

*The Winning Defense  
in Massachusetts*

ON FEBRUARY 15, 2005, the Supreme Judicial Court of Massachusetts found in favor of the commonwealth in the *Hancock* school adequacy case.<sup>1</sup> In so doing, the court lifted its 1993 finding of constitutional violation and decisively terminated twenty-seven years of litigation. The court's decision to "dispose of the case in its entirety"<sup>2</sup> was a stunning reversal of the trial judge's conclusion, and it bucked the trend of plaintiff victories in adequacy lawsuits nationwide. It was a case that had been closely watched by leaders of the adequacy movement, who visited the state repeatedly, viewed it as "the advance wave of the second round" of adequacy suits, and were confident of success.<sup>3</sup>

What was it about the *Hancock* case that distinguished Massachusetts from other states? And what insights can we draw from *Hancock* regarding the meaning and utility of the adequacy theory more generally?

The commonwealth's victory was the result of the state's unusually vigorous education reforms since 1993. In a two-pronged program, the state infused

In this chapter, the author draws heavily on his experience as an expert witness for the commonwealth in *Hancock* as well as his experience in Massachusetts education policy in the Massachusetts Executive Office for Administration and Finance from 1999 to 2006. He would like to acknowledge how much he has learned from assistant attorneys general Deirdre Roney and Juliana Rice, with whom he had the privilege of working closely throughout the case. He would also like to thank Roney and David Danning, of the Massachusetts Teachers Association, for their helpful comments as discussants at the Harvard conference where the original version of this chapter was delivered.

massive sums of money into property-poor districts, followed by a rigorous regime of academic standards, graduation exams, and accountability. As a national leader in both finance equity and standards-based reform, with high test scores that continue to rise, the state was undoubtedly better situated than most to withstand another adequacy lawsuit.

There was, however, more to the decision than simply a good set of facts. In crediting these facts, I argue, the court rejected the adequacy theory itself. That theory posits a constitutional standard that not even these facts, strong as they were, could meet. The court, accordingly, rejected the adequacy theory as, at the very least, unrealistic. Specifically, in reaching its decision, the *Hancock* court found that:

- Educational progress counts,
- Equity in spending counts, and
- Factors other than spending count, especially accountability and standards.

Under the adequacy theory, educational progress, equity in spending, and nonfinancial factors are “all basically irrelevant,” according to the plaintiffs and national leaders of the adequacy movement.<sup>4</sup> Thus on all three counts the court implicitly or explicitly rejected key tenets of the adequacy theory.

The adequacy theory seeks to establish a *specific policy* on outcomes and inputs as the *constitutional standard*. Consequently, the theory also raises a separation of powers issue. The *Hancock* court identified that issue and chose to apply a much looser constitutional standard: Has the legislature acted in a rational and appropriate fashion to provide education for all? Given the facts of the case, the answer to that question was obvious. The court accordingly found no reason to make “policy choices that are properly the legislature’s domain.”<sup>5</sup>

To draw out the lessons of *Hancock*, this chapter begins by reviewing the adequacy theory and highlighting the general issues of contention over that theory. Turning to Massachusetts, it summarizes the legal history of *Hancock* and then presents the history of education reform from 1993, which constituted the commonwealth’s positive case in *Hancock*. The core of the plaintiffs’ adequacy case—its three adequacy studies—as well as defense rebuttal and the trial court’s judgment follow. The chapter then turns to the Supreme Judicial Court’s reasoning and conclusions. The chapter closes with my speculations on the lessons of *Hancock*, both for litigation in other states and for educational policy.

## The Adequacy Theory

The adequacy theory, in its clearest and undiluted form, can be stated simply:

—The constitutional education clause commits the state to ensuring that all students reach a minimum level of educational achievement, and

—The state is required to ensure a level of spending in all districts that is adequate to obtain the required level of educational achievement.

This theory differs from its predecessor, the equity theory, which held that the state was obliged to close spending gaps between rich and poor districts. That is, instead of comparing financial inputs among districts (the spread), the idea is to establish minimum spending (a floor) required for the minimum level of educational output.

There were good reasons for the shift in approach. After all, perfect equity can obtain at zero spending, in which case there surely remains a violation of the constitutional requirement to provide education to all. Conversely, if the richest districts choose to spend heavily, it does not immediately follow that poor districts must spend the same to assure an adequate education. Indeed, one of the notable drawbacks of the equity approach was that court-ordered policies for equalization could *reduce* spending, due either to the perverse incentives of redistributive finance schemes or to outright caps on spending by rich districts. By shifting to adequacy, it was argued, the state could set a floor for spending and leave rich districts free to spend as much as they choose. Finally, the standards-based reform movement provided the basis, according to adequacy advocates, for setting minimal educational outputs to which floor spending could be tied.

The adequacy theory defines the constitutional standard as a very specific policy on educational output and spending. First, the policy sets a specific floor for the level of educational output presumed to satisfy the education clause. Next, it assumes a simple relationship between spending and outputs. Finally, it derives the corresponding spending requirement by various “costing out” methodologies.

Thorny issues arise in setting the required levels of output and spending. These issues, to which we now turn, concern both the workability of such a policy and the propriety of establishing that policy as the constitutional standard.

### *Setting Minimum Educational Outputs*

Should the courts be in the business of setting minimum levels of educational output and, if so, at what level?<sup>26</sup> Adequacy proponents point to Kentucky’s *Rose* factors—a list of seven general capabilities issued by that state’s high court in 1989—as precedent for doing so. To make this operational, plaintiffs point to a state’s educational standards, tied to test scores. In this way, they contend,

the courts would not usurp policymaking authority, since they would only be holding the state to standards they have already set, requiring the authorities to provide funds necessary to meet them.

This approach, however, distorts the intent of state standard-setters, who often set an ambitious goal with the aim of stimulating progress toward that goal, even if it may never be fully achieved. No Child Left Behind (NCLB), which sets a goal of 100 percent student proficiency by 2014, is an obvious example. At the state level, Massachusetts also has set ambitious goals, while establishing sanctions only for more modest standards. It has established curriculum frameworks in seven subjects<sup>7</sup> but thus far has phased in graduation exams in math and English only. The tests are rigorous (for the tenth grade, that is), but passing scores have been set, at least temporarily, below the “proficient” level. The state contended that the system has been effective in driving educational progress toward the more ambitious goals. The plaintiffs replied that *progress* is not the constitutional standard: the standard is the *level* of achievement specified as proficient in the state’s full set of seven frameworks.<sup>8</sup>

Under the adequacy theory, states would, in effect, be punished for setting high standards strategically as a means toward obtaining educational progress,<sup>9</sup> as adequacy leaders more or less have acknowledged in their more candid moments. For example, Michael Rebell, the adequacy movement’s most prominent leader, said in 2004,

I must admit it’s been a very interesting experience being a plaintiff in this area, because we have some qualms about the heavy emphasis on test scores that many states use, that NCLB uses, but I’ve got to admit to you from a litigating point of view this stuff is dynamite and the more extreme the NCLB gets, the better it is for us plaintiffs. So, we have a lot of differences with President Bush, but he’s given us a lot of tools to drive this thing a lot harder than we ever imagined . . . [The 2014 goal of 100 percent proficiency] is an impossible standard, but I can tell you over the next ten years, as long as the federal government leaves that in effect, we’re going to continue to be close to 100 percent in winning these cases.<sup>10</sup>

The plaintiffs’ strategy raises the question of whether courts will allow a state’s high standards to be used against it under the adequacy theory and, if so, whether such rulings infringe on the state’s standard-setting strategy.

In Massachusetts, where the plaintiffs based their case on a curriculum that had not yet been fully implemented in any district, one must ask how this could be a constitutional minimum. Since the education clause is predicated

on the needs of a functioning republic, the claim must be that no high school graduate in the state is adequately educated for the responsibilities of citizenship. No doubt the governance of our states has yet to reach perfection, but if *no* graduate is minimally prepared for democracy, it is a wonder that our government functions at all.

