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Closing the School Doors in the Pursuit of Equal Education Opportunity: A Comment on *Montoy v. State*, 2003 WL 22902963 (Kan. Dist. Ct. 2003)

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TABLE OF CONTENTS

I. INTRODUCTION

In *Brown v. Board of Education of Topeka*,[2] the U.S. Supreme Court decided its most significant case on equal education opportunity. In the year of *Brown*'s fiftieth anniversary, Topeka, Kansas again provides the site for what may become widely-cited as a revolutionary decision on equal education opportunity. In December 2003, Shawnee County, Kansas District Court Judge Terry Bullock held that the Kansas system of funding schools provided unequal educational funding and was unconstitutional. His ruling in *Montoy v. State* was in response to a lawsuit filed in 1999, claiming that the State's funding formula is unconstitutional, because it is "inadequate

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1. No. 99-C-1738 (Shawnee County, Kan. Dist. Ct. Dec. 2, 2003) (Memorandum Decision and Preliminary Interim Order); Montoy v. State, No. 99-C-1738, 2004 WL 1094555 (Shawnee County, Kan. Dist. Ct. May 11, 2004) (Decision and Order Remedy), *available at* http://www.shawneecourt.org/decisions/Montoy (REMEDY).html.

2. 347 U.S. 483 (1954).

and inequitable."[3] Judge Bullock withheld issuing a final order and gave the Kansas legislature and governor until July 1, 2004 to remedy the system. The legislature considered numerous proposals, but failed to reach an agreement and adjourned on May 8, 2004, without changing the existing formula or allocating additional resources. On May 11, Judge Bullock issued his Decision and Order in the case, freezing all payments from the State to school districts, effective June 30, 2004. The order required that public schools be closed on June 30 and kept closed until the legislature took corrective action to eliminate the "inequitable and inadequate" educational system in the state:

> This action by the court will terminate all spending functions under the unconstitutional funding provisions, effectively putting our school system on "pause" until the unconstitutional funding defects are remedied by the legislative and executive branches of our government. Although this action may delay our children's education slightly (should the other branches fail to respond quickly), it will end the inadequate and inequitable education being provided now and the disparate damage presently being done to the most vulnerable of our children.[4]

II. THE KANSAS SCHOOL FINANCE LITIGATION AND RURAL SCHOOLS

The Kansas Supreme Court issued a stay of Judge Bullock's order on May 19, 2004 and heard oral arguments in the case on August 30, 2004.[5] In my Article in the 2003 Symposium issue of the *Nebraska Law Review* on rural school finance litigation, I concluded that equitable claims were still viable for rural school finance litigation, but noted that even in successful cases, the attempts to find appropriate remedies presented problems and required that the appropriate remedy be carefully considered as a part of litigation strategy.[6] In that same issue, Malhoit and Black discuss the approaches that courts have taken

3. Montoy v. State, No. 99-C-1738, 2003 WL 22902963, at *51 (Shawnee County, Kan. Dist. Ct. Dec. 2, 2003) (Memorandum Decision and Preliminary Interim Order).

4. Montoy v. State, No. 99-C-1738, 2004 WL 1094555 (Shawnee County, Kan. Dist. Ct. May 11, 2004) (Decision and Order Remedy), *available at* http://www.shawneecourt.org/decisions/Montoy(REMEDY).html.

5. An appeal was filed and the state supreme court issued a stay of Judge Bullock's order on May 19, 2004. Order, Emergency Motion to Stay District Court Proceedings, Montoy v. State (Kan. May 19, 2004) (No. 92,032), *available at* http://www.kscourts.org/schoolfinanceorder20040519.pdf. See discussion *infra* accompanying notes 25–38.

6. *See* Anna Williams Shavers, *Rethinking the Equity vs. Adequacy Debate: Implications for Rural School Finance Reform Litigation*, 82 NEB. L. REV. 133, 178–81 (2003).

to remedying inadequacy and inequity in school finance.[7] Judge Bullock's order provides an opportunity to revisit this issue.

Since nearly half the schools in Kansas are rural, and the state ranks seventh in the percentage of its students who attend smaller rural schools,[8] the litigation and resulting orders may have significant implications for rural school districts in Kansas and other states.

