

STATE OF CONNECTICUT SUPREME COURT

S.C. 18032

CONNECTICUT COALITION FOR JUSTICE IN
EDUCATION FUNDING, ET AL.

v.

GOVERNOR M. JODI RELL, ET AL.

REPLY BRIEF OF PLAINTIFF-APPELLANTS

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ARGUMENT

The State argues that under article eighth, § 1 the Legislature can implement any educational system as long as it is free, public, and equal. Defendants are incorrect. As the lone dissenter in *Horton v. Meskill (Horton I)* affirmed, the Constitution's guarantee of free education "must be interpreted in a reasonable way," and the State "may not herd children in an open field to be lectured to by illiterates." 172 Conn. 615, 659 (1977) (Loiselle, J., dissenting). If such a qualitative standard must exist, plaintiffs are entitled to the opportunity to develop a record as to the nature of that standard, the purposes it serves, and the failure of the State to meet it. In response, defendants put forward false semantic distinctions. However, whether the standard is labeled "suitable," "minimally adequate," or any other qualitative term, plaintiffs' request is that this Court recognize a constitutional floor that serves the purposes of article eighth, §1 in order to protect the interests of Connecticut's schoolchildren.

The State also argues that plaintiffs' claims are nonjusticiable. Yet, that argument is contrary to this Court's precedent. The *Sheff* Court unanimously found article eighth, § 1 claims to be justiciable, with the majority stating: "Just as the legislature has a constitutional duty to fulfill its affirmative obligation to the children who attend the state's public elementary and secondary schools, so the judiciary has a constitutional duty to review whether the legislature has fulfilled its obligation." *Sheff v. O'Neill*, 238 Conn. 1, 15 (1996). The State has failed to offer any compelling reason to revisit this Court's prior determinations on the issue of justiciability.

Nevertheless, the trial court granted defendants' motion to strike three counts of plaintiffs' complaint. This result was improper not only substantively, but also procedurally.

Plaintiffs should have been afforded the opportunity for fact-finding, as plaintiffs have been granted in prior cases involving fundamental, affirmative rights. Thus, the trial court's decision should be reversed and remanded, with guidance as to the existence of a qualitative standard and the precise definition of that standard.

I. THE TRIAL COURT'S DECISION PREMATURELY NARROWED A FUNDAMENTAL, AFFIRMATIVE RIGHT

Connecticut courts have found it necessary to make findings of fact as well as law in applying the *Geisler* tools of analysis. As plaintiffs' claims seek to determine the scope of a fundamental, affirmative duty, this is an archetypal example of a case in which a full *Geisler* analysis would require fact-finding. As such, the trial court's decision to grant the State's motion to strike was premature.

A. FACTUAL DETERMINATIONS HAVE PLAYED AN IMPORTANT ROLE IN PRIOR GEISLER CASES

Defendants assert that none of the *Geisler* factors requires findings of fact. (See Defs. Br. p. 47.) While it is true that questions of constitutional text and prior case law do not require such findings, the same cannot always be said for the history of constitutional provisions or economic and sociological considerations. In several prior cases, Connecticut courts have needed fact-finding to evaluate these *Geisler* factors properly.

Courts have evaluated testimony and examined facts relating to the history factor of the *Geisler* analysis. See, e.g. *Moore v. Ganim*, 233 Conn. 557 (1995) (discussing factual evidence provided by the state historian regarding the intent of the framers of the 1818 Constitution); *Hilton v. City of New Haven*, 233 Conn. 701 (1995) (same). *Sheff v. O'Neill*, 1995 Conn. LEXIS 249 (1995) (copy attached to Pls. Br. as Exhibit E), though not explicitly invoking *Geisler*, also relied on similar historical evidence. *Id.* at 4-13 (making numerous

findings of fact with respect to the historical background and intent of the framers of the 1965 Constitution). Courts have also made findings of fact with respect to economic and sociological considerations when applying the *Geisler* analysis. See *Benjamin v. Bailey*, 234 Conn. 455 (1995) (citing factual evidence found by the trial court regarding the societal risks of assault weapons). See also *Sheff v. O'Neill*, 238 Conn. at 33 (relying on the trial court's finding that "racial and ethnic segregation is harmful, and that integration would likely have positive benefits for all children and for society as a whole.").

Defendants allege that *Ledbetter* establishes that factual hearings are never required in applying *Geisler*. (Defs. Br. p. 48.) Yet *Ledbetter* simply states that courts may take judicial notice of *well-established scientific* evidence when defendants raise constitutional claims under *Geisler* on appeal. *State v. Ledbetter*, 275 Conn. 534, 567-68 (2005). *Ledbetter* does not suggest that this Court may take judicial notice of facts in this case. As this Court has stated, appellate courts should take judicial notice "only if those findings reasonably can be said to be not in dispute." *State v. Griffin*, 251 Conn. 671, 703 (1999). See also *State v. Porter*, 241 Conn. 57, 85 n.30 (1997) (finding that "very few scientific principles are so firmly established as to have attained the status of scientific law . . . [and that only such principles] properly are subject to judicial notice . . .") (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 592, 593 n.11 (1993)).

B. FACTUAL DETERMINATIONS ARE NECESSARY FOR A FULL GEISLER INQUIRY IN THE PRESENT CASE

Several factual claims underpinning the *Geisler* analysis in this case are in dispute, aligning this case with *Moore v. Ganim* and *Benjamin v. Bailey* rather than *State v. Ledbetter*. This case presents the type of constitutional claim in which findings of fact are

needed and not amenable to judicial notice.¹ In that regard, it is similar to cases such as *Broadley v. Bd. of Education of Meriden*, 229 Conn. 1 (1994) and *Sheff v. O'Neill*, 238 Conn. 1 (1996) in which trial courts correctly found that it was inappropriate to dispose of claims at the motion to strike stage.² See *Broadley v. Bd. of Educ. of Meriden*, 1990 WL 269168 (Conn. Super. Ct. July 20, 1990) (rejecting motion to strike) (attached to Pls. Br. as Exhibit A); *Sheff v. O'Neill*, 1990 WL 284341 (Conn. Super. Ct. June 18, 1990) (same) (attached to Pls. Br. as Exhibit B).

Fact-finding would be instructive in the present case. For example, the trial court's decision prevented plaintiffs from offering educational experts to discuss the substantial improvements in school performance that have resulted from the recognition of a right to an adequate education in sister states – testimony that would specifically rebut factual claims made by defendants in their discussion of the sixth factor under *Geisler Compare* (Defs. Br. p. 43 (“there is no indication that the right the plaintiffs seek will remedy [problems in Connecticut’s educational system]”)), with Molly Hunter, *All Eyes Forward: Public Engagement and Educational Reform in Kentucky*, 28 J.L. & Educ. 485, 485, 515 (1999)

¹ If the trial court had reached its legal conclusion after presuming in plaintiffs’ favor all relevant historical and socioeconomic facts, plaintiffs would agree that there was no procedural error, and only a substantive one. However, insofar as those facts are relevant to the present *Geisler* inquiry and are *not* presumed in plaintiffs’ favor, plaintiffs believe fact-finding is necessary to a proper determination of the legal question presented.

² While defendants cite cases in which courts have granted a motion to strike constitutional claims, *i.e.* *Batte-Holmgren v. Comm’r of Pub. Health*, 281 Conn. 277 (2007) and *Alexander v. Comm’r of Admin. Servs.*, 86 Conn. App. 677 (2004), these cases did not seek to examine the scope of a constitutional provision, and therefore did not involve the use of the *Geisler* test or require factual evidence. (See Defs. Br. p. 46.) In *Batte-Holmgren*, “the parties concede[d] . . . that the challenged legislation [did] not implicate a fundamental right or a suspect class,” 281 Conn. at 295, and thus the court had only to conduct a standard rational-basis analysis; no special inquiry into the contours of a fundamental right was required. Likewise, plaintiffs in *Alexander* brought an equal protection claim governed by established law, and merely failed to make the requisite allegations of “specific instances of discrimination among the members of the class of eligible inmates.” 86 Conn.App. at 685.

(discussing the role that the *Rose* decision played in moving Kentucky "to the forefront of the national education reform movement," and improving student achievement such that "several high-poverty elementary schools scored among the state's top twenty in all subjects tested. . . [in] 1998"), and Michael Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C.L. Rev. 1467, 1527 (2007) (discussing how adequacy rulings have resulted in "dramatic reductions in spending disparities among school districts" and "a significant increase in . . . student achievement scores."). Indeed, while the State argues that facts are not necessary, it introduces several assertions of fact in its discussion of the sixth *Geisler* factor: "Connecticut has historically made education a high priority," (Defs. Br. p. 41; *contra* Brief for Christopher Collier and Simon Bernstein, as Amici Curiae Supporting Plaintiff-Appellants p. 7); "[Connecticut] has shown outstanding educational leadership by any measure," (Defs. Br. p. 41); "Connecticut schools have been more effective than others in closing the achievement gap," (Defs. Br. 44; *contra* Brief for Connecticut State Conference NAACP and Center for Children's Advocacy, Inc. as Amici Curiae Supporting Plaintiff-Appellants p. 5-6).

The extensive and at times contradictory information submitted in briefs, amicus briefs, and appendices reflects the importance of fact-finding in this case. While parties have used these channels to put forward relevant information, that information is by no means complete, nor has it been subjected to cross-examination. Relevant facts could be more thoroughly presented and evaluated during discovery and trial. Defendants assert that "judicial economy militates in favor of adjudicating the legal sufficiency of [plaintiffs' suitability] claims before trial," (Defs. Br. p. 48), yet allowing plaintiffs' suitability claims to proceed along with plaintiffs' equity claim will not prolong the length of discovery or future

proceedings. The trial court's decision to apply the full *Geisler* tools of analysis without fact-finding constitutes grounds for reversal.

II. AN INTERPRETATION OF ARTICLE EIGHTH, § 1 THAT FAILS TO RECOGNIZE A QUALITATIVE STANDARD IS PLAINLY INCORRECT

In reversing the court below, this Court should provide guidance as to the existence of a qualitative standard that serves the purposes of article eighth, § 1. Plaintiffs believe such a standard is essential to maintain consistency with this Court's precedent, the history of article eighth, § 1, and the principle of constitutional interpretation set out in *State v. Dukes* that the Constitution is "an instrument of progress . . . and should not be interpreted too narrowly or too literally so that it fails to have contemporary effectiveness for all citizens." 209 Conn. 98, 115 (1988). *See also State v. Linares*, 232 Conn. 345, 382 (1995).

A. DEFENDANTS' ARGUMENTS RELY ON A FALSE DISTINCTION BETWEEN TERMS

In order to be meaningful and effective for schoolchildren, the right to education must include a right to a qualitative standard that serves the purposes of article eighth, § 1. Confronted with this simple proposition, defendants engage in semantic misdirection. Defendants make much of the putative difference between "suitable" and "minimally adequate," when in fact plaintiffs define suitable as the minimum standard necessary to serve the purposes of education (see Am. Compl. ¶46). Defendants contend that these terms are wholly distinct, and that plaintiffs' choice of the word "suitable" distinguishes this case from adequacy decisions in sister states, especially those favorable to plaintiffs' position. (See Defs. Br. p. 29-34.) However our sister states, like plaintiffs, also tie their qualitative standards to the purposes of education. Defendants fail to cite a single case in which word choice has doomed an adequacy claim, nor do they offer any explication of the

distinction. This is because no meaningful distinction exists.³

As stated in plaintiffs' brief (see Pls. Br. p. 18), every court that has found education adequacy claims to be justiciable has found a qualitative standard, even as they have called their standards by different names. Justice Loiselle, dissenting in *Horton I*, acknowledged this simple proposition when he explained that education must be "meaningful" and must "measure up to standards accepted by knowledgeable leaders in the field of education." *Horton v. Meskill*, 172 Conn. 615, 659 (1977) (Loiselle, J., dissenting).

Defendants' semantic argument is particularly inappropriate given the court's duty on a motion to strike to "construe the complaint in the manner most favorable to sustaining its legal sufficiency," reading it "broadly and realistically." *Comm'r of Labor v. C.J.M. Services, Inc.*, 268 Conn. 283, 292 (2004). See also *Seymour v. Region One Bd. of Educ.*, 261 Conn. 475, 483 (2002). The gravamen of plaintiffs' complaint is the State's failure to provide schools that meet the purposes of education (see, e.g., Am. Compl. ¶¶ 4, 45, 46, 54, 76, 79, 82). Thus, "plaintiffs can succeed if any of their claims fall within the constitutional right as [the court] ha[s] defined it." *Sheff v. O'Neill*, 238 Conn. 1, 35 (1996). (See also Brief for The Campaign for Educational Equity and The National Access Network as Amici Curiae

³ Presupposing this false distinction, defendants argue that a failure to plead "minimally adequate" in the original complaint is fatal to plaintiffs' claims. (Defs. Br. p. 19-20 n.4.) However, the case they cite for this proposition involves a matter in which plaintiffs sought to invoke an entirely different statute at the appellate level. See *A & M Towing & Recovery, Inc. v. Guay*, 282 Conn. 434, 439 n.3 (2007). Moreover, courts have accepted new arguments at the appellate level, where full briefing was provided. See *Reardon v. Windswept Farm, LLC*, 280 Conn. 153, 165 (2006) ("[B]ecause the parties had the opportunity to brief the case's impact, we conclude that the interest in the uniform application of the plainly governing law warrants our consideration of a claim beyond the narrow issue that was before the trial court.") Therefore, the distinction defendants seek to draw is not only false, but even if true would not defeat plaintiffs' claims.

Supporting Plaintiff-Appellants p. 9-10.)

B. A REASONABLE READING OF ARTICLE EIGHTH, § 1 REQUIRES THE RECOGNITION OF A QUALITATIVE STANDARD

Defendants assert that article eighth, § 1 lacks a qualitative term, and therefore this Court cannot recognize a right to a qualitative standard. This argument ignores the text of article eighth, § 1, standard canons of textual interpretation, and this Court's own rules for interpreting constitutional provisions.

Article eighth, § 1 not only establishes education as a fundamental right, but also places an affirmative obligation on the State to ensure the provision of that right. The qualitative term that ensures that the right is actually provided is the term "appropriate."⁴ See *Horton I*, 172 Conn. at 638 ("[T]he present financing system is not *appropriate* legislation to discharge the state's constitutional duty to educate its students") (emphasis added). Further, this Court has adopted the standard canon of interpretation that text must be read reasonably. See *Modern Cigarette, Inc. v. Town of Orange*, 256 Conn. 105, 120 (2001) ("[C]ommon sense must be used and courts must assume that a reasonable and rational result was intended").⁵ If the "principle" of "free public schools" contains no qualitative standard, as defendants argue, a legislative enactment providing

⁴ Notably, the term "appropriate" is synonymous with the term "suitable." See *Webster's Third New International Dictionary, Unabridged* (1993) (defining "appropriate" as "specially suitable"); *The Oxford English Dictionary* (2d ed. 1989) (defining "appropriate" as "specially fitted or suitable"); *The American Heritage Dictionary of the English Language* (4th ed. 2000) (defining "appropriate" as "suitable for a particular person, condition, occasion, or place"); *The Oxford Thesaurus, American Edition* (1992) (listing "appropriate" and "suitable" as synonyms of one another).

⁵ Even in cases in which there is no qualitative term, courts strive to interpret education provisions reasonably. See *McDuffy v. Sec'y of Executive Office of Educ.*, 415 Mass. 545, 551 n.8 (1993) ("The word 'adequate' does not appear in the constitutional language. . . . Thus, we strive to ascertain, as we should, the intention of the drafters of the constitutional language and to provide a frame of reference for the implementation of that intent in a modern society").

nothing more than an empty school building could be deemed “appropriate.” Finally, the State’s narrow and mechanical construction violates this Court’s principle that constitutional provisions must be interpreted so as to maintain their “contemporary effectiveness,” *State v. Linares*, 232 Conn. 345, 382 (1995), and, “adapt[] to the various *crises* of human affairs.” *State v. Dukes*, 209 Conn. 98, 115 (1988) (emphasis in original, internal citations omitted).

There are two major substantive questions before the Court: first, whether article eighth, § 1 contains a qualitative standard and second, how that standard ought to be defined. For the reasons discussed above, the first question is easily answered. The second question – how precisely to define the standard – is more complicated. This question should be informed by the intent of the framers, (*see, e.g.*, Defs. Br. 41; *contra* Brief for Christopher Collier and Simon Bernstein, as Amici Curiae Supporting Plaintiff-Appellants p. 11-13), the historical aims of education in Connecticut, (*see, e.g.*, Brief for One Connecticut as Amici Curiae Supporting Plaintiff-Appellants p. 2-3), and sociological and economic data, (*see, e.g.*, Brief for Workforce Alliance *et al.* as Amici Curiae Supporting Plaintiff-Appellants p. 2-4), and will need to be explored in further proceedings.

C. THE HISTORY OF ARTICLE EIGHTH, § 2 AND THIS COURT’S DECISION IN SIMMONS v. BUDDS DO NOT SUPPORT A CONCLUSION THAT ARTICLE EIGHTH, § 1 LACKS A QUALITATIVE STANDARD

As plaintiffs have already noted (*see supra* section IIB), article eighth, § 1 includes a qualifier: the word “appropriate.” Further, the history of article eighth, § 2 reveals that neither this provision nor the decision in *Simmons v. Budds*, 165 Conn. 507 (1973), has any impact on plaintiffs’ claims. Article eighth, § 2 was the product of a debate over the limits of academic freedom in higher education. 3 Proceedings of the Connecticut Constitutional Convention of 1965, p. 1034-35 (1966). The purpose was to “insulate [the

University of Connecticut] from partisanship” and “protect it from uninformed temporary pressures.” *Id.* at p. 1048. The initial clause of article eighth, § 2 and the word “excellence” were taken from a letter that John J. Budds, Chairman of the Board of Trustees of the University of Connecticut, sent to the delegates, in which he wrote that “there is ample evidence to support the views that constitutional recognition serves as an added guarantee of the autonomy and intellectual independence of state universities. I believe such recognition . . . would make it possible for the university to serve better as a model of excellence for the state system of public education.” *Id.* at p. 1062. Thus, article eighth, § 2 was intended to establish the University of Connecticut as an academic institution insulated from legislative caprice, and not to create a qualitative standard of education. As such, the decision in *Simmons* was perfectly consistent with the purpose of the provision, namely to grant the university academic independence. *Simmons* involves entirely different factual circumstances and a constitutional provision with a distinct history and logic, and thus has no bearing on the case before the Court.

D. RECOGNITION OF A QUALITATIVE STANDARD THAT SERVES THE PURPOSES OF ARTICLE EIGHTH, § 1 WOULD PROTECT THE INTERESTS OF CONNECTICUT SCHOOLCHILDREN WHILE RESPECTING LOCAL CONTROL

Horton I was a landmark case that did much to fulfill Connecticut’s long-standing commitment to public education. However, *Horton I* has *not* been interpreted to mandate strict equity, *i.e.*, a system in which all districts are able to spend commensurately with the highest spending districts (as is the case in California, see *Serrano v. Priest*, 18 Cal.3d 728 (1976)). See *Horton v. Meskill (Horton III)*, 195 Conn. 24 (1985). The Court in *Horton I*, and more notably in *Horton III*, sought to maintain a degree of local control by allowing districts to spend more than the amount dictated by the State’s education formula. As such,

disparities in education funding have been found to be permissible under *Horton I*. See *Horton III*, 195 Conn. at 39-40 (recognizing that “continued significant disparities . . . did not undermine the basic policy of equalizing state support for education”). Since even “significant” disparities may be constitutional under *Horton III*, a qualitative standard that serves the purposes of article eighth, §1 is essential to ensuring that schoolchildren in poorer districts continue to receive a meaningful education. Thus, in contrast to the State’s arguments (see Defs. Br. p. 43), the recognition of a qualitative standard that serves the purposes of education is a means to ensure that article eighth, § 1 remains effective for all children while still respecting local control.

III. PLAINTIFFS’ CLAIMS UNDER ARTICLE EIGHTH, § 1 ARE JUSTICIABLE

Not a single Justice of this Court has ever found a claim under article eighth, § 1 nonjusticiable. As the trial court explicitly found and plaintiffs reiterated in their brief (Mem. Decision Mot. Strike p. 11; Pls. Br. p. 27-31), plaintiffs’ claims are justiciable. *Horton I* and *Sheff v. O’Neill* established that constitutional claims exploring the contours of article eighth, § 1 are proper for judicial review. *Horton I*, 172 Conn. 615 (1977); *Sheff*, 238 Conn. 1, 14 (1996). Moreover, this Court has expressly acknowledged its role as guardian of the rights guaranteed under article eighth, § 1. See *Sheff*, 238 Conn. at 15 (“[W]e are persuaded that the phrase ‘appropriate legislation’ in article eighth, § 1, does not deprive the courts of the authority to determine what is ‘appropriate.’”).

