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Defendants' Brief in the School Finance Case: McDuffy v. Robertson: An Excerpt and a Summary

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The Defendants' Brief in the School Finance Case: *McDuffy* v. *Robertson*: An Excerpt and a Summary

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[Note: The introduction and part I of this article are excerpts from the brief of the defendants in the McDuffy *case. Part II of the article is a summary of the remainder of the brief.]*

Introduction

The wisdom of promoting public education in the Commonwealth was recognized by the earliest settlers, the framers of the Constitution, and many subsequent legislatures, officials, educators and citizens. The opinions of the Department, the Secretary of Education, the Governor and various educators, contained in the stipulation, demonstrate that a policy of supporting public education is as important today as ever.[2]

The implementation of this policy goal by the Legislature and municipalities involves choices that are at the heart of representative government: how much public money to raise, how best to allocate the money among education and the many other public purposes that compete for public funds, and how to strike the balance between state and local control of the schools, so as to promote education. The decisions made through these processes have resulted in some success in raising educational expenditures over the past decade and providing a significant degree of equalization, but they have also resulted in relative shortcomings in some districts, which are detailed in the parties' stipulation. The question for the Court is what status our Constitution affords these decisions, made through democratic processes.

Ordinarily, "[a]llocation of taxpayer dollars, especially in times of limited fiscal resources, is the quintessential responsibility of the popularly-elected Legislature, not the Courts." See *County of Barnstable* v. *Commonwealth*, 410 Mass. 326, 329 (1991). The plaintiffs argue, however, that Pt. II, c. 5, §2 of the Massachusetts Constitution (The Education Clause) requires the Commonwealth to provide an "adequate" education. While apparently accepting the notion that some school districts may lawfully choose to spend more per pupil than others, the plaintiffs urge the Court to invalidate the existing legislative scheme on the ground that education in their public schools does not meet an undefined standard of "adequacy." The Commonwealth's Constitution does not, however, wrest control over questions of educational adequacy, school finance and equitable distribution of funds from the legislative bodies of the state and the municipalities. As in many areas of vital importance to the well-being of the Commonwealth's citizens, decisions regarding educational finance are committed to the democratic processes.

I. The Education Clause Does not Invalidate the Commonwealth's System of Education or Education Finance.

The Education Clause appears in Part II of the Massachusetts Constitution, which concerns the "frame of government." It reads:

> Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of the legislatures, and magistrates, in all future periods of this commonwealth, *to cherish the interests of li[terature] and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns*; to encourage private societies and public institutions, rewards and immunities for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country, to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good humor, and all social affections, and generous sentiments among the people.

Mass. Const. Pt. II, c. V, §2 (emphasis added).

The Clause urges legislators to hold education in high regard as they consider and enact or reject proposed legislation. The operative word as to literature and sciences, however, is "cherish." By its plain meaning in 1780 (and now), the word does not prohibit or require any class of legislation; it simply means "to hold dear... to make much of; ... to foster, tend, cultivate; ... to entertain in the mind, harbor fondly, encourage...." Oxford English Dictionary (2d Ed. 1989), p. 88 (definitions 1, 2b, 7). John Adams, who drafted the Education Clause, used "cherish" in this sense.[3]

> The Education Clause is aspirational: The section, couched in broad inspirational terms, is an exhortation from the founding fathers to their successors. It sets out the goals of the social order and suggests the means by which they might best be attained. So far as we are aware, however, *the section has never been cited as a constitutional command forbidding or requiring specific legislative action.*

McNeely v. *Board of Appeal of Boston*, 358 Mass. 94, 104 (1970) (emphasis added). The Clause's language—particularly the operative verb, "cherish"—does not refer to or imply a right to an adequate or equal education beyond what the Legislature or municipality provides. Indeed, if such a right existed, it would undoubtedly have been placed where the framers enumerated the rights that were to be protected against majority rule: in Part I of the Constitution, the Declaration of Rights.

The general content of the Education Clause further demonstrates that it cannot be a limitation upon legislative authority. The legislature's "duty" extends not only to "cherish... literature and the sciences," but also to "encourage" private and public efforts in promotion of agriculture, arts, sciences, etc. and "to countenance and inculcate the principles of humanity and general benevolence," etc. In this section, "the interests of literature and the sciences" are grouped with a number of other goals, such as "general benevolence," "sincerity, good humor, and all social affections, and generous sentiments among the people," that cannot be measured or evaluated under any judicially manageable standard. The objects of the "duty" include not only the "public schools and grammar schools in the towns," but also Harvard University and private societies. In other words, it is one of a number of provisions containing aspirational language authorizing legislative action, which appear throughout the Constitution.[4]

The Education Clause does not articulate any requirement that local schools meet some constitutional standard of "adequacy." Even today, the notion of adequacy commands no consensus among educational experts (Supp. Stip. ¶542). Nor does the Clause intimate that education in different districts must be equal or substantially equivalent. Like some other constitutional education clauses in northeastern states, our Education Clause does not suggest that "districts choosing to provide opportunities beyond those that other districts might elect or be able to offer be foreclosed from doing so, or that local control of education, to the extent that a more extensive program were locally desired and provided, be abolished." *See Board of Education, Levittown Union Free School District* v. *Nyquist*, 57 N.Y.2d 27; 453 N.Y.S. 2d, 643; 439 N.E.2d 359, 368 (1982), *appeal dismissed for lack of a substantial federal question*, 459 U.S. 1139 (1983).