### *Financial and Nonfinancial Inputs*

Assuming a minimum level of output can be set, adequacy theory then attempts to determine the required spending. A host of difficulties arise.

First, if the minimum output is set higher than any district's current level of performance (as the plaintiffs proposed in *Hancock*), there is simply no empirical basis for determining the required spending. Consequently, plaintiffs put forth more speculative methods, notably the "professional judgment" model, discussed further below.

If the minimum output is set within the observed range, then there are pertinent data. However, it is problematic to infer spending requirements from those data, since educational output is not systematically associated with spending, contrary to the theory's key assumption. There is typically a wide spread of spending for any given level of output. That is because districts may pay different amounts for the same inputs (for example, some negotiate better terms with their unions), they may use different levels of input with no effect on output (for example, smaller class sizes, but no better instruction), or they may differ in a host of nonfinancial inputs (such as the quality of leadership or the flexibility to lead free from bureaucratic and union restraints). For whatever reason, typically there is little or no relationship between spending and output among demographically similar districts.

This is not to say that money does not—or cannot ever—matter. If spending is cut to zero, educational output will disappear, so it is certainly the case that money matters a great deal at very low levels of spending. Beyond a certain level, however, there are diminishing returns; the maximum obtainable output still increases with spending, but at a much lower rate. Moreover, the *actual* output may increase even less, or not at all, with spending, for the reasons discussed above. Conversely, widely varying levels of output are associated with the same spending. By focusing solely on spending, the adequacy theory ignores what may be far more important determinants of performance. There is much more to be gained by improving the practices of high-spending/low-performing districts—whether in management, resource allocation, or the like—than would be gained by providing them with additional funds.

### *School Inputs, Home Inputs, and Compensatory Finance*

To take the best case so far, suppose we have set minimum outcomes within the observed range and have found an efficient cost level to attain that output in districts with demographic advantages. How, then, does adequacy theory assign a minimum spending level to disadvantaged districts? It is often the case that no disadvantaged district performs at the level of advantaged ones. If so, once again, there is no empirical basis for “costing out” these districts. Instead, adequacy studies typically apply arbitrary premiums to the spending levels found in advantaged districts.

Suppose, however, that the premium can be reliably determined, so one can calculate the compensatory finance required to offset fully a deficiency in nonschool inputs. It is then a hugely important *policy question* to determine the extent of compensatory finance to provide. But is it a *constitutional* one, to be determined by the courts? Does the education clause require 100 percent compensatory finance, sufficient to achieve a given outcome for all students regardless of cost? Or does it call for something more modest—for example, to assure a reasonable level of inputs that are under the state’s control?<sup>11</sup>

All of these questions on the viability and propriety of the adequacy theory of constitutionally mandated outputs and inputs arose in Massachusetts’s *Hancock* case.

### **Brief Legal History: From McDuffy to Hancock**

Prior to 1993, Massachusetts’s school system was highly decentralized: funding was overwhelmingly based on local finance (about 70 percent), and there were no state educational standards to speak of. Starting in 1978, plaintiffs filed suit over the finance system. The suits worked their way through the courts, off and on (as state aid and funding reform waxed and waned), and ultimately were consolidated into the *McDuffy* case of 1993. In *McDuffy* the Supreme Judicial Court found that the education clause established “an enforceable duty on the magistrates and legislatures of this 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.”<sup>12</sup>

In finding, further, that the commonwealth was not meeting its constitutional duty, the court relied heavily on evidence of spending gaps between plaintiff districts and three property-rich “comparison” districts (Brookline, Concord, and Wellesley): “We need not conclude that equal expenditure per

pupil is mandated or required, although it is clear that financial disparities exist in regard to education in the various communities . . . The reality is that children in the less affluent communities . . . are not receiving their constitutional entitlement of education.”<sup>13</sup>

Thus although *McDuffy* is often considered one of the nation’s early adequacy suits, it is actually not so clear on this. The court relied more on evidence of equity than on measures of educational output and explicitly declined to adopt the language of “adequacy.”<sup>14</sup>

The court did raise the issue of educational outputs in the course of providing guidance on what constituted the “duty to educate.” It did so by citing Kentucky’s *Rose* capabilities, such as “sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization.”<sup>15</sup> However, the concrete meaning of this citation was unclear and would be vigorously debated in *Hancock*.

In short, *McDuffy* was an adequacy decision only loosely, if at all. It was aimed primarily at establishing overall state responsibility for education, in light of the egregious disparities that had arisen in the absence of such a role. The court stopped well short of defining the “duty to educate” in terms resembling the current adequacy theory, nor did it impose a remedy of the sort typically sought by adequacy plaintiffs today.

Indeed, the *McDuffy* court imposed no specific remedy for the violation. It left the matter to “the magistrates and the legislatures,” which were in the process of enacting the Massachusetts Education Reform Act (MERA) of 1993. The court reserved the discretion “to determine whether, within a reasonable time, appropriate legislative action has been taken.”<sup>16</sup>

No further legal action was taken until a new set of plaintiffs—Julie Hancock et al.—filed for further remedial action at the end of 1999. The Council for Fair School Finance, an umbrella group led by the American Civil Liberties Union of Massachusetts and funded largely by the Massachusetts Teachers Association, organized this effort. By the time of trial, the educational landscape had changed dramatically from 1993, and so had the commonwealth’s defense. The defense refused to acquiesce in broad stipulations sought by the plaintiffs, unlike in *McDuffy*. One key expert witness in school finance switched from the plaintiff in *McDuffy* to the defense in *Hancock*. Finally, the commissioner and Department of Education were fully engaged in their defense, more so than in *McDuffy* and quite unlike many other states facing adequacy claims. As Alfred Lindseth has pointed out, state departments of education are often diffident defendants, since it is the legislatures, not the departments, that are responsible for any financial remedy.<sup>17</sup>

The court assigned the case to Superior Court judge Margot Botsford for trial. During pretrial proceedings, Judge Botsford considered arguments over the critical issue of the constitutional standard to be applied during trial. The plaintiffs argued that *McDuffy* had established the seven *Rose* capabilities as the standard of an adequate education and that the Massachusetts legislature (through the Board of Education) had made the standards concrete in the seven curriculum frameworks. These frameworks, it was argued, established the educational outputs to which all students in the commonwealth were constitutionally entitled. The main task of the trial court, according to the plaintiffs, was to determine whether the inputs available to plaintiff districts were adequate to obtain those outputs.

The defense argued that *McDuffy* established a rather different standard, not a standard for educational outputs, but instead a standard for legislative action: “whether, within a reasonable time, appropriate legislative action has been taken” to address the deficiencies found in *McDuffy*. The task of the trial court, according to the defense, was to evaluate the educational progress made since 1993, the narrowing of spending gaps identified in *McDuffy*, and the reasonableness of the state’s policy strategy for further educational progress—namely, targeted assistance and accountability.

Judge Botsford sided with the plaintiffs. The trial court would use the educational outputs implied by the seven curriculum frameworks as the constitutional standard for educational adequacy. The defense vigorously objected on both substantive and procedural grounds. Nonetheless, Judge Botsford’s order established the framework for the trial, which was held in 2003. Judge Botsford allowed the defense to present its positive case on the progress of education reform, but she indicated that this would not be the standard she would use in her conclusions.

The heart of the plaintiffs’ case would be three pieces of finance testimony aimed at demonstrating that spending was inadequate in the plaintiff districts to reach the level of educational achievement defined by the curriculum frameworks. Judge Botsford rejected two of these three studies. Still, based on the remaining evidence and her reading of the constitutional standard, she recommended in April 2004 that the court find for the plaintiffs. The remedy she proposed was similar to the one pursued in New York: the court should order a cost study with a host of specific guidelines to gauge the additional spending required and retain jurisdiction to ensure that the legislature acts on it.