Defendants invoke *Seymour v. Region One Bd. of Educ.*, 261 Conn. 475 (2002) to claim that education cases are not “per se justiciable” (Defs. Br. p. 10), and that *Horton I* and *Sheff* do not settle the question of justiciability. However, plaintiffs do not claim that all cases remotely related to the field of education are justiciable, but rather that cases

challenging the State's fulfillment of its duties under article eighth, § 1 are justiciable. *Seymour* is inapposite on this point. As this Court stated in *Seymour*, "the plaintiffs do not seek to vindicate students' state fundamental constitutional right to education; compare *Horton* . . .; but rather to vindicate their constitutional rights as taxpayers." *Seymour*, 261 Conn. at 487. Moreover, *Seymour* was found justiciable.⁶

A. ADJUDICATING THIS CASE DOES NOT REQUIRE THE JUDICIARY TO SET EDUCATIONAL POLICY, NOR ENGRAFT PARTICULAR STANDARDS INTO THE CONSTITUTION

The State asserts that plaintiffs' claims are nonjusticiable because, *inter alia*, "there are no judicially discoverable and manageable standards for resolving the issue," and "the court would be required to make an initial policy determination of the kind that clearly involves nonjudicial discretion." (Defs. Br. p. 8 (citing *Seymour v. Region One Bd. Of Educ.*, 261 Conn. 475, 482 (2002), which incorporates the factors discussed in *Baker v. Carr*, 369 U.S. 186, 217 (1962)).)⁷ The State insists that Connecticut courts cannot evaluate the constitutionality of the educational system without becoming a policymaking authority. (See

⁶ Further, state courts need not view justiciability and separation of powers issues in the same manner as federal courts, particularly with respect to positive rights like the right to education. See e.g. Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 Harv. L. Rev. 1833 (2001); Jonathan Feldman, *Separation of Powers and Judicial Review of Positive Rights Claims*, 24 Rutgers L. J. 1057 (1993). Even the defendants' own expert, (see Defs. Br. p. 41), has more recently argued that "[courts] should not hesitate to do their part in upholding students' educational rights." Sonja Ralston-Elder, *Standing Up to Legislative Bullies: Separation of Powers, State Courts, and Educational Rights*, 57 Duke L. J. 755, 788 (2007).

⁷ The State also claims that plaintiffs fail on *all* four of the other *Baker* factors. However, the Court's rulings in *Horton I* and *Sheff* that claims under article eighth, § 1 are justiciable should govern the Court's analysis of these *Baker* factors. The State does not distinguish this case from the matters before the Court in *Horton I* or *Sheff* with respect to the first factor (textual commitment), the fourth factor (due respect for coordinate branch), the fifth factor (adherence to a political decision), or the sixth factor (embarrassment from multifarious pronouncements).

Defs. Br. p. 3-4, 10, 13-14.) These same arguments were made, and rejected, in *Sheff*.⁸ Judicial examination of the constitutionality of the State's education system does not require that the judiciary set educational standards (class size, teacher quality, etc.), nor engraft such standards into the Constitution.

Defendants' concern with judicially-established standards, (see Defs. Br. p. 40), misconceives the nature of plaintiffs' claims. Standards for plaintiffs' proffered "inputs" are already present in the "extensive body of state education statutes." (Defs. Br. p. 5.) Such standards are also found in federal law and the recommendations of educational experts.⁹ Furthermore, plaintiffs' claims do not require that the judiciary engraft particular educational standards into the Constitution. Rather, plaintiffs simply ask that the court evaluate, based on widely agreed-upon standards, whether educational opportunities for certain schoolchildren are so constricted that their fundamental right to education is infringed.

The prior practice of this Court and the extensive experience of our sister state courts demonstrate that courts are adept at evaluating the quality and appropriateness of a state's education system without presuming to mandate particular policies. In *Horton I*, the

⁸ The State's brief in the current case is replete with language from the State's brief in *Sheff*. See Brief of Defendants, *Sheff v. O'Neill*, 238 Conn. 1 (1996) (copy attached hereto as Exhibit F). See, e.g., Defs. Br., *Sheff v. O'Neill*, p. 77 ("The courts' involvement in this exercise would engraft particular standards onto the constitution . . . making for static rather than progressive standards that keep pace with contemporary theories."); Defs. Br., *Sheff v. O'Neill*, p. 78 ("The plaintiffs have not challenged any particular legislative enactment, but have simply alleged that the legislature's actions have not been 'effective' or 'sufficient'."); Defs. Br., *Sheff v. O'Neill*, p. 77 ("The Court would be left speculating and grasping for standards to determine if a constitutional violation exists.").

⁹ See, e.g., *No Child Left Behind Act of 2001*, 20 U.S.C. 7801, § 901 (2006) (establishing federal standards for teachers); Jeremy D. Finn & Charles M. Achilles, *Tennessee's Class Size Study: Findings, Implications, Misconceptions*, Educ. Evaluation & Pol'y Analysis, Summer 1999, at 97, 106 (advocating reduced class sizes in the early grades); Linda M. Espinosa, Nat'l Inst. for Early Educ. Research, *High Quality Preschool: Why We Need It and What It Looks Like* 1 (2003), <http://nieer.org/resources/factsheets/1.pdf> (recommending preschool for all 3- and 4-year olds).

Court identified as “criteria for evaluating the ‘quality of education,’” *inter alia*, “(a) size of classes; (b) training, experience and background of teaching staff; (c) materials, books and supplies; . . . (h) course offerings and extracurricular activities,” see *Horton I*, 172 Conn. 615, 634, yet standards for these criteria were neither judicially mandated nor engrafted into the Constitution. See also *Van Steensburg v. Lawrence & Mem’l Hosps.*, 194 Conn. 500, 505-06 (1984) (stating that, in the medical care context, standards can be employed as evidence without becoming independent legal rules). Courts are fully capable of using the types of “inputs” suggested by plaintiffs as broad metrics, without constitutionalizing any of them individually. Plaintiffs also note that the proffered “inputs” are merely suggestive, and need not constitute, in whole or in part, the factors the trial court ultimately weighs in evaluating Connecticut’s educational system.

In adjudicating adequacy claims, courts can conduct “totality of the circumstances” analyses that evaluate different indicators, such as teacher qualifications or graduation rates, to determine whether or not there is a constitutional violation. On a more systemic level, courts can examine expert “costing-out studies” to determine whether state funding levels are sufficient to meet the true cost of education. In practice, most courts rely on a mix of such methods; however, courts are never called upon to set educational policies or engraft particular standards.

In Massachusetts, for example, the Supreme Judicial Court relied on evidence from a range of inputs to find that the state’s education system was unconstitutional. In addition to general assessments by the state Board of Education, the court considered evidence submitted by superintendents in four Massachusetts school districts, which

outline[d] specific deficiencies . . . such as: large classes; reductions in staff; inadequate teaching of basic subjects including reading, writing, science,

social studies, mathematics, computers, and other areas; neglected libraries; inability to attract and retain high quality teachers; lack of teacher training; lack of curriculum development; lack of predictable funding; administrative reductions; and inadequate guidance counseling.

McDuffy v. Sec'y of Executive Office of Educ., 415 Mass. 545, 617 (1993). The Massachusetts court conducted an holistic analysis of these "inputs," basing its analysis on the entire "portrait" of the system, rather than the failure to meet any particular standard: "The bleak portrait of the plaintiffs' schools and those they typify, painted in large part by the defendants' own statements and about which no lack of consensus has been shown, leads us to conclude that the Commonwealth has failed to fulfill its obligation." *Id.*¹⁰

Taking a less input-focused approach, the Kansas Supreme Court considered a broad-based cost study previously commissioned by the state. In finding that the Kansas Constitution had been violated, the court relied primarily on this cost study's conclusion that "both the formula and funding levels were inadequate to provide what the legislature had defined as a suitable education." *Montoy v. State*, 278 Kan. 769, 774 (2005).

On remand in this case, the trial court can conduct a totality of the circumstances analysis, using whatever factors it deems relevant, or rely on a costing-out study. There is no need to set or constitutionalize any particular educational standards. The State's insistence to the contrary is grounded in a mischaracterization of plaintiffs' claims – one that is impermissible at this procedural posture. As stated above, see *infra* Part II, the trial

¹⁰ In their "totality of the circumstances" analyses, some sister state courts have also looked to education outcomes. See, e.g., *Campaign for Fiscal Equity v. State (CFE II)*, 100 N.Y.2d 893, 903, 919 (2003) (after examining "the weight of the credible evidence" the New York Court of Appeals concluded that "whether measured by the outputs or the inputs, New York City schoolchildren are not receiving the constitutionally-mandated opportunity for a sound basic education."); *Leandro v. State*, 346 N.C. 336, 355 (1997) (stating that the "level of [student] performance . . . on standard achievement tests" should be examined to determine a constitutional violation.).

court must “construe the complaint in the manner most favorable to sustaining its legal sufficiency.” *Comm’r of Labor v. C.J.M. Servs., Inc.*, 268 Conn. 283, 292 (2004). Defendants seek to invert the motion to strike standard, urging the Court to view plaintiffs’ claims in the *least favorable light*. The proper posture was illustrated in *Seymour v. Region One Bd. of Educ.*, where the Court had “grave doubts about the justiciability of the claim,” 261 Conn. 475, 483 (2002), and yet overturned the trial court’s determination that plaintiffs’ claims were nonjusticiable, stating that:

When a complaint is challenged by a motion to dismiss, we view its allegations in the light favorable to the pleader. We see no reason why the same principle should not apply to the prayer for relief. . . . This latter prayer for relief [declaratory judgment] is susceptible of an interpretation that would leave the formulation of the appropriate remedy to the legislative branch, rather than requiring the judicial branch to entangle itself in what probably would be the nonjudicial function of establishing a taxing district. . . . We, therefore, consider the question of justiciability on the premise that the plaintiffs seek a declaration of the unconstitutionality of § 10-51(b) with the remedy that they propose to be considered by the legislative branch.

Id. at 483-84 (internal citations omitted).

Properly characterized, plaintiffs’ claims are plainly justiciable. Prior precedent and the practice of sister state courts demonstrate that trial courts can evaluate the constitutionality of educational systems in ways that are feasible, practical, flexible and respectful of separation of powers.

B. CASES IN WHICH COURTS HAVE FOUND EDUCATION ADEQUACY CLAIMS NONJUSTICIABLE ARE DISTINCT FROM THE CASE AT HAND

As stated in plaintiffs’ brief, the vast majority of “adequacy” claims have been found justiciable. (Pls. Br. p. 17-20.) The small number of cases in which courts have determined

such matters to be nonjusticiable are distinct from the case at hand.¹¹

For example, the State cited several cases that occurred in states where at the time of decision, education was not a fundamental right. These cases therefore shed limited light on the justiciability of the current case. See *Ex Parte James*, 836 So.2d 813 (Ala. 2002); *Coal. for Adequacy & Fairness v. Chiles*, 680 So.2d 400 (Fla. 1996); *Comm. for Educ. Rights v. Edgar*, 174 Ill.2d 1 (1996); *Lewis v. Spagnolo*, 186 Ill.2d 198 (1999); *Oklahoma Educ. Ass'n v. State*, 158 P.3d 1058 (Okla. 2007); *Lobato v. State*, 2008 Colo. App. LEXIS 69 (Jan. 24, 2008).

Likewise, other states have dramatically different constitutional provisions, legislative histories, or prior precedent, and are, accordingly, also not relevant. See *City of Pawtucket v. Sundlun*, 662 A.2d 40, 55 (R.I. 1995) (finding that the constitutional text gave the legislature "virtually unreviewable discretion"); *Neb. Coal. for Educ. Equity & Adequacy v. Heineman*, 273 Neb. 531, 537 (2007) (finding that Nebraska voters had rejected a 1996 amendment that would have added the term "quality education" to the constitution); *Marrero v. Commonwealth*, 559 Pa. 14, 17-19 (1999) (relying in part on *Danson v. Casey*, 484 Pa. 415 (1979) in which the Court foreclosed an "equity" claim).

IV. SISTER STATE CASES DEMONSTRATE THAT JUDICIAL REMEDIES CAN BE SUCCESSFULLY IMPLEMENTED IN EDUCATION ADEQUACY CASES

Given the current procedural posture, the State's discussion of remedy is premature. Nevertheless, similar cases in other states illustrate that judicial remedies can be successfully implemented in adequacy cases. (See Brief for The Campaign for Educational Equity and The National Access Network as Amici Curiae Supporting Plaintiff-Appellants p.

¹¹ Defendants cite *Skeen v. State*, 505 N.W.2d 299 (Minn. 1993) as a non-justiciable case (Def. Br. p. 36), when in fact Plaintiffs' claims were fully adjudicated. *Id.* at 319.

17-20.) These successful remedies provide important lessons that may inform an appropriate remedy in this case. Remedies have been most successful when courts have (a) set forth broad guidelines defining the purposes of education, or (b) instructed legislatures to implement processes for determining the true cost of education. Experiences in states such as Massachusetts and New York suggest that these approaches allow courts to safeguard the constitutional rights of schoolchildren without improperly intruding into the legislative sphere.

Plaintiffs agree with the State that education cases in Massachusetts are instructive with regards to the current matter. In *McDuffy v. Sec'y of Office of Educ.*, 415 Mass. 545 (1993), the Supreme Judicial Court of Massachusetts issued a successful order in response to the state's failure to provide an adequate education. The court dictated broad guidelines to govern the constitutionality of the state's educational system, *id.* at 618-19, which mirror the educational objectives presented by plaintiffs here. (Am. Compl. ¶ 46.) Upon setting these guidelines, the court deferred to the legislature to adopt appropriate legislation. 415 Mass. at 618. The legislature complied three days later, see Education Reform Act of 1993, 1993 Mass. Acts 71, and students in Massachusetts have since exhibited demonstrable gains in educational performance. The National Assessment of Educational Progress (NAEP) is a national assessment administered by the U.S. Department of Education. From 1992 to 2005, Massachusetts students scoring at or above proficient on NAEP increased from 36% to 44% in 4th grade reading, from 37% to 44% in 8th grade reading, from 23% to 49% in 4th grade math, and from 24% to 43% in 8th grade math. See Education Week, *Quality Counts 2006: Massachusetts* 4, 5, 6 (2006),

<http://www.edweek.org/media/ew/qc/2006/17shr.ma.h25.pdf>.¹²

It is true that the Massachusetts education finance system was challenged again in *Hancock v. Commissioner of Education*, 443 Mass. 428 (2005). However, as a result of the education reforms enacted in response to *McDuffy*, the court found that the state was in compliance with its constitutional duty to provide an adequate education, noting that the legislative branch was “proceeding purposefully to implement a plan to educate all public school children in the Commonwealth.” *Id.* at 435. Indeed, *Hancock* supports plaintiffs’ position by illustrating that when states enact legislation that protects the constitutional rights of schoolchildren, the courts have fulfilled their responsibility.

In more recent cases, courts have continued to leave education policy decisions to legislatures, yet have required them to implement a process for determining funding allocations that is non-arbitrary. In *Campaign for Fiscal Equity v. State (CFE I)*, 86 N.Y.2d 307 (1995), the New York Court of Appeals held that students were constitutionally entitled to a “sound basic education.” *Id.* at 315. Although the State asserts that the *CFE I* plaintiffs’ request for “minimally adequate” education “morphed into a judicial definition of a ‘sound, basic’ education” (Defs. Br. p. 33), the court had in fact used the “sound basic” language interchangeably with “minimally adequate” throughout the litigation. See, e.g., *id.* at 307-08, 317, 319. As the Court noted in *CFE I*, the “sound basic” language was drawn from a prior

¹² Defendants’ discussion of Connecticut’s NAEP scores fails to disclose the fact that in 2007, only 10% of students eligible for free or reduced lunch scored at or above proficient level on eighth grade math, an improvement of just one percentage point from 1996. By contrast, the percentage of Massachusetts students eligible for free or reduced lunch scoring at or above the proficient level in eighth grade math increased from 7% in 1996 to 25% in 2007. Nat’l Ctr. for Educ. Statistics, NAEP Data Explorer, <http://nces.ed.gov/nationsreportcard/naepdata/> (click “continue to the main NAEP version NDE” hyperlink; select “Go to Quick Start”; select the following variables: Grade 8, subject: mathematics, jurisdiction: Connecticut and Massachusetts, variables: National School Lunch Variability, Years: All years available; under “view results,” select “achievement level (cumulative)”).

case. *Id.* at 326 (citing *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27, 48 (1982)). After finding that such an education was not being provided, the court ordered the legislature to “ascertai[n] the actual costs of providing a sound basic education” and to “[ensure] a system of accountability to measure” the success of the reforms implemented. *Campaign for Fiscal Equity v. State (CFE II Trial)*, 719 N.Y.S.2d 475, 550 (N.Y.S. 2001). With regards to the costing-out study, the court deferred to the legislature concerning methodology. See *Campaign for Fiscal Equity v. State (CFE III)*, 8 N.Y.3d 14, 28-29 (2006).

The State asserts that the *CFE III* court “retrenched” the lower court’s remedial ruling and “rebuked the trial court” for making its own determination of the proper level of funding. (See Defs. Br. p. 34-35.) However, these actions were entirely consistent with the court’s express intention to defer to the legislature as long as it adhered to a non-arbitrary process. Accordingly, the court noted that while the state’s costing-out study methodology and findings were “debatable,” they were not “irrational.” *CFE III*, 8 N.Y.3d at 60.¹³

The common thread in *McDuffy*, the *CFE* cases, and the long list of other successful remedies has been that courts have either adopted broad guidelines, or instructed legislatures to implement a non-arbitrary process. Defendants have not argued, nor is there any reason to think, that Connecticut courts cannot do likewise.

CONCLUSION


For the foregoing reasons the trial court’s September 17, 2007 decision should be reversed and remanded with appropriate instructions.

¹³ By contrast, see Brief for Connecticut Conference of Municipalities et. al. as Amici Curiae Supporting Plaintiff-Appellants 1-7, stating the Connecticut school financing system is irrational and arbitrary.

Respectfully Submitted,

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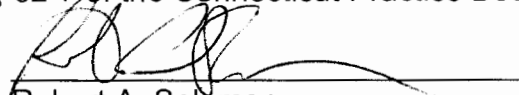
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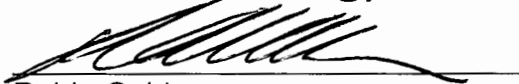
CERTIFICATION OF COMPLIANCE

This is to certify that the foregoing brief, filed on this 11th day of March, 2008,
complies with the requirements of § 67-2 and § 62-7 of the Connecticut Practice Book.

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STATE OF CONNECTICUT SUPREME COURT

S.C. 18032

CONNECTICUT COALITION FOR JUSTICE IN
EDUCATION FUNDING, ET AL.

v.

GOVERNOR M. JODI RELL, ET AL.

APPENDIX

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Brief of Defendants, *Sheff v. O'Neill*, 238 Conn. 1 (1996).....A1

Exhibit F

SUPREME COURT

OF THE

State of Connecticut

JUDICIAL DISTRICT OF HARTFORD
AT HARTFORD

S.C. 15255

MILO SHEFF, ET AL.

Plaintiffs-Appellants

v.

WILLIAM A. O'NEILL, ET AL.

Defendants-Appellees

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WITH APPENDIX**

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Note Regarding Citation Form

The defendants will use the following shorthand to refer to portions of the transcript and printed record.

- 1T - Transcript of proceedings on 12/16/92 (David Carter and Edna Negron).
- 2T - Transcript of proceedings on 12/17/92 (Edna Negron, Elizabeth Noel and Donald Carso).
- 3T - Transcript of proceedings on 12/18/92 (Charles Senteio, Catherine Kennelly, John Shea and Alice Dickens).
- 4T - Transcript of proceedings on 12/21/92 (Mary Wilson, Gladys Hernandez and Eddie Davis).
- 5T - Transcript of proceedings on 12/22/92 (Jomills Braddock and Hernan LaFontaine).
- 6T - Transcript of proceedings on 12/23/92 (Raul Montenez-Pietre, Robert Pitocco, Jean Anderson and Freddie Morris).
- 7T - Transcript of proceedings on 12/29 92 (William Trent and Norma Neuman-Johnson).
- 8T - Transcript of proceedings on 12/30/92 (Norma Neuman-Johnson and Gary Natriello).
- 9T - Transcript of proceedings on 12/31/92 (Gary Natriello).
- 10T - Transcript of roceedings on 1/5/93 (Robert Crain).
- 11T - Transcript of proceedings on 1/6/93 (Gary Natriello).
- 12T - Transcript of proceedings on 1/7/93 (John Allison and William Gordon).
- 13T - Transcript of proceedings on 1/8/93 (William Gordon).
- 14T - Transcript of proceedings on 1/12/93 (Mary Kennedy, Hernan LaFontaine and Milo Sheff).
- 15T - Transcript of proceedings on 1/13/93 (Charles Willie).
- 16T - Transcript of proceedings on 1/14/93 (Christopher Collier, Yvonne Griffin and Clara Dudley).
- 17T - Transcript of proceedings on 1/15/93 (Mary Carroll and Diane Brown Cloud).
- 18T - Transcript of proceedings on 1/20/93 (Julie Morales and T. Josiha Haig).

- 19T - Transcript of proceedings on 1/21/93 (Robert Slavin).
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- 21T - Transcript of roceedings on 1/27/93 (Jeffrey Foreman, Eugene Leach and Badi Foster).
- 22T - Transcript of proceedings on 1/28/93 (Gary Orfield).
- 23T - Transcript of proceedings on 2/2/93 (Thomas Steahr and Lloyd Calvert).
- 24T - Transcript of proceedings on 2/3/93 (Lloyd Calvert, Robert Nearine and John Hubert).
- 25T - Transcript of proceedings on 2/4/93 (John Keaveny, Elliott Williams and G. Donald Ferree).
- 26T - Transcript of proceedings on 2/5/93 (G. Donald Ferree and Christine Rossell).
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- 28T - Transcript of proceedings on 2/10/93 (Robert Brewer).
- 29T - Transcript of proceedings on 2/11/93 (John Lemega and Douglas Rindone).
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- 31T - Transcript of proceedings on 2/18/93 (Lloyd Calvert and John Flynn).
- 32T - Transcript of proceedings on 2/19/93 (David Armor).
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- 34T - Transcript of proceedings on 2/25/93 (William Gordon).
- 35T - Transcript of proceedings on 2/26/93 (Robert Crain and Gary Orfield).
- 36T - Transcript of proceedings on 12/16/93.
- 37T - Transcript of proceedings on 11/30/94.

R._____, S. _____ represents citations to the parties' Revised Stipulation dated June 6, 1995, in the Printed Record.

R._____, F._____ represents citations to the trial court's Finding dated June 27, 1995, in the Printed Record.

