Massachusetts’ *Hancock* Case and the Adequacy Doctrine

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Introduction and Plan of the Paper

On February 15, 2005, the Supreme Judicial Court of Massachusetts found in favor of the Commonwealth in the *Hancock* adequacy case. In so doing, the court lifted its 1993 finding of Constitutional violation and decisively terminated 27 years of litigation. The court’s decision to “dispose of the case in its entirety” was a stunning reversal of the trial judge’s conclusion, and it bucked the trend of plaintiff victories in adequacy lawsuits nationwide. It was a case that had been closely watched by leaders of the adequacy movement, who visited the state repeatedly, viewed it as “the advance wave of the second round” of adequacy suits, and were confident of success.  

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

The Commonwealth’s victory in *Hancock* was the result of the state’s unusually vigorous education reform effort, since 1993. In a two-pronged effort, the state infused massive sums of money to property-poor districts, followed by a rigorous regime of academic standards, graduation exams and accountability. As a national leader in both standards-based reform and finance equity, with high-ranking test scores that continue to rise, Massachusetts was undoubtedly better situated than many states to withstand another adequacy lawsuit.

There was, however, more to the decision than simply a good set of facts. In crediting these facts, I will argue, the court fundamentally rejected the adequacy doctrine itself. That doctrine, as presented by the plaintiffs, posited a constitutional standard that not even these facts, strong as they were, could meet. The court, accordingly, rejected the adequacy doctrine
as, at the very least, unrealistic. Specifically, in reaching its decision, the \textit{Hancock} court found that:

1. educational progress counts;
2. equity in spending counts;
3. factors other than spending count, especially accountability and standards.

On all three counts the court implicitly or explicitly rejected key tenets of the adequacy doctrine. Specifically, the three counts above reject adequacy tenets on (respectively) educational outputs, financial inputs, and non-financial inputs, as will be detailed below.

The adequacy doctrine seeks to establish a \textit{specific policy} on educational outputs and inputs as a \textit{constitutional standard}. Consequently, the doctrine raises a separation of powers issue, even leaving aside that policy’s workability. The \textit{Hancock} court clearly identified that issue and chose, in further rejection of the adequacy doctrine, to apply a much looser constitutional standard: has the Legislature acted in a rational and appropriate fashion to provide education for all? Given the facts of the case, the answer to that question was obvious. The court accordingly found no reason to make “policy choices that are properly the Legislature’s domain.”

To draw out the potential lessons of \textit{Hancock}, this paper will begin by reviewing the adequacy doctrine and highlighting the general issues of contention over that doctrine. Turning to Massachusetts, I will summarize the legal history of \textit{Hancock}. I will then present the history of education reform from 1993, which constituted the Commonwealth’s positive case in \textit{Hancock}. This will be followed by the core of the plaintiffs’ adequacy case -- its three
The Adequacy Doctrine

The adequacy doctrine can be simply stated:

(i) the constitutional education clause commits the state to ensuring all students reach a minimum level of educational achievement;

(ii) the state is required to ensure a level of spending in all districts that is adequate to obtain the required level of educational achievement.

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

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

To summarize, the adequacy doctrine puts forth as a constitutional standard a very specific policy on educational output and spending. First, the policy sets a floor output level presumed to satisfy the education clause. Next, the policy assumes a simple educational production function, \( \text{Output} = f(\text{Spending}) \). Finally, the policy derives the corresponding spending requirement by various “costing out” methodologies.

Issues arise in setting output and spending, over both the workability of such a policy and the propriety of establishing that policy as a constitutional standard:

**Setting Minimum Educational Outputs**

Should the courts be in the business of setting minimum educational output levels, and, if so, at what level? Adequacy proponents point to Kentucky’s *Rose* factors – a list of seven general capabilities issued by that state’s high court in the first adequacy case – as precedent for doing so. To make this operational, plaintiffs put forth the state educational standards, often tied to test scores. In this way, plaintiffs contend, the courts would not usurp policy-making authority, since they would only be holding the state to the standards they have already set, while forcing the authorities to provide the funds necessary to meet them.

This approach, however, arguably distorts the intent of state standard-setters. One approach to standard-setting is to set an ambitious goal with the aim of stimulating progress toward that goal, even if that goal may never be fully achieved. NCLB’s goal of 100% student proficiency by 2014 is an obvious example. At the state level, Massachusetts has also
set ambitious goals. It established curriculum frameworks in seven subjects, but has only phased in graduation exams in math and English (science is scheduled to kick in for the class of 2010). The tests are rigorous (for the 10th grade, that is), but passing scores have been set, at least temporarily, below the “proficient” level. The state contended that the system has been effective in driving educational progress. The plaintiffs replied that progress is not the constitutional standard: the standard is the level of achievement specified as “proficient” in the state’s full set of seven frameworks.

Under the adequacy doctrine, states would, in effect, be barred (or at least discouraged) from setting high standards strategically as a means toward obtaining educational progress. This raises the question of whether the adequacy doctrine’s position -- that high state standards create a constitutionally enforceable obligation to ensure all students meet those standards -- infringes on the state’s standard-setting strategy.

**Financial and Non-Financial Inputs**

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

First, if the minimum output is set higher than any district’s current performance level (as was the standard put forth by plaintiffs in *Hancock*), there is simply no empirical basis for determining the required spending. (Indeed, if the standard is ultimately unattainable, the cost is infinite.) With no empirical basis in actual spending and performance patterns, plaintiffs put forth more speculative methods, notably the “professional judgment” model, discussed further below.
If the minimum output is set within the observed range, then data can be used. However, controversies arise in the interpretation of those data, due to the fact that educational output is not uniquely associated with spending – contrary to one of the doctrine’s key assumptions. There is typically a wide spread of spending associated with any given output level. That is because districts may pay different amounts for the same inputs (e.g. some negotiate better terms with their unions), or they may use different input levels with no effect on output (e.g. smaller class sizes, but no better instruction), or they may differ in a host of non-financial inputs (such as the quality of leadership or the flexibility to lead free of bureaucratic and union restraints). For whatever reason, typically there is little or no relationship between spending and output, among demographically similar districts. Does this mean “money doesn’t matter?” To answer this question, see Figure 1.

