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THE CONSTITUTIONAL RIGHT TO EDUCATION IN THE COMMONWEALTH

By M. Patrick Moore Jr.

I. INTRODUCTION

Twenty-six years ago, in *McDuffy v. Secretary of Executive Office of Education*, the Supreme Judicial Court (SJC) held that the Education Clause of the Massachusetts Constitution requires the state to provide an adequate educational opportunity to public school children in the commonwealth.¹ In sweeping language, the court held that:

the Commonwealth has a duty to provide an education for *all* its children, rich and poor, in every city and town of the Commonwealth, at the public school level, and that this duty is designed not only to serve the interests of the children, but, more fundamentally, to prepare them to participate as citizens of a free State and to meet the needs and interests of a republican government.²

In *McDuffy* and in the handful of Education Clause cases that have followed, the SJC has emphasized that the state Constitution imposes upon the commonwealth an affirmative duty to “devise a plan and devote sources of funds sufficient” to allow municipalities to provide to their children an adequate public education.³ Such affirmative constitutional responsibilities — that require the commonwealth to take action, rather than refrain from it — are rare.⁴ Among them, the right to an adequate education is unique, both in terms of its foundational importance for our system of government and the complex issues involved in its enforcement.⁵

Because Education Clause litigation has been limited in



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Massachusetts, and because claims based on the affirmative right to an adequate education raise separation of powers and institutional concerns for the judiciary, numerous questions that would be elementary in any other area of law remain open.⁶ The three most prominent are: (i) what constitutes an adequate educational opportunity; (ii) who may enforce the right; and (iii) under what circumstances will an Education Clause claim warrant judicial relief. These unresolved issues are of significant importance to the elected branches of state government, the commonwealth's 351 municipalities, the students served by our public education system, and those who advocate for them. If anything, *McDuffy*'s successor case, *Hancock v. Commissioner of Education*, deepened the uncertainty surrounding the three questions.⁷

1. The Education Clause states:

Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them, especially the . . . public schools and grammar schools in the towns.

MASS. CONST. Part II, c. 5, § 2. In *McDuffy*, the SJC reviewed this language and its historical roots and determined that “the words are not merely aspirational or hortatory, but obligatory.” *McDuffy v. Sec’y of Exec. Office of Educ.*, 415 Mass. 545, 606 (1993).

2. *McDuffy*, 415 Mass. at 606 (emphasis in the original).

3. *Id.* at 621; *see Doe v. Sec’y of Educ.*, 479 Mass. 375, 387 (2018) (the Education Clause imposes “an affirmative duty on the Commonwealth to provide a level of education in the public schools for the children there enrolled that qualifies as constitutionally ‘adequate’”); *Hancock v. Comm’r of Educ.*, 443 Mass.

428, 462 (2005) (Marshall, C.J., plurality opinion).

4. *See Gillespie v. City of Northampton*, 460 Mass. 148, 154 (2011) (cataloging constitutional rights that the SJC has “proclaimed to be paradigmatically fundamental” and listing only negative rights); *cf. Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (Posner, J.) (describing the “Constitution [as] a charter of negative rather than positive liberties,” and noting that “[t]he men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them”).

5. *See generally* George D. Brown, “Binding Advisory Opinions: A Federal Courts Perspective on the State School Finance Decisions,” 35 B.C. L. REV. 543, 544 (1994) (describing *McDuffy* as a “bold de[claration] of individual rights and legislative duties [deriving] from the education clause of the Massachusetts Constitution,” but explaining that “[t]he court comes close to saying that while it can say what is wrong, only the legislature can fix it” and explicating the “dissonance between the right and the remedy”).

6. *See* Rachel Wainer Apter, “Institutional Constraints, Politics, and Good Faith: A Case Study of School Finance Reform in Massachusetts,” 17 CORNELL J.L. AND PUB. POL’Y 621, 660–61 (2008).

7. *Hancock v. Comm’r of Educ.*, 443 Mass. 428 (2005).

The SJC's 2018 rejection of an Education Clause challenge to the state's charter school cap, styled *Doe v. Secretary of Education*, offers a bit more clarity.⁸ The case was brought by five students in the City of Boston who had applied for admission to charter schools operating within the city; failed to win the lottery that allocates the limited number of charter seats; and were instead relegated to struggling district schools.⁹ They claimed that the charter cap deprived them of an opportunity for an adequate education; violated the Education Clause; and therefore, should be struck down.¹⁰ The claim garnered widespread attention. Even before the complaint was filed, the litigation was featured on the front page of the *Boston Globe*.¹¹

Ultimately, the SJC determined that the plaintiff students had failed to state an actionable claim.¹² Though they had plausibly alleged that the education provided to them was inadequate, that allegation, even if proven, would not have been a sufficient basis on which to provide the sought-after relief, i.e., a holding that the charter cap was unconstitutional.¹³ As summarized by the court: "The [E]ducation [C]lause provides a right for all the Commonwealth's children to receive an adequate education, not a right to attend charter schools."¹⁴ Because there were other education policy choices that could have remedied the alleged inadequacies with the plaintiffs' education, and because those choices are properly left to the legislature in the first instance, the alleged wrong did not warrant the sought-after remedy.¹⁵

The court's path to that conclusion warrants close examination. When the *Doe* court's analysis is placed in the context of the court's two other seminal Education Clause decisions (*McDuffy* and *Hancock*), the framework of the state constitutional right to public education begins to take shape. What circumstances might lead to the judicial enforcement of that right remains an open question.

II. THE ROAD TO *DOE V. SECRETARY OF EDUCATION*

The SJC's first two landmark Education Clause decisions — *McDuffy* and *Hancock* — sprung out of the same long-running case.¹⁶ Each decision is an important part of the judicial, educational, and political history of the commonwealth. Each case still

provides much to analyze.¹⁷ For present purposes, discussion will be focused on how *McDuffy* and *Hancock* explicated the state constitutional right to an education.

A. *McDuffy* and the Enforceable Right to an Adequate Education

Before *McDuffy* arrived at the full SJC for argument in February 1993, it had traveled an unusual path.¹⁸ The plaintiffs were 16 public school students in a variety of municipalities throughout the commonwealth.¹⁹ On behalf of the defendant state officials, the attorney general stipulated to facts regarding the school systems that plaintiffs attended — both as to the districts on which factual development was focused (the so-called "focus" districts of Brockton, Leicester, Lowell and Winchendon), and as to the fact that the focus districts were representative of other less affluent districts throughout the commonwealth.²⁰

The stipulated facts were striking.²¹ Brockton, for example, could not even afford textbooks for elementary school students in core subjects including math, writing and social studies; in Winchendon, the middle school could not afford a principal, and the elementary school had no science curriculum at all.²² By contrast, the parties agreed that students in more affluent districts had "significantly greater educational opportunities than the public schools in which the plaintiffs attend school" and received a higher quality education.²³ They further agreed that disparity of resources between affluent districts and poorer districts was "a significant contributing factor that affect[ed] the quality of education that the[] communities [were] able to provide."²⁴

The plaintiffs' central contention was that these facts violated the Education Clause. In evaluating that contention, the court addressed three questions: whether the Education Clause imposed an enforceable "constitutional duty on the Commonwealth to ensure the education of its children in the public schools"; whether the commonwealth was meeting that duty; and, if not, what should be done.²⁵

8. See *Doe v. Sec'y of Educ.*, 479 Mass. 375 (2018).

9. *Id.* at 382–84.

10. *Id.* at 386. As set forth below, state law caps the number of available charter school enrollments at 9 percent of a school district's total enrollment, unless the district is in the lowest 10 percent of statewide performance, in which case the cap rises to 18 percent of the district's total enrollment.

11. Michael Levenson, "Civil Rights Fight Looms on Charter Schools Cap," *BOSTON GLOBE*, March 8, 2015, at A1.

12. *Doe v. Sec'y of Educ.*, 479 Mass. 375, 390–91 (2018).

13. *Id.* at 390.

14. *Id.*

15. *Id.*

16. In 1978, a number of students brought an action in the Supreme Judicial Court for Suffolk County (the "Single Justice"), contending the education provided to them by their respective municipalities failed to comport with the Education Clause and naming as defendants the state officials responsible for statewide education policy. *McDuffy*, 415 Mass. at 548. After various fits and starts, that case finally reached the SJC in February 1993, yielding the *McDuffy* decision. Thereafter, it was remanded to the Single Justice by the full court where, a number of years later, successor plaintiff students filed a motion for

further relief. *Hancock v. Driscoll*, SJC Docket No. 02–2978, Report to the Single Justice, 2004 WL 877984 (Apr. 26, 2004) (Botsford, J.). The evaluation of that motion was referred by the Single Justice to the Superior Court and was specifically assigned to then-Judge Margot Botsford. *Hancock*, 2004 WL 877984, *3–4. Judge Botsford heard evidence on the issue over six months spanning June 2003 through January 2004, involving "testimony from 114 witnesses . . . more than 1,000 exhibits," and ultimately "issued a 318-page report containing thoughtful and comprehensive findings of fact, conclusions, and recommendations." *Hancock*, 443 Mass. at 443. The SJC's review of that report yielded the *Hancock* decision.

17. *E.g.*, Nic Evans, "When Adequate is Not Adequate," 46 *J.L. AND EDUC.* 285 (2017).

18. See Apter, *supra* note 6, at 629–36.

19. *McDuffy*, 415 Mass. at 545 nn.1, 2.

20. *Id.* at 551–57. The case "remains the only school finance case in the country to be decided solely on a stipulated record." Apter, *supra* note 6, at 634.

21. *McDuffy*, 415 Mass. at 551–57; Apter, *supra* note 6, at 634–35.

22. Apter, *supra* note 6, at 634–35.

23. *McDuffy*, 415 Mass. at 555.

24. *Id.* at 555.

25. *Id.* at 551.

The language of the Education Clause, attributed by the court to the draftsmanship of John Adams, provides:

Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, *it shall be the duty of legislatures and magistrates*, in all future periods of this Commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; *especially the . . . public schools and grammar schools in the towns.*²⁶

The question before the *McDuffy* court was whether the “duty” to “cherish” public education impressed by the Constitution on the legislature and “magistrates” — as executive branch leaders were known at the time of the framing of the 1780 Constitution²⁷ — was enforceable or precatory.²⁸

Following a lengthy exploration of the language of the Education Clause, the history of its drafting, and the role of public education in the commonwealth in the periods just before and after the framing of the 1780 Constitution, the court concluded that the language was mandatory. “What emerge[d] from this review is that the words are not merely aspirational or hortatory, but obligatory.”²⁹ Notably, the court determined that “according to common usage in the late Eighteenth Century, a duty to cherish was an obligation to support or nurture.”³⁰ The court was guided further by the structure of the Clause: “The preservation of rights and liberties was one of the principal reasons for the formation of the Commonwealth and the adoption of a republican form of government.”³¹ The Education Clause describes the general provision of “wisdom and knowledge” by the commonwealth as necessary to achieve that goal; in the words of the court, the spreading of that “wisdom and knowledge” was a “prerequisite for the existence and survival of the Commonwealth.”³²

Having determined the Education Clause to be enforceable, the *McDuffy* court had little difficulty concluding that the legislature and the executive branch had failed to meet their obligations to adequately support the “public schools and grammar schools in the towns.”³³

First, the court defined what constitutes the provision of an adequate education by reference to a case that had been decided four years earlier by the Supreme Court of Kentucky:

An educated child must possess ‘at least the seven following capabilities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable students to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient level of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.’³⁴

The court also cited the perspective of the commonwealth’s first secretary of education, Horace Mann, for guidance on the substance of the right to an adequate education: “it seems clear that the minimum of this education can never be less than such is sufficient to qualify each citizen for the civil and social duties he will be called to discharge.”³⁵

Second, the court concluded that the commonwealth was falling well short of providing the required level of education to students in less affluent districts. Those districts were characterized by “inadequate teaching of basic subjects including reading, writing, science, social studies, mathematics, computers and other areas,” the “inability to attract and retain high quality teachers,” and “lack of curriculum development and support services to keep pace with modern demands.”³⁶ Affluent districts faced no such challenges.³⁷ Indeed, the commonwealth’s own state Board of Education had issued a report just two years before the *McDuffy* decision that described certain districts as “simply warehous[ing] children at this time, with no effective education being provided”; the court directly quoted that passage in its analysis.³⁸ The court’s conclusion that the commonwealth was not meeting its obligation to provide an education in less affluent districts also may have been influenced by the attorney general’s approach to defending the case — which focused

26. Mass. Const. Pt. II, c. 5, § 2 (emphasis added); see *McDuffy*, 415 Mass. at 578–79 (“John Adams is generally regarded as the principal author of the draft constitution produced by th[e] drafting] committee, including the section which became Part II, c. 5, § 2”).

27. *McDuffy*, 415 Mass. at 561 n.16, 606 (explaining that “magistrates” referred to those comprising the Executive Branch of the Commonwealth, using as example the constitutional reference to the governor as the “supreme executive Magistrate”).

28. *Id.* at 559–607.

29. *McDuffy v. Sec’y of Exec. Office of Educ.*, 415 Mass. 545, 606 (1993).

30. *Id.* at 564.

31. *Id.* at 565. As the court noted, the Preamble to the Massachusetts Constitution provides that the “end of the institution, maintenance and administration

of government, is to secure the existence of the body politic, to protect it, and to furnish the individuals who compose it with the power of enjoying in safety and tranquility their natural blessings of life.” *Id.* (quoting Mass. Const. Preamble).

32. *Id.* at 566.

33. *Id.* at 607–18.

34. *Id.* at 618–19 (quoting *Rose v. Council for Better Educ. Inc.*, 790 S.W.2d 186, 212 (Ky. 1989)).

35. *McDuffy v. Sec’y of Exec. Office of Educ.*, 415 Mass. 545, 619 (1993) (quoting Horace Mann, “The Massachusetts System of Common Schools,” *Tenth Annual Report of the Massachusetts Board of Education* (1849)).

36. *Id.* at 617–18.

37. *Id.* at 618.