I. COUNTERSTATEMENT OF FACTS AND PROCEEDINGS

A. STATEMENT OF THE CASE

The plaintiffs^{1/} brought this case as a "school desegregation" case, premised on two basic allegations: that there is a large concentration of minority students in the Hartford public schools, and that on average these students perform more poorly on standardized tests than do students in the suburban towns nearby. The crux of the plaintiffs' argument has always been that, despite the fact that the defendants did not cause the racial concentration that exists, and despite the fact that the defendants have worked hard to dispel it, and have provided Hartford with dramatically greater financial and technical assistance than any of the suburban towns, they have somehow violated the state Constitution. According to the plaintiffs, this violation exists whenever, and for as long as, "conditions" or "circumstances" (P/B 30) create a school district with a disproportional racial or socioeconomic balance, notwithstanding that the defendants have no control over these conditions or circumstances. Their entire case rests on comparisons of raw test scores, even though the evidence showed and the trial court found that the scores are not reliable indicators of comparative achievement or of the quality of education provided. (R. 352-53)

The remedy the plaintiffs seek is nothing less than a massive mandatory reassignment of students based on race and ethnic origin, even though the overwhelming evidence, and the trial court's findings, establish that it is poverty and not racial isolation that

^{1/} The plaintiffs are seventeen individuals, who are students in Hartford or surrounding towns, and their parents. Although they seek sweeping relief that will affect every student in the entire 22 town region, if not the state, they have never sought to certify a class of plaintiffs.

causes lower educational achievement (R. 350, F 92), and that the mandatory measures sought do not work or have unacceptable social and educational consequences. (R, 360, F 159)

B. EDUCATION IN CONNECTICUT: WHAT THE EVIDENCE SHOWS

It is ironic that the plaintiffs have charged the defendants with failing to provide an equal educational opportunity to the children of Hartford because no state has been more committed to providing a quality education to all children than has Connecticut. From colonial times to the present, this state has been a leader in the field of education. (R. 336-38, F 1-2, 12) Basic to the state's commitment has been its ongoing evaluation of the quality of education being provided, and periodic adjustments made as necessary to the manner of its delivery. (R. 336-39, F 3-25)

Recognizing social and demographic trends that have led to increased concentrations of minority students in the schools of the major cities of this state, including Hartford, (R. 340, F 26-28), Connecticut has been in the forefront of efforts to promote racial and ethnic balance in our schools.^{2/} On an intradistrict level, the state in 1969 passed the Racial Imbalance Act, codified at Conn. Gen. Stat. §§ 10-226a et seq., which requires that all schools in a district maintain a student population which reflects the student population as a whole, within certain specified tolerances. (R. 343, F 52-55; R. 230, S 62) The state Department of Education ("DOE") has enforced this Act vigorously, bringing legal actions against towns whose schools do not comply with its requirements. (R. 343, F 55-58)

^{2/} The plaintiffs specifically amended their complaint to withdraw any claim that the defendants had caused racial concentrations by failing to provide integrated housing. (R. 334)

On an interdistrict level, the state has funded Project Concern, one of the nation's first voluntary interdistrict programs designed to promote voluntary desegregation, (R. 342, F 48); given technical assistance and funding for constructing interdistrict magnet schools; and established the Interdistrict Cooperative Grant Program, Conn. Gen. Stat. § 10-74d, to encourage school districts to develop plans to move students voluntarily across district lines. (R. 345, F 65-66; R. 211, S 217-18)^{3/} In 1993, the legislature passed P.A. 93-263, "An Act Improving Educational Quality and Diversity," now codified as Conn. Gen. Stat. §§ 10-264a et seq., which establishes regional advisory boards to design plans for increasing interdistrict diversity, and provides grants to fund such plans. §§ 10-264c - 10-264i.

The DOE has also been vigorous in identifying the combination of social and economic factors that impact on a child's ability to learn, and in establishing methods of ameliorating those factors to the extent possible.^{4/} Probably the most egregious mischaracterization the plaintiffs have presented in their brief is their statement that the trial court and the defendants operate on the assumption that "poor and minority children [are] uneducable." (P/B 60) If the defendants believed such a thing, it is unlikely that they would have devoted so much money and energy to developing programs designed to compensate for the social disadvantages so

^{3/} Connecticut is one of only three states in the nation that have voluntarily adopted legislation with a self-imposed goal to reduce racial imbalance and promote integration, (R. 344, F 59), and one of only seven states that voluntarily spend state funds exclusively on desegregation programs without a court order. (R. 342, F 46)

^{4/} See DX 3.9, 3.10, 4.1, 4.2, 12.5, 12.6, 12.8, 12.9-12.12, 12.29; R. 342, 345, 347-48, F 47, 68-69, 77, 86.

many urban children bring to school with them. (R. 189, 191, 199, 212; S 63, 75, 156-58, 220-22)

Since 1979, the basic state educational funding formula, or Education Cost Sharing ("ECS") formula, has been weighted to provide more money to districts with more low income students, and since 1989, the formula has been reconstituted to provide additional funding on the basis of remedial needs -- the first state in the nation to do so. Conn. Gen. Stat. §§ 10-262f, 10-262g, 10-262h. (R. 345, F 64, 69) The plaintiffs have conceded that the "purpose and effect" of this formula "is to provide the most state aid to the neediest school districts." (R. 189-90, S 63) The state also provides numerous educational grants to fund everything from construction to transportation to special education, and virtually all of these grants are calculated according to financial need.^{5/} See App. A178-A182.

In addition, the DOE has established a Priority School District program for the eight largest-population cities in the state, including Hartford, "to improve student achievement and enhance educational opportunities," (R. 212, S 222; R. 345, F 68); and in 1992, the DOE was reorganized to establish an Office of Urban and Priority School Districts "in order to concentrate the resources of the department on the problems of the cities, and more

^{5/} Hartford received \$4,915 per pupil in state educational aid in 1991-92, over two and one half times the \$1,758 per pupil received by the 21 suburban towns -- an increase of \$401 per pupil over the previous year for Hartford, and a decrease of \$120 per pupil for the suburban districts. (R. 190, S 64-71) State contributions to education comprised over 60% of Hartford's total school budget in 1991-92, but less than 24% of the suburban districts' budgets. (R. 190, S 71-72)

specifically, to improve the achievement of students in the three largest urban districts." (R, 347, 352, F 77, 103-05; R. 199, S 154-58).

The state has always been and remains committed to doing all that the educational system can do to ameliorate the massive social problems that impair the educational achievement of students in the state, and to provide them with an equal educational opportunity. All the evidence supports the court's findings that the state has done so. (R. 355, 357, F 132, 143) The contrary view advanced in the plaintiffs' brief is with the record and at odds with the truth.

C. THE PLAINTIFFS' APPROACH TO THE FACTS.

In their nearly thirty page factual recitation, the plaintiffs cite to the trial court's findings exactly four times, other than to challenge a number of findings as clearly erroneous. They have chosen instead to create their own version of the facts by misrepresenting many facts as "undisputed," even though they are not contained in the parties' stipulations, and simply disregarding others in an attempt to paint for this Court a picture they failed to establish at trial. Not only is this unfair to the trial court and the defendants, who endured a trial the plaintiffs insisted on,^{6/} but it does a great disservice to this Court, which, having received detailed factual findings, must now sift through the record and briefs to uncover the true state of the facts.

^{6/} The plaintiffs opposed the defendants' motions to strike and for summary judgment, did not file their own summary judgment motion, and then presented 40 witnesses and 537 exhibits at a trial that consumed 35 days. They later proposed 551 findings of fact to the trial court. Having received an adverse decision, the plaintiffs now ask this Court simply to ignore the trial's results.

This "treasure hunt" is precisely the situation this Court sought to avoid when it ordered the parties to "prepare a Joint Stipulation of all facts that are undisputed [and] . . . additional proposed findings of fact." (App. A28) Because of the "obvious importance" of this case, it took the extraordinary step of ordering further findings on issues not reached by the trial court, even though it had neither heard the appeal nor found any error. (Supreme Court Tr. 5/11/95, at 2 (App. A32)) Having championed this procedure, the plaintiffs now ask the Court to ignore its results.

To the extent that the plaintiffs were dissatisfied with the scope of the trial court's response to their proposed findings, they should have moved for review. Practice Book § 4054; Stamford Apartments Co. v. Stamford, 203 Conn. 586, 590 n.1, 525 A.2d 1327 (1987). This is consistent with the general rule that it is the appellants' duty to ensure that the record is adequate for review. Barnes v. Barnes, 190 Conn. 491, 493, 460 A.2d 1302 (1983).^{7/}

To the extent that the plaintiffs claim evidence was "undisputed" or "uncontested," the Court should be extremely wary. Although this Court occasionally accepts as true facts the parties have expressly agreed are "undisputed"; see Connecticut Mobile Home Ass'n., Inc. v. Jensen's Inc., 178 Conn. 586, 593 n.3, 424 A.2d 285 (1979); it ordered the parties to undertake the exercise of

^{7/} In light of the unusual procedure it had ordered, this Court recognized the possibility of the need for a motion for review and incorporated time for such motions into its scheduling order. (App. A30) This procedure was akin to the old findings system, under which the appellants still had the duty to move the trial court to correct the record and, if aggrieved, to seek a proper order from this Court. See W. Maltbie, Connecticut Appellate Procedure §§ 281 & 283 (2d ed. 1957). The plaintiffs also could have moved the trial court for clarification. Eslami v. Eslami, 218 Conn. 801, 817, 591 A.2d 411 (1991).

formulating a stipulation precisely to determine which facts are undisputed.^{8/} As the Chief Justice astutely observed at the May 11, 1995 hearing, there is a difference between "what the parties individually think to be undisputed and what ... they jointly think to be undisputed, and there's bound to be disagreement about that." (Supreme Court Tr. 5/11/95 at 9 (App. A39)). These words proved prophetic, for as demonstrated below, many facts the plaintiffs describe as "undisputed" were actually hotly contested.^{9/} See MVMA of the United States, Inc. v. O'Neill, 203 Conn. 63, 78-79, 523 A.2d 486 (1987). In fact, the defendants actually disproved much of what the plaintiffs now call "undisputed."

Further, "a trier is not required to believe testimony merely because it is not directly contradicted ... nor is the trier bound by the opinions of experts." Johnson v. Fuller, 190 Conn. 552, 556, 461 A.2d 988 (1983). Thus, the plaintiffs' claims that the trial court and this Court are bound to accept what they characterize as "uncontradicted" testimony, and that their experts must be believed over the defendants', (P/B 43-44, 60) simply ignores the law. See Mather v. Griffin Hospital, 207 Conn. 125, 145, 540 A.2d 666 (1988).^{10/} See App. A209 for representative citations of testimony undermining the plaintiffs' experts.

^{8/} The parties did, in fact, stipulate to over 250 facts. The plaintiffs proposed 551 further findings and the defendants proposed 94. From these, the trial court made 161 findings.

^{9/} For a list of some purported "undisputed" or "uncontested" facts that the defendants have disputed, see App. A207.

^{10/} While this Court may accept uncontradicted documentary evidence as part of the record; State National Bank v. Dick, 164 Conn. 523, 525-26, 325 A.2d 235 (1973); Dr. Natriello's report, relied on by the plaintiffs, was not "uncontradicted documentary evidence" Cont'd on next page

Finally, to the extent the plaintiffs challenge a trial court finding as "clearly erroneous," they bear the heavy burden of showing that the evidence could not support that finding, keeping in mind that this Court cannot retry facts or pass upon the witnesses' credibility. Pandolphe's Auto Parts, Inc. v. Manchester, 181 Conn. 217, 220-21, 435 A.2d 24 (1980); Practice Book § 4061. The plaintiffs' "torrent of claimed error" does not serve the ends of justice, but instead reveals their true motive: to retry the facts of this case on appeal, having failed to establish them at trial. See State v. Pelletier, 209 Conn. 564, 566, 552 A.2d 805 (1989).

D. SETTING THE RECORD STRAIGHT: CORRECTING THE PLAINTIFFS' VERSION OF THE FACTS

In their discussion of the facts, the plaintiffs have painted a bleak picture of education in Hartford to support their claims that Hartford children do not receive a minimally adequate education or an equal educational opportunity compared to children in the suburban districts. Since the trial court found as a matter of fact that Hartford children are receiving both (R. 355, 357; F 132, 143), the plaintiffs have ignored virtually all of the court's findings other than to assert that they are clearly erroneous, and to criticize the court for failing to credit the testimony of their witnesses. This Court should decline the plaintiffs' invitation to retry the case and assess the credibility of witnesses. Nevertheless, the defendants feel compelled to address the plaintiffs' factual presentation, if only to set the record straight.

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dence." (P/B 12) In fact, the defendants' experts undermined much of the basis for this report and its conclusions. See App. A208.

1. Racial Composition, Socioeconomic Factors, And
Test Scores

When the rhetoric is stripped away, the plaintiffs' case rests on two bases: that the Hartford school population is comprised predominantly of minority children, many of whom come from extremely poor socioeconomic backgrounds, and that, on average, Hartford students score lower than their suburban counterparts on standardized tests, especially on the CMT.

a. Racial Composition

There is no question that the great majority of the Hartford school population is African-American or Latino (of various backgrounds). As the trial court noted, this fact is the result of personal geographic choices and powerful demographic trends that have been in operation for decades. (R. 340, F 26-27) The record shows that these trends are continuing,^{11/} changing in accordance with the "collective exercise of personal geographic preferences," (R. 340, F 26) and will continue to change. (23T 21-22)

The plaintiffs use these figures to argue that high racial concentrations in a school district -- which they refer to as "segregation" -- lead to lower educational achievement. In the first

^{11/} Between 1980 and 1992, the African American student population in Hartford actually decreased by 9.6%, from 12,393 to 11,201, while increasing in the 21 suburban towns by 62.5%, from 3,925 to 6,380. (R. 187-89, S 44, 47, 57) The increase in Latino students is a relatively recent phenomenon in Hartford, rising dramatically from 599 students in 1963 to 12,564 in 1992. (R. 187, S 41, 42) This trend began in the late sixties, but really began to make a significant impact in the seventies, and in the last ten years alone, Hartford's Latino population has increased by about 58%. (18T 29-30) Even here, though, it should be noted that the numbers of persons of Latino origin in the suburban districts has also increased steadily by 69.3% between 1980 and 1990, with a concomitant decline in Hartford's share of the Latino population in the region as a whole. (23T 40-41 and DX 1.5) See App. A186.

place, the Court should reject the plaintiffs' repeated use of the word "segregation," a loaded term that connotes intentional separation according to racial and ethnic membership.^{12/} Even the plaintiffs have conceded that no child in Connecticut has ever been intentionally assigned to a public school or district on the basis of race, national origin, or socioeconomic status, except for a brief period in 1869 when Hartford attempted to do so, but was prevented from continuing the practice by the General Assembly. (R. 211, S 216)

Second, the state has had and continues to have as a long-standing goal the reduction of racial and ethnic concentrations of students, and has implemented the numerous programs and initiatives discussed above precisely to encourage this result. The defendants have always believed that all of our citizens benefit from integrated schools in an integrated society. Conn. Gen. Stat. §§ 10-264a et seq.

The defendants part company with the plaintiffs' argument on two points. First, the plaintiffs' own experts^{13/} presented no competent evidence to establish that attending integrated schools leads to greater academic achievement for minority students, or that attending schools with demographically high concentrations of minority students necessarily leads to poor academic achievement.^{14/} Notably, not one of the plaintiffs' experts could

^{12/} See fuller discussion, Section II.A infra, and App. A195-A206.

^{13/} 4T 87-88 (Davis); 5T 86-88, 112-113 (Braddock); 7T 100,120 (Trent); 10T 159-161 (Crain); 15T 88-89 (Willie).

^{14/} The experience of Bloomfield, which arguably has an even greater minority concentration than Hartford, demonstrates that minority children can achieve excellent educational results in schools
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say with any degree of certainty that mandatory redistricting of schools in the Hartford area and the reassignment of children to schools according to some preset racial or ethnic percentage would lead to a better level of achievement for any of the children. See Part I.D.5 infra. The plaintiffs' experts could not even suggest what percentage would be sufficient to achieve a "constitutionally adequate" racial and ethnic mix. (R. 359-60, F 157)

This fact leads to the second point of disagreement. The defendants' experts presented strong evidence that mandatory redistricting and reassignment of students to achieve racial balance are "ineffective methods of achieving integration." (R. 360, F 158, 159) Ultimately, the plaintiffs insist on massive and mandatory reassignments of students on the basis of race and ethnic origin, but have failed to establish that such mandatory measures are either constitutionally required or educationally desirable.

b. Socioeconomic Factors

The trial court found that the "generally poorer academic performance" of Hartford students is a function of their low socioeconomic status rather than their race or ethnic origin. (R. 350, F 90-94) This finding is overwhelmingly supported by the evidence.

If there is one thing the plaintiffs and the defendants agree on, it is that many children in Hartford live in dismal

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with a high concentration of minority students. (DX 8.2, 11.16 (App. A142-43), 32T 73-81) The difference between the Bloomfield experience and the Hartford experience is one of socioeconomic influences, not of race. Id.

socioeconomic conditions.^{15/} Added to these sad living conditions are the facts that many children in Hartford have limited English proficiency (R. 196, S 124-26), and some frequently move from place to place, causing interruptions or inconsistency in their schooling.^{16/}

Unquestionably these deplorable conditions exact both a social and academic cost on these children, and both the state and the Hartford Board of Education have initiated a number of specialized programs in an attempt to ameliorate their effects to the extent possible. See discussion, § I.D.3, infra. All parties agree on the seriousness of these conditions. Their present significance is their impact on test scores as a measure of student achievement.^{17/}

^{15/} Many children come to school hungry, tired, poorly clothed, and with a variety of health and dental problems that have been neglected. (17T 95-99; 1T 91) Many begin kindergarten with one to two year developmental delays, and cannot even speak in a sentence or formulate a question. (R. 237, S 145; 17T 99) A number come from low-income, single parent homes, or homes where parents have alcohol or drug problems, and where parents provide little or no supervision, nurturing, or encouragement, and show no interest in their children's schools. (R. 198, S 144; 1T 67; 17T 96) Others live in overcrowded homes, in high crime neighborhoods, and many of the children or their families have been the victims of crime. (R. 236, S 128-33)

^{16/} High mobility rates, some in excess of 50% turnover in a given school in a given year, are among the most important factors that negatively affect Hartford children's academic achievement. (2T 91-92; 24T 77, DX 2.32, PX 197) In fact, Hartford has the lowest stability rate (percentage of students who return to the same school as the prior year) at the elementary level of all other schools in the 22 town region. (R. 196, S 131) Some children move in and out of the Hartford district as many as two to three times a year. (24T 77)

^{17/} The plaintiffs' claim that the concentration of children with low socioeconomic status has an additional negative impact on student achievement (P/B 24) is an exaggeration of the testimony of their own witnesses. Their own experts could not agree on what constituted a "concentration effect", or whether one actually exists. Compare 11T 25-26, 164 (Natriello) with 15T 37-38, 84 (Willie).

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c. Test Scores

Probably the most contested issue at trial was the effect to be given to test scores as a measure of educational opportunity and achievement. This is not surprising, since the plaintiffs' entire case rests on their claim that lower test score results, primarily on the Connecticut Mastery Test ("CMT"), obtained by Hartford school children in comparison to suburban students, prove that Hartford students are receiving an inadequate education. The trial court found that mastery test scores cannot be used to draw conclusions about the adequacy of Hartford education, alone or in comparison with the suburbs, because, inter alia, the tests do not control for important variables that dramatically affect them. (R. 352-53, F 103-15) The plaintiffs have termed these findings clearly erroneous (P/B 8 n.17), but the evidence demonstrates that the findings are clearly correct.

Substantial evidence, some from the plaintiffs' own witnesses, established that it is improper to use the CMT scores for comparison with other districts, or to support a finding of inadequate education, for several reasons. The CMT, first administered in 1985, is a criterion-referenced test^{18/} that was designed by the

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Even their chief proponent of the theory, Dr. Mary Kennedy, concluded that concentration has no statistically significant effect on the rate of learning (14T 78), and the author of the study on which she relied concluded that concentration does not have a large effect on achievement. (14T 76) At any rate, both Kennedy and Natriello agreed that to whatever extent a "concentration effect" may exist, it can be overcome by special school programs designed to alleviate it (14T 59; 11T 175-176) -- programs such as those offered in Hartford.

^{18/}A criterion-referenced test measures an individual's mastery of certain skills, as opposed to a norm-referenced test, which measures
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State Board of Education for two primary purposes: to show each district the strengths and weaknesses of its programs, so that it can adjust its attention to areas where it is most needed, and to serve as a basis for increased funding for districts whose students fall below a set remedial standard. (R. 352, F 103) As a criterion-referenced test, the CMT was not designed for interdistrict comparisons because it does not measure or control for any variables, primarily socioeconomic factors, that affect test scores or test takers, in various districts.^{19/} (31T 149-151 (Flynn))

Numerous witnesses testified that since the CMTs do not control for factors such as developmental delays, reduced English language proficiency, and high mobility rates, the tests tell nothing about relative achievement or the quality of education provided. (31T 151-53; 32T 21; 18T 96-97) Children with limited English proficiency will obviously have more trouble on a standardized test constructed in English than those speaking English fluently. (2T 15-16; 4T 60-61; 20T 57-58) Similarly, a student coming to school with a severe developmental delay caused by numerous

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ures relative achievement against a normative sample. (31T 148-49) Criterion-referenced tests are not designed to be used for comparative purposes. (31T 151 (Flynn))

^{19/} Professor John Flynn, a testing expert, testified that the plaintiffs' use of CMT scores to compare the quality of education in Hartford schools to the quality of education in the suburban districts was of "no use whatsoever." (31T 151) Even Dr. Natriello, the plaintiffs' chief expert who constructed his study and based his conclusions on the differences in test scores, was forced to admit that at least some of the gap between Hartford scores and suburban scores was attributable to socioeconomic factors, but he did not control for them in his analysis of the scores. (11T 81)

background factors -- such as the kindergartner who cannot speak in a sentence -- may well have attained a greater degree of achievement than a suburban counterpart in two years, yet still have a lower test score because she started at such a dramatically lower base. (6T 41-42; 24T 116-117) Children moving in and out of school two or three times during a single school year will obviously have less opportunity to learn even the most basic concepts than those students who have remained in the same school for the entire course of study. (2T 91-92; 3T 139-40; 6T 39; 24T 88-89, 116-117) High mobility rates in some Hartford schools are seen as the most serious problem affecting the learning process,^{20/} (2T 91) and also impair the validity of the test score as measure of the educational input. When students move in and out of schools so frequently, the tests do not measure the quality of education at any particular school. Similarly, since the test is not measuring the same group of students, no reliable conclusions may be drawn about the pattern of learning over time.^{21/} Yet the plaintiffs have used these scores to draw these very conclusions.