Like many states, the school finance litigation in Kansas dates back to the 1970s.[9] In 1972, the trial court in *Caldwell v. State*[10] found the Kansas public education-funding system unconstitutional on equal protection grounds, because the State had not provided enough aid to offset disparities among school districts in taxing efforts and per-pupil expenditures. In response, the Kansas Legislature enacted the 1973 School District Equalization Act ("SDEA"), which established a foundation level of school funding per pupil, in which the State would make up the difference between local revenues and this target amount. Subsequently, in 1990, plaintiffs, including forty-two school districts, in the consolidated lawsuit *Mock v. State,*[11] challenged the constitutionality of the SDEA and the state school finance formula, alleging that the school districts receive less than a proportionate share of the funding for elementary and secondary education. The *Mock* plaintiffs claimed that the system, which relied upon local mill levies, was unconstitutional. In advance of trial, Judge Bullock issued a pretrial opinion on certain questions of law raised by the lawsuits, finding the State's school finance formula unconstitutional.[12] He held that under the Education Article of the Kansas Constitu-

7. *See* Gregory C. Malhoit & Derek W. Black, *The Power of Small Schools: Achieving Equal Educational Opportunity Through Academic Success and Democratic Citizenship*, 82 NEB. L. REV. 50, 67–74 (2003).

8. Elizabeth Beeson & Marty Strange, *Rural School and Community Trust, Why Rural Matters: The Need for Every State to Take Action on Rural Education* 40 (2003), *available at* http://www.ruraledu.org/streport/pdf/ks_2003.pdf; *see also* NAT'L ASS'N OF STATE BDS. OF EDUC., RURAL EDUCATION: WHAT'S DOWN THE ROAD FOR SCHOOLS 2 (1996) (The 1996 NASBE report provided figures that, in Kansas 81.3 percent of school districts were rural and 51.7 percent of students attended rural schools.) (citing NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., COMMON CORE OF DATA PUBLIC SCHOOL UNIVERSE, 1991–1992), *available at* http://www.nasbe.org/Educational_Issues/Reports/Rural_Schools.pdf.

9. *See* Charles Berger, *Equity Without Adjudication: Kansas School Finance Reform and the 1992 School District Finance and Quality Performance Act*, 27 J.L. & EDUC. 1 (1998).

10. No. 50616, slip. op. (Johnson County, Kan. Dist. Ct. Aug. 30, 1972).

11. No. 91-CV-1009 (Shawnee County, Kan. Dist. Ct. Oct. 14, 1991).

12. Mock v. State, No. 91-CV-1009 (Shawnee County, Kan. Dist. Ct. Oct. 14, 1991) (opinion on questions of law presented in advance of trial), *reprinted* in Philip C. Kissam, *Constitutional Thought and Public Schools: An Essay on* Mock v. State of Kansas, 31 WASHBURN L.J. 474, 489–505 (1992).

tion,[13] "the duty owed by the Legislature to each child to furnish him or her with an educational opportunity is equal to that owed every other child."[14] Judge Bullock agreed to delay the trial in order to give the governor and the legislature the chance to consider taking corrective action consistent with the principles that he had identified. A gubernatorial task force was created, which devised a new school finance system that was submitted to the legislature, leading to the School District Finance and Quality Performance Act ("SDFQPA"), which was adopted in 1992.[15] The SDFQPA created a statewide property tax and a statewide system for collecting and distributing taxes for all districts. Rural and small schools initially benefited from the redistribution of taxes.[16] The system also set, among other things, a minimum level of state aid per pupil and an accountability system based upon minimum state standards in specified courses.

Following passage of the new act, Judge Bullock dismissed some of the consolidated cases and transferred jurisdiction of the remaining cases to Judge Marla Luckert. After a trial of the cases in the summer of 1993, Judge Luckert issued her 168-page opinion in December 1993, finding the 1992 law unconstitutional. Judge Luckert stayed the effective date of the finding until July 1, 1994. On appeal, the Kansas Supreme Court upheld the constitutionality of the 1992 Act in *Unified School District No. 229 v. State*.[17] In response to the district court's finding that the Act violated section 6(b) of Article 6 of the Kansas Constitution, in that it does not contain "suitable provision for finance of the educational interests of the state," the Kansas Supreme Court decided that the constitutional provision placed the responsibility for determining what was "suitable" with the legislature.[18]

Montoy v. State was filed by two school districts and thirty-one students from those districts. The students represented various protected classes, including African-American, Hispanic, Asian-American, students with disabilities, and those of non-United States

13. KAN. CONST. art. 6, § 6b ("The Legislature shall make suitable provision for finance of the educational interests of the state . . .").
14. Kissam, *supra* note 12, at 475; *See also* Mock v. State, No. 91-CV-1009 (Shawnee County, Kan. Dist. Ct. Oct. 14, 1991).
15. KAN. STAT. ANN. §§ 72-6405 to -6440 (2003). The Legislature also established the School District Capital Improvements State Aid Program, based on an equalization concept, in order to assist school districts in making bond and interest payments. The latter was enacted in response to Judge Bullock's pretrial ruling that all costs—including capital expenditures—are included in the constitutional mandate placed on the Legislature by the Education Article of the Kansas Constitution. *See* Berger, *supra* note 9.
16. Nancy Niles Lusk, *A Primer on Kansas School Finance*, KANSAS CITY STAR, Feb. 28, 2004, *at* http://www.kansascity.com/mld/kansascitystar/news/local/states/kansas/counties/johnson_county/cities_neighborhoods/shawnee/8060430.htm.
17. 885 P.2d 1170 (Kan. 1994).
18. *Id.* at 1182.

