

INSTITUTIONAL CONSTRAINTS, POLITICS, AND GOOD FAITH: A CASE STUDY OF SCHOOL FINANCE REFORM IN MASSACHUSETTS*

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INTRODUCTION

School finance litigation has become one of the primary tools of education advocates to address the racial achievement gap and improve educational opportunities for poor and minority children. It is only more important in the wake of the Supreme Court's recent decision in *Parents Involved in Community Schools v. Seattle School District No. 1*, which prohibits the use of race-based student assignment plans to integrate local

school districts.¹ Yet even before the Supreme Court limited local districts' options for racially integrating public schools, the focus of advocates at the state level had largely turned away from racial integration and toward money.² Since 1973, lawsuits challenging state methods for funding public schools have been brought in forty-five states.³ Many of the early suits focused on equity, claiming that reliance on the local property tax to fund public education, coupled with varying property values across a state, created vast disparities in funding available to local school districts and violated state constitutional Equal Protection Clauses.⁴ More recent cases have focused on adequacy, claiming that these funding disparities mean that many districts cannot provide their students with the education required under state constitutional Education Clauses.⁵

Although school finance litigation relies on the power of courts to create social change and to improve educational outcomes for individual students, not enough is known about the power or desire of courts to create such change in the face of legislative or popular opposition, or the relationship between court action and actual change on the ground. This Article explores this important issue through the lens of one state's experience with school finance litigation. By examining the legal, political, and social history of school finance reform in Massachusetts through personal interviews with many of its most important players, this Article reveals that before intervening in education reform, courts consider both their own institutional capacity to produce change and the efforts made by the elected branches of government to comply with the constitutional mandate. This holds important implications for advocates seeking to use the law to change educational outcomes and to produce any type of social reform.

¹ *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (U.S. 2007).

² See, e.g., Tamar Lewin & David M. Herszenhorn, *Money, Not Race, Is Fueling New Push to Bolster Schools*, N.Y. TIMES, June 30, 2007, at A10.

³ See generally National Access Network: Litigation, <http://www.schoolfunding.info/litigation/litigation.php3> (last visited Feb. 23, 2008).

⁴ See Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101, 104–15 (1995).

⁵ Peter Enrich provides a nuanced explanation of the three “waves” in school finance litigation. *Id.* According to Enrich, traditional equity claims are based solely on state Equal Protection Clauses, arguing that the clauses forbid differences in the fiscal capacity of local school districts. *Id.* at 106–07. Other equity claims are based on both state Education and Equal Protection Clauses, arguing that the state Education Clause recognizes a fundamental right to an education which cannot be violated by differences in district fiscal capacity. *Id.* at 107. Both types of suits claim a right to equal treatment: equal educational opportunity, equal funding for education, or equal capacity to raise funds for education. *Id.* at 108. Traditional adequacy claims are based on state Education Clauses and argue that students have a substantive right to public schooling and that their constitutional right to education is being violated by the poor quality of educational services in their districts. See *id.* at 108–10.

In 1993, in *McDuffy v. Secretary of Executive Office of Education*, the Supreme Judicial Court of Massachusetts found that the Education Clause of the Massachusetts constitution imposed an enforceable duty on the Commonwealth “to provide education in the public schools for the children there enrolled, whether they be rich or poor and without regard to the fiscal capacity of the community or district in which such children live.”⁶ It defined the constitutional duty by adopting seven capabilities that an educated child must possess.⁷ Three days after the court’s decision, then-Governor William Weld signed the Education Reform Act of 1993 (ERA).⁸ The Act provided for a massive, progressive refinancing of public education in Massachusetts in exchange for high standards and accountability from students, teachers, and schools.⁹ In 1999, on the eve of the full implementation of the progressive funding scheme, the *McDuffy* plaintiffs filed for additional relief.¹⁰ They claimed that the Commonwealth was still not providing them with the education required by the Massachusetts constitution as defined by the seven *McDuffy* capabilities.¹¹ A superior court judge found that the plaintiff districts were not providing students with the education to which they were constitutionally entitled and recommended a costing-out study to determine how much it would cost to provide all children with an adequate education.¹² In *Hancock v. Commissioner of Education*, the Massachusetts Supreme Judicial Court adopted the judge’s findings and praised her report but found that the Commonwealth was not violating its constitutional duty to provide plaintiff children with an education.¹³

⁶ *McDuffy v. Sec’y of Executive Office of Educ.*, 615 N.E.2d 516, 555 (Mass. 1993).

⁷ *Id.* at 554. These capabilities were originally declared in the famous Kentucky school finance case, *Rose v. Council for Better Education*, 790 S.W.2d 186 (Ky. 1989). They include: “(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 academic 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.” *McDuffy*, 615 N.E.2d at 554 (quoting *Rose*, 790 S.W.2d at 212).

⁸ Peter J. Howe, *Weld Puts Lukewarm Pen to Education Reform Bill*, BOSTON GLOBE, June 19, 1993, at 1.

⁹ See *infra* Part I.B.2.

¹⁰ See *infra* note 174 and accompanying text.

¹¹ *Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134, 1145 (Mass. 2005).

¹² *Hancock ex rel. Hancock v. Driscoll (Botsford Report)*, No. 02-2978, 2004 WL 877984, at *143-45 (Mass. Super. Apr. 26, 2004).

¹³ *Hancock*, 822 N.E.2d at 1136-39.

Part I of this Article provides a comprehensive social, political, and legal history of school finance reform in Massachusetts, focusing primarily on *McDuffy*, *Hancock*, and the ERA. This history reveals that the Massachusetts school finance experience is unique in a number of respects. First, *McDuffy* remains the only school finance case in the country to be decided on the basis of a stipulated factual record submitted by the parties.¹⁴ Second, the ERA, which comprehensively reformed school financing in the Commonwealth, was passed by the Massachusetts legislature not in response to an order from the Massachusetts Supreme Judicial Court, but one week before *McDuffy* was even decided.¹⁵ The *McDuffy* court was mindful of the legislative action and state legislators were mindful of the court case; thus, the litigation and lobbying can only be understood in concert.¹⁶ Similarly, the *Hancock* court has not had the last word on school funding or education reform. Current Massachusetts Governor Deval Patrick expressed his commitment to reviewing the school finance system while on the campaign trail and has recently announced education reform proposals that would be the system's biggest overhaul since the ERA.¹⁷

Part II discusses three main factors that help explain the *Hancock* decision. First, the court was aware of its own institutional constraints and concerns regarding the judiciary's role.¹⁸ It intentionally chose not to impose a remedial order that would require the legislature to appropriate additional funds for education because it feared provoking inter-branch conflict. The court was not concerned with constraints on courts generally, but its particular constraints due to its own previous clashes with the Massachusetts legislature over gay marriage and campaign finance reform, the difficulty of crafting remedies in school finance cases, and the lack of political support for the plaintiffs' case. This explains the second factor. The court's concerns regarding its judicial role reflected its implicit, and correct, assumption that policy elites, the legislature, the

¹⁴ Alan Jay Rom, *McDuffy Is Dead; Long Live McDuffy: Fundamental Rights Without Remedies in the Supreme Judicial Court of Massachusetts*, 21 ST. JOHN'S J. LEGAL COMMENT. 111, 125 (2006).

¹⁵ See *infra* Part I.B.2.

¹⁶ See *infra* Part I.B.3.

¹⁷ See Maria Sacchetti, *Governor Stirs UMass-Boston Graduates, They Cheer His Plan for 2-Year Colleges*, BOSTON GLOBE, June 2, 2007, at B1 [hereinafter Sacchetti, *Governor Stirs Graduates*]; Maria Sacchetti, *Patrick Seeks Free Two-Year State Colleges, Goal is Key in "Cradle to Career" Plan*, BOSTON GLOBE, June 1, 2007, at A1; Lisa Wangsness, *Patrick Targets School Funding, Criticizes Reliance on Property Tax*, BOSTON GLOBE, May 2, 2007, at A1.

¹⁸ Robert Keogh, the editor of *Commonwealth Magazine*, picked up on this concern, stating that the justices indicated that they did not want to get "bogged down" in the "quagmire" of issuing orders that they could not enforce. Audio recording: *Hancock vs. Driscoll: How Much is Enough*, sponsored by MassINC (Dec. 9, 2004), available at http://forum.wgbh.org/wgbh/forum.php?lecture_id=1719.

executive branch, and the public at large were generally uninterested in investing substantial new money in underperforming school districts. Stated otherwise, any fear of provoking inter-branch conflict or concern regarding the implementation of a judicial remedy would have been irrelevant if there had been substantial political support for the remedies the plaintiffs sought. Third, the court believed that the political branches had acted in good faith to increase state spending, minimize funding disparities between districts, and improve education in plaintiff districts.¹⁹ It accepted the story, shared by many in the Commonwealth, that Massachusetts schools had once been severely under-funded, but under the ERA, which had been encouraged and influenced by *McDuffy*, state spending on education had dramatically increased, disparities between districts had been reversed or reduced, and remaining problems in underperforming schools could no longer be traced to a lack of funds.

Part III discusses *Hancock's* important implications for the efficacy of courts in producing social change and for plaintiffs contemplating school finance lawsuits. A number of scholars, including Gerald Rosenberg and Michael Klarman, have suggested that courts cannot produce significant social change in the face of popular opposition.²⁰ Some scholars have claimed that this is particularly true in the area of school finance reform, where remedies such as increased funding for public schools and programmatic improvements are notoriously difficult for courts to enforce.²¹ *McDuffy* suggests partial, nuanced support for these theories. While the *McDuffy* court cannot be credited with creating social change in the face of legislative or popular opposition, the existence of the lawsuit influenced the ERA and the broader politics of education reform in the Commonwealth, just as the decision was in turn influenced by political action.²² *Hancock*, on the other hand, points in a direction that has been less explored: regardless of a court's capacity to produce social change, a court might be unwilling to produce change out of fear of provoking inter-branch conflict if it believes that there is little support for change within the political branches. This highlights the importance of the interactive relationship between litigation and legislation, especially in the school finance context.

¹⁹ Audio tape: Oral Argument, *Hancock*, 822 N.E.2d 1134 (No. SJC-09267) [hereinafter Audio tape of *Hancock* Oral Argument] (on file with author). During oral argument, Chief Justice Margaret Marshall explicitly stated that the Massachusetts Department of Education had proceeded in good faith. *Id.*

²⁰ See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004).

²¹ See e.g., William S. Koski, *The Politics of Judicial Decision-Making in Education Policy Reform Litigation*, 55 HASTINGS L.J. 1077 (2004).

²² Facts developed for the litigation, especially, helped to create an awareness of the funding problem and a sense that something had to be done. See *infra* Part I.B.3.

As for implications for future school finance litigation, *Hancock* shows that courts may be unwilling to find constitutional liability in states where the political branches have engaged in a serious, sustained effort to improve education and reduce spending disparities between districts. This is especially true when, like in Massachusetts, the effort has been met with a fair amount of success state wide. Therefore, advocates should be wary of bringing school finance suits in states where there is a perception that the political branches have acted in good faith to fulfill their constitutional obligations. This remains true even when students in plaintiff districts fail to meet state standards and perform far below average on state performance evaluations.

Before offering a social, political, and legal history of school finance reform in Massachusetts, a brief introduction to the state's public education is in order. Massachusetts has a population of approximately 6.3 million people and is divided into 351 cities and towns.²³ In the 2006–2007 school year, 968,661 students were enrolled in 389 operating public school districts.²⁴ Of those students, 71.5% were white, 13.3% were Hispanic, and 8.2% were African American.²⁵ In addition, 16.9% of students were enrolled in special education, and 28.9% were from low income backgrounds.²⁶ At the time *McDuffy* was filed, the Commonwealth provided 35.47% of all funding for public education, and local cities and towns provided 60.42%.²⁷ Massachusetts ranked seventh in the nation in total per-pupil expenditures, but forty-third in the proportion of education expenditures provided by the state.²⁸ Reliance on local property taxes created huge disparities in per-pupil expenditures between districts. In Fiscal Year (FY) 1991, the Town of Lincoln spent \$9,567 per-pupil while the Town of Douglas spent \$3,251.²⁹

I. SOCIAL, POLITICAL, AND LEGAL HISTORY OF SCHOOL FINANCE REFORM IN MASSACHUSETTS

A. THE EARLY YEARS

The Council for Fair School Finance (Council) was formed by the Massachusetts “education establishment” in 1975 for the purpose of fil-

²³ Citizen Information Service: Welcome to Massachusetts!, <http://www.sec.state.ma.us/cis/ciswel/weltomas.htm> (last visited Feb. 23, 2008).

²⁴ Massachusetts Department of Education, State Profile, <http://profiles.doe.mass.edu/state.asp> (last visited Feb. 23, 2008).

²⁵ *Id.*

²⁶ *Id.*

²⁷ Stipulation of Agreed Facts at 37, *McDuffy v. Sec’y of Executive Office of Educ.*, 615 N.E.2d 516 (Mass. 1993) (No. 90-128) [hereinafter Stipulation of Facts].

²⁸ Brief for the Defendants at 30–31, *McDuffy*, 615 N.E.2d 516 (No. SJC 06128).

²⁹ Brief for the Plaintiffs at 54, *McDuffy*, 615 N.E.2d 516 (No. SJC 06128).

ing a state-level, school finance lawsuit.³⁰ The founding organizations included the Massachusetts Federation of Teachers and the Massachusetts Teachers Association (the two state teachers unions), the Massachusetts Association of School Superintendents, and the Massachusetts Association of School Committees.³¹ The first suit was filed in 1978 under the caption *Webby v. Dukakis*.³² Almost immediately after the suit was filed, the Massachusetts legislature responded by enacting the “School Funds and State Aid for Public Schools Act,” the first state-wide, comprehensive school funding formula.³³ The purpose of the Act was “to promote the equalization of educational opportunities in public schools of the Commonwealth.”³⁴ *Webby* was then suspended to allow the new funding scheme to take effect.³⁵

In 1980, the Massachusetts electorate approved Proposition 2 ½, which significantly affected the ability of municipalities to raise revenues through the local property tax.³⁶ One of the major effects of Proposition 2 ½ was severe funding reductions for school systems across the state.³⁷ The *Webby* parties initiated discovery in 1983, and in July of 1985, a single justice of the Supreme Judicial Court for the County of Suffolk referred *Webby* to a special master to hear evidence and make findings and conclusions.³⁸ Later that month, the legislature responded again by

³⁰ Interview with Norma Shapiro, President, Council for Fair School Finance, in Boston, Mass. (Jan. 16, 2007 and Jan. 19, 2007) [hereinafter Shapiro Interview]. Ms. Shapiro originally became involved in the Council for Fair School Finance in the late 1970s. *Id.* She became President of the Council in 1989 and continues to serve in that capacity today. *Id.*; see also The Council for Fair School Finance in Massachusetts, <http://www.aclu-mass.org/issues/FairSchools/About.htm> (last visited Feb. 25, 2008).

³¹ Shapiro Interview, *supra* note 30.

³² *McDuffy*, 615 N.E.2d at 518.

³³ See *id.*; see also Shapiro Interview, *supra* note 30.

³⁴ Stipulation of Facts, *supra* note 27, at 15–16.

³⁵ *McDuffy*, 615 N.E.2d at 518.

³⁶ Stipulation of Facts, *supra* note 27, at 10–11; Kate Strickland, *The School Finance Reform Movement, a History and Prognosis: Will Massachusetts Join the Third Wave of Reform?*, 32 B.C. L. REV. 1105, 1157 n.392 (1991) (noting that Proposition 2 ½ sets a two and one-half percent cap on the amount by which local taxes can be raised in a given year without a special voter approval called an override).

³⁷ 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 8 (July 1991) [hereinafter EVERY CHILD A WINNER!].

³⁸ *McDuffy*, 615 N.E.2d at 518. A brief explanation of Massachusetts’s single justice practice is in order. The *Webby v. Dukakis* suit and the *McDuffy* suit were both filed in the Supreme Judicial Court for the County of Suffolk, the single justice court of the Commonwealth. *Id.* The Supreme Judicial Court (SJC) has concurrent jurisdiction with the superior court over equitable matters. See MASS. GEN. LAWS ch. 231A, § 1 (2007). Parties may file cases originally with the SJC for the county of Suffolk, and the case is then referred to a single justice of the SJC. See Supreme Judicial Court for Suffolk County, <http://www.sjccourtclerk.com/singjusprpr.html> (last visited Feb. 25, 2008). The single justice has discretion over whether to reserve ruling and report the case to the full SJC (if the parties have stipulated to a

enacting “An Act Improving the Public Schools of the Commonwealth” (1985 Act).³⁹ The single justice then suspended proceedings in *Webby* once again.⁴⁰

B. *McDUFFY* AND THE EDUCATION REFORM ACT OF 1993

1. *The Litigation*

Under the 1985 Act, new state money was distributed according to a needs-based formula.⁴¹ Equal Educational Opportunity grants were specifically designed to reduce disparities in spending between school districts.⁴² However, state aid for schools was distributed along with aid to municipalities, with no particular money earmarked exclusively for schools.⁴³ The entire process became a “political black box,” with the official funding formulas being overridden by the legislature each year.⁴⁴ The plaintiffs filed a restated complaint in 1990.⁴⁵

a. Plaintiff’s strategy

The Council contended that the Commonwealth’s school finance system denied plaintiff children the opportunity to receive an adequate education in violation of the Education Clause and the Equal Protection

factual record), transfer the case to the superior court for decision pursuant to Massachusetts General Laws chapter 211, § 4A, or appoint a judge of the superior court to make findings of fact and recommendations. *Id.* The process is largely not governed by formal rules. *See id.* However, novel questions of law may be grounds for a single justice to reserve decision and report a case to the full court. *Id.* In *McDuffy*, the single justice assigned to the case, Ruth Abrams, received the parties’ stipulations and then referred the case without decision to the full SJC. *McDuffy*, 615 N.E.2d at 518. Therefore, there was no lower court that ever decided the case. In *Hancock*, the single justice assigned to the case after Justice Abrams retired, Justice Greaney, presided over the parties’ attempts to reach a stipulated factual record, and then, when agreement proved impossible, referred the case to Superior Court Judge Margot Botsford for findings of fact and recommendations. Judge Botsford presided over a lengthy trial and then submitted a report of her findings and conclusions to Justice Greaney. Justice Greaney referred the case without decision to the full SJC. *See Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134, 1145–46 (Mass. 2005).

³⁹ *McDuffy*, 615 N.E.2d at 518. The existence of the *Webby* suit and its referral for trial almost certainly impacted the legislature’s decision to pass the Act. Telephone Interview with Alan Jay Rom, Litigation Director, Legal Assistance Corporation of Central Massachusetts, in Worcester, Mass. (Jan. 15, 2007) [hereinafter Rom Interview]; Shapiro Interview, *supra* note 30. Mr. Rom acted as co-counsel for the plaintiffs in both *McDuffy* and *Hancock*. Rom Interview, *supra*.

⁴⁰ *McDuffy*, 615 N.E.2d at 518.

⁴¹ Stipulation of Facts, *supra* note 27, at 20.

⁴² *Id.* at 28.

⁴³ Shapiro Interview, *supra* note 30.

⁴⁴ Shapiro Interview, *supra* note 30; Interview with Douglas Wilkins, Partner, Anderson and Krieger, LLP, in Cambridge, Mass. (Jan. 17, 2007) [hereinafter Wilkins Interview]. Mr. Wilkins was an Assistant Attorney General and chief counsel for the defendants in *McDuffy*. *Id.*

⁴⁵ *McDuffy*, 615 N.E.2d at 518.