^{20/} Mobility rates measure the rate at which students move in and out of a school or district during a school year. (21T 10) The evidence established that high mobility is one of the chief problems in the Hartford schools (2T 91), and that mobility rates among the Hartford schools in 1991-92 ranged from a low of 16.6% at Naylor School, to a high of 63.1% at Kinsella school. (DX 2.32, App. A141) Nearly 3/4 of the schools had a mobility rate of at least thirty percent, *id.*, a rate substantially higher than in the suburban schools. (R. 196, S 131; DX 2.32; PX 163, p. 27)

^{21/} For example, if a child enters a school in March and is tested in April, that test reveals nothing about the education he has received in that school, since he just arrived there. It is really measuring the education he received in his previous school or schools, wherever they may be. Similarly, it is impossible to compare second grade scores with fourth grade scores and draw a conclusion about whether children are learning as they are pro-

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Other types of testing, such as cohort analysis using the Metropolitan Achievement Tests (MATs),^{22/} show that Hartford students' scores continue to increase each year, demonstrating that they are continuing to learn. (DX 13.11; 24T 86-88, 116-117) Although their average scores still fall below the suburban averages, they do not fall further behind over time, even though the socioeconomic gap continues to increase. (Id.) What this demonstrates is that, although many Hartford students start at a dramatically lower level than their suburban counterparts and continue to suffer the effects of a low socioeconomic environment, they are learning at a rate comparable to suburban students. (Id.) These tests also show that a significant number of Hartford students tested in the high percentile range, some tested at the lowest, and the majority fell somewhere in the middle (DX 13.11-13.14, App. 146; 24T 96), demonstrating that average scores reveal nothing about individual achievement within the range.

Even Dr. Natriello, the plaintiffs' expert, had to concede that the CMT is at best a narrow indicator of educational attainment. (11T 189) Yet he and the plaintiffs used it as the primary basis for claiming that Hartford students are not receiving an adequate education. The evidence -- even the plaintiffs' own evidence -- amply supports the trial court's findings that the CMT results

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gressing through school, because substantial numbers of the fourth graders were not in that school in second grade, or even in third grade. (3T 139-40; 6T 38-40) See also (24T 161-167) (same criticism for Spanish SABE results).

^{22/} In cohort analysis, the same students are tested in consecutive years. See DX, 13.10, 13.11. App. A145-46. For fuller discussion, see testimony of Dr. Robert Nearine, App. A147-A176.

cannot be used to draw comparisons between districts or conclusions about the adequacy of education being provided in Hartford.

d. The SSP

The plaintiffs and their witnesses base much of their claim of inadequacies in the Hartford schools on data from the Strategic Schools Profile ("SSP"), a district reporting device established by the state DOE to monitor school systems, in order to support numerous claims that Hartford does not measure up to the suburban schools in teaching staff, facilities, and programs. The SSP was developed by the DOE to enable district administrators to assess strengths and weaknesses in their systems and to develop corrective action plans, (29T 80-81), and the DOE expressly cautioned against making comparisons across district lines. (29T 81-83) This is especially important here because the SSP results the plaintiffs and their experts use in drawing conclusions about the relative quality of the Hartford system were drawn from the first year of the SSP program, and start-up problems with definitional components of the survey caused unreliability in the reported results. (Id.)^{23/} Nevertheless, the plaintiffs in their brief continue to refer to these figures for comparative purposes, knowing they are not reliable.

2. Teachers, Facilities And Supplies

a. Teachers and Class Sizes

The plaintiffs conceded, and the trial court found, that the teaching staff in the Hartford schools is excellent, at least as

^{23/}A state DOE official testified that numerous errors were discovered in the Hartford profile, leading to problems in interpreting estimates of instructional time per week, lab sciences and foreign languages offered, as well as the educational background of Hartford teachers. (29T 86-90) The official testified that the state was attempting to "tighten up" the definitions and build in accuracy checks so that data from future SSPs would be more reliable. (Id.)

qualified as the teachers in the suburban districts, and that the class sizes in Hartford are comparable to, and in many cases lower than, those in the suburban districts and around the state. (R. 354, F 120-121; R. 191-92, S 76-84) The plaintiffs now attempt to denigrate the teaching staff, claiming that they have a lower proportion of masters' degrees and more first year teachers than other districts. These claims misstate or distort the evidence, and are contrary to the testimony of their own witnesses and their own stipulations. (R. 191-92, S 76-84; 2T 7, 29; 4T 28-29) The claimed lower rate of masters' degrees turned out to be based on a reporting error on which the plaintiffs' expert, Dr. Natriello, had relied. In reality, 88.5% of the Hartford teachers in 1992 had a master's degree or equivalent, as the plaintiffs themselves conceded (R. 191, S 78), the second highest level in the 22 town region. (PX 163, Fig. 39)^{24/}

b. Facilities

As one of the plaintiffs' own witnesses testified, the Hartford school buildings are in generally good shape. (Senteio, 3T 16; PX 153, p. 5-2) The plaintiffs' attempt in their brief to paint a picture of schools falling down around the school children is simply unsupported. Although as in any district some schools are in

^{24/}As for the plaintiffs' claim that the "number of first year teachers in Hartford is twice the statewide average," (P/B 19) the plaintiffs neglect to mention that the difference in number is actually quite low: 2.4% first year teachers for the statewide average vs. 4.9% for Hartford. (DX 8.7; 29T 143) Further, the majority of Hartford's first year teachers were hired in 1989-90, as part of a concerted effort by Hartford to reduce class sizes and improve teacher-student ratios. (DX 8.7; 29T 143-44) As a result, Hartford's teacher-student ratio improved by 2.2 teachers per thousand students, while the statewide teacher-student ratio worsened. (R. 191, S 79-80) More to the point, the plaintiffs' own evidence showed that the new teachers coming into the district were of "excellent" quality. (4T 9)

need of repairs or maintenance projects, even the plaintiffs concede that no school has any health, safety, or fire code violations. (R. 193, S 100)^{25/}

Besides exaggerating the schools' condition, the plaintiffs also neglect to tell the Court that shortly before trial, Hartford voters approved a \$204 million bond project for school repairs, maintenance, and construction projects, and that schools in need of repair or additions, including schools referred to by the plaintiffs, were slated to receive them. (2T 115;^{26/}R. 193, S 103) The plaintiffs also fail to mention that the money spent by Hartford on these construction projects is reimbursable by the state at a rate of at least 73%. (R. 193, S 102-04; 12T 135) What is significant here, since only the state is a defendant, is that Hartford has the authority to plan construction or major renovation projects as needed, to set its own priorities in this regard, and to apply to the state for reimbursement. (3T 11; 25T 24) The evidence showed that the city has never had such a reimbursement request denied by the state. (28T 20)

c. Equipment and Supplies, Textbooks and Libraries

Once again, the plaintiffs have attempted to depict Hartford students as having inadequate supplies for even basic needs, but

^{25/} In comparing Hartford schools to the suburban districts, the plaintiffs deliberately skewed the picture by selecting as a basis of comparison the schools of the Glastonbury, Farmington, and West Hartford systems, which their own expert, Dr. Natriello, admitted are not necessarily representative of the schools of the 21 suburban towns in the region. (11T 84-84B)

^{26/} The principal of McDonough elementary school, cited by the plaintiffs as an example of a school in very poor condition, testified that bids were going out for a major renovation of the school that would include an auditorium, gymnasium, and expansion, and as a result portable classrooms would no longer be needed. (2T 115)

the evidence does not support the claim. The evidence showed that the schools have sufficient basic textbooks in all subject areas. (1T 73; 2T 102; 31T 94-95, 102) If they fall short anywhere, it is in extras, or supplemental supplies. (Id.) One of plaintiffs' own witnesses testified that equipment provided in Hartford schools was comparable to suburban districts (6T 71), and the plaintiffs conceded that between the years 1989-90 and 1990-91, the Hartford Board of Education increased its budget for library books by 267 per cent. (R. 193-94, S 105)^{27/} To the extent the plaintiffs relied on the SSP to claim gross disparities between Hartford and the suburban districts, those claims are open to question for the reasons stated earlier.

More to the point for this case, though, Hartford sets priorities and decides how to allot its education budget among its many areas of need, just as the suburban school districts do. Evidence established that Hartford paid its employees \$2,361 more per pupil in employee benefits than the state average between 1980 and 1992, substantially more even than did the cities of New Haven and Bridgeport. (R. 194, S 107, 108) These decisions, whether they be wise or not, are made by Hartford, not by the defendants. (R. 194, S 110) Indeed, they are typical of the choices that all school boards must make all the time.^{28/}

^{27/} The record also shows that Hartford receives numerous grants from private groups and corporations for books and equipment. (30T 14-15, 31-32, 89-90)

^{28/} The chairman of the West Hartford Board of Education testified that, due to state funding cuts in 1991-92, West Hartford eliminated its talented and gifted program, some all day kindergartens, the computer education program in the middle schools, foreign language instruction in the elementary schools, and ca-

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3. Curriculum And Special Programs

a. Curriculum

The plaintiffs have relied on selective and often erroneous information to try to persuade this Court that the Hartford curriculum is inadequate (P/B 18-19), but the record belies their efforts. As noted earlier, data relied on by the plaintiffs extracted from the SSPs are highly suspect, especially in the areas of instruction time, lab offerings, and foreign languages. The evidence demonstrates that Hartford schools offer a full and varied range of courses that easily satisfies the mandates of Conn. Gen. Stat. § 10-16b, and even surpasses it.^{29/} (DX 2.19; 30T 4-9) One witness^{30/} who reviewed the Hartford school system in depth, testified (30T 4-5):

[T]he Hartford public schools offers a breadth and depth of academic programs sufficient to meet the education needs, common to all students, and by that I mean, if I went into another school system, what I would find is a curriculum statement that would be very, very similar, because what this document shows are those programs that are being offered from kindergarten through grade 12. I also noted, and I think it's worth commenting on, was that Hartford not only offers a curriculum that you'd

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reer and vocational counseling in the high schools. (29T 10-15; R. 194, S 111-12) During this same period, Hartford received a substantial increase in state education funds, (R. 190, S 64-72), and continued to provide numerous special programs. See § 3(b) infra.

^{29/} For example, Hartford offers advanced Pascal computer courses unavailable in many suburban schools, college courses to advanced students in local colleges, a "classical magnet program" for middle school students that includes Latin, philosophy, logic, rhetoric and astronomy, and classical English and Latin at the high school level. (30T 5-8)

^{30/} Lloyd Calvert was superintendent of schools in West Hartford (1987-1990), Trumbull (1971-1976), Windsor (1967-1969), and assistant superintendent in Hartford (1969-1971), so he was uniquely qualified to compare Hartford schools to suburban schools. (DX 2.0)

expect to be available in any school system, but it also has some unique offerings which are a reflection of the unique needs and also unique interests of children and young people attending that school system. (30T 4)

b. Special Programs Offered

The plaintiffs state that Hartford has "few" special needs programs, despite the need for them, and that the bilingual program is inadequate. (P/B 20) These statements are simply unsupported by the evidence, even the evidence of many of their own witnesses, which shows a school system that has been creative and dedicated in developing programs to deal with the special needs of its students -- many of them far removed from a traditional educational program.

To combat social problems that inhibit children's ability to achieve in school, the Hartford school system offers a preschool program for four year olds in 18 of its 26 elementary schools (30T 9-10; 3T 151; 6T 31; 17T 86); and provides all day kindergarten in each of its schools. (3T 10) All schools offer free breakfast and free or reduced lunch programs, funded entirely by federal and state funds. (R. 192, S 91-93) Schools provide health and dental screening and referral services, far beyond what is provided in other districts. (14T 151; 1T 81; 6T 11, 42-43, 151-52) One school, the Betances School, provides a Family Resources Center, funded by a state grant, which offers many innovative programs to parents and children, including day care services, parenting classes, drug counseling, and adult education courses. (Conn. Gen. Stat. § 10-4o, 2T 11-12; 30T 65-66) Seven schools in Hartford are designated as Comer Schools, following a program developed by Yale Professor Dr. James Comer expressly to mitigate the effects of low socioeconomic backgrounds. (30T 29-30; 66-67; 18T 63, 100-101) Even

the plaintiffs' expert, Dr. Robert Slavin, testified to the effectiveness of the Comer School concept. (19T 32)

Contrary to the plaintiffs' description, the bilingual program in Hartford is the most comprehensive in the area, if not in the state. (20T 11-12, 60) This program offers a full bilingual program for 6,000 students in five languages, to enable them to continue their academic program in their native language while learning English. Id., 11. In addition, the system offers an English as a Second Language ("ESL") program for students in twenty-three other languages, to provide supplementary support for students in the mainstream program. (20T 11-12)^{31/}

To address the high mobility problem as it applies to students who move frequently within Hartford, the school system has standardized its curriculum and textbooks to make intradistrict transfers easier. (R. 192, S 88) The system also provides a dropout program (18T 40), a career program (2T 23), with visits to college campuses for interested students (2T 62-63) and, in lieu of Advanced Placement courses, has arranged with area colleges to permit academically advanced students to take courses in the colleges themselves. (30T 6-7) Hartford has even set up a New Arrival Center for West Indian students to assist immigrating students make a smoother academic transition (R. 233, S. 94; 6T 88-89), and teachers receive specialized training in methods of dealing with the unique backgrounds and problems presented by their students. (R. 354, F 122; R. 192, S 87; 4T 10)

^{31/} Hartford also offers a Spanish as a Second Language program for English-speaking students, to encourage intermingling of students from various backgrounds. (1T 72)

All in all, the evidence amply supports the trial court's findings that "[s]ome of the best special education classes in the state can be found in the Hartford city schools," (R. 354, F.124) and that Hartford "offer[s] academic programs that are sufficient to meet the basic educational needs of all its students and also provide[s] other programs that are required to meet the special needs of its economically disadvantaged students." (Id., F 125)

4. "As Well As Can Be Expected"?

The plaintiffs and amici^{32/} excoriate the trial court and the defendants' expert, Dr. David Armor, for allegedly "advancing a theory that poor children in Hartford are doing as well as can be expected given their circumstances, and that schools cannot make a difference." (P/B 10-11) They also claim that Dr. Armor's opinions are invalid as based on "poor methodology." (P/B 60) These statements are gross distortions, and require a brief response.

Dr. Armor, a well recognized social scientist with an extensive background in educational and desegregation studies (DX 11.0), studied the Hartford schools using regression models to control for various socioeconomic and racial factors. (32T 29) Based on these studies, he concluded that racial composition does not have a statistically significant effect on achievement test scores or on differences between Hartford and the suburban schools (32T 94, 120), and so simply changing racial composition is not likely to increase achievement. (32T 122-123) Rather, socioeconomic factors other than race explained most of the difference in achievement. (32T 31, 48, 67, 83-85; DX 11.1-11.31) In conducting his regression analysis,

^{32/} Amici Connecticut Federation of School Administrators, et al., and amici Connecticut Legislative Black and Puerto Rican Caucus, et al.

he compared *actual* test scores against *expected* or *predicted* scores for the particular control, and concluded that the actual approximately matched the expected. (32T 84, 94-95) The conclusion that Hartford students on average scored "about where expected" when the control is factored in is clearly stated in the statistical analysis sense, not in a pejorative sense as the plaintiffs and amici suggest. The trial court's citations to Dr. Armor in Findings 139 and 140 are clearly made in the same context, and the plaintiffs' and amici's attempts to twist the meaning is reprehensible.^{33/}

Contrary to the plaintiffs' further mischaracterization, Dr. Armor also concluded, unremarkably, that school programs can make a small but statistical difference in closing the achievement gap caused by socioeconomic factors (32T 97-98, 148) but that real improvement requires changing the socioeconomic conditions themselves. (32T 121-122)

5. Remedy

It is quite telling that the plaintiffs' experts could not propose a plan for the redistricting they seek, nor could most of them even hazard a guess as to what percentages of which ethnic group would comprise the proper distribution.^{34/} Nor did they have any idea how to factor in the socioeconomic factors that they all

^{33/}As for the criticism of Dr. Armor's methodology by the plaintiffs' expert, Dr. Crain, it should be noted that Dr. Crain's conclusions were themselves challenged by Dr. Armor, 32T 117-119; DX 11.26, and that Dr. Armor's methodology was considered appropriate by another testing expert, Dr. John Flynn, 31T 183. It should also be emphasized that Dr. Crain himself conceded on cross-examination that socioeconomic factors have an impact on achievement and must be controlled for in any study, and that his only disagreement with Dr. Armor is in the extent of the socioeconomic effect, not the fact of it. (35T 76, 79-80, 111-12)

^{34/}See e.g. 34T 24, 70, (Gordon); 7T 133-35 (Trent); 22T 44, 58, 92-96 (Orfield); 12T 72-76 (Allison).

agree impact on student performance, conceding that this is not the "usual" case where race alone should be considered. They were content to leave it to the court to figure it all out.^{35/}

Similarly, they were singularly unconcerned about how much such a massive redistribution of students would cost, 19T 49 (Slavin); 22T 104 (Orfield); 15T 124-126 (Willie), even though projections made by Hartford showed that to achieve a 50-50 minority/majority balance would require the reassignment of more than 20,000 students at a cost of over \$10 million for transportation costs alone, and to achieve a 33.8% minority enrollment in Hartford to reflect the regional average would require the reassignment of more than 30,000 students at a cost of nearly \$15 million for transportation costs alone. (DX 13.4; 21T 81-85)^{36/} Nor did the plaintiffs provide any solid evidence that such a massive upheaval would result in higher achievement for any student.^{37/}

^{35/} 13T 150-51, 34T 94 (Gordon); 11T 156-162 (Natriello); 22T 92-98 (Orfield); 7T 81,134 (Trent); 12T 85-86 (Allison)

^{36/} It is also quite telling that some previous court ordered desegregation plans the plaintiffs' experts touted as successful often ended with minority concentrations dramatically increasing, 15T 108-109; 27T 13, 17-18; 34T 20-21, 52, 55, and with courts being forced to retain jurisdiction and supervision over the school systems for upward of 20 years. (R. 214, S 256; 34T 63-64)

^{37/} In fact, the contrary is the case. A 1992 Report on San Francisco schools following a desegregation consent decree, prepared by a panel chaired by the plaintiffs' expert, Dr. Gary Orfield, concluded that, after eight years of court supervision and nearly a quarter of a billion dollars in new funds, desegregation had been achieved, but minority students still showed "devastating levels of educational failure." PX 455, p.1, 5, 30. See also 22T 102-05 (Orfield); 7T 102, 110-111, 120, 131-134 (Trent); 19T 70-73 (Slavin); DX 12.25, p. 7, 13 (Schofield Report); 27T 63 (Rossell), all demonstrating no improvement in achievement attributable to integration.

Despite this demonstrated lack of success, the plaintiffs ask this Court to order massive disruptions to thousands of students, and effectively to assume control of the educational system in Connecticut, acting as a super-legislature and glorified Board of Education. The Court should decline this invitation.

II. ARGUMENT

A. CONSTITUTIONAL RIGHTS ARE NOT "TAKEN TOGETHER": DEBUNKING THE PLAINTIFFS' INTERPRETATION OF HORTON v. MESKILL

The plaintiffs allege violations of their: (1) right not to be "segregated" under Art. I, § 20; (2) equal protection rights under Conn. Const. Art. I, §§ 1 and 20; and (3) fundamental right to a free public elementary and secondary education under Article VIII, § 1.^{38/} The plaintiffs strive mightily to convince this Court that these constitutional provisions, "taken together," (P/B 39) grant them heightened constitutional protection. Their "combined force," (P/B 47) they argue, gives this Court the authority to rectify the "conditions" of which they complain. The Court should not be deceived by this sleight of hand.

There is no such thing as a constitutional amalgamation. Constitutional adjudication is not an arithmetic exercise by which litigants can simply stack provisions one on another to achieve enhanced protections. For example, a citizen has no greater rights against a warrantless search under the Fourth Amendment because the police happen to be looking for "arms" protected under the Second Amendment or Conn. Const. Art. I, § 15. Rather, the Court addresses the claims separately under the appropriate standards. In

^{38/}The plaintiffs have abandoned their Fourth Count alleging due process claims. (R. 44; P/B 2 n.1)

this case too, the Court must evaluate the plaintiffs' constitutional claims individually.

The most obvious example of the plaintiffs' misguided constitutional stacking theory is their fundamental misunderstanding or mischaracterization of 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"). They twist the holdings of these cases in an attempt to accomplish three things: (1) eliminate the state action requirement for an equal protection claim; (2) invoke strict scrutiny; and (3) invite the Court to second guess whether the legislature has passed "appropriate legislation."^{39/} These cases, while landmarks in Connecticut jurisprudence, have never been read to permit an amalgamation of constitutional rights. Rather, they are plainly no more than equal protection cases, and this Court has since understood and applied them as such. See Benjamin v. Bailey, 234 Conn. 455, 461-62, ___ A.2d ___ (1995); Horton III, 195 Conn. 24, 35-41, 486 A.2d 1099 (1985); Campbell v. Board of Education, 193 Conn. 93, 105, 475 A.2d 289 (1984).

