ZARELLA, J., with whom McLACHLAN, J., joins, dissenting. This case presents this court with a rare opportunity to consider the experience of our sister states in deciding whether to become involved in the resolution of an issue that raises important philosophical and practical questions regarding the legitimate exercise of judicial power. Rather than examining and learning from this experience, however, a majority of this court has elected to ignore it, thus setting the court on a path that will lead to decades of confusion and produce a trail of wasteful litigation. James Madison warned in the Federalist Papers that judges must refrain from lawmaking: "Were the power of judging joined with the legislative . . . the judge would then be the legislator." The Federalist No. 47 (James Madison). Yet that is what will come to pass as a result of the court's conclusion that the plaintiffs'[1] stricken claims are justiciable under *Baker* v. *Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962). Judges will become legislators because courts will now be allowed, and very likely required, to define minimum educational "inputs" and "outputs" in order to determine whether the state has satisfied its purported constitutional mandate to provide Connecticut schoolchildren with a "suitable" education, a task that involves educational policy making and demands specialized skills that courts do not possess. In concluding that the plaintiffs' claims do not involve a political question, this court misinterprets our case law and dismisses the clear distinctions between the plaintiffs' claims and the claims adjudicated by this court in *Sheff* v. *O'Neill*, 238 Conn. 1, 678 A.2d 1267 (1996), and *Seymour* v. *Region One Board of Education*, 261 Conn. 475, 803 A.2d 318 (2002). More importantly, this court disregards the plain language of article eighth, § 1, which directs the General Assembly, not the judiciary, to implement the principle of "free public elementary and secondary" education by enacting "appropriate legislation." The most immediate practical effect of the court's decision is that it will take control of educational matters from local boards of education and vest it with the courts, a result that the framers of article eighth, § 1, could not have possibly envisioned. Moreover, it will require the legislature to appropriate *at least* $2 billion per year in additional funding to ensure that Connecticut schoolchildren will be provided with the resources allegedly required for a suitable education. See part III D of this opinion. Thus, by extending judicial authority into areas expressly reserved to the legislature, this court's ruling in the present case sets a dangerous precedent that will create a quagmire of uncertainty with respect to future controversies regarding the boundaries of judicial and legisla-

tive power in matters concerning education. Because I cannot agree with this clear violation of the separation of powers, I respectfully dissent.[2]

I

THE PLAINTIFFS' CLAIMS

It is first necessary to understand exactly what the plaintiffs claim in order to fully appreciate the effect of this court's decision on our state constitutional jurisprudence and the separation of powers. The plaintiffs do not claim that the current school funding system is in violation of the state constitution's equal protection provisions because different towns are not receiving reasonably similar funding. Rather, they claim that Connecticut students are not receiving a "suitable" educational opportunity as measured by certain "outputs . . . ." Thus, irrespective of the relative equality of funding, the plaintiffs claim that, if certain performance based results or outcomes are not *achieved*, students will be deprived of a suitable educational opportunity.

The plaintiffs specifically allege in their complaint that their constitutional rights have been violated because the state has failed "to maintain an educational system that provides [them] with *suitable* and substantially equal educational opportunities . . . ." (Emphasis added.) The plaintiffs further allege that the state has failed "to maintain a public school system that provides [them] with *suitable* educational opportunities . . . ." (Emphasis added.) The plaintiffs describe generally the "inputs" and "outputs" that are essential to a "suitable" educational experience, with the "inputs," or "essential components of a suitable educational opportunity," consisting of (1) high quality preschool, (2) appropriate class sizes, (3) programs and services for at-risk students, (4) highly qualified administrators and teachers, (5) modern and adequate libraries, (6) modern technology and appropriate instruction, (7) an adequate number of hours of instruction, (8) a rigorous curriculum with a wide breadth of courses, (9) modern and appropriate textbooks, (10) a school environment that is healthy, safe, well maintained and conducive to learning, (11) adequate special needs services pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq., (12) appropriate career and academic counseling, and (13) an adequate array of and suitably run extracurricular activities. The plaintiffs describe the even more crucial "outputs" as measures of, inter alia, performance on the student achievement tests required under the federal No Child Left Behind Act of 2001, 20 U.S.C. § 6301 et seq., school retention rates, and high school graduation rates. The plaintiffs thus do not seek to create programs and allocate resources on an equal funding basis but in a manner designed to ensure that all students graduate at a constitutionally guaranteed minimum level of competence. With this understanding in mind, I briefly recapitulate the govern-

ing law on justiciability.

II

LAW OF JUSTICIABILITY

"The principles that underlie justiciability are well established. Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute . . . (2) that the interests of the parties be adverse . . . (3) that the matter in controversy be capable of being adjudicated by judicial power . . . and (4) that the determination of the controversy will result in practical relief to the complainant. . . . The third requirement for justiciability, the political question doctrine, is based on the principle of separation of powers. . . . The characterization of [an issue] as political is a convenient shorthand for declaring that some other branch of government has constitutional authority over the subject matter superior to that of the courts. . . . The fundamental characteristic of a political question, therefore, is that its adjudication would place the court in conflict with a coequal branch of government in violation of the primary authority of that coordinate branch. . . .

"Whether a controversy so directly implicates the primary authority of the legislative or executive branch, such that a court is not the proper forum for its resolution, is a determination that must be made on a case-by-case [basis]. . . . Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestion[ed] adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question. Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence." (Citations omitted; internal quotation marks omitted.) *Nielsen* v. *State*, 236 Conn. 1, 6–8, 670 A.2d 1288 (1996), quoting *Baker* v. *Carr*, supra, 369 U.S. 217. In the present case, all six *Baker* factors are implicated by the plaintiffs' stricken claims, and, accordingly, the controversy is nonjusticiable.

III

APPLICATION OF THE *BAKER* FACTORS

A

Textually Demonstrable Commitment

I begin by noting that article eighth, § 1, does not refer to a "suitable" education or to an "adequate" education, nor does any other constitutional provision suggest that the state is obligated to provide Connecticut schoolchildren with a suitable or minimum standard of education. Even the plurality ultimately concedes in its discussion of the first *Geisler* factor that the defendants'[3] interpretation of the constitutional text to mean that it does not confer a right to suitable educational opportunities is reasonable in the absence of an affirmative provision regarding a minimum educational standard. Consequently, I would initially conclude that the plaintiffs' claims are nonjusticiable because there is no explicit basis in the constitution for the right to a suitable education.

The lack of such a provision is consistent with the purpose of article eighth, § 1. As this court noted in *Sheff*, "[t]he primary motivation for the addition of article eighth, § 1, to the constitution in 1965 appears to have been the realization that Connecticut was the only state in the nation that did not provide an express right to public elementary and secondary education in its constitution. See [Proceedings of the Connecticut Constitutional Convention (1965), Pt. 3] pp. 1039–40, remarks of [Simon Bernstein]." *Sheff* v. *O'Neill*, supra, 238 Conn. 30–31. Bernstein, a delegate to the constitutional convention and the proponent of article eighth, § 1, explained during a debate on the matter that he had submitted a similar resolution earlier in the proceedings and that the purpose of the resolution was to ensure "that our system of free public education have a tradition [of] acceptance on a par with our bill of rights and it should have the same [c]onstitutional sanctity.[4] It was because our [c]onstitution had no reference to our school system that I submitted my resolution and of course others were aware of the same [omission] in our [c]onstitution and other similar resolutions were submitted. . . . Connecticut with its great tradition certainly ought to honor this principle. . . . I can't possibly see any dispute over the principle involved, [as] it is such a basic principle that it should be in the [c]onstitution." Proceedings of the Connecticut Constitutional Convention (1965), Pt. 3, pp. 1039–40. The only other delegate to speak on the proposed provision explained that he supported it because Connecticut was the only state in the nation in which the constitution made no reference to elementary and secondary education, and, therefore, adopting the amendment seemed like the "natural and proper thing to do." Id., p. 1040, remarks of Albert E. Waugh. Thus, the delegates gave no thought to the question of educational quality, their intent simply being to elevate the general principle of a free public elementary and secondary education to the status of a constitutional right, as every other jurisdiction in the nation had done.[5] Indeed, if it had been

the intent and purpose of the delegates to adopt a constitutional provision that would guarantee students a minimum standard of education or level of educational achievement, one would have expected such a controversial concept to have been mentioned and fiercely debated. An examination of the proceedings, however, indicates that the very brief discussion that occurred when Bernstein introduced the provision that became article eighth, § 1, was entirely about constitutionalizing the right to a free public education, not the right to a minimum standard of education or level of educational achievement. See Proceedings of the Connecticut Constitutional Convention (1965), Pt. 1, pp. 310–13; Proceedings of the Connecticut Constitutional Convention (1965), Pt. 3, pp. 1038–41. To that end, Bernstein repeatedly emphasized that the purpose of the proposed provision was to secure nothing more than the right to a "free public education," adding that the principle ought to be honored because it was "not anything revolutionary . . . ." Proceedings of the Connecticut Constitutional Convention (1965), Pt. 3, p. 1039; see also *Sheff* v. *O'Neill*, supra, 120 (*Borden*, *J.*, dissenting) ("[Bernstein] made clear that [article eighth, § 1] was intended *only* to constitutionalize the then existing system of free public education" [emphasis added]). Accordingly, in the absence of an affirmative statement of a governmental obligation to provide Connecticut schoolchildren with a minimum standard of education, there is no textual basis or historical support for the judicial enforcement of such a right. See, e.g., *Moore* v. *Ganim*, 233 Conn. 557, 595, 660 A.2d 742 (1995) ("We are especially hesitant to read into the constitution unenumerated affirmative governmental obligations. In general, the declaration of rights in our state constitution was implemented not to impose affirmative obligations on the government . . . but rather to secure individual liberties against direct infringement through state action.").