The Supreme Judicial Court heard oral arguments in October 2004 and, in February 2005, ruled 5-2 for the defense. In doing so, the chapter argues, the court rejected the adequacy theory.

## Education Reform since 1993: Funding, Accountability, and Educational Progress

At the same time as *McDuffy* was moving toward conclusion, the legislature and the governor were finalizing MERA. The main features of the act were the reform of funding, with the simultaneous establishment of educational standards, followed by accountability for results.<sup>18</sup>

The key components of the finance reform were:

—Establishment of a foundation budget, which set minimum per-pupil spending for all districts, with an add-on of more than 40 percent for low-income children,

—Establishment of a required local contribution, and

—Commitment by the state to fill the gap between foundation budget and required local contribution over seven years (that is, by 2000).

Figures 12-1 and 12-2, which were presented in court, demonstrate how much these steps accomplished. At the outset, two-thirds of the state's students were in districts that spent below foundation, often by a large margin (figure 12-1). By 2000, after a massive increase in state aid, all students were brought up to foundation, thereby eliminating the left tail of the spending distribution (figure 12-2).

In dollar terms, the spending gaps were reversed between districts with the highest and lowest poverty. Average spending in the highest-poverty quartile (that is, districts with the highest rate of students with free and reduced-priced lunch status, educating a quarter of the students) now exceeds that in the quartile with the least poverty. Similarly, by other measures (district income and property wealth) the gaps were much narrowed, although not eliminated. In comparison to other states, Education Trust has consistently found that Massachusetts is at or near the top in the progressivity of its funding system, by measures similar to those discussed here.<sup>19</sup>

Equally as important were the state's accountability reforms:

—Establishment of curriculum frameworks and state assessments,

—Requirement of students to pass tenth-grade English and math assessments for high school graduation, beginning with the class of 2003, and

—Procedures for evaluating districts and schools, ultimately leading to state intervention in failing schools.

The requirement that students pass tenth-grade math and English assessments for high school graduation was a particularly important driver of education reform and was highly contested. The state's largest teacher union, the Massachusetts Teachers Association, led a vigorous effort against the requirement, including a well-funded advertising campaign. A case was filed against

the requirement, but the court pointedly rejected the suit. Significantly, that decision was cited repeatedly in the *Hancock* decision.

The exit exams initially seemed to pose a nearly insurmountable hurdle, as the failure rates were very high in the dry runs, before the exams had high stakes attached to them. Once the graduation requirement kicked in, however (in 2001 for the class of 2003), failure rates dropped dramatically (see figure 12-3). After retakes in grades eleven and twelve, the failure rate dropped to about 5 percent. In addition, racial gaps narrowed on the pass rate, and both majority and minority groups registered large gains at the higher levels of performance.

State performance on national exams also improved.<sup>20</sup> Massachusetts now performs at the top nationally on the National Assessment of Educational Progress. The state's SAT performance has improved markedly over the last decade, passing the national average in 1999 and widening its lead since then, despite one of the nation's highest participation rates.

None of these facts was in dispute during the case. Nor was there any dispute that far more progress needs to be made. Significant gaps in performance remain, especially at the level of "proficiency." Some schools are failing, by state and federal criteria. The state has methodically (if slowly) identified these schools as part of its school and district accountability program and has recently begun a program of targeted assistance and intervention.

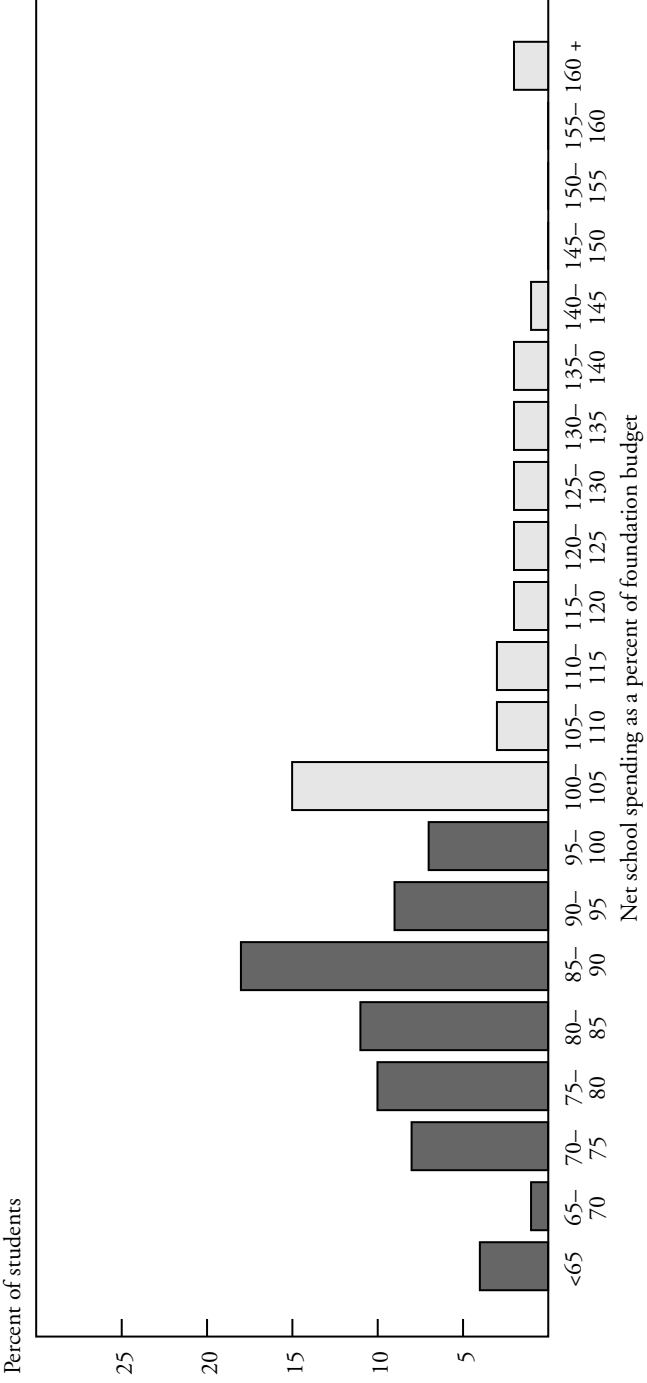
The defense asserted that the state's reform efforts and educational progress since 1993 not only had demonstrated appropriate action in a reasonable time but had been exemplary. Consequently, the state should be permitted to continue with its plan of targeted assistance and intervention to address the undisputed shortcomings that remain, rather than be placed under court-mandated spending directives.

Judge Botsford acknowledged "that spending gaps between districts based on property wealth have been reduced or even reversed."<sup>21</sup> However, ultimately she agreed with the plaintiffs that "the issue here is not spending equity but educational adequacy," so data on the closing of spending gaps are irrelevant.<sup>22</sup>

With regard to adequacy, the plaintiffs argued that educational *progress* was not the constitutional standard, and Judge Botsford agreed. Instead, the standard was asserted to be the *level* of performance—specifically, whether the students had reached proficiency in all seven subjects of the curriculum frameworks. Given that standard, her finding of a constitutional violation was a foregone conclusion.