Like all equal protection cases, the predicate to determining the proper level of scrutiny is whether the regulation infringes upon a fundamental right. For example, the right to vote, to which Horton III analogized, is a fundamental right. Reynolds v. Sims,

^{39/}The plaintiffs in their brief state that "this case falls squarely under Horton v. Meskill." (P/B 38). Plaintiffs' counsel, however, has more accurately described what the Court must do to Horton for their legal theory to prevail: "The Connecticut experiment in Sheff seeks to extend the jurisprudence of Horton beyond funding and into educational equity." Brittain, "Educational and Racial Equity: Towards the Twenty-First Century - A Case Experiment in Connecticut," Civil Rights Litigation and Attorneys Fees Annual Handbook (hereinafter "Educational and Racial Equity") 219, 226 (1990) (emphasis supplied). See 37T 37 (court takes notice of article). (App. A56)

377 U.S. 533, 562, 84 S.Ct. 1362 (1964). Thus, under the equal protection clause, any alleged inequality in the regulation of that fundamental right must pass elevated scrutiny. Kramer v. Union Free School Dist., 395 U.S. 621, 626, 89 S.Ct. 1886 (1969).

In Connecticut, the right to free public elementary and secondary education is an affirmative state obligation. Moore v. Ganim, 233 Conn. 557, 595-96, 660 A.2d 742 (1995). This obligation is a fundamental right. Horton I, 172 Conn. 615, 646, 376 A.2d 359 (1977). Thus, any alleged inequality in the provision of that fundamental right must pass elevated scrutiny. Horton III, 195 Conn. 24, 38, 486 A.2d 1099 (1985).

This Court did not in Horton I read Art. VIII, § 1 "together with" Art. I, § 20 to create a new right; neither did the U.S. Supreme Court in Reynolds read the right to vote "together with" the Fourteenth Amendment to create a new right. Moreover, neither Horton I nor Horton III established that the Court would review all conditions affecting the enjoyment of the fundamental right to education, regardless of whether the State's action in regulating or implementing that right had caused those conditions.

Thus, the Court should not succumb to the plaintiffs' persistent attempts to mischaracterize the Horton cases.^{40/} Rather, the Court must address separately the plaintiffs' distinct legal claims: the right against "segregation" under Art. I, § 20, the

^{40/} See, e.g., Plaintiffs' Brief, p. 38 ("In Horton I the plaintiffs challenged a state system that sent children to schools with grossly disparate financial means to educate children."); p. 40 ("Horton I and Horton III established that any measures potentially abridging the right to education is subject to strict judicial scrutiny"); p. 56 (Horton I held that "the judiciary is responsible for determining compliance with [the state's] duty" to educate its children).

substantive right to education under Art. VIII, § 1, and the equal provision of that right under Art. I, §§ 1 and 20. See Broadley v. Board of Education, 229 Conn. 1, 639 A.2d 502 (1994) (addressing substantive and equal protection claims separately).

B. THE "SEGREGATION" CLAUSE OF ART. I, § 20 DOES NOT OBLIGATE THE STATE TO RECTIFY DE FACTO, INTERDISTRICT RACIAL IMBALANCE.

The United States Supreme Court has held in the segregation context that only de jure segregation violates the Fourteenth Amendment. Plaintiffs must "'prove not only that segregated schooling exists but also that it was brought about or maintained by intentional state action,' ... that is, that the school officials had 'intended to segregate.'" Columbus Board of Ed. v. Penick, 443 U.S. 449, 464, 99 S.Ct. 2941 (1979) (emphasis supplied).^{41/} Thus, "intentional state action," a positive act of segregation, is an "indispensable prerequisite" to a finding of prohibited racial classification. 2 R. Rotunda & J. Nowak, Treatise on Constitutional Law, § 16.4(d) (2d ed. 1992), p. 570.

Of course, federal precedents do not bind this Court's interpretations of state constitutional provisions. State statutes and the state constitution may afford citizens higher levels of

^{41/} See also Missouri v. Jenkins, 115 S.Ct. 2038, 2048-54 (1995); Freeman v. Pitts, 503 U.S. 467, 112 S.Ct. 1430, 1447 (1992) ("the school district is under no duty to remedy imbalance that is caused by the demographic factors."); Pasadena City Board of Education v. Spangler, 427 U.S. 424, 434, 96 S.Ct. 2697 (1976) ("the Constitution is not violated by racial imbalance in the schools, without more."); Milliken v. Bradley, 418 U.S. 717, 746-47 and n.22, 94 S.Ct. 3112 (1976) ("The suggestion ... that schools who have a majority of Negro students are not 'desegregated,' whatever the racial make-up of the school district's population and however neutrally the lines have been drawn and administered, finds no support in our prior cases.")

protection than the federal constitution. State v. Geisler, 222 Conn. 672, 684, 610 A.2d 1225 (1992). However,

[t]his Court has never viewed constitutional language as newly descended from the firmament like fresh fallen snow upon which jurists may trace out their individual notions of public policy uninhibited by the history which attended the adoption of the particular phraseology at issue and the intentions of its authors.

Cologne v. Westfarms Associates, 192 Conn. 48, 62, 469 A.2d 1201 (1984). Thus, the Court employs now familiar "tools of analysis" in construing the "contours of our state constitution [to] reach reasoned and principled results." State v. Geisler, 222 Conn. 672, 684-85, 610 A.2d 1225 (1992). These tools include the provision's text, holdings and dicta of this Court, federal precedent, sister state decisions, the historical setting and the framers' debates and economic/sociological considerations. Id. at 685. This "systematic analysis" "encourages a principled development of our state constitutional jurisprudence." State v. Morales, 232 Conn. 707, 716 n.10, 657 A.2d 585 (1995).

The plaintiffs contend that the word "segregation"^{42/} in Art. I, § 20 manifests an intent to impose an affirmative obligation on

^{42/} Throughout their brief the plaintiffs use the term "segregation" loosely, not distinguishing between de jure "segregation" and de facto racial imbalance. The defendants, of course, do not believe that de facto racial imbalance is a positive or acceptable condition. To the contrary, all students and all races can benefit from ameliorating these conditions. (R. 198, S 150-52) Government and society has, as plaintiffs' counsel characterized it, a "moral obligation" (36T 37) to attempt to remedy the ills that flow from racial imbalance, as well as many other "conditions." Brittain, "Educational and Racial Equity," at 223. While the plaintiffs and amici have seized upon the trial court's finding that the State "has long acknowledged an affirmative responsibility to desegregate its public schools," (R. 342, F 45) this "responsibility" differs from strict constitutional liability for conditions it has not created. (37T 171)

the state to eliminate de facto, interdistrict racial imbalance in public schools. (R. 42-43) Given the clear federal precedent, the plaintiffs must provide "principled" reasons to read our Constitution differently than the federal Constitution. Neither the text, the historical record nor any of the other Geisler factors supports the plaintiffs' claim.

Art. I, § 20 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 or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability.

The provision's text itself compels a conclusion that by "segregation" the framers meant de jure or state-sponsored segregation. Black's Law Dictionary (6th ed. 1990) defines "discrimination": "In constitutional law, the effect of a statute or established practice which confers particular privileges on a class arbitrarily selected Unfair treatment or denial of normal privileges to persons because of their race, age, nationality or religion." Black's defines "segregation": "The act or process of separation. The unconstitutional policy and practice of separating people on the basis of color, nationality, religion, etc. in housing and schooling." Clearly then, "segregation" is a specific type of "discrimination," and, like "discrimination," is an affirmative "act," manifested by a "process," "policy" or "practice." At the very least, however, the term is ambiguous and the Geisler factors clearly support the defendants' construction.

At the 1965 Convention, Resolution No. 168 was introduced to make numerous amendments to the "Declaration of Rights" in

accordance with the Report to the General Assembly and the Governor of the Commission on State Government Organization, dated February, 1950. (App. A60-A65) Section 16 of that resolution proposed to amend Art. I, § 20 to state that no "person shall ... be discriminated against in, nor be segregated ... because of religious principles, race, color, ancestry or national origin." (App. A69)

The Convention's Rules Committee decided against proposing drastic changes to Declaration of Rights, instead revising only certain sections. "Anti-Discrimination Addition To Bill of Rights Is Prepared," Hartford Courant, October 6, 1965, p. 1. (App. A77) One of the sections revised was Art. I, § 20, which, when brought to the Convention floor, read: "No person shall be denied the equal protection of the law, nor the enjoyment of his civil or political rights, nor be discriminated against in the exercise thereof because of religion, race, color, ancestry or national origin." File No. 7.^{43/} (App. A72)

Before debate on this proposal, however, the Connecticut Council of Churches and other civil rights groups objected to the absence of a specific "segregation" provision. The Council sent a letter to the Convention urging that "segregation constitutes such a core area of discrimination as it affects the pattern of relationship among persons and groups and needs thereby to be specifically guarded against through constitutional provision."

^{43/}The Committee had removed the word "segregation" from the original proposal for fear that specifying one type of "discrimination" might lead to a narrow reading of the rest of the provision. See 2 Proceedings, p. 691 ("The only question that has arisen is the idea of general language or more specific language."). (App. A92) Mrs. Woodhouse emphasized, however, that the Constitution should "unequivocally oppose the philosophy and the practice of segregation," thereby connoting intentional state action. Id. (emphasis supplied). (App. A92)

"Anti-Segregation Clause Urged for Bill of Rights," Hartford Courant, October 14, 1965, p. 1, p. 11 (emphasis supplied). (App. A78) Thus, when the resolution reached the Convention floor, Mrs. Woodhouse offered an amendment reinserting the word "segregation" and rearranging the section so it read: "No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise of or enjoyment of his civil or political rights" 2 Proceedings, p. 690. (App. A91)

Mrs. Woodhouse also expressed the concern of civil rights groups that the term "discrimination" might be read narrowly, perhaps leaving it open for the state to separate groups so long as it afforded those groups equal treatment.^{44/} 2 Proceedings, pp. 690-96. (App. A91-A97) See also "Convention Approves Rights Bill," Hartford Courant, October 15, 1965, p. 1. (App. A79) Therefore, by adding the word "segregation" to the section, the Convention sought to placate those who believed the proposal brought to the floor would have prohibited governmental separation classes only when one class was disadvantaged.^{45/}

^{44/} The terms "discriminate" and "discrimination" connote action that both separates and disadvantages one group, while favoring another. The terms "segregate" and "segregation," on the other hand, imply only separation or setting apart. See Appendix 7 to Defendants' Post-Trial Brief. (App. A195-A206)

^{45/} The plaintiffs claim that reading "discrimination" and "segregation" as "synonymous" would make this clause of Art. I, § 20 "redundant" with the federal constitution. (P/B 47, n.66). First, the defendants do not claim that the words are synonymous, but that "segregation" is an example of "discrimination." Further, the Court must recall that Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686 (1954), was barely ten years old in 1965, and not nearly as embedded in our constitutional consciences as it is today. While it is not remarkable for a state provision to be redundant of a federal provision, what was "new" about Art. I, § 20 is that it said expressly what the Brown inferred from the

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Chief Justice Baldwin, in supporting the amendment, confirmed that inserting the word "segregation" was intended to clarify, and not create a monumental change in the law,^{46/} and Justice O'Sullivan, as chair, ruled: "this amendment is not a substitutive [sic] change and therefore we can act upon the entire bill today." Id. at 696. (App. A97) "An amendatory act is presumed not to change the existing law further than is expressly declared or necessarily implied." Grodis v. Burns, 190 Conn. 39, 47 n.5, 459 A.2d 994 (1983).

The historical circumstances surrounding the 1965 Convention also do not support the plaintiffs' claim that the framers intended to make the state liable for all de facto racial imbalance. The delegates to the 1965 Convention were aware of the U.S. Supreme Court's explicit rejection of state-enforced school segregation in Brown v. Board of Education, 347 U.S. 483, 495, 74 S.Ct. 686 (1954), and the increasing concentration of minority students in

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Fourteenth Amendment, thereby ensuring that Brown was made a part of the state law, even if federal law were ever to change. The delegates did the opposite in Art. III, § 5. Rather than writing "one man, one vote" into the Constitution, the delegates by this provision left themselves an "escape clause" in case the U.S. Supreme Court ever renounced Reynolds v. Sims, 377 U.S. 533, 84 S.Ct. 1362 (1964), thereby allowing states to return to former apportionment methods. See 3 Proceedings, pp. 884-85, 897. (App. A98-A100); Bosworth, "1965 Constitutional Convention: Its Politics and Issues," 19 Conn. Gov't No. 3 at p. 4 (Mar. 1966); "Baldwin Explains Work of Convention," Hartford Courant, 12/5/65, p. 36. (App. A83)

^{46/} "As a matter of fact we discussed this very thing in the committee and we thought that segregation was unnecessary to put in there, but if it will please people, then I am perfectly agreeable to having it there as a member of this convention." 2 Proceedings, p. 692. (App. A93)

our cities' schools.^{47/} In fact, the Convention was called for and assembled in the midst of a heated controversy over a New Haven Board of Education plan addressing the existing racial imbalance, "though fortuitous in origin," in the New Haven middle schools. This plan mandated student busing within the city and generated tremendous controversy. (R. 138-39; R. 343, F 50-51)^{48/}

The plaintiffs argue that if the framers had sought to require state action for a segregation claim "they could have done so explicitly." (P/B 50) Of course the opposite presumption prevails. "Without a clear showing" of the framers' intent, this Court will not "presume an intent to make a radical revision of a long established constitutional principle." Fonfara v. Reapportionment Commission, 222 Conn. 166, 172-7, 610 A.2d 153 (1992). Further, just as "it is appropriate to assume that a pre-1818 exercise of legislative authority simply vests similar authority in the General Assembly after 1818," absent "a specific showing to the contrary";

^{47/}At the beginning of this century, the African-American population was approximately 3% of the state's total population, and by 1940 had declined to 1.2%. The greatest increase in Hartford's African-American population came between 1950-60, and by 1963 36.3% of Hartford public school students were African-American. (R. 187-89, S 38-56) The percentage of minority students in the suburban schools was, of course, much less. (See PX 1, p. 7)

^{48/}The Superior Court upheld the plan in Guida v. Board of Education, 26 Conn. Supp. 121, 124, 213 A.2d 843 (1965). There are not available in this case the same common law antecedents to the 1965 Constitution as the Court may find illuminating when interpreting provisions of the 1818 Constitution. See E. Peters, "Common Law Antecedents of Constitutional Law In Connecticut," 53 Alb. L. Rev. 259 (1989). This is made up for by the temporal proximity the 1965 Convention bears to the modern day. See also E. Peters, "State Constitutional Law: Federalism In The Common Law Tradition," 84 Mich. L. Rev. 583, 586 (1986); Norwalk Core v. Norwalk Board of Education, 298 F.Supp. 213, 224 (D.Conn. 1969), aff'd. 423 F.2d 121 (2d Cir. 1970).

Moore v. Ganim, 233 Conn. 557, 577, 660 A.2d 742 (1995); a similar assumption is appropriate regarding 1965.^{49/}

By the plaintiffs' reading of Art. I, § 20, the addition of the word "segregation" in 1965 would have required immediate remedial action in the assignment of children to public schools, both intradistrict and interdistrict. Given that town boundaries have constituted the state's school district boundaries since 1909, that busing to remedy existing de facto intra-district segregation had generated significant controversy and that state action is an element of all other equal protection claims, had the framers intended to create such a dramatic departure from current law by eliminating state action as an element of a segregation claim, they would certainly have said so explicitly. At the very least, the Convention's

^{49/}The plaintiffs state that by 1965 courts had begun finding de facto segregation to violate the constitution. (P/B 50). First, if any had, they were in the great minority. See Springfield School Committee v. Barksdale, 348 F.2d 261, 264 (1st Cir. 1965); Downs v. Board of Education, 336 F.2d 988, 998 (10th Cir. 1964), cert. denied, 380 U.S. 914 (1965); Bell v. School City of Gary Indiana, 324 F.2d 209, 213 (7th Cir. 1963), cert. denied, 377 U.S. 924 (1964) (no affirmative duty "to change innocently arrived at school districts by the mere fact that shifts in population either increase or decrease the percentage of either Negro or white pupils"). As the Second Circuit summarized, "[a]lthough there may be some dissent, courts generally agree that communities have no constitutional duty to undo bona fide de facto segregation." Offerman v. Nitkowski, 378 F.2d 22, 24 (2d Cir. 1967). Second, the cases the plaintiffs cite do not support their point. In vacating the District Court's judgment, the First Circuit in Springfield School Committee specifically rejected the contention that de facto segregation violated the constitution. The Court in Blocker v. Board of Education, 226 F.Supp. 208, 230 (E.D.N.Y. 1964), also stated that "racial imbalance, not tantamount to segregation, is not violative of the constitution." Of course, Booker v. Board of Education, 212 A.2d 1 (N.J. 1965) and Jenkins v. Township of Morris School District, 279 A.2d 619 (1971) merely hold that New Jersey's Commissioner of Education, like Connecticut's, has the authority to reduce or eliminate de facto segregation as a matter of state law and policy, regardless of whether the Constitution compels such action.

debates certainly would have included a discussion of its extraordinary and controversial consequences. The Convention record, contemporary accounts and publications describing the new Constitution are remarkably bereft of such debate.^{50/}

This is not surprising, since the delegates had assembled principally to change the constitution to comply with the federal courts' reapportionment decisions. See E. Peters, "State Constitutional Law: Federalism In the Common Law Tradition," 84 Mich. L. Rev. 583, 586 (1986) (principal agenda of convention useful tool of construction). Professor Collier described the 1965 Convention as a "very, very conservative body that made only those changes that had to be made in order to comply with the legislative reapportionment mandates of the federal courts and it was extremely reluctant to change anything that did not have to be changed." (R. 339, F 25) Thus, the historical record of the 1965 Convention clearly demonstrates that by inserting the word "segregation" into the proposal brought to the floor the delegates did not intend to remove the requirement of state action from a segregation claim.^{51/}

^{50/} See, e.g., Davis, "Connecticut Con-Con," National Civic Review 194, 200 (1967); Bosworth, "1965 Constitutional Convention: Its Politics and Issues," 19 Conn. Gov't No. 3 at p. 5 (Mar. 1966); "Baldwin Explains Work Of Convention," Hartford Courant, December 5, 1965 (App. A83); "Convention Approves Rights Bill," Hartford Courant, October 15, 1965, p. 1 (App. A79); "Bill of Rights-Historic Touch," Hartford Courant, October 15, 1965, p. 7 (App. A80); "Convention Story," Hartford Courant, October 18, 1965, p. 14 (App. A81); Proposed Revised Constitution For The State of Connecticut With Marginal Notes (1965) (App. A131-A135); Resume of the Proposals Passed by the Constitutional Convention of 1965 (Secretary of the State, 1965) (App. A128-A130).

^{51/} Apparently the legislature believed similarly. In 1983, while debating the proposal of amendment twenty-one to our state constitution, which added "physical or mental disability" to the classes protected by Art. I, § 20, Senator Howard Owens stated:
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The sister state cases the plaintiffs cite (P/B 51-52) also do not support their construction of Art. I, § 20.^{52/} Thus, the plaintiffs are left with the last Geisler factor: policy arguments. "In effect, this factor directs [the Court's] attention to considerations of public policy. It requires [the Court], in the context of this case, to determine whether [the right alleged by the plaintiffs] is, as a matter of sound constitutional policy, required to guarantee the people of Connecticut 'the full panoply of rights [that they] have come to expect as their due.'" State v. Diaz, 226 Conn. 514, 540, 628 A.2d 567 (1993), quoting Horton I, 172 Conn. 615, 642, 376 A.2d 359 (1977).

The plaintiffs and several amici essentially ask this Court to consider the "evils" of "segregation," and write a prohibition against interdistrict, racial imbalance into our State Constitution. (P/B 53; Amici Religious Groups at 7-8; Amici Cities at 2) These policy arguments about "segregation," however, relate as in

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"Where the court finds significant state action it will subject segregation or discrimination complaint to strict judicial scrutiny." 26 S.Proc., Pt. 9, 1983 Sess., p. 3170 (emphasis supplied). See Daly v. DelPonte, 225 Conn. 499, 514, 624 A.2d 876 (1993) (quoting Sen. Owens).

^{52/}As noted in note 49, supra, Booker v. Board of Education, 212 A.2d 1 (N.J. 1965), is entirely inapposite. So too is N.A.A.C.P. v. City of Dearborn, 434 N.W.2d 444 (Mich. App. 1988), which held that a city ordinance preventing park usage to city residents violated the anti-discrimination clause of Michigan's constitution, despite no discriminatory intent, because it disparately effected minority racial groups. Of course, this case concerned not a "segregation" clause, but a "discrimination" clause, thus bolstering the defendants' argument that segregation is a type of discrimination. More importantly, however, the case ruled on an ordinance that had an immediate disparate impact and that was passed well after the constitutional provision. School district boundaries in Connecticut have been in place since 1909, including in 1965 when the intervening private action of demographics had caused the imbalance.

Brown to state sponsored, de jure segregation, the psychological harm flowing from the intentional singling out and separation of the races. While the defendants unequivocally endorse the virtues of diversity and integration, in our schools and elsewhere,^{53/} the Court cannot rely on this alone "to enshrine one policy choice as a matter of constitutional law." Moore v. Ganim, 233 Conn. 557, 614, 660 A.2d 742 (1995).

The plaintiffs would have this Court, on what they call "policy grounds," dramatically alter local government and education in Connecticut despite the lack of evidence and that the public, including the inner city public, supports (or supported in 1965) breaking down town boundary barriers and sending children to schools far away from their homes. In fact, there is evidence to the contrary. (25T 158-59) See n.48, supra. This is simply bad constitutional law. Moreover, the best evidence of public policy is found in our statutes, which call for local control and neighborhood schools. See State v. Ross, 230 Conn. 183, 250-51, 646 A.2d 1318 (1994); Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471, 480, 427 A.2d 385 (1980).

