

So Ordered?

Scrutinizing the Massachusetts Judiciary's Role in the State's Sweeping Education Reform Plan

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Hampered by a ballot initiative that rigidly capped local property taxes, cities and towns throughout Massachusetts struggled mightily in the 1980s to adequately fund their schools. Richer school districts were better equipped to survive the difficult financial climate than poorer ones, and disparities widened. The quality of a student's education turned more than ever on the wealth of her parents and their neighbors.

Whether and to what extent the *state* government was responsible for ensuring that public schools had sufficient funding began to dominate Massachusetts political discourse in the early '90s. Pressed by educators, business leaders, and other stakeholders, the state legislature debated ways of strengthening the quality of public education, especially in towns where student achievement lagged behind state averages. Meanwhile, a long-running educational adequacy challenge finally reached the Supreme Judicial Court (SJC).¹

June 1993 was a watershed month for Massachusetts schoolchildren. On June 15, the SJC ruled in *McDuffy v. Secretary of Executive Office of Education*² that the Education Clause in the state constitution made the Commonwealth³ responsible for providing all public school students

¹ The Supreme Judicial Court is the highest court in Massachusetts. It is the oldest appellate court in the Western Hemisphere.

² 615 N.E.2d 516 (1993).

³ The term "Commonwealth" appears frequently throughout this paper. I use it to refer to Massachusetts generally or to the Massachusetts state government specifically. Massachusetts is one of four states (along

with an “adequate” education. Three days later, Governor Bill Weld signed the Education Reform Act (ERA), which dramatically revamped school funding, accountability, and administration mechanisms throughout Massachusetts.

The close timing of these two events, along with subsequent developments over the nearly two decades since, raises a fundamental question: Did the judiciary act as a pivotal catalyzing force for meaningful education reform, or did it simply rubber stamp legislation that ultimately falls short of the constitutional mandate?

I. City of Champions, State in Disarray

Half an hour south of Boston is Brockton, a blue-collar city of about 90,000. During the nineteenth century, Brockton, like so many other New England towns, developed into a hotbed of industry and innovation. Its specialty: shoes.

Equipped with specialized knowhow and eager to make use of rapidly advancing industrial capabilities, Brockton’s entrepreneurs secured hundreds of shoemaking patents.⁴ A handful of these patents revolutionized the industry, and the city was soon supplying boots to over half the Union Army during the Civil War.⁵ In 1907, more than 15,000 people worked in Brockton’s shoe factories, many of them recent immigrants pursuing the American Dream, and the city earned the moniker “Shoe City, U.S.A.”⁶

with Kentucky, Pennsylvania, and Virginia) officially designated as commonwealths, hearkening back to a traditional English term for a political community established for the common good. This has no practical impact on their status as states.

⁴ Jean Porrazzo, “March of progress—the rise and decline of Shoe City, U.S.A.,” THE ENTERPRISE, Sep. 24, 2007, available at <http://www.wickedlocal.com/brockton/town-info/history/x1649539547#axzz1J0OGXUUq>.

⁵ Massachusetts Department of Housing and Community Development, “Description of Brockton, Massachusetts,” available at <http://www.mass.info/brockton.ma/description.htm>.

⁶ Porrazzo, *supra* note 4.

Brockton's age of prosperity did not last long, however, and its decline was swift. Rapid European industrialization and the Great Depression combined to cripple manufacturing throughout the Northeast.⁷ Brockton's most successful shoemakers either folded, downsized, or left for cheaper labor in the South or to be closer to leather sources in the Midwest.⁸ By 1964, the once-famed shoe factories of Brockton employed a mere 2,000 workers.⁹

Yet even as the city's economy sputtered and shrank during the '50s and '60s, anyone doubting Brockton's scrappy resolve need only have looked to its most famous son. Rocky Marciano was born and bred in Brockton, the product of a modest Italian immigrant home. An aspiring boxer, he spent his youth working out using homemade weights and punching a stuffed mail bag that he hung from a tree.¹⁰ After high school, he worked as a ditch digger, a delivery man for an ice-and-coal company, and, of course, a shoemaker.¹¹ Following a stint in World War II, Marciano entered—and won—an armed forces boxing tournament, and he soon began a professional boxing career. He won every bout and retired in 1955 as the heavyweight champion of the world.¹²

Marciano was born during the city's golden age, matured during the Great Depression, survived the trials of war, and fought, literally, for everything he earned, his world-famous career playing out at a time when his hometown struggled to stay afloat. No longer Shoe City, Brockton adopted the new nickname "City of Champions," primarily in recognition of Marciano. The

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Gerald Beals, "An Abridged Biography of the Life of Rocky Marciano," *available at* <http://www.rockymarciano.com/biography.html>.

¹¹ *Id.*

¹² Rocky Marciano should not be confused with Rocky Balboa, the fictional pugilist from Philadelphia played famously in a series of blockbuster movies by Sylvester Stallone. Marciano finished his career with a record of 49-0, with 43 KOs. Balboa finished his (big-screen) career with a record of 58-23-1, with 54 KOs. Both Marciano and, curiously, Stallone have been inducted into the International Boxing Hall of Fame.

boxer infused the city with a renewed sense of identity, its residents reminded of the grittiness and determination that had once put Brockton on the map.

Perhaps the best tangible symbol of the city's resolve sprang up in 1970, when the city opened a state-of-the-art building to house Brockton High School. Just six years after the local shoe industry had essentially evaporated, Rocky Marciano's alma mater moved into a facility the size of an aircraft carrier. Replete with a host of modern amenities, including a television studio, swimming pool, greenhouse, ice skating rink, high-tech planetarium, large auditorium, and 10,000-seat stadium, Brockton High became one of the largest and most elaborate public schools east of the Mississippi.¹³

Buoyed by the new facilities, the school system produced impressive results. In the '70s and '80s, Brockton students tended to academically outperform their counterparts in many other urban school districts across Massachusetts.¹⁴ The high school developed a very successful fine arts program, with several award-winning bands and frequent theater productions,¹⁵ and its athletes—now competing under the team name “Boxers”—continued a longstanding tradition of excellence.¹⁶ “This is not a rich city, but it's a city with a rich tradition of caring about education and getting involved,” said Manthala George, Brockton's superintendent from 1984 to 1994. “Schools are a point of light for this city, a real source of pride.”¹⁷

¹³ Patricia Nealon, “In Brockton, A Case Study of Crisis; Students, Teachers Feel \$5.5m in Cuts,” BOSTON GLOBE, Nov. 24, 1991, at 38.

¹⁴ *Id.*

¹⁵ Maria Papadopoulos, “New building helped Brockton High School programs and students flourish,” *The Enterprise*, Oct. 6, 2010, available at <http://http://www.patriotledger.com/archive/x161460382/New-building-helped-Brockton-High-School-programs-and-students-flourish>.

¹⁶ In 2005, Sports Illustrated ranked the best high school athletic programs in the country. Brockton High School finished first among Massachusetts schools and twenty-first nationally. See Alan Shipnuck, “The 25 Best High School Athletic Programs,” SPORTS ILLUSTRATED, May 16, 2005. The author of this story distinctly and painfully remembers playing against Brockton High in baseball and coming out on the losing end of a no-hitter.

¹⁷ Michael Grunwald, “City System Still Delivers Despite Cuts,” BOSTON GLOBE, Jun. 20, 1993, at South Weekly 1.

That pride, however, was put to the test in the late '80s. At the beginning of the decade, with anti-tax sentiment sweeping the nation, Massachusetts voters passed Proposition 2½.¹⁸ The ballot initiative severely hampered municipalities' ability to raise revenue by capping property tax rates at 2.5 percent. The restriction resulted in an all-too-predictable crisis in education funding.

Under the state's existing school finance apparatus, public school districts primarily relied on local funding. Towns and cities decided how much property tax revenue they wanted to direct toward education. (The Commonwealth did not require local governments to spend above a certain level on education or direct a certain percentage of their revenues toward schools.¹⁹) Municipalities with relatively high real estate valuations had a broader tax base, and thus could typically set aside considerably more money for public education. The state did dole out supplementary education aid, and it did so progressively, giving more to poorer districts than to wealthier districts.²⁰ However, the ability of this aid to effect equity in education spending across districts was limited. Even in boom years, the funds set aside for state education aid were woefully insufficient to bring spending in poor districts to anywhere near state average.²¹ And what aid there was tended to dip substantially in fiscally lean years.²² Exacerbating matters were curious administrative nuances: supplementary aid was given to municipalities rather than directly to school districts, and there was no requirement that local governments use the money to fund schools rather than for other purposes.²³

¹⁸ Mass. Gen. Laws Ch. 59 § 21C.

¹⁹ *McDuffy*, 615 N.E.2d at 522.

²⁰ Roger Hatch, "Massachusetts," Descriptions of Funding Systems, Education Finance Statistics Center, available at <http://nces.ed.gov/edfin/pdf/StFinance/Massachu.pdf>.

²¹ *Id.*

²² *McDuffy*, 615 N.E.2d at 522.

²³ *Id.*

Thus, when Proposition 2½ came into effect, it severely limited public education funding. The problem was particularly acute for poor districts. Whereas wealthy suburbs might be able to amply fund education using property tax rates well under 1 percent, poor towns could not do so even, hypothetically, if they cut all other municipal services and gave their schools every bit of revenue collected at the maximum permissible rate of 2.5 percent.

For a few years during the mid-‘80s, the state government compensated for aggravated shortfalls by increasing aid payments to local governments.²⁴ But in the late ‘80s, the economy plummeted, state tax revenues declined, and school systems across the Commonwealth experienced a two-tiered crisis: state aid payments to municipalities shrank, and municipalities gave schools a smaller-than-before share of what aid the state did mete out.²⁵ While towns could ask voters to pass an operational override that would remove the Proposition 2½ restrictions for a given year, such efforts typically failed.²⁶

Brockton’s schools quickly began to feel the pinch. A series of funding cuts culminated in a \$5.3 million slashing of the budget in 1991 that included the firing of nearly 200 teachers, counselors, or specialists.²⁷ Class sizes ballooned, frequently exceeding forty in elementary schools and even sixty for a junior-high swimming class.²⁸ User fees mounted for Brockton High athletes and musicians, and the planetarium and greenhouse fell into disuse.²⁹ Many of the teachers that held on to their jobs were reassigned to teach subjects and grade levels with which they had little or no experience.³⁰ Textbook purchases and building repairs were put on the back-

²⁴ Anthony Flint, “Saving a System Mired in Mediocrity,” Dec. 15, 1991, BOSTON GLOBE, at A21.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Nealon, *supra* note 13.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

burner.³¹ At one elementary school catering primarily to low-income minorities, an innovative program for integrating special needs students into regular classrooms was scrapped when all the teachers involved were laid off.³² The school's principal lamented, "We had a tremendous school system up until the first hits in '82 with Proposition 2½. A child in Brockton does not have equal access. It's a question of a level playing field, a question of equity."³³

Though local residents could have passed an override that would have raised additional property tax revenue to fund the city's schools, even a committee of state education officials conceded that the blame lay in Beacon Hill,³⁴ not Brockton. Noting that Brockton had one of the highest local property tax rates among financially capsizing school districts, the committee arrived at a blunt conclusion: "Brockton . . . seems to be an example where the Commonwealth has not provided funding sufficient to satisfy its obligations vis-à-vis the shared responsibility for public education."

II. Pressure for Reform from an Unlikely Source

In 1991, as public schools in Brockton and other communities across the state struggled to deal with the limitations of Proposition 2½ during a down economy, some of the very interest groups that help pushed the ballot initiative a decade earlier became concerned with its effects on education. Concerned that the public education system had fallen below "levels of quality, relevance, and effectiveness needed in the 1990s and beyond," representatives of a number of leading companies from across the Commonwealth came together to form the Massachusetts

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Beacon Hill, one of the oldest and most historic neighborhoods of Boston, is the site of the Massachusetts State House and is often used to describe the state government and its politicians.

Business Alliance for Education (MBAE).³⁵ The MBAE founders, convinced that the state’s schools needed a “total system review,” raised private funds for a thorough investigation and assessment that they hoped would stimulate meaningful discourse and lay the groundwork for concrete reform proposals.³⁶

Spearheading the MBAE’s effort was Paul Reville. A former teacher, principal, and administrator at two urban, alternative secondary schools, Reville had founded an education reform think tank in Central Massachusetts in the early ‘80s.³⁷ When the MBAE coalesced in 1986, Reville became its executive director.³⁸ In July 1991, after over two years of meticulous research, Reville’s team published *Every Child A Winner! A Proposal for a Legislative Action Plan for Systemic Reform of Massachusetts’ Public Primary and Secondary Education System*.³⁹

The report proposed overhauling the educational finance system to “guarantee overall funding, sufficient to provide for a quality education for all students, equity across all school districts, and improved year-to-year stability . . . and to give special attention to economically disadvantaged youth.”⁴⁰ To ensure districts used the money effectively, the Commonwealth could employ statewide standards to demand accountability from districts and initiate operational reforms designed to improve teacher quality and school management.⁴¹

³⁵ Massachusetts Business Alliance for Education, “Every Child a Winner! A Proposal for a Legislative Action Plan for Systemic Reform of Massachusetts’ Public Primary and Secondary Education System” [hereinafter MBAE Report], at 1, July 1991, *available at* <http://www.mbae.org/uploads/13102003114120EveryChildAWinner.pdf>. Among the most prominent Massachusetts companies constituting the MBAE were Lotus Development Corp., the Massachusetts Mutual Life Insurance, Co., Digital Equipment Corp., and Polaroid Corp.

