

# “MCDUFFY IS DEAD; LONG LIVE MCDUFFY!”: FUNDAMENTAL RIGHTS WITHOUT REMEDIES IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

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“Laws for the liberal education of youth, especially of the lower class of people, are so extremely wise and useful, that, to a humane and generous mind, no expense for this purpose would be thought extravagant,” John Adams, 1776.<sup>1</sup>

## INTRODUCTION: THE HISTORY OF RIGHTS AND REMEDIES

Forming the foundation for American values and law, the Declaration of Independence introduced the concept that certain fundamental rights are derived from a higher power and that government exists to ensure that these rights are delivered to man.<sup>2</sup> Embedded within the Declaration’s premise is the assumption that without government, “god-given” fundamental rights would not be fully protected and recognized in society.<sup>3</sup>

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<sup>1</sup> JOHN ADAMS, *Thoughts on Government*, in 4 WORKS OF JOHN ADAMS 193, 199 (C.F. Adams ed. 1851).

<sup>2</sup> See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.

<sup>3</sup> See Paolo Torzilli, Article, *Reconciling The Sanctity of Human Life, The Declaration of Independence, and the Constitution*, 40 CATH. LAW. 197, 214 (2000) (“The Constitution

While this concept is certainly apparent in the underpinnings of American jurisprudence – from the old town meeting to the modern congressional legislature – the government's role in protecting rights dates as far back as the ancient Greek and Roman Empires.<sup>4</sup> Plato's notions regarding the balance of law and man demonstrate that he shared the similar thoughts of our forefathers with respect to the role of government.<sup>5</sup> "Laws are partly formed for the sake of good men, in order to instruct them how they may live on friendly terms with one another, and partly for the sake of those who refuse to be instructed, whose spirit cannot be subdued, or softened, or hindered from plunging into evil."<sup>6</sup> Remaining true to notion that government must serve a protective function, Charles de Montesquieu observed in the pre-Revolutionary War era, "In the state of nature . . . all men are born equal, but they cannot continue in this equality. Society makes them lose it, and they recover it only by the protection of the law."<sup>7</sup>

The theories of political philosophers through the ages teach the concepts behind the origin of rights and laws.<sup>8</sup> In modern practice, rights and laws exist in a broad spectrum of hierarchy from municipal ordinances and agency regulation to common law, legislative statutes, and of course, the constitutions of our states and nation.<sup>9</sup> Paired with each one of these various rights within the legal system are their distinct counterparts – their

established a government system best suited to secure the rights embraced by the Declaration of Independence.").

<sup>4</sup> See Albert M. Rosenblatt, *Fifty-Fifth Cardozo Memorial Lecture: The Law's Evolution: Long Night's Journey Into Day*, 24 CARDOZO L. REV. 2119, 2129 (2003) (noting Greek writers explored "the nature of the universe" and laid the foundation for modern rules of behavior and governance).

<sup>5</sup> See *id.* at 2129–30 (discussing Plato's idea that justice is best achieved in an ideal state or Republic and that "harmony exists when people live together in the polis under precepts of universal and eternal justice").

<sup>6</sup> PLATO, LAWS, Book IX 227 (Benjamin Jowett, trans., Prometheus Books 2000).

<sup>7</sup> Charles de Montesquieu, 1 THE SPIRIT OF LAWS, Book VIII, Ch. 3, 121 (Thomas Nugent, LL.D., trans., G. Bell & Sons, Ltd. 1914).

<sup>8</sup> See Thom Brooks, *Does Philosophy Deserve a Place at the Supreme Court?* 27 RUTGERS L. REC. 1, 1 (2003) (noting courts often use philosophers' theories as a "backdoor method" for justifying judicial policy).

<sup>9</sup> See Carl Bruch, Wole Coker & Chris VanArsdale, *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*, 26 COLUM. J. ENVTL. L. 131, 138–39 (2001) (discussing civil law systems and the recent trend towards constitutionalism, involving a hierarchy of laws beginning with the constitution, followed by statutes, regulations, and custom).

“bite,” their remedy.<sup>10</sup> Depending on the right infringed, remedies take the form of legal or equitable relief.<sup>11</sup> Sometimes remedies afford monetary compensation, sometimes injunction or other specific performance, and other times remedies exist in the punitive form as prison sentences or even death.<sup>12</sup> As William Blackstone noted, “[W]here there is a legal right, there is also a legal remedy, . . . whenever that right is invaded.”<sup>13</sup> Accordingly, American legal rights, whatever the physical form, intuitively follow with a remedy, designed to ensure that the justice provided for in the right is effectuated and not left empty.<sup>14</sup> Remedies thus mandate the involvement of the governing body and require that these bodies ensure rights through their application.<sup>15</sup>

This article tracks the history of certain legal rights, which exist expressly or impliedly under both the U.S. Constitution and the Massachusetts Constitution, and the remedies which give these rights their “bite.” It further establishes certain differences between the Constitutions, concluding that the Massachusetts Constitution is wholly more protective of individual rights than its federal counterpart. This article posits that one right – the fundamental right to education – as expressly provided under the Massachusetts Constitution, has been permitted to exist without a remedy, a jurisprudential choice which has not been supported though all of history and thus leaves the fundamental right to education empty in the Commonwealth.

<sup>10</sup> See Marsha S. Berzon, *Rights and Remedies*, 64 LA. L. REV. 519, 530 (2004) (suggesting rights and remedies be kept distinctly separate in legal analysis, fearing tremendous harm to legal doctrine and individual rights enforcement if rights and remedies are blended together).

<sup>11</sup> See E. ALLAN FARNSWORTH, WILLIAM F. YOUNG & CAROL SANGER, *CONTRACTS* 452 (Robert C. Clark ed., Foundation Press 2001) (1965) (noting at common law, equitable relief was discretionary and often withheld if “considerations of fairness or morality dictated”).

<sup>12</sup> See *id.* (discussing equitable remedies at common law and their application when damages awards were “adequate”).

<sup>13</sup> *Id.* at 531.

<sup>14</sup> *Id.* at 530 (noting that a “foundational tenet” of our legal society is that courts fashion remedies after finding that a right has been impeded).

<sup>15</sup> *Id.* at 533 (demonstrating judicial remedies are one way governments may step in to support a claim of right).

## I. EXPRESS AND IMPLIED RIGHTS UNDER THE U.S. CONSTITUTION AND THEIR CORRESPONDING REMEDIES

“The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.”<sup>16</sup>

There are rights so elemental to the American way of life, that they are clearly written and enumerated in the text of the United States Constitution. For example, the rights to freely speak, print, and protect oneself with the force of a weapon,<sup>17</sup> proved so essential to the basic structure of the American government that perhaps no Constitution would have been ratified without their inclusion.<sup>18</sup> Following the proposal of the United States Constitution to the several states in 1787, Anti-federalist leaders urged the framers to include a Bill of Rights before the document would be ratified.<sup>19</sup>

On June 8, 1789, James Madison introduced the Bill of Rights in the House of Representatives, effectively enumerating twelve rights which the founders of the Constitution, as well as the citizens of the United States, valued so greatly.<sup>20</sup> Ten of the 12 original rights<sup>21</sup> stand unchanged more than two centuries later.<sup>22</sup>

A brief look at the rights and remedies expressly guaranteed under the First through Eighth Amendments demonstrates the

<sup>16</sup> *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

<sup>17</sup> See U.S. CONST. amend. I, II. The First Amendment states, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I. The Second Amendment states, “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II.

<sup>18</sup> See CHARLES A. SHANOR, *AMERICAN CONSTITUTIONAL LAW: STRUCTURE AND RECONSTRUCTION* 5 (2nd ed. 2003).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Articles I and II of Madison’s 1789 proposed Bill of Rights were never ratified. Art. I pertained to calculation of House of Representative seats and Art. II involved congressional compensation changes. While Article I was never added to the Constitution, Article II was adopted in 1994 as the 27<sup>th</sup> Amendment to the Constitution. Bill of Rights: See BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 1164, 1171 (Chelsea House 1971); see also U.S. CONST. amend. XXVII.

<sup>22</sup> See U.S. CONST. amend. I–X (composing ten of the original twelve provisions enumerated in the proposed Bill of Rights).

varying types of liberties the Framers sought to preserve for the American people and the means through which courts and Congress chose to ensure they would be enforced.<sup>23</sup> The Sixth Amendment right to a speedy trial<sup>24</sup> was given remedial credence by congressional statute. Under 18 U.S.C.A. § 3162, charges against a criminal defendant will be dismissed with or without prejudice if the statutory and constitutional guarantees of the right to a speedy trial are not satisfied.<sup>25</sup> The right to freedom from cruel and unusual punishment under the Eighth Amendment<sup>26</sup> is enforced through suits against individual prison officials charged with constitutional violations.<sup>27</sup> The Sixth and Seventh Amendment rights to a trial by jury<sup>28</sup> were paired with the remedy that individual cases be heard and decided by jurors, rather than a judge.<sup>29</sup> Further, the First Amendment, which ensures the freedom of expression,<sup>30</sup> is often accompanied by the issuing of an injunction to protect the free expression of the speaker.<sup>31</sup>

<sup>23</sup> See Dennis G. LaGory, *Federalism, Separation of Powers, and Individual Liberties*, 40 VAND. L. REV. 1353, 1353 (1987) (discussing preservation of liberty as the Framers' "chief objective of government").

<sup>24</sup> See U.S. CONST. amend VI (establishing right to a speedy trial).

<sup>25</sup> See 18 U.S.C.A. § 3162 (1975) (indicating ramifications of not satisfying right to a speedy trial).

<sup>26</sup> See U.S. CONST. amend VIII (establishing freedom from cruel and unusual punishment); see generally *Roper v. Simmons*, 543 U.S. 551, 560–61 (discussing how Eighth Amendment "cruel and unusual punishment" language should be examined in the same manner as other expansive language in the Constitution is interpreted).

<sup>27</sup> See *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68 (2001) (noting threat of suits against United States was "insufficient" to deter unconstitutional acts of individuals).

<sup>28</sup> See *Blakely v. Washington*, 542 U.S. 296, 309 (2004) (asserting that traditional jury function is finding facts essential to the lawful imposition of a penalty).

<sup>29</sup> See *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 564 (1990) (quoting Seventh Amendment, "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.>").

<sup>30</sup> See *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 125 S. Ct. 2722, 2742 (2005) (noting government may not favor one religion over another, thus enabling free expression of religious beliefs).

<sup>31</sup> See *id.* at 2745 (highlighting Supreme Court's affirmation of Sixth Circuit's preliminary injunction against governmental action that had a predominantly religious purpose).

Finally, the rights to bear arms<sup>32</sup> and to be free from the imposition of the federal government on certain land and property rights were guaranteed by the Second, Third, and Fourth Amendments, shielding individuals from unreasonable searches and seizures<sup>33</sup> and prohibiting the government from occupying land to quarter soldiers without the property owner's consent.<sup>34</sup> These rights also come with individualized remedies. Most notably, Fourth Amendment violations are remedied in court through the exclusionary rule, an evidentiary standard which proscribes the use of evidence against defendants obtained in violation of their Constitutional right to "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . ."<sup>35</sup>

While the rights expressly stated in the Constitution and their respective judicial or statutory remedies form the basic infrastructure of American justice, other rights not explicitly stated in the Constitution but inferred from the text, form an additional body of fundamental liberties.<sup>36</sup> Just like express rights, these implied rights are often paired with particular remedies specifically tailored to guarantee that the right is effectuated.<sup>37</sup> These implied fundamental rights have been

<sup>32</sup> See Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 461-65 (1995). Reynolds analyzes the history, meaning, and interpretations of the Second Amendment in the context of the debates surrounding the right to bear arms and gun control. *Id.* It should be noted that it is not within the purview of this article to discuss whether the Second Amendment refers to the "individual" right to bear arms or whether this right is a "collective" right in the context of the prefatory language "a well regulated militia."

<sup>33</sup> See *Hiibel v. Sixth Judicial Dist. Court of Nev., Humboldt County*, 542 U.S. 177, 187-88 (2004) ("The reasonableness of a seizure under the Fourth Amendment is determined by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests.").

<sup>34</sup> See *Whalen v. Roe*, 429 U.S. 589, 600 n.24 (1977) (referring to Fourth Amendment right of the individual to be free in his/her private affairs from governmental surveillance and intrusion).

<sup>35</sup> See *Illinois v. Gates*, 462 U.S. 213, 254 (1983) ("If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring that his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."); see also *Mapp v. Ohio*, 367 U.S. 643, 648 (1961) (stating that "this Court has held [the exclusionary rule] to be a clear, specific, and constitutionally required-even if judicially implied-deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to 'a form of words'").

<sup>36</sup> See, e.g., *Faretta v. California*, 422 U.S. 806, 818 (1975) (holding criminal defendant has a fundamental right implied in Sixth Amendment to represent himself during trial).

<sup>37</sup> See *id.* at 815-19 (noting that state cannot constitutionally force a lawyer upon defendant).

described as fitting into six additional categories<sup>38</sup> including: (1) freedom of association, (2) right to vote, (3) right to travel, (4) right to fairness in the criminal process, (5) right to fairness in individual claims against the government for deprivation of life, liberty or property and (6) right to privacy.<sup>39</sup> Within these categories, the Supreme Court has further cited and developed specific fundamental entitlements, which are alleged to exist between the lines of the Constitution and accordingly provided their remedies.<sup>40</sup>

The implicit right to freedom of association was established in the 1958 Supreme Court case *NAACP v. Alabama*.<sup>41</sup> In *NAACP*, the court had to decide whether the State of Alabama could require the NAACP to submit a list of names and addresses of members residing in the state.<sup>42</sup> The Court reasoned that a close nexus existed between freedom of speech guaranteed under the First Amendment and the non-enumerated right to freedom of assembly.<sup>43</sup> Based on an intertwined relationship between the two rights, the court inferred a fundamental right to assemble and applied a strict scrutiny test to hold that the state could not compel the NAACP to report its members.<sup>44</sup> Even though the words “right to assemble” are absent from the text of the First Amendment, the court nonetheless created a remedy that

<sup>38</sup> See Dr. G. Steven Neeley, *The Constitutional Right to Suicide, the Quality of Life, and the “Slippery Slope”: An Explicit Reply to Lingering Concerns*, 28 AKRON L. REV. 53, 76 n.16 (1994) (defining implied fundamental rights as “those explicitly guaranteed by the Bill of Rights or otherwise implied but not expressly articulated in the Constitution’s text”).

<sup>39</sup> See Rex E. Lee, *The Religious Freedom Restoration Act: Legislative Choice and Judicial Review*, 1993 BYU L. REV. 73, 82 (1993) (referring to right to appeal a criminal conviction, right to travel and right to privacy as implied fundamental rights).

<sup>40</sup> See, e.g., *Saenz v. Roe*, 526 U.S. 489, 498 (1999) (noting the word “travel” is not found in Constitution’s text but the right to travel from one state to another is nonetheless firmly embedded in the Court’s jurisprudence).

<sup>41</sup> 357 U.S. 449, 466 (1958) (holding that Fourteenth Amendment protects members of NAACP when they pursue their lawful private interests and associate freely with others).

<sup>42</sup> See *id.* at 451 (“The question presented is whether Alabama, consistently with the Due Process Clause of the Fourteenth Amendment, can compel petitioner to reveal to the State’s Attorney General the names and addresses of all its Alabama members and agents, without regard to their positions or functions in the Association.”).

<sup>43</sup> See *id.* at 460 (noting nexus between freedom of speech and freedom of assembly).