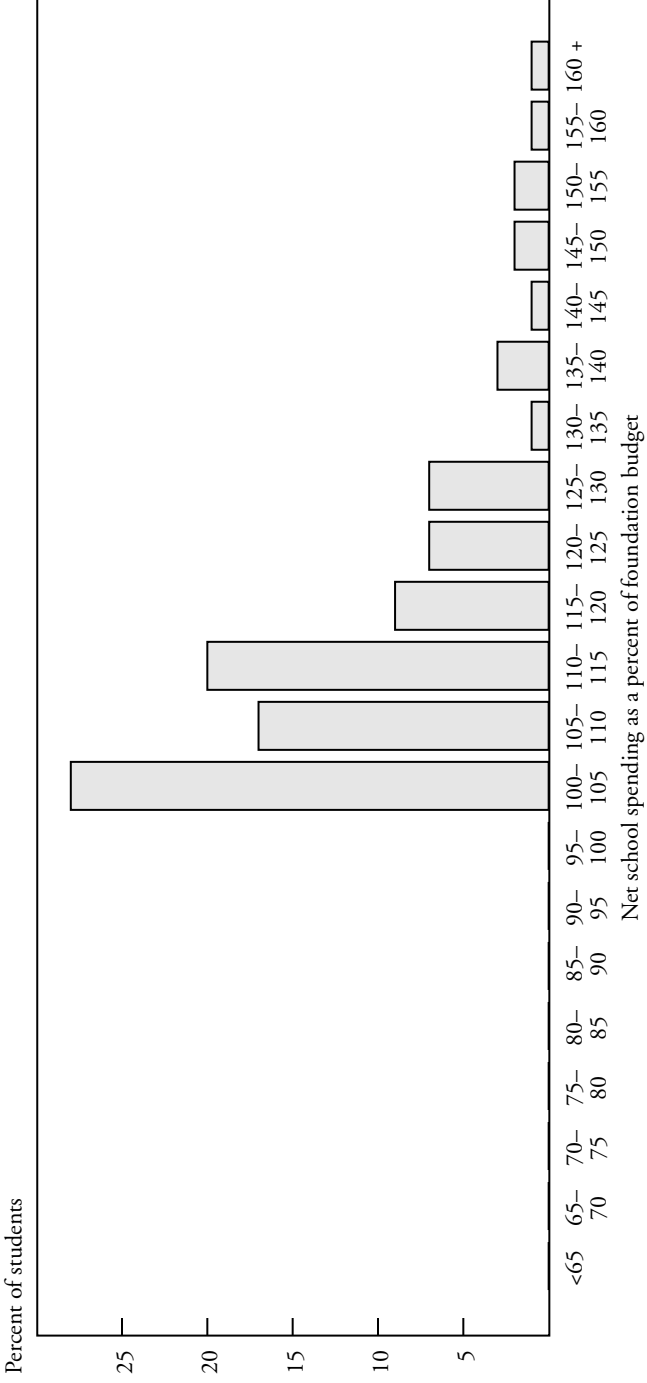
All that remained was to determine whether inadequacy of funding was the source of the violation. That was the subject of the plaintiffs' three adequacy studies. Examining these studies brings the underlying difficulties with the adequacy theory concretely into relief.

Figure 12-1. *Net School Spending as a Percent of Foundation Budget in K-12 Districts in Massachusetts, Fiscal 1993*



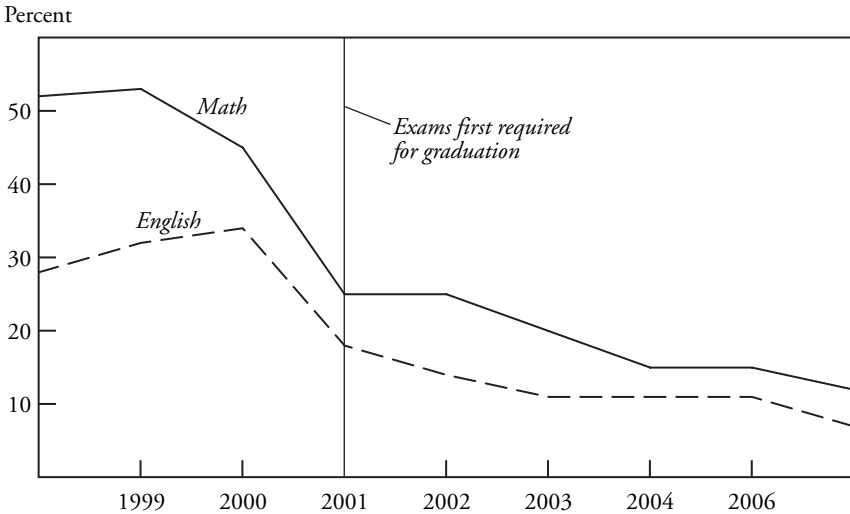
Sources: Massachusetts Executive Office for Administration and Finance; Massachusetts Department of Education.

Figure 12-2. *Net School Spending as a Percent of Foundation Budget in K-12 Districts in Massachusetts, Fiscal 2002*



Sources: Massachusetts Executive Office for Administration and Finance; Massachusetts Department of Education.

Figure 12-3. *Failure Rate for First-Time Takers of Tenth-Grade State Exit Exams, 1998–2006*



Source: Massachusetts Department of Education.

### Plaintiffs' Case I: Professional Judgment Study

The first leg of the plaintiffs' finance case was the professional judgment study prepared by Professor Deborah Verstegen of the University of Virginia.<sup>23</sup> Very simply, a group of educators from the plaintiff districts were presented with the seven curriculum frameworks and asked for their professional judgment regarding the resources, such as class size, teacher aides, and computers, necessary to achieve proficiency in all subjects. Finance experts then assigned dollar amounts to these resources to complete the "costing out." Dr. Verstegen concluded that actual per-pupil expenditures fell \$4,100–\$8,000 short annually of what was necessary for an adequate education in each of the four plaintiff focus districts.

The key piece of defense testimony on the study extended its findings from the four plaintiff districts to the rest of the state. Using Verstegen's methodology, the defense argued that almost no district in the state had adequate spending, not even the wealthy "comparison" districts chosen by the plaintiffs. More than 80 percent of the state's pupils are in districts that fell short of the Verstegen standard by at least \$4,500 per student.<sup>24</sup> Ironically, the only district of any size with adequate spending by this criterion was Cambridge, a notoriously low-achieving district.

The Verstegen study proved too much for the trial judge to swallow. The panelists had been instructed (as is typical for the genre) to be creative in designing programs and not to consider any revenue constraints. As a result, the judge concluded that the study represents “to some extent a wish list.”<sup>25</sup> Moreover, the judge wrote, the choice of panelists for a “lawsuit involving funding issues for the very districts in which the panel members teach and work gives one pause about its total objectivity.”<sup>26</sup>

The problems with the Verstegen study are common to the professional judgment approach more generally, as discussed by Eric Hanushek in chapter 4 of this volume. One underlying problem that goes to the heart of the adequacy theory is that the level of educational output, on which professional judgment was sought, was chosen to be well above that yet offered by any district. Consequently, there was no data-based approach that *could* be used; there was no alternative but to ask panelists to “be creative.”<sup>27</sup> Yet Judge Botsford’s dismissal of the Verstegen study did not prevent her from recommending that the court order a cost study of the same type, which almost certainly would suffer from the same defects.

### Plaintiffs’ Case II: Successful Schools Model

The second adequacy study, conducted by school finance consultant John Myers, was of the “successful schools” variety.<sup>28</sup> The level of output was chosen to be that of the seventy-five highest-scoring districts in the state’s math and English assessments. The plaintiffs carefully asserted that this criterion was below the constitutionally required minimum (since it did not cover all seven subjects) but commissioned the study to determine the required expenditures for that more modest goal. The basic idea was to infer from actual expenditures of the “successful” districts what expenditures would be required for the plaintiff districts, after accounting for their demographic disadvantages. The study found that plaintiff districts fell \$1,200–\$3,500 short in annual per-pupil expenditures.

As with the professional judgment model, the plaintiffs’ expert applied the model only to the plaintiff districts. The key piece of defense testimony was to apply the same methodology to the “successful” districts themselves. Two-thirds of these districts were found to spend less than what was determined to be “necessary” for their success. This paradoxical result helped to lead Judge Botsford to reject the model as fatally flawed. Still, because the model she eventually accepted was closely related to the “successful schools” model, it is important to identify the methodology’s underlying problems.

