTEMPORARY SCHOOL DESEGREGATION* 85-86 (1995) (describing the settlement of Hartford by Thomas Hooker's congregation).

<sup>21</sup> For a detailed description of Massachusetts's early official support for Harvard College, see *McDuffy v. Sec'y of Executive Office of Educ.*, 615 N.E.2d 516, 531-32 (Mass. 1993) (explaining that "[i]n 1636, the General Court of the Bay Colony founded Harvard College with a public grant of 400 pounds" and that public financial support continued until 1828).

<sup>22</sup> See STAVE, *supra* note 20, at 87 (describing the start of Connecticut's public education system).

<sup>23</sup> See Ellen A. Peters, *Common Law Antecedents of Constitutional Law in Connecticut*, 53 ALB. L. REV. 259, 259-60 (1989) (reviewing Connecticut's constitutional history, including the promulgation in 1638 of a document of constitutional principles—the *Fundamental Orders*).

<sup>24</sup> See Wesley W. Horton, *Law and Society in Far-Away Connecticut*, 8 CONN. J. INT'L L. 547, 553 (1993) (describing the origins of Connecticut's charter and constitution).

<sup>25</sup> *Id.*; see also CONN. SEC'Y OF THE STATE, *CONNECTICUT STATE REGISTER & MANUAL* 871 (2002) (describing how Captain Joseph Wadsworth swiped and hid the charter from the British nobleman Sir Edmond Andros in 1687). The Charter Oak's species is the official state tree of Connecticut, CONN. GEN. STAT. § 3-110 (2001), and is depicted on the U.S. Mint's 1999 Connecticut quarter.

charter continued even after the colony's transition to statehood under the United States Constitution; the charter remained Connecticut's foundational document until 1818, when the first state constitution was established by convention.<sup>26</sup>

While Connecticut exhibited strong support for both its public schools and foundational documents from the beginning, the state's history of race relations is less endearing. Although slavery was legally phased out beginning in 1784 and the Underground Railroad passed through the state,<sup>27</sup> "the city [of Hartford] was not particularly hospitable to blacks."<sup>28</sup> Economic and political discrimination severely restricted the rights of Connecticut's African-American citizens.<sup>29</sup> Because they could not legally own land, black Connecticutians were forced by economic necessity to live in cities, where rental housing and service sector jobs were more readily available.<sup>30</sup> In this way, the state's segregated housing patterns are the vestiges of early and long-enduring racist laws.

In 1909, before large numbers of African-Americans fleeing southern poverty and Jim Crow discrimination had moved to Connecticut,<sup>31</sup> the general assembly passed a law directing schoolchildren to attend their neighborhood schools.<sup>32</sup> In 1941, during the period of mass migration of African-Americans into the state's urban centers,<sup>33</sup> the general assembly passed an act setting school district lines coterminously with town borders.<sup>34</sup> That action linked housing discrimina-

<sup>26</sup> See Horton, *supra* note 24, at 553-54 (noting that Connecticut operated under its colonial charter until a publicly held democratic constitutional convention in 1818).

<sup>27</sup> See STAVE, *supra* note 20, at 94 ("A column in the weekly *Connecticut Courant* during 1784 noted that the General Assembly had provided for the gradual emancipation of the 6500 slaves then in the state . . .").

<sup>28</sup> *Id.* at 95.

<sup>29</sup> See *id.* (describing the persistence of discriminatory conditions, including denial of suffrage, residential segregation, and bans on government employment, through the 18th and 19th centuries).

<sup>30</sup> *Id.*

<sup>31</sup> See *id.* (chronicling the doubling of the black population in Connecticut between 1910 and 1930).

<sup>32</sup> See *Sheff v. O'Neill*, 678 A.2d 1267, 1273 (Conn. 1996) ("Since at least 1909, as a result of another state statute . . . schoolchildren have been assigned to the public school district in which they reside." (citation omitted)).

<sup>33</sup> See STAVE, *supra* note 20, at 96 ("With the beginning of World War II, more blacks came north to work in the defense industries.").

<sup>34</sup> *Sheff*, 678 A.2d at 1273.

tion with school demographics in a way that would gradually produce viciously segregated schools.<sup>35</sup>

Connecticut's history of race relations in the public schools was further complicated by a significant influx of Latino families, primarily from Puerto Rico, beginning in the early 1940s.<sup>36</sup> By 1970, Connecticut's Puerto Rican population had risen to 88,361,<sup>37</sup> roughly 2.9% of the state's total population.<sup>38</sup> In addition to the problems of racial isolation already present in the African-American community in Hartford, the arrival of Latino immigrants introduced the stubborn problem of linguistic isolation to the city's schools.<sup>39</sup>

In the midst of these seachanges in the complexion of Connecticut's citizenry, a constitutional convention was called in 1965 to revise the 1814 constitution.<sup>40</sup> There, convention delegates proposed and debated two new sections for the Connecticut Constitution: article I, section 20, prohibiting segregation in any state program or policy; and article VIII, section 1, establishing a state duty to provide public schools.<sup>41</sup> These provisions would become the textual foundation of the state supreme court's holding in the landmark case of *Sheff v. O'Neill*.

<sup>35</sup> On racism in housing distribution, see STAVE, *supra* note 20, at 96 (noting that a 1944 study showed Hartford to be still "rife with discrimination in public and private employment and in public and private housing," despite various nominal efforts to improve civil rights). *But cf.* *Missouri v. Jenkins*, 515 U.S. 70, 121 (1995) (Thomas, J., concurring) ("[L]ocal school assignments[] do not offend the [Federal] Constitution when individual *private choices* concerning work or residence produce schools with high black populations." (emphasis added)).

<sup>36</sup> See STAVE, *supra* note 20, at 97 ("Meanwhile, Hispanics from Puerto Rico, Cuba, and Central and South America had been migrating to Hartford since the 1940s to neighborhoods in both the North and South Ends.").

<sup>37</sup> *Id.* at 98.

<sup>38</sup> See *Connecticut Population of Counties by Decennial Census: 1900 to 1990*, Population Division, U.S. Bureau of the Census, at <http://www.census.gov/population/cencounts/ct190090.txt> (last visited Oct. 18, 2002) (reporting Connecticut's total population in 1970 as 3,031,709).

<sup>39</sup> See STAVE, *supra* note 20, at 99 ("The issue of bilingual education was of particular concern during the early 1970s.").

<sup>40</sup> See *Sheff v. O'Neill*, 678 A.2d 1267, 1283 (Conn. 1996) (discussing the 1965 constitutional convention).

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



B. *The Case Proceeds in the Superior Court*

By April 1989, Hartford's public schools were educating their students in an atmosphere of severe racial and economic isolation and the situation was getting worse.<sup>42</sup> Elizabeth Horton Sheff, an African-American community activist, politician, and mother of a Hartford fourth grader named Milo, decided to sue Democratic Governor William O'Neill to demand that the situation be fixed.<sup>43</sup> She joined with sixteen other African-American, Latino, and white plaintiffs from the Hartford metropolitan area to assert that the Connecticut Constitution guaranteed them an integrated public education.<sup>44</sup> The nature of the plaintiffs' demands was unprecedented, both in Connecticut and across the country.<sup>45</sup>

Although the plaintiffs' legal theory that the state officials had an affirmative obligation to desegregate the public schools asserted a dramatic and controversial claim against the state, the complaint was also noteworthy for three of its somewhat technical characteristics.

<sup>42</sup> See *Sheff v. O'Neill*, No. CV89-0360977S, 1995 Conn. Super. LEXIS 1148, at \*10 (Apr. 12, 1995) (recognizing the parties' stipulation that Hartford schools were 90.5% composed of racial and ethnic minorities in the 1987-1988 school year); see also Richard Fossey, *The Hartford Desegregation Case: Is There a Judicial Remedy for Racially Isolated Inner-City School Districts?*, in 13 READINGS ON EQUAL EDUCATION: FORTY YEARS AFTER THE BROWN DECISION: IMPLICATIONS OF SCHOOL DESEGREGATION FOR U.S. EDUCATION 157, 161 (Kofi Lomotey & Charles Teddlie eds., 1996) (observing that 93% of Hartford public school students were African-American or Latino in 1990).

<sup>43</sup> See Rachel F. Moran, *Milo's Miracle*, 29 CONN. L. REV. 1079, 1079 (1997) (noting the Sheff family's involvement in the litigation); see also Carole Bass, *The Iron Sheff*, NEW HAVEN ADVOC., Sept. 27, 2001 (identifying Ms. Sheff), at <http://www.newhavenadvocate.com/articles/ironsheff.html>.

<sup>44</sup> See Fossey, *supra* note 42, at 161-62 (explaining the start of the *Sheff* case). The legal team representing the schoolchildren was composed of attorneys renowned in Connecticut's civil rights circles; plaintiffs' counsel included the activist John C. Britain, then a law professor at the University of Connecticut and subsequently Dean of the Thurgood Marshall School of Law; Wesley Horton, a state appellate litigation specialist and constitutional scholar who had successfully litigated the groundbreaking school finance case, *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977), in the 1970s; Martha Stone, Director of the Center for Children's Advocacy at the University of Connecticut School of Law and former Legal Director of the Connecticut Civil Liberties Union Foundation; and Philip D. Tegeler, current Legal Director of the Connecticut Civil Liberties Union Foundation. National civil rights organizations also participated in representing the plaintiffs, including the ACLU and the Puerto Rican Legal Defense and Education Fund. The NAACP Legal Defense Fund took an early and lasting leadership role in the case.