^{53/} The Court should note that Art. I, § 20 is not limited to schools or to racial discrimination. Thus, under the plaintiffs' theory, if de facto imbalances in religious groups, sexes or physically or mentally disabled persons evolved, by the plain language of Art. I, § 20, the State would be liable to undo them. It is merely convenient, but not analytically proper, to argue that by reading Art. I, § 20 "through" or "together with" Art. VIII, § 1, the plaintiffs can limit their claim to schools. (P/B 55-56)

C. PLAINTIFFS HAVE NOT PROVEN A VIOLATION OF THEIR
RIGHT TO AN EQUAL EDUCATIONAL OPPORTUNITY

The plaintiffs' equal educational opportunity claim may be described charitably as "evolving."^{54/} The latest version of their theory appears in their brief to this Court:

In the present case, plaintiffs challenge the system of providing public elementary and secondary education, a system that sends children to schools that are segregated on the basis of race, ethnicity and economic status and are unequal. ... [T]he question before this Court is whether the undisputed condition of racial and economic isolation of the public schools, coupled with the undisputed and extreme disparities in educational resources afforded Hartford's school children, violate plaintiffs' constitutional right to an equal educational opportunity. (P/B 38) (emphasis supplied).

This muddy claim cries out for clarity. When clarified, however, the claim's untenability becomes more apparent.

First, although the plaintiffs devote much of their statement of facts to portraying the Hartford school district as starved for resources compared to the suburbs, they have expressly and repeatedly disclaimed this as a Horton v. Meskill disparate educational funding case.^{55/} Thus, while they castigate the trial court for failing to find "one single fact that the resources provided in

^{54/} Compare R. 42-43, ¶¶ 75, 78; Ps' Memo in Opp. to Motion to Strike at 18; Ps' Memo in Opp. to Motion for Summary Judgment at 5; Ps' Post-trial brief at 94).

^{55/} Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment dated 9-20-91 at page 15 reads:

A. Not A Funding Case The defendants repeatedly forget that this is not a funding case. The fact that the state may have directed and continues to direct extra dollars into the Hartford system may have been a plausible defense if this case was a repeat of Horton v. Meskill. But the funding formula for urban schools is not what is directly at issue here. It is the racial, ethnic and economic segregation which has caused the unequal educational opportunities that are at the heart of plaintiffs' case.

Hartford compared poorly to those in the suburbs," (P/B 44) the court did so for good reason: that evidence, which was far from undisputed, see § I.D.2, supra, was in no way material to the equal educational opportunities claim. (See R. 42-43) Nor have the plaintiffs sought to prove, and the trial court did not find, that this alleged lack of resources stems from racial and economic isolation. Thus, the alleged lack of resources in Hartford is for another case and a red herring in this one. ^{56/}

Further, the "economic isolation" component does not aid the plaintiffs' cause. Wealth or poverty, unlike race, is not a suspect class triggering strict scrutiny. Dandridge v. Williams, 397 U.S. 471, 485, 90 S.Ct. 1153 (1970). Thus, this is essentially, as it was pleaded, a case about racial imbalance.

The plaintiffs claim that because some of them reside in a district overwhelmingly populated by poverty-stricken minorities, the State has violated their equal protection rights. They claim they are constitutionally entitled to relief from these

^{56/} While the resources available to the Hartford School district may be relevant to whether the plaintiffs are receiving a minimally adequate education under Art. VIII, § 1, disparities in resources between districts are not. R.E.F.I.T. v. Cuomo, 1995 N.Y. LEXIS 1137 (June 15, 1995) ("The Education Article does not by its express terms contain an egalitarian component.") That is instead for an equal protection claim alleging unequal funding and resources, which the plaintiffs say is not this case, and which the evidence does not support. See § II.C.3, infra.

Many of the Hartford School system teachers and administrators who testified for the plaintiffs were obviously confused, however, believing this case was in fact about funding for Hartford. (See, e.g. 4T 110; 6T 7) This misunderstanding was no doubt perpetuated by plaintiffs' counsel, who wrote Hartford's School Board President seeking the Board's cooperation and representing that "[m]ost of the plaintiffs attend schools in Hartford, and they represent the best opportunity for the Hartford District to obtain more resources for the neediest poor and racially isolated school children." (DX 37). See also 18T 122-24.

"conditions," and must attend schools with a racial and economic balance, although they refuse to define what that balance is, how to find it in a constitutional provision silent on the issue or whether such a balance would in fact lead to a better education for them.

Under Savage v. Aronson, 214 Conn. 256, 571 A.2d 696 (1990), however, the plaintiffs' equal protection claim is doomed from its inception because they have failed to allege or prove that any state action caused the "segregated conditions" of which they complain. Their claim that under our state constitution prohibits de facto racial, ethnic and economic imbalance denies them equal educational opportunity is not supported by the historical record. Alternatively, the plaintiffs claim now that they did in fact prove state action or, in a new twist on appeal, that because education is a public function there is automatically state action. These arguments are feeble, but in any case, under any definition of equal educational opportunity, the plaintiffs have not proven a deprivation of that opportunity.

1. State Action Is A Necessary And Threshold Element Of Any Equal Protection Claim Under Our State Constitution

This Court has held often and recently that "the equal protection provisions of the federal and state constitutions have the same meaning and limitations." Broadley v. Board of Education, 229 Conn. 1, 8 n.15, 639 A.2d 502 (1994) (claimed violation of Art. I, § 20 and Art. VIII, § 1). An equal protection claim under either the federal or state constitution requires proof that the government has treated similarly situated individuals dissimilarly.

Barde v. Board of Trustees, 207 Conn. 59, 65, 539 A.2d 1000 (1988). "When litigants claim the protection of such guarantees, courts must first determine whether it is indeed government action -- state or federal -- that the litigants are challenging." L. Tribe, American Constitutional Law, § 18-1, p. 1688 (2d ed. 1988). "State action concerning social and economic regulation will survive an equal protection challenge if it satisfies a rational basis test If, however, state action invidiously discriminates against a suspect class or affects a fundamental right," it must survive strict scrutiny." Daly v. DelPonte, 225 Conn. 499, 513, 624 A.2d 876 (1993) (emphasis supplied).

Consistent with these principles and the determination that the Fourteenth Amendment "is phrased as a limitation on the State's power to act"; DeShaney v. Winnebago County DSS, 489 U.S. 189, 195, 109 S.Ct. 998 (1989); the United States Supreme Court has held that only de jure segregation of public schools violates the Fourteenth Amendment. The plaintiffs therefore advance no federal equal protection argument and refrain from citing federal precedents. Thus, they must furnish "principled" reasons, based on other Geisler factors, distinguishing our state constitution's equal protection provisions from the similar federal provision in the Fourteenth Amendment and relieving them from proving state action. Said another way, the plaintiffs must show that the state constitution, unlike the federal, compels the state to achieve a specific interdistrict racial, ethnic and economic^{57/} balance in our public schools, although it has in no way acted to render them imbalanced.

^{57/} For purposes of this state action discussion, the defendants will Cont'd on next page

Even after considering the differences in language between the Fourteenth Amendment and Article I, § 20,^{58/} this Court has held that state action is necessary to establish an equal protection violation of our state constitution. Cologne v. Westfarms Associates, 192 Conn. 48, 63, 469 A.2d 1201 (1984), quoting Lockwood v. Killian, 172 Conn. 496, 501, 375 A.2d 998 (1977).

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assume the dubious proposition that "economic segregation" constitutes a cognizable claim. It is this element alone that distinguishes this argument from the plaintiffs' claim under the "segregation" clause.

^{58/}The Fourteenth Amendment provides: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." Article I, § 20 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 or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability."

Article I, § 1 provides: "All men when they form a social compact, are equal in right; and no man or set of men are entitled to exclusive public emoluments or privileges from the community." Until 1965, Art. I, § 1 was the only equal protection section of our Constitution, and served the dual purpose of protecting against the denial of rights enjoyed by others; Snyder v. Newtown, 147 Conn. 374, 381, 161 A.2d 770 (1960) (equal protection clauses of 14th Amendment and Art. I, § 1 "have substantially the same meaning"); as well as prohibiting the grant of rights not enjoyed by others. Wilson v. Connecticut Produce & Development Corp., 167 Conn. 111, 114-19, 355 A.2d 72 (1974). Since 1965, Art. I, § 20 has principally served the former purpose and Art. I, § 1 the latter. See W. Horton, The Connecticut State Constitution 38-39, 77 (1993). Thus, while the 1965 Constitutional Convention added Art. I, § 20 to our Declaration of Rights, "[a]ctually, § 20 is not something entirely new in Connecticut; it is a modern equal protection clause, complementing [Art. 1,] § 1, adopted in 1818." Id. at 77. While the plaintiffs list Art. I, § 1 in their litany of constitutional provisions to be "taken together," they do not explain how it grants them any greater rights. In any case, except for the "segregation" clause of Art. I, § 20, addressed separately by the plaintiffs and earlier by the defendants, the plaintiffs do not claim that the addition of the modern equal protection clause in 1965 itself changed the state action requirement.

The plaintiffs and amici law professors claim that because Art. VIII, § 1, mandates affirmative state action, it effectively eliminates the need to prove "state action" as a threshold element of their equal protection claim. That is to say, Art. I, § 20 and Art. VIII, § 1 "taken together," in their view, require that the state remedy de facto school segregation, whatever its cause.

Article VIII, § 1 is clearly an exception to the usual rule that a constitution limits, rather than mandates, state action. Moore v. Ganim, 233 Conn. 557, 595-96, 660 A.2d 742 (1995). Thus, unlike a usual substantive due process claim, a substantive claim under Art. VIII, § 1 claiming the State has failed to provide an adequate education, would not require proof of state action. In fact, the process a child is due substantively is state action. The failure to provide this education will be strictly scrutinized.

As an equal protection matter, however, state action is still required. There is no evidence in the historical record that the framers intended by Art. VIII, § 1 to eliminate the need to prove state action in equal protection claims regarding education.^{59/} If the plaintiffs claimed that the State had by its actions provided

^{59/}Also, the plaintiffs' theory, if adopted, would set up the anomalous situation in which litigants would not have to prove intentional state action to succeed on a claim of de facto school segregation, but would to succeed on any other de facto segregation claim (e.g., housing, swimming pools) because the state constitution does not contain other affirmative obligations. Further, the silence in the text, the debates and the contemporary accounts of the convention belies any intent to saddle the State with such strict constitutional liability. See, e.g., Davis, "Connecticut Con-Con," National Civic Review 194, 200 (1967); Miller, "1965 Constitutional Convention: Proposals Affecting Towns and Cities," 19 Conn. Gov't No. 3 at p. 8 (Mar. 1966); "Baldwin Explains Work Of Convention," Hartford Courant, December 5, 1965 (App. A83); "First Constitutional Guarantee of Free Education Approved" Hartford Courant, October 19, 1965, p. 1 (App. A82); 3 Proceedings, pp. 1038-69.

diversity in schools unequally, that might require strict scrutiny.^{60/} They claim, however, that "conditions" (racial and economic isolation), rather than any state action, violate the constitution.^{61/}

This Court has recently and explicitly rejected this same unprecedented legal theory holding that "conditions" or "circumstances" do not violate the constitution, even if they impair the plaintiffs' enjoyment of their fundamental right to education. In Savage v. Aronson, 214 Conn. 256, 571 A.2d 696 (1990), a case the plaintiffs handle by ignoring, the plaintiffs claimed that a Department of Income Maintenance decision reducing the number of days a family could qualify for emergency housing would force them to move more often and, as a result, disrupt their children's education because of numerous school changes. The Court held 6-1 that the plaintiffs had not proven state constitutional violation because the impairment of the children's educational opportunities resulted from the plaintiffs' difficult financial circumstances, not any "interference by the State." "The financial circumstances of these plaintiffs, which are the root cause of their inability to obtain 'permanent' homes, have not been produced by any state action, an essential requirement for invocation of the due process

^{60/} Thus, the plaintiffs' reference to cases of "unequal treatment affect[ing] a fundamental right" (P/B 36 n.60) misses the mark.

^{61/} This Court has already held that plaintiffs bringing an equal protection claim regarding the state's provision of elementary or secondary education, enjoy a lighter burden because education is a fundamental right under the state constitution, as it is not under the federal constitution. Horton I, 172 Conn. 615, 646, 376 A.2d 359 (1977). Therefore, this Court employs heightened scrutiny. Horton III, 195 Conn. 24, 38, 486 A.2d 1099 (1985). In the absence of state action, however, the strict scrutiny test becomes a red herring for there is no state action to tailor narrowly or justify by a compelling state interest.

clause of both our federal and state constitutions." Id. at 284

(emphasis supplied). The Court then held:

We do not believe that the burden imposed on the state by our decision in Horton to ensure approximate equality in the public educational opportunities offered to children throughout this state ... despite variations in funding by the towns, includes any guaranty that children are entitled to receive their education at any particular school or that the state must provide housing accommodations for them and their families close to the schools they are presently attending. The undoubted hardship imposed upon the children of these plaintiffs from the lack of affordable housing near the schools where they now are being educated cannot be disputed. It results, however, from the difficult financial circumstances they face, not from anything the state has done to deprive them of the right to equal educational opportunity."

Id. at 286-87 (emphasis supplied). See also Moore v. Ganim, 233 Conn. 557, 582-83, 660 A.2d 742 (1995). Thus, this Court has already rejected the plaintiffs' claim that Horton I holds there is no need to prove state action in the education context and that the State must eliminate "conditions" infringing on the right to education.^{62/}

^{62/} Horton I declared unconstitutional a specific statutory scheme that it held distributed dollars inequitably, thereby depriving children in certain towns of an educational opportunity equal to those in other towns. There was clear, reviewable and enjoicable state action present in Horton I. In Pellegrino v. O'Neill, 193 Conn. 670, 683, 480 A.2d 476 (1984), the Court made clear that Horton I hinged on a finding of wrongful state action and that the Court viewed its power to respond to this state action as limited to the power to enjoin it.

In Horton I the court had before it various statutory grants for public schools and it concluded that those legislative provisions for financing education in the state violated the provisions of the Connecticut constitution. [Citations omitted] Rather than enjoin the defendants from implementing the existing statutory financing scheme, the customary remedy in such a situation as sought in one of the prayers for relief, the court chose to defer any action until the legislature had considered the matter further The case was clearly one where a judicial remedy could have been ap-

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Savage's holding is consistent with the rule that the "state has no obligation to remove obstacles inhibiting the exercise of fundamental rights unless those barriers were constructed by the government" Moore v. Ganim, 233 Conn. 557, 582, 660 A.2d 742 (1995). See also Doe v. State, 216 Conn. 85, 104, 579 A.2d 37 (1990).

Not surprisingly, the plaintiffs can cite no authority for their constitutional claim of de facto, interdistrict racial and economic segregation, or for the revolutionary relief that would flow from it. Any courts that have held that their respective state constitutions create an affirmative obligation to rectify racial imbalance at best concern intra-district racial imbalance. Connecticut's racial imbalance law, Conn. Gen. Stat. § 10-226, et seq., already requires this. Further, no case concerns the interdistrict disparities or the "economic isolation" the plaintiffs allege in this case. Put simply, no case in the nation holds that students have a constitutional right to attend economically or racially balanced schools.^{63/}

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plied, although its scope would be far more limited than a solution which the legislature might devise.

Although the point seems rather obvious from a reading of Horton I and Pellegrino, any suggestion that Horton I focused on unconstitutional "conditions," rather than unconstitutional state action, is fully dispelled by Horton III, 195 Conn. 24, 486 A.2d 1099 (1985). By the time Horton III came before this Court, the General Assembly had enacted a new system of school finance. There was, however, little evidence that the "conditions" before the Court in Horton I had changed. Id. at 39 n.15. Focusing on the changes in the state's actions, however, the Court ruled for the state. The Court undoubtedly would have reached the opposite result if, as the plaintiffs suggest, the Court had concerned itself with "conditions" rather than state action.

^{63/} Plaintiffs' counsel admits to pursuing a "unique," "novel" and "experimental" legal theory. Brittain, "Educational and Racial Equity," p. 230 (App. A58).

The plaintiffs are therefore again left to argue the last Geisler factor, which they employ as a catch-all, permitting them to discuss the obvious and critical importance of education to children and diversity to education. The defendants do not quarrel with these maxims; in fact, they take very seriously the obligation to provide high quality, equal educational opportunity to this state's children. See § I.B, infra. Exactly how to accomplish that, and how to measure whether it has been accomplished, has been, and will continue to be, subject to intense public and political debate. The plaintiffs cannot constitutionalize their claims merely by alleging that the legislature's policy choices in this regard have not been "sufficient" or "effective." (R. 39-41). This Court should properly be "extremely hesitant to choose sides in this policy debate and to enshrine one policy choice as a matter of constitutional law." Moore v. Ganim, 233 Conn. 557, 614, 660 A.2d 742 (1995).

Thus, for equally strong policy reasons, the Court should reject the plaintiffs' argument that the equal protection provisions of our constitution either alone or in conjunction with the education clause do not require a showing of state action or create and impose upon the state a judicially enforceable affirmative obligation to address and eliminate "conditions" that adversely affect their educational performance. The government should address poverty, drug abuse, health care, racial imbalance and many other social problems that affect educational achievement, but it plainly does not violate the constitution by failing to cure them. Such "strict constitutional liability," as the trial court described it

(R. 171), would set up the State, and this Court when the State failed, as a panacea for every conceivable social ill affecting a child's education (e.g., family discord, scarcity of food in the home, violence in the streets).^{64/} This Court has rejected such a role for itself. See Broadley v. Board of Education, 229 Conn. 1, 7, 639 A.2d 502 (1994) (no constitutional right to any particular educational program); Savage v. Aronson, 214 Conn. 256, 284-87, 571 A.2d 696 (1990) (no constitutional right to attend a particular school). Had the framers intended to saddle the State with such strict and virtually certain constitutional liability, they would have said so explicitly and provided some textual guidance (e.g., required racial balance, test score levels).

Fiscal concerns, which are apparently much of what this case is really about; see DX 37; should also inform the Court's decision. The public fisc is not unlimited. Transportation costs alone for plans like those the plaintiffs propose have been estimated at \$10-15 million. See § I.D.5. The trial court could not determine that such a plan would necessarily provide Hartford's students with a better education. (R. 358-60) These dollars could be better spent on the state's continuing efforts to maximize educational quality and diversity by providing educational resources

^{64/} Like the federal constitution, our state "constitution does not provide judicial remedies for every social and economic ill." Moore v. Ganim, 233 Conn. 557, 614, 660 A.2d 742 (1995), quoting Lindsey v. Normet, 405 U.S. 56, 74, (1972). The Court has thus heeded Judge Newman's warning against looking to the state constitution as a "source of remedies for every societal defect." Newman, "The 'Old Federalism' Protection of Individual Rights by State Constitution In An Era of Federal Court Passivity," 15 Conn. L. Rev. 21, 28 (1982), cited with approval in Moore v. Ganim, 233 Conn. 557, 598, 660 A.2d 742 (1995).

that will help children learn. In any event these are legislative choices.

2. The Trial Court Properly Ruled That The Plaintiffs Had Failed To Prove State Action.

The trial court determined as a legal and a factual matter that the plaintiffs had not negotiated the threshold hurdle in their case: the state action requirement. Since courts eschew deciding unnecessary constitutional questions; State v. Cofield, 220 Conn. 38, 49-50, 595 A.2d 1349 (1991); it properly went no further.

In fact, the trial court gave the plaintiffs every conceivable opportunity to make out a cognizable constitutional claim, over the objection of the defendants who had filed motions to strike and for summary judgment based, inter alia, on the lack of pleading or proof of any state action. After ruling that State action "goes to the merits," (R. 88, 102) the Court addressed the issue after trial "in the light of all the relevant evidence that has been offered" (R. 167) and under the most lenient state action standard it could employ, that espoused by Justice William O. Douglas.^{65/}

Justice Douglas believed that school cases are unique under the Fourteenth Amendment, but even he required some indirect state action for "de facto" desegregation. He maintained that "when school authorities, by their actions, contribute to segregation in education, whether by causing additional segregation or maintaining

^{65/} Continuing to give the plaintiffs the benefit of every doubt, the trial court apparently noted that in interpreting our state constitution this Court is occasionally influenced by dissents to United States Supreme Court opinions. See, e.g., State v. Linares, 232 Conn. 345, 383, 630 A.2d 1340 (1995); State v. Marsala, 216 Conn. 150, 164, 169-71, 579 A.2d 58 (1990). It is puzzling that the plaintiffs criticize the trial court's reliance on Douglas' opinions merely because they appear in federal cases. (P/B 30) This standard is most favorable to the plaintiffs.

existing segregation, they deny to the students equal protection of the laws." Keyes v. School District No. 1, 413 U.S. 189, 215, 93 S.Ct. 2686 (1973) (Douglas J., concurring), quoting United States v. Texas Education Agency, 467 F.2d 848, 863 (5th Cir. 1972). Such state activities, often described as de facto, are "only more subtle types of state actions that create or maintain a wholly or partially segregated school system." Id. at 216.^{66/}

Justice Douglas also conceded, however, that "there can be de facto segregation without the State's being implicated in the creation of the dual system." Spencer v. Kugler, 404 U.S. 1027, 1031, 92 S.Ct. 707 (1972) (Douglas, J., dissenting). The trial court found as a factual matter that this was such a case, stating that "the plaintiffs have not established any of what Justice Douglas described as the 'more subtle' types of state action that are ordinarily presumed in 'de facto' segregation cases." (R. 178) The record amply supports this finding.