38. *Id.* at 615.

on the legal question of whether the constitutional provision was enforceable, rather than the more fact-driven question of whether the education provided was adequate.³⁹

On the question of remedy, the court “assume[d] that [the elected branches] of the Commonwealth will fulfill [their] duty to remedy the constitutional violations that we have identified.”⁴⁰ The court set forth its expectation that the commonwealth would “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.”⁴¹ But the SJC “le[ft] it,” in the first instance at least, “to the magistrates and the Legislature to define the precise nature of the task which they face in fulfilling their constitutional duty to educate our children today, and in the future.”⁴² The Single Justice was empowered to “retain jurisdiction to determine whether, within a reasonable time, appropriate legislative action has been taken.”⁴³

B. Signs of Educational Progress and Judicial Reticence in *Hancock*

The *McDuffy* court did not act in a vacuum. Just down Ashburton Place at the State House, the development of the Massachusetts Education Reform Act (MERA or the Act) was well underway. It was enacted by the legislature on June 8, 1993, just under a week before the *McDuffy* decision was issued, and was signed by the governor on June 18, 1993 — three days after *McDuffy*.⁴⁴ The many details of MERA are beyond the scope of this article; suffice it to say that the Act “entirely revamped the structure of funding public schools,” and strengthened executive branch authority to “establish [s]tatewide education policies and standards, focusing on objective measures of student performance and on school and district assessment, evaluation and accountability.”⁴⁵

1. Then-Judge Botsford’s Findings and Recommendations

By 1999, in the view of the *McDuffy* plaintiffs and the advocacy groups that supported them, insufficient progress had been made. So, they brought a motion for further relief with the Single Justice, which was referred to the Superior Court for discovery and trial.⁴⁶ Unlike in *McDuffy*, the parties did not reach material factual stipulations; instead, years of discovery followed.⁴⁷ In 2003, then-Judge Botsford presided over a six-month trial concerning the adequacy of

the education provided in four “focus” districts — again, Brockton, Lowell and Winchendon, and newly-added Springfield — concluding with her issuance of a report to the full SJC.⁴⁸

Judge Botsford’s fact findings — spanning 275 pages — comprehensively detailed how the provision of public school education had changed since MERA and how it had not.⁴⁹ She noted that:

[t]he Commonwealth, and the [Department of Education], have accomplished much over the past ten years in terms of investing enormous amounts of new money in local educational programs, ensuring a far greater degree of equitable spending between rich and poor school districts, and redesigning in some fundamental ways the entire public school educational program.⁵⁰

Still, Judge Botsford concluded, the “inadequacies of the educational program provided in the four focus districts are many and deep,” and “are even more profound” for “children with learning disabilities, children with limited English proficiency, racial and ethnic minority children, and those from low-income homes.”⁵¹ These inadequacies were “reflected in” and “illustrated” by scores on the state-administered exams known as the Massachusetts Comprehensive Assessment System (MCAS).⁵²

Judge Botsford recommended that the executive branch be ordered to: (i) “ascertain the actual cost of providing the level of education in each of the focus school districts” that permits all children “the opportunity to acquire the capabilities outlined in *McDuffy*”; (ii) determine the cost associated with state measures “that will provide meaningful improvement in the capacity of these local districts to carry out an effective implementation of the necessary educational program”; and (iii) implement “whatever funding and administrative exchanges result from” these determinations.⁵³

2. The Splintering of the *Hancock* Court

Before the full SJC, the commonwealth defendants portrayed Judge Botsford’s decision as an incursion on powers reserved by the Massachusetts Constitution to the legislature and the executive branch.⁵⁴ The court’s focus, they argued, should be on whether the state’s elected branches had taken “appropriate action within a reasonable time” to remedy the inadequacies identified in *McDuffy*.⁵⁵

39. Apter, *supra* note 6, at 632. On the basis of an interview with Douglas Wilkins — who represented the commonwealth defendants in *McDuffy*, and is now a justice of the Superior Court — Apter describes the attorney general’s position thusly: “[C]ounsel at the Attorney General’s office decided that the case was not contestable on the facts and that they needed to focus their efforts solely on the law.” *Id.*

40. *McDuffy v. Sec’y of Exec. Office of Educ.*, 415 Mass. 545, 618 (1993).

41. *Id.* at 621.

42. *Id.* at 621. As one commentator noted at the time, “the overall thrust of the [remedy analysis in *McDuffy*] is one of guidance rather than direction. The Legislature is under a duty to furnish education The broad Kentucky guidelines . . . give a general, aspirational idea of how to meet it. Beyond that, however, the Legislature is to decide what to provide and how to pay for it.” Brown, *supra* note 5, at 548.

43. *Id.* at 621.

44. St. 1993, c. 71; see Peter J. Howe, “Weld Leans Towards Signing Bill for Education Reform,” *BOSTON GLOBE*, June 9, 1993; see also *Hancock v. Driscoll*, 2004 WL 877984, *3 (Mass. Super. Ct. April 26, 2004) (Botsford, J.).

45. *Hancock v. Comm’r of Educ.*, 443 Mass. 428, 437 (2005).

46. *Hancock*, 2004 WL 877984 at **3-4. Because the students who comprised the plaintiffs in *McDuffy* had graduated, current students were substituted; so, too, the commonwealth defendants were substituted for current executive branch members. *Id.* at **1-6 and n.6.

47. Apter, *supra* note 6, at 649-50.

48. *Hancock*, 2004 WL 877984 at *4.

49. See *Hancock*, 443 Mass. at 433 (praising Judge Botsford’s “thoughtful and detailed findings of fact,” reflecting “that sharp disparities in the educational opportunities and the performance[] of some Massachusetts public school students persist”).

50. *Hancock*, 2004 WL 877984 at *143.

51. *Id.*

52. *Id.*

53. *Id.*

54. Apter, *supra* note 6, at 656.

55. *Id.*

A plurality of the court, led by Chief Justice Margaret Marshall, embraced those arguments and determined that no relief was warranted.⁵⁶ Meanwhile, two justices advocated overturning *McDuffy* entirely, arguing that the Education Clause should be interpreted as a “broad directive” that public schools must be established, rather than an enforceable mandate that they be adequate.⁵⁷ Two justices dissented, contending that the “bleak” facts found by Justice Botsford required a remedy under the Education Clause; otherwise, in their view, the clause would “become[] an empty promise.”⁵⁸

The splintered court cast into doubt the scope of the Education Clause and the circumstances under which it will be enforced. Though the *McDuffy* court explained that an adequately educated child must possess the “capabilities” set forth in *Rose v. Council for Better Educ. Inc.*,⁵⁹ the *Hancock* plurality questioned the relevance of those capabilities.⁶⁰ It cited with approval an academic critique of the *Rose* capabilities that stated: “If this standard is taken literally, there is not a public school system that meets it.”⁶¹

Though the *Hancock* plurality acknowledged the “slow, sometimes painfully slow” pace of improvement in less affluent districts, it focused less on the adequacy of education provided in those districts than on state legislative efforts to improve it.⁶² Of those efforts, the plurality stated: “[T]his is not a case where the Legislature reasonably could be said to have neglected or avoided a constitutional command.”⁶³ Instead, by “provid[ing] substantial and increasing . . . resources to support public education in a way that minimizes rather than accentuates differences between communities based on property valuations, constitutionally impermissible classifications, and other criteria extrinsic to the educational mission,” and “addressing problems in underperforming schools and districts according to a plan of ‘pragmatic gradualism,’” the legislature was meeting its constitutional responsibility.⁶⁴

Moreover, the *Hancock* plurality raised concerns with Judge Botsford’s proposed remedies, specifically that the study she proposed would be “but a starting point for what inevitably must mean judicial directives concerning appropriations.”⁶⁵ The plurality emphasized that education policy choices embody “value judgment[s]; each carries a cost in real, immediate tax dollars; and each choice is fundamentally political.”⁶⁶ Such choices were the domain of the elected branches, which are to be afforded “substantial deference.”⁶⁷ The plurality concluded that:

[T]he legislative and executive branches have shown

that they have embarked on a long-term, measurable, orderly, and comprehensive process of reform to ‘provide high quality public education to every child.’ G.L. c. 69, § 1. They are 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 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.⁶⁸

The circumstances in *Hancock*, in other words, did “not constitute the egregious, statewide abandonment of the constitutional duty identified in [*McDuffy*],” and judicial relief was unwarranted.⁶⁹

In the wake of *Hancock*, there was considerable uncertainty as to what constituted an adequate education (including whether the *Rose* capabilities had continued vitality), the legal threshold for judicial intervention, and the practical appetite of the judiciary to wade into statewide education matters.

III. THE *DOE* COURT’S EMBRACE OF AN ENFORCEABLE RIGHT TO ADEQUATE EDUCATION AND REJECTION OF A NARROW REMEDY

So remained the state of Education Clause jurisprudence in the commonwealth in early 2015, 10 years after *Hancock*. The next chapter in what now comprises our Education Clause trilogy began in early 2015, when five school children in the City of Boston who had applied for admission to charter schools⁷⁰ operating within the city, but lost the lottery for the limited number of available seats in such schools, brought suit.⁷¹ Plaintiffs alleged that the charter schools they sought to attend achieved such exceptional results that they had received nationwide acclaim.⁷² Instead, they were assigned to district schools ranked by the commonwealth’s own data as “in the bottom fifth of all schools statewide”; few students in their schools reached a level of proficiency in the basic subjects of mathematics, science, or English language arts.⁷³

56. *Hancock*, 443 Mass. at 452–63 (Marshall, C.J., plurality opinion).

57. *Id.* at 464 (Cowan, J., concurring).

58. *Id.* at 477, 485 (Greaney, J., dissenting).

59. *Rose v. Council for Better Educ. Inc.*, 790 S.W. 2d 186, 212 (Ky. 1989).

60. *Hancock*, 443 Mass. at 456 (Marshall, C.J., plurality opinion).

61. *Id.* at 456 n.29 (Marshall, C.J., plurality opinion) (quoting Thro, “A New Approach to State Constitutional Analysis in School Finance Litigation,” 14 J.L. AND POL’Y, 525, 548 (1998)).

62. *Id.* at 445–58 (Marshall, C.J., plurality opinion).

63. *Hancock v. Comm’r of Educ.*, 443 Mass. 428, 444–45 (2005) (Marshall, C.J., plurality opinion).

64. *Id.* at 453–54 (Marshall, C.J., plurality opinion).

65. *Id.* at 460–61 (Marshall, C.J., plurality opinion).

66. *Id.* at 460 (Marshall, C.J., plurality opinion).

67. *Id.* (Marshall, C.J., plurality opinion).

68. *Id.* at 435 (Marshall, C.J., plurality opinion).

69. *Hancock v. Comm’r of Educ.*, 443 Mass. 428, 435 (2005) (Marshall, C.J., plurality opinion).

70. Under state law, there are two types of charter schools: (i) commonwealth charter schools; and (ii) Horace Mann charter schools (of which there are varying types not material here). *Doe v. Sec’y of Educ.*, 479 Mass. 385, 378–79 (2018). Commonwealth charter schools are operated pursuant to a charter granted by the state Board of Elementary and Secondary Education, and are funded pursuant to a per-pupil tuition calculated at the state level. *Id.* at 379. Horace Mann charter schools also operate pursuant to a charter granted by the state Board, but operate only pursuant to the approval by the local school district; they are funded directly from the school district’s budget. *Id.* at 378. Accordingly, the degree of local control over Horace Mann charter schools is significantly higher. *Id.* at 378. The plaintiffs’ claims related exclusively to commonwealth charter schools.

71. *Id.* at 382–83.

72. *See Doe v. Sec’y of Educ.*, Suffolk County Superior Ct. Docket No. 1584CV02788, Compl. ¶¶ 75–85.

73. *Doe v. Sec’y of Educ.*, 479 Mass. 375, 383 (2018).

The plaintiff students asked that the state's charter school cap, established by General Laws (G.L.) c. 71, § 89(i), be struck down as irreconcilable with the Education Clause and asserted a related equal protection claim.⁷⁴ The defendants were the state officials charged with enforcing the charter cap (the "Executive Branch Defendants").⁷⁵

The case arrived with great fanfare, receiving considerable media attention before it was even filed; three of Boston's largest law firms (WilmerHale, Goodwin and Foley Hoag) represented the plaintiffs pro bono.⁷⁶ It ended with a fizzle two and a half years later, as the SJC affirmed the Superior Court's judgment granting a motion to dismiss. Though that path seems unremarkable — particularly as compared to *McDuffy* and *Hancock* — the substance of the SJC's decision offers much to consider and, possibly, a framework for Education Clause jurisprudence going forward.