[insert Figure 1]

The curve in Figure 1 depicts a hypothetical relationship between spending and the maximum output one can obtain from that spending. Note that if spending is cut to zero, educational output will disappear, so it is certainly the case that money matters a great deal at very low levels of spending. Beyond a certain level, however, there are surely diminishing returns; the maximum obtainable output still increases with spending, but at a much lower rate. Moreover, the actual output may increase even less, or not at all with spending, as depicted in the bubbles of Figure 1, for the reasons discussed above. Conversely, there are widely varying levels of output associated with the same spending, such as district A and district B. By focusing solely on spending, the adequacy doctrine ignores what may be far more important determinants of performance. There is arguably much more to be gained by improving B’s practices – whether it is management, resource allocation, or the like – than
would be gained by providing additional funds to a district that does not appear to use existing funds efficiently.

**School Inputs and Home Inputs**

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

Finally, suppose the premium can be reliably determined, so one can calculate the compensatory finance required to fully offset a deficiency in non-school inputs. It is then a hugely important policy question to determine the extent of compensatory finance to provide. But is it a constitutional one, to be determined by the courts? Does the education clause require 100% compensatory finance, sufficient to achieve a given outcome regardless of cost? Or does it call for something more modest, such as an equality of opportunity based on inputs that are under the state’s control?

The answers to these questions are further complicated by the fact that there is a greater dispersion of performance among disadvantaged schools than there is among districts and a greater dispersion yet among disadvantaged students. If some disadvantaged students at a given school perform at the specified level, but others do not, then can it be said their school does not offer an opportunity to perform at that level? Is there a difference between a policy
decision to try and bring all students to proficiency and a constitutional obligation to reach that result?

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

**Brief History of Hancock**

Prior to 1993, Massachusetts’ school system was highly decentralized: funding was overwhelmingly based on local finance (about 70%) and there were no state educational standards to speak of. Starting in 1978, plaintiffs filed suit over the finance system. The suits worked their way through the courts, off and on (as state aid and funding reform waxed and waned), and were ultimately consolidated into the *McDuffy* case of 1993. In *McDuffy* the SJC found that the education clause established

> an enforceable duty on the magistrates and Legislatures of this Commonwealth to provide education in the public schools for the children there enrolled, whether they be rich or poor and without regard to the fiscal capacity of the community or district in which such children live.\(^\text{10}\)

In finding, further, that the Commonwealth was not meeting its constitutional duty, the court relied heavily on evidence of spending gaps between plaintiff districts and three property-rich “comparison” districts (Brookline, Concord, and Wellesley).

> We need not conclude that equal expenditure per pupil is mandated or required, although it is clear that financial disparities exist in regard to education in the various communities...[T]he reality is that children in the less affluent communities...are not receiving their constitutional entitlement of education...\(^\text{11}\)

Thus, although *McDuffy* is usually considered one of the nation’s early adequacy suits, the court relied on equity evidence.\(^\text{12}\) Measures of educational output played little or no role.
To provide further guidance on what constituted the “duty to educate” going forward, however, the court cited the Kentucky court’s *Rose* capabilities, such as “sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization.” The concrete meaning of *McDuffy*’s citation to *Rose* would be vigorously debated in *Hancock*.

The *McDuffy* court imposed no specific remedy for the violation; it left the matter to “the magistrates and the Legislatures,” while assigning to a single justice the discretion “to determine whether, within a reasonable time, appropriate legislative action has been taken.” In the meantime, the Legislature and the Governor enacted the Education Reform Act of 1993 (discussed in the next section).

No further legal action was taken until a new set of plaintiffs – Julie Hancock, et. al. -- filed for further remedial action at the end of 1999. The single justice of the SJC assigned the case to Superior Court Judge Margot Botsford for trial.

During pre-trial proceedings, Judge Botsford considered arguments over the constitutional standard to be applied during trial – a key issue. The plaintiffs argued that *McDuff*y had established the standard of an adequate education by invoking the seven *Rose* capabilities, and that the Massachusetts Legislature (through the Board of Education) had made the standards concrete in the seven curriculum frameworks. These frameworks, it was argued, established the educational outputs (or performance levels) to which all students in the Commonwealth were constitutionally entitled. The main task of the trial court, according to the plaintiffs, was to determine whether the inputs available to plaintiff districts were adequate to obtain those output levels.
The defense argued that *McDuffy* established a rather different standard – not a standard for educational outputs, but instead a standard for legislative action: “whether, within a reasonable time, appropriate legislative action has been taken” to address the deficiencies found in *McDuffy*. The task of the trial court, according to the defense, was to evaluate the educational progress made since 1993, the narrowing of spending gaps identified in *McDuffy*, and the reasonableness of the state’s policy strategy for further educational progress, namely targeted assistance and accountability.

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

The heart of the plaintiffs’ case (detailed in subsequent sections) would be three pieces of finance testimony aimed at demonstrating that spending was inadequate in the plaintiff districts to achieve the level of educational achievement defined by the curriculum frameworks. Two of these three studies were rejected by the trial judge. Still, based on the remaining evidence and her reading of the constitutional standard, Judge Botsford’s April 2004 report recommended that the SJC find for the plaintiffs. In her view the foundation budget was inadequate for all districts. It then followed that actual spending was inadequate in the plaintiff districts, since they spend near foundation. The remedy she proposed was similar to that in New York: the SJC should order a cost study with a host of specific
guidelines to gauge the additional spending that is necessary, and retain jurisdiction to ensure the Legislature acts upon it.