The Constitution is "an enduring instrument," and its words are intentionally general, so as to permit the people to govern themselves "through radical changes in social, economic and industrial conditions." *Cohen* v. *Attorney General*, 357 Mass. 564, 570-572 (1970). To reflect that need for flexibility, the framers of the Education Clause chose broad aspirational language instead of words of limitation or obligation. The language of the Constitution is controlling. *See generally, id.*, 357 Mass. at 572; *Lincoln* v. *Secretary of the Commonwealth*, 326 Mass. 313 (1950).

II. Summary of Remaining Portions of the Brief

The history of the Clause supports this reading. From the colonial days to the present, Massachusetts has depended upon strong local control over the provision and financing of public education. *Cushing* v. *Inhabitants of Newburyport*, 51 Mass. 508, 515-519 (1845). See also *Jenkins* v. *Inhabitants of Andover*, 103 Mass. 94, 97-99 (1869). The state has had a secondary role in such matters. Differences in spending among the towns have been viewed as promoting education, in conformity with the goals of the Education Clause. John Adams, who drafted the Constitution, believed that support for education would have to come from the people,[5] and did not intend to establish a Constitutional right to an adequate or equal education.

Even if the Education Clause contains mandatory content, the Commonwealth has complied with it. The legislature has weighed the need for local control, state funding for specific educational programs, general state education aid to communities, and fiscal concerns. The legislature's passage of numerous laws, the substantial increase in spending per pupil over the past decade, the significant equalizing effect of state education aid distribution, and the recent increases in aid earmarked for education all demonstrate that the legislature has "cherished" education, within the meaning of the Education Clause. In addition, the state has required local municipalities to provide for education. The resulting system is evolving, and reflects a balance between these goals that the legislature could rationally accept. This is particularly true, in light of the uncertainties and policy judgments that attend any effort to define or achieve educational adequacy or equality.

Finally, the record shows that the plaintiffs' districts provide fewer educational opportunities than in a number of wealthier districts, but does not establish educational "inadequacy" in any of plaintiffs' schools as a constitutional matter. There is no accepted standard by which to measure adequacy and no agreement on how much money would be necessary to provide an adequate education. The levels spent on education per pupil are high in Massachusetts, by historic standards and compared to levels in other states. The opinions of experts in the record regarding the inadequacy of education in plaintiffs' districts are not tied to any articulable standard and do not, in themselves, set the constitutional minima.

If out-of-state decisions are to be considered, the most analogous and persuasive opinions are from the 16 jurisdictions that have upheld education finance systems.[6] These jurisdictions include states with constitutional education clauses that are similar to, or stronger than Massachusetts' Education Clause. E.g. *Nyquist, supra.* In the 10 jurisdictions that have invalidated educational finance systems, the constitutional provisions and the facts

tend to differ greatly from those in Massachusetts. Moreover, the aftermath of education finance decisions in many of those 10 jurisdictions gives cause for concern.

The plaintiffs' equal protection challenge must be evaluated under the rational basis test. For equal protection purposes in a school finance challenge of this nature, there is no fundamental right of access to an "adequate education" of undefined quality, at least where the plaintiffs are receiving a public education. *See San Antonio School District* v. *Rodriguez*, 411 U.S. 1 (1973). There is also no suspect class, as distinctions based upon residence are not "suspect" for purposes of equal protection strict scrutiny. *Barlow* v. *Wareham*, 410 Mass. 408 (1988).

Under the equal protection rational basis test, the preservation of local control over education is ample justification for the Commonwealth's education system. *See Opinion of the Justices*, 386 Mass. 1201 (1982). Indeed, the Massachusetts Home Rule Amendment (Mass. Const. Art. Am. 2) declares the fundamental interest of the people in local self-government as a means of ensuring customary and traditional liberties. Local control allows citizens to participate in decision-making, allows localities to tailor their education programs to local needs and permits experimentation and innovation. The plaintiffs' proposed remedies would cut deeply into local control. While their approach may have merit, it is a legislative choice whether or not to reduce local control and increase state regulation and monitoring of the education system.

NOTES

1 The views expressed in this Article are entirely those advanced in the brief of the defendants in *McDuffy* v. *Robertson*, SJC No. 6128 and do not necessarily reflect the personal views of the Attorney General of Massachusetts or the named defendants.

2. The opinions of the Attorney General regarding educational policy (but not the merits of the *McDuffy* case) are set forth in "The Case for Education Reform: Our Debt to the Next Generation" by Scott Harshbarger, *ante* at page 5.

3. *See* J. Adams, "A Dissertation on the Canon and the Feudal Law," No. 4 (October 21, 1765), reprinted in I Papers of John Adams (R. Taylor ed. 1977), p. 126 ("Let us tenderly and kindly cherish, therefore the means of knowledge.").

4. *See e.g.* Pt. I, Art. 1 (people's right "of seeking and obtaining their safety and happiness"); Pt. I, Art. VII ("Government is instituted for the common good" and only the people have a right to change it); Pt. I, Art. XVIII ("The people ought ... to have a particular attention to" piety, justice, moderation, temperance, industry and frugality "in the choice of their lawgivers and representatives"); Pt. II, Art. IV (Legislature's power to make such laws, not repugnant to the Constitution "as they shall judge to be for the good and welfare of this commonwealth"); Art. Am. 88 (industrial development is a public purpose); Art. Am. 97 (protection of the people's right to conservation, development and utilization of natural resources is "a public purpose."); *LIMITS* v. *President of the Senate*, 414 Mass. 31, 35 (1992) (legislature's duty to take final action under Am. Art. 48 is not judicially enforceable).

5. *See* VI Works of John Adams, pp. 198, 416 (C.F. Adams, ed. 1851).

6. *See generally*, Dively and G.A. Hickrod, "Update of Selected States' Equity Funding Litigation and the 'Box Score'," 17 J. Ed. Fin. 352, 362-363 (Spring 1992).