A. Plaintiffs' Narrow Focus on the Charter School Cap

Among the many provisions of MERA was legislative authorization to create 25 commonwealth charter schools.⁷⁷ As explained by then-Senate Ways and Means Chairman Tom Birmingham, "charter schools were intended to provide 'a laboratory for testing different methods and those methods that proved useful . . . would be replicated' in traditional public schools."⁷⁸ Rather than being governed by a local school board, commonwealth charter schools operate under a charter granted by the state Board of Elementary and Secondary Education; they are governed by a board of trustees, are overseen by the state's Office of Charter Schools and School Redesign, and report, ultimately, to the state Board of Elementary and Secondary Education.⁷⁹

Over the years, the legislature gradually has expanded the number of available commonwealth charters.⁸⁰ In 1997, the number rose to 37, though no more than 6 percent of a district's net school spending could be allocated to commonwealth charter schools.⁸¹ In 2000, the number rose again to 72, and the percentage of a district's net school spending that could be allocated to commonwealth charter schools was increased to 9 percent.⁸² For districts among the lowest

performing 10 percent statewide, the permissible spending allocation was raised again in 2010 — this time, to 18 percent of the district's net school spending.⁸³ As explained by the former commissioner of education, "[t]his explicit and targeted use of available charters to serve students in low-performing districts reflect[ed] a growing recognition that many charters were having particular success in serving minority and low-income students who were performing at low levels on state assessments."⁸⁴

When *Doe* was filed in 2015, the statewide cap on the number of available commonwealth charter schools had not yet been reached, but a number of districts — prominently including Boston — were spending the maximum allowable percentage of their net school spending on commonwealth charters.⁸⁵ In addition, though charter schools were achieving mixed results statewide, the plaintiffs alleged, with citation to numerous well-regarded studies, that students educated in charter schools located in Boston were making marked gains on statewide assessment tests — yielding results that were garnering nationwide attention.⁸⁶

Where demand for charter school seats exceeds the number of available seats — as it did in Boston when *Doe* was filed and continues to do today⁸⁷ — state law provides that the seats are to be allocated by lottery.⁸⁸ The *Doe* plaintiffs applied for charter admission in the City of Boston but "failed to secure a seat through the lottery."⁸⁹ Instead, they each were assigned to a Boston district "school that [was] in the bottom fifth of all schools Statewide."⁹⁰ The commonwealth's own data regarding those schools — collected by the Department of Elementary and Secondary Education (DESE) via statewide achievement assessments — painted a bleak picture.⁹¹ Students at plaintiffs' schools reached a level of proficiency in English language arts at rates ranging from 10 to 35 percent; in math ranging from 15 to 37 percent; and in science ranging from 10 to 30 percent.⁹² At best, then, only about one in three students in plaintiffs' schools was achieving a level of proficiency in core subjects; at worst, only about one in 10 was.⁹³ At least as pled in the complaint, the charter school plaintiffs desired to attend schools that achieved substantially higher proficiency rates.⁹⁴

74. *Id.* at 384.

75. *Id.* at 375 n.3. Specifically, the named defendants were the secretary of the Executive Office of Education, the chair of the Board of Elementary and Secondary Education, the commissioner of elementary and secondary education, and all members of the Board of Elementary and Secondary Education.

76. *E.g.*, Levenson, "Five Students Sue to Lift State's Charter School Cap," *BOSTON GLOBE*, Sept. 15, 2015; Levenson, "Civil Rights Fight Looms on Charter Schools Cap," *BOSTON GLOBE*, March 8, 2015, at A1.

77. St. 1993, c. 71, § 55.

78. *Doe v. Sec'y of Educ.*, 479 Mass. 375, 377 (2018) (quoting *STATE HOUSE NEWS SERVICE*, "Charter Schools" (Feb. 24, 1993) (statement of Senate Ways and Means Chairman Thomas Birmingham)).

79. *Id.* at 378–79 (describing MASS. GEN. L. c. 71, § 89).

80. *Id.* at 381–82.

81. St. 1997, c. 46, § 2.

82. St. 2000, c. 277, § 2.

83. St. 2010, c. 12, § 7.

84. Chester, "Building on 20 Years of Education Reform" (Department of Elementary and Secondary Education, Nov. 2014), available at <http://www.doe.mass.edu/commissioner/BuildingOnReform.pdf>.

85. *See Doe*, 479 Mass. at 383–84.

86. Compl. ¶¶ 75–85. Notably, as the *Doe* case was pending, a statewide ballot initiative proposed to further increase the number of available charters by 12 annually, focused on the areas with the lowest district school performance and the highest demand for charter seats. *See* Ballot Initiative 15-31 (2016); Secretary of the Commonwealth, Elections Division, "Statewide Ballot Measures, 1919 through 2018" (Jan. 2019), available at: <https://www.sec.state.ma.us/ele/elepdf/Statewide-Ballot-Measures.pdf> ("Statewide Ballot Measures"). The SJC certainly was aware of that initiative, which it referenced repeatedly in its decision. *Doe*, 479 Mass. at 391 n.27. The measure failed, with 60 percent of Massachusetts voters voting against it, including a majority of every municipality in the commonwealth. *Statewide Ballot Measures* at 65.

87. *Doe*, 479 Mass. at 382–83 n.19; *see* Department of Elementary and Secondary Education, "Massachusetts Charter School Waitlist" (Jan. 2018), available at <http://www.doe.mass.edu/charter/enrollment/FY2018/UpdatedWaitlist.html>.

88. Gen. Laws. c. 71, § 89(n); 603 CMR § 1.05(6)(c), 7(a).

89. *Doe*, 479 Mass. at 383 n.19.

90. *Id.* at 382.

91. *Id.* at 383 n.18.

92. *Id.*; *see* Compl. ¶¶ 49–66.

93. *Doe*, 479 Mass. at 383 n.18; *see* Compl. ¶¶ 78–85.

94. *See* Compl. ¶¶ 80–85.

Relying on DESE's data, the plaintiffs alleged the education provided to them by the Boston public schools was constitutionally inadequate; the relief they sought was a declaration that the cap on charter school enrollment violated the Education Clause and, as will be discussed below, the equal protection provisions of the Massachusetts Constitution.⁹⁵

B. Superior Court Decision and the Path to the SJC

It was likely no accident that the *Doe* plaintiffs captioned Secretary of the Executive Office of Education James Peyser as the lead Executive Branch Defendant. He is a longtime charter school advocate and a longtime critic of the charter cap.⁹⁶ No matter his policy preferences, though, Secretary Peyser and his co-defendants — represented by the Attorney General's Office, as required by G.L. c. 12, § 3 — undertook to defend the constitutionality of the law.

The Executive Branch Defendants filed a motion to dismiss, arguing, among other things, that the claim had failed to allege “systemic deprivation of the right to education”; that the “causal link between the existence of the charter school cap and the constitutionally inadequate education they allegedly receive is illogical, highly speculative, and remote”; and that “the Education Clause does not allow the specific judicial remedy that plaintiffs seek [i.e.] invalidation of the charter school growth management strategy adopted by the Legislature in G.L. c. 71, § 89(i).”⁹⁷

The Superior Court (Breiger, J.) granted the Executive Branch Defendants' motion to dismiss. In so doing, the Superior Court indicated that DESE data cannot be used to plausibly claim that students are receiving an inadequate education.⁹⁸ The court also implied that plaintiffs residing in one district alone cannot establish an Education Clause claim.⁹⁹ And the court noted the incongruence between the claim (an inadequate education) and the remedy (more of one type of school). The Superior Court held that the Education Clause “does not mean that plaintiffs have the constitutional right to choose a particular flavor of education, whether it be a trade school, a sports academy, an arts school, or a charter school.”¹⁰⁰ That decision — “how to allocate public education choices amongst the multitude of possible types — is best left to” the elected branches.¹⁰¹

Concerning the *Doe* plaintiffs' equal protection claim, the Superior Court briefly concluded that the right to an adequate education was not a fundamental right, and that the limit on charter school enrollment was rationally related to the legislature's interest

in equitably “allocat[ing] education funding” between charter and in-district schools.¹⁰²

C. The SJC's Disposition of *Doe* and an Education Clause Roadmap for the Future

In the wake of *McDuffy*, *Hancock*, and the Superior Court's decision in *Doe*, the SJC faced several unresolved Education Clause questions: (i) what constitutes an adequate educational opportunity; (ii) who may enforce the right (e.g., may students from only one district seek to do so, or must plaintiffs span multiple representative districts); and (iii) under what circumstances will an Education Clause claim warrant judicial relief. As to the first two questions, a unanimous SJC in *Doe* provided relatively clear guidance. The third remains an open question.

Concerning the nature of the education required by the Education Clause, the court stated that the clause “imposes an affirmative duty on the Commonwealth to provide a level of education in the public schools for the children there enrolled that qualifies as constitutionally adequate.”¹⁰³ In defining adequacy, the court stated that the state's “public education plan [must] ensure that our children are educated in a manner so that they possess capabilities that ‘accord with our Constitution's emphasis on educating our children to become free citizens on whom the Commonwealth may rely’ to ensure the functioning of our democracy and society.”¹⁰⁴ The court cited the *Rose* capabilities with approval, describing them as “aptitudes” that “broad[ly]” constituted an adequate education.¹⁰⁵ So, the *Rose* capabilities live on, despite the skepticism of the *Hancock* court.¹⁰⁶ Furthermore, the SJC stressed that *Rose* capabilities may evolve to meet modern demands, just as the *McDuffy* court had: “Significantly, the capabilities considered to be essential ‘necessarily will evolve together with our society.’”¹⁰⁷

The SJC also concluded that school children from a single school district had standing to assert an Education Clause claim. As the court stated, “[i]f the Commonwealth's public education plan were to abandon students attending schools in a particular city or town, those students may seek recourse under the [C]ause.”¹⁰⁸ The court further suggested that DESE state assessment data might be used to plausibly allege an Education Clause claim at the pleadings stage. It stated that the DESE data cited by plaintiffs “support[ed] the claim that the education provided in their schools is, at the moment, inadequate.”¹⁰⁹ The court did, however, note that “[a]lthough sufficient

95. *Doe v. Sec'y of Educ.*, 479 Mass. 375, 376 (2018).

96. Michael Levenson, “Charter School Advocate Picked for Mass. Education Chief,” *BOSTON GLOBE*, Dec. 23, 2014; James A. Peyser, “Boston and the Charter School Cap: Politics Halts Growth of Top-Notch Schools,” *EDUCATION NEXT*, 15–20 (Winter 2014).

97. *Doe v. Peyser*, Suffolk Sup. Ct. Docket No. 1584CV02788, Docket Entry 11 (Defendants' Motion to Dismiss).

98. *Doe v. Peyser*, Suffolk Sup. Ct. Docket No. 1584CV02788, 2016 WL 9738404, *8 (Oct. 4, 2016) (Breiger, J.) (“Accepting plaintiffs' allegations as true, however, does not mean that the court must find that because a school has been designated a Level 3 or 4 school [by DESE's data] and the students have low MCAS examination scores, that there has been the kind of ‘Statewide abandonment’ demonstrating a constitutional violation. To the contrary, the department classifies schools by level so that it can identify the schools most in need of assistance and then provide such schools with the ways and means to try to improve the school.”).

99. *Id.* at *8–9.

100. *Id.* at *9.

101. *Id.* at *8–9.

102. *Id.* at *10.

103. *Doe v. Sec'y of Educ.*, 479 Mass. 375, 387 (2018).

104. *Id.* at 387 n.23 (quoting *McDuffy v. Sec'y of the Exec. Office of Educ.*, 415 Mass. 545, 619 (1993)).

105. *Id.* at 387 n.23 (quoting *Rose v. Council for Better Educ. Inc.*, 790 S.W. 2d 186, 212 (Ky. 1989)).

106. *See supra* note 59.

107. *Doe v. Sec'y of Educ.*, 479 Mass. 375, 387 n. 23 (2018) (quoting *McDuffy*, 415 Mass. at 620).

108. *Id.* at 389 n.25.

109. *Id.* at 388–89.

for the motion to dismiss stage,” such data likely would be insufficient, without more, to establish the provision of an inadequate education because proficiency on statewide assessment tests is not an exact proxy for “whether an education is constitutionally adequate.”¹¹⁰

The court then turned to a straightforward explication of why the *Doe* plaintiffs had not stated a claim for enforcement of the Education Clause. First, plaintiffs seeking enforcement of the Education Clause must allege “facts to support a claim that the Commonwealth’s public education plan does not provide reasonable assurance of improvements for their schools’ performance over a reasonable period of time.”¹¹¹ Plaintiffs had not attempted to allege such facts, nor had they faulted the state’s broad “public education plan”; instead, they focused exclusively on the availability of charter school seats and what they characterized as legislative unresponsiveness to the demand for those seats.¹¹² In other words, the only aspect of the commonwealth’s approach to education the plaintiffs had addressed was the cap limiting charter school expansion; more was required.¹¹³

Second, the court stressed that the “specific relief” that the *Doe* plaintiffs sought was not “available.”¹¹⁴ Were plaintiffs to establish that they had received an inadequate education, the result would be a declaration of constitutional inadequacy with the remedy left to the elected branches.¹¹⁵ But they sought something else: “expanding access to charter schools.”¹¹⁶ That relief was the province of the legislature. As the court stated: “Although a violation of the education clause may result in judicial action to remedy the wrong, the clause does not permit courts to order ‘fundamentally political’ remedies or ‘policy choices that are properly the Legislature’s domain.’”¹¹⁷ Raising the charter school cap “could potentially help address the plaintiffs’ educational needs,” [but] other policy choices might do so as well, such as taking steps to improve lower-performing traditional public schools.¹¹⁸ Which path to take “involve[d] policy considerations that must be left to the Legislature.”¹¹⁹

Read as a whole, the analysis of the unanimous *Doe* court suggests a judicial willingness to determine whether the state is meeting its obligation to provide an adequate education, but considerable hesitancy to order a particular remedy.¹²⁰ Students from one district may maintain an action and may do so, at least at the pleadings stage, with reference to DESE data.¹²¹ The complaint, however, must

include plausible allegations that the state’s “public education plan does not provide reasonable assurance of improvements for their schools’ performance over a reasonable period of time.”¹²² *Doe* suggests that the remedy available — if such a claim can be alleged and then proven — will not relate to just one element of the state’s education plan; instead, it will be a declaration that the plan writ large is not meeting constitutional demands, with direction to the elected branches to implement an unspecified solution. On this point, the instruction of the *McDuffy* court was impliedly re-emphasized in *Doe*: “[W]e leave it to the magistrates and the Legislatures to define the precise nature of the task which they face in fulfilling their constitutional duty to educate our children today, and in the future.”¹²³

D. Contours of the State Equal Protection Provisions in the Context of Educational Adequacy Remain Undefined

The *Doe* plaintiffs, like the *McDuffy* plaintiffs before them, also asserted that the education provided to them violated the equal protection provisions of the Massachusetts Constitution.¹²⁴ The *McDuffy* court did not address the equal protection claim, as it found the Education Clause controlling.¹²⁵ In *Doe*, the SJC had no such luxury; having dispensed with plaintiffs’ Education Clause claim, the court was forced to confront the equal protection claim.¹²⁶

It did so with dispatch, saying very little about the future application of Articles 1 and 10 of the Massachusetts Declaration of Rights in the context of public education. First, the court declined to address whether the right to an adequate education is a fundamental right, such that state laws affecting its provision would be subject to strict scrutiny.¹²⁷ The court allowed that the students’ “educational interest is undeniably greater” than in cases where it had applied rational basis review in the past.¹²⁸ But no matter the importance of the interest, deferential rational basis review is appropriate unless the interest is interfered with significantly.¹²⁹ And here the court concluded that, no matter whether the right to an adequate education is fundamental, the “charter school cap [did not] interfere[] with it significantly.”¹³⁰ The cap did “not interfere with the [plaintiff] students’ [right] to attend traditional public schools,” and there was no colorable claim that the plaintiff students had a “constitutional right to attend charter schools.”¹³¹

Once the SJC settled on rational basis review and afforded the

110. *Id.* at 389 n.24.