The SJC heard oral arguments in October 2004 and issued its decision in February 2005, ruling 5-2 in favor of the defense. In doing so, as I will discuss in more detail below, the court rejected the adequacy doctrine.

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

At the same time as *McDuffy* was moving toward conclusion, the Legislature and the Governor were finalizing the Massachusetts Education Reform Act (MERA) of 1993. The main features of the act were the reform of funding, with the simultaneous establishment of educational standards, followed by accountability for results.

The key features of the finance reform were:

(i) establishment of a foundation budget, which set minimum per pupil spending for all districts, with an add-on of over 40% for low-income children;

(ii) establishment of a required local contribution;

(iii) commitment by the state to fill the gap between foundation budget and required local contribution, over seven years (i.e. by 2000).

Figures 2 and 3 (presented in court) demonstrate what a dramatic and ambitious reform this was. At the outset, two-thirds of the state’s students were in districts that spent below foundation, often by a large margin. By 2000, all students were brought up to foundation, thereby eliminating the left tail of the spending distribution.

[insert Figures 2 & 3]

In dollar terms, Figure 4 shows the spending gaps between districts with the highest and lowest poverty, before and after reform. Average spending in the highest poverty quartile
(i.e. districts with the highest rate of free and reduced lunch, educating a quarter of the
students) now exceeds that in the quartile with the least poverty. Similar graphs presented
in court showed that by other measures (district income and property wealth) the gaps were
much narrowed, but not eliminated. In comparison to other states, *Education Trust* has
consistently found that Massachusetts is at or near the top in the progressivity of its funding
system, by measures similar to those discussed here.

[insert Figure 4]

This funding reform required massive growth of state funding, largely targeted at poor
districts. As Figure 5 shows, funding of the education aid formula (i.e. excluding grants)
grew at double-digit rates -- far exceeding the underlying growth in the tax base -- from 1993
until the foundation gap was closed. Funding growth abated thereafter, and fell briefly during
the recession, but much less so than in the recession preceding the funding reforms, despite a
much steeper drop in revenues.

[insert Figure 5]

The key features of the accountability reforms were:

(i) establishment of curriculum frameworks and state assessments (MCAS);

(ii) requirement of students to pass 10th grade English and math assessments for high
    school graduation, beginning with the class of 2003;

(iii) procedures for evaluating districts and schools, ultimately leading to state
    intervention in failing schools.

The graduation requirement was a particularly important driver of educational reform, and
was highly contested. The state’s largest teachers’ union led a vigorous effort against the
requirement, including a well-funded and controversial advertising campaign. A lawsuit was
filed to prevent the graduation requirement from being implemented, but the suit failed,
ending with a pointed rejection by the SJC. Significantly, that case was cited repeatedly in the *Hancock* decision (as discussed further below).

The exit exams initially seemed to pose nearly insurmountable hurdles, as the failure rates were very high in the dry runs, prior to high stakes. Once the graduation requirement kicked in, however (in 2001, for the class of 2003), failure rates dropped dramatically (see Figure 6). After retakes in grades 11 and 12, the failure rate dropped to about 5%.¹⁷ In addition, racial gaps narrowed on the pass rate, although they remain wide at the higher levels of performance.

[insert Figure 6]

State performance on national exams also improved.¹⁸ Massachusetts now performs at or near the top nationally on the NAEP’s. The state’s SAT performance has improved markedly over the last decade, passing the national average in 1999 and widening its lead since then, despite one of the nation’s highest participation rates.

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

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

**Plaintiff Critique and Trial Judge Opinion**

Judge Botsford acknowledged “that spending gaps between districts based on property wealth have been reduced or even reversed.” However, ultimately she agreed with the plaintiffs, that “the issue here is not spending equity but educational adequacy,” so data on spending gaps are irrelevant.19

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

All that remained was to determine whether inadequacy of funding was the source of the violation. That was the subject of the plaintiffs’ three adequacy studies. In examining these studies, the underlying difficulties with the adequacy doctrine, discussed above, will concretely come into relief.

**Plaintiffs’ Case I: Professional Judgment Study**

The first leg of the plaintiffs’ finance case was the professional judgment study prepared by Professor Deborah Verstegen of the University of Virginia. Very simply, a group of educators from the plaintiff districts was presented with the seven curriculum frameworks and asked for their professional judgment regarding the resources necessary – class size,
numbers of teacher aides, computers, etc. -- to produce proficiency in all the frameworks. Dollar amounts were then assigned to these resources to complete the “costing out.” Dr. Verstegen concluded that the actual per pupil expenditures fell $4,100–8,000 short of what was necessary for an adequate education in each of the four plaintiff focus districts.

Defense Critique and Trial Judge Opinion

The key piece of defense testimony on the study extended its findings from the four plaintiff districts to the rest of the state. Using Verstegen’s methodology, the defense found that almost no district in the state had adequate spending – not even the wealthy “comparison” districts chosen by the plaintiffs. Nor were most districts even close -- over 80 percent of the state’s pupils are in districts that fell short of the Verstegen standard by at least $4500 per student. (See Figure 7, which reproduces the defense exhibit.) Ironically, the only district of any size with adequate spending by this criterion was Cambridge – the state’s most notoriously high-spending and low-achieving district.

[insert Figure 7]

The Verstegen study proved too much for the trial judge to swallow. Judge Botsford was more than open to claims that the plaintiff districts had inadequate resources, but clearly something was suspect in a methodology that found virtually no student in the state – even in the most affluent districts – to be adequately educated.