Consider figure 12-4, which presents performance on the vertical axis and per-pupil spending on the horizontal axis. The figure identifies districts by poverty level to examine the relationship between spending and performance among demographically similar districts. The bubbles in the top of the diagram represent districts in the lowest-poverty quartile (as measured by free and reduced-price lunch status). These districts correspond closely to the top-scoring districts identified by Myers, since, in practice, the selection of schools in the successful schools model is driven largely by demographics.<sup>29</sup> The diamonds represent districts in the poorest quartile. (Districts in the middle two quartiles are excluded from the diagram, for clarity.)

Stripped to its core, the successful schools model identifies average spending of the high-performing districts (with a few adjustments) as the necessary level of spending for demographically advantaged districts. The model then determines the necessary spending for more disadvantaged districts by applying a premium (50 percent in the Myers study, a figure based on convention rather than scientific evidence) for low-income children, along with similar premiums for other types of disadvantage.

Thus the necessary spending for plaintiff districts, with more low-income children, is determined to be somewhat higher than average spending in the advantaged districts. As shown in figure 12-4, poor districts in Massachusetts already spend a bit more (on average) than low-poverty districts. However, the successful schools model determines that the necessary spending in these districts is higher yet, resulting in the claim of spending shortfalls.

The point here is that this procedure, which purports to be based on the adequacy theory, goes back to the equity approach, but with a twist. By comparing spending in the poor districts with spending in the rich districts, but only after a premium is applied to the rich districts' spending, it establishes an equity-plus standard.

The adequacy rationale for this procedure does not stand up to scrutiny. As figure 12-4 shows, there is a wide range of spending among demographically similar districts and little or no relationship between spending and performance. This contradicts the adequacy theory's assumed relationship between spending and output.

The model ignores this problem and simply defines average spending as the minimum necessary for success in these districts. This is the main source of the paradoxical result cited above: if the *minimum* is defined as the *average*, it is no surprise that half or more of these districts are found to fall short of what is "necessary" for their own success.<sup>30</sup> One must live in Lake Wobegon to pretend that this is an adequacy procedure—that is, a calculation of minimum necessary spending to achieve a given output. It is not. At its core, it is an

equity calculation, pure and simple, to set the standard based on average spending of the high-performing, demographically advantaged districts.

Recall that one of the main reasons for the shift from equity to adequacy lawsuits was to set a spending floor that was independent of rich districts' spending, leaving rich districts free to spend as much as they choose. Under the successful schools model, however, *any* level of spending chosen by the rich, high-performing districts can and will be used as the basis to increase the floor in poor districts. Independent of whether this result is good or bad, one thing is certain: it is not what the adequacy theory promised.

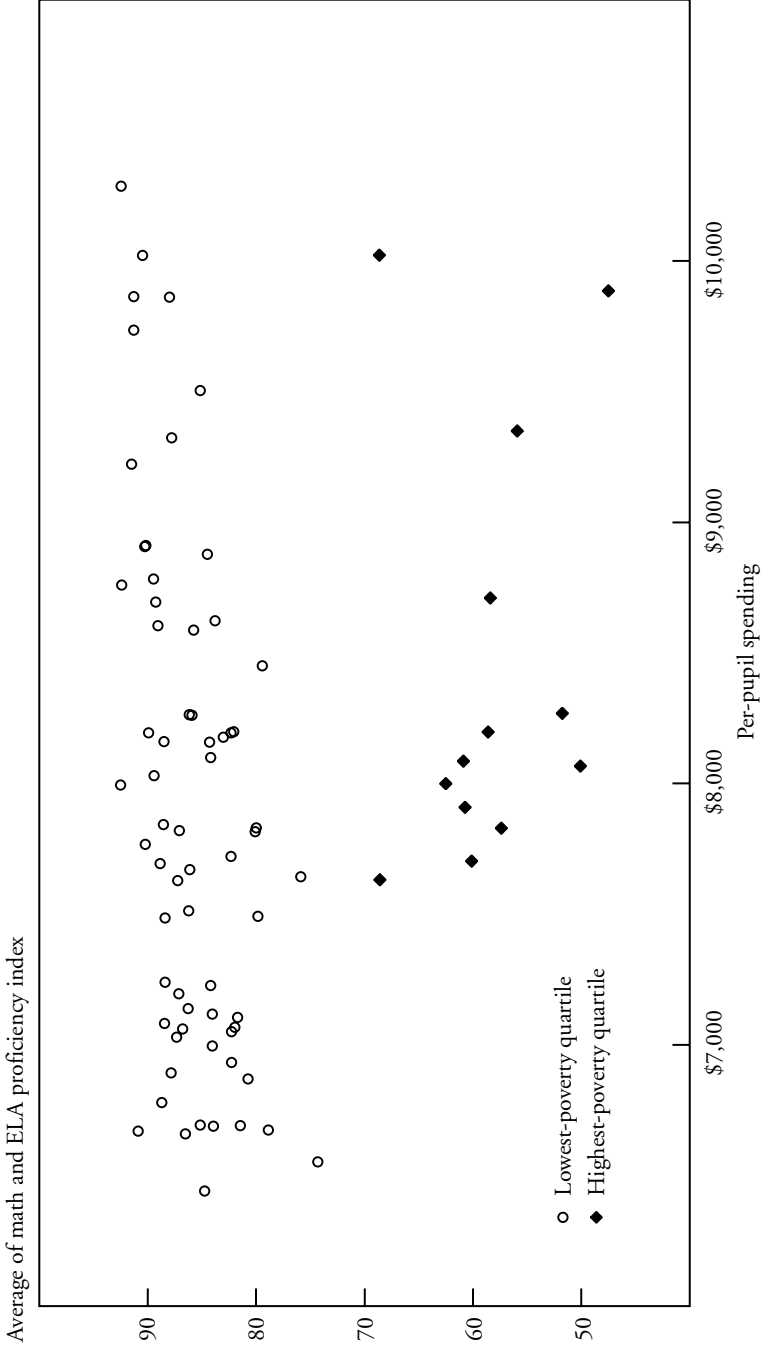
### Plaintiffs' Case III: Spending as a Percent of Foundation

The third adequacy argument presented, by Robert Berne of New York University (based on exhibits prepared by the Massachusetts Teachers Association), considered spending as a percent of foundation budget rather than as dollars per pupil. Specifically, spending as a percent of foundation in high-scoring, low-poverty districts was compared with that of plaintiff districts. Since, on average, spending exceeded the foundation budget in Myers's seventy-five "successful" districts by about 30 percent, the plaintiffs argued that the foundation budget was inadequate in those districts and must, by extension, be inadequate in poorer districts as well. Consequently, since spending is close to foundation in the plaintiff districts, their spending must be inadequate. Judge Botsford found this argument "rough," but persuasive.<sup>31</sup>

The spending as a percent of foundation argument is essentially a variant of the successful schools model. Figure 12-5 depicts the same spending and performance data as in figure 12-4, except that spending is measured as a percent of foundation instead of as dollars per pupil. Again, this approach begins with the successful, generally low-poverty districts and assumes that the average spending in those districts, as a percent of foundation, is necessary for their success. However, there is a wide spread of spending as a percent of foundation in the high-scoring districts, including several that are close to 100 percent of foundation. Using the *average* spending ratio of 125–130 percent to indicate the *minimum* necessary spending in these districts repeats the Lake Wobegon fallacy and converts a purported adequacy approach into an equity calculation.