I also conclude that the plaintiffs' claims are nonjusticiable because article eighth, § 1, unequivocally delegates to the legislature the task of enacting "appropriate legislation" to ensure that Connecticut schoolchildren will be provided with a free public education. By implication, "appropriate legislation" includes whatever qualitative standards, if any, the legislature deems necessary to achieve its mandate.[6]

The directive in article eighth, § 1, that the General Assembly "shall implement" the principle of a free education by enacting "appropriate legislation" is no different from the language used in other constitutional provisions that impose affirmative obligations on the legislature and that have been deemed nonjusticiable. See *Nielsen* v. *State*, supra, 236 Conn. 9–10 (article third, § 18); *Pellegrino* v. *O'Neill*, 193 Conn. 670, 681–82, 480 A.2d 476 (article fifth, § 2), cert. denied, 469 U.S. 875, 105 S. Ct. 236, 83 L. Ed. 2d 176 (1984); *Simmons* v.

Budds, 165 Conn. 507, 514, 338 A.2d 479 (1973) (article eighth, § 2), cert. denied, 416 U.S. 940, 94 S. Ct. 1943, 40 L. Ed. 2d 291 (1974). For example, article fifth, § 2, which concerns the number and appointment of judges, provides in relevant part that "[*t*]*he judges of the . . . superior court shall*, upon nomination by the governor, *be appointed by the general assembly* in such manner as shall by law be prescribed. . . ." (Emphasis added.) Similarly, article third, § 18 (b),[7] which imposes a cap on general budget expenditures, provides in relevant part that "[*t*]*he general assembly shall by law define* 'increase in personal income', 'increase in inflation' and 'general budget expenditures' for the purposes of this section . . . ." (Emphasis added.) Finally, article eighth, § 2, which requires the state to "maintain a system of higher education, including The University of Connecticut, which shall be dedicated to excellence in higher education," provides in relevant part that "[*t*]*he general assembly shall determine* the size, number, terms and method of appointment of the governing boards of The University of Connecticut and of such constituent units or coordinating bodies in the system as from time to time may be established." (Emphasis added.)

We concluded in *Nielsen*, *Pellegrino* and *Simmons* that claims brought under each of the foregoing provisions were nonjusticiable because they could not be resolved without interfering with a clearly articulated duty of the legislature. See *Nielsen* v. *State*, supra, 236 Conn. 10; *Pellegrino* v. *O'Neill*, supra, 193 Conn. 682; *Simmons* v. *Budds*, supra, 165 Conn. 514. We specifically observed in *Pellegrino* that "[w]e must resist the temptation which this case affords to enhance our own constitutional authority by trespassing [on] an area clearly reserved as the prerogative of a coordinate branch of government." *Pellegrino* v. *O'Neill*, supra, 681. We likewise noted in *Nielsen* that article third, § 18, "by its plain and unambiguous terms, commits exclusively to the General Assembly the power to define the spending cap terms and nowhere intimates any role in this process for the judiciary. . . . Nothing elsewhere in our constitution contradicts this textual commitment to the General Assembly." (Citation omitted.) *Nielsen* v. *State*, supra, 9. In *Simmons*, we also explained that the plaintiff's claim in that case was nonjusticiable because the language in article eighth, § 2, referring to the General Assembly's affirmative duty to appoint the university's governing boards and constituent bodies, indicated a clear intention that "the board of trustees and the administrators were to be free to decide what is wise in educational policy. . . . Corrective action, if warranted, lies within the provinces of the board of trustees from [which] the university senate's authority is derived, the governor who appoints the trustees under [General Statutes] § 10-118 . . . and, ultimately, with the General Assembly to which the

constitution of Connecticut, article eighth, § 2, entrusts the responsibility of governing the University of Connecticut. We find no error in the conclusion of the trial court that the constitutional [s]tandard of 'excellence' was not meant to be a wedge for penetration of the educational establishment by judicial intervention in policy decisions." (Citations omitted.) *Simmons* v. *Budds*, supra, 514.

The language of article eighth, § 1, is similar to the language in the preceding provisions—all of which impose an affirmative duty on the legislature—because it plainly and unambiguously provides that the "general assembly *shall* implement [the] principle [of a free public elementary and secondary school education by enacting] *appropriate legislation*." (Emphasis added.) There is no suggestion in this or in any other constitutional provision that the judicial branch has a role in the process, nor has the court referred to any Connecticut case permitting judicial intervention when the claim involves a constitutional provision that imposes an affirmative duty on the legislature. Moreover, it is counterintuitive to conclude, in light of *Simmons*, that, when a level of quality is mandated by the constitution, there is *no* justiciable issue because matters concerning educational quality fall within the legislative domain but that when no level of quality is mandated, there *is*. Thus, even if a "free" education could be construed to mean a suitable education, *Simmons* dictates that questions concerning educational quality are nonjusticiable.

Our decisions in *Horton* v. *Meskill*, 172 Conn. 615, 376 A.2d 359 (1977) (*Horton I*), and *Horton* v. *Meskill*, 195 Conn. 24, 486 A.2d 1099 (1985) (*Horton III*), are distinguishable because the constitutional challenge in those cases was brought under *both* article eighth, § 1, *and* the equal protection provisions of the state constitution, namely, article first, §§ 1 and 20. See, e.g., *Horton* v. *Meskill*, supra, 172 Conn. 621. The right to equal protection, as with most other rights guaranteed by the state constitution, differs from the right to education because it is a "negative" right, that is, a right granted to the individual on which the government may not infringe. *State ex rel. Morrison* v. *Sebelius*, 285 Kan. 875, 894, 179 P.3d 366 (2008). The judiciary almost always can protect a negative constitutional right by ordering the government to cease the infringement, either by striking the offending statute or by prohibiting the offending act. Id. In contrast, a person alleging that the legislature has failed to perform an affirmative duty must seek a judicial remedy that mandates the performance of that duty. Id. Our precedent, however, particularly in *Simmons*, in which this court declined to intervene even though the constitution specifically declared that the University of Connecticut shall be dedicated to excellence; see *Simmons* v. *Budds*, supra, 165 Conn. 514; compels this court to refrain from

interfering in the present dispute because the duty to implement the principle of a free public education is clearly committed to the legislature.

The plurality's conclusion that *Nielsen* did not consider the "appropriate legislation" language of article eighth, § 1, to be a textual commitment to the General Assembly like the "plain and unambiguous" spending cap language in article third, § 18; *Nielsen* v. *State*, supra, 236 Conn. 9; reflects an improper understanding of that case. What the court indicated in *Nielsen* was that the "appropriate legislation" language at issue in *Horton I* was broader than the spending cap language only in the context of the equal protection claim in *Horton I*. See id., 10 ("In construing [article eighth, § 1], we expressly held [in *Horton I*] that the then-existing financing scheme for the state's public schools [was] not appropriate legislation . . . *to implement the requirement that the state provide a substantially equal educational opportunity* to its youth in its free public elementary and secondary schools. . . . It was in light of the textual distinction between these different constitutional provisions that, in *Pellegrino* v. *O'Neill*, supra, [193 Conn.] 683, we described *Horton I* as clearly [a case in which] a judicial remedy could have been applied . . . ." [Citations omitted; emphasis added; internal quotation marks omitted.]). Consequently, in *Nielsen*, we did not view the "appropriate legislation" language of article eighth, § 1, as opening the door to judicial intervention in all matters pertaining to education but, rather, as a tool that the court in *Horton I* had used *in conjunction with* the equal protection provisions of the state constitution to evaluate whether the then existing system of funding public education was providing children with substantially equal educational opportunities. See *Nielsen* v. *State*, supra, 10.

The plaintiffs in the present case appear to be asking this court to do something that the court in *Nielsen* could not have imagined, that is, to use the equal protection provisions of the state constitution as a vehicle to establish a substantive floor for educational achievement as a constitutional right. See, e.g., B. Neuborne, "State Constitutions and the Evolution of Positive Rights," 20 Rutgers L.J. 881, 887 (1989) (in absence of independent textual basis for substantive federal constitutional rights in education, health and housing, lawyers have sought to use federal constitution to protect poor by invoking equal protection and due process clauses "to bootstrap judges into a position [of] trump[ing] government refusals to spend money on critical services [that are] desperately needed by the poor"). This court, however, should do everything in its power to avoid using the equal protection provisions in this manner because the concept of substantive equal protection has not been recognized in this state, and there is no textual support in the constitution for judicial intervention in substantive educational matters. See *Harris* v.

McRae, 448 U.S. 297, 322, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980) ("[t]he guarantee of equal protection . . . is not a source of substantive rights or liberties, but rather a right to be free from invidious discrimination in statutory classifications and other governmental activity").

In addition to the fact that the text of article eighth, § 1, specifically commits the function of providing a free public education to the legislature, this court has recognized on numerous occasions that providing Connecticut schoolchildren with an education is a function of the state that is properly exercised by the legislature. See, e.g., *New Haven* v. *State Board of Education*, 228 Conn. 699, 703, 638 A.2d 589 (1994) (article eighth, § 1, "places the ultimate responsibility for the education of the children of Connecticut on the state," which distributes responsibility through statutory framework granting state board of education "the broad and general power to supervise and control the educational interests of the state" [internal quotation marks omitted]); *Stolberg* v. *Caldwell*, 175 Conn. 586, 598, 603, 402 A.2d 763 (1978) (state function and duty of providing education is manifest from extensive legislation relating to furnishing of education for general public under article eighth, §§ 1 and 2, the legislative branch having responsibility for determining general education policy). Indeed, the legislature has committed significant financial resources and developed an extensive statutory framework to carry out this duty. For example, the General Assembly's office of fiscal analysis has estimated that the annual appropriation for elementary and secondary education for the budget years 2009 through 2011 will be approximately $3.3 billion, or 17 percent of the state budget, the second highest expenditure after human services. Office of Fiscal Analysis, Connecticut General Assembly, Connecticut State Budget 2009–2011, p. 12.