The question this raises is what step – or steps -- in the methodology account for the result. Since professional judgment studies are the most common form of “adequacy study”
presented by plaintiffs, and since the Verstegen study is typical in most respects, this is an important question.

The most obvious candidate for explaining the result – the one singled out by Judge Botsford -- is the subjectivity of the procedure. The panelists were instructed (as is typical for this kind of study) to be creative in designing programs and to not consider any revenue constraints. As a result, the judge concluded that the study represents “to some extent a wish list.” Moreover, the judge wrote, the choice of panelists for a “lawsuit involving funding issues for the very districts in which the panel members teach and work – gives one pause about its total objectivity.” Consequently, Judge Botsford dismissed the Verstegen study as unhelpful.

Professional Judgment Problems Rest on Underlying Problems with Adequacy Doctrine

The subjectivity of the approach follows from the fact that it is not based on data. But that is in some measure due to more fundamental problems with the adequacy doctrine. First of these is the fact that the data on educational inputs and outputs do not support the relationship assumed by the doctrine. Indeed, the most widely cited practitioners of the professional judgment approach write that

The effort to develop these approaches stems from the fact that no existing research demonstrates a straightforward relationship between how much is spent to provide education services and performance. One of the main reasons the data do not show the assumed relationship is that non-financial inputs vary. So it is also noteworthy that panelists in professional judgment studies are not asked to consider improvements in such inputs as leadership or freedom from union restraints, but rather to focus solely on new resource-using programs.
The final problem with the study was that the educational output level, on which professional judgment was sought, was chosen to be well above that yet offered by any district. It then follows tautologically that no child in the Commonwealth is receiving an “adequate” education. And yet, how could such an output level be a constitutional minimum? Since the education clause is predicated on the needs of a functioning republic, the claim must be that no high school graduate in the Commonwealth is adequately educated for democracy. No doubt our Commonwealth’s governance has yet to reach perfection, but if no graduate is minimally prepared for democracy, it is a wonder that our government functions at all.

**Plaintiffs’ Case II: Successful Schools Model**

The second adequacy study was of the “successful schools” variety, by John Myers (formerly of the consulting firm Augenblick and Myers). Here the output level was chosen to be that of the highest scoring 75 districts in the state’s math and English assessments. The plaintiffs carefully asserted that this output level was below the constitutionally required minimum, but commissioned the study to determine the required expenditures for that more modest goal. The basic idea was to infer from actual expenditures of the “successful” districts, what expenditures would be required for the plaintiff districts, accounting for their demographic disadvantages. The study found that plaintiff districts fell $1,200-3,500 short.

**Defense Critique and Trial Judge Opinion**

As with the professional judgment model, the plaintiffs’ expert applied the model only to the plaintiff districts. The key piece of defense testimony was to apply the methodology to the “successful” districts themselves. As Figure 8 shows, two-thirds of these districts were
found to spend less than was determined to be “necessary” for their success. This paradoxical result (along with some other anomalous results) indicated to Judge Botsford that the model was fatally flawed, and she rejected the study.

Successful Schools Model is a Hyper-equity Model, not an Adequacy Model

To see how the model works, consider Figure 9. Here we have performance on the vertical axis and per pupil spending on the horizontal axis. The bubbles in the top of the diagram represent districts in the lowest poverty quartile (as measured by free and reduced lunch). These districts are almost coterminous with the top-scoring districts identified by Myers for his successful schools study. The diamonds represent districts in the poorest quartile (districts in the middle two quartiles are excluded from the diagram, for clarity).

Stripped to its essentials, the successful schools model takes the average spending of the high-performing districts – essentially the low-poverty districts depicted here – and identifies that as the necessary spending level for demographically advantaged districts. The model then determines the necessary spending for more disadvantaged districts by applying a premium (50% in the Myers study) for each low-income child, along with similar premiums for other types of disadvantage.
Thus, the necessary spending for plaintiff districts, with more low-income children, is determined to be somewhat higher than the average actual spending in the advantaged districts. In Massachusetts, poor districts spend a bit more (on average) than low-poverty districts (as we saw in Figure 4 and as can be seen in Figure 9, by comparing the diamonds and the bubbles). However, the successful schools model generates a higher level yet of necessary spending in these districts, resulting in the claim of spending shortfalls.

The point here is that this procedure, which purports to be based on the adequacy doctrine, takes us back to the equity approach, but with a twist. The procedure – quite simply -- compares spending in the poor districts with the rich districts, but only after a premium is applied to the rich districts’ spending. This is a hyper-equity standard.

The adequacy rationale for this procedure is very thin, and does not stand up to scrutiny. The first point is that there is a wide range of spending among demographically similar districts (see the bubbles in the top half of Figure 9) and little or no relationship between spending and performance. Once again, this does not accord with the adequacy doctrine’s assumed relationship between spending and output.

The model ignores this problem and simply defines the average spending level as the minimum necessary for success in these districts. This is the main source of the paradoxical result in Figure 8: if the minimum is defined as the average, it is no surprise that half or more of these districts are found to fall short of what is necessary for their own success.27

One must live in Lake Wobegon to pretend that this is an adequacy procedure, i.e. a calculation of minimum necessary spending to achieve a given output. It is not. It is an equity calculation, pure and simple, to set the standard at average spending of the high-
performing, demographically advantaged districts. The model then goes on to add a premium for low-income children, and becomes a hyper-equity model.