111. *Id.* at 389.

112. *Doe v. Sec’y of Educ.*, 479 Mass. 375, 388-89 (2018). The SJC expressly questioned that characterization. It noted that the legislature had “modified the commonwealth charter school cap numerous times since 1993,” and described the “history of charter school caps in Massachusetts [as] encompass[ing] multiple legislative enactments spanning several decades” that have “steadily increased the number of permissible charter schools or charter school seats.” *Id.* at 381, 391 n.27.

113. *Id.* at 389–90.

114. *Id.* at 390–91.

115. *Id.* at 390.

116. *Id.*

117. *Id.* (quoting *Hancock*, 443 Mass. at 454 (Marshall, C.J., plurality opinion)).

118. *Doe v. Sec’y of Educ.*, 479 Mass. 375, 390 (2018).

119. *Id.* at 390.

120. *Id.* at 387–90.

121. *Id.* at 389 n.24.

122. *Id.* at 389.

123. *McDuffy v. Sec’y of Exec. Office of Educ.*, 415 Mass. 545, 620 (1993).

124. Mass. Const. Pt. I, arts. 1 and 10.

125. *McDuffy*, 415 Mass. at 557 n.15.

126. *Doe v. Sec’y of Educ.*, 479 Mass. 375, 391 (2018).

127. *Id.* at 392.

128. *Id.* at 394.

129. *Id.* at 393 (quoting *Zablocki v. Redhail*, 434 U.S. 374, 389 (1978)).

130. *Id.* at 392.

131. *Id.* at 393.

“presumption of rationality” to the charter cap, the die was cast.¹³² The court found that the cap was a rational “effort to allocate funding among all the Commonwealth’s students attending these two types of publicly funded schools,” i.e., charter schools and district schools.¹³³

IV. THE CONSTITUTIONAL RIGHT TO EDUCATION IN THE COMMONWEALTH GOING FORWARD

As the Supreme Court of the United States recognized in its most famous decision, “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”¹³⁴ In *McDuffy*, the SJC added another admonishment: without the opportunity for an adequate educational opportunity, not only will the success of our children be at risk, but so too will the health of our commonwealth. The state constitutional duty “is designed not only to serve the interests of the children, but, more fundamentally, to prepare them to participate as citizens of a free State to meet the needs and interests of a republican government, namely the Commonwealth of Massachusetts.”¹³⁵ But judicial involvement in enforcing that constitutional responsibility necessarily implicates Article 30 concerns.¹³⁶ The three most significant Education Clause decisions — *McDuffy*, *Hancock* and *Doe* — reflect the SJC grappling with the importance of an adequate education, on the one hand, and the proper judicial role, on the other.

In the wake of *Doe*, the Education Clause continues to impose an enforceable duty to provide an adequate education on the state’s elected branches. The substance of an adequate education remains a

demanding standard. “[U]nder 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.”¹³⁷

What case might justify a judicial remedy for the elected branches’ failure to meet that standard, however, remains an open question. In Massachusetts, wide achievement gaps in student achievement between affluent students and low-income students, and between white students and students of color, persist.¹³⁸ Following *Doe*, students from a diverse and economically disadvantaged district may use the state’s own data to allege that the education they are being provided is inadequate.¹³⁹ A showing of present inadequacy will not be enough, though; they likewise must establish that the “Commonwealth’s public education plan does not provide reasonable assurance of improvements for their schools’ performance over a reasonable period of time.”¹⁴⁰ What such a showing might look like is left for a future case.

For now, it is clear that *McDuffy* explicated the right to an adequate education and the SJC in *Doe* restated its adherence to *McDuffy*. Still, no case has yet determined the precise remedy where it is conclusively determined that an inadequate education is being provided. *Hancock* instructs that a broad remedy (substantial judicial oversight over statewide education policy) cannot be squared with Article 30, nor, under *Doe*, can a narrower remedy (the striking down of one part of the state’s multifaceted education framework). Whether anything lies between is yet to be determined.

132. *Doe v. Sec’y of Educ.*, 479 Mass. 375, 394 (2018).

133. *Id.*

134. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1954).

135. *McDuffy*, 415 Mass. at 606.

136. *E.g.*, *Hancock*, 443 Mass. at 46-62.

137. *McDuffy*, 415 Mass. at 619 (quoting Horace Mann, “The Massachusetts

System of Common Schools,” *Tenth Annual Report of the Massachusetts Board of Education* (1849)).

138. *E.g.*, Massachusetts Equity in Education Partners, “#1 for Some: Opportunity & Achievement in Massachusetts,” available at: <https://number1forsome.org/wp-content/uploads/sites/16/2018/09/Number-1-for-Some-9.25-18.pdf>.

139. *Doe*, 479 Mass. at 389 n.24.

140. *Id.*

Zoning: The Exemption for Educational Use Under the Dover Amendment

The McLean Hospital Corp. v. Town of Lincoln, 483 Mass. 215 (2019)

A. INTRODUCTION

McLean Hospital (McLean) is a renowned Belmont-based non-profit institution engaged in treating individuals and families affected by psychiatric and related illnesses. As a part of its mission, McLean has undertaken to provide specialized assistance and care to a group of teenagers and young adults (ages 15 through 21). More particularly, it established and operated a residential facility for its teen and young adult population called the 3East Program for Boys (3East) at its main Belmont campus. Seeking to expand the male portion of its program from its crowded facility in Belmont, McLean purchased two lots within a Lincoln residential zone, which together contained about 5.5 acres of land. McLean sought permission from the Belmont Building Commissioner (Commissioner) to use the land for “education purposes,” which use is exempted from local zoning laws under the Dover Amendment, General Laws (G.L.) c. 40A, § 3, second par., and its local analog, section 6.1 of the town’s bylaws.¹ The Commissioner approved McLean’s request.

Following the Commissioner’s approval, certain abutters objected to the application of the Dover Amendment exemption to McLean’s proposed use and appealed the Commissioner’s decision to the town’s Zoning Board of Appeal (ZBA). In reversing the Commissioner’s decision, the ZBA determined that the proposed use was medical and therapeutic rather than educational. It further concluded, “the objective of the program is the treatment of a mental disease or disorder and in this respect, the curative aspects of the program predominate.” Relying upon several cases, and claiming entitlement to the exemption, McLean filed a lawsuit in the Land Court under G.L. c. 240, § 14A and G.L. c. 40A, § 17.²

B. “EDUCATION” IN THE COMMONWEALTH

McLean argued that in the commonwealth the term “educational” encompasses the process of developing and training the powers

and capabilities of human beings and that the education use predominates over any therapeutic benefit. In doing so, without conceding the importance of the mental fitness or healthiness of its residents, McLean directed its focus on the overriding educational core of the program. In this regard, the Supreme Judicial Court (SJC) repeatedly has held “that a program that instills ‘a basic understanding of how to cope with everyday problems and to maintain oneself in society is incontestably an education process within the meaning of the Dover Amendment.’”³ In other words, and as consistently argued by McLean, the goal of facilitating independent living by persons struggling to do so does not lose its predominantly educational character because it also results in a therapeutically favorable outcome.

The history of education and its central place in the functioning of the commonwealth was extensively discussed in *McDuffy v. Secretary of the Office of Education*,⁴ where the SJC was tasked to decide whether the Massachusetts Constitution established a duty of the commonwealth to adequately and fairly educate all of its young persons. In its thorough examination of the history and paramountcy of education from colonial times to the present, the SJC noted the words of then-Gov. John Hancock:

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.⁵

Put otherwise, an educated people is essential to the preservation of the entire constitutional plan: a free, sovereign, constitutional

1. The Dover Amendment provides, in relevant part, “no zoning ordinance or by-law shall . . . prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased by the commonwealth or any of its agencies, subdivisions or bodies politic or by a religious sect or denomination, or by a nonprofit educational corporation; provided, however, that such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements.” MASS. GEN. LAWS c. 40A, § 3 (2019) (emphasis added).

2. *The McLean Hosp. Corp. v. Town of Lincoln*, No. 16 MISC 000694 (KFS), 2018 WL 5262365 (Mass. Land Ct. Oct. 22, 2018).

3. *The McLean Hosp. Corp. v. Town of Lincoln*, 483 Mass. 215, 221 (2019); see *Gardner-Athol Area Mental Health Ass’n Inc. v. Zoning Bd. of Appeals of Gardner*, 401 Mass. 12, 14 (1987); *McDuffy v. Sec’y of Exec. Office of Educ.*,

415 Mass. 545, 560-61 (1993). The term education has been defined: “1. to develop mental, moral, or social capabilities of, especially by schooling or instruction” and “3. to provide with information, as in an effort to gain support in a position or to influence behavior.” *The American Heritage Dictionary of the English Language*, at 569 (5th ed. 2016). This enduring definition of education is an accepted part of Massachusetts’ jurisprudence. See *McDuffy*, 415 Mass. at 618.

4. *McDuffy v. Sec’y of Exec. Office of Educ.*, 415 Mass. 545 (1993).

5. *McDuffy*, 415 Mass. at 561 (“The immediate purpose of the establishment of the duty is the spreading of the opportunities and advantages of education throughout the people; the ultimate end is the preservation of rights and liberties. “[A]s these [wisdom, knowledge, and virtue, diffused among the people] depend on spreading the opportunities and advantages of education . . . it shall be the duty of legislatures and magistrates . . . to cherish . . . public schools.”).

democratic state. Indeed, Part II, c. 5, Section 2 of the Massachusetts Constitution states that education is the means of “diffusing wisdom, knowledge, and virtue, [and] is, therefore, a prerequisite for the existence and survival of the Commonwealth.”⁶

In deciding that a constitutionally ordained duty to educate its youth existed in the commonwealth, the court in *McDuffy* concluded:

We have reviewed at great length the history of public education in Massachusetts so that we might glean an understanding of the meaning of c. 5, Section 2. In doing so, we have considered the history of the colony, the province, the condition and concepts relating to education underlying the drafting of the Constitution of the Commonwealth and, in particular, c. 5, Section 2. We have examined the intention of the framers, the language and the structure of the Constitution, the ratification process by the towns and also the words, acts, and deeds of contemporaries of that time, and, especially the views, addresses, and statutes of early Governors (magistrates) and the Legislatures. In this light, we have considered the proper meaning of the words “duty” and “cherish” found in c. 5, Section 2. What emerges from this review is that the words are not merely aspirational or hortatory, but obligatory. *What emerges also is that the Commonwealth has a duty to provide an education for all its children, rich and poor, in every city and town of the Commonwealth at the public school level, 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, namely the Commonwealth of Massachusetts.*⁷

C. THE LAND COURT PROCEEDINGS

After a four-day trial, a justice of the Land Court (Land Court) agreed with the abutters and the town, deciding that, in this context, “the primary and predominant purpose of 3East is the treatment of a serious mental condition ... and not an educational use entitled to the benefits and protections of the Dover Amendment.”⁸ The Land Court recognized that while “there are no medical interventions ... there are psychosocial interventions,” whose purpose is to provide a school environment within which the attendees can curb their emotional dysregulation and “to mitigate the effects of Borderline Personality Disorder (BPD).”⁹ Noting that the Land Court had relied upon a “novel theory that attempted to distinguish between certain impactful elements that are ‘focused outward’ and

those that ‘look inward,’” McLean filed a petition for direct appellate review that the SJC allowed.¹⁰

D. THE SJC’S DECISION

1. The Underlying Facts

The factual underpinning of the court’s analysis was based on “the essentially undisputed facts found by the trial judge, supplemented occasionally with uncontroverted facts from the record.”¹¹

McLean sought to establish 3East in Lincoln based on an existing model in Belmont, albeit on a slightly larger scale. According to the SJC, the proposed use in Lincoln anticipated developing competencies in social emotional learning, which include many aspects of the 3East model in that:

- “[m]any of the residents have been diagnosed with borderline personality disorder; all have varying degrees of emotional dysregulation. Some have a co-occurring condition such as attention deficit disorder, anxiety, or depression, and some have no official diagnosis.”¹²
- “The 3East program’s curriculum is designed to instill fundamental life, social, and emotional skills in adolescent males who are deficient in these skills, who experience severe emotional dysregulation, and who have been unable to succeed in a traditional academic setting.”¹³
- “Regardless of their diagnosis, all of the residents at McLean share difficulties in identifying and regulating their emotions, and therefore may react to ordinary, day-to-day events, which they perceive as stressful situations, with outbursts of fear, anger, or self-loathing. Overwhelmed by emotions they cannot identify or control, these individuals have difficulty concentrating in school, following directions, responding appropriately to others, and maintaining interpersonal relationships. They tend to view situations as juxtapositions of diametrically opposite positions (from ‘opposite sides of the Grand Canyon’), with no middle ground. Slight disappointments (i.e., ‘can we meet at 5:15 rather than 5:00?’) may be viewed as negative statements about themselves, and can lead to increased feelings of abandonment, shame, ‘emptiness, anger and resentment.’”¹⁴
- “The 3East program uses a highly structured, nationally recognized, dialectical behavior therapy (DBT) approach to attempt to develop social and emotional skills in students with severe deficits in these skills.

6. *Id.* at 566.

7. *Id.* at 606 (emphasis added).

