

ARTICLES

The Promise of State Constitutionalism: Can It Be Fulfilled in *Sheff v. O'Neill*?

By GAYL SHAW WESTERMAN*

Table of Contents

Prologue	351
I. Introduction	353
IIa. The Failed Federal Standard	367
IIb. The Fundamental Differences between Federal and State Constitutional Adjudication	381
A. The Limitations of Federalism	382
B. The State Action Requirement	383
C. Institutional and Functional Differences	386
IIIa. Developing an Independent Approach to State Constitutional Decisionmaking	388
A. The Need for Structural Reform	390
B. The Need for an Effects-Based Jurisprudence	391
C. The Antisubjugation Principle Applied to <i>Sheff</i>	393
IIIb. The Value of Successfully Desegregated Schools: An Empirical Review	398
IV. Conclusion	405

Prologue

On April 12, 1995, the Connecticut Superior Court issued its long-awaited decision in *Sheff v. O'Neill*,¹ the landmark school deseg-

* Professor of Law, Pace University School of Law. B.A., Stanford University, 1961; M.S., University of Pennsylvania, 1965; J.D., Pace Law School, 1981; L.L.M. and J.S.D., Yale Law School, 1982 and 1984, respectively. The author wishes to thank the Charles A. Frueauff Foundation and Pace University School of Law, which provided partial research funding for this project; her colleagues, in particular Professor Owen Fiss, whose insightful comments improved the quality of this piece; and her research assistant, YiYi Lam, whose tireless efforts contributed so much to its publication.

1. No. CV89-0360977S, 1995 Conn. Super. LEXIS 1148, at *1 (Apr. 12, 1995).

regation case. *Sheff* was the first case since the mid-seventies to challenge the doctrine and rationale of federal school desegregation cases on the basis of state constitutional provisions alone.² Specifically, the *Sheff* plaintiffs argued that a metropolitan-wide remedy should be imposed to cure metropolitan-wide school segregation, whether or not state action infused with discriminatory intent caused the segregative conditions.³

The *Sheff* case was brought by seventeen African-American, Hispanic, and White children attending schools in Hartford, Connecticut and one of its contiguous suburbs.⁴ As is the case in many metropolitan areas throughout the United States, over 90% of the children attending the inner city's schools of Hartford are members of minority groups,⁵ and virtually 100% of the children attending the suburban schools are White. The plaintiffs asked the court for a judgment declaring that "separate educational facilities for minority and non-minority students are inherently unequal."⁶ They argued that by knowingly maintaining public school districts segregated by race and ethnicity, the state violated each student's fundamental right to an equal educational opportunity,⁷ a right clearly established under the Education⁸ and Equal Protection⁹ Clauses of the Connecticut Constitution. Plaintiffs asked the court to order the State to require Hartford and its suburban districts to jointly develop a plan addressing these segregative conditions and to reconfigure school district boundaries or take other steps necessary to eliminate educational inequities,¹⁰ a remedy not available under federal law.¹¹

Not surprisingly, the State of Connecticut has based the crux of its defense on *federal* equal protection standards.¹² It has claimed as a threshold matter that unless the plaintiffs prove that state action caused the segregative conditions, the state cannot be held responsible for correcting those conditions.¹³

2. *Id.* at *3-*4.

3. *Id.* at *23.

4. *Id.* at *1.

5. *Id.* at *40.

6. *Id.* at *3.

7. *Id.* at *3-*4, *27.

8. CONN. CONST. art. VIII, § 1. See *infra* note 65 for the text of this provision.

9. CONN. CONST. art. I, §§ 1 and 20. See *infra* note 66 for the text of these provisions.

10. *Sheff v. O'Neill*, No. CV89-0360977S, 1995 Conn. Super. LEXIS, at *3 (Apr. 12, 1995).

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

12. *Sheff*, No. CV89-0360977S, slip op. at *73-*89.

13. *Id.* at *5, *27-*28.

Sheff was filed on April 28, 1989.¹⁴ On April 12, 1995, the superior court held in favor of the State of Connecticut entirely on the basis of federal precedents and the federal state action/discriminatory intent/causation standard,¹⁵ without any attempt to construe the Connecticut constitutional provisions under which the case had been brought.

On April 27, 1995, the Connecticut Supreme Court accepted the *Sheff* case on direct appeal. This led some observers to hope for an ultimate decision more in keeping with the Connecticut judiciary's recent history as one of the leaders in the state constitutional law movement. On numerous occasions, the Connecticut Supreme Court has demonstrated a willingness to provide greater protection for individual rights—beyond that provided under the Federal Constitution—by giving independent meaning to the state constitutional provisions.¹⁶

This Article reflects on the anomaly of the superior court's decision in *Sheff* in light of this recent history and recommends that the Connecticut Supreme Court use an alternative, analytical framework based on the Connecticut Constitution to decide the *Sheff* appeal. This independent approach is equally available to all state courts seeking to resolve fundamental issues under their own constitutions. Only by speaking in a clear, state voice can state courts balance the constitutional vision of the federal courts and fulfill the promise of the state constitutional law movement.

I. Introduction

The newly rediscovered vigor and promise of state constitutional law has dominated legal discourse since 1977 when Justice Brennan issued the following call to arms in his seminal article:

[S]tate courts cannot rest when they have afforded their citizens the full protections of the [F]ederal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.¹⁷

14. *Id.* at *1.

15. *Id.* at *86-*87.

16. *See infra* notes 36-55 and accompanying text.

17. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

Justice Brennan's call for a rebirth of state constitutionalism could be construed as merely recommending a return to the original federalist principles, which recognize that allocating the powers of government among federal and state entities would protect the interests of citizens more effectively than concentrating power within one governmental entity alone.¹⁸

However, some scholars argue that Justice Brennan was not advocating a restrictive view of state constitutionalism in which each state turns inward to create an independent constitutional vision based on unique state sources and local circumstances. Rather, these commentators argue that Justice Brennan was urging state courts to rejoin the common enterprise of defining the meaning and the parameters of American constitutional values. Professor Paul Kahn, for example, takes this view of Brennan's intentions and agrees that what is needed is not a return to the old federalism but rather an expanded American constitutional dialogue in which state courts play a key role: "When there is only a single view of the possibilities of law, the meaning of the constitutional order is impoverished. A democracy that does not debate the legal boundaries of its own political choices is already failing the constitutional project."¹⁹ Professor Kahn urges state courts to enter freely into an expanded constitutional dialogue on the meaning of American citizenship²⁰ in order to serve as a "powerful counterforce"²¹ to the federal courts.

Since 1977, commentators²² and state courts²³ have answered Justice Brennan's call for an expanded constitutional dialogue and have looked to state constitutional provisions to provide protection for the

18. Yvonne Kauger, *Reflections on Federalism: Protections Afforded by State Constitutions*, 27 GONZ. L. REV. 1, 1 n.1 (1991-92). Kauger quotes from THE FEDERALIST to make her point: "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." *Id.* at 1 n.1 (quoting THE FEDERALIST No. 51, at 353, 356 (A. Hamilton, J. Madison, and J. Jay), reprinted in THE CENTRAL LAW JOURNAL Co. (1916)).

19. Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1155 (1993). Kahn quotes from a portion of Brennan's article which supports the view that Brennan saw an activist role for state courts in the national debate: "[S]tate courts [should] thrust themselves into a position of prominence in the struggle to protect the people of our nation from government intrusions on their freedoms." *Id.* at 1151 (quoting Brennan, *supra* note 17, at 503) (emphasis added).

20. Kahn, *supra* note 19, at 1168.

21. *Id.* at 1166.

22. The volume of scholarship in this area has been documented by other scholars, and therefore a lengthy citation will not be given here. Many of the most influential writings

rights and liberties of state citizens beyond the minimum of federal protections. Today, no commentator and certainly no judge, either state or federal, would deny that state courts have the power, and indeed the duty, to independently interpret their own constitutions.²⁴

Nor has this power been newly-created out of the crucible of late twentieth century constitutional theory. From the colonial period until the federal domination of the rights dialogue began during the Warren Court era, state courts routinely exercised full judicial review²⁵ and acted to protect the rights and liberties of citizens under their own constitutions, many of which predated their federal counterpart.²⁶

Connecticut's own constitutional history is exemplary in this regard. Chief Justice Peters has noted that Connecticut is not merely called the "Constitution State" because of its role in the creation of the Federal Constitution, but rather because by 1638 the Colony had promulgated the *Fundamental Orders*,²⁷ a set of principles referred to by many scholars as the world's first written constitution.²⁸ These Orders established a democratic form of government and granted significant rights to citizens against the incursions of government.²⁹

The rights of Connecticut citizens were further expanded by the enactment in 1650 of a statutory declaration of rights.³⁰ This declaration of rights became a body of fundamental law which safeguarded

on the topic have been cited separately throughout the body of this work. See, e.g., Kahn, *supra* note 19; Kauger, *supra* note 18.

23. Recent estimates indicate that in over 450 cases prior to 1992, state courts interpreted state constitutional guarantees as going beyond federal constitutional minimums. Robert F. Utter, *State Constitutional Law, the United States Supreme Court and Democratic Accountability: Is There a Crocodile in the Bathtub?*, 64 WASH. L. REV. 19, 27 (1989). See also William J. Brennan, Jr., *The Bill of Rights and The States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548 (1986).

24. For a full discussion of the basis of state court authority in this regard, see *infra* notes 224-228 and accompanying text.

25. Unlike the Federal Constitution, state constitutions often expressly provide for the exercise of judicial review by state courts. See *infra* notes 236-240 and accompanying text.

26. See *infra* note 228 and accompanying text.

27. Ellen A. Peters, *Common Law Antecedents of Constitutional Law in Connecticut*, 53 ALB. L. REV. 259, 259-60 (1989) (citing *Fundamental Orders of Connecticut* (1638), reprinted in 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 249-52 (B. Poore ed., 1878) [hereinafter ORGANIC LAWS]).

28. Robert I. Berdon, *The Connecticut Constitution: An Analytical Framework for Raising State Constitutional Claims in Connecticut*, 14 QUINNIPAC L. REV. 191, 192 (1994).

29. The *Fundamental Orders* were later incorporated into and supplemented by the charter granted to the colony in 1662 by Charles II. This charter extended "all the 'liberties and immunities' of the realm of England" to Connecticut citizens. Henry S. Cohn, *Connecticut Constitutional History—1636-1776*, 64 CONN. B.J. 330, 335 (1990).

30. Berdon, *supra* note 28, at 192.

individual rights and liberties by granting equal protection and providing for due process and the protection of reputation.³¹ Other rights now termed “constitutional”—such as freedom of religion, the right to legal counsel, protection against double jeopardy and defamation, rules against censorship and unreasonable searches and seizures—were also protected by the Connecticut courts under a variety of common law antecedents.³²

Therefore, long before the Federal Constitution was drafted and even prior to the enactment of Connecticut’s first formal constitution in 1818,³³ Connecticut courts freely invoked a rich body of state law to protect individual rights.³⁴ Except for the period during which the vast expansion of constitutional protections by the federal courts seemed to cast doubt on the continuing need for an independent state constitutional jurisprudence, Connecticut state courts have continuously exercised their authority to resolve controversy and safeguard the liberties of citizens under the fundamental laws of their state.

In Connecticut, as in other states, however, the effort of the state judiciary to emerge from the torpor caused by federal domination was hampered by a series of state constitutional cases which declared that state provisions were to be interpreted as having “like meaning and similar limitations” to their federal counterparts.³⁵ After a somewhat

31. *Id.* at 194. From the date of enactment, these statutory rights were occasionally amended to provide *additional* rights, but never to curtail previously existing rights. *Id.* at 192.

32. Peters, *supra* note 27, at 261. That Connecticut citizens possessed a wide body of human rights safeguarded by the civil government was well understood in the eighteenth century. Legal commentators of the time, such as Judge Jesse Root, charged the state with the responsibility of ensuring “the advancement of order, peace and happiness in society, by protecting its members in the quiet enjoyment of their natural, civil, and religious rights and liberties.” ROOTS REPORTS xvi (1789-1793), *quoted in* Ellen A. Peters, *State Supreme Courts in our Evolving Federal System*, 17 *Intergovernmental Persps.* 21, 21 (1991) [hereinafter Peters, *Evolving Federal System*].

33. CONN. CONST. of 1818, *reprinted in* 1 ORGANIC LAWS, *supra* note 27, at 258-66.

34. Chief Justice Peters has suggested that Connecticut constitutional law, statutory law, and natural and common law principles were all endowed with what would today be called a “constitutional penumbra.” Peters, *Evolving Federal System*, *supra* note 32, at 21. Peters has also observed that it is this multifaceted nature of Connecticut constitutional history that

provides our state constitutional law with a starting point that is different from federal constitutional law. A constitutional tradition that does not draw hard lines of separation between constitutional, statutory, and common law precepts emphasizes that . . . a state court must cast a wide net in searching for guidance to resolve invariably troublesome constitutional controversies.

Id. at 22.

35. Virtually all states have had such “like meaning” cases to contend with. See, for example, *Cyphers v. Allyn*, 118 A.2d 318, 321 (Conn. 1955), but other examples abound.

slow and inconsistent start, Connecticut courts have acted to repudiate these precedents. Two cases in particular, *Fasulo v. Arafeh*³⁶ and *Horton v. Meskill*,³⁷ recognized the "primary independent vitality of the provisions of our own constitution,"³⁸ and indicated that state and federal provisions do not have to be read with like meaning and similar limitations. Although federal case law may be considered by state courts in adjudicating state constitutional issues,³⁹ this consideration "in no way compromises [the state courts'] obligation independently to construe the provisions of our state constitution."⁴⁰

In line with this obligation, Connecticut courts have responded to Justice Brennan's call to rejoin the constitutional discourse. As the United States Supreme Court has moved inexorably to subordinate individual rights to private and governmental interests in the areas of equal protection,⁴¹ criminal procedure,⁴² privacy,⁴³ free exercise,⁴⁴ procedural due process⁴⁵ and others, the Connecticut judiciary has ex-

36. 378 A.2d 553 (Conn. 1977).

37. 376 A.2d 359 (Conn. 1977).

38. *Id.* at 371. Although the old "like meaning" language occasionally finds its way into current cases, the term now appears to stand for the proposition that the Connecticut Constitution "shares but is not limited by the content of its federal counterpart." *Fasulo*, 378 A.2d at 554.

39. *State v. Geisler*, 610 A.2d 1225, 1232 (Conn. 1992), sets forth an analytical framework for state constitutional claims. The tools of analysis to be considered are: first, the text of the state constitutional provision in question; then, the holdings and dicta of the supreme and appellate courts of the state; federal precedents; sister state decisions; history; and economic and sociological considerations.

40. *State v. Lamme*, 579 A.2d 484, 490 (Conn. 1990).

41. See, for example, *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973), *Milliken v. Bradley*, 418 U.S. 717 (1974), *Washington v. Davis*, 426 U.S. 229 (1976), *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977), and *Personnel Adm'r v. Feeney*, 442 U.S. 256 (1979), all of which imposed a discriminatory intent standard for federal equal protection cases. See also *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989) (invalidating minority set aside plan); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (finding no fundamental right to education under the Federal Constitution).

42. See, e.g., *Payne v. Tennessee*, 501 U.S. 808 (1991) (finding no constitutional basis for keeping victim impact evidence from the jury in capital cases).

43. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986) (state statute criminalizing homosexual sodomy upheld). See also *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989), *Harris v. McRae*, 448 U.S. 297 (1980), and other recent abortion cases which, while confirming a woman's continuing right to an abortion under *Roe v. Wade*, 400 U.S. 113 (1973), nonetheless sanction state laws placing limits on that right or placing restrictions on those women who can exercise it.

44. See, e.g., *Employment Div., Ore. Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990) (state may deny unemployment benefits to those who engage in the use of drugs in religious ceremonies).

45. See, e.g., *Lassiter v. Department of Social Servs.*, 452 U.S. 18 (1981) (no right to counsel in parental status termination proceedings).

panded the rights of citizens under state constitutional provisions in several key areas. In *Doe v. Maher*,⁴⁶ for example, the court rejected the approach taken by the United States Supreme Court in *Harris v. McRae*⁴⁷ and struck down, under the state Due Process Clause, a Connecticut regulation restricting the right to medicaid payment for abortions.⁴⁸ In *State v. Davis*,⁴⁹ the court created a rule different from the federal courts on the ultimate right to call a witness under Article I, Section 8 of the state constitution. *Griswold Inn, Inc. v. State*⁵⁰ expanded state protection of religious freedoms beyond the federal model. An expansion of rights has also occurred in several other key areas, including search and seizure,⁵¹ substantive due process,⁵² and freedom of expression.⁵³

By the time *State v. Dukes*⁵⁴ was decided in 1988, the Connecticut Supreme Court could firmly state that, although Connecticut courts are free to follow the lead of the federal courts at their discretion, "this court has never considered itself bound to adopt the federal interpretation in interpreting the Connecticut [C]onstitution. . . . Thus, in a proper case 'the law of the land' may not, in [the] state constitutional context, also be 'the law of the [S]tate of Connecticut.'"⁵⁵

46. 515 A.2d 134 (Conn. Super. Ct. 1986).