³⁶ *Id.* at 2-3.

³⁷ “Paul Reville,” Faculty Profile, Harvard Graduate School of Education, *available at* http://www.gse.harvard.edu/faculty_research/profiles/profile.shtml?vperson_id=253.

³⁸ *Id.*

³⁹ MBAE Report, *supra* note 35.

⁴⁰ *Id.*

⁴¹ *Id.* at ES-3-ES-4.

Under the existing school finance scheme, the state did distribute money to communities progressively, but the amounts that poor districts received in excess of rich districts were insufficient to make up for disparities resulting from unequal property tax revenue.⁴² Consequently, poor communities taxed their residents at higher property tax levels, only to find that they still could not match typical per-pupil expenditures in rich communities.⁴³ Per-pupil annual spending in Massachusetts varied from as low as \$3,382 in Douglas to \$10,000 in Lincoln.⁴⁴

The *Every Child a Winner!* formula, conceived of by school superintendents and developed by an MBEA-hired economist, centered around the concept of “foundation funding.” Using a modeling technique employed in other states’ school finance reform efforts, the team estimated the “funding level below which most educators would be hard pressed to do right by their students.”⁴⁵ Factors used to determine the amount of money necessary each year to provide a student an adequate education included a community’s enrollment at different grade levels, the number of teachers needed, how much the teachers should be paid, and how much should reasonably be spent on educational supplies, building maintenance, insurance, and other costs.⁴⁶

Resulting figures pointed toward a default foundation funding level of around \$4,950 per pupil per year.⁴⁷ The MBEA rounded this up to \$5,000 for typical districts, and increased it to

⁴² *Id.* at D-2.

⁴³ *Id.*

⁴⁴ Muriel Cohen, “School Panel OK’s \$8M Cut, 269 Layoffs; Weld Seeks to Balance State’s Disparities,” *BOSTON GLOBE*, Jan. 16, 1992, at 1.

⁴⁵ MBEA Report, *supra* note 35 at D-4.

⁴⁶ *Id.* at D-2.

⁴⁷ *Id.* at D-9. This overall value broke down as follows: \$2,561 for teacher salaries, \$792 for other salaries, \$536 for utilities and maintenance, \$420 for insurance, \$297 for equipment, and \$344 for miscellaneous expenses.

\$6,000 in districts in which low-income students predominated.⁴⁸ Case-by-case adjustments could take into account overall enrollment levels, student demographics, inflation, differences in local labor markets, and other relevant factors.

In explaining the need for additional education spending in low-income districts, the MBAE pointed to the more pronounced negative impact of violence, drugs, poverty, and family tensions in such communities. The “extra” money needed to supply an adequate education in those districts would go toward increasing teacher staffing, raising teacher compensation to account for the heightened educational challenge, strengthening early childhood education initiatives, and expanding afterschool programs.⁴⁹

How did existing spending patterns compare to foundation budget levels? Nearly half the districts in the state—accounting for more than half the students in the state—spent significantly less than foundation level, while about a third spent considerably more than foundation level. Fifteen percent of districts spent right around foundation level.⁵⁰ Many of the low-spending districts, due to low property values, relied on well-above-average property tax rates to get what minimal funding they did receive.

The MBAE sought to move toward “the ideal of having all communities in the state be able to provide foundation budget funding for their students with the same school tax rate.”⁵¹

Under the proposal, the state would not require any community to supply schools with more than

⁴⁸ *Id.* at 36. Note that districts with large numbers of poor students do not overlap completely with the property-poor districts most vulnerable to insufficient state funding. In some urban districts, for example, low-income students and families predominate, but commercial and industrial property supplies a fairly substantial property tax base. See Note, *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 YALE L.J. 1303 (1972). Remember, though, that the foundation budget concept specifically addresses the amount of money that should be spent, not methods of raising revenue to support such spending.

⁴⁹ *Id.* at D-16-D-17.

⁵⁰ *Id.* at D-11.

⁵¹ *Id.* at D-2.

\$10 for every \$1000 (or 1 percent) of equalized property valuation, though there was no prohibition against employing a higher tax rate.⁵² If monies generated by these local property taxes were insufficient to meet the foundation budget, state aid funds would make up the difference.⁵³ To better understand how this would work, let's work through some examples:

Start with Brockton, where there was only \$282,000 worth of property per pupil as of 1991—barely half the state average. Under the existing school finance system, Brockton spent at only 65 percent of foundation level. This should not be surprising. Existing state aid—progressive but insufficiently so, in the eyes of the MBAE—provided some money, but to raise enough to achieve foundation spending Brockton would have had to assess a 1.55 percent property tax solely for the purpose of funding schools. Doing so was practically impossible given the strict Proposition 2½ cap on all property taxes at 2.5 percent. Under the MBAE proposal, Brockton could direct a 1 percent property tax toward schools (leaving a 1.5 percent cushion for other municipal spending), and the state would provide the additional money necessary to reach its foundation budget. Of course, this would not be cheap for the Commonwealth; state aid would have to rise from \$1,900 per Brockton student to \$3,442. The city would of course be free to spend in excess of foundation level by raising additional local revenue, and the state would partially subsidize Brockton and other low-wealth districts engaging in such spending.

What about property-rich communities? Lincoln is a particularly wealthy suburb in which there was, in 1991, about \$1.7 million worth of property per pupil—roughly three times the state average. Given its significantly broader tax base, Lincoln had been able to fund its schools at well above foundation level merely by assessing a fairly low property tax. Under the MBAE plan, Lincoln's state aid would be gradually diminished to free up funds for lower-wealth

⁵² *Id.* at 36.

⁵³ *Id.*

districts, and the town would likely have to raise property taxes—albeit only slightly and still to nowhere near 1 percent—to account for the subsequent shortfall.⁵⁴

At the risk of adding some complexity, it is worth noting that the MBAE funding proposal was not nearly as radical as it could have been.⁵⁵ For example, it did not go so far as to insist that a municipality like Lincoln implement a 1 percent school tax and transfer “excess” revenue to the state for redistribution to poorer districts; “such an ideal [was] out of reach” because it would require wealthy communities to “make large payments to the state.”⁵⁶ Moreover, the proposal did not advocate terminating all state funding to the richest districts, even though a town like Lincoln could more than adequately obtain foundation funding locally even with a tax rate well under 1 percent. On the contrary, the plan guaranteed every community \$100 per pupil in state funding; “since taxpayer in all communities contribute to the aid pool,” the MBAE determined that all districts should receive some assistance.⁵⁷ Wealthy districts were further buffeted from state funding cuts by the plan’s requirement that “every community receive 95 percent of its previous year’s aid” to ensure “funding stability in all school systems.”⁵⁸ It would take upwards of twenty-five years for the state aid given to certain rich communities to gradually decline to the \$100-per-pupil minimum prescribed under the plan.

At its core, then, the MBAE funding scheme was a nuanced marriage of principled reasoning and political expediency. The proposal drew its theoretical foundations from notions of educational adequacy and equity. But the details of the proposal reveal that it was crafted not

⁵⁴ For more examples and an in-depth explanation of the MBAE proposal, see Appendix D of the MBAE Report.

⁵⁵ I refer here to structural aspects of the funding scheme. Set aside, for now, the additional and critically important possibility that the foundation budget levels the MBAE identified may have been insufficient to fund a truly “adequate” education, and that this insufficiency may have been particularly pronounced in low-income districts.

⁵⁶ MBAE Report, *supra* note 35, at D-21.

⁵⁷ *Id.* at D-24.

⁵⁸ *Id.*

so much to level the playing field between the Brocktons and the Lincolns of Massachusetts but rather to ensure that the Brocktons could adequately fund their schools without overburdening their residents or gutting other services. Any number of factors might explain the existence of, say, the \$100-per-pupil minimum for wealthy districts—a desire not to alienate those communities and their voters, an effort to retain the support of as many important interest groups as possible, a reluctance to espouse radically redistributive principles at odds with the MBAE’s business leanings—but all are fundamentally political.

Indeed, though notable for the thoroughness of its research and the specificity of its recommendations, the report was perhaps most remarkable for its savvy political acumen. Cognizant that some educators blamed big business for pushing Proposition 2½, the MBAE actively conceded that many in industry underestimated the impact the initiative would have on the state’s schools, only to learn from the trials and tribulations of the late ‘80s.⁵⁹ Rather than trying to coming off as benevolent outsiders taking a quasi-charitable interest in students’ schooling, the industry leaders positioned themselves as integrally involved in, reliant upon, and affected by education policy.⁶⁰

Careful not to alienate educators and parents suffering through budget crises, and yet aware of the palpable anti-tax sentiment that contributed to the frequent failure of Proposition 2½ overrides, Reville and his colleagues chose their words carefully:

⁵⁹ *Id.* at 10.

⁶⁰ *Id.* at 10-11. The MBAE listed several motivations for business involvement, including “parochial factors” such as: “(1) [t]o ensure the availability of a workforce possessing the basic skills necessary for entry-level jobs; (2) [t]o promote work force preparedness for the advanced training required in higher technological and managerial positions; (3) [t]o generate better-educated and better-paid consumers who will provide future markets; [and] (4) [t]o provide the leadership for tomorrow’s business sector and community at large.” Yet the most important reason for business involvement, according to the MBAE, was “[t]o ensure that Massachusetts and the nation have an informed, educated electorate to sustain a free society in which the nation’s values will endure and business flourish.” In many ways, these rhetorical themes hearkened to the Reagan’s Administration famous 1983 report, *A Nation At Risk*.

The current fiscal crisis has created acute financial pressure on schools, and it has become very apparent that while business may oppose taxation for other reasons, it has not lost faith in educators or the importance of public schools. . . . With regard to school funding, industry lacks confidence primarily in the existing system of revenue distribution and allocation, not in the educators and schools themselves. . . . The Commonwealth's school systems of the future must be adequately financed, but they must also operate differently to achieve necessary performance levels.⁶¹

In refusing to blame any one factor or constituency or to prescribe any simple solution, Reville craftily insulated the report's recommendations from blanket criticism by cost-conscious taxpayers concerned that education reform might trigger massive rate hikes without structural and operational changes, and by skeptical local educators and administrators uneasy about the business sector's involvement.

Yet none of the report's written language would have had the same effect had Reville not been so careful to bring a diverse range of stakeholders to the table when gathering information and preparing recommendations. People consulted during the MBAE process—that is, long before Reville and his colleagues drafted a report—included state representatives and state senators, the presidents of the Massachusetts Teachers Association and the Massachusetts Parent-Teacher-Student Association, numerous superintendents and school committee members, leaders of the state Department of Education, elementary school principals, secondary school administrators, the dean of the Harvard Graduate School of Education and the president of Fitchburg State College, experts in vocational education and bilingual education, school volunteers, and many more.⁶² Reville's career in education had taken him through the roles of volunteer, teacher, principal, administrator, and policymaker, and he believed that meaningful reform of something as complex as a statewide public education system required the input—and support—of a wide range of interested parties.

⁶¹ *Id.* at 8-9.

⁶² *Id.* at A-5-A-7.

The report stated: “Massachusetts’ businesses now stand ready to ally themselves with the education sector, thereby becoming part of a joint constituency which will use its political power to demand a reckoning on how public education is treated by those involved with public policy in the Commonwealth.” Under other circumstances, this language might come across as a naked attempt to cheaply curry favor. But Reville had conceived of the MBAE project as “reform done *with* the [education] field, not *to* the field,” and his actions backed that up.⁶³

III. Sporadic Progress on Beacon Hill

The central reform calculus advanced in *Every Child a Winner!*—demanding state-level standards and accountability measures in exchange for a dramatic and progressive school refinancing bankrolled by the Commonwealth—reverberated with a number of key politicians on Beacon Hill.

Bill Weld, the first Republic governor of Massachusetts since 1975, was more at ease interacting with business groups than the education establishment, and with education reform dominating the state’s political climate, he welcomed the proposals.⁶⁴

The Democratic leadership of the House-Senate Joint Education Committee—State Representative Mark Roosevelt and State Senator Thomas Birmingham—was sincerely committed to education reform and to public education.⁶⁵ Roosevelt, a great-grandchild of President Theodore Roosevelt and, like Weld, the son of a privileged aristocratic family, was keenly aware of his good fortune in attending the St. Albans School in D.C., Harvard College,

⁶³ Rachel Wainer Apter, *Institutional Constraints, Politics, and Good Faith: A Case Study of School Finance Reform in Massachusetts*, 17 CORN. J. L. PUB. POL. 621, 639.

⁶⁴ *Id.* at 640.

⁶⁵ *Id.* at 641.

and Harvard Law School.⁶⁶ “If I ask myself what luck has given me,” he said, “by far the greatest gift is education.”⁶⁷

Birmingham, meanwhile, grew up in Chelsea, a blue-collar, industrial suburb of Boston not unlike Brockton.⁶⁸ Like the young heroes of novels written by fellow Chelsea native Horatio Alger, Birmingham possessed a dogged determination to accomplish far more than might be expected of someone from such a humble background.⁶⁹ Nearly apocryphal stories of his legendary work ethic abound. (One summer, while earning money by shoveling solid waste at a sewage plant known for its noxious odors, he would spend his breaks reading English poetry, even amid the wretched stench.⁷⁰) After a stint at Phillips Exeter, a bastion of northern privilege where other students mocked his working-class accent and assumed he was there merely to play football, Birmingham earned a scholarship to Harvard and a Rhodes Scholarship to Oxford. When he graduated from Harvard Law, Birmingham shunned the trappings of a fancy law-firm lifestyle, instead becoming a labor lawyer and moving back to Chelsea.⁷¹ If any Massachusetts politician understood issues of class, educational opportunity, and equity, it was Tom Birmingham. “I have my foot in both worlds,” he said.⁷²

Beginning in 1991, this group of unlikely bedfellows began meeting to hash out an education reform bill.⁷³ There was Weld, the Republic governor who had taken a firm stance against taxes and spending during his campaign but now accepted the need to increase the state

⁶⁶ Peter J. Howe, “Roosevelt Says Background Gives Him Insight into Weld,” BOSTON GLOBE, May 23, 1994, at 16.