<sup>45</sup> Fossey, *supra* note 42, at 166 ("*Sheff's* demand—that a state court disregard local boundaries to shape a large-scale desegregation plan—is unprecedented in reported court cases.”).

First, the case was brought on behalf of the seventeen named Hartford-area plaintiffs individually, not as a class action.<sup>46</sup> One might have expected the plaintiffs to choose the class action device for achieving broad institutional reform altering the structural relationship between government and the people, but the plaintiffs' lawyers preferred not to represent a formal class.<sup>47</sup> Second, the primary relief sought was a declaratory judgment; the plaintiffs did not enter court proposing any concrete plan or specific injunctive remedy.<sup>48</sup> Although Connecticut's civil practice rules require that stringent notice be issued when a declaratory judgment is sought,<sup>49</sup> the declaratory judgment action need not meet the full panoply of class action procedural hurdles.<sup>50</sup> Furthermore, the declaratory judgment action may be a judicially preferred form for the adjudication of constitutional rights in Connecticut.<sup>51</sup>

The third procedurally noteworthy aspect of the case is that the plaintiffs sued the governor, state treasurer, comptroller, school board members, and commissioner of education, all in their official capacities, but did not sue the State of Connecticut, the general assembly, or any legislative officials directly.<sup>52</sup> The attorney general argued that

<sup>46</sup> See *Sheff*, 1995 Conn. Super. LEXIS 1148, at \*1 (noting that the suit was initiated "by seventeen named plaintiffs" as a declaratory judgment action and omitting mention of a class).

<sup>47</sup> Interview with Philip Tegeler, Counsel for the *Sheff* Plaintiffs and Legal Director, Connecticut Civil Liberties Union Foundation, in Hartford, Conn. (Mar. 13, 2002).

<sup>48</sup> *Id.*

<sup>49</sup> See CONN. R. CT. § 17-56 (requiring that "[a]ll persons who have an interest in the subject matter of the requested declaratory judgment that is direct, immediate and adverse to the interest of one or more of the [parties to] the action" be joined in or given reasonable notice of the action and mandating certification that the notice requirement has been met).

<sup>50</sup> Interview with Philip Tegeler, *supra* note 47. The preclusive effect of a declaratory judgment in institutional reform cases is unclear. *Id.*

<sup>51</sup> See *Horton v. Meskill*, 376 A.2d 359, 365 (Conn. 1977) ("The declaratory judgment procedure in Connecticut . . . is peculiarly well adapted to the judicial determination of controversies concerning constitutional rights . . .").

<sup>52</sup> See *Sheff v. O'Neill*, No. CV89-0360977S, 1995 Conn. Super. LEXIS 1148, at \*1 (Apr. 12, 1995) ("The defendants . . . were the incumbent governor, William A. O'Neill, or his successors in that office, the state board of education, its individual members, the state commissioner of education, . . . the state treasurer and the state comptroller, as well as their successors in those offices."). While the general assembly might or might not have been an available defendant, *cf.* *Nielsen v. Connecticut*, 670 A.2d 1288, 1289-90 (Conn. 1996) (holding that where the plaintiffs sued the state directly "to compel the General Assembly to enact legislation that would implement the constitutional spending cap" there was no subject matter jurisdiction), the State of Connecticut's sovereign immunity would not apply to protect the general assembly

this list of defendants was inadequate and that the suit should be dismissed for failure to join necessary parties (including the City of Hartford), but that motion was defeated and subsequently abandoned on appeal.<sup>53</sup> A defense motion for summary judgment was denied in 1992.<sup>54</sup>

In January 1993, nearly four years after the original filing, a trial finally began before superior court Judge Harry Hammer.<sup>55</sup> The plaintiffs' witnesses were put in the uncomfortable position of emphasizing the fundamental failures of the city's schools in order to buttress the plaintiffs' claim of an inadequate education under the state constitution.<sup>56</sup> This was most likely embarrassing to the school officials. Given the watching and credulous suburban parents' eagerness to believe the worst about city schools, the testimony was probably also damaging to any chance of persuading them that Hartford's schools were a good place for their children. Shortly after the testimony began, Governor O'Neill's successor, Lowell Weicker, Jr.,<sup>57</sup> publicly ac-

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from claims of constitutional violations. See *Horton*, 376 A.2d at 364 (holding that sovereign immunity does not apply where constitutional violations are alleged). National civil rights lawyers might follow the federal fiction embodied in *Ex parte Young*, 209 U.S. 123, 149-60 (1908) (reviewing case law holding that a plaintiff may not sue a state in federal court), out of custom, but in state court the choice to exclude defendants otherwise available should be treated by courts as meaningful and intentional. A court presented with an intentionally limited list of defendants should therefore fashion its inquiry, as well as any remedy, with reference only to the named defendants, not to those who might have been included.

<sup>53</sup> See *Sheff v. O'Neill*, 678 A.2d 1267, 1275 n.14 (Conn. 1996) ("The defendants have failed to pursue their defenses based on sovereign immunity, stare decisis and the plaintiffs' failure to join necessary parties.").

<sup>54</sup> *Sheff v. O'Neill*, 609 A.2d 1072, 1076 (Conn. Super. Ct. 1992).

<sup>55</sup> *Fossey*, *supra* note 42, at 161.

<sup>56</sup> See Susan E. Eaton & Gary A. Orfield, *Brown v. Board of Education and the Continuing Struggle for Desegregated Schools*, in 13 READINGS ON EQUAL EDUCATION: FORTY YEARS AFTER THE BROWN DECISION: IMPLICATIONS OF SCHOOL DESEGREGATION FOR U.S. EDUCATION, *supra* note 42, at 117, 133 ("[T]eachers and principals testified at the *Sheff* trial that their schools are overcome by the burdens of poverty and isolation."); see also *Sheff*, 1995 Conn. Super. LEXIS 1148 *passim* (referring to expert testimony and the testimony of Hartford public school employees). Such testimony from city insiders did nothing to improve the image of Hartford schools in the eyes of suburban parents, upon whose cooperation any voluntary plan of integration would depend.

<sup>57</sup> Governor Weicker was a former U.S. Senator who had abandoned the Republican Party to run for governor as an independent. He received the John F. Kennedy Library Foundation's "Profile in Courage Award" in 1992 for successfully advocating the introduction of a state income tax at great political risk. *John F. Kennedy Profile in Courage Award Recipients*, John Fitzgerald Kennedy Library Foundation, at [http://www.jfklibrary.org/pica\\_recipients.html](http://www.jfklibrary.org/pica_recipients.html) (last visited Sept. 26, 2002).

knowledgeed the need for major state-wide school desegregation efforts.<sup>58</sup> Despite Weicker's acknowledgment, however, the state continued a vigorous defense in the courtroom.

Judge Hammer did not submit his decision in the case until April 1995, six years after it was first filed.<sup>59</sup> While admitting the prevalence of racial and economic isolation in the Hartford area,<sup>60</sup> Judge Hammer ruled that there was insufficient state action to sustain a claim against the defendants.<sup>61</sup> Oddly, the bulk of his legal reasoning was derived from the judicial writings of U.S. Supreme Court Justice William O. Douglas, despite the purely state-law basis for the plaintiffs' claims.<sup>62</sup> Governor Weicker's successor in office, Republican John G. Rowland, was elated at the state officials' victory over the schoolchildren; in a public faux pas he would later regret, Governor Rowland greeted news of the decision with a bottle of champagne.<sup>63</sup>

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<sup>58</sup> See Eaton & Orfield, *supra* note 56, at 133 (remarking that "even Connecticut's governor, Lowell Weicker, . . . cited school segregation as a serious educational problem . . .").

<sup>59</sup> Fossey, *supra* note 42, at 161.

<sup>60</sup> See *Sheff*, 1995 Conn. Super. LEXIS 1148, at \*8-9 (noting the defendants' admission that "there is a relatively high concentration of children from poor families and black and Hispanic students' in the Hartford public schools compared to the public schools in most of the twenty-one towns surrounding Hartford").

<sup>61</sup> See *id.* at \*89 ("The court . . . finds that the plaintiffs have failed to prove that 'state action is a direct and sufficient cause of the conditions' which are the subject matter of the plaintiffs' complaint . . . , and that accordingly the constitutional claims asserted by the plaintiffs need not be addressed.").

<sup>62</sup> See *id.* at \*80-89 (following Justice Douglas's treatment of various de facto school desegregation cases because he was "the principal and most consistent proponent of the view that strict constitutional liability . . . should be imposed on local and state governments for conditions of segregation that arose from demographic, social and economic forces"). In a case based solely on the Connecticut Constitution, Judge Hammer's Memorandum of Decision cited ten U.S. Supreme Court cases and seven other federal cases, but only five Connecticut Supreme Court cases and four in-state lower court decisions. *Sheff*, 1995 Conn. Super. LEXIS 1148. "[E]ven many of those who were pleased [with the decision] were surprised . . . that the decision for a case based on state law was decided on federal law and federal cases." STAVE, *supra* note 20, at 125 (citations omitted).