origin. Named as defendants were the State of Kansas, the Governor of Kansas, the state treasurer, each member of the State Board of Education, and the Commissioner of the Kansas Department of Education. The plaintiffs alleged three separate violations of the Kansas Constitution: (1) a failure of the Legislature to make "suitable provision for finance of the educational interests of the state" as required by KAN. CONST. art. 6, § 6(b); (2) violations of state equal protection; and (3) state substantive due process violations. All of the violations were based upon a challenge of the total amount of funds provided to their school districts.[19] Specifically, the plaintiffs challenged the low-enrollment weight, the local option budget, special education excess costs, and capital outlay factors utilized in the school-funding formula.[20] They also claimed that, under the formula, too much money goes to rural school districts. Judge Bullock *sua sponte* granted judgment for the defendants, on procedural and substantive grounds, primarily basing his decision on the supreme court's 1994 decision in *Unified School District No. 229* that upheld the state education finance system. However, in January 2003, the Kansas Supreme Court reversed Judge Bullock's dismissal and ordered the case back to the trial court for further proceedings. The court instructed Judge Bullock (1) that *Unified School District No. 229*[21] required a more vigorous analysis than Judge Bullock had presumed and (2) that, while the legislature had the responsibility to promulgate education standards, the "ultimate question on suitability" remained with the court.[22]

After an eight-day bench trial, on December 2, 2003, Judge Bullock issued a preliminary order in the case, finding that the school finance formula was unconstitutional, and setting a deadline of July 1, 2004, to allow a full legislative session for "our Legislature and our state's chief executive [to] step up to the challenge to bring the Kansas school funding scheme into compliance" with the state constitution.[23] In reaching his decision, Judge Bullock first reexamined his opinion in *Mock v. State*,[24] concluding that the analysis was still good law since the decision had not been appealed, and then he discussed the analysis provided by the Kansas Supreme Court in *Unified School District*.

19. Montoy v. State, No. 99-C-1738, 2004 WL 1094555 (Shawnee County, Kan. Dist. Ct. May 11, 2004) (Decision and Order Remedy), *available at* http://www.shawneecourt.org/decisions/Montoy(REMEDY).html.
20. At the same time, the same attorneys filed a case on behalf of many of the same plaintiffs in the U.S. District Court, arguing that the school finance scheme violated the federal Constitution. Robinson v. Cahill, 358 A.2d 457 (N.J. 1976).
21. District Court Judge Luckert, who decided *Unified School District No. 229*, was appointed to the Kansas Supreme Court in November 2002.
22. Montoy v. State, 62 P.3d 228, 234 (Kan. 2003).
23. Montoy v. State, No. 99-C-1738, 2003 WL 22902963, at *50 (Shawnee County, Kan. Dist. Ct. Dec. 2, 2003) (Memorandum Decision and Preliminary Interim Order).
24. No. 91-CV-1009 (Shawnee County, Kan. Dist. Ct. Oct. 14, 1991).

Judge Bullock provided guidelines for making the funding system more equitable, more adequate, and for providing more resources for the school districts educating the groups represented by the plaintiffs. The court retained jurisdiction and set a date to reconvene in July 2004 to review the actions taken by both the governor and the legislature to remedy the constitutional violations.

When the Kansas Legislature failed to approve a school finance plan and ended its 2004 session, just three days later, Judge Bullock issued his order to close schools. The State Attorney General filed a motion with the Supreme Court seeking a stay of Judge Bullock's order until the Supreme Court could rule on the appeal. The parties in the lawsuit then filed a joint order seeking clarification of Judge Bullock's remedies order. Specifically, the parties asked that the judge clarify whether the order ceasing the expenditure of funds for education would apply to the expenditure of funds related to financial obligations for the acquisition of capital assets. Judge Bullock's school-closing order resulted in some confusion, causing him to issue a clarifying Memorandum and Decision Order that same day which permitted the expenditure of funds for the financial obligations related to the acquisition of capital assets.[25] The decision did not prohibit school districts from paying general obligation bonds, temporary notes, no-fund leases and warrants, or lease-purchases, or from making other related payments to school districts from the school district capital improvements fund. On May 19, 2004, the Kansas Supreme Court granted the stay requested by the State.[26] Oral arguments on the case were held on August 30, 2004. In response to Judge Bullock's findings that the school finance formula favors rural school districts over urban school districts and that there is no rational basis for low-enrollment weighting, rural and smaller school districts defended their funding levels and argued that, with the funding formula based on enrollment, additional dollars are necessary to provide quality education.[27] A rejection of the formula could lead to consolidation of smaller schools and a reduction in the number of school districts in Kansas. Fifty districts have fewer than 250 students.[28] Plaintiffs argued that the formula provides too much money to small, rural schools