47. 448 U.S. 297 (1980).

48. 515 A.2d at 450.

49. 506 A.2d 86 (Conn. 1986).

50. 441 A.2d 16 (Conn. 1981).

51. See, e.g., *State v. Miller*, 630 A.2d 1315 (Conn. 1993) (invalidating as a matter of state constitutional law, warrantless automobile search conducted while automobile is impounded at police station); *State v. Geisler*, 610 A.2d 1225 (Conn. 1992) (rejecting claim that emergency situation existed to support police officer's warrantless entry into hit and run driver's house in order to arrest him); *State v. Oquendo*, 613 A.2d 1300 (Conn. 1992) (rejecting claim that police officer had reasonable basis for suspicion to seize defendant).

52. See, e.g., *Fair Cadillac-Oldsmobile Isuzu Partnership v. Bailey*, 640 A.2d 101 (Conn. 1994) (holding that statute prohibiting party engaged in business of selling motor vehicles from selling them on Sunday violates substantive due process under Connecticut Constitution).

53. See, e.g., *Dow v. New Haven Indep., Inc.*, 549 A.2d 683 (Conn. Super. Ct. 1987) (holding that statements in editorials, clearly labeled as such, about public officials concerning matters of public concern, are entitled to an absolute, unconditional privilege).

54. 547 A.2d 10 (Conn. 1988).

55. *Id.* at 18-19. See also *id.* at 17 (citing *State v. Stoddard*, 537 A.2d 446 (Conn. 1988); *State v. Jarzbek*, 529 A.2d 1245 (Conn. 1987); *State v. Scully*, 490 A.2d 984 (Conn. 1985); *State v. Couture*, 482 A.2d 300 (Conn. 1984) and others, including *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977), and *Fasulo v. Arafah*, 378 A.2d 553 (Conn. 1977)). Connecticut's independence in constitutional adjudication is but a part of the nationwide trend. Many other state supreme courts have been developing a different constitutional vision than that which is developing under federal law. See, e.g., *Commonwealth v. Colon-Cruz*, 470 N.E.2d 116 (Mass. 1984); *Durant v. State Bd. of Educ.*, 381 N.W.2d 662 (Mich. 1985); *Wein v. State*, 347 N.E.2d 586 (N.Y. 1976) and *Wein v. Carey*, 362 N.E.2d 587 (N.Y. 1977).

One of the most important examples of the state judiciary's willingness to forge an alternative constitutional vision for Connecticut came in *Horton v. Meskill*,⁵⁶ a 1977 case in which plaintiffs challenged the constitutionality of Connecticut's school financing scheme. Just four years earlier, the United States Supreme Court had faced an almost identical challenge in *San Antonio Independent School District v. Rodriguez*.⁵⁷

The Court decided *Rodriguez* during a period of intense debate over whether the right to equal access to education should be added to the expanding list of fundamental rights under the Fourteenth Amendment. *Brown v. Board of Education*⁵⁸ had suggested as much almost twenty years earlier.⁵⁹ In *Rodriguez* the Court, which technically had been asked to determine whether the school finance laws of Texas violated the United States Constitution, was in fact being asked to reflect on much more: the role of education in a democracy. In a five-to-four decision, the *Rodriguez* Court upheld the Texas financing laws despite the substantial disparities in funding between districts with predominantly poor, nonwhite students and districts which had predominantly affluent, White students.⁶⁰ The Court also found that education was not a fundamental right under the Fourteenth Amendment⁶¹ and that the poor were not a suspect class for federal equal protection purposes.⁶² *Rodriguez* was one of the first federal education cases to place educational policymaking back into state hands. In particular, the job of determining the meaning of "an equal educational opportunity" was effectively returned to the states. As some commentators suggested, in some ways this was a welcome return to normalcy.⁶³

Four years later, when *Horton*⁶⁴ challenged the Connecticut school financing scheme, it seemed that the task had passed back into

56. 376 A.2d 359 (Conn. 1977).

57. 411 U.S. 1 (1973).

58. 347 U.S. 483 (1954).

59. "Today, education is perhaps the most important function of state and local governments. . . . It is required in the performance of our most basic public responsibilities It is the very *foundation* of good citizenship. . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Id.* at 493 (emphasis added).

60. 411 U.S. 1, 28 (1973). See JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* 214 (1991).

61. 411 U.S. at 33.

62. *Id.* at 36-37.

63. Bernard James & Julie M. Hoffman, *Brown in State Hands: State Policymaking and Educational Equality After Freeman v. Pitts*, 20 HASTINGS CONST. L.Q. 521, 525 (1993).

64. 376 A.2d 359 (Conn. 1977).

safe hands. Acting decisively to reject the approach taken by the United States Supreme Court in *Rodriguez*, the Connecticut Supreme Court interpreted the Education⁶⁵ and Equal Protection⁶⁶ Clauses of the Connecticut Constitution as together creating a fundamental right to an equal educational opportunity.⁶⁷ Finding that wide disparities in funding between rich and poor school districts were violative of this fundamental equality right, the court in *Horton* struck down the state's school finance scheme.⁶⁸

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

66. CONN. CONST. art. I, § 1 ("All men when they form a social compact, are equal in rights; and no man or set of men are entitled to exclusive public emoluments or privileges from the community.") and § 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 civil or political right because of religion, race, color, ancestry or national origin.").

67. *Horton*, 376 A.2d at 369-70.

68. *Id.* Many other states have taken part in this important educational equality debate since *Rodriguez*. By 1993, courts in thirty-three states had decided challenges to the constitutionality of school finance schemes. Jonathan Feldman, *Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in an Era of Positive Government*, 24 Rutgers L.J. 1057, 1079 n.112 (1993). In fifteen states, the financing systems were held to be unconstitutional. *Id.* In many of these cases, education was also found to be a fundamental right under state constitutional law, as was the case in Connecticut. See, e.g., *Shostall v. Hollins*, 515 P.2d 590 (Ariz. 1973); *Alma Sch. Dist. No. 30 v. Dupree*, No. 77-406 (Ch. Ct., Pulaski City, Ark. Oct. 26, 1981); *Serrano v. Priest (Serrano II)*, 557 P.2d 929 (Cal. 1976) (en banc), cert. denied, 432 U.S. 907 (1977); *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989); *Somerset County Bd. of Educ. v. Hornbeck*, No. A-58438 (Cir. Ct., Baltimore, Md., May 19, 1981); *Helena Elem. Sch. Dist. v. Montana*, 769 P.2d 684 (1989); *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973), cert. denied, 414 U.S. 976 (1973); *Edgewood Ind. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *Seattle Sch. Dist. No. 1 v. Washington*, 585 P.2d 71 (Wash. 1978) (en banc); *Kukor v. Grover*, 436 N.W.2d 568 (Wisc. 1989); *Pauley v. Kelly*, 255 S.E.2d 859 (W.Va. 1979); *Washakie County Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310 (Wyo. 1980), cert. denied, 449 U.S. 824 (1980).

In eighteen of the thirty-three states, the challenged state finance scheme was upheld. Feldman, *supra*, at 1079 n.112. In several of these cases, courts appeared to rely on the separation of powers doctrine, fearing that to direct the state legislature to alter its school funding policies would place the court in the position of a superlegislature. See, e.g., *Thompson v. Engel King*, 537 P.2d 635, 640 (Idaho 1975). Some scholars argue, however, that reliance on this doctrine is but one more device employed by state courts to avoid their responsibility to flesh out the meaning of equality in an educational setting. Feldman, for example, suggests that although a state legislature may be empowered by the state constitution to develop policy and allocate funds for public education, only the state judiciary can decide the *content* of positive state constitutional guarantees, such as the right to a free and public education. Feldman, *supra*, at 1087.

Other scholars have suggested that the idea that a state legislature acting alone can decide the constitutional parameters of an equal educational opportunity may have resulted from a "fundamentally flawed view of the concept of judicial review." James & Hoffman, *supra* note 63, at 555 (quoting Martin H. Redish, *Judicial Review and the "Political Question,"* 79 Nw. U. L. REV. 1031, 1031 (1985)). See also Peter J. Galie, *The Other*

Interpreting the Connecticut Equal Protection Clauses in *Horton*, the state supreme court opted to retain the “tiers of scrutiny” approach of the federal courts, but declined to import the federal state action/discriminatory intent/causation threshold test for finding government responsibility.⁶⁹ At most, the court applied an “effects” test that requires a showing that a specific condition, such as an inequity in school financing, “resulted” from delegating legislation. Once shown, the court could conclude that such a result constitutes a violation of both the Equal Protection Clauses of the Connecticut Constitution and the duty to provide for equal educational opportunity by taking “appropriate legislative action.”⁷⁰ Unencumbered by the separation of powers doctrine which burdened other states in making this decision, the Connecticut Supreme Court instructed the state legislature to develop appropriate legislation that would minimize the funding disparities between school districts in keeping with the fundamental right to a substantially equal educational opportunity.⁷¹

The *Horton* case, and many of the Connecticut constitutional cases discussed above which followed during the next decade, reinforced the impression that the Connecticut judiciary was determined to exercise its independence from federal court domination and to summon the “strength and the will to undertake the painstaking task of assigning independent meaning to independent state constitutions.”⁷² In fact, until the Connecticut Superior Court decision in *Sheff v. O’Neill* was announced in April 1995,⁷³ it appeared that Connecticut courts had entered the expanded constitutional dialogue with vigor and become exemplars of the kind of new state constitutionalism lauded by Professors Bernard James and Julie Hoffman in their recent work on the topic:

Whatever one may think of the phenomenon of modern state constitutional law in the abstract, it is now clear beyond quibble that these documents have become the cloth out of which mod-

Supreme Courts: Judicial Activism Among State Supreme Courts, 33 SYRACUSE L. REV. 731 (1982) and Joshua S. Lichtenstein, Note, *Abbott v. Burke: Reaffirming New Jersey’s Constitutional Commitment to Equal Educational Opportunity*, 20 HOFSTRA L. REV. 429 (1991).

Interestingly, four of the states which upheld their state finance systems, Arizona, Maryland, West Virginia and Wisconsin, nevertheless found a fundamental right to education under their state constitutions. James & Hoffman, *supra* note 63, at 548 n.128.

69. 376 A.2d at 369.

70. *Id.* at 376.

71. *Id.*

72. Ellen A. Peters, *State Constitutional Law: Federalism in the Common Law Tradition*, 84 MICH. L. REV. 583, 593 (1986) (book review of DEVELOPMENTS IN STATE CONSTITUTIONAL LAW (Bradley D. McGraw ed., 1985)) [hereinafter *State Constitutional Law*].

73. No. CV89-0360977S, 1995 Conn. Super. LEXIS 1148, at *1 (Apr. 12, 1995).

ern social compacts are woven. . . . [S]tate constitutions are being used to provide a forum for both discussion and resolution of the major issues of the day.⁷⁴

In light of this recent history, it would seem that the Connecticut Supreme Court's decision in *Horton* would have impelled the lower court to take the next logical step in *Sheff*. Recall that in *Horton*, the court found that the specific condition of inequity in school financing resulted from delegating legislation and constituted a violation by the State of both the Equal Protection Clauses of the Connecticut Constitution and the duty to provide for equal educational opportunity by appropriate legislation.⁷⁵ The *Sheff* plaintiffs argued that *Sheff* is a "perfect analog" to *Horton*.⁷⁶ Indeed, it seems a very short step to find in *Sheff* that another specific condition—the racial and ethnic segregation of the schools in Hartford and its suburbs—also resulted from delegating legislation by the state. This legislation created local school districts and attendance zones which have made racially balanced schools, also required under Connecticut law, impossible to achieve in metropolitan areas throughout Connecticut. This statutory scheme may, therefore, also constitute a violation of both the Equal Protection Clauses of the Connecticut Constitution and the duty to provide for equal educational opportunity by appropriate legislation.

Missing the analogy completely, the lower court in *Sheff* failed to take the next step. Distinguishing *Horton* on dubious grounds, the court stated that the *Horton* plaintiffs were attacking only the specific statute which created the school finance system, whereas the *Sheff* plaintiffs were challenging the present condition of racial segregation in the Hartford schools.⁷⁷ Yet, how is it possible that a landmark case brought *solely* under state constitutional provisions could prompt a lower court decision utterly devoid of any analysis of those state provisions? How is it possible that after six years of adjudication, the court could decide this case based entirely upon federal standards and cases? The *Sheff* court found 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."⁷⁸

74. James & Hoffman, *supra* note 63, at 526.

75. 376 A.2d 359, 376 (Conn. 1977).

76. *Sheff*, No. CV89-0360977S, slip op. at *66.

77. *Id.* at *67-68.

78. *Id.* at *89.

There are no easy answers to these questions. Perhaps it was simply a case too hot to handle, or a failure of judicial nerve when confronted with an issue pregnant with enormous societal and political implications. Certainly, in retrospect, the *Rodriguez* case passed some relatively easy educational issues back into state hands. Unlike the Federal Constitution, virtually every state constitution has an education clause which mandates, or at least permits, the state legislature to provide for a free and public state educational system.⁷⁹ Only a short step was required for some state courts to declare that this positive right guaranteed to all citizens was also fundamental under their state's constitutional scheme. The issue of equalizing state funding for education so as to minimize the disparities in the educational opportunities offered to rich and poor children, though somewhat more controversial, has nonetheless been tackled by the majority of states following *Rodriguez*, albeit with differing outcomes.⁸⁰

Prior to the *Sheff* case, however, no state had been forced to face the monumental and politically charged equality issue left over from the United States Supreme Court's school desegregation decisions in *Keyes v. School District No. 1*,⁸¹ *Milliken v. Bradley*,⁸² and their progeny: Is a student's right to an equal educational opportunity violated when a state's system of school districting and attendance zones results in that student attending a segregated school?

Surely this is one of the most troubling issues of our time, especially in the North where in scores of metropolitan areas similar in character to Hartford and its surrounding suburbs, children attend schools every day in segregative conditions that seem impossible to imagine forty years after *Brown*. Virtually every federal school desegregation decision since *Swann v. Charlotte-Mecklenburg Board of Education*⁸³ has narrowed the *Brown* mandate and handed the states

79. David Dormont, *Separate and Unequal: School District Financing*, 11 LAW AND INEQUALITY 261, 276 (1992).

80. See *supra* note 68 for discussion of the outcomes of challenges to school finance schemes in thirty-three states.

81. 413 U.S. 189 (1973) (holding desegregation remedies for southern schools approved in earlier cases are equally applicable to northern school districts never segregated by law, but only where local officials had pursued deliberately segregative policies).

82. 418 U.S. 717 (1974) (rejecting a metropolitan-wide remedy for Detroit and holding that it must be shown that racially discriminatory acts of state or local school districts, or of a single school district, have been a substantial cause of interdistrict segregation).

83. 402 U.S. 1 (1971). For cases after *Swann* which have consistently pulled back from ordering all-out desegregation remedies, see *Keyes*, 413 U.S. 189 (1979), and *Milliken*, 418 U.S. 717 (1974). See also *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424 (1976). In that case, the City had met its goals in the areas of pupil assignment and the hiring and promoting of teachers and administrators for one year, but not thereafter. *Id.* at 431. The

convenient doctrines which they might employ effectively should they wish to avoid facing the issue altogether. The de jure/de facto distinction, the discriminatory intent/causation standard, the local control of schools imperative, the separation of powers doctrine, and the state action requirement used so effectively by Judge Hammer in *Sheff*, have all served to insulate states from the moral imperative of *Brown* and often enabled state courts to turn a deaf ear to the inequality claims of school-aged plaintiffs.⁸⁴

What might help account for the anomaly of a state declaring education to be a fundamental right, but then treating educational equality as merely an option, is a philosophy which values liberty over equality and extols the virtues of local control and the private "free" choices of individuals to move to suburbs with the guarantee of all-white schools. Professors James and Hoffman have described "a curious pattern of resistance among states to a notion of 'equality of educational opportunity' if it truly means 'equality of opportunity through education' and an equal chance to succeed."⁸⁵ It would seem that this resistance becomes especially pronounced if it is suggested that a child only has a chance to succeed in the majority culture if she is allowed to attend schools alongside members of that culture.