⁶⁷ *Id.*

⁶⁸ Rick Klein, “Renaissance Man, Politician: Birmingham Is Driven,” BOSTON GLOBE, Aug. 18, 2002, at A1.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ See Diego Ribandeneira, “Property Tax Funding of Schools Questioned,” BOSTON GLOBE, Mar. 4, 1992, at 23.

government's share of education costs.⁷⁴ Also present were Roosevelt and Birmingham, two liberal Democrats and strong advocates of public education who had come from vastly different childhood environments only to take strikingly similar paths once they graduated from high school. And of course there was the MBAE, representing business and industry interests that only a decade earlier had used their political muscle to help pass the very initiative that so badly hamstrung local school districts in the early '90s.

At first, progress seemed promising. The parties agreed that the state should enact rigorous standards for students, teachers, and schools in exchange for large amounts of new state aid to help districts reach foundation budget spending targets.⁷⁵ But friction began to appear in 1992. For weeks, meetings to iron out a final proposal had lasted for four hours a day.⁷⁶ Though previous statements by Governor Weld had suggested to some that he might retreat from his campaign promise not to levy any new taxes, he now held firmly to that position.⁷⁷ A major sticking point involved relatively wealthy communities that engaged in low per-pupil spending.⁷⁸ Such municipalities would have to raise their spending to foundation budget levels, but might be prevented from sufficiently doing so by Proposition 2½. Weld worried that the only way to compensate for such a shortfall would be to raise state taxes. For a time, the governor stalled in the face of perceived political pressures—in one rather cryptic example of political hedging, Weld said, “What I believe in philosophically may lead me to go beyond where I want to go politically, and politically I don't think we should raise taxes.”⁷⁹

⁷⁴ *Id.*

⁷⁵ Cohen, *supra* note 44.

⁷⁶ Muriel Cohen, “School Bill Faces Limits; Equity, Raising Money May Be Sticking Points,” BOSTON GLOBE, Mar. 9, 1992, at 15.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Ribandeneira, *supra* note 73.

Despite these hitches, meaningful reform, if not inevitable, was at least highly probable. Momentum had gathered behind significant education reform proposals in the past, only to result in inaction or weak legislation, but there was reason this time to be optimistic. The governor and the Democratic legislative leadership had a great deal invested politically in education reform, and public pressure had mounted in the face of ongoing crises in cities like Brockton. Opposition by Republican legislators was weak and unorganized.⁸⁰ Most interpreted the public hiccups as little more than political posturing or, at worst, issues on which a compromise could and would be reached. Landmark education reform legislation, it seemed was on the horizon.

IV. *McDuffy v. Secretary*

While politicians at the State House moved in fits and starts toward potentially momentous legislation, a longstanding school finance challenge that had been dormant through much of the '80s before being revived in 1990 was approaching resolution. The Supreme Judicial Court (SJC) agreed in December 1992 to hear *McDuffy v. Secretary*, and the scope of what state legislators were *obligated* to do under the Massachusetts Constitution would soon become more clear.

The genesis of *McDuffy* took place two decades before it reached the SJC. In 1973, the U.S. Supreme Court held in *San Antonio Independent School District v. Rodriguez* that the *federal* Constitution does not guarantee students a right to equal educational opportunity, rejecting theories centered around education as a fundamental right or poverty as a suspect class.⁸¹ Just two years later, a number of organizations—including the two large Massachusetts teachers' unions, the Massachusetts Association of School Superintendents, the Massachusetts

⁸⁰ Apter, *supra* note 63, at 642.

⁸¹ *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

Association of School Committees, and the ACLU of Massachusetts—joined together to form the Council for Fair School Finance.⁸² The council’s purpose: to file a lawsuit challenging the validity of the state’s school finance apparatus under the *Massachusetts* Constitution.⁸³

The Council filed a complaint in 1978 under the heading *Webby v. Dukakis*, but shortly thereafter the state legislature enacted a comprehensive school funding formula designed to promote the equalization of public educational opportunities across the state.⁸⁴ The case remained inactive for several years to allow the new legislation to take effect, but it was revived in 1983, three years after the approval of Proposition 2½.⁸⁵ In 1985, however, proceedings were again suspended following the enactment of a new round of finance reform legislation. *Id.*

Under the financing scheme initiated in 1985—described in greater detail above—the state distributed funds progressively, offering larger amounts of aid to poorer districts than to wealthier districts. However, this aid oscillated sometimes significantly depending on the economic climate, and perhaps more importantly, it was not specifically earmarked for school spending. Thus, municipalities struggling to raise funds in the wake of Proposition 2½ often dipped into state education aid to fund other strapped programs.

In 1990, at a time when schools in Brockton and other cities across the state struggled mightily under the weight of budget shortfalls, the Council filed a restated complaint that framed the claim as an *adequacy* challenge.⁸⁶ A brief history of state-constitution school finance litigation is necessary to place this strategic decision in context.

⁸² Apter, *supra* note 63, at 627-28.

⁸³ *Id.* at 628.

⁸⁴ *McDuffy*, 615 N.E.2d at 518.

⁸⁵ *Id.*

⁸⁶ *Id.*

A. Adequacy Not Equity — The Plaintiffs Strategize

In *Serrano v. Priest*,⁸⁷ the California Supreme Court determined that the education financing scheme in that state required residents in poorer districts to pay high property taxes to secure for their children the same or often inferior educational opportunities as compared to children in wealthier districts. This, the *Serrano* court concluded, violated the equal protection clauses of the federal and California constitutions. After *Rodriguez* effectively closed off federal constitutional avenues for challenging states' systems of financing education, *Serrano* survived on state constitutional grounds,⁸⁸ and similar state-constitution challenges flared up across the country.

Much of the litigation centered around a notion of “equity.” Plaintiffs in such cases argued that a state’s school finance system was unconstitutional because education spending in property-rich districts exceeded spending in property-poor districts.⁸⁹ Early equity cases typically hinged on courts’ interpretation of the state’s equal protection clause, but such suits failed more often than they succeeded, with courts often adopting the reasoning of the *Rodriguez* Court.⁹⁰ As a result, state-constitution equity challenges increasingly began to rest not only on equal protection clauses but also on education clauses that gave the state some degree of responsibility with respect to the public education system.⁹¹ Such clauses provided plaintiffs with a simple way of suggesting that the state-constitution equity analysis should diverge from the *Rodriguez*

⁸⁷ 487 P.2d 1241 (Cal. 1971).

⁸⁸ See generally *Serrano v. Priest (Serrano II)*, 557 P.2d 929, 950 (Cal. 1976) (holding that California’s equal protection provisions “are possessed of an independent vitality which, in a given case, may demand an analysis different from that which would obtain if only the federal standards were applicable”).

⁸⁹ Paul A. Minorini & Stephen D. Sugarman, “School Finance Litigation in the Name of Educational Equity: Its Evolution, Impact, and Future,” in EQUITY AND ADEQUACY IN EDUCATION FINANCE 46 (1999).

⁹⁰ *Id.* at 53-55.

⁹¹ Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 107 (1995).

analysis: an education clause, depending on how it is worded and interpreted, might dictate that education should be recognized as a fundamental right for state constitutional purposes.⁹² In 1989, plaintiffs in Montana and Texas won equity-based victories in cases where the courts focused on education-specific constitutional provisions.⁹³

Around that same time, some reformers and some courts began to rely even more heavily on education clauses. So-called “adequacy” claims do not hinge on a lack of equality across school districts. Instead, they directly challenge, under an education clause, the quality of public educational services received by children in disadvantaged communities.⁹⁴ Plaintiffs typically brought both equity and adequacy claims in their lawsuits, and this alternative pleading often leads parties and the courts to let the two theories intermingle. But a notable 1989 court decision suggested for the first time that a school finance reform victory could rest primarily on adequacy, rather than equity, grounds. In *Rose v. Council for Better Education, Inc.*, the Kentucky Supreme Court ruled that funding inequity across districts was just one of many ways in which the state government had failed to meet the substantive requirements of an education clause that called for an “efficient system of common schools.”⁹⁵ The court deemed the *entire* Kentucky school system unconstitutional and forced the state legislature to effect dramatic education reforms.

In many situations, equity and adequacy theories point toward the same remedy. For example, if rich districts in a state spend at levels adequate to produce desired educational outcomes and poor districts do not, then an equity remedy driving spending up in the poor districts to match spending in the rich districts will also result in adequacy. The same can be true in reverse. But in Massachusetts, the Council deliberately decided in 1990 to recast its challenge

⁹² *Id.*

⁹³ *Helena v. Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684 (Mont. 1989); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989).

⁹⁴ Enrich, *supra* note 91, at 109.

⁹⁵ *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 215 (Ky. 1989).

as strictly an adequacy claim—not an equity claim, nor some hybrid of the two. This represented an unprecedented approach. This was the first time that plaintiffs had challenged a school finance system solely on adequacy grounds.⁹⁶ It is therefore worth identifying the circumstances in which an adequacy claim, at least theoretically, may point toward remedies that diverge from those required by equity.

Professor Clune has identified three such scenarios. First, “where practically all schools in a state are inadequate,” the remedy must guarantee new resources for education in virtually every district, and an equity suit would merely bring very low-spending districts up to par with insufficiently higher-spending districts.⁹⁷ Second, “where certain groups of students, schools, or districts need extra resources to meet minimum achievement standards,” the remedy should ideally include some kind of compensatory aid above and beyond equity as measured by financial inputs.⁹⁸ And third, “where reaching minimum achievement levels requires schools to become more effective and efficient,” an adequacy theory may more readily lend itself to a remedy that additionally involves a systematic overhaul of aspects of a state’s public education system other than funding.⁹⁹

The Council’s decision to file a strictly adequacy-based suit derived from the second of these considerations: the chief motivating factor was new research suggesting that certain student populations, especially in low-income communities, require more resources than others to achieve the same educational outcomes.¹⁰⁰ (This research similarly motivated the MBAE to

⁹⁶ Enrich, *supra* note 91, at 141. Optimism that the adequacy claim might succeed sprang from the hybrid decisions in Montana and Texas from the victory in Kentucky. The latter ruling in particular made clear that an education challenge could successfully stand on adequacy grounds alone.

⁹⁷ William H. Clune, *Educational Adequacy: A Theory and Its Remedies*, 28 U. MICH. J.L. REF. 481, 481 (1995).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Apter, *supra* note 63, at 630 n.48.

propose a higher foundation budget for low-income school districts.) Equity, as conventionally defined, was not what the Council sought. Rather than suing for *equal funding*, which may not by itself ensure sufficient progress in low-income communities, it sought *adequate funding*. This distinction may not matter in the early stages of school finance reform, when low-spending, low-income districts are merely catching up financially with high-spending, high-income districts. However, once funding equilibrates across districts, low-income districts might theoretically leverage a successful adequacy claim into even more funding from the state.

The Council made some other key strategic decisions up front. Lead council Michael Weisman, believing that the Supreme Judicial Court might be wary of granting a sweeping remedy, sought only a declaration that the Commonwealth had violated a duty imposed by the Education Clause of the Massachusetts Constitution obligating it to provide public school children with the opportunity to receive an adequate education.¹⁰¹ With the political branches close to enacting new reforms, a ruling that imposed a heavy-handed remedy risked derailing or delaying the legislative progress. A declaration of a constitutional duty, however, would come in handy should the lawmaking efforts stall or should resulting legislation prove deficient.

Additionally, the Council chose sixteen relatively well-managed plaintiff school districts, all of which were suffering significantly from insufficient funding.¹⁰² When describing the conditions in the plaintiff school districts, the Council highlighted “sufficiently typical” “focus districts”: Brockton and Lowell, two large, urban districts from southeastern and northeastern Massachusetts, respectively, and Winchendon and Leicester, two small, rural districts from the central part of the state.¹⁰³ The Council also identified three “comparison districts”—Brookline,

¹⁰¹ *Id.*

¹⁰² *Id.* at 631.

¹⁰³ *McDuffy*, 615 N.E.2d at 520.

Concord, and Wellesley.¹⁰⁴ Those three communities, like Lincoln, are among a number of affluent suburbs in Eastern Massachusetts known for their high property values and successful public school systems. This was an adequacy challenge only, and thus distinctions between the focus districts and comparison districts were not directly relevant to its resolution. That said, the inclusion of those comparison districts provided helpful context for evaluating whether conditions in the focus districts were adequate. (This is a useful reminder that a truly binary distinction between “pure” equity and “pure” adequacy challenges may ultimately be out of reach.)