The funds appropriated for education are administered pursuant to an extensive and detailed statutory scheme incorporated in title 10 of the General Statutes, which vests ultimate power and authority for general supervision and control of the state's educational interests in the state board of education. See General Statutes § 10-4.[8] The legislature has further delegated responsibility for *implementing* the principle of a free public education to local boards of education. E.g., *Cheshire* v. *McKenney*, 182 Conn. 253, 257–58, 438 A.2d 88 (1980); *West Hartford Education Assn., Inc.* v. *DeCourcy*, 162 Conn. 566, 573, 295 A.2d 526 (1972); see also *State ex rel. Board of Education* v. *D'Aulisa*, 133 Conn. 414, 418–19, 52 A.2d 636 (1947) ("Under the statutes, provision is made for the education of the inhabitants of each town through its town board of education. Accordingly . . . [a] town board of education is an agency of the state in charge of education in the town; to that end it is granted broad powers by the legislature

. . . ." [Internal quotation marks omitted.]). This court has expressly acknowledged the link between the constitutional mandate and the duty of local boards by describing the boards as agencies of the state that "carry out the constitutional guarantee of free public education contained in article eighth, § 1 . . . ." *Local 1186, AFSCME* v. *Board of Education*, 182 Conn. 93, 100, 438 A.2d 12 (1980); see also *Murphy* v. *Board of Education*, 167 Conn. 368, 372–73, 355 A.2d 265 (1974) ("[T]he furnishing of education for the general public, required by article eighth, § 1, of the Connecticut constitution, is by its very nature a state function and duty. . . . The local boards have of necessity been delegated this responsibility. . . . Clearly, then, town boards of education . . . act as agents of the state under the authority of our state constitution and the enactments of our legislature." [Citations omitted.]).

To guide and assist the local boards in carrying out this duty, General Statutes § 10-220 (a) provides that "[e]ach local or regional board of education shall maintain *good* public elementary and secondary schools, implement the educational interests of the state as defined in section 10-4a and provide such other educational activities as *in its judgment* will best serve the interests of the school district . . . ." (Emphasis added.) This includes providing an "appropriate learning environment" through "(1) adequate instructional books, supplies, materials, equipment, staffing, facilities and technology, (2) equitable allocation of resources among its schools, (3) proper maintenance of facilities, and (4) a safe school setting . . . ." General Statutes § 10-220 (a). Local boards of education also "shall prescribe rules for the management, studies, classification and discipline of the public schools and, subject to the control of the State Board of Education, the textbooks to be used; shall make rules for the control, within their respective jurisdictions, of school library media centers and approve the selection of books and other educational media therefor, and shall approve plans for public school buildings and superintend any high or graded school in the manner specified in this title." General Statutes § 10-221 (a). General Statutes § 10-222 (a) further requires each local board to "prepare an itemized estimate of the cost of maintenance of public schools for the ensuing year . . . ." Thus, it is the local boards of education that decide, in their discretion, how education funds shall be budgeted and expended. *Local 1186, AFSCME* v. *Board of Education*, supra, 182 Conn. 100.

The effect of the court's decision to permit—indeed, require—judicial involvement in educational matters will be to wrest control of education from the local boards and place it in the hands of the court. It is clear that this will happen because the plaintiffs' complaint alleges that the state's failure to provide "suitable" educational opportunities is caused by inadequate and

unequal educational "inputs," which the complaint defines as "the resources and conditions, such as staff, programs, and environment, that constitute an educational system." Such "resources and conditions," however, are exactly what the legislature has directed local boards to provide under §§ 10-4a and 10-220 to ensure that each child will have a "suitable program of educational experiences"; General Statutes § 10-4a (1); and "an appropriate learning environment . . . ." General Statutes § 10-220 (a). Court intervention to establish a minimum standard of education or level of educational achievement thus will conflict with legislative directives to local boards, whose discretion to determine what constitutes a "suitable program" and "an appropriate learning environment" for children in their respective districts will not only be severely curtailed, but very likely eliminated, because the court will become the ultimate arbiter of whether Connecticut schoolchildren are receiving the proper educational resources to satisfy the newly defined constitutional mandate of a suitable education.

The plurality asserts that its ruling is "not intended to supplant local control over education," explaining that the purpose of court intervention is merely "to articulate the broad parameters of [the] constitutional right, and to leave their implementation to the expertise of those who work in the political branches of state and local government, informed by the wishes of their constituents. [As] long as those authorities prescribe and implement a program of instruction rationally calculated to enforce the constitutional right to a minimally adequate education . . . then the judiciary should stay its hand." Footnote 59 of the plurality opinion. As New Jersey, Kansas and other jurisdictions have discovered, however, such a view is unrealistic. See part III B of this opinion. The court will not be able to limit its involvement in educational matters to vague declarations of principle but will be required to adjudicate constitutional challenges to the adequacy of *specific* state and local programs of instruction, which will place the court in a position to override decisions made by state and local authorities regarding the level and distribution of limited financial resources for education in their respective jurisdictions.

This could not be what the proponents of article eighth, § 1, intended. If it were, they surely would not have described the provision as "not anything revolutionary." Proceedings of the Connecticut Constitutional Convention (1965), Pt. 3, p. 1039, remarks of Bernstein. That the framers never would have contemplated this change of course also is evident from other parts of the convention records, in which delegates described the proposed provision on education as embodying nothing more than Connecticut's long history and tradition of providing children with a free public education. See, e.g., Convention Resolution No. 109 (July 27, 1965),

reprinted in 1965 Connecticut Constitutional Convention Bulletins, Calendars, Resolutions, Files, Appendix (1965). Proponents of article eighth, § 1, demonstrated no interest in supplanting legislative or local control of education but, rather, stated that their intent was to correct an *omission* in the constitution and thus achieve consistency with the constitutions of other states. See Proceedings of the Connecticut Constitutional Convention (1965), Pt. 3, pp. 1039–40, remarks of Bernstein. In fact, there is nothing in the recorded history of the 1965 convention to suggest that the framers wanted to end the tradition of local control of education by granting the courts authority to determine how the principle of a free public education should be implemented. If that had been the framers' intent, they would not have used specific language delegating such authority to the legislature. Indeed, cases interpreting the power of the state and local boards of education following adoption of article eighth, § 1, never have questioned the constitutionality of the statutory scheme or the authority of the legislature or the boards to determine the content of a suitable educational opportunity or an appropriate learning environment. I thus fail to comprehend how a majority of this court can peruse our case law, the statutory framework and the history of the constitutional convention without concluding that the legislature and local boards have been delegated exclusive authority to implement the constitutional mandate of providing children with a free public education.

Nevertheless, the plurality, after failing to find any textual support in the constitution, claims that the principle articulated in *Sheff* that courts may enforce the constitutional right to substantially equal education opportunities also governs in the present case because our holding in *Sheff* "does not refer specifically to the [state] constitution's equal protection provisions, and relies expressly on the 'appropriate legislation' clause from article eighth, § 1, to justify judicial examination of [education] statutes." Footnote 18 of the plurality opinion. The plurality, however, adopts an extraordinarily broad interpretation of *Sheff* and ignores the fact that the court's holding in *Sheff* was intended to resolve the claim, raised in the state's affirmative defense, that "the text of article eighth, § 1, deprives the trial court of jurisdiction to consider whether the plaintiffs are entitled to relief by way of an order to the legislature to provide a remedy for their impaired educational opportunities"; *Sheff* v. *O'Neill*, supra, 238 Conn. 12; the impairment being that the state did not satisfy the constitutional mandate of providing "substantially *equal* educational opportunit[ies] . . . ." (Emphasis added.) Id., 14. Thus, the plurality ignores the court's observation in *Sheff* that the claim of nonjusticiability had been raised "[i]n the context of judicial enforcement of the right to a substantially equal educational opportunity arising under article eighth, § 1, and article

first, §§ 1[9] and 20[10] . . . ." Id. The court explained that it had reviewed similar claims involving inequities in educational opportunities in *Horton I* and *Horton III*, and that the defendants in *Sheff* had not challenged the continued vitality of those two cases but had argued that their claim of nonjusticiability was distinguishable. Id. The court disagreed with the defendants, however, stating that the plaintiffs had "invoke[d] the *same* constitutional provisions [concerning equality and education] to challenge the constitutionality of state action that the plaintiff schoolchildren [had] invoked in *Horton I* and *Horton III*";[11] (emphasis added) id., 14–15; and that our decisions in the *Horton I* and *Horton III* had been reaffirmed in *Nielsen* v. *State*, supra, 236 Conn. 9–10, and *Pellegrino* v. *O'Neill*, supra, 193 Conn. 683. *Sheff* v. *O'Neill*, supra, 14. Only then did the court state that the phrase "appropriate legislation" in article eighth, § 1, did not preclude it from determining what was "appropriate" in that case, plainly referring to the court's constitutional duty to review whether the legislature had fulfilled its obligation to provide children who attend the state's public schools with substantially equal educational opportunities. Id., 15. The court concluded with the observation that "our *precedents* compel the conclusion that the balance must be struck in favor of the justiciability of the plaintiffs' complaint."[12] (Emphasis added.) Id., 16.