<sup>63</sup> See Christopher Keating, *Rowland Says He's Sorry: Champagne in Sheff Case Called Error*, HARTFORD COURANT, Apr. 21, 1995, at A3 ("Gov. John G. Rowland apologized Thursday for bringing out a bottle of champagne last week to celebrate the state's victory in the *Sheff vs. O'Neill* school desegregation case."). Attorney General Richard Blumenthal, an independently elected Democrat, later commented that the gesture was inappropriate. *Id.*

C. *The Case Proceeds in the Supreme Court*

Mindful of the case's long pendency in the trial court, the Connecticut Supreme Court granted the plaintiffs' request for direct review, bypassing the intermediate appellate court.<sup>64</sup> Apparently dissatisfied with Judge Hammer's Memorandum of Decision, the court ordered a clarification of the lower court's findings of fact.<sup>65</sup> Judge Hammer complied and submitted a supplemental opinion that listed 161 distinct findings.<sup>66</sup> The supreme court heard arguments in the case in September 1995; in an opinion by Chief Justice Ellen A. Peters<sup>67</sup> released on July 9, 1996, a divided court reversed the trial court and held for the plaintiffs.<sup>68</sup>

The case's political thorniness produced a flowery majority opinion, an emotional concurrence, and a furious dissent. The court's holding, at least, is clear: Connecticut has an affirmative obligation under the state constitution to repair the racial isolation in Hartford's public schools.<sup>69</sup> The reasoning and the remedy, however, remain somewhat obscure behind the chief justice's rhetorical flourishes.<sup>70</sup>

<sup>64</sup> See *Sheff v. O'Neill*, 678 A.2d 1267, 1272 (Conn. 1996) ("Because of the importance of the novel and controversial questions of constitutional law raised in this litigation . . . we transferred to this court the plaintiffs' appeal . . . . Noting that the plaintiffs' complaint had been pending since 1989, we held a special hearing . . .").

<sup>65</sup> *Id.*

<sup>66</sup> *Sheff v. O'Neill*, 1995 Conn. LEXIS 249 (Conn. June 27, 1995).

<sup>67</sup> Chief Justice Peters was one of only nine women nationwide who had served as a state chief justice by the fall of 1997. John B. Wefing, *State Supreme Court Justices: Who Are They?*, 32 NEW ENG. L. REV. 47, 57 (1997). Chief Justice Peters was among the "59.9% of [state supreme court] justices [who] attended law school in the state where they would eventually serve," *id.* at 82, having graduated from Yale Law School, where she also served as a professor until her appointment to the supreme court in 1978. Michael F. J. Piecuch, High Court Study, *State Constitutional Law in the Land of Steady Habits: Chief Justice Ellen A. Peters and the Connecticut Supreme Court*, 60 ALB. L. REV. 1757, 1759 n.1 (1997).

<sup>68</sup> *Sheff*, 678 A.2d at 1267.

<sup>69</sup> See *id.* at 1270-71 ("We hold today that the needy schoolchildren of Hartford have waited long enough. The constitutional imperatives . . . of our state constitution entitle the plaintiffs to relief.")

<sup>70</sup> For a remarkable example of limpid language coupled with legal opacity, consider the following climactic passage:

In staying our hand, we do not wish to be misunderstood about the urgency of finding an appropriate remedy for the plight of Hartford's public schoolchildren. Every passing day denies these children their constitutional right to a substantially equal educational opportunity. Every passing day shortchanges these children in their ability to learn to contribute to their own well-being and to that of this state and nation. We direct the legislature and the execu-

This Part will first review the logic behind the court's holding and then address the remedy provided by the court.

Judge Hammer's reliance on federal case law was not adopted by the Connecticut Supreme Court in *Sheff*.<sup>71</sup> The majority explicitly rejected the applicability of federal desegregation precedent for two reasons. First, "there is no right to education under the United States [C]onstitution," while the Connecticut Constitution does include education as a fundamental right.<sup>72</sup> Second, "the federal cases are guided by principles of federalism" that are irrelevant to a state court's construction of a state constitution.<sup>73</sup> Instead, Chief Justice Peters turned to two independent sources of state law—the court's own precedents and the history of the 1965 state constitutional convention—to guide the court's construction of the constitution's text.

The education and equal protection clauses of the Connecticut Constitution<sup>74</sup> had been the objects of extensive litigation in *Horton v. Meskill*, a 1977 case concerning equitable school financing.<sup>75</sup> To reach the merits of the plaintiffs' claims in *Horton*, the supreme court denied that sovereign immunity protected the defendant officials' conduct to the extent that such conduct was unconstitutional.<sup>76</sup> Turning to the merits, the court quoted a 1909 case noting that "Connecticut has for centuries recognized it as her right and duty to provide for the proper

tive branch to put the search for appropriate remedial measures *at the top of their respective agendas*.

*Id.* at 1290 (emphasis added).

<sup>71</sup> See *id.* at 1279 ("[W]e are not persuaded that we should adopt these [federal] precedents as a matter of state constitutional law.").

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> CONN. CONST. art. 8, § 1 ("There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation."); CONN. CONST. art. 1, § 20 ("No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability.").

<sup>75</sup> 376 A.2d 359 (Conn. 1977) (holding, in a declaratory judgment action, that the state's system of financing public schools was unconstitutional). The lead plaintiff was Barnaby Horton, now a Hartford state representative and the son of Wesley Horton, the appellate litigation specialist representing the *Sheff* plaintiffs. See Bass, *supra* note 43 ("Horton is not part of the *Sheff* case, although his dad, Hartford constitutional law expert Wes Horton, is on the legal team. . . . Now he's a state representative from Hartford, . . . married to a Hartford public school teacher who's used to teaching all-black classes.").

<sup>76</sup> See *Horton*, 376 A.2d at 364 (discussing the sovereign immunity defense).

education of the young,"<sup>77</sup> and pursued a detailed review of the school financing scheme before affirming the trial court's declaration of unconstitutionality.<sup>78</sup> The remedy, however, was left to the legislature.<sup>79</sup> The plaintiffs returned to court and the supreme court ruled again in 1985, eight years after its first holding in the case. The 1985 court applied a relatively deferential review of the legislature's efforts at reform and remanded to the trial court for further proceedings without ordering a new remedy.<sup>80</sup>

The *Sheff* court used the *Horton* precedents to establish the justifiability of the plaintiffs' suit against the state defendants.<sup>81</sup> The *Horton* litigation also provided the *Sheff* court with a rationale for holding the state strictly liable for its affirmative constitutional obligations.<sup>82</sup>

To evaluate the nature of those obligations, the *Sheff* court turned to the history of constitutionalized public education in Connecticut, particularly the debate transcripts and committee reports from the 1965 state constitutional convention.<sup>83</sup> The court concluded that the convention delegates "intended to encompass de facto segregation in the circumstances presented by the present case."<sup>84</sup> The court also noted the general assembly's extensive control over the state's

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<sup>77</sup> *Id.* at 373-74 (quoting *State ex rel. Town of Huntington v. Huntington Town Sch. Comm.*, 74 A. 882, 883 (Conn. 1909)).

<sup>78</sup> *See id.* at 375-76 (finding no error in the superior court's ruling).

<sup>79</sup> *See id.* at 376 (determining that a pending legislative plan to reform school financing "should serve to stay judicial intervention to afford the General Assembly an opportunity to take appropriate legislative action").

<sup>80</sup> *See Horton v. Meskill*, 486 A.2d 1099, 1110 (Conn. 1985) ("[W]e believe that the proper test requires the state to prove that the amendments reasonably advanced a rational state policy . . .").

<sup>81</sup> *See Sheff v. O'Neill*, 678 A.2d 1267, 1276 (Conn. 1996) ("The plaintiff schoolchildren in the present case invoke the same constitutional provisions to challenge the constitutionality of state action that the plaintiff schoolchildren invoked in *Horton* . . . [P]rudential cautions . . . do not deprive a court of jurisdiction.").

<sup>82</sup> *See id.* at 1277 (citing *Horton*, 376 A.2d at 374-75, for the proposition that the state constitution's education and equal protection clauses "impose on the legislature an affirmative constitutional obligation . . . [and] if the legislature fails, for whatever reason, to take action to remedy substantial inequalities . . . its actions and its omissions constitute state action").

<sup>83</sup> *See id.* at 1283-84 & nn.33-37 (poring over the remarks of the convention delegates who supported the passage of the education clause). For a different view of the legislative history behind these constitutional provisions, see Michael Besso's thorough new work in *Sheff v. O'Neill: A Research Note*, 34 CONN. L. REV. 315 (2002).

<sup>84</sup> *Sheff*, 678 A.2d at 1284.

schools.<sup>85</sup> To support its holding that state action was sufficiently implicated to hold the state accountable for unintentional school segregation, the majority also stridently repeated the trial court's finding that the statute establishing school district lines coterminously with town borders "is the *single most important factor* contributing to the present concentration of racial and ethnic minorities in the Hartford public school system."<sup>86</sup> Strangely, however, the court's discussion of the districting statute, although plainly blaming that law for causing unconstitutional conditions, never directly declared the statute itself unconstitutional or unenforceable.<sup>87</sup>

The court's bold work in holding the state to be in violation of its affirmative constitutional obligation was immediately undermined by its failure to provide a fruitful remedy. The majority opinion provided plenty of bombast about the importance of finding a remedy,<sup>88</sup> but granted only declaratory relief aimed at politely persuading the general assembly and champagne-popping governor to find a solution using "energy and good will."<sup>89</sup> No guidelines were provided as to what components the court would require of such a solution. "[J]urisdiction to grant consequential relief, if needed, at some future time," was retained,<sup>90</sup> leaving open the possibility of a later injunctive remedy.

The court's expression of confidence in the abilities of the political branches to find a solution was emotionally attacked by Governor Rowland, who told the press that "[t]here's nothing courageous

<sup>85</sup> See *id.* at 1285 ("The legislature has created the current school districts, has required students to attend school and has determined which students will attend a particular school district.")