The case also needed a new lead plaintiff. Roburn Webby of Brockton had graduated from high school, and the Council replaced her with Jami McDuffy, another Brockton youth. Just twelve when the Supreme Judicial Court decided to hear the case, Jami was a precocious junior-high-school student.¹⁰⁵ Her father, Scott McDuffy, was a member of both the Brockton Fire Department and the Brockton School Committee.¹⁰⁶ It’s easy to see what the Council saw in Jami: an eager and well-spoken young girl who enjoyed school and extracurricular activities and whose hardworking father found enough time to serve on a school committee that had been one of the more innovative in the state. If anyone was keeping Jami McDuffy from an adequate education, it was the Commonwealth.

B. Stipulation and Argument — The Parties Litigate

If the defendants’ optimal strategy in what was now known as *McDuffy v. Secretary* was at all uncertain, a scathing report issued in November 1991 forced their hand. The state Board of Education, which oversees Department of Education operations, had solicited a report from a

¹⁰⁴ *Id.* at 519-20.

¹⁰⁵ Marla R. Van Schuyler, “Decision Makes 7th Grader a Heroine to Her Classmates,” BOSTON GLOBE, Jun. 16, 1993, at 23.

¹⁰⁶ *Id.*

specially formed Committee on Distressed School Systems and School Reform.¹⁰⁷ Three of the four members of the Committee had been handpicked by Governor Weld: MBAE Executive Director Paul Reville; Secretary of Education Piedad Robertson; and Martin Kaplan, Weld's former partner at the prestigious Boston law firm Hale & Dorr.¹⁰⁸

The governor likely hoped for merely modest recommendations from the Committee, especially as he tried to contain the financial impact associated with the legislative reform proposals of Mark Roosevelt and Tom Birmingham. But Marty Kaplan, the principal author of the report and the one education outsider on the Committee, was left with grave concerns after touring struggling districts. He concluded that a number of school systems across the state faced a "state of emergency due to grossly inadequate financial support."¹⁰⁹ Furthermore, he told reporters when the Committee published its findings that without significant reform, "more towns will be coming to us desperate next year, and the year after."¹¹⁰

The report was so stark in its assessment and so emphatic in its calls for MBAE-type foundation budgets that Secretary of Education Robertson resigned from the Committee and took her name off the report just days before it was released.¹¹¹ This move may have served as political damage control; with Weld carefully trying to balance his staunch anti-tax-hike position against his desire to appear pro-education, he did not need one of his top appointees headlining a highly visible report slamming the condition of schools across the state and demanding dramatic increases in funding.

¹⁰⁷ *McDuffy*, 615 N.E.2d at 553 n.9.

¹⁰⁸ Anthony Flint, "School Financing Attacked by Panel; Reform Urged in Mass.," *BOSTON GLOBE*, Nov. 24, 1991, at 1.

¹⁰⁹ *McDuffy*, 615 N.E.2d at 552.

¹¹⁰ Flint, *supra* note 108.

¹¹¹ *Id.*

The report was the most obvious indication of the limited range of politically viable legal arguments that the *McDuffy* defendants might bring. Robertson’s recusal notwithstanding, the report was still officially authorized by the executive departments being sued in *McDuffy*. Thus, it had become virtually untenable for the Department of Education to contend that it was providing students in the plaintiff school districts with an adequate education. It chose not to meaningfully contest the case on that issue. Instead, it focused on arguing that the language of the Education Clause was merely “aspirational” and did not impose any enforceable duty on the Commonwealth.¹¹²

With the contours of the litigation thus set, the two sides agreed to a litany of factual stipulations. In Massachusetts, the Supreme Judicial Court, though best known as the state’s highest appellate court, also has concurrent jurisdiction with superior courts over equitable claims.¹¹³ If the parties file a case originally with the SJC, it is referred to a single justice of the court. That justice, when presented with a novel question of law, has the option of refraining from ruling and instead reporting the case to the entire SJC, but only if the parties have stipulated to a factual record.¹¹⁴

The *McDuffy* stipulations filled 200 pages and required a six-volume supplement, but a few key agreed-upon conclusions stand out. The parties established that public schools in the comparison districts “offer significantly greater educational opportunities” than their counterparts in the focus districts; that even absent expert consensus on the relationship between financial resources and educational quality, schools must have a “sufficient” amount of funding in order to attain basic educational goals; and that the availability of ample funding in the

¹¹² Apter, *supra* note 63, at 632.

¹¹³ See Mass. Gen. Laws ch. 231A § 1 (2007).

¹¹⁴ “Practice and Procedure—Single Justice,” Supreme Judicial Court of Suffolk County, *available at* <http://www.sjccountyclerk.com/singjusprpr.html>.

comparison districts “significantly contribut[ed]” to their stipulated edge in educational quality over the focus districts.¹¹⁵

In December 1992, SJC Justice Ruth Abrams, the single justice assigned to *McDuffy*, reported the case to the full court for resolution.¹¹⁶ The announcement that the court would hear arguments later that winter had politicians of all stripes trying to impress upon the media and the general public that they were serious about passing meaningful reform legislation as soon as possible.¹¹⁷ Whereas ultimately unsatisfying legislative enactments had forestalled previous chapters of the Massachusetts school finance litigation, it had now become a real possibility that a holding for the plaintiffs in *McDuffy*, or even just the threat of such a holding during the months leading up to a final ruling, might prod the political branches to enact meaningful reform.

C. An Ode to John Adams — The Court Rules

The central legal issue in *McDuffy* was the interpretation of the Education Clause of the Massachusetts Constitution, which by its terms imposes upon the Commonwealth a “duty . . . to cherish” public education.¹¹⁸

¹¹⁵ Stipulation of Agreed Facts at 42-43, *McDuffy*, 615 N.E.2d 516 (Mass. 1993) (No. 90-128). Though these stipulations may at first blush seem to have provided the plaintiffs a dramatic advantage, recall that the state government did not want to factually contest the adequacy of the education being provided in the focus districts. Of course, these factual stipulations may nonetheless have shaped how the SJC justices viewed the disputed legal arguments.

¹¹⁶ *McDuffy*, 615 N.E.2d at 518.

¹¹⁷ See Lauren Robinson, “SJC Takes School Case; Lawsuit Challenges Property-Tax Funding,” BOSTON GLOBE, Dec. 15, 1992, at 25.

¹¹⁸ The full text of the Education Clause reads:

Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this Commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns; to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of this

The plaintiffs, in their brief, had asserted that the Education Clause compels the state government to ensure that public school students have the opportunity to receive an adequate education.¹¹⁹ They asked the court to provide the legislature with a set of guidelines explaining what a constitutionally satisfactory education system might look like.¹²⁰

The defendants countered that the Education Clause was merely aspirational, and did not establish any judicially enforceable rights.¹²¹ As Assistant Attorney General Douglas Wilkins explained at argument, the state has a “political and moral duty” to provide children with equal and adequate educational opportunities, but that does not rise to the level of a legal obligation.¹²²

As he absorbed the parties’ written and oral arguments, Chief Justice Paul Liacos brought to bear an interesting perspective. Born to Greek immigrants in Peabody, yet another blue-collar Massachusetts city, Chief Justice Liacos had watched his father become the first Greek-born attorney in the state after paying for law school by working at a leather factory.¹²³ As a jurist, Liacos became “an unapologetic defender of individual rights and civil liberties.”¹²⁴ Under his watch, the SJC ruled that the state constitution prohibits the death penalty, expanded protections

country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good humour, and all social affections, and generous sentiments among the people.

Mass. Const., Part II, C. 5, § 2.

¹¹⁹ Brief for the Plaintiffs at 85, 125-26, *McDuffy*, 615 N.E.2d 516 (No. SJC 06128).

¹²⁰ *Id.* at 4.

¹²¹ Brief for the Defendants at 60, 65, *McDuffy*, 615 N.E.2d 516 (No. SJC 06128).

¹²² Doris Sue Wong, “SJC Hears Arguments in Suit to Change Education Funding,” BOSTON GLOBE, Feb. 2, 1993, at 20.

¹²³ Tom Long, “Paul Liacos, Former Chief Justice of Supreme Judicial Court; At 69,” BOSTON GLOBE, May 8, 1999, at B7.

¹²⁴ Kevin Cullen & John Ellement, “Rights Defender Drew from Experience,” BOSTON GLOBE, Jun. 20, 1996, at 16.

of a woman’s right to an abortion, and vigorously protected defendants’ rights against impermissible searches and seizures.¹²⁵

Some judges are acutely cognizant—arguably to a fault—of the limits of judicial capacity and the benefits of punting complex issues to the political branches. To know that Chief Justice Liacos was not such a judge, one need only have looked to the portrait above his desk of nineteenth-century SJC Chief Justice Lemuel Shaw, who famously ruled that any slave who arrived in Massachusetts would be set free.¹²⁶ Just a year before *McDuffy*, on the 300th anniversary of the SJC, Chief Justice Liacos spoke emphatically about the important role state courts and state constitutions must play in safeguarding individual rights.¹²⁷ He was particularly reverential toward the Massachusetts Constitution, which preceded and served as a model for the federal Constitution.¹²⁸ In *McDuffy*, then, the chief justice was in his element. If the Massachusetts Constitution established a right to an adequate education, he would protect that right without regard to the potentially difficult political consequences that might ensue.

Much of Chief Justice Liacos’s majority opinion in *McDuffy* reads like a textbook example of constitutional interpretation, with detailed analysis of the plain meaning of the Education Clause, its structural relationship to other parts of the constitution, the background of public education against which it was adopted, its drafting history, and courts’ and politicians’ early understanding of its terms. To Chief Justice Liacos, each of those five prongs of interpretive analysis weighed in favor of siding with the plaintiffs. For example, after carefully parsing the Education’s Clause’s language for its meaning as understood when it was adopted in

¹²⁵ Long, *supra* note 123.

¹²⁶ *Id.*

¹²⁷ Doris Sue Wong, “On SJC’s 300th, Liacos Hails Role Guarding Rights,” BOSTON GLOBE, May 1, 1992, at 25. The belief that state supreme courts must protect individual rights through state constitutional interpretation was perhaps most famously stated by U.S. Supreme Court Justice William Brennan in *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

¹²⁸ Cullen and Ellement, *supra* note 124

1780, he concluded that a duty to cherish public schools entailed “a duty to ensure that the public schools achieve their object and educate the people.”¹²⁹ Turning to structure, he noted that the framers dedicated an entire chapter out of six to education and placed that chapter in “The Frame of Government” portion of the constitution, confirming that they believed education was “fundamentally related to the very existence of government.”¹³⁰ The opinion describes the origins of a public commitment to education during the first years of the Massachusetts Bay Colony and the unwavering commitment of early-eighteenth-century legislators to fulfilling their duty to cherish public education.¹³¹

Yet perhaps the most heartfelt and reverential language of the interpretive analysis came as Chief Justice Liacos described the drafting of the Education Clause championed by John Adams.¹³² Adams served as primary drafter of the Massachusetts Constitution, chief justice of the SJC during the Declaration of Independence, and second president of the United States. Before holding those illustrious positions, however, Adams was a public school student and then a public school teacher.¹³³ Chief Justice Liacos carefully quoted an impassioned defense by Adams of the importance of public education:

There were, [Adams] claims, . . . some persons in Massachusetts “who affect to censure [the] provision for the education of our youth as a needless expense, and an imposition upon the rich in favor of the poor”; this attitude, Adams continued, was calculated to foster ignorance and, with it, servility. Ignorance and servility were not the lot of the people of Massachusetts, however, because people have natural rights to liberty and to knowledge . . . “[L]iberty cannot be preserved without a general knowledge among the people.” For this reason, he argued, “the preservation of the means of knowledge among the lowest ranks, is of more importance to the public than all the property of all the rich men in the country.”¹³⁴

¹²⁹ *McDuffy*, 615 N.E.2d at 526.

¹³⁰ *Id.* at 527.

¹³¹ *See id.* at 529-545.

¹³² *See id.* at 533-37.

¹³³ *Id.* at 531 n.52.

¹³⁴ *Id.* at 535-36 (internal citations omitted).

For a jurist of Chief Justice Liacos's leanings, Adams's powerful words all but decided *McDuffy*.

The Commonwealth, the court held, "has a duty to provide an education for *all* its children, rich and poor, in every city and town of the Commonwealth at the public school level."¹³⁵ This duty lay with the state legislative and executive branches, and could not be abdicated or delegated to local municipalities.¹³⁶ The plaintiffs had obtained the declaration they sought. The court then concluded, not surprisingly given the defendants' litigation strategy and the parties' factual stipulations, that the state had failed to satisfy its constitutional obligation.¹³⁷

In providing a rough sketch of the contours of the Commonwealth's duty, the *McDuffy* court suggested that a constitutionally adequate education is best understood by looking to the characteristics of an "educated child." It turned to seven factors laid out four years earlier by the Kentucky Supreme Court in that state's school finance case:

An educated child must possess at "at least the seven following capabilities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable students to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academics or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient level of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics, or in the job market."¹³⁸

¹³⁵ *Id.* at 548.

¹³⁶ *Id.*

¹³⁷ *Id.* at 553-54.

¹³⁸ *Id.* at 554 (quoting *Rose*, 790 S.W.2d at 212).