Court held that one year of compliance justified removing the issue of pupil assignment from the remedial authority of the courts, thereby assuring resegregation. *Id.* at 434-45. See James & Hoffman, *supra* note 63, at 533. See also *Freeman v. Pitts*, 503 U.S. 467 (1992), in which the Court, faced with racially identifiable schools in DeKalb County, Georgia, reasoned that these segregative conditions were caused by free demographic choices. *Id.* at 494. Judges thereafter had the discretion to measure *incremental progress* toward unitariness and relinquish jurisdiction over those areas free of the vestiges of official race-based policymaking. The most recent of these cases, *Missouri v. Jenkins*, 115 S. Ct. 2038 (1995), held that the State of Missouri could stop supporting the Kansas City schools (where \$1.5 billion has been spent to date to build the nation's finest educational facilities without producing any measurable improvement in student achievement), even though no improvement in test scores has yet been produced. *Id.* at 2055-56. Apparently, the improvement in educational outcomes will no longer be the test for relinquishing federal court jurisdiction over a district's desegregation plan, even if that improvement has been established as one of the major objectives of the plan. As a further slap to the district court in the case, the Supreme Court also disapproved Kansas City's goal of building magnet schools to attract White students back from the suburbs, as an impermissible way to achieve an interdistrict remedy where no discriminatory intent had been proven. *Id.* at 2051.

84. James & Hoffman, *supra* note 63, at 526.

85. *Id.* at 572. Jonathan Kozol has reflected on the underlying cause of this resistance: "This, then, is the dread that seems to lie beneath the fear of equalizing. Equity is seen as dispossession. Local autonomy is seen as liberty Again there is this stunted image of our nation as a land that can afford one of two dreams—liberty or equity—but cannot manage both." KOZOL, *supra* note 60, at 173.

The *Sheff* case forced the court to reflect on the hardest questions left in the educational equity debate: Does attendance at a segregated school violate a child's right to an equal educational opportunity no matter how these segregative conditions have arisen? Does the *Brown* conclusion that separate educational facilities for minority and nonminority students are "inherently unequal"⁸⁶ have any continuing resonance for a state court deciding this issue under its own constitution's equal protection guarantees? Can a state court be expected to rule against majoritarian will and order a mandatory metropolitan-wide remedy for metropolitan-wide segregation, a remedy which no other state official in his right mind would support and no federal court since *Milliken* has had the courage or wisdom to impose?

Certainly the challenge to the lower court in *Sheff* was great. But great also was the opportunity to say in a clear *state* voice, "the emperor has no clothes." Meaningful progress in desegregation has not occurred since the early seventies⁸⁷ when many court-ordered plans were implemented in the South, in spite of the fact that many of those plans have been successful and have provided voluminous research evidence in support of those successes.⁸⁸ Outside of these enclaves of success, however, the realities of a minority child's life remain remarkably unchanged. As many scholars have noted, the goal of racial integration has not yet been achieved; educational opportunity is still dependant on where a child happens to live.⁸⁹ Over forty years after *Brown*, 63.3% of all black children still attend segregated schools,⁹⁰ and in twenty-five of the nation's largest inner-city school districts, more racially segregated schools exist today than in 1954.⁹¹

In Connecticut, where black students account for only 12.1% of the school-aged population, 60.3% attend segregated schools located in the inner cities, which are, in many cases, poorly equipped and maintained.⁹² Over the past four years, this author visited numerous

86. *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954).

87. James & Hoffman, *supra* note 63, at 573.

88. See *infra* Part III(b) for a discussion of these results and a description of some of the outcomes in successfully desegregated districts.

89. See James & Hoffman, *supra* note 63, at 573; KOZOL, *supra* note 60, *passim*; Dormont, *supra* note 79, at 264.

90. See James & Hoffman, *supra* note 63, at 573 (citing ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 162 (1992)). The authors also point out that these statistics only refer to African-American children. *Id.* Integration for other minorities has never really begun.

91. James & Hoffman, *supra* note 63, at 573 (citing Sonia R. Jarvis, *Brown and the Afrocentric Curriculum*, 101 YALE L.J. 1285, 1285 (1992)).

92. James & Hoffman, *supra* note 63, at 575 n.256.

schools in Connecticut and made several trips to the South to study five counties which have succeeded in their 20-year investment in desegregation plans. Their cities and their schools are safe and productive, while Connecticut's are often dangerous and filled with despair.⁹³ This present-day reality serves as a compelling reminder of Professor Kahn's warning that "[a] democracy that does not debate the legal boundaries of its own political choices is already failing the constitutional project."⁹⁴

The lower court in *Sheff* failed to take up its "independent responsibility" to interpret the Connecticut Constitution in light of today's realities.⁹⁵ Now, the Connecticut Supreme Court has the opportunity to criticize the restricted constitutional vision of the federal courts upon which the lower court's decision was based, and to develop an independent state approach to metropolitan-wide school segregation which might help to resolve, rather than perpetuate, one of our society's most persistent and destructive problems.

This Article develops an alternative analytical approach to the assignment of state responsibility in school desegregation cases and proposes a pathway which state courts might utilize in responding to the issues raised in such cases with a clear, state voice. In Part II(a), I recommend that a state court construing the provisions of its own constitution reject the federal standard in school desegregation cases for several reasons: because the current federal approach to the assessment of governmental responsibility in such cases is based on an arguably flawed legal theory; because it is not mandated by either the United States Constitution or federal precedent; and because it has proven inadequate to the task of providing a satisfactory remedy to metropolitan-wide segregation. In Part II(b), I argue that state courts should also reject the federal approach because it has evolved from the federal courts' concern for federalism, the state action requirement of the Fourteenth Amendment, and other institutional and functional differences which are wholly irrelevant to and do not limit the power of state courts to resolve issues under state constitutional provisions.

93. See *infra* Part III(b) for a discussion of the outcomes produced by successfully desegregated schools.

94. Kahn, *supra* note 19, at 1155.

95. "State constitutions must . . . be construed to relate open-ended constitutional language to modern-day reality. . . . [S]tate judges bear an independent responsibility for making state constitutions adaptable to current conditions." Peters, *State Constitutional Law*, *supra* note 72, at 586.

In Part III(a), I propose an independent, state constitutional approach to the issues presented in the *Sheff* case. This approach is based on the need in school desegregation cases for an effects-based jurisprudence focused on the segregative conditions themselves and the possibilities for resolving them—an approach fully supported by the express language of Connecticut’s own equal protection guarantees and the Connecticut case law construing those guarantees. Such an approach is equally available to all state courts deciding such cases under their own constitutions. In Part III(b), I argue that school desegregation has proven successful in areas of the country where it has been “done right,” and review the results of empirical research studies that affirm the value of racially balanced schools to both minority and nonminority students, as well as to our society at large.

IIa. The Failed Federal Standard

In the early 1970s, two United States Supreme Court cases pointed toward an enlightened school desegregation doctrine in which courts moved away from condemning only those cases of segregation where assignments were explicitly race-based to a result-oriented approach that focused on segregative conditions and their effects.⁹⁶ In *Green v. County School Board*,⁹⁷ the Court invalidated a presumed race-neutral student assignment plan based on “freedom-of-choice,” where the result of the plan was continued racial segregation.⁹⁸ The Court expanded this approach in *Swann v. Charlotte-Mecklenburg Board of Education*,⁹⁹ by declaring “geographic proximity” an impermissible basis for student assignment because the plan did not “work” in diminishing the segregated condition of the schools,¹⁰⁰ and by ordering the Board of Education to achieve the “greatest possible degree” of actual desegregation that it could with an interdistrict remedy.¹⁰¹

Many commentators at the time would have agreed with Professor Owen Fiss that

the net effect of [*Swann* was] to move school desegregation doctrine further along the continuum toward a result-oriented ap-

96. Owen M. Fiss, *The Charlotte-Mecklenburg Case—Its Significance for Northern School Desegregation*, 38 U. CHI. L. REV. 697, 704-05 (1971) [hereinafter *Charlotte-Mecklenburg*].

97. 391 U.S. 430 (1968).

98. *Id.* at 441-42.

99. 402 U.S. 1 (1971).

100. *Id.* at 20.

101. *Id.* at 26.

proach [In] retrospect, [*Swann*] will then be viewed, like *Green*, as a way-station to the adoption of a general approach to school desegregation which, by focusing on the segregated patterns themselves, is more responsive to the school segregation of the North.¹⁰²

Two factors, one internal and the other external, conspired against the continuation of this trend: first, the language of the cases themselves; and second, a new process-based theory of constitutional law then gaining ascendancy in the academy and the courts.

Although *Swann* is, in part, result-oriented and enormously productive in terms of remedy, that case carried within it the seeds of a doctrinal trend which veered away from a focus on segregated conditions and back toward a focus on past discriminatory practices. Professor Fiss noted the danger in this element of the Court's approach but discounted it for two reasons. First, he believed that, although the Court had spoken in terms of causation and past discrimination in *Swann*, their real concern was the segregated pattern of school attendance which still existed in Mecklenberg County.¹⁰³ Otherwise such an "all-out" remedy could not be defended.¹⁰⁴ Second, the Court's theory of causation "seemed contrived."¹⁰⁵ As in all of the southern desegregation cases, the evidence of past discrimination could hardly be refuted. Nevertheless, there is no language in *Swann* which reveals an attempt to determine the degree to which past discrimination has led to current segregative conditions.¹⁰⁶ Rather, Professor Fiss believes, the Court used past discrimination as a "trigger" . . . for a cannon," the all-out desegregation remedy, as well as a way to "preserve the continuity with *Brown* and add a moral quality to its decision."¹⁰⁷ Additionally, Professor Fiss predicted that the result-oriented language of *Swann* would outlive the past discrimination/causal link requirement since the Court would be unable to treat segregated conditions in northern and southern schools differently:

A complicated analysis of causation might . . . serve to justify the differential treatment afforded these otherwise identical patterns. But such an analysis is not likely to be understood or even believed by most people. And no national institution can afford to be unresponsive to the popular pressures likely to be

102. Fiss, *Charlotte-Mecklenburg*, *supra* note 96, at 704-05.

103. *Id.* at 705.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

engendered by an appearance of differential treatment of certain regions of the country.¹⁰⁸

Immediately following *Swann*, these confident predictions of a trend toward a result-oriented jurisprudence in school desegregation cases seemed well-founded. District courts, while paying heed to the discriminatory intent/causal link element of the Court's decision, found these requirements to be easily satisfied in a variety of creative ways, such as finding government responsibility in cases where a segregated condition is the foreseeable and avoidable consequence of government action,¹⁰⁹ or when government has failed to act when under a duty to do so, even if no actual causal link to discriminatory animus could be proved.¹¹⁰ Some courts adopted the burden-shifting approach taken in *Swann*, where, once the plaintiff had shown a segregated condition existed, the State was forced to prove that its actions had *not* caused that condition to be created or maintained.¹¹¹

This jurisprudential trend might have continued had an external factor not intervened: a new process-based theory of constitutional law.¹¹² Those espousing this theory maintained that in a democratic society, essentially nondemocratic institutions such as courts should

108. *Id.*

109. *Id.* at 706. See also *infra* notes 250-251 and accompanying text.

110. Fiss, *Charlotte-Mecklenburg*, *supra* note 96, at 706-07. As Professor Fiss has said in another context, "An individual who starts a boulder rolling down a hill is responsible for the expected consequences; but the individual who gives the boulder the initial shove and at the same time possesses the power to stop it, or at least deflect it, at any point on its journey down the hill, is even more responsible for the outcome." Owen M. Fiss, *Racial Imbalance in the Public Schools: The Constitutional Concepts*, 78 HARV. L. REV. 564, 585 (1965) [hereinafter Fiss, *Constitutional Concepts*].

111. This burden-shifting approach was also used by the Connecticut Supreme Court in *Horton v. Meskill* (*Horton III*), 486 A.2d 1099, 1110 (Conn. 1985).

112. Many commentators participated in the "process-based" dialogue in the 1970s and 1980s. Among the leading proponents were ALEXANDER BICKEL, whose book, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS*, was published in 1962. In his other books, such as *THE MORALITY OF CONSENT* (1975) and *THE JUDICIARY AND RESPONSIBLE GOVERNMENT* (1984), Bickel expanded on his theories of judicial review (the public value theory, the procedural value theory, and the political value theory), all of which stressed the prudence of conservatism in judicial decisions.

Another influential member of the "process-based" theory group was JOHN H. ELY, whose book, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980), was enormously influential, along with many of his articles, such as *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970); *Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); *Supreme Court 1977 Term—Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5 (1978); *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 MD. L. REV. 451 (1978); *Constitutional Interpretivism: Its Allure and Impossibility*, 53 IND. L.J. 399 (1978). Ely's theory of judicial review conceived the role of courts to be that of merely perfecting the procedural preconditions for a representative democracy.

avoid reviewing the substance or the fairness of governmental decisionmaking and should intervene only if the decisionmaking process had become adulterated.¹¹³ In equal protection terms, this adulteration was seen as resulting from forbidden discriminatory motivations.¹¹⁴

The rapid ascendancy of process-based theories in the scholarly literature coincided with the beginning of a period of retrenchment in the Supreme Court which occurred precisely at the time the Court decided the first "northern" school desegregation case in 1973. In *Keyes v. School District No. 1*,¹¹⁵ the Court held that the desegregation remedies approved in *Swann* were equally applicable to northern school districts which had never been segregated by law, but only where local officials had pursued deliberately segregative policies.¹¹⁶

Keyes was followed by *Milliken v. Bradley*,¹¹⁷ in which the Court rejected a metropolitan-wide desegregation remedy for Detroit, holding that "it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation."¹¹⁸ This rejection left uncorrected the vestiges of school segregation that the lower courts had found in Detroit, vestiges which the Supreme Court had ordered removed "root and branch" throughout the South.¹¹⁹

The final pieces of the current Court's equal protection doctrine were put into place with three cases which left no doubt as to the emerging doctrinal trend. First, in *Washington v. Davis*,¹²⁰ the Court held that in the absence of a racially discriminatory motive or purpose, a facially neutral governmental action, which has an adverse ra-

113. Many commentators such as Paul Kahn have criticized this process-based approach to judicial review. Professor Kahn observes that the current federal approach to constitutional analysis narrows the constitutional vision of the federal courts, but it need not affect state courts in the same way if they re-enter the constitutional dialogue with an independent voice. Kahn, *supra* note 19, at 1152. Professor Kahn would agree, I think, that to narrow the reach of courts by viewing them as nonmajoritarian institutions misunderstands their fundamental role in our democratic system, where "[c]onstitutional discourse is the inquiry into the legal boundaries of majoritarian choice." *Id.* at 1160 (emphasis added).

114. See generally Daniel R. Ortiz, *The Myth of Intent in Equal Protection*, 41 STAN. L. REV. 1105 (1989).

115. 413 U.S. 189 (1973).

116. *Id.* at 213.

117. 418 U.S. 717 (1974).

118. *Id.* at 744-45.

119. *Id.* at 780 (White, J., dissenting). See also *Green v. County Sch. Bd.*, 391 U.S. 430, 437-38 (1968).

120. 426 U.S. 229 (1976).

cial impact, such as the use of screening tests in hiring, will not be subject to strict scrutiny.¹²¹ Second, in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*,¹²² the Court held that race must be shown to be a motivating factor in the refusal to rezone land for low-income housing and that disproportionate impact alone would not satisfy the intent standard.¹²³ And finally, in *Personnel Administrator v. Feeney*,¹²⁴ the Court refused to import into equal protection jurisprudence the familiar doctrine that a person intends the natural and foreseeable consequences of voluntary actions, a doctrine which had been used productively by district courts in satisfying the intent/causation requirement in school desegregation cases.¹²⁵

Over time, these and other federal court decisions imposing a discriminatory intent/causation standard, have had a devastating effect on the *Brown* desegregation mandate. Since the mid-1970s, some plaintiffs have successfully proved a constitutional violation based on discriminatory intent, although most commentators would agree that their task has been made inordinately more difficult.¹²⁶ Courts have ordered desegregation plans implemented in Dayton,¹²⁷ Columbus,¹²⁸ Yonkers,¹²⁹ Kansas City,¹³⁰ and a few other cities since that time. But because of the Court's refusal to countenance a metropolitan-wide remedy in Detroit, all cases following *Milliken* have restricted the remedy to the cities themselves, where most of the minorities affected by the vestiges of segregation still reside. This has made actual desegregation virtually impossible to achieve and has hastened the flight of urban, White families to the contiguous suburbs where school districts have been effectively insulated by *Milliken* from any unwanted incursions by minorities.