The language in *Sheff* thus demonstrates, without question, that the court did not reject the defendants' affirmative defense on the ground that article eighth, § 1, permits the judicial branch to consider whether the General Assembly has enacted "appropriate legislation" in *all* cases arising under that provision, as the plurality declares. *Sheff* merely determined that the "appropriate legislation" language in article eighth, § 1, does not prevent the courts from adjudicating claims involving inequities in educational opportunities similar to the claims that the court addressed in *Horton I* and *Horton III*. Indeed, the only logical explanation for the court's repeated references to the *Horton* decisions is that it wished to reaffirm their continued precedential value in similar cases involving claims alleging unequal educational opportunities.

The plurality asserts that, because *Sheff* did not refer specifically to the constitution's equal protection provisions in its holding on article eighth, § 1, it intended to endorse judicial review of issues relating to public education generally that do not implicate equal protection concerns. The *Sheff* holding, however, merely repeated language used in the defendants' affirmative defense, in which they argued that the "text of article eighth, § 1," deprived the court of jurisdiction to consider the relief that the plaintiffs requested under both the equal protection and education provisions of our state constitution. Id., 12. Moreover, the court interpreted the provision only after specifying that it was doing

so "[i]n light of these precedents" involving inequalities in educational opportunities. Id., 15. In relying on *Sheff* to permit judicial review of education adequacy claims, the plurality expands the principles articulated in *Sheff* far beyond their stated meaning.

The arguments made by the parties in *Sheff* further illustrate this point. In their brief to this court, the defendants contended that the plaintiffs' claims were nonjusticiable under article eighth, § 1, because the "appropriate legislation" language committed the issues that the plaintiffs raised to the legislature. *Sheff* v. *O'Neill*, Conn. Supreme Court Records & Briefs, September Term, 1995, Pt. 4B, Defendants' Brief p. 75. The plaintiffs countered that the defendants' characterization of their claims as resting on "article eighth, § 1, in isolation" was incorrect because the complaint had "*conjoin*[*ed*] the guarantee of free public elementary and secondary schools with article first, §§ 1 and 20, which promise 'equal rights' to public benefits and privileges and which condemn 'segregation and discrimination.' " (Emphasis added.) *Sheff* v. *O'Neill*, Conn. Supreme Court Records & Briefs, September Term, 1995, Pt. 4C, Plaintiffs' Reply Brief p. 18. The plaintiffs further explained that article eighth, § 1, must be read "in pari materia" with article first, §§ 1 and 20, to establish "a 'basic and fundamental right' . . . to a 'substantially equal educational opportunity.' " (Citation omitted.) Id. The plaintiffs in *Sheff* thus took great pains to clarify that they viewed the "appropriate legislation" language of article eighth, § 1, in the context of their right to equal protection enumerated in article first, §§ 1 and 20, as this court did in the opinion that followed. Consequently, the plurality's construction of *Sheff* to mean that all claims arising under article eighth, § 1, are justiciable represents a significant and unwarranted departure from *Sheff* that the court in that case could not have contemplated.

The plurality attempts to bolster its strained reading of *Sheff* to mean that educational issues arising under article eighth, § 1, are not textually committed to the legislature by resorting to a footnote in that opinion in which the court states that other jurisdictions "overwhelmingly" have determined that "the judiciary has a constitutional duty to review whether the legislature has fulfilled its obligation." *Sheff* v. *O'Neill*, supra, 238 Conn. 15 and n.18. The court, however, could not have intended to establish a principle of general reviewability of all education claims arising under article eighth, § 1, when it cited cases from our sister states because the claim before our court was the far narrower one of whether the plaintiffs had been deprived of "substantially equal educational opportunit[ies] . . . ." Id., 6. The plurality thus takes that footnote out of context[13] and applies its reasoning to an entirely different factual and legal scenario. In other words, rather than interpret the statement in the footnote in the context of the claims

made in *Sheff*, the plurality elects to untether the comment and make it a statement of general applicability. Moreover, it is absurd to attribute such a major change in our interpretation of article eighth, § 1, to a comment in a footnote referring to cases from other jurisdictions, especially when the footnote does not make it absolutely clear that that was the court's intent. Accordingly, although the plurality relies on footnote 18 in *Sheff*, which, in any event, is nothing more than dictum, I submit that the footnote sheds no light on the meaning of article eighth, § 1. The only conclusion that can be drawn from the footnote is that the court in *Sheff* simply was recognizing that other courts also have determined that constitutional claims involving education are justiciable when the provision or provisions implicated, like the "conjoin[ed]" equal protection and education provisions in *Sheff*; *Sheff* v. *O'Neill*, Conn. Supreme Court Records & Briefs, September Term, 1995, Pt. 4C, Plaintiffs' Reply Brief p. 18; or the equal protection provision in the Wyoming constitution, permit judicial review.

The plurality subsequently concludes that certain cases that the defendants cite, in which other jurisdictions have deemed education adequacy claims nonjusticiable, are inapplicable in the present case because they do not involve constitutional language similar to the "appropriate legislation" language contained in article eighth, § 1. See *Coalition for Adequacy & Fairness in School Funding, Inc.* v. *Chiles*, 680 So. 2d 400, 405 (Fla. 1996) ("[*a*]*dequate provision* shall be made by law for a uniform system of free public schools and for the establishment, maintenance and operation of institutions of higher learning and other public education programs that the needs of the people may require" [emphasis in original; internal quotation marks omitted]), quoting Fla. Const., art. IX, § 1; *Nebraska Coalition for Educational Equity & Adequacy* v. *Heineman*, 273 Neb. 531, 535, 731 N.W.2d 164 (2007) ("[r]eligion, morality, and knowledge . . . being essential to good government, it shall be the duty of the Legislature to pass *suitable* laws . . . to encourage schools and the means of instruction," and "[t]he Legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-one years" [emphasis added; internal quotation marks omitted]), quoting Neb. Const., art. I, § 4, and art. VII, § 1; and *Oklahoma Education Assn.* v. *State ex rel. Oklahoma Legislature*, 158 P.3d 1058, 1062 nn.6 and 8 (Okla. 2007) ("[p]rovisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of the state and free from sectarian control; and said schools shall always be conducted in English: Provided, that nothing herein shall preclude the teaching of other languages in said public schools," and "[t]he Legislature shall establish and maintain a system of free public schools wherein all the children of the State may be

educated" [internal quotation marks omitted]), quoting Okla. Const., art. I, § 5, and art. XIII, § 1. A review of the constitutional provisions of such states nevertheless suggests that the Connecticut constitutional provision, which contains no qualitative language, is textually closer to those of states that do not permit judicial review of such matters than to those of states that do.

In sum, the plaintiffs' claims are nonjusticiable under the first *Baker* factor because there is no enumerated constitutional right to a suitable or a minimum standard of education, and there is a textually demonstrable commitment of issues concerning education to the General Assembly as part of its express obligation under the constitution to enact legislation to provide Connecticut schoolchildren with a free public education. This court has stated that, "[i]n dealing with constitutional provisions we must assume that infinite care was employed to couch in scrupulously fitting language a proposal aimed at establishing or changing the organic law of the state. . . . Unless there is some clear reason for not doing so, effect must be given to every part of and each word in the constitution." (Citations omitted.) *Stolberg* v. *Caldwell*, supra, 175 Conn. 597–98. The delegates to the 1965 constitutional convention established the right to a free public education and, in unambiguous language, assigned its implementation to the legislature, not the courts.

B

Lack of Judicially Discoverable and Manageable Standards

I also disagree with the plurality that the second *Baker* factor poses no obstacle to judicial review because "[t]here are easily discoverable and manageable judicial standards for determining the merits of the plaintiffs' claim[s]." (Internal quotation marks omitted.) As I previously discussed, the constitution provides no qualitative or substantive standards regarding the type of public education to be provided to Connecticut schoolchildren, and there is nothing in the historical record indicating that the delegates to the 1965 constitutional convention considered such standards. The majority nonetheless concludes that *Seymour* v. *Region One Board of Education*, supra, 261 Conn. 475, and *Horton I* govern our resolution of this question because the plaintiffs merely request a declaration of a constitutional violation,[14] "with the precise remedy being left to the defendants in the first instance." Part I of the plurality opinion; see *Seymour* v. *Region One Board of Education*, supra, 484; *Horton* v. *Meskill*, supra, 172 Conn. 650–51. Consequently, the plurality asserts that the requested remedies will not "turn a trial judge into a de facto education superintendent . . . ." The complaints in *Seymour* and *Horton I*, however, are distinguishable.

The principal issue before the court in *Seymour* and *Horton I* was the constitutionality of school financing legislation under one or more of the due process and equal protection provisions of the state and federal constitutions. See *Seymour* v. *Region One Board of Education*, supra, 261 Conn. 479–80 (involving claim that statutory formula set forth in General Statutes § 10-51 [b] for financing public education in regional school districts deprived plaintiff taxpayers of state and federal constitutional rights to due process and equal protection because tax burden per student fell more heavily on taxpayers in some communities than similarly situated taxpayers in surrounding communities); *Horton* v. *Meskill*, supra, 172 Conn. 618, 649 (involving claim that state system of public education financing violated equal protection provisions of state constitution and was not constitutionally mandated "appropriate legislation," under article eighth, § 1, to implement requirement that state provide substantially equal educational opportunity to students in free public elementary and secondary schools). In contrast, the principal issue in the present case is whether Connecticut schoolchildren have a right to a suitable education, which does not implicate the state constitution's equal protection provisions.[15] This distinction is significant because the nature of a claim determines the difficulty of developing the judicial standards required to resolve it.