While these seven enumerated factors shed some light on the nature of the state’s constitutional duty to educate, the court explicitly left it to the legislative and executive branches to “define the precise nature of the task which they face”¹³⁹

V. The Education Reform Act of 1993

Ironically, the political branches had already finished defining the nature of this education reform task. Six months earlier, when the SJC initially agreed to hear *McDuffy*, Attorney General Scott Harshbarger emphasized that “the fastest and least adversarial way to achieve meaningful reform in our education system is for the governor and [l]egislature to agree on a legislative package.”¹⁴⁰ Despite some late resistance from Republicans concerned over sources of funding, the state legislature passed a massive education reform bill a week before the *McDuffy* ruling.¹⁴¹ The day Chief Justice Liacos issued his opinion, the Education Reform Act of 1993 (ERA) sat on Governor Weld’s desk, awaiting his signature. Within three days, the Act formally became law.¹⁴²

The relationship between *McDuffy* and the ERA was unorthodox. Though no doubt influenced by public pressure, interest groups, and even ideology, politicians were also very cognizant of *McDuffy* as they crafted an education reform bill.¹⁴³ They knew any solution would have to address the financial inequities and insufficiencies at issue in the case.¹⁴⁴ Key legislators met with attorneys for both parties while *McDuffy* was proceeding, and facts stipulated in the

¹³⁹ *Id.* at 555.

¹⁴⁰ Robinson, *supra* note 117.

¹⁴¹ Peter J. Howe, “Senate OK’s School Bill Amid Criticisms,” BOSTON GLOBE, June 4, 1993, at 1.

¹⁴² 1993 Mass. Legis. Serv. Ch. 71 (West).

¹⁴³ Apter, *supra* note 63, at 644.

¹⁴⁴ *Id.*

case shaped legislative negotiation and bartering.¹⁴⁵ The SJC was likewise well aware of the impending legislation. That the decision came down just days after the ERA's passing prompted speculation among politicians. Some wondered whether the court was trying to pressure Governor Weld into signing the bill, while others suggested that the court wanted to "look like it had forced the bill's enactment without offending legislators by setting them up to pass the bill under threat."¹⁴⁶ Such theories are little more than conjecture, but there is no doubt that the court knew of the impending legislation. As Justice Greaney of the SJC would later explain, the passage of the ERA, the *McDuffy* decision, and Governor Weld's signing "comprised in fact and law a joint enterprise on the part of the three branches of government."¹⁴⁷

The ERA's substantive provisions largely embraced the *Every Child a Winner!* proposals, emphasizing increased and more equitable school funding; accountability for student learning; and statewide standards for students, educators, schools, and districts. Among the key components of the reform strategy were:

- the establishment of statewide curriculum frameworks and learning standards in all academic subjects, based on a "general statement of expected outcomes of schooling for all children" similar to the seven-point guide offered in *McDuffy*;
- the creation of the Massachusetts Comprehensive Assessment System (MCAS), a statewide "high-stakes" testing apparatus designed to identify struggling students and schools;
- the introduction of graduation requirements tied to MCAS performance;
- the institution of heightened time and learning requirements;

¹⁴⁵ *Id.* at 644-45.

¹⁴⁶ Peter J. Howe, "School Bill May Answer SJC Demands: Speed of Aid Hikes Seen as an Issue," BOSTON GLOBE, June 16, 1993, at 19.

¹⁴⁷ *Hancock v. Commissioner*, 822 N.E.2d 1134, 1165 (Mass. 2005) (Greaney, J., dissenting).

- the requirement of teacher testing in both specific subject areas and general communication and literacy;
- the authorization of the Massachusetts Department of Education to determine criteria for governing state receivership of “under-performing” school districts;
- and the launch of charter schools, subject to stringent approval and renewal requirements and a fixed cap on the number of charters granted.

Perhaps most importantly, though, the ERA called for the implementation of a foundation budget finance mechanism virtually identical to the MBAE proposal. The “Chapter 70” funding apparatus operated in four steps.¹⁴⁸ First, a school district’s foundation budget was calculated. This process involved a complicated matrix whereby the number of students in the district within a particular demographic group—criteria used to index students included grade level, income level, special needs status, and English proficiency—was multiplied by projected spending requirements associated with teacher compensation, professional development, building maintenance, equipment, and more. Thus, the resulting estimate of the minimum amount of money the district would need to adequately educate all of its students at least attempted to take into account the particular educational challenges in that district. Second, the state determined each municipality’s ability to contribute local property tax revenue toward the operation of its schools. Third, the state filled the gap between a district’s required local contribution and its foundation budget. Although for the wealthiest districts there would not be any gap between those two values, the formula nevertheless guaranteed these districts a minimum level of state funding. Fourth and finally, cities and towns could contribute additional money to their school districts. Of course, those municipalities capable of funding the entire foundation budget using

¹⁴⁸ See “Facts at a Glance: Demystifying the Chapter 70 Formula—How the Massachusetts Education Funding System Works,” Massachusetts Budget and Policy Center, Oct. 22, 2010, *available at* http://www.massbudget.org/documentsearch/findDocument?doc_id=762&dse_id=1383.

relatively low property tax rates—the Lincolns—were best equipped to engage in this above-foundation spending. The state did, to a limited extent, distribute supplemental aid to partially match above-foundation spending in poor districts.

In the decade that followed the passage of the ERA, opinions varied widely and wildly as to the success of the legislation’s numerous reform mechanisms. A thorough account of this complicated aftermath could fill a large tome, but the brief version is that everything from the MCAS tests to charter schools engendered optimism among some stakeholders and pessimism among others.

One thing was beyond debate, however: funding was threatening to become a crippling issue. On one hand, the Chapter 70 formula seemed to be accomplishing exactly what it was designed to accomplish. State spending on education grew rapidly. In 1993, only 30 percent of education funding in Massachusetts came from state sources, but that fraction rose to 39 percent in 1999 and then 44 percent in 2004. The gap between rich and poor districts appeared to be shrinking, too. One study found that in 1993, the state’s wealthiest districts, taken collectively, spent about 25 percent more on education than the state’s poorest districts, but that difference narrowed to less than 5 percent by 2000.

On the other hand, critics pointed to two distinct, emerging, money-related problems. First, political and economic forces often made it difficult to raise sufficient state funds to supply school districts with the aid promised to them under the foundation budget framework. Second, many school districts quickly became concerned that the foundation levels themselves were themselves woefully insufficient.

The first problem—not enough money in the state coffers—quickly became the province of State Senator Tom Birmingham. Two years into the ERA era, Birmingham explained:

“[Education funding] remains a political and budgetary struggle every year, and unless those who support education reform are as vocal as those who support other programs, the likely result will be the diminution of funding for our public schools, which I think is the wrong result.”¹⁴⁹ Though limited by Republican control of the executive branch and Governor Weld’s vow to veto tax increases, Birmingham worked tirelessly, using the full breadth of his political acumen to secure funding.¹⁵⁰ One of his favorite tactics was to remind fellow legislators of the *McDuffy* ruling and the possibility that the plaintiffs might reopen the litigation.¹⁵¹ By 2000, this problem had abated to the point that every district in the state was funded at or above foundation level.¹⁵² But underlying this achievement was the unsettling reality that a booming economy in the late ‘90s may well have been the most integral contributing factor. Should the economy falter, the foundation budget system might crumble.

The second problem—not enough money prescribed for districts under the foundation budget formula—was even more complex than the first. In a finance scheme like the one established under the ERA, it is imperative that the foundation budget sufficiently account for the true costs of providing an adequate education. If not, school districts will have to raise additional funding from local sources, and property-rich districts like Lincoln will have a familiar advantage over property-poor districts like Brockton. While the gulf between the Lincolns and the Brocktons may not be as pronounced as under the old funding formula, the net effect of the foundation budget system will simply be to move schools in the direction of adequacy and equity without achieving either.

¹⁴⁹ Doris Sue Wong, “Backers Say School Reform Needs New Push to Stay on Track,” BOSTON GLOBE, Oct. 13, 1995, at 31.

¹⁵⁰ Apter, *supra* note 63, at 646.

¹⁵¹ *Id.*

¹⁵² *Hancock ex rel. Hancock v. Driscoll*, No. 02-2978, 2004 WL 877984, at *8 (Mass. Super. Apr. 26, 2004) (hereinafter *Hancock Single Justice Report*).

So an obvious question emerged: were the foundation budgets established under the ERA sufficient? Tom Birmingham seemed to think so. Two years after *McDuffy*, when the plaintiffs briefly reopened the litigation to challenge continued funding disparities and inadequacies, Birmingham snidely remarked, “I’m reminded of someone who gorges himself, burps and says give me more.”¹⁵³ Yet others felt there was genuine cause for concern. The Massachusetts Teachers Union suggested just days before the passage of the ERA that the foundation budget was set too low.¹⁵⁴ Michael Weisman, lawyer for the *McDuffy* plaintiffs, pointed to a lack of tangible progress in the early years of the ERA as evidence of inadequate foundation funding: “Children continue to be educated in overcrowded classrooms with inadequate textbooks, teaching materials and curriculum.”

By the end of the ‘90s, another round of pivotal litigation loomed on the horizon. This time, the battle would prove more contentious. On one side were those who felt increased funding was necessary to satisfy the constitutional mandate of adequacy established in *McDuffy*. On the other were those who believed that misguided attempts to throw more and more money at the problem were threatening to derail the genuine and encouraging reform efforts of the legislature.

The precise role of the judiciary had been a murky aspect of the *McDuffy*-ERA reforms. Of course, the SJC had found that the Commonwealth had a constitutional duty with regard to public education. But it had refrained from delineating any but the most broad contours of this duty. Instead, it left the more concrete questions, at least temporarily, to the discretion of the political branches. At most, perhaps, the *McDuffy* decision might have added to the already significant political pressure on Governor Weld to sign the ERA.

¹⁵³ Jordana Hart, “Education Funding Suit Reopened,” BOSTON GLOBE, May 11, 1995, at 64.

¹⁵⁴ Peter J. Howe, “MTA Deems School Overhaul Bill Inadequate,” BOSTON GLOBE, June 17, 1993, at 47.

Now, in *Hancock v. Commissioner of Education*,¹⁵⁵ the judiciary's willingness, or unwillingness, to force the political branches to engage in further reforms would be brought into sharp focus. Would the courts rule that the Education Clause demanded more from the state legislature than what the ERA had provided, embracing an active role in effecting truly meaningful educational reform? Or would they deferentially give the ERA a stamp of constitutional approval, revealing an acute awareness of the limits on judicial capacity?

VI. *Hancock v. Commissioner*

Things had generally improved for the Brockton Public Schools in the wake of *McDuffy* and the Education Reform Act. In 1993, the city received \$37 million in education funding from the state; ten years later, that number had more than tripled.¹⁵⁶ Buoyed by state money, Brockton built three new schools, spent money on state-of-the-art computers that had once been unthinkable luxuries, and reintroduced foreign-language courses in its junior high schools.¹⁵⁷ The gap in average spending between the state's richest and poorest districts had essentially evaporated, and Brockton had been a prime beneficiary.¹⁵⁸

But did the city have enough money to provide an adequate education for all of its students? The simple answer: no. At one elementary school that lacked an auditorium, gymnasium, or cafeteria, class sizes still exceeded thirty-five and a library with few books served as a cramped space for band practice, a makeshift computer lab, and everything in between.¹⁵⁹ Even state officials extolling the virtues of the ERA conceded that there was considerable room

¹⁵⁵ 822 N.E.2d 1134 (Mass. 2005).

¹⁵⁶ Anand Vaishnav, "School-Funding Lawsuit Renews Fight for Fairness," BOSTON GLOBE, May 11, 2003, at A1.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

for improvement.¹⁶⁰ Exacerbating matters, the progress that had been made seemed in jeopardy given the dominant economic and political forces of the early 2000s. Not only had a severe recession dried up state and local treasuries, but newly elected Governor Mitt Romney was hell-bent on cutting the state budget.¹⁶¹

Around the time Romney was elected, Jami McDuffy returned to the school system that had once made her something of a celebrity. A bright-eyed young woman fresh out of college, McDuffy fulfilled a lifelong goal by becoming a first-grade teacher at the John F. Kennedy Elementary School in Brockton.¹⁶² Reflecting on the reforms that had taken place in her home city and across the state, McDuffy stated with cautious optimism, “I think we’re getting there.” But was “getting there” good enough to satisfy the mandate of the Massachusetts Constitution?

A. A Single Justice Advocates Judicial Enforcement

Much about *Hancock v. Commissioner* mirrored *McDuffy v. Secretary*. Once again the Council filed suit on behalf of a set of plaintiff districts—nineteen this time, up from sixteen.¹⁶³ Once again the lead plaintiff was from the City of Champions. Like Jami McDuffy before her, Julie Hancock was an enthusiastic student. Her father Maurice was a good friend of Jami’s

¹⁶⁰ *Id.*

¹⁶¹ Having earned a reputation in his pre-politics days as an accomplished business administrator capable of turning around struggling operations, Romney hoped to apply those skills to education reform. “The MCAS test ensures that students are able to meet the high standards expected of them,” he said during his campaign. “The challenge now is in focusing resources on schools where large numbers of students are failing the test.” When he took office, Romney’s tax-cutting impulses and education reform objectives stood in direct conflict. Poor districts, which tended to be the ones whose students struggled most on the MCAS exam, were also the ones that depended the most on state funding. Instead of determining the magnitude of funding cuts on a town-by-town basis, Romney was determined to push through an across-the-board 5% reduction in aid.¹⁶¹ For a wealthy municipality like Wellesley, which relied on the state for only 9% of its education budget, a 5% reduction in state aid would effectively reduce its education spending only by about 0.45%. On the other hand, for a low-income city like Lawrence, which derived 99% of its funding from the state, Romney’s cuts would slash a potentially crippling 4.95% chunk out of the local education budget.