<sup>44</sup> See *id.* at 466 (delineating that Alabama failed to show a controlling justification for the deterrent effect on enjoyment of the right to associate, a liberty under the Fourteenth Amendment).

shielded NAACP members from the reach of the state, allowing them to remain anonymous.<sup>45</sup>

Similar to the implicit fundamental right to assemble, the Court has also inferred the fundamental rights to vote and travel. The Court in *Shapiro v. Thompson*<sup>46</sup> held that the right to freely pass interstate was so fundamental to the function of this country as to simply be understood, despite the absence of an enumerated right from which to derive a right to travel.<sup>47</sup> Accordingly, the Court provided the remedy which mandated statutes or other regulations bearing a “chilling effect” on interstate travel to be modified or removed.<sup>48</sup> Likewise, the Court in *Harper v. Virginia State Bd. of Elections*<sup>49</sup> found an implicit right to vote in state elections by concluding: “While the right to vote in federal elections is conferred by Article I, § 2, of the Constitution the right to vote in state elections is nowhere expressly mentioned. It is argued that the right to vote in state elections is implicit, particularly by reason of the First Amendment and that it may not constitutionally be conditioned upon the payment of a tax or fee.”<sup>50</sup> The *Harper* Court, like the *Shapiro* Court, struck down the adverse poll-tax statute, thus fostering a remedy consistent with the historical role of the courts since the advent of judicial review.<sup>51</sup>

Another category of fundamental rights inferred under the Constitution includes those rights that help to ensure fairness in the criminal process.<sup>52</sup> Perhaps the most noteworthy Supreme Court decision in this regard was the 1963 case *Gideon v. Wainwright*.<sup>53</sup> Wrestling with the issue of whether the right to counsel, enumerated under the Sixth Amendment, compelled the court to provide an attorney to criminal defendants who could not afford to pay for one, the Court held:

<sup>45</sup> See *id.* (ruling that NAACP does not have to comply with production order).

<sup>46</sup> 394 U.S. 618 (1969).

<sup>47</sup> See *id.* at 630–31 (including right to travel as a fundamental right guaranteed under the Constitution).

<sup>48</sup> See *id.* at 623 (noting the court struck down one-year waiting period requirement).

<sup>49</sup> 383 U.S. 663 (1966) (holding Virginia poll-tax violated Equal Protection Clause and the implicit right to vote in state elections).

<sup>50</sup> *Id.* at 665.

<sup>51</sup> See *id.* at 670 (asserting that “the right to vote is too precious, too fundamental to be so burdened or conditioned”).

<sup>52</sup> See Lee, *supra* note 39, at 82 (noting right to appeal a criminal conviction is neither explicitly nor implicitly guaranteed by the Constitution).

<sup>53</sup> 372 U.S. 335 (1963).



The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.<sup>54</sup>

Drawing on American values, and more specifically, the American criminal justice system's high premium on preserving the adversarial process, the Court inferred that the right to counsel, even for those who can not afford it, is fundamental under the Constitution's guarantees and therefore must be provided by the court.<sup>55</sup> And, although the remedy required by this decision might be difficult to implement, the Court was not intimidated and did not negate the right.

The opinion came to an end without any mention of the difficult problems of the scope of the decision: what kinds of criminal cases it covered; if any apart from felonies; at what stage of the proceeding counsel was required; whether the decision applied to persons already in prison, so that those who had not had counsel must now be given new trials. All those questions were presumably left to be answered when raised specifically by later cases.<sup>56</sup>

The *Gideon* court's perseverance in requiring courts to provide and pay for legal counsel to indigent defendants as a remedy for the right to counsel remains arguably the most fair and courageous action taken by the Court in giving "bite" to an implied constitutional right.

The right to procedural Due Process in claims against the government encompasses the next category of implied fundamental rights under the U.S. Constitution.<sup>57</sup> Codified

<sup>54</sup> *Id.* at 344.

<sup>55</sup> *See id.* (holding right to counsel is a fundamental right, even to those who cannot afford an attorney).

<sup>56</sup> ANTHONY LEWIS, *GIDEON'S TRUMPET* 189 (Vintage Books 1966).

<sup>57</sup> *See* *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2812 (2005). "The Due Process Clause [of the Fourteenth Amendment] extends procedural protection to guard

under the Fourteenth Amendment in 1868, the right mandates that no state shall “deprive any person of life, liberty, or property, without due process of law.”<sup>58</sup> The Amendment was given full effect by the Court in the 1970s with landmark cases *Mathews v. Eldridge*<sup>59</sup> and *Goldberg v. Kelly*.<sup>60</sup> Both cases turned on the issue of how much “process” the government must provide individuals before encroaching on other entitlements such as property interests or substantive rights.<sup>61</sup> Just like the right to assemble and travel, Due Process became an implied fundamental right, which required the courts to balance the private interest that would be affected by the government action, the risk that erroneous deprivation would occur given the circumstances, and the government’s functional interest in the matter.<sup>62</sup> With respect to the remedy for due process, the *Eldridge* Court stated, “a person in jeopardy of serious loss [must] (be given) notice of the case against him and an opportunity to meet it.”<sup>63</sup>

against unfair deprivation by state officials of substantive state-law property rights or entitlements; the federal process protects the property created by state law.” *Id.* The Fifth Amendment’s due process clause accomplishes the same end regarding federal actions. What we call “due process” can be traced back to Chapter Thirty-Nine of Magna Carta. Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 948. Chapter Thirty-Nine in Magna Carta became Chapter Twenty-Nine in 1225. *Id.* at 958. It first read, “[n]o free man shall be taken or imprisoned or disseised or exiled, or in any way destroyed except by lawful judgment of his peers or by the law of the land.” See FAITH THOMPSON, *MAGNA CARTA: ITS ROLE IN THE MAKING OF THE ENGLISH CONSTITUTION, 1300-1629*, 87 (1948). The phrase “due process of law” first appeared in a statutory version of the 1225 reissue in 1354, “No man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of the law.” 28 EDW. III, c. 3; THOMPSON, *supra*, at 97 n.72. See generally A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* (University of Virginia Press 1968). Howard shows how this influenced the colonies and later the United States. See generally *Id.*

<sup>58</sup> U.S. CONST. amend. XIV, § 1.

<sup>59</sup> 424 U.S. 319, 348 (1976) (holding that discontinuance of social security disability benefits without a hearing did not violate Due Process).

<sup>60</sup> 397 U.S. 254, 267–68 (1970), *superseded by statute*, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C.S. § 601b (2005) (ruling that discontinuance of welfare benefits without notice and a hearing violated Due Process).

<sup>61</sup> See *Goldberg*, 397 U.S. at 266–71. *Goldberg* was the first case to hold that a hearing was necessary to satisfy Fourteenth Amendment due process. *Id.* The case involved terminating an individual welfare recipient’s monthly stipends for failure to meet program requirements without providing recipient an opportunity to contest the charges. *Id.*

<sup>62</sup> See *Eldridge*, 424 U.S. at 334–35 (discussing factors derived from precedent that must be considered in deciding due process issues).

<sup>63</sup> See *id.* at 348 (citing *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171–72 (1951)).

Finally, the implied fundamental right to privacy as established in *Griswold v. Connecticut*<sup>64</sup> has proven the most expansive, and perhaps the most controversial, of the rights inferred by the Court as fundamental under the Constitution. Justified as existing within a “penumbra” of enumerated rights expressly contained in the Bill of Rights, or the opened-ended tether of the Ninth Amendment, the right to privacy encompasses more specific rights within its breadth such as the right to inter-racial marriage,<sup>65</sup> the right to procreation,<sup>66</sup> the right to raise children as one sees fit,<sup>67</sup> and the right to choose whether to have an abortion.<sup>68</sup> The respective remedies of such rights which trigger the broader category of “privacy” deal mainly with the removal of government presence from certain areas of private life, and the courts’ role in policing the distance between individual choices and government involvement.<sup>69</sup> Whatever the means for ensuring the respective remedy specific to each subset of the right to privacy, be it striking down an unconstitutional statute or some other judicial or legislative action, the remedy must always focus on the protection of the individual to ensure the right to privacy is protected.<sup>70</sup>

<sup>64</sup> 381 U.S. 479, 499 (1965) (finding that Connecticut law prohibiting use of contraceptives violated fundamental right to privacy).

<sup>65</sup> See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding Virginia statute banning inter-racial marriage unconstitutional).

<sup>66</sup> See *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (finding Oklahoma Habitual Criminal Sterilization Act in violation of fundamental right to procreate).

<sup>67</sup> See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (ruling that Oregon’s Compulsory Education Act “unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control”).

<sup>68</sup> See *Roe v. Wade*, 410 U.S. 113, 153 (1973) (White, J., concurring) (finding that right of privacy “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy”).

<sup>69</sup> See Gary A. Winters, Note, *Unconstitutional Conditions as “Nonsubsidies”: When Is Deference Inappropriate?*, 80 GEO. L.J. 131, 156–58 (1991) (discussing Supreme Court’s view on separation of public and private spheres).

<sup>70</sup> See *Miller v. Rumsfeld*, 647 F.2d 80, 85 (9th Cir. 1981) (stating Court’s focus in substantive due process inquiries involving privacy has been “on the significance and intimacy of a personal decision to the individual”).

## II. A MORE PROTECTIVE DOCUMENT: EXPRESS AND IMPLIED RIGHTS UNDER THE MASSACHUSETTS CONSTITUTION

We have recognized that our Constitution may more extensively protect individual rights than the Federal Constitution in widely different contexts.<sup>71</sup>

The Commonwealth of Massachusetts can easily be regarded a cornerstone of American democracy.<sup>72</sup> While the express and implied protections offered within the bounds of the U.S. Constitution have sustained the extensive fundamental rights of the American people for nearly two and a quarter centuries, the Constitution of the Commonwealth of Massachusetts stands its elder<sup>73</sup> and arguably grants broader rights.<sup>74</sup> It seems to follow that the remedies paired with these more inclusive fundamental rights in the Commonwealth should similarly remain more inclusive and protective in their applications.<sup>75</sup>

The Declaration of Rights of the Inhabitants of the Commonwealth of Massachusetts (Part the First)<sup>76</sup> within the Massachusetts Constitution resembles its federal counterpart, the Bill of Rights, in a number of ways. Protecting similar basic rights – exercise of religion remedied (Art. II),<sup>77</sup> freedom from unreasonable searches and seizures (Art. XIV),<sup>78</sup> trial by jury

<sup>71</sup> Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 959 n.18 (Mass. 2003).

<sup>72</sup> See S.B. Benjamin, *The Significance of the Massachusetts Constitution of 1780*, 70 TEMP. L. REV. 883 (1997) (positing Massachusetts' Constitution as "the source of the Federal Constitution's political theory").

<sup>73</sup> *Id.* at 884 (noting that Massachusetts' state constitution is "one of the oldest written constitutions still in continuous use").

<sup>74</sup> See Roderick L. Ireland, *How We Do it in Massachusetts: An Overview of How the Massachusetts Supreme Judicial Court has Interpreted its State Constitution to Address Contemporary Legal Issues*, 38 VAL. U. L. REV. 405, 410 (2004) (stating that Massachusetts Supreme Judicial Court "concluded that Article 12 of the Massachusetts Declaration of Rights provided a broader protection against self-incrimination than the Fifth Amendment").

<sup>75</sup> See *id.* at 414–15 (arguing that even when similar principles are articulated by both Massachusetts and Federal Constitution, they do not have to be similarly interpreted).

<sup>76</sup> See MASS. CONST., available at <http://www.mass.gov/legis/const.htm> (including text of the Declaration of Rights of the Inhabitants of the Commonwealth of Massachusetts).

<sup>77</sup> See MASS. CONST. art. II (stating "no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience."); see also *Soc'y of Jesus of New England v. Commonwealth*, 808 N.E.2d 272, 279 (Mass. 2004) (noting free exercise of religion" protection in Massachusetts).

<sup>78</sup> See MASS. CONST. art. XIV (stating "[e]very subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his

(Art. XV), right not to impeach one's self (Art. XII),<sup>79</sup> protection against cruel and unusual punishment (Art. XXVI)<sup>80</sup> – the Massachusetts Constitution additionally includes such enumerated rights as the right to assemble (Art. XIX)<sup>81</sup> and freedom from taxation without the consent of the people or their representatives (Art. XXIII).<sup>82</sup> The bulk of the implied rights for which the Supreme Judicial Court (SJC) has focused its time unearthing are subdivisions of an implicit right to privacy. Over the years, the SJC has rendered Commonwealth residents the right to decide whether to have a child,<sup>83</sup> the right to decide how to raise one's children,<sup>84</sup> and the right to decide whether to accept medical treatment.<sup>85</sup>

As one might assume, these rights come paired with various remedial measures, just as in their federal versions.<sup>86</sup> Such remedies range from statutory remedy and individual causes of action to injunction and evidentiary provision.<sup>87</sup> Chapter V's fundamental right to education is one right, however, that falls outside of the natural right and remedy dichotomy.<sup>88</sup> Not only

possessions.”); *see also In re Jansen*, 826 N.E.2d 186, 192 (Mass. 2005) (noting Article XIV of Massachusetts' Declaration of Rights).

<sup>79</sup> *See* MASS. CONST. art. XII (requiring no subject shall be held to “furnish evidence against himself”); *see also Commonwealth v. Martin*, 827 N.E.2d 198, 200 (2005) (noting Article XII).

<sup>80</sup> *See* MASS. CONST. art. XXVI (stating that no magistrate or court of law shall “inflict cruel or unusual punishments”).

<sup>81</sup> *See* MASS. CONST. art. XIX (recognizing the right to assemble in an orderly and peaceable manner).

<sup>82</sup> *See* MASS. CONST. art. XXIII (“No subsidy, charge, tax, impost, or duties, ought to be established, fixed, laid, or levied, under any pretext whatsoever, without the consent of the people or their representatives in the legislature.”).

<sup>83</sup> *See In re Moe*, 432 N.E.2d 712, 723 n.11 (Mass. 1982) (ruling that Massachusetts “has no interest in compelling the sterilization of its citizen for any purpose”).

<sup>84</sup> *See In re Care and Prot. of Robert*, 556 N.E.2d 993, 996 (Mass. 1990) (describing conceiving and raising children as a basic human right).

<sup>85</sup> *See Brophy v. New England Sinai Hospital, Inc.*, 497 N.E.2d 626, 633 (Mass. 1986) (recognizing that “[t]he right of a patient to refuse medical treatment arises both from the common law and the unwritten and penumbral constitutional right to privacy.”).

<sup>86</sup> *See Arizona v. Evans*, 514 U.S. 1, 8 (1995). It is not at all surprising that Massachusetts differs slightly from the federal government in the extension of its liberties, even though both sets of liberties arose from the same tenets of freedom. After all, “state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.” *Id.*

<sup>87</sup> *See generally Moe*, 432 N.E.2d at 715 (noting guardian seeking an order permitting tubal ligation).

<sup>88</sup> *See McDuffy v. Sec'y of the Executive Office of Educ.*, 615 N.E.2d 516, 527 (Mass. 1993) (concluding that Framers of Massachusetts Constitution “conceived of education as fundamentally related to the very existence of government”).

does this right remain absent from the express guarantees of the U.S. Constitution, but the Supreme Court has also declined to infer such a right.<sup>89</sup> Once again, the explanation for this divide is provided by the SJC itself—the constitution of the Commonwealth is simply more protective of individual rights than its federal successor.<sup>90</sup> Yet, the question remains as to why this express fundamental right comes with no corresponding remedy. More importantly, how did we even get here?

### III. FUNDAMENTAL RIGHT TO EDUCATION UNDER THE MASSACHUSETTS CONSTITUTION: “ALAS POOR MCDUFFY, WE KNEW YOU”<sup>91</sup>

#### A. *McDuffy and the Fundamental Right to Education*

John Adams, author of the Massachusetts Constitution, valued education. Part II, c. 5, § 2, in relevant part, 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 duties of legislatures and magistrates, in all future periods of the Commonwealth, to *cherish* the interests of literature and sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns; . . . (emphasis added)

*McDuffy* was originally filed directly in the SJC, *sub nom. Webby v. Dukakis*,<sup>92</sup> on behalf of the parents of children in

<sup>89</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (holding education is neither explicitly nor implicitly protected by United States Constitution).