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

Plaintiffs’ Case III: Spending as Percent of Foundation

The third adequacy argument presented, by Dr. Robert Berne of New York University (based on exhibits prepared by the research department of the Massachusetts Teachers’ Association) considered spending as a percent of foundation budget, rather than dollars per pupil. Specifically, spending as a percent of foundation in high-scoring, low-poverty districts was compared with that of plaintiff districts. Since, on average, spending significantly exceeded foundation budget in Myers’ 75 “successful” districts (by about 30%), it was argued that foundation budget was inadequate in those districts, and must, by extension, be inadequate in poorer districts as well. Consequently, since actual spending is close to foundation in the plaintiff districts, their spending must be inadequate. Judge Botsford found this argument “rough,” but persuasive.

The Spending/Foundation Argument is also a Hyper-equity Argument
The spending/foundation argument is essentially a variant of the successful schools model discussed above. Figure 10 depicts the same spending and performance data as in Figure 9, except spending is measured as a percent of foundation instead of dollars per pupil. As in the successful schools model, this approach begins with the successful, generally low-poverty districts and assumes that the average spending in those districts, as a percent of foundation, is necessary for their success. However, there is a wide spread of spending as a percent of foundation in the high-scoring districts, including a number that are close to 100% of foundation. Using the average spending ratio, of 125-130%, to indicate the minimum necessary spending in these districts repeats the Lake Wobegon fallacy discussed earlier, and turns what is purported to be an adequacy approach into a pure equity calculation.

[Insert Figure 10]

Turning to the low-income districts, the argument suggests that since successful districts spend 25-30% above foundation, perhaps poor districts should, too. This essentially reproduces the successful schools argument that whatever is spent per pupil in high-scoring rich districts should be scaled up by a premium for disadvantaged children. That is because the foundation budget in poor districts is considerably higher than in rich districts, due to the premium on low-income children (over 40% in Massachusetts’ foundation budget). Hence, in comparing the bottom halves of Figures 10 and 9, one sees that spending/foundation is lower in poor districts than rich ones, even though it is higher in actual dollars. By arguing that spending/foundation should be raised in the poor districts toward that of the rich ones, this approach implies the diamonds in Figure 9 should be moved further to the right. Once again, we have a hyper-equity model, rather remote from the adequacy doctrine the model is purported to convey.29
Supreme Judicial Court Rejects the Adequacy Doctrine

The first two adequacy models failed at the trial court level, and the third adequacy argument -- spending as a percent of foundation -- fared no better at the SJC: the court simply ignored it. More importantly, the court not only rejected the adequacy models, it also rejected the adequacy doctrine itself. In finding for the Commonwealth, the court made clear that it had no intention of establishing any particular level of educational output as a constitutional minimum, nor would it be drawn into a process leading to court-ordered spending levels designed to achieve some particular output. In short, the court considered the adequacy doctrine to be a particular policy, and declared it is not the job of the court to impose such policies on the legislature.

The court’s standard for the case was considerably less prescriptive. The court adopted the question of its single justice "whether, within a reasonable time [since 1993], appropriate legislative action ha[d] been taken to provide public school students with the education required under the Massachusetts Constitution." In answering that question the court construed the education clause as "a statement of general principles and not a specification of details." The language used by the court was instructive:

While the plaintiffs have amply shown that many children in the focus districts are not being well served by their school districts, they have not shown that the defendants are acting in an arbitrary, nonresponsive, or irrational way to meet the constitutional mandate. Moreover, not only did the court apply a much looser standard than the adequacy doctrine; in finding that the Commonwealth had acted appropriately, the court relied on criteria that the adequacy doctrine rejects.
**Progress counts**

The court’s key finding was that, as a result of the education reform act,

The public education system we review today…is not the public education system reviewed in *McDuffy*…A system mired in failure has given way to one that, although far from perfect, shows a steady trajectory of progress.\(^{31}\)

The court specifically cited various measures of progress, on inputs and outputs, including the improvement in test scores, both statewide and in the plaintiff districts.

The adequacy doctrine, by contrast, holds that only the level of achievement counts, not progress, a point reiterated by plaintiffs throughout the trial. Thus, the plaintiff’s post-trial brief dismissed “the Commonwealth’s argument that improvement is enough,” arguing instead that “the minimum level of education required by the Massachusetts Constitution” was defined by the seven *Rose* factors, and given content by the state’s seven curriculum frameworks.\(^{32}\)

The court, however, “did not mandate any particular program of public education,” nor did the *Rose* capabilities “themselves prescribe a specific curriculum.”\(^{33}\) Indeed, the court cites with apparent approval one scholar’s comment on those capabilities that “[i]f this standard is taken literally, there is not a public school system in America that meets it.”\(^{34}\)

With regard to the seven curriculum frameworks (vs. the two subjects required for graduation), the court cited an earlier decision, which held that “[n]othing in the *McDuffy* decision requires…a graduation requirement on an assessment of multiple subjects.” That earlier decision – repeatedly cited in *Hancock* – had validated the Commonwealth’s strategy of “pragmatic gradualism,” to achieve educational progress.
Thus, the first leg of the adequacy doctrine was rejected by the court. The Commonwealth could, in its policy-making function, establish a set of ambitious goals to drive educational progress, without thereby establishing a constitutional mandate that all children shall necessarily achieve at that level.