¹⁶² Anand Vaishnav, “Class Action Former Plaintiff Sees Education Reforms Firsthand,” BOSTON GLOBE, Sep. 15, 2002, at B1.

¹⁶³ *Hancock Single Justice Report*, *supra* note 152, at *4.

father, and the two men had served together in the Brockton Fire Department and on the Brockton School Committee.¹⁶⁴

The *Hancock* plaintiffs contended that the quality of public education in the plaintiff districts had not improved sufficiently since 1993, indicating that the Commonwealth had violated the constitutional duty established in *McDuffy*.¹⁶⁵ Perhaps their most compelling argument was a fairly simple one: because policymakers had determined the foundation budget formula contained in the ERA long before the development of new curriculum frameworks, the creation of MCAS testing, and the institution of a host of other reforms, that formula was now an outdated and inaccurate predictor of the costs of a constitutionally adequate education.¹⁶⁶ Wary of critics' attempts to couch the suit as a crude money grab that disregarded the complicated realities of education reform, lawyer Michael Weisman described the requested remedy carefully: "We're not asking the court to mandate specific expenditures," he said. "We're asking the state to figure out what resources will be needed."¹⁶⁷

The defendants' strategy was to avoid the complex and potentially unwinnable issue of education quality in the plaintiff districts.¹⁶⁸ Instead, they focused on the efforts the state had undertaken to minimize funding inequality and inadequacy across the state.¹⁶⁹ They argued that those efforts had yielded meaningful progress and represented a reasonable political response to *McDuffy*.¹⁷⁰ Assistant Attorney General Deidre Roney further suggested that spending was a

¹⁶⁴ Vaishnav, *supra* note 156.

¹⁶⁵ *Hancock*, 822 N.E.2d at 1145.

¹⁶⁶ See *Hancock Single Justice Report*, *supra* note 152, at *126-27.

¹⁶⁷ Suzanne Sataline, "Lawyer Presses Case for State Panel on School Funding," BOSTON GLOBE, Dec. 23, 2003, at B4.

¹⁶⁸ Apter, *supra* note 63, at 649.

¹⁶⁹ *Id.* at 650.

¹⁷⁰ *Id.*

poor proxy for meaningful improvement of a school system, and that other indicators, such as rising MCAS scores, indicated that the state was satisfying its constitutional duty.¹⁷¹

Filed pursuant to the SJC’s original jurisdiction, *Hancock* was first heard by Justice Margot Botsford. She issued a 358-page report in which she explained that progress alone was not enough for the Commonwealth to discharge its constitutional duty to cherish public education.¹⁷² While she acknowledged that the ERA had resulted in “some impressive results,” she rested her conclusion on numerous and deep inadequacies of the educational program provided in cities like Brockton—inadequacies which revealed that “the schools attended by the plaintiff school children . . . are not currently equipping all students with the [seven] *McDuffy* capabilities.”¹⁷³

Justice Botsford’s recommendations evinced a conviction that the role of the judiciary is to enforce the specific guarantees afforded to individuals by the law. She was aware of the potential political upheaval her decision might cause, yet she did not hedge her ruling to account for it. Instead, she suggested that Massachusetts follow in the lead of New York, where a commission set up to implement that state’s key school finance decision determined that revamped funding schemes could cost an extra \$2.5 billion to \$5.6 billion a year. Massachusetts might incur similar costs after a foundation budget cost study, but to Justice Botsford, those would simply be the necessary costs of complying with the state constitution.

B. A Divided Court Espouses Judicial Deference

Under the SJC’s arcane procedures, Justice Botsford issued her extensive findings and recommendations, reserved formal decision, and reported *Hancock* to the rest of the court. The

¹⁷¹ Sataline, *supra* note 167.

¹⁷² *Hancock Single Justice Report*, *supra* note 152, at *143.

¹⁷³ *Id.*

other justices would decide whether to accept or reject her report and recommendations, and their decision would ultimately turn on their conception of the judiciary's proper role.

Margaret Marshall is a white South African who agitated against apartheid in college, migrated to Massachusetts shortly thereafter, and ultimately became the first woman to serve as chief justice of the SJC. When Governor Bill Weld nominated her to the court in 1996, he emphasized her “very healthy respect for the roles and prerogatives of other branches of government.”¹⁷⁴

This respect for the political branches permeated the majority opinion she authored in *Hancock*. Unlike Justice Botsford, Chief Justice Marshall accepted the defendants' invitation to view the case in fluid terms of effort, progress, and improvement rather than rigid conceptions of adequacy and inadequacy. On one hand she emphatically underscored the continuing vitality of *McDuffy* and acknowledged the failure of many of the plaintiff districts to adequately educate their students.¹⁷⁵ Yet on the other she preached patience when demanding change in an area as complex as statewide education reform, noting that a system once “mired in failure” now showed a “steady trajectory of progress”¹⁷⁶ The legislative and executive branches had “establish[ed], exercise[d] ultimate control over, and provide[d] substantial and increasing . . . resources to support public education in a way that minimizes rather than accentuates discrepancies between communities based on property valuations.” Chief Justice Marshall refused to conclude that the state was violating the Education Clause.¹⁷⁷ The fact that the Commonwealth, particularly under Governor Romney's watch, had reduced funding in response to what she called “dire fiscal

¹⁷⁴ Frank Phillips, “Harvard Counsel Marshall Is Weld's Nominee for SJC,” BOSTON GLOBE, Sep. 4, 1996, at A1.

¹⁷⁵ *Hancock*, 822 N.E.2d at 1140.

¹⁷⁶ *Id.* at 1139.

¹⁷⁷ *Id.* at 1152.

circumstances” could not sustain the plaintiffs’ claim since they could not show that such a response was either arbitrary or irrational.¹⁷⁸

From one angle, Chief Justice Marshall’s conclusions in *Hancock* prove somewhat surprising. Two years earlier, she famously authored the majority opinion in *Goodridge v. Department of Public Health*, a case in which the SJC became the first state high court to declare that same-sex couples have the right to marry.¹⁷⁹ In *Goodridge*, though three dissenters advocated deference to the legislature, Marshall boldly addressed what she felt to be a simple question of basic rights.¹⁸⁰ *Hancock*, it would seem, provided another question of basic rights. How could the chief justice describe her satisfaction with amorphous notions of “effort” and “progress” in the same opinion in which she reiterated the importance of *McDuffy* and pointed out the inadequacies of public school systems across the state?

The answer lies in her grounded understanding of judicial capacity. Marshall has often been described as a pragmatist, and a ruling for the plaintiffs in *Hancock* would have tested the SJC’s relationship with the other branches in ways that *Goodridge* had not. The *Hancock* plaintiffs wanted to force the political branches to engage in the complicated weighing of numerous policy alternatives, pick one that would inevitably prove extremely expensive to implement, and then hope without any real assurances that the selected option vindicated the right to an adequate education. Contrast that to *Goodridge*, where the court was able to make a binary distinction between two alternatives, one constitutional and the other not. There, the court could impose its judgment on the political branches with confidence that the basic right to marriage would be readily implemented, and at far more manageable cost.

¹⁷⁸ *Id.* at 1140.

¹⁷⁹ 798 N.E.2d 941 (Mass. 2003).

¹⁸⁰ “Margaret Marshall to Retire: A Commitment to Justice,” BOSTON GLOBE, July 22, 2010, at 16.

Yet some of Chief Justice Marshall's colleagues did not share her willingness to engage in what essentially amounted to judicial abdication. Justice Roderick Ireland, for one, issued an impassioned dissent in which he argued forcefully for a reevaluation of foundation funding levels. The first African-American to serve on the SJC, Justice Ireland had grown up in Springfield, one of the four plaintiff districts at the very center of the *Hancock* litigation.¹⁸¹ As a child, he dealt with racism and the limitations of growing up in a working-class neighborhood. But he possessed a critical advantage: his parents and his friends' parents placed a premium on education.¹⁸² When a white guidance counselor suggested that Ireland attend Springfield's trade school instead of its college preparation high school, his father would have nothing of it. His mother, now 93, was a public school teacher for decades in Springfield, where she still lives. If any of the justices could appreciate the pleas of students, families, and towns like Springfield and Brockton that cared passionately about education but did not have the money to fund it, it was Justice Ireland.

At the core of Justice Ireland's dissent was a criticism of the majority's approach that pointedly analogized to *Brown v. Board of Education*:

I disagree with the Chief Justice's assessment that the enactment of the Education Reform Act and the existence of what she calls "painfully slow" progress fulfills the Commonwealth's enforceable constitutional duty to provide education to public school students. Although admittedly an imperfect analogy, the Chief Justice's endorsement of "painfully slow progress" reminds me of the "with all deliberate speed" standard the United States Supreme Court endorsed concerning school desegregation.¹⁸³

¹⁸¹ Jonathan Saltzman, "Nominee Seen as Thoughtful and Self-Effacing," BOSTON GLOBE, Nov. 5, 2010, at 8.

¹⁸² Dan Ring, "Ceremony Becomes Spirited as Springfield Native Roderick Ireland Sworn In as First Black Chief Justice of Massachusetts Supreme Judicial Court," Dec. 21, 2010, available at www.masslive.com/news/index.ssf/2010/12/ceremony_becomes_spirited_as_s.html.

¹⁸³ *Hancock*, 822 N.E.2d at 1174 (Ireland, J., dissenting).

Justice Ireland highlighted and endorsed Justice Botsford’s conclusions that the plaintiff districts lagged far behind comparison districts like Lincoln; that the foundation budget formula was no longer accurate; and that recent state budget cuts had significantly worsened these concerns.¹⁸⁴ He also independently pointed to extremely high MCAS failure rates among students in cities like Springfield and Brockton, and to the fact that schools were disproportionately failing to improve the test scores of their black and low-income students.¹⁸⁵

Justice Ireland, however, ceded some ground, seemingly recognizing limits on judicial capacity. Like Chief Justice Marshall, he described his faith that the political branches, “having had pointed out to them the deficiencies of their good faith attempt to provide the children of the Commonwealth with their constitutionally required education, will act to remedy the situation.”¹⁸⁶ He endorsed Justice Botsford’s proposed study, but rejected her more radical proposal that the Department of Education be ordered to implement any key reform ideas that might emerge from the study. That even Justice Ireland would call for a somewhat muted and arguably toothless remedy suggests that courts face intractable problems when enforcing constitutional adequacy mandates.

C. Mixed Reactions

Reaction to *Hancock* was highly polarizing. Most legislators praised the ruling. State Representative Robert Correia, a Democrat who opposed Chief Justice Marshall’s ruling in *Goodridge*, now gave her something resembling praise: “Perhaps I should find [the opinion] and frame it. She’s been butting heads with the legislature and, finally, she says, ‘Wow’—at least

¹⁸⁴ *Id.* at 1175-76.

¹⁸⁵ *Id.* at 1176.

¹⁸⁶ *Id.* at 1177.

we're not completely worthless in her eyes. I'm very happy that the court is doing what it should be doing constitutionally and not overstepping its bounds.”¹⁸⁷

Some analysts attempted to draw connections between *Goodridge* and *Hancock*. “There are whispers and theories and chatter that . . . some of the SJC justices thought it might not be the wisest thing to start another standoff with the legislature,” speculated David Yas, editor-in-chief of Massachusetts Lawyers Weekly.¹⁸⁸

Criticism, some of it extremely harsh, dominated the op-ed pages of the typically left-leaning *Boston Globe*. One columnist lamented the glacial pace of education reform in Massachusetts, arguing that accountability should be demanded of the governor, the education commissioner, and the legislature, just as the ERA demanded it of students, teachers, principals, and superintendents.¹⁸⁹ Longtime *Globe* columnist Derrick Z. Jackson issued what may well have been the most scathing appraisal:

In . . . 1963, . . . Martin Luther King Jr. wrote, “The Negro had been an object of sympathy and wore the scars of deep grievances, but the nation had come to count on him as a creature who would quietly endure, silently suffer, and patiently wait.” No one can be naïve any longer. A half-century after *Brown*, students of low-income school districts in our state are the creatures told to patiently wait. . . .

The victims are no longer just “the Negro” of King’s . . . day. The plaintiffs represented a multicultural outpouring of people who see that neglect of schools in black neighborhoods was just a canary. Today, all but the youth in the toniest suburbs are at risk.¹⁹⁰

¹⁸⁷ Michael Levinson & Jonathan Saltzman, “Legislators Praise Ruling on Poor Districts,” BOSTON GLOBE, Feb. 21, 2005, at B1.

¹⁸⁸ *Id.*

¹⁸⁹ Joan Vennoch, “Where’s the Stick?,” BOSTON GLOBE, Feb. 17, 2005, at A14.

¹⁹⁰ Derrick Z. Jackson, “Separate and Unequal Schools,” BOSTON GLOBE, Feb. 18, 2005, at A19.

VII. Lessons and Lingering Questions

McDuffy, the ERA, and *Hancock* offer some important lessons for school finance reform and litigation, while pointing to just as many lingering questions. Was the decision to sue on adequacy rather than equity grounds sound, foolish, or irrelevant? What, ultimately, is the proper role of the judiciary with respect to education reform? Is foundation funding the optimal mechanism for ensuring adequate school funding, or might better tools exist? Consider each of these issues in turn.

A. The Equity-Adequacy Distinction: Meaningful or Illusory?

The distinction between equity and adequacy litigation has been much scrutinized. Some argue that it is largely illusory, while others suggest it has important implications. Because the *McDuffy* plaintiffs were the first to challenge a state's school finance system *solely* on adequacy grounds, their decision merits some discussion.