8. The McLean Hosp. Corp. v. Town of Lincoln, No. 16 MISC 000694 (KFS), 2018 WL 5262365, at * 7 (Mass. Land Ct. Oct. 22, 2018).

9. The program “is designed to teach skills ... to lead productive lives ... Coping skills are at the core of a DBT treatment program.” DBT is an acronym for dialectical behavioral training, which is an integral part of the 3East Program. See *McLean Brief* at 13 et. seq. It is further “a skills development model originally developed by Marsha Linehan, Ph.D. (Dr. Linehan) to assist

individuals with BPD.” The McLean Hospital Corp. v. Town of Lincoln, 2018 WL 5262365, at *3 (Mass. Land Ct. Oct. 22, 2018). Nor did the definition change because of new jargon like “rehabilitation” or “therapeutic.” Harbor Sch., Inc. v. Bd. of Appeals of Haverhill, 5 Mass. App. Ct. 600, 605 (1997).

10. The McLean Hosp. Corp. v. Town of Lincoln, 483 Mass. 215, 216 (2019).

11. *Id.*

12. *Id.* at 217.

13. *Id.*

14. *Id.*

To do so, the program teaches students to notice and identify their emotions, to slow down and consider alternatives rather than simply reacting, and to interact constructively with other people. It further teaches fundamental behavioral skills so that the students, whose difficulties in emotional regulation interfere with an ability to learn in a more traditional setting, may acquire skills to respond more productively to the challenges that confront them in their day-to-day lives. The goal of the program is to enable the students to return to their communities and their families, to succeed in traditional educational programs, and to become able to lead productive lives.”¹⁵

- “The curriculum is taught in an experiential manner by specialists in clinical education. Each day, the students learn multiple skills in 45-minute classroom sessions, as well as how to apply them to the complex problems in life that they may encounter at home, school, or work. The curriculum involves formal training sessions, demonstrations and examples by the instructors, group practice, and individualized practice sessions for each student, as well as daily worksheets and homework. The director of the Program holds a Ph. D degree in psychology. Although a part-time registered nurse is available to treat any medical issues that arise for staff or students, no medical interventions are included as part of the program.”¹⁶

The Land Court determined that the DBT program involved the teaching and development of the following skills: (i) mindfulness, the study and practice of which “increases cognitive awareness and control, to the end of maintaining attention” and “block[ing] out distractions”;¹⁷ (ii) emotional regulation to accept and adjust to both positive and negative emotions;¹⁸ (iii) development of interpersonal social relationships; (iv) distress tolerance; and (v) validation so as to accept and empathize with others and self-validate.¹⁹

Entrance to the program is selective. “Once selected, participation

in the immersive residential program generally lasted for 60 to 120 days ...”²⁰ A typical day starts at 9 a.m. with mindfulness exercises and classroom activities until 4 p.m., followed by structured family therapy or athletic time, and concludes with additional skills practices and a final group mindfulness session. The day ends at 10 p.m. with lights out. The program is operated under the general authority of a medical director-psychiatrist who is the only medical staff member besides a part-time nurse.²¹

The Land Court recognized that extant Massachusetts case law approved a residential program where life skills for independent living were taught, “such as self-care, cooking, job seeking and budgeting to formerly institutionalized adults with histories of mental illness,” as predominantly “educational.”²² Similarly, “providing ‘emotionally disturbed children’ with psychiatric adjustment as well as ‘daily educational indoctrination’ in basic studies [is] deemed ‘educational.’”²³ Here, however, in coming to its conclusion, the Land Court traveled an innovative theoretical path by dichotomizing the pedagogic uses into: (i) an educational goal focused outward “toward assimilation into the community — and distinct from the residents’ mental illness, and (ii) “developing skills which look inward and pointedly address the manifestations of the individual’s diagnosis.”²⁴ As so framed, the latter form of skills-based program “to regulate their emotions due to mental illness” did not fall within the judge’s view of a dominant education purpose, but rather the dominant purpose was identified as medical and therapeutic. Critically, the Land Court determined that the use proposed by McLean was excluded from the broad and comprehensive definition of education because it was “more medical in nature.”²⁵

By splitting the focus of the skill-based process into an outward educational program and an inward therapeutic program, the Land Court was able to characterize the proposed McLean program as only secondarily educational and primarily and predominantly therapeutic and curative, in that the resident individuals were being helped to “deal with the inability to regulate their emotions due to their mental illness.”²⁶ Otherwise put, the Land Court concluded that “the primary and predominant purpose of the 3East Boys Program is the treatment of a serious mental condition.”²⁷

15. *Id.* at 217-18.

16. *The McLean Hosp. Corp. v. Town of Lincoln*, 483 Mass. 215, 219 (2019).

17. *Id.* Two excellent and informative amicus briefs were filed. The amicus brief of the Disability Law Center and the Mental Health Legal Advisors Committee (Amicus Brief of Disability Law Center) noted the failure of the judge to acknowledge “Massachusetts’ holistic view of education” (Amicus Brief for Disability Law Center at 14) and the amicus brief for the Association for Behavioral Healthcare Inc. and others (Amicus Brief of Behavioral Healthcare) discussed the “130 nonprofit organizations in Massachusetts” that provide “services and supports to individuals with intellectual and developmental disabilities” not unlike those individuals and others benefitting from the 3East Program and similar instructional behavioral modification/coping programs. Amicus Brief for Behavioral Healthcare at 17.

18. *The McLean Hosp. Corp. v. Town of Lincoln*, No.16 MISC 000694 (KFS), 2018 WL 5262365, at *4 (Mass. Land Ct., Oct. 22, 2018). Many of these organizations are contracted by agencies of Massachusetts to promote social and emotional learning. Amicus Brief of Disability Law Center at 15-20.

19. *The McLean Hosp. Corp.*, 2018 WL 5262365, at *4.

20. *Id.* at *3.

21. *Id.* at 4.

22. *Fitchburg Hous. Auth’y v. Bd. of Appeals of Fitchburg*, 380 Mass. 869, 875 (1980) (“Inculcating a basic understanding of how to cope with everyday problems and to maintain oneself in society is incontestably an educational process.”).

23. *The McLean Hosp. Corp. v. Town of Lincoln*, No.16 MISC 000694 (KFS), 2018 WL 5262365, at *6 (Mass. Land Ct. Oct. 22, 2018).

24. *The McLean Hosp. Corp.*, 2018 WL 5262365 at * 6. *Congregation of the Sisters of St. Joseph of Boston v. Town of Framingham*, 1994 WL 16193868, at *2 (March 31, 1994).

25. *The McLean Hosp. Corp.*, 2018 WL 5262365, at *6.

26. “In this case, the evidence at trial established that the 3East Boys Program is a structured, skills-based curriculum with formal classroom-based sessions in addition to individual therapy sessions aimed at providing residents with critical coping skills to mitigate the effects of BPD.” *Id.* at 7.

27. *Id.*

2. Legal Analysis

The SJC framed the legal issue as follows: “Based upon the trial court’s factual findings, does the proposed use of the land by McLean qualify for the educational purposes exemption of the Dover Amendment?” The court concluded that it did.

Foundationally, the SJC criticized the Land Court’s inside/outside formula: “We have not previously endorsed such a distinction, nor do the parties identify any case law or scientific research that would support such a concept.”²⁸ Rather than highlight the core educational nature and operational foundation of the program, the Land Court focused its analysis upon those young people struggling to behaviorally adjust and adopt socially appropriate responses to the stresses of daily living within the emotionally dysregulated community. The Land Court failed to account for the fact that these individuals were being taught coping life skills through such attention-modifying skills as mindfulness, interpersonal discipline, and related methods of adjustment employed by 3East.

The didactic nature of the information provided is evidenced by, inter alia, the large number of nonprofit programs in Massachusetts that provide “educational” support to persons with developmental and intellectual disabilities, including those persons with autism and brain injuries, which support those organizations feared might be unfairly jeopardized. In this latter regard, it was pointed out that the trial court’s decision “upends the balance struck by the Dover Amendment allowing aversion to difference to trump the Commonwealth’s strong and articulated policy in favor of equal treatment.”²⁹ In this respect, it could fairly be said that the trial court turned the educational purpose of the program on its head by subordinating it to an analysis of the residents’ mental and emotional problems and the curative effect of the primarily educational objective of 3East.

3. Predominant Educational Purpose

Precedent explicating the term “educational purpose” under the Dover Amendment has a lengthy history in which a well-understood meaning has developed. McLean’s 3East neatly falls within that precedent. Plainly put, the McLean program constitutes the use of DBT to edify, through a series of classes, instruction, and other didactic methods, and thereby to inform, the residents about basic living and social skills. The SJC relied, in part, upon *Regis College v. Town of Weston* as its juridical pathfinder. In *Regis College*, the court articulated a two-pronged test to decide whether a use meets the Dover education exemption. “First, the use must have as its ‘bona fide goal something that can reasonably be described as educationally significant.’” Second, the educationally significant goal must be the “‘primary or dominant’ purpose for which the land or structures will be used.”³⁰

With a focus on the overall nature of the McLean program, the term “educational purposes” and the meaning heretofore attributed to that phrase within the context and reasons for the exemption under the Dover Amendment lie at the heart of the inquiry. While important to an analysis of the Dover exemption, the impact of the educational endeavors upon the residents does not resolve the paramount question of whether the use for educational purposes dominates the day-to-day events occurring at the facility any more than does the nature/condition of the persons benefitting therefrom. At its essence, the underlying question remains: Is the land predominantly being used to teach and to educate within the plain meaning of those words?

Dialectical behavioral therapy intertwines both educational and therapeutic objectives in the context of many mental disorders and behavioral dysfunctions. The Massachusetts appellate courts have adopted a refined and broad approach to the application of the exemption under the Dover Amendment.³¹ Thus, while several incidental benefits may underlie a particular endeavor, there is likely but one feature of the enterprise that, under the test explicated in *Regis College*, overrides less dominant facets thereof. In ascertaining the dominant educational purpose in the context of a contested educational endeavor, the courts have refused to limit that determination to traditional schools and colleges. The educational umbrella is comprehensive and includes attention to important and necessary life skills like maintaining oneself in the community, confronting everyday stressors and accomplishing the goal of preparing for independent living. Thus, the Dover Amendment fully embraces “the idea that education is the process of preparing persons [including individuals with mental disabilities] for activity and usefulness in life.”³²

Nor does the presence within a curriculum of remedial and rehabilitative benefits preclude a determination that the program is predominantly educational. Education and rehabilitation “do not denote functions so distinct that a [local zoning authority or a court] could be required to quantify them relative to each other.”³³ Nor is this exercise necessarily part of an “either/or” paradigm. In this respect, “rehabilitation surely falls within the meaning of education”; the terms are “not mutually exclusive,” but rather, “education encompasses that which is ‘particularly directed to either the mental, moral or physical powers and faculties, but in its broadest sense it relates to them all.’”³⁴ In this latter respect and for more than 120 years, the court has construed education as a “broad and comprehensive” term,³⁵ which includes many “means by which the purposes were to be accomplished to the end of ‘preparing persons for activity and usefulness of life.’”³⁶

Nor does the prior treatment for mental illness of persons within

28. *The McLean Hosp. Corp. v. Town of Lincoln*, 483 Mass. 215, 224 (2019).

29. Amicus Brief of Disability Law Center at 30.

30. *Regis Coll. v. Town of Weston*, 462 Mass. at 285 (2012).

31. *Id.*; see generally *Mount Herman Boys’ Sch. v. Gill*, 145 Mass. 139 (1887), where in connection with the taxation of farm products sold by a farm engaged in the education of young farmers, the determinative consideration was to be found within the comprehension of a dominant or incidental use. Thus, money earned from the sale of farm products “was merely incidental to the educational purpose of the institution.” *Id.* at 148.

32. *Id.*; see *The McLean Hospital Corp. v. Town of Lincoln*, 483 Mass. 215, 220 (2019); *Gardner-Athol Area Mental Health Ass’n. v. Zoning Board of*

Appeals of Gardner, 401 Mass. 12, 13 (1987) *Harbor Sch. Inc. v. Bd. of Appeals of Haverhill*, 5 Mass. App. Ct. 600, 604-05 (1977).

33. *The McLean Hosp. Corp. v. Town of Lincoln*, 483 Mass. 215, 221 (2019) (quoting *Harbor Sch.*, 5 Mass. App. Ct. 600, 603-05 (1977)).

34. *The McLean Hosp. Corp. v. Town of Lincoln*, 483 Mass. 215, 221 (2019) (quoting *Mt. Herman Boys’ Sch. v. Gill*, 146 Mass. 139, 146 (1887)); *Whitinsville Ret. Soc’y v. Northbridge*, 394 Mass. 757, 759-61, n.3 (1985).

35. *The McLean Hosp. Corp.*, 483 Mass. at 221.