Equity in spending counts
In evaluating the Commonwealth’s actions on school finance, the court found

The [education reform] act eliminated the central problem of public school funding that we identified as unconstitutional in *McDuffy*. ... Specifically, the act eliminated the principal dependence on local tax revenues that consigned students in property-poor districts to schools that were chronically short of resources... 35

In evaluating the results of the act, the court gave great weight to the facts that state aid grew rapidly since 1993, especially in the plaintiff districts, and that “spending gaps between districts based on property wealth have been reduced or even reversed.” The court cited various equity measures such as those in Figure 4 above, which had been declared irrelevant by the plaintiffs and by the trial judge. With regard to finance, the court concluded

Where the Governor and the Legislature … provide substantial and increasing … resources to support public education in a way that minimizes rather than accentuates differences between communities based on property valuations … we cannot conclude that they are presently violating the education clause. 36

Note that the constitutional problem identified here is finance disparities based on the property tax. The Commonwealth’s solution of that problem, by achieving a rough equity, falls far short of the adequacy strategy’s stance on financial inputs. As we have seen, some of the key methodologies used in adequacy cases ultimately set a standard of hyper-equity in spending: no matter how much is spent in rich districts, poor districts must spend far more to accord its students an adequate education.
In rejecting these methodologies, and relying instead on equity evidence, the court implicitly declined to adopt as a constitutional standard the goal of equal outcomes in rich and poor districts that seems to be implicit in them, or that compensatory finance is the means to achieve that goal. That is, it was one thing to find (in 1993) that gross inequities based on property wealth violated the constitutional obligation to provide universal education; but now that rough equity has been achieved, the court saw no need to venture beyond that into the policy debate over compensatory education.

Non-financial inputs count, especially standards and accountability

In evaluating the Commonwealth’s actions, the court made it clear that it considered non-financial inputs very important, especially standards and accountability.

The act also established, for the first time in Massachusetts, uniform, objective performance and accountability measures for every public school student, teacher, administrator, school, and district in Massachusetts.37

The court went on at some length in praise of the state’s implementation of these measures, including “world class” curriculum frameworks and graduation exams in core subjects. The court’s frequent citation of its previous decision upholding the graduation exams seemed indicative of the importance it attached to them. Indeed, in one of the court’s more pointed comments, it concluded that delays in full implementation of education reform owed not to legislative or departmental inaction, but instead to factors such as “protracted litigation over some provisions of education reform,” citing again the challenge to the graduation exams. The court also cited “poor leadership and administration” as “a principal cause of poor performance in the focus districts.”38 By recognizing the importance of non-financial inputs, the court rejected a key linchpin of the adequacy doctrine: a tight, determinate relationship between spending and educational outcomes.
While all sides agreed that much more progress is required, they differed on the means to achieve that progress. The court accorded great deference and respect to the state’s strategy of standards, accountability, targeted assistance, and intervention. By contrast, the adequacy doctrine (and, for that matter, the equity doctrine that preceded it) focus almost entirely on district spending, to the exclusion of non-financial inputs or state intervention resources. The *Hancock* plaintiffs minced no words:

…there is no room for debate in this case about whether accountability is a better solution than increased funding… [A]dditional funding is not a policy choice open to debate, but a matter of constitutional necessity.\(^{39}\)

The court held, to the contrary, that the question of additional funding was very much a policy choice open to debate. Indeed, during oral arguments Chief Justice Marshall seemed to take the other side of that debate: “What…comes through to me loud and clear is that there are real problems in these districts that have nothing to do with money.”\(^{40}\) She disagreed quite explicitly with the contention that the Commonwealth can only meet its obligations with more money, and posed the question as to why some districts are failing and not others, despite similar spending. The written decision, to be sure, did not repeat such skeptical comments on the need for more spending, but made it clear such policy debates were the province of the legislature, as discussed below.\(^{41}\)

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**Separation of Powers**

The court clearly recognized that the adequacy doctrine – establishment of a constitutional minimum for educational output, coupled with the specification of spending
needed to meet that minimum – comprised a specific policy prescription that lay beyond the court’s purview. The court particularly stressed, at some length, the separation of powers for spending decisions:

Because decisions about where scarce public money will do the most good are laden with value judgments, those decisions are best left to our elected representatives.\textsuperscript{42} Thus, the court vigorously rejected the seemingly benign remedy of a court-ordered “cost study,” because such a study

would be rife with policy choices that are properly the Legislature’s domain… Each choice embodies a value judgment; each carries a cost, in real, immediate tax dollars; and each choice is fundamentally political. Courts are not well positioned to make such decisions.\textsuperscript{43}

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

The plaintiffs’ remedy, as it always is with political questions, is at the ballot box.\textsuperscript{44}

**Conclusion: Lessons from Massachusetts?**

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

The main (and most obvious) lesson is that states that have not already done so may wish to adopt reforms that are strong on equity, standards, and accountability. It is not only good policy; it is also the best way to test the limits of the adequacy doctrine. States that fail to do so may continue to lose adequacy lawsuits, despite the doctrine’s flaws. States with vigorous education reforms stand the best chance of calling adequacy’s bluff.

In adopting such reforms, note that a key driver of educational progress is high standards tied to high stakes. Hancock established that the state can set ambitious standards without necessarily having it held against the state in adequacy decisions.45

To make high stakes successful, the first step in education reform should be on funding.46 It is important to note that a well-constructed foundation budget funding formula need not – and should not -- require excessive reliance on state revenues. State revenues are typically based on income and sales taxes, which are much more volatile than local property taxes, so a high state share makes education funding more vulnerable in the downturn. In addition, local funding of education gives local officials a greater stake in educational success.47

If state aid is well targeted to top up local revenues in property-poor districts, a great deal of equalization can take place without a dramatic rise in the state share of education. In Massachusetts, the state share rose from about 30% to 40% in the years following the reforms
of 1993. This is still below the national average. And yet, the degree of spending progressivity achieved by this formula is among the highest in the nation, according to Education Trust. Figure 11 illustrates this point. The variable on the vertical axis is Education Trust’s estimate of the spending gap between a state’s poorest and richest districts (where the districts are sorted into quartiles by the poverty rate among school-aged children). A positive figure means per pupil spending is higher in poor districts and conversely for a negative figure. By Education Trust’s measures, Massachusetts and New Jersey are top-rated on equity, but have low state shares of funding. In general, there is no relationship between state share and progressivity.