Though equity was the dominant principle underlying early school finance litigation, its value as a remedy is limited in critical ways. For one thing, equity as measured in strictly financial terms would likely not satisfy most education reformers. At this point, there is voluminous evidence suggesting that certain students, schools, and districts need more money to achieve basic educational outcomes. Thus, in some cases, even if litigation is successful in bringing spending in poor districts up to the level of wealthy districts, that may not be enough. Perhaps more importantly, any conception of funding equity—even one that does not account for poorer districts' heightened needs—requires either that the state limit spending in wealthy districts or invest massive amounts of money in poor districts. Neither option is likely to be politically expedient.

An adequacy-centered remedy alleviates some of these concerns. Theoretically, at least, adequacy suits carry the potential benefit of “shift[ing] . . . the emphasis in school finance from inputs to outcomes,” arguably making them more amenable to district-by-district adjustments that take into account the particular educational challenges in a given community.¹⁹¹ Also, because adequacy focuses on educational opportunity in any one district without relying on comparison to others, it offers an often more politically palatable solution. Put more bluntly, “the costs of adequacy are far less than the costs of equality, especially for the elites who derive the greatest benefits from the existing inequalities, because adequacy does not threaten their ability to retain a superior position.”¹⁹² The logical corollary, however, is that adequacy challenges risk “aiming too low;” that is, “when we give up appeals to equality in favor of appeals to adequacy, we in all likelihood relegate vast groups of children to mediocre educational opportunities (or worse), and we ensure that they will face significant competitive disadvantages relative to their peers from privileged communities.”¹⁹³

In one obvious respect, the decision to cast *McDuffy* in adequacy terms was successful. The plaintiffs, after all, won the declaration regarding a constitutional duty that they sought. There is no way of knowing that an equity theory would have been equally successful. While the political branches likely would have enacted the ERA even absent such a declaration, there is a significant possibility that the pending *McDuffy* litigation helped produce and shape that legislation. And in the years that followed, dramatically amplified state aid, especially to poorer districts, helped both increase and equalize education spending across the state.

Yet in *Hancock*, the most important theoretical benefit of an adequacy remedy—financing for poor districts that truly accounts for the educational needs of their student

¹⁹¹ Clune, *supra* note 97, at 485.

¹⁹² Enrich, *supra* note 91, at 179.

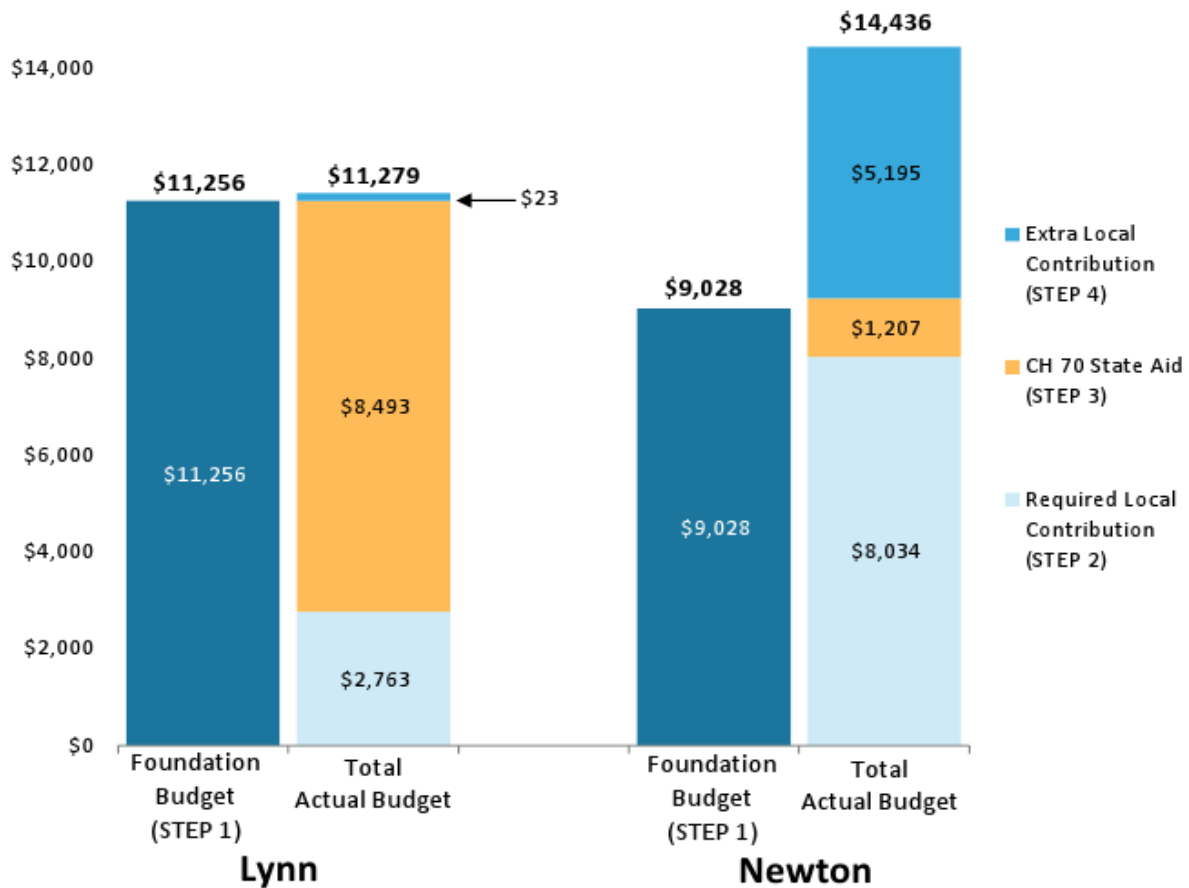
¹⁹³ *Id.* at 181.

populations—proved elusive. In ensuring that all districts could spend at a certain foundation level, the Chapter 70 formula did ostensibly yield some degree of equity and adequacy. About ten years after *McDuffy* and the enactment of the ERA, virtually every district in Massachusetts was spending at foundation level or above, and discrepancies in spending between rich and poor districts had markedly decreased. But because the foundation level, even with its numerous adjustments for student demographics, was simply not set high enough, and because the *Hancock* court did not force the legislature to raise it, this purported equity and adequacy was more fiction than reality. The fourth and final step of the ERA funding paradigm—cities and towns setting aside funds that allowed their school districts to spend at above-foundation levels—took on paramount importance. The diagram¹⁹⁴ on the following page illustrates this point.

¹⁹⁴ “Demystifying the Chapter 70 Formula,” *supra* note 148.

Chapter 70 Funding for Two Sample Districts

Per-pupil spending by revenue source, Fiscal Year 2010



Lynn is a blue-collar city of around 90,000; Newton is a suburb of the same size but is significantly wealthier. If we pause after Step 3—having set foundation budgets for the two towns, determined their required local contributions, and then earmarked Chapter 70 state aid—we see a rather encouraging picture. Each town is able to spend at a level deemed “adequate,” and the difference in spending between the two town is justified on the rationale that education of Lynn’s student population requires more student resources. But that picture is only encouraging if the foundation formula is sufficiently high to realistically account for necessary

expenditures. If that were the case, then Step 4—extra, above-foundation, local contribution—would be largely obviated.¹⁹⁵

Instead, Step 4 funding is essential if districts are to reach truly adequate spending levels, and Newton and the Lincolns have a significant advantage over Lynn and the Brocktons. Lynn's ability to secure extra local contribution is likely limited in two important ways. Most obviously, Lynn's property tax base is substantially lower than Newton's. Lynn will therefore have to impose a fairly high property tax rate just to generate its required local contribution, and it would have to try to force through substantial tax increases—that might literally prove impossible under Proposition 2½—just to secure modest extra funding. Newton, on the other hand, can likely rely on smaller, more politically feasible rate hikes to generate relatively large amounts of additional funding. Additionally, compared to Newton and Lincoln, cities like Lynn with greater numbers of low-income residents typically face greater demand and need for municipal services other than education, and this make it even more difficult for them to generate Step 4 funding.

But if the post-1993 problem plaguing Massachusetts school finance reform was essentially that foundation levels were set too low, the adequacy challenge in *Hancock*, or similar adequacy arguments impressed upon the political branches, should theoretically have been able to address that problem. So why did reform efforts fall short?

Judicial capacity limitations aside, adequacy challenges, like equity challenges, face significant and inevitable political hurdles. Adequacy, in its most stripped-down theoretical formulation, simply stands for the proposition that every district should have the money

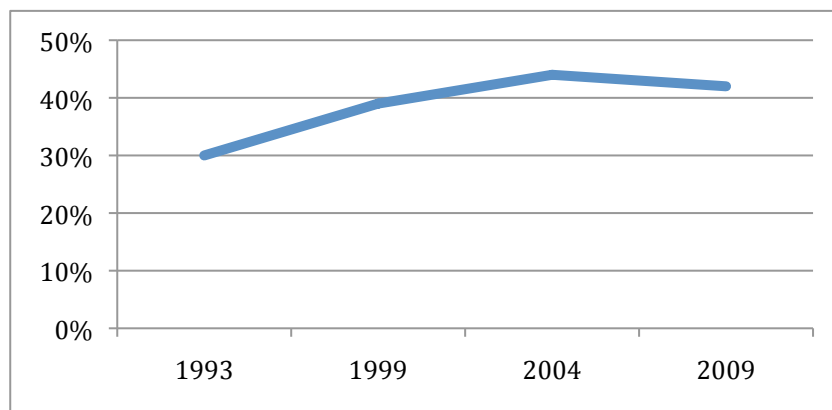
¹⁹⁵ Of course, municipalities might offer extra funding even if foundation levels were satisfactory, simply to gain a competitive advantage over other communities or to promote the normative goals that attach to better-than-adequate public education. In that regard, wealthy communities would have an advantage over poor communities even if foundation levels truly represented adequate funding. This speaks to a fundamental drawback accompanying adequacy litigation, rather than its failure to reach its full potential in Massachusetts. See text accompanying *supra* note 193.

necessary to finance a minimally adequate education for its particular students. But in practice, an adequacy remedy inevitably must confront the reality that the districts with the greatest spending needs tend to have the most difficulty generating revenue.¹⁹⁶ Thus, for an adequacy remedy to reach its true potential, the state must implement a highly redistributive school finance system that, on the whole, shifts large sums of money from high-property-wealth districts to low-property-wealth or low-income districts. Rallying political support for such a system can, not surprisingly, prove quite difficult.

One of the simplest empirical proxies for redistributive school financing is the percentage of education spending that comes from state rather than local sources. The greater the percentage of funding districts obtain via state channels, the more money communities—either directly or through taxation of their residents—are contributing to the state coffers for redistribution.

Consider, then, the following graph:

**Percentage of Financing that Massachusetts Public School Districts
Obtained from State Sources¹⁹⁷**



¹⁹⁶ This is not a perfect correlation. Some districts, especially big cities like Boston, have high proportions of low-income students and thus high spending needs, but have moderate or high levels of property wealth and thus moderate or high revenue-generating ability. Still, taken collectively, districts with large percentages of low-income students, special needs students, and English language learners, tend to have low property wealth.

¹⁹⁷ Data for graph obtained from a variety of sources.

The graph suggests that Massachusetts school financing became significantly more redistributive in the decade or so following *McDuffy* and the passage of the ERA before reaching a plateau around the time when *Hancock* was decided. What is notable here is that the political branches, left to implement their variation of school finance reform, took steps toward increasing progressive redistribution before letting the system stabilize in what was likely the most politically expedient arrangement.

Thus, a lawsuit that successfully secures a statement that the state is required to ensure students *adequate* educational opportunity is no more fortified against political roadblocks than a lawsuit that speaks to *equal* educational opportunity. Both theories “depend upon the courts primarily to perform the role of striking down the traditional approaches to school finance.”¹⁹⁸ Once an initial challenge is successful—as *McDuffy* was in 1993—it is up to the legislature to enact reform (for example, through the ERA). The legislature’s response, though perhaps shaped by the courts’ mandate, will inevitably reach an equilibrium point at which political forces counsel against further reform. If courts’ are unwilling to “provide[] the negative prod of insisting that” this equilibrium political response is “insufficient”¹⁹⁹—as the SJC was unwilling in *Hancock*—then the legislature will be free to continue to address school finance issues subject to ebbs and flows in political dynamics, with the initial decision (*McDuffy*) perhaps serving as little more than a backstop against too significant a backslide toward inequitable or inadequate educational opportunity.

The promise of adequacy litigation, then, is inextricably tied up in notions of judicial capacity. The *Hancock* court could have tried forcing the legislature to make the system even more redistributive by granting the plaintiffs their desired remedy, thereby paving the way for

¹⁹⁸ Minorini & Sugarman, *supra* note 89, at 64.

¹⁹⁹ *See id.*

the full benefits of an adequacy solution. But the court declined, and we now turn to competing notions of judicial enforcement and judicial deference.