36. *Fitchburg Hous. Auth’y v. Bd. of Zoning Appeals of Fitchburg*, 380 Mass. 869, 875 (1980); *Mt. Herman Boys’ Sch.*, 146 Mass. at 148.

the population of the program participants undermine the eventuality of a predominantly educational use.³⁷ Thus, the emotional/coping deficits of the participants are occasionally specifically diagnosed as borderline personality disorder; sometimes a diagnosis is not clearly spelled out. Whatever diagnosis is made, if any, “the participants here all share a form of emotional dysregulation which benefits from a program of intense behavioral therapy.”³⁸ In this context, for approximately 11 hours per day for 120 days, the students are “immersed” in the learning and practice of coping skill sets, including (i) substantial participation in mindfulness and its concomitant and salutary consequence of learning how to pay attention; (ii) establishment of interpersonal relationships; (iii) distress toleration; and (iv) emotional regulation and validation to the end of adjusting their responses to a variety of previous unwanted emotional triggers. Thus, the “full-time program includes an admissions process, instruction on social and emotional skills development, group and individual sessions, exercises to practice the skills learned, structured social and athletic time with classmates and peers, and homework and worksheets to complete each evening.”³⁹

An overarching goal of the program is to identify shortcomings in one or more residents’ ability to learn and to teach them various methods to gain emotional control and focus with the object thereof to become proficient in the difficult process (at least for them) of learning to cope with a range of behavioral dysfunctions. More generally, an essential part of the learning endeavor includes exercises to reduce attentional distractions in order that the participant may thereby obtain the benefits of “a specialized form of education which includes the complex, emotional social, and daily living skills necessary to participate actively and succeed in life.”⁴⁰ The fact that a psychiatrist and therapists are on the staff and the director holds a doctorate in psychology does not mean, as the town argued, that we are on a “slippery slope in which every therapist or doctor’s office or hospital could become a facility afforded protection under the Dover Amendment.”⁴¹

Nor, finally, does 3East constitute mere “window dressing” or a “smokescreen” for another purpose, e.g., “informal arts and crafts in a luxury condominium.”⁴² Moreover, teaching the same or similar emotional and behavioral aspects of 3East is increasingly becoming a part of the traditional public school curriculum.⁴³

4. Life Skills Learning

The court has made clear (indeed, in many ways, reaffirmed) that in connection with understanding education purposes, it is uninterested in maintaining a distinction between a skill-based endeavor with a perceived therapeutic outcome/purpose — that is “to teach how to live in society, cope with daily tasks and interact with others — and education with a traditional academic purpose.”⁴⁴ In this respect, the salutary purpose of life-skills education is enhanced where participants also learn the lessons of emotional regulation that may be beneficially augmented through the attendant receipt of individual therapy. Nor, similarly, does the confluence of meeting educational objectives and relief of mental disorders limit the meaning of the former, rather than serve as an important guidepost on the productive path of ameliorative teaching. They are of an educational piece, and not, as the town urged, consequential alternatives of each other.⁴⁵

5. Emotional Inhibitions to Learning — Special Needs

Deficiencies in regulating emotions and the impact upon individuals’ lives often result in feelings of shame, disproportionate reactivity, and despair that animate self-harm and dissociation from others. These deficits have been relieved (although not necessarily cured) through a well-researched and thoughtful program of specialized teaching, with or without medical assistance. Nothing in 3East, including that particular version proposed for use in the Town of Lincoln, runs afoul of the educational purpose of the Dover Amendment. Rather, it provides communal and related mental health advantages in the form of teaching life skills to a group of variously disadvantaged and young persons in need of foundational social proficiencies. As stated in McLean’s brief, “the record is replete with evidence of the education community’s consensus regarding the centrality of social and emotional skills in scholastic and professional achievement.”⁴⁶ Otherwise said, the “broad and comprehensive” meaning underscored by the court of the term “education” is well-served by the recent affirmation of the expansive educational purpose under the Dover Amendment.⁴⁷

Within the educational sphere, the term “special needs” has been variously applied to individuals whose broadly understood

37. The McLean Hosp. Corp., 483 Mass. at 222. The SJC noted that shifting the emphasis from educational to therapeutic merely directs attention to the discredited attempt to identify the program with a particular kind of student. Indeed, it characterized such an attempt as “a rather futile exercise.” *Id.* at 225.

38. In his testimony, Dr. Fruzzetti, a psychologist and the director of training and family services for 3East, defined emotional dysregulation as “effective instability due to marked reactivity to mood.” *The McLean Hosp. Corp.*, 2018 WL 5262365, n.5.

39. *The McLean Hosp. Corp. v. Town of Lincoln*, 483 Mass. 215, 223 (2019).

40. *Id.* at 222. These living skill deficits cover the spectrum of day-to-day activities, including how to take care of one’s own money and one’s hygiene, apply for a job and maintain employment, go to a restaurant, socialize with others, exercise, and succeed in participating within a group. As insightfully suggested to the court in the Amicus Brief of Behavioral Healthcare, “learning that occurs in programs designed to aid individuals with developmental and intellectual abilities is an integrated mix of teaching both the essential skills of daily living and the coping skills to manage their own behavior, with the goal of allowing them to live as independent a life as possible.” Amicus Brief of Behavioral Healthcare at 20. In this latter regard, the inside-outside formula of the Land Court falls demonstrably short, *inter alia*, in its failure to recognize, especially

in this context, the integrated nature of DBT instruction and its benefits.

41. *Id.* at 223.

42. *Id.* at 224; *see* *Whitinsville Ret. Soc’y, Inc. v. Northbridge*, 394 Mass. 757, 760 (1985).

43. *See, e.g.*, G.L. c. 69, § 1P; Amicus Brief of Disability Law Center at 18.

44. *The McLean Hosp. Corp. v. Town of Lincoln*, 483 Mass. 215, 225 (2019).

45. *Harbor Sch. Inc. v. Bd. of Appeals of Haverhill*, 5 Mass. App. Ct. 600, 605 (1977); *GAAMHA v. Zoning Bd. of Appeals of Gardner*, 401 Mass. 12, 15 (1987) (“Rehabilitation surely falls within the meaning of education.”).

46. Brief of McLean at 15.

47. Note the striking by the legislature of the delimiting modifiers to the term “education,” thereby codifying the protection for “all educational uses.” *St.* 1975, c. 808, § 3; *Mount Herman Boys’ Sch. v. Gill*, 145 Mass. 139, 146 (1887); *Regis Coll. v. Town of Weston*, 462 Mass. 280, 286, nn.9 and 10 (2012); *Campbell v. City Council of Lynn*, 32 Mass. App. Ct. 152, 154-55 (1991) (teaching a “basic understanding of how to cope with everyday problems” is educational). Everyday problems include “cooking, personal hygiene and physical therapy.” *Watros v. Greater Lynn Mental Health and Retardation, Ass’n, Inc.*, 37 Mass. App. Ct. 657, 658 (1994).

educational requirements are augmented in order that they may more fully participate in society. In and of itself, returning these newly enlightened and fortified young people to their homes and schools is a mission well within the purpose of the Dover Amendment, especially its exemption for education purposes. Social and emotional learning that alleviates coping deficiencies has long been recognized as integral to the process of education.⁴⁸ Further, there is nothing in the previous interpretations of the education exemption of the Dover Amendment that justifies removal of 3East from its protections. The Land Court's attempt to dichotomize into inward- and outward-facing life skills — with only the latter making the “educational” cut under the Dover Amendment — underscores the artificial and unavailing nature of that endeavor.

Moreover, the purported distinction of an educational purpose based in a perceived therapeutic undertaking was properly rejected, not the least reason for which lies in the attempt to constrict the salutary and established understanding of that term. An educational program geared to “special needs” is just another way of discussing or considering emotional dysregulation, which, in all events, does not undermine the educational focus of the endeavor, but reinforces it.

6. Disability Discrimination

It is, finally, important to recall that the Dover Amendment was founded upon the notion that particular identified land uses may not be discriminated against by or through zoning provisions.⁴⁹ In addition to the state prohibitions, federal law prohibits municipalities from making zoning or land use decisions or implementing land use policies that exclude or otherwise discriminate against protected persons, including individuals with disabilities.⁵⁰ In this case, amicus curiae briefs were filed on behalf of groups interested in protecting and advancing the rights of the intellectually disabled.⁵¹ The focus of those submissions was clearly on the potential discriminatory impact upon the disability/handicap community of preventing the planned use of 3East in Lincoln.

In this particular respect, the Land Court denied a Dover Amendment exemption precisely because of the court's perception of the population taking the program and that the use was not educational, but a therapeutic method to deal with and ameliorate the residents' behavioral and social deficits, including mental illness.⁵² Here, the educational purpose exemption has been consistently and expansively applied for the benefit of persons receiving (being

taught) a variety of practical, social, emotional, and behavioral skills to assist them in coping with enduring mental developmental problems, as well as disabilities attendant to drug and alcohol addiction. The potential impact of the Land Court's decision upon persons with mental health disabilities was immediately recognized through the substantial participation in the appeal of a large contingent of agencies servicing that community.⁵³ The construct adopted by the Land Court of perceived inward- and outward-looking effects of the 3East curriculum does not make sense, if for no other reason than the complexity of mental illness cannot be so easily parsed into a form of “cookie cutter” tenet.

What does make sense was the analysis of the substance of the program and the salutary effect of teaching social and emotional skills upon residents struggling to achieve the benefits of those necessary competencies. In characterizing the teaching of remedial control of disabling emotional skills as dominantly curative and therapeutic and only incidentally educational, the Land Court not only lost sight of the end goal of improving the ability (educating) of a special population to learn how to improve their life skills and thereby to independently maintain themselves, but also failed to tease apart the governing educational means from the linked incidental experiential ends.

The bias rooted in the potential for stereotyping disabled residents and playing upon unfounded fears for the safety of persons within the neighborhood clearly existed here.⁵⁴ This form of bias was precisely why the Dover Amendment was enacted and why the SJC and, in the broader context, the commonwealth have enacted a wide-ranging number of anti-discriminatory laws protecting the disabled.

E. CONCLUSION

In conclusion, the suite of services provided to its students by 3East includes a number of elements that undoubtedly ameliorate the emotional afflictions from which they suffer. Further, 3East unquestionably relieves the participants' emotionally dysregulating difficulties, and to that extent, one could envision and describe these benefits as therapeutic and indeed curative. That being said, and whatever words are used, the SJC has removed from speculation the notion that a program of practical skills-building instruction, tutelage, enlightenment, social improvement, and alleviation of behaviorally dysregulating symptoms, fairly characterized as medically helpful, nonetheless remains predominantly undertaken with an educational purpose within the meaning of the Dover Amendment.

— Barry Ravech

48. *Fitchburg Hous. Auth'y v. Bd. of Zoning Appeals of Fitchburg*, 380 Mass. 869, 875 (1980).

49. *See* MASS. GEN. LAWS c. 151B, §1; MASS. GEN. LAWS c. 40A, §3. In *Attorney Gen. v. Town of Dover*, 327 Mass. 601, 603 (1954), the SJC held that a zoning ordinance to prohibit any use of land in a residential district for sectarian educational purposes was invalid under St. 1950, c. 325, where, by virtue of Section 1, there was added to the first paragraph of the section conferring these general powers a limitation or qualification in these words: “No by-law or ordinance which prohibits or limits the use of land for any church or other religious purpose or which prohibits or limits the use of land for any religious, sectarian or denominational educational purpose shall be valid.”

50. *See* Section 504 of the Rehabilitation Act of 1973, 42 U.S.C. § 3604(f) and the Americans with Disabilities Act of 1990, 42 U.S.C. §12101 et seq.

51. *See supra* note 17; Amicus Brief of Disability Law Center at 14 (“Instead, the Land Court concluded that the purpose of the 3East Boys Program is not educational because it is primarily ‘therapeutic and curative, providing individuals who need significant intervention and tools at their disposal to help them deal with the inability to regulate their emotions due to their mental illness.’”).

52. *See text supra* at note 20 and *Regis Coll. v. Town of Weston*, 462 Mass. 280, 293-94 (2012).

53. *See supra* notes 29 and 40.

54. *See* Amicus Brief of Disability Law Center, *supra* note 17.

BOOK REVIEW

Policing the Open Road: How Cars Transformed American Freedom

By Sarah A. Seo (Harvard University Press) 2019, 352 pages

The insight animating Sarah Seo's new book, *Policing the Open Road: How Cars Transformed American Freedom*,¹ is what she calls the "automobile paradox": the car is simultaneously a source of incredible mobility and privacy, and "the most policed aspect of everyday life."² *Policing the Open Road* charts the key role of the automobile in the development of both modern policing and the Fourth Amendment, arguing that the need to discipline drivers led to the courts' accommodation of discretionary policing, which Seo sees as crucial to "understand[ing] the history of American criminal justice and its troubled present."³

To a degree that is now hard to fathom, the mass production of the automobile transformed American society. Cars, of course, greatly increased access to jobs and other opportunities.⁴ At the same time, cars diminished the role of local communities and their "custom-based methods of ensuring conformity to community norms."⁵ Cars also posed an unprecedented public safety challenge; Seo notes that during the 19 months of American involvement in World War I, more than twice as many Americans died in car accidents as did in the war.⁶ Since the rise of the car coincided with Prohibition, as Fourth Amendment scholar Orin Kerr has written, the car became a new key tool of bootleggers.⁷ Seo's account of this history is engaging, but it serves a larger point: the explosion of the automobile led directly to the rise of modern policing.

Mass production of the automobile, and the ensuing need for traffic enforcement, resulted in an incredible rise in the number of police officers across the country, as well as the creation of state police departments.⁸ The growth of police forces, meanwhile, coincided with efforts to professionalize policing. Perhaps surprisingly for a book written by a professor of legal history and criminal procedure,

and fairly shelved in either category, there are some extensive character studies in *Policing the Open Road*. The first is about August Vollmer, the chief of the Berkeley Police Department from 1905 to 1932, and the so-called "father of modern policing."⁹ As Seo describes, Vollmer aimed to professionalize his police force, and did so by adopting many practices that quickly became the norm. By 1913, he had put his men in uniform, on bicycles, and then in cars.¹⁰ He established the first police academy, and promoted the use of crime laboratories.¹¹ Other police chiefs followed suit. Even though traffic enforcement enabled the growth of police forces, Vollmer did not see it as a tool to advance the core crime-fighting mission of the police, as later law enforcement officials would. He and other reformist police chiefs of his time unsuccessfully advocated that a separate agency be created to deal with enforcing traffic regulations.¹²

In Seo's telling, the rise of the automobile also led to the modernization of the Fourth Amendment. In particular, there was a shift from 19th century classical legal thought, pursuant to which private spaces were protected from government intrusion while public spaces were regulated, to a focus on "reasonableness" as the Fourth Amendment's touchstone. Seo explains this shift by focusing on the first car search case to reach the Supreme Court, *Carroll v. United States*,¹³ in 1925. Seo's discussion of *Carroll* is somewhat meandering; she discusses the case for 25 pages before finally getting around to telling the reader that *Carroll* is the case from which the automobile exception to the warrant requirement emerged. This tendency to bury the lede afflicts the discussion of other cases in *Policing the Open Road* as well, at times rendering it unnecessarily opaque.