Clause of the Massachusetts constitution.⁴⁶ They decided to frame what came to be known as *McDuffy v. Secretary of the Executive Office of Education* as an adequacy claim, rather than an equity claim or some sort of hybrid. This was due to successful adequacy lawsuits in Kentucky, New Jersey, Texas, and Montana in 1989 and 1990,⁴⁷ and to new research on the resources necessary for diverse student populations to learn.⁴⁸ It also saved them from difficult political decisions about the exact meaning of “equity” in the context of school finance litigation.⁴⁹ The Council decided to seek only a declaration that the Commonwealth had the obligation to provide public school children in Massachusetts with the opportunity to receive an adequate education and that it had violated the constitution by failing to do so.⁵⁰ Michael Weisman, lead counsel for the plaintiffs, thought that the Supreme Judicial Court would

⁴⁶ The text of the Education Clause of the Massachusetts constitution 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 science, 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 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. pt. 2, ch. 5, § 2. The equal protection provisions are found in Articles 1 and 10 of the Massachusetts Declaration of Rights. Article 1 provides: “All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality of under the law shall not be denied or abridged because of sex, race, color, creed or national origin.” MASS. CONST. pt. 1, art. 1. Article 10 provides: “Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws.” MASS. CONST. pt. 1, art. 10.

⁴⁷ Rom Interview, *supra* note 39. See *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989); *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684 (Mont. 1989); *Abbott v. Burke*, 575 A.2d 359 (N.J. 1990); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989). While not all of the cases raised pure adequacy claims, all were based on a state Education Clause.

⁴⁸ Shapiro Interview, *supra* note 30. This suggests that plaintiffs’ adequacy claim was a way of getting at “vertical equity” or the idea that some students require more resources than other students in order to achieve the same educational outcomes.

⁴⁹ While most scholars conclude that equity is easier to understand and define than adequacy, Alan Rom explained that during the earlier iterations of the suit, the Council debated how to define equity: Equity with whom? With wealthy districts? With a state average? If equality is mandated for all districts, would that prevent wealthy districts from hosting bake sales or other informal measures to raise money for education? Rom Interview, *supra* note 39.

⁵⁰ *Id.*; Interview with Michael Weisman, Partner, Weisman & McIntyre, in Boston, Mass. (Feb. 2, 2007) [hereinafter Weisman Interview]. Mr. Weisman was lead counsel for the plaintiffs in *McDuffy* and *Hancock*. *Id.* However, the plaintiffs’ brief to the SJC strayed a bit from this strategy. See *infra* discussion in Part I.B.1.e.

be more inclined to take a modest step rather than impose a dramatic remedy during the first phase of litigation and had faith that once the court declared a constitutional duty, the legislature would enact meaningful reform.⁵¹

The Council chose sixteen plaintiff districts that were well managed but did not have sufficient funds to provide their students with an adequate education.⁵² They chose four “focus” districts (Brockton, Leicester, Lowell, and Winchendon), which they thought exemplified the problems in the plaintiff districts.⁵³ The focus districts were well managed and geographically diverse, spanning both urban and rural communities.⁵⁴ The urban districts dealt with similar issues in terms of racial and ethnic makeup, and all of the districts dealt with similar issues in terms of percentage of poor, English language learning, and special education students.⁵⁵ The Council also selected three “comparison” districts, or districts that spent a lot of money on their school systems and were very successful.⁵⁶ These districts (Brookline, Concord-Carlisle, and Wellesley) also agreed to work with the plaintiffs in assembling facts.⁵⁷

b. Defendant’s strategy

The defendants’ strategy in *McDuffy* changed when Scott Harshbarger was sworn in as Attorney General in January 1991.⁵⁸ When Mr. Harshbarger was campaigning for Attorney General in the fall of 1990, he attended a candidates’ forum hosted by the Greater Boston Civil Rights Council and was asked whether, if elected, he would join the plaintiffs in the *McDuffy* suit and appoint a Special Attorney General to defend the Commonwealth. Harshbarger responded that he would.⁵⁹

⁵¹ Weisman Interview, *supra* note 50.

⁵² Rom Interview, *supra* note 39. The sixteen plaintiff districts in *McDuffy* were Brockton, Belchertown, Berkley, Carver, Hanson, Holyoke, Lawrence, Leicester, Lowell, Lynn, Rockland, Rowley, Salisbury, Springfield, Whitman, and Winchendon.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ It may seem odd that the plaintiffs chose comparison districts in a pure adequacy case. This paper categorizes *McDuffy* as an adequacy case because the claim was based on the Education Clause of the Massachusetts constitution and the plaintiffs did not seek equal funding for education or equal district capacity to raise funds for education. Instead, they claimed a substantive right to an adequate education, and provided evidence of the programs offered in the comparison districts to highlight the poor quality of educational services provided in plaintiff districts. See *McDuffy v. Sec’y of Executive Office of Educ.*, 615 N.E.2d 516, 519–20 (Mass. 1993). However, this introduces some notion of equity into the definition of an adequate education; otherwise, the services provided in comparison districts would be irrelevant to the inquiry.

⁵⁷ Rom Interview, *supra* note 39.

⁵⁸ Wilkins Interview, *supra* note 44.

⁵⁹ Rom Interview, *supra* note 39. Mr. Rom drafted the question. *Id.*

Once he took office, Harshbarger decided that he needed to defend the Commonwealth and would not join the plaintiffs.⁶⁰ Around this time, counsel at the Attorney General's office decided that the case was not contestable on the facts and that they needed to focus their efforts solely on the law.⁶¹ Therefore, they agreed to a stipulation of facts and argued that the constitutional Education Clause, which only required the legislature to "cherish" education, was hortatory and did not impose any judicially enforceable duty on the legislature.⁶²

c. Executive branch

The course of the litigation as a whole was profoundly impacted by statements and reports made by the defendants Commissioner of Education and Board of Education during 1990 and 1991. When the plaintiffs filed their restated complaint in 1990, then-Commissioner of Education and named defendant, Harold Reynolds, suggested that the court could help schools by siding with the plaintiffs.⁶³ Reynolds resigned from his position in 1991 in protest over the state's disinvestment in public education.⁶⁴ Once he was no longer a defendant in the litigation, he provided an affidavit in support of the plaintiffs.⁶⁵ Reynolds stated, "The purpose of public education is to provide every single child with an opportunity for success in learning. In many of the communities in Massachusetts, particularly less affluent communities such as the ones in which the plaintiffs attend school, Massachusetts is failing—and failing more than ever before—to achieve this goal."⁶⁶

The Board of Education agreed. In November, 1991, the Board released the Report of the Committee on Distressed School Systems and School Reform.⁶⁷ The Report proclaimed a "state of emergency" in the Commonwealth's public schools "due to grossly inadequate financial

⁶⁰ *Id.*

⁶¹ The attorneys' perception that the system could not be defended was shaped by statements of Department of Education staff members and members of the Board of Education discussed below. In addition, the Attorney General's office had no experts to testify that education was adequate in the plaintiff districts and did not think they could make an argument that the state's support for education was sufficient. Wilkins Interview, *supra* note 44. For a discussion of the posture of the Board of Education and Department of Education at the time, see *infra* Part I.B.1.c.

⁶² *Id.*

⁶³ Muriel Cohen, *School Cuts Revive Suit to Redress Inequality; At Issue a Right to Equal Opportunity*, BOSTON GLOBE, Sept. 27, 1991, at 24.

⁶⁴ Diego Ribadeneira, *Mass. Education Chief Quits*, BOSTON GLOBE, July 27, 1991, at 1.

⁶⁵ See *McDuffy v. Sec'y of Executive Office of Educ.*, 615 N.E.2d 516, 520 (Mass. 1993).

⁶⁶ *Id.* at 520 n.11. The court was clearly impacted by Reynolds' statement. See *infra* Part I.B.1.f.

⁶⁷ See *McDuffy*, 615 N.E. 2d at 553 n.9.

support”⁶⁸ and admitted that “[c]ertain classrooms simply warehouse children at this time, with no effective education being provided.”⁶⁹ It called for ending reliance on the local property tax and creating a “foundation budget” to ensure adequate spending in school systems throughout the state.⁷⁰ The Report’s author, then Board Chairman Martin Kaplan, told the *Boston Globe* that the Commonwealth was on a “collision course with disaster” because it did not have “adequate education funding across the board.”⁷¹ In addition, Robert Blumenthal, counsel for the defendant Department of Education, called one of the plaintiff focus districts “a school system in crisis,” and a special committee appointed by the chairman of the state Board of Education described the same district as an example of where “the commonwealth has not provided funding sufficient to satisfy its obligations . . . for public education .”⁷²

⁶⁸ *Id.* at 552.

⁶⁹ *Id.* Mr. Wilkins explained that the Attorney General’s office knew that the Board was planning to release the report but did not try to stop them. “The business of the Department of Education is to try to make sure that education is maintained at the level it should be maintained I think it’s wrong to have it governed by litigation So we didn’t try to shut them up” Wilkins Interview, *supra* note 44. Paul Reville, current Chairman of the Massachusetts Board of Education and co-author of the report, explained that the Board members knew about the existence of *McDuffy* and were aware that the report could influence the litigation. Interview with Paul Reville, Professor, Harvard Graduate School of Education, in Cambridge, Mass. (Jan. 30, 2007) [hereinafter Reville Interview]. However, they chose to proceed because they believed they had a moral obligation to expose the problems in the school financing system and felt “if that contributes to the outcome of the suit, so be it. We don’t mind.” *Id.* Mr. Reville is the co-founder and Executive Director of the Massachusetts Business Alliance for Education. He served on the Massachusetts State Board of Education from 1991–1996 and was one of the coauthors of the Report of the Committee on Distressed School Systems and School Reform. Mr. Reville also chaired the Massachusetts Education Reform Review Commission from 1996–2003. He is currently the President of the Rennie Center for Education Research and Policy and became Chairman of the State Board of Education on August 28, 2007. See The Rennie Center for Education Research & Policy, <http://www.renniecenter.org/1staff.html> (last visited Feb. 25, 2008). Not all Board members agreed. Piedad Robertson, Secretary of the Executive Office of Education and a member of Governor Weld’s cabinet, resigned from the Committee after consulting legal counsel because, as a named defendant in *McDuffy*, she did not feel she should sign a report which stated that the whole school financing system was in need of reform. See Jack Sullivan, *Weld Aide Downplays School Report*, *BOSTON GLOBE*, Nov. 25, 1991, at 13.

⁷⁰ Sullivan, *supra* note 69. Counsel for the plaintiffs apparently thought the Board’s report was vital to their case as they began their brief to the Supreme Judicial Court by quoting from it extensively. Brief for the Plaintiffs, *supra* note 29, at 2. The *McDuffy* court agreed. After quoting the same passages, the court stated, “Arguably, this admission, by itself, suffices to establish the constitutional violations.” *McDuffy*, 615 N.E.2d at 552.

⁷¹ Anthony Flint, *School Financing Attacked by Panel; Reform Urged in Mass.*, *BOSTON GLOBE*, Nov. 24, 1991, at 1.

⁷² Patricia Nealon, *In Brockton, a Case Study of Crisis; Students, Teachers Feel \$5.5m in Cuts*, *BOSTON GLOBE*, Nov. 24, 1991, at 38.

d. Stipulation of facts and conditions in the plaintiff districts

McDuffy remains the only school finance case in the country to be decided solely on a stipulated record.⁷³ The parties submitted a Stipulation of Agreed Facts in October 1991 and a supplement with a six-volume appendix the next year.⁷⁴ The stipulation stated that the focus districts were typical of all plaintiff school districts.⁷⁵ All four focus districts had per-pupil expenditures⁷⁶ and equalized property valuation below the state average.⁷⁷ The superintendents in all four districts stated that their schools could not provide students with an adequate education due to fiscal constraints.⁷⁸

The stipulation also revealed the terrible conditions in the focus districts. In Brockton, first- and second-graders had no math textbooks, first- through third-graders had no writing textbooks, and seventh-graders had no social studies textbooks.⁷⁹ In Leicester, teachers were discouraged from attending trainings because the school could not afford to pay substitutes, and the primary school teachers spent \$500–\$600 of their own money on classroom supplies each year.⁸⁰ In Lowell, all administrators, including the superintendent, spent one day per week acting as a substitute teacher.⁸¹ In Winchendon, the middle school principal and assistant principal were eliminated as a result of funding cuts.⁸² In addition, the district could not afford an elementary school science program, elementary or middle school art programs or high school advanced placement or honors courses.⁸³

The parties also stipulated to a number of conclusions that impacted the *McDuffy* court. First, a public school in one of the comparison districts “[would] offer significantly greater educational opportunities than the public schools in the communities in which the plaintiffs attend school.”⁸⁴ Second, although there was disagreement among social science experts over the impact of resources on educational quality, all agreed that schools must have sufficient funds in order to reach educa-

⁷³ Rom, *supra* note 14, at 125.

⁷⁴ *McDuffy*, 615 N.E.2d at 518.

⁷⁵ Stipulation of Facts, *supra* note 27, at 41.

⁷⁶ For the 1989–1990 school year, per-pupil expenditure in Brockton was \$4,191, in Leicester \$4,088, in Lowell \$4,455, and in Winchendon \$3,783. The statewide average was \$4,972. *Id.* at 44, 128, 149, 195.

⁷⁷ *Id.* at 62, 143, 161, 210.

⁷⁸ *Id.* at 48–49, 53, 129, 153–54, 195.

⁷⁹ *Id.* at 53–55.

⁸⁰ *Id.* at 131–32.

⁸¹ *Id.* at 153.

⁸² *Id.* at 196, 201.

⁸³ *Id.* at 207–08.

⁸⁴ *Id.* at 42.

tional goals.⁸⁵ And third, the amount of money available to schools in the comparison districts “[was] a significant contributing factor that affects the quality of the education that these communities are able to provide their students, as compared to the plaintiffs’ communities.”⁸⁶ In December of 1992, a single justice reserved and reported the case without decision to the full Supreme Judicial Court on the stipulated record.⁸⁷

e. Briefs of the parties

The plaintiffs argued that the Education Clause of the Massachusetts constitution required the Commonwealth to provide every public school child with the opportunity to receive an adequate education and that this duty could not be delegated to local governments.⁸⁸ They sought a declaratory judgment that the Massachusetts constitution guaranteed students the right to an equal opportunity to receive an adequate education.⁸⁹ Plaintiffs asked the court to provide guidelines for a constitutional system and endorsed the seven guidelines adopted by the Kentucky Supreme Court in *Rose v. Council for Better Education*.⁹⁰ They also asked the court to declare that each school district must have a guaranteed minimum level of funding, citing the Board of Education’s and Massachusetts Business Alliance for Education’s (MBAE) support for a foundation budget.⁹¹

The defendants stated the issue identically to the plaintiffs: whether, under the Education Clause or equal protection provisions of the Massachusetts constitution, the Commonwealth had a duty to provide the plaintiffs with equal access to an adequate education.⁹² They argued that state

⁸⁵ *Id.*

⁸⁶ *Id.* at 43.

⁸⁷ *McDuffy v. Sec’y of Executive Office of Educ.*, 615 N.E.2d 516, 518 (Mass. 1993). There was no lower court decision in *McDuffy*. For an explanation of single justice practice, see *supra* note 38.

⁸⁸ Brief for the Plaintiffs, *supra* note 29, at 85, 125–26. Plaintiffs also argued that the Commonwealth had a duty under the equal protection provisions of the Massachusetts constitution to provide children with equal access to an adequate education. *Id.* at 129–31. They contended that education was a fundamental right under the constitution and that the Commonwealth had no compelling government interest in depriving plaintiffs of an adequate education. *Id.* at 103, 129. Local control was not compelling because only districts with large tax bases could actually “control” education; property-poor districts could not tax themselves into being able to provide an adequate education. *Id.* at 140, 143. In the alternative, plaintiffs argued that the Massachusetts school financing system was not rationally related to any legitimate state interest. *Id.* at 127–53. The court decided the case solely on the Education Clause and did not reach the equal protection issue. *McDuffy*, 615 N.E.2d at 522 n.15.

⁸⁹ Brief for the Plaintiffs, *supra* note 29, at 4.

⁹⁰ *Id.* at 157 (quoting *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989)).

⁹¹ *Id.* at 158–59. For an explanation of the MBAE’s role, see *infra* Part I.B.2.b.

⁹² Brief for the Defendants, *supra* note 28, at 1; Brief for the Plaintiffs, *supra* note 29, at 1.

aid had an equalizing effect that reduced the effects of unequal district income and property wealth to a point where per-pupil expenditures were no longer substantially unequal.⁹³ In addition, even in the lowest spending districts, spending was high by historic measures. Massachusetts per-pupil expenditures ranked seventh or eighth highest in the nation.⁹⁴

Defendants argued that the constitution left school finance decisions to the legislature and the democratic process.⁹⁵ First, the Education Clause was aspirational, not mandatory, and did not create judicially enforceable rights.⁹⁶ The plain language, structure, history, and original understanding of the clause all supported this interpretation.⁹⁷ Next, if the Education Clause did impose some duty on the legislature, the legislature had acted to “cherish” education by providing equalizing state funding and promoting local control.⁹⁸ If the constitution required the Commonwealth to provide plaintiffs with an adequate education, the plaintiffs had not shown that the duty had been violated.⁹⁹ Lastly, school finance litigation in Texas and New Jersey cautioned against a constitutional interpretation that would require massive, redistributive state spending in the face of popular opposition.¹⁰⁰

f. At the Supreme Judicial Court

The Supreme Judicial Court (SJC) heard oral argument in February 1993 and issued its decision on June 15 of that year.¹⁰¹ The court decided the case solely on the Education Clause, holding that it imposed “a

⁹³ Brief for the Defendants, *supra* note 28, at 19–23. Specifically, defendants used the Gini Coefficient to show that the departure from perfect equality in per-pupil expenditure was only ten percent. *Id.* at 21.

⁹⁴ *Id.* at 27–31. However, when only state funding was considered, Massachusetts ranked forty-third. *Id.* at 31.

⁹⁵ *Id.* at 60.

⁹⁶ *Id.* at 60, 65.

⁹⁷ *Id.* at 60–87. The defendants argued that the word “cherish” meant merely to hold dear. *Id.* at 61–62. First, the framers and first legislatures of the Commonwealth could not have thought that “cherish” meant to support or provide for education, because no state funding was provided until 1827. *Id.* at 62–63. Second, the Education Clause was placed in the structural section of the constitution, rather than the section that protected individual rights. *Id.* at 63–64. Third, the legislature’s “duty” in the Education Clause was not only to “cherish” the public schools, “but also to ‘encourage’ private and public efforts in [the] promotion of agriculture, arts, sciences, etc.” and to “countenance and inculcate the principles of humanity and general benevolence.” *Id.* at 64. These goals could not be judicially enforceable. *Id.*

⁹⁸ *Id.* at 96–100, 102–06. The legislature provided \$30 million in emergency school funding during the 1991–1992 school year. Money was distributed to reduce classroom overcrowding and purchase new text books. One-hundred eighty-six million dollars in emergency funding was also budgeted for Fiscal Year (FY) 1993. *Id.* at 102–03.

⁹⁹ *Id.* at 111–17. The defendants conceded that a minimal level of education could be required, but they argued that plaintiffs had not alleged that such a standard had been violated. *Id.* at 116 n.50.

¹⁰⁰ *Id.* at 132–37.

¹⁰¹ *McDuffy v. Sec’y of Executive Office of Educ.*, 615 N.E.2d 516 (Mass. 1993).

constitutional duty on the Commonwealth to ensure the education of its children in the public schools.”¹⁰²

The bulk of the court’s opinion consists of a detailed explanation of the history of public education in Massachusetts since 1647 and a rigorous analysis of the language and original understanding of the Education Clause.¹⁰³ The Education Clause, in relevant part, imposes a duty on legislatures and magistrates “to cherish . . . public schools and grammar schools in the towns.”¹⁰⁴ Chief Justice Paul Liacos, through the use of eighteenth century dictionaries, showed that when the Massachusetts constitution was adopted, “a duty to cherish” meant an obligation to support and nurture.¹⁰⁵ After summarizing the early writings of John Adams, principal author of the Massachusetts constitution, and the views and actions of early Massachusetts legislatures, the court concluded that “the Commonwealth 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.”¹⁰⁶ The court further explained that this duty lay squarely on the executive and legislative branches. While the Commonwealth could delegate some implementation of education policy to local governments, it could not “abdicate the obligation imposed on magistrates and Legislatures placed on them by the Constitution.”¹⁰⁷

After reviewing the “bleak portrait of the plaintiffs’ schools . . . painted in large part by the defendant’s own statements,” the court concluded that the Commonwealth was failing to fulfill its constitutional obligation to educate all children.¹⁰⁸ To define the nature of the Commonwealth’s duty, the court adopted the seven guidelines set out by the Kentucky Supreme Court in *Rose v. Council for Better Education*.¹⁰⁹

¹⁰² *Id.* at 519.