[Insert Figure 11]

Note that many states have adopted equitable funding policies. Figure 11 shows that about half the states spend more in their poor districts than their rich ones; another data set, from Education Week, puts that figure at 40 states.48

There are also early signs that perhaps more states are adopting strong standards-based reforms -- under pressure from NCLB, if nothing else -- and that test scores are improving. Perhaps these results, coupled with the spread of equitable finance systems, will led more courts to find the Legislatures have honored the education clause. That is, perhaps the adequacy wave is nearing or even past its peak. If so, it would help revive John Adams’ other great constitutional principle, arguably far more fundamental to our system of government:

The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not men.49
ENDNOTES
(Note: pagination for some court documents is based on printout, not official pagination; other pagination to be supplied later.)

1 In this paper, I draw heavily on my experience as an expert witness for the Commonwealth in Hancock, as well as my experience in Massachusetts education policy over the last several years. I would like to acknowledge how much I have learned from Assistant Attorneys General Deirdre Roney and Juliana Rice, with whom I had the privilege of working closely throughout the Hancock case.


3 I shall argue in subsequent sections of this paper that in courtroom practice, this distinction has often been lost: the methods used in adequacy lawsuits can end up obsessively focusing on how inputs compare between rich and poor districts.

4 Strictly speaking, this is an inverse cost function.

5 English language arts; mathematics; science and technology; history and social science; foreign languages; the arts; and health.


7 Plaintiffs may or may not be unhappy with that result. For example, in Massachusetts, the plaintiffs emphasized their support for the state standards and assessments (MCAS), but the case was largely funded by the teachers’ union that had vigorously opposed the assessments.

8 Other questions remain, even if the standard is set at a lower level. On the one hand, if the lower standard carries actual state sanctions, then the obligation to ensure students meet it is presumably stronger. Even so, the question remains whether that obligation rises to the constitutional level, when certain factors are not totally within the state’s control. In Massachusetts, for example, the pass rate is now about 95% of 12th graders on the math and English graduation exams, a point cited with approval by one of the justices of the SJC during oral arguments. The plaintiffs’ counsel protested that this omits students who have dropped out in earlier grades. Another justice immediately responded pointedly, “What are we supposed to do about that?” As the justice’s question indicates, there are other inputs to educational output besides financial inputs, notably the student’s own effort and commitment. This suggests that, to this justice at least, perhaps the constitutional obligation is to provide the opportunity for students to acquire an adequate education, rather than a literal requirement of results.

9 Econometric attempts to determine the extra spending required are based on an extrapolation of the estimated impact of spending well beyond the empirical span on which the estimate is based, for a given demographic group – always a problematic procedure. The extrapolation beyond the empirical span is even greater if the estimated impact of spending is very small, as is typically the case (e.g. in Figure 1, where the slope is near zero), since the implied increase in required spending is correspondingly very large.

10 415 Mass. 621. Much rested on the interpretation of the 18th century meaning of the term “cherish.”

11 Ibid, 614.

12 This was pointed out at the time by the sole dissenter in McDuffy. It is also of interest to note that the majority explicitly declined to adopt the language of “adequacy.” (See note 8 of the McDuffy decision.)

13 Specifically, the defense entered a continuing objection that the constitutional standard could only be decided by the SJC, not the trial court.
14 There were two opinions submitted by the 5-member majority. Chief Justice Marshall, writing for two other justices, upheld McDuffy’s determination that the education clause imposed an enforceable duty on the Legislature, but found that the Legislature had fulfilled that duty. Justice Cowin, writing for one other justice, concluded that McDuffy itself was wrongly decided. By interpreting the education clause as it did, “the McDuffy court cast aside this separation of powers doctrine and improperly inserted a final layer of judicial review on top of the public policy debate over education.” (p. 9)


16 The poorest quartile includes Boston, which is relatively high-spending. (Its schoolchildren are poor, but the residents as a whole are of above-average income, and the city is property-rich, due to commercial and industrial properties.) Excluding Boston (which was not a plaintiff district) from the figures reduces the amount by which spending in poor districts now exceeds rich districts, but compared to 1993, the swing in the gap is actually larger.

17 The pass rates in the four plaintiff “focus” districts were 90%, 90%, 75%, and 94%.


19 Botsford report, note 33, which made particular reference to equity comparisons with other states.

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

21 During the trial, the judge expressed particular surprise at finding among the list of panelists the mother of Jami McDuffy (the original plaintiff), who works in the Brockton school system.

22 Augenblick and Myers, Inc., “Calculation of the Cost of an Adequate Education in Indiana, 2001-2002 Using the Professional Judgment Approach” (prepared for the Indiana State Teachers Association), September 2002, p. 4. The authors continue, “If such a demonstrated relationship [between spending and performance] existed, then state policy-makers could simply determine the level of performance they wanted, and provide the appropriate amount of revenue…In the absence of such a simple relationship, and in light of the fact that some people believe that there is no clear association between spending and performance,” the professional judgment approach and the successful school approach (among others) have emerged. One of the “disadvantages” of the approach, they write, is that “there is little evidence that the provision of money at the designated level…will produce the anticipated outcomes.”

23 Consequently, there was no data-based approach that could be used – there was no alternative but to ask panelists to “be creative” (Deborah A. Verstegen, “Calculation of the Cost of an Adequate Education in Massachusetts Under the Curriculum Frameworks,” June 2003, p. 77).


25 I am abstracting from a refinement of this procedure, which attempts to back out of these districts’ expenditures the spending on low-income and other disadvantaged children, to obtain a pure baseline spending figure, before adding back in premiums for disadvantaged children. Myers’ execution of this procedure was highly flawed, as Judge Botsford discerned. But this is a side point, compared to the fundamental issues with the successful schools model, discussed in the text.