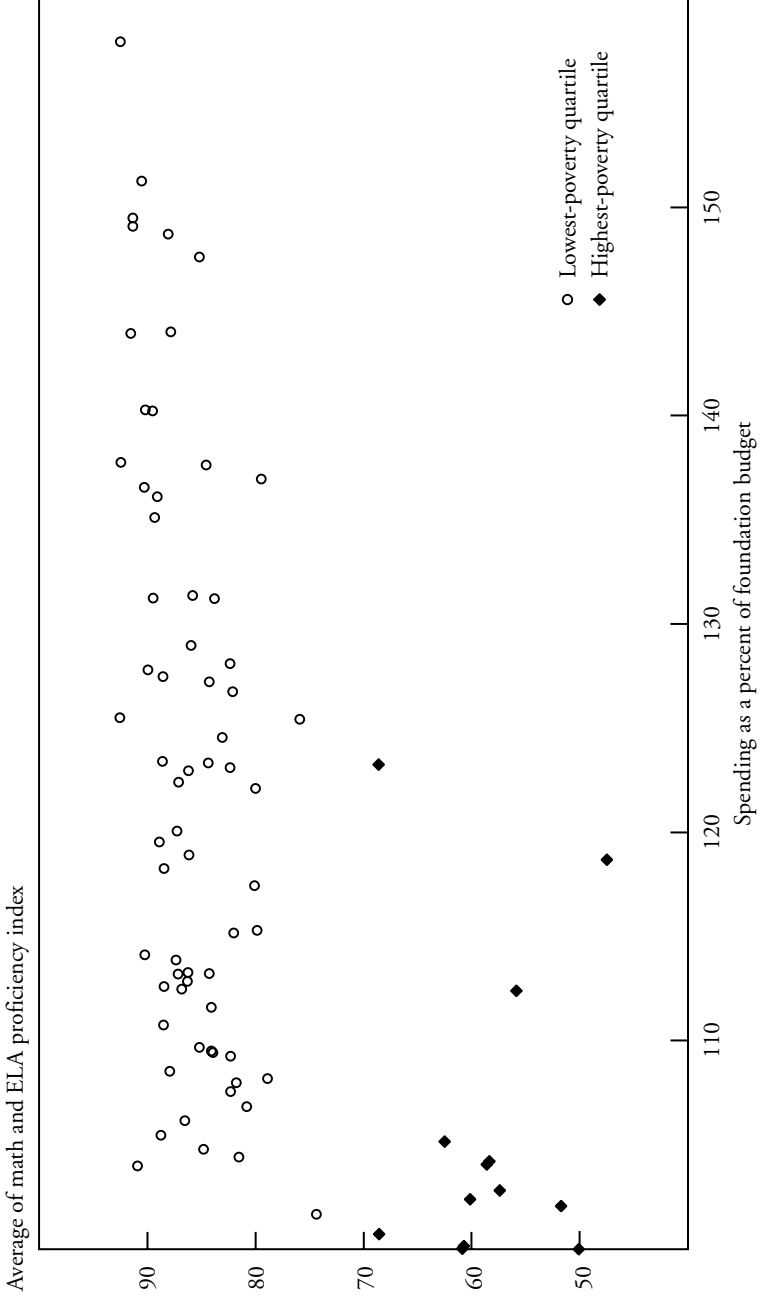
Next it is argued that, since many successful districts spend well above foundation, poor districts should, too. Again, this implies that whatever is spent in high-scoring rich districts should be scaled up by a premium for disadvantaged children. That is because the foundation budget in poor districts is set higher than in rich districts. Hence, as shown in the bottom halves of figures 12-4 and

Figure 12-4. Performance and Per-Pupil Spending among Highest- and Lowest-Poverty Districts, 2001–02 School Year



Sources: Massachusetts Executive Office for Administration and Finance; Massachusetts Department of Education.

Figure 12-5. Performance and Above-Foundation Spending among Highest- and Lowest-Poverty Districts, 2001–02 School Year



Sources: Massachusetts Executive Office for Administration and Finance; Massachusetts Department of Education.

12-5, spending as a percent of foundation is lower in poor districts than in rich ones, even though it is higher in actual dollars. By arguing that spending as a percent of foundation should be raised in the poor districts toward that of the rich ones, this approach implies that the diamonds in figure 12-4 should be moved farther to the right. Once again, a purported adequacy model turns out to be an equity-plus model.

## Supreme Judicial Court Rejects the Adequacy Theory

The first two adequacy models were rejected by the trial court, and the third argument—spending as a percent of foundation—fared no better at the Supreme Judicial Court: the court simply ignored it. More important, not only did the high court reject the adequacy models, it also rejected the theory itself. This was made clear both by the standard used in the case as well as by the criteria the court drew on to evaluate the commonwealth's compliance with the standard.

With regard to the constitutional standard, the court wrote, “The plaintiffs read the education clause to mandate that all current public school students demonstrate competency in a specific program of education.”<sup>32</sup> The court then rejected this reading of the education clause. In short, the court considered the standard presented by the plaintiffs under the adequacy theory to be a particular policy and ruled that it is not the court's job to set policy.

Instead, the court interpreted *McDuffy* as construing the education clause to be “a statement of general principles and not a specification of details.”<sup>33</sup> Consequently, the court's standard was considerably less prescriptive than plaintiffs sought. The court considered the question that *McDuffy* had left open: “whether, within a reasonable time [since 1993], appropriate legislative action ha[d] been taken to provide public school students with the education required under the Massachusetts constitution.”<sup>34</sup> The court's answer to that question is indicative of the standard used: “While the plaintiffs have amply shown that many children in the focus districts are not being well served by their school districts, they have not shown that the defendants are acting in an arbitrary, nonresponsive, or irrational way to meet the constitutional mandate.”<sup>35</sup>

To find a violation, the court implied, would require the kind of “egregious, statewide abandonment of the constitutional duty” identified in *McDuffy*.<sup>36</sup> Moreover, in finding that the commonwealth had acted appropriately, the court relied on criteria that the adequacy theory explicitly rejects.

### *Progress Counts*

The court's key finding of fact was that, as a result of MERA, "The public education system we review today . . . is not the public education system reviewed in *McDuffy* . . . A system mired in failure has given way to one that, although far from perfect, shows a steady trajectory of progress."<sup>37</sup> The court specifically cited various measures of progress, on inputs and outputs, including the improvement in test scores, both statewide and in the plaintiff districts.

The adequacy theory, by contrast, holds that only the *level* of achievement counts, not *progress*, a point reiterated by plaintiffs throughout the trial. Thus the plaintiffs' brief dismissed "the commonwealth's argument that improvement is enough," arguing instead that "the minimum level of education required by the Massachusetts constitution" was defined by the seven *Rose* factors and given content by the state's seven curriculum frameworks.<sup>38</sup>

Chief Justice Marshall, however, interpreted the *McDuffy* court's citation of *Rose* less prescriptively. It "did not mandate any particular program of public education," nor did the *Rose* capabilities "themselves prescribe a specific curriculum."<sup>39</sup> Indeed, she cites, in apparent agreement, one scholar's comment that "if this standard is taken literally, there is not a public school system in America that meets it."<sup>40</sup> With regard to the seven curriculum frameworks (versus the two subjects required for graduation), the court cited an earlier decision that validated the commonwealth's strategy of "pragmatic gradualism" to achieve educational progress.<sup>41</sup>

Thus the court rejected the first leg of the adequacy theory. The court made it clear that it had no intention of establishing any particular set of educational outcomes as a constitutional minimum. The commonwealth was free to set a *policy* of ambitious goals to drive educational progress, without thereby establishing a *constitutional mandate* that all students demonstrate competency at that level.