¹⁰³ *See id.* at 523–45.

¹⁰⁴ *Id.* at 523 (quoting MASS. CONST. pt. II, ch. 5, § 2).

¹⁰⁵ *Id.* at 525–26.

¹⁰⁶ *Id.* at 548.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 553–54. In coming to its conclusion, the court described “statement after statement recounting the Commonwealth’s failure to educate the children in the plaintiffs’ school and those they typify,” and was particularly affected by the 1991 Report of the Committee on Distressed School Systems and School Reform. *Id.* at 552.

¹⁰⁹ *See id.* at 554 (“An educated child must possess ‘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

The court stressed that the ultimate responsibility for defining the specific and appropriate means of providing the constitutionally required education was properly left to the legislative and executive branches.¹¹⁰ It expressed faith that the Commonwealth would fulfill its duty and remedy the constitutional violations.¹¹¹ The court concluded by permitting a single justice to retain jurisdiction to “determine whether, within a reasonable time, appropriate legislative action has been taken.”¹¹²

2. *The Legislation*

The education reform movement in Massachusetts cannot be explained solely in terms of the *McDuffy* litigation. Education reform had political momentum of its own that can only be understood by examining the interrelated roles of the factual situation in the school districts between 1990 and 1993, the Massachusetts Business Alliance for Education (MBAE), and the political leadership of state senator Thomas Birmingham, state representative Mark Roosevelt, and Governor William Weld.

a. Facts on the ground

During the mid-1980s, the Massachusetts economy was strong, and state aid to public schools helped soften the blow of Proposition 2 1/2.¹¹³ However, in 1988, Massachusetts entered a period of economic downturn that profoundly impacted state aid to public schools.¹¹⁴ In FY 1987, 39.04% of school budgets came from state aid, but by FY 1990, that number was down to 35.47%.¹¹⁵ In FY 1990, the state attempted to cut local aid by \$210 million; in FY 1992 local aid was successfully reduced by \$328.6 million, or 20.6%.¹¹⁶ The impact on schools did not go unnoticed. School budgets were “cut to the bone” as a result of the cuts in state aid.¹¹⁷ Newspaper stories highlighted students in Ware, who, after

states, in academics or in the job market.” (quoting *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186, 212 (Ky. 1989)).

¹¹⁰ See *id.* at 554–55.

¹¹¹ See *id.* at 554. For a discussion of why the court had such faith in the legislature, see *supra* Part I.B.3.b.

¹¹² *Id.* at 556. Justice Sandra Day O’Connor concurred in part and dissented in part, finding that although the Commonwealth did have an enforceable constitutional duty to provide education for all of its children, the plaintiffs had not shown that the duty had been violated. See *id.* at 556–57 (O’Connor, J., concurring in part and dissenting in part).

¹¹³ Anthony Flint, *Saving a System Mired in Mediocrity*, BOSTON GLOBE, Dec. 15, 1991, at A21.

¹¹⁴ *Id.*; see also Diego Ribadeneira, *School Board Hears of Devastation by Cuts*, BOSTON GLOBE, Sept. 27, 1991, at 1.

¹¹⁵ Stipulation of Facts, *supra* note 27, at 37.

¹¹⁶ *Id.* at 32–33. In FY 1990 the \$210 million cut was successfully challenged by a lawsuit, but the funding was not distributed to cities until FY 1991. *Id.*

¹¹⁷ Wilkins Interview, *supra* note 44.

their elementary school was condemned, had to eat lunch in the basement of the district court, only feet away from shackled prisoners.¹¹⁸ In Holyoke, one special education class had eighty students.¹¹⁹

However, there was never any mass social movement around school funding.¹²⁰ Paul Reville, current Chairman of the Massachusetts Board of Education, explained that, in general, parents were fairly happy with their own children's schools, therefore pressure for education reform came more from the political and governmental elite.¹²¹ Senator Thomas Birmingham, who co-chaired the Senate Education Committee during this era, confirmed that education reform was mostly run by institutional players and interest groups.¹²²

b. Jack Rennie and the Massachusetts Business Alliance for Education

One of the most important institutional players was the Massachusetts Business Alliance for Education (MBAE). The MBAE was formed in 1988 by Jack Rennie, a well respected businessman and CEO, and Paul Reville, an education advocate, for the purpose of bringing about a massive reinvention of the public school system in Massachusetts.¹²³ Conceiving of the project as "reform done *with* the [education] field, not *to* the field,"¹²⁴ the MBAE immediately embarked on meetings with stakeholder groups to find out what was needed to reform and reshape public education.¹²⁵ Out of these conversations emerged the 1991 report

¹¹⁸ See Flint, *supra* note 113.

¹¹⁹ Ribadeneira, *supra* note 114, at 1.

¹²⁰ See Interview with Thomas Birmingham, Former Senator, Massachusetts State Legislature, in Boston, Mass. (Jan. 25, 2007 and Feb. 1, 2007) [hereinafter Birmingham Interview]. Former Senator Birmingham was the chairman of the Senate Education committee, chairman of the Senate Ways and Means Committee, and then Senate President between 1991 and 2002. *Id.* He was one of the primary authors of the Education Reform Act of 1993 and left the legislature to run for Governor of Massachusetts in 2002. *Id.*

¹²¹ Reville Interview, *supra* note 69.

¹²² Birmingham Interview, *supra* note 120.

¹²³ Reville Interview, *supra* note 69. Mr. Rennie was the Chairman and CEO of Pacer Systems Inc. and Mr. Reville, at that time, ran a local education fund in Worcester. *Id.* The two sat on the Commonwealth's School Business Partnership Advisory Group. *Id.* Mr. Reville explained that as business leaders, Mr. Rennie and others spent increasing time in public schools through partnership activities; they were shocked by the lack of clear goals, accountability, human resource development, and power for principals to run their own schools. *Id.* These business leaders came to realize that schools were not producing kids who were ready to take the kinds of jobs they had to offer. *Id.*

¹²⁴ *Id.*

¹²⁵ Everyone interviewed for this paper who discussed the role of the MBAE stressed how inclusive of all voices the organization, and Jack Rennie in particular, was. Interview with Joanne Blum, Governmental Services Director, Massachusetts Teachers Association, in Boston, Mass. (Jan. 26, 2007) [hereinafter Blum Interview]; Shapiro Interview, *supra* note 30. The list of stakeholders consulted includes state legislators, both state teachers unions, superintendents, members of the State Board of Education, local school committee members, staff

“Every Child a Winner! A Proposal for a Legislative Action Plan for Systemic Reform of Massachusetts’ Public Primary and Secondary Education System.”¹²⁶ The basic premise of the report was high standards and accountability for all students in exchange for a progressive refinancing of public schools.¹²⁷ The MBAE recommended that the Commonwealth create outcome-oriented goals for education and performance measurements to attach rewards and penalties to school performance.¹²⁸ In exchange, the state would calculate a foundation budget for each school district.¹²⁹ The budget, created by school superintendents and written by economist and MBAE consultant Dr. Edward Moscovitch, was based on specific factors and assumptions and took into account the increased costs of educating special education, bilingual, and low income students.¹³⁰

The report was incredibly well-received by decisionmakers on Beacon Hill and across the Commonwealth. Governor Weld, a Republican, was more comfortable dealing with business groups than he was with the education “establishment”—teachers unions, superintendents, and school committees.¹³¹ Jack Rennie had political connections to the Weld administration, and Paul Reville was close to James Harrington, Weld’s education advisor during his transition in early 1991.¹³² Education was at the top of the political agenda, and both Governor Weld and the state house and senate leadership wanted some type of reform.¹³³ The MBAE proposals were perfectly situated to become the ideas that catalyzed the movement.

from the Department of Education, professors, the Commissioner of Education, Governor Weld and his advisors, the Boston Chamber of Commerce, the Massachusetts Business Roundtable, the Small Business Association of New England, the University of Massachusetts, and many others. See *EVERY CHILD A WINNER!*, *supra* note 37, at Appendix A-5 to 9.

¹²⁶ See generally *EVERY CHILD A WINNER!*, *supra* note 37 (proposing how to reform the failing education system).

¹²⁷ Reville Interview, *supra* note 69.

¹²⁸ See *EVERY CHILD A WINNER!*, *supra* note 37, at 27–28.

¹²⁹ See *id.* at 36–39.

¹³⁰ *Id.* at 36. The budget included extra teachers and aids to be provided for special education students and smaller class sizes to be provided for bilingual students. *Id.* at Appendix D-4 to 5. For low income students there was money to reduce class sizes and create half day preschool, full day kindergarten, and parent outreach programs for children ages one to three. *Id.* at Appendix D-16 to 17. Extra hours of schooling during the academic year and a twelve-week summer program were also included. *Id.* at 36, Appendix D-17. This extra state funding made a huge difference in the foundation budgets of districts with high percentages of low income students. *Id.* at Appendix D-19 to 20. In the eleven districts with low income enrollment greater than 40%, Boston was the only district that spent within \$2,000 per pupil of its foundation budget. See *id.* at Appendix D-20.

¹³¹ Shapiro Interview, *supra* note 30.

¹³² Reville Interview, *supra* note 69.

¹³³ See Flint, *supra* note 113.

c. The Legislature and Governor Weld

The story of education reform in the Massachusetts state house is largely one of the heroic efforts of Representative Mark Roosevelt and Senator Thomas Birmingham. Newly appointed to chair the House-Senate Joint Education Committee, both men were sincerely committed to education reform and to public education.¹³⁴ Governor Weld came on board early as well.¹³⁵

Joint meetings between Representative Roosevelt, Senator Birmingham, Governor Weld, and the MBAE began in the summer of 1991, with the idea that all three branches would work together to submit a joint education reform bill.¹³⁶ All parties agreed on the basic concept of a massive infusion of new state money in the form of a foundation budget in exchange for high standards and accountability from all students, teachers, and schools.¹³⁷ However, talks broke down during the summer of 1992, mostly over funding, and each branch eventually submitted its own bill.¹³⁸ Edward Moscovitch continued to work with Representative Roosevelt, and his foundation budget made it into the final legislation almost whole cloth.¹³⁹

As the bills made their way through the state house, there was an absence of real, vehement, institutional opposition to education reform. Some legislators were concerned about what the foundation budget would cost.¹⁴⁰ Others were skeptical that it would constitute “real” re-

¹³⁴ Blum Interview, *supra* note 125 (Ms. Blum called Senator Birmingham the legislator with the deepest understanding of how education can change lives); Shapiro Interview, *supra* note 30. Birmingham credits his own upbringing for his understanding of how education can change lives. Birmingham Interview, *supra* note 120. He grew up in a working class neighborhood with parents who did not attend college but who made education a top priority for their children. *Id.* Senator Birmingham attended Harvard University, won a Rhodes Scholarship, and then graduated from Harvard Law School. *Id.*

¹³⁵ See Anthony Flint & Muriel Cohen, *Education Report Retreats on Some Cuts; But Adviser Seconds Weld on Abolishing Regents Panel*, BOSTON GLOBE, Apr. 3, 1991, at 19. Governor Weld's education advisor met with MBAE representatives, reviewed a draft copy of *Every Child a Winner! A Proposal for a Legislative Action Plan for Systemic Reform of Massachusetts' Public Primary and Secondary Education System*, and adopted a number of the MBAE proposals in his transition report, including the foundation budget. Reville Interview, *supra* note 69.

¹³⁶ Diego Ribadeneira, *Property Tax Funding of Schools Questioned*, BOSTON GLOBE, March 4, 1992, at 23; Reville Interview, *supra* note 69.

¹³⁷ Muriel Cohen, *School Panel Ok's \$8m Cut, 269 Layoffs; Weld Seeks to Balance State's Disparities*, BOSTON GLOBE, Jan. 16, 1992, at 1; Birmingham Interview, *supra* note 120.

¹³⁸ Both Representative Roosevelt and Senator Birmingham believed that funding education reform would require new taxes, while Governor Weld was adamantly opposed to any tax increase. Muriel Cohen, *School Bill Faces Limits Equity, Raising Money May Be Sticking Points*, BOSTON GLOBE, March 9, 1992, at 15; Birmingham Interview, *supra* note 120.

¹³⁹ Reville Interview, *supra* note 69.

¹⁴⁰ *Id.*

form, given the problems with the 1978 and 1985 legislation.¹⁴¹ However, no organizations were opposed to the general proposition of increased state funding in exchange for high standards.¹⁴² Wealthy school districts did not lobby against the reform bill.¹⁴³ There was no furor from anti-tax coalitions or other small government groups.¹⁴⁴ Out of all the organizations it met with, the MBAE had the most difficult time getting the teachers unions, both of whom were members of the Council, on board.¹⁴⁵ Senator Birmingham pointed out that the lack of opposition might have been due to the fact that most people, including most legislators, did not understand how redistributive the foundation budget would be.¹⁴⁶ The formula was a complicated calculation determined by eighteen different factors, and very few people besides its authors knew precisely how it worked.¹⁴⁷ He also acknowledged that while State House support for the legislation was very broad, “for some legislators, I think it was probably as deep as the veneer of the table.”¹⁴⁸

That is not to say that the bill “roll[ed] in on wheels of inevitability.”¹⁴⁹ It took two years and hundreds of hours of work from the time meetings with Representative Roosevelt, Senator Birmingham, and Governor Weld first began until final passage of the bill. Funding for the ERA was a huge fight that caused multiple breakdowns in negotiations. Even in the days leading up to final passage in June of 1993 there was a fair amount of politicking.¹⁵⁰ However, final passage was secured on

¹⁴¹ Birmingham Interview, *supra* note 120.

¹⁴² *See Id.*; Blum Interview, *supra* note 125; Reville Interview, *supra* note 69. Some business groups, including the Hi-Tech Council, had other priorities for education, but because they respected Jack Rennie, they largely stayed out of the debate. Reville Interview, *supra* note 69. The one exception was Bill Ederly, the CEO of State Street Bank and former board member of the conservative Pioneer Institute. *Id.* He formed a group called CEOs for Fundamental Change and pushed for school choice. *Id.* Although his proposals did not make it into the Education Reform Act, they were the basis for Governor Weld’s eighteen reform bills submitted after he signed the Act. *Id.*

¹⁴³ Birmingham Interview, *supra* note 120; Shapiro Interview, *supra* note 30. In fact, as noted above, Brookline, Concord-Carlisle, and Wellesley were so supportive of the plaintiffs’ case that they participated as comparison districts in *McDuffy*.

¹⁴⁴ Birmingham Interview, *supra* note 120.

¹⁴⁵ Reville Interview, *supra* note 69.

¹⁴⁶ Birmingham Interview, *supra* note 120.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* This superficiality of the support became clear when attempts were made to cut funding while the Act was being implemented. *See infra* Part I.C.

¹⁴⁹ Birmingham Interview, *supra* note 120.

¹⁵⁰ The house passed the Education Reform Bill by a large margin on June 2, 1993, and the senate followed suit the next day. *See* Peter J. Howe, *Mass. Senate OK’s School Bill Amid Criticisms*, BOSTON GLOBE, June 4, 1993, at 1 [hereinafter Howe, *Senate OK’s School Bill*]. That day, a Weld insider leaked a memorandum written by Special Assistant Steven Wilson, who had previously worked at the conservative Pioneer Institute. *Id.* The memo reluctantly urged Weld to sign the bill but called the reforms “hollow”: “We are buying very little real reform. We are simply pumping money into the failed structure with a little tinkering.” *Id.*

June 8, 1993, and Governor Weld signed the Education Reform Act of 1993 (ERA) on June 18, three days after the *McDuffy* decision.¹⁵¹

The ERA dramatically changed the system of public education in the Commonwealth.¹⁵² The foundation of the Act was a massive increase in state funding for education to be distributed in a very progressive manner, in exchange for increased accountability from students, teachers, and administrators for educational outcomes.¹⁵³ The Act has a number of key provisions. First, it established a foundation budget for each school district, designed to be the minimum level of per-pupil spending for each district.¹⁵⁴ The foundation budget is calculated by eighteen factors ranging from teacher salaries to maintenance expenses.¹⁵⁵ A minimum local contribution, based on equalized property valuation, is also required.¹⁵⁶ The state makes up the difference between a school district's local contribution and its foundation budget through Chapter 70 aid.¹⁵⁷ The budget formula includes weights to account for the higher cost of educating special education students, English language learners, and low income students.¹⁵⁸

Second, the ERA set up a sophisticated assessment and accountability system. It directed the Board of Education and the Commissioner of Education to establish statewide educational standards for all elementary and secondary school students and "curriculum frameworks" for attaining those standards in English, math, science and technology, history and social science, foreign languages, and the arts.¹⁵⁹ It instructed the board to create a system to evaluate the performance of districts and schools based on statewide academic standards.¹⁶⁰ Schools that fail to improve

House Republicans then tried to block final passage of the bill by releasing what they called the "real costs" of the legislation, based on figures provided by defendant and Weld cabinet member, Piedad Robertson. Frank Phillips & Scott Lehigh, *School Bill Leader Urges Weld to Quit 'Sabotage' Efforts*, BOSTON GLOBE, June 8, 1993, at 22. Governor Weld indicated that he would probably sign the bill but return to the legislature with follow up legislation to deal with issues with which he was not satisfied, including provisions on school choice and charter schools. Peter J. Howe, *Weld Leans Toward Signing Bill for Education Reform*, BOSTON GLOBE, June 9, 1993, at 26 [Howe, *Signing Bill*].

¹⁵¹ Howe, *supra* note 8, at 1.

¹⁵² The Education Reform Act of 1993 is codified at 1993 Mass. Legis. Serv. Ch. 71 (West). Most of the Act's changes are codified at MASS. GEN. LAWS ch. 69, § 1-1L, ch. 70, and ch. 71 (2007).

¹⁵³ Birmingham Interview, *supra* note 120; Reville Interview, *supra* note 69.

¹⁵⁴ See Hancock *ex rel.* Hancock v. Driscoll (*Botsford Report*), No. 02-2978, 2004 WL 877984, at *5 (Mass. Super. Apr. 26, 2004) (citing MASS. GEN. LAWS ch. 70, § 2).

¹⁵⁵ See *id.* (citing MASS. GEN. LAWS ch. 70, § 2).

¹⁵⁶ See *id.* (citing MASS. GEN. LAWS ch. 70, § 2).

¹⁵⁷ *Id.* (citing MASS. GEN. LAWS ch. 70, § 6).

¹⁵⁸ Hancock v. Comm'r of Educ., 822 N.E.2d 1134, 1142 (Mass. 2005) (citing MASS. GEN. LAWS ch. 70 §§ 2 et seq.).

¹⁵⁹ *Botsford Report*, 2004 WL 877984, at *6.

¹⁶⁰ *Id.*

student academic performance can be deemed “underperforming” or “chronically underperforming” and can be taken over by the state.¹⁶¹ The Act also created a rigorous new teacher qualification program.¹⁶² Lastly, it removed principals from collective bargaining agreements and officially abolished teacher tenure.¹⁶³

3. *The Influence of the Court on the Legislative Outcome and Vice Versa*

a. The impact of *McDuffy* on the Education Reform Act

While the ERA was not a response to the *McDuffy* decision, as the bill was passed one week before the court issued its decision, the litigation played an important role in the development of the Act and the general politics concerning education reform. Legislators were mindful of *McDuffy* as they debated education reform.¹⁶⁴ They were particularly aware that, in order to address the plaintiff’s case, any reform would need to confront the rampant inequalities in the financing system.¹⁶⁵ Both the MBAE and Senator Birmingham used the existence of the lawsuit to push state legislators to act.¹⁶⁶ Lead counsel for defendants, Douglas Wilkins, met with legislators and staffers to keep them apprised of case developments.¹⁶⁷ Senator Birmingham also met with plaintiffs’ counsel while the case was proceeding. He explained that he supported the plaintiffs’ case and hoped the SJC would declare that an equitable, adequate education was constitutionally required in Massachusetts, thinking “it would make a firmer basis going forward for support for education if it was a constitutional requirement.”¹⁶⁸

Facts developed by the plaintiffs for the court case helped to create the sense that the school finance system was broken and needed fixing. This almost certainly influenced how legislators thought about the issue. Newspaper articles commonly used stipulated facts to highlight the dis-

¹⁶¹ *Id.*

¹⁶² *Id.* at *7.