Courts are uniquely qualified to determine issues of equality and particularly unqualified to determine minimum educational standards. In *Baker*, the United States Supreme Court emphasized that "[j]udicial standards under the [e]qual [p]rotection [c]lause are well developed and familiar, and it has been open to courts since the enactment of the [f]ourteenth [a]mendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action."[16] *Baker* v. *Carr*, supra, 369 U.S. 217. Thus, equity claims in school funding cases are often decided under the rational basis test. See, e.g., *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 44, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973); *Pawtucket* v. *Sundlun*, 662 A.2d 40, 60 (R.I. 1995); see also R. Levy, "Gunfight at the K-12 Corral: Legislative vs. Judicial Power in the Kansas School Finance Litigation," 54 U. Kan. L. Rev. 1021, 1052 (2006); cf. *Lobato* v. *State*, 218 P.3d 358, 362–63 (Colo. 2009) (combining elements of traditional equal protection and adequacy analysis, and concluding that challenge to "the adequacy of [the state's] public school funding system" is justiciable and that courts are responsible for reviewing funding scheme to determine if it is rationally related to legislature's constitutional mandate to provide " 'a thorough and uniform' " system of public education in accordance with legislature's own pronouncements).

In Connecticut, educational financing legislation is

strictly scrutinized under the equal protection clause pursuant to a three part test designed to evaluate whether the financing plan, as a whole, supports the policy of "providing significant equalizing state support to local education."[17] *Horton* v. *Meskill*, supra, 195 Conn. 38. The claim that Connecticut schoolchildren have a right to a "suitable" education, however, does not implicate the equal protection provisions of our state constitution and will require the court to articulate qualitative standards defining a minimum quality of education. This is a complicated task heavily laden with policy implications that courts are ill equipped to handle, a conclusion shared by many other jurisdictions. See, e.g., *Coalition for Adequacy & Fairness in School Funding, Inc.* v. *Chiles*, supra, 680 So. 2d 406–408 ("While the courts are competent to decide whether or not the [l]egislature's distribution of state funds to complement local education expenditures results in the required uniform system, the courts cannot decide whether the [l]egislature's appropriation of funds is adequate in the abstract, divorced from the required uniformity. To decide such an abstract question of adequate funding, the courts would necessarily be required to subjectively evaluate the [l]egislature's value judgments as to the spending priorities to be assigned to the state's many needs, education being one among them. . . . The judiciary must defer to the wisdom of those who have carefully evaluated and studied the social, economic, and political ramifications of this complex issue—the legislature. . . . [T]here are no judicially manageable standards available to determine adequacy. . . . [T]he phrase uniform has manageable standards because by definition this word means a lack of substantial variation. By contrast . . . [the term] adequacy simply does not have such straightforward content." [Citations omitted; internal quotation marks omitted.]); *Lewis E.* v. *Spagnolo*, 186 Ill. 2d 198, 209, 710 N.E.2d 798 (1999) ("No matter how the question is framed, recognition of the plaintiffs' cause of action under the education article would require the judiciary to ascertain from the constitution alone the content of an 'adequate' education. The courts would be called [on] to define what minimal standards of education are required by the constitution, under what conditions a classroom, school, or district falls below these minimums so as to constitute a 'virtual absence of education,' and what remedy should be imposed. . . . [T]hese determinations are for the legislature, not the courts, to decide."); *Nebraska Coalition for Educational Equity & Adequacy* v. *Heineman*, supra, 273 Neb. 553 ("It would be a transparent conceit to suggest that whatever standards of quality courts might develop would actually be derived from the constitution in any meaningful sense. Nor is education a subject within the judiciary's field of expertise . . . . Rather, the question of educational quality is inherently one of policy involving philosophical and practical considerations

that call for the exercise of legislative and administrative discretion. To hold that the question of educational quality is subject to judicial determination would largely deprive the members of the general public of a voice in a matter which is close to the hearts of all individuals . . . . In contrast, an open and robust public debate is the lifeblood of the political process in our system of representative democracy. Solutions to problems of educational quality should emerge from a spirited dialogue between the people of the [s]tate and their elected representatives." [Internal quotation marks omitted.]); see also J. Elson, "Suing to Make Schools Effective, or How to Make a Bad Situation Worse: A Response to Ratner," 63 Tex. L. Rev. 889, 904–905 (1985) ("Ordering schools to become more effective poses unique problems because no one knows how to force educators to make students learn. . . . The methods for making ineffective schools effective . . . are neither direct nor objective, because they must affect students' minds through the medium of educator behavior. Before a successful remedy can be constructed, certain now-mysterious causal relations must be understood: how teacher behavior affects learning, how school administration affects teacher behavior, and how the implementation of school reforms affects school administration and teacher behavior.").

Moreover, some jurisdictions that have assumed the challenge have become bogged down for years in endless litigation because there are no easily identifiable judicial standards by which to measure whether children are receiving a suitable education. Among the most compelling examples of what may happen in the absence of judicial standards is the state of New Jersey. After the New Jersey Supreme Court struck down the state's education funding system in *Robinson* v. *Cahill*, 62 N.J. 473, 515–20, 303 A.2d 273 (1973) (*Robinson I*), because it failed to comply with the constitutional mandate of providing students with a "thorough and efficient"[18] education; id., 520; the court found itself embroiled in the controversy for years thereafter as it tried to avoid imposing judicial standards and as the legislature struggled to develop a means of eliminating disparities in education expenditures among districts with vastly different resources.[19] In *Robinson I*, the court first interpreted the "thorough and efficient" clause; see footnote 18 of this opinion; to mean the "educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market." *Robinson* v. *Cahill*, supra, 62 N.J. 515. The court then decided that the legislature had not provided all students with a "thorough and efficient" education solely on the basis of the gross disparities in expenditures between wealthier and poorer districts because it had "been shown no other viable criterion for measuring compliance with the constitutional mandate." Id., 515–16. Lacking any

standards to shape a proper judicial remedy, the court ordered the legislature to do so and then postponed issuance of the order for nearly eighteen months to give the legislature a reasonable opportunity to comply with the constitutional directive. *Robinson* v. *Cahill*, 63 N.J. 196, 198, 306 A.2d 65, cert. denied sub nom. *Dickey* v. *Robinson*, 414 U.S. 976, 94 S. Ct. 292, 38 L. Ed. 2d 219 (1973). When the legislature failed to act, the court extended the deadline. See *Robinson* v. *Cahill*, 67 N.J. 35, 36–37, 335 A.2d 6 (1975). In the continuing absence of legislative action, the court finally issued an order to redistribute $300 million in state funds to achieve greater conformity with the constitutional mandate, but, still hoping to avoid imposing a judicial solution, the court delayed the order's effective date approximately four months to give the legislature additional time to enact remedial legislation. See *Robinson* v. *Cahill*, 69 N.J. 133, 144 n.4, 146–50, 351 A.2d 713, cert. denied sub nom. *Klein* v. *Robinson*, 423 U.S. 913, 96 S. Ct. 217, 46 L. Ed. 2d 141 (1975). The legislature finally responded with the Public School Education Act of 1975 (act), c. 212, 1975 N.J. Laws 871, which was intended to reduce gross disparities in education expenditures among the districts and which the court found "constitutional on its face . . . assuming it [was] fully funded." *Robinson* v. *Cahill*, 69 N.J. 449, 467, 355 A.2d 129 (1976). When the act was not fully funded, the court enjoined state and local officials from distributing *any* funds, with a few limited exceptions, beginning July 1, 1976, if the legislature did not provide full funding for the act by that date. See *Robinson* v. *Cahill*, 70 N.J. 155, 159–61, 358 A.2d 457, modified, 70 N.J. 464, 360 A.2d 400 (1976). The legislature finally passed legislation imposing the state's first income tax to provide the required funding, and the court dissolved the injunction. See *Robinson* v. *Cahill*, 70 N.J. 465, 360 A.2d 400 (1976).

After the *Robinson* cases, in which the court repeatedly gave the legislature additional time to act because it was reluctant to develop its own constitutionally based standards, there followed another line of cases in a still ongoing controversy challenging the constitutionality of the school funding formula and its ability to provide a "thorough and efficient education" for disadvantaged students living in "property-poor school districts" with special needs. *Abbott ex rel. Abbott* v. *Burke*, 100 N.J. 269, 279, 495 A.2d 376 (1985); see also *Abbott ex rel. Abbott* v. *Burke*, 117 N.J. 51, 563 A.2d 818 (1989); *Abbott ex rel. Abbott* v. *Burke*, 119 N.J. 287, 575 A.2d 359 (1990); *Abbott ex rel. Abbott* v. *Burke*, 136 N.J. 444, 643 A.2d 575 (1994); *Abbott ex rel. Abbott* v. *Burke*, 149 N.J. 145, 693 A.2d 417 (1997); *Abbott ex rel. Abbott* v. *Burke*, 153 N.J. 480, 710 A.2d 450 (1998); *Abbott ex rel. Abbott* v. *Burke*, 163 N.J. 95, 748 A.2d 82 (2000); *Abbott ex rel. Abbott* v. *Burke*, 164 N.J. 84, 751 A.2d 1032 (2000); *Abbott ex rel. Abbott* v. *Burke*, 170 N.J. 537, 790 A.2d 842 (2002); *Abbott ex rel. Abbott* v. *Burke*, 172 N.J. 294, 798 A.2d

602 (2002); *Abbott ex rel. Abbott* v. *Burke*, 177 N.J. 578, 832 A.2d 891 (2003), modified, 182 N.J. 153, 862 A.2d 538 (2004); *Abbott ex rel. Abbott* v. *Burke*, 177 N.J. 596, 832 A.2d 906 (2003); *Abbott ex rel. Abbott* v. *Burke* 185 N.J. 612, 889 A.2d 1063 (2005); *Abbott ex rel. Abbott* v. *Burke*, 187 N.J. 191, 901 A.2d 299 (2006); *Abbott ex rel. Abbott* v. *Burke*, 193 N.J. 34, 935 A.2d 1152 (2007); *Abbott ex rel. Abbott* v. *Burke*, 196 N.J. 451, 956 A.2d 923 (2008); *Abbott ex rel. Abbott* v. *Burke*, 196 N.J. 544, 960 A.2d 360 (2008); *Abbott ex rel. Abbott* v. *Burke*, 199 N.J. 140, 971 A.2d 989 (2009). In these cases, the court considered various definitions of a "thorough and efficient" education as applied to students in the state's poorer districts, constantly revising and redefining the concept. See J. Lichtenstein, note, "*Abbott v. Burke*: Reaffirming New Jersey's Constitutional Commitment to Equal Educational Opportunity," 20 Hofstra L. Rev. 429, 473–75 (1991). The court ultimately moved away from its original definition in *Robinson I*, pursuant to which the goal had been to reduce significant disparities in state funding among the districts; *Robinson* v. *Cahill*, supra, 62 N.J. 515–16; and gravitated toward a broader definition that considered educational outputs and resulted in greater funding for poorer districts with large numbers of disadvantaged students who "must be given a chance to be able to compete with relatively advantaged students." *Abbott ex rel. Abbott* v. *Burke*, supra, 119 N.J. 313; see also J. Lichtenstein, supra, 474. The *Abbott* litigation is still in progress as a special master considers on remand whether the "special needs of disadvantaged students can be met sufficiently" through the application of the state's most recent funding formula. *Abbott ex rel. Abbott* v. *Burke*, supra, 199 N.J. 190.