But Seo's ultimate conclusion about *Carroll* is compelling: in holding that police could stop and search a car whenever they have

1. Sarah A. Seo, *Policing the Open Road: How Cars Transformed American Freedom* (Harvard University Press, 2019) (hereinafter "Seo").

2. *Id.* at 12.

3. *Id.* at 8.

4. *Id.* at 39.

5. *Id.*

6. *Id.* at 22.

7. Orin S. Kerr, "An Equilibrium-Adjustment Theory of the Fourth

Amendment," 125 HARV. L. REV. 476, 504 (2011).

8. Seo, *supra* note 1, at 69-70, 76, 78.

9. *Id.* at 65, 68.

10. *Id.* at 64, 68.

11. *Id.* at 68.

12. *Id.* at 71-72.

13. 267 U.S. 132 (1925).

“reasonable or probable cause for believing that the automobile which [they] stop[] and seize[] has contraband,” the Supreme Court both moved Fourth Amendment jurisprudence from a public/private categorical approach to “an individualized determination of reasonableness,” and centered “the new inquiry . . . on the officer’s point of view, on his reasonable belief.”¹⁴ This focus “reflected an increasing reliance on proactive policing”¹⁵ that was, like *Carroll* itself, born of the automobile age. But as Seo argues, *Carroll* has reverberated beyond the highway. In carving out a category of seizure (the vehicle stop) that fell somewhere short of arrest, *Carroll* paved the way for *Terry v. Ohio* — which, she notes, cites *Carroll* — to do the same thing more than 40 years later when it sanctioned the stop-and-frisk on reasonable suspicion¹⁶ (or “pint-sized . . . probable cause,” to borrow a phrase from Anthony Amsterdam, whose seminal 1974 lecture, “Perspectives on the Fourth Amendment,” is an influence Seo discusses in the book).¹⁷

As Seo explains, *Carroll* was the first iteration of what became the 20th century approach to the Fourth Amendment: was a particular exercise of police discretion reasonable? That question more often than not resulted in answers favorable to police power. Noting the weak evidence of probable cause in *Carroll*, Seo argues that the “crux of *Carroll* depended on how trial judges would interpret the nebulous concept of probable cause.”¹⁸ The answer, most of the time, was that they would endorse the police account of probable cause, which in turn again expanded the discretionary power of the police.¹⁹ Seo rightly and repeatedly emphasizes the practical tension at the heart of the Fourth Amendment — it is invoked almost exclusively on behalf of the guilty.²⁰ As Seo argues, it therefore takes discipline and resolve to apply. Quoting Amsterdam, she writes that “the reasonableness standard meant that ‘appellate courts defer to trial courts and trial courts defer to police.’”²¹

As Seo recounts, the Supreme Court also adopted a number of rules expanding police discretion in the 1970s and 1980s: *United States v. Robinson*²² and *Gustafson v. Florida*²³ (both car stop cases) permitted police to search inside containers found on arrestees; *New York v. Belton*²⁴ permitted, incident to lawful arrest, the search of a

car and the contents of any containers in the passenger compartment; *United States v. Ross*²⁵ extended the automobile exception to permit searches of containers in the trunk of the car; and *Schneekloth v. Bustamonte*²⁶ held that a valid consent search did not require that the person being searched know, or be informed, of the right to refuse consent. In short, “Fourth Amendment jurisprudence evolved not just to limit police discretion . . . but also to accommodate it.”²⁷

Seo’s observation about the accommodation of police discretion is tied to another of her central critiques of the Fourth Amendment jurisprudence of reasonableness: that it elevates procedural over substantive rights. Seo registers concern that, even when police discretion was hemmed in by the court, it was restrained based not on “privacy rights, but proceduralism — that is, the process of hashing out rules determining the bounds of reasonable policing.”²⁸ Her exploration of this idea leads her to Charles Reich, an administrative law professor at Yale in the 1960s, whose landmark article, “The New Property,” proposed conceiving public benefits as private property. That idea was embraced by the Supreme Court in *Goldberg v. Kelly*,²⁹ which held that the Due Process Clause requires an evidentiary hearing before a person’s welfare benefits can be discontinued.³⁰ Reich became preoccupied by a number of encounters he had with police, both in his car and on the street. He turned his attention to the question of police discretion to initiate such stops in an essay published in the *Yale Law Journal* in 1966, “Police Questioning of Law-Abiding Citizens.”³¹

Reich’s essay is unconventional — it contains no footnotes and only a couple of references to case law, but it is moving and it was influential. Seo is particularly interested in how “Police Questioning” picks up the thread of the “groundbreaking argument” Reich made in “The New Property.” In the contexts of both protection of welfare benefits and challenging police discretion, Reich noted that the lines between public and private had blurred, and “suggested turning the public into the private as a way to reclaim the sphere of freedom and put some limits on the state.”³²

Seo’s imagination is clearly captured by Reich’s appeal for “privacy in public” — what he envisioned, with a citation to the

14. *Id.* at 141 (emphasis original).

15. Seo, *supra* note 1, at 141.

16. *Id.* at 151 (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)).

17. Anthony G. Amsterdam, “Perspectives on the Fourth Amendment,” 58 MINN. L. REV. 349, 414 (1974).

18. Seo, *supra* note 1, at 166.

19. *Id.* at 166.

20. *Id.* at 168, 237.

21. *Id.* at 247.

22. 414 U.S. 218 (1973).

23. 414 U.S. 260 (1973).

24. 453 U.S. 454 (1981).

25. 456 U.S. 798 (1982).

26. 412 U.S. 218 (1973).

27. Seo, *supra* note 1, at 17.

28. *Id.* at 226.

29. 397 U.S. 254 (1970).

30. Seo, *supra* note 1, at 217.

31. Charles A. Reich, “Police Questioning of Law Abiding Citizens,” 75 YALE L.J. 1161 (1966).

32. Seo, *supra* note 1, at 217.

“Connecticut Birth Control case,”³³ as a constitutional right to privacy that would “form a protective shield for the individual against an increasingly intrusive world.”³⁴ Yet, as Seo acknowledges, Reich’s prescription for making that vision a reality consisted of “a list of detailed rules regulating police conduct, which were procedural, not substantive in nature.”³⁵ Reich’s essay is cited in *Papachristou v. City of Jacksonville*,³⁶ in which the Supreme Court struck down Florida’s vagrancy laws, but as Seo notes, the decision was not based on a right to privacy but on “the procedural void-for vagueness rationale.”³⁷

Although her critique of Fourth Amendment proceduralism as “now too proceduralized”³⁸ is central to the book, Seo herself never offers a real, substantive rights-based alternative. The closest she comes is early on in the book, when she submits that histories of the Warren Court have thus far failed to explain “why the justices settled on procedural rights to protect individuals from the police, rather than, for example, a substantive privacy right not to have one’s car searched.”³⁹ But she does not explain what a “substantive privacy right not to have one’s car searched” would mean in practice. The end of *Carroll*’s automobile exception to the warrant requirement? As she has acknowledged elsewhere — the “warrant requirement itself is a procedural protection.”⁴⁰ Seo is persuasive when, summarizing the car stop cases, she questions a jurisprudence that deems it reasonable “for the police to use an arrest for a minor traffic violation as the starting point to search the entire car.”⁴¹ But, like Reich, she does not adequately explain how a substantive rights-based approach to the Fourth Amendment would work.

Seo criticizes Reich’s “Police Questioning” for its “inattention to racialized policing.”⁴² In places, the treatment of race in *Policing the Open Road* also has the flavor of afterthought and understatement. Seo can be overly coy: for example, she writes that before cars, “the police had focused most of their attention on beggars, drunks and those who seemed out of place.”⁴³ But Seo compensates for these concerns near the end of the book, when she trains her attention

on the Supreme Court’s 1996 decision in *Whren v. United States*.⁴⁴

By the time of *Whren*, policing had come a long way from the days when August Vollmer sought to rid his police department of responsibility for traffic enforcement. Given the sheer number of potential traffic violations, police effectively have what Seo has elsewhere described as a general warrant to stop cars,⁴⁵ and by the mid-1980s they were using it methodically as a tool in proactive investigation. Law enforcement agencies began training their officers to pull over drivers who fit a “drug courier profile,” which, Seo writes, included information about “ethnic groups” purportedly associated with the drug trade.⁴⁶ Once a minor traffic violation was observed — perhaps changing lanes without signaling, or exceeding the speed limit by a few miles per hour — a traffic stop could be initiated. This stop, in turn, could provide a chance for a warrantless search, usually based on the driver’s “consent,” which most drivers did not know they could refuse.⁴⁷ In some percentage of such searches, contraband would be discovered, and the “ultimate goal” — “felony arrest” — achieved.⁴⁸

As Seo writes, *Whren* argued that the practice of pretextual traffic stops was a problem of both arbitrary policing — manifested in the ability of police to pull over virtually any driver — and discriminatory policing — because minorities are disproportionately targeted for enforcement.⁴⁹ However, a unanimous court rejected the argument that pretextual stops were therefore unconstitutional, holding that an officer’s subjective intent was irrelevant to the question of whether a traffic stop was reasonable. All that mattered was that police could establish some violation of the traffic code. A defendant could bring an equal protection claim under the Fourteenth Amendment if he could prove intentionally discriminatory enforcement, but the Fourth Amendment was unconcerned with whether African Americans were disproportionately pulled over by police.⁵⁰

Evidence of racial disparities in traffic stops has piled up since *Whren*; a concurring justice of the Massachusetts Supreme Judicial

33. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

34. Reich, *supra* note 31, at 1170.

35. Seo, *supra* note 1, at 220.

36. Justice Douglas quoted one of Reich’s more poetic musings: “If I choose to take an evening walk to see if Andromeda has come up on schedule, I think I am entitled to look for the distant light of Almach and Mirach without finding myself staring into the blinding beam of a police flashlight.” *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 n.6 (1972).

37. Seo, *supra* note 1, at 223.

38. *Id.* at 275.

39. *Id.* at 19-20.

40. Sarah A. Seo, “The New Public,” 125 *YALE L.J.* 1616, 1627 (2016).

41. Seo, *supra* note 1, at 254.

42. *Id.* at 216.

43. *Id.* at 81.

44. 517 U.S. 806 (1996).

45. Seo, *supra* note 40, at 1643.

46. Seo, *supra* note 1, at 256.

47. *Id.* at 257.

48. *Id.* at 257-58.

49. *Id.* at 262.

50. *Whren v. United States*, 517 U.S. 806, 813 (1996).

Court (SJC) recently noted that “[y]ears of data bear out what many have long known from experience: police stop drivers of color disproportionately more often than caucasian drivers for insignificant violations (or provide no reason at all).”⁵¹ Research shows that this is largely due to disparities in pretextual stops. A comprehensive study of traffic stops in Kansas City found that black drivers are 2.7 times more likely than white drivers to be subjected to traffic stops for pretextual reasons, while disparities in traffic safety stops were relatively insignificant.⁵² And those disparities also affect who is searched during a traffic stop. One report in Massachusetts detailed that black drivers in 2014 and 2015 were 83.5 percent more likely than white drivers to be searched when stopped by Massachusetts state police, but 18.5 percent less likely to be found with contraband.⁵³ Nonetheless, the SJC has held fast to the *Whren* rule, recently rejecting an invitation to abandon it and reiterating that concerns about racial disparities in stops that implicate the Fourth Amendment and Article 14 of the Massachusetts Declaration of Rights do not give rise to cognizable claims under those same provisions.⁵⁴

Seo argues that the rejection by the courts of disparate racial impact as a cognizable theory under the Fourth Amendment “amount[s] to a disavowal of judicial review of the reasonableness of

the traffic enforcement as a whole.”⁵⁵ In this observation, she echoes Anthony Amsterdam’s critique of the “atomistic” approach to Fourth Amendment jurisprudence — that is, a view of the amendment “as a collection of protections of atomistic spheres of interest of individual citizens,” rather than “as a regulation of government conduct.”⁵⁶ Seo regards the lurking question in *Whren* as “how much power the police should have in a free society.”⁵⁷ As she notes in her epilogue, that question remains critical in an era of new technologies, which offer police access to far more information about our daily lives than the framers of the Fourth Amendment could have possibly imagined. Cell-site location information obtained from our mobile phones tracks our every move, and the content of those phones, as the Supreme Court has held, “would typically expose to the government far more than the most exhaustive search of a house.”⁵⁸

Ironically, though, it may ultimately be technology that renders the “automobile paradox” obsolete, and makes the car the vehicle of unadulterated freedom of our collective imagination. It could be the self-driving car that finally ends pretextual traffic stops.⁵⁹

— Rebecca Kiley

51. *Commonwealth v. Buckley*, 478 Mass. 861, 876 (2018) (Budd, J., concurring).

52. C. Epp, et al., *Pulled Over: How Police Stops Define Race and Citizenship*, 64-66 (University of Chicago Press 2014).

53. Tom Relihan, “State police more likely to search non-white drivers, less likely to discover contraband,” *BROCKTON ENTERPRISE* (Aug. 21, 2017, 5:33 p.m.), <https://www.enterpriseneeds.com/news/20170820/state-police-more-likely-to-search-non-white-drivers-less-likely-to-discover-contraband>.

54. *Buckley*, 478 Mass. at 870.

55. Seo, *supra* note 1, at 263.

56. Amsterdam, *supra* note 17, at 367.

57. Seo, *supra* note 1, at 266.

58. *Riley v. California*, 573 U.S. 373, 396 (2014) (emphasis original).

59. See Orin Kerr, “How self-driving cars could determine the future of policing,” *WASHINGTON POST* (June 16, 2017, 4:37 PM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/16/how-self-driving-cars-could-determine-the-future-of-policing/>.