<sup>90</sup> See *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 959 (2003) (positing that “[t]he Massachusetts Constitution protects matters of personal liberty against government incursion as zealously, and often more so, than does the Federal Constitution, even where both Constitutions employ essentially the same language.”).

<sup>91</sup> See WILLIAM SHAKESPEARE, *THE TRAGEDY OF HAMLET, PRINCE OF DENMARK* act 5, sc. 1. Hamlet beheld the skull of the King’s former jester and uttered the famous, but often misquoted words: “Alas, poor Yorick! I knew him, Horatio. . . .” *Id.*

sixteen property-poor cities and towns.<sup>93</sup> Soon thereafter, the Legislature devised a new finance scheme<sup>94</sup> and the plaintiffs had to wait to see its results. As the plaintiffs revived their claims and started to prepare for trial, the Legislature enacted yet another state aid formula<sup>95</sup> and the case was delayed by order of the single justice of the SJC, who was overseeing the case.<sup>96</sup> As the economy faltered and property-poor school districts were bearing the brunt of cuts from the reduced state aid, the plaintiffs filed a restated complaint in 1990.<sup>97</sup>

To this day, *McDuffy* is the only school finance case in the nation in which the issue of liability was decided on a stipulated record. There were “546 stipulations and six volumes of documentary material.”<sup>98</sup> The parties agreed on the validity of certain state reports, affidavits of educators (from within and without the Massachusetts Department of Education and other stipulations in order to establish a record for the Court’s review).<sup>99</sup> Some of the stipulations stated that, while the Commonwealth did not agree as to the content of the opinions asserted, they did constitute the opinion of the persons making them.<sup>100</sup> It took two and one-half years to develop this stipulated record.<sup>101</sup>

<sup>92</sup> See *McDuffy*, 615 N.E.2d at 518 (noting origin of case); see also Joseph B. Harrington, *Current Developments in the Law: A Survey of Cases Affecting Public Education*, 4 B.U. PUB. INT. L.J. 171, 171 n.3 (1994) (discussing procedural history of the case).

<sup>93</sup> See *McDuffy v. Sec’y of the Executive Office of Educ.*, 615 N.E.2d 516, 516 n.1 (Mass. 1993). The sixteen cities were Brockton, Belchertown, Berkley, Carver, Hanson, Holyoke, Lawrence, Leicester, Lowell, Lynn, Rockland, Rowley, Salisbury, Springfield, Whitman, and Winchendon. *Id.*

<sup>94</sup> See MASS. ANN. LAWS. ch. 70 § 32 (1978) (noting 1993 amendment).

<sup>95</sup> See MASS. ANN. LAWS. ch. 70A § 33 (1978) (noting it was repealed in 1993).

<sup>96</sup> See Harrington, *supra* note 92, at 171 (discussing slow progression of the case).

<sup>97</sup> *Id.* at 172. The plaintiffs argued that local public education was inadequate as a result of insufficient funding via property tax revenues generated by the poorer communities. See *id.* In addition, they claimed that the state aid provided was insufficient to compensate for this lack of local funding. See *id.*

<sup>98</sup> *McDuffy*, 615 N.E.2d at 519.

<sup>99</sup> See *McDuffy v. Sec’y of the Executive Office of Educ.*, 615 N.E.2d 516, 519 (Mass. 1993) (explaining what parties agreed upon).

<sup>100</sup> See *id.* at 519–21. The plaintiffs cited affidavits containing the opinions of various education professionals, such as Harold Reynolds (former Commissioner of Education), Peter Finn (Executive Director of the Massachusetts Association of School Superintendents), Rosanne Bacon (former President of the Massachusetts Teachers Association), and Robert Sperber (Professor of Education at Boston University). *Id.*

<sup>101</sup> See *id.* at 518. The initial Stipulation of Facts was filed in October 1991 and a supplemental Statement of Facts filed in November 1992, along with a six volume Joint

The question the Court addressed in *McDuffy* was whether the above quoted language “is merely hortatory, or aspirational, or imposes instead, a constitutional duty on the Commonwealth to ensure the education of its children in the public schools.”<sup>102</sup> The Court concluded that the text was:

[T]o be interpreted in the sense most obvious to the common intelligence. . . . “The words of a constitutional provision are to be given their natural and obvious sense according to common and approved usage as the time of its adoption.’ . . .<sup>103</sup> [T]he Constitution ‘is to be is to be interpreted in the light of the conditions under which it, and its several parts were framed, the ends which it was designed to accomplish, the benefits which it was expected to confer, and the evils which it was hoped to remedy.’<sup>104</sup> . . . Its words must be given a construction adapted to carry into effect its purpose.”<sup>105</sup>

Applying these standards of interpretation, the Court reasoned that, “First, the protection of rights and liberties requires the diffusion of wisdom, knowledge, and virtue throughout the people. Second, means of diffusing these qualities and attributes among the people is to spread the opportunities and advantages of education throughout the Commonwealth.”<sup>106</sup> In other words, “an educated people is viewed as essential to the preservation of the entire constitutional plan: a free, sovereign, constitutional democratic State.”<sup>107</sup>

To define what “duty” and “cherish” meant when the Constitution was written, the Court looked to dictionaries in existence at that time. “Duty” was defined as “that to which a man is by any natural or legal obligation bound.”<sup>108</sup> The word, “cherish,” meant “‘to support’ ‘to nourish’ or ‘to nurture,’”<sup>109</sup> and

Appendix. *See id.* The consolidated cases were reported by the Single Justice to the Full Court in December 1992, argued on 2 February 1993 and decided on 15 June 1993. *See id.*

<sup>102</sup> *Id.* at 519.

<sup>103</sup> *Id.* at 523.

<sup>104</sup> *Id.*

<sup>105</sup> *McDuffy v. Sec’y of the Executive Office of Educ.*, 615 N.E.2d 516, 524 (Mass. 1993)

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 525.

<sup>109</sup> *Id.*



the Court cited numerous dictionaries having similar usages of that term,<sup>110</sup> and other texts, including Shakespeare.<sup>111</sup> The Court's examination of this important word included how John Adams and other framers of the Constitution used it, for example, in describing the importance of freedom of the press, Adams said, "none of the means of information are more sacred, or have been *cherished* with more tenderness and care by the settlers of America, than the press."<sup>112</sup>

Thus, according to common usage in the late Eighteenth Century:

A duty to cherish was an obligation to support or nurture. Hence, the "duty . . . to cherish the interests of literature and the sciences, and all seminaries of them; especially . . . public schools and grammar schools in the towns" is an obligation to support or nurture these interests and institutions. The breath of the meaning of these terms ("duty . . . to cherish"), together with the articulated ends for which this duty is established, strongly support the plaintiffs' argument that the "duty . . . to cherish . . . the public schools" encompasses the duty to provide an education to the people of the Commonwealth. Part II, c.5, §2, states plainly that the duty to "cherish" —support— public schools arises out of the need to educate the people of the Commonwealth; it is reasonable therefore to understand the duty to "cherish" public schools as a duty to ensure that the public schools achieve their object and educate the people.<sup>113</sup>

It was also significant that the subject of education was put directly in the Constitution.

The framers' decision to dedicate an entire chapter — one of six — to the topic of education signals that it was to them a central concern. . . . [R]ather than listing it as a matter within the powers of the legislative or executive branches indicates structurally what is said

<sup>110</sup> *Id.* at 526, n.17. The Court noted that modern usage of "cherish" defines it as "to have the highest regard for" and "to hold dear." *Id.*

<sup>111</sup> See *McDuffy v. Sec'y of the Executive Office of Educ.*, 615 N.E.2d 516, 563 (Mass. 1993) (quoting WILLIAM SHAKESPEARE, *THE THIRD PART OF KING HENRY THE SIXTH* 1170 (Howard Staunton ed., Gramercy Books 1998) (1998)).

<sup>112</sup> *Id.* at 525.

<sup>113</sup> *Id.* at 526.

explicitly by words: that education is a 'duty' of government, and not merely an object within the power of government.<sup>114</sup>

Moreover, inserting the provisions about education in "The Frame of Government" – rather than in the Declaration of Rights" – demonstrates that the framers conceived of education as fundamentally related to the very existence of government.<sup>115</sup>

The next question the Court addressed was whether this duty was mandatory or "hortatory," as the Attorney General argued.<sup>116</sup> The Court gave two reasons why the duty is mandatory.<sup>117</sup> First was the Eighteenth Century interpretation of the words, "duty" and "cherish" as described above.<sup>118</sup> The second reason, the court explained, was a "double injunction:"

It not only sets forth the "duty"; it also, by the use of the term "shall," mandates the duty: "it *shall be the duty* of legislatures and magistrates"... Third, the duty is enjoined "for all future periods of this Commonwealth." The unusual temporal reference underscores the continuing nature of the obligation and militates against a reading of "duty" as merely advisory. Fourth, the Constitution does not use the term "duty" lightly. None of the powers and responsibilities of the three branches of government is described or prescribed in the Constitution as a "duty."<sup>119</sup>

Next, the court traced the history of public education in Massachusetts back to the colonial days of the 1630s, leading up to the drafting of Part II, c.5, §2 of the Massachusetts Constitution, which John Adams principally wrote.<sup>120</sup> Adams believed that "widespread public education was integral to the very existence of a republican government."<sup>121</sup>

<sup>114</sup> *Id.* at 526–27.

<sup>115</sup> *Id.* at 527(arguing Framers considered education a fundamental right).

<sup>116</sup> *See id.* (arguing that Massachusetts Constitution requires government to provide education).

<sup>117</sup> *McDuffy v. Sec'y of the Executive Office of Educ.*, 615 N.E.2d 516, 527 (Mass. 1993) (discussing reasons why providing education is a governmental duty).

<sup>118</sup> *Id.* (noting Eighteenth Century meaning of the word "duty" was "obligation").

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 529 (tracing history of public education).

<sup>121</sup> *Id.* at 535.

The Court traces Adams' many statements about the importance of public education and why it was important for "knowledge to be diffused generally through the whole body of the people."<sup>122</sup> In a document prepared three years before the drafting of the Massachusetts Constitution, Adams views about widely dispersed public education are best summarized, "[L]aws for the liberal education of youth, especially of the lower class of people, are so extremely wise and useful, that, to a humane and generous mind, no expense for this purpose would be thought extravagant."<sup>123</sup> In a subsequent writing, Adams said, "two things are indispensably to be adhered to, – one is, some regulation for securing forever an equitable choice of representatives; another is, the education of youth, both in literature and morals."<sup>124</sup> In *Defense of the Constitutions of Government* (1787), Adams wrote:

The instruction of the people, in every kind of knowledge that can be of use to them in the practice of their moral duties, as men, citizens, and Christians, and of their political and civil duties, as members of society and freemen, ought to be the care of the public, and of all who have any share of the conduct of its affairs, in a manner that never yet has been practiced in any age or nation. The education here intended is not merely that of the children of the rich and noble, but of every rank and class of people, down to the lowest and the poorest. It is not too much to say, that schools for the education of all should be placed at convenient distances, and be maintained at the public expense.<sup>125</sup>

This background was reflected in the writing of the Massachusetts Constitution in 1780 and also in the first legislative session after the Constitution was adopted, where the needs of the public schools was addressed:

Nor can the schools throughout this Commonwealth be permitted to continue under such inattention and

<sup>122</sup> *Id.*

<sup>123</sup> *McDuffy v. Sec'y of the Executive Office of Educ.*, 615 N.E.2d 516, 536 (Mass. 1993).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

discouragement as they have for many years suffered, to the irreparable injury of the present and future generation, and to the indelible disgrace of a free government. We shall therefore hold ourselves obliged to form proper establishments for restoring them to their primitive dignity and usefulness.<sup>126</sup>

The Commonwealth's first comprehensive school law was enacted in 1789 and reiterated the constitutional mandate to "provide for the education of youth,"<sup>127</sup> and this duty was reaffirmed over the years by those who had been involved in the writing of the constitution.<sup>128</sup> For example, prior to the enactment of the 1789 school law, then Governor John Hancock stated:

That this Commonwealth...may increase its own internal prosperity... we ought to support and encourage the means of Learning, and all Institutions for the Education of the rising generation; an equal distribution of Intelligence being as necessary to a free Government, as Laws for an equal distribution of property.<sup>129</sup>

In 1793 Governor Hancock again asked the Legislature to address the needs of the public schools:

Amongst the means by which our government has been raised to its present height of prosperity, that of education has been the most efficient; you will therefore encourage and support our Colleges and Academies; but more watchfully the Grammar and other town schools. These offer equal advantages to poor and rich; should the support of such Institutions be neglected, the kind of education which a free government requires to maintain its force, would soon be forgotten.<sup>130</sup>

Other governors continued their support for public education. Governor Samuel Adams, who succeeded Hancock, said "the

<sup>126</sup> *Id.* at 537.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* (discussing framers' thoughts on governmental duty to provide education).

<sup>129</sup> *McDuffy v. Sec'y of the Executive Office of Educ.*, 615 N.E.2d 516, 538 (Mass. 1993) (discussing framers' thoughts on governmental duty to provide education).

<sup>130</sup> *Id.*

security of the State depended on the education of youth; one reason, among others, was that education ‘qualifies] them [youth] to discover any error, if there should be such, in the forms and administration of Governments, and point out the method of correcting them.’<sup>131</sup> In 1801, Governor Caleb Strong addressed the Legislature and spoke of the settlers who, “considered the education of children, as the most essential duty, and the most important exercise of government and provided for the establishment of schools for the children of the poor as well of the rich.”<sup>132</sup> Again, in 1819, Governor John Brooks, in a speech, said “[S]hould the existing laws be found insufficient to provide for the primary education of children, especially of destitute orphans, and the education of the poor and necessitous, prerequisite to their admission into grammar schools, the deficiency has strong claims to the consideration of the Legislature.”<sup>133</sup>

The 1789 law “required the towns to maintain schools in proportion with the number of their inhabitants . . . [and] prescribe[] penalties for neglect of the law.”<sup>134</sup> Case law developed that supported the 1789 law. The SJC said, in a case in which a town only maintained one grammar school in one of its districts,

The schools required by the statute . . . are to be maintained for the benefit of the whole town, as it is the wise policy of the law to give all of the inhabitants equal privileges, for the education of their children in the public schools. *Nor is it in the power of the majority to deprive the minority of this privilege. . . . Every inhabitant of the town has a right to participate in the benefits of both descriptions of schools; . . . and it is not competent for a town to establish a grammar school for the benefit of one part of the town, to the exclusion of the other; although the money raised for the support of schools may be, in other respects, fairly apportioned.*<sup>135</sup>

<sup>131</sup> *Id.* at 539.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 540.

<sup>134</sup> *Id.* at 541.

<sup>135</sup> *Commonwealth v. Inhabitants of Dedham*, 16 Mass. 141, 146 (1819).

*McDuffy* recounts a history of laws enacted to cover a wide variety of educational issues concerning public education administration, raising funds for the support of the public schools, textbooks, and, in 1834, for the creation of a state fund to aid the public schools. Then-Governor Davis stated that:

[t]he people of Massachusetts owed the early colonial settlers “a debt of never ending gratitude for establishing free schools to be maintained at public expense, . . . The great wisdom evinced in thus boldly striking out a course of public policy which required the rich to aid in educating the poor, and which is rapidly tending to revolutionize the world, has not been wasted on their posterity, for free schools have ever since been cherished and maintained as the nurseries of virtue and liberty. So deeply imbued was this attachment was the public mind when the Constitution of the State was framed, that one of its sections, in language of singular beauty, enjoins on those who administer the government the duty of promoting the diffusion of knowledge as the basis of civil liberty.<sup>136</sup>

In a prescient observation of current conditions, a Special Commission on Education reported in 1919:

To the reader of this report who takes comfort in the thought that his city or town is now taxing for maintenance of schools all it can possibly afford, and is on the whole doing pretty well by its unfortunates . . . it would be a rather disconcerting revelation to visit the poorer cities, the struggling towns and sparsely settled rural sections of the State, and see how large a number of boys and girls of the Commonwealth are being denied the equal opportunity for an education which Chapter V, section II, of the Massachusetts Constitution guarantees.<sup>137</sup>

The recommendations of this Special Commission included the establishment of “a general school fund in the Commonwealth, supported by income tax, which would be ‘distributed to all cities and towns so as to assist them in supporting education and

<sup>136</sup> *McDuffy v. Sec’y of the Executive Office of Educ.*, 615 N.E.2d 516, 544 (Mass. 1993).