B. The Role of the Courts: Feeble Mouthpieces or Powerful Change Agents?

A fascinating aspect of *Hancock* is that it illustrates no less than four different conceptions of the appropriate role of the judiciary in school finance reform. Justice Botsford, who issued her report before her colleagues heard the case, advocated an aggressive form of judicial enforcement, whereby the courts not only can deem insufficient a legislative response intended to satisfy a constitutional duty but also can bind the legislature to a particular remedy aimed to address the deficiency. Justice Ireland, who authored a dissent, proved similarly willing to identify a legislative solution as lacking, but declined to require anything more than a non-binding investigation into potential improvements. Chief Justice Marshall leaned more toward judicial deference, reiterating the legislature's duty but satisfying herself with mere "progress" towards fulfillment of that duty. Two concurring justices—Cowin and Sosman—even went so far as to suggest that *McDuffy* be overturned.²⁰⁰

It would be foolhardy to extrapolate too much from the Massachusetts example. Judicial willingness or reluctance to get heavily involved in school finance litigation may turn pivotally on the particularly wording of the constitutional education clause at issue; for example, the relatively tame wording of the Massachusetts clause, rather than drastically different conceptions of the judicial role, might explain why some SJC justices were reluctant to find any constitutional duty whatsoever. Meanwhile, there is at least some reason to believe that Chief Justice Marshall's position might have been influenced by a heightened awareness of the delicate position of the state judiciary in the wake of a controversial decision in *Goodridge* that had nothing to do with education reform. Perhaps the most interesting distinction—between the

²⁰⁰ See *Hancock*, 822 N.E.2d at 1158 (Cowin, J., concurring).

aggressive and tempered judicial enforcement stances of Justices Botsford and Ireland, respectively—may be attributable to fundamental ideological differences with respect to separation of powers, or may simply result from the significantly different procedural stages at which they issued their opinions. All of which is to say: *Hancock* highlights the critical influence notions of judicial capacity can have on education reform outcomes, without pointing to any clear lessons.

Indeed, there is no broad consensus regarding the ability of courts to catalyze meaningful school finance reform. Professor Heise described the issue succinctly in 1995, writing that an

assumption common to equity and adequacy court decisions that invalidate school finance systems is that such decisions can influence educational spending. This assumption rests on empirical questions that remain largely unaddressed. Legal impact research on the relation between courts and educational policy is scant, qualitative data are thin, and helpful quantitative data are all but nonexistent.²⁰¹

The Massachusetts example is particularly unequipped to illuminate this issue: The *McDuffy* plaintiffs won and increased and more equitable educational spending followed, but this progress may well have occurred absent a favorable judicial ruling. The *Hancock* plaintiffs lost, but the court there did not in any way advocate or condone a traditional school finance system; instead, it merely refused to force to legislature to further tweak its reform framework.

Some scholars have expressed a broader and more jaded variation of Heise’s moderate skepticism. Professor Rosenberg, for example, has controversially argued that the judiciary’s ability to effect widespread social change is subject to a number of significant constraints.²⁰² For example, courts may lack sufficient independence from the political branches. And, unlike those branches, courts may not have sufficient authority to either enforce or secure funds necessary for

²⁰¹ Michael Heise, *State Constitutions, School Finance Litigation, and the “Third Wave”: From Equity to Adequacy*, 68 TEMPLE L. REV. 1151, 1167 (1995).

²⁰² See generally GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed.2008).

important rulings that would otherwise promote reform. Yet in the years since Heise's appraisal, one thorough empirical survey concluded that "the bulk of the evidence suggests that court-ordered reform has achieved its primary goal of fundamentally restructuring school finance and generating a more equitable distribution of resources."²⁰³

As is often the case, the most accurate description of reality is likely a combination of two positions. There may exist, at any given time and in any given state, a range of politically feasible arrangements with respect to school finance. Courts can and should be able to push the political branches toward the arrangement within that range that best effectuates equity and adequacy of educational opportunity. Yet courts may fundamentally lack the ability to effectuate an arrangement outside the range of what is politically feasible. This may in part be the result of insufficient independence from political pressure, a concern that can be particularly galling given the prevalence of judicial elections at the state level.²⁰⁴ Judges may also, given the need to preserve institutional legitimacy, be concerned about issuing a ruling that depends heavily on the cooperation of a reluctant legislature for funding or executive branch for enforcement.

Perhaps judicial capacity in the context of education reform is best examined by looking to a famous outlier. In New Jersey's long-running *Abbott* litigation, the New Jersey Supreme Court first issued a ruling in 1985 that students in urban districts were constitutionally entitled to a public education equal to that available in the state's wealthiest districts.²⁰⁵ Then, through a series of decisions over the next two decades, the high court repeatedly struck down legislative responses as insufficient and directed the political branches toward other, more aggressive

²⁰³ William N. Evans, Sheila E. Murray & Robert M. Schwab, "The Impact of Court-Mandate School Finance Reform," in EQUITY AND ADEQUACY IN EDUCATION FINANCE 93 (1999).

²⁰⁴ See, e.g., William Glaberson, "Fierce Campaigns Signal a New Era for State Courts," N.Y. TIMES, June 5, 2000, at A1.

²⁰⁵ *Abbott v. Burke*, 495 A.2d 376 (1985).

solutions.²⁰⁶ (The analogous outcome in Massachusetts would be if the SJC ruled in favor of plaintiffs in *Hancock* and a series of similar subsequent lawsuits.) *Abbott*, if nothing else, charts the outer boundaries of plausible judicial enforcement, and forces us to continue to investigate what forces might be at play when other courts prove reluctant to expand out to those boundaries.

C. Foundation Funding, Its Limitations, and Potential Alternatives

Setting aside the role of the courts, the story of school finance reform in Massachusetts is as much about the reforms that were enacted as it is about those that were not. Some of the most fascinating reforms that occurred—the controversial but lasting implementation of high-stakes standardized testing, the arrival and gradual expansion of a successful charter school movement, and the broadened ability of the state government to intervene in the administration of struggling schools and districts—are beyond the scope of this discussion. Consider, though, the pivotal Chapter 70 funding mechanism.

If we assume that educational adequacy is best measured by looking at financial inputs—admittedly a much-debated assumption—then are foundation budgets the best tool available? As implemented in Massachusetts, foundation levels account for a wide array of factors that might affect the costliness of students’ educational needs. Yet valuation, though purportedly mathematically precise, can often involve subjective judgments or unsubstantiated assumptions. There is a risk, too, that calculations will result in systematic underestimates. State-level politicians approving the formula may have a weighty interest in setting targets low to ensure that state revenues can sufficiently provide prescribed aid.

²⁰⁶ This expansive conception of the judiciary’s role has not been limited to the school finance realm; for example, New Jersey courts also established the controversial *Mount Laurel* doctrine, interpreting the state constitution as prohibiting exclusionary zoning and requiring cities and towns to take on a proportional share of the state’s affordable housing burden. See *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975).

Weighted student funding is a funding scheme often offered as an alternative to foundation funding.²⁰⁷ The formulas used in weighted student funding schemes, though mechanistically different from foundation budget formulas, are similar in that they adjust per-student funding according to a child's need and other circumstances. Perhaps the key differences are administrative and operational. Foundation funding, at least in Massachusetts, is distributed at the district-level, with school districts then free to spend the money however they want, despite the component-by-component calculations underlying the budgets. This can result in significant intra-district inequity. Recall, for example, the pre-*Hancock* elementary school in Brockton that suffered through extreme financial distress even as the city built several new elementary schools using state aid. Weighted student funding, on the other hand, typically "follows" an individual child to the specific public school that he or she attends, though it too can then be spent however the school decides. Of course, the relative promise of different funding schemes can hardly be assessed in a vacuum, and may depend pivotally on limiting constraints such as district-wide contracts with teachers' unions.

Another interesting funding question is how best to determine required local contribution. Two years after *Hancock*, the Massachusetts legislature made some significant changes to the Chapter 70 framework. Specifically, required local contribution no longer turned solely on property values. Instead, the state instituted a formula adding a certain percentage of each town's total property values to a certain percentage of income earned by the town's residents.²⁰⁸ (The percentages were set so as to ensure that, on average, property-wealth and income-wealth equally affected the required contribution.) The reform was a significant boon for urban districts with

²⁰⁷ For a thorough explanation and defense of weighted student funding, see "Fund the Child: Tackling Inequity & Antiquity in School Finance," Thomas B. Fordham Institute (2006), available at http://www.schoolfunding.info/resource_center/media/Fordham_FundtheChild.pdf.

²⁰⁸ See "Demystifying the Chapter 70 Formula," *supra* note 148.

moderate or high property wealth but low resident income. By reducing those districts' required contributions, the legislature hoped to mitigate municipal overburden problems that tend to disproportionately affect central cities facing heightened costs relating to police, fire, health, and safety services.

Another important change that arguably flew in the face of the very rationale underlying foundation funding was a heightened minimum aid level for wealthy districts. While there had always been provisions guaranteeing a baseline amount of aid to all districts, 2007 reforms raised this minimum considerably. The state now guarantees all districts aid equivalent to at least 17.5 percent of their foundation budget, resulting in a windfall for wealthy districts compared to the aid levels in place when *Hancock* was decided.²⁰⁹ This change came in response to increased public pressure regarding perceived inequities in the Chapter 70 framework. The pressure no doubt came primarily from residents of wealthy school districts—the same demographic typically best equipped to organize politically.

VIII. Coda

Six years after *Hancock*, eighteen years after *McDuffy* and the passage of the ERA, thirty-one years after the approval of Proposition 2½, and two-and-a-half centuries after the penning of the Education Clause, Massachusetts continues to grapple with the complex problem of education reform. Achievement gaps are a particular concern in Massachusetts; the state often ranks at or near the top of national education assessments, but this is predominantly attributable to the performance of wealthy suburbs.

²⁰⁹ Noah Berger & Jeff McLynch, “Public School Funding in Massachusetts: Where We Are, What Has Changed, and Options Ahead,” Massachusetts Budget and Policy Center, Nov. 2006, *available at*, http://www.massbudget.org/file_storage_documents/Public_School_Funding-Where_We_Are_What_Has_Changed_-_FINAL.pdf.

Key government positions are currently occupied by decision makers whose ideology and track record suggest a proclivity to advocate for meaningful education reform, especially in the low-income communities that need it most desperately. Deval Patrick is the first Democratic governor to occupy the State House since 1991. He appointed as his education czar Paul Reville, the man who drafted the influential *Every Child a Winner!* He elevated Roderick Ireland to SJC chief justice following Margaret Marshall's retirement. And the state legislature remains dominated, as ever, by Democrats.

Like many of his predecessors, Governor Patrick has declared education reform to be one of the cornerstones of his political agenda. Early in his tenure, he and Reville proposed reform legislation, only to see it stumble in the face of political resistance and massive budget shortfalls driven by the recent economic collapse. Money, it seems, is always a potential stumbling block.

Last year saw the state's finances stabilize somewhat, and the Commonwealth received a welcome boost in late 2010 when the federal government awarded it \$250 million in Race to the Top funding. This should help the Patrick administration implement an innovative set of reforms that became law through the Education Reform Act of 2010. Aimed primarily at narrowing achievement gaps, these reforms includes efforts to implement statewide teacher contracts; loosen the cap on charter schools; grant superintendents sweeping powers to overhaul underperforming schools; and improve target output measures like MCAS scores, graduation rates, and college enrollment.

Not all meaningful reform is occurring at the state level. Consider one high school with all the usual indices of a failing school—entering freshmen whose 8th-grade MCAS scores are well below state averages, dramatically high dropout rates as recently as ten years ago, and a predominantly low-income, minority, student population. The last decade, however, has seen the

school engage in a dramatic turnaround, earning it plaudits in the pages of *The New York Times* and in a report by Harvard's Achievement Gap Initiative entitled "How High Schools Become Exemplary." The site for this remarkable reversal of educational outcomes? None other than Brockton High.

Passing the MCAS became a graduation requirement starting in 2003. Four years earlier, teachers and administrators at Brockton faced the stark reality that somewhere in the vicinity of 70% of seniors at the school might not be able to pass the test. A group of teachers proposed, and the administrators approved, a novel literacy initiative aimed to improve students' reading, writing, speaking, and reasoning. The initiative permeated every corner of the giant school and every hour of the school day—students even wrote open-ended responses questions occasionally during gym class. A more positive school culture and increased test scores followed almost immediately. Today, Brockton students make some of the most dramatic gains in the state from 8th to 10th grade.

The Brockton experiment provides a mix of lessons. Those who were disappointed with the *Hancock* ruling might draw hope from the fact that Brockton engaged in such successful reform without any significant increases in funding. Conversely, some might argue that thriving programs like Brockton's are exactly the type that should be dissected, analyzed, and cost out by a committee tasked with reevaluating foundation funding formulas.

The greatest complexity in education reform is that we have no perfect metric for educational opportunity. Inputs like funding provide a gauge of commitment to education. Outputs like test score and graduation rates serve as a rough proxy for schools' effectiveness in building productive citizens. Focusing on inputs alone would ignore the reality that extrinsic factors may make more costly the educational needs of some students. Focusing on outputs

alone, on the other hand, would ignore the similar reality that even the most effective public education system will likely not be able to fully account for all extrinsic factors.

And the hardest challenge is understanding how various inputs contribute to particular outputs—how the complicated web of teachers, parents, peers, buildings, curricula, and more contributes to a student’s ultimate success. The Brockton literacy initiative is just one of countless programs across Massachusetts and the country that yields a surprising degree of educational achievement despite limited resources.

Perhaps the most important lesson from Brockton is that we know so little about education reform and funding. Conventional wisdom provides a slew of reasons why Brockton’s turnaround should never have happened. Yet it is hard to take away much other than simply that convention wisdom is often wrong, especially in the nebulous world of education reform.



Massachusetts Governor Deval Patrick congratulates Brockton High students on the school’s dramatic recent turnaround.