<sup>86</sup> *Id.* at 1274; see also *id.* at 1278 ("The trial court expressly found that the enforcement of these [school districting] statutes constitutes the 'single most important factor' creating the present racial and ethnic imbalance in the Hartford public school system."); *id.* at 1287 ("[T]he districting statute . . . is the single most important factor contributing to the concentration of racial and ethnic minorities in the Hartford public school system."); *id.* at 1289 ("[T]he single most important factor that contribute[s] to the present concentration of racial and ethnic minorities in Hartford [is] the town-school district system . . .") (quoting the trial court's findings) (alterations in original)).

<sup>87</sup> *But cf.* *Sheff v. O'Neill*, No. CV89-0360977S, 1996 Conn. Super. LEXIS 2664, at \*2 (Oct. 15, 1996) ("[J]udgment may enter for the plaintiffs declaring . . . that the school districting scheme, as codified . . . and as enforced with regard to these plaintiffs, is unconstitutional . . .").

<sup>88</sup> See, e.g., *Sheff*, 678 A.2d at 1290 ("Finding a way to cross the racial and ethnic divide has never been more important than it is today.")

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*



about reiterating the fact that there's racial imbalance in the cities, but they want us to solve it."<sup>91</sup> The governor also publicly criticized the chief justice herself, "saying it was 'unfortunate' that one person—Peters—could 'take an issue and force it back' on the legislature."<sup>92</sup> Not everyone responded to the court's ruling as angrily as the lead defendant, however. Perhaps predictably, optimistic parents and teachers from urban districts across the state celebrated the court's holding that the constitution required Connecticut to integrate its schools.<sup>93</sup>

The court's decision to confine its remedy to a declaration of the plaintiffs' rights was consistent with the form of the plaintiffs' declaratory judgment action (although the plaintiffs had initially requested undefined injunctive relief as well).<sup>94</sup> In two important respects, however, the *Sheff* court ignored the special features of the plaintiffs' case discussed earlier in this Part.<sup>95</sup> First, the court ignored who the plaintiffs were; second, it ignored the identity of the defendants. The court's rationale focused on the rights of "the schoolchildren who reside in Hartford and other urban centers in Connecticut,"<sup>96</sup> but white schoolchildren from a Hartford suburb made up more than 10% of the plaintiffs and none of the named plaintiffs was from any of Connecticut's other urban areas.<sup>97</sup> Furthermore, the court's opinion and remedy (such as it was) were primarily directed against the *general assembly*,<sup>98</sup> which had never been named as a defendant, either in its collective capacity or through any legislative official.<sup>99</sup> The potential

<sup>91</sup> Matthew Daly, *Rowland Calls Sheff Ruling 'Easy Way Out': Governor Says Changes May Not Come for Years*, HARTFORD COURANT, July 11, 1996, at A1.

<sup>92</sup> *Id.*

<sup>93</sup> See Matthew Kauffman, *Stunned Plaintiffs and a Dance of Joy*, HARTFORD COURANT, July 10, 1996, at A11 (reporting that one parent "couldn't resist breaking into a dance of joy" following the ruling).

<sup>94</sup> See *Sheff*, 678 A.2d at 1290 (observing that the plaintiffs had not "focused their attention on the remedial consequences of a substantive decision in their behalf"); *id.* at 1271 (stating that the plaintiffs sought "a declaratory judgment and injunctive relief").

<sup>95</sup> See *supra* notes 45-52 and accompanying text (discussing several noteworthy technical aspects of the case, including the plaintiffs' decision not to name any legislative official as a defendant).

<sup>96</sup> *Sheff*, 678 A.2d at 1294 (Berdon, J., concurring).

<sup>97</sup> See *id.* at 1271 n.3 (listing eighteen plaintiffs by name, race, and hometown).

<sup>98</sup> See *id.* at 1290 (holding that "[p]rudence and sensitivity to the constitutional authority of coordinate branches of government" demand that the legislature be given a chance to remedy the problem before the court compels a solution).

<sup>99</sup> See *id.* at 1271 n.4 (naming the defendants and their offices).

ramifications of the court's sloppiness over the parties' identities will be discussed in Part III.

D. *The Plaintiffs Seek a Remedy and Enforcement of the Supreme Court's Holding*

Two years after the supreme court's holding, segregation between minorities in Hartford's schools and its suburban neighbors had grown worse, and the plaintiffs returned to court.<sup>100</sup> In Connecticut, once a judge has been reversed on appeal, the case must be remanded to a different judge,<sup>101</sup> so superior court Judge Julia Aurigemma took over the case from Judge Hammer.<sup>102</sup>

The supreme court had found the general assembly strictly liable for its constitutional violations, since the legislature had been deemed responsible for finding a solution but had "enacted no legislation that was intended to cause either de jure or de facto segregation."<sup>103</sup> Logically, where a party is held liable for the unintended consequences of its acts, good faith can be no defense. However, the remand court's opinion gives extensive coverage to the state's efforts to study and begin to repair the problem of racial isolation,<sup>104</sup> as if good intentions could excuse the state's failure to provide an integrated education.

The trial court found that the state's increased spending on "interdistrict cooperative programs,"<sup>105</sup> "interdistrict magnet schools,"<sup>106</sup>

<sup>100</sup> See *Sheff v. O'Neill*, 733 A.2d 925, 938 (Conn. Super. Ct. 1999) (acknowledging the "undisputed fact that at the time [the plaintiffs] returned to court in March, 1998 . . . the racial imbalance in the Hartford schools had not only not improved, but had become slightly worse than it was at the time the Supreme Court issued its decision in this case").

<sup>101</sup> Connecticut law provides:

No judge of any court who tried a case without a jury in which a new trial is granted, or in which the judgment is reversed by the Supreme Court, may again try the case. No judge of any court who presided over any jury trial . . . in which a new trial is granted, may again preside at the trial of the case.

CONN. GEN. STAT. § 51-183(c) (2001).

<sup>102</sup> See *Sheff*, 733 A.2d at 925 (naming Judge Aurigemma as the opinion's author).

<sup>103</sup> *Sheff*, 678 A.2d at 1288.

<sup>104</sup> See, e.g., *Sheff*, 733 A.2d at 927 (implying that the court was impressed by an executive education improvement panel because, inter alia, "even [the] controversial topic [of mandatory busing] was fully explored [though rejected]").

<sup>105</sup> *Id.* at 928 (outlining a program to fund occasional field trips between city and suburban schools).

<sup>106</sup> *Id.* at 929 (describing special state-subsidized schools designed to attract suburban students to city schools).

“charter schools,”<sup>107</sup> “minority staff recruitment,”<sup>108</sup> the “choice program,”<sup>109</sup> and “lighthouse schools”<sup>110</sup> were all important remedial steps taken by the legislature and the commissioner of education. The court also noted, as a positive step on the state’s part, the significance of the state’s 1997 takeover of Hartford’s schools due to the elected school board members’ inability to work together.<sup>111</sup> In light of these efforts by the state, all toward purely voluntary integration and none invalidating the shape of any school district, the trial court held that the plaintiffs had “returned to court well before any reasonable efforts could possibly have had any discernible effects.”<sup>112</sup> Conscious of the supreme court’s ambivalence toward rapid, politically unpopular remedies,<sup>113</sup> Judge Aurigemma held for the defendants. Seemingly in contradiction of the supreme court’s holding that the plaintiffs’ rights were judicially enforceable, the court concluded that “[t]he best way to achieve popular support is not to impose a judicially mandated remedial plan, but to encourage Connecticut’s populace as a whole, both directly and through their elected representatives, to solve the problems facing the state’s schools.”<sup>114</sup> Convinced that the court was

<sup>107</sup> *Id.* at 930 (identifying flexibility and accountability as key characteristics of charter schools).

<sup>108</sup> *Id.* at 931 (asserting that “[t]here is no dispute that increasing the diversity of school staff and administrators . . . can play a role in the reduction of racial and ethnic isolation”).

<sup>109</sup> *Id.* at 932 (explaining a program designed to send urban students to suburban schools according to the capacity and willingness of the receiving schools).

<sup>110</sup> *Id.* at 933 (endorsing a program of prototype magnet schools already operating in New Haven and planned for eventual operation in Hartford).

<sup>111</sup> *See id.* at 935 (remarking that “the Hartford board of education was beset by such discord that it could not take any effective action” and that in 1997 the legislature “eliminated the [elected] Hartford board of education and replaced it with the [appointed] state board of trustees as the governing body of the Hartford public schools”).

<sup>112</sup> *Id.* at 938.

<sup>113</sup> The Supreme Court did not specify a time frame for the reduction of racial and ethnic isolation. It used the word “urgent” at the same time it ordered the legislative and executive branches to take action. The Supreme Court was certainly aware that the legislative process is not an instantaneous one and that . . . the executive and legislative branches needed sufficient time to propose and enact meaningful legislation.

*Id.* at 939.

<sup>114</sup> *Id.* at 943.

wrong, but restrained by strategic pragmatism, the plaintiffs decided not to appeal.<sup>115</sup>

Finally, more than a year and a half later, the plaintiffs had waited long enough and re-filed a motion to enforce the supreme court's judgment.<sup>116</sup> After further delay to allow a legislative response that never came, the plaintiffs requested that Judge Aurigemma schedule hearings on the case, which began on April 16, 2002.<sup>117</sup> The plaintiffs' proposed remedy requires a new infusion of state money to improve Hartford's schools and to expand and improve the interdistrict magnet schools.<sup>118</sup> Although the plaintiffs' lawyers agree that merely improving Hartford's schools with new funding will not, by itself, solve the problem of racial isolation,<sup>119</sup> they have never suggested a mandatory student placement remedy to the courts.<sup>120</sup> As of this writing, it remains to be seen whether Judge Aurigemma (and subsequently the supreme court) will respect the plaintiffs' compromising spirit and

<sup>115</sup> See E-mail from John C. Brittain, Plaintiffs' Counsel and Dean of the Thurgood Marshall School of Law, to Justin Long (Feb. 18, 2002) ("Though harmful to the schoolchildren to continue the unconstitutional conditions without an appeal, it was more strategic to wait . . . [T]he proof of non-compliance with the Supreme Court's mandate is more persuasive after waiting three more years.") (on file with author).