¹⁶³ *Id.* Thomas Payzant, the Superintendent of the Boston Public Schools from 1995 until 2006, explained that while taking school principles out of collective bargaining had a major impact on day to day school operations, officially abolishing teacher tenure did not, because the new “just cause” system was virtually indistinguishable from the old. Interview with Thomas Payzant, Senior Lecturer, Harvard Graduate School of Education, in Cambridge, Mass. (Mar. 21, 2007).

¹⁶⁴ Birmingham Interview, *supra* note 120; Reville Interview, *supra* note 69.

¹⁶⁵ Reville Interview, *supra* note 69.

¹⁶⁶ *Id.*; Birmingham Interview, *supra* note 120.

¹⁶⁷ Wilkins Interview, *supra* note 44.

¹⁶⁸ Birmingham Interview, *supra* note 120. For a discussion of how *McDuffy* influenced the implementation of the Education Reform Act, see *infra* Part I.C.

parities between districts.¹⁶⁹ While the Council as an entity did not lobby, individual member groups did, and when they spoke to legislators and testified at hearings, they used facts developed in the litigation to prove their points.¹⁷⁰ The *Boston Globe* consistently connected the pending education reform bills to the lawsuit; after the decision came down, the *Globe* published a set of articles on whether the Act would fulfill the court's constitutional mandate.¹⁷¹ When *McDuffy* was referred to the full SJC by the single justice, state officials expressed hope that the case would prompt Governor Weld and the Legislature to pass a reform bill before they were forced to do so by the court. Attorney General Harshbarger advised 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."¹⁷²

b. The impact of the Education Reform Act on *McDuffy*

In most school finance cases, this inquiry is irrelevant because legislation is passed in order to remedy a constitutional violation already declared by the court. However, in *McDuffy*, the reform legislation was passed one week before the court issued its decision, and it is therefore useful to consider what, if any, impact the legislation had on the court's decision. State legislators had their own theories at the time. A number commented that they were struck by the timing of *McDuffy* and speculated whether the SJC was trying to push Governor Weld to sign the bill, which he did three days later, or "to ensure the court acted in time to look like it had forced the bill's enactment without offending legislators by setting them up to pass the bill under threat."¹⁷³

When the case was briefed, the court knew that education reform legislation was in the works. Newspaper articles about the legislation were difficult to avoid. The plaintiffs stated in their brief that both the MBAE and Governor Weld had proposed a foundation budget formula.¹⁷⁴ Most importantly, Justice John Greaney, a member of the

¹⁶⁹ See, e.g., Diego Ribadeneira, *Disparities Between Rich, Poor Systems Often Glaring*, BOSTON GLOBE, Jan. 25, 1993, at 16 (using facts from the Stipulation of Facts in *McDuffy* to showcase disparities between Wellesley and Winchendon).

¹⁷⁰ Shapiro Interview, *supra* note 30.

¹⁷¹ See, e.g., Jordana Hart, *School Reform Bill Resembles SJC Guide*, BOSTON GLOBE, June 17, 1993, at 47; Peter J. Howe, *MTA Deems School Overhaul Bill Inadequate*, BOSTON GLOBE, June 17, 1993, at 47; Editorial, *From Courthouse to Schoolhouse*, BOSTON GLOBE, June 18, 1993, at 18.

¹⁷² Lauren Robinson, *SJC Takes School Case; Lawsuit Challenges Property-Tax Funding*, BOSTON GLOBE, Dec. 15, 1992, at 25.

¹⁷³ Peter J. Howe, *School Bill May Answer SJC Demands; Speed of Aid Hikes Seen as an Issue*, BOSTON GLOBE, June 16, 1993, at 19.

¹⁷⁴ Brief for the Plaintiffs, *supra* note 29, at 159. In its amicus brief to the court, the MBAE also stressed that reform legislation was imminent. See also Brief of Amici Curiae

McDuffy court, confirmed the justices' knowledge of the impending legislation. In his *Hancock* dissent, Greaney explained that "*McDuffy* was released with the court's knowledge that the Legislature was poised to enact the Education Reform Act of 1993 . . . the three events[—the *McDuffy* decision and the Act's passage and signing—]comprised in fact and law a joint enterprise on the part of the three branches of government."¹⁷⁵ He made a similar point during the *Hancock* oral argument, explaining that the lack of a specific remedy in *McDuffy* had to be considered in light of the court's knowledge, at the time the decision was written, that passage of the ERA was imminent.¹⁷⁶ Therefore, it seems certain that the impending passage of the ERA influenced how the court wrote the *McDuffy* decision and why it expressed such confidence that the legislature would step in with an appropriate remedy.

C. IMPLEMENTATION OF THE EDUCATION REFORM ACT AND THE ROAD TO *HANCOCK*

Getting the ERA implemented was difficult. The bill was signed into law with no dedicated pool of money to fund the massive increases in state aid that were scheduled to phase in over seven years, and Governor Weld vowed to veto any tax increase that the legislature tried in order to fund the bill.¹⁷⁷ That all school districts reached their foundation budgets by the year 2000 was largely the result of Senator Birmingham's work in the state house, a burgeoning economy that made fully-funding the bill possible without increasing taxes, and *McDuffy*.¹⁷⁸ Sen-

Massachusetts Business Alliance for Education, et al. at 16 n.4, *Hancock v. Comm'r of Educ.*, 822 N.E.2d 1134 (Mass. 2005) (No. SJC-09267).

¹⁷⁵ *Hancock*, 822 N.E.2d at 1165 (Greaney, J., dissenting).

¹⁷⁶ Audio tape of *Hancock* Oral Argument, *supra* note 19. Some scholars fail to recognize this dynamic or acknowledge that the *McDuffy* decision was handed down *after* the legislature had already passed the ERA, and therefore characterize the decision as weak on remedy. See, e.g., George D. Brown, *Binding Advisory Opinions: A Federal Court's Perspective on the State School Finance Decisions*, 35 B.C. L. REV. 543, 544 (1994) ("When it comes to the question of remedy, however, the *McDuffy* court's boldness evaporates. A high degree of deference to the legislature is the dominant theme."); Michael Heise, *Preliminary Thoughts on the Virtues of Passive Dialogue*, 34 AKRON L. REV. 73, 103-04 (2000) (commenting that the tone of the remedy section of *McDuffy* "reveal[ed] marked institutional hesitance" and essentially left to the legislature the task of recreating the school finance system).

¹⁷⁷ Howe, *supra* note 8.

¹⁷⁸ Paul Reville, Norma Shapiro, Joanne Blum, and Deirdre Roney all credit Senator Birmingham with ensuring that the act was fully funded. Blum Interview, *supra* note 125; Reville Interview, *supra* note 69; Interview with Deirdre Roney, Assistant Attorney General, in Boston, Mass. (Jan. 24, 2007) [hereinafter Roney Interview]; Shapiro Interview, *supra* note 30. Ms. Roney was chief counsel for the defendants in *Hancock*. Roney Interview, *supra*. By 1994, Birmingham was the Chair of the Senate Ways and Means Committee and officially in charge of the senate budget. See *Profile of Thomas F. Birmingham*, Edwards Angell Palmer & Dodge, <http://www.eapdlaw.com/professionals/detail.aspx?attorney=411> (last visited Mar. 28, 2008).

ator Birmingham used the *McDuffy* decision to prod legislators to fund the Act even when political will was lacking.¹⁷⁹ For example, in 1995, the house budget came out of the Ways and Means Committee with \$46 million cut from what had been promised for education reform.¹⁸⁰ Speculation abounded that legislative support for the ERA was unraveling and the legislature would not keep its promise to schools.¹⁸¹ The *McDuffy* plaintiffs immediately filed for additional relief.¹⁸² However, after the senate budget fully funded the Act and the house agreed to the senate funding, the plaintiffs dropped their claim.¹⁸³ Similar funding issues arose a number of other times.¹⁸⁴

Notwithstanding these setbacks, education funding took precedence over all other social programs between 1993 and 2000.¹⁸⁵ By 2000, every school district in Massachusetts was spending at or above its foundation budget.¹⁸⁶ State aid to public schools increased from \$1.6 billion in 1993 to \$4 billion in 2002.¹⁸⁷ Between 1993 and 2003, the Commonwealth spent a total of \$30.8 billion in state aid to public schools.¹⁸⁸ State aid also reduced or reversed spending gaps between districts. In 1993, the top 25% of districts by property wealth spent 38% more per pupil than the lowest 25%; in 2003, the difference was reduced to 19%.¹⁸⁹ In terms of numbers of students eligible for free or reduced-price lunch, the 25% of districts with the most students in poverty spent 4% less than the 25% of districts with the least numbers of poor students in 1993; in 2002, the numbers reversed, with the highest poverty districts spending \$8,504, or 5% more than the lowest poverty districts at \$8,144.¹⁹⁰ In addition, the curriculum frameworks were adopted in

¹⁷⁹ Birmingham Interview, *supra* note 120.

¹⁸⁰ Peter J. Howe, *Planned School Aid Hike Is Cut; House Chairman Says \$46m Must Go*, BOSTON GLOBE, Apr. 4, 1995, at 23.

¹⁸¹ Birmingham Interview, *supra* note 120; *see also* Howe, *supra* note 180.

¹⁸² Shapiro Interview, *supra* note 30; Weisman Interview, *supra* note 50; *see also* Jordana Hart, *Education Funding Suit Reopened*, BOSTON GLOBE, May 11, 1995, at 64.

¹⁸³ *See* Birmingham Interview, *supra* note 120; Weisman Interview, *supra* note 50.

¹⁸⁴ In 1999, the house budget cut \$90 million from what had been promised for education reform, and the budget was held up for six months because Senator Birmingham refused to pass it without fully funding the Act. *See* Doreen Iudica Vigue, *Education Reform Funds May Be Cut; Schools Losing State House Allies*, BOSTON GLOBE, Oct. 18, 1999, at A1. Later that year then-Governor Cellucci vetoed \$94 million of school aid, and the veto was unanimously overridden by the house and senate. *See* Michael Crowley, *Lawmakers Override Veto of School Aid; \$94m Fund Restored as Cellucci Suffers Setbacks in Final Hours*, BOSTON GLOBE, Nov. 18, 1999, at A1.

¹⁸⁵ Birmingham Interview, *supra* note 120.

¹⁸⁶ *Hancock ex rel. Hancock v. Driscoll (Botsford Report)*, No. 02-2978, 2004 WL 877984, at *8 (Mass. Super. Apr. 26, 2004).

¹⁸⁷ *Id.*

¹⁸⁸ *See id.*

¹⁸⁹ *Id.* at *14.

¹⁹⁰ *Id.* at *14.

1996,¹⁹¹ and the Massachusetts Comprehensive Assessment System (MCAS) test¹⁹² and school and district accountability systems were administered for the first time in 1998.¹⁹³

Despite the fact that the foundation budgets were about to be fully funded and the accountability system implemented, plaintiffs filed for additional relief in December of 1999.¹⁹⁴ This was not a surprise. Many Council groups thought from the beginning that the foundation budget would not be sufficient. Two days before the ERA was signed by Governor Weld, the Massachusetts Teachers Association (MTA) argued that the foundation budget was inadequate.¹⁹⁵ The union introduced a proposal which would have set the annual foundation budget at an average of \$6,000 per student, rather than the \$5,500 included in the Act.¹⁹⁶ Norma Shapiro explained that because the formula had not been adjusted for inflation and for various other reasons, the foundation budget was about \$1,000 per student too low from the start.¹⁹⁷ However, Council members recognized that, for political reasons, they needed to allow the foundation budget to be implemented before filing for additional relief.¹⁹⁸

¹⁹¹ See *id.* at *8; Birmingham Interview, *supra* note 120.

¹⁹² *Botsford Report*, 2004 WL 877984, at *9. The test is currently given in English/language arts (ELA), math, and science/technology classes. All high school students must achieve a score of “Needs Improvement” or better on the tenth grade ELA and mathematics tests in order to receive a diploma. *Id.*

¹⁹³ *Id.* at *9–13. The elaborate system provides that schools with the lowest performance ratings can be referred to the Department of Education (the Department) for review to determine whether they are “underperforming.” *Id.* at *11. An “underperforming” determination leads to technical assistance from the Department and eventually to corrective action. *Id.* at *12. On the other hand, schools that drastically improve student performance can be named “compass” schools to help disseminate best practices. *Id.* at *11. Due to a lack of resources, the Department actually reviews very few schools each year. *Id.* at *11–12. In 2001, the Department identified between 100 and 200 schools as candidates for underperforming status because of very low MCAS performance but reviewed only twelve. *Id.*

¹⁹⁴ See *Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134, 1145 (Mass. 2005).

¹⁹⁵ See *Howe*, *supra* note 171.

¹⁹⁶ Diego Ribadeneira & Victoria Benning, *Panel Urges Unity on School Reform Plans*, BOSTON GLOBE, Nov. 21, 1992, at 14.

¹⁹⁷ Shapiro Interview, *supra* note 30. Ms. Shapiro explained that a number of items that the MBAE had kept outside the foundation budget, including preschool and teacher training, were included by the legislature in the budget without raising the overall funding. See *id.* However, this appears to be incorrect. *Every Child a Winner! A Proposal for a Legislative Action Plan for Systemic Reform of Massachusetts’ Public Primary and Secondary Education System* specifically states that the budget of approximately \$5,600 per student includes \$475 million per year for preschool and \$73 million per year to provide additional salary payments for some teachers. *EVERY CHILD A WINNER!*, *supra* note 37, at D-18. Because the ERA did not finance preschool at all, theoretically, the foundation budget should have been lowered to reflect that missing cost. *Id.*

¹⁹⁸ Rom Interview, *supra* note 39; Shapiro Interview, *supra* note 30.

D. *HANCOCK V. COMMISSIONER OF EDUCATION*1. *Plaintiffs' and Defendants' Strategy*

In *Hancock*, plaintiffs employed a strategy similar to their winning efforts in *McDuffy*. The Council again filed suit on behalf of nineteen students from nineteen districts across the Commonwealth.¹⁹⁹ They claimed that public education in the plaintiff districts had not improved significantly since 1993 and that the Commonwealth was still in violation of its constitutional duty to provide students with an education.²⁰⁰ They reasoned that because the foundation budget was created before the curriculum frameworks or the MCAS test was adopted, the Commonwealth could not predict what it would cost to provide all students with the constitutionally required education.²⁰¹ Therefore, a costing-out study was required.²⁰²

The defendants' strategy was largely determined before the plaintiffs filed for additional relief: focus on the last sentence of *McDuffy*, and argue that the legislature had taken appropriate action within a reasonable time.²⁰³ Deirdre Roney, chief counsel for the defendants in *Hancock*, believed that the sentence was not just a throwaway, but a deliberate standard that the court should and would apply.²⁰⁴ Therefore the proper focus of the case would be on the specific actions the state had taken over the years, and not on the quality of education in the plaintiffs' districts.²⁰⁵

2. *Stipulation Attempt and the Road to Trial*

Attempts to reach a stipulated factual record did not go well. Unlike in *McDuffy*, where the plaintiffs' attorneys enjoyed a close relationship with Attorney General Harshbarger's office, relationships between the *Hancock* attorneys were strained.²⁰⁶ After strongly encouraging the

¹⁹⁹ *Hancock ex rel. Hancock v. Driscoll (Botsford Report)*, No. 02-2978, 2004 WL 877984, at *4 (Mass. Super. Apr. 26, 2004). While *McDuffy* was handled pro bono, *Hancock* was financed mostly by the MTA and the MFT. Kevin Rothstein, *Funding Advocate Puts Money Where Her Mouth Is*, BOSTON HERALD, Apr. 27, 2004, at 5.

²⁰⁰ *Hancock v. Comm'r of Educ.*, 822 N.E.2d 1134, 1145 (Mass. 2005).

²⁰¹ See *Botsford Report*, 2004 WL 877948, at *126-27.

²⁰² Weisman Interview, *supra* note 50.

²⁰³ Wilkins Interview, *supra* note 44.

²⁰⁴ Roney Interview, *supra* note 178.

²⁰⁵ *Id.* The argument was not that money did not matter. Instead, through conversations with staff at the Department of Education, Ms. Roney developed the idea that while money did matter (and was greatly increased by the legislature after *McDuffy*), what was needed to help failing districts meet state standards was accountability and technical assistance from the Department and not more money. See *id.*

²⁰⁶ Mr. Weisman and Mr. Rom could not say enough about how different their relationship with the Attorney General's ("AG") office was between *McDuffy* and *Hancock*. See Rom Interview, *supra* note 39; Weisman Interview, *supra* note 50. Alan Rom said that the AG's office had no interest in stipulating to anything, including "whether the sun was shining or it

parties to reach a stipulated agreement, Justice Greaney, the single justice with jurisdiction over the case, referred the case to then-Judge Margot Botsford of the superior court.²⁰⁷ The reference order instructed Judge Botsford to hear the parties and their witnesses and make findings of fact and such recommendations as she considered material.²⁰⁸

A number of pre-trial issues illustrate key points about the *Hancock* case. First, Judge Botsford and the plaintiffs agreed that a trial could not proceed with all nineteen plaintiff districts.²⁰⁹ Judge Botsford therefore asked both parties to select between two and six “exemplary” districts on which to focus factual evidence.²¹⁰ The plaintiffs agreed, but the defendants refused; they agreed to select particular schools, but refused to select any districts.²¹¹ The plaintiffs proceeded to choose their own “focus” districts, this time Brockton, Lowell, Springfield, and Winchendon, and then asked the defendants to stipulate that the four districts were typical of all nineteen plaintiff districts.²¹² Defendants again refused.²¹³ They had commissioned Dr. Moscovitch, the economist who wrote the foundation budget for the MBAE, to do a study of the plaintiff districts and, based on his findings, concluded that none of the plaintiff districts were typical.²¹⁴

was nighttime or daytime.” Rom Interview, *supra* note 39. Deirdre Roney characterized her model for a relationship with opposing counsel as “a good divorce [which] requires a level of civility.” Roney Interview, *supra* note 178.

²⁰⁷ *Hancock ex rel. Hancock v. Driscoll (Botsford Report)*, No. 02-2978, 2004 WL 877984, at *3 (Mass. Super. Apr. 26, 2004); Interview with Judge Margot Botsford, Superior Court Judge, Superior Court of Massachusetts, in Cambridge, Mass. (Jan. 31, 2007) [hereinafter Botsford Interview]; Weisman Interview, *supra* note 50. Justice Botsford was nominated to the Supreme Judicial Court by Governor Deval Patrick on July 26, 2007, and was sworn in on September 4, 2007. See April Simpson, *Patrick Hails Jurist as Ideal Pick for SJC*, BOSTON GLOBE, July 27, 2007, at B3; Steve LeBlanc, *Patrick Swears in Botsford to Supreme Judicial Court*, BOSTON.COM, Sept. 4, 2007, http://www.boston.com/news/local/massachusetts/articles/2007/09/04/patrick_swears_in_botsford_to_supreme_judicial_court.

²⁰⁸ *Botsford Report*, 2004 WL 877984, at *3.

²⁰⁹ Weisman Interview, *supra* note 50.

²¹⁰ *Id.*

²¹¹ Botsford Interview, *supra* note 207.