### *Equity in Spending Counts*

In evaluating the commonwealth's actions on school finance, the court found, "The [Education Reform] Act eliminated the central problem of public school funding that we identified as unconstitutional in *McDuffy* . . . Specifically, the act eliminated the principal dependence on local tax revenues that consigned students in property-poor districts to schools that were chronically short of resources."<sup>42</sup>

The court gave great weight to the facts that state aid grew rapidly after 1993, especially in the plaintiff districts, and that "spending gaps between districts

based on property wealth have been reduced or even reversed.”<sup>43</sup> The court cited various equity measures such as those discussed above, which had been declared irrelevant by the plaintiffs and by the trial judge. With regard to finance, the court concluded, “Where the governor and the legislature . . . provide substantial and increasing . . . resources to support public education in a way that minimizes rather than accentuates differences between communities based on property valuations . . . we cannot conclude that they are presently violating the education clause.”<sup>44</sup>

The constitutional problem identified here relates to finance disparities based on the property tax. The commonwealth’s solution, which achieved at least a rough equity, falls far short of the adequacy theory’s standard for financial inputs. As we have seen, some of the key adequacy methods set a standard of *equity-plus* in spending: no matter how much is spent in rich districts, poor districts must spend far more.

In rejecting the adequacy models, and relying instead on equity evidence, the court implicitly declined to adopt the standard of equal outcomes that seems to be embedded in the models or compensatory finance as the means to achieve that goal. That is, it was one thing to find (in 1993) that gross inequities based on property wealth violated the constitutional obligation to provide universal education; but now that at least a rough equity has been achieved, the court saw no need to venture beyond that into the policy debate over compensatory education.

### *Standards and Accountability Count*

In evaluating the commonwealth’s actions, the court considered nonfinancial inputs very important, especially standards and accountability: “The [1993] act also established, for the first time in Massachusetts, uniform, objective performance and accountability measures for every public school student, teacher, administrator, school, and district in Massachusetts.”<sup>45</sup>

The court went on at some length in praise of these measures, including “world class” curriculum frameworks and graduation exams in core subjects. The court’s frequent citation of its previous decision upholding the graduation exams seemed indicative of the importance it attached to them. Indeed, in one of the court’s more pointed comments, it concluded that delays in full implementation of education reform owed not to legislative or departmental inaction, but instead to factors such as “protracted litigation over some provisions of education reform,” citing again the challenge to the graduation exams.<sup>46</sup>

While all sides agreed that much more progress is required, they differed on the means to achieve that progress. The court accorded great deference and

respect to the state's strategy of standards, accountability, targeted assistance, and intervention. By contrast, the adequacy theory focuses almost entirely on district spending. The *Hancock* plaintiffs minced no words: "There is no room for debate in this case about whether accountability is a better solution than increased funding . . . Additional funding is not a policy choice open to debate, but a matter of constitutional necessity."<sup>47</sup>

The court held, to the contrary, that the question of additional funding was very much a policy choice open to debate. Indeed, during oral arguments Chief Justice Marshall seemed to take the other side of that debate: "What . . . comes through to me loud and clear is that there are real problems in these districts that have nothing to do with money."<sup>48</sup> The important question, she said, is why some districts are failing and not others. "We know more money isn't the answer."<sup>49</sup> The written decision, to be sure, did not repeat such openly skeptical comments on the need for more spending, but it did cite "poor leadership and administration" as "a principal cause of poor performance in the focus districts."<sup>50</sup> More important, the court ruled decisively that such policy debates were the province of the legislature.

### *Separation of Powers*

The court recognized that the adequacy theory—specification of required educational outcomes and of the spending needed to achieve them—comprised a specific policy prescription that lay beyond the court's purview. The court particularly stressed the separation of powers for spending decisions: "Because decisions about where scarce public money will do the most good are laden with value judgments, those decisions are best left to our elected representatives."<sup>51</sup>

Thus the court vigorously rejected Judge Botsford's recommended remedy of a court-ordered "cost study," because such a study would be "rife with policy choices that are properly the legislature's domain . . . Each choice embodies a value judgment; each carries a cost, in real, immediate tax dollars; and each choice is fundamentally political. Courts are not well positioned to make such decisions."<sup>52</sup>

The court's conclusion here strikes at the heart of the adequacy strategy. The observation that spending choices involve trade-offs among competing public purposes flatly denies the contention of the adequacy strategists that the education clause places education spending above all other purposes. The court's conclusion that spending choices are "fundamentally political" directly rebuffs the strategy of circumventing the political process to obtain court-ordered spending solutions. As Justice Cowin concluded, in her concurring

opinion, “The plaintiffs’ remedy, as it always is with political questions, is at the ballot box.”<sup>53</sup>

### Conclusion: Lessons from Massachusetts?

Massachusetts’s Supreme Judicial Court quite fittingly handed down its *Hancock* decision in the newly renovated John Adams Courthouse. It was Adams, of course, who famously wrote the world’s first constitutional education clause, to secure the republican experiment he had done so much to launch. As the birthplace of the education clause—and still a national leader in education—perhaps Massachusetts yet has lessons to offer.

The main (and most obvious) lesson is that states that have not already done so may wish to adopt reforms that are strong on equity, standards, and accountability. In this area at least, good policy is the best defense against lawsuits. The reason is that, despite the adequacy theory’s flaws, the theory has rightly focused judicial attention on educational outcomes, not just inputs. The *Hancock* court, while rejecting the specific theory, put great stress on progress in educational *outcomes*, and in that respect the adequacy movement has left its mark, even in Massachusetts. States with vigorous reforms like those in Massachusetts stand the best chance of making progress in educational outcomes that courts might credit in the face of an adequacy suit.

The centerpiece of such reforms is the effort to drive educational progress by setting high standards and tying them to high stakes. *Hancock* has now established that the state can set ambitious standards without necessarily having it held against the state, as the adequacy strategists had hoped. Indeed, to the contrary, the court found that high standards and high stakes were key factors in the commonwealth’s defense.

To make high stakes successful, the first step in education reform should be to focus on funding.<sup>54</sup> However, a well-constructed funding formula need not—and should not—rely excessively on state revenues. State revenues are typically based on income and sales taxes, which are much more volatile than local property taxes, so a high state share makes education funding more vulnerable in an economic downturn. In addition, local funding of education gives local officials a greater stake in educational success.<sup>55</sup> If state aid is well targeted to supplement local revenues in property-poor districts, a great deal of equalization can take place without a dramatic rise in the state share of funding. In Massachusetts, the state share rose from about 30 to 40 percent in the years following the reforms of 1993. This is still below the national average,

and yet the degree of spending progressivity is among the highest in the nation, according to Education Trust. In general, there is no relationship between state share and progressivity.<sup>56</sup>

Many states have already adopted equitable funding policies. According to data from Education Trust and *Education Week*, at least half of the states spend more in their poor districts than in their rich ones.<sup>57</sup> Some of these states are pursuing the second step of the reform formula—high standards with high stakes and accountability for results—and others are poised to follow. The road beyond is still uncharted, as states grapple with the challenge of turning around underperforming schools in the midst of overall progress.