<sup>116</sup> Plaintiffs' Motion for Order Regarding the Implementation of the Project Choice Program and the Interdistrict Magnet School Program in the Hartford Region at 1, *Sheff v. O'Neill*, No. X03 CV89-0492119S (Conn. Super. Ct. filed Dec. 28, 2000) (on file with author).

<sup>117</sup> See Robert A. Frahm, *Racial Balance Remains an Issue: State Supreme Court to Review New Plan to Integrate Schools*, HARTFORD COURANT, Apr. 15, 2002, at A1 (anticipating the plaintiffs' return to court to seek various concrete remedies).

<sup>118</sup> See *id.* ("The plan calls for more money and sets enrollment goals, but its central approach—the expansion of magnet schools and of a voluntary program allowing Hartford children to enroll in suburban schools—is the same path the state already has begun."); see also Plaintiffs' Exhibit A, Report of Leonard B. Stevens, Ed.D. at 4, *Sheff v. O'Neill*, No. X03 CV89-0492119S (Conn. Super. Ct. Jan. 2002) (on file with author) (reporting the plaintiffs' lead expert's opinion emphasizing "magnet schools and voluntary interdistrict choice of school" as among the minimum elements of an appropriate plan for school desegregation).

<sup>119</sup> See E-mail from John C. Brittain, *supra* note 115 ("More funding is necessary to achieve educational equity, but increased funding alone for 'school improvement' in the urban disadvantaged school districts will never eliminate . . . extreme racial and ethnic isolation . . .").

<sup>120</sup> See Plaintiffs' Exhibit A, Report of Leonard B. Stevens, Ed.D., *supra* note 118 (recommending voluntary student placements only); Bass, *supra* note 43 (noting that the plaintiffs have "played footsie with . . . the dreaded busing—but have never directly endorsed" it).

provide the state with a binding timeline tied to specific integration goals.<sup>121</sup>

At the conclusion of the spring 2002 hearings in the superior court, Judge Aurigemma's comments showed that the important formalistic aspects of the case are still not being weighed. The specific identities of the defendants still have not been given adequate attention,<sup>122</sup> nor have the plaintiffs' identities been observed.<sup>123</sup> By acting outside the strictures of regular civil procedure to bind political bodies that had no opportunity to defend themselves in court, whatever remedy the superior court provides is unlikely to appear to the suburban public as a legitimate exercise of the judicial function.

## II. OTHER JURISDICTIONS HAVE SOUGHT TO ENFORCE AFFIRMATIVE OBLIGATIONS, WITH VARYING SUCCESS

Connecticut's struggle with holding the political branches of government judicially accountable for their affirmative obligations is far from unique.<sup>124</sup> Furthermore, "Hartford's racially isolated schools are

<sup>121</sup> The state defendants entered settlement negotiations with the plaintiffs in mid-July. See Rachel Gottlieb, *Sides Seek Sheff Pact: Serious Talks in School Desegregation Case*, HARTFORD COURANT, July 13, 2002, at A1 ("The state and the plaintiffs announced Friday that they are seeking an extension of the deadline to file legal briefs until after Labor Day to give them time to negotiate for a settlement."). As of this writing, no settlement has been reached. The effects of a settlement on future opportunities to enforce affirmative obligations remain unclear.

<sup>122</sup> See Robert A. Frahm, *Sheff Judge Asks for Proposals: Both Sides in the Landmark School Desegregation Case Are Being Asked to Give Suggestions About How the Court Should Proceed*, HARTFORD COURANT, May 4, 2002, at B1 ("And to whom would the court direct an order? 'Is it only the state?' [Judge Aurigemma] asked after hearing the final witness. 'Is it Hartford? Is it the suburban [school] districts?'"). Normally, courts direct orders against the defendants before them, and judges identify those defendants by determining whom the plaintiffs have sued. To do otherwise is not only ineffective, but is generally considered a violation of due process. See, e.g., *Martin v. Wilks*, 490 U.S. 755, 762 (1989) ("A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings."); *Williams Ford, Inc. v. Hartford Courant Co.*, 657 A.2d 212, 217-18 (Conn. 1995) (barring evidence related to non-parties as prejudicial to defendant). Neither the state, nor Hartford, nor the suburban districts were named as defendants in *Sheff*. *Supra* note 52 and accompanying text.

<sup>123</sup> See Frahm, *supra* note 122 ("[T]he state's final witness, New Haven school official Edward Linehan, testified that New Haven has been able to develop a successful magnet school program under existing state policies and without court intervention."). Note that none of the plaintiffs lives in New Haven, nor are conditions in New Haven the subject of the complaint.

<sup>124</sup> See Michael A. Rebell & Robert L. Hughes, *Efficacy and Engagement: The Remedies Problem Posed by Sheff v. O'Neill—and a Proposed Solution*, 29 CONN. L. REV. 1115, 1133

typical."<sup>125</sup> Thus, courts from the federal system and from other states may offer a useful comparison for techniques for enforcing affirmative obligations.<sup>126</sup> To that end, this Part first reviews federal precedents dealing with affirmative obligations, though these are rare under the U.S. Constitution and are more often limited by federalism concerns than by the separation of powers problem typically faced by state courts. Federal cases reviewed include those dealing with school desegregation, where the federal courts sitting in equity have supervised massive institutional reform. Next, this Part will briefly survey recent cases based on constitutions from Connecticut's sister states in the areas of public campaign finance reform, legislative reapportionment, education, and judicial branch funding. In all of these cases, particular attention will be devoted to the role of procedural technicalities in securing an effective remedy in light of the special difficulties of affirmative obligations.

#### A. Federal Courts Have Struggled with Affirmative Constitutional Obligations

Perhaps the most significant federal school desegregation case in recent years has been *Missouri v. Jenkins*.<sup>127</sup> In *Jenkins*, the U.S. Supreme Court held that where the historical de jure segregation sought to be reversed had not extended beyond school district lines, no federally mandated remedy could so extend.<sup>128</sup> The district court had overreached its authority by ordering the funding of magnet schools and other educationally appealing features designed to attract subur-

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(1997) ("The Connecticut Supreme Court's decision in *Sheff* to allow the legislature broad, unstructured discretion to formulate a remedy is . . . consistent with . . . general state court approach[es].").

<sup>125</sup> Fossey, *supra* note 42, at 168.

<sup>126</sup> *But cf.* Seth F. Kreimer, *Invidious Comparisons: Some Cautionary Remarks on the Process of Constitutional Borrowing*, 1 U. PA. J. CONST. L. 640, 646 (1999) (positing that "the history of the use of comparative analysis in American law suggests that the result is often as oppressive as liberating").

<sup>127</sup> 515 U.S. 70 (1995). For comments on the case's significance for contemporary civil rights advocates, see Raina E. Brubaker, Comment, *Missouri v. Jenkins: Widening the Mistakes of Milliken v. Bradley*, 46 CASE W. RES. L. REV. 579, 580-81 (1996) (recounting, inter alia, Jesse Jackson's description of the *Jenkins* holding as "devastating").

<sup>128</sup> *See Jenkins*, 515 U.S. at 76 ("Because it had found no interdistrict violation, the District Court could not order mandatory interdistrict redistribution of students between the [Kansas City school district] and the surrounding [suburban school districts].").

ban students into Kansas City's schools.<sup>129</sup> The Court reached this holding despite its awareness that any remedy strictly limited to operation within the city lines would likely result in extreme racial isolation due to the small number of white students residing in Kansas City proper.<sup>130</sup>

Two central axioms governing the Court's rationale in *Jenkins* are uniquely relevant to the federal nature of U.S. courts: the requirement that only de jure segregation can constitutionally be addressed,<sup>131</sup> and the need for federal courts to respect the states' historical dominance in the field of education.<sup>132</sup> Both of these concerns were strongly emphasized in the earlier case of *Milliken v. Bradley*,<sup>133</sup> which held that "[b]oundary lines may be bridged where there has been a constitutional violation calling for interdistrict relief, but the notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country."<sup>134</sup> Plainly, the significance of school district lines varies from state to state, and states have largely retained a more significant control over those boundary lines than has the federal government. The issue of de jure versus de facto segregation also carries different connotations in the federal context than it does under state constitutions, which in many instances include more vigorous equal protection clauses than does the U.S. Constitution.<sup>135</sup> Incredibly, Justice Thomas, writing separately in *Jenkins*, quoted the unequivocal declaration in *Brown v. Board of Education* that "[s]eparate educational fa-

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<sup>129</sup> See *id.* (noting the district court's approval of "a comprehensive magnet school and capital improvements plan").

<sup>130</sup> See *id.* at 87 ("We also rejected '[t]he suggestion . . . that schools which have a majority of Negro students are not "desegregated," whatever the makeup of the school district's population . . .'" (alterations in original) (quoting *Milliken v. Bradley*, 418 U.S. 717, 747 n.22 (1974))); *id.* at 91 & n.5 (citing cases to support the majority's contention that racially isolated school districts may still be considered "desegregated" for U.S. constitutional purposes).