Faced with findings of constitutional violations and prevented from ordering the only remedy which has proven successful in signifi-

121. *Id.* at 246-48.

122. 429 U.S. 252 (1977).

123. *Id.* at 270-71.

124. 442 U.S. 256 (1979).

125. *Id.* at 278.

126. See generally Robert A. Sadler, *Metropolitan Desegregation in the Wake of Milliken—On Losing Big Battles and Winning Small Wars: The View Largely from Within*, 1975 WASH. U. L.Q. 535; Leonard P. Strickman, *School Desegregation at the Crossroads*, 76 Nw. U. L. REV. 725 (1975).

127. *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526 (1979).

128. *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979).

129. *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d. Cir. 1987).

130. *Missouri v. Jenkins*, 495 U.S. 33 (1990). See *Missouri v. Jenkins*, 115 S. Ct 2038 (1995), for the subsequent High Court ruling on this remedy.

cantly resolving metropolitan-wide school segregation,¹³¹ district courts were left with no option but to order extraordinary expenditures in an attempt to make the city schools equal in quality to suburban schools,¹³² an ironic return to the “separate but equal” doctrine which had been vigorously renounced in *Brown*.¹³³ Sadly, in no case have these massive efforts been successful in significantly raising the level of educational achievement for blacks and other minorities,¹³⁴ one of the major results achieved by successful metropolitan-wide desegregation plans implemented throughout the South.¹³⁵

Many commentators have criticized the Supreme Court’s use of a discriminatory intent/causation requirement in school desegregation cases which—in addition to other rationales often used to limit the reach of judicial remedies such as the de jure/de facto distinction, federalism concerns, and respect for school district lines and local control—has become a formidable obstacle to the invalidation of public policies alleged to violate the Fourteenth Amendment.¹³⁶ Most, if not all, of these legal scholars have agreed that such a standard is not implied or required by the general language of the Equal Protection Clause of the Fourteenth Amendment.¹³⁷ Nor was it required under prior federal case law, which generally held intent to be irrelevant in

131. See *infra* Part III(b) for full discussion of this point.

132. See, e.g., *Jenkins*, 495 U.S. at 57.

133. 348 U.S. 483, 495 (1954).

134. The Kansas City case is perhaps the most striking example of this phenomenon: many years of effort and \$1.5 billion expended to create some of the nation’s most splendid schools, produced virtually no progress in student achievement. Having set in motion a series of acts doomed to failure, the Supreme Court informed us just last year in *Missouri v. Jenkins*, 115 S. Ct. 2573 (1995), that gains in student achievement will no longer be seen as a necessary test in deciding whether or not to release a district from federal court supervision. *Jenkins*, 495 U.S. at 75-76 (Kennedy, J., concurring).

135. See *infra* Part III(b) for discussion of research findings.

136. See Gayle Binion, *Intent and Equal Protection: A Reconsideration*, 1983 SUP. CT. REV. 397; Owen M. Fiss, *The Fate of an Idea Whose Time Has Come: Anti-discrimination Law in the Second Decade after Brown v. Board of Education*, 41 U. CHI. L. REV. 742 (1974); Frank I. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CAL. L. REV. 275 (1972); James S. Liebman, *Desegregating Politics: ‘All-Out’ School Desegregation Explained*, 90 COLUM. L. REV. 1463 (1990); Eric S. Stein, *Attacking School Desegregation Root and Branch*, 99 YALE L.J. 2003 (1990); and LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1436-1672 (2d ed. 1988) [hereinafter TRIBE, *AMERICAN CONSTITUTIONAL LAW*]; Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980) [hereinafter Tribe, *Constitutional Theories*]; Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1 (1989) [hereinafter Tribe, *Constitutional Physics*]. See generally Ortiz, *supra* note 114.

137. See *supra* note 136.

equal protection cases.¹³⁸ Other explanations must therefore be provided for such a radical change in course.

Professor Daniel Ortiz has proposed the theory that several factors influenced the Court's new approach to equal protection under the Fourteenth Amendment.¹³⁹ By the early 1970s, the Court had so thoroughly fleshed out its "tiers of scrutiny" jurisprudence that results in equal protection cases had become predictable.¹⁴⁰ Once the groups deserving strict scrutiny had been recognized, equal protection analysis centered on identifying the group targeted by the governmental decision.¹⁴¹ This was a fairly simple task when laws discriminated on their face against protected groups. When government officials began to use "proxy" classifications—classifications such as wealth and education that appear facially neutral but which correlate with race and other protected classifications—the Court needed an intent requirement to uncover these covert, proxy classifications to identify the proper level of judicial scrutiny.¹⁴² This development coincided with the ascendancy of process-based theories in constitutional law which required a showing of intentional discrimination in the decisionmaking process to justify court intervention.

As necessary as such a doctrinal development may have been considered, Professor Ortiz argues that it has not served its purpose and is in fact applied differently depending on the type of case being adjudicated.¹⁴³ In equal protection cases involving housing and employment, a plaintiff prevails only with absolute proof of discriminatory motive,¹⁴⁴ an approach which protects the cohort classifications of wealth and education by which such benefits are traditionally allocated.¹⁴⁵ In cases involving voting and jury selection, benefits not traditionally allocated by wealth and education, discriminatory intent can be considered the "cause" of an adverse impact by showing the impact on an identifiable group combined with either the susceptibility of the selection process to manipulation (jury selection cases) or discrimination in other areas of life (voting cases).¹⁴⁶

138. See, e.g., *Palmer v. Thompson*, 403 U.S. 217 (1971).

139. Ortiz, *supra* note 114, at 1110-19.

140. *Id.* at 1116-17.

141. *Id.* at 1117.

142. *Id.* at 1118.

143. *Id.* at 1119.

144. *Id.* at 1107, 1135-40.

145. *Id.* at 1135-40.

146. See *id.* at 1119, 1126, 1135.

Ortiz states that in school desegregation cases, the federal discriminatory intent/causation requirement comes into play at three stages of litigation and is most bizarrely applied.¹⁴⁷ At the initial liability stage, the plaintiff must produce evidence of discriminatory intent occurring at some time between the *Brown* decision and the present day.¹⁴⁸ Once that has been accomplished by plaintiffs—which is increasingly hard to do as motivations become more and more attenuated and causal links to current segregated conditions become all but impossible to discern—the state can rebut such evidence only with a compelling justification for segregation, a standard which no state has ever met.¹⁴⁹ Finally, should a plaintiff prevail in establishing liability, the state is under an affirmative duty to achieve a unitary system, and its efforts in this regard are judged solely on the basis of effect.¹⁵⁰

Ortiz argues that the federal standard becomes even more burdensome to plaintiffs after unitariness has been achieved because, should resegregation occur after the district court has relinquished its jurisdiction over the case, plaintiffs must then carry the burden of showing actual discriminatory motivation in the current decisionmaking process,¹⁵¹ much as plaintiffs are required to do in housing and employment cases. Needless to say, this approach has not only made the problem of metropolitan-wide segregation very difficult to remedy, but has also made it virtually impossible to attack de facto resegregation in areas where the original problem had previously been alleviated.¹⁵²

There are other problems inherent in the discriminatory intent/causation approach, not the least of which is its failure to properly take note of the effect of unconscious racism in the decisionmaking process. Professor Charles Lawrence is one of many commentators who have written on this phenomenon: “Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional . . . nor unintentional [A] large part of the behavior that

147. *Id.* at 1135.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. The recent U.S. Supreme Court decision in *Freeman v. Pitts*, 503 U.S. 467 (1992), is exemplary in this regard. See *supra* note 83.

produces racial discrimination is influenced by unconscious racial motivation."¹⁵³

Professor Lawrence argues that Americans share a common cultural heritage in which racism has played a dominant role.¹⁵⁴ Out of this shared heritage has developed a common belief system containing certain "tacit understandings" of which we are largely unaware.¹⁵⁵ Because these beliefs and understandings are so widespread in society and are rarely directly taught, we are not as likely to be conscious of the fact that we harbor them.¹⁵⁶ Even if such beliefs do surface occasionally, they are quickly refused recognition because they conflict with a shared moral code which rejects such thoughts as "racist":

In short, requiring proof of conscious or intentional motivation as a prerequisite to constitutional recognition that a decision is race-dependent ignores much of what we understand about how the human mind works. . . . The [E]qual [P]rotection [C]ause requires the elimination of governmental decisions that take race into account without good and important reasons. Therefore, equal protection doctrine must find a way to come to grips with unconscious racism.¹⁵⁷

Professor Laurence Tribe has criticized federal doctrine as applied in school desegregation cases on the same grounds.¹⁵⁸ Rather than contracting the judicial role in cases of de facto segregation, Professor Tribe believes it should be expanded, precisely because the exact motivations, purposes, intentions, and causes of such segregation are so difficult to discern. Professor Tribe sees little difference between the harm which results from either de jure or de facto segregation. He agrees that in de facto cases, discriminatory intent, which is likely to be more "present than provable," often results from an unconscious racism which is the legacy of our segregated history.¹⁵⁹ Tribe suggests that until this legacy recedes, "judicially compelled integration may be the only acceptable response to the high probability of governmental prejudice and corruption behind all segregation."¹⁶⁰

153. Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987).

154. *Id.* at 322-23.

155. *Id.*

156. *Id.* at 323.

157. *Id.*

158. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, *supra* note 136, at 1500.

159. *Id.*

160. *Id.* For other scholars in agreement on this point, see generally Goodman, *supra* note 136 and Ronald Dworkin, *Social Sciences and Constitutional Rights—The Consequences of Uncertainty*, 6 J.L. & EDUC. 3 (1977).

Many other commentators have criticized the current federal approach on the grounds that it has developed from a form of legal analysis which seeks to identify wrongdoers and hold them responsible for "causing" harm to a protected group.¹⁶¹ Professor Tribe has identified the problem as one resulting from reliance on "antidiscrimination" as the mediating principle underlying the Equal Protection Clause.¹⁶² Because discrimination is defined as an "act based on prejudice,"¹⁶³ the finding of discrimination requires that we identify both an actor *and* an act based on invidious motivation. Further, because the focus is on the "perpetrator,"¹⁶⁴ this leads inexorably to the state action, discriminatory intent, and causation standards under the Fourteenth Amendment currently employed by federal courts and, therefore, to the results in *Washington v. Davis*, *Milliken*, and other cases.

In each case, Professor Tribe asserts, the Supreme Court has noted the disparate, harmful effect on the victim, and then focused on the discriminatory motives of the particular actor instead of the Constitution's more proper focus, *i.e.*, the harmful impact on a protected group.¹⁶⁵ Professor Tribe suggests that at the present stage, when the problems have become so entrenched that intent/causation is almost impossible to prove, a far better mediator for equal protection purposes would be the "antidiscrimination principle, which aims [not at preventing discriminatory acts of wrongdoers, but rather] to break down legally created or legally reenforced systems of subordination that treat some people as second-class citizens."¹⁶⁶

Professor James Liebman raises similar concerns. He describes the Court's movement in desegregation cases from reliance on the equal educational opportunity or integration theories in the 1950s and 1960s—which tended to focus on remedying the effects of government decisionmaking—to what he terms the "Correction Theory," which focuses on the evil acts of wrongdoers.¹⁶⁷ The moral imperative of the Correction Theory is identical to that which motivates the law of torts, that is, a "deep sense of common law morality that one who hurts

161. Liebman, *supra* note 136, at 1501-20; OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION passim* (1978) [hereinafter FISS, *CIVIL RIGHTS*]; Owen M. Fiss, *The Supreme Court 1978 Term: Foreword: The Forms of Justice*, 93 Harv. L. Rev. 1, 1-23 (1979) [hereinafter Fiss, *1978 Term*].

162. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, *supra* note 136, at 1514.

163. *Id.* at 1515.

164. *Id.*

165. *Id.*

166. *Id.* See *infra* Part III(a) for an application of this antidiscrimination principle to school desegregation under the Connecticut Constitution.

167. Liebman, *supra* note 136, at 1501.

another should compensate him.’”¹⁶⁸ In the desegregation context, this theory translates into the “‘strong moral claim that purposeful discrimination is a wrong whose effects must be eradicated.’”¹⁶⁹

Professor Liebman argues that the courts have found the tort analogy—which fits in neatly with process-based theories—appealing because “it is simple, individualistic, and by hypothesis nonredistributive.”¹⁷⁰ Ultimately, however, private law solutions to public law problems are inherently unsatisfying and ineffective. In particular, they fail to respond satisfactorily to the victims of entrenched metropolitan-wide school segregation and other forms of racial discrimination for the same reasons that private tort law fails to deal satisfactorily with the victims of mass toxic tort disasters.¹⁷¹

Professor Liebman draws convincing analogies between the two cases. He argues that “[t]he complicated character and massive scale of the problem in both situations cause the correctively critical prerequisites of an identifiable plaintiff and an identifiable defendant to elude proof, notwithstanding that unjustly enriched wrongdoers almost certainly have visited harms on large numbers of victims.”¹⁷² As a result, in both the mass toxic tort and school segregation contexts, the supposed moral integrity of the compensatory system “evaporates.”¹⁷³

Tort scholars have drawn attention to the problems of victims of cancer who can prove beyond doubt their exposure to a toxic agent that is known to increase the incidence of cancer in the population but which may be only one of many “causes” of the victims’ cancers.¹⁷⁴ Typically, these plaintiffs can also show that the agent was produced at a given time by one or several chemical companies, but cannot prove which companies. Professor Liebman argues that the case of residentially and educationally segregated minority children is similar, in that they can show “exposure” to myriad acts of school, housing and other government officials, any one of which, in addition to a number of so-called “neutral factors,”¹⁷⁵ may have resulted in their attendance in

168. *Id.* (quoting Leon Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401, 1412 (1961)).

169. *Id.* (quoting Paul Gewirtz, *Choice in the Transition: School Desegregation and the Corrective Ideal*, 86 COLUM. L. REV. 728, 729 (1986)).

170. *Id.* at 1502 (citations omitted).

171. *Id.* at 1518-19.

172. *Id.* at 1519.

173. *Id.*

174. *See, e.g.*, PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* 3-15 (1986).

175. Liebman, *supra* note 136, at 1519.

segregated schools, but they cannot pinpoint which factor or actor may have “caused” their harm. Liebman sees the problem in both cases as being the near impossibility of proving “specific causation of injuries that regrettably, are not substance- or discrimination-specific.”¹⁷⁶

Professor Liebman concludes that rather than resolving the problems suffered by victims in both cases, the traditional tort approach merely allows a court to engage in “an ostrich-like avoidance of them.”¹⁷⁷ He favors the abandonment of the Correction Theory in federal equal protection jurisprudence,¹⁷⁸ but, curiously, argues for the retention of some form of the intent standard, even though he admits that to do so makes the problem of metropolitan-wide segregation nearly impossible to resolve.¹⁷⁹

Many commentators agree that it would be better by far to abandon the tort model completely since it has failed to eliminate a society-wide harm in any but the most ad hoc and arbitrary fashion. Under the current federal approach, the Court appears to be saying to plaintiffs, “if you can prove by a preponderance of the evidence that a given actor’s discriminatory animus during the decisionmaking process caused the harm you are currently suffering, in an era in which a reluctant society is ever more skillful at disguising such animus and obliterating the causal links, then we will use the full force of declaratory and injunctive relief to remedy your suffering. If you fail to surmount this burden, however, we must turn a blind eye to your suffering.” This is exactly the approach taken by the lower court in *Sheff*.

Professor Tribe has offered compelling criticism of this particular result of the current federal approach: “A corollary of responsible modernism is to admit that we can *see* more than we can *do*. But this does not mean that we should lie about what we see.”¹⁸⁰ He argues that by utilizing a reference point of detached neutrality to selectively reach into society, make a few fine-tuning adjustments, and step back out, the federal courts are ignoring the lesson of modern quantum mechanics which tells us that the act of observing always affects what is being observed, and that the observer is never really “detached” from the system being studied.¹⁸¹ “The results courts announce—the

176. *Id.* (internal quotations omitted).

177. *Id.* at 1521 (quoting SCHUCK, *supra* note 174, at 267-68).

178. *Id.* at 1523.

179. *Id.* at 1663.