Reacting with alarm to the proceedings in New Jersey, the Rhode Island Supreme Court noted in *Pawtucket* v. *Sundlun*, supra, 662 A.2d 40, that, in attempting to define what constitutes the "thorough and efficient" education specified in the New Jersey constitution, "the New Jersey Supreme Court has struggled in its self-appointed role as overseer of education for more than twenty-one years, consuming significant funds, fees, time, effort, and court attention. The volume of litigation and the extent of judicial oversight provide a chilling example of the thickets that can entrap a court that takes on the duties of a [l]egislature." Id., 59. Hoping to avoid a "morass comparable to the decades-long struggle [in New Jersey]"; id.; the Rhode Island Supreme Court declined to adopt the lower court's holding that the Rhode Island constitution required an "equal, adequate and meaningful education . . . ." (Internal quotation marks omitted.) Id., 55, 58.

When the Kansas Supreme Court chose to follow the path taken by New Jersey, it found itself facing similar problems for the exact same reason, namely, the lack of objective, quantifiable judicial standards. What later was described as a "constitutional confrontation"; R.

Levy, supra, 54 U. Kan. L. Rev. 1021; began in earnest when the Kansas Supreme Court ruled in *Montoy* v. *State*, 278 Kan. 769, 771, 773, 102 P.3d 306 (2005), that the state's school financing system was unconstitutional because it violated the mandate in the Kansas constitution that "[t]he legislature shall provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools"; Kan. Const., art. 6, § 1; and by making "suitable provision for finance of the educational interests of the state. . . ." Id., art. 6, § 6 (b). Rejecting the plaintiffs' claim that the then existing school funding scheme raised equal protection concerns, the court in *Montoy* concluded that an equitable and fair distribution of funding was required to provide an opportunity for every student to obtain the constitutionally mandated suitable education to which he or she was entitled. *Montoy* v. *State*, supra, 773. Just as the New Jersey court had done in the *Robinson* case, however, the Kansas court declined to develop its own standards and relied instead on the legislature, which commissioned an independent study "to define the level of performance for which funding must be provided." R. Levy, supra, 1052. As a consequence of that decision, the legislature enacted school finance legislation that appropriated approximately $142 million of additional funding for education and changed the funding formula. Id., 1022. The Kansas Supreme Court ruled that the new legislation did not remedy the constitutional violation, however, and, relying on the independent study, the court ordered the legislature to implement a minimum increase of $285 million above the funding level for the 2004–2005 school year, which included the $142 million of additional funding already contemplated in the existing legislation. *Montoy* v. *State*, 279 Kan. 817, 840, 845, 112 P.3d 923 (2005). As a result of that order, the legislature was called back into a "very contentious special session"; R. Levy, supra, 1022; during which unsuccessful efforts were made to amend the constitution or to reject *Montoy* v. *State*, supra, 279 Kan. 817. R. Levy, supra, 1023. Ultimately, the legislature enacted a multiyear plan that increased school funding by approximately $466 million. Id., 1023–24. In *Montoy* v. *State*, 282 Kan. 9, 138 P.3d 755 (2006), the court subsequently held that the latest school finance legislation substantially complied with its prior orders, noting that the legislature will have provided annual increased funding by the 2008–2009 school year of $755.6 million over that provided in the 2004–2005 school year; id., 19, 22; and that the funds had been allocated in a manner that satisfied the court's concerns regarding at-risk students, special education students and medium and large school districts. Id., 21–22.

The difficulty of developing standards in the present case is brought into stark relief by the plaintiffs' complaint, which, as I previously noted, describes the

"essential components of a suitable educational opportunity" in vague generalities, such as "appropriate" class sizes, "highly qualified" administrators and teachers, an "adequate" number of hours of instruction and a "rigorous" curriculum with a "wide breadth" of courses,[20] and proposes to measure whether a suitable education has been attained by evaluating student achievement, a concept that is far removed from the plain meaning of article eighth, § 1, and is devoid of any substantive content. I would suggest that the court is not equipped to evaluate these "inputs" and "outputs" or to provide them with the content now lacking to determine whether Connecticut schoolchildren are being provided with an adequate education. The plurality nevertheless dismisses such concerns, stating that the plaintiffs' complaint is similar to the complaints in *Seymour* and *Horton I* because it seeks, among other remedies, declaratory relief, "with the precise remedy being left to the defendants in the first instance." The plurality also observes that "the plaintiffs' claims at this stage [of the proceedings] present nothing more than a basic question of constitutional interpretation"; part I of the plurality opinion; and that it "will not let premature, and perhaps unfounded, concerns about the crafting of a remedy deprive the plaintiffs of their day in court." Footnote 22 of the plurality opinion. The plurality further suggests that, even if this court ultimately must adjudicate the substantive content of an adequate education, similar adequacy claims have been considered by our sister states, some of which have articulated standards that could serve as guideposts for Connecticut courts in determining when public schools have satisfied the constitutional mandate of a suitable education.

I find the plurality's assertion that it will not allow concerns about the crafting of a remedy to "deprive the plaintiffs of their day in court" remarkable in light of the fact that it is the existence of judicial standards, or lack thereof, that determines the court's ability to adjudicate a matter, including the crafting of an effective remedy. This goes to the heart of the doctrine of justiciability. The plurality's rationale effectively concedes that this court will be required at some point in the proceedings to define what a "suitable" education actually means if the defendants are unable to do so "in the first instance." This court, however, will not be able to declare, even "in the first instance," that the present system does *not* provide the plaintiffs with "suitable educational opportunities" without first adding substantive content to this presently vague and open-ended concept. We thus are asking the trial court to do what the plurality refuses to do, which is to define the constitutional parameters. Furthermore, educational standards cannot necessarily be borrowed from other states with different public needs and perceptions as to what a minimum quality of education entails

because policy judgments regarding educational goals and methods and how to resolve competing claims for limited state resources are typically based on unique local factors that may not be relevant in other jurisdictions. Accordingly, there are no easily discoverable judicial standards available to guide this court in determining whether Connecticut schoolchildren have been provided with a suitable education that guarantees certain predetermined outputs.

C

Nonjudicial Policy Determination

For many of the same reasons that I conclude that there is a textually demonstrable commitment of the issue to the legislature and a lack of judicially discoverable and manageable standards, I also conclude that the third *Baker* factor is implicated by the plaintiffs' claims, namely, the impossibility of resolving them without an initial policy determination of a kind clearly intended for nonjudicial discretion. See *Baker* v. *Carr*, supra, 369 U.S. 217. The plurality declares that deciding the plaintiffs' claims would not require the court to become involved in policy determinations regarding issues such as maximum class sizes or minimal technical specifications for classroom computers but that the judicial role would be limited to deciding whether selected public education systems, as presently constituted and funded, satisfy an articulated constitutional standard. The plurality, however, fails to provide even the faintest clue as to what that constitutional standard might be, just as it fails to recognize that, in order to determine whether a particular system is properly constituted and funded, the courts will be required to develop baseline criteria to make such comparisons possible, a task that most certainly will involve policy making because it will require decisions regarding the distribution of limited state resources and the balancing of competing political interests.

D

Lack of Respect for a Coordinate Branch of Government

The prudential considerations embodied in the final three *Baker* factors, which limit the challenges that a court may hear, also counsel against justiciability in this case. Judicial intervention to resolve an issue with potentially vast financial consequences demonstrates a lack of respect for a coordinate branch of government because the court is treading on a constitutional prerogative of the legislature regarding education *and* the legislature's exclusive authority to appropriate funds.[21] As I previously noted, jurisdictions that have considered constitutional claims alleging that the state has failed to provide a suitable education have required the legislature to enact drastic increases in education funding to satisfy the constitutional mandate. For example, the

Kansas legislature adopted a multiyear plan that increased the annual appropriation for education by several hundred million dollars over a period of four years to ensure that adequate funding would be available. See *Montoy* v. *State*, supra, 282 Kan. 19, 22. Similarly, the New Jersey legislature was compelled to institute the state's first income tax to provide increased school funding before the court would lift an injunction precluding state and local officials from distributing any funds for education until sufficient funding had been provided. See *Robinson* v. *Cahill*, supra, 70 N.J. 159–61. Court decisions that affect basic legislative functions such as funding thus pose challenges that have serious practical as well as philosophical implications for the separation of powers. As the Florida Supreme Court wisely observed, "[w]hile the courts are competent to decide whether or not the [l]egislature's distribution of state funds to complement local education expenditures results in the required uniform system, the courts cannot decide whether the [l]egislature's appropriation of funds is adequate in the abstract, divorced from the required uniformity. To decide such an abstract question of adequate funding, the courts would necessarily be required to subjectively evaluate the [l]egislature's value judgments as to the spending priorities to be assigned to the state's many needs, education being one among them. In short, the [c]ourt would have to usurp and oversee the appropriations power, either directly or indirectly, in order to grant the relief sought by [the] [p]laintiffs." (Internal quotation marks omitted.) *Coalition for Adequacy & Fairness in School Funding, Inc.* v. *Chiles*, supra, 680 So. 2d 406–407.