<sup>137</sup> *Id.* at 545.

equalizing educational opportunities.”<sup>138</sup> The need was described as follows:

[N]o state probably can show a greater diversity among the towns and cities with respect to their financial ability to maintain schools [than Massachusetts], and no state can produce a social and industrial situation that makes more necessary a high level of general education throughout all communities. . . . [i]n earlier days, when wealth was more evenly distributed over the State, the system (of local funding) was not seen at its worst. . . . Now, however, the need for ‘equalizing educational opportunity’ across the towns was acute: While Massachusetts has some of the best schools in the country, she also has some of the poorest.’<sup>139</sup>

Anticipating that “dollars don’t make a difference,” the 1919 Special Commission opined that “[t]he excellence of schools depends in large measure upon the amount of money spent upon them.”<sup>140</sup>

Chief Justice Liacos then discussed past cases where the Court declared that Part II, c.5, §2’s “duty” to provide education authorized other decisions to be made.<sup>141</sup> This lengthy review of constitutional history led the Court to conclude that the wording of Part II, c.5, §2 is:

[N]ot merely aspirational or hortatory, but obligatory. . . . [so 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

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *See id.* at 545–46 (citing *Nicholls v. Mayor & School Committee of Lynn*, 7 N.E.2d 577 (Mass. 1937), requiring flag salute and pledge of allegiance). *See generally* *Antell v. Stokes*, 191 N.E. 407 (Mass. 1934) (enforcing rule prohibiting public high school students from participating in secret societies); *Commonwealth v. Interstate Consol. St. Ry.*, 73 N.E. 530 (Mass. 1905) (justifying Legislature’s passage of statute that required street railway companies to transport public school students to and from school at half price); *Merrick v. Amherst*, 12 Allen 500 (1866) (“accepting a grant of Federal lands to be used for an agricultural college in the State”); *Lynch v. Commissioner of Educ.*, 56 N.E.2d 896 (Mass. 1944) (holding Commonwealth is not required to provide free education in higher institutions of learning, such as teachers’ colleges, as it does in elementary and secondary schools); *Jenkins v. Andover*, 103 Mass. 94 (1869) (requiring legislature to “cherish” public and grammar schools); *Care & Protection of Charles*, 504 N.E.2d 592 (Mass. 1987) (highlighting State’s interest in educating young citizens).

the public school level, and that this duty is designed not only to serve the interests of the children, but, more fundamentally, to prepare them to participate as free citizens of a free State to meet the needs and interests of a republican government.<sup>142</sup>

Then the Court declared who owed the duty:

This duty lies squarely on the executive (magistrates) and legislative (Legislatures) branches of this Commonwealth. That local control and fiscal support has been placed in greater or lesser measure through our history on local governments does not dilute the validity of this conclusion. While it is clearly within the power of the Commonwealth to delegate some of the implementation of the duty to local governments, such power does not include the right to abdicate the obligation imposed on magistrates and Legislatures placed on them by the Constitution.<sup>143</sup>

The Court then turned to the question as to what this constitutional duty meant and whether that mandate was violated in light of the facts of this case.<sup>144</sup>

As in most states, the Legislature of Massachusetts created a state Board of Education and a state Department of Education and empowered local communities, through school committees, with the authority to run the local school district, subject to what many would describe as a complex web of state laws and regulations.<sup>145</sup> The laws and regulations covered all aspects of education, such as administration, curriculum, transportation, and financing.<sup>146</sup> Federal funds constitute a small portion of any community's finance scheme and are targeted for specific programs.<sup>147</sup> Until *McDuffy*, and similar to the financing schemes in many other states, the primary source of funding

<sup>142</sup> *McDuffy v. Sec'y of the Executive Office of Educ.*, 615 N.E.2d 516, 548 (Mass. 1993).

<sup>143</sup> *Id.* at 548.

<sup>144</sup> See MASS. ANN. LAWS ch. 15, § 1E (2005) (stating that Board of Education was created to support, serve, and plan general education in public schools); see also MASS. ANN. LAWS ch. 15, § 1G (2005) (explaining role of advisory counsels to Board of Education).

<sup>145</sup> See generally *McDuffy*, 615 N.E.2d. at 548–49 (citing various laws of Massachusetts as laid out in chapters of the general law code).

<sup>146</sup> See *id.* at 549–50 (explaining responsibilities of the board).

<sup>147</sup> See *id.* at 550 (explaining federal monies account for only four to five percent of total expenditures, and thus are generally for specific programs).



came from the localities' assessment of property taxes, but it could not exceed the amount appropriated by the locality's legislative body.<sup>148</sup> School committees prepare annual school budgets, which are reviewed and possibly modified by its respective city or town governing body.<sup>149</sup> It should be noted that cities and towns have other competing interests, such as police and fire departments, public works and health departments.<sup>150</sup>

The setting of property tax rates is a complex process, involving state as well as local authorities. A tax-limiting constitutional amendment, known as Proposition 2 ½ "limits the amount of local taxes which any city or town may assess in a given fiscal year to two and one-half per cent of the full and fair cash valuation of the real and personal property in such city or town."<sup>151</sup> To override this constitutional amendment, the voters of the community must vote to by a two-thirds majority.<sup>152</sup> The Commissioner of Revenue then must determine the total limit on local taxes for each community, but he may not approve tax rate for any community that would "allow the amount of property taxes levied to exceed the limit" on local taxes.<sup>153</sup>

The secondary source of funding examined by the Court was the state contribution.<sup>154</sup> This formula is known as Chapter 70 funding. In Massachusetts, as in other states:

[T]he purpose of the financial assistance . . . shall be to promote the equalization of educational opportunity in the public schools of the commonwealth, to reduce the reliance upon the local property tax in financing public schools, and to promote the equalization of the burden of the cost of school support to the respective cities,

<sup>148</sup> See *McDuffy v. Sec'y of the Executive Office of Educ.*, 615 N.E.2d 516, 550 (Mass. 1993) (noting cities and towns are not required to provide more money for support of public schools than is appropriated by vote of the legislative body).

<sup>149</sup> *Id.* at 551 (stating school committees in each town prepare an annual budget request for the schools, which local appropriating authority then votes on).

<sup>150</sup> *Id.* (explaining that annual budget request is prepared alongside requests to appropriate funds for municipal services such as police, fire, and public health areas).

<sup>151</sup> *Id.* (quoting *Mass. Teachers Ass'n v. Sec'y of the Commonwealth*, 424 N.E.2d 469, 474 (Mass. 1981)).

<sup>152</sup> See *id.* (noting that two-thirds vote is needed at general election to "override").

<sup>153</sup> *Id.* (citing G.L. c. 59, § 21D).

<sup>154</sup> See *McDuffy v. Sec'y of the Executive Office of Educ.*, 615 N.E.2d 516, 551 (Mass. 1993) (stating state aid is second source of funds for public schools).

towns, regional school districts, and independent vocational schools.<sup>155</sup>

As the parties stipulated, since 1984, state aid to public schools had not been determined according to the Chapter 70 formula, but rather by the annual legislative budget process.<sup>156</sup> This process would likely result in lifting the cap on state aid, which was generated by the formula, and entering a different amount, which was determined by the legislative appropriations process.<sup>157</sup> Shortly before the case was to go to trial in the mid-1980s, the Legislature enacted an "Additional Assistance" formula that was designed to be an "equal educational opportunity grant program" that would "accelerate the achievement" of certain academic purposes "[in] cities and towns whose total direct service expenditures [sic] . . . on schools . . . [were] less than eighty-five per cent of the State average of such expenditures."<sup>158</sup> "For six years, starting in 1985, such towns and cities were to be awarded one-sixth of the difference between the eighty-five per cent figure and their actual expenditure."<sup>159</sup> As the parties also stipulated, both the Chapter 70 and Additional Assistance aid were reduced, once in 1991 by four per cent and again in 1992 by twenty percent.<sup>160</sup> While the defendants argued that, even if there was a constitutional duty, the Commonwealth was meeting it, the Court disagreed:

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. It is also clear, however, that fiscal support, or the lack of it, has a significant impact on the quality of education each child may receive. Additionally, the record shows clearly that, while the present statutory and financial schemes

<sup>155</sup> *Id.*

<sup>156</sup> *See id.* (explaining that since 1984 state aid has been determined through the annual appropriations process).

<sup>157</sup> *See id.* (demonstrating that when Chapter 70 formulas have been overridden by appropriations acts, it has usually meant specific caps being set on state aid).

<sup>158</sup> *See id.* at 552 (explaining in addition to annual appropriation of state aid, some municipalities receive additional state money through the equal educational opportunity grant program).

<sup>159</sup> *Id.*

<sup>160</sup> *McDuffy v. Sec'y of the Executive Office of Educ.*, 615 N.E.2d 516, 552 (Mass. 1993) (noting reduction in aid).

purport to provide equal educational opportunity in the public schools for every child, rich or poor, the reality is that children in the less affluent communities (or the less affluent parts of them) are not receiving their constitutional entitlement of education as intended and mandated by the framers of the Constitution.<sup>161</sup>

The Court stated: “We find statement after statement recounting the Commonwealth’s failure to educate the children in the plaintiffs’ schools and those they typify. The Commonwealth has not directed us to, nor have we discovered, any statements in the record tending to show otherwise.”<sup>162</sup> The Court cited a 1991 Report of the Committee on Distressed School Systems and School Reform, in which the Board of Education spoke of a “state of emergency due to grossly inadequate financial support,”<sup>163</sup> and further admitted that “certain classrooms simply warehouse children at this time, with no effective education being provided.”<sup>164</sup> Former Commissioner of Education, Harold Reynolds, was equally explicit:

[I]n many of the communities of 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 [the] goal [of providing every child with an opportunity for success in Learning].<sup>165</sup>

The opinion of the former Executive Director of the Massachusetts Association of School Superintendents, Peter Finn, stated, “[I]t is also clear that the education now offered in many of the poor communities, including the communities in which the plaintiffs attend school, is inadequate.”<sup>166</sup> The condition of the schools in which the plaintiffs from the four exemplar cities and towns attended (Brockton, Leicester, Lowell, and Winchendon) was stipulated to be typical of the conditions of the schools attended by plaintiffs in the other plaintiff

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *See id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *McDuffy v. Sec’y of the Executive Office of Educ.*, 615 N.E.2d 516, 553 (Mass. 1993).

communities.<sup>167</sup> Moreover, these conditions were compared to the conditions existing in what were termed comparison communities of Brookline, Concord, and Wellesley.<sup>168</sup>

The stipulations and the opinions supporting them:

Outline specific deficiencies in the plaintiffs' schools, such as: large classes; reductions in staff; inadequate teaching of basic subjects including reading, writing, science, social studies, mathematics, computers, and other areas; neglected libraries; inability to attract and retain high quality teachers; lack of teacher training; lack of curriculum development; lack of predictable funding; administrative reductions; and inadequate guidance counseling.<sup>169</sup>

The contrast with the comparison districts was revealing and obvious. Those districts were able to offer:

Significantly greater educational opportunities, including: multi-faceted reading programs; extensive writing programs and resources; thorough computer instruction; active curriculum development and review ensuring comprehensive and up-to-date curriculum; extensive teacher training and development; comprehensive student services; and a wide variety of courses in visual and performing arts. In short, the record indicates that these districts are able to educate their Children.<sup>170</sup>

Thus, the Court concluded:

It is clear that c. 5, §2, obligates the Commonwealth to educate all its children. The bleak portrait of the plaintiffs' schools and those they typify painted in large part by the defendants' own statements and about which no lack of consensus has been shown,

<sup>167</sup> *Id.* (stating "[t]he parties have stipulated that the conditions in these schools are 'typical' of the schools in the other twelve communities in which plaintiffs attend school.").

<sup>168</sup> *See id.* (finding "[t]he parties have stipulated that students in the plaintiffs' districts are offered 'significantly fewer educational opportunities and lower educational quality than' students in the schools in the 'comparison' districts of Brookline, Concord and Wellesley.").

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 553.

leads us to conclude that the Commonwealth has failed to fulfill its obligation.<sup>171</sup>

In outlining the elements of a constitutional education, the Court recognized that what is required and appropriate for educating one generation's children may be totally inadequate in another.<sup>172</sup> For example, at one time it was appropriate for schools to have individual desks with ink wells, ink, pens and pen nibs, but this current generation requires up-to-date computers. Furthermore, since computer technology is constantly changing, old computers will not suffice. Old Apple computers are the functional equivalent of out-of-date ink wells and pens. The Court borrowed from one of the school finance cases it cited to describe the elements of an educated child and said that an educated child must possess:

[A]t least the seven 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 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 academic or in the job market.<sup>173</sup>

<sup>171</sup> *Id.* at 553–54.

<sup>172</sup> *McDuffy v. Sec'y of the Executive Office of Educ.*, 615 N.E.2d 516, 554 (Mass. 1993) (articulating “[t]he crux of the Commonwealth’s duty lies in its obligation to educate all of its children. As has been done by the courts of some of our sister States, we shall articulate broad guidelines and assume that the Commonwealth will fulfill [sic] its duty to remedy the constitutional violations that we have identified.”).

<sup>173</sup> *See id.* These capabilities were taken from *Rose v. Council for Better Education, Inc.*, 790 S.W. 2d 186, 212 (Ky. 1989). They parallel what Horace Mann, the first secretary of the Board of Education said in 1849:

The Court's remedy was to leave it to the Legislature to develop a remedy and the judgment was as follows:

These cases are remanded . . . for entry of a judgment declaring that the provisions of Part II, c.5, §2, of the Massachusetts Constitution impose 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. It shall be declared also that the constitutional duty is not being currently fulfilled by the Commonwealth. Additionally, while local governments may be required, in part, to support public schools, it is the responsibility of the Commonwealth to take such steps as may be required in each instance effectively to devise a plan and sources of funds sufficient to meet the constitutional mandate. No present statutory enactment is to be declared unconstitutional, but the single justice, may, in his or her discretion, retain jurisdiction to determine whether, within a reasonable time, appropriate legislative action has been taken.<sup>174</sup>

#### *B. Post McDuffy Legislative Action*

In regard to the application of this principle of natural law, — that is, in regard to the extent of the education to be provided for all at the public expense, — some difference of opinion may fairly exist under different political organizations; but, under our republican government, it seems clear that the minimum of this education can never be less than such as is sufficient to qualify each citizen for the civil and social duties he will be called to discharge, — such an education as teaches the individual the great laws of bodily health, as qualifies for the fulfillment of parental duties, as is indispensable for the civil functions of a witness or a juror, as is necessary for the voter in municipal and in national affairs, and, finally, as is requisite for the faithful and conscientious discharge of all those duties which devolve upon the inheritor of a portion of the sovereignty of this great republic.

*McDuffy*, 625 N.E.2d at 555.

<sup>174</sup> *Id.* at 555–56.