Although the plaintiffs claim that by making the school district lines coterminous with town boundaries the State has engaged in state action, the trial court found this was accomplished in 1909 "to improve the quality of education on a statewide basis ... at a time when the demographic patterns which began in the 1940's and resulted in the high concentration of minorities in the cities could not have been predicted." (R. 339, F 23) This legislation

^{66/}The "various devices" by which Douglas believed that the state perpetuates racial imbalance included drawing school attendance lines, selecting and closing school sites, enforcing restrictive covenants, dispensing public funds for housing and zoning patterns that confine groups along racial lines. Milliken v. Bradley, 418 U.S. 717, 761-62, 94 S.Ct. 3112 (1974) (Douglas, J., dissenting); see also id. 755 (Stewart, J., concurring).

"was not racially motivated in any sense nor was it a product of any of discriminatory motive or purpose." (Id., F 24).

The trial court found that the state had no control over the "racial and ethnic composition of the towns in the Hartford metropolitan area." Rather, a variety of powerful and unpredictable social and demographic factors, including different birth and immigration rates, use of private schools and flow of white and minority families to the suburbs, has led to increased racial concentration in our city schools. (R. 340, F 26-27) Thus, Cologne v. Westfarms Associates, 192 Conn. 48, 469 A.2d 1201 (1984), does in fact control this case for it is private conduct, i.e., individuals' choices of where to reside, that has "produced" or "resulted in" the "conditions" of which the plaintiffs now complain.

The plaintiffs complain that the trial court "improperly conflated the doctrine of state action with considerations of causation and liability and standards of proof in discrimination cases." (P/B 29) Had they considered Savage, however, they would have understood that liability is determined (or found lacking) by considering whether state action caused, "resulted in" or "produced" the "circumstances" alleged. Savage v. Aronson, 214 Conn. 256, 284-87, 571 A.2d 696 (1990).^{67/}

^{67/} The creation of town school districts nearly ninety years ago could not conceivably be considered the proximate cause of the racial and ethnic concentrations that now exist. At best it is the "but for" cause. Proximate cause by state action must be a consideration, as it was in Savage, or else the State's liability would be limitless. For example, in considering the fundamental right to vote, if a traffic jam, or even intentional private conduct, prevented a citizen from reaching the polls, would the state be liable because "but for" a statute requiring an election on that day the citizen could have voted?

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The plaintiffs go on to argue that they did indeed prove state action, although that their theory has always been that they need not prove it. The trial court properly disagreed. It found that the state plays no part in school site selection. Although the State may reimburse towns for building new schools, if and where to build is a purely local decision the state has not sought to influence. (R. 341, F 35-37) Nor has the state established intradistrict "attendance zone boundaries," "which are exclusively the statutory duty of local boards of education under § 10-220." (R. 178) Finally, this is in no way a housing or zoning case, the plaintiffs having expressly disavowed such a claim. (R. 333-35).

Thus, the trial court correctly found that the "defendants have not created or maintained racially or economically segregated population patterns." (R. 341, F 38) Whether judged under current federal and state constitutional law, Justice Douglas' standard, or any "more flexible" state action model "requir[ing] less definite government action than is required under federal law"; Cologne v. Westfarms Associates, 192 Conn. 48, 82, 469 A.2d 1201 (1984) (Peters, J., dissenting);^{68/} the plaintiffs still did not prove

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Astutely, the amici law teachers recognize that Savage is dispositive. Ineffectively, they seek to distinguish it for the plaintiffs as a housing case and as a dictum. (p. 5 n.4). Finally, their suggested standard of foreseeability, even if supported by the historical record, gains the plaintiffs nothing since the trial court found that in 1909 the demographic shifts were not foreseeable. (R. 339, F 23) Thus, ultimately, their brief is of no help to the plaintiffs or this Court.

^{68/}Unlike the plaintiffs, the defendants do not necessarily agree with Justice Peters' observation in Cologne that "[i]n part, at least, the state action requirement is designed to address the

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that the defendants partook in any action that resulted in the "conditions" of which they now complain.^{69/}

3. The Plaintiffs Failed To Prove That The Defendants Have Denied Them An Equal Educational Opportunity.

In addition to the fatal absence of state action, the plaintiffs' claim that the defendants have denied them their right to an "equal educational opportunity" fails because: 1) their definition

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demands of federalism, to create space for state regulation." Cologne v. Westfarms Associates, 192 Conn. 48, 82, 469 A.2d 1201 (1984) (Peters, J. dissenting). The Fifth Amendment has no equal protection clause, but the U.S. Supreme Court has construed it to apply the same equal protection law of the Fourteenth Amendment against the federal government. Bolling v. Sharpe, 347 U.S. 497, 499-500, 74 S.Ct. 693 (1954). This requires a showing of governmental action. Medical Institute of Minnesota v. National Assn. of Trade and Technical Schools, 817 F.2d 1310, 1312-13 (8th Cir. 1987). No authority supports an argument that these state action standards differ in any way. See L. Tribe, American Constitutional Law § 18-2 (2d ed. 1988), p. 1691 (state action requirement "creates a space for state and congressional regulation").

Also, the idea that state inaction can constitute state action for equal protection purposes does not apply in this case. DeShaney v. Winnebago Country Social Services Dept., 489 U.S. 189, 199-200, 109 S.Ct. 998 (1989), does not say what the amici law teachers say it does. (p. 4). In Reynolds v. Sims, 377 U.S. 533, 570, 84 S.Ct. 1362 (1964), the legislative inaction "coupled with the unavailability of any political or judicial remedy," diluted the constitutional right to vote. Voting cases are in large part sui generis because the right means nothing unless the vote counts equally. In this case there is no constitutional right to attend schools with a certain racial balance and there is not the same lack of remedy because citizens' votes have not been diluted. Apparently, the U.S. Supreme Court agrees that voting cases are distinguishable for it has since Reynolds declined to hold that state inaction constitutes state action in desegregation cases. Milliken v. Bradley, 418 U.S. 717, 94 S.Ct. 3112 (1976).

^{69/} The plaintiffs also argue in this Court, as they did not below, that because public education is a public function, they necessarily have fulfilled their state action requirement. This simplistic argument would make the State constitutionally liable for everything affecting a child's education because of the State's "involvement." This Court has properly never gone that far. See Savage v. Aronson, 214 Conn. 256, 571 A.2d 696 (1990).

of this phrase is not this Court's; and 2) under either the court's definition, or a definition most generous to the plaintiffs, the trial court found the plaintiffs had not proven their case.

a. "Equal Educational Opportunity" as an Equal Protection Concept

The phrase "equal educational opportunity" does not appear in either the federal or state constitutions, but rather arises from Horton I and Horton III. Having held that education is a fundamental right under our state constitution, the Court determined that strict scrutiny was required in testing any alleged State infringement of that right. Horton I, 172 Conn. 615, 646, 376 A.2d 359 (1977). Noting that the equal protection clause is addressed "to the unjustifiable inequalities of state action," id. at 645-46; the Court addressed the then existing "significant disparity in the quality of education available to the youth in this state." Id. at 648. It concluded that the legislation discharging "the state's constitutional duty to educate its children, depending, as it [did], primarily on a local property tax base without regard to the disparity in the financial ability of the towns to finance an educational program and with no significant equalizing state support, [was] not 'appropriate legislation' (article eighth, § 1) to implement the requirement that the state provide a substantially equal educational opportunity to its youth in its free public elementary and secondary schools." Id. at 649 (emphasis supplied).

The plaintiffs have blatantly mischaracterized Horton I, however, by stating: "Equality of educational opportunity is ascertained by comparing the quality of education provided in the school districts." (P/B 41) While the Court in Horton I listed eight

criteria for evaluating "quality of education," it did so only in noting that "because many of the elements of a quality education require higher per pupil operating expenditures, there is a direct relationship between per pupil school expenditures and the breadth and quality of educational programs." Horton I, 172 Conn. 615, 635 (1977). That is, to achieve quality costs money. The Court only intended, and has only applied, the phrase to measure whether the State has provided ample funding, i.e., "equalizing state support," to the towns of this State so they can provide that opportunity. Never has the Court said it will look at the eight factors to determine if children are receiving an equal opportunity.

The Court reaffirmed this understanding in Horton III, 195 Conn. 24, 35, 486 A.2d 1099 (1985), and most recently in New Haven v. State Board of Education, 228 Conn. 699, 707-08, 638 A.2d 589 (1994): "[T]he equal protection clauses of the state constitution require the state to subsidize education in a manner that provides all students in Connecticut's public elementary and secondary schools with 'a substantially equal educational opportunity' by compensating for great discrepancies in local property tax revenues." (emphasis supplied). Indeed, equalizing funding between districts is all the Court is capable of assuring. The New Jersey Supreme Court recognized this recently:

We will do only that which we are capable of doing, we will assure the opportunity for this substantially equivalent education by ordering substantially equivalent funding: it is up to the state to assure that the money is spent well and not wasted.

Our view of the matter is not new. "Obviously, equality of dollar input will not assure equality in educational results ... [b]ut it is nonetheless clear that there is a significant connection between the sums expended and the

quality of the educational opportunity." Robinson v. Cahill, 62 N.J. 473, 481, 303 A.2d 273 (1973).

Abbott by Abbott v. Burke, 643 A.2d 575, 580 (N.J. 1994). Thus, while there may be professional disagreement in education circles over the definition of "equal educational opportunity," see § II.C.3.b, infra, there can be no disagreement over the legal definition of that phrase: "significant equalizing state support to local education" to make up for disparities in the financial ability of towns to finance education. Horton I, 172 Conn. 615, 649, 376 A.2d 359 (1977). This Court has never held that it can or will measure equal educational opportunity on the basis of test results or racial, ethnic or economic balances.

Because this is not a funding case, the plaintiffs do not, and cannot, claim that the state has failed to provide Hartford with "significant equalizing state support." In fact, in Hartford, the state has gone well beyond such support. Hartford receives by far the most state aid of any of the 22 districts (DX, 7.21, p. 11A) and spends more per pupil than all but two of them. (DX 7.1, pp. 3A, 11) For specifics, see § I.B.2, supra. Even after increasing Hartford's school population by an artificial multiplier of 1/4 student for each student on AFDC and for each student who tested below the remedial standard on the CMT the preceding school year (thereby counting some children as 1.5), Hartford placed fifteenth in per pupil spending in the twenty-two town area during the 1990-91 school year. (R. 191, S 75) Thus, by the only appropriate constitutional measure, "significant equalizing state support," Hartford's school children are clearly receiving an equal educational opportunity. Further, as a policy matter, the State Board

has opined that "those who need more must receive more," (PX 39) and the defendants have followed through.

b. The Trial Court Correctly Found That Hartford Students Are Receiving An Equal Educational Opportunity

Even assuming *arguendo* that the plaintiffs are constitutionally entitled to an equal educational opportunity that encompasses more than funding, the trial court correctly found that they received it. The court found as a matter of fact (R. 357, F 143):

An equal opportunity in the educational sense of that term is being provided to the children of a particular school district if they are provided with the level of resources, competence in terms of instruction and an ongoing systematic program that is similar to that of other communities in the state, and under that definition the educational programs and curriculum that are being offered in Hartford provide equal educational opportunity to its students.

Although the plaintiffs attack this finding on a number of grounds (P/B 43-44), in reality their complaint is plainly and simply that the court found the wrong facts, and believed the wrong witnesses. ("There is no evidence in the record to show that all of the plaintiffs' experts were unworthy of belief."). (P/B 44)

The plaintiffs complain first that the trial court used the wrong definition of educational opportunity, although the plaintiffs themselves proffered the definition used. (PX 493, p. 133 (Ferrandino)) Although the plaintiffs now object to this definition, it is clear that they have provided no better one. In fact, every witness asked to define the term "equal educational opportunity" came up with a different reply.^{70/} What is even more perplexing about the plaintiffs' present complaint is that the definition

^{70/} See, e.g. 5T 28 (Braddock); 15T 35-36 (Willie); 1T 18 (Carter; 2T 45 (Noel)).

the court used encompasses for the most part the criteria used by this Court in Horton I, 172 Conn. at 634, to evaluate the "quality of education" offered by a town, criteria the plaintiffs now claim the trial court erroneously did not consider:

(a) size of classes; (b) training, experience and background of teaching staff; (c) materials, books and supplies; (d) school philosophy and objectives; (e) type of local control; (f) test scores as measured against ability; (g) degree of motivation and application of the students; (h) course offerings and extracurricular activities.

When the plaintiffs' rhetoric and mischaracterizations are stripped away,^{71/} it is plain that whether one uses the trial court's definition or the Horton I criteria, the trial court's finding that Hartford is providing an equal educational opportunity to its students is correct, and strongly supported by the evidence.

As discussed supra, Hartford class sizes and teacher training, experience and background are comparable to the suburban districts, and to the state as a whole. (Part I.D.) So too are materials, books, and supplies for basic educational courses, as the plaintiffs' own witnesses testified. (Part I.D.; R.354, F 125-26) The plaintiffs have never claimed that the state or the Hartford school district's "philosophy and objectives" are less appropriate than the suburban districts, and it is clear from the plaintiffs' own evidence that the state and Hartford are committed to providing an excellent educational system. (Part I) Nor have the plaintiffs

^{71/} The defendants have never admitted that they do not provide an equal educational opportunity for all students. The plaintiffs' attempt to characterize every statement made by a state official as an admission, or to consider every aspiration as a constitutional standard, should be rejected. See 36T 40, 99-100 (12/16/93 argument, in which plaintiffs conceded that statements of state officials were not offered as judicial admissions).

ever suggested that the city of Hartford's control of its school system is improper -- in fact, the plaintiffs have expressly eschewed any claim of unconstitutional acts or omissions by Hartford. (R. 335, F 3) The Hartford course offerings and activities provided, as discussed above, are not only comparable to other districts, in many ways they surpass most districts' offerings as they relate to the needs of the Hartford students. (Part I.D.)

What the plaintiffs are really arguing, and the entire thrust of their lawsuit, is that because Hartford students on average have lower CMT test scores than the students of the suburban districts on average, they cannot be receiving an equal educational opportunity. Such an argument is without any basis, either in law or in reality. The defendants have discussed above that the plaintiffs' use of test scores as a proxy for equal educational achievement is invalid because the scores are a function of multiple variables that may be present in one district and not another, or that may affect one child differently than another. (Part I.D.)^{72/}

The logical conclusion of the plaintiffs' argument is that unless test scores in every district in the state are the same, all districts but the top scoring one would not be providing an equal educational opportunity. If anything defies common sense, it is the plaintiffs' argument. A school system can never guarantee parity in test scores between schools in a district, much less between

^{72/}The plaintiffs also claim that the trial court erred "by completely bypassing the analysis of disparities in the provision of materials, books and supplies and course offerings, by similarly neglecting the wide disparity in test scores, and by disregarding the impact of racial and ethnic isolation and the concentration of poverty in reaching his conclusion." (P/B 43) Since, as the plaintiffs concede, "this is not a funding case," their barrage of alleged interdistrict disparities is simply irrelevant, as well as inaccurate. See discussion II.D. supra.

students in different districts, where different backgrounds and conditions affect results. The Horton Court apparently recognized this principle when it listed test scores "as measured against ability" as a criterion, and further provided that the "degree of motivation and application of the students" must be factored into the analysis. Id. These qualifications reflect an awareness that test scores cannot be seen as absolutes, but must be considered in light of various factors impacting on them.

A school system can do no more than present an adequate educational program and attempt to ameliorate the forces and factors that hinder students in taking advantage of it. Schools cannot cure every social and personal problem that might impact on a student's performance. (1T 50-51 (Carter); 31T 120-121 (Calvert); 32T 120-121 (Armor); PX 73, p. 5.) The trial court's finding that an equal educational opportunity is being offered to Hartford students is the only finding the court could have made that is consistent with the evidence, and should be upheld by this Court.

D. HARTFORD SCHOOL CHILDREN ARE PLAINLY RECEIVING THEIR ARTICLE VIII, SECTION 1 RIGHT TO A MINIMALLY ADEQUATE EDUCATION.

1. The Legal Requirement

Article VIII, § 1 provides: "There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation." Clearly this provision is an affirmative state obligation, an exception to the usual rule that a constitution limits rather than mandates, governmental action. Moore v. Ganim, 233 Conn. 557, 595-96, 660 A.2d 742 (1995). In defining the contours of this

constitutional obligation, and applying them to the plaintiffs' claim; the Court again must employ the Geisler tools.

"It is this Court's obligation to construe the open-ended terms of our state constitution to reach reasoned and principled results." State v. Diaz, 226 Conn. 514, 532, 628 A.2d 567 (1993). The Court must first determine the scope of the "constitutionally protected interest" before determining whether it has been improperly infringed. Benjamin v. Bailey, 234 Conn. 445, 462 (1995). "In this pursuit the Court must 'exercise [its] authority with great restraint' [and] must be convinced, therefore, on the basis of the evidence, that the recognition of a constitutional right or duty is warranted." Moore v. Ganim, 233 Conn. 557, 581, 660 A.2d 742 (1995). See id. at 627-29 (Peters, C.J., concurring).

The plaintiffs ask the Court to hold that Art. VIII, § 1 imposes on the General Assembly affirmative obligations beyond offering a system of free public elementary and secondary education. They ask the Court to read into the Education Article, with no guidance from its text or history, specific educational and racial standards, determine that the General Assembly has not met those standards and order implementation of those standards. This would necessarily require court involvement in every aspect of the provision of public education to children in Hartford and the 21 neighboring school districts. It would also necessarily require an alteration of the local governmental control of education imbedded in this State's history. The language and the history of Art. VIII, § 1 belie any notion that the framers intended anything of the sort.

supervised the provision of education, including the setting of standards.^{74/}

"According to its proponents at the convention, the purpose of article eight, § 1, was to give 'our system of free public education ... the same Constitutional sanctity' as our bill of rights. 3 Proceedings of the Connecticut Constitutional Convention (1965) p. 1039." Moore v. Ganim, 233 Conn. 554, 596, 660 A.2d 742 (1995).^{75/} Nothing in the history of the 1965 Constitutional Convention suggests that this "very, very conservative body" of people, who "were extremely reluctant to change anything they didn't have to change," intended anything other than that the power to determine educational policy would remain with the General Assembly, the people's elected representatives. (R. 339, F 25) Rather, the framers intended nothing more than to insure that education retain the position of importance it has always maintained in this state and that it always be free. 3 Proceedings, p. 1064. In fact,

^{74/} Educators have not reached a uniform consensus as to what constitutes a "minimally adequate education" or a "substantive minimum level of education." (14T 139-140) These concepts must be fluid and subject to redesign to fit the times. (R. 356, F 133)

^{75/} "In July I submitted a resolution No. 109 which pertained to the subject of education, ... and the statement of purpose of that resolution of mine was that our system of free public education have a tradition acceptance on a par with our bill of rights and it should have the same Constitutional sanctity. It was because our Constitution had no reference to our school system that I submitted my resolution [s]o that this again is not anything revolutionary, it is something which we have, it is which is practically all Constitutions in the States of our nation and Connecticut with its great tradition certainly ought to honor this principle ... I can't possibly see any dispute over the principle involved, it is such a basic principle that it should be in the Constitution." 3 Proceedings, pp. 1039-40, remarks of delegate Simon J. Bernstein, quoted in Moore v. Ganim, 233 Conn. 557, 597 n.51, 660 A.2d 742 (1995) (emphasis added).

So long as the General Assembly provides a free public elementary and secondary education, the text of Art. VIII, § 1 is satisfied. This provision does not authorize the judiciary to establish specific educational programs and goals or levels of educational achievement as a constitutional requirement.

The history of Art. VIII, § 1 too demonstrates that the framers of that provision contemplated no such sweeping power and obligations for the judiciary. As the trial court found, Connecticut has a long tradition of local control of public education, going back to the 18th Century.^{73/} (R. 336-37, F 1-5) In 1909, the legislature consolidated the state's school districts making town boundaries the dividing line between all school districts. (R. 339, F 22; R. 171) This legislation had the intent of improving educational quality statewide and had no racial motivation or other discriminatory purpose. (R. 339, F 23-24) Nor could it have, since it predated by decades the demographic patterns that have since resulted in today's high concentration of minorities in the cities. (Id.; R. 185-87, S 26-38)

By the 1965 Constitutional Convention, however, these demographic trends had been well under way for over twenty years. (R.187, S. 39-45) Also, prior to 1965, the General Assembly

^{73/} Amici Black and Puerto Rican Caucuses, et al. challenge this finding as clearly erroneous, which the plaintiffs do not and cannot because it is based solely on their witness' testimony. (16T 19-22) The amici point out that town control has only been state policy since 1909. (pp. 4, 5, 8 n.4) Before 1909, however, districts were even smaller and more locally controlled (local control being the judge's finding) (R. 4-5), thereby undercutting their thesis, which argues for larger school districts.

plaintiffs' counsel has referred to Art. VIII, § 1 as a "perfunctory addition" to the Constitution. W. Horton, "Connecticut Constitutional History," 64 Conn. B.J. 355, 380 (1990).

While the right to an education clearly means the right to an "adequate education"; Horton I, 172 Conn. 615, 659 (Loiselle, J., dissenting); "the Education Article does not by its express terms contain an egalitarian component." R.E.F.I.T. v. Cuomo, 1995 N.Y. LEXIS 1137 (June 15, 1995). Rather, that is what the equal protection clause requires. Horton I, 172 Conn. 615, 645-46, 376 A.2d 359 (1977); San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 89 (Marshall, J., dissenting) ("The Equal Protection Clause is not addressed to minimal sufficiency but rather to the unjustifiable inequities of State action").

Also, students have no constitutional right to any particular kind of educational program. Broadley v. Board of Education, 229 Conn. 1, 6-7, 639 A.2d 502 (1994). See also Campbell v. Board of Education, 193 Conn. 93, 104-05, 475 A.2d 289 (1984). This Court should "not define the parameters of the education mandated by the Constitution as that task is, in the first instance, for the legislature and the Governor." Claremont School District v. Governor, 635 A.2d 1375, 1381 (N.H. 1993).