In the present case, the named plaintiff, the Connecticut Coalition for Justice in Education Funding, Inc., commissioned a report published in 2005 estimating that $2.02 billion in additional funding, an annual increase of nearly 92 percent over actual school funding,[22] would have been required in the 2003–2004 school year to ensure that all school districts across the state had a reasonable chance of meeting the standards that the report deemed necessary to provide Connecticut schoolchildren with a suitable public education.[23] See Augenblick, Palaich & Associates, Inc., Estimating the Cost of an Adequate Education in Connecticut (June, 2005) p. v (report), available at http://www.schoolfunding.info/states/ct/CT-adequacystudy.pdf (last visited March 9, 2010). Even this astounding estimate may have been low, however, because it focused exclusively on operating rather than capital expenses and did not include the cost of enforcing similar standards in public institutions such as magnet and vocational schools, which also educate students. Id., p. ii. Moreover, the report notes that its figures will require adjustment for inflation to calculate costs in future years. Id., p. iii. Thus, the inescapable fact that emerges from the report

is that the plaintiffs are asking this court to order the legislature to rearrange its spending priorities by increasing the annual appropriation for public elementary and secondary education by nearly 92 percent over the present level of funding in order to satisfy the constitutional mandate of providing Connecticut schoolchildren with a suitable education. This represents a significant reallocation of limited state resources, a function that normally rests with the legislature rather than the courts.

The situation in the present case is further complicated by the fact that none of the defendants has the power or authority to increase state funding for education.[24] The complaint does not name any members of the legislature as defendants. Also omitted from the list of defendants are the individual towns that potentially would be affected if the court deems their discretionary funds necessary for redistribution to satisfy the purported constitutional mandate of providing children with a suitable education. Accordingly, it is not clear how the court could order a funding increase as the complaint is presently structured.

E

Risk of Multifarious Pronouncements and Unquestioning Adherence to a Political Decision

In addition, judicial intervention would raise the possibility of "embarrassment from multifarious pronouncements" on educational matters as the courts and the legislature struggle to define and carry out their respective responsibilities. *Baker* v. *Carr*, supra, 369 U.S. 217. There is also an "unusual need for unquestioning adherence to a political decision already made"; id.; namely, the constitutional delegation of authority to the legislature to implement the principle of a free public education, for the obvious reason that to do otherwise would constitute a violation of the separation of powers and might even have the unfortunate effect of creating an adversarial relationship between the judicial and legislative branches. When the Kansas Supreme Court accepted a similar challenge, what subsequently occurred was described as "[a] dramatic and suspenseful showdown between two governmental heavyweights . . . [that] kept many Kansans gripping the edges of their seats as each new episode unfolded . . . [and that] set in motion a series of actions and reactions [the] repercussions [of which] have not yet been fully realized." R. Levy, supra, 54 U. Kan. L. Rev. 1021. This court should learn from what has happened in other jurisdictions and decline to shoulder a burden that clearly does not fall within the judicial domain and that, upon delegation to the courts, will turn judges into legislators.

Accordingly, because I conclude that the plaintiffs'

claims are nonjusticiable, I respectfully dissent.

[1] The plaintiffs are the Connecticut Coalition for Justice in Education Funding, Inc., and certain parents and grandparents of students enrolled in various public schools throughout the state. See footnote 3 of the plurality opinion and accompanying text.

[2] I note that, although the trial court deemed the plaintiffs' claims justiciable on the basis of this court's reasoning in *Horton* v. *Meskill*, 172 Conn. 615, 376 A.2d 359 (1977), *Horton* v. *Meskill*, 195 Conn. 24, 486 A.2d 1099 (1985), and *Sheff* v. *O'Neill*, supra, 238 Conn. 1, among other cases, commentators from Yale University Law School have concluded that the trial court's *Geisler* analysis; see *State* v. *Geisler*, 222 Conn. 672, 684–85, 610 A.2d 1225 (1992); was for all practical purposes "a thinly veiled justiciability decision." J. Simon-Kerr & R. Sturm, "Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education," 6 Stan. J. C.R. & C.L. (forthcoming 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1312426, p. 49 (last visited March 9, 2010). According to the analysis of these commentators, which I find persuasive, "[the trial court] claimed [that its] 'prudential cautions' concerns were part of the *Geisler* test traditionally employed by Connecticut courts to construe the contours of a state constitutional right. A close reading of [the trial court's memorandum of decision] shows, however, that [its] 'prudential cautions' map perfectly onto the justiciability case [of] *Baker* v. *Carr* [supra, 369 U.S. 217]. Further, neither *Geisler*—nor any case before or after—introduces a justiciability analysis as a step in defining the contours of a constitutional right. [The trial court's application] of the *Geisler* test therefore suggests that, as in other states recently dismissing adequacy suits, justiciability concerns actually drove the [court's] decision." J. Simon-Kerr & R. Sturm, supra, pp. 49–50.

Moreover, even if the trial court's analysis had followed the *Geisler* test more closely, I agree with commentators who question its legitimacy on the ground that "it is no more than a checklist from which to select [various interpretive] tools" and that it provides no guidance as to the significance of selecting "any particular method in any particular case." M. Besso, "Commenting on the Connecticut Constitution," 27 Conn. L. Rev. 185, 207 (1994). See generally *State* v. *Geisler*, supra, 222 Conn. 684–85 (stating that court should consider text of constitutional provision, holdings and dicta of this court and Appellate Court, federal precedent, sister state decisions, history surrounding adoption of constitutional provision and economic and sociological factors in interpreting contours of state constitution). The test is more harmful than beneficial because, without such guidance, the mere accumulation of analyses or precedents from an array of different methods, some of which may be of questionable relevance, can be used as a means to reach a desired end. See M. Besso, supra, 216–17.

[3] The defendants in this case are M. Jodi Rell, the governor of Connecticut, Denise Lynn Nappier, the state treasurer, Nancy S. Wyman, the state comptroller, Mark K. McQuillan, successor to Betty J. Sternberg, the former state commissioner of education, and various former and current members of the state board of education.

[4] Resolution No. 109 of the constitutional convention, which originally received an unfavorable report from the resolution committee, contained the following statement of purpose: "Our system of free public education has traditional acceptance on a par with our Bill of Rights and it should have the same constitutional sanctity." Convention Resolution No. 109 (July 27, 1965), reprinted in 1965 Connecticut Constitutional Convention Bulletins, Calendars, Resolutions, Files, Appendix (1965).

[5] Bernstein also referred in passing to a " 'good education' " when he stated: "[I]n the decade of the [1950s] . . . I served on a board of education and was surprised to find that Connecticut with its traditional good education had no reference to it in the [c]onstitution[.] [W]hen I use the word[s] 'good education' I am quoting, because if I may I would like to quote from the Connecticut [C]ode of 1650 which others I believe call the Ludlow Code. Quote '[a good] education of children is of singular . . . benefit to any [c]ommonwealth' so we do have the tradition which goes back to our earliest days of free good public education and we have [had] good public schools so that this again is not anything revolutionary . . . ." Proceedings of the Connecticut Constitutional Convention (1965), Pt. 3, p. 1039. It is clear from the context in which these remarks were made, however, that, in using the word "good," Bernstein did not intend to give any substantive meaning to the proposed provision but intended to recognize that a free public education is a deeply rooted tradition in this state that should be elevated to a constitu-

tional right. See, e.g., *Moore* v. *Ganim*, 233 Conn. 557, 596, 660 A.2d 742 (1995) (purpose of article eighth, § 1, was to give right to public education constitutional status).

[6] Some scholars have divided the education clauses of the state constitutions into four categories that are based on the level of obligation each state constitution imposes on the respective state legislature, with the first category imposing the slightest obligation and the fourth category imposing the greatest obligation. W. Thro, "The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation," 19 J.L. & Educ. 219, 243–45 nn.130–39 (1990); see also E. Grubb, "Breaking the Language Barrier: The Right to Bilingual Education," 9 Harv. C.R.-C.L. L. Rev. 52, 66–70 (1974); G. Ratner, "A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills," 63 Tex. L. Rev. 777, 815–16 and nn. 143–46 (1985). Connecticut and fourteen other states are included in the first category, presumably because the education clauses of the constitutions of those states do not refer to any standard concerning educational quality but merely require the establishment of a system of free public schools. See W. Thro, supra, 243–44 and nn.130–31. Thus, "[a]ccording to the very terms of [any constitutional] provision [providing merely for free public schools], the legislature has met its obligation simply by setting up a free public school system. To force the legislature to do more, while obviously desirable, would be to engage in judicial activism." Id., 246.

[7] Article third, § 18, was added to the state constitution in 1992 by article twenty-eight of the amendments.