Yet again, the Legislature responded to court action.<sup>175</sup> While the first two times resulted in limp efforts, this time court action had reached a culmination point, with the case actually submitted for final resolution by the SJC.<sup>176</sup> The Legislature drafted the Education Reform Act (ERA),<sup>177</sup> and the Court was also well-aware of its development. Three days after the Court's decision in *McDuffy*, the ink was dry on the Governor's signature on this legislation.<sup>178</sup> Essentially, the Legislature determined what it would cost to educate children per pupil and created a funding formula that would bring all school districts that could not raise that amount to what it called, "foundation," through state aid over a seven year period.<sup>179</sup> Once again, those who helped *McDuffy* come to court had to wait until this formula was fully implemented.<sup>180</sup> In December 1999, as the last of the districts were about to reach the foundation level of spending, plaintiffs filed a "Motion for Further Relief,"<sup>181</sup> challenging the

<sup>175</sup> See *Education Reform: Education Reform Act of 1993*, Eye on Education, [http://www.eyeducation.tv/reform/ed\\_reform\\_act.html](http://www.eyeducation.tv/reform/ed_reform_act.html) (explaining "[t]he Massachusetts Legislature created the Act on the heels of the Supreme Judicial Court's (SJC) 1993 ruling in *McDuffy v. Robertson*.").

<sup>176</sup> See *id.* (commenting "the SJC ordered the Commonwealth to provide equal educational opportunity for all students in Massachusetts.").

<sup>177</sup> See generally MASS. ANN. LAWS ch. 69 (2005) (addressing powers and duties of Department of Education).

<sup>178</sup> See *Education Reform: First Annual Implementation Report: Educational Summary*, [http://www.doe.mass.edu.edreform/1st\\_Imp/EXEC.SUMMARY.html](http://www.doe.mass.edu.edreform/1st_Imp/EXEC.SUMMARY.html) (specifying "[o]n June 18, 1993, the Massachusetts Education Reform Act was signed into law.").

<sup>179</sup> See *Education Reform: Education Reform Act of 1993*, Eye on Education, [http://www.eyeducation.tv/reform/ed\\_reform\\_act.html](http://www.eyeducation.tv/reform/ed_reform_act.html) (stating "[o]ne of the most prominent and costly features of the Act was increased state funding for education. To remedy inequities in funding across schools and districts, the Act established a 'foundation budget' designed to bring all schools to an adequate level of per-pupil spending.").

<sup>180</sup> See *Education Reform: Education Reform Act of 1993*, Eye on Education, [http://www.eyeducation.tv/reform/ed\\_reform\\_act.html](http://www.eyeducation.tv/reform/ed_reform_act.html). "In 1993, that foundation average was \$5500 per student. By the year 2000, average per-pupil spending would be increased to the foundation level statewide, and the state contribution to education funding would increase from 30% to 50%." *Id.* Counsel for the case were assisted by the Council for Fair School Finance, which was created in the 1970s, and incorporated as a 501 (c)(3) corporation in the early 1980s to help with community support for the litigation and a fair legislative formula. The Council consisted of a number of organizations, including the League of Women Voters, ACLU, Greater Boston Civil Rights Coalition, Massachusetts Teachers Association, Massachusetts Federation of Teachers, Citizens for Public Schools, representatives from school districts, school superintendents and school committees, and others.

<sup>181</sup> See *Hancock v. Driscoll*, No. 02-2978, 2004 Mass. Super. LEXIS 118, at \*24 (April 26, 2004). The action was filed "[b]y her father and next friend, Maurice Hancock." *Id.* at \*1 n.1 Massachusetts procedure [MASS. GEN. LAWS ch. 231A] permits certain types of actions to be filed directly in the Supreme Judicial Court, and the original case, *Webby v.*

efforts of this law to meet the constitutional requirements of *McDuffy*. This time, Julie Hancock, a student at Brockton High School, by her parents, was the lead plaintiff.<sup>182</sup>

Plaintiffs based their challenge on the failure to implement the *McDuffy* factors, and not the specifics of the ERA.<sup>183</sup> To present evidence, however, specific standards are needed so that the evidence can be tested, and plaintiffs proposed that the constitutional standards could not be less than what is required by the ERA.<sup>184</sup> The Attorney General's office objected to equating the constitutional standards to the requirements of the ERA and resisted any attempt to establish a standard which could be measured (or to which it could be held accountable).<sup>185</sup> The court rejected the Attorney General's attempt to avoid a measurable standard and ruled that, for the purposes of this trial, the constitutional standard was no less than what was required by the ERA.<sup>186</sup> The trial began on June 12 and ended January 16, 2004, after 78 days of trial, over 100 witnesses, and over 1,000 exhibits.<sup>187</sup>

Four of the nineteen school districts where plaintiff children attended were analyzed in great detail during the trial.<sup>188</sup> These

*Dukakis*, took advantage of this procedure. All other iterations of this actions remained in the SJC. However, the SJC does not sit as a trier of fact, but resolves issues of law based on findings of fact. When there are issues of fact to be resolved, the SJC refers the case to the Superior Court for trial, or may appoint a special Master to hear evidence and make findings in a report to the SJC. In the mid-1980s, when *Webby* was close to trial, a Master had been appointed. In *Hancock*, unlike *McDuffy*, the current Attorney General (Thomas F. Reilly) was not willing to enter into stipulations, and the SJC, rather than submitting the case to the Superior Court for trial, specially appointed Superior Court Judge Margot Botsford, a highly respected judge, to make findings of fact, and allowed her, in her report, to make recommendations as to remedy, if she deemed them warranted.

<sup>182</sup> See *Hancock*, No. 02-2978, 2004 Mass. Super. LEXIS at \*1 n.1. In 1999, nineteen plaintiff public school children from 19 different school districts "filed a motion for further relief." Other children and their parents were from Barnstable, Belchertown, East Bridgewater, Fitchburg, Gill-Montague Regional, Holyoke, Leicester, Lowell, Lynn, Mashpee, Orange, Revere, Rockland, Sandwich, Springfield, Taunton, Uxbridge, and Winchendon. *Id.*

<sup>183</sup> See *id.* at \*27 (proposing plaintiffs' evidence centered principally on "their claim that students on the four focus districts are not receiving the level of education to which they are entitled under the Massachusetts Constitution").

<sup>184</sup> See generally *id.* (focusing factual evidence on Education Reform Act).

<sup>185</sup> See generally *id.* (refuting claims of inadequate education).

<sup>186</sup> See *id.* at \*27 (April 26, 2004) (applying Education Reform Act standard).exhibits.").

<sup>187</sup> See *Hancock v. Driscoll*, No. 02-2978, 2004 Mass. Super. LEXIS 118, at \*27 (April 26, 2004) (noting that "[t]rial commenced on June 12, 2003, and concluded in January of 2004. There were 114 witnesses who testified and over 1,000 exhibits.").

<sup>188</sup> See *id.* at \*25-26 (suggesting that "the decision was made to proceed to trial by focusing the factual evidence on a group of districts fewer than the total, and the plaintiffs



districts, Brockton, Lowell, Springfield, and Winchendon, were known as the “focus districts.” Three of them are large, urban districts with significant numbers of students from racial and ethnic minorities; the other, Winchendon, is a small rural district.<sup>189</sup> All four districts have substantial numbers of low income children<sup>190</sup>

There was much progress over the first ten years of education reform under the ERA.<sup>191</sup> The Commonwealth developed statewide educational standards, known as curriculum frameworks and a testing battery, known as the Massachusetts Comprehensive Assessment System (MCAS), which up to the time of this trial measured English Language Arts and Mathematics.<sup>192</sup> Students not passing this examination cannot receive a high school diploma. Tests measuring other subjects are being developed for similar treatment.<sup>193</sup> Over that time period, \$30.8 billion in state aid was provided, with an average yearly increase of 12% per year, except for declines in 2003 and 2004.<sup>194</sup> The Commonwealth instituted a system of teacher certification and professional development, as well as establishing a new office to measure school district accountability.<sup>195</sup> Thus, a plan was in place; the trial was about measuring whether children were receiving the benefits of the promise of the plan, as measured by the seven McDuffy

ultimately selected four: Brockton, Lowell, Springfield, and Winchendon (referred to collectively hereafter as ‘the focus districts’ or ‘the four focus districts’”).

<sup>189</sup> *Id.* (noting three districts are urban with many racial and ethnic minority students).

<sup>190</sup> *See id.* (explaining that “[a]ll four districts have substantial numbers of low income children.”).

<sup>191</sup> *See id.* at \*9 (explaining there have been impressive accomplishments in past ten years by the Commonwealth and Department of Education).

<sup>192</sup> *See id.* at \*43–44 (stating that MCAS was developed in response to the Education Reform Act and noting that it is only administered in two subjects, mathematics and English language arts).

<sup>193</sup> *See* *Hancock v. Driscoll*, No. 02-2978, 2004 Mass. Super. LEXIS 118, at \*43–44 (April 26, 2004) (noting that commissioner has proposed a schedule of incorporating other subjects into the competency determination of MCAS tests, including science and technology and history/social science).

<sup>194</sup> *See id.* at \*2–3 (discussing increase in spending on education in the last ten years).

<sup>195</sup> *See id.* at \*3 (noting new standards adopted for teacher certification and professional development, as well as the creation of the new Office of Educational Quality Assurance to increase school accountability).

capabilities and the seven Massachusetts curriculum frameworks.<sup>196</sup>

The court then proceeded to outline the conditions in each of the four focus districts, measured by the standards.<sup>197</sup> For each of the focus districts, the court examined “student and district demographics, school funding since 1993, and then the educational program from preschool through high school, covering, among other areas, English language arts, math, science, history, health, and the arts.”<sup>198</sup> Also examined for the four focus districts were “[S]chool libraries, the state of technology, and special education . . . as well as issues relating to teacher qualifications and professional development.”<sup>199</sup> Lastly, for each district, the court examined MCAS and SAT scores.<sup>200</sup>

While there are similarities and differences among the four focus districts, the court concluded that “not one of the districts is adequately implementing the Massachusetts curriculum frameworks, nor equipping its students with the capabilities described in *McDuffy*. In every one of these districts, therefore, the students are not receiving the level of education that the Commonwealth has a constitutional duty to provide.”<sup>201</sup> These conclusions were based on “objective measures used by the Commonwealth to assess public school and district performance, including: MCAS scores, dropout rates, high school graduation rates, SAT scores, and post-graduation plans of high school seniors.”<sup>202</sup> Comparing the four focus districts to “the state-wide average performance of school districts in the Commonwealth, it is clear that the districts fall below the statewide averages, particularly over the course of the last five years.”<sup>203</sup> They “also

<sup>196</sup> See Maura M. Pelham, Comment. *Promulgating Preschool: What Constitutes a Policy Decision Under Hancock v. Commissioner of Education*, 40 NEW ENG. L. REV. 209, 225 (2005) (explaining that *Hancock* court would rely on the state’s curriculum standards to decide whether state was meeting its constitutional obligation to provide plaintiff students with an adequate education).

<sup>197</sup> See *Hancock*, No. 02-2978, 2004 Mass. Super. LEXIS 118, at \*4 (explaining the report examined educational programs in each of the focus districts, beginning with a review of applicable standards for evaluating these programs).

<sup>198</sup> *Id.* at \*5.

<sup>199</sup> *Hancock v. Driscoll*, No. 02-2978, 2004 Mass. Super. LEXIS 118, at \*5 (April 26, 2004).

<sup>200</sup> See *id.* (stating that MCAS and SAT scores were examined over time and by student group).

<sup>201</sup> *Id.*

<sup>202</sup> See *id.* at \*6.

<sup>203</sup> *Id.*

fall below the performance of three school districts that were used in the original *McDuffy* case as comparison districts: Brookline, Concord/Carlisle, and Wellesley.”<sup>204</sup>

The Commonwealth considers that the foundation budget is the amount necessary to implement educational standards, and there was much evidence provided as to whether this amount was sufficient. But the court found:

It is significant that in the school districts across Massachusetts that are considered to be performing well in terms of the Department’s [of Education] performance rating system, the average expenditure is 130% of the district’s foundation budget, and the statewide average expenditure is about 115-117% of the district foundation budget.<sup>205</sup>

The “group average expenditure” in the comparison districts of Brookline, Concord/Carlisle, and Wellesley was 161% of the foundation budget.<sup>206</sup> “In contrast, the focus districts at present only have funds available for school spending that are much closer to 100% of the districts’ foundation budget.”<sup>207</sup> Spending by the four focus districts offers “a rough indication that the foundation budget formula itself does not produce an adequate level of spending, although they do not provide specific evidence of the level of inadequacy.”<sup>208</sup> While there was much evidence as to the shortcomings of the foundation budget formula, the reasons included:

[I]nadequacies in factoring in the high costs of special education, and the absence of any review of the foundation budget formula in light of the seven curriculum frameworks and their demands.<sup>209</sup> Moreover, the FY04 cuts in Chapter 70 aid as well as specific State grants programs (for example, MCAS remediation, class size reduction and early childhood

<sup>204</sup> *Id.*

<sup>205</sup> *Hancock v. Driscoll*, No. 02-2978, 2004 Mass. Super. LEXIS 118, at \*7 (April 26, 2004).

<sup>206</sup> *Id.* (noting higher average of the comparison districts).

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at \*8. It is significant that the foundation budget formula was created *before*, and not *after*, the adoption of the curriculum frameworks. Therefore, the Commonwealth had no rational idea of how much it would cost to implement the curriculum frameworks.

education) have exacerbated the financial troubles of many struggling school districts, including the focus districts.<sup>210</sup>

The conclusion of the court as to the problem was about more than needed funds:

[T]he foundation budget does not presently provide sufficient funds to the focus districts to permit them to implement the curriculum frameworks or generally to meet the standards of *McDuffy*, and no other source of state funding fills the gap. This is not to say, however, that increases in the foundation budget alone will produce an adequate educational program in these districts. There is also a need to enhance the managerial, administrative, and leadership capacities of the districts.<sup>211</sup>

The court then considered several key remedies developed during the trial, one extremely important one being the importance of preschool education.

Years of research and national studies show, without dispute, that for many children at risk of school failure, including children from low income families, a high quality preschool education program for three and four year olds offers the best and perhaps only realistic chance to achieve success in school thereafter; without preschool, many children at risk (in the focus districts and elsewhere) will not be able to benefit from K through 12 public school education, no matter what its quality. The four districts have very good public school preschool programs, but only for a limited number of the eligible children; none of them has the resources to reach all or even nearly all the children who need to attend.<sup>212</sup>

Finally, the court made several recommendations in the report as to the remedy it thought appropriate.<sup>213</sup> Those

<sup>210</sup> *See id.*

<sup>211</sup> *Hancock v. Driscoll*, No. 02-2978, 2004 Mass. Super. LEXIS 118, at \*8 (April 26, 2004).

<sup>212</sup> *Id.* at \*9.

<sup>213</sup> *See id.* at \* 9–10 (noting that report will end with recommendations to Supreme Judicial Court concerning remedial relief).

recommendations sought an order from the SJC to the Commonwealth education officials to:

- (1) determine the actual cost of providing to *all* children in the focus districts' public schools the opportunity to acquire the capabilities outlined in *McDuffy*, which in essence means determining the cost to implement effectively the seven curriculum frameworks for all school children (the funding issue);
- (2) determine the costs associated with enacting measures to improve the educational leadership capacities of the focus districts (the leadership issue);
- and (3) implement whatever funding and administrative changes result from the first two determinations (the implementation issue).<sup>214</sup>

The court also recommended that the Commonwealth be “provided a definite but limited period of time to accomplish these tasks, and that the Court [Supreme Judicial Court] retain jurisdiction to be satisfied that the remedial efforts are progressing towards a timely, effective solution.”<sup>215</sup>

### C. *The Doe Case*

While the plaintiffs in *McDuffy* felt compelled to wait until the seven years of increased funding to foundation budget status was fully implemented before returning to court to seek further relief, the courts were not prepared to wait so long. Within two years of the decision in *McDuffy*, a case found its way to the SJC to give the nature of the right interpretation.<sup>216</sup> A section of the ERA dealt with student discipline and provided for suspension or expulsion of students who possessed illegal substances, including weapons.<sup>217</sup> In the fall of 1993, a Worcester high school student brought a lipstick case, which contained a small blade where the

<sup>214</sup> *Id.* at \*10.

<sup>215</sup> *Id.*

<sup>216</sup> *See Doe v. Superintendent of Schools of Worcester*, 653 N.E.2d 1088 (Mass. 1995) (involving a student expelled for one year for bringing a knife to school).