25. Montoy v. State, No. 99-C-1738 (Shawnee County, Kan. Dist. Ct. May 18, 2004) (Memorandum Decision and Preliminary Interim Order), *available at* http://www.shawneecourt.org/decisions/Montoy(bond).html.

26. Montoy v. State, No. 92,032 (Kan. May 19, 2004) (order granting preliminary injunction), *available at* http://www.kscourts.org/schoolfinanceorder20040519.pdf.

27. John Milburn, *Varied Voices Weigh In on School Finance Case*, LAWRENCE J.-WORLD, Aug. 29, 2004, *available at* http://6news.ljworld.com/section/schoolfinance/story/179851.

28. RURAL EDUC. FIN. CTR., THE RURAL SCHOOL FUNDING REPORT—VOLUME 2, ISSUE 3 (Feb. 15, 2003), *available at* http://www.ruraledu.org/issues/finance/news203.htm#kansas.

at the expense of districts with relatively high concentrations of poor and minority students.[29]

III. REMEDIAL ORDERS IN SCHOOL FINANCE CASES

An initial reaction to Judge Bullock's school-closing order may be that he was usurping powers of the legislative and executive branches of government and indulging in judicial activism. But, the evidence is against such a conclusion. Judge Bullock "describes his judicial philosophy as 'basically conservative.'"[30] His actions in *Montoy* indicate that he was meticulously trying to follow the law and guidance of the Kansas Supreme Court and give proper recognition to the functions of each branch of government. In fact, he initially dismissed the suit based upon the 1994 decision in *Unified School District No. 229*, but the Kansas Supreme Court overruled him. In his December 2003 preliminary order, he set out a separate section on his proposed remedy, where he emphasized the different responsibilities given to the three branches of government in the Kansas Constitution. His opinion makes it clear that he preferred to avoid the coercive action[31] of closing schools and preferred that a solution be reached by the legislature and the governor, much like what had occurred after his opinion in *Mock v. State*.[32] What led Judge Bullock to enter such a radical, far-reaching, remedial order in which he ordered schools to close if the state legislature did not remedy the situation, was a combination of the circumstances existing in Kansas as well as nationwide.

As Judge Bullock stated in both his December and May orders, the Kansas school finance scheme "dramatically and adversely impacted the learning and educational performance of the most vulnerable and/or protected Kansas children [which] occurred by virtue of underfunding, generally, and selective underfunding of . . . schools."[33] He also recognized that remedial orders in school finance cases have been unpredictable and in many cases ineffectual. Many courts have been reluctant, for a number of reasons, to become too actively involve in school finance controversies, preferring to defer to the political

29. Associated Press, *Small School Districts Officials Nervous About School Finance Case*, Sept. 5, 2004, *available at* http://www.kansas.com/mld/kansas/news/state/9590801.htm

30. Berger, *supra* note 9, at 16.

31. Injunctions are generally viewed as coercive remedies. See D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES, 2.9–.10, at 93–113 (1973).

32. In *Mock*, Judge Bullock also threatened to close schools if the legislature did not take corrective action. Steve Painter, *Can Judge Force Action on Schools?*, KANSAS.COM, THE WICHITA EAGLE, Dec. 7, 2003, *at* http://www.kansas.com/mld/kansas/news/state/7432705.htm.

33. Montoy v. State, No. 99-C-1738, 2004 WL 1094555, at *3 (Shawnee County, Kan. Dist. Ct. May 11, 2004) (Decision and Order Remedy), *available at* http://www.shawneecourt.org/decisions/Montoy(REMEDY).html.

branches of government. Additionally, because of the impact on a state treasury and taxpayers, courts have responded to school finance litigation by leaving remedial measures to legislatures even when a constitutional violation is found.[34] However, there is a continued role for the courts. As Rebell and Hughes have put it, "[w]ithout judicial guidance and oversight, the legislative and executive branches can not realistically be expected to solve these confrontational problems—which come to the courts' attention in the first place largely because the other branches fail to deal with them."[35] The state courts have deferred to the legislatures to take action and have avoided what has been described by some as the federal court model[36] of institutional reform.[37] Institutional reform litigation in federal court that involves schools, prisons, jails, and other government institutions[38] has resulted in the courts exercising remedial powers that are not present in typical judicial remedies. The desegregation cases that arose after *Brown* are often discussed as instances of institutional reform litigation.[39]