2. The Trial Court Correctly Found That Hartford Is Providing A Minimally Adequate Education

Even if this Court does consider the issue, it is clear that the trial court correctly found that Hartford students "are receiving at least a minimally adequate education, in the sense that a minimally adequate education is one that gives a child a chance of leading a successful life." (R. 355, F 132) (P/B 58). The

plaintiffs' attack consists largely of distortions, misrepresentations, and exaggerations, but it reveals once again that the core of their case is their contention that the quality of education in the constitutional sense is measured by raw test scores.

The plaintiffs complain first that the trial court did not articulate an appropriate legal standard, a surprising claim considering that the definition used by the court essentially tracks the definition proposed by the plaintiffs' chief expert, Dr. Natriello (a minimally adequate education is one "that would prepare students to participate in the adult society"). (9T 63-64) The plaintiffs now ask this Court to define the minimal constitutional standard as the remedial level set for the CMT, despite the overwhelming evidence, discussed above, that the CMT score cannot be used to measure either comparative achievement or quality of education. See Part I.D. supra, and R. 352-53, F 103-119. The plaintiffs' request that test scores be constitutionalized is simply untenable,^{76/} and disregards the substantial scientific evidence discussed above, as well as the mandate of the legislature in authorizing the mastery tests in the first place ("achievement of a satisfactory score on the state-wide mastery examination ... [shall not be] the sole criterion of promotion or graduation"). Conn. Gen. Stat. § 10-14n(e). The plaintiffs seek to make the test scores the primary criterion for the constitutional analysis.

^{76/} One of the great ironies of this case is that the legislature was under no obligation to create the CMT program in the first place, nor is it under any obligation to continue it. The plaintiffs have taken a program voluntarily initiated to improve the delivery of education in this state and attempted to use it as a basis for establishing a constitutional violation. The plaintiffs have not said what they would use for their constitutional standard if the legislature simply abolished the CMT, or changed the method of calculating the remedial level.

Because the plaintiffs' position has no basis in fact, law, or science, they have sought to use distortion and emotion to persuade the Court. They equate a score below the remedial level on a test with an inability to read, write, add, or subtract, although such a proposition is unsupported by any evidence. They claim that the defendants have "stipulated" that Hartford education is inadequate, although their own citations reveal the falsity of that charge. They reserve their worst pejoratives for the trial judge, distorting his findings beyond recognition, accusing him of finding that poor children are "uneducable," and of implying that schools can do nothing to help. Of course the trial court found or implied no such thing.

When the accusations and hyperbole are removed, it becomes obvious that under any definition, the trial court's finding of a minimally adequate education is solidly based on the evidence. The state mandates the elements of a minimally adequate education that must be provided in the schools of the state, and the students in Hartford are receiving it: the legislature has set specific course requirements for various levels of education, § 10-16b, minimum hours of school work per school day, § 10-16, minimum number of school days per year, § 10-15, and ages for mandatory school attendance, § 10-184. It has imposed minimum graduation requirements for high schools, § 10-221a, set minimum teacher standards, § 10-145a, and required certification of all teachers and business administrators in the state. §§ 10-145, 10-145f, and 10-145d. (R. 212-13, S 227-29; 231, 233, 237-40; R. 335) The State Board of Education prepares courses of study and curricula for schools,

§ 10-4, and prepares a comprehensive five year plan for education. (R. 212, S 225-26) The plaintiffs do not claim that these detailed requirements set less than a minimum standard of education for all state schools, nor do they claim that Hartford has failed to comply with them. To the contrary, the plaintiffs have expressly denied any claim that Hartford by its actions or inaction has infringed upon the plaintiffs' right to education. (R. 335, F p. 3)^{77/}

The conclusion is unavoidable that Hartford students receive a minimally adequate education.

E. THE PLAINTIFFS' CLAIMS THAT THE DEFENDANTS' ACTIONS HAVE BEEN "INEFFECTIVE" OR "INSUFFICIENT" ARE NOT JUSTICIABLE

The weakness of the plaintiffs' case stems from the fact that they argue essentially, as they alleged explicitly below, that the defendants have not "effectively" or "sufficiently" addressed the "conditions" that they claim violate the state constitution. (R. 39-41, 358, F 144) In state constitutional terms, the plaintiffs allege that the General Assembly has not implemented Art. VIII, § 1 by "appropriate legislation." (See Ps' Memo in Opp. to Summary Judgment, at 21; 37T 48, 53) This claim is not justiciable.

Justiciability requires that the matter be capable of being adjudicated by judicial power.^{78/} Pellegrino v. O'Neill, 193 Conn.

^{77/} Further, as discussed above, the evidence revealed that Hartford public schools "offer a breadth and depth of academic programs sufficient to meet the education needs [of] all students." (30T 4; see § I.D.3, supra)

^{78/} The defendants have not challenged the seventeen plaintiffs' standing to bring this action. However, the plaintiffs never sought to certify this as a class action, although the drastic, revolutionary relief they suggest would affect the rights of many others not parties to this action, including many similarly situated persons who do not support the relief the plaintiffs propose

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670, 674, 480 A.2d 476 (1984). The justiciability doctrine is one method by which a court determines when it is both constitutionally necessary and judicially prudent to refrain from adjudicating a controversy in deference to another governmental branch.^{79/}

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(e.g., attending schools other than those nearest their homes).
(See 25T 158-59)

Also, regarding the plaintiffs' claim that conditions in Hartford's public schools violate their right to a quality education, the Court does not have the responsible parties before it. Consistent with Art. X of our Constitution, and our tradition of local control of education; Horton I, 172 Conn. 615, 634 (1977); the State has delegated the day-to-day decisions about the operation of the schools to local boards of education. Conn. Gen. Stat. § 10-220. The plaintiffs have not named the Hartford Board of Education as a party in this action, an entity that is sui juris. Neither do they claim that either the City of Hartford, the Hartford Board of Education or any of the twenty-one suburban towns have violated their constitutional rights. (R. 335; 37T 15-19) Their complaints about the Hartford public schools, besides being exaggerated, relate to matters that are the subject of local discretion. Bastan v. Ricci, 174 Conn. 522, 528, 391 A.2d 161 (1978). (See R. 194, S 110) The State has no constitutional obligation to tell the local boards how to spend their money. In fact, while the record clearly shows that the State gives the greatest amount of aid to education to Hartford and that this amount has increased even in years that aid to other towns has decreased (R. 190-91, S 64-74), Hartford's School Superintendent testified that the Hartford City Council has not always passed on the full amount of the increase to the Hartford Board of Education (14T 129). Thus, the Court has no case or controversy presently before it.

^{79/} The defendants raised the issue of justiciability both by a motion to strike and a motion for summary judgment. (R. 72, 94) The trial court denied those motions relying on Judge Parskey's ruling on a motion to erase in Horton I and Justice Peters' dissent in Pellegrino v. O'Neill, 193 Conn. 670, 692-93, 480 A.2d 476 (1984). (R. 82-86, 106-07) As previously demonstrated in § II.A., supra, however, Horton I was strictly an equal protection case. See Baker v. Carr, 369 U.S. 186, 226, 82 S.Ct. 691 (1962) ("Judicial standards under the Equal Protection Clause are well developed and familiar."). Rather than fashioning relief, the Court merely entered a declaratory judgment and gave the legislature a chance to remedy the problem. Horton I, 172 Conn. 615, 650-51, 376 A.2d 359 (1977). As this Court stated in Pellegrino, "implicit in [Horton I] was the assumption that, if neces-

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"Although it is widely assumed that the judiciary, as the ultimate arbiter of the meaning of constitutional provisions, must determine every constitutional claim presented and provide appropriate relief, some constitutional commands fall outside the conditions and purposes that circumscribe judicial action." Pellegrino v. O'Neill, 193 Conn. 670, 679, 480 A.2d 476 (1984), citing Colegrove v. Green, 328 U.S. 549, 556, 66 S.Ct. 1198, 90 L.Ed. 432 (1946). The Court is not capable of adjudicating a claim that the General Assembly has not legislated "appropriately" under Art. VIII, § 1 because this poses a "political question."

The political question doctrine is grounded firmly in the constitutional mandate of separation of powers. Conn. Const., Art. II. See Adams v. Rubinow, 157 Conn. 150, 153-54, 251 A.2d 49 (1968). "The characterization of such issues as political is a

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sary, appropriate relief could be fashioned within constitutional bounds": namely the Court could have "enjoin[ed] the defendants from implementing the existing statutory scheme." Pellegrino v. O'Neill, 193 Conn. 670, 683, 480 A.2d 476 (1984). Thus, although the Court indicated that the State's public school funding scheme was not "appropriate legislation" Horton I, 172 Conn. 615, 649 (1977); it was "inappropriate" because it violated an independent constitutional provision.

Further, Judge Parskey's opinion did not truly pass on justiciability in the political question sense. He held merely that in a "declaratory judgment action the only issue that involves justiciability is whether the interests of the opposing parties are adverse." Horton v. Meskill, No. 185283 (1/21/74) at 2 (App. A137) Clearly we now know from Pellegrino, in which Justice Parskey joined, that declaratory actions may be nonjusticiable on political question as well as standing grounds. Pellegrino v. O'Neill, 193 Conn. 670, 685, 480 A.2d 476 (1984).

Finally, Justice Peters' concerns in her Pellegrino dissent, that "the plaintiffs should not be deprived of the opportunity ... to make an evidentiary showing that the legislature has violated the state constitution," id. at 692-93, have of course been obviated. The plaintiffs have now had a trial, which has not cured the justiciability problems posed by this action.

convenient shorthand for declaring that some other branch of government has constitutional authority over the subject matter superior to that of the courts." Pellegrino v. O'Neill, 193 Conn. 670, 680, 480 A.2d 476 (1984).

While the plaintiffs' brief hardly mentions any possible relief this Court might afford them, the relief requested must "be capable of being adjudicated by judicial power." State v. Nardini, 187 Conn. 109, 112, 445 A.2d 304 (1982). It "is a general rule that what [courts] cannot enforce they cannot decree." Pellegrino v. O'Neill, 193 Conn. 670, 683, 480 A.2d 476 (1984). Otherwise, a court's decree would be no more than an idle threat. See Baker v. Carr, 369 U.S. 186, 327-28, 82 S.Ct. 691 (1962) (Frankfurter, J., dissenting).^{80/} The plaintiffs' reluctance to discuss relief is understandable for the consideration of possible and available relief, even that they do propose, renders this action clearly nonjusticiable. (R. 41-46, 358-59, F 145, 152; R. 41) (Ps' Post-trial Brief at 108-22.)

In discussing the contours of the political question doctrine, this Court has followed the six factors enumerated in Baker v. Carr, 369 U.S. 186, 210, 82 S.Ct. 691 (1962). See Pellegrino v. O'Neill, 193 Conn. 670, 680-81, 483 A.2d 476 (1984). If "one of these formulations is inextricable from the case at bar," the case

^{80/} In fact, in the only two cases since Baker in which the U.S. Supreme Court has held a case nonjusticiable, the Court relied principally on the ground that it could provide the plaintiffs no practical relief. See Nixon v. United States, ___ U.S. ___, 113 S.Ct. 732, 739 (1993); Gilligan v. Morgan, 413 U.S. 1, 7-8, 93 S.Ct. 2440 (1973); Comment, "Article III Problems in Enforcing The Balanced Budget Amendment," 83 Col. L. Rev. 1065, 1091 (1983).

is nonjusticiable. U.S. Dept. of Commerce v. Montana, ___ U.S. ___, 112 S.Ct. 1415, 1424 (1992).

Professor Tribe observes that [Baker's] statement of the doctrine draws upon three different theories of the role of the court. The first consideration enumerated in Baker reflects a "classical" view, which would deem a case non-justiciable only if the court finds, "purely as a matter of constitutional interpretation, that the Constitution itself has committed the determination of the issue to the autonomous decision of another agency of government." ... The last three considerations reflect a "prudential" view, which would avoid adjudication "when reaching the merits would force the Court to compromise an important principle or would undermine the Court's authority." Id. Finally, the second and third considerations incorporate a "functional" view, which would have the Court "consider such factors as the difficulties in gaining judicial access to relevant information, the need for uniformity of decision, and the wider responsibilities of the other branches of government, when determining whether or not to decide a certain issue or case." Id. Tribe observes that these three theories are, to some extent, in tension. They can also, however, be mutually reinforcing.

Fonfara v. Reapportionment Commission, 222 Conn. 166, 184-85, 610 A.2d 153 (1992). All of these considerations and analytical tools counsel against justiciability of the plaintiffs' claims.

1. The Classical Approach: A Textual Commitment.

"The fundamental characteristic of a political question ... is that its adjudication would place the court in conflict with a co-equal branch of government in violation of the primary authority of that coordinate branch." Nielsen v. Kezer, 232 Conn. 65, 74, 652 A.2d 1013 (1995). As in Pellegrino, the most significant of the Baker criteria in this case is the first: a "textually demonstrable commitment to a coordinate political department."

Article VIII, § 1 provides: "There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation."

(emphasis supplied). "When a constitutional provision expressly confers upon the legislature the power to legislate on a given subject, it grants the legislature broad power both to set policy on that subject and to enact legislation therein" AFSCME, Council 4, Local 681, AFL-CIO v. West Haven, 43 Conn. Supp. 470, 487 (1994), aff'd 234 Conn. 217 (1995).

Nothing in the text or history of Article VIII, § 1 indicates that the framers contemplated that the judiciary would have a role in determining what is "appropriate legislation." See § II.D.1, supra. The people of this state delegated this role to the General Assembly, which has the last word on this subject so long as it in fact provides free public elementary and secondary schools and does not by its actions violate other constitutional provisions.^{81/} The plaintiffs nonchalantly ask this Court to disregard this explicit delegation and substitute their own notions of "appropriate legislation" for the General Assembly's. To do so, however, would render the second sentence of Art. VIII, § 1 virtually meaningless.

That the judiciary cannot define "appropriate legislation" is buttressed by reference to other sections of Article VIII, which are general pronouncements of support for education. By the plaintiffs' theory, citizens could bring suit asking a court to assess whether the State had met its obligation to maintain "a system of higher education ... dedicated to excellence." Conn. Const., Art. VIII, § 2 (emphasis supplied). Simmons v. Budds, 165 Conn. 507, 514, 338 A.2d 479 (1973) ("constitutional standard of 'excellence'

^{81/} In Rose v. Council for Better Education, 790 S.W.2d 186, 200 (Ky. 1989), which plaintiffs trumpet in their favor, the Court held in construing the constitutional phrase "appropriate legislation" that "legislation is only inappropriate if it conflicts with some other constitutional provisions of equal dignity."

[in Art. VIII, § 2] was not meant to be a wedge for penetration of the educational establishment by judicial intervention in policy decisions"). See also Conn. Const., Art. VIII, § 4 ("support and encouragement of the public schools throughout the state").

The plaintiffs' suggested relief would also involve breaking down school district boundaries, necessarily eviscerating the power of local governing boards of education and substituting regional district governing bodies. Such authority too is textually committed to the General Assembly in Art. X, § 2. The General Assembly alone has the discretion to establish such regional governments and has exercised it on occasion. See 3 Proceedings, pp. 1079, 1081-84. The courts may not force it to exercise this discretion.

2. The Functional Approach.

The "functional" approach also supports a conclusion of non-justiciability in this case. This approach concerns the difficulties courts have in gaining access to information, including the lack of judicially discoverable and manageable standards and the need for an initial, nonjudicial policy determination. Nixon v. United States, ___ U.S. ___, 113 S.Ct. 732, 735 (1993). Decisions concerning "an appropriate" educational policy for this state require balancing important and competing interests. A court cannot do this.

It is not the role of the court to strike precise balances among the fluctuating interests of competing private groups which then become rigidified in the granite of constitutional adjudication. That function has traditionally been performed by the legislature, which has far greater competence and flexibility to deal with the myriad complications which may arise from the exercise of constitutional rights by some in diminution of those of others.

Cologne v. Westfarms Associates, 192 Conn. 48, 65, 469 A.2d 1201 (1984) (courts cannot "strike a balance" that becomes "rigidified in the granite of constitutional adjudication").

As demonstrated above, even among the plaintiffs' witnesses, there are no professionally agreed upon standards available to the Court to define such amorphous concepts such as a "minimally adequate education," "equal educational opportunity," or racial and socio-economic balance. (R. 354, 356, 359-60, F 127, 133-34, 157) The Court would be left speculating and grasping for standards to determine if a constitutional violation exists. With no agreed upon goals, or goals that change as educational theories progress, the Court would be at a loss for criteria to measure constitutional compliance. The courts' involvement in this exercise would engraft particular standards onto the constitution (e.g. test scores (see 11T 23-24; R. 352, F 133)), making for static rather than progressive standards that keep pace with contemporary theories.^{82/} See Milliken v. Bradley, 418 U.S. 717, 743-744, 94 S.Ct. 3112 (1974) ("District Court will become first, a de facto 'legislative authority' to resolve these complex questions, and then the 'school superintendent' for the entire area.").

To resolve this case to the plaintiffs' satisfaction, the Court must make nonjudicial policy decisions about the basic structure of local government, the general allocation of state and local resources and educational issues. Whether the State should

^{82/} For example, in 1965, at the time of the passage of Art. VIII, § 1, professionals measured the education a student received based on "inputs." As the plaintiffs' expert, Dr. Natriello, testified, only in the last ten to fifteen years have some professionals begun to measure educational quality based on "outputs" (e.g., test scores). (11T 23-24; R. 356, F 133)

allocate its limited resources toward addressing the many serious social problems existing outside the schools, or toward addressing them once they manifest themselves within the school would become a judicial question. Also, whether corrective measures should be mandatory, as the plaintiffs propose, or voluntary as the State has chosen, (R. 359, F 151) and as has proven most effective, (R. 359-60, F 156-61), would also become a judicial question.

3. The Prudential Approach.

The prudential approach addresses concerns that the Court pay due respect to the other branches, adhere to political decisions already made and avoid multiple pronouncements on the same topic. Professor Bickel wrote that these concerns include "the anxiety, not so much that the judicial judgment will be ignored, as that it should be but will not be." A. Bickel, The Least Dangerous Branch 184 (1962).

Even if the Court believes that the legislature has not chosen the best approach to providing the State's children with free public elementary and secondary education, it cannot ignore its separation of powers limitations. "Just as the exercise of judicial power by the legislature is constitutionally prohibited, so is the legislative power forbidden to the judiciary." Pellegrino v. O'Neill, 193 Conn. 670, 679, 480 A.2d 476 (1984). See also id. at 682.

The plaintiffs have not challenged any particular legislative enactment, but have simply alleged that the legislature's actions have not been "effective" or "sufficient." (R. 39-42). In fact, the legislature addressed problems of economic and racial diversity. See, e.g., Conn. Gen. Stat. §§ 10-226a et seq.; 10-264 et

seq. To date, however, the legislature has chosen to assign each child to a school district based on the neutral basis of where the child lives and has focused its efforts on voluntary measures with incentives that have greater political support and have proven to work better than mandatory measures. (R. 347, 359, F 81, 151) For the Court to cast aside these decisions would demonstrate an utter lack of respect for the coordinate branch explicitly charged with carrying out this duty.

This case also involves the need for an "unquestioning adherence to political decisions already made" and the risk of multiple pronouncements on the same topic. The legislature has acted in this area by Conn. Gen. Stat. § 10-264a.^{83/} This plan is in mid-stream and is presumed constitutional. Court involvement could doom to failure, or at least unnecessarily complicate, the efforts of both the plaintiffs and the defendants as they proceed simultaneously. Court-ordered remedies aimed specifically at Hartford

^{83/} P.A. 93-263, codified as Conn. Gen. Stat. §§ 10-264a et seq., was based on four premises: 1) the people of the state seek quality and diversity in our schools; 2) voluntary measures will prove the most reasonable and effective means to advance these goals; 3) the people's support is essential to effective pursuit of the goals; and 4) there is no one right way to achieve quality and diversity. For the Court to interfere and not allow it to progress simply because the plaintiffs allege it is not "effective" would undercut the political support needed for any such plan, even a court-devised plan, to succeed. (R. 347-48, F 79-82)

The plan contained in P.A. 93-263 differs significantly from the one the plaintiffs propose that the Court implement. For example, the twenty-one towns that the plaintiffs allege make up the Hartford metropolitan area differ from the legislature's: the plaintiffs include Newington and Farmington, while the legislature has included Bolton and Enfield. The P.A. 93-263 plan operates with local advisory and regional committees permitting direct input from citizens across the community. The plaintiffs propose a planning group dominated by experts and lawyers. The plans also differ in the authority proposed for choosing, implementing and monitoring a plan.

(which is all this case is about) risk inconsistent state-wide plans and programs, with perhaps somewhat different goals.

All of these concerns illustrate the realistic limitations of a judicial decree in this case. Moreover, a decision over the allocation of limited public funds is fraught with judgments of morality, "policy and value over which opinions are sharply divided." ... [The Court] should not forget that 'legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.'" Moore v. Ganim, 233 Conn. 557, 614-15, 660 A.2d 742 (1995), quoting Maher v. Roe, 432 U.S. at 479-80. See also Pellegrino v. O'Neill, 193 Conn. 670, 679, 480 A.2d 476 (1984); Cologne v. Westfarms Associates, 192 Conn. 48, 66, 469 A.2d 1201 (1984). Thus, this Court should "resist the temptation which this case affords to enhance [its] own constitutional authority by trespassing upon an area clearly reserved as the prerogative of a coordinate branch of government." Id. at 681.

III. CONCLUSION

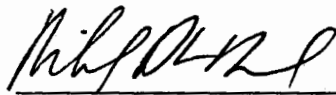
For all the foregoing reasons, the judgment of the trial court should be affirmed, either on the ground decided or on any of the alternative grounds discussed herein.

Respectfully submitted;

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