There is now a vibrant debate in Massachusetts over policies such as merit pay, turnaround strategies, reconstitution, and the like. This debate would surely have been short-circuited had *Hancock* turned out differently. The debate would not be over education reform, but over funding formulas and revenue sources—a repeat of the first step of reform, instead of a debate over the next steps. As courts in other states consider whether to drive policy under the adequacy theory's reading of the education clause, one can only hope that they will bear in mind John Adams's other great constitutional principle, arguably far more fundamental to our system of government: "The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not men."<sup>58</sup>

## Notes

1. *Hancock v. Commissioner of Education*, 443 Mass. 428, 822 N.E.2d 1134 (Mass. 2005).
2. *Ibid.*, at 1137.
3. Michael Rebell, Askwith Forum at Harvard Graduate School of Education, November 16, 2004 (video at [forum.wgbh.org/wgbh/forum.php?lecture\\_id=1723](http://forum.wgbh.org/wgbh/forum.php?lecture_id=1723) [October 30, 2005]). See Rebell's comments on *Hancock* at approximately 1:05 to 1:10. This forum was held after the trial judge's report was issued, but prior to the Supreme Judicial Court's decision.
4. *Ibid.*, at approximately 1:05. See also citations below to the plaintiffs' briefs.
5. *Hancock v. Commissioner of Education*, at 1156.
6. Adequacy advocates claim that the standard does not require specified outcomes, but merely the *opportunity* to achieve those outcomes. If so, this would seem to allow for something fewer than all students achieving the outcome in any given school or district ("how few" is not specified). As argued in court, however, the distinction between results and opportunity is minimal. Thus in *Hancock*, although plaintiffs described the standard as assuring a "reasonable opportunity" to acquire specified capabilities (Plaintiffs-Appellees Brief, 2004 WL 3250225, at 103), they stressed that the districts in question "are not equipping all of their students" with those capabilities, as judged by outcomes (Plaintiffs-Appellees Brief, at 87, and similar language throughout). To the court, the plaintiffs' case seemed to be about outcomes for all students.

7. English language arts (ELA); mathematics; science and technology; history and social science; foreign languages; the arts; and health.

8. *Ibid.*, at 5–6, 96–97.

9. See Alfred A. Lindseth, “Educational Adequacy Lawsuits: The Rest of the Story,” PEPG 04-07 (Harvard Program on Educational Policy and Governance, April 2004).

10. Rebell, Askwith Forum, at approximately 1:11. In Massachusetts, the plaintiffs emphasized in court their support for the state standards and assessments (MCAS), but the case was funded largely by the teacher union, which had vigorously opposed the assessments.

11. During oral arguments before the Supreme Judicial Court, the plaintiffs’ counsel cited the number of students who dropped out prior to their senior year. Justice Cowin responded pointedly, “What are we supposed to do about that?” The justice’s reaction suggests that there are limits to the state’s obligation to secure results when inputs such as the student’s own effort and commitment are beyond state control.

12. *McDuffy v. Secretary of the Executive Office of Education*, 415 Mass. 545, 615 N.E.2d 516 (Mass. 1993). John Adams’s famous education clause states: “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 . . . it shall be the duty of legislatures and magistrates . . . to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns.” Much of the *McDuffy* decision rested on the interpretation of the eighteenth-century meaning of “cherish.”

13. *Ibid.*, at 614.

14. *Ibid.*, note 8, as well as the dissenting opinion.

15. *Ibid.*, at 618.

16. *Ibid.*, at 620–21.

17. Lindseth, “Educational Adequacy Lawsuits.”

18. For an account of the politics of this act, including the key role of business-backed reform groups, see Robert M. Costrell, “Comment on ‘Test-Based Accountability: The Promise and the Perils,’” in *Brookings Papers on Education Policy 2005*, edited by Diane Ravitch (Brookings, 2005) pp. 27–37.

19. Education Trust, *The Funding Gap* (various years).

20. See S. Paul Reville, “High Standards + High Stakes = High Achievement in Massachusetts,” *Phi Delta Kappan* (April 2004): 591–97.

21. *Hancock v. Commissioner of Education*, 2004 WL 877984 (Mass. Super. Ct., April 26, 2004), at 14.

22. *Ibid.*, note 33, which makes particular reference to equity comparisons with other states.

23. Deborah A. Verstegen, “Calculation of the Cost of an Adequate Education in Massachusetts under the Curriculum Frameworks” (University of Virginia, June 2003).

24. This result was no different from what the head of the plaintiffs’ organization had been publicly saying for months prior to the trial—namely that she had evidence that *all* districts in the state were dramatically underfunded. In court, however, the plaintiff lawyers chose not to present this implication of the study.

25. *Hancock v. Commissioner of Education*, 2004 WL 877984 (Mass. Super. Ct., April 26, 2004), at 121.

26. *Ibid.* During the trial, the judge expressed particular surprise at finding among the list of panelists the mother of Jami McDuffy (the original plaintiff), who works in the school system attended by her daughter and also by the subsequent lead plaintiff.

27. Versteegen, "Calculation of the Cost of an Adequate Education," p. 77.

28. For further discussion of the successful schools model, and also for an alternative approach, see James Peyser and Robert Costrell, "No Money Left Behind: Exploring the Costs of Accountability," *Education Next* 4 (Spring 2004): especially pp. 28–29.

29. Of Myers's forty-five top-scoring K–12 districts, thirty-nine are included in the sixty-eight low-poverty districts depicted. (Myers's set of seventy-five districts included districts that are elementary only and high school only, as well as K–12 districts. However, high school costs differ from elementary school costs, so the figure depicts K–12 districts only to facilitate comparisons.)

30. The dynamic implications of this procedure are even more paradoxical. If the minimum is taken to be the average, then every district below average must raise its spending to the average. But, of course, this raises the average further. The process does not end until all districts are brought up to that of the highest-spending district. Thus by setting the average as the minimum, one ultimately ends up with the *maximum* as the minimum. This is not simply an exercise in *reductio ad absurdum*; it is a recipe for constantly recurring litigation, if the successful schools model is taken as dispositive, since each round's remedy lays the ground for the next round's complaint.

31. For a fuller discussion of this strand of evidence (and the Botsford report more generally), see Robert M. Costrell, "Wrong Answer on School Finances," *CommonWealth* (Fall 2004): 79–87.

32. *Hancock v. Commissioner of Education*, at 1153.

33. *Ibid.*, at 1146.

34. *Ibid.*

35. *Ibid.*, at 1140.

36. *Ibid.*, at 1138.

37. *Ibid.*, at 1139.

38. Plaintiffs-Appellees Brief, at 6, 12.

39. *Hancock v. Commissioner of Education*, at 1153.

40. *Ibid.*, at 1154, note 29, citing William E. Thro, "A New Approach to State Constitutional Analysis in School Finance Litigation," *Journal of Law and Politics* 14 (1998): 525, 548. Justice Cowin (writing also for Justice Sosman) distanced herself from *Rose* even more vigorously, on separation of powers grounds. She argued that *McDuffy* did indeed embrace the *Rose* capabilities more prescriptively than Chief Justice Marshall's opinion portrayed. In her view, *McDuffy* was wrongly decided, and the embrace of the *Rose* capabilities was the most egregious aspect of that "overreaching" decision, "a display of stunning judicial imagination." *Ibid.*, at 1160.

41. *Ibid.*, at 1152.

42. *Ibid.*, at 1141.

43. *Ibid.*, at 1147.

44. *Ibid.*, at 1152–53.

45. *Ibid.*, at 1138.

46. *Ibid.*, at 1155.

47. Plaintiffs-Appellees Brief, at 143–44.

48. Quoted in Jonathan Saltzman, "School Woes Not Simple, Say Justices," *Boston Globe*, October 5, 2004.

49. Quoted in Kevin Rothstein, "SJC: Money Alone Won't Boost Education," *Boston Herald*, October 5, 2004.

50. *Hancock v. Commissioner of Education*, at 1149 and note 35 at 1157.

51. *Ibid.*, at 1156.

52. *Ibid.*, at 1156–57.

53. *Ibid.*, at 1165.

54. For a fuller discussion of how and why the “grand bargain” sequence (funding first, high stakes second) worked in Massachusetts, see Costrell, “Comment on ‘Test-Based Accountability.’”

55. See Caroline M. Hoxby, “Are Efficiency and Equity in School Finance Substitutes or Complements?” *Journal of Economic Perspectives* 10, no. 4 (1996): 51–72.

56. Robert M. Costrell, “Equity v. Equity: Why *Education Week* and the Education Trust Don’t Agree,” *Education Next* 32 (Summer 2005): 77–81.

57. *Ibid.*, p. 80.

58. Constitution of the Commonwealth of Massachusetts, Part the First: A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts, Article XXX.