The traditional approach of having the state courts decide if rights have been violated and then turning the matter over to the legislature to formulate a remedy has not been successful in school finance cases. Consider for example, the *DeRolph*[40] school-funding case in Ohio. In 1991 a lawsuit was filed against the state of Ohio claiming that the school-funding system was unconstitutional. In 1994, a district court judge found education to be a fundamental right in Ohio and that the Ohio funding system was unconstitutional. In 1997, the Ohio Su-

34. *See generally* George D. Brown, *Binding Advisory Opinions: A Federal Courts Perspective on the State School Finance Decisions*, 35 B.C. L. REV. 543 (1994).

35. Michael A. Rebell & Robert L. Hughes, *Efficacy and Engagement: The Remedies Problem Posed by* Sheff v. O'Neill—*and a Proposed Solution*, 29 CONN. L. REV. 1115, 1119 (1997); *See also* Jonathan Banks, Note, State Constitutional Analyses of Public School Finance Reform Cases: Myth or Methodology?, 45 VAND. L. REV. 129, 154–55 (1991) (suggesting that courts are more willing to order remedial action when they conclude that legislatures will not pass the necessary remedial legislation).

36. Rebell & Hughes, *supra* note 35, at 1120.

37. *See generally* Brown, *supra* note 34, at 543.

38. *See* Molly Townes O'Brien, *At the Intersection of Public Policy and Private Process: Court-Ordered Mediation and the Remedial Process in School Funding Litigation*, 18 OHIO ST. J. ON DISP. RESOL. 391 (2003) (citing Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 467 n.6 (1980) (typically requiring the courts to scrutinize the operation of large public institutions, examples include challenges to conditions in prison and in mental hospitals, and litigation involving voting districts and school desegregation)); *see also* Margo Schlanger, *Beyond the Hero Judge: Institution Reform Litigation as Litigation*, 97 MICH. L. REV. 1994 (1999).

39. *See e.g.*, Susan Poser, *Termination of Desegregation Degrees and the Elusive Meaning of Unitary Status*, 81 NEB. L. REV. 283, 295–99 (2002).

40. DeRolph v. State, 677 N.E.2d 733 (Ohio 1977) [*DeRolph I*].

preme Court upheld the decision.[41] Starting with 1997, four Ohio Supreme Court decisions ruled that the system was unconstitutional.[42] After the court's second decision in 2000, and the legislature's failure to adequately change the system, some commentators characterized the actions of Ohio's legislature as defiance and urged the court to take a more active role in the remedial process.[43] The court's third opinion in *DeRolph v. State*, stated that there was "no reason to retain jurisdiction" and that "[i]f the order receives less than full compliance, interested parties have remedies available to them."[44] The court appointed a mediator in December 2001 with the hopes of resolving the funding issues.[45] The mediation failed,[46] and in December 2002, in response to a motion for reconsideration, the court vacated its opinion in *DeRolph III*. The court then issued its fourth opinion of unconstitutionality and found that the legislature had not complied with the court's previous orders.[47] The court directed the legislature "to enact a school-funding scheme that is thorough and efficient, as explained in *DeRolph I*, *DeRolph II*, and the accompanying concurrences,"[48] but decided to not retain jurisdiction over the case. In response to an action filed in the County Common Pleas Court seeking an order compelling state officials to comply with the supreme court's December 2002 ruling, in May 2003, the Ohio Supreme Court issued a Writ of Prohibition sought by the State and barring the county judge from conducting any further proceedings in the *DeRolph* school-funding case.[49] The court stated that "[t]he duty now lies with the General Assembly to remedy an educational system that has been found by the majority in *DeRolph IV* to still be unconstitutional."[50] On August 13, 2003, the

41. *Id.*
42. *Id.* (declaring the school-funding system unconstitutional by a 4–3 vote); DeRolph v. State, 728 N.E.2d 993 (Ohio 2000) [*DeRolph II*] (Lawmakers have made strides in the right direction by increasing funding to education, however, the system was still found unconstitutional. The court gave the legislature until June 15, 2001 to fix it.); DeRolph v. State, 754 N.E.2d 1184 (Ohio 2001) [*DeRolph III*]; DeRolph v. State, 780 N.E.2d 529 (Ohio 2002) [*DeRolph* IV] (leaving in place its *DeRolph III* decision; held that the General Assembly had failed to meet the mandates of the court's first two orders in the case). *See* State *ex rel.* State v. Lewis, 789 N.E.2d 195, 197 (Ohio 2003).
43. *See, e.g.*, Suzanne Ernst Drummond, Comment, *Deja Vu: The Status of School Funding in Ohio After* DeRolph II, 68 U. CIN. L. REV. 435, 460 (2000).
44. *DeRolph III*, 754 N.E.2d at 1201.
45. DeRolph v. State, 760 N.E.2d 351 (Ohio 2001).
46. Howard S. Bellman, *Master Commissioner's Report*, DeRolph v. State, 754 N.E.2d 1184 (Ohio Mar. 21, 2002), *available at* http://www.sconet.state.oh.us/derolph/bellman3-21.pdf.
47. *DeRolph IV*, 780 N.E. 2d 529.
48. *Id.* at 530.
49. State *ex rel.* State v. Lewis, 789 N.E.2d 195 (Ohio 2003), *cert. denied*, 540 U.S. 966 (Oct. 20, 2003).
50. *Id.* at 202.