26 As testimony in Hancock established, the premium is based on convention, not on scientific evidence.
The dynamic implications of this procedure are even more extreme. If the average is taken as the minimum, then the policy implication is that every district below average must have its spending raised to the average. But of course this raises the average further. The process does not end until all districts are brought up to that of the highest-spending district. In short, by defining the average as the minimum (which is nonsensical enough), one ultimately ends up with the maximum as the minimum. This is not simply an exercise in *reductio ad absurdum*: it is a recipe for never-ending litigation, if the successful schools model is taken as dispositive.


Indeed, the whole idea of foundation budget systems is to set a spending floor and allow rich districts to spend more if they choose. The plaintiffs’ spending/foundation argument turns the foundation budget system against itself, by taking above-foundation spending in rich districts as the basis for raising the floor.

The criterion of irrationality was the same one used in *Goodridge*, the gay marriage case. In that case, the court found the Legislature had no rational basis for defining marriage as between a man and a woman.

Brief of Appellees, pp. 6, 12.

Justice Cowin (writing also for Justice Sosman) distanced herself from *Rose* even more vigorously, on separation of powers grounds. She argued that *McDuffy*’s embrace of the *Rose* capabilities was the most egregious aspect of that “overreaching” decision, “a display of stunning judicial imagination.” (pp. 4, 5)

Note 29, citing Thro.

Pp. 4-5.


There are passages in the SJC decision that plaintiffs have interpreted as asserting the need for more spending. However, this interpretation is shorn from the context. The statements in question appear in an exchange between Justice Marshall and Justice Greaney over whether a court-ordered cost study would necessarily lead to court-ordered spending. Justice Greaney argued that the court could order the cost study, as recommended by Judge Botsford, without Accepting Judge Botsford’s recommendation to then “implement” additional funding. Justice Marshall argued this was impossible. It is in this context that Justice Marshall writes, “No one reading [Judge Botsford’s] report can be left with any doubt that the question is not “if” more money is needed, but how much. Endorsing one aspect of her recommendation (a study) and rejecting the other (the directive to “implement” additional funding) will not cure the constitutional violation the dissenting Justices perceive…” Taken alone, the first sentence is interpreted by plaintiffs as the court agreeing with the need for more money. In context, however, the statement more likely refers to the fact that the recommended study will no doubt call for more money, since Judge Botsford structured the study to add a host of resources and programs. The plaintiffs’ interpretation that Justice Marshall agrees with the call for more spending is difficult to reconcile with her clear statements to the contrary at oral arguments.
This result also carries implications for NCLB as a driver of educational progress.

For a fuller discussion of how and why the “grand bargain” sequence (funding first, high stakes second) worked in Massachusetts, see “Comment on ‘Test-Based Accountability: The Promise & the Perils,’” op. cit.


Education Trust’s measure is based on the Census variable for state and local education revenues, while *Education Week*’s spending variable includes spending from Federal aid. Since Federal aid is concentrated in low-income districts, *Education Week*’s spending variable will show a more progressive pattern, resulting in more states with a positive gap. See Robert M. Costrell, “Equity v. Equity: Why *Education Week* and the Education Trust Don’t Agree,” *Education Next*, Summer 2005, pp. 77-81.

Part the First (the Declaration of Rights), Article XXX.
Fig. 1. Spending and performance – theoretical and actual
Fig. 2. Before Ed Reform: 2/3 students below Foundation, Wide Dispersion, Fat Left Tail

Net School Spending as % of Foundation Budget, FY93, K-12 districts
Fig. 3. After Ed Reform: all students at or above Foundation, No Left Tail

Net School Spending as % of Foundation Budget, FY02, K-12 districts
*including 1 district (Lawrence), at 99.9% of Foundation
Fig. 4. Spending gaps by children’s family income reversed due to progressive foundation aid system

Gaps much narrowed, but not reversed on other measures: median income, property wealth

<table>
<thead>
<tr>
<th>Year</th>
<th>2% below lowest poverty quartile</th>
<th>8% above lowest poverty quartile</th>
</tr>
</thead>
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<tr>
<td>FY93</td>
<td>$5,334</td>
<td>$5,005</td>
</tr>
<tr>
<td>FY04</td>
<td>$5,452</td>
<td>$8,018</td>
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</tbody>
</table>

Net School Spending per pupil, by district % free & reduced lunch

Source: Executive Office for Administration and Finance

- highest poverty quartile
- middle half
- lowest poverty quartile
Fig. 5. Growth rate of state education formula aid
Fig. 6. Failure Rate on 1st take of 10th grade state exams

Retakes further reduce failure rate to about 5%.

Racial gaps have narrowed on 1st take & narrow further on retakes.
Fig. 7. Results of Plaintiffs’ “Professional Judgment Study”

Virtually all districts found to spend too little, by far

Spending Gap Per Pupil Between “Necessary” & Actual, in $1000s

% of students

Cambridge Nantucket Provincetown

Districts found to spend enough
Fig. 8: Results of Plaintiffs’ “Successful Schools Study”
Most "successful" districts spend less than is "necessary" for success

69% of students

31% of students

Gap between "actual" and "necessary" per pupil expenditures, in $1000s
FY01, 75 districts identified by Myers for "successful schools" model

50 districts spend less than "necessary"
25 districts spend more than "necessary"
Fig. 9. Performance and Per Pupil Spending, Among Highest and Lowest Poverty Districts
Fig. 10. Performance and Above-Foundation Spending Among Highest and Lowest Poverty Districts
Fig. 11. State Share of School Funding vs. Progressivity

Source: Education Trust 2004