180. Tribe, *Constitutional Physics*, *supra* note 136, at 38.

181. *Id.* at 13, 20.

ways they view the legal terrain and what they say about it—will in turn have continuing effects that reshape the nature of what the courts initially undertook to review”¹⁸²

Professor Tribe points out that the current perception that “white flight” is the result of purely private choices by individuals, and therefore beyond the power of courts to remedy, has resulted from a series of Supreme Court decisions which, until recently in *Freeman v. Pitts*, did not purport to establish such a principle.¹⁸³ Taken together, Tribe suggests that *Pierce v. Society of Sisters*,¹⁸⁴ *Swann*, *Milliken*, and even *Brown* (due to its original focus on the *school district* rather than the state as the responsible party), say in effect that White parents have the “‘inherent right’ to keep [their] children in [W]hite, affluent schools by moving to a suburban school district.”¹⁸⁵ Professor Fiss has also recognized that the clear, legitimating message of a state’s rigid adherence to geographic criteria for school attendance is to say to the parents who do not want their children to attend an integrated school, “this desire can be fulfilled by moving to a [W]hite neighborhood.”¹⁸⁶

Tribe criticizes the Supreme Court’s decision in *Milliken* as a failure to create a rights/remedy dialogue which might have eventually located a solution to the problem of metropolitan-side segregation.¹⁸⁷ Counselling abandonment of the current federal approach to equal protection in general, and school desegregation cases in particular, Professor Tribe reminds us that even so-called neutral acts can have “racially separatist consequences.”¹⁸⁸ A finding of governmental responsibility for these consequences does not require a court to uncover the hidden motives behind governmental action. Instead, courts should look clearly at “the world government has built”¹⁸⁹ and recognize that for some citizens, the equal chance to succeed in that world has been severely compromised by the structure that government, perhaps unwittingly, has devised.¹⁹⁰

182. *Id.* at 20. Professor Fiss has also observed the power of a court’s response in school desegregation cases to reshape both the legal and societal landscape: “The moral status of a claim may derive from its legal recognition: morality shaped the judgment in *Brown v. Board of Education* and that judgment then shaped our morality.” FISS, CIVIL RIGHTS, *supra* note 161, at 95.

183. Tribe, *Constitutional Physics*, *supra* note 136, at 27.

184. 268 U.S. 510 (1925).

185. Tribe, *Constitutional Physics*, *supra* note 136, at 28.

186. Fiss, *Constitutional Concepts*, *supra* note 110, at 587-88.

187. Tribe, *Constitutional Physics*, *supra* note 136, at 30 (citations omitted).

188. *Id.* at 33 (citing *Washington v. Davis*, 426 U.S. 229 (1976)). See also Fiss, *Constitutional Concepts*, *supra* note 110, at 585-87.

189. Tribe, *Constitutional Physics*, *supra* note 136, at 39.

190. *Id.*

Professor Tribe agrees with commentators such as Lawrence Sager, who suggest that when federal courts announce that the state cannot be held responsible for correcting harmful conditions it has not intended or caused, they legitimate both the acts of government *and* their harmful effects.¹⁹¹ This, in turn, relieves other potential actors of the responsibility for resolving the problem.¹⁹² A far better outcome would be a federal court's admission that a protected group has been impermissibly harmed but that the district court has no way to remedy it, rather than to say no harm has been done, or that the government is not responsible for finding a remedy.¹⁹³ This would leave the way clear, as Professor Fiss reminds us, for state governments, local school boards and other agencies—even the Congress of the United States—to pass laws requiring or inducing states and their local districts to take steps to eliminate segregation.¹⁹⁴ Both Professor Fiss and Professor Tribe argue for a theory of government responsibility based on the government's ability to avoid harmful effects rather than on its intent to cause such effects. Professor Tribe suggests:

We may all be engulfed by, and dependent upon, the structure of the law, but we are not all rendered equally vulnerable by it. If the special dependence upon the law and *its omissions* that is experienced by the most vulnerable among us could be dismissed as irrelevant because it was not directly created by any state force targeting such individuals, their heightened dependence might be seen as legally immaterial. But if the systemic vulnerability of some . . . is instead regarded as centrally relevant to how the law's shape should be understood, then one is more likely at least to ask whether the legal system's very failure to do more for such persons might not work an unconstitutional deprivation of their rights.¹⁹⁵

State courts need not be held hostage to a federal model which has failed to provide many of their most vulnerable citizens with an adequate basis for an autonomous and successful life. In *Sheff*, the Connecticut Supreme Court, independently construing its own equal protection provisions and pursuing its own constitutional values, should abandon the failed federal model in school desegregation cases in toto and at last put flesh on the bare bones of Connecticut's declared fundamental right to an equal educational opportunity.

191. *Id.* at 33-34 (citing Lawrence G. Sager, *Fair Measure: The Legal Status of Under-enforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978)).

192. *Id.*

193. Fiss, *Charlotte-Mecklenburg*, *supra* note 96, at 708.

194. *Id.*

195. Tribe, *Constitutional Physics*, *supra* note 136, at 13 (emphasis added).

Iib. The Fundamental Differences between Federal and State Constitutional Adjudication

The federal courts comprise a crucial bulwark against evulsive depredation of constitutional values; but against scattered erosion they are relatively powerless.¹⁹⁶

Like Professor Lawrence Sager, other commentators have observed that, while federal courts have been effective against overt apartheid, such as Jim Crow laws and "White's only" signs, "[t]he contemporary symptoms of inertial and unconscious prejudice are more subtle"¹⁹⁷ and have proven much more difficult to eradicate. However, the limitations—some institutional, some doctrinally self-imposed—which have hampered the federal courts' remedial efforts in this arena do not apply to state courts and therefore should not stop them from articulating a more effective approach.

The current trend of independent state constitutional interpretations, which extend protections beyond those offered under the Fourteenth Amendment, has led to a growing perception among judges and legal scholars that federal Supreme Court decisions, which we have tended to consider as the end-point of the constitutional decisionmaking process, represent instead the mid-point of an evolving system.¹⁹⁸ In this system, if the Court strikes down the state action, it sets a federal minimum.¹⁹⁹ But if it upholds the state action, the decision may precipitate a series of "second-looks" by state decisionmakers in which Supreme Court decisions no longer carry presumptive validity.²⁰⁰ As Professor Kahn notes, "the mere fact that a doctrine emerges from the authoritative voice of the Supreme Court does not make it correct. . . . In this debate over the meaning and requirements of law, the Court's voice is never final."²⁰¹ There is now an extensive literature favoring this trend, as well as many state and federal decisions which attest to its validity. One reason for this evolving pattern is that state courts are not bound by the same implicit or explicit institutional limitations which often form the basis of a federal decision.

196. Sager, *supra* note 191, at 1263.

197. See, e.g., TRIBE, *AMERICAN CONSTITUTIONAL LAW*, *supra* note 136, at 1513-14.

198. Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of the Supreme Court's Reasoning and Result*, 35 S.C. L. REV. 353, 360 (1984). See also Brennan, *supra* note 17; Stanley Mosk, *The State Courts*, in *AMERICAN LAW: THE THIRD CENTURY* 213, 220-25 (Bernard Schwartz ed., 1976).

199. Williams, *supra* note 198, at 361.

200. *Id.*

201. Kahn, *supra* note 19, at 1155.

A. The Limitations of Federalism

The first of these limitations is the Court's concern for federalism, especially in equal protection cases. Professor Tribe believes that the Supreme Court's deep reservations about the efficacy and legitimacy of intrusive federal injunctive remedies lie at the base of its decisions which involve a discriminatory intent/causation requirement.²⁰² Often, plaintiffs have sought remedies which, in the Court's view, would have involved the federal courts too deeply in state or local matters. This is an institutional concern that is serious and legitimate but which does not excuse the Court from ignoring the underlying problem by imposing a threshold test.²⁰³ Rather than deciding that no constitutional violation can be shown without evidence of discriminatory intent,²⁰⁴ Professor Tribe argues that the federal courts should say "[t]here is a violation here but institutional considerations prevent us from providing a remedy."²⁰⁵

The significance of this very different message is that the problem is then passed on for resolution to other branches of government which are equally obliged to uphold constitutional values. State governmental entities are not restrained by principles such as federalism that might limit the power of the federal courts to act in a particular instance.²⁰⁶ In particular, state courts may play a role, vis-a-vis the other branches of state government, that differs markedly from the limited "interstitial" role of the federal courts.²⁰⁷ Presumably, Professor Tribe would approve of the Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*²⁰⁸ which, while denying a basis for a fundamental right to education under the United States Constitution, clearly stated that their decision was not to be viewed as placing its judicial imprimatur on the status quo,²⁰⁹ thus implicitly inviting state courts to resolve the issue without being burdened by federalist concerns.

This invitation was understood perfectly by the Connecticut Supreme Court in finding a fundamental right to an equal educational opportunity under the Connecticut Constitution in *Horton*.²¹⁰ As

202. See TRIBE, *AMERICAN CONSTITUTIONAL LAW*, *supra* note 136, at 1510-12.

203. *Id.* at 1512.

204. *Id.*

205. *Id.* at 1513.

206. *Id.*

207. *Id.*

208. 411 U.S. 1 (1973).

209. *Id.* at 58.

210. 376 A.2d 359, 371 (Conn. 1977).

Chief Justice Peters, dissenting in *Pellegrino v. O'Neill*,²¹¹ explained: "We are free to consider this matter unencumbered by the considerations of federalism which have led federal courts to doubt the propriety of federal intervention in the administration of state judicial systems."²¹²

B. The State Action Requirement

A second limitation on federal constitutional analysis is the state action requirement which federal courts have derived from the "No state shall . . ." language of the Fourteenth Amendment. In addition to the obvious lack of any such limiting, state-specific language in either of the Equal Protection Clauses of the Connecticut Constitution,²¹³ there is an even more fundamental reason for not importing a state action requirement into state constitutional decisionmaking: the purpose served by that requirement in interpreting the Federal Constitution does not exist in the state context.

The original purpose of the state action requirement was to shield some portion of state sovereignty from the broad reach of the Fourteenth Amendment. Professor Martin Margulies sees the requirement of state action as a shorthand expression used by federal courts in balancing the interests of a complainant against those of an alleged wrongdoer, while showing due deference to the interest of the state "in resolving the conflict without federal interference."²¹⁴ This state interest factor is missing in state court adjudication.

Chief Justice Peters, dissenting in *Cologne v. Westfarms Associates*,²¹⁵ argued that the state action requirement was designed by the federal courts to address the demands of federalism by creating space for state regulation.²¹⁶ According to Chief Justice Peters, there is no basis for a state action requirement under state constitutions because this "federalism component" is missing.²¹⁷ However, she asserts that if the state courts should decide to devise a state action requirement independently, it should be applied more flexibly than under federal law and be "more readily found for a claim of racial discrimina-

211. 480 A.2d 476 (Conn. 1984).

212. *Id.* at 488.

213. *See supra* note 66.

214. Martin B. Margulies, *A Lawyer's View of the Constitution*, 15 CONN. L. REV. 107, 111 (1982).

215. 469 A.2d 1201, 1210 (Conn. 1984).

216. *Id.* at 1218 (citing Tribe, *Constitutional Theories*, *supra* note 136, at 1149-50).

217. 469 A.2d at 1218.

tion."²¹⁸ In reaching her conclusions, Chief Justice Peters drew on *Robins v. Pruneyard Shopping Center*²¹⁹ and several decisions by other courts²²⁰ that refused to impose a state action requirement on state constitutional decisionmaking.

Therefore, when the *Sheff* defendants assert that the plaintiffs cannot proceed without first satisfying the state action requirement, they are invoking a federal doctrine devised by federal courts for federal purposes under the Fourteenth Amendment. Technically, there is no state action requirement under *any* state constitution.

In Connecticut, this last assertion could be based solely on the different language of the federal and state provisions, a difference which many state courts have used persuasively to avoid implying a state action requirement into state constitutional adjudication. But even if the language of the state and federal provisions were exactly the same, many scholars and jurists would agree that there would be no inherent reason for state courts to read that language as requiring the same interpretation that their federal counterparts have given it.²²¹ As Justice Berdon of the Connecticut Supreme Court has observed, "even when state and federal provisions have identical language, the state charter may require more protection."²²²

An increasing number of state courts have construed state constitutions and state bills of rights as guaranteeing more protection than the federal provisions, even if identical in wording. Justice Brennan cites several cases in New Jersey, Hawaii, Michigan, South Dakota, Maine, and other states as examples of this phenomenon.²²³ In particular, he refers to these words of the California Supreme Court:

We . . . declare that [the decision to the contrary of the United States Supreme Court] is not persuasive authority in any state prosecution in California We pause . . . to reaffirm the independent nature of the California Constitution and our responsibility to separately define and protect the rights of California citizens, despite conflicting decisions of the United States Supreme Court interpreting the Federal Constitution.²²⁴

218. *Id.*

219. 447 U.S. 74 (1980).

220. *See, e.g.*, *State v. Schmid*, 423 A.2d 615 (N.J. 1980); *Batchelder v. Allied Stores Int'l, Inc.*, 445 N.E.2d 590 (Mass. 1983).

221. *Williams, supra* note 198, at 389-90; *Brennan, supra* note 17, at 495.

222. *Berdon, supra* note 28, at 205-206. *See also Peters, supra* note 72, at 585. *See, e.g.*, *People v. Young*, 814 P.2d 834, 846 (Colo. 1991) (en banc) (declaring death penalty statute facially invalid under state Cruel and Unusual Punishment Clause, despite fact that it was identical to its federal counterpart).

223. *Brennan, supra* note 17, at 499-501.

224. *People v. Disbrow*, 545 P.2d 272, 280-81 (Cal. 1976).

Nor are United States Supreme Court statements, such as those in *Robins v. Pruneyard Shopping Center*,²²⁵ that state courts are free to interpret their constitutions to expand constitutional rights as they see fit, the source of state power in this regard. It is now widely accepted that a state constitution is an independent source of rights, to be interpreted on its own terms.²²⁶ Chief Justice Peters has asserted that “[u]nder our federal system of dual sovereignty, state constitutions embody the reservation to the states of all residual power not . . . conferred upon the federal government. State courts therefore must be empowered to determine, in light of state interests and state history, what meaning to attribute to provisions contained in state constitutions.”²²⁷

Not only are federal court decisions not the source of a state’s power to interpret its own constitution, but the notion that state constitutional provisions were intended to mirror the federal provisions does not comport with history. A historical analysis of the federal Bill of Rights reveals that the drafters drew from provisions of the already existing state constitutions.²²⁸ Additionally, the bills of rights of the various states continued to play the crucial role in limiting governmental abuse even after the federal constitution was written because, until the adoption of the Fourteenth Amendment, the federal Bill of Rights was held to be inapplicable to the states.²²⁹ Therefore, as Justice Brennan noted, Supreme Court decisions “are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law.”²³⁰

In sum, the institutional limitations on federal courts that produced the state action requirement under the Fourteenth Amendment provide Connecticut courts with ample reasons to reject the use of a

225. 447 U.S. 74 (1980).

226. The majority opinion in *Cologne v. Westfarms Associates*, 469 A.2d 1201, 1206 (Conn. 1984), reaffirms this principle for Connecticut by relying on *State v. Ferrell*, 463 A.2d 573, 578 n.12 (Conn. 1983), *Griswold Inn, Inc. v. State*, 441 A.2d 16, 20 n.3 (Conn. 1981), *Fasulo v. Arafteh*, 378 A.2d 553, 554 (Conn. 1977), and *Horton v. Meskill*, 376 A.2d 359, 371 (Conn. 1977).

227. Peters, *supra* note 72, at 588. See also Berdon, *supra* note 28, at 206; Kauger, *supra* note 18, at 17 (citing *Turner v. City of Lawton*, 733 P.2d 375, 378-79 (Okla. 1986)); Peters, *Evolving Federal System*, *supra* note 32, at 23. See generally Brennan, *supra* note 17; Kahn, *supra* note 19; and Robert A. Burt, *Brown’s Reflection*, 103 YALE L.J. 1483 (1994).

228. See Robert F. Williams, *Experience Must Be Our Only Guide: The State Constitutional Experience of the Framers of the Federal Constitution*, 15 HASTINGS CONST. L.Q. 403, 403-04 (1988).

229. Brennan, *supra* note 17, at 502.

230. *Id.* See generally WILLIAM J. BRENNAN, JR., *The Bill of Rights and the States*, in THE GREAT RIGHTS 65 (Edmond N. Cahn ed., 1963).

state action requirement in Connecticut equal protection cases, the most fundamental being that a state action requirement has no basis in the substantive Connecticut constitutional guarantee of equality.