plaintiffs filed a petition for a *writ of certiorari* with the United States Supreme Court, which was denied on October 20, 2003. Thus, the plaintiffs in Ohio remain with a finding of unconstitutionality but no remedial order for enforcement.

As Rebell has stated:

> [F]ew of the [school finance] victories have resulted in reforms that have demonstrably ameliorated the inequities. [O]verall, the record is disappointing. In some states, court orders have been virtually ignored; in others, the courts have felt compelled repeatedly to strike down legislative responses which were inadequate or unconstitutional or both.[51]

An article written by Professor Kaden two decades ago, in which he advocates greater state court involvement in school finance reform, continues to be convincing.[52] In an article describing the strategy used to obtain a desegregation/school finance victory from the Connecticut Supreme Court in *Sheff v. O'Neill*,[53] Professor Brittain expresses his disappointment with the progress made in the remedial phase of the litigation by stating that "[w]henever the courts put the remedy back into the hands of the perpetrator, they commit the first basic mistake."[54] Judge Bullock has recognized this need for more state court involvement in school finance controversies.

In his Remedy Order, Judge Bullock cited a number of states where there has arguably been a failure to correct school financing problems because the state legislative remedies have not implemented the necessary reforms for achieving the rights as defined by the courts. In many cases, courts were compelled to utilize various techniques to oversee the actions of the legislature, including the appointment of special masters,[55] the imposition of time deadlines for

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51. Michael A. Rebell, *Fiscal Equality in Education: Deconstructing the Reigning Myths and Facing Reality*, 21 N.Y.U. REV. L. & SOC. CHANGE 691, 693–94 (1995) (citations omitted).

52. *See* Lewis B. Kaden, *Courts and Legislatures in a Federal System: The Case of School Finance*, 11 HOFSTRA L. REV. 1205, 1255–59 (1983). *See also* Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072, 1072 (1991) (asserting that "unwarranted judicial deference to the political branches in the remedial phase hinder[s] the school finance plaintiff's prospects for securing a constitutional remedy").

53. 678 A.2d 1267 (Conn. 1996).

54. Symposium, Brown v. Board of Education *at Fifty: Have We Achieved Its Goals?*, 78 ST. JOHN'S L. REV. 281, 286 (2004) (Remarks of John C. Brittain). *See also* David M. Engstrom, *Civil Rights Paradox? Lawyers and Educational Equity*, 10 J.L. & POL'Y 387, 404 (2002) (concluding that the court's deference to the legislative and executive branches resulted in no significant change to the financing of racially isolated schools). In January 2003, the plaintiffs and Governor reached a settlement in *Sheff v. O'Neill*, which was approved by the General Assembly and the trial court. *See* Michael Besso, Sheff v. O'Neill*: The Connecticut Supreme Court at the Bar of Politics*, 22 QUINNIPIAC L. REV. 165 (2003).

55. Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472 (Ark. 2002); Abbott v. Burke, 710 A.2d 450 (N.J. 1998).

corrective action,[56] the maintaining of jurisdiction to oversee the implementation of a proper remedy,[57] and even handing down school-funding provisions that were to be adopted by the legislature.[58]

As Mills and McClendon have concluded, improvement in an education system "depends upon the legislature responding positively and comprehensively to a court declaration."[59] Professor Dyson has suggested that it may be time for litigants to rethink the remedial phase of school finance litigation.[60] Professor Ryan has also observed that "court decisions . . . often wax grandiloquent in describing the rights involved and wane to the point of silence when it comes to specifying a remedy."[61] Judge Bullock's approach is consistent with these admonitions. His first approach is for the judiciary and the political branches of government to work together to solve the school finance problem and then only use extraordinary measures when a failure occurs. Having found that the present system was unconstitutional, he reasoned that it was therefore void and could not be used to fund the school districts.[62] Judge Bullock has faced head-on the issue of remedial orders necessary to implement findings of unconstitutional school finance formulas. A number of commentators have praised Judge Bullock's actions, including Pennsylvania Congressman Chaka Fattah who issued a press release commending Judge Bullock.[63] Congressman Fattah has introduced a Student Bill of Rights,[64] which is aimed at providing public school systems with adequate and equitable resources.