<sup>217</sup> *See MASS. ANN. LAWS ch. 71, § 37(H)* (2005) (stating notwithstanding any general or specific law to the contrary, all student handbooks shall contain a provision that any student found on school premises in possession of a dangerous weapon may be subject to expulsion).

lipstick would be found.<sup>218</sup> She intended it as a practical joke, but found herself expelled for violation of the statute and school district policy.<sup>219</sup> Among the issues winding their way to the SJC in early 1995 was whether *McDuffy* gave her a fundamental right to a public school education that was being violated by her expulsion, her argument being that she was denied substantive due process because expulsion was too severe a punishment to have that right taken away.<sup>220</sup>

The lower court deemed the right to be that of an “equal opportunity to an adequate education, a right which she may lose by conduct seen to be detrimental to the community as a whole.”<sup>221</sup> The SJC agreed:

We agree that *McDuffy* should not be construed as holding that the Massachusetts Constitution guarantees each individual student the fundamental right to an education. While the court acknowledged in *McDuffy* the importance of education and decided that the Commonwealth generally has an obligation to educate its children, the court did not hold, and we decline to hold today, that a student’s right to an education is a “fundamental right” which would trigger strict scrutiny analysis whenever school officials determine, in the interest of safety, that a student’s misconduct warrants expulsion.<sup>222</sup>

If that was as far as the distinction went, not much damage would be done to *McDuffy*. While most of the *McDuffy* opinion focused on the legal duty or obligation to provide education, the court recognized the importance of a constitutional right.<sup>223</sup> In Note 23 of *McDuffy*, the Court stated:

[W]e note that a constitutional right to an education is fully consistent with the provisions of several articles in the Declaration of Rights: the right to liberty (art.

<sup>218</sup> See *Doe*, 653 N.E.2d at 1091 (noting that a student brought a lipstick case to school containing a blade).

<sup>219</sup> See *id.* at 1091 (noting school policy).

<sup>220</sup> See *id.* at 1095 (arguing expulsion is too harsh a punishment).

<sup>221</sup> *Id.* at 1095.

<sup>222</sup> *Doe v. Superintendent of Schools of Worcester*, 653 N.E.2d 1088, 1095 (Mass. 1995).

<sup>223</sup> See *McDuffy v. Sec’y of Executive Office of Educ.*, 615 N.E.2d 516, 564 (1993) (noting that constitutional language supports the proposition that government has a duty to provide education for the populace).

1), the right of self-government (art. 4), the right to elect officers and to be elected as an officer (art. 9), the right to “obtain right and justice freely” (art. 11), the right to be free from unreasonable searches (art. 14), the right and duty to “require of . . . lawgivers and magistrates an exact and constant observance of” the fundamental principles of the Constitution (art. 18), and the right to “assemble to consult upon the common good: give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer” (art. 19).<sup>224</sup>

Moreover, the Court stated that “the reality is that children in the less affluent communities (or in the less affluent parts of them) are not receiving their constitutional entitlement of education as intended and mandated by the framers of the Constitution.”<sup>225</sup>

One could argue that there was a collective right, but, in light of *Doe*, an individual student could forfeit that right by his or her own actions found to affect the safety of the education community.<sup>226</sup> Indeed, *Doe* began by saying: “[I]n fact, the court implicitly recognized in *McDuffy* that educational opportunities can be lost by students as a result of their actions.”<sup>227</sup> Distinguishing the school finance cases from cases bringing the issue of education in other contexts, the Court continued:

The only case we have found that stands for the proposition that education is “fundamental” in the same sense that the constitutional guarantees of freedom of religion and freedom of speech and the press are considered fundamental, is *State v. Rivinius* [328 N.W. 2d 220 (N.D. 1982), *cert. denied*, 460 U.S. 1070 (1983)]. We decline to follow the reasoning of that case. Instead, we join the courts of several other jurisdictions in holding that education is not a fundamental right. See *Lujan v. Colorado State Bd. Of Educ.*, 649 P.2d 1005, 1018 (Colo. 1982) (“A heartfelt

<sup>224</sup> See *id.* at 527 n. 23.

<sup>225</sup> *Id.* at 552.

<sup>226</sup> See *Doe*, 653 N.E.2d at 1095 (stating students do not have a fundamental right to education in every situation).

<sup>227</sup> *Id.* at 1096.

recognition and endorsement of the importance of education does not elevate a public education to a fundamental interest warranting strict scrutiny").<sup>228</sup>

The Court suggested that the duty referred to in *McDuffy* as a "public obligation to provide for general education,"<sup>229</sup> and used *McDuffy* to support the proposition that the duty to provide an adequate public education "includes the duty to provide a safe and secure environment in which all children can learn."<sup>230</sup>

This rationale prompted a dissent from Chief Justice Liacos, the author of *McDuffy*. He could not "agree that the standard of review to be applied to the defendants' actions need only have a rational basis to be deemed constitutionally valid."<sup>231</sup> He thought it "wrong to deny that *McDuffy* indicated 'that the Massachusetts Constitution guarantees each . . . student the fundamental right to an education.'" <sup>232</sup>

Clearly, since *McDuffy*, the Commonwealth has a duty to provide education to the plaintiff and it is an enforceable one [citation to *McDuffy* omitted]. This duty exists to serve her interests, as well as those of the Commonwealth. [citations omitted]. As a matter of logic and of law, she has a correlative right to education.<sup>233</sup>

He asked, "Would the plaintiff, a public school student, be eligible to seek enforcement of the Commonwealth's duty to provide education [*McDuffy*] yet not have a right to that education?"<sup>234</sup> Referring to the Court's citation of cases distinguishing the right of education to other constitutional rights, he observed, "the constitutional right to education is of no less a magnitude in our jurisprudence than an insurer's 'fundamental right to a decision as to its liability.'"<sup>235</sup> He further compared the right to education to be comparable to

<sup>228</sup> Doe v. Superintendent of Schools of Worcester, 653 N.E.2d 1088, 1096 (Mass. 1995).

<sup>229</sup> *Id.* (citing *Nicholls v. Mayor & School Comm. of Lynn*, 297 Mass. 65, 68 (1937)).

<sup>230</sup> *Id.* Therefore, the Court applied the rational basis test to justify the expulsion as not a violation of substantive due process. *Id.*

<sup>231</sup> *Id.* at 1099.

<sup>232</sup> *Id.* at 1099–1100.

<sup>233</sup> *Id.* at 1100.

<sup>234</sup> Doe v. Superintendent of Schools of Worcester, 653 N.E.2d 1088, 1100 (Mass. 1995).

<sup>235</sup> *Id.*



[A]n inmate's "constitutional right" to judicial review of the sufficiency of the evidence to warrant the findings of a prison disciplinary board [citation omitted], a plaintiff's "fundamental right" to work with his hands to what he regards as his best advantage [citation omitted], the public's "fundamental right" to read [citation omitted], and an individual's "fundamental right" to own property [citation omitted].<sup>236</sup>

Chief Justice Liacos then cited Black's Law Dictionary to correlate "duty" and "right," and then concluded that the right generated from the duty was fundamental.<sup>237</sup> He first looked:

to the nature of the right and its interrelated affirmative and enforceable duty, the separate and prominent treatment of education in our Constitution, the importance of education in Massachusetts since the earliest years of the colony, our related statutes including those on compulsory attendance, the relationship of education to other rights of our citizens, and the "keystone" role education serves in the development of each individual and in the functioning of our democracy.<sup>238</sup>

He reviewed how school cases based on language less clear about the nature of the right had been clear about the fundamental right.<sup>239</sup> He concluded:

For us to retreat from the principles stated in *McDuffy* would be to deny the thrust and logic of its historical underpinnings and would be inconsistent with the letter of our Constitution. Such a retreat would ignore the opinions of other State courts and put Massachusetts into the sad condition of giving greater status to property rights and other rights, recognized as fundamental, which are not as fundamental to the liberty of our free citizens and the preservation of our

<sup>236</sup> *Id.* at 1100–01.

<sup>237</sup> *Id.* at 1101 (citing Black's Law Dictionary 505 (6th ed. 1990)).

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* (noting it is not unusual for states to consider education a fundamental right and such rights have been found in constitutional language more vague than language in Massachusetts constitution).

constitutional democracy as is the right to a public education.<sup>240</sup>

He characterized the nature of the right as being necessary “fundamentally, to prepare [our children] to participate as free citizens of a free State to meet the needs and interests of a republican government, namely the Commonwealth of Massachusetts.”<sup>241</sup> Citing *McDuffy*, Chief Justice Liacos said, “[I]n such a retreat I cannot join.”<sup>242</sup>

The ERA set in motion a series of reforms that awaited full funding, including the development of curriculum frameworks and high stakes testing, known as the Massachusetts Comprehensive Assessment System (MCAS).<sup>243</sup> In order for a high school student to graduate at the end of the 2002-2003 school year, he or she must have obtained a particular score on the MCAS.<sup>244</sup> Many students failed the MCAS while *Hancock* was preparing for trial and since they would be prevented from graduating, they could not await the outcome of the *Hancock* trial for legal relief.<sup>245</sup> They filed a case and it was assigned to the same judge who was hearing *Hancock*.<sup>246</sup> They challenged the regulations of the Board of Education that required that they pass the tenth grade English language arts and mathematics MCAS exams<sup>247</sup> and sought a preliminary injunction.<sup>248</sup> All the plaintiffs met all of the local school districts’ requirements for graduation except for passing the MCAS tests.

<sup>240</sup> Doe v. Superintendent of Schools of Worcester, 653 N.E.2d 1088, 1102 (Mass. 1995).

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* Chief Justice Liacos then turned to the proper standard of review, noting that even though education is a fundamental right, he agreed that “school discipline, including expulsion, may be warranted when necessary to maintain safety and security in the schools . . .” *Id.* To him the question was “whether that compelling State interest is served with as little infringement as possible.” *Id.* at 1104. He would have put the “burden on the State to demonstrate its objectives could not be achieved in a less restrictive manner than by expulsion.” *Id.* at 1103.

<sup>243</sup> MASS. REGS. CODE tit. 603, § 30.03 (2005).

<sup>244</sup> *Id.* (noting the passage rates).

<sup>245</sup> See *Student No. 9 v. Bd. of Educ.*, 802 N.E.2d 105, 114 n.13 (Mass. 2004) (noting plaintiffs’ frustration in waiting for the Act’s implementation).

<sup>246</sup> *Id.* at 107 (noting Justice Greaney wrote the opinion).

<sup>247</sup> See MASS. REGS. CODE tit. 603, § 30.03 (2006) (establishing MCAS requirements for graduation).

<sup>248</sup> See *Student No. 9*, 802 N.E.2d. at 107 (stating plaintiffs sought preliminary injunction enjoining defendants from enforcing regulation).

One argument posited was that the actions of the Board of Education in only requiring success on the English language arts and mathematics exams was *ultra vires* of the statute's requirement that they demonstrate proficiency in all of the areas of the curriculum frameworks, which also included science and technology, history and social science, foreign language.<sup>249</sup> As a matter of fact, the Board of Education had only developed testing for the two subject areas tested by MCAS.<sup>250</sup> If students were to be held accountable, they argued, so too should the educators.

The Court rejected this argument in *Student No. 9 v. Board of Education*.<sup>251</sup> The SJC held that the Board of Education could:

[P]ermissibly exercise its discretion by the form of pragmatic gradualism it undertook, particularly because the fundamental subjects of English language arts and mathematics can be considered the basic foundational requirements with which other core subjects can be studied and mastered. Put more colloquially, the board could properly conclude that a student should have competence in "reading, writing, and arithmetic" before being tested on competence in science, history, and other areas.<sup>252</sup>

More relevant to the continued efficacy of *McDuffy* than the legal strategy utilized by the plaintiffs in this case to achieve relief, were the Court's statements regarding the *McDuffy* requirements.<sup>253</sup> The plaintiffs argued that "because the graduation requirement has not yet been based on the other core subjects, the students educated in this State with public funds are not being provided with a 'comprehensive education'"<sup>254</sup> But the Court replied:

Nothing in the *McDuffy* decision requires a graduation requirement, let alone a graduation requirement based on an assessment of multiple subjects. Simply put, enjoining the regulation, and enjoining the

<sup>249</sup> See *id.* at 113 (explaining plaintiffs' contention that the regulation's limitation of competency requirement conflicts with several provisions of statute).

<sup>250</sup> See *id.* at 107 (stating plaintiffs' conclusion that the competency determination does not take into account other core subjects mentioned in statute).

<sup>251</sup> 802 N.E.2d 105 (Mass. 2004).

<sup>252</sup> *Id.* at 114.

<sup>253</sup> See *id.* at 108 n.5 (detailing *Rose* factors).

<sup>254</sup> *Id.* at 114–15.

defendants from requiring the plaintiffs to pass the tenth grade English language arts and mathematics sections of the MCAS exam as a prerequisite to receiving a high school diploma, would undermine educator accountability and hinder education reform.<sup>255</sup>

One justice expressed concern over lack of progress over the long period of time that had passed since *McDuffy* was decided: “The education of our children is no less a compelling issue than their physical safety.”<sup>256</sup> Quoting from *Brum v. Dartmouth*,<sup>257</sup> he observed:

Local schools lie at the heart of our communities. Each morning, parents across the Commonwealth send their children off to school. They entrust the schools with nothing less than the safety and well-being of those most dear to them – their own children. No arm of government touches more closely the core of our families and our children than our schools.<sup>258</sup>

<sup>255</sup> *Id.* at 115.

<sup>256</sup> *Id.* at 116 (Ireland, J., concurring) (noting importance of education).

<sup>257</sup> 704 N.E.2d 1147 (Mass. 1999).

<sup>258</sup> *See Student No. 9 v. Bd. of Educ.*, 802 N.E.2d 105, 116 (Mass. 2004) (Ireland, J., concurring). Justice Ireland summarized the status of the claims before the Court:

On the record before us today, we know that (1) the current use of the Massachusetts

Comprehensive Assessment System (MCAS) examination means that some core subjects have been omitted from the requisite competency determination; [footnote omitted]

(2) “the record is devoid of evidence about when the board plans fully to implement

the Act’s curriculum provisions by incorporating the remaining core subjects into the

competency determination”; [footnote omitted] (3) “alternative routes to a high school

diploma, theoretically available through a ‘performance appeal’ or an ‘alternative assessment,’ as a practical matter are closed to almost all students, particularly those

with significant learning disabilities”; [footnote omitted] (4) there is a “considerable”

disparity in pass rates for different subgroups within the Commonwealth, as well as

between urban and suburban schools, and (5) there is no system in place to assess the

performance of the schools in core subjects not tested by the MCAS examination [foot-

note omitted].

*Id.* at 117–18. This rationale indicates that the SJC was hopeful that, or infatuated by, the ERA of 1993 and that this statute would solve the problem. The SJC was equating the

While this case reached the Court at the preliminary injunction phase of the litigation, the probabilities are that the decision would have been the same after a full record from a full trial.

*D. Pay No Attention to the Man Behind the Curtain*<sup>259</sup>

Following the 350+ page Report to the Court, the parties briefed the case.<sup>260</sup> Over two dozen briefs *amici curiae* were submitted on behalf of the plaintiffs' position, including one from over 40 state legislators, one from the Massachusetts Business Alliance for Education, and one on behalf of Jonathan Kozol, author of *Savage Inequalities, Death at an Early Age*, and other books on the plight of children growing up in poor urban environments.<sup>261</sup> The case was argued on October 4, 2004 and there were widespread predictions that the Court's decision would favor the plaintiffs.<sup>262</sup> Plaintiffs, and much of the community watching this case, were shocked by the Court's decision on February 15, 2005, in which a plurality of the Court refused to implement Judge Botsford's recommendations and dismissed the case in its entirety.<sup>263</sup>

The plurality opinion in *Hancock v. Comm'r of Educ.*,<sup>264</sup> written by Chief Justice Marshall,<sup>265</sup> accepted every finding of fact in Judge Botsford's extensive and thorough report.<sup>266</sup> In fact, during oral argument, the Assistant Attorney General conceded constitutional violations in the four focus districts, but argued

constitutional provision of the education clause with the requirement that there be a plan. The dissents in *Doe, Student No. 9* and *Hancock* demonstrate that the education clause imposed constitutional standards to which all students were entitled to actually receive. *Id.*

<sup>259</sup> See THE WIZARD OF OZ (Metro-Goldwyn-Meyer 1939).