C. Institutional and Functional Differences

Federal doctrine is also dictated in part by other institutional limitations which do not hamper state courts. First, United States Supreme Court decisions must operate in all areas of the nation and must, therefore, represent the lowest common denominator of rights protection. Second, the doctrine of selective incorporation used for applying the Bill of Rights to the states leads to questions regarding the dilution of those rights in a state context.²³¹ Third, as Justice Brennan observed, "state courts that rest their decisions wholly or even partly on state law need not apply federal principles of standing and justiciability that deny litigants access to the Courts."²³²

Furthermore, some commentators have noted significant functional differences between federal and state courts which militate against the adoption of a federal approach to state constitutional questions. First, state courts are often deeply involved in the state policymaking process, which implies a very different institutional position from that of the United States Supreme Court. Legislators and state judges are, in a very real sense, "partners in the business of planning for the welfare of the state."²³³ Second, a state court's judicial function is often quite different. State courts perform a great deal of nonconstitutional lawmaking, a power which federal courts have been denied since *Erie Railroad Co. v. Tompkins*.²³⁴ As Professor Robert Williams has observed, state supreme courts can effectively make law through their rulemaking powers, as well as exercising a variety of "inherent powers" unknown by their federal counterparts.²³⁵

Chief Justice Peters has also stressed the significant differences between the pursuit of constitutional business in the Supreme Court in Washington and the high courts of the various states. For example, federal and state courts do not share the same constitutional heritage nor do they rely on the same methodology to reach their constitutional decisions. In addition, to a far greater degree than federal judges, state court judges are publicly accountable for their decisions

231. Williams, *supra* note 198, at 389-91.

232. Brennan, *supra* note 17, at 501.

233. Peters, *Evolving Federal System*, *supra* note 32, at 22.

234. 304 U.S. 64 (1938).

235. Williams, *supra* note 198, at 399.

because they are not appointed for life, either being elected by state citizens or appointed to their terms in office with the approval of the legislature.²³⁶ This greater public accountability could be said to give state courts greater weight as democratic institutions than their federal counterparts.

In addition to the fact that state constitutional provisions may differ qualitatively from their federal counterparts, other “nonrights” provisions of state constitutions may differ from provisions of the federal constitution so greatly as to profoundly change the balance of power in state government. For example, many state constitutions contain provisions enlarging judicial authority at the expense of the legislature.²³⁷ Also, the text of a state constitution may explicitly provide for judicial review of legislative and executive action.²³⁸ In fact, judicial review was a phenomenon of state law long before *Marbury v. Madison*,²³⁹ and contrary to the federal experience, most judiciary provisions of state constitutions have been revised and ratified in this century without a serious struggle over the exercise of judicial review.²⁴⁰

Because of these institutional and functional differences, and numerous others,²⁴¹ the judicial review exercised by a state court should be qualitatively and doctrinally different from that which would be exercised by a federal court. This is particularly true in school desegregation cases where the federal approach has failed to remedy so fundamental a societal problem as metropolitan-wide school segregation. Viewing United States Supreme Court decisions as presumptively valid for state constitutional analysis—the view apparently held by the lower court in *Sheff* and expressed in many of the older state cases when parallel decisionmaking under provisions of both the federal and state constitutions was the norm—denigrates the importance of state constitutional jurisprudence. Efforts to limit state decisionmak-

236. Peters, *Evolving Federal System*, *supra* note 32, at 21-22.

237. Williams, *supra* note 198, at 401.

238. The Framers of many of the state constitutions intended judicial review to play a more significant role than did the Framers of the federal constitution. See Feldman, *supra* note 68, at 1062. See generally William E. Nelson, *Changing Conceptions of Judicial Review, The Evolution of Constitutional Theory in the States, 1790-1860*, 120 U. PA. L. REV. 1166, 1167 (1972). States continued to see judicial review as a critical state court function in order to check the powers of state legislatures as part of the Jacksonian era's impetus toward reform. See James A. Henretta, *Foreword: Rethinking the State Constitutional Tradition*, 22 RUTGERS L.J. 819, 833-35 (1991).

239. 5 U.S. 137 (1803).

240. See Williams, *supra* note 198, at 401. See also Feldman, *supra* note 68, at 1062.

241. Further differences are noted in Williams, *supra* note 198, at 397-404.

ing by analytical formulations and doctrines designed to serve the purposes of the Fourteenth Amendment and the federal judicial system constitute an unwarranted delegation of state power to the federal courts. Moreover, they result in an abdication of state judicial responsibility to provide for some of its most vulnerable citizens "the full panoply of rights which Connecticut residents have come to expect as their due."²⁴²

IIIa. Developing an Independent Approach to State Constitutional Decisionmaking

Through a series of events and doctrinal missteps, federal school desegregation law has moved away from the early promises of *Brown*,²⁴³ *Green*,²⁴⁴ and *Swann*,²⁴⁵ which held the segregated condition of schools to be an unconstitutional deprivation of equal protection, and toward a process-oriented jurisprudence which has made solving the unique problems posed by metropolitan-wide school segregation progressively more difficult through its use of the discriminatory intent barrier.

It would be possible, of course, for a state court to avoid the full chilling effect of this approach by carving out a narrow path through the federal jurisprudential wilderness, as was done by some district courts following *Swann*. This path *could* be constructed by adopting a doctrine of state responsibility based on the foreseeable segregative consequences of state acts.²⁴⁶ The same result could be achieved by enlarging the categories of evidence deemed relevant in establishing intent/causation to include "root" evidence, such as community attitudes and their effect on elected officials, and/or "branch" evidence, such as the decisions of other branches of state government which have played a part in creating or maintaining a segregated system in

242. *Horton*, 376 A.2d 359, 371 (Conn. 1977).

243. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

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

245. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

246. See Fiss, *Constitutional Concepts*, *supra* note 110, at 584-85 (arguing that a deliberate choice of geographic criteria with knowledge of the probable consequences, combined with a deliberate "decision not to mitigate the consequences of a prior choice reinforces the ascription of responsibility") and Robert I. Richter, Note, *School Desegregation After Swann: A Theory of Government Responsibility*, 39 U. CHI. L. REV. 421, 424-29 (arguing that segregative intent can easily be shown in facially neutral acts, such as attendance zone designation or school site location, which have the natural and probable effect of fostering residential segregation and which may subsequently result in racially imbalanced schools). See generally Binion, *supra* note 136; Goodman, *supra* note 136; Liebman, *supra* note 136.

both schools and housing.²⁴⁷ The path could also be constructed by shifting the burden of proof on intent/causation to defendants once racial isolation has been established by objective criteria, the approach taken by the Supreme Court in *Swann*.²⁴⁸ The Connecticut Supreme Court took a similar burden-shifting approach in *Horton*.²⁴⁹

One might also argue that current federal doctrine permits the narrow approaches described above, based on the language in *Columbus Board of Education v. Penick*.²⁵⁰ *Penick* blurred the de facto/de jure distinction by suggesting that, even in a city like Columbus which had no statutorily mandated segregation in this century, disparate racial impact and foreseeable consequences could be “fertile ground for drawing inferences of segregative intent,” even though they “without more, do not establish a constitutional violation.”²⁵¹

Even under federal law, the argument has been made that the considerations often cited by federal courts as justifying a refusal to recognize an affirmative constitutional duty to act, such as the negative constitutional language of the Fourteenth Amendment, the state action requirement, a concern for federalism, and the problem of designing enforceable remedies—do not apply once the state has undertaken to act.²⁵² This is especially true in the state constitutional context where many of the constitutional guarantees protect positive rights, such as the right to an education, which can only be enforced by legislative action.²⁵³

All of these options are available to state courts seeking to circumvent federal standards. However, constructing such a pathway under state law would be a mistake. Instead, since it seems clear that no objective standard can be devised that will effectively and fairly determine whether the governmental decisionmaking process had be-

247. See Stein, *supra* note 136, at 2005; TRIBE, *AMERICAN CONSTITUTIONAL LAW*, *supra* note 136, at 1500. This was the approach taken by the federal district court in *Milliken v. Bradley*, 418 U.S. 717, 754 (1974).

248. 402 U.S. 1 (1979).

249. 486 A.2d 1099, 1110 (Conn. 1985).

250. 443 U.S. 449 (1979).

251. *Id.* at 464-65.

252. See Goodman, *supra* note 136, at 357.

253. Feldman has defined a “positive” constitutional right as one which can only be effectuated through governmental action, whereas a “negative” right is one which can only be realized when the government does *not* act. Feldman, *supra* note 68, at 1057, 1057 n.2 (emphasis added) (citing Burt Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights*, 20 *RUTGERS L.J.* 881, 883 n.12 (1989)). Most of the constitutional rights protected under the federal Constitution are negative rights (freedom of speech, religion, etc.) as opposed to state constitutions which enumerate many positive state rights for state citizens. *Id.*

come tainted by discriminatory motivations,²⁵⁴ the federal approach should be rejected completely. State courts in general, and the Connecticut Supreme Court in particular in *Sheff*, should carve out a distinctive jurisprudence based solely on the original understanding of *Brown* and all school desegregation cases prior to *Keyes*, i.e. that it is the segregated condition of the schools, and the known harmful effects of such conditions on the lives of children and their communities, that constitutes the wrong which must be remedied.

A. The Need for Structural Reform

A state court engaged in independent state constitutional decisionmaking should take note that the goal of school desegregation is structural reform. According to Professor Fiss,

[S]tructural reform is premised on the notion that the quality of our social life is affected in important ways by the operation of large scale organizations The structural suit is one in which a judge, confronting a state bureaucracy over values of constitutional dimension, undertakes to restructure the organization to eliminate a threat to those values posed by the present institutional arrangements.²⁵⁵

The question in such cases is not whether the discriminatory acts or motivations of state officials have "caused" a particular social condition to exist. In a structural lawsuit, the need to identify such "wrongdoers" virtually disappears.²⁵⁶ Rather, courts must ask whether the condition itself threatens important constitutional values and whether an "organizational dynamic" exists that serves to perpetuate that condition.²⁵⁷ If the answers to these judicial inquiries are affirmative, the cost of reformation can legitimately be placed on the organization. As Professor Fiss has noted, this assignment of governmental responsibility is not based on the fact that the organization has "'done wrong' in either the literal or metaphysical sense" but rather on the realization that only through structural reform can the "threat to constitutional values posed by the operation of the organization be removed."²⁵⁸ An understanding of the need for structural reform in achieving equal educational opportunity, as well as the usefulness of the structural injunction in reforming the operations of a given bureaucratic

254. Fiss, *Constitutional Concepts*, *supra* note 110, at 575.

255. Fiss, *1978 Term*, *supra* note 161, at 2.

256. *Id.* at 22.

257. *Id.* at 18.

258. *Id.* at 23.

institution, was expressed by the Connecticut Supreme Court in *Horton v. Meskill*:

Our own cases have similarly acknowledged that a court, in the exercise of its discretion to frame injunctive relief, must “balance the competing interests of the parties” to assure that the relief it grants is compatible with the equities of the case, and *takes account of the possibility of embarrassment to the operations of government.*²⁵⁹

A school desegregation case is a paradigmatic structural lawsuit in which the segregated condition of the schools is alleged to violate the constitutional right of students to equal protection of the laws. The appropriate remedy in such a case is the structural injunction. As opposed to preventive or reparative injunctions, the structural injunction is used to effectuate the reorganization of an ongoing social institution.²⁶⁰ In a structural injunction context, like a school desegregation case, it is imperative to see that “[t]he constitutional wrong is the structure itself; the reorganization is designed to bring the structure within constitutional bounds. . . .”²⁶¹

B. The Need for an Effects-Based Jurisprudence

In a school desegregation case, the court’s focus must turn away from the process by which schools become segregated, toward the segregated condition itself, and the effects of that condition on the lives of school children, their families, and their communities. This is, in fact, the constitutional wrong to be remedied because it is the effects of racial isolation which constitute a *per se* deprivation of equal protection and equal educational opportunity.

Under the structural approach advocated by Professor Fiss and other scholars, government responsibility attaches regardless of intent or causation when the state fails to remedy the racial imbalance within its power to avoid. Since the state, in the form of its many interconnected governmental units, has complete control over all aspects of public education, including the establishment of local school districts and compulsory attendance rules, the designation of attendance zones, the creation of student assignment plans, and the development of school funding schemes, it seems facetious to suggest that the state cannot be held accountable for the cumulative impact of these deci-

259. 486 A.2d 1099, 1111 (Conn. 1985) (citations omitted) (emphasis added).

260. Fiss, *1978 Term*, *supra* note 161, at 23-24.

261. OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 11 (1978).

sions if they result in segregated conditions which the state has within its power to correct.²⁶²

Feldman has noted that the enforcement of positive state constitutional guarantees calls for primary attention to be placed on the benefits of government action. The proper inquiry is "What can the state do to solve the problem?" rather than "What has the state done to cause the problem?"²⁶³ State courts are particularly well-suited to enforce these positive constitutional guarantees because of their expertise in shaping the common law, their ability to account for unique local circumstances, and the "democratic imprimatur" enjoyed by state judges because of their special position of public accountability.²⁶⁴

Professor Tribe has strongly recommended such an effects-based approach and has advocated a new mediating principle which better comports with the underlying goal of equal protection.²⁶⁵ As discussed above in Part II(a), Professor Tribe contends that the antidiscrimination principle, which has been used as an equal protection mediator for many years in school desegregation cases, requires a "perpetrator" who engages in the invidious act of discriminating.²⁶⁶ This requirement leads inexorably to a jurisprudence based on state action, discriminatory intent and causation, and the subsequent "travesty" of *Milliken*. Professor Tribe suggests that, at the present stage, a far better mediating principle for equal protection cases would be the antisubjugation principle, which aims not at preventing discriminatory acts, but rather at breaking down legally reinforced systems of subordination that treat some people as second-class citizens. "The core value of this principle is that all people have equal worth[,]"²⁶⁷ which comes much closer to the core value underlying the principle of equal protection. Surely, it cannot be said that the original purpose of an equal protection clause, either at the federal or state level, was to uncover "impure thoughts"²⁶⁸ and pursue them. Rather, it seems clear that such clauses were intended to prevent the systematized subordination of any group of citizens and to "guarantee a full measure of

262. See Richter, *supra* note 246, at 440; Fiss, *Constitutional Concepts*, *supra* note 110, at 587.

263. Feldman, *supra* note 68, at 1089 ("[W]hen positive rights are at issue legislative action represents the good and legislative inertia the evil.").

264. Neuborne, *supra* note 253, at 893-900.

265. See *supra* notes 162-166 and accompanying text.

266. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, *supra* note 136, at 1515.

267. *Id.*

268. *Id.*

human dignity for all.”²⁶⁹ Under the antisubjugation principle, an equal protection clause asks whether the particular conditions complained of deprive a particular group of its right to be fully human.²⁷⁰

Professor Tribe observes further that the

antidiscrimination principle may be sufficient to contend with the deprivations of equal protection that result from “isolated instances of overt impropriety” or “transitory hysteria.” But the subjugation of blacks, women, and other groups that persists today is usually neither isolated nor hysterical. . . . Regimes of sustained subordination [] generate “devices, institutions, and circumstances that impose burdens or constraints on the target group without resort to repeated or individualized discriminatory actions.”²⁷¹

The inequities that persist in American society have survived because they have become ingrained in our modes of thinking.²⁷² As the United States Supreme Court recognized a century ago in *Strauder v. West Virginia*,²⁷³ habitual discrimination is the hardest to eradicate.

Many commentaries have harshly criticized the United States Supreme Court’s current process-oriented approach to equal protection because state officials cannot be held responsible for correcting conditions which violate the constitutional norm of equality unless they have engaged in a course of conduct with the intent to discriminate against an identifiable group.²⁷⁴ This approach turns a blind eye toward the harm which can be caused to members of certain groups when government actors are merely “indifferent to their suffering.”²⁷⁵ Fiss has described the same phenomenon as the “policy of disregard.”²⁷⁶ Current federal equal protection doctrine merely serves to legitimate and perpetuate this disregard and is “utterly alien to the basic concept of equal justice under the law.”²⁷⁷

C. The Antisubjugation Principle Applied to *Sheff*

The use of the antisubjugation principle as an equal protection mediator allows a court to focus on the denial of humanity which the

269. *Id.*

270. *Id.*

271. *Id.* at 1518 (quoting Eric Schnapper, *Perpetuation of Past Discrimination*, 96 HARV. L. REV. 828, 834 (1983)).

272. JOEL KOVEL, *WHITE RACISM: A PSYCHOHISTORY* 60-66 (1970).

273. 100 U.S. 303, 306 (1880).

274. *See supra* note 136.

275. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, *supra* note 136, at 1518-19.