²¹² *Id.*

²¹³ *Id.* Plaintiffs switched Leicester for Springfield. However, Springfield public schools were extremely different in terms of performance and quality and the difference was not related to funding. *Botsford Report*, 2004 WL 877984, at *32. This allowed the defendants to argue that targeted assistance from the Department of Education, not increased funding, was what Springfield’s failing schools, and all failing schools, needed in order to succeed. Brief for Appellants Commissioner of Education et al. at 115–16, *Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134 (Mass. 2005) (No. SJC-09267) [hereinafter Brief for Appellants]. Ms. Roney thought the plaintiffs’ choice of focus districts was a mistake. Roney Interview, *supra* note 178.

²¹⁴ Roney Interview, *supra* note 178. Dr. Moscovitch called his analysis the “value added” approach. See *Botsford Report*, 2004 WL 877984, at *124–25. He analyzed performance data for each school district and calculated an average proficiency score for students of various demographic subgroups. *Id.* at *124. He then calculated an expected proficiency

Second, because *McDuffy* assigned to the Commonwealth the responsibility of “defining the specifics and the appropriate means to provide the constitutionally-required education,” the plaintiffs and Judge Botsford asked the defendants to define the constitutionally required minimum level of education that the Commonwealth had to provide.²¹⁵ The defendants refused, believing that the entire inquiry was contrary to *McDuffy* and that the real question was whether appropriate action had been taken within a reasonable time.²¹⁶ In the absence of guidance from the defendants, the plaintiffs presented evidence that the Commonwealth itself considered the curriculum frameworks to be the definition of a constitutionally required education, and argued that the frameworks should therefore be the guide by which to judge education in the plaintiff districts.²¹⁷ Judge Botsford agreed and so ordered.²¹⁸

3. *Trial and Judge Botsford’s Report*

From June 2003 to January 2004, Judge Botsford heard testimony from 114 witnesses and accepted more than one thousand exhibits.²¹⁹ She released a 318-page report in April 2004.²²⁰ Defendants presented evidence of the steps the Commonwealth had taken to improve education throughout the state. Their witnesses testified, and Judge Botsford found, that the curriculum frameworks were world class documents of exceptional quality, the teacher certification requirements were among the most rigorous in the country, the school and district accountability system was one of the first of its kind in the United States, and the MCAS test was of high quality.²²¹ However, Judge Botsford also found that the Department of Education lacked the capacity to implement the accountability system.²²² The Department reviewed only twelve to four-

score for each district in the Commonwealth based on the number of students in each demographic subgroup in the district. *Id.* A district’s “value added” was any positive difference between its actual proficiency score and its expected proficiency score based on the model. *Id.* at *124. Moscovitch then compared districts’ “value added” with their per-pupil spending and concluded there was generally no positive relation between spending and performance. *Id.* at *124–25.

²¹⁵ *Botsford Report*, 2004 WL 877984, at *16 (quoting *McDuffy v. Sec’y of Executive Office of Educ.*, 615 N.E.2d 516, 554 n.92 (Mass. 1993)); *Botsford Interview*, *supra* note 207.

²¹⁶ *Roney Interview*, *supra* note 178.

²¹⁷ Chairman of the Board of Education, James Peyser, and Deputy Commissioner of Education, Mark McQuillan, testified that the curriculum frameworks were intended to implement the seven capabilities outlined in *McDuffy*. Brief for Appellees at 13, *Hancock*, 822 N.E.2d 1134 (No. SJC-09267).

²¹⁸ *Botsford Report*, 2004 WL 877984, at *16; *Botsford Interview*, *supra* note 207.

²¹⁹ *Hancock*, 822 N.E.2d at 1145.

²²⁰ See generally *Botsford Report*, 2004 WL 877984.

²²¹ *Id.* at *8–19, 113.

²²² *Id.* at *144.

teen schools per year, even though hundreds of schools' performances made them eligible for accountability review.²²³

Plaintiffs presented evidence of the quality of education in each of the four focus districts, focusing on the implementation, or lack thereof, of the curriculum frameworks, number of certified teachers, MCAS scores, SAT scores and dropout rates, special education services, and more.²²⁴ Judge Botsford found that each district was failing to provide an educational program that conformed to the curriculum frameworks or the seven *McDuffy* capabilities.²²⁵ In many ways, facts on the ground were similar to those described in 1993. In Lowell high school, some health classes had more than forty students, and the department was managed by the foreign languages chair, who had no background in health.²²⁶ One Springfield middle school taught students in coatrooms and locker rooms, had no science lab, and had twelve microscopes for 930 children.²²⁷ Approximately forty percent of Springfield ninth-graders graduated with their class in four years.²²⁸ In Winchendon, no subjects were aligned to the curriculum frameworks, there were no high school electives, and no middle school math teachers were actually certified in math.²²⁹ However, Judge Botsford found that some of these problems originated in the districts themselves. Lowell refused to spend the funds required by the state; Springfield had both fantastic and terrible elementary schools, with variation that was not related to funding and instead reflected problems of management and leadership; and teachers and administrators in Winchendon were passive and did not care to make changes in the school system.²³⁰ Defendants chose not to present evidence about the quality of education in the plaintiff districts, preferring to elicit positive information about the districts from plaintiff witnesses on cross examination.²³¹

Both parties presented evidence about funding, which was largely rejected by the judge. Dr. Robert Costrell, chief economist of the Commonwealth, testified that once a district spent one hundred percent of its

²²³ *Id.* at *144. The Department's staff had been cut from one thousand to fewer than four hundred at a time when its responsibilities multiplied. *Id.*

²²⁴ Deirdre Roney thought the plaintiffs were "trying the case that they won on ten years ago [in *McDuffy*] rather than getting beyond that." Roney Interview, *supra* note 178. She had thought they would have spent more time on the accountability system and how under-funded it was. *Id.*

²²⁵ *Botsford Report*, 2004 WL 877984, at *19–37.

²²⁶ *Id.* at *66.

²²⁷ *Id.* at *27, 29.

²²⁸ *Id.* at *92.

²²⁹ *Id.* at *34.

²³⁰ *Id.* at *26–37. There was no evidence that any Winchendon teacher had ever attended one of the free summer training institutes offered by the Department, and the district had never applied for available professional development grants. *Id.* at *107.

²³¹ Roney Interview, *supra* note 178.

foundation budget, there was no evidence that increased spending would improve performance.²³² Instead, student performance was largely determined by district median income.²³³ Dr. Moscovitch presented his “value added” study, which showed that there was no positive correlation between spending and performance.²³⁴ Judge Botsford rejected both studies and also found that the “successful schools” and “professional judgment” funding models presented by the plaintiffs’ experts were seriously flawed.²³⁵ However, she nonetheless held that the foundation budget did not provide sufficient funds to finance the constitutionally required education, explaining that while plaintiff districts generally spent one hundred percent of their foundation budgets, among the top performing seventy-five districts in the Commonwealth, actual spending was about 130% of foundation.²³⁶ Additionally, witnesses for both parties testified that the foundation budget did not accurately reflect the cost of an adequate education in certain areas.²³⁷ Judge Botsford found that the foundation budget under-funded special education, implementation of the curriculum frameworks, teacher salaries, bilingual education, the low income factor, growing student enrollment, and more.²³⁸

The plaintiffs also presented voluminous testimony on remedies. They focused on preschool because they believed that early childhood education was critical in order to ensure the future success of children in school,²³⁹ and witnesses for both parties unanimously agreed that high quality preschool for three and four year olds could significantly improve a child’s performance in school, particularly for students at risk of school

²³² *Botsford Report*, 2004 WL 877984, at *124.

²³³ *Id.*

²³⁴ *Id.* at *124–25.

²³⁵ *Id.* at *119–25. Dr. Costrell pointed out that under the plaintiffs’ “successful schools” model, two thirds of the “successful” districts were not spending what the model deemed “necessary” to fund an adequate education, and under the “professional judgment” model, only five districts in the entire Commonwealth were spending enough. *Id.* at *121 n.152. Mr. Weisman knew about Dr. Costrell’s critiques but decided to present the costing out studies anyway because he thought the strengths of the testimony outweighed the weaknesses. Weisman Interview, *supra* note 50.

²³⁶ *Botsford Report*, 2004 WL 877984, at *122–23. If these districts thought their foundation budgets were sufficient to provide an adequate education, theoretically they would not have consistently spent more.

²³⁷ Edward Moscovitch and then-Commissioner Driscoll both testified that the foundation budget was inadequate when it came to special education. *Id.* at *126. The Associate Commissioner of Education for School Finance testified that the foundation budget underestimated how much districts spent on teacher salaries. *Id.* at *127. Dr. Moscovitch advocated adding money to the formula for building local leadership capacity and creating a formal preschool education program. *Id.* at *128. He also thought the low income factor should be increased. *Id.*

²³⁸ *Id.* at *126–28.

²³⁹ Weisman Interview, *supra* note 50.

failure due to poverty, learning disabilities, or limited English proficiency.²⁴⁰

Judge Botsford concluded that while the Commonwealth had made significant progress throughout the state, the plaintiff districts were not implementing the curriculum frameworks or providing the constitutionally required education under *McDuffy*.²⁴¹ She recommended that the defendants be ordered to ascertain and implement the actual cost of providing the level of education constitutionally required by *McDuffy*.²⁴² Items that “must” have been included in the cost study were special education, implementation of the curriculum frameworks, facilities, and a public preschool program for three and four year old children at risk.²⁴³

In retrospect, Judge Botsford explained that she believed the last sentence of *McDuffy* retained jurisdiction but did not eliminate or in any way lessen the Commonwealth’s duty to provide students with the constitutionally required education.²⁴⁴ Therefore, she thought that the state’s efforts were to be judged not by whether the curriculum frameworks were world class documents or the MCAS test was well respected, but by how that translated into the education that children in the plaintiff districts were receiving.²⁴⁵ She also confessed that she regretted including the remedial section in her report and thought that the SJC might have decided *Hancock* differently if she had found only that the Commonwealth was violating its constitutional duty and left the remedy to the legislature.²⁴⁶

4. *Briefs of the Parties*

In May 2004, Justice Greaney reserved and reported the case to the full SJC to determine “whether, within a reasonable time, appropriate legislative action has been taken to provide public school students with the education required under the Massachusetts Constitution.”²⁴⁷

²⁴⁰ *Botsford Report*, 2004 WL 877984, at *137. Witnesses for the plaintiffs testified that the quality of community-based preschool programs was not as high or as consistent as public preschool programs. *Id.* at *140. The plaintiffs also presented evidence on the benefits of small class sizes (fewer than twenty students) in grades K-3 and the importance of additional services beyond the regular school day for children at risk. *Id.* at *141–42.

²⁴¹ *Id.* at *143.

²⁴² *Id.* at *145.

²⁴³ *Id.* at *146. Items that “should” have been considered for inclusion were teacher salaries, the low income factor, and the bilingual factor; other proposed factors for technology, teacher coaches, and school leadership; class sizes of fewer than twenty for grades Kindergarten through 3; school libraries; and remedial programs such as tutoring, extended day, and extended year. *Id.* at *147.

²⁴⁴ Botsford Interview, *supra* note 207.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134, 1146 (Mass. 2005). This framing of the issue illustrates how the “appropriate action/reasonable time” inquiry can be equivalent to

The parties' briefs reflected their views of the issue and were therefore extremely different. Whereas in *McDuffy* the parties had stated the issue identically, the *Hancock* parties stated the issue alternatively as: 1) whether appropriate action within a reasonable time had been taken and the remedy ordered by the superior court violated separation of powers,²⁴⁸ and 2) whether the Commonwealth was providing plaintiff children with the minimum level of education required by the constitution and the relief ordered by the superior court was proper.²⁴⁹

Defendant-appellants did not contend that any of Judge Botsford's findings were clearly erroneous, believing that the case would be won or lost on the standard the court employed.²⁵⁰ However, they portrayed Judge Botsford as having found that the Commonwealth violated its constitutional duty because the focus districts did not have educational outcomes equal to the comparison districts.²⁵¹ They argued that because funding disparities between poor and wealthy districts had narrowed, closed, or even reversed, funding had to be adequate, because wealthy districts could not be expected to under-fund themselves.²⁵² In addition, they claimed that actual spending would obviously be higher than foundation budget in wealthy districts because foundation budgets in wealthy districts were lower to begin with.²⁵³ They characterized the plaintiffs as arguing that "across-the-board, unrestricted spending increases [were] a

the "are the plaintiffs receiving the constitutionally mandated education" inquiry. If appropriate action is defined as action which provides all students with the constitutionally required education, then appropriate action would not have been taken unless all students were receiving the education mandated by *McDuffy*. However, the plaintiffs did not spend a significant amount of time pushing this interpretation of "appropriate" in their briefs; the issue is first discussed on page 99. See Brief for Appellees, *supra* note 217, at 99–100. The defendants avoided defining "appropriate" altogether. When pressed for a definition, Ms. Roney defined "appropriate" in terms of approaches within the broad range of accepted educational choice and within the range of what other states have done. Roney Interview, *supra* note 178.

²⁴⁸ See Brief for Appellants, *supra* note 213, at 1–2.

²⁴⁹ See Brief for Appellees, *supra* note 217, at 1.

²⁵⁰ Roney Interview, *supra* note 178.

²⁵¹ Brief for Appellants, *supra* note 213, at 15. Judge Botsford focused on whether the plaintiff schools were implementing the curriculum frameworks and the *McDuffy* capabilities. She did not mandate "equal" results, unless all students receiving an adequate education could be construed as "equal." See *Hancock ex rel. Hancock v. Driscoll (Botsford Report)*, No. 02-2978, 2004 WL 877984, at *16–37 (Mass. Super. Apr. 26, 2004).

²⁵² Brief for Appellants, *supra* note 213, at 29. This contention implicitly denies a major assumption of the foundation budget—that poor schools need more money than wealthy schools in order to provide their students with an adequate education.

²⁵³ *Id.* at 113; Reply Brief for Appellants at 14, *Hancock v. Comm'r of Educ.*, 822 N.E.2d 1134 (Mass. 2005) (No. SJC-09267). This reflected the fact that wealthier districts had less needy student populations and, according to the ERA, required less money to provide those students with an adequate education than poor districts. The fact that wealthy districts spent above their foundation budgets still showed that they believed that the foundation funding level was not sufficient to provide their students with the kind of education they wanted to provide. See Brief for Appellees, *supra* note 217, at 117–18.

better way to improve student performance in struggling schools and districts than accountability and targeted assistance.”²⁵⁴ As such, they stressed, it was the province of the legislature, not the court, to decide how to help failing schools.²⁵⁵ Therefore, their argument concluded, the appropriate inquiry in *Hancock* was not the level of education provided in the focus districts, but whether the Commonwealth had taken appropriate action within a reasonable time.²⁵⁶ This standard properly placed responsibility for education policy in the elected branches. In contrast, Judge Botsford’s attempt to mandate particular education policy choices, especially with regard to preschool, violated the separation of powers.²⁵⁷

Plaintiff-appellees spent the first eighty pages of their brief largely repeating Judge Botsford’s findings and conclusions.²⁵⁸ Eventually, they contended that the Commonwealth was attempting to shift the inquiry from whether the constitutional mandate was being met to whether appropriate action had been taken within a reasonable time, a task it defined as improvement, not compliance.²⁵⁹ According to plaintiffs, the constitution required more from the Commonwealth than doing its best.²⁶⁰ *McDuffy* did not hold that “improvement, however marginal and regardless of how many thousands of children [were] leaving school un-equipped with the seven capabilities and ill equipped to succeed in life, [was] constitutionally sufficient.”²⁶¹ In fact, whether appropriate action within a reasonable time had been taken had to be judged with regard to whether all students in the plaintiff districts were receiving the constitutionally required minimum level of education.²⁶² Creating academic standards, a student assessment system, and teacher certifications that were national models was not constitutionally sufficient if such programs were not being implemented in the plaintiff districts.²⁶³ In addition, addressing school failure through accountability and targeted assistance from the Department of Education was ineffective because Judge Bot-

²⁵⁴ Brief for Appellants, *supra* note 213, at 114.

²⁵⁵ *Id.* at 126–28.

²⁵⁶ *Id.* at 119–20.

²⁵⁷ *Id.* at 123–28.

²⁵⁸ See Brief for Appellees, *supra* note 217, at 6–81.

²⁵⁹ *Id.* at 96–99.

²⁶⁰ *Id.* at 5–6. The court disagreed. See *Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134, 1152–53 (Mass. 2005). Mr. Weisman explained that he thought appropriate action within a reasonable time was “the most absurd argument I’d ever heard” because it would mean holding adults to a lower standard than children. Weisman Interview, *supra* note 50. Children who wanted to graduate high school had to pass the MCAS; effort was not sufficient. *Id.* According to Weisman, holding that effort was sufficient for the state would be ridiculous.

²⁶¹ Brief for Appellees, *supra* note 217, at 96–97.

²⁶² *Id.* at 99. This point was not stressed and was first mentioned on page 97.

²⁶³ *Id.* at 102.

sford found that the Department was “not currently adequate to do the job.”²⁶⁴

Lastly, the plaintiffs addressed the defendants’ separation of powers arguments. They tried to characterize additional school funding and public preschool as constitutional mandates, not policy choices.²⁶⁵ They also analogized to the *Abbott v. Burke* litigation in New Jersey, claiming that both state supreme courts faced a “failure to educate that has persisted for decades,”²⁶⁶ and therefore needed to implement a remedy to correct longstanding constitutional violations.²⁶⁷

5. *Oral Argument and the Hancock Decision*

Oral argument went terribly for the plaintiffs. The justices’ questions are discussed further below, but it is sufficient to note that plaintiffs’ attorney Alan Rom said he knew the plaintiffs would lose after attending oral argument.²⁶⁸

The SJC decision reaffirmed *McDuffy*’s constitutional mandate and praised Judge Botsford’s report, but found that the Commonwealth was meeting “its constitutional charge to ‘cherish the interests of . . . public schools.’”²⁶⁹ Chief Justice Margaret H. Marshall, for a plurality consisting of herself, Justice Francis X. Spina, and Justice Robert J. Cordy, stated that the appropriate inquiry was, “whether, within a reasonable time, appropriate legislative action has been taken to provide public school students with the education required under the Massachusetts Constitution.”²⁷⁰ She openly acknowledged that serious inadequacies in public education remained, the goals of education reform had not yet been achieved, and the plaintiffs were not being well served by their schools.²⁷¹ However, Marshall stressed that the public school system was radically different from the one reviewed in *McDuffy*. “A system mired in failure has given way to one that, although far from perfect, shows a trajectory of progress.”²⁷² The elected branches were continuing to make education reform a priority and had undertaken a long-term, systematic, quantifiable and comprehensive process of reform to provide a high quality education to each child in the Commonwealth.²⁷³ Where,

²⁶⁴ *Id.* at 121 (quoting *Hancock ex rel. Hancock v. Driscoll* (Botsford Report), No. 02-2978, 2004 WL 877984, at *144 (Mass. Super. Apr. 26, 2004)).

²⁶⁵ *Id.* at 144.

²⁶⁶ *Id.* at 148.

²⁶⁷ In the *Abbott* litigation, the New Jersey Supreme Court ordered preschool and full-day Kindergarten. *Id.* at 148, 153.

²⁶⁸ Rom Interview, *supra* note 39.

²⁶⁹ *Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134, 1136–39 (Mass. 2005).

²⁷⁰ *Id.* at 1146.

²⁷¹ *Id.* at 1139–40.

²⁷² *Id.* at 1139.