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56. Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326 (N.Y. 2003) (The New York court gave the state one year); McDuffy v. Sec'y of the Executive Office of Educ., 615 N.E.2d 516 (Mass. 1993).
57. Hoke County Bd. of Educ. v. North Carolina Bd. of Educ., 95 CVS 1158 (Wake County, N.C. Dist. Ct. 2002).
58. Montoy v. State, No. 99-C-1738, 2004 WL 1094555, at *19 (Shawnee County, Kan. Dist. Ct. May 11, 2004) (Decision and Order Remedy), *available at* http://www.shawneecourt.org/decisions/Montoy(REMEDY).html.
59. Jon Mills & Timothy Mclendon, *Setting a New Standard for Public Education: Revision 6 Increases the Duty of the State to Make "Adequate Provision" for Florida Schools*, 52 FLA. L. REV. 329, 383 (2000).
60. Maurice R. Dyson, *A Covenant Broken: The Crisis of Educational Remedy for New York City's Failing Schools*, 44 HOW. L.J. 107 (2000).
61. James E. Ryan, *The Influence of Race in School Finance Reform*, 98 MICH. L. REV. 432 n.116 (1999).
62. Montoy v. State, No. 99-C-1738, 2004 WL 1094555, at *20 (Shawnee County, Kan. Dist. Ct. May 11, 2004) (Decision and Order Remedy), *available at* http://www.shawneecourt.org/decisions/Montoy(REMEDY).html.
63. News Release, Office of Congressman Chaka Fattah, Congressman Fattah Commends Kansas School Finance Ruling (Dec. 2, 2003), *available at* http://www.house.gov/apps/list/press/pa02_fattah/Kansas_Ruling.html.
64. H.R. 236, 108th Cong. (2003) (providing for adequate and equitable educational opportunities for students in State public school systems, and for other purposes) (Congressman Fattah and 180 co-sponsors have introduced legislation that would establish a Student Bill of Rights).

IV. SCHOOL CLOSINGS AND EQUAL EDUCATION OPPORTUNITY

Even if it is conceded that courts should become more actively involved in constructing remedial measures, the question remains as to whether closing schools is an appropriate remedy. School closings have a generally negative history in the attainment of equal education opportunity. Such actions have often been viewed as a method of resistance to avoid equal education opportunity.

School closings were the method of massive resistance[65] used in connection with desegregation orders. In those situations, it was the school boards, governors and legislatures that were resisting court orders and closing schools to prevent students from obtaining equal education opportunity. In desegregation situations, closing schools was an unprecedented act of defiance.[66] When *Brown* led to the issuance of desegregation orders for Little Rock, Arkansas schools, and the attendance of the Little Rock Nine at Central High School in 1957, after the end of the school year, the governor called the legislature into special session to obtain broad powers to prevent desegregation of the schools.[67] This grant of authority led Governor Faubus to close the high schools in 1958 and attempt to use public schools leased to private school corporations to avoid integration. Hundreds of high school students lost a year of high school and some never returned.[68]

In 1959, the Prince Edward County, Virginia County Board of Supervisors refused to appropriate funds for the operation of public schools in an attempt to avoid integration. A private foundation was established to operate schools for white children only, who in 1960 became eligible for county and state tuition grants.[69] Prince Edward County was one of the five cases that led to the *Brown* decision. Virginia's school-closing law was ruled unconstitutional in January

65. *See generally* Judith A. Hagley, *Massive Resistance—The Rhetoric and the Reality*, 27 N.M. L. REV. 167 (1997).

66. *See, e.g.*, Reed v. Rhodes, 179 F.3d 453, 474 (6th Cir. 1999) (noting the "menacing history" of the school board's "resistance, defiance, and utter disregard for [remedial] orders").

67. *Governor's School-Closing Proclamation*, 3 RACE REL. L. REP. 869 (1958); *see also Act No. 4 of the 1958 Extraordinary Session of the Arkansas Legislature*, 3 RACE REL. L. REP. 1048–49 (1958).

68. For a discussion of Little Rock and desegregation, see JUAN WILLIAMS, EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS, 1954–1965 at 91–119 (1987).

69. *See generally* J. KENNETH MORLAND, THE TRAGEDY OF CLOSED PUBLIC SCHOOLS: PRINCE EDWARD COUNTY, VIRGINIA: A REPORT FOR THE VIRGINIA ADVISORY COMMITTEE TO THE UNITED STATES COMMISSION ON CIVIL RIGHTS (1964), *available at* http://www.library.vcu.edu/jbc/speccoll/report1964.pdf; ROBERT C. SMITH, THEY CLOSED THEIR SCHOOLS: PRINCE EDWARD COUNTY, VIRGINIA 1951–1964 (1965).