<sup>260</sup> See *Hancock v. Comm'r of Educ.*, 822 N.E.2d 1134, 1151 (Mass. 2005) (noting that Judge Botsford's report comprised more than 300 pages).

<sup>261</sup> See *id.* at 1135 (listing parties who submitted briefs for *amici curiae*).

<sup>262</sup> See *id.* at 1172 (Greaney, J., dissenting) (commenting that "[p]ractically everyone involved in this case assumed that the court was going to use this litigation to order the Legislature to appropriate money to remedy the severe problems identified.").

<sup>263</sup> See *id.* at 1136–37 (declining to adopt the conclusions of Judge Botsford and disposing of the case in its entirety).

<sup>264</sup> 822 N.E.2d 1134 (Mass. 2005).

<sup>265</sup> *Id.* at 1137. The plurality opinion was joined by Spina, J. and Cordy, J.

<sup>266</sup> See *id.* at 1138 (accepting the Superior Court judge's "thoughtful and detailed" findings of fact).

that these districts were not typical of the other communities in the Commonwealth.<sup>267</sup> Two concurring Justices Cowan and Sosman, who would have overruled *McDuffy* as wrongly decided, complemented the Judge Botsford's thoroughness in her work:

Although I criticize the treatment of the Superior Court judge's lengthy findings and conclusions in the Chief Justice's concurring opinion, the fault here does not lie with the Superior Court judge, who superbly analyzed the overwhelming body of evidence before her. Given our opinion in *McDuffy*, the judge undertook a logical analysis and produced meticulous and scholarly findings. Unfortunately, because our opinion in *McDuffy* mistakenly interjected judicial review where it does not belong, the judge's laudable efforts are for naught. The very level of detail and comprehensiveness of her findings and conclusions indicates that we have gone far astray in assuming a role in the education debate.<sup>268</sup>

<sup>267</sup> See Audio tape: Transcript of Record, *Hancock v. Comm'r of Educ.*, 822 N.E.2d 1134 (Mass. 2005) (SJC-09267) (Oct. 4, 2004) (on file with author). The hearing of the argument at the Supreme Judicial Court was tape-recorded. Here is part of the exchange between Assistant Attorney General Deirdre Roney and Chief Justice Margaret Marshall:

Marshall: "Let us assume that is fact that the Commonwealth has adopted are in fact

perfectly reasonable standards, MCAS, for example, but here we have, as far as I can understand it and that the Commonwealth has done that with respect to two of the seven measures that are suggested in *McDuffy*, um, but here we have four districts where it appears from the evidence, uncontested by the Commonwealth, that in these four districts, these children are not even meeting these standards, correct? In overwhelming numbers."

Roney: "There is certainly no reason to think that the children who are failing on the MCAS have received the capabilities mentioned in *McDuffy*."

Marshall: "So we have, whatever steps have been taken, these children, at least, have failed by what the Commonwealth has said are reasonable measures?"

Roney: "Yes."

*Id.* Conceding that MCAS was based on reasonable standards and that failing MCAS therefore constituted constitutional violations is factually undeniable. However, the point of the case was that there were widespread and extensive violations, as Judge Botsford's report exhaustively demonstrated, and this degree of violations constituted a violation of the Education Clause, as the dissent demonstrates, and as plaintiffs argued.

<sup>268</sup> *Hancock*, 822 N.E.2d at 1162 n.2 (Cowan, J., with whom Sosman, J. joins, concurring) (praising Judge Botsford's report).

The plurality argued that the constitutional requirements decided in *McDuffy* were not violated because the Commonwealth developed the ERA and because the facts did not rise to the level of constitutional proportions.<sup>269</sup> As to the first point, the court said:

No one, including the defendants, disputes that serious inadequacies in public education remain. But the Commonwealth is moving systemically to address those deficiencies and continues to make education reform a fiscal priority. It is significant . . . that the Commonwealth has allocated billions of dollars for education reform since the act's passage, and that this new and substantial financial commitment has continued even amidst one of the worst budget crises in decades. By creating and implementing standardized Statewide criteria of funding and oversight; by establishing objective competency goals and the means to measure progress toward those goals; by developing, and acting on, a plan to eliminate impediments to education based on property valuation, disability, lack of English proficiency, and racial or ethnic status; and by directing significant resources to schools with the most dire needs, I cannot conclude that the Commonwealth is not meeting its constitutional charge to "cherish the interests of . . . public schools." Part II, c.5, §2.<sup>270</sup>

As to the second point, which is essentially the standard of proof needed to prove a constitutional violation, and given the erosion of *McDuffy* described in *Doe* and *Student No. 9*, the Court now sets as the threshold standard, not only that plaintiffs show "that many children in the focus districts are not being well served by their school districts, they [must show] that the defendants are acting in an arbitrary, nonresponsive, or irrational way to meet the constitutional mandate."<sup>271</sup> This logic

<sup>269</sup> See *id.* at 1155 (concluding that Commonwealth has not neglected its constitutional duties and thus judicial intervention is not warranted).

<sup>270</sup> *Hancock v. Comm'r of Educ.*, 822 N.E.2d 1134, 1139 (Mass. 2005).

<sup>271</sup> *Id.* at 1140. The rationale for this conclusion was:

Here, the legislative and executive branches have shown that they have embarked on a long-term, measurable, orderly, and comprehensive process of reform "to provide a high quality public education to every child." G.L. c. 69, §1. They are

leads to the conclusion that as long as there is a plan, and financial resources committed to such plan, it does not matter that neither the plan nor the financial support of such plan is sufficient to deliver the educational standards required by the Commonwealth of the students or the school districts.<sup>272</sup> Regardless of how efficiently a school district spends its limited resources, it does not matter that the students who do not meet the Commonwealth's educational testing requirements do not receive a high school diploma because they were not taught the educational requirements.<sup>273</sup>

And, it does not matter that if a school district did not spend its limited resources wisely or even acted incompetently, and that the students were not at fault, they are denied a high school diploma for failure to meet the testing requirements and the Commonwealth is not responsible; after all, it has a plan! The *McDuffy* judgment's mandate that the provisions of Part II, c.5, §2, of the Massachusetts Constitution impose a 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>274</sup> In short, do current students, who do not abdicate their constitutional right to a public education through fault of their own, have an enforceable right to an education under the

proceeding purposefully to implement a plan to educate all public school children in the Commonwealth, and the judge did not find otherwise. They have committed resources to carry out their plan, have done so in fiscally troubled times, and show every indication that they will continue to increase such resources as the Commonwealth's finances improve. 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 way to meet the constitutional mandate.

*Id.*

<sup>272</sup> See *id.* at 1152 (explaining education clause requires the Governor and Legislature to have a plan to educate and provide resources to create and maintain said plan, but details of policymaking are left to their discretion).

<sup>273</sup> See *id.* at 1152–53 (explaining that as long as government provides substantial and increasing financial support to public education in a way that minimizes differences between communities, it is not violating education clause).

<sup>274</sup> *Id.* at 1171.



education clause John Adams wrote and *McDuffy* defined, when it is not being delivered by their school district? How, if at all, can they enforce it? If that right is not owed, due, and enforceable now, 12 years after *McDuffy* and the ERA, when, if ever, will it be owed, due, and enforceable?

The concurring justices believed that *McDuffy* was wrongly decided, in that, aside from providing public education, there is no enforceable duty under Part II, c.5, §2. The rationale is because the Constitution “declares only fundamental principles as to the form of government and the mode in which it shall be exercised.’ . . . ‘It is a statement of general principles and not a specification of details.’ . . . ‘Its phrases are chosen to express generic ideas, and not shades of distinction.”<sup>275</sup> Under this rationale:

It is inconsistent therefore with the general structure of our Constitution to interpret the education clause as imposing an enforceable duty on the Commonwealth to create and maintain the kind of highly complex and intricate public school establishment that the Chief Justice’s concurring opinion today would presume. 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. [citation omitted]. . . While I do not debate that the clause presumes the establishment of some public schools by the legislative and executive branches, nowhere in its text does the clause mandate any particular action on the part of the Commonwealth, or confer any role on the judiciary to enforce it. Public education is a government service, the organization and finance of which is to be determined by the executive and legislative branches.<sup>276</sup>

<sup>275</sup> *Cohen v. Attorney General*, 259 N.E.2d 539, 543 (1971) (quoting *Tax Commissioner v. Putnam*, 116 N.E. 904, 906 (Mass. 1917) and *Attorney General v. Methuen*, 129 N.E. 662, 664–65 (Mass. 1921)).

<sup>276</sup> *Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134, 1159 (Mass. 2005). Justices Cowan and Sosman reject that *McDuffy* could impose any duty that was enforceable by the judiciary, but continued:

Even assuming that the education clause imposes some continuing duty on the

This view of the education clause and *McDuffy* would be held to mean only that it imposes “a duty to provide an education for *all* [the Commonwealth’s] children, rich and poor, in every city and town, [citation omitted] and that the Commonwealth (not this court) must ‘devise a plan and sources of funds sufficient to meet the constitutional mandate.’”<sup>277</sup> This concurring opinion referred to the education clause imposing the duty (to the extent that it exists) on the executive and legislative branches of government “without intrusion by the judiciary.”<sup>278</sup> Moreover, these justices asserted:

In the twelve years since *McDuffy*, the Legislature passed The Education Reform Act, and spent billions of dollars toward realizing its goals. That is certainly enough under our broad constitutional directive to satisfy the mandate that the Commonwealth “cherish” our public schools.<sup>279</sup>

The dissenting judges understood that the shell of a plan is no answer to rights denied. Justice Greaney wrote:

Commonwealth to support a public education system, it clearly does not guarantee any particular level of educational success or mandate specific programmatic choices. In a display of stunning judicial imagination, the *McDuffy* court used its already bold reading of the education clause to include specific programmatic “guidelines” for the Commonwealth to follow (the seven *McDuffy* “capabilities”) in an attempt to guarantee specific curriculum areas. [citation omitted] The *McDuffy* court fashioned these guidelines from a constitutional directive that only speaks of “cherish[ing]” education, under the guise of constitutional “interpretation.” [citation omitted] To read specific mandates, or even guidance, into the education clause is unsupportable. The clause no more guarantees certain educational results for the children of the Commonwealth than it guarantees any measure of success in any other category that the same section instructs the Legislature to promote – “humanity,” “general benevolence,” “industry,” “charity,” “frugality,” “honesty,” “punctuality,” “sincerity,” “good humor,” “social affections,” and “general sentiments among the people.”

*Id.* at 1160.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Id.* at 1160.

By any standard, the extensive findings made by the Superior Court judge conclusively establish that the constitutional imperative of *McDuffy* is not being satisfied in the four focus districts, when they are examined objectively against the three comparison districts. The factual record establishes that the schools attended by the plaintiff children in the focus districts are not currently implementing the Massachusetts curriculum frameworks in any meaningful way, nor are they otherwise equipping their students with the capabilities delineated in *McDuffy* as the minimum standard by which to measure and educate a child.<sup>280</sup>

Real students were being injured as “[a]cute inadequacies exist in the educational programs of the four focus districts in the core subjects of English language arts, mathematics, science and technology, and history.”<sup>281</sup> After reviewing the detailed findings of the Report, which show a lack of quality teachers, old textbooks and lack of funds to meet basic requirements, Justice Greaney concluded, “the judge’s report paints a ‘bleak portrait of the plaintiffs’ schools’ that is remarkably similar to what the *McDuffy* court found eleven years ago.”<sup>282</sup> As to his differences between the plurality opinion and his, he observed,

[The Chief Justice] believes . . . that the Commonwealth currently is meeting its duty to educate the plaintiff students in the focus districts, because of its duty to educate depends on effort and not on results. This proposition is way off the mark. The Chief Justice, in effect, overrules *McDuffy*. The plurality result reached today both undermines protections guaranteed to the students in the focus districts (and other districts where the obligations of the education clause are not being fulfilled) and ignores principles of *stare decisis*.<sup>283</sup>

Justice Greaney minced no words about the Court’s departure from *stare decisis*:

<sup>280</sup> *Id.* at 1166.

<sup>281</sup> *Id.*

<sup>282</sup> *Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134, 1168 (Mass. 2005).

<sup>283</sup> *Id.* at 1171.

The *McDuffy* court unanimously held that children in the Commonwealth are constitutionally entitled to an education that is reasonably calculated to provide them with the seven capabilities set forth in the Supreme Court of Kentucky's guidelines in *Rose v. Council for a Better Education, Inc.* [citation and footnote omitted]. That pronouncement was reached after intensive and scholarly examination of the meaning and provenance of the education clause and consideration of the principles involved. All of the arguments now advanced by the parties were contemplated, and decided, in *McDuffy*, and there was then no misconception of the points involved.<sup>284</sup>

Justice Ireland (joined by Justice Greaney) was equally appalled by the plurality opinion.<sup>285</sup> He reminded the Court of the promise of *Brown v. Board of Education of Topeka*:<sup>286</sup> “[I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”<sup>287</sup> He continued:

Today, a plurality of the court has left the children of the Commonwealth, who have been waiting now for over twelve years for the promises of a constitutionally required education this court declared in *McDuffy v. Secretary of the Executive Office of Educ.*, 415 Mass. 545, 621, 615 N.E.2d 516 (1993) (*McDuffy*), without recourse.<sup>288</sup>

Like Justice Greaney, Justice Ireland reminded the court of the duty to provide the constitutionally required education and emphasized that this duty is an “*enforceable duty*.”<sup>289</sup> Moreover, citing *McDuffy*, he added, “[t]he citizens ‘of the Commonwealth have a correlative right to be educated,’”<sup>290</sup> and reminded them of the seven *McDuffy* (*Rose*) capabilities of an educated child. He reminded the court that “offering to aid education was

<sup>284</sup> *Id.*

<sup>285</sup> *See id.* at 1173 (noting discontent with plurality opinion).

<sup>286</sup> 347 U.S. 483, 493 (1954).

<sup>287</sup> *See Hancock*, 822 N.E.2d at 1173 (citing *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954)).

<sup>288</sup> *Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134, 1173 (Mass. 2005).

<sup>289</sup> *See id.* (commenting on government’s duty).

<sup>290</sup> *Id.* at 1174.

insufficient,”<sup>291</sup> and that “[t]he Legislature also is not permitted to shift its duty to local governments.”<sup>292</sup> Justice Ireland added that, in his opinion, “*McDuffy* did not envision that this constitutional duty would be subject to the vagaries of budget issues.”<sup>293</sup> Because Justice Greaney’s dissent scrutinized Justice Cowan’s views, Justice Ireland took aim at the reasoning of the plurality opinion. Comparing the language used by the Chief Justice in the plurality opinion, “painfully slow,” with language used by the Supreme Court in *Brown*, “with all deliberate speed,”<sup>294</sup> Justice Ireland concluded that, “the Chief Justice’s assessment that this painfully slow progress does not violate the education clause implicitly overrules the holding of *McDuffy*.”<sup>295</sup> He agreed with Judge Botsford, who concluded “that the children of the Commonwealth are not receiving their constitutionally required education.”<sup>296</sup> He also agreed that Judge Botsford’s findings were a “model of precision, comprehensiveness, and meticulous attention to detail.”<sup>297</sup> After his own review of several of the findings, Justice Ireland emphasized some of the funding deficiencies found by Judge Botsford from the evidence: “The judge considered evidence concerning the foundation budget formula and found that even the defendants’ own witnesses were not able to say that the foundation budget is adequate to provide the education called for by *McDuffy*, in terms of the curriculum frameworks.”<sup>298</sup> He addressed the separation of powers argument advanced by the Commonwealth to argue that the Court didn’t have the power to order a remedy by quoting Judge Botsford’s findings:

[T]he difficulty with the defendants’ solution is that the system they depend on to improve the capacities of the schools and districts is not currently adequate to do the job. Since approximately 1980, the department’s staff has been reduced by more than half

<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> See *Brown v. Bd. of Educ. of Topeka*, 349 U.S. 294, 301 (1955).