<sup>131</sup> See *id.* at 102 ("[T]he remedial quality education program should be tailored to remedy the injuries suffered by the victims of prior de jure segregation.").

<sup>132</sup> See *id.* at 88 (noting that "federal courts . . . must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution" (quoting *Milliken v. Bradley*, 433 U.S. 267, 280-81 (1977))).

<sup>133</sup> 418 U.S. 717 (1974).

<sup>134</sup> *Id.* at 741.

<sup>135</sup> See G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 169 (1998) (highlighting the potential for state judges to offer their citizens state constitutional civil rights above the federal floor).

cilities are inherently unequal"<sup>136</sup> to support his proposition that "there is no reason to think that black students cannot learn as well when surrounded by members of their own race as when they are in an integrated environment."<sup>137</sup> This proposition reflects a fundamental assumption that integration is really a matter of educational policy, rather than of legal obligation; that assumption is false in states like Connecticut that have affirmative constitutional obligations to provide an integrated education.

One aspect of *Jenkins* that does have potential applicability to state desegregation law comes from Justice O'Connor's mitigating concurrence. She opined that the social factors responsible for segregation "are not readily corrected by judicial intervention, but are best addressed by the representative branches; time and again, we have recognized the ample authority legislatures possess to combat racial injustice."<sup>138</sup> Even this concept is tinged with implied federalism and comity concerns (consider the plural "legislatures," suggesting that the "representative branches" referenced are really *state* institutions), but the idea can be at least roughly transported to state court concerns about separation of powers.<sup>139</sup> In federal desegregation cases like *Milliken* and *Jenkins*, and more generally whenever separation of powers concerns are raised to limit the equitable enforcement of constitutional obligations, much more attention is paid to the inherent limitations of the judiciary than to the institutional weaknesses of the

<sup>136</sup> *Jenkins*, 515 U.S. at 120 (Thomas, J., concurring) (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954)).

<sup>137</sup> *Id.* at 121-22. Whether or not separate is still inevitably unequal as a matter of law under the Federal Constitution, the Connecticut Supreme Court's holding in *Sheff* denies the possibility that racially isolated schools could ever be constitutionally "equal." Therefore, in Connecticut, at least, academic discussion of the potential educational benefits from single-race schooling is legally irrelevant. *But cf.* Alicia L. Mioli, Note, *Sheff v. O'Neill: The Consequence of Educational Table-Scraps for Poor Urban Minority Schools*, 27 *FORDHAM URB. L.J.* 1903, 1942 (2000) (arguing that it is more important to improve the quality of racially isolated urban schools than to institute "integrationist" programs devoted to getting "white students and minority students [to] sit next to each other in the classroom").

<sup>138</sup> *Jenkins*, 515 U.S. at 112 (O'Connor, J., concurring) (citation omitted).

<sup>139</sup> Since most state court judges are elected, Wefing, *supra* note 67, at 55, most state judiciaries are themselves politically "representative branches." Given the context, though, Justice O'Connor probably did not mean to include judiciaries in her phrase. Whether electoral accountability provides state judges with greater moral authority to interfere with their coordinate branches than federal judges possess remains an open question.



other branches.<sup>140</sup> One might look at the history of the *Jenkins* litigation itself for a ready example. The case began in 1977<sup>141</sup> and has been in and out of court ever since, having been remanded by the Eighth Circuit for further proceedings as recently as 2000.<sup>142</sup> While this protracted history could be explained as illustrative of the courts' failure to fashion a suitable remedy, it might just as well be the result of the political branches' failure to comply with the law as judicially construed. If the latter reason is more persuasive, the solution is likely to be more judicial intervention, not less.<sup>143</sup>

### B. Other State Courts Have Struggled with Affirmative Constitutional Obligations

Four cases in four different areas of law—three decided this year and one more than three decades old—illustrate different state courts' techniques for enforcing affirmative constitutional obligations. Each case will be discussed in turn, with close attention paid to any procedural characteristics that affected the courts' potential remedies.

In *Bates v. Director of the Office of Campaign & Political Finance*,<sup>144</sup> decided February 25, 2002, the Massachusetts Supreme Judicial Court addressed the troubling question of the legislature's failure to fund a campaign finance statute passed by popular initiative.<sup>145</sup> In *Bates*, twenty-eight individual plaintiffs and four associations<sup>146</sup> brought a suit (but apparently not a class action) seeking primarily injunctive relief against the two state officials responsible for campaigns and elec-

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<sup>140</sup> See Rebell & Hughes, *supra* note 124, at 1123 (observing that "the critics of judicial activism approach the issue [of remedies] myopically by focusing on the institutional limitations of the judicial branch, while ignoring the institutional shortcomings of the legislative and executive branches in promoting sound reform").

<sup>141</sup> Sch. Dist. v. Missouri, 438 F. Supp. 830 (W.D. Mo. 1977).

<sup>142</sup> *Jenkins ex rel. Jenkins v. Missouri*, 216 F.3d 720 (8th Cir. 2000).

<sup>143</sup> Similar problems to those in the school desegregation cases arise for federal courts exercising supervisory responsibilities over prison authorities' affirmative obligations to provide safe and adequate conditions of incarceration, with mixed results. See Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805, 808 (1990) (complaining that "[c]ritics [of judicial activism] emphasize the limitations of judicially managed change without addressing the failure of the responsible officials to comply with the law and the absence of any realistic alternative means to remedy ongoing constitutional and statutory violations").

<sup>144</sup> 763 N.E.2d 6 (Mass. 2002).

<sup>145</sup> *Id.* at 9.

<sup>146</sup> *Id.* at 6 n.1.

tions.<sup>147</sup> The complaint was founded on the Massachusetts legislature's refusal to appropriate money to effectuate a clean elections law passed by popular initiative pursuant to procedures detailed in the Massachusetts Constitution.<sup>148</sup> The plaintiffs "sought permanent injunctive relief ordering the director [of campaign and political finance] to provide public campaign funds to all candidates entitled to such funds, and barring the Secretary [of the Commonwealth] from holding any elections unless and until such funds had been made available to all eligible candidates."<sup>149</sup>

The court noted that the constitutional clause providing for popular initiatives "is plain and unambiguous. If a measure properly enacted by the people is not repealed, the Legislature 'shall' raise by taxation or otherwise and 'shall' appropriate funds to 'carry such law into effect.'"<sup>150</sup> Ultimately, the *Bates* court held that despite this plain constitutional obligation, the plaintiffs' case for injunctive relief failed because the defendant director "has no clean elections funds to distribute and no authority on his own to reach those funds."<sup>151</sup> Even so, the court reached the question of the non-party legislature's obligations, declaring that the state constitution indeed mandated that the legislature either repeal or fund the campaign finance reform laws.<sup>152</sup> This obligation gave rise to a cognizable claim at law for one of the plaintiffs, a gubernatorial candidate who had already been certified as eligible for public financing for his campaign.<sup>153</sup> On that basis, and despite a vigorous sovereign immunity defense by the commonwealth, the court directed that the certified candidate (alone among the plaintiffs) be awarded the funds he had been promised by the state's campaign finance director.<sup>154</sup>

Interestingly, the *Bates* court, like Connecticut's *Sheff* court, felt free to declare the legislature's constitutional responsibilities even

<sup>147</sup> *Id.* at 10.

<sup>148</sup> *Id.* at 9.

<sup>149</sup> *Id.* at 10.

<sup>150</sup> *Id.* (construing MASS. CONST. amend. art. XLVIII, pt. 2, § 2).

<sup>151</sup> *Id.* at 11.

<sup>152</sup> *See id.* at 24 ("We have determined that [the Massachusetts Constitution] mandates that the Legislature . . . 'appropriate such money as may be necessary' to carry the clean elections law into effect." (quoting MASS. CONST. amend. art. XLVIII, pt. 2, § 2)).

<sup>153</sup> *Id.* at 24-28.

<sup>154</sup> *See id.* at 30-31 (entering judgment for the certified candidate against the director in the amount of \$811,050).

though the legislature had not been made a party to the action and no relief was sought directly against it. Also like the *Sheff* court, once the *Bates* majority decided that the legislature's failure to act was unconstitutional, the court ceased its review and declined to command any specific remedy, except with respect to the narrow issue of the single candidate who had already been certified. That exception presents a difference between the *Bates* and *Sheff* courts, in that the Massachusetts court was closely attentive to the claims and rights of the specific plaintiffs before it. Providing a damages remedy to one plaintiff but denying the drastic injunctive relief sought by the rest may have permitted the court to demonstrate to the legislature that its affirmative obligations would be enforced without provoking widespread hostility against the court from the political branches. This conclusion may be supported by the *Bates* court's direction that a single justice would retain jurisdiction over the case in the event future plaintiffs became eligible for relief.<sup>155</sup>

The Idaho case of *Bingham County v. Idaho Commission for Reapportionment*,<sup>156</sup> decided March 1, 2002, offers a simpler fact pattern and a seemingly simpler judicial remedy, but also illustrates firm judicial correction of a legislature's failure to meet affirmative constitutional obligations. The Idaho Constitution establishes a bipartisan citizens' commission to draw new legislative districts after each decennial census.<sup>157</sup> After the Idaho Supreme Court found the commission's first proposed plan impermissible under the Federal Constitution for having too great a population deviation among districts, the commission submitted a new plan, with an even greater population deviation.<sup>158</sup> The acknowledged purpose of the districts' wide deviation was to

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<sup>155</sup> Justice Martha Sosman, exercising her retained jurisdiction, was so dissatisfied with the commonwealth's compliance that she threatened to auction off state property. See *Massachusetts Ordered to Finance Campaign Law*, N.Y. TIMES, Apr. 7, 2002, § 1 ("This unquestionably inflicts needless damage on the commonwealth," Justice Sosman wrote. "However, the only way to break this impasse is to let the auctioneer's hammer fall again and again."). By mid-July, the legislature had still not appropriated clean elections funds and state land was auctioned off to pay for candidates' campaigns. See Benjamin Gedan, *Clean Elections Auction Falls Short: Lakeville Land Sale Brings Just \$2.4M*, BOSTON GLOBE, July 11, 2002, at B7 ("The Supreme Judicial Court ordered the sale of state property to fund the [campaign finance] law, and a set of SUVs were sold at an earlier auction. Last night's sale [was] the first to include state-owned land . . .").