²⁷³ *Id.* at 1140.

as in this case, “the independent branches of government have shown that they share the court’s concern, and that they are embracing and acting on their constitutional duty to educate all public school students,” the court could not conclude that judicial intervention was required.²⁷⁴

Justice Judith A. Cowin and Justice Martha B. Sosman concurred.²⁷⁵ They argued that the Education Clause did not impose any judicially enforceable duty on the Commonwealth and that, “instead, the clause should be construed as a broad directive, intended to establish the central importance of education in the Commonwealth and clarify that the legislative and executive branches will be responsible for the creation and maintenance of our public school system.”²⁷⁶

Justice Greaney—the only *Hancock* justice who had decided *McDuffy*—and Justice Roderick L. Ireland both dissented.²⁷⁷ Justice Greaney argued that statewide academic and teacher certification standards and student assessment systems could not satisfy the Commonwealth’s constitutional duty if they were not being implemented in plaintiff districts.²⁷⁸ The changes enacted by the legislature “must be judged on results and not on effort (no matter how praiseworthy).”²⁷⁹ Justice Greaney contended that Justice Marshall effectively overruled *McDuffy* by finding that the Commonwealth had fulfilled its constitutional duty through effort, not through results.²⁸⁰ Justice Ireland argued similarly.²⁸¹

II. INSTITUTIONAL CONSTRAINTS, POLITICS, AND LEGISLATIVE GOOD FAITH

The *Hancock* court held that the Commonwealth was not violating its constitutional duty to cherish the public schools.²⁸² This reinterprets *McDuffy* into an effort-based, rather than an outcome-based standard.

²⁷⁴ *Id.* at 1155.

²⁷⁵ *Id.* at 1159 (Cowin, J., concurring).

²⁷⁶ *Id.* at 1159 (Cowin, J., concurring). The concurring opinion is a bit unclear. At times the justices seem to say that *McDuffy* should be overruled and the Education Clause should be interpreted to impose no constitutional duty on the Commonwealth at all; at other times they seem to say that the Education Clause should impose a constitutional duty to provide for public schools, albeit a duty that is not judicially enforceable, arguing that the main problem with the *McDuffy* decision was the *Rose* factors. See *id.* at 1159–65 (Cowin, J., concurring).

²⁷⁷ Justice Greaney and Justice Ireland each wrote separate dissenting opinions, but joined in each other’s opinions. See *id.* at 1165 (Greaney, J., dissenting); *id.* at 1173 (Ireland, J., dissenting).

²⁷⁸ *Id.* at 166–69 (Greaney, J., dissenting).

²⁷⁹ *Id.* at 1169 (Greaney, J., dissenting).

²⁸⁰ *Id.* at 1171 (Greaney, J., dissenting).

²⁸¹ He accused Justice Marshall of implicitly overruling *McDuffy* by finding that the state’s “painfully slow” progress satisfied the Commonwealth’s constitutional duty. *Id.* at 1175 (Ireland, J., dissenting) (quoting *id.* at 1154).

²⁸² *Id.* at 1136–37, 1140.

McDuffy held that a constitutional education requires providing students with the seven *Rose* capabilities.²⁸³ However, the *Hancock* court did not consider whether children in the plaintiff districts were being provided with the seven capabilities.²⁸⁴ Instead, it found that the Commonwealth was not neglecting its constitutional duty and therefore judicial intervention was not required.²⁸⁵

Three factors help explain what led the court to reach this conclusion in *Hancock*. First, the court was aware of its own institutional constraints and concerns regarding its judicial role uniquely relevant to *Hancock* and the implementation of a remedy that would require increased funding for education. It intentionally chose not to impose a remedial order because it feared provoking inter-branch conflict. Second, the court's fears reflected its implicit and largely correct assumption that there was a lack of political will among policy elites, the legislature, the executive branch, and the public at large for investing substantial new money in underperforming districts. Third, the court believed that the legislative and executive branches acted in good faith to fulfill their constitutional duties under *McDuffy* and had been met with a fair amount of success statewide. The court felt that given the political branches' serious and intensive efforts to fulfill the constitutional mandate, judicial interference, even in the form of a finding of constitutional violation, would be inappropriate.

A. THE SUPREME JUDICIAL COURT'S FEAR OF ITS OWN INSTITUTIONAL CONSTRAINTS

Concerns about inter-branch conflict and the judiciary's role played a part in *Hancock*.²⁸⁶ In the days following the decision, Beacon Hill legislators and others openly speculated that the desire to avoid another standoff with the legislature motivated the court's ruling.²⁸⁷ The editor-in-chief of *Massachusetts Lawyers Weekly* acknowledged that while no one could "put their finger on it and say for sure there is some political

²⁸³ *McDuffy v. Sec'y of Executive Office of Educ.*, 615 N.E.2d 516, 554 (Mass. 1993).

²⁸⁴ Many have doubted from the start that the SJC would ever try to enforce the seven capabilities, believing them to be more of an aspiration than a concrete constitutional requirement. See Birmingham Interview, *supra* note 120; Wilkins Interview, *supra* note 44. This highlights the distinction between courts declaring constitutional violations and implementing remedies. While the seven capabilities were adopted in order to define the Commonwealth's constitutional obligation, one could argue that the capabilities themselves constitute, or at least require, a particular remedy.

²⁸⁵ *Hancock*, 822 N.E.2d at 1140.

²⁸⁶ These concerns were largely irrelevant in *McDuffy* because the court knew that the legislature had passed or was about to pass comprehensive legislation. Therefore, the decision could not have caused inter-branch conflict.

²⁸⁷ Michael Levenson & Jonathan Saltzman, *Legislators Praise Ruling on Poor Districts*, BOSTON GLOBE, Feb. 21, 2005, at B1.

wrangling going on here,” many people thought “that there might be exactly something like that going on—that somewhere in the analysis of this decision, some of the SJC justices thought it might not be the wisest thing to start another . . . standoff with the Legislature.”²⁸⁸

The *Hancock* justices previously clashed with the legislature over taxes, elections, and, most famously, same-sex marriage.²⁸⁹ In 1998, Massachusetts voters passed a clean elections law to provide for public funding of political campaigns, and although it was never repealed, the legislature refused to fund it.²⁹⁰ In February, 2002, the SJC held that the constitution required the legislature to finance clean elections.²⁹¹ The legislature refused.²⁹² In April, 2002, Justice Sosman ruled that the SJC would auction off state property if the legislature continued to refuse to fund the act.²⁹³ In response to the “darkest moment yet in the relationship between the Legislature and the judiciary,” a top lieutenant of the state house speaker introduced a budget rider to strip the justices of the power to hire their own personnel, including secretaries and law clerks.²⁹⁴ A year and a half later, in *Goodridge v. Department of Public Health*, the SJC held that the refusal to grant marriage licenses to same-sex couples lacked a rational basis and violated the state constitution.²⁹⁵ The senate then asked the court to clarify whether a proposed civil union bill, which would have prohibited same-sex marriage but permitted civil unions with all the benefits, rights, and responsibilities of marriage, would violate the constitution.²⁹⁶ The court said that it would.²⁹⁷ It is impossible to overstate the intense public and legislative scrutiny that *Goodridge* provoked. One representative filed a bill to have the four justices in the majority removed, a measure that had been attempted only twice in the Commonwealth’s history, most recently in 1922.²⁹⁸ Five people interviewed for this Article suggested that *Goodridge* and the

²⁸⁸ *Id.*

²⁸⁹ All of the justices who decided *Hancock* were appointed to the SJC by 2001. See Justices of the Supreme Judicial Court, <http://www.massreports.com/justices/AllJustices.htm> (last visited Mar. 28, 2008).

²⁹⁰ *Bates v. Dir. of Office of Campaign and Political Fin.*, 763 N.E.2d 6, 9 (Mass. 2002).

²⁹¹ *Id.* at 11.

²⁹² *House Member Blasts Legislative Leaders*, BOSTON GLOBE, Mar. 7, 2002, at B3.

²⁹³ Rick Klein, *SJC Ready to Sell State Property to Pay for Clean Elections*, BOSTON GLOBE, Apr. 6, 2002, at B3.

²⁹⁴ Frank Phillips, *Judges Watch as Legislators Ready a Power Play; Analysts See Threat to Judicial Authority*, BOSTON GLOBE, May 7, 2002, at B1.

²⁹⁵ 798 N.E.2d 941 (Mass. 2003).

²⁹⁶ *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565, 566 (Mass. 2004).

²⁹⁷ *Id.* at 572.

²⁹⁸ Raphael Lewis, *Foes of Gay Marriage Try Long Shot: Bill Seeks to Remove Four of SJC Justices*, BOSTON GLOBE, Apr. 20, 2004, at B1. Months later the SJC struck down a capital gains tax increase that had been made effective May 1, 2002. See generally *Peterson v. Comm’r of Revenue*, 806 N.E.2d 78 (Mass. 2004). The court held that the increase violated a constitutional requirement that all property be taxed at the same rate during the same calendar

clean elections case may have impacted the court's decision in *Hancock*;²⁹⁹ only one person doubted that the cases played a role.³⁰⁰

More importantly, during oral argument, the justices themselves indicated that they were concerned about their judicial role and their ability to implement any decision that would require increased funding for education.³⁰¹ Justice Greaney, who dissented in *Hancock* because he supported a finding of liability for the Commonwealth, asked Ms. Roney what would happen if the court ordered the legislature to fund universal preschool, and the legislature responded that it did not have the money. "What are we supposed to do? There's nothing we can do, right?"³⁰² Later, he suggested that before courts "bite off big constitutional issues," they have to think about how they are going to enforce their orders.³⁰³ "Now, we learned in clean elections that that turned out to be extremely difficult, and ended up, in my opinion, to be a stalemate between us and the legislature."³⁰⁴ Greaney explained that *Goodridge* was different because it was easily enforceable; the court could just order the issuance of marriage licenses.³⁰⁵ However, any costing-out study in *Hancock* would end with someone asking the court to order the legislature to appropriate more money, and courts in other states that had gone down this route had ended up in "quagmires."³⁰⁶ Justice Sosman, who concurred in *Hancock*, agreed that a remedial order would get the court into "very treacherous waters."³⁰⁷ Chief Justice Marshall asked what would happen if "you identify the measures that are necessary and then the Commonwealth comes back and says 'there's absolutely no way. We've gone to the legislature and the legislature hasn't funded those.'"³⁰⁸

Justice Cowin, who also concurred, thought the entire area was one for the legislature, not the court. She asked, "Why is it up to the court to mandate mandatory preschool? . . . Isn't that something for the legisla-

year. The ruling aggravated an already tense relationship between the legislature and the court.

²⁹⁹ Birmingham Interview, *supra* note 120; Blum Interview, *supra* note 125; Reville Interview, *supra* note 69; Rom Interview, *supra* note 39; Interview with Jarrett Barrios, Former Senator, Massachusetts State Senate, in Boston, Mass. (Feb. 14, 2007) [hereinafter Barrios Interview]. Barrios served as a state senator from 2002–2007 and resigned in May of 2007 to become president of the Blue Cross Blue Shield of Massachusetts Foundation. See Michael Levenson, *Barrios Set to Resign from State Senate—Says He Will Head Health Foundation*, BOSTON GLOBE, May 23, 2007, at B1.

³⁰⁰ Botsford Interview, *supra* note 207.

³⁰¹ See *supra* note 18.

³⁰² Audio tape of *Hancock* Oral Argument, *supra* note 19.

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Id.*

ture to decide?"³⁰⁹ She then told Mr. Weisman that he was asking them to "step into education and policy. Won't there always be someone to say that education isn't sufficient?"³¹⁰ These comments and questions make it clear that at least some of the justices were concerned about the judiciary's role, the court's institutional constraints, and how the court would implement any remedy that required the Commonwealth to take further action to provide the plaintiffs with an adequate education.

B. LACK OF POLITICAL INTEREST IN INVESTING NEW MONEY IN UNDERPERFORMING DISTRICTS

As discussed above, implicit in the justices' concerns about institutional competence, implementation of a judicial remedy, and inter-branch conflict was the assumption that education reform and the plaintiffs' case no longer enjoyed the type of broad based support they did during *McDuffy*. Stated otherwise, the court's concerns over how it would implement a judicial remedy would have been irrelevant if there had been substantial political support for the remedies the plaintiffs sought. This can be understood most clearly from *McDuffy*, where the legislature passed the Education Reform Act of 1993 before the court decision was handed down.³¹¹ The political situation shielded the *McDuffy* court from any fear of provoking the legislature with a major constitutional ruling. This section explores the politics of education reform during the time of *Hancock* and concludes that the court was correct in believing that a majority of policy elites, members of the public, and the legislative and executive branches did not support increased funding for plaintiff districts as a main component of education reform.

1. *Policy Elites Involved in McDuffy or the Education Reform Act*

A number of people and organizations that were instrumental in securing the ERA's passage and supported the plaintiffs in *McDuffy* felt differently about education reform and the *Hancock* suit ten years later. While a number of them supported a finding of liability for the Commonwealth, none thought that increased funding for plaintiff districts should be a main component of a new round of education reform.

Dr. Edward Moscovitch, the author of the foundation budget for the MBAE, testified for the defendants in *Hancock* that, in high poverty districts, there was "no positive relation between spending and perform-

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *See supra* Part I.B.

ance.”³¹² The day before oral argument, Dr. Moscovitch told the *Boston Globe* that “[t]he single biggest thing holding us back is not money.”³¹³ Instead, “principals and teachers don’t . . . know how to turn schools around, and the (Education) Department has not been in a position to implement a program to help them to do it.”³¹⁴

Paul Reville, co-founder of the MBAE and supporter of the plaintiffs in *McDuffy*, testified for the defendants in *Hancock*.³¹⁵ He felt ambivalent about the suit but was concerned that more money, by itself, would not help struggling districts.³¹⁶ His main focus during the *Hancock* era was on increased school time for at-risk students and capacity building to teach teachers how to bring all students to proficiency, not on an increase in the foundation budget.³¹⁷

The MBAE also did not see increasing the foundation budget as a major priority for education reform. In 2002, it published a report that called intervention in districts that could not teach their students the “next big issue faced by education reform.”³¹⁸ It called for a strategy of bringing outside change agents into underperforming districts:

MBAE believes that we must recognize that inherent structural flaws and ineffective local management can prevent the changes in curriculum, personnel and leadership that would lead to genuine improvements. We must be willing to challenge the status quo by shifting power away from those individuals and institutions that have not used it effectively.³¹⁹

³¹² *Hancock ex rel. Hancock v. Driscoll (Botsford Report)*, No. 02-2978, 2004 WL 877984, at *124–25 (Mass. Super. Apr. 26, 2004). For a discussion of Dr. Moscovitch’s testimony regarding costs that should be added to the foundation budget, see *supra* note 237.

³¹³ Jonathan Saltzman, *SJC Set to Weigh School Funding; Hundreds of Millions in State Aid at Stake*, BOSTON GLOBE, Oct. 3, 2004, at A1.

³¹⁴ *Id.* Similarly, Dr. Moscovitch published an article in 2004 praising Judge Botsford’s report but arguing that schools improve through data-driven instruction, something that more money would not necessarily ensure. Edward Moscovitch, *Passing Judgment: What it Will Take to Make Schools Constitutionally Adequate*, COMMONWEALTH, Summer 2004, at 9, 11–12.

³¹⁵ Reville Interview, *supra* note 69.

³¹⁶ *Id.* Mr. Reville thought that the Commonwealth had made a substantial effort, and he feared that if the adequacy arguments were pushed too strongly it could allow teachers and schools to escape accountability. *Id.*

³¹⁷ *Id.*; Scott Lehigh, Op-Ed, *The Case for Longer School Days*, BOSTON GLOBE, Jan. 19, 2005, at A15.

³¹⁸ Massachusetts Business Alliance for Education, *Intervening in Low Performing Districts: An Effective Strategy ii* (Dec. 2002) (unpublished manuscript, on file with the Massachusetts Business Alliance for Education), available at <http://www.mbae.org/uploads/13102003120347MBAEInterventionPaper.doc>.

³¹⁹ *Id.* at 2.

This strategy was directly at odds with the interests of the education establishment, who were represented on the Council and allied with the *Hancock* plaintiffs. The MBAE filed an amicus brief in *Hancock* contending that students in the plaintiff districts were not receiving a constitutional education under *McDuffy*.³²⁰ However, they did not support Judge Botsford's conclusion that a lack of funding constituted an important and independent cause of the failure in plaintiff districts. Therefore, they argued, it was "premature to require substantial new expenditures of public funds before the schools and districts that will receive new resources have the capacity to use those resources effectively."³²¹

Lastly, Senator Tom Birmingham and Representative Mark Roosevelt, champions of the ERA in the legislature, did not support plaintiffs' case. Before the plaintiffs filed *Hancock*, they met numerous times with Senator Birmingham's staff, who indicated that the senator thought any attempt to return to court would be premature while the legislature was fully funding the foundation budget.³²² Representative Roosevelt had already left the legislature and was the executive director of the MBAE while *Hancock* was pending.³²³ In an article in *Commonwealth Magazine*, he contended that without management reforms, including administrative power to remove poorly performing teachers, "additional resources sent directly to local districts might be inefficient or simply wasteful."³²⁴

2. *The Executive Branch*

While the former Commissioner of Education and the Board of Education arguably wanted to lose in *McDuffy*, this was certainly not true for the executive branch in *Hancock*.³²⁵ Then-Commissioner David

³²⁰ Brief of Amici Curiae Massachusetts Business Alliance for Education, *supra* note 174, at 11–15.

³²¹ *Id.* at 7.

³²² Birmingham Interview, *supra* note 120.

³²³ See Mark Roosevelt, *Remedy Lies in New Goals, New Strategies*, COMMONWEALTH, Fall 2004, at 87, 90.

³²⁴ *Id.* at 89. A week after *Hancock* was decided, Roosevelt published an Op-Ed in the *Boston Globe* arguing that once a certain level of spending had been reached, school reform was about more than money. See Mark Roosevelt, Op-Ed, *Unfinished Business: Real Reform*, BOSTON GLOBE, Feb. 20, 2005, at D1. He claimed that the education reform battle was between "those who are willing to take on powerful institutional interests and contemplate systemic change and those who are not" and characterized *Hancock* as a suit by the unions to divert attention from real reform. *Id.*

³²⁵ However, there were still Department employees who made statements that were helpful to the plaintiffs in *Hancock*. During his deposition, Deputy Education Commissioner Mark McQuillan agreed that some districts did not have sufficient resources to fully implement the curriculum frameworks. See Anand Vaishnav, *New Lawsuit Attacks Public School Funding*, BOSTON GLOBE, June 13, 2003, at B7; Weisman Interview, *supra* note 50. The AG's office submitted 110 corrections to his 120 minute deposition, and the plaintiffs called McQuillan as their first witness at the *Hancock* trial. Weisman Interview, *supra* note 50.

Driscoll testified that the foundation formula yielded adequate funding for Commonwealth schools.³²⁶ Indeed, Deidre Roney noted that he was “solidly behind” the defense, and Judge Botsford called him a “shill for the administration.”³²⁷ Additionally, then-Governor Mitt Romney made it abundantly clear that he did not think more money was the answer for improving failing schools.³²⁸ His administration’s chief economist, Dr. Robert M. Costrell, was the defense’s star witness on funding and spent countless hours working on the case and speaking to the media about how increased spending would not lead to increased school or student performance.³²⁹

3. *The Legislature*

Senator Jarrett Barrios and sixty other state legislators submitted an amicus brief in support of the plaintiffs in *Hancock*.³³⁰ The purpose of the brief was to “show the SJC there was broad support for [the plaintiff’s case and requested relief] so [the justices] didn’t feel like they were ‘meddling’ in what [was] the legislature’s duty.”³³¹ The message, however, did not get through. Ultimately, the court was seemingly correct in its implicit assessment of the legislature’s lack of political interest in greatly increasing funding in the plaintiff districts or embarking on a second round of comprehensive education reform.

By 2002, both Representative Roosevelt and Senator Birmingham had left the state legislature; no major champions of the ERA or school funding arose to take their place.³³² Senator Barrios implied that there was a sense of “been there, done that” when it came to education reform.³³³ Education in grades Kindergarten through twelve had taken priority over all other sectors in the 1990s, and by the time the Act was fully

³²⁶ *Hancock ex rel. Hancock v. Driscoll (Botsford Report)*, No. 02-2978, 2004 WL 877984, at *126, 129 (Mass. Super. Apr. 26, 2004). Commissioner Driscoll retired on August 31, 2007. See Press Release, Mass. Dep’t of Educ., *Deputy to Serve as Acting Commissioner After Education Chief Retires* (Apr. 24, 2007), available at <http://www.doe.mass.edu/news/news.asp?id=3384>.