<sup>295</sup> *Hancock v. Comm’r of Educ.*, 822 N.E.2d 1134, 1174 (Mass. 2005).

<sup>296</sup> See *id.* at 1175 (noting Chief Justice’s statement that the “goals of education reform adopted since *McDuffy* [clearly have not] been fully achieved”).

<sup>297</sup> *Id.*

<sup>298</sup> *Id.* at 1176.

– from over 1,000 employees to a number less than 400. At the same time, under the [Education Reform Act], the department's responsibilities have multiplied and intensified in critical ways. In terms of reviewing school district performance, in the three years since the department developed the school accountability system, it has been able to conduct School panel reviews in only twelve to fourteen schools each year, although the annual pool of schools demonstrating 'low' or 'critically low' performance is in the hundreds.<sup>299</sup>

Justice Ireland concluded his dissent by reminding the court of the Supreme Court decision in *DeShaney v. Winnebago County Dep't of Social Services*,<sup>300</sup> where a father abused his child, rendering him permanently injured.<sup>301</sup> He sued the state's Department of Social Services for not protecting him, arguing that the failure to protect him denied him liberty under the due process clause of the Fourteenth Amendment to the United States Constitution. Justice Ireland related that the Supreme Court "expressed its 'natural sympathy' for Joshua, but declined to hold that the due process clause offered him any relief."<sup>302</sup> Justice Blackmun dissented, lamenting "'Poor Joshua!' and stated that given a choice, he would adopt a "'sympathetic' reading [of the due process clause], one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging."<sup>303</sup> Justice Ireland concluded, "Today the Chief Justice states that she has sympathy for the 'sharp disparities in the educational opportunities, and the performance, of some' children of the Commonwealth and states that it is too late for many students."<sup>304</sup> In Justice Ireland's words, he was "disappointed and saddened that, instead of acting to assist our children, five

<sup>299</sup> *Id.* at 1177.

<sup>300</sup> 489 U.S. 189 (1989).

<sup>301</sup> *Id.* at 191 (noting petitioner was "beaten and permanently injured by his father").

<sup>302</sup> See *Hancock v. Comm'r of Educ.*, 822 N.E.2d 1134, 1178 (Mass. 2005).

<sup>303</sup> See *DeShaney*, 489 U.S. at 213 (noting plaintiffs deserve an opportunity to have facts considered).

<sup>304</sup> See *Hancock*, 822 N.E.2d at 1178 (expressing disappointment and sadness in the majority decision).

Justices leave them without recourse like ‘Poor Joshua.’ Our children deserve better.”<sup>305</sup>

#### IV. EQUAL PROTECTION UNDER THE MASSACHUSETTS CONSTITUTION AND THE HANCOCK DECISION

An application of the Massachusetts Equal Protection provisions begins with reviewing Equal Protection under the U.S. Constitution. Under the Equal Protection Clause of the Fourteenth Amendment,<sup>306</sup> the Supreme Court has generally recognized three separate tiers of analysis, each beginning with an inquiry into what type of right or classification the law in question is alleged to infringe.<sup>307</sup> The “tiers of scrutiny” break down into “strict scrutiny,”<sup>308</sup> an application which covers

<sup>305</sup> *Id.* Nor did the Court refer to Campaign for Fiscal Equity, Inc. v New York, 801 N.E.2d 326, 332 (2003), where the New York Court of Appeals not only held educational requirements to a high standard [similar to the *Rose* or *McDuffy* standards], but, as was requested in *Hancock*, ordered that a study be implemented to determine the cost of implementing these educational requirements. *Id.* The court was analyzing whether schoolchildren got a meaningful high school education. *See id.* Nor did the Court in *Hancock* look to see how other state supreme courts dealt with the issue of remedy for the denial of an adequate or equal education in those states. *Hancock*, 822 N.E.2d.1134 *passim*. The court was only noting *McDuffy*. *See id.*

<sup>306</sup> U.S. CONST.. amend. XIV, § 1 (stating “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

<sup>307</sup> *See* CHARLES A. SHANOR, AMERICAN CONSTITUTIONAL LAW: STRUCTURE AND RECONSTRUCTION 662–63 (2nd ed. 2003).

<sup>308</sup> *See* U.S. v. Carolene Products, 304 U.S. 144, 153 n. 4 (1938):

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . . It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

*Id.* The Court noted that laws that curtail civil rights are immediately suspect. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944). The court explained the heavy burden on the state. *See* Loving v. Virginia, 388 U.S. 1, 9 (1967).

“suspect classifications” and “fundamental rights;” “middle tier scrutiny,” which implicates gender classifications;<sup>309</sup> and “rational basis scrutiny,”<sup>310</sup> which applies to all other government action that does not trigger a heightened category.<sup>311</sup>

While textually the Equal Protection specifications under the Massachusetts Constitution may not resemble the Fourteenth Amendment, “the Massachusetts courts have traditionally applied the federal equal protection framework when addressing claims raised under the state constitution.”<sup>312</sup> Accordingly, Massachusetts’ courts, like the federal courts, apply the strict scrutiny test to cases involving a fundamental right or a suspect class,<sup>313</sup> and simple rational basis scrutiny to most other actions.<sup>314</sup> Further, the respective legal tests that effectuate the rational basis and strict scrutiny standards under the Declaration of Rights mirror their federal counterparts – strict scrutiny mandating a compelling state interest and rational basis requiring plaintiff show illegitimate interest or irrational means.<sup>315</sup>

While the Massachusetts and federal courts agree on several points of their particular Equal Protection applications, there are

<sup>309</sup> See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (noting “[t]o withstand constitutional challenge, previous cases establish that classifications by gender must serve important government objectives and must be substantially related to achievement of those objectives.”).

<sup>310</sup> See *New York City Transit Authority v. Beazer*, 440 U.S. 568, 593 (1979) (concluding, after applying rational basis scrutiny, that it was not a Fourteenth Amendment violation for Transit Authority to refuse to hire methadone users for safety reasons).

<sup>311</sup> See William L. Campbell, *Moving Against the Tide: An Analysis of Home School Regulation in Alabama*, 52 ALA. L. REV. 649, 654–55 (2001) (explaining different levels of scrutiny).

<sup>312</sup> See Lawrence Friedman, *Ordinary and Enhanced Rational Basis Review in the Massachusetts Supreme Judicial Court: A Preliminary Investigation*, 69 ALB. L. REV. 415, 417 n. 7 (citing *Dickerson v. Attorney Gen.*, 488 N.E.2d 757, 759 (Mass. 1986), for the proposition that “[f]or purposes of equal protection analysis, [the] standard of review under the cognate provisions of the Massachusetts Declaration of Rights is the same as under the Fourteenth Amendment.”); see also *Dickerson v. Attorney Gen.*, 488 N.E.2d 757, 759 (1986) (holding that absent a suspect class or fundamental right, a rational basis test should be used).

<sup>313</sup> See *Lowell v. Kowalski*, 405 N.E.2d 135, 138 n.7 (Mass. 1980) (noting that Massachusetts amended its constitution in 1976 to include race, color, creed, or national origin).

<sup>314</sup> See *Dickerson*, 488 N.E.2d at 759 (commenting that if a law is rationally related to legitimate government purpose it is valid).

<sup>315</sup> See *Murphy v. Department of Corrections*, 711 N.E.2d 149, 152 (1999) (noting standard of review for equal protection claims are nearly identical to Federal Constitution).



two major differences between them.<sup>316</sup> The first departure exists in the respective courts' treatment of the gender classification.<sup>317</sup> Codified in 1976, the Massachusetts Equal Rights Amendment (ERA) provides, "Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin."<sup>318</sup> By including gender-based classifications under the reach of strict scrutiny, the SJC held, "[a] statutory classification based on sex is subject to strict judicial scrutiny under the State ERA and will be upheld only if a compelling interest justifies the classification and if the impact of the classification is limited as narrowly as possible consistent with its proper purpose."<sup>319</sup> Thus instead of applying middle tier or intermediate scrutiny to gender cases, Massachusetts' courts treat gender-based classifications with the same level of scrutiny as race-based classifications.

The other major difference between the federal and Commonwealth Equal Protection analyses is the area of "enhanced rational basis scrutiny."<sup>320</sup> Although it has drawn much attention in the legal community since the 2003 SJC decision in *Goodridge v. Department of Public Health*,<sup>321</sup> the enhanced rational basis scrutiny has existed in the Commonwealth since the beginning of the 20th century.<sup>322</sup> In order to evoke an application of enhanced rational basis scrutiny rather than the ordinary rational basis test, "the government action must implicate or restrict an interest that the court deems important, but that does not rise to the level of a fundamental

<sup>316</sup> See *Dickerson*, 488 N.E.2d at 759 (explaining for all purposes state equal protection claims are treated just like Fourteenth Amendment claims).

<sup>317</sup> See Stanley H. Friedelbaum, *State Equal Protection: Its Diverse Guises and Effects*, 66 ALB. L. REV. 599, 626–28 (2003) (comparing the levels of scrutiny Massachusetts and federal courts use).

<sup>318</sup> MASS. CONST. art. I (1976) (stating "[a]ll people are born free and equal and have certain natural, essential and unalienable rights.>").

<sup>319</sup> See *Lowell v. Kowalski*, 405 N.E.2d 135, 139 (Mass. 1980) (concluding the state does have a compelling interest under strict scrutiny).

<sup>320</sup> Compare *Cleburne v. Cleburne Living Center*, 473 U.S.432, 432 (1985) (employing normal rational basis review), with *Goodridge v. Dep't of Public Health*, 798 N.E.2d, 941, 960 (2003) (noting that the court uses a modified rational basis standard).

<sup>321</sup> 798 N.E.2d at 959–60 (commenting Massachusetts Constitution protects individual rights more than the Federal Constitution).

<sup>322</sup> See *id.* at 960 (explaining modified rational basis).

personal interest.”<sup>323</sup> The enhanced test thus shifts the focus from a “conceivable” basis for government action to a “real and demonstrable connection.”<sup>324</sup>

While the *Hancock* court did not proceed to an Equal Protection analysis of the ERA, the question is whether that legislation would have overcome any tier of scrutiny.

#### V. TO DIE UPON A KISS<sup>325</sup>

To what extent there is anything left of *McDuffy*, and to what extent this Court has been faithful to *Marbury v. Madison*<sup>326</sup> and its own precedent for courts to give remedies to wrongs, is for you, dear reader, to decide.<sup>327</sup> The *Hancock* plurality says yes,

<sup>323</sup> See Friedman, *supra* note 312 (forthcoming 2006); see also *Goodridge*, 798 N.E.2d at 960 n. 20 (noting “[s]tatutes have failed rational basis review even in circumstances where no fundamental right or ‘suspect’ classification is implicated.”).

<sup>324</sup> See Friedman, *supra* note 312 (forthcoming 2006); see also *Goodridge*, 798 N.E.2d at 960 n. 20 (noting “[n]ot every asserted rational relationship is a ‘conceivable’ one, and rationality review is not ‘toothless.’”).

<sup>325</sup> Shakespeare, *Othello*, [http://shakespeare.about.com/library/lothello\\_5\\_2.htm](http://shakespeare.about.com/library/lothello_5_2.htm) (quoting *Othello*).

<sup>326</sup> 5 U.S. 137, 163 (1803) (establishing judicial review).

<sup>327</sup> It is a myth to state that courts, even those where the justices are not elected, but are appointed, are not subject to the pressures of public opinion. To be sure, there have been prestigious courts and prestigious justices who were courageous in the face of extreme adverse public opinion. But, a study of history shows that this is the exception to the rule that courage and wisdom do not come automatically with judicial robes. Often times, that pressure survives current politicians. Two cases decided prior to *Hancock* resulted in steady criticism of the SJC. The SJC decided *Bates v. Director of Office of Campaign and Political Finance*, 763 N.E.2d 6, 6 (2002) (explaining how to interpret a statute). This case is commonly known as the Clean Elections Law case, as the voters used the constitutional initiative process to provide state funding to political candidates who agreed not to spend beyond a certain amount on political campaigns. See MASS. ANN. LAWS ch. 55A, § 1 (noting it was repealed). The SJC upheld this law and told the Legislature to implement the law or repeal it, the response of the leadership of the House of Representatives was swift and pointed. In an article in the *Boston Globe*, the Speaker of the House, Thomas Finneran, threatened to change the judicial appointment system to an elective system. He said, “[I]f the court’s going to insert itself into things like this . . . you may as well put everything on the ballot. . . . Elections are cleansing agents for when we make mistake.” See also Rick Klein, *Finneran Suggests Election of Judges*, BOSTON GLOBE, February 8, 2002, at A1. Klein went on to say that “[t]here is no cleansing mechanism against judges.” [Currently, Massachusetts judges are appointed by the Governor and may serve until they reach the age of 70.]. Furthermore, there is concern about judges becoming involved in political decision making. Rick Klein *Risks Lurk In SJC’S Clash With Legislature Some See Justices Overstepping Bounds*, BOSTON GLOBE, March 11, 2002, at B1.

Ever since the decision by the Court in *Goodridge*, it has been attacked by politicians at the local, state, and national level. Attacks on the SJC for substituting their values for the values of heterosexual marriage have been constant ever since the decision in 2003. Recently, at a function of the Federalist Society in Washington, D.C. Massachusetts Governor Mitt Romney, who has attacked the Court for its decision in *Goodridge* many times, was quoted by the *Boston Globe* as saying, “If a judge substitutes his or her values

the dissent says *McDuffy* was overruled, and the concurring opinion agrees with the dissent, but also maintains that *McDuffy* was initially wrongly decided.<sup>328</sup> Everyone agrees that the children in the four focus districts did not get the education promised to them, and it is clear that these children, in the public schools of the Commonwealth at this moment in time are not getting any remedy from this Court. Whether these children's children and future generations of students will get *McDuffy's* promises will be decided in the future. This Court's treatment of John Adams' value of education and its interpretation of the Constitution in *McDuffy*, is perhaps best described by Shakespeare:

Put out the light, and then put out the light:  
If I quench thee, thou flaming minister,  
I can again thy former light restore,  
Should I repent me: but once put out thy light,  
Thou cunning'st pattern of excelling nature,  
I know not where is that Promethean heat  
That can thy light relume.  
When I have pluck'd thy rose,  
I cannot give it vital growth again,  
Its needs must wither; - I'll smell it on the tree. -  
Kissing her  
Ah balmy breath, that dost almost persuade  
Justice to break her sword! One more, one more.  
Be thus when thou art dead, and I will kill thee,  
And love thee after. One more, and that's the last:  
So sweet was ne'er so fatal. It must weep,  
But they are cruel tears: this sorrow's heavenly;  
It strikes when it doth love.<sup>329</sup>

for those values that were placed in the constitution, they do so at great peril to the culture of our entire land." Scott Helman, *Romney Rips SJC's on Values*, BOSTON GLOBE, November 11, 2005, at A1. The author also noted that the comment by Romney resulted in over 500 lawyers applauding. *See id.*

<sup>328</sup> *Hancock v. Comm'r Educ*, 822 N.E.2d 1134, 1139, 1159-60 (2005) (exploring significance of *McDuffy*).

<sup>329</sup> Shakespeare, *Othello*, [http://shakespeare.about.com/library/blothello\\_5\\_2.htm](http://shakespeare.about.com/library/blothello_5_2.htm) (quoting Othello in Act V, Scene II).