276. FISS, *Constitutional Concepts*, *supra* note 110, at 565.

277. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, *supra* note 136, at 1519.

state has allowed to exist for certain of its citizens.²⁷⁸ Using the *Sheff* case as an example, the antisubjugation principle implies that by focusing on the condition of segregation existing in the schools of the Hartford metropolitan area, and by declaring outright, as the *Brown* Court did, that subjecting children to these inherently unequal conditions constitutes a per se violation of their fundamental right to an equal educational opportunity, the Connecticut Supreme Court could more fully realize the goal of equal protection within the framework of Connecticut's constitutional values.

Such an approach may, at the present time, be beyond the reach of the federal courts. However, it is fully supported and arguably required by the express language of Article I, Section 20 of the Connecticut Constitution, which states in part that "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."²⁷⁹

Under the standard rules of constitutional interpretation, the word "subjected" must be construed as having some meaning and should be given its plain and ordinary meaning, unless a special meaning was clearly intended by the drafters. The ordinary meanings of "subjected," when used as a verb and particularly when followed by "to," as it is in Section 20, are: "to bring under domination, control, or influence; to cause to undergo or to expose to something specified; to make liable or vulnerable; to lay open or expose."²⁸⁰ Interestingly, in light of the antisubjugation principle discussed above, the ordinary meanings of the word "subjugate" are: "to bring under complete control or *subjection*; to conquer, to master; to make submissive or subservient; to enslave."²⁸¹ The importance of the definitional interrelationship between the two terms "subjugation" and "subjection" cannot be overlooked in the construction of the phrase, "be subjected to" in Article I, Section 20.

In addition to the plain meaning rule, Connecticut courts have ascribed to the fundamental tenet of constitutional construction which directs that a constitutional provision should be construed to give the provision effective operation and to suppress the mischief at which it

278. Whereas the antidiscrimination principle [and the discriminatory intent/causation requirement which it has spawned] look[] inward to the perpetrator's state of mind, the antisubjugation principle looks outward to the victim's state of existence. *Id.*

279. CONN. CONST. art. I, § 20 (emphasis added).

280. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1893 (2d ed. 1987).

281. *Id.* (emphasis added).

was aimed.²⁸² The insertion by the drafters of very particularized language into the second Equal Protection Clause of the Connecticut Constitution in 1965, in full awareness of the major expansion of political and civil rights then occurring, must have been aimed at suppressing the mischief of the continued subjugation of African-Americans and other target groups in Connecticut. To follow the words "subjected to" with words as uncompromisingly negative as "segregation" and "discrimination" clearly indicates that the drafters did not intend "subjected to" to carry the sunnier meaning of "to bring under dominion," but rather to carry the full negative burden of the phrase—that is, to expose, to make vulnerable, to subjugate, to enslave.

In reflecting on the power of Connecticut courts to assign independent weight to state constitutional provisions, in particular those relating to the protection of civil rights and liberties, Chief Justice Peters has urged courts to search for historical data and precedents to illuminate the constitutional text. In the absence of such evidence, however, Chief Justice Peters urges courts to look to the agenda of the Connecticut Constitution as a whole in the context of the central historical and sociological issues present at the time of ratification.²⁸³

Surely, in 1965, ten years after *Brown* and in the midst of the civil rights movement in which Connecticut citizens took such an early and active role, we must assume that the drafters of this extraordinary and unique provision recognized that some Connecticut citizens were still being subjected to segregation and discrimination in the exercise and enjoyment of their political and civil rights. They must have been equally aware that this condition resulted in the subjugation of these individuals to second-class citizen status which could no longer be tolerated in a state committed to the equal worth of all persons under the law.

The Connecticut Supreme Court expanded on this recognition in *Horton* by declaring "that in Connecticut, elementary and secondary education is a fundamental right, [and] that pupils in the public schools are entitled to the equal enjoyment of that right"²⁸⁴ Reading that holding into the language of Article I, Section 20, it seems clear that the Connecticut Constitution forbids any person to suffer segregation or discrimination in the exercise or enjoyment of his or her fundamental right to education.

282. *Palka v. Walker*, 198 A. 265, 267 (Conn. 1938).

283. Peters, *supra* note 72, at 583-86.

284. *Horton v. Meskill*, 376 A.2d 359, 369-70 (Conn. 1977).

Connecticut courts have also adopted the rule of construction that effect must be given to every part and word of the constitution unless there is a clear reason for not doing so.²⁸⁵ By using the disjunctive “or” between “segregation” and “discrimination,” the drafters must have intended the words to carry different import. Discrimination may imply an invidious act by a wrongdoer.²⁸⁶ But to this constitutionally impermissible act, the drafters added a second condition—not to “segregate,” which might also imply a conscious act of isolation, but rather a person’s being “subjected to segregation.” This condition arguably exists whenever a person is left to endure a segregated condition which the state might reasonably prevent.

The children in Hartford and its surrounding suburbs are being “subjected to segregation,” and to its known harmful effects, when the State of Connecticut regards state-imposed school district lines as sacrosanct and refuses to abridge them, as well as when a child’s fundamental right to an equal education is valued less highly than a town’s interest in maintaining impermeable borders.²⁸⁷ By maintaining these so-called neutral systems, the state has consented to the continued subjugation of these children as second-class citizens in the majority culture.

Many states have adopted this per se approach to government responsibility based on the premise that racially unbalanced schools are inherently unequal and that the failure of the state to remedy this unequal treatment of minorities is a denial of equal protection regardless of the underlying causes.²⁸⁸ On this reasoning, intent and foreseeability are irrelevant. In *People ex rel. Lynch v. San Diego Unified School District*,²⁸⁹ a California appellate court found that the knowing failure of a school board to remedy an imbalance that resulted in in-

285. *Cahill v. Leopold*, 103 A.2d 818, 828 (Conn. 1954).

286. *See supra* note 266 and accompanying text.

287. Such borders can, of course, be readily breached to achieve cost savings in police and fire protection or garbage removal. Several sister states have recognized that the fixation on local control must end if equality rights are to be preserved. *See, e.g., Rose v. Council for Better Educ. Inc.*, 790 S.W.2d 186 (Ky. 1989). In the *Rose* case, the Kentucky Supreme Court held that “[e]ach child . . . in this Commonwealth must be provided with an equal opportunity to have an adequate education. Equality is the keyword here. The children of the poor and the children of the rich . . . must be given the same opportunity and access *This obligation cannot be shifted to local counties and local school districts.*” *Id.* at 211 (emphasis added). Notably, Kentucky has produced some of the most outstanding examples of successful desegregation plans in the country, in particular the plan implemented in the central city of Jefferson County, Louisville.

288. *TRIBE, AMERICAN CONSTITUTIONAL LAW*, *supra* note 136, at 1515-16.

289. 96 Cal. Rptr. 658 (4th Dist. Ct. App. 1971), *cert. denied*, 405 U.S. 1016 (1972).

ferior education for African-American students was sufficient to attribute responsibility to the state for curing the problem.²⁹⁰

A similar approach was taken by the New Jersey Supreme Court in *Jenkins v. Township of Morris School District*.²⁹¹ Recommending an interdistrict remedy to solve racial imbalance, the Court eschewed the seemingly inviolate nature of school district lines, saying "governmental subdivisions of the state may readily be bridged when necessary to vindicate state constitutional rights and policies."²⁹²

The holdings in the three *Horton* cases, and the principle of "basic fairness" which the Connecticut Supreme Court announced as underlying all equal protection cases under the Connecticut Constitution in *Moscone v. Manson*,²⁹³ argue in favor using the same per se approach in Connecticut. This is particularly true in light of the clear and convincing evidence of the severe social, academic, and intellectual detriments suffered by children in segregated schools.²⁹⁴ The State's own experts originally recommended just such a per se approach to segregative conditions, calling for "collective responsibility" among the cities and their contiguous and adjacent suburbs in eradicating racial imbalance in the schools.²⁹⁵ This recommendation was ultimately rejected by state officials who feared the political backlash of a mandatory approach to desegregation. Shortly after this rejection, the *Sheff* case was filed.

The State's knowing failure to eradicate the condition of metropolitan-wide school segregation currently existing in Connecticut is all the more intolerable because of the State's power to "define expectations, confer legitimacy, establish a status quo, and thus necessarily shape the nature and distribution of interests and attitudes in society itself."²⁹⁶ By refusing to resolve the problem, the state affirms as inevitable the status quo of racial imbalance and its effects in metropolitan-area schools. Surely, this is a constitutionally impermissible result.

290. *Id.* at 666.

291. 279 A.2d 619 (N.J. 1971).

292. *Id.* at 629.

293. 440 A.2d 848 (Conn. 1981).

294. See *infra* Part III(b), for discussion of numerous research projects which have enumerated these harms.

295. COMM. ON RACIAL EQUALITY, CONN. ST. BD. OF EDUC., A REPORT ON RACIAL/ETHNIC EQUITY AND DESEGREGATION IN CONNECTICUT'S PUBLIC SCHOOLS 11-18 (Jan. 1988).

296. Tribe, *Constitutional Theories*, *supra* note 136, at 1078.

IIIb. The Value of Successfully Desegregated Schools: An Empirical Review

A per se approach to segregative conditions under state constitutional provisions is supported by empirical research studies which affirm the value of racially balanced schools to minority and White students alike, to their parents, and to the society at large. Deprivation of the opportunity to attend such schools in many metropolitan areas of the United States has exacerbated the problems of the inner cities and made the words of Thurgood Marshall, dissenting in *Milliken v. Bradley*, seem particularly prescient: "In the short run, it may seem to be the easier course to allow our great metropolitan areas to be divided up each into two cities—one white, the other black—but it is a course, I predict, our people will ultimately regret."²⁹⁷

It seems especially fitting to recall Justice Marshall's words and to use them as a starting point for assessing the results of school desegregation plans in our nation's cities. However, there is a bittersweet irony in this assessment. Professor Liebman has answered the question, "Is school desegregation dead?" by observing that school desegregation appears to be "alive and well" throughout the South in cities like Charlotte-Mecklenburg, North Carolina; Greenville, South Carolina; Jacksonville, Florida; Louisville, Kentucky; Nashville-Davidson, Tennessee; and Tampa-St. Petersburg, Florida, where mandatory school desegregation plans came with a court order in the late-1960s and early 1970s, and stayed to become a source of intense civic pride.²⁹⁸ To this exemplary list must be added Stamford, Connecticut,

297. 418 U.S. 717, 814-15 (1974).

298. Liebman, *supra* note 136, at 1465-67, specifically 1466 nn.6 & 7. I would concur in Leibman's "alive and well" assessment. To his list I would add Darien, Georgia, one of the cities which, in addition to Charlotte, Greenville, Louisville and Tampa, I have studied over the last four years on several trips south to visit successfully desegregated school districts. Each of the cities visited was desegregated as part of a county-wide plan, and each has been exceptionally successful in retaining a commitment to racial balance over the years, despite major demographic changes in their counties.

I should say at the outset of this research-oriented section that what may appear to be my emphasis on the "benefits" side of the research data, which is by far the most voluminous, most likely stems from my having seen first hand the power of the law to change a society's fundamental values. Twenty-five years after Jim Crow ruled in these counties, I have seen minority and White children learning and playing together in modern, well-maintained and well-equipped schools, some of the finest I have seen in 30 years in education, first as a teacher, then as director of an educational research facility, and now as a professor of law. I have visited schools in each district and interviewed students, teachers, parents, and school administrators, all of whom were anxious to tell me how it can be done when people are committed and "it's the law of the land." While outside of the South, many of us have prayed that busing and desegregation would never come to our cities,

which alone among Connecticut's cities has succeeded in effectively integrating its schools, also under a mandatory school desegregation plan.

What makes for successful desegregation? The most authoritative current empirical research has established that substantial progress has been achieved in school districts with court or administratively-ordered desegregation plans, whereas little or no progress has been noted in the eighty-five percent of school districts without such plans.²⁹⁹ The same research has shown that the highest level of progress has been achieved in areas in which the desegregation plan was mandatory rather than voluntary, where desegregation occurred at all grade levels from the plan's inception, and where the plan included interdistrict desegregation techniques such as "pairing" and "clustering."³⁰⁰ County-wide plans were particularly effective.

these courageous people have been conducting a vast 25-year experiment in social change for the nation. I have reviewed twenty-five years of standardized test scores and have concluded that the gains in these successful districts are even *more* impressive than those homogenized over an entire region and reflected in the national studies. I have interviewed business executives and civic leaders in Greenville, South Carolina, who have told me that their region's current status as the engine of American economic growth could never have been achieved in a segregated society and without their twenty-five year "investment in human capital." *E.g.*, interviews with Arnold Norz, Vice-President, Metropolitan Life Ins. Co.; Becky Turner, C.E.O., Haywood Mall Dev. Corp.; Max Heller, former Exec. Dir., Economic Dev. Bd., State of South Carolina, Rudolph Gordon, Asst. Superintendent, Greenville County Schools, and others, in Greenville, South Carolina (Feb. 21-24, 1994). When I think of the South 25 years ago with its intense hatreds, its poverty, and what *must* have seemed the great unlikelihood of success, I confess to impatience when it is said that a court-mandated planning process in Connecticut, the most affluent state in the nation, will cause "blood to run in the streets." I hope, therefore, I will be forgiven if the tone of this section is not totally that of the neutral observer, but rather of one who has gone to see it work—and marvelled.

299. Liebman, *supra* note 136, at 1468 (citing FINIS WELCH & AUDREY LIGHT, *NEW EVIDENCE ON SCHOOL DESEGREGATION* 40, 67, and Table 12 (U.S. Comm. on Civil Rights Clearinghouse Publ. 92 1987)).

300. The "pairing" of schools involves taking a group of schools in a metropolitan area which has heretofore been racially and ethnically segregated and pairing one minority and one white school which are geographically proximate to each other. One elementary school which has previously included grades K-6 is typically converted into a K-3 school and the other, a 4-6 school, thus achieving racial balance in both and minimizing the distance travelled to school by all children in that "paired" area. By "clustering" a group of schools in one area of the county and reorganizing the grade levels so that grades K-12 can all be served in this concentrated area, many southern districts were able to tell parents whose children were entering the district at kindergarten, exactly which schools their children would attend from grades K-12, barring unforeseen demographic changes which might necessitate re-assignment. This technique also minimized travel distances and calmed the fears of parents who had been unnerved by the anti-busing shibboleth, "small children will spend hours on buses travelling to outlying areas," as well as by the specter of their child's moving from school to school each year to achieve racial balance. Interviews

The irony, of course, is that many of these county-wide plans were implemented in the South, the region which has demonstrated the most progress in integration.³⁰¹

In the generation since these executive branch and court-ordered desegregation plans were initiated, widespread progress, which could only be predicted in 1954, has been substantiated by empirical research. Writing in 1965, Professor Fiss catalogued the various harms which were said to result from segregation: the psychological harm to African-American children, who feel insult and stigma whether their schools have been de jure or de facto segregated; the academic and intellectual harms resulting from inferior school plants, educational materials, teachers, and curricula; and the perpetuation of social barriers which results when minority children are deprived of the further opportunity to "develop relationships with . . . members of the dominant class."³⁰² Professor Fiss acknowledged the difficulty in drawing causal connections in the absence of empirical data showing that such harms can be remedied by attacking the segregated condition, but argued that support for this proposition "is suggested by the embryonic indications of improved . . . achievement by [minority students] in integrated schools."³⁰³

Today, these indications are no longer embryonic. Volumes of research data in several disciplines now indicate that minority performance in desegregated schools has improved, and minority performance on standardized achievement tests has risen in desegregated settings.³⁰⁴ It has also been well-documented that career opportuni-

with school officials in Charlotte-Mecklenburg County and others named *supra* note 298, October 1991, January 1993, and February 1994.

301. See WELCH & LIGHT, *supra* note 299, at n.6 Tables 1, A1, and A2.

302. Fiss, *Constitutional Concepts*, *supra* note 110, at 568-570.

303. *Id.* at 569.