³²⁷ Botsford Interview, *supra* note 207; Roney Interview, *supra* note 178.

³²⁸ See, e.g., Scott S. Greenberger, *With Suit Pending, School Aid Gets Second Look*, BOSTON GLOBE, Oct. 11, 2004, at B1.

³²⁹ Deidre Roney sometimes got emails from Dr. Costrell at 3:00 a.m. with new ideas for the case. Roney Interview, *supra* note 178. For an example of Dr. Costrell’s work, see Robert M. Costrell, *Wrong Answer on School Finances*, COMMONWEALTH, Fall 2004, at 79.

³³⁰ See Brief of Amici Curiae, *Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134 (Mass. 2005) (No. SJC-09267).

³³¹ Barrios Interview, *supra* note 299.

³³² Representative Roosevelt left the legislature to run for Governor in 1994. See Michael Kenney, *Kicking Off the City Campaigns*, BOSTON GLOBE, Dec. 25, 1994, at 3. Senator Birmingham did the same in 2002. See John Laidler, *Travaglini Faces Final Hurdle in Bid for Senate Presidency*, BOSTON GLOBE, Oct. 24, 2002, at 3.

³³³ Barrios Interview, *supra* note 299.

funded in 2000, many legislators thought it was time to concentrate on other things.³³⁴ Further, the foundation budget formula was not popular in the state house. Many legislators, especially those representing fast-growing suburban communities, thought the formula was short-changing his or her district.³³⁵ Additional pressure was placed on the legislature in 2000 when a coalition of suburban districts began a vigorous lobbying effort to get more state money for their schools.³³⁶ Senator Barrios explained that the “magic of changing the formula [became] everybody has to do better, or else you’re not going to get the votes.”³³⁷ Thus, a successful legislative attempt to increase the foundation budgets for failing schools would have meant a concomitant increase for wealthy schools.³³⁸ No Council groups ever seriously pushed a bill as comprehensive as Judge Botsford’s remedy before filing for additional relief.³³⁹ The MTA and other Council groups lobbied for foundation budget increases for plaintiff districts while *Hancock* was pending, but they never coalesced a movement centered on increasing state funding for underperforming schools.³⁴⁰ The MBAE was no longer active in lobbying at this point.³⁴¹ Many legislators dropped bills for their favorite projects, but there was no comprehensive vision for where the state should be headed on education reform.³⁴²

³³⁴ Birmingham Interview, *supra* note 120; Blum Interview, *supra* note 125; Reville Interview, *supra* note 69.

³³⁵ Barrios Interview, *supra* note 299.

³³⁶ Brian C. Mooney, *School Funding Under Scrutiny; Growing Suburbs Call Formula Unfair*, BOSTON GLOBE, Dec. 10, 2000, at B1. See Birmingham Interview, *supra* note 120; Blum Interview, *supra* note 125. The effort eventually paid off. In July, 2006, the legislature enacted a bill guaranteeing that within four years, each district would receive at least 17.5% of its foundation budget from state aid. See James Vaznis, *Suburbs Big Aid Winners; City Districts Get Smaller Increases*, BOSTON GLOBE, July 16, 2006, at 1. Under the original formula, some wealthy districts received less than 10% of their foundation budgets from the state. See *id.*; Shapiro Interview, *supra* note 30.

³³⁷ Barrios Interview, *supra* note 299.

³³⁸ *Id.*

³³⁹ Senator Birmingham said the MTA’s top priorities at the time were getting rid of charter schools and securing early retirement for teachers. Birmingham Interview, *supra* note 120. Senator Barrios confirmed that there was no major lobbying effort aimed at increasing the foundation budget until 2004. Barrios Interview, *supra* note 299.

³⁴⁰ For example, in 2003, the MTA introduced “A Bill to Ensure Adequate Resources to Help All Students Achieve.” See Massachusetts Teachers Association, *MTA’s Bill to Ensure Adequate Resources to Help All Students Achieve*, JUST THE FACTS, Jan. 20, 2003 (on file with author). By raising the sales tax one percent, the bill would have increased the foundation budget to provide for no more than fifteen students per class in kindergarten through third grade, full day kindergarten, \$1,000 in remediation funding for each student who failed MCAS, preschool for three and four year olds, a minimum teacher salary of \$42,000, increased special education and low income factors, and additional money for building assistance. *Id.*

³⁴¹ Jack Rennie’s death in early 2001 left a leadership gap not only in the MBAE, but in the greater world of Massachusetts education reform. See Editorial, *Rennie’s Achievement*, BOSTON GLOBE, Jan. 18, 2001, at A18.

³⁴² Blum Interview, *supra* note 125; Reville Interview, *supra* note 69.

Even as *Hancock* progressed, it remained a lawsuit that many people did not follow; it never created enough momentum to initiate a second round of education reform as *McDuffy* did for the ERA.³⁴³ After Judge Botsford released her report and the SJC heard oral argument, Senator Barrios introduced a bill to create a panel that would have calculated the cost of providing an adequate education in all underperforming districts.³⁴⁴ The legislation was supported by the MTA, the ACLU, and other Council groups.³⁴⁵ Despite more than half of the members of both houses of the legislature signing on to the bill, it never went anywhere before *Hancock* was decided because the house and senate leadership did not support it.³⁴⁶

4. *Public Opinion and The Boston Globe*

Most people were likely not paying much attention to *Hancock* or lobbying efforts in the legislature, and there was not widespread public support for a massive increase in funding to underperforming schools. Weeks before the *Hancock* decision, a poll by Mass Insight Education found that only 21% of Massachusetts adults surveyed thought that schools needed more money.³⁴⁷ MTA polls also revealed that most people believed that education had improved.³⁴⁸ On the contrary, in December, 1992, 50 to 66% of voters supported raising the sales tax as long as it was linked to education.³⁴⁹ The *Boston Globe*, which had been solidly behind the plaintiffs in *McDuffy*, later published several articles questioning whether more money mattered. For example, an editorial in September 2004 argued that “money isn’t the biggest factor in the next round of education reform at the elementary, middle, and high school levels.”³⁵⁰ The *Globe* later called *Hancock* “an educated ruling,” which recognized that “it will take more than adjustments to the state education funding formula to improve failing schools.”³⁵¹

³⁴³ Reville Interview, *supra* note 69. See also Blum Interview, *supra* note 125.

³⁴⁴ Scott S. Greenberger, *Panel to Study Schools Debated*, BOSTON GLOBE, Dec. 15, 2004, at B4.

³⁴⁵ *Id.*

³⁴⁶ Senator Antonioni, then senate chair of the joint education committee, declined to sign on to the bill because he did not think that significant new money would be involved in any new education reform efforts. *Id.*; Blum Interview, *supra* note 125.

³⁴⁷ Maria Sacchetti, *Group Seeks to Lift Worst State Schools*, BOSTON GLOBE, Feb. 2, 2005, at A1.

³⁴⁸ See Blum Interview, *supra* note 125.

³⁴⁹ Peter J. Howe, *Weld Seeks ‘Rescue’ of School Bill*, BOSTON GLOBE, Dec. 23, 1992, at 1.

³⁵⁰ Editorial, *Greater Expectations*, BOSTON GLOBE, Sept. 16, 2004, at A18.

³⁵¹ Editorial, *An Educated Ruling*, BOSTON GLOBE, Feb. 16, 2005, at A18.

C. THE COMMONWEALTH'S GOOD FAITH EFFORT AND STATEWIDE SUCCESS

The court's recognition of its own institutional constraints and correct assessment of the lack of political interest in providing substantial additional funding for underperforming districts helps to explain why the SJC refused to order Judge Botsford's proposed remedies. It does not, however, adequately explain why the SJC refused to find that the Commonwealth was violating its constitutional duty to educate plaintiff children.³⁵² Justice Greaney, who was most vocal during oral argument in expressing concerns about implementing a judicial remedy, supported a finding of liability for the Commonwealth.³⁵³ In addition, many legislators and policy elites agreed that the Commonwealth was violating its constitutional duty, at least as articulated by *McDuffy*.³⁵⁴ A finding of a constitutional violation without specifying a remedy would likely not have precipitated a major conflict between the legislative and judicial branches. Nonetheless, the SJC still found that the Commonwealth was fulfilling its constitutional duty to "cherish the interests of public schools."³⁵⁵ This was largely because the plurality believed that the Commonwealth had acted in good faith to improve education in the plaintiff districts and comply with the *McDuffy* ruling and was on the right path to success. This belief was bolstered by the fact that Massachusetts was a high-performing state and many of its efforts were nationwide models for education reform.

1. *The Commonwealth's Good Faith and Correct Path*

Both at oral argument and in the written opinions, the justices expressed the belief that the Commonwealth had acted in good faith to remedy constitutional violations and was on the correct path to success, and that the court should therefore not get involved. At oral argument, Justice Sosman stated, "Whatever the situation in particular districts, we are not confronted with a recalcitrant legislature that has refused to do anything to address these educational flaws."³⁵⁶ Similarly, Chief Justice

³⁵² The distinction between courts as finders of violations versus crafters of remedies underlies Judge Botsford's suggestion that the SJC might have decided *Hancock* differently on the constitutional violation question if she had limited her report to only finding a constitutional violation and not crafting a politically controversial remedy. See Botsford Interview, *supra* note 207.

³⁵³ See *Hancock v. Comm'r of Educ.*, 822 N.E.2d 1134, 1165–73 (Mass. 2005) (Greaney, J., dissenting); Audio tape of *Hancock* Oral Argument, *supra* note 19.

³⁵⁴ See Roosevelt, *supra* note 323, at 87, 88; Barrios interview, *supra* note 299. See generally *supra*, Part II.B.

³⁵⁵ See *Hancock*, 822 N.E.2d at 1136.

³⁵⁶ Audio tape of *Hancock* Oral Argument, *supra* note 19.

Marshall explained, “The commonwealth, DOE, has every interest in seeing every child educated. It has proceeded in good faith.”³⁵⁷

The plurality opinion could not say enough about how the Commonwealth had made a serious, good faith effort to improve education throughout the state.³⁵⁸ Chief Justice Marshall explained that “the legislative and executive branches have shown that they have embarked on a long-term, measurable, orderly, and comprehensive process of reform.”³⁵⁹ She contrasted the Massachusetts experience with reform efforts in New Jersey and New York, where

The respective courts stepped in, only reluctantly, after many years of legislative failure or inability to enact education reforms and to commit resources to implement those reforms. . . . In sharp contrast, the Massachusetts Legislature and Governor responded . . . with a comprehensive and systematic overhaul of State financial aid to and oversight of public schools. The level of responsive, sustained, intense legislative commitment to public education established on the record in this case is the kind of government action the Abbott and CFE court, in the respective underlying cases, had hoped to see from their Legislatures, and reluctantly concluded would not be forthcoming without a detailed court order.³⁶⁰

The justices also believed, as did many in political and public circles, that the Commonwealth was on the right track to improving underperforming districts and that additional funding was not the answer. For example, at oral argument, Justice Sosman asked Mr. Weisman, “What we have before us is information about four districts with some serious problems. What is irrational or wrong or unconstitutional about an approach that says ‘what we are going to do with those not doing well is go in and find out what the specific problem is, school by school?’”³⁶¹ Justice Cordy echoed that sentiment later in the argument.³⁶² When Mr. Weisman argued that the state could not be expected to meet its constitu-

³⁵⁷ *Id.*

³⁵⁸ *See, e.g., Hancock*, 822 N.E.2d at 1155 (plurality opinion) (“Here, the independent branches of government have shown that they share the court’s concern, and that they are embracing and acting on their constitutional duty to educate all public school students”); *id.* at 1158 (“I am confident that the Commonwealth’s commitment to educating its children remains strong, and that the Governor and the Legislature will continue to work expeditiously to ‘provide a high quality public education to every child.’” (quoting MASS. GEN. LAWS ch. 69, § 1 (2003))).

³⁵⁹ *Id.* at 1134, 1140.

³⁶⁰ *Id.* at 1153–54.

³⁶¹ Audio tape of *Hancock* Oral Argument, *supra* note 19.

³⁶² *Id.* Judge Cordy asked, “If you look at the individual districts and say, ‘why aren’t kids learning in these districts?’ then you can begin to quantify things. Some may be cost,

tional obligations without a study to show how much those obligations would cost, Chief Justice Marshall disagreed. She said that much more important than a costing out study would be figuring out why individual school districts and individual students were performing poorly, and that was not only a matter of money.³⁶³ Similarly, Justice Cordy suggested that accelerating the Department of Education's assessment of underperforming schools would also be more important than a costing out study.³⁶⁴ Chief Justice Marshall also stated, "What . . . comes out to me loud and clear is that there are real problems in this district that have nothing to do with money."³⁶⁵

2. *The Commonwealth's Leadership and Success Nationwide*

As discussed above, Judge Botsford found that the curriculum frameworks were world class documents, the teacher certification requirements were among the most rigorous in the country, the school and district accountability system was one of the first of its kind in the United States, and the MCAS test was of high quality.³⁶⁶ The *Hancock* plurality noted that the ERA had reduced, eliminated, or reversed spending gaps between districts based on property wealth,³⁶⁷ and that MCAS scores were improving in the focus districts.³⁶⁸ Brockton sixth graders scored one year and one month ahead of the national average on the Iowa Basic Skills test in language, six months ahead in math, and on par with the national average in reading.³⁶⁹ Judge Botsford also found that Massachusetts students performed at the highest levels on the National Assessment of Educational Progress (NAEP) test.³⁷⁰ In 2002, fourth graders scored second highest in the nation in writing and highest in reading, while eighth graders scored higher than students in forty-one other states in writing and higher than students in thirty-two states in writing.³⁷¹ In 2003, fourth graders tied for first place in reading and math; eighth graders tied for first place in reading and second place in math.³⁷²

leadership, curriculum . . . why isn't the Department's decision to proceed that way constitutional?" *Id.*

³⁶³ At another point, Chief Justice Marshall again asked why doing a costing-out study would be important if fixing failing schools was not just about money, but also about district leadership, capacity, and other areas on which the Department was already focusing. *Id.*

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ *Hancock ex rel. Hancock v. Driscoll (Botsford Report)*, No. 02-2978, 2004 WL 877984, at *8-19, 113 (Mass. Super. Apr. 26, 2004).

³⁶⁷ *Hancock v. Comm'r of Educ.*, 822 N.E.2d 1134, 1147-48 (Mass. 2005).

³⁶⁸ *Id.* at 1149-50.

³⁶⁹ *Id.* at 1150.

³⁷⁰ *Botsford Report*, 2004 WL 877984, at *15.

³⁷¹ *Id.*

³⁷² *Id.*

While the court did not specifically state that Massachusetts' ranking among other states influenced its judgment that the Commonwealth had not violated its constitutional duty, this likely played a role in the *Hancock* decision. A number of people interviewed focused on Massachusetts' status as a nationwide education leader.³⁷³ Michael Weisman suggested that the fact that Massachusetts does so well on national rankings might have influenced *Hancock*.³⁷⁴ Senator Birmingham questioned how, given the Commonwealth's indisputable success on nationwide tests and studies, the plaintiffs could argue that the system did not pass the threshold question of constitutionality.³⁷⁵ And the Rhode Island Supreme Court, in a school finance challenge, found it "of particular interest and significance" that per-pupil expenditure in Rhode Island ranked sixth highest in the nation and only Hawaii and the District of Columbia had a more equalized per-pupil expenditure.³⁷⁶ It is likely that these types of considerations affected the *Hancock* court as well.

III. IMPLICATIONS FOR THE ROLE OF COURTS IN SOCIAL CHANGE AND FOR FUTURE SCHOOL FINANCE LITIGATION

The *Hancock* decision has important implications for the role of courts in creating social change—specifically change in schools—and for plaintiffs that are contemplating school finance lawsuits. A number of scholars have suggested that courts cannot produce significant social change in the face of popular opposition. Some have claimed that this is particularly true in the area of school finance.³⁷⁷ *McDuffy* and *Hancock* provide partial, nuanced support for these theories but they also point in a different direction, one that has been less explored: regardless of a court's capacity to produce social change, a court might be unwilling to produce change in the face of popular opposition out of concern for judicial role and a fear of provoking inter-branch conflict. This reinforces the inter-connectedness of courts and the political branches of government, especially with regard to school finance. As for implications for future school finance suits, *Hancock* shows that courts may be unwilling to find constitutional liability in states where the political branches have engaged in a serious, sustained, successful effort to improve education in plaintiff districts. *Hancock* also shows that using objective performance

³⁷³ Reville Interview, *supra* note 69; Roney Interview, *supra* note 178.

³⁷⁴ Weisman Interview, *supra* note 50.

³⁷⁵ Birmingham Interview, *supra* note 120. Senator Birmingham noted that in 2005, Massachusetts fourth and eighth graders scored higher than students in any other state on the NAEP reading test and tied for first place in math. *See id.*; Scott Lehigh, Op-Ed, *Encouraging Signs for Education Reform*, BOSTON GLOBE, Oct. 21, 2005, at A17.

³⁷⁶ *Pawtucket v. Sundlun*, 662 A.2d 40, 60–61 (R.I. 1995).

³⁷⁷ *See infra* Part III.A.

standards to support findings of educational inadequacy may not be the “Midas touch” that some scholars have predicted.

A. IMPLICATIONS FOR THE ROLE OF COURTS IN CREATING SOCIAL CHANGE

The *McDuffy* and *Hancock* decisions have important implications for the efficacy of courts in producing social change. In *The Hollow Hope*, Gerald Rosenberg argues that United States courts can almost never effectively produce significant social reform: “at best, they can second the social reform acts of other branches of government.”³⁷⁸ Due to the limited nature of constitutional rights, a lack of judicial independence, and a lack of implementation power,³⁷⁹ courts can only make an impact when political, social, and economic forces have already moved society substantially along a path to reform. Even then, courts may be merely reflecting societal reform rather than independently furthering it.³⁸⁰ Therefore, “[t]urning to courts to produce significant social reform substitutes the myth of American courts for its reality. It credits courts and judicial decisions with a power that they do not have,”³⁸¹ allowing courts to “act as ‘fly-paper’ for social reformers who succumb to the ‘lure of litigation.’”³⁸²

While not as pessimistic, Michael Klarman agrees that court decisions cannot fundamentally alter society. According to Klarman, judges generally reflect popular opinion and rarely hold views deviating far from it. Their decisions therefore reflect the dominant opinion of the time and place.³⁸³ As such, litigation will rarely help those most desperately in need; instead, judges are only likely to protect minority groups that are supported by the majority.³⁸⁴ “[J]ustices are too much products of their time and place to launch social revolutions. And, even if they had the inclination to do so, their capacity to coerce change is too heavily constrained.”³⁸⁵

A number of scholars have applied these and other theories to the use of the courts to create social change specifically to the school finance

³⁷⁸ ROSENBERG, *supra* note 20, at 35. While Rosenberg concentrates on the role of the United States Supreme Court, his conclusions have implications for other courts, including state supreme courts.

³⁷⁹ These are Rosenberg’s three constraints, or the three main reasons why courts will not be effective change agents. *Id.* at 10–21.

³⁸⁰ *Id.* at 5–6.

³⁸¹ *Id.* at 338.

³⁸² *Id.* at 341.

³⁸³ KLARMAN, *supra* note 20, at 6. Professor Klarman also only focuses on the role of the United States Supreme Court, but his conclusions have implications for state supreme courts as well.

³⁸⁴ *Id.* at 449–50.