[8] General Statutes § 10-4 (a) provides that the state board of education "shall have general supervision and control of the educational interests of the state, which interests shall include preschool, elementary and secondary education, special education, vocational education and adult education; shall provide leadership and otherwise promote the improvement of education in the state, including research, planning and evaluation and services relating to the provision and use of educational technology, including telecommunications, by school districts; shall prepare such courses of study and publish such curriculum guides including recommendations for textbooks, materials, instructional technological resources and other teaching aids as it determines are necessary to assist school districts to carry out the duties prescribed by law; shall conduct workshops and related activities, including programs of intergroup relations training, to assist teachers in making effective use of such curriculum materials and in improving their proficiency in meeting the diverse needs and interests of pupils; shall keep informed as to the condition, progress and needs of the schools in the state; and shall develop or cause to be developed evaluation and assessment programs designed to measure objectively the *adequacy and efficacy* of the educational programs offered by public schools and shall selectively conduct such assessment programs annually and report, pursuant to subsection (b) of this section, to the joint standing committee of the General Assembly having cognizance of matters relating to education, on an annual basis." (Emphasis added.) General Statutes § 10-4a adds that it shall be an educational interest of the state to ensure that "(1) each child shall have . . . equal opportunity to receive a *suitable* program of educational experiences; [and] (2) each school district shall finance at a reasonable level . . . an educational program designed to achieve this end . . . ." (Emphasis added.) In furtherance of these goals, General Statutes § 10-4 (b) requires that the state board of education "shall submit to the Governor and to the joint standing committee of the General Assembly having cognizance of matters relating to education an account of the condition of the public schools and of the amount and quality of instruction therein and such other information as will assess the true condition, progress and needs of public education."

[9] Article first, § 1, of the Connecticut constitution provides: "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."

[10] Article first, § 20, of the Connecticut constitution provides: "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 rights because of religion, race, color, ancestry or national origin."

Article first, § 20, has been amended by articles five and twenty-one of the amendments, which added sex and disability, respectively, to the list of protected classes.

[11] In *Sheff*, the plaintiffs claimed, inter alia, that the Hartford public school district, in comparison to surrounding suburban school districts, had failed

to provide equal educational opportunities for Hartford schoolchildren. *Sheff* v. *O'Neill*, supra, 238 Conn. 5–6.

[12] In *Sheff*, we explicitly acknowledged that the constitutional underpinnings of *Horton I* and *Horton III* were the same when we stated: "The defendants do not challenge the continued validity of *Horton I* and *Horton III* . . . but argue that their claim of nonjusticiability differs. That argument is unavailing. The plaintiff schoolchildren in the present case invoke the *same constitutional provisions* to challenge the constitutionality of state action that the plaintiff schoolchildren invoked in *Horton I* and *Horton III*." (Emphasis added.) *Sheff* v. *O'Neill*, supra, 238 Conn. 14–15.

[13] Significantly, one of the cases involved a claim brought *solely* under the equal protection provision of that state's constitution; see *Washakie County School District Number One* v. *Herschler*, 606 P.2d 310, 315–16, 332 (Wyo.) (reviewing claim that school funding system failed to provide equal educational opportunity and thus was in violation of equal protection clause of Wyoming constitution), cert. denied sub nom. *Hot Springs County School District Number One* v. *Washakie County School District Number One*, 449 U.S. 824, 101 S. Ct. 86, 66 L. Ed. 2d 28 (1980); and another case involved a de facto equal protection claim brought under the "thorough and efficient" education clause of that state's constitution only to avoid the possibility of an appeal to the United States Supreme Court. J. Lichtenstein, note, "*Abbott v. Burke*: Reaffirming New Jersey's Constitutional Commitment to Equal Educational Opportunity," 20 Hofstra L. Rev. 429, 439–40 n.42 (1991); see *Robinson* v. *Cahill*, 69 N.J. 133, 140, 147, 351 A.2d 713, cert. denied sub nom. *Klein* v. *Robinson*, 423 U.S. 913, 96 S. Ct. 217, 46 L. Ed. 2d 141 (1975).

[14] The plaintiffs' complaint requests, inter alia, that "[t]he [trial] [c]ourt order [the] defendants to create and maintain a public education system that will provide suitable and substantially equal educational opportunities to [the] plaintiffs."

[15] Although two of the plaintiffs' three stricken claims are also brought under the equal protection provisions of the state constitution, the disputed issue in all three claims is the alleged right of the plaintiffs to a suitable education.

[16] The court in *Baker* nonetheless did not presume that *all* equal protection claims would be justiciable, noting that "it must be clear that the [f]ourteenth [a]mendment claim is not so enmeshed with those political question elements which render [related] claims nonjusticiable as actually to present a political question itself." *Baker* v. *Carr*, supra, 369 U.S. 227.

[17] We articulated the test in *Horton III* as follows: "First, the plaintiffs must make a prima facie showing that disparities in educational expenditures are more than de minimis in that the disparities continue to jeopardize the plaintiffs' fundamental right to education. If they make that showing, the burden then shifts to the state to justify these disparities as incident to the advancement of a legitimate state policy. If the state's justification is acceptable, the state must further demonstrate that the continuing disparities are nevertheless not so great as to be unconstitutional." *Horton* v. *Meskill*, supra, 195 Conn. 38.

[18] The New Jersey constitution provides in relevant part: "The Legislature shall provide for the maintenance and support of a *thorough and efficient* system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." (Emphasis added.) N.J. Const., art. VIII, § IV, para. 1.

[19] The court did not rule that the system violated the equal protection clause of either the state or the federal constitution because the United States Supreme Court had rejected an equal protection challenge to the Texas public school funding scheme in *San Antonio Independent School District* v. *Rodriguez*, supra, 411 U.S. 28, 37, 55 (ruling that Texas public school funding scheme was constitutional because, inter alia, claim did not involve fundamental right or suspect class). As one commentator observed: "[T]he New Jersey Supreme Court [in *Robinson I*] modified the constitutional basis of the lower court's ruling in order to shield its decision from any possible hostile review by the United States Supreme Court. . . . [T]he New Jersey Supreme Court [thus] became the first in the nation to base its opinion that the state's system of funding public schools was unconstitutional *solely* upon the [education provision of the] state constitution." (Citations omitted; emphasis in original.) J. Lichtenstein, note, "*Abbott v. Burke*: Reaffirming New Jersey's Constitutional Commitment to Equal Educational Opportunity," 20 Hofstra L. Rev. 429, 439–40 n.42 (1991).

[20] Many have observed that student achievement is not merely a function of what takes place at school, but is also influenced by economic, social,

cultural and other factors, some unknown and perhaps unknowable, beyond the control of the educational system. See J. Simon-Kerr & R. Sturm, "Justiciability and the Role of Courts in Adequacy Litigation: Preserving the Constitutional Right to Education," 6 Stan. J. C.R. & C.L. (forthcoming 2010) (courts increasingly skeptical that greater funding will produce constitutionally adequate school systems when children are exposed to negative home environment), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1312426,p. 37 and n.112 (last visited March 9, 2010). Thus, in seeking to elevate to the status of a constitutional right a minimum level of achievement for every student, the plaintiffs ask our schools to perform an impossible task. As the current President of the United States, Barack Obama, recently explained in an address before a joint session of Congress: "[E]ducation policies will open the doors of opportunity for our children. But it is up to us to ensure they walk through them. In the end, there is no program or policy that can substitute for a mother or father who will attend those parent-teacher conferences, or help with homework after dinner, or turn off the TV, put away the video games, and read to their child. I speak to you not just as a President, but as a father, when I say that responsibility for our children's education must begin at home." President Barack Obama, Address to Joint Session of Congress (February 24, 2009), available at http://www.whitehouse.gov/the-press-office/remarks-president-barack-obama-address-joint-session-congress (last visited March 9, 2010).

[21] Although there is no constitutional provision that vests the legislature with the power to make appropriations, we have stated that "[s]uch legislative power is readily inferrable from article fourth, § 22, [of the Connecticut constitution] concerning the duties of the state treasurer, who shall receive all monies belonging to the state, and disburse the same only as he may be directed by law." (Internal quotation marks omitted.) *Eielson* v. *Parker*, 179 Conn. 552, 561, 427 A.2d 814 (1980).

[22] According to the General Assembly's office of fiscal analysis, the annual appropriation for education other than higher education (i.e., public colleges and universities) for fiscal year 2004, which would cover the 2003–2004 school year, was approximately $2.2 billion, or approximately 16 percent of the gross annual budget of $13.8 billion. Office of Fiscal Analysis, Connecticut General Assembly, Connecticut State Budget 2003–2005, p. 13. This means that the $2.02 billion increase in funding for a purportedly adequate education proposed in the report commissioned by the named plaintiff would constitute a staggering 91.8 percent increase in school funding for that year, thus increasing the appropriation for education from approximately 16 percent to nearly 26.7 percent of the total state budget for the 2004 fiscal year.

[23] The plurality asserts that consideration of this report is premature because its content, which the plurality describes as consisting of "adjudicative, rather than legislative, facts," cannot be "subject to judicial notice without an opportunity for a hearing . . . ." Footnote 20 of the plurality opinion. The plurality misses the point; the report is relevant not because the facts contained therein are necessary to a judicial determination of the case but because the facts demonstrate that the plaintiffs *themselves* recognize that the remedy they seek will require a significant reallocation of limited state resources.

[24] To the extent that the plaintiffs' intent is merely to seek a redistribution of funds already appropriated by the legislature to the state department of education and the towns, it is unclear whether this can be accomplished without knowing which statutes have been violated and without naming the towns as defendants. Although the plaintiffs' failure to join the legislature and the towns as parties does not implicate the subject matter jurisdiction of the trial court or this court; see *Hilton* v. *New Haven*, 233 Conn. 701, 721, 661 A.2d 973 (1995); their participation in the proceedings would appear to be required to aid the court in determining the appropriate relief in the event that the current school funding system is deemed unconstitutional under article eighth, § 1. See *Horton* v. *Meskill*, 187 Conn. 187, 198, 445 A.2d 579 (1982).