BOOK REVIEW

To End a Presidency: The Power of Impeachment

By Laurence Tribe and Joshua Matz (Basic Books) 2018, 281 pages

Since George Washington transferred the presidency to John Adams in 1797, the United States has an unblemished record of peaceful and mostly noncontroversial transfers of executive power. The few exceptions prove the rule: the tie vote in the Electoral College between Thomas Jefferson and Aaron Burr in 1800 and the *Bush v. Gore* case.¹ In both instances, the republic survived intense public controversy and warnings of its imminent demise. On four occasions, power has transferred peacefully after the assassination of a president: Lincoln, Garfield, McKinley and Kennedy. The vice president stepped up, and the nation endured.

The most dramatic means of changing the chief executive has never been tried to conclusion. Unlike an election, impeachment transfers power in the middle of a presidential term. By its very nature, it is involuntary: in essence, the people (through their elected representatives) fire the boss. Richard Nixon resigned before facing the possibility of early termination. Bill Clinton and Andrew Johnson survived their respective trials in the Senate: the former by a comfortable margin along party lines, the latter by a single vote. As one scholar has observed, “[I]mpeachment . . . is the heaviest piece of artillery in the congressional arsenal, but because it is so heavy, it is unfit for ordinary use.”²

In *To End a Presidency: The Power of Impeachment*, Harvard Law School Professor Laurence Tribe and Joshua Matz, one of his former students, have written an insightful and readable overview of impeachment. Their book should be required reading for all 535 members of Congress as well as the blabbering heads who purport to analyze impeachment in the media. For the rest of us, *To End a Presidency* provides thoughtful analysis and a sprightly read.

The impeachment of President Donald J. Trump has focused public attention on the process like never before.³ This is both a

blessing — the book is timely and necessary — but also a slight curse — events move so quickly that they threaten to outrun the authors’ work. Indeed, when contemplating all of the events since the book’s completion in March 2018, one feels for the authors’ sense of being overtaken by facts they cannot control. Nonetheless, the authors are to be commended for writing an objectively historical, political and legal analysis, which is mostly divorced from the day-to-day controversies in Washington today. They studiously avoid judging the then-hypothetical case against President Trump, preferring instead to give background and context.⁴ Although written for a lay reader, the book is neither partisan nor political. One of the book’s theses is that impeachment will be a recurring sight on the political landscape for many years. Regardless of the outcome of the Trump presidency, readers will want to return to the book (perhaps with appendices on recent events) in the future.

The authors frame their discussion as “three vital questions.”⁵ These are: has the president done something that authorizes his removal under the Constitution; second, as a matter of political reality, is the effort likely to succeed; and third, is impeachment necessary, recognizing the collateral damage that will likely be significant. *To End a Presidency* is Tribe’s and Matz’s brief on these issues.

To answer the first question, they start with a short historical narrative to put the process in perspective and to look at impeachment through the eyes of the drafters of the Constitution. Having recently removed themselves from the authority of a despot, the framers were keen to avoid violent upheavals in power, but they also wanted to ensure that they had a means to do so. Led by Benjamin Franklin, the framers looked to 14th century England, where the House of Lords used impeachment to remove members of the king’s court who challenged Parliament’s prerogatives.⁶ The framers

1. 531 U.S. 98 (2000).

2. William A. Jackman et al., *The History and Government of the United States: A History of the American People*, 1364 (L.W. Walter Co., 1911).

3. After this book review was written, the Senate tried and acquitted President Donald Trump. Although the trial is over, Mr. Tribe’s book remains extremely relevant and timely for its useful constitutional analysis.

4. Recent events, including the scandal over the president’s request that

Ukraine open an investigation into Joe and Hunter Biden, have eroded Tribe’s neutrality. In an op-ed published in *USA Today* on Oct. 9, 2019, Tribe openly called for impeachment. Tribe, “The Time for Waiting is Over. The House Must Move on Trump Impeachment Articles Now” (*USA TODAY*, Oct. 9, 2019).

5. Laurence Tribe & Joshua Matz, *To End a Presidency: The Power of Impeachment* xiv (Basic Books, 2018).

6. Tribe & Matz, *supra* note 4, at 2.

were concerned both with an incapacitated executive as well as (with typical prescience) a president who was susceptible to foreign influence and attempts to enrich himself while in office.⁷ For George Mason, impeachment was about vindicating the rule of law, as he said, “Shall any man be above Justice [sic]?”⁸

In formulating the impeachment power, the framers were vague in many respects, leaving decisions to future governments. Article II, Section 4 of the Constitution provides, “The President, Vice President, and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.” Thus, impeachment is reserved for federal officers, including members of the judiciary. The Constitution names only two offenses: treason and bribery, and then rests on the well-known phrase, “high crimes and misdemeanors.” As then-Congressman Gerald Ford said when Congress considered impeachment of Supreme Court Justice William O. Douglas (an idea that went nowhere), “An impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history.”⁹

The interpretation is hindered by a dearth of legislative history. Originally, George Mason proposed “maladministration” as the standard for impeachment. When others objected that the term was so broad that it would essentially convert impeachment to a parliamentary vote of no-confidence, Mason relented. Without any further debate or discussion, he substituted the phrase “other high crimes and misdemeanors.” Without debate, the convention accepted the substitution and moved on.¹⁰ That’s it. The almost complete absence of debate about the definition of impeachable offenses should give pause to those who uphold the original text of the Constitution as an almost holy text of reasoned debate by founding deities. Apparently, George Mason, James Madison and their brethren had more important fish to fry.

In understanding the meaning of the clause, it is helpful to consider the two specifically enumerated crimes: treason and bribery. With respect to the former, it is clear that the framers feared insidious foreign influence. In *Federalist No. 65*, Alexander Hamilton wrote about his fear of interference by “foreign power in our councils.”¹¹ Of equal concern was bribery: both the making and receiving

of bribes. To the minds of the framers, bribery struck at the heart of a democracy. It undermined government by the consent of the governed. As Tribe and Matz explain, this fear manifests itself both in the Impeachment Clause as well as the Emoluments clauses, both foreign and domestic.¹²

As the authors note, actual cases of treason and bribery are virtually nonexistent in the history of presidential impeachment. Their main purpose is to inform the interpretation of the second clause, “high crimes and misdemeanors,” a term of great controversy and debate over the decades. There are two camps: one that argues based on the plain text of the document that a president may be impeached only if he committed an actual crime. The second camp, occupied by Tribe and Matz, gives the clause a much broader meaning.

Examining the text of the Constitution as a whole, the authors argue convincingly that impeachable offenses should and must include acts that are not simply violations of the federal criminal code. As Alexander Hamilton wrote, impeachable offenses are defined by the “abuse or violation of some public trust.”¹³ The authors pose many examples of violations of the public trust that would not violate a federal (or a state) criminal statute, writing, “It is inconceivable that the architects of checks and balances forbade us from removing presidents who use lawful purposes to achieve tyrannical ends.”¹⁴

The definition of impeachable offenses plays into the decision of whether to impeach. In examining this issue, the authors answer the second and third questions of their brief: is the effort likely to succeed and is the effort necessary? Here, Tribe and Matz are at their best and most relevant: they place the question of impeachment within the larger context of the checks and balances that form the foundation of American democracy. Their discussion of this topic bears particular relevance to the current political discussion of the possible impeachment of Donald Trump. Since the completion of the *Mueller Report* and the revelations about the president’s overtures to Ukraine to investigate former Vice President Joseph R. Biden (not to mention ongoing controversies surrounding violations of the Emoluments clauses and the campaign finance violations caused by payments to adult film star Stormy Daniels), Americans have debated whether the conduct, if proven, would justify the president’s impeachment and eventual removal from office.¹⁵ This is not

7. *Id.* at 5-6.

8. *Id.* at 6 (citing Max Farrand, *The Records of the Federal Convention of 1787*, 65-67 (Yale Univ. Press, rev. ed., vol. 2 1966)).

9. *Id.* at 25 (citing Bruce Allen Murphy, *Wild Bill: The Legend and Life of William O. Douglas*, 433 (Random House, 2003)).

10. See Farrand, *supra* note 7, at 550.

11. *The Federalist No. 65* (Alexander Hamilton).

12. Tribe and Matz, *supra* note 4, at 33.

13. *The Federalist No. 65* (Alexander Hamilton).

14. Tribe & Matz, *supra* note 4, at 82.

15. See, e.g., “The Case for an Impeachment Inquiry of President Trump,” COMMON CAUSE (2019).

simply a legal analysis, the authors emphasize. Whether to impeach and remove a president invokes political considerations, and a credit of the book is that it does not denigrate the political. In other words, political concerns are as vital as the legal concerns. The book treats both with equal emphasis.

In the words of the late Senator Robert Byrd of West Virginia, impeachment involves a “uniquely and especially grave” judgment that affects the entire constitutional system.¹⁶ The Constitution provides no guidance for when a president should be impeached ... either permissively or mandatorily. As the authors note, the Constitution does not state or imply when Congress must remove a president.¹⁷ The framers did not establish the House of Representatives as a “roving commission to smite every wrongdoer.”¹⁸ The House has other options to rein in the executive, such as the power of the purse, the authority to override a veto, and the megaphone of censure. Even when the odds of conviction are low, the fear or threat of impeachment may effectively control a president’s poor instincts. Conversely, a president who survives impeachment (either by defeating the resolution in the House or winning an acquittal in the Senate) may feel emboldened. Thus, impeachment does not involve a simple question of right and wrong. The decision to undertake the effort must consider the impact on our national politics.

Despite the possible downsides, Tribe and Matz do not suggest that Congress shirk its responsibility to impeach. As the authors note, impeachment is the “final limit” on the single most powerful person on the planet. “There is a point when *not* impeaching becomes the more dangerous choice.”¹⁹ There are times when impeachment is necessary for the survival of our constitutional government. In other words, the authors posit that the affirmative act to impeach carries huge risks, but the inverse is also true: a decision to forego impeachment for any number of reasons, including political calculations, may be just as dangerous.

In looking at the political question, the authors shine a light on the unsuccessful impeachment of Andrew Johnson. Although Johnson survived by a single vote in the Senate, the authors persuasively argue that the effort was worth it. First, Johnson’s violations of the public trust were so egregious that Congress could not let them pass. Second, although he survived, he was chastened. He appointed moderates to his cabinet and tempered his worst racist impulses. In a similar vein, the impeachment of President Nixon (which was interrupted when he resigned) had the salubrious effect of re-ordering the separation of powers, such that Congress was able to exert its authority against an increasingly imperial presidency. By contrast, the unsuccessful attempt to remove President Clinton shows the dangers of a precipitous impeachment that is viewed by the public as partisan. Not only did Clinton avoid conviction, his party saw atypical gains in the midterm election that followed his acquittal.

As with all good lawyers, Tribe and Matz recognize that process may be as important as substance. This maxim is particularly true for impeachment, since the Constitution characteristically gives little specific guidance, and there are no statutes or regulations. The framers wisely separated the roles of prosecutor and judge, leaving the decision to prosecute to the House, which at the time was the only democratically elected body (Senate elections were held in state legislatures and the president was elected by the Electoral College, which was less of a rubber-stamp for the popular vote in each state as it is today). Concerned with “too much democracy,” the framers did not want to leave the decision solely in the hands of the House.²⁰ And, because they trusted the Senate, the framers gave that body, rather than the Supreme Court as some had suggested, the authority to try impeachments. The framers were also concerned that trial in the Supreme Court might involve justices whom the president had appointed.

16. 145 Cong. Rec. 2,569-71 (1999) (statement of Sen. Byrd).

17. Tribe & Matz, *supra* note 4, at 70.

18. *Id.* at 77.

19. *Id.* at 99 (emphasis in original).

20. *Id.* at 120.

The Constitution is silent on important matters: the burden of proof, rules of evidence, and the right to call witnesses, for example. Each impeachment trial is a tabula rasa. Trial in the Senate is presented to 100 finders of fact, all of whom have their own standard of review and, more significantly, their own political interests. The Constitution does not require senators to explain their vote.

Other than the requirement that removal requires a two-thirds super-majority, the House and Senate are “left to their own devices.”²¹ They enjoy broad latitude in initiating an impeachment inquiry (including whether a formal vote in the House is necessary), structuring an inquiry, whether to hear testimony, the role of lawyers, and when the trial should be public. The key, the authors note, is that the proceedings are fair and *appear* fair.²² The process must build and maintain public credibility.²³ The divergent consequences of historical impeachments lead to the authors’ final and overarching thesis. Impeachment is inherently a political act. As they write, “Efforts to end a presidency do not occur in a vacuum.”²⁴ While some may flinch at this notion, preferring instead a clean legal process, that view is both naive and dangerous. Given the immense implications of the process, Tribe and Matz stress that there *must* be public support for involuntary removal of the chief executive. Because conviction requires two-thirds of the Senate (67 out of 100 votes as currently constituted), removal must necessarily be bipartisan and popular. There must be a national consensus, a flight

above politics. The authors have faith in the American body politic: they opine that the failure to secure 67 votes indicates that removal would not be in the nation’s interest.²⁵

In our current political climate, it may seem impossible to remove a president through impeachment. The divisions are just too strong and deep, complain those who would seek an easier path. But, for better and worse, those divisions reflect American society today. The obstacles to removing a president are not simply the result of rules that may seem unfairly complicated and challenging. Rather, those obstacles are the result of our political culture.

Impeachment forces us to contemplate things we take for granted: the rule of law, the placing of country above politics, and the inherent good faith of our elected representatives. By writing on this topic, Tribe and Matz have compelled the reader to confront these challenges. By taking a step back from the current controversies, the authors have provided a much-needed historical and legal perspective. They debunk misconceptions about impeachment, showing that it is as much a political process as a legal one. In doing so, they have performed a public service.

— Joseph Berman

Any views expressed herein are those of the author himself and are not the views of any organization with which he works or is affiliated.

21. *Id.* at 127.

22. *Id.* at 128.

23. See Tribe and Matz, *supra* note 4, at 129.

24. *Id.* at 53.

25. Professor Jonathan Turley has written, “ultimately, an impeachment says more about the values and expectations of a society than it does about the conduct of a President.” Jonathan Turley, “Congress as Grand Jury: The Role of the House of Representatives in the Impeachment of an American President,” 67 GEO. WASH. L. REV. 650, 735 (1999).