³⁸⁵ *Id.* at 468.

context. Many agree with Rosenberg, arguing that state supreme courts have failed to substantially reform school finance systems. William Koski posits that “courts in school finance cases are constrained by their inability to implement their policy decisions and the risk that their legitimacy may be compromised both by a legislative and executive branch unwilling to comply with the court’s mandate.”³⁸⁶ The potential for inter-branch conflict may be particularly high in school finance litigation, where remedies such as additional funding or programmatic improvements are notoriously difficult to enforce.³⁸⁷ Therefore, courts might be in the best position to act when there is consensus among the political elite that school finance reform is necessary and policymakers merely require political “cover” from a court decision.³⁸⁸ John Dayton and Anne Dupre similarly contend that while court decisions may be helpful or even necessary to produce greater school finance equity, they are not sufficient.³⁸⁹ Therefore, if the end goal is to increase or improve funding for public schools, building political support is essential to producing meaningful, long-term reform.³⁹⁰ Others agree, arguing that even when school finance plaintiffs win in court, judicial remedies are generally inadequate and constitutional rights are left under-enforced.³⁹¹

In contrast, Matthew Bosworth argues that courts are effective and are capable of making and oftentimes do make independent contributions to education policymaking.³⁹² After studying school finance litigation in Kentucky, North Dakota, and Texas, Bosworth concludes that change would not have been possible in those states without court involvement. School finance reform advocates did not command a majority or a near majority in any of those state legislatures before the cases were decided, and state policymakers credited the courts with producing substantial change.³⁹³ Ronald Dove also found that without the Kentucky Supreme Court’s order, Kentucky’s Education Reform Act of 1990 would not have passed.³⁹⁴ Nonetheless, he concluded that “a good litigation strat-

³⁸⁶ Koski, *supra* note 21, at 1082.

³⁸⁷ *Id.* at 1095.

³⁸⁸ *Id.* at 1082.

³⁸⁹ John Dayton & Anne Dupre, *School Funding Litigation: Who’s Winning the War?*, 57 VAND. L. REV. 2351, 2411 (2004).

³⁹⁰ *Id.*

³⁹¹ See Note, *Unfulfilled Promises: School Finance Remedies and State Courts*, 104 HARV. L. REV. 1072, 1078 (1991).

³⁹² MATTHEW H. BOSWORTH, COURTS AS CATALYSTS: STATE SUPREME COURTS AND PUBLIC SCHOOL FINANCE EQUITY 25–26 (2001).

³⁹³ *Id.* at 219–20.

³⁹⁴ Ronald G. Dove, Jr., *Acorns in a Mountain Pool: The Role of Litigation, Law and Lawyers in Kentucky Education Reform*, 17 J. EDUC. FIN. 83, 116–18.

egy is not enough; lawyers must orchestrate a union of political, social and legal forces in support of their cause.”³⁹⁵

McDuffy and *Hancock* lend partial support to those who agree with Professors Rosenberg and Klarman that courts are unable and unlikely to produce significant social change in the face of popular opposition. They also demonstrate the inter-connectedness of courts and the political branches of government. As discussed above, the ERA was passed by the legislature a week before *McDuffy* was decided; therefore it cannot be suggested that the court was creating social change in the face of legislative or popular opposition. However, the existence of the lawsuit in part drove the legislation, and the existence of the court order played a major role in the Act’s implementation. Thus, *McDuffy* can be seen as part of the broader political education reform effort in Massachusetts, in which the court and the political branches both played an important role.

Hancock is different because the SJC did not attempt to produce change. Instead, it refused to act, partially out of fear of provoking inter-branch conflict. This fear was grounded in the court’s implicit belief that there was a lack of political support for the plaintiffs’ proposed remedies. While the willingness, rather than the capacity, of courts to produce change has not received sustained scholarly attention, some school finance scholars have addressed how courts perceive their own institutional competence and how that perception might affect a court’s willingness to attempt to produce change. William Koski contends that judges engage in an “overtly political analysis” whereby they consider if political elites support education finance reform.³⁹⁶ If they do not, judges may reflect on the fact that unpopular court decisions can be ignored and can ultimately undermine court legitimacy and effectiveness.³⁹⁷ Judges may fear that their institutional legitimacy will be called into question and may therefore refuse to intervene in the education policymaking of the political branches.³⁹⁸ Michael Heise agrees, suggesting that because court decisions might not be able to change school finance outcomes, courts might choose not to “pick a potential constitutional

³⁹⁵ *Id.*

³⁹⁶ Koski, *supra* note 21, at 1228.

³⁹⁷ *Id.* at 1090, 1101.

³⁹⁸ *Id.* at 1228–29. Koski explains that this appears to have been the case in Ohio. *See id.* at 1229. Plaintiffs claimed that the legislature had failed to comply with the court’s earlier order to create a constitutional system of school financing. *See DeRolph v. State*, 754 N.E.2d 1184, 1195–96 (Ohio 2001). The court did not find that the legislature was in compliance or that the system was constitutional, but refused to act nonetheless. The court explained, “None of us is completely comfortable with the decision we announce in this opinion. But . . . we have reached the point where, while continuing to hold our previously expressed opinions, the greater good requires us to recognize ‘the necessity of sacrificing our opinions sometimes to the opinions of others for the sake of harmony.’ . . . In that spirit, we have created the consensus that should terminate the role of this court in the dispute.” *Id.* at 1189–90.

fight when the outcome is not obvious.”³⁹⁹ Similarly, George Brown suggests that state supreme courts may fear the political consequences of ordering explicit remedies in school finance cases because they fear direct conflict with the legislative branch.⁴⁰⁰ Michael Heise also points out that courts may have one view of their institutional role when it comes to articulating a constitutional right to an education and another view when it comes to ordering a specific remedy.⁴⁰¹

Hancock provides support for and goes beyond these theories. As discussed above, during oral argument, Justice Greaney asked what the court was supposed to do if it ordered the legislature to implement a remedy and the legislature refused. He explained that before making constitutional orders, courts must consider how they are going to enforce the orders. Greaney specifically referred to the SJC’s remedial orders in the clean elections case and the “stalemate” that ensued between the court and the legislature.⁴⁰² *Hancock* therefore points towards the importance of focusing on the willingness, rather than merely on the capacity, of courts to produce significant social change and the interconnectedness of courts and legislatures. In *Hancock*, the court’s hesitance seems to stem from its experience with previous inter-branch conflicts and its assessment of the lack of political support for additional funding for poor school districts. However, this is surely only one of many factors. More research is necessary to understand the conditions under which courts might fear imposing social change in the face of popular or legislative opposition. Similarly, *Hancock* suggests that school finance attorneys and all attorneys who urge courts to create social change must focus on the legislative sphere in addition to the judicial sphere. This is true not only in terms of winning political support from the legislative and executive branches, but also then conveying that support back to the court. If courts are going to, in part, base their willingness to act on their perception of the political support for a given issue, then attorneys must focus on presenting courts with evidence that the political branches and the public support their cause and their requested relief.⁴⁰³

B. IMPLICATIONS FOR SCHOOL FINANCE SUITS

Hancock also has important implications for those contemplating bringing school finance suits. The most important lesson is that advocates should be wary of bringing school finance cases in states where the legislature has created a foundation budget or some other form of guar-

³⁹⁹ Heise, *supra* note 176, at 98.

⁴⁰⁰ Brown, *supra* note 176, at 554.

⁴⁰¹ Heise, *supra* note 176, at 94.

⁴⁰² See *supra* Part II.A.

⁴⁰³ The plaintiffs did not do this successfully in *Hancock*.

anteed funding and has made a good faith effort to improve educational opportunities in plaintiff districts and equalize per-pupil spending among districts. This remains true even when students in plaintiff districts fail to meet state standards and perform well below average on state mandated performance evaluations. These two lessons are discussed in turn.

1. *Legislative Good Faith Effort and Success*

A few school finance scholars have theorized that a court will not find that a state has violated its constitutional duty if it has genuinely tried to equalize per-pupil funding or otherwise guarantee that students receive an adequate education. Jonathan Banks argues that “[o]nly when courts conclude that their legislature is unwilling or unable to pass effective remedial legislation will they intervene.”⁴⁰⁴ After studying a number of school finance decisions, he found that frustration with legislative inaction was a factor in every case that plaintiffs won.⁴⁰⁵ Therefore “frustration with the legislature may be the real key to successful finance reform challenges.”⁴⁰⁶ This may be even more true for remedial litigation such as *Hancock*. George Brown explains that, like *McDuffy*, many courts initially issue a finding of constitutional liability without specifying a remedy. “This situation puts the court in a difficult position if the matter returns to it, a distinct possibility in school finance cases. To the extent that the legislature has tried to follow the court’s advice, it will be difficult to strike down that action.”⁴⁰⁷

This makes sense on a theoretical level and is practically supported by *Hancock*. Theoretically courts should not get involved in education policy unless the legislative and executive branches have proven incapable of addressing or unwilling to address constitutional violations. Practically, there are two reasons why this is so. First, if the legislative and executive branches have engaged in a serious effort to improve educational outcomes, like in *Hancock*, then support for a plaintiff’s adequacy suit among policy elites, the public, and the political branches will likely be lacking. As discussed above, this could mean that a court will be unable to achieve real reform or unwilling to even attempt reform out of fear of inter-branch conflict. Second, even if a court does not fear inter-branch conflict, it might be unwilling to get involved in a school finance lawsuit if it thinks that the political branches of government have taken their constitutional responsibilities seriously and are on the right path to success because it might believe its involvement is unnecessary. As dis-

⁴⁰⁴ Jonathan Banks, *State Constitutional Analyses of Public School Finance Reform Cases: Myth or Methodology?*, 45 VAND. L. REV. 129, 154–55 (1992).

⁴⁰⁵ *Id.* at 155.

⁴⁰⁶ *Id.* at 157.

⁴⁰⁷ Brown, *supra* note 176, at 566.

cussed above, the *Hancock* plurality opinion was adamant that the Commonwealth had made a serious, good faith effort to improve education in the plaintiff districts and was on the correct path to success. The opinion specifically contrasted Massachusetts' experience with New Jersey's, where the *Abbott* court determined that its involvement was necessary only after years of legislative recalcitrance.⁴⁰⁸ Therefore, advocates should be wary of bringing school finance suits in states where there is a perception that the political branches have acted in good faith to fulfill their constitutional obligations.

2. Adequacy Suits and Objective Performance Measures

This counseled hesitance towards school finance litigation in states that have not been plagued by legislative inaction or recalcitrance is no less true when objective state performance measures support the plaintiffs' case. Many scholars have proposed that using accountability measures to support adequacy litigation may be a successful new approach for school finance plaintiffs.⁴⁰⁹ Michael Heise contends that the standards movement made it easier for plaintiffs to win school finance suits by allowing plaintiffs to define adequate funding as the level of funding necessary for all school districts and students to meet state education standards.⁴¹⁰ "Thus, a new wave of litigation may be upon us, one that turns the states' efforts to improve achievement through standards against the state and enables school districts to gain financially from their inability to perform at desired levels."⁴¹¹ John Dayton and Anne Dupre suggest that using outcome-based standards might give school funding plaintiffs "the 'Midas touch' as they attempt to turn student performance failure into gold."⁴¹² Molly McUsic comments that adequacy claims owe their growing success to the standards movement because it saved plaintiffs and judges from having to define the content of an adequate education.⁴¹³ Similarly, Thomas Saunders counsels that plaintiffs can

⁴⁰⁸ See *supra* Part II.C.1.

⁴⁰⁹ Paul Reville pointed out the irony of this situation. School finance plaintiffs are often the people who are most vehemently opposed to accountability measures. However, in adequacy litigation, accountability measures are often helpful and are therefore embraced by plaintiffs who decry them in other aspects of their work. Reville Interview, *supra* note 69.

⁴¹⁰ Michael Heise, *Educational Jujitsu: How School Finance Lawyers Learned to Turn Standards and Accountability into Dollars*, EDUC. NEXT, Fall 2002, at 31, 32.

⁴¹¹ *Id.*

⁴¹² Dayton & Dupre, *supra* note 389, at 2397.

⁴¹³ Molly S. McUsic, *The Laws' Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation*, in LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 88, 91 (Jay P. Heubert ed., 1999).

rely on the failure to meet state standards to secure relief under a constitutional Education Clause.⁴¹⁴

Some commentators have recognized potential problems with holding states liable whenever students or districts fail to meet objective performance criteria. James S. Liebman asks, “[A]re judges likely—and should they be encouraged—to interpret every expression of aspirational educational policy as an enforceable commitment[?]”⁴¹⁵ However, Tico Almeida suggests that in the age of “high-stakes testing,” when failure to perform satisfactorily on state tests can mean non-promotion or inability to graduate high school, “courts may no longer be able to claim credibly that state education standards constitute only aspirational goals” and should not be enforced in adequacy suits.⁴¹⁶

Hancock proves that some courts may refuse to hold states responsible for objective student performance outcomes as long as the state has acted in good faith to improve education in plaintiff districts. Judge Botsford found that the curriculum frameworks defined the content of the Commonwealth’s constitutional duty to provide students with an education, and “[t]he . . . MCAS test was developed in response to the ERA’s mandate that a system of student assessments be created.”⁴¹⁷ She found that none of the plaintiff districts were implementing the curriculum frameworks for all students or equipping all students with the *McDuffy* capabilities.⁴¹⁸ In addition, in 2003, 18 to 29% of tenth graders in the four focus districts failed the MCAS ELA test; 32 to 47% failed the mathematics test.⁴¹⁹ These scores were lower than the state average and significantly lower than the scores in the comparison districts.⁴²⁰ In that same year, due to MCAS scores, Brockton did not make Adequate Yearly Progress (AYP) in mathematics, Lowell did not make AYP in ELA, Springfield did not make AYP in ELA or math, and Winchendon did not make AYP in ELA or math for the student subgroups of special education and free/reduced-price lunch.⁴²¹

The *Hancock* court accepted Judge Botsford’s findings but did not hold that the Commonwealth was violating its constitutional duty to

⁴¹⁴ Thomas Saunders, *Settling Without “Settling”: School Finance Litigation and Governance Reform in Maryland*, 22 YALE L. & POL’Y REV. 571, 579 (2004).

⁴¹⁵ James S. Liebman, *Implementing Brown in the Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform*, 76 VA. L. REV. 349, 384–85 (1990).

⁴¹⁶ Tico A. Almeida, *Refocusing School Finance Litigation on At-Risk Children: Leandro v. State of North Carolina*, 22 YALE L. & POL’Y REV. 525, 547 (2004).

⁴¹⁷ *Hancock ex rel. Hancock v. Driscoll (Botsford Report)*, No. 02-2978, 2004 WL 877984, at *8, 16 (Mass. Super. Apr. 26, 2004).

⁴¹⁸ *Id.* at *143.

⁴¹⁹ *See id.* at *113.

⁴²⁰ *Id.*

⁴²¹ *Id.* at *114–15.

cherish the interests of public schools.⁴²² The fact that the MCAS test was “high stakes,” in that in order to graduate from high school a Massachusetts student must pass the ELA and math portions of the test, was not even discussed. Likewise, the court did not find it constitutionally problematic or even relevant that students in plaintiff districts failed to meet state standards. Therefore, predictions that standards-based reform or state accountability measures will become a “Midas touch” for plaintiffs in adequacy lawsuits are overblown. The *Hancock* court was far more interested in the efforts made by the Commonwealth than in the outcomes achieved by students in plaintiff districts.

CONCLUSION

School finance reformers in Massachusetts have much debated the consequences of the *Hancock* decision. Some see *Hancock* as the worst possible loss, a decision that the Massachusetts legislature has taken as the SJC’s “imprimatur to produce budgets without any education initiatives.”⁴²³ Others see hope in the fact that a majority of the court reaffirmed *McDuffy* and all seven justices adopted Judge Botsford’s findings.⁴²⁴ Michael Weisman went as far as to call *Hancock* “relatively insignificant from a legal perspective.”⁴²⁵ Current Massachusetts Governor Deval Patrick clearly does not understand *Hancock* to be permission from the SJC to ignore school funding. He appointed a task force, lead by Paul Reville, to advise him on a number of education issues, including school finance, and announced his interest in reexamining the state’s school financing scheme, stating, “The property tax is not working.”⁴²⁶ On June 1, 2007, during a commencement address at the University of Massachusetts at Boston, Patrick announced a comprehensive education reform plan, calling for universal preschool, full-day kindergarten, and a longer school day and year for Massachusetts public schools.⁴²⁷ He also appointed Judge Botsford to the Supreme Judicial Court; she was sworn in on September 4, 2007.⁴²⁸

⁴²² *Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134, 1138–39 (Mass. 2005).

⁴²³ Birmingham Interview, *supra* note 120. Judge Botsford agreed and said that the greatest tragedy of *Hancock* was that education reform would not happen without pressure from the court. Botsford Interview, *supra* note 207.

⁴²⁴ See Blum Interview, *supra* note 125. Joanne Blum also explained that the MTA used *Hancock* in its early negotiations with current Massachusetts Governor, Deval Patrick. The message was, “you guys aren’t really off the hook. The hook may not be as big as we hoped it would be, but you still have a constitutional obligation.” *Id.*

⁴²⁵ See Weisman Interview, *supra* note 50.

⁴²⁶ Wangsness, *supra* note 17, at A1.

⁴²⁷ Sacchetti, *Governor Stirs Graduates*, *supra* note 17, at B1; *Patrick Seeks Free Two-Year State Colleges, Goal is Key in “Cradle to Career” Plan*, BOSTON GLOBE, June 1, 2007, at A1.

⁴²⁸ See LeBlanc, *supra* note 207.

Yet, despite the Governor's interest in education reform and finance, the power of the ambiguity surrounding the *McDuffy* standard as a tool for motivating political leaders has been lost. Senator Birmingham explained that after *McDuffy* was decided, it was unclear whether the court would try to enforce the seven *McDuffy* capabilities or whether the capabilities were merely aspirational.⁴²⁹ The uncertainty was used as a prod to convince legislators to do more to ensure that all children received an adequate education as defined by the court. This was particularly helpful during the implementation of the ERA. However, *Hancock* removed this tool when it clarified that the *McDuffy* capabilities were not enforceable and that the legislature would be judged based on effort, not results.⁴³⁰ Most legislators responded: "[g]reat, we don't need to worry about this. We have enough other things competing for the dime If the court says we can get to it later, we'll get to it later."⁴³¹

There is also speculation that Springfield, one of the focus districts in *Hancock*, might bring another school finance suit.⁴³² However, anyone considering school finance litigation, or any type of litigation that urges a court to create social change, should first look closely at the lessons of *McDuffy* and *Hancock*.

Both *McDuffy* and *Hancock* illustrate the inter-connectedness of courts and politics. *McDuffy* shows that it is possible for courts to create social change, or at least to be an important part of a larger social change movement, when there is substantial political support for change among policy elites, the public, and the political branches of government. Between 1993 and 2002, state aid to Massachusetts public schools increased from approximately \$1.6 billion to \$4 billion,⁴³³ spending gaps between districts were reversed or reduced,⁴³⁴ and schools experienced fewer of the extreme resource shortages that were hallmarks of the pre-*McDuffy* era. Most people would agree that many Massachusetts schools tangibly changed during this period. On the other hand, *Hancock* demonstrates that courts might intentionally avoid attempting to create change out of fear of provoking inter-branch conflict or concerns regarding judicial role. This type of concern will only be neutralized if there is substantial political support for the plaintiffs' remedies. This too demonstrates the inter-relatedness of courts and politics when it comes to school finance.

⁴²⁹ See Birmingham Interview, *supra* note 120.

⁴³⁰ See *id.*

⁴³¹ Barrios Interview, *supra* note 299.

⁴³² See Botsford Interview, *supra* note 207.

⁴³³ See *Hancock ex rel. Hancock v. Driscoll (Botsford Report)*, No. 02-2978, 2004 WL 877984, at *8 (Mass. Super. Apr. 26, 2004).

⁴³⁴ *Id.* at *14.

Lastly, *Hancock* establishes that even where institutional constraints are not relevant, such as in finding a constitutional violation rather than ordering a judicial remedy, courts might refuse to impose constitutional liability if they perceive that the legislative and executive branches of government have undertaken a serious, good-faith effort to minimize funding disparities and improve education in underperforming school districts, and are on the path to success. This will be true even in cases where plaintiffs can rely on objective performance data to show that children in their districts are not being provided with the state-required education. Therefore, advocates should be wary of bringing social change litigation in states where there is a perception that the political branches have acted in good faith to fulfill their constitutional obligations. They should also consider whether, given the political contexts of their particular states, even a successful school finance lawsuit will lead to a tangible improvement for students.