<sup>156</sup> No. 28153/28197, 2002 Ida. LEXIS 35 (Idaho Mar. 1, 2002).

<sup>157</sup> *Id.* at \*2.

<sup>158</sup> *Id.* at \*2-3.

maintain the integrity of political subdivisions (counties), in accordance with a provision of the Idaho Constitution requiring that political subdivisions be kept whole to the maximum extent possible, consistent with federal law.<sup>159</sup> The *Bingham County* court noted, however, that the commission had split some counties but not others without apparent reason, and consequently invalidated the new reapportionment plan.<sup>160</sup> By way of remedy, the court simply directed the commission to prepare and submit a new plan,<sup>161</sup> thereby enforcing the legislature's affirmative constitutional obligation to develop an appropriate plan.

On February 21, 2002, the New Jersey Supreme Court decided a complex case known as *Abbott v. Burke*, dealing with educational equity.<sup>162</sup> The named plaintiffs were twenty urban schoolchildren; they sued the state commissioner of education, budget director, treasurer, and the state board of education for failure to comply with earlier enforcement orders of the court.<sup>163</sup> The *Abbott* litigation has a lengthy history in New Jersey; the state courts first addressed the case in 1984<sup>164</sup> and this year's decision marks the seventh time the state supreme court has adjudicated between the parties.<sup>165</sup> The plaintiffs argued that preschool programs established by court order in special at-risk school districts (known as "Abbott districts") remained inadequate<sup>166</sup> and sought as relief the implementation of a complex administrative scheme anchored on "the appointment of a judge of the Superior Court to hear and resolve anticipated disputes."<sup>167</sup> In a lengthy opinion heavily reliant on details of school administration, the *Abbott* court decided that although administrative agency compliance with the court's earlier mandates concerning the preschool programs was inconsistent enough to be "troubl[ing],"<sup>168</sup> the state had made sub-

<sup>159</sup> *Id.* at \*6 (citing IDAHO CONST. art. III, § 5).

<sup>160</sup> *Bingham County*, 2002 Ida. LEXIS 35, at \*13-19.

<sup>161</sup> *Id.* at \*24-25.

<sup>162</sup> 790 A.2d 842 (N.J. 2002).

<sup>163</sup> *Id.* at 844-45.

<sup>164</sup> *See Abbott v. Burke*, 477 A.2d 1278 (N.J. Super. Ct. App. Div. 1984) (holding that a court may determine if the inequality of educational opportunities is of such magnitude as to be unconstitutional).

<sup>165</sup> *See Abbott*, 790 A.2d at 844-45 ("As before, the [plaintiffs] allege[] that the Commissioner of Education (Commissioner) has failed to comply with the Court's mandate in *Abbott V*, and now *Abbott VI* . . .").

<sup>166</sup> *See id.* at 845 (describing the plaintiffs' complaint).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 847.

stantial progress<sup>169</sup> and as such no new judicial intervention was warranted.<sup>170</sup> After its long years of facing the *Abbott* litigation, the New Jersey Supreme Court felt qualified to provide responsible state officials with a set of highly detailed requirements for education to be constitutional in New Jersey, down to exactly what preschool curricula were to be employed in the different *Abbott* districts.<sup>171</sup> However, the court's descent into extra-judicial detail left little room for explication of the broader historical, moral, and structural trends operating behind the law. While education bureaucrats were provided with a concrete framework for how to come into compliance, the *Abbott* opinion was not noticeably attentive to the traditional purposes of a constitution.

The extraordinary complexity of the *Abbott* court's opinion, and the court's obvious familiarity with the minutiae of educational policy and procedure, could cause great irritation for someone who believes courts should restrain themselves from imposing remedies requiring continuing judicial activism. Even the *Abbott* court itself refused the plaintiffs' request that it adopt a more interventionist jurisprudence. However, New Jersey's progress toward educational equity and improved schools for racially and economically isolated children has clearly been accelerated by the supreme court's willingness to impose obligations on its coordinate branches of government.

The final state example of enforcement of affirmative constitutional obligations is the 1971 Pennsylvania Supreme Court case of *Commonwealth ex rel. Carroll v. Tate*.<sup>172</sup> The president judge of the Court of Common Pleas of Philadelphia brought a class action seeking mandamus on behalf of all Philadelphia Court of Common Pleas judges to force the city's executive and legislative branches to fund the court system adequately.<sup>173</sup> The remarkable issues facing the Pennsylvania Supreme Court, as it saw them, were whether the judiciary had the "inherent" power to determine how much money it needed, and if so, whether it could force the other branches to supply the necessary

<sup>169</sup> *See id.* ("Today, three out of every five children in the *Abbott* districts participate in those programs. Much has been accomplished.")

<sup>170</sup> *See id.* ("[W]e cannot justify a new and superseding role [for the courts in this matter].")

<sup>171</sup> *See, e.g., id.* at 849-50 (listing specific educational opportunities available in twenty-four *Abbott* districts and requiring a plan to ensure development of curricula by a specific deadline).

<sup>172</sup> 274 A.2d 193 (Pa. 1971).

<sup>173</sup> *Id.* at 194.

funds.<sup>174</sup> The court majority used strong moral language, looking to the fundamental structures of republicanism, to hold that such power was inherent in the constitutional scheme of tripartite government.<sup>175</sup> The courts' "inherent power to preserve the efficient and expeditious administration of Justice" provided sufficient authority to "protect [that power] from being impaired or destroyed."<sup>176</sup> By way of remedy, the plaintiffs sought no mere declaratory judgment or voluntary change in legislative priorities; despite "the deplorable financial conditions in Philadelphia,"<sup>177</sup> the *Carroll* court affirmed a trial court judgment awarding nearly 2.5 million (1970) dollars to the Philadelphia court system.<sup>178</sup>

The *Carroll* court never examined any potential problems in obtaining compliance with the monetary award, merely ordering the defendants to provide the court of common pleas with the court-awarded amount.<sup>179</sup> This loud silence might have been deliberately designed to avoid calling attention even to the possibility of non-compliance. It may also have been that the city's cooperation in the early stages of the case provided an adequate bonding mechanism to effectuate the later judgment.<sup>180</sup> If no security had been provided, and a city council majority had failed to appropriate the funds after judgment, from whom might the court have realistically been able to compel compliance? Once again, the identity of the parties to the case may solve the problem: The defendants were the mayor, finance director, treasurer, city council president, and the city councillors individually, all named in their official capacities.<sup>181</sup> The least messy judicial solution to noncompliance would probably have been to order

<sup>174</sup> *Id.*

<sup>175</sup> *See id.* at 197 ("Because of the basic functions and inherent powers of the three co-equal Branches of Government, the co-equal independent Judiciary must possess rights and powers co-equal with its functions and duties, including the right and power to protect itself against any impairment thereof.")

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 199.

<sup>178</sup> *Id.* at 200 (affirming the judgment below, but reducing it proportionately "to reflect the amount of time remaining in this fiscal year" and ultimately granting \$1,365,555).

<sup>179</sup> *Id.*

<sup>180</sup> *See id.* at 195 ("[A]n agreement was worked out by the parties [at a pretrial conference] that defendants would hold and keep available sufficient funds to pay any sums ultimately awarded to the Court.")

<sup>181</sup> *Id.* at 194 n.1.

the finance director to disburse the money to the courts, whether or not the executive and legislative branches had directed it elsewhere.<sup>182</sup>

### III. AFFIRMATIVE CONSTITUTIONAL OBLIGATIONS CAN BE SUCCESSFULLY ENFORCED BY STATE JUDICIARIES

Connecticut's Chief Justice Peters, by then no longer sitting on the court, told a New York University Law School audience in 1998 that "the availability of remedial flexibility led [the state supreme court], in our school desegregation case, *Sheff v. O'Neill*, deliberately to craft a mandate that . . . *underenforced our state constitutional law*."<sup>183</sup> Unfortunately, the segregated schoolchildren of Hartford have borne the brunt of that willful underenforcement. Chief Justice Peters and the *Sheff* court may have felt obliged to compromise in the face of intensely emotional opposition to court-ordered desegregation.<sup>184</sup> However, leaving the solution to such a controversial problem in the hands of the very people who violated the constitution in the first place is asking the lion to mind the lamb. Governor Rowland's blocking the integration of Hartford Public High School in 2002 by political means is not like Governor Faubus's blocking the integration of Little Rock High School in 1957 by means of force. However, Governor Rowland still has serious reasons to resent any judicial desegregation order. Even if the governor were just a regular private litigant and somehow not accountable to the suburban electorate (and so naturally resistant to any counter-majoritarian decree), it would be extraordinary and unjust for a court to leave the choice of remedy entirely to the discretion of a defendant already found liable for violations of the community's fundamental law.