304. The most highly-respected researchers on minority achievement have concluded that attendance in racially balanced schools improves the educational outcomes for minority students. See Rita E. Mahard & Robert L. Crain, *Research on Minority Achievement in Desegregated Schools*, in THE CONSEQUENCES OF SCHOOL DESEGREGATION 103, 124 (Christine H. Rossell & Willis D. Hawley eds., 1983); Willis D. Hawley & Mark A. Smylie, *The Contribution of School Desegregation to Academic Achievement and Racial Integration*, in ELIMINATING RACISM: PROFILES IN CONTROVERSY 284-85 (Phyllis Katz and Dalmás Taylor eds., 1988); Christopher Jencks & M. Brown, *The Effects of Desegregation on Student Achievement: Some New Evidence from the Equality of Educational Opportunity Survey*, 48 SOC. OF EDUC. 136-37 (1975); Robert L. Crain & Rita E. Mahard, *Desegregation and Black Achievement: A Review of the Research*, in 42 LAW & CONTEMP. PROBS. 17-56 (1978); Rita E. Mahard & Robert L. Crain, *The Effect of Research Methodology on Desegregation-Achievement Studies: A Meta-Analysis*, in 88(5) AM. J. SOC. 839-54 (1983); Paul M. Wortman & Fred B. Bryant, *School Desegregation and Black Achievement: An Integrative Review*, in 13(3) SOC. METHODS AND RES. 289-324 (1985). See generally JAMES S. COLE-

ties of minorities attending desegregated schools have improved.³⁰⁵ This evidence is particularly important because other studies have shown that the isolation of minorities in poor urban areas is the greatest barrier to their social and economic mobility.³⁰⁶

Professor Liebman has also cited extensive research indicating that in addition to improvements in standardized test scores and career options, minority students have made substantial gains in I.Q. scores which erase a third to one-half of the overall difference between African-American and White students.³⁰⁷ These gains, widely believed to be due to the changing expectations of African-American students by teachers in desegregated settings, are strongest when desegregation begins in the early grades, has a metropolitan-wide plan, and takes place in predominately white schools with a critical mass of African-American students.³⁰⁸ The preponderance of the evidence

MAN ET AL., EQUALITY OF EDUCATIONAL OPPORTUNITY (1966); NANCY H. ST. JOHN, SCHOOL DESEGREGATION: OUTCOMES FOR CHILDREN (1975); Robert L. Crain & Rita E. Mahard, *Minority Achievement: Policy Implications of Research*, in EFFECTIVE SCHOOL DESEGREGATION: EQUITY, QUALITY, AND FEASIBILITY (Willis D. Hawley ed., 1981) [hereinafter EFFECTIVE SCHOOL DESEGREGATION]. Notably, many of the gains reported can be impaired by techniques such as "ability-group tracking," which may create segregated classes within desegregated schools. See generally MEYER WEINBERG, THE SEARCH FOR QUALITY INTEGRATED EDUCATION: POLICY AND RESEARCH ON MINORITY STUDENTS IN SCHOOL AND COLLEGE 146-71 (1983); William L. Taylor, Brown, *Equal Protection, and the Isolation of the Poor*, 95 YALE L.J. 1700, 1710-11 nn.36-42 (1986).

305. Attending desegregated schools apparently helps African-American students break through the structural barriers to employment which have resulted from discrimination in the labor market. There are many other employment-related benefits. African-American students who attend racially balanced schools tend to have more friends in the majority culture, to live in integrated neighborhoods, to finish high school and/or college, and to work in higher status jobs upon graduation. See Jomills H. Braddock, II & James M. McPartland, *Going to College and Getting a Good Job: The Impact of Desegregation*, in EFFECTIVE SCHOOL DESEGREGATION, *supra* note 304, at 141-54; Jomills H. Braddock, II & James M. McPartland, *Social-Psychological Processes that Perpetuate Racial Segregation: The Relationship Between School and Employment Desegregation*, 19 J. BLACK STUD. 267-89 (1989); Jon W. Hoelter, *Segregation and Rationality in Black Status Aspiration Processes*, 55 SOC. OF EDUC. 31-39 (1982); and Gary Orfield, *Housing Patterns and Desegregation Policy*, in EFFECTIVE SCHOOL DESEGREGATION, *supra* note 304 at 185-224. See generally ROBERT L. CRAIN & JACK STRAUSS, SCHOOL DESEGREGATION AND BLACK OCCUPATIONAL ATTAINMENT: RESULTS FROM A LONG-TERM EXPERIMENT (1985); G. THOMAS, THE ACCESS AND SUCCESS OF BLACKS AND HISPANICS IN U.S. GRADUATE AND PROFESSIONAL EDUCATION (1986).

306. See T. COOK, BLACK ACHIEVEMENT AND SCHOOL DESEGREGATION 985 (1984) (finding that African-American students educated in desegregated schools are more likely to graduate from high school and college and to major in more remunerative subjects). See generally WILLIAM J. WILSON, THE TRULY DISADVANTAGED (1987).

307. See Liebman, *supra* note 136, at 1624-25 n.675.

308. See generally Jomills H. Braddock, II & James M. McPartland, *The Social and Academic Consequences of School Desegregation*, EQUITY & CHOICE, Feb. 1988.

also suggests that African-American students who attend desegregated schools feel less stigmatized by race. Moreover, desegregation has been shown to make both African-American and White students who attend such schools from an early age more comfortable in racially integrated settings as adults.³⁰⁹ Progress for Hispanic students in desegregated schools, though not yet as widely researched, appears to be equally impressive.³¹⁰

It is particularly important to note that none of this progress by minority students has been achieved at the expense of White students' progress, as had been feared in 1954 and is still feared today. Studies of student achievement in desegregated settings have shown that White achievement test scores have either risen slightly or stayed the same.³¹¹ It has also been shown that white students have benefited from the school reforms which typically are initiated as part of a desegregation plan, as well as the increases in teacher training and interracial cooperation that desegregation fosters.³¹² White students, as well as minority students, benefit from learning to function in a racially diverse environment, a prerequisite for functioning in the racially diverse workforce of the future.³¹³

Nor has racial animosity or "white flight," which may occur at the beginning stages of a given implementation plan, been a permanent result.³¹⁴ In fact, those metropolitan areas which have implemented successful desegregation plans have actually experienced the *lowest* rates of white flight because of the enlargement of school district catchment areas beyond city boundaries and the unlinking of school

309. Liebman, *supra* note 136, at 1630 (quoting AMY GUTMAN, *DEMOCRATIC EDUCATION* 160, 163).

310. See U.S. COMM. ON CIVIL RIGHTS, *MEXICAN-AMERICAN EDUCATION STUDY* (Reports I-VI, April 1971-February 1974); *Mexicano/Chicano Concerns in School Desegregation in Los Angeles* (Monograph No. 9, UCLA Chicano Studies Center, 1977).

311. See WEINBERG, *supra* note 304, *passim*. See also the work of one of the State of Connecticut's own researchers: JANET W. SCHOFIELD, *CONN. ST. DEP'T OF EDUC., REVIEW OF SCHOOL DESEGREGATION'S IMPACT ON ELEMENTARY AND SECONDARY SCHOOL STUDENTS* (1989).

312. Desegregation has led to more educational reform than any other "school reform" methodology. MEYER WEINBERG, *NAT'L INST. OF EDUC., MINORITY STUDENTS: A RESEARCH APPRAISAL* 329 (1977).

313. U.S. LABOR DEP'T, *WORKFORCE 2000: WORK AND WORKERS FOR THE TWENTY-FIRST CENTURY* (1987); U.S. EQUAL OPPORTUNITY COMM'N PROJECT 2000: *JOB AND TRAINING OPPORTUNITIES FOR MINORITIES AND WOMEN* (1984). Both of these reports concluded that the workforce of the future will be increasingly multiracial and that those workers who know how to function effectively in these job settings will have substantial employment advantages.

314. Liebman, *supra* note 136, at 1622.

attendance zones and places of residence.³¹⁵ Ironically, it is those cases in which the cities alone have been included in the desegregation remedy—such as Detroit, Kansas City, St. Louis, Boston, and others—or those which have implemented no desegregation plan at all, which have experienced the highest incidence of white flight.³¹⁶

On a related issue, it is also important to note that in *Sheff*, the lower court's finding that school segregation is largely the result of residential segregation beyond the power of courts to rectify is contradicted by research. Empirical studies indicate that although the two forms of segregation are related, the causal connection actually runs in the opposite direction.³¹⁷ One of many studies concluded that school desegregation between 1968 and 1973 doubled the rate of housing integration in 25 central cities with an African-American population of at least 100,000.³¹⁸ Another study of 960 school districts found that cities which implemented metropolitan-wide desegregation plans experienced substantially increased housing integration, an effect evident in districts of all sizes and in all regions of the country.³¹⁹ Other studies have indicated that districts which have experienced desegregation over the longest period of time have the lowest levels of housing segregation as well.³²⁰

Therefore, it would appear that the *Sheff* lower court's finding that school segregation is the result of housing segregation may be false, as is the notion that the state is powerless to effect desegregation in either of these areas. The lower court's adoption of this view in

315. See *id.* at 1621 and particularly 1621-29 nn.664-693. See also WELCH & LIGHT, *supra* note 299, at 3-4.

316. *Id.*

317. See generally JOMILLS H. BRADDOCK, II & JAMES M. MCPARTLAND, MORE EVIDENCE ON THE SOCIAL-PSYCHOLOGICAL PROCESSES THAT PERPETUATE MINORITY SEGREGATION: THE RELATIONSHIP OF SCHOOL DESEGREGATION AND HOUSING DESEGREGATION (Johns Hopkins University, Center for the Social Organization of the Schools, Report 338, 1983); WILLIS D. HAWLEY, ET AL., STRATEGIES FOR EFFECTIVE DESEGREGATION: LESSONS FROM RESEARCH (1983); Gary Orfield, *Housing Patterns and Desegregation Policy*, *supra* note 305, *passim*; DIANA PEARCE, NAT'L INST. OF EDUC., BREAKING DOWN BARRIERS: NEW EVIDENCE ON THE IMPACT OF METROPOLITAN SCHOOL DESEGREGATION ON HOUSING PATTERNS (1980); and Meyer Weinberg, *Housing and School Desegregation: Citizen Initiatives and Government Responses*, 18 INTEGRATED EDUCATION 2-11 (July-August 1980).

318. Diana Pearce, Robert L. Crain, & R. Farley, *Lessons Not Lost: The Impact of School Desegregation on the Racial Ecology of Large American Central Cities*, Paper presented at the American Educational Research Association Annual Meeting, New Orleans (April 1984) (on file with author).

319. Karl Taeuber, *Desegregation of Public School Districts: Persistence and Change*, PHI DELTA KAPPAN, September 1990, at 18-24.

320. See PEARCE, *supra* note 317, *passim*.

Sheff merely contributes to the perception that segregated schools in inner cities are inevitable, and that white flight "is an inherently private matter beyond the scope of the law."³²¹

Much of the research data referred to above has been further documented by the State of Connecticut's own blue ribbon commissions which have studied this growing problem since 1965.³²² These prestigious groups have consistently recommended that the state do everything in its power to rectify the segregated conditions which now exist in Connecticut's schools. In reaching their conclusions, they have relied on some of the data cited herein, as well as their own commissioned report by Janet W. Schofield.³²³

In reaching its own decision in *Sheff*, the lower court appears to have ignored this data as well as voluminous testimony at trial from many of the most respected researchers in the country, who verified the research findings referred to in this section, and more. As the *Findings of Fact* issued on June 27, 1995 make clear, the court relied instead on the testimony of the handful of experts who disputed this body of research, only to find that the real problem in the Hartford schools is not that they are racially segregated but rather that the children attending these schools are so poor.³²⁴ Poverty, the court explained, is the strongest predictor of low academic achievement³²⁵ (and, of course, is another factor beyond the power of the court to remedy). Reasoning circularly, the court found that, taking the disparity in socio-economic class into account, the children in Hartford schools and those of its surrounding, largely White and affluent suburbs are scoring at about the level one would expect on the state mastery tests³²⁶ and therefore are receiving a "minimally adequate education."³²⁷ In effect, the court tells us that minority children are doing as well as can be expected under the circumstances while ignoring twenty years of research indicating what can be accomplished when the circumstances are changed. By refusing to acknowledge the

321. Tribe, *Constitutional Physics*, *supra* note 136, at 28. See also *supra* note 185 and accompanying text.

322. See, e.g., Gov.'s COMM'N ON QUALITY AND INTEGRATED EDUC., CROSSING THE BRIDGE TO EQUITY AND EXCELLENCE: A VISION OF QUALITY AND INTEGRATED QUALITY AND INTEGRATED EDUC. FOR CONN. (DEC. 1990) [hereinafter CROSSING THE BRIDGE]; CONN. ST. DEP'T OF EDUC., QUALITY AND INTEGRATED EDUC.: OPTIONS FOR CONN. (April 1989) (Follow-up Report to the January 1988 Report).

323. See SCHOFIELD, *supra* note 311.

324. *Sheff v. O'Neill*, No. SC15255, 1995 Conn. LEXIS 249, at *30-*43 (June 27, 1995).

325. *Id.* at *31.

326. *Id.* at *42-*43.

327. *Id.* at *40-*41.

power of courts to change the circumstances of children's lives, the court has, like the federal courts before it, declared the status quo to be inevitable.

This solid empirical record of progress has not been matched by any of the alternative approaches to providing equal educational opportunity in racially isolated settings such as "separate but enhanced schools" (termed the "gilded ghetto" approach by Liebman and others), "effective schools," school-based management methodologies, all-minority high schools, minority control of city school boards and other political institutions, and decentralized school districts.³²⁸ This failure by minority students to achieve equal educational and social progress in segregated settings under plans which focus on "equal treatment and equal access" or other "make-do in segregated schools" methodologies, has also been noted by the Governor's Commission on Quality and Integrated Education,³²⁹ the state's *second* group of experts to stress the vital importance of racially balanced school settings to the school achievement and social adjustment of minority children in a majority culture.³³⁰

Perhaps if the research data were not so compelling, it might yet be possible to argue that the State can provide equal educational opportunity in ways other than by assuring integrated school settings to all Connecticut public school students. In *Brown*, the Supreme Court declared that segregated schools were inherently unequal, largely on the basis of tentative sociological data.³³¹ There now appear to be more than adequate indicators that this statement is correct: separate can never be equal. To deprive Connecticut students, as well as their parents and their communities, of the social, intellectual, academic, and career achievements documented as achievable in successfully integrated schools, must be seen as a per se deprivation of the fundamental right to the equal educational opportunity mandated in *Horton*³³² because, as we now know, a like opportunity cannot be provided in any other way.

IV. Conclusion

State courts have a long history of independent constitutional adjudication under state constitutional provisions. More recently, the

328. Liebman, *supra* note 136, at 1489-91 n.142.

329. See *CROSSING THE BRIDGE*, *supra* note 322.

330. See *SCHOFIELD*, *supra* note 311.

331. *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 n.11, 495 (1954).

332. 376 A.2d 359, 369-70 (Conn. 1977).

Connecticut Supreme Court has creatively construed its own constitution to provide additional protections to the rights and liberties of Connecticut citizens beyond federal minimums. The lower court's decision in *Sheff v. O'Neill* fails to fulfill the promise of that legacy, even as it fails to protect the fundamental rights of some of the most vulnerable of those citizens.

Should the Connecticut Supreme Court affirm the *Sheff* lower court's opinion, it will be perpetuating the serious error made at the federal level over twenty years ago. The United States Supreme Court in effect said in *Milliken*, "We know that you are being deprived of an equal educational opportunity due to your required attendance in racially, ethnically and socio-economically segregated schools within state-authorized attendance zones, but unless affirmative discriminatory acts of the state have 'caused' the problem, we cannot help you." This error has made one of the most troubling domestic issues facing our country—perhaps the defining problem of American history³³³—all but impossible to cure. However, there is one important difference. The Connecticut Supreme Court will be acting with full access to a body of extensive research unavailable when *Milliken* was decided in 1974. Whether such findings would have diverted the *Milliken* majority from their doctrinal course cannot be known. But the moral dilemma for a Connecticut court acting under Connecticut constitutional provisions in 1996 is substantially increased.

Instead, the Connecticut Supreme Court should overrule the *Sheff* lower court's decision and, pursuant to their obligation to independently construe the provisions of the Connecticut Constitution, declare that the federal state action/discriminatory intent/causation standard, which has hampered federal courts in solving the pernicious problem of metropolitan-wide segregation, has no place in Connecticut state constitutional adjudication.

The Connecticut Supreme Court should build on the excellent foundation laid in *Horton* and take the lead from other states such as Montana where the Montana Supreme Court declared a fundamental state right to education and held that the state constitutional guarantee of equality of educational opportunity was not merely an aspirational goal but a real guarantee, binding on all three branches of government, whether at the state, local, or school district level.³³⁴ Surely, in light of what we now know can be achieved by making good on such a guarantee, the school-age plaintiffs in *Sheff* deserve no less.

333. See Liebman, *supra* note 136, at 1473.

334. *Helena Elem. Sch. Dist. v. State*, 769 P.2d 684, 684-88 (Mont. 1989).