1959,[70] both by the Virginia Supreme Court of Appeals and a federal district court. The state legislature then repealed the compulsory school attendance law and made the operation of public schools a local option for the state's counties and cities.[71] Hundreds of black school children had no schooling from 1959 until 1963. Public schools were finally reopened and integrated when the U.S. Supreme Court held in *Griffin v. County School Board of Prince Edward County*[72] that Virginia's tuition grants to private education was unlawful.

Desegregation orders in many states also led to the closing of African-American schools in favor of busing into white neighborhoods. This also resulted in the loss of jobs for black teachers based upon the assumption that white parents did not want black teachers for their children.[73] Some African-Americans boycotted school closings and transfers and requested additional funding to improve their schools.

The pursuit of equal education opportunity by black children in the south is still sometimes counteracted with school closings. Now the closings come in the form of school consolidation. Take, for example, Lake View School District in Arkansas. Lake View is a rural school district with an all-black student body. After Lake View sued and won in court,[74] the state implemented a school finance plan which would force the school district to close and consolidate with another school district. The consolidation plans from some state legislatures have resulted in the consolidation of rural districts into unified school districts and the closure of many small rural schools.[75] Thus, school finance litigation by rural school districts has been avoided in some circumstances for fear of being punished for their actions by a school consolidation plan.

Judge Bullock's order and remedy, however, is not based upon any of the negatives associated with desegregation closings or consolidation closings. Judge Bullock has issued an order with the hopes of motivating the legislature and the executive branch to resolve the inequitable and inadequate system. All school children stand to benefit from this "coerced" action. While some rural districts may not look

70. James v. Almond, 170 F. Supp. 331 (E.D. Va. 1959) (violation of Fourteenth Amendment of the U.S. Constitution); Harrison v. Day, 106 S.E.2d 636 (Va. 1959) (violation of section 129 of Virginia's State Constitution).

71. Even prior to *Brown*, some states had passed laws allowing the closing of schools to avoid integration. *See* Kevin D. Brown, *Reexamination of the Benefit of Publicly Funded Private Education for African-American Students in a Post-Desegregation Era*, 36 IND. L. REV. 477, 492–93 (2003).

72. 377 U.S. 218 (1964).

73. *See generally* Greg Toppo, *Thousands of Black Teachers Lost Jobs*, USA TODAY, April 28, 2004, at D06.

74. Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472 (Ark. 2002), *cert denied*, 538 U.S. 1035 (May 19, 2003).

75. *See generally* Robert M. Bastress, *The Impact of Litigation on Rural Students: From Free Textbooks to School Consolidation*, 82 NEB. L. REV. 9 (2003).

favorably on Judge Bullock's order because it could mean the creation of a school finance formula that gives rural school districts less favorable financing than urban districts[76] and result in them being at a disadvantage if the school formula is altered, a revised formula that carefully considers the needs of individual students should result in increased funding for the entire system rather than a redistribution of existing funds. The bold step taken by Judge Bullock should be enforced by the Kansas Supreme Court and modeled in other states. There is evidence that this type of action can get results. In New Jersey, when the legislature did not authorize appropriate funding for a remedial school finance plan, the New Jersey Supreme Court ruled in *Robinson v. Cahill*,[77] that the existing system was unconstitutional and enjoined "every public officer, state, county or municipal . . . from expending any funds for the support of any free public school."[78] The schools were closed for the summer and, several weeks later, the legislature had adopted a new educational plan and enacted New Jersey's first income tax.

V. CONCLUSION

Drastic measures are required by courts when the political branches of government have not provided for fair access to services provided by public institutions. This is particularly true when the service is education. Courts recognized that drastic measures were needed when some states resisted the implementation of the Supreme Court's mandate in *Brown v. Board of Education* to end segregation. Judge Bullock has recognized that a similar situation exists when there is a finding that the State has failed to adopt a school finance system that provides an adequate and equitable education for all children. By issuing his order to close the schools, Judge Bullock sent a strong message to the political branches that corrective measures, as well as extraordinary judicial remedies, may be needed when it is established that the State has an unconstitutional system of school finance.

76. *See generally* RURAL EDUC. FIN. CTR., RURAL SCHOOL FUNDING REPORT—VOLUME 3, ISSUE 7 at 3 (July 2003), *available at* http://www.ruraledu.org/issues/finance/news307.htm.

77. 358 A.2d 457 (N.J. 1976).

78. *Id.* at 459.