The *Sheff* court exercised wishful thinking in assuming that the "energy and good will"<sup>185</sup> of the political branches would jump into ac-

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<sup>182</sup> Cf. *Spallone v. United States*, 493 U.S. 265, 280 (1990) (holding that while contempt sanctions were permissible against a city found to be in contempt of a federal district court, fines against city councillors not named as defendants in the original action were an abuse of the court's discretion to craft equitable remedies).

<sup>183</sup> Ellen A. Peters, *Capacity and Respect: A Perspective on the Historic Role of the State Courts in the Federal System*, 73 N.Y.U. L. REV. 1065, 1071 (1998) (emphasis added) (footnote omitted).

<sup>184</sup> See *Rebell & Hughes*, *supra* note 124, at 1152 ("Deep-seated public opposition to desegregation, fiscal equity, and other highly controversial decisions undoubtedly has affected the courts' ability and willingness to ensure the implementation of effective remedies in these cases.").

<sup>185</sup> *Sheff v. O'Neill*, 678 A.2d 1267, 1290 (Conn. 1996).

tion to send impoverished inner-city minority children flooding into wealthy white suburban schools. Whether the failure to provide specific timelines and desegregation targets was the result of intra-court politics, reluctance to confront the political majority, or even a genuine belief in the philosophy of judicial restraint, the result for Connecticut's constitution and schools has been devastating. The plaintiffs' lawyer Philip Tegeler has succinctly described the state's failure to comply with the supreme court's holding as a "constitutional crisis" in Connecticut.<sup>186</sup> In contrast to the muddled logic of the *Sheff* case, recall the unmistakably clear commands of the U.S. Supreme Court's unanimously authored opinion in *Cooper v. Aaron*,<sup>187</sup> enforcing the supremacy of the Federal Constitution and demanding political officials' compliance with the lower courts' desegregation decrees:

It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action. The Constitution created a government dedicated to equal justice under law. The Fourteenth Amendment embodied and emphasized that ideal. . . . The right of a student not to be segregated on racial grounds in schools . . . is indeed so fundamental and pervasive that it is embraced in the concept of due process of law.<sup>188</sup>

The *Cooper* opinion recognized that continued refusal by state officials affirmatively to desegregate the nation's schools threatened not only the welfare of affected children, but also the entire relationship between the Constitution, as construed by the U.S. Supreme Court, and the rest of the country.<sup>189</sup> There is no reason to doubt the equal seriousness of state officials' declining to follow state supreme court mandates. The ability of state courts to assert their authority under state constitutions, as the Pennsylvania Supreme Court did in *Carroll*, must be available for the maintenance of the rule of law and constitutional order.

A substantively more innovative and procedurally more traditional remedy could provide the fully enforceable remedy the courts have been missing. The essence of this proposal lies in the state supreme

<sup>186</sup> Interview with Philip Tegeler, *supra* note 47.

<sup>187</sup> 358 U.S. 1 (1958) (Warren, C.J., Black, Frankfurter, Douglas, Burton, Clark, Harlan, Brennan, & Whittaker, JJ.).

<sup>188</sup> *Id.* at 19.

<sup>189</sup> *Id.* at 19-20.



court's realizing its institutional strengths and relying on those strengths unapologetically. Once the *Sheff* court determined that the state constitution demanded an integrated education for Connecticut's students, attention to certain narrow procedural elements of the case would have helped the court to find an effective, but feasible, remedy.

To begin with, the court should have remembered and accounted for the special characteristics of the group of plaintiffs at the bar. Because both white suburban students and inner-city minorities were pressing their claims together, the court should have treated seriously the plaintiffs' notion that the constitutional violation was *racial isolation*, not the *effect* of such isolation on the quality of education available. An opinion and, more importantly, a remedy confined to this issue would have been necessarily clear; such de facto segregation is either permissible or it is not. Determining constitutional compliance is then literally a matter of facial review. Furthermore, understanding the identity of the plaintiffs this way would have avoided treating integration as a right of the urban minorities, which provokes the reasonable critique that courts are suggesting that black school children are unable to learn unless they are surrounded by white school children.<sup>190</sup> It is tempting for judges accustomed to deriving principles of constitutionalism from the federal example to consider constitutions as establishing "rights against rules,"<sup>191</sup> but state constitutions are different: in addition to providing negative "rights against rules," the state constitutions impose affirmative obligations. Recasting these obligations as rights held by the affected parties obscured the *Sheff* court's ability to see just what the constitution required. In contrast, Justice Borden's angry dissent in *Sheff* correctly foresaw that a "necessary implication" of the majority's opinion, "compelled in part by the identity of the plaintiffs," is that all overwhelmingly white school districts in Connecticut are equally an affront to the state constitution as the overwhelmingly black and Latino school district in Hartford.<sup>192</sup>

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<sup>190</sup> See *Missouri v. Jenkins*, 515 U.S. 70, 114 (1995) (Thomas, J., concurring) ("It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior.").

<sup>191</sup> See Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 3 (1998) (insisting that it is a basic aspect of constitutional structure that constitutional rights exist only as protection from inappropriate government action).

<sup>192</sup> *Sheff v. O'Neill*, 678 A.2d 1267, 1331 (Conn. 1996) (Borden, J., dissenting); see also *id.* at 1332 ("[E]very rural and suburban school district, from Litchfield to Pomfret

Even if that result is not logically compelled by the court's holding, the majority was mistaken to describe the state's obligations in terms of the plaintiffs' rights.

If the *Sheff* court had more clearly understood school integration as an affirmative obligation of the state, then the natural next step would have been to define the obligation's contours. What, precisely, would the named defendants have to do to comply with their constitutional responsibilities? The general assembly's obligations may be greater or lesser than those of the executive branch officials sued by the plaintiffs, but since the legislators were not a party to the litigation, the court should have declined to declare their rights and responsibilities. Instead, the court should have reviewed the individual defendants' liability, one by one, and directed a remedy strictly to correct that liability.

For example, the court might have held that the commissioner of education's policy-making role in the state's provision of public education meant that his constitutional obligation included the redrawing of school district lines, using racially-inclusive standards. The court might then have given the commissioner a deadline by which to present such new district maps. The remedial regime would then be very similar to that employed in electoral reapportionment cases, which the *Bingham County* example from Idaho shows is easily within the capacity of the courts. A similar examination of responsibility and assignment of obligation could be applied to each of the executive officials brought before the *Sheff* court. The hierarchical nature of the executive branch would work to the decreeing court's advantage, because agency officials are institutionally habituated to taking and implementing orders from political superiors.

Such an individualized remedy would have the additional advantage of being enforceable against a natural person, rather than a body politic. It is implausible that any court would (or could) hold an entire legislature in contempt, but the real human being occupying the office of commissioner can easily be subjected to judicial sanctions sufficiently serious to encourage constitutionally mandated conduct.

Once the court has made individual determinations of official liability, an eminently judicial task, there should be no hesitancy to make bold demands on an official's conduct. As one scholar has cor-

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and from Greenwich to Granby, is now either clearly or probably unconstitutional . . .").

rectly explained: “Judicial invocation of separation of powers concerns to justify deference to legislative oversight often operates as no more than an abdication to majority preferences, which impedes the development and the implementation of constitutionally mandated remedial programs.”<sup>193</sup> Since a court’s constitutional authority has a significant moral component, a weakly proffered judicial remedy (such as one entirely dependent on voluntary remedies) may signal moral insecurity to the affected public, making compliance less likely than a bolder decree would inspire. Persistent racism and educational inequity,<sup>194</sup> nearly fifty years after *Brown v. Board of Education* declared “separate” to be “inherently unequal”<sup>195</sup> and thirteen years after *Sheff v. O’Neill* required Connecticut to eliminate the separation, is depressing. A court that claims on the one hand that society must take painful and expensive steps to fix the problem because the constitution demands it, but then relies on purely voluntary measures to achieve a solution, invites the public’s righteous skepticism and resistance. Therefore, enforcing state constitutional affirmative obligations requires mandatory remedies to protect the legitimacy of the constitutional order as much as to protect the litigants’ rights.

With strict attention to formalistic details, joined with explicitly moral constitutional construction and unhesitating mandatory remedies targeted at individuals, state courts in Connecticut and across the country have an exemplary opportunity to eliminate a social evil that has troubled our nation since colonial times. In the words of a national hero: “All we say to America is be true to what you said on paper.”<sup>196</sup>

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<sup>193</sup> Tom Beimers, Note, *A Wrong Still in Search of a Remedy: Educational Adequacy After Sheff v. O’Neill*, 82 MINN. L. REV. 565, 594 n.157 (1997).

<sup>194</sup> See Gayl Shaw Westerman, *The Promise of State Constitutionalism: Can It Be Fulfilled in Sheff v. O’Neill?*, 23 HASTINGS CONST. L.Q. 351, 365 (1996) (“Over forty years after *Brown*, 63.3% of all black children still attend segregated schools, and in twenty-five of the nation’s largest inner-city school districts, more racially segregated schools exist today than in 1954.”).

<sup>195</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

<sup>196</sup> Martin Luther King, Jr., *I’ve Been to the Mountaintop*, Address at Bishop Charles Mason Temple (Apr. 3, 1968), in *A CALL TO CONSCIENCE: THE LANDMARK SPEECHES OF DR. MARTIN LUTHER KING, JR.* 207, 213 (Clayborne Carson & Kris